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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM PART 40D

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BRIDGET BUTLER and RICHARD BUTLER,

Plaintiffs,

INDEX NUMBER:

- against -

101654/01

LYALL A. GORENSTEIN, M.D., MICHAEL L. SCHWARTZ, M.D.,
ROCKLAND THORACIC ASSOCIATES, P.C., MARY LEAHY, M.D.,
NYACK HOSPITAL, ROCKLAND CRITICAL CARE PHYSICIANS,
PETER WISTREICH, M.D., ROCKLAND NEUROLOGICAL ASSOCIATES,
MARC D. LONDON, M.D., NEW CITY ORTHOPEDIC GROUP, P.C.,
MARK WEIDENBAUM, M.D. and DAVID ADAMS, M.D.,

Defendants.

- - - - - X

111 Centre Street
New York, New York
January 24, 2006

BEFORE:

HONORABLE JOAN B. CAREY, Justice,
(And a sworn jury.)

APPEARANCES:

ASHER & ASSOCIATES, P.C.
Attorney of Record for the Plaintiff
111 John Street, Suite 1200
New York, New York 10038
BY: RYAN H. ASHER, ESQ.

JACOB FUCHSBERG LAW FIRM, LLP
Attorney for the Plaintiff
500 Fifth Avenue
New York, New York 10110-0393
BY: LESLIE KELMACHER, ESQ., of Counsel.

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APPEARANCES: (Continued)

HEIDELL, PITTONI, MURPHY & BACH, LLP
Attorneys for Defendants Lyall A. Gorenstein, M.D.
Michael L. Schwartz, M.D. Schwartz
and Rockland Thoracic Associates
99 Park Avenue
New York, New York 10016
BY: VINCENT L. GALLO, ESQ.

LAW OFFICES OF SANTANGELO, BENEVENUTO & SLATTERY
Attorneys for Defendants Mary Leahy, M.D. and
New City Orthopedic Group, P.C.
67 North Main Street
New City, New York 10956
BY: MAUREEN M. ARCIERO, ESQ.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorneys for Defendant Nyack Hospital
150 East 42nd Street
New York, New York 10017
BY: IRVING B. HIRSCH, ESQ.

KOPFF, NARDELLI & DORF, LLP
Attorneys for Defendants Rockland Critical Care
Physicians, Peter Wistreich, M.D.,
Rockland Neurological Associates, Marc D. London, M.D.
and Mark Weidenbaum, M.D.
440 Ninth Avenue
New York, New York 10001-1688
BY: PETER C. KOPFF, ESQ.

MARTIN, CLEARWATER & BELL, LLP
Attorneys for Defendant David Adams, M.D.
220 East 42nd Street
New York, New York 10017
BY: SEAN F.X. DUGAN, ESQ.

MARGARET BAUMANN
RICHARD FEIS
Official Court Reporters

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M O R N I N G S E S S I O N .

MR. KOPFF: Your Honor, it's my application, a disclosure of this witness is directed against Lyall Gorenstein, Michael Schwartz, Rockland Thoracic Associates and in part Mary Leahy.

And there's no disclosure by this witness against Dr. Wistreich, Dr. London or Dr. Weidenbaum.

I concede that on the motion for summary judgment plaintiffs' attorney, instead of getting the appropriate experts, used this witness for a global, lengthy affidavit against everyone which laid out different deviations, for instance, against Dr. Wistreich and the emergency room physician, who has already come and gone, and so my motion is he should be limited to his expert disclosure.

The fact they used him on a motion for summary judgment to persuade the Court at that time not to dismiss the case in no way binds us at trial, particularly when the deviations are different and contradictory. In fact, the witness engaged statements in there that are contradicted by plaintiffs' opening plaintiff and their proof in this case to. If this witness is allowed the latitude of this affidavit, chaos will rein today. All of -- there's no limit. We'll have duplicative and

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2 contradictory testimony coming from this witness, from
3 witnesses who were trained and qualified, for
4 instance, in emergency medicine.

5 I have no problems as long as he sticks to
6 the disclosure. They never revised this disclosure
7 and said, we're going to go with the affidavit. They
8 shouldn't have done that. It would have been several
9 experts on the same topic, which normally is not
10 - allowed.

11 So, as long as she keeps him to this
12 disclosure, I have no problems, but I do object on
13 behalf of my client strenuously if he's allowed to
14 testify against any of my clients because we've
15 already had experts in orthopedics, experts in
16 emergency room, and there will be a neurologist
17 tomorrow.

18 MR. HIRSCH: May I just, on behalf of Nyack
19 Hospital, before plaintiffs speak, I join in the
20 application, and there's tremendous prejudice. It's
21 not a question of surprise, we know what was in the
22 affidavit. The affidavit was in connection with the
23 motion for summary judgment. That's it.

24 MS. KELMACHER: Your Honor, perhaps --

25 MR. HIRSCH: Let me say one more thing.

26 MS. KELMACHER: Sorry, I thought you

1 Proceedings

2 finished speaking.

3 MR. HIRSCH: If we had received disclosure
4 of the 3101(d) that a vascular surgeon was going to
5 testify with respect to the emergency room part of the
6 case -- and I'll just limit my comments to that, well,
7 then I may very well have considered retaining a
8 vascular surgical expert. But there's been no
9 disclosure that a vascular surgical expert is going to
10 testify with respect to those defendants that
11 Mr. Kopff just placed on the record, so I join in his
12 application.

13 MS. ARCIERO: I'm sorry, may I, I apologize,
14 but in light of the fact that the testimony from the
15 orthopedic surgeon affects Dr. Kubik I have to join in
16 that aspect of the application that it be limited in
17 the scope to what's within the 3101(d).

18 What I would also ask the Court that in this
19 case we had testimony all day yesterday with respect
20 to Dr. Leahy's roles, the departures from, placed
21 yesterday. The testimony went in. Anything that this
22 doctor has to testify with respect to Dr. Leahy and,
23 quite frankly, with respect to Dr. Kubik, because we
24 had Dr. Brenner on the stand as well, would be
25 cumulative, and I would request the Court direct that
26 he not be allowed to go into that particular area with

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2 respect to Dr. Leahy.

3 MR. GALLO: I have an application.

4 MS. KELMACHER: You have a misapprehension.

5 THE COURT: Could I hear it all?

6 MS. KELMACHER: Sure, but it's his.

7 MR. GALLO: My application, we heard from
8 plaintiffs' internist yesterday on the issue of APS
9 and what his opinions are vis-a-vis the presence of
10 APS in 1998. We heard extensive testimony about what
11 the laboratory data showed at Columbia with respect to
12 the anticardiolipin tests, and Dr. Fishberger's
13 opinion that had this test been performed in 1998, it
14 would have been positive.

15 In light of that testimony, it would be
16 inappropriate for the vascular surgeon to come on the
17 stand and testify to the same thing regarding APS,
18 what the tests would have shown because it's all
19 cumulative in nature. They had an expert on the stand
20 yesterday who testified to all the laboratory values
21 he did. To permit this expert to once again --

22 Can I please finish?

23 MS. KELMACHER: I'm not speaking with you,
24 I'm speaking with my associate and asking him a
25 question.

26 MR. GALLO: To permit this expert to testify

1 Proceedings

2 on the same exact issues about whether APS was present
3 in 1998 and what the lab values would have shown in
4 1998, and what the lab values showed in 2000 is
5 cumulative in nature and highly prejudicial to my
6 clients.

7 MS. KELMACHER: Your Honor, I think this is
8 a misapprehension on the part of the defendants. This
9 witness is called appropriately and consistently with
10 his 3101(d). I will ask him questions with regard to
11 the departures of Dr. Gorenstein, Schwartz and the
12 Rockland Thoracic Associates. It is consistent with
13 the 3101(d) to ask him questions with regard to the
14 surgeries at Columbia-Presbyterian, what was found
15 during the surgeries with regard to the clotting, what
16 caused the clotting, with regard to the pathological
17 information as to the clotting, what that entails,
18 what that means, all consistent with the 3101(d) going
19 towards issues of causation, your Honor.

20 With regard to asking him about laboratory
21 values, he's not -- yesterday the internal medicine
22 doctor did testify with regard to laboratory values as
23 to the APS. It was not my intention to ask him
24 questions with regard to the laboratory values. He
25 will testify from a vascular surgery point of view and
26 the relationship between the surgery findings and APS,

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2 and I think that everything is well within the scope.

3 And, my only point with regard to the
4 affidavit is this is not an instance where under any
5 circumstances any defendant here can say that they do
6 not have a full knowledge of what is within the realm
7 of this witness' testimony. But, I will not ask him
8 departure questions with regard to practice, departure
9 questions with regard to anybody but Dr. Gorenstein
10 and that practice.

11 THE COURT: All right, with respect to that
12 I agree. I think that Mr. Kopff's application was
13 accurate and correct, I think if Dr. Wistreich and
14 Dr. --

15 MR. KOPFF: London and Weidenbaum.

16 THE COURT: (Continuing) -- London and
17 Dr. Weidenbaum are not mentioned in the 3101(d),
18 although we know, whether you are surprised or not,
19 and there's no question that there is not an issue of
20 surprise here, but they're not mentioned in the
21 3101(d). It's reasonable you did not get an expert
22 with respect to them vis-a-vis the vascular situation,
23 and I will not allow departure questions with respect
24 to them.

25 With respect to what this doctor looked at
26 in the records and the nucleus of the predicate

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2 conditions here, I will see what he testifies about,
3 but you just can't limit a witness in terms of what he
4 or she is going to testify about if there are the
5 facts in the case, and he will be able to testify what
6 he proves -- saw in the records, but you make an
7 objection if you feel something is being inquired
8 about and you feel it's improper.

9 But I think Ms. Kelmachter is correct, I
10 think with respect to his interpretation of certain
11 things I will allow that, I don't feel it's cumulative
12 and I feel there is no surprise.

13 But, in terms of departure questions with
14 respect to the three doctors that were not mentioned
15 in the 3101(d)s, I will not allow that.

16 Now, with respect to the medical records
17 that you gave me yesterday with respect to Dr. Thome
18 and Doctor --

19 MR. DUGAN: Judge, could I be heard briefly
20 before we get up to that expert?

21 THE COURT: (Continuing) -- Capalbo. I'll
22 return these to you if you want to ask questions about
23 them. If there's anything, they have been marked for
24 identification. If there is an issue that you want to
25 circulate to the jury or whatever, then I'll have to
26 rule on it at that time, but other than that, you

1 Proceedings

2 could inquire about things that you think are relative
3 and probative with respect to the issues involved in
4 this case.

5 With respect to these records and whether or
6 not they totally go into evidence, I'll determine
7 that.

8 THE COURT: Mr. Dugan.

9 MR. DUGAN: Also, just so the record is
10 complete, Mr. Kopff's application referable to his
11 doctors also applies to Dr. Adams.

12 THE COURT: Dr. Adams, because I take it
13 from what has been said here then the 3101(d) did not
14 relate to Dr. Adams?

15 MR. DUGAN: Correct.

16 THE COURT: There could be no departure
17 questions with respect to Dr. Adams.

18 MR. GALLO: Judge, I have one other issue.

19 THE COURT: Sure.

20 MR. GALLO: I have transcripts for you to
21 follow when I question plaintiffs' expert. Before he
22 gets on the stand, do you want it?

23 THE COURT: You don't need it?

24 MR. GALLO: I have my own copies.

25 THE COURT: Well, they're marked for
26 identification. He could keep them. It's up to you.

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2 All right, we'll bring in the jury.

3 (Whereupon, the jury enters the courtroom.)

4 THE COURT: All right, good morning,
5 Mr. Lawton and members of the jury. We will now
6 proceed further with the plaintiffs' case.

7 Call your next witness.

8 MS. KELMACHER: Your Honor, I call
9 Dr. David Mayer. Dr. Mayer.

10 THE CLERK: Remain standing, Doctor. Place
11 your left hand on the Bible, raise your right hand

12 D A V I D M A Y E R, M.D., called
13 as a witness on behalf of the plaintiffs, stating his
14 address 19 South Down Road, Huntington, New York,
15 having been first duly sworn, was examined and
16 testified as follows:

17 THE WITNESS: I do.

18 THE CLERK: Please have a seat, Doctor. In
19 a loud and clear voice, please state your full name,
20 spelling your name and your business address for the
21 record.

22 THE WITNESS: David Mayer, M-A-Y-E-R, M.D.,
23 19 Southdown Road, Huntington, New York.

24 Good morning, your Honor.

25 THE COURT: Good morning.

26 THE COURT: You may inquire.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 MS. KELMACHTER: Thank you, your Honor.

3 DIRECT EXAMINATION

4 BY MS. KELMACHTER:

5 Q Good morning, Doctor.

6 A Good morning.

7 MS. KELMACHTER: Good morning, jurors.

8 Q Doctor, are you licensed to practice medicine in
9 the State of New York?

10 A Yes, I am.

11 Q And, are you also licensed in other state or
12 states as well?

13 A In New York and Florida.

14 Q And, sir, could you start by describing for us
15 your education and medical training.

16 A Yes. I went to medical school at Cornell
17 University at -- which is on the East Side of Manhattan.
18 Then I did a five year surgical residency at New York
19 Hospital Cornell that included one year fellowship at
20 Memorial-Sloan Kettering Cancer Center.

21 Following my graduation in 1978, I went into
22 private practice in general and vascular surgery out on
23 Long Island at Huntington Hospital and Syosset Hospital
24 which are my two main hospitals.

25 Q Doctor, let me just stop you for a moment. You
26 indicated you were trained in surgery. Were you trained

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 in vascular surgery?

3 A Yes.

4 Q Would you tell the jury something about that
5 training?

6 A Yes. When I trained, vascular surgery was part
7 of general surgery training so we had some of the
8 brightest minds and best vascular people at New York
9 Hospital such as Tom Shires and Malcolm Perry, actually
10 both of those professors worked on the autopsies of
11 President Kennedy after he was shot, so they're well-known
12 nationally and internationally.

13 After 1980, vascular training became
14 separate, and they started to have vascular fellowships
15 where they, after you finished general surgery, you would
16 be trained separately in vascular, so I finished just
17 before the training separated, and, therefore, my vascular
18 privileges are, what the term is, grandfathered in, where
19 at every hospital I've ever worked I've had full operating
20 and diagnostic privileges in vascular surgery as well as
21 general surgery.

22 Q So, Doctor, if I understand, you've had the
23 benefit of training in general surgery and vascular
24 surgery; is that correct?

25 A Yes, and I'm board certified by the American
26 Board of Surgery and recertified three times. My current

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 certification goes out through 2011.

3 Q And when did you get that current certification
4 recertification?

5 A Around 2001, 2002.

6 Q And what's the process by which you become
7 recertified as a diplomate?

8 A That's a written examination. The original
9 boards are a day-long written examination and then a
10 day-long oral examination if you pass the written. The
11 recertification is just that, a day-long written
12 examination.

13 Q And, Doctor, since you first started practicing
14 general and vascular surgery, could you tell us something
15 about the work you've done, the experience you've had?

16 A Yes, I have had a teaching appointment as an
17 associate professor of surgery at New York Medical
18 College, and I have a large operative experience of
19 probably in the order of 20,000 cases or so over my
20 operative experience in the gamut of general and
21 peripheral general and vascular surgery.

22 So, in the area of vascular surgery, it
23 would be pacemakers, dialysis grafts, operations on the
24 abdominal aorta for aneurysm or blockage, bypasses of the
25 lower extremity arteries.

26 I've also written and published extensively

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 in the fields of general and vascular surgery.

3 Q Before we get to that, in terms of the surgeries
4 you've performed, have you also done types of elective
5 vascular surgeries?

6 A Yes.

7 Q And what types of elective vascular surgeries
8 have you done?

9 A They would be in the area of bypass grafts, would
10 be either synthetic grafts made of Dacron or Gortex
11 material or using the patient's own native vein to bypass
12 blockages or for dilatation or aneurysm disease in the
13 arteries of the abdomen like the aorta or the lower
14 extremity femoral arteries or the smaller vessels below
15 the knee. I also operated on carotid arteries for
16 blockages and narrowings.

17 Q Have you ever done what's known as vein stripping
18 or vein ligation surgery?

19 A Yes.

20 Q And approximately, in your career, how many times
21 have you done that type of surgery?

22 A Several thousand of those particular procedures.

23 Q Now, you told us that you have an affiliation
24 with two hospitals; is that at the present time?

25 A Yes.

26 Q Could you tell us what those hospitals are and

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 the nature of your practice with the hospitals?

3 A Yes, they both would be teaching community
4 hospitals, meaning they are smaller institutions, several
5 hundred beds, but they have residents and fellows and
6 medical students rotating through so --

7 Q First, what are those hospitals, the names?

8 A One is Huntington Hospital and the other is
9 Syosset Hospital. They're both on the North Shore of Long
10 Island, as you all know, about an hour out from the city.

11 I'm one of the senior attending surgeons at
12 Huntington Hospital and I'm the chairman of surgery at
13 Syosset Hospital.

14 Q Well, Doctor, what does it mean to be the
15 chairman of surgery at Syosset Hospital?

16 A So I direct the department of surgery and run all
17 the quality assurance board meetings for the department of
18 surgery, oversee the teaching of the residents and
19 fellows, work towards the accreditation of the residency
20 programs and the accreditation of the hospital.

21 Q Doctor, what is the Huntington Vascular
22 Laboratory?

23 A In 1978, I founded a noninvasive vascular
24 laboratory in Huntington. At the time there were very few
25 of them. There was one up in Massachusetts General
26 Hospital in Boston, and this was actually the first

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 vascular lab or one of the first in New York State,
3 basically using ultrasound or Doppler technology to
4 diagnose clots in the deep venous system, arterial
5 blockages, all noninvasively without having to put dye or
6 catheters in the patient, and that's remained in existence
7 and active up to the present time.

8 Q And, Doctor, you mentioned the term Doppler.

9 In terms of the -- we've heard the term
10 Doppler a number of times during this trial, maybe too
11 many times during this trial, but with regard to the term
12 Doppler, what is a Doppler, what kind of instrument or
13 instruments does that refer to commonly?

14 A So a Doppler would be sort of a catch-all phrase
15 to describe various instruments, but all using ultrasound
16 or very high frequency sound waves to detect the flow of
17 blood in a vessel. Often, it's used like, let's order a
18 Doppler on a patient, is the most common definition would
19 be an ultrasound where you actually see the inside of the
20 artery, and could see blockages or clot and one of the
21 most common uses is to image the veins of the legs to rule
22 out a deep venous thrombosis or clot, such as Mrs. Butler
23 obtained on several times in 1998.

24 A Doppler is also used for diagnosing artery
25 blockages, and we can image the arteries directly or just
26 put a little Doppler probe over the artery of the foot and

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 blow up a blood pressure cuff right above it and get a
3 pressure. In other words, you would blow up the cuff
4 until you don't hear the signal or pulse any more, that's
5 called ankle pressure.

6 Also putting that number over the top
7 pressure of the arm pressure gives you an ABI or ankle
8 brachial index, and if it -- normally, in you or I would
9 be one or greater, but if it's less than .5, it would be
10 distinctly abnormal. That would be a simple, like
11 several-minute test that could be done in a patient's
12 bedside in the emergency room or in the office --

13 MR. KOPFF: Objection move to strike.

14 MR. HIRSCH: Move to strike as well as --

15 THE COURT: Overruled.

16 Q Doctor, could you finish my answer?

17 A (Continuing) -- or in the office for a quick,
18 easy, instantaneous diagnosis to rule out an arterial
19 problem.

20 MR. KOPFF: Objection move to strike.

21 MR. HIRSCH: Objection.

22 THE COURT: Overruled.

23 MR. HIRSCH: It's not within the scope of
24 the disclosure.

25 (Continued on next page.)

26

1 Mayer - Plaintiff - Direct

2 Q. Doctor, with regard to the different terms that
3 you used for dopplers, we also heard the term duplex
4 doppler. I just want to be clear, which instrument or
5 instruments would be referred to in the duplex doppler?

6 MR. KOPFF: Objection.

7 THE COURT: Overruled.

8 Yes, you can answer.

9 A. A duplex doppler would be a more sophisticated
10 instrument found only, generally speaking, in a radiology
11 department or a vascular lab. Duplex means two.

12 So one mode of the two is actually looking on
13 a screen and seeing the inside of the arterial artery or
14 vein to see if there is any clot or a narrowing in it.

15 And the second part is getting a wave form, a
16 spike as the blood goes through the vessel, and that's
17 technically called spectral analysis. But by seeing --
18 but we know that if blood goes through a narrow part of
19 the artery, that jet of blood has a faster velocity than
20 normal. So that's how, putting that with the picture, we
21 can make an accurate diagnosis of arterial blockages and
22 disease.

23 Q. Could you just, going back to the nature of your
24 work, you told us a little bit about your teaching
25 experience.

26 Could you tell the jury what it is you teach,

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 who it is you teach, how that happened?

3 A. Majority of my teaching has been with surgical
4 residents there. They are, of course, trainees who work
5 in an out of the operating room with attending surgeons
6 and we have to oversee all their activities and process in
7 and out of the operating room.

8 I've worked with innumerable residents on
9 writing and publications and a lot of the research that I
10 have done has been published in peer literature, has been
11 cooperatively with residents, where we write various
12 topics of general and vascular surgery, the resident works
13 cooperatively with one of the professors of surgery.

14 I am currently associate professor and we
15 jointly publish research.

16 Q. Doctor, approximately how many articles or book
17 contributions have you had published?

18 A. Probably between 45 and 50 articles, with one book
19 chapter.

20 Q. What, generally speaking, were the topic or topics
21 of those writings?

22 A. It's fairly verified, but in the vascular
23 literature I've published one of the first reports of
24 using a duplex scanning or duplex doppler for the
25 diagnosis of narrowings of grafts, in this case
26 dialysis-type grafts.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 We've also written on various minimum evasive
3 surgery topics, on pacemaker related topics, and needle
4 insertion. And other aspects of general surgery as well.

5 Q. Doctor, just so we are clear here. Have you ever
6 met Bridget Butler, the plaintiff in this action?

7 A. Not before today.

8 Q. You were introduced this morning?

9 A. Yes.

10 - Q. You never treated her, would that be correct?

11 A. I have not.

12 Q. Could you tell us, was there a time when you were
13 contacted by attorneys on behalf of Mrs. Butler and when
14 that was?

15 A. It was in 2000 when I was first asked to review
16 the medical records on the case.

17 Q. When you say medical records, at that time there
18 was no lawsuit, there were medical records, and you
19 reviewed them, would that be, correct?

20 A. That is correct.

21 Q. Now, since that time, would it be correct to say
22 the lawsuit proceeded, you received additional documents
23 in the form of deposition testimony, things of that
24 nature, would that be, correct?

25 A. Yes, that is correct.

26 Q. You have been working with Ms. Asher and Mr.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 Asher's office with regard to this matter, since late
3 2000, would that be correct?

4 A. Yes, I have.

5 Q. Now, with regard to the work you've done, your
6 earlier work on the case and over the years, it would be
7 fair to say that you were compensated for the time you put
8 into that?

9 A. Yes.

10 - Q. It is your understanding you will be compensated
11 for your time coming into court to testify?

12 A. That is correct.

13 Q. This is the only time you assisted in matters such
14 as this and you come to court to testify, would that be
15 correct?

16 A. That is correct.

17 Q. Now, I am going to ask you a number of questions.
18 I am going to ask you to make certain assumptions based on
19 the evidence that has been presented and then ask you
20 questions with regard to that.

21 Doctor, I would like you to assume that
22 Bridget Butler was admitted to Columbia Presbyterian
23 Hospital on January 7, of 2000 for a myelogram, CAT scan
24 and pain management.

25 I would like you to also assume on January 8,
26 the following day, a vascular consult occurred and Mrs.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 Butler was told that she would need emergency surgery.

3 I also ask you to assume that there was a
4 diagnosis, among others, of arterial ischemia.

5 Doctor, could you tell the jury, what is
6 arterial ischemia?

7 A. Arterial ischemia is when -- well, we are talking
8 specifically of a leg. It does not get enough blood
9 flow. So in the early stages it might present just as a
10 cramping in a calf muscle called intermittent claudication,
11 where the muscle in the thigh or calf would cramp on
12 walking a short distance.

13 The more severe cases you get pain at rest in
14 the leg or foot, and also numbness can occur as well as
15 paralysis, where motion is lost as the circulation to the
16 peripheral nerve is diminished. That would be, of course,
17 a later stage.

18 Of course all of you are thinking correctly
19 that those signs and symptoms sound very similar to a
20 pinched nerve or herniated disk. The answer is they
21 overlap and they are very similar. Often it's the job of
22 the vascular surgeon or the vascular lab to determine
23 whether or not arterial insufficiency is the cause or
24 whether in the process of ruling that out, whether it is a
25 pinched nerve or what we call a radiculopathy. That can
26 often clinically be a difficult diagnosis. So the

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct
2 physician needs to carry forward what we call a
3 differential diagnosis --.

4 MS. ARCIERO: Judge, I object.

5 MR. HIRSCH: Objection, beyond what we talked
6 about.

7 MR. KOPFF: Objection.

8 THE COURT: Overruled.

9 A. -- where the clinician needs to evaluate
10 clinically the signs of the patient and they may have pain
11 radiating down the leg, some numbness, and the
12 differential could be a pinched nerve, radiculopathy,
13 arterial insufficiency. And what we do clinically is,
14 standard of care dictates we rule out the --

15 MS. ARCIERO: Objection, standard of care.

16 MR. HIRSCH: Objection.

17 MR. KOPFF: Objection.

18 THE COURT: Overruled.

19 A. -- we rule out the more serious condition first.
20 And of course a pinched nerve is extremely painful but it
21 is not immediately limb threatening. So the arterial
22 insufficiency would be even a more serious condition. So
23 the clinician is obligated to obtain a doppler and --

24 MS. ARCIERO: I object.

25 MR. HIRSCH: I object and move to strike.

26 MR. KOPFF: Objection.

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1 Mayer - Plaintiff - Direct

2 THE COURT: Come to the sidebar.

3 (Whereupon, there was an off-the-record
4 discussion at the sidebar out of the hearing of the
5 jury.)

6 THE COURT: All right, the objection is
7 overruled. And we are in the middle of an answer.

8 MS. KELMACHTER: Yes.

9 Q. Doctor, are you able to continue at this point, if
10 not I'll go on to the next question?

11 A. Yes. I am basically done.

12 I just was saying the clinician is obligated
13 to rule out the more serious condition first. Obviously
14 lack of blood to an extremity is potentially limb
15 threatening and can lead to limb amputation.

16 MR. KOPFF: Objection, move to strike.

17 THE COURT: You made your objection, it is
18 continuing.

19 MR. GALLO: Objection.

20 THE COURT: You made your objection.

21 Your objection is overruled.

22 Go ahead.

23 A. So a simple doppler in the vascular lab would rule
24 out that, and especially pressing to do so in view that
25 the MRI obtained on the 27th at Nyack Hospital --

26 MS. ARCIERO: Objection.

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1 Mayer - Plaintiff - Direct

2 MR. GALLO: Objection

3 MR. HIRSCH: Objection.

4 MR. KOPFF: Objection.

5 THE COURT: I am glad you know, I didn't hear
6 what he said.

7 MR. HIRSCH: He said the MRI of the 27th.

8 THE COURT: Wait a moment, please.

9 Would you please read me back the whole
10 - answer.

11 (Whereupon, the referred to portion of the
12 record was read back by the court reporter.)

13 MR. HIRSCH: Judge --

14 THE COURT: Stricken from the record is the
15 part of the testimony that relates to the MRI. Next
16 question.

17 Q. Doctor, I would like you to further assume that on
18 January 8, 2000, after the vascular consult of Mrs.
19 Butler, Mrs. Butler underwent surgery, and in fact we have
20 the records before you, I had them placed up there prior
21 to the jury coming into the courtroom, the Columbia
22 Presbyterian record, which is Plaintiff's Exhibit 5, and
23 Dr. Nowggrod's records, which are Plaintiff's Exhibit 12.

24 You reviewed those records before; is that
25 correct?

26 A. Yes, I have.

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1 Mayer - Plaintiff - Direct

2 Q. And, doctor, with regard specifically to
3 Mrs. Butler and the surgeries that began on January 8,
4 2000, could you describe in detail for the jury what the
5 surgeries were.

6 Why don't we start with that then move on
7 from there, with regard to the surgery?

8 A. Sure. There is a graph or diagram I can show the
9 jury where the surgeries were performed on part of the
10 body.

11 MS. KELMACHTER: With the Court's permission,
12 the doctor asked me to bring a graph of the body. With
13 the court's permission I would just use the diagram.

14 THE COURT: You want to show it to counsel.

15 MS. KELMACHTER: Sure.

16 MR. HIRSCH: Except that it is a male --

17 MS. KELMACHTER: Just the location of the
18 leg, Judge.

19 THE COURT: Just to show the areas of the
20 body.

21 Is there any objection to that?

22 MR. HIRSCH: It's the right leg, wrong leg,
23 wrong sex, otherwise it is okay.

24 THE COURT: We will see how far he goes with
25 what he has to demonstrate. All right. We will use it
26 for graphic purposes.

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1 Mayer - Plaintiff - Direct

2 Q. Doctor, you need to step down.

3 Doctor, just for the record, anatomic figures
4 are often men as opposed to woman in textbooks.

5 MR. HIRSCH: I objection.

6 MS. ARCIERO: Objection.

7 THE COURT: Anatomic figures are often of men
8 as opposed to women?

9 MS. ARCIERO: Objection.

10 THE COURT: Overruled.

11 A. Yes, they usually, for whatever reason, probably
12 because they are written by men, in the text they use men
13 to illustrate, but the arteries are identical in both
14 sexes. It's true that this demonstrates the opposite leg
15 of Bridget Butler's. The events of 1999 and 2000 involved
16 the left leg. But on the morning of the 8th, in the year
17 2000, Bridget Butler's foot suddenly reached the end point
18 or end stage of the arterial ischemia or lack of blood
19 flow where the foot become mottled, cold, paralyzed, and
20 basically like what we call medically, pardon the
21 expression, like a dead foot.

22 So Dr. Nowgrod appropriately made the
23 decision there wasn't time to send her down for a
24 preliminary arteriogram, that type of patient needs to go
25 right to the operating room to attempt to restore flow,
26 because the leg is in immediate jeopardy of being lost

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2 through amputation.

3 So Dr. Nowgrod was in a real bind when they
4 called him on the 8th. This was, in my opinion, such a
5 delay of diagnosis.

6 MR. HIRSCH: Objection.

7 MR. KOPFF: Objection, move to strike.

8 MR. HIRSCH: Move to strike that.

9 THE COURT: Sustained. Stricken from the
10 - record. You can say your opinion, what you observed
11 about it, but not that it was a delay in diagnosis.

12 Overruled. You can explain what you mean by
13 what was observed at that time.

14 A. As we mentioned before the leg had progressed
15 beyond the early stages of lack of blood flow, cramping in
16 the muscle, pain at rest, and had progressed to the end
17 stage of imminent limb loss, which we, as vascular
18 surgeons hope to avoid or to treat before it reaches that
19 point.

20 So Dr. Nowgrod was in a very tough position.

21 I will just demonstrate, with your
22 permission, your Honor?

23 THE COURT: Yes, you can step down.

24 (Whereupon, the witness enters the well of
25 the courtroom.)

26 A. I don't have a pointer, unfortunately. So I will

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1 Mayer - Plaintiff - Direct

2 just use this pen.

3 But, Dr. Nowggrod noticed that now, assuming
4 this is the left leg for demonstration purposes, there was
5 a very weak pulse in the femoral artery. I think he
6 graduated it one plus over four. So he suspected some
7 blockage up higher.

8 Again, he didn't have the luxury of sending
9 the patient down for several hours to get an angiogram and
10 arteriogram because the foot was in immediate danger. So,
11 he went in and operated on the femoral artery. And its
12 very telling to me as a vascular surgeon that he described
13 the artery as very soft and pliable. In other words, most
14 of the vascular patients that we operate on, the artery is
15 hard, calcified. Sometimes almost rock hard. They have a
16 lot of plaque or debris in them.

17 This artery was really a normal soft artery,
18 without a pulse. So basically that plus other aspects of
19 the case confirmed that the patient was not clotting and
20 closing down arteries, for a reason other than arterial
21 sclerosis, which of course in this case we know to be the
22 antiphospholipid syndrome, which is a clotting syndrome.

23 So he tried to pass a catheter up with a
24 balloon on the end to take the clot out of this artery and
25 restore flow. This is the aorta, the main artery that
26 divides into the main artery to either leg, that's called

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1 Mayer - Plaintiff - Direct

2 the iliac arteries. But the catheter kept hitting an
3 obstruction. In other words, the clot had been there for
4 such a long period of time that it was not removable.

5 He also tried to put the catheter down, down
6 the leg and below the knee. We normally have three
7 vessels, we have two tibial vessels and a peritoneal
8 vessels below the knee, divides into three vessels that go
9 into the foot. The catheter kept stopping at the knee
10 level, because again, the clot below that was not
11 removable at the time.

12 There are various types of clot that we can
13 find in a situation like this. We hope to find a fresh
14 recent clot that can come out with a balloon catheter and
15 we clear the arteries, sew it up and restore flow.

16 In this case, unfortunately, as the surgeon
17 observed, and was confirmed by the pathologist, the clot
18 was an old clot, it was fixed and adherent and what we
19 call organized. It was already actually growing into the
20 wall of the artery which was growing shut. That's like a
21 very late, almost end stage finding of clot which is left
22 in the leg for 10, 12 days, that is what the finding would
23 be.

24 He actual biopsied the posterior tibial
25 artery down by the ankle because he found no opening in
26 the artery. And the biopsy was read by the pathologist as

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1 Mayer - Plaintiff - Direct

2 having organized clot. The clot has been -- had been
3 there for so long, 10, 12, days it actually grew into the
4 wall of the artery, and obliterated it.

5 The biopsy and the clot that was removed
6 being fixed, organized and adherent, and also the clot was
7 described as white in color. A clot that is has been left
8 there for days, weeks, loses the red color and becomes
9 white. So it's my opinion, with absolute scientific proof
10 that the clot had been there at least 10 to 12 days, and
11 dating back to the emergency room visit on 12/27.

12 MR. KOPFF: Objection.

13 MR. GALLO: Move to strike.

14 MR. HIRSCH: Objection.

15 THE COURT: The doctor stated it dated back
16 approximately two weeks?

17 THE WITNESS: That is correct.

18 THE COURT: That portion is stricken, any
19 reference to the emergency room.

20 A. So what the surgeon did was to do a bypass graft
21 in the artery in the right groin, of course right and left
22 is switched, I apologize, to the left groin, and that's
23 called a femoral femoral bypass. In order to restore flow
24 and bypass the blockage of the flow of the iliac artery.

25 Then again noting a minimum flow into the
26 foot while the patient was still asleep and intubated he

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1 Mayer - Plaintiff - Direct

2 brought the patient down to the x-ray suite and did an
3 arteriogram of the entire lower extremity.

4 Q. Doctor, what is an arteriogram, just tell us the
5 results of it?

6 A. That would be putting die into the actual vessels
7 through a catheter and x-raying with the contrast die in
8 the vessels.

9 Q. What was the results of this testing?

10 A. The results were that below the knee, in the
11 mid-calf area all the vessels were completely blocked, all
12 occluded. That's a very bad almost dismal finding in
13 vascular surgery, when the run off is actually occluded
14 like that. The chance of saving the leg is minimal.

15 He also noted that there was a clot in the
16 right leg, the good leg, what we call the deep femoral
17 artery, which was probably there for a period of time as
18 well. As well as some branches of, you see the main
19 arteries come down, there is a little what we call deep
20 femoral that feeds the muscles of the thigh and some of
21 the branches on the left had some clot, but the main area
22 of that artery had clot.

23 So he returned the patient to the operating
24 room and it was his determination, I believe correctly,
25 that there was no way to remove the clot below the knee
26 and all three vessels that had been there, as in his own

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2 words it was fixed, adherent and had been there for so
3 long it was not removable. So he opened the good leg and
4 removed the clot that he found in the deep femoral, and
5 that also he described as a white clot. In other words,
6 nothing recent, but an old clot. And he made slits in the
7 lower left leg called fasciotomies. That's where the
8 skin and subcutaneous tissue and the lining of the muscle
9 that connective tissue called the fascia are opened or
10 slit to relieve pressure. And he accepted the fact that
11 in his post-op note, probably an amputation would be
12 needed. But he really did all he could in the operating
13 room and he took the patient to the recovery room.

14 Q. Doctor, you just mentioned that he did a
15 fasciotomy. How many fasciotomies did he actually do with
16 regard to the left leg?

17 A. I would have to check. I thought he made several
18 slits.

19 Q. Doctor, what is a fasciotomy?

20 A. It's a, with a leg that hasn't been getting blood,
21 any increase in circulation would cause a swelling of the
22 leg. And the skin and the muscle connective tissue fascia
23 can shut off the blood flow to the muscle. So it's a
24 longitudinal slit made from the knee to the ankle and the
25 inside and outside of the leg that relieves the pressure.

26 Q. Doctor, is fasciotomy painful after the surgery?

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2 A. Well, it would be painful by virtue of a longer
3 incision, correct.

4 MS. KELMACHTER: With the Court's permission,
5 may I show the witness what has been marked as
6 Plaintiff's Exhibit 17.

7 MR. HIRSCH: Objection.

8 MR. KOPFF: Objection.

9 THE COURT: Sustained.

10 MS. KELMACHTER: You don't want me to show
11 it?

12 THE COURT: Right.

13 Q. Doctor, just going back to the surgeries, you told
14 us a little bit about the pathology of the surgery, where
15 does that information come from, the pathology of the
16 clots?

17 A. The medical record and the report by the surgical
18 pathologist, and also comments of the operating surgeon
19 regarding his observations.

20 Q. What is a surgical pathologist and when is that
21 work done?

22 A. The surgeon, Dr. Nowgrod in this case, took
23 samples of the clot, whatever little he was able to
24 remove, because most of it was fixed and adherent and old,
25 sent it done to pathology for examination. And he also,
26 as I mentioned biopsied one of the blocked three arteries

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2 in the lower leg, which was actually good that he did it,
3 and in terms that we know that the it made scientific
4 proof of the diagnosis of -- I don't want to say, you know
5 the statement I made before but --

6 MR. HIRSCH: I object.

7 A. -- it proved that the clot had been there for 10 to
8 12 days, and that the process of lack of blood flow,
9 arterial ischemia to the leg accounted for the patient's
10 pain in the leg, as she presented on the 27th to the
11 emergency room.

12 MS. ARCIERO: Objection.

13 MR. HIRSCH: Objection, move to strike the
14 whole answer.

15 THE COURT: That's stricken. The whole
16 answer is not stricken. That's stricken from the
17 record.

18 The portion that is stricken is the portion
19 that relates to the 27th of December.

20 Q. Doctor, would you tell us whether or not, in your
21 opinion, within a reasonable degree of medical certainty,
22 the age of the clot -- withdrawn.

23 Can you tell us in your opinion, within a
24 reasonable degree of medical certainty, as to whether the
25 appearance of the clot would be consistent with
26 excruciating pain in the left leg, which Mrs. Butler was

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1 Mayer - Plaintiff - Direct

2 unable to weight bear on?

3 MS. ARCIERO: Objection.

4 MR. GALLO: Objection.

5 MR. HIRSCH: Objection.

6 THE COURT: Overruled.

7 A. Yes, it would be consistent with that. And again,
8 I would date it back 10 to 12 days, from the day of the
9 surgery on the 8th.

10 (Continued on next page.)

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RICHARD FEIS - OFFICIAL COURT REPORTER

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 MR. HIRSCH: Judge, I move to strike as that
3 was not responsive to the question.

4 MR. KOPFF: I join in the objection.

5 THE COURT: The objection is overruled.

6 BY MS. KELMACHTER:

7 Q And, Doctor, in your review of the records of
8 Columbia-Presbyterian Hospital and Dr. Nowygrad, could you
9 tell us in your opinion whether or not you found any other
10 cause or explanation for pain of an excruciating nature in
11 Mrs. Butler's left leg?

12 MR. HIRSCH: I object, your Honor.

13 THE COURT: Overruled.

14 A I did not.

15 THE WITNESS: I assume I'm not allowed to
16 comment on the MRI finding.

17 THE COURT: No. The statement is stricken.

18 THE WITNESS: Okay.

19 THE COURT: Did you see anything else
20 indicative of situation from your review of the
21 records?

22 THE WITNESS: No, no tests or, or
23 examination in my mind was consistent with any other
24 diagnosis but an arterial ischemia.

25 Q And, Doctor, with regard to the description you
26 gave us of the vessels during the surgery, you mentioned

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 the nature of the vessels. Could you tell us whether or
3 not that would have been consistent with some sort of
4 ongoing vascular disease?

5 A Yes. The history in Mrs. Butler of having a
6 venous clots in the deep venous system in 1998 and now
7 clots in the arteries coupled with the finding by the
8 surgeon that the femoral arteries were just soft and
9 normal and pliable and didn't have any plaque, would lead
10 one to believe there had to be an underlying process or
11 coagulopathy where the patient's blood clotted more
12 readily than normal. That is consistent, in my opinion,
13 with antiphospholipid syndrome, taking, of course, into
14 account the hematologist's opinion of Columbia during the
15 admission of early 2000 as well.

16 Q Well, Doctor, just so we're clear here, we had
17 evidence and testimony in this matter that there are
18 certain laboratory values that are considered with regard
19 to a diagnosis of antiphospholipid syndrome.

20 Is it your opinion, within a reasonable
21 degree of medical certainty, that in addition to lab
22 values one considers actual surgical or clinical findings
23 in making such a diagnosis?

24 MS. ARCIERO: Objection.

25 MR. GALLO: Objection.

26 THE COURT: Overruled?

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 A Yes, I would agree with that statement. One to
3 five percent of the normal population walks around with
4 antibodies to their own phospholipids, but we're not
5 claiming that five percent of people have antiphospholipid
6 syndrome clinically.

7 So you have to put the clinical picture in
8 with the laboratory data, and, in this case, thrombi or
9 clots in both veins and arteries and the clinical findings
10 of surgery and the elevated anticardiolipin antibodies
11 which were subtly elevated in 2002 but significantly
12 elevated on second blood testing in 2002 would be all
13 consistent with antiphospholipid syndrome.

14 MS. ARCIERO: Judge, I move to strike.

15 MR. GALLO: Me too, your Honor.

16 THE COURT: Overruled.

17 Q I would like to move on to another part of
18 Mrs. Butler's hospitalization, and, that is, did there
19 come a time when there was a diagnosis with regard to
20 pneumonia?

21 A Yes.

22 Q Okay. And did you recall in the records -- I'd
23 like you to assume that a CT angiogram, as you said, was
24 done would show pulmonary embolism. Did you see that in
25 the records?

26 A I did.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 Q Doctor, would you explain that to the jury, what
3 that was, how it occurred?

4 A That was in the postoperative setting following
5 the exploration that Dr. Nowygrod did on January 8th, so
6 postoperatively the patient was convalescing from this
7 major nine-hour procedure and the vascular surgeon noted
8 that the leg was warm down to the ankle, but the foot was
9 still cold and he was observing the need for possible
10 amputation.

11 During that time, the patient was worked up
12 and found on a test called a CTA or CT angiogram, it's
13 basically a CAT scan or a radiologic imaging of the test
14 where they give some contrast and they could rule out if
15 there's a clot in the pulmonary arteries. If the patient
16 has clots in the deep veins of the leg, sometimes they
17 could break off, travel to the heart, go through the right
18 side of the heart and lodge in the pulmonary artery
19 vessels. In this case, on the left side there were
20 several areas of clots, so it made the diagnosis of a
21 pulmonary embolism. So, that --

22 Q Doctor, let me just ask you first, I'm sorry to
23 interrupt, but what's the significance of a pulmonary
24 embolism?

25 A Well, this is the feared complication of a deep
26 venous thrombosis. If a clot breaks off from the leg and

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 goes to the lung and occludes enough of the pulmonary
3 artery, it could cause instantaneous death or, at least,
4 shortness of breath and critical condition of the
5 patient.

6 So, that's why when you find a clot in the
7 deep vein of the leg you immediately heparinize the
8 patient, thin their blood, ultimately give them Coumadin
9 so the clot could remain fixed and start dissolving in the
10 leg.

11 In this case, because the patient was
12 postoperative, you couldn't give massive -- they had the
13 patient already on Heparin, a blood thinner that happened
14 anyway, which is just about proof of some hypercoagulable
15 syndrome going on because that's very abnormal, but they
16 were worried if another clot broke off and shot to the
17 lungs it could kill the patient, so they put in a filter.
18 This is like a strainer that's deployed in the vena cava
19 the big vein of the abdomen, that's put in through a
20 radiographic procedure, percutaneously so you don't have
21 to operate on the person, and it sits as a strainer just
22 below the kidneys. If any more clots break off it will
23 catch them. Because, once you've thrown a major pulmonary
24 embolism, if another occurs it could be fatal, so they
25 promptly put in what they call a Greenfield Filter or
26 strainer into the vena cava.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 Q Just so we're clear here, you've indicated by
3 history, and history you are familiar with from 1998, and
4 history with regard to the 2000 Columbia-Presbyterian
5 admission, and the pulmonary embolisms that there was
6 clotting with regard to Mrs. Butler in veins and arteries.

7 Could you tell us what the significance is
8 with regard to a diagnosis of a hypercoagulability state
9 such as APS?

10 MR. GALLO: Objection.

11 MR. HIRSCH: Objection.

12 THE COURT: Overruled.

13 A That would be diagnostic of a hypercoagulable
14 state in a young person, and Mrs. Butler was really, 40,
15 41-year-old at the time, you know, you are not going to
16 develop clotting in the arterial system and the venous
17 system on repeated episodes unless there's a
18 hypercoagulable state. So, I believe that is clinically
19 consistent with antiphospholipid syndrome.

20 Q Doctor, now we've talked about Mrs. Butler's
21 condition, and I'd just like to go back to the question of
22 ischemia. You indicated that the diagnosis was arterial
23 ischemia.

24 I would like you to assume that prior to
25 January 8th of 2000 there is no indication in any of the
26 medical records that Mrs. Butler's foot or leg was cold.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 Is that inconsistent in anyway with an
3 arterial ischemia?

4 MR. HIRSCH: Objection.

5 MS. ARCIERO: Objection.

6 MR. HIRSCH: This is beyond the scope of
7 disclosure.

8 MR. GALLO: Objection.

9 MR. KOPFF: Objection.

10 THE COURT: Overruled.

11 MR. HIRSCH: Overruled?

12 THE COURT: Yes.

13 A I believe it is consistent. One would suppose, I
14 would believe in this case, that the blockage of the
15 arteries in the abdomen, the iliac artery occurred first.
16 That would cause severe cramping and pain going down the
17 leg from the hip radiating down the entire leg as opposed
18 to just cramping in a calf.

19 The foot could still remain warm and viable
20 in that situation because of what we call collateral
21 vessels. These are extra little, small channels that
22 bypass the blockage and go through the muscles of the
23 abdomen and pelvis. Everyone has them, but with a
24 blockage they enlarge rapidly over a matter of days or
25 weeks. And that would keep the leg alive and warm.

26 It was only when the -- due to the low flow

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 state the runoff vessels or the vessels below the knee
3 started to clot as well that the leg's viability or
4 ability to remain alive become in jeopardy.

5 Q And there's also been testimony that the leg did
6 not become mottled or discolored until the 8th. How could
7 that be if there's arterial ischemia?

8 MR. HIRSCH: Same objection.

9 MR. KOPFF: Objection.

10 THE COURT: Overruled.

11 A That would be that the runoff vessels or the
12 three vessels below the knee don't all clot a hundred
13 percent simultaneously, they clot progressively in a low
14 flow hypercoagulable state, so if one or two went down,
15 the foot would start getting more and more painful, maybe
16 the patient couldn't put weight on it, it would be numb,
17 but only on the 8th, when they all three became a hundred
18 percent blocked, did the foot appear mottled, blue, cold,
19 paralyzed and numb, so that would be the final stage where
20 it was at a very low likelihood of being salvaged.

21 Q Now, just so we're clear here, you've indicated
22 that there was surgical finding of clotting in the right
23 leg as well. There is nothing in the records, I'd like
24 you to assume and I'm sure you've seen, there's nothing in
25 the record indicating Mrs. Butler complained of pain in
26 the right leg. How could that be?

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 A The clot in the right leg was in the deep or
3 profunda femoral artery, that extra channel, the main
4 highway was open so the patient really wouldn't have any
5 symptoms. However, when the vascular surgeon saw that, he
6 was correctly worried the clot could propagate or extend
7 into the main arteries and that was, of course, a good
8 leg, so he went after that and cleared it out which I
9 think was a wise decision.

10 - Q And, Doctor, I would like you to assume as
11 indicated in the records and the evidence in this case
12 that on January 28th of 2000, Bridget Butler underwent
13 surgery for a below-the-knee amputation.

14 First of all, from the records were you able
15 to discern which portion or part of the lower left
16 extremity was not viable?

17 A Yes.

18 Q And what was that?

19 A It looked like the, from the medical records
20 indicate the leg was warm up to the ankle. So, it's
21 really just the foot that was nonviable. There are types
22 of unusual amputations through the ankle joint and foot,
23 but the patient usually does not rehabilitate well from
24 that, so the vascular surgeon made an appropriate
25 recommendation for a below-knee amputation which was an
26 area with enough blood flow that it was likely to heal

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 well.

3 Q And, Doctor, I think you've anticipated my next
4 question, but the evidence is that Mrs. Butler testified
5 that she asked for a second opinion prior to the
6 amputation, and as a result of that she was given an
7 option of what's known as a Symes procedure or a
8 below-the-knee amputation.

9 Could you just describe for the jury what a
10 Symes procedure is as opposed to a below-the-knee
11 amputation?

12 A Yes. The Symes procedure is an amputation where
13 the foot is removed, it's a little gruesome, I apologize,
14 but the ankle joint, specifically the calcaneal or heel
15 bone is left and the skin it flapped up so there is a
16 post, so to speak, for the patient to stand on with a foot
17 prosthesis.

18 The below-the-knee amputation is done a few
19 inches below that little bump, below your knee in the
20 tibia, and both the tibia and fibula are transected. So
21 you are left with a padded stump below the knee that fits
22 into a prosthesis, and you still have the knee joint for
23 rehabilitation.

24 Q And, Doctor, from the records it appears that, as
25 you've indicated, Dr. Nowygrad recommended a
26 below-the-knee amputation and not a Symes procedure.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 Could you explain to the jury why?

3 A Well, with the lack of outflow vessels there was
4 an excellent chance that a Symes amputation wouldn't heal
5 properly with knee crossed breakdown, and Mrs. Butler
6 would have to undergo yet another procedure to convert it
7 to a below knee. A below-knee amputation, which was in a
8 warm, well perfused area, was likely to heal primarily and
9 facilitate her rehabilitation. I believe Dr. Nowygrod
10 made the correct recommendation for that.

11 Q And, Doctor, is there anything in the records
12 that indicates why they didn't simply do a below-the-knee
13 amputation on January 8th going into January 9th when
14 Mrs. Butler was undergoing the original vascular
15 surgeries?

16 A Well, there wasn't the specific statement on
17 that, but with a tremendous nine-hour-plus effort to save
18 the leg and doing fasciotomies and anticoagulating and
19 thinning the patient's blood, you would normally give them
20 a period of time to see what the perfusion is going to be
21 before giving up on it, so I think it was appropriate to
22 give the patient a number of days both to see surgically
23 if a hundred percent the foot was not viable, and also to
24 give the patient emotionally time to accept and deal with
25 an amputation.

26 I'm sure Mrs. Butler would have been fairly

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 distracted to wake up on the 8th missing the leg, you
3 know, at the time of the attempted salvage.

4 Q And, Doctor, with regard to this determination
5 that a below-the-knee amputation was required as a result
6 of the portion of the foot below the ankle being
7 nonviable, do you have an opinion within a reasonable
8 degree of medical certainty, based upon all the medical
9 records in this matter, when that portion of the foot
10 became nonviable? Do you have an opinion?

11 A Yes.

12 Q And what is your opinion?

13 A Well, I would say that the foot became nonviable
14 on the January 8th of 2000.

15 Q And could you explain why that's your opinion?

16 A I believe the sudden event where the foot, which,
17 of course, was painful and numb and showing signs of lack
18 of blood flow, became critical without blood flow or
19 cadaveric or dead appearing was at that time. In all
20 medical likelihood, all three outflow vessels below the
21 knee were shut a hundred percent, and the foot was getting
22 no blood at all, and that precipitated the dire situation
23 on the 8th. Of course, we had --

24 MR. HIRSCH: Objection. If he's going to go
25 beyond the question, which it sounds like he is, I
26 want to object.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 THE COURT: Your objection is noted and it's
3 overruled.

4 A Of course, the vascular surgeon hopes to be able
5 to address the arterial ischemia before it reaches the end
6 stage condition.

7 Q And, Doctor, with that as your opinion, do you
8 have an opinion within a reasonable degree of medical
9 certainty as to whether or not diagnosis of the arterial
10 ischemia on January 7th or prior to that, whether or not
11 Mrs. Butler would have been required to undergo a
12 below-the-knee amputation?

13 MR. GALLO: Objection.

14 MS. ARCIERO: Objection.

15 MR. HIRSCH: Objection.

16 MR. KOPFF: Objection.

17 MR. DUGAN: Objection.

18 MR. HIRSCH: This is completely beyond this
19 disclosure.

20 THE COURT: Overruled.

21 Q First, do you have an opinion?

22 A Yes.

23 Q And what is your opinion?

24 A My opinion is more likely than not had the
25 arterial ischemia been diagnosed or addressed on or before
26 January 7th the leg was still in a situation where salvage

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 could have occurred and the amputation prevented.

3 Q Now, Doctor I would like to return to an earlier
4 time in Mrs. Butler's care and treatment, and I would like
5 to go back to medical treatment that she received starting
6 in or around April of 1998 where she saw Dr. Leahy, and
7 Dr. Leahy referred her to Dr. Lyall Gorenstein.

8 And I'd like you to assume that
9 Dr. Gorenstein is a vascular surgeon such as yourself.

10 I'd like you to further assume that he
11 diagnosed in Mrs. Butler varicose veins and recommended
12 vein stripping surgery and ligation surgery to remove the
13 right greater saphenous vein, and I believe that you've
14 seen those records as well; is that correct?

15 A Yes, I have.

16 Q And, Doctor --

17 MS. KELMACHTER: Your Honor, may we just get
18 the records from Dr. Gorenstein and also Nyack
19 Hospital?

20 Nyack Hospital is 10 and Dr. Gorenstein is
21 9.

22 (Handed to witness.)

23 MS. KELMACHTER: Thank you.

24 THE WITNESS: Thank you.

25 Q Doctor, the records are there if you need to
26 refer to them at any point.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 A Thank you.

3 Q Doctor, I'd like you to assume and there's no
4 issue with regard to this, that on July 10th, 1998, with
5 Dr. Gorenstein performing the surgery, Mrs. Butler
6 underwent a vein stripping and ligation surgery as
7 recommended by Dr. Gorenstein to remove the right greater
8 saphenous vein.

9 Now, have you ever performed a surgery of
10 that nature, such as was performed --

11 MR. GALLO: Objection; asked and answered.

12 Q (Continuing) -- such as was performed on
13 Mrs. Butler?

14 A Yes, I have.

15 Q And there are different ways to do vein stripping
16 surgery today; is that correct?

17 A Well, there are different procedures available
18 for -- to accomplish that. In 1998 really, the modern
19 vascular surgeons were still stripping or removing the
20 vein.

21 Q Okay. And approximately how many times have you
22 performed that kind of surgery, in that manner?

23 A Excuse me. Several thousand of them.

24 Q And, Doctor, Dr. Gorenstein described the surgery
25 I believe he used the word "barbaric." Would you agree or
26 disagree with that description?

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 A I disagree.

3 Q And can you describe what a surgery to remove the
4 greater saphenous vein would be like?

5 A So, it is certainly far from barbaric. It's a
6 simple outpatient procedure. We make a small incision at
7 the ankle and a small incision at the joint and pass a
8 plastic stripper through the vein, put a little bulb at
9 the end and simply pull the vein out of the leg without
10 making any big incisions or cuts.

11 The procedure takes really under half an
12 hour. If additional channels are dealt with through other
13 incisions, it could take 45 minutes to an hour in time.
14 The leg is wrapped in an Ace bandage after, the patient
15 goes home the same day, is walking the same day. It's
16 considered a minor outpatient procedure, ambulatory
17 procedure, so patients recover rapidly. They have good
18 results. They generally back to work in ten days. So, it
19 wouldn't be considered a major disabling procedure in any
20 way.

21 Q And, Doctor, just so we're clear here, what is
22 elective surgery?

23 A Elective surgery is nonlife-threatening surgery
24 where a patient sees you in the office and you schedule
25 them to come into the operating room at their convenience
26 and the surgeon's convenience.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 Q And was this elective surgery?

3 A Yes.

4 Q And, Doctor, was this in any way life-threatening
5 surgery for Mrs. Butler?

6 A No, it was not.

7 Q And do you have an opinion, was this -- did she
8 absolutely have to have this surgery to go on?

9 A No. But I believe the surgery was medically
10 indicated and appropriate.

11 Q Now, Doctor, you indicated that it's ambulatory
12 surgery. Why doesn't it require overnight
13 hospitalization?

14 A Because, well, the patient, basically we found in
15 recent years can easily walk, go home and function without
16 the need for hospital environment. I usually prescribe
17 something like Darvocet for pain control afterwards which,
18 of course, is a very mild drug, it's not a narcotic, it's
19 probably just a little more than Tylenol, so it's
20 certainly not extremely painful, so it's appropriate for
21 ambulatory or outpatient performance.

22 Q And, Doctor, what would the leg that had the vein
23 strip look like after the surgery?

24 A You'd have a few -- an incision at the ankle and
25 groin, maybe some additional cuts, very small to remove
26 other tributaries, generally gets black and blue for a

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 period of time, which is a function of the removal of the
3 main trunk of the vein, but, otherwise, really, would be
4 fine. It wouldn't be -- the pain would be minimal, it
5 wouldn't have much or any swelling, and would rapidly
6 return to normal level of performance.

7 Q And assuming most complications, how long would
8 it be black and blue the leg?

9 A It could last up to three weeks, you know, just
10 like, well, if you might have had a bad bruise at one
11 time, it could take a few weeks for all the blood pigment
12 to absorb.

13 Q Assuming no complications, how long would it be
14 painful?

15 A Generally just the first 48, 72 hours after which
16 it would be minimal.

17 Q Now, Doctor, I would like you to assume further
18 it's in the records that after an office visit on 7/14 of
19 1998, Mrs. Butler went to Nyack Hospital emergency room on
20 July 17th of 1998, and at that time she was seen by
21 Dr. Gorenstein and diagnosed with a deep vein thrombosis
22 in her right leg.

23 What is a deep vein thrombosis or what we
24 have been referring to as a DVT?

25 A Well, that's a clot that forms in the deep venous
26 system. Of course, that's the system we worry about

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 because it doesn't have a lot of valves, and the clot can
3 dislodge and travel up to the lungs as Mrs. Butler
4 suffered in 2000.

5 However, it's an extremely unusual
6 occurrence after a minor outpatient surgery of any kind,
7 let alone a vein stripping, for the patient to have a deep
8 venous thrombosis because they're basically up walking
9 home the same day, they're not in bed with immobility for
10 long periods of time, and normally would raise a red flag
11 if you saw a patient having a minor ambulatory procedure
12 and coming up with a deep venous thrombosis that the
13 patient could have a hypercoagulability or clotting
14 problem.

15 Q Well, Doctor, let me just ask you this, to assume
16 that Dr. Gorenstein testified in this matter and he
17 testified that a DVT was a common post surgery occurrence
18 that occurred in approximately five percent of vein
19 stripping surgeries, though admitting that DVTs had a much
20 higher incidence in other types of general surgery.

21 Doctor, you've told us that you've done
22 about 2,000 vein stripping surgeries of a similar nature.
23 How many times have you had patients in those 2,000
24 surgeries who have had DVTs as a postsurgical
25 complication, Doctor?

26 MR. GALLO: Objection to the form.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 THE COURT: Overruled.

3 A I have not seen that in any of the 2,000 patients
4 that I personally performed the vein stripping. Certainly
5 I'm not claiming it could never happen, but it's a very
6 low incidence in my experience, in general experience that
7 it would be unusual enough to warrant further
8 investigation regarding the patient's clotting system.

9 Q So, Doctor, just so we understand, is -- other
10 than the neurosurgeries, is the testimony with regard to
11 Dr. Gorenstein indicating that approximately five percent
12 of vein stripping surgeries result in DVTs, is that five
13 percent the normal and your statistics extraordinary or
14 something else?

15 MR. GALLO: Objection to the form.

16 THE COURT: Overruled.

17 A Well, I personally would disagree with
18 Dr. Gorenstein's statement if five out of every hundred
19 patients who had this little outpatient vein stripping
20 developed a life-threatening complication of a deep venous
21 thrombosis, we would never recommend vein stripping to
22 anyone. It would be too dangerous an operation.
23 Obviously, we don't see it in that high a percentage in
24 this country.

25 Q So let me ask you if you assume that
26 Dr. Gorenstein is right and five percent of all the

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 patients who have vein stripping surgeries are diagnosed
3 with DVTs, would you agree that each of those five
4 patients out of a hundred would need hospitalization for
5 almost a week like Mrs. Butler would need Heparin therapy,
6 would need Coumadin therapy?

7 A Yes.

8 MR. GALLO: Objection.

9 THE COURT: Overruled.

10 - A I would agree with that.

11 Q So would you agree then out of every thousand
12 vein stripping surgeries done there would be 50 patients
13 who would need a week of hospitalization, need Coumadin
14 therapy and Heparin therapy?

15 MS. ARCIERO: Objection.

16 MR. GALLO: Judge, could we have no leading.

17 THE COURT: Just do not lead.

18 Q I want you to assume that Dr. Gorenstein
19 testified that five percent of patients with vein
20 stripping surgeries have DVTs as opposed as a
21 postoperative complication.

22 What would happen to the 50 patients out of
23 the thousand who were diagnosed with DVTs if he were
24 correct?

25 MR. HIRSCH: Objection.

26 MR. GALLO: Objection.

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter

2 THE COURT: Overruled.

3 A They would have a potential life-threatening
4 problem and would need blood thinning with Heparin usually
5 done in a hospital situation and Coumadin at least a
6 six-month period. So, obviously, that's not occurring
7 because, if that were, we couldn't in good conscience
8 recommend that as a treatment for varicose veins which is
9 a nonlife-threatening problem.

10 - Q And, Doctor, I want you to assume that when
11 Mr. Richard Butler, Mrs. Butler's husband testified, he
12 was asked by Dr. Gorenstein's attorney what Dr. Gorenstein
13 told him at the time that Mrs. Butler was diagnosed at the
14 Nyack Hospital with the DVT on July 17th, and Mr. Butler
15 replied that Dr. Gorenstein told him that the incidents of
16 DVTs were probably three percent or less.

17 Would three percent even be the normal for
18 the occurrence of DVTs postsurgically?

19 MR. GALLO: Objection.

20 THE COURT: Overruled.

21 Q In your opinion with a reasonable degree of
22 medical certainty?

23 A Excuse me. You are referring to after a vein
24 stripping?

25 Q Right, after a vein stripping.

26 A I would think that would be much higher than the

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 actual incidence.

3 Q And again, what is your understanding of the
4 actual incidence statistically?

5 A That it's a rare occurrence it can occur, and
6 often in the setting of hypercoagulability, such as an
7 antiphospholipid syndrome or some other hypercoagulable
8 syndrome, that we could measure with a simple blood test.

9 Q And, Doctor, I'm just going back to these
10 statistics. Is there a difference in terms of determining
11 the cause of DVT depending upon the patient's age; is
12 there any significance to that?

13 MR. GALLO: Objection.

14 THE COURT: Overruled.

15 A Yes, the more elderly, older patients would have
16 a higher incidence, also obese or heavy patients could
17 have a higher incidence and concomitant diseases that
18 could reduce the mobility of the patient, hip fracture,
19 other things would increase the incidence.

20 Q Now, so, in terms of Mrs. Butler, at the time she
21 has the vein stripping surgery she's 40-year-old. There's
22 been testimony she was overweight, but not what would be
23 considered medically obese. She appeared to be otherwise
24 healthy. Do you have an opinion within a reasonable
25 degree of medical certainty as to whether or not under
26 those circumstances Dr. Gorenstein correctly assumed that

1 Dr. Mayer - By Plaintiffs - Direct/Kelmachter
2 the DVT was simply a postsurgical complication?

3 MR. GALLO: Objection.

4 THE COURT: Overruled.

5 A Yes, I have an opinion.

6 Q And what is your opinion?

7 A I believe that one could not assume it was a
8 normal postoperative occurrence. That it's an unusual
9 occurrence with a very low incidence after a simple
10 outpatient procedure where the patient is home the same
11 day, and that standard of care dictates obtaining a
12 hypercoagulable workup, getting the panel of blood tests
13 to rule out entities such as antiphospholipid syndrome.
14 If found, the patient is then left on lifelong Coumadin
15 which, of course, in all likelihood would have prevented
16 the subsequent arterial and venous thrombosis that she
17 suffered.

18 (Continued on next page.)

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26

1 Mayer - Plaintiff - Direct

2 Q. Now, Doctor, I would like to go further back with
3 regard to Mrs. Butler's medical treatment by Dr.
4 Gorenstein, and more specifically to the examination he
5 did on May 5th of 1998.

6 I want you to assume it is in the records
7 before you that at that time he took what his office took,
8 a history that at that time Mrs. Butler was a 39 year old
9 female with complaint of bilateral varicose veins. That
10 under the written category significant family history, the
11 mother, father, grandparent, which in that office meant
12 the date was significant for having varicose veins, but no
13 other family history was taken.

14 I want you to assume that there is nowhere in
15 the record to indicate that doctor -- that Dr. Gorenstein
16 elicited a history that Mrs. Butler's mother had died of a
17 stroke. I want you to further assume that the records
18 state that she was positive for varicose veins right
19 greater than left, and superficial phlebitis in the right
20 leg during her first pregnancy.

21 And that's what the records say.

22 But I want you to further assume that
23 Mrs. Butler testified that during her first pregnancy she
24 had varicose veins, that she never had superficial
25 phlebitis at or after that first pregnancy.

26 And then I want you to assume that she

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1 Mayer - Plaintiff - Direct

2 underwent stripping surgery and that was discussed, and
3 that was on 7/17 of '98, as the records indicate. We have
4 been talking about she was diagnosed a DVT in the same
5 leg, the right leg where she had the vein stripping
6 surgery. That she was forty years old, overweight but
7 appeared otherwise healthy.

8 I want you to further assume that Dr.
9 Gorenstein undertook her care and treatment for this DVT,
10 was hospitalizing her, prescribing intravenous heparin
11 followed by oral Coumadin, and that he prescribed Coumadin
12 for her to take when she left the hospital. Gave her a
13 prescription that she could fill for her Coumadin
14 therapy.

15 I want you to further assume that he
16 coordinated her care to some extent with an internist Mary
17 Leahy, who has been her internist since 1994 and who
18 Mrs. Butler explained visited her in the hospital, was
19 unofficially seeing her while she was hospitalized from
20 7/17 to 7/22.

21 And I want you to assume that Dr. Leahy had
22 testified that she agreed to supervise the Coumadin
23 therapy level and the blood work, because as a vascular
24 surgeon Dr. Gorenstein testified that that wasn't
25 something that he did. Not that he couldn't do it but
26 that he didn't do it.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 I want you to further assume that the
3 evidence shows that Bridget Butler was seen in
4 Dr. Gorenstein's office on July 30, 1998 for follow-up
5 visit. That she on August 4 of 1998 returned to the
6 office for a doppler exam, and again on September 1st of
7 1998 she went to Dr. Gorenstein's office complaining that
8 she banged her leg on the table and she had a hematoma.

9 I want you to further assume, as the records
10 indicate, and we've had testimony that she was seen on a
11 final visit on November 11th -- I am sorry, November 17th
12 of 1998, in Dr. Gorenstein's office, that a doppler was
13 done, and that Dr. Gorenstein found that the DVT was
14 recannalized.

15 First of all, what does the fact that the DVT
16 was recannalized, what does that mean?

17 A. That would mean that the clot had -- the body has
18 dissolved the clot and basically the vein was clear at
19 this point, a new channel had occurred for the blood to
20 flow.

21 Q. Now, I want you do further assume that at that
22 time Coumadin therapy was discontinued for Mrs. Butler.

23 I would like you to further I assume that Dr.
24 Gorenstein testified that he was familiar with
25 hypercoagulability studies because he was familiar with
26 the fact that blood could be drawn and studies could be

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 done from the blood drawn to determine a hypercoaguability
3 state.

4 Assuming those facts, do you have an opinion
5 within a reasonable degree of medical certainty as to
6 whether or not Dr. Gorenstein, and together with his
7 partners who aided him in the hospital when Mrs. Butler
8 was a patient, whether these doctors departed from good
9 and accepted practice by failing to order hypercoagulation
10 studies on Mrs. Butler after the diagnosis of a DVT, on
11 July 17, 1998.

12 Do you have an opinion.

13 MR. GALLO: Objection.

14 A. Yes.

15 THE COURT: Overruled.

16 A. Yes, I have an opinion.

17 Q. What is that opinion?

18 A. I believe it was a deviation from the standard of
19 care, and in fact negligent not to order
20 hypercoagulability blood tests on the patient after the
21 DVT was followed, a minor relatively trivial outpatient
22 surgical procedure.

23 Q. Doctor, if Dr. Gorenstein, the vascular surgeon,
24 didn't want to order those studies himself, would it have
25 been a departure for him to refer Mrs. Butler to her
26 internist to have the studies done?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 MR. GALLO: Objection.

3 THE COURT: Overruled.

4 You can answer that.

5 A. No, that would be an appropriate referral.

6 Q. Could he have referred her to a hematologist to
7 have that done?

8 A. Yes.

9 Q. Doctor, why is it your opinion that it was a
10 departure from good and accepted medical practice for Dr.
11 Gorenstein not to undertake or make a referral that would
12 have gotten Mrs. Butler hypercoagulability studies at that
13 time?

14 MR. GALLO: Objection.

15 THE COURT: Overruled.

16 You can answer that.

17 A. Because the failure to get the hypercoaguability
18 studies at that time led to the lack of diagnosis of
19 antiphospholipid syndrome and the inappropriate cessation,
20 cessation of the Coumadin in November of that year. Had
21 the Coumadin been continued, in all likelihood the
22 subsequent arterial and venous clotting would not have
23 occurred and Mrs. Butler would still have her leg today.

24 Q. Now, as of 1998 you've testified that the standard
25 would be to order those studies. Why was that the
26 standard?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 MR. GALLO: Objection.

3 THE COURT: Overruled.

4 A. Because in unusual clinical settings where
5 patients develop clots following very minor or trivial
6 surgery, a red flag goes up for the clinician that this is
7 not a normal situation and its an unusual situation, the
8 standard of care is to rule out hypercoagulability
9 syndrome.

10 It gives the clinician the opportunity to put
11 the patient long term on blood thinners to prevent other
12 clotting events that can cause strokes, other venous
13 clots, pulmonary embolus, arterial clots and more of a
14 loss of limb. An excellent opportunity to make that
15 diagnosis was wasted by not ordering the
16 hypercoagulability panel at that time.

17 Q. Doctor, just so we understand. Vascular surgeons,
18 you ever order coagulability panels?

19 A. I order them very frequently.

20 Q. What does that entail?

21 A. Weekly basis.

22 Q. What does that entail?

23 A. Basically, I can't speak for Nyack Hospital
24 specifically, but the majority of hospitals you simply
25 write an order hypercoaguability panel and about fifteen
26 marker tests, genetic testing, antibody tests are

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1 Mayer - Plaintiff - Direct

2 performed. So it's not necessary in most hospitals for
3 the clinician to know the names of every single one of the
4 tests in order to order this.

5 Sometimes if I am extremely suspicious I will
6 simply refer the patient to their primary care or
7 hematologist and let them perform the workup because
8 often, especially hematologists, are more intimately aware
9 of interpretation of the testing.

10 - Q. Doctor, just so we are clear, from the patient's
11 point of view, what did it entail to order
12 hypercoagulability studies?

13 A. It's just a blood drawn, usually can be done at
14 the same time, if they are having their protime and
15 international ratio checked to regulate the Coumadin, they
16 can draw out of the same needle so they don't even need
17 another stick. It could have been drawn in Mrs. Butler in
18 any of the six blood draws that she had between July of
19 '98 and November of '98, when they were regulating the
20 Coumadin.

21 MS. KELMACHTER: I have no further questions.

22 THE COURT: All right , ladies and gentlemen,
23 we will take a -- let's take a fifteen minute break.
24 It's 5 to eleven. We will back at 11:10. Keep an open
25 mind. See you all

26 (Whereupon, the jury leaves the jurybox and

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1 Mayer - Plaintiff - Direct

2 exits the courtroom and the following takes place.)

3 MS. ARCIERO: Your Honor, I would just
4 move --

5 THE COURT: Yes.

6 MS. ARCIERO: With respect to the last answer
7 that was just given by the doctor I would move to
8 strike that aspect of that referred, while he didn't
9 use the name, let's be honest, clearly referred to
10 testimony of the treatment rendered by Dr. Leahy
11 accumulative. We already heard it. I object to it at
12 this time.

13 THE COURT: The objection is overruled.

14 Let me just say something also. But the
15 record will speak for itself.

16 It is not a problem. I mean, some of the
17 objections I think are thoroughly misplaced. I will
18 tell you the reason. I will just give you an example.

19 Mr. Kopff, I think, throughout much of his
20 questioning of different people certainly would leave
21 one with the impression that during particular times,
22 and I don't remember each time that he referred to, but
23 there was constant, constant, I remember it; again, as
24 I said, the record will certainly collaborate this,
25 that the foot was not cold at certain points in time,
26 leading one do draw the inference that, you know, that

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1 Mayer - Plaintiff - Direct

2 the whole thing materialized on the morning of the 8th
3 at Columbia Presbyterian.

4 And obviously this witness put that in
5 perspective. Whether the jury accepts it or rejects
6 it, that's up to them. There was an objection. But
7 the this witness put it in perspective. You have other
8 vessels working, and that possibly the other vessels
9 were working, one might have been done but the other
10 - two were working, and therefore, the foot might not
11 necessarily have had to have been cold at any
12 particular point in time.

13 But I am just saying that, what I am allowing
14 in, there are things that are in the record that are
15 still questionable, that there have been questions
16 about and the jury and myself left with the impression,
17 with respect to a particular fact or lack of a fact, in
18 one way or another.

19 And this doctor is telling us, has the right
20 to explain that. The plaintiff has the right to
21 explain that, that maybe, just maybe the foot was not
22 cold on January 6th or 5th or 3rd by virtue of the fact
23 that the other vessels were operating.

24 There were three critical vessels one might
25 have gone down but the other two were up. That's
26 certainly very relevant and probative testimony, in

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2 light of all the other testimony we received.

3 So some of the objections, if you know the
4 record and if you listen to all the records, all of the
5 testimony, which I am sure all of you have, there is
6 plenty in the record to substantiate some of the
7 reasons why I overruled some of the objections.

8 MR. KOPFF: Judge, just to clarify.

9 THE COURT: You can clarify it after. We've
10 got ten minutes to take a break. All right. You can
11 keep that in mind. Clarify it at lunchtime.

12 You can take a break.

13 MR. HIRSCH: At lunchtime, Judge.

14 THE COURT: Keep it in mind at 4 o'clock.

15 MR. HIRSCH: I want to move for a mistrial.
16 Just so you know that. Because what we saw here, and
17 that gentleman, by the way, was in the courtroom when
18 you made your rulings that this attorney did, with due
19 respect --

20 THE COURT: Which attorney.

21 MR. HIRSCH: The plaintiff's attorney
22 violated your own rulings, Judge. I will amplify it so
23 we can take a short break, but what we just saw her, as
24 your Honor made some ruling, your Honor said you are
25 limited to the disclosure, the disclosures are crystal
26 clear, I would like to make it an exhibit as part of

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1 Mayer - Plaintiff - Direct

2 the record.

3 THE COURT: I didn't say that. I said you
4 are limited to the departure questions that you can
5 ask. You cannot ask about Dr. Wistreich. You cannot
6 ask about one or two -- Dr. Weidenbaum with respect to
7 certain items, whatever. And she has not. I told her
8 she could not.

9 MR. HIRSCH: If it sounds like a duck and
10 - walks like a duck. We just had a duck in here without
11 using the name.

12 THE COURT: A lot it doesn't sound act walk
13 like a duck.

14 MR. KOPFF: I join in that motion, Judge.

15 THE COURT: That motion is denied. All
16 right.

17 MR. HIRSCH: I will amplify at your
18 convenience when everyone has a break.

19 THE COURT: Just remember the particular item
20 you are referring to.

21 MR. HIRSCH: Thank you, Judge.

22 (Whereupon, a recess was taken.)

23 THE COURT: Let's bring out the jury.

24 (Whereupon, the jury enters the courtroom.)

25 THE COURT: All right, Doctor, please have a
26 seat.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct

2 Mr. Chung, I will talk to you a little bit
3 later about your situation.

4 All right.

5 Doctor, I remind you you have been previously
6 sworn, you are still under oath.

7 You understand?

8 THE WITNESS: Yes, your Honor.

9 THE COURT: You may inquire.

10 MR. GALLO: May I require, your Honor.

11 THE COURT: Yes.

12 CROSS-EXAMINATION

13 BY MR. GALLO:

14 Q. Good morning, Doctor.

15 A. Good morning.

16 Q. You and I have never met, have we?

17 A. We have not.

18 Q. Now, Doctor, I think you testified on direct you
19 were initially contacted in the year 2000, correct?

20 A. Yes.

21 Q. What were you told when you were contacted?

22 A. I can't remember but I was given a set of records
23 to review to render an opinion on the care and treatment
24 of Mrs. Butler.

25 Q. Who contacted you?

26 A. Roberta Arciero and her law firm.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 Q. Prior to reviewing the records, did you know that
3 Ms. Butler had suffered an amputation?

4 A. I did not.

5 Q. Can you tell me what records you reviewed
6 initially?

7 A. Yes. I brought a list of documents that I
8 reviewed. It would be records from the Nyack Hospital
9 emergency room, 12/27/99; Nyack Hospital MRI; Dr. Marc
10 London, a neurologist's records; New City Orthopedic
11 Group; Dr. Kubik's records; Dr. Mark Weidenbaum's records;
12 Columbia Presbyterian Hospital, the admission of 1/6 to
13 3-9-00; Nyack Hospital surgical records, 7/10/98; Nyack
14 Hospital admission, 7/17/98 to 7/22/98; Dr. Lyall
15 Gorenstein's records from 7/98 to 11/17/98; blood work
16 performed on Mrs. Butler from 5/1/96 through 9/8/98.

17 I also reviewed --

18 Q. I just want to know what you reviewed initially?

19 A. I would believe, I am not sure if any other
20 depositions had been taken at that point. So I would
21 assume that would be my initial review.

22 Q. Now, when you reviewed your records -- the records
23 initially, did you then speak to Ms. Asher about your
24 opinions in the case?

25 A. Yes.

26 Q. You gave her certain opinions prior to actually

RICHARD FEIS - OFFICIAL COURT REPORTER

- 1 Mayer - Plaintiff - Cross/Gallo
- 2 reviewing the deposition testimony in this case, correct?
- 3 A. Preliminary opinions, correct.
- 4 Q. Now, can you just tell me how many hours you spent
- 5 looking at all those records initially?
- 6 A. They were somewhat comprehensive, so I would
- 7 estimate five or six hours initially.
- 8 Q. Now, did there come a time when you reviewed
- 9 deposition testimony?
- 10 A. Yes, there did.
- 11 Q. Can you tell me what depositions you reviewed?
- 12 A. They were enumerable, but I reviewed depositions
- 13 of Bridget and Richard Butler.
- 14 Q. Do you know how many times Mrs. Butler was
- 15 deposed?
- 16 A. Not off the top of my head, but I reviewed all of
- 17 her depositions.
- 18 Q. Can you estimate for me how long her deposition
- 19 testimony was?
- 20 A. I can't answer that without --
- 21 Q. If I told you it was in excess of 600 pages, does
- 22 that refresh your recollection?
- 23 A. Yes.
- 24 Q. What else did you review?
- 25 A. Of the following physician depositions, Dr.
- 26 Gorenstein, Ginsberg, Schwartz, Kubic, Leahy, Rymond, Dr.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo
2 Wistreich, London, Weidenbaum, Adams, and the physician
3 assistant Robin Weems.

4 Q. Now, how many hours did you spend looking at the
5 deposition testimony?

6 A. You know, I don't have an exact figure but I would
7 assume somewhere to the amount of time as my initial
8 review.

9 Q. You looked at all the deposition testimony
10 including the 500 pages of Mrs. Butler in five hours, is
11 that your testimony?

12 A. Five or six hour period, yes.

13 Q. Doctor, if I told you that all the deposition
14 testimony was in excess of twelve hundred pages, is it
15 still your testimony that you looked at all the deposition
16 testimony in five or six hours?

17 A. I don't have an exact figure. I am just
18 estimating. You are asking me something.

19 Q. Fine, Doctor?

20 A. Amount of time years ago, so.

21 Q. Doctor, did you keep any billing records regarding
22 how much time you spent looking at the records, at the
23 deposition testimony, so you could accurately bill Ms.
24 Asher?

25 A. Yes, we have such records.

26 Q. Where are the billing records, Doctor?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 A. They are at my office in Huntington.

3 Q. Doctor, you have been in court on a number of
4 occasions, haven't you?

5 A. Yes.

6 Q. Doctor, you are aware, are you not, that you have
7 been asked to produce your billing records on a number of
8 occasions that you were cross-examined, correct?

9 MS. KELMACHTER: Objection.

10 THE COURT: Sustained.

11 Has that ever happened?

12 A. It has never happened, your Honor, where I have
13 been asked to produce them.

14 Q. Doctor, have you ever been asked to produce your
15 billing records in a context of a deposition?

16 A. You are not referring to trial testimony?

17 Q. No, I am referring to a deposition.

18 A. Yes, that has happened.

19 Q. So the answer is yes, you have been asked to
20 turnover your billing records, correct?

21 A. Yes.

22 Q. Doctor, is there a reason why you didn't bring
23 your billing records today, if you had been asked that
24 question before?

25 MS. KELMACHTER: Objection to the form.

26 THE COURT: Sustained as to the form of the

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 question.

3 Q. Doctor, did you render a written report in this
4 case?

5 A. I did not render a written report, but I assisted
6 in the preparation of an affirmation which I signed.

7 Q. In that affirmation you swore to tell the truth,
8 correct?

9 A. Yes.

10 - Q. Now, Doctor, when you were reviewing this case did
11 you make any written notations of any significant events
12 that appear in the medical records?

13 A. I did not.

14 Q. Now, Doctor, have you reviewed any trial
15 testimony?

16 A. Yes.

17 Q. What trial testimony did you review?

18 A. The testimony of the orthopedic expert that
19 appeared on behalf of Mrs. Butler, I believe that was
20 yesterday.

21 Q. Did you review Dr. Gorenstein's trial testimony?

22 A. I did not.

23 Q. Did you review Dr. Schwartz's trial testimony?

24 A. I did not.

25 Q. Did you review Dr. Leahy's trial testimony?

26 A. I did not.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 Q. Did you ask Ms. Kelmachter for copies of that
3 testimony just so you could know what those defendants
4 testified to?

5 A. We spoke in general.

6 Q. That wasn't my question, Doctor.

7 My question was did you ask counsel to look
8 at those trial transcripts, yes or no?

9 MS. KELMACHTER: I object, assumes I have
10 - them.

11 THE COURT: Please, overruled.

12 Did anyone ask you for trial transcripts?

13 THE WITNESS: I reviewed, your Honor, the
14 orthopedic expert trial transcript, not the others.

15 THE COURT: All right.

16 Q. Doctor, in formulating your opinion today, would
17 it have been significant for you to review the trial
18 testimony of Dr. Gorenstein and Dr. Schwartz, yes or no?

19 A. I don't believe so. It should be consistent with
20 their depositions.

21 Q. Doctor, let's go into a different area.

22 Am I correct that you have been to court on a
23 number of occasions to testify?

24 A. Yes.

25 Q. Am I correct that you have been retained by
26 attorneys from a number of different states to offer

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 opinions as to physicians, correct?

3 A. Yes.

4 Q. You have been retained by attorneys in

5 Connecticut, correct?

6 A. Yes.

7 Q. Pennsylvania?

8 A. Yes.

9 Q. Texas?

10 - A. Yes.

11 Q. Georgia?

12 A. Yes.

13 Q. Missouri?

14 A. I believe so.

15 Q. Massachusetts?

16 A. Yes.

17 Q. New York?

18 A. Yes.

19 Q. Any other states, Doctor?

20 A. I believe Maine.

21 Q. Doctor, have you also testified in court in a

22 number of court houses in New York; for instance, you've

23 testified in Staten Island, correct?

24 A. Yes.

25 Q. Manhattan?

26 A. Yes.

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1 Mayer - Plaintiff - Cross/Gallo

2 Q. Nassau?

3 A. Yes.

4 (Continued on next page.)

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RICHARD FEIS - OFFICIAL COURT REPORTER

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 CROSS-EXAMINATION (Continued)

3 BY MR. GALLO:

4 Q Suffolk?

5 A Yes.

6 Q Broome County?

7 A Yes.

8 Q Brooklyn?

9 A Yes.

10 Q And the Bronx?

11 A Yes.

12 Q What about Westchester?

13 A Yes.

14 Q Can you think of any other states you've
15 testified -- any other counties in New York State that
16 you've testified in?

17 A I cannot.

18 Q And, am I also correct that you've also testified
19 in federal court, correct?

20 A I don't recall that, but --

21 Q It's possible?

22 A I'm not sure. I don't recall that.

23 Q Well, Doctor, in the course of reviewing files as
24 an expert, is it fair to say that you have offered
25 opinions against general surgeons? Yes or no?

26 A I've also --

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Yes or no?

3 A (Continuing) -- offered opinions for general
4 surgery.

5 Q Doctor, listen to my question. My question was:

6 Have you offered opinions against general
7 surgeons; yes or no?

8 A Yes.

9 Q What about vascular surgeons, yes?

10 A Yes.

11 Q What about internists?

12 A I can't recall specifically.

13 Q Well, Doctor, didn't you tell me about five
14 minutes ago that you signed an affidavit in this case?

15 A Yes.

16 Q And in that affidavit did you comment on the care
17 of an internist, yes or no?

18 A Yes.

19 Q And can we also agree that you've also offered
20 opinions against emergency room physicians, yes or no?

21 A Yes.

22 Q And can we agree that you've also offered
23 opinions against neurologists, yes or no?

24 A Yes.

25 Q And can we agree in the past you've offered
26 opinions against hospitals, yes or no?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A Yes.

3 Q And can we agree you've offered opinions against
4 orthopedic surgeons, yes or no?

5 A Yes.

6 Q And can we agree that you have offered opinions
7 against neurosurgeons, yes or no?

8 A I don't recall that.

9 Q Well, Doctor, didn't you testify a couple of
10 years ago in a neurosurgery case in Staten Island?

11 A Yes.

12 Q And do you recall Mr. Dugan was actually the one
13 who was questioning you in that case?

14 A Yes.

15 Q Do you remember him?

16 A Yes, I do.

17 Q And, Doctor, have you also testified, offered
18 opinions against nurses?

19 A That I couldn't say.

20 Q What about obstetricians and gynecologists?

21 A I'm not sure.

22 Q Well, Doctor, can we agree that you have no
23 training in internal medicine, emergency room medicine,
24 neurology, or orthopedics?

25 A Well, I have --

26 Q Yes or no?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A (Continuing) -- I have training -- no.

3 MS. KELMACHER: No, I want to clarify the
4 answer. There were two questions there. I want the
5 doctor to qualify.

6 MR. KOPFF: Move to strike her discussion.

7 MR. GALLO: Objection.

8 MS. KELMACHER: It's a compound question if
9 you read the record back.

10 THE COURT: Overruled. Overruled. I'll
11 tell you, come to the side however. Come to the
12 side.

13 (Whereupon, an off-the-record discussion is
14 had.)

15 MS. KELMACHER: Judge, can we clarify the
16 last answer?

17 THE COURT: Let me hear the last question
18 and answer, please.

19 (Whereupon, the requested portion of the
20 record was read back by the Reporter.)

21 THE COURT: All right. No, I'll allow it.

22 THE WITNESS: I think I got confused by the
23 question.

24 THE COURT: It could remain in the record.

25 THE WITNESS: I'm not sure I gave the right
26 answer.

***PAGE(S) MISSING
FROM ORIGINAL
TRANSCRIPT***

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 vs. Yale New Haven Hospital from August 10, 2004, page
3 91:

4 "QUESTION: Doctor, did you apply to be
5 certified in vascular surgery?

6 "ANSWER: Yes.

7 "QUESTION: Were you turned -- you were
8 turned down, were you not?

9 "ANSWER: Yes.

10 "QUESTION: When was that?

11 "ANSWER: It was probably back in 1980,
12 1981."

13 Doctor, were you asked those questions and
14 did you give that testimony in the case of Carchia vs.
15 Yale New Haven Hospital, yes or no?

16 A I can't remember my testimony in that case --

17 Q Doctor --

18 A (Continuing) -- to say if it's accurate or not.

19 THE COURT: All right.

20 Do you have a recollection that you were
21 asked those questions, and you gave those answers, yes
22 or no?

23 THE WITNESS: I don't have a recollection of
24 that, your Honor.

25 THE COURT: All right.

26 Q Doctor, do you dispute the fact that you did

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 apply to become board certified in vascular surgery and
3 were turned down?

4 A Could you define "turned down"?

5 Q Doctor, it was your answer, not mine.

6 A I don't understand the question to answer it.

7 Q Well, Doctor, did you ever submit an application
8 to be board certified in vascular surgery, yes or no?

9 A No.

10 THE COURT: Next question.

11 Q Doctor, have you ever advised anyone or
12 represented to anyone that you have been board certified
13 in vascular surgery?

14 A Have I -- I don't understand the question.

15 Q Well, Doctor, have you ever represented yourself
16 as a board certified vascular surgeon?

17 A Only to the extent that I'm board certified by
18 the American Board of Surgery, which certifies you in
19 general and peripheral vascular surgery.

20 Q Doctor, that wasn't my question.

21 MS. KELMACHER: Objection.

22 Q My question was --

23 MS. KELMACHER: Objection to the form,
24 Judge, that was his question, and he did answer.

25 THE COURT: I'll overruled it. You could
26 ask the question again. You could ask it again.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q My question is have you ever represented yourself
3 as a surgeon who was board certified in vascular surgery,
4 yes or no?

5 MS. KELMACHER: Asked and answered.

6 THE COURT: Overruled.

7 Can you answer that, yes or no?

8 THE WITNESS: I don't know what he means by
9 "represented myself." Could he define that?

10 - Q Well, Doctor, have you ever held yourself out as
11 a board certified vascular surgeon, yes or no?

12 A I never claimed to be certified by the American
13 Board of Vascular Surgery, a subspecialty of the American
14 Board of Surgery.

15 Q Well, Doctor, can we agree that you are on the
16 staff of Huntington Hospital?

17 A Yes.

18 Q And, Doctor, can we also agree that you are on
19 the staff of Syosset Hospital?

20 A Yes.

21 Q And can we also agree that from time to time
22 Huntington Hospital refers you patients, correct?

23 A Yes, correct.

24 Q And they have a physician referral service, am I
25 correct?

26 A Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q And as part of that physician referral service,
3 am I correct that you have to provide certain information
4 to the hospital in terms of what medical providers you
5 accept, am I correct?

6 A Yes.

7 Q And you provide information on your background so
8 they know what type of surgeon you are, correct?

9 A Yes.

10 Q Doctor, isn't it true that you have advised the
11 staff of Huntington Hospital that you are board certified
12 in vascular surgery, yes or no?

13 A I advised the staff?

14 Q Advised the hospital that you have a board
15 certification in vascular surgery, yes or no?

16 A As a stand-alone subspecialty board?

17 Q Yes, yes.

18 A I don't believe I ever represented that to them.

19 MR. GALLO: Your Honor, could I approach the
20 witness?

21 THE COURT: Yes.

22 Q Doctor, I'm showing you a printout from the
23 Huntington Hospital Physicians Directory; do you see
24 that?

25 A Yes.

26 Q Am I correct that this printout indicates that

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 you are board certified in vascular surgery, yes or no?
3 A I don't --
4 Q Yes or no?
5 A No, I don't believe it indicates that.
6 Q Doctor, am I correct --
7 THE COURT: You asked the question. Does it
8 indicate that. He said, no, it does not.
9 MR. GALLO: Okay.
10 Q Doctor, can you read for me what the line says
11 under "board certification" on that document?
12 MS. KELMACHTER: Judge, I'm going to ask --
13 THE COURT: Yes.
14 MS. KELMACHTER: (Continuing) -- the
15 whole --
16 THE COURT: What are you going to do, are
17 you going to object?
18 MS. KELMACHTER: Objection.
19 THE COURT: Objection sustained.
20 Q Well, Doctor, does that document say --
21 THE COURT: Objection sustained. Objection
22 sustained. The document is not in evidence.
23 MR. GALLO: Well, Judge, I offer it into
24 evidence.
25 THE COURT: Sustained.
26 Doctor, take a look at that document, and

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 tell us, does that document in any way refresh your
3 recollection or cause you to change your answer that
4 you represented to the hospital in Huntington that you
5 are a board certified vascular surgeon, yes or no?

6 THE WITNESS: I never made such
7 representation to the hospital.

8 THE COURT: And that document doesn't cause
9 you to change your answer?

10 THE WITNESS: No.

11 THE COURT: Next question.

12 Q Doctor, what's your primary area of expertise?

13 A General and peripheral vascular surgery.

14 Q And, Doctor, can you tell the jury how much, in
15 terms of percentage of your practice, vascular surgery
16 is?

17 A Counting my active work in noninvasive vascular,
18 it would probably be about half of my practice.

19 Q Doctor, isn't it true that 75 percent of your
20 practice is general surgery, yes or no?

21 A I would say of my operations --

22 Q Doctor.

23 A (Continuing) -- but not of my entire practice.

24 THE COURT: Can you answer it in that form?

25 THE WITNESS: No, I cannot answer yes or no.

26 THE COURT: All right, next question.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Doctor, have you ever testified that 75 percent
3 of your -- 75 percent of the surgeries that you do are
4 general surgery procedures, yes or no?

5 A Yes.

6 Q And, only 25 percent of your procedures are
7 vascular surgery procedures, correct?

8 A Yes.

9 Q Now, Doctor, am I correct that you have been
10 doing expert reviews for a number of years?

11 A Yes.

12 Q And, am I also correct that you probably have
13 been doing expert reviews for about 20 years?

14 A Yes.

15 Q And, Doctor, am I also correct that you advertise
16 your services to be an expert?

17 A Yes.

18 Q And, Doctor, are you -- in the past you've
19 advertised in "The New York Law Journal," which is a
20 magazine or a daily newspaper for attorneys, correct?

21 A Yes.

22 Q And you've advertised your services as both a
23 general surgeon and a vascular surgeon in "The New York
24 Law Journal" in about the years 2000, 2001, correct?

25 A Yes.

26 Q And, Doctor, you also belong to an expert

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 referral service over the Internet known as www.seak.com?

3 A Yes.

4 Q And, Doctor, how long have you been advertising
5 your services in that website?

6 A Approximately for the last five years or so.

7 Q And just so we're clear, that's a website where
8 physicians can post their qualifications in the hope of
9 getting business to be a expert, am I correct?

10 - A Yes.

11 Q And, Doctor, are you also a member of some
12 referral services where you were sent cases by a number of
13 different companies?

14 A Only one that I'm aware of, but --

15 Q Only one. And would that be the American Medical
16 Forensic Specialists?

17 A Yes.

18 Q And, Doctor, you started working for them in
19 about 1985; is that correct?

20 A Yes.

21 Q And, Doctor, have you ever testified that there
22 was some other services that may have sent you cases in
23 the past?

24 THE COURT: Has he ever testified about
25 that?

26 MR. GALLO: Absolutely.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 THE COURT: All right.

3 A I don't recall.

4 Q You familiar with a service in Pennsylvania by
5 the name of Medival, M-E-D-I-V-A-L?

6 A Yes.

7 Q And, am I correct that in the past that service
8 has sent you cases?

9 A That probably is true. I don't think in recent
10 times, but, yes, I --

11 Q So, that's two services that have sent you cases
12 over the years, correct?

13 A Yes.

14 Q Now, Doctor, in the course of being an expert
15 witness, how many files or cases have you reviewed in the
16 last 20 years?

17 A About, I would estimate 250 to 300 files.

18 Q Well, Doctor, can we agree that in the last five
19 years you probably look at about 20 cases a year?

20 THE COURT: Twenty cases what?

21 MR. GALLO: A year.

22 THE COURT: A year.

23 A I would say, yes, for both plaintiff and to
24 defend doctors as well.

25 Q Well, Doctor, bringing up that point, in terms of
26 reviewing cases, can we agree that at least 80 percent of

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 the reviews are for plaintiff's attorneys?

3 A I would agree with that.

4 Q And, Doctor, can we also agree that in the past
5 you've testified that as many as -- that it may be as high
6 as 90 percent?

7 THE COURT: What's the question?

8 MR. GALLO: Has he testified.

9 THE COURT: Not has he. What is the
10 question? Put a question to him.

11 Q Doctor, can we agree that as -- it's possible
12 that 90 percent of the cases that you have reviewed have
13 been for plaintiffs?

14 A Reviewed?

15 Q Yes.

16 A No, I thought it --

17 THE COURT: Yes, yes, you are correct, the
18 question was changed. I believe the testimony was he
19 reviewed 80 percent; is that correct?

20 THE WITNESS: Yes, yes.

21 THE COURT: How many cases have you
22 testified about in court wherein you testified on
23 behalf of the plaintiff?

24 THE WITNESS: I would say it was closer to
25 90 percent in court.

26 THE COURT: All right.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Thank you, Doctor.

3 Now, Doctor, when you review a case, what's
4 the average length of time you spend reviewing a case?

5 A Well, it varies. There's no average length of
6 time. Well, there is an average length of time, but it
7 could be an hour or two, it could be 10 or 15 hours, it
8 depends on the extent.

9 Q And how much money do you charge to review
10 materials on an hourly basis?

11 A I think it's \$300 an hour for review.

12 Q Well, Doctor, isn't it true that you charged \$350
13 an hour?

14 A That might be. I don't handle personally the
15 billing for it, but I wouldn't dispute that amount.

16 Q The \$350 an hour?

17 A Might be correct, yes.

18 Q Now, Doctor, prior to coming to court, can you
19 tell us how much you've charged plaintiffs' attorney for
20 your preparation time, from the beginning of the case
21 until today?

22 A I don't have that exact amount of hours into the
23 case. It's been over a six-year period, so it's an
24 extensive period of time, so I don't have, don't have
25 those figures for you.

26 Q Would you agree that it's probably about 15 or 20

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 hours?

3 A I would agree with that.

4 Q And can we agree that your fee for reviewing the
5 material prior to today is probably in the range of five
6 or \$6,000?

7 A Over a six year period?

8 Q Yes.

9 A In increments, that might be correct.

10 Q And, Doctor, you also charge, am I correct, for
11 trial testimony?

12 A Yes.

13 MS. KELMACHTER: Objection to form, Judge,
14 it's not trial testimony, it's time.

15 THE COURT: Yes, with respect to the
16 question, yes.

17 MS. KELMACHTER: And I move to strike,
18 Judge, it's time.

19 THE COURT: Yes, stricken from the record.

20 Q Doctor, can you tell the jury what your fee is
21 for today?

22 A Yes, it's \$400 an hour, based on the amount of
23 time spent today.

24 Q Doctor, isn't it true that you charged \$7,000 a
25 day to testify?

26 THE COURT: You asked him what he is

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 charging in this case?

3 MR. GALLO: No, I asked him, isn't it true.

4 THE COURT: You asked him what he's charging
5 for his appearance in court today.

6 MR. GALLO: In this court today, yes, your
7 Honor.

8 THE COURT: You asked him, isn't it true.
9 You were asking another question.

10 Q Doctor, have you ever charged \$7,000 a day to
11 testify?

12 A I have in other cases. I'm appearing today at
13 \$400 an hour based on time.

14 Q And the clock runs from the time you left your
15 house until you go home tonight?

16 A It would be time away from my surgical practice
17 because there is a loss of income associated with my not
18 being in my practice today.

19 Q So, Doctor, can we agree that your total fee for
20 testifying in this case is probably -- can I finish?

21 MS. KELMACHTER: Judge, he doesn't get a fee
22 for testifying. He gets a fee for his time and
23 counsel should know that.

24 THE COURT: Please, please.

25 It's not for testifying; it is for time in
26 court.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 MR. GALLO: Let me rephrase the question.

3 THE COURT: Yes.

4 Q The total compensation for this case, including
5 review of records and time in court, is it in excess of
6 \$10,000?

7 A I can't verify that. I don't have my billing
8 records with me.

9 Q Well, Doctor, in addition to testifying in court,
10 you also gave depositions, am I correct?

11 A Yes.

12 Q And, can we agree that in the course of your
13 career you probably gave them 40 or 50 depositions?

14 A That might be correct.

15 Q And, Doctor, can we also agree that when you give
16 a deposition your fee is generally around \$5,000 for a
17 full day?

18 A Well, generally, they don't run a full day.
19 They're usually like three hours or something, so it would
20 be a half day.

21 Q Well, Doctor, if it's a half day, it's about
22 \$3,000 or \$2,500?

23 A That might be correct.

24 Q And can you tell this jury how many times you've
25 testified in court?

26 A Probably about 15 times.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Doctor, did you ever participate in a residency
3 in hematology?

4 A In hematology?

5 THE COURT: I'm sorry, in what residency?
6 In what?

7 MR. GALLO: Hematology.

8 THE COURT: Hematology.

9 A No, I did not.

10 Q And, Doctor, have you ever participated in a
11 fellowship of hematology?

12 A No.

13 Q And, Doctor, am I correct you haven't authored
14 any articles on hypercoagulability issues?

15 A I have not.

16 Q And, Doctor, am I also correct that you haven't
17 authored any articles on APS?

18 A I have not.

19 Q Now, Doctor, I believe you testified on direct
20 that you perform a number of vascular surgery procedures;
21 correct?

22 A Yes.

23 Q And, Doctor, am I also correct that when you
24 performed certain vascular procedures you need a board
25 certified vascular surgeon in the operating room to help
26 you?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A Do I need?

3 Q Do you need?

4 A No.

5 Q Doctor, are you familiar with Dr. Mark Gennaro?

6 A Yes.

7 Q And he is a board certified vascular surgeon, am
8 I correct?

9 A Yes.

10 Q And, am I also correct that when you performed
11 certain vascular surgery procedures he's in the operating
12 room assisting you?

13 A Well, if I ask him to assist me.

14 Q Yes or no?

15 A Me?

16 Q Yes or no?

17 A It would be at my direction.

18 Q Is the answer yes or no?

19 THE COURT: Well, well, I don't understand
20 the nature of your question.

21 THE WITNESS: I don't understand the
22 question either.

23 THE COURT: Is it he's required there or is
24 it at his option?

25 Q Doctor, is it your option to have a board
26 certified vascular surgeon assist you in performing

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 certain vascular surgery procedures?

3 A It's an option, yes.

4 Q And on occasion, Dr. Gennaro assists you,
5 correct?

6 A And vice versa, and I assist him as well on
7 occasion.

8 Q Doctor?

9 A We have a working relationship.

10 Q Doctor, did I ask that question?

11 MS. KELMACHER: Objection.

12 THE COURT: Please, please.

13 Q Doctor, you also testified on direct that
14 Huntington Hospital has residents, am I correct?

15 A We've had residents since 1978 to about two years
16 ago. Currently we have a PA program, and we're trying to
17 get the residency back.

18 Q So currently Huntington Hospital does not have a
19 residency program?

20 A That's correct.

21 Q Doctor, I just want to refer your attention to
22 Dr. Gorenstein's May 5th, 1998 office note.

23 MR. GALLO: Your Honor, could we have

24 Dr. Gorenstein's chart?

25 THE COURT: Is that Plaintiffs' 9?

26 MR. GALLO: I think so.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 MS. KELMACHER: It's right there.

3 MR. ASHER: Yes, Judge.

4 THE COURT: We have 9.

5 COURT OFFICER: It should be up there.

6 THE COURT: Is that the office chart we're
7 talking about?

8 MR. GALLO: Yes, your Honor.

9 THE WITNESS: I have it, yes.

10 A I can't seem to find that entry there.

11 May 5, '98.

12 Yes, I have it.

13 Q Now, Doctor, can we agree that Dr. Gorenstein's
14 procedure that he performed on Ms. Butler was indicated,
15 correct?

16 A Yes.

17 Q And can we agree that he performed the
18 appropriate test before he operated on Mrs. Butler on July
19 10th, correct?

20 A Yes.

21 Q Now, Doctor -- and you agree with his diagnosis
22 in terms of performing the procedure, correct?

23 A Yes.

24 Q Now, Doctor, I believe the records of
25 Dr. Gorenstein indicate some information regarding the
26 patient's past medical history, correct?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A Yes.

3 THE COURT: I'm sorry?

4 MR. GALLO: Past medical history.

5 THE COURT: Yes, all right.

6 A Yes.

7 Q Doctor, from reviewing all the information in
8 this case, you are aware that Mrs. Butler underwent a
9 Cesarean section in 1989, correct?

10 A Yes.

11 Q And you are aware that she did not suffer blood
12 -- any blood clots after that procedure, correct?

13 A Yes.

14 Q And you are also aware that in 1990, she had
15 another Cesarean section procedure, correct?

16 A Yes.

17 Q And we could agree that she did not suffer any
18 blood clots following that procedure?

19 A Yes.

20 Q And we could also agree that in 1993 she had her
21 third Cesarean section, correct?

22 A Yes.

23 Q And following that procedure she did not suffer
24 any blood clots, correct?

25 A Yes.

26 Q And, Doctor, from reviewing the material, you are

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 aware that in 1992, she had a laparotomy and the removal
3 of an ovarian cyst, correct?

4 A Yes.

5 Q Could you tell the jury what a laparotomy is?

6 A That's when the abdomen is opened for surgical
7 purposes to either explore or remove an organ in the
8 abdomen.

9 Q And, Doctor, following the performance of that
10 laparotomy, Mrs. Butler did not suffer any blood clots,
11 correct?

12 A Not as far as we know, correct.

13 Q And, Doctor, am I also correct from reviewing the
14 Nyack Hospital chart that you are aware that in 1997,
15 Mrs. Butler had a gynecological procedure performed known
16 as a D & C?

17 MS. KELMACHER: Objection.

18 THE COURT: Overruled.

19 A I don't recall that specifically, but I wouldn't
20 dispute it.

21 (Continued on next page.)

22

23

24

25

26

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Pardon, Doctor?

3 A. I will not dispute it, I don't have a specific
4 recall of that.

5 Q. Doctor, can we agree that prior to 1998 Mrs.
6 Butler underwent a number of surgical procedures and she
7 did not suffer any blood clot following these procedures?

8 MS. KELMACHER: Objection to form.

9 THE COURT: Well, you are talking about '89,
10 - '90, '93?

11 Q. '92 and '97.

12 THE COURT: But with respect to those
13 procedures, were there any blood clots disclosed after
14 those procedures?

15 THE WITNESS: Not that are shown in the
16 medical records.

17 Q. Doctor, based upon your review of the medical
18 records, Mrs. Butler was pregnant on three occasions,
19 correct?

20 A. Yes.

21 Q. Is it also correct that she never suffered a
22 miscarriage?

23 A. Not that I know of.

24 Q. Doctor, would you agree that would be a
25 significant piece of information because women who have
26 been diagnosed with APS typically have a history of --

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 THE COURT: Sustained.

3 Q. Doctor, would you agree with me that 75 percent of
4 woman who are diagnosed with APS have a history of
5 miscarriages?

6 A. I wouldn't specifically agree with that, no.

7 Q. Doctor, did you see any evidence in the record
8 that Ms. Butler was ever diagnosed with a DVT, prior to
9 1998?

10 - A. I did not.

11 Q. Now, Doctor, Ms. Kelmachter asked you some
12 questions this morning on the vein stripping and ligation
13 procedure, correct?

14 A. Yes.

15 Q. And, Doctor, that procedure was performed under
16 general anesthesia, was it not?

17 A. Yes.

18 Q. And does general anesthesia in and of itself
19 increase the risk of a DVT?

20 A. I think the depends on the duration. I can't
21 answer that.

22 Q. You can't answer that question yes or no?

23 A. No.

24 Q. Doctor, in terms of performing the vein stripping
25 and ligation procedure, how many incisions did
26 Dr. Gorenstein make?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. That I would have to check.

3 Q. Well, Doctor, can you look at Dr. Gorenstein's
4 operative note.

5 A. Where would I find that?

6 Q. That would be in the Nyack Hospital chart for the
7 July 17 -- July 10th admission?

8 A. It would be faster if you could hand it to me.

9 MR. GALLO: Your Honor, may I approach the
10 - witness and find it for him?

11 THE COURT: Yes, yes.

12 THE WITNESS: Thank you.

13 THE COURT: What was the question?

14 Q. I asked the doctor how many incisions did Dr.
15 Gorenstein make during in performing the surgical
16 procedure?

17 A. It doesn't specifically say that, unfortunately.

18 Q. Well, Doctor, does the operative report indicate
19 that an incision was made in the groin?

20 A. Yes.

21 Q. Does the operative report also indicate that an
22 incision was made in the ankle area?

23 A. Yes.

24 Q. And can we agree then that at least two incisions
25 were made for the procedure?

26 A. We could agree with that.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Doctor, an excision is made in the groin area for
3 what purpose?

4 A. To ligate the top of the saphenous vein near the
5 -- into the femoral vein and tributaries and prepare the
6 main trunk for stripping.

7 Q. Doctor, why is an incision made in the ankle?

8 A. To tie off the bottom of the vein strain so a
9 stripper than could be passed through the vein and
10 removed.

11 Q. Can you tell this jury what a stripper is?

12 A. It's a little plastic ball that goes in the end of
13 a long plastic rod, they actually used to be made out of
14 metal, that can pull the vein out without making an
15 incision in the leg, just through two little incisions at
16 the top and bottom.

17 Q. So am I correct that this stripper is passed from
18 the ankle up through the vein up into the groin?

19 A. Generally speaking, yes.

20 Q. Generally speaking?

21 A. It could be passed the other way as well.

22 Q. But you don't dispute that Dr. Gorenstein's
23 operative note indicates it was passed up?

24 A. Correct.

25 Q. And once it gets up to the groin, do they put a
26 ball on top of the stripper?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. Yes.

3 Q. And is a suture then placed?

4 A. You can tie the vein on to the stripper, you don't
5 have to have -- absolutely have to.

6 Q. Then the surgeon pulls down the stripper and pulls
7 the vein out, correct?

8 A. Yes.

9 Q. Doctor, are there side branches along the length
10 of the vein?

11 A. Yes.

12 Q. Doctor, during the performance of the procedure
13 are the side branches ligated?

14 A. Not generally. Generally they are just severed
15 with the passage of the stripper and the leg is wrapped in
16 an Ace bandage for compression.

17 Q. Are there also branches that connect the
18 superficial vein to the deep vein?

19 A. Perforating vein, yes.

20 Q. Doctor, when the greater saphenous vein is
21 stripped, am I correct that all these small branches are
22 evulsed?

23 A. Well, I wouldn't say --

24 Q. Yes or no?

25 A. No, I wouldn't call it evulsed.

26 Q. What happened to the side branches, Doctor?

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1 Mayer - Plaintiff - Direct/Gallo

2 A. They are severed from the vein, venous trunk, and
3 they basically, with pressure, just clot off.

4 Q. But Doctor, they bled before there is pressure,
5 correct?

6 A. Yes.

7 Q. And they bled into the subcutaneous space?

8 A. Into the tunnel generally that the stripper
9 creates.

10 - Q. Doctor, are the communicating branches also
11 evulsed during the surgical procedure?

12 A. Not generally. They run through the muscles and
13 they are generally intact.

14 Q. Doctor, is it common for patients to develop
15 hematomas following the procedure?

16 A. That can happen usually along the stripping
17 tunnel.

18 Q. Doctor, when you were in your residency, was this
19 procedure performed as an in- patient procedure?

20 A. Yes.

21 Q. It was originally. I believe within the last
22 recent years that you testified this morning that it
23 became an outpatient procedure, correct?

24 THE COURT: I don't believe that was his
25 testimony.

26 MR. GALLO: I believe that was his testimony.

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1 Mayer - Plaintiff - Direct/Gallo

2 THE COURT: That he testified.

3 MR. GALLO: In recent years it has become an
4 outpatient procedures.

5 THE COURT: First there is an outpatient
6 procedure, did you say how many years it was an
7 outpatient procedure?

8 THE WITNESS: I did not.

9 THE COURT: All right.
10 Do you know how many years it has been an
11 outpatient procedure?

12 THE WITNESS: Probably from the early 1980s,
13 mid '80s it become an outpatient procedure.

14 Q. Doctor, we can agree that stripping procedure is
15 very painful, correct?

16 A. I don't agree with that.

17 Q. Doctor, didn't you testify this morning that
18 patients are given pain medication following the
19 procedure?

20 A. Yes.

21 Q. Doctor, from your review of the chart, you are
22 aware that Mrs. Butler was given pain medication
23 immediately after the procedure, correct?

24 A. Yes.

25 Q. And you are also aware that she received pain
26 medication to take at home, correct?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. Yes.

3 Q. Doctor, I think you talked a little this morning
4 about the fact that patients can walk after the surgical
5 procedure, correct?

6 A. Yes.

7 Q. Doctor, will you agree with me that if a patient
8 stayed in bed for three days following the procedure they
9 are more likely to develop a DVT, yes or no?

10 - A. Can you define staying in bed. Continuously or --

11 Q. Let me ask the question.

12 I want you to assume that Mrs. Butler
13 testified on page 55 of the deposition that following the
14 procedure that Friday she stayed in bed and that she said
15 on bed rest Saturday and Sunday following the procedure.

16 Would you agree that somebody who says on bed
17 rest following a stripping procedure for three or four
18 days is more likely to definitely a DVT, yes or no?

19 THE COURT: You said bed rest no more than
20 two days now you are saying four.

21 Q. Three.

22 A. I can't answer it yes or no.

23 Q. Doctor, did you consider Ms. Butler to be obese as
24 of the time of the surgical procedure?

25 A. Overweight but not morbidly obese.

26 Q. Doctor, would you consider her to be just obese?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. I would have to refresh my memory as to her exact
3 height and weight.

4 Q. Doctor, I want you to assume in the hospital chart
5 she was about five foot two and weight about a hundred and
6 ninety pounds.

7 THE COURT: I believe it was 180 or 190.

8 Do you have the chart there?

9 Q. Doctor, assuming it is 180, would that be obese
10 for an individual about 5'2?

11 A. It would be overweight. I wouldn't call it obese.

12 Q. Doctor, are obese patients more likely to, or
13 overweight patients more likely to develop a DVT?

14 A. That is a risk factor for an DVT.

15 Q. Doctor, can we also agree that that surgery itself
16 is a risk factor for developing a DVT?

17 A. Depending on the magnitude and type of surgery.

18 Q. Yes or no. Just yes or no.

19 A. I can't answer it yes or no.

20 Q. Well, Doctor, can a DVT happen following any
21 surgical procedure?

22 A. With varying degrees of occurrence.

23 Q. Doctor, can we also agree that individuals can
24 develop DVTs if they are sitting on a plane for an
25 inordinate amount of time?

26 A. It has occurred.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Correct?

3 A. Often their coaguability --

4 THE COURT: You said it has occurred.

5 MR. GALLO: I am sorry, I did not hear.

6 THE COURT: You can't hear. All right. He
7 said it has occurred.

8 Q. Now, Doctor, how does a surgeon minimize a risk of
9 a patient developing a DVT during the performance of his
10 surgery?

11 A. You can administer a heparin dose before surgery,
12 often like Lobinox, or a longacting heparin, a single dose
13 prior to surgery. You can use antiembolic venous pumps
14 during the surgery, that brings the blood back from the
15 calf up the leg to avoid venous stasis.

16 You do a vein stripping you put the patient
17 in the Trendelenburg with the head down, to empty the legs
18 of blood. Get patient up and moving and ambulating
19 quickly after surgery and those type of procedures.

20 Q. Doctor, can we agree that despite precautions a
21 patient can still develop a DVT following surgery in
22 general?

23 A. Theoretically possible.

24 Q. Doctor, one of the other ways to prevent the
25 development of a DVT following surgery is to use plastic
26 boots on a patient's leg, correct?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. Yes.

3 Q. Doctor, in light of the fact that Mrs. Butler had
4 a vein stripping surgery, you certainly could not put a
5 plastic boot on her right leg, correct?

6 A. Correct.

7 Q. Doctor, just so we are clear, why are patients
8 instructed to walk around following a vein stripping
9 surgery procedure?

10 - A. Following any procedure, activity is good
11 following surgery any type of surgery and prevents many
12 complications, collapse of lung bases and alactysis
13 (phonetic), it diminishes the chance of DVT and it's good
14 in general for recovery of a patient.

15 Q. Can you tell us how getting up and walking around
16 diminishes the risk of a DVT?

17 A. Just the musculature pump in the calf would assist
18 in returning blood to the heart and reduce stasis in
19 blood.

20 Q. If you perform the vein stripping procedure, am I
21 correct that you would want your patient to get out of bed
22 as soon as possible, correct?

23 A. Yes.

24 Q. And you would want them to get out of bed over the
25 course of the next several days following a vein stripping
26 procedure just because there is a risk of developing a

1 Mayer - Plaintiff - Direct/Gallo

2 DVT, correct?

3 A. Well --

4 Q. Yes or no?

5 A. I can't answer it yes or no.

6 Q. Doctor, is it your testimony that in 1998 the
7 standard of care required that a hypercoagulability workup
8 be performed for a patient who suffers a DVT following a
9 vein stripping surgery?

10 - A. I can't give a yes or no answer to that.

11 Q. Doctor, in this particular case your opinion is
12 that Dr. Gorenstein should have ordered a coagulability
13 workup, correct?

14 A. Yes.

15 Q. What is the basis for your opinion?

16 A. That it was a healthy patient, young, had a
17 relatively small trivial surgical procedure, and it was an
18 unexpected rare occurrence that would make one have to
19 rule out hypercoagulability.

20 Q. Doctor, despite the fact that during the vein
21 stripping surgery the vein is ripped out and the branches
22 that are attached to the vein are also ripped, it is still
23 your contention that is a simple procedure?

24 A. I wouldn't characterize it as you are
25 characterizing it. I think it is a relatively a traumatic
26 well tolerated procedure. It does not lead with any

1 Mayer - Plaintiff - Direct/Gallo

2 degree of regularity to clotting in the deep veins.

3 Q. Was it reasonable for Dr. Gorenstein to assume
4 that the DVT was related to the surgery?

5 A. I don't believe so.

6 Q. Doctor, I want to read to you from the testimony
7 of Dr. Kenneth Fisberger, who testified yesterday for the
8 plaintiff's counsel, specifically at page 2155.

9 Doctor Fishberger was questioned beginning on
10 line 12.

11 "QUESTION: Isn't it true then, Doctor, that
12 Dr. Gorenstein and Dr. Leahy's opinion that the deep
13 vein thrombosis developed in July of 1998 was related
14 to the surgery was a reasonable opinion, wasn't it, yes
15 or no?

16 "ANSWER: Yes, reasonable."

17 Q. You disagree with the testimony of Dr. Fishberger
18 who was plaintiff's expert yesterday?

19 A. Only on that one point. I do have a different
20 opinion.

21 Q. Doctor, can we agree that physicians can have
22 different opinions on certain issues?

23 A. Yes.

24 Q. Just because you have an opinion on a certain
25 issue doesn't mean you are necessarily correct?

26 A. I can't answer that.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Doctor, in the course of your practice do you have
3 on occasion, the opportunity to refer to any textbooks in
4 the office?

5 A. Yes.

6 MR. GALLO: Your Honor, can I just go over
7 there to get a textbook?

8 THE COURT: Yes.

9 Q. Doctor, can we agree that in the past you have
10 testified that you keep a version of Rutherford on
11 Vascular Surgery in your office?

12 A. I do.

13 Q. Doctor, can we also agree that on occasion in the
14 past you have testified that Rutherford's textbook on
15 vascular surgery is very valuable?

16 A. Yes.

17 Q. Am I also correct in the past you have testified
18 that this textbook is very good?

19 A. Yes.

20 Q. Doctor, in the past have you testified that this
21 is a fairly standard testbook in the field of vascular
22 surgery?

23 A. I couldn't say if I said that or not but I would
24 agree with that statement.

25 Q. Doctor, do you recognize this book as being
26 authoritative?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. I do not.

3 Q. Doctor, isn't the reason why you do not recognize
4 it as authoritative you know if you admitted to it being
5 authoritative I could question you on the contents of the
6 book. You have been asked that question before; am I
7 correct?

8 A. You are asking a compound question, in the sure
9 what you are asking.

10 Q. Doctor, in the past you have been questioned
11 regarding whether certain textbooks are authoritative,
12 correct?

13 A. Yes, I have.

14 Q. Doctor, you are aware if you do not admit that a
15 textbook is authoritative that I cannot question you on
16 the content of the textbook; you are aware of that?

17 A. I am aware of that.

18 Q. Doctor, do you agree or disagree with the
19 following statement regarding saphenous ligation and vein
20 stripping.

21 Major complications of this operation are
22 infrequent but include damage to deeply placed arteries or
23 veins. Deep venous thrombosis and saphenous nerve damage,
24 do you agree or disagree?

25 A. Infrequent but can occur.

26 Q. Yes?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 A. I would agree with that.

3 Q. Doctor, --

4 A. It shouldn't occur in good hands.

5 Q. Doctor, there is no question pending.

6 A. All right. Sorry.

7 Q. Doctor, this morning you were questioned on

8 whether you believe that Mrs. Butler had antiphospholipid
9 syndrome, am I correct?

10 - A. Yes.

11 Q. And am I also correct, Doctor, that you testified
12 this morning that the initial anticardiolipin test
13 performed at Columbia Presbyterian was elevated, did you
14 testify to that?

15 A. Elevated?

16 Q. Yes.

17 A. I thought it was high normal or borderline.

18 Q. Doctor, could we have the Columbia Presbyterian
19 hospital chart for the doctor?

20 MS. KELMACHTER: It's right there, Judge.

21 THE WITNESS: It's going to be a little
22 difficult spotting it in this chart.

23 THE COURT: Do you have --

24 MR. GALLO: I have it a specific page, your
25 Honor.

26 THE COURT: You have, good.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Yes.

3 THE WITNESS: Pages don't appear to be
4 marked.

5 Q. Doctor, I want to refer you to Page 829 of the
6 hospital chart.

7 MS. KELMACHTER: Just show it to the doctor
8 where it is paginated because it was added.

9 THE COURT: Mr. Gallo, can you do that?

10 MR. GALLO: Yes. Your Honor, I think they
11 are not here.

12 THE COURT: They are not there.

13 MR. GALLO: No.

14 THE COURT: Do you have your copy?

15 MR. GALLO: My copy is marked up.

16 MS. ARCIERO: What, I am sorry, what are we
17 looking for?

18 MR. GALLO: Page 829 of the chart.

19 MS. ARCIERO: Of the Columbia chart?

20 MR. GALLO: Yes.

21 THE COURT: Just that page is missing?

22 MR. GALLO: I don't see any lab values here.

23 MR. KOPFF: You want to use mine?

24 THE COURT: Unless they are in another spot.

25 (Whereupon, they are handed to Mr. Gallo.)

26 THE COURT: Is there a question?

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Direct/Gallo

2 Q. Yes. Doctor, can you look at 829?

3 A. Yes.

4 Q. Doctor, does that page contain the results of an
5 anticardio, antilipid, antibody test from January 11th,
6 2000?

7 A. It doesn't appear to, it must be the wrong page.
8 The page number has the homocystine test and the IGG
9 testing.

10 (Continued on next page.)

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1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 CROSS EXAMINATION (Continued)

3 BY MR. GALLO:

4 Q Well, Doctor --

5 MS. KELMACHER: You have to go to the next
6 page.

7 MR. GALLO: No, I think it's on the bottom
8 of the page.

9 THE COURT: Let's get the right page or
10 we're going to have to go on to another question.

11 MS. KELMACHER: You are asking about IgM.
12 He's talking about IgM. It's the next page.

13 MR. GALLO: Starting here on the page.

14 THE WITNESS: Correct, it is on the next
15 page.

16 Q It's on page 829.

17 THE COURT: That's the anticardiolipin test,
18 correct?

19 THE WITNESS: Yes.

20 Q And, Doctor, referring to page 829, does that
21 laboratory result indicate the result of the IgG serum?

22 A Yes.

23 Q And, Doctor, can you tell the jury what IgG
24 stands for?

25 A It's an immunoglobulin, I believe it's the test
26 for anticardiolipin antibody.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q And, Doctor, was a result of the IgG 3.0?

3 A It appears to be.

4 Q And, Doctor, based upon that lab sheet, was that
5 a normal or negative result?

6 A It would be a normal result.

7 Q And, Doctor, can you go to the next page, which
8 is page 830.

9 A Yes.

10 Q And, does that record the result of the IgM?

11 A Yes.

12 Q And is that result 6.0?

13 A Yes.

14 Q And, Doctor, can you tell the jury what IgM
15 stands for?

16 A I think a hematologist would be better able to
17 explain it, but it's immunoglobulin.

18 Q You don't know specifically what it stands for?

19 A It's an immunoglobulin or antibody test.

20 Q Would you defer to a hematologist as to what it
21 specifically entails?

22 THE COURT: As to what?

23 Q As to what the IgM value specifically entails?

24 A Yes, it's not within my area of expertise to
25 opine on the meaning of an IgM value.

26 Q And, Doctor, can we agree that the result of 6.0

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 is negative?

3 A Well, Dr. Diuguid interpreted it as a --

4 Q Doctor, Doctor --

5 A (Continuing) -- borderline.

6 THE COURT: No, the objection is sustained.

7 MS. KELMACHER: Judge, I'm asking he be
8 permitted to answer the question.

9 THE COURT: Well, he's using the word
10 - negative, I believe the testimony was unless there are
11 meaning the same.

12 Is the word negative with respect to what
13 the test discloses? Is that different from normal or
14 within normal limits or are they the same? What does
15 6 mean in that test? That's a serum test, is that
16 correct?

17 THE WITNESS: Yes, it's the highest level of
18 a normal reading, but it's a borderline reading, and
19 the hematologist in this case interpreted it as
20 consistent with --

21 MR. KOPFF: Objection, move to strike.

22 THE COURT: Objection sustained. You can't
23 tell us what the hematologist said.

24 MR. KOPFF: Move to strike.

25 THE COURT: I will allow this to the extent
26 did you rely on what the hematologist said with

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 respect to that finding in terms of any of the
3 testimony you've given today?

4 MR. GALLO: Objection.

5 THE COURT: Overruled.

6 I'll allow that.

7 THE WITNESS: Yes, I relied on Dr. Diuguid,
8 the hematologist's --

9 THE COURT: But don't tell us what he said.

10 THE WITNESS: (Continuing) -- opinion.

11 Q Doctor, can we go back to that page, please, and
12 the 6.0 value?

13 THE COURT: The IgM?

14 MR. GALLO: The IgM value.

15 THE COURT: You're saying the six is within
16 normal limits, is that your testimony?

17 THE WITNESS: It's high normal.

18 THE COURT: High normal.

19 Q Can we go specifically to this test result?

20 A Yes.

21 Q Doctor, do you see the reference range which is
22 listed under IgM?

23 A Yes.

24 Q And is a negative test zero to six; is that a a
25 negative test based upon?

26 A According to that laboratory.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Yes. Am I right, am I correct it's a negative
3 test?

4 A I would defer to a hematologist. I'm not really
5 qualified to --

6 Q Look at the laboratories?

7 A (Continuing) -- to opine on the borderline test.

8 MR. GALLO: Move to strike as not
9 responsive.

10 THE COURT: Yes. Stricken from the record.

11 Q Looking at page 830 of the hospital chart, is the
12 result of zero to six negative, yes or no?

13 A I can't answer it.

14 Q Well, Doctor, can you look at page 830, please.
15 Well, is zero to six within normal limits;
16 yes or no?

17 MS. KELMACHER: Judge, it's been asked and
18 answered. He said --

19 THE COURT: I can't get an answer. I'd like
20 to get an answer.

21 Is zero to six, in your opinion, within
22 normal limits?

23 THE WITNESS: It has -- it can't be analyzed
24 as a stand-alone value. It has to be put in the
25 clinical picture of the patient and history of the
26 patient.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 THE COURT: All right.

3 THE WITNESS: And interpreted by a
4 hematologist, so I can't say that six is normal in
5 this case.

6 Q Well, Doctor, I'm not asking you about your
7 personal opinion. I'm just asking you about what page 830
8 indicates.

9 Does it -- let me please finish, please.

10 - Does page 830 indicate that a result from
11 zero to six is negative; yes or no, that's all I'm
12 asking?

13 A Well, that's what it says on the page.

14 Q So, the answer is yes, am I correct?

15 THE COURT: That's --

16 Q Is that a yes?

17 THE COURT: He's only asked you does it
18 indicate that zero to six is within normal limits.

19 A According to that page?

20 Q Yes.

21 A Yes.

22 Q And, does that page also indicate that if the
23 result was between 7 and 10 that would be equivocal?

24 A That's what it says.

25 Q And, Doctor, does it also indicate that a result
26 greater than 10 would be positive?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A Yes.

3 Q And lower, the result was six, correct?

4 A Yes.

5 Q And, Doctor, based upon this laboratory test,
6 from your review of pages 829 and 830, that test, both the
7 IgG and the IgM were negative according to the criteria on
8 page 830, yes or no?

9 MS. KELMACHER: Objection. There's no
10 criteria on the page, Judge.

11 THE COURT: Do they indicate that on that
12 page, that's all.

13 MR. GALLO: That's all my question is, your
14 Honor.

15 THE COURT: Yes.

16 A Well, that's what the page indicates.

17 Q Doctor --

18 MR. GALLO: Move to strike.

19 A Far from --

20 MR. GALLO: As nonresponsive.

21 A -- from the final answer.

22 THE COURT: Yes, that's all right. The
23 plaintiffs' lawyer could ask you other questions, but
24 that indicates that it's within normal limits.

25 That's your answer?

26 THE WITNESS: Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 THE COURT: All right.

3 Q Doctor, when you testified this morning that the
4 first anticardiolipin antibody test was elevated, based
5 upon your review of the January 11, 2000 test, am I
6 correct that the first result was negative, it did not
7 show any elevated IgM or IgG levels; yes or no?

8 A I didn't testify. You are characterizing my
9 testimony incorrectly this morning.

10 Q Doctor, you did not testify?

11 A I said the first was high normal and the 2002 was
12 elevated. That's what I testified.

13 Q Okay, Doctor, tell me, what about the January 11,
14 2000 laboratory result, was high normal, tell me why it's
15 high normal, Doctor?

16 A Because six is right on the borderline of the
17 equivocal reading, it's considered a high normal.

18 Q Doctor, according to the lab result, is it
19 negative; yes or no?

20 THE COURT: We've had that. I think we all
21 understand what it says. We had that.

22 Q Doctor, are you familiar with the diagnostic
23 criteria in diagnosing APS?

24 A Just generally I refer to hematology to make the
25 specific diagnosis.

26 Q Doctor, do you know when APS was first diagnosed

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 as a disease?

3 A I don't know the exact year.

4 Q Doctor, if I told you it was 20 years ago, would
5 it refresh your recollection?

6 A It might be.

7 Q Do you know which physician first discovered this
8 syndrome?

9 A I do not.

10 - Q Doctor, if I told you that APS is also known as
11 Hughes syndrome, would that refresh your recollection?

12 A Might be.

13 Q Doctor, have you ever heard of sticky blood
14 syndrome?

15 A I don't use that terminology.

16 Q That wasn't my question, Doctor.

17 My question was, have you ever heard of
18 sticky blood syndrome?

19 A I haven't heard of it.

20 Q Doctor, are you familiar with the different types
21 of APS?

22 A Generally, yes.

23 Q And, Doctor, is there a primary type?

24 A Yes.

25 Q And, Doctor, what is a primary type?

26 A Well, that would be, you know, I'm not

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 characterizing myself as an expert on hematology, but
3 primary would occur de novo from a younger age, presenting
4 often with arterial and venous thrombosis, occasionally
5 miscarriages during pregnancy, and that's what I would
6 characterize as a primary form.

7 Q And what's secondary APS, Doctor?

8 A That would occur at a later age, and I would have
9 a hematologist define it specifically for you.

10 Q Doctor, is APS genetic or is it acquired?

11 A I don't believe it's inherited genetically.

12 Q So, it's acquired, is that correct?

13 A Yes.

14 Q Doctor, I just questioned you on the January 11,
15 2000 anticardiolipin antibody test, correct?

16 A Yes.

17 Q And we agreed that based upon pages 829 and 830
18 that test was negative, am I correct?

19 MS. KELMACHTER: Objection; asked and
20 answered.

21 THE COURT: Yes, sustained.

22 Q Well, Doctor, if in your opinion the January 11,
23 2000 test was negative -- I'll withdraw that question.

24 Doctor, do you know how APS promotes
25 thrombosis?

26 A The patient has antibodies against their own

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 phospholipids.

3 Q Anything else?

4 A I'm not a hematologist or an expert on the
5 intricacies of hypercoagulable syndromes.

6 Q Doctor, do you have an opinion as to whether, if
7 Mrs. Butler had undergone hypercoagulability workup in
8 1998, whether that test would have been positive for APS?

9 A I believe it would have been.

10 - Q Well, Doctor, what's the basis of your opinion?

11 A Because the analysis of this test was read as
12 positive by Dr. Diuguid, the hematologist.

13 MR. KOPFF: Objection. Move to strike.

14 A He wrote --

15 THE COURT: Objection overruled.

16 He asked him the question.

17 A He made the diagnosis in the medical records this
18 is consistent with antiphospholipid syndrome. I think
19 Dr. Diuguid, a hematologist, would have analyzed it
20 positively also back in '98.

21 Q Doctor, how do you know that Dr. Diuguid
22 interpreted this as a positive result?

23 A Well, he wrote that in the medical records.

24 Q Well, Doctor, was he referring to this test or
25 another test, Doctor?

26 THE COURT: Did he refer to what?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 MR. GALLO: This test or another test.

3 A Well, I believe it was contemporaneously with
4 this admission.

5 Q Doctor, you don't know for certain, do you; yes
6 or no?

7 MS. KELMACHER: Objection to form.

8 THE COURT: Yes, sustained, sustained.

9 Q Do you know for certain that Dr. Diuguid was
10 referring to this test?

11 A Yes, because it was written in the progress notes
12 contemporaneously with the drawing of the test, not at a
13 later date in his office notes.

14 Q Well, Doctor, in light of the fact that this test
15 was negative according to the laboratory result, what
16 makes you believe that if a test was done two years
17 earlier that it would have been positive?

18 A Well, this hematologist would have picked up the
19 same feature a year earlier than he did on this, and he
20 picked up antiphospholipid syndrome. The hematologist
21 takes many things into account beyond one single test and
22 that was his diagnosis.

23 Q So, Doctor, just let me be clear, you are basing
24 your testimony on Dr. Diuguid's note not your own
25 independent knowledge in the areas of APS?

26 A I always defer to the hematologist for the final

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 diagnosis of APS.

3 Q So my answer is you are relying on Dr. Diuguid's
4 interpretation, you are not relying on your own
5 interpretation of this lab value, yes or no?

6 A Well, I also rely on my interpretation of the
7 clinical syndrome of the patient with the laboratory.

8 Q Doctor, I'm only speaking about the lab values.

9 A Right. I don't make my own diagnosis based
10 solely on an isolated lab value.

11 Q Well, Doctor, are you aware whether patients who
12 have APS have low platelet counts?

13 A Can occur.

14 Q Doctor, would you agree with me that about 40
15 percent of the patients who have APS have a low platelet
16 count?

17 A I don't know the percentage, but it sounds like
18 that would be a reasonable statement.

19 Q Doctor, can you look at the Nyack Hospital chart
20 and tell me what the patient's platelet count was at the
21 time of the vein stripping procedure?

22 A I think it was in the 400,000 range.

23 Q That's a normal result, isn't it, Doctor?

24 A Yes.

25 Q I didn't hear you.

26 A Yes, the platelet count was not low.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Doctor, are you familiar with the diagnostic
3 laboratory criteria in order -- that that must be
4 satisfied in order for a conclusive diagnosis of APS to be
5 made?

6 A I'm not an expert on that. I would defer to the
7 hematologist for that.

8 Q So the answer is no?

9 A The answer is no.

10 Q Doctor, I want you -- let me just backtrack.

11 I want to read to you the testimony of
12 Dr. Fishberger, who was plaintiffs' expert, who testified
13 on page 2201 from yesterday, beginning on page 2200:

14 "QUESTION: So you can't -- if it could have
15 been positive, am I correct that it could have been
16 negative? Yes or no?

17 "ANSWER: In theory, yes.

18 "QUESTION: If it could have been positive
19 and it could have been negative, you can't state --
20 you can't state one way or the other as you sit here
21 now whether it could have been positive in 1998, yes
22 or no?

23 "ANSWER: I believe it was positive.

24 "QUESTION: Yes or no, Doctor?

25 "ANSWER: Yes."

26 Doctor, do you agree with Dr. Fishberger's

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 testimony that he can't state one way or the other if the
3 test, the anticardiolipin antibody test was performed in
4 1998, whether it would have been positive or negative?

5 MS. KELMACHER: Objection.

6 THE COURT: Sustained.

7 Q Doctor, is it your testimony that a diagnosis of
8 APS can be made on one blood test or would you defer to a
9 hematologist on that issue?

10 A I would defer to hematology.

11 Q Well, Doctor, didn't you state this morning that
12 a diagnosis of APS could be made in one simple blood
13 test?

14 A The blood test is simple. Whether or not a
15 second test hematology wanted for confirmation or not
16 would be up to hematology, but the process is a simple
17 blood draw, a simple blood test.

18 Q Well, Doctor, didn't you testify that the
19 diagnosis could be made in one simple blood test; didn't
20 you testify to that?

21 A It is possible.

22 Q Well, Doctor, but now you are testifying that you
23 would have to defer to a hematologist, am I right?

24 A For interpretation, correct.

25 Q Now, Doctor, there are other disease processes
26 which can cause hypercoagulability; am I correct?

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 A Yes.

3 Q And am I correct that some of these disease
4 processes may be genetic in origin?

5 A It's possible.

6 Q And, Doctor, am I also correct that some of these
7 processes we may not be able test for with the current
8 state of technology?

9 A That's correct. We don't know, but we suspect
10 there may be others we can't currently test for.

11 Q And, Doctor, can you just tell the jury what
12 hypercoagulability means?

13 A Just that the blood clots more readily than
14 normal, so it would be, the patient would be at risk for
15 clots in arteries, veins, et cetera.

16 Q And, Doctor, can we also agree that sometimes it
17 may not be possible to specifically identify the cause of
18 the hypercoagulability?

19 A Theoretically, it may not be possible in every
20 single case.

21 Q Doctor, can birth control pills contribute to
22 hypercoagulability?

23 A Yes.

24 Q And how is -- does that happen?

25 A Well, the hormones in the birth control pills
26 have been associated with increased incidence of

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 clotting.

3 Q And, Doctor, in this case, have you ruled out the
4 possibility that Mrs. Butler has a different
5 hypercoagulation syndrome?

6 THE COURT: What is the question?

7 MR. GALLO: In this case has he ruled out
8 the possibility --

9 THE COURT: "Did you"?

10 MR. GALLO: Has he, not whether Dr. Diuguid,
11 has he ruled out the possibility that the patient may
12 have another blood clotting syndrome?

13 Q Yes or no?

14 A In my mind, I think the others are ruled out.

15 Q And what's the basis for your opinion, Doctor?

16 A Well, the patient was not on birth control pills
17 for any extended period of time. I think they were
18 transiently prescribed in August of '99 when she saw the
19 gynecologist and had the Doppler of her leg, and she may
20 have taken them for less than a cycle, but I don't see any
21 other specific cause, and the hematologist was very
22 adamant about his opinion there was antiphospholipid
23 syndrome, so I think he carries the expertise in making
24 that diagnosis and I'd agree with it.

25 MR. GALLO: Your Honor, could I ask the
26 witness to look at the Columbia Hospital discharge

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 summary, page 865.

3 THE COURT: Do we have it there?

4 THE WITNESS: I can't seem to locate it,
5 unfortunately.

6 MR. GALLO: Your Honor, may I approach the
7 witness?

8 THE COURT: Yes.

9 THE WITNESS: The problem is this only goes
10 up to 727.

11 MR. GALLO: Judge, are there any more
12 records over there?

13 THE COURT: Not the Columbia records.

14 Are the Columbia records here?

15 I think he has them all. He has them all
16 there.

17 If you want, you could give the Doctor your
18 copy.

19 Q Doctor, I want you to look at page 866, which is
20 a page in the Columbia chart that I gave you.

21 A Yes.

22 Q And, Doctor, can you tell me what the second
23 sentence reads beginning with "hematology workup"?

24 A "Show a possible hypercoagulability questionable
25 antiphospholipid antibody syndrome."

26 Q Now, Doctor, from that discharge summary, it

1 Dr. Mayer - By Plaintiffs - Cross/Gallo
2 indicates that there was only a questionable
3 antiphospholipid syndrome present, am I correct?

4 A That's what it says.

5 Q And, Doctor, have you had occasion to treat
6 patients who are on lifelong Coumadin?

7 A Yes.

8 Q And, Doctor, what is the risk in terms of a major
9 bleed that a patient may experience if they're on lifelong
10 Coumadin per year?

11 A It's a very low risk, unless they're elderly in
12 which it increases.

13 Q Well, Doctor, would you agree with me that the
14 risk is approximately one percent, five percent per year
15 for any patient who is on Coumadin?

16 A One percent you said?

17 Q One percent to five percent. Would you agree
18 with me?

19 A I wouldn't agree with that, no.

20 Q Would you defer to a hematologist?

21 A No. The risk in a young, otherwise healthy
22 patient is not going to be that high. It's the elderly
23 who are at most risk for falls and bleeds on Coumadin.

24 MR. GALLO: Move to strike as not
25 responsive.

26 THE COURT: No, overruled.

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 Q Now, Doctor, did you testify this morning that
3 had the APS been diagnosed in 1998 the patient would have
4 been placed on lifelong Coumadin?

5 A Yes.

6 Q And, Doctor, can we agree you do not treat
7 patients with APS, in other words, you would defer to a
8 hematologist to treat the patient with APS?

9 A Well, I treat them --

10 - Q Yes or no, Doctor?

11 A (Continuing) -- but jointly with hematology.

12 Q Well, Doctor, do you agree it's the hematologist
13 who prescribes the Coumadin for the management of the
14 APS?

15 A Yes.

16 MR. GALLO: Judge, you want me to continue?
17 I'm going into another area which maybe we could do
18 after lunch.

19 THE COURT: We'll take a break now for
20 lunch.

21 All right, jurors, we'll take an hour. I
22 would ask you to back here at 10 after two, and we'll
23 resume at that time.

24 Please keep an open mind. Do not discuss
25 the case.

26 (Whereupon, the jury leaves the courtroom.)

1 Dr. Mayer - By Plaintiffs - Cross/Gallo

2 THE COURT: All right, we'll take a break
3 for lunch. I think everyone ought to look at the
4 chart and make sure the chart pages have not -- that
5 they're all in order.

6 MR. GALLO: Judge, those pages aren't up
7 there.

8 (Whereupon there is an off-the-record
9 discussion).

10 (Whereupon, there is a luncheon recess.)

11 (Continued on following page.)

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1 Mayer - Plaintiff - Cross/Gallo

2 A F T E R N O O N S E S S I O N .

3 THE COURT: Bring the jury in.

4 (Whereupon, the sworn jurors enter the
5 courtroom and take their respective seats.)

6 THE COURT: Mr. Lawton and members of the
7 jury, we will continue with the doctor's testimony.

8 Doctor, will you take the stand, please.

9 Doctor, I remind you have been previously
10 - sworn, you are still under oath.

11 You understand?

12 THE WITNESS: Yes, your Honor.

13 CROSS EXAMINATION

14 BY MR. GALLO:

15 Q. Good afternoon, Doctor.

16 A. Good afternoon.

17 Q. I just have some follow-up questions.

18 Can you tell me what your fellowship was in.

19 A. It was part of the New York Hospital Cornell
20 program where we were fellows on the various oncology
21 service at Memorial Sloane Kettering. So it was in
22 oncology that we functioned as fellows.

23 Q. Would it be fair to say that it was actually in
24 oncologic head and neck surgery?

25 A. Yes, head and neck, the gastric and mixed tumors
26 service, breast service.

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 Q. Now, Doctor, this morning I asked you some general
3 questions about the vein stripping procedure performed by
4 Dr. Gorenstein. I believe I asked you about a
5 communicating vessel, do you remember that?

6 A. Yes.

7 Q. Am I correct that a communicating vessel, that
8 connects the deep vein to the superficial vein?

9 A. That is correct.

10 - Q. And in this case it would be a vessel connecting
11 the deep vein to the greater saphenous vein, correct?

12 A. Yes.

13 Q. After the stripper is used and the vein is pulled
14 down, does the communicating vein bleed?

15 A. Not generally, because it runs through the muscle,
16 so just by the muscle contracting the bleeding is
17 minimal. Most of the bleeding occurs with the side
18 branches of the saphenous vein.

19 Q. But, Doctor, it does bleed, right?

20 A. It can a minimal amount, yes.

21 Q. How does the bleeding stop?

22 A. Just by wrapping the leg and pressure.

23 Q. Doctor, isn't it true the vein clots off?

24 A. The side branch may either retract and be sealed
25 in the muscle or it can form a small thrombus at the end
26 of the vein.

1 Mayer - Plaintiff - Cross/Gallo

2 Q. So we can agree that after the greater saphenous
3 vein is stripped the communicating vein does clot?

4 A. Not always, no.

5 Q. But it does on occasion?

6 THE COURT: The question is can it clot,
7 that's the question?

8 A. It is possible.

9 THE COURT: All right.

10 - Q. Doctor, could this clot propogate into the deep
11 vein and cause a deep vein thrombosis, yes or no?

12 A. No.

13 Q. Now, Doctor, I asked you this morning about some
14 -- I asked you some questions on APS and whether it's an
15 acquired syndrome.

16 Doctor, isn't it possible that the APS could
17 have been acquired in 1989?

18 A. Extremely unlikely.

19 Q. Is it possible?

20 MS. KELMACHER: Objection. Anything is
21 possible.

22 MR. GALLO: Counsel --

23 THE COURT: Sustained. When he answers the
24 question that's the answer to the question. Ask it is
25 it possible, yes or no?

26 THE WITNESS: In the realm of anything is

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Mayer - Plaintiff - Cross/Gallo

2 possible, extremely unlikely, but it is possible.

3 Q. Is it possible that it developed in 2000?

4 A. I think that's medically inconsistent with the
5 facts of the case.

6 Q. Doctor, does surgery itself produce a
7 hypercoagulability state?

8 A. Generally not in minor an outpatient surgery.

9 Q. Doctor, can we agree that any time surgery is
10 performed blood proteins rev up and cause clotting?

11 THE COURT: In all surgeries?

12 Q. In a surgery?

13 A. I don't agree with that.

14 Q. Doctor, if I cut my hand and I start to bleed,
15 wouldn't you agree with me that the blood proteins caused
16 the wound to clot?

17 A. Not to clot, no.

18 Q. Doctor, is it your testimony that every time a
19 patient develops a deep vein thrombosis, good and accepted
20 medical practice requires a hypercoagulability work-up?

21 A. No, that's not my testimony.

22 Q. In this case, however, it's your testimony that
23 they should have ordered a hypercoagulability workup,
24 right?

25 A. Yes.

26 Q. The basis of the testimony is that the vein

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1 Mayer - Plaintiff - Cross/Gallo

2 stripping surgery, in your opinion, a minor procedure,
3 correct?

4 A. Yes.

5 Q. Doctor, I think I questioned you this morning
6 about the fact that in the 1980s patients who underwent a
7 vein stripping surgery remained in the hospital for a
8 couple of days, correct?

9 A. There was no outpatient surgery of any sort so
10 everyone remained in the hospital after any type of
11 surgery.

12 Q. Isn't it true that they remained in the hospital
13 because the vein stripping surgery is a very painful
14 procedure?

15 A. No.

16 Q. Now, Doctor, I asked you some questions this
17 morning about your prior testimony. I believe I asked you
18 if you remember Mr. Dugan cross-examining you in Staten
19 Island. Were you asked --

20 THE COURT: You didn't ask him that, I think
21 you asked him whether or not he has testified in cases
22 where Mr. Dugan --

23 Q. Do you remember being questioned by Mr. Dugan in a
24 case in Staten Island called Geltzer?

25 A. Very vaguely, not specifically.

26 Q. Were you asked the following question and did you

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1 Mayer - Plaintiff - Cross/Gallo

2 give the following answer in *Geltzer v Loenthal*, November
3 4, 1999 Supreme Court, Richmond County, before Justice
4 Rosenberg?

5 Page 73.

6 "QUESTION: On the issue of the neurosurgical
7 standards of care referable to the approach to this
8 pathology into whether or not the standard of
9 neurosurgical care was to identify and isolate the
10 - right recurrent --"

11 THE COURT: Repeat that.

12 Q. "QUESTION: On the issue of the neurosurgical
13 standards of care referable to the approach to this
14 pathology into whether or not the standard of
15 neurosurgical care was to identify and isolate the
16 right laryngeal nerve, are you familiar with the text
17 *Vascular Surgery*, edited by Dr. Robert Rutherford, who
18 is a professor of surgery, the chief of vascular
19 surgery, section of the University Hospital?

20 "ANSWER: Yes, I am familiar with that text.

21 "QUESTION: Do you consider this text
22 authoritative?

23 "ANSWER: Not on that particular subject, no,
24 but in vascular surgery in general, yes."

25 Were you asked that question and did you give
26 that answer in the case of *Gelser v Loenthal* on November

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1 Mayer - Plaintiff - Cross/Gallo

2 4, 1999?

3 A. I have no recollection of the question or the
4 answer.

5 Q. Now, I believe I also questioned you this morning
6 about the vein stripping surgery and the fact that the
7 patient may become black and blue following the procedure,
8 correct?

9 A. You get some bruising, yes.

10 - Q. I think I also questioned you about the fact that
11 you can get some swelling and some pain, correct?

12 A. Yes.

13 Q. Is it your testimony that despite the presence of
14 black and blue swelling and pain requiring medication that
15 this is still a trivial procedure?

16 THE COURT: Trivial. I don't remember that
17 statement being used.

18 Q. Doctor, did you testify on direct that the vein
19 stripping procedure is a trivial procedure?

20 THE COURT: Did you testify to that?

21 THE WITNESS: I don't recall that. I think I
22 indicated minor procedure, is what I meant to convey.

23 Q. You have no recollection of using the word
24 trivial?

25 A. I do not.

26 Q. Well, Doctor, in light of the presence of possible

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1 Mayer - Plaintiff - Cross/Gallo

2 black and blue for a couple of days, the swelling and the
3 pain, is it your testimony that a vein stripping procedure
4 is still a minor procedure?

5 A. In my experience, which is considerable, in the
6 thousands, the pain is minimal, the patients are up and
7 walking right after. I consider it a minor procedure,
8 yes.

9 Q. Doctor, you are aware that Mrs. Butler did not
10 walk immediately after the procedure, correct?

11 A. She must have walked to get home that day or she
12 wouldn't have gotten home.

13 Q. Doctor, didn't we discuss this morning that
14 Bridget Butler testified she was on bed rest all weekend
15 Saturday and Sunday, didn't we talk about that?

16 A. That's what you said. I wasn't -- I had not trial
17 transcript to corroborate that, that's the statement you
18 made.

19 Q. Doctor, you previously --

20 THE COURT: Rephrase the question.

21 Q. Doctor, did you review her deposition testimony?

22 A. Yes.

23 Q. Doctor, can we agree that on page 55 she testified
24 she was on bed rest that Saturday and Sunday?

25 THE COURT: We had that. On Saturday and
26 Sunday, she had bed rest. All right, what is the

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2 question.

3 Q. Doctor, in light of the fact that she was on bed
4 rest that Saturday and Sunday and also was on pain
5 medication Monday and Tuesday, is it still your testimony
6 that it was a trivial procedure or a minor procedure?

7 A. Yes. Vein stripping is a minor surgical
8 procedure. That's my testimony, it's not my opinion.
9 That's a factual statement.

10 Q. Pardon?

11 A. It's a medical fact that it is a minor procedure.
12 It's not major surgery.

13 Q. That's your opinion, Doctor, correct?

14 THE COURT: He said it is not his opinion,
15 it's a fact. Let's go on to something else.

16 Q. One final question, Doctor.

17 Am I correct that the only DVT that
18 Ms. Butler developed was the DVT she developed in the
19 right leg, which was the leg that the vein stripping
20 surgery was performed on in 1998, yes or no?

21 A. I would say no, because when she had the pulmonary
22 embolism, undoubtedly it came from the legs, so probably
23 she had two episodes.

24 Q. Okay. Prior to September of 2000, prior to
25 September of 2000, can we agree the only DVT she suffered
26 was an in the right leg, which was the leg in which the

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2 vein stripping procedure was performed?

3 A. Prior to.

4 Q. September of 2000?

5 A. Well, that would include the admission where she
6 had pulmonary embolism, so I couldn't agree with that.

7 Q. Can we agree that prior to December 1999, the only
8 DVT that she had was in her right leg, which was the leg
9 where the operation was performed by Dr. Gorenstein?

10 - A. Yes, we agree on that.

11 MR. GALLO: I have no further questions.

12 THE COURT: Ms. Arciero.

13 CROSS-EXAMINATION

14 BY MS. ARCIERO:

15 Q. Good afternoon, Doctor.

16 A. Good afternoon.

17 Q. I am Maureen Arciero, we never met before, have
18 we?

19 A. No, we have not.

20 Q. When did Mrs. Butler acquire APS?

21 A. It's my opinion on or before July of 1998.

22 Q. I am sorry, because I'm not sure what you mean by
23 on or before. I will ask it again.

24 When did Mrs. Butler acquire APS.

25 MS. KELMACHTER: Judge, objection, asked and
26 answered.

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2 THE COURT: Sustained.

3 Q. Do you know for certain when she acquired APS?

4 A. Well, no one ordered the necessary blood work to
5 determine that. So it's impossible to definitively say.

6 Q. Well, can we agree that she didn't have it when
7 she delivered her first child, correct?

8 A. We can't definitively say that.

9 THE COURT: Doctor --

10 - A. Not every patient --

11 THE COURT: Can we get an answer.

12 MS. ARCIERO: I am sorry, Judge.

13 THE COURT: She did not have it the first
14 child you say?

15 THE WITNESS: There is no way to say she
16 could have that.

17 Q. Excuse me Judge, could we have an admonition --

18 THE COURT: Let's go to the side-bar.

19 (Whereupon, there was an off-the-record
20 discussion at the sidebar.)

21 THE COURT: All right, Ms. Arciero, have the
22 last question read back.

23 MS. ARCIERO: Thank you, Judge.

24 (Whereupon, the referred to portion of the
25 record was read back by the court reporter.)

26 THE WITNESS: No antibodies were drawn and so

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2 I can't say whether she did or didn't. There was no
3 clinical evidence of it.

4 Q. There was no clinical evidence of it when she
5 delivered her second or her third child as well, correct?

6 A. That is correct.

7 Q. And she also went on and had an ovarian cystectomy
8 and there was no clinical evidence at that time that she
9 had APS, right?

10 A. No, but there was right after the vein stripping.
11 It was strong clinical evidence that she had it.

12 Q. Okay.

13 But with all due respect, Doctor, I just
14 asked about the ovarian cystectomy. I know you want to
15 say something, you just answer my questions.

16 A. Yes.

17 THE COURT: Please, doctor, the question is
18 is there any clinical evidence whatsoever that after
19 the second or the third child, clinical or otherwise,
20 that she had APS during that period of time, yes or
21 no?

22 THE WITNESS: There's no evidence, there's no
23 antibody blood work was done so.

24 MR. HIRSCH: Objection.

25 MR. GALLO: Just yes or no on.

26 THE COURT: But --

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2 Your attorney, if she wants to ask you other
3 questions she can.

4 THE WITNESS: Yes.

5 THE COURT: The question is there was no
6 clinical or other evidence to indicate after the second
7 or the third child that she had APS, correct?

8 THE WITNESS: Correct.

9 THE COURT: All right, next question.

10 - Q. I am sorry, Judge, but my last question was a
11 different question.

12 THE COURT: Another procedure.

13 Q. Yes. You know, that Mrs. Butler went and had an
14 ovarian cystectomy, correct?

15 A. Yes.

16 Q. After the delivery of her three children, right?

17 A. Yes.

18 Q. And at that time there were no complications, no
19 clotting as a result of that procedure for APS either,
20 right?

21 A. There was not.

22 Q. If I understand correctly, Doctor, you believe
23 that she had APS as of the time she went for the vein
24 stripping procedure?

25 THE COURT: On or before 7/98?

26 A. I did.

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2 Q. Have you looked at the pathology report from the
3 vein stripping procedure?

4 A. I saw it.

5 Q. You are aware that there is absolutely no evidence
6 that there was any clotting in the vein that was removed
7 at that time, correct?

8 A. I don't think that shows anything.

9 MR. GALLO: Objection, not.

10 MR. HIRSCH: Objection.

11 MR. GALLO: Not responsive.

12 Q. We went through knew this.

13 THE COURT: Overruled.

14 Q. Simple yes or no.

15 THE COURT: Can you answer that question?

16 Q. You looked at it pathology report, right?

17 A. Yes.

18 Q. It doesn't indicate that there is any clots within
19 the vein that was removed, right? Yes or no?

20 A. I don't believe the pathologist examined for that
21 so --

22 Q. It is a yes or no or is it a not?

23 A. I can't answer it yes or no.

24 THE COURT: All right. Then just say I can't
25 answer it yes or no.

26 Q. I would like to read to you from the pathology

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2 report of July 10 of 1998. It lists in here gross
3 description. Gross description, just so the jury
4 understands, that's what the people in the lab see grossly
5 with their -- visually when the specimen is brought to the
6 pathology department, right?

7 A. Yes.

8 Q. And in this case it indicates the specimen is
9 labeled "right leg varicose vein specimens consistent of a
10 pink vessel measuring 42 centimeters in length, and up to
11 .7 centimeters in diameter. One representative segment
12 submitted. It also says diagnosis. I would like to read
13 that to you, venous segment, correct? Would you look to
14 at it at the same time, you recall what it says?

15 A. I accept your words what it says.

16 Q. It also says I am probably mispronouncing this
17 phlebosclerosis?

18 A. Yes.

19 Q. It does not say in there what I just read to you,
20 correct, the presence of any clots were identified, yes or
21 no?

22 A. It does not have the word clot in the reading.

23 Q. That would be yes then, right, to my question. It
24 was a yes?

25 A. No, I am not saying yes. The pathologist doesn't
26 examine it for clots. Just a vein removed. It is not an

1 Mayer - Plaintiff - Cross/Arciero

2 examination for thrombosis.

3 Q. Do you have a hard time answering yes or no
4 questions, Doctor?

5 MS. KELMACHER: Objection.

6 THE COURT: Sustained.

7 MS. ARCIERO: I am done, Judge.

8 THE COURT: Is there anything in that report
9 that indicates anything about a clot?

10 THE WITNESS: No, your Honor.

11 THE COURT: It does not?

12 THE WITNESS: Just my statement that the
13 pathologist isn't examining it for that purpose to
14 comment one way or the other on it.

15 THE COURT: So you are saying you can't
16 answer it in that fashion?

17 THE WITNESS: That is correct.

18 THE COURT: All right.

19 MS. ARCIERO: One more question. I
20 apologize.

21 THE COURT: Go ahead.

22 Q. Are you telling the jury that the pathologist
23 would not have commented upon the presence of a clot if it
24 was there?

25 A. Yes, because the stripper is through the vein
26 which is removed mechanically, so the vein is traumatized

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2 in its removal. You can't comment on the lining or the
3 vein or presence of clot because they could be byproducts
4 of the stripping. So I am saying that they are not
5 looking for that purpose for that particular operation.

6 Q. Okay. If a clot was present it would be a
7 departure for the pathologist not to identify it though,
8 correct?

9 A. Not necessarily, because there is always blood in
10 the vein that could clot on the way down to the pathology
11 lab, so it is not an accurate, that's why they don't place
12 value on commenting on it. I have never seen a comment on
13 it.

14 Q. They meaning the pathologist?

15 A. That is correct.

16 Q. Are you an expert in pathology now to, Doctor?

17 THE COURT: Oh, please, that's argumentative,
18 please.

19 Mr. Hirsch?

20 MR. HIRSCH: Thank you, your Honor.

21 CROSS EXAMINATION

22 BY MR. HIRSCH:

23 Q. Dr. Mayer, good afternoon.

24 A. Good afternoon.

25 Q. Dr. Mayer, my name is Irving Hirsch. I represent
26 the employees of Nyack Hospital.

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2 You and I have never spoken or met before,
3 correct?

4 A. We have not.

5 Q. By the way, sir, when you were first contacted by
6 plaintiff's counsel Roberta Asher, did you know who she
7 was or was she a complete stranger to you at that time?

8 A. At that time I believe it was our first
9 introduction.

10 - Q. Have you been called upon by her firm to review
11 any other cases other than this one, yes or no?

12 A. Maybe one or two over the years.

13 Q. That's a yes?

14 A. Yes.

15 Q. Doctor, I am going to be asking you some questions
16 and if the question calls for a yes or no please answer it
17 that way. If you can't answer it yes or no, just let us
18 know. Is that all right?

19 A. Yes.

20 Q. Dr. Mayer, I heard you correctly today in
21 listening to your credentials, your board certification,
22 your background, did you say, sir, that the area of
23 hematology, you defer to those people who specialize in
24 that field with respect to opinions relating to
25 hematology, yes or no?

26 A. Unless it is something very obvious that a surgeon

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2 would be familiar with, but the subtleties of diagnosing
3 certain syndromes I defer to hematology.

4 Q. Would one of those syndromes be APS, yes or no?

5 A. Unless the testing was obvious.

6 Q. In this case yes or no?

7 A. Sometimes, I can't answer it yes or no.

8 Q. In this case?

9 A. Rephrase the question.

10 - Q. Sure.

11 In this case, the Butler case, again, it's
12 going to be a yes or no question.

13 Am I correct, sir, that you deferred to a
14 hematologist with respect to an opinion on whether or not
15 Mrs. Butler had or has APS, correct?

16 Again, yes or no or you can't answer it that
17 way?

18 A. I can't answer it yes or no.

19 Q. But we all agree that there are people who are
20 board certified hematologists, correct?

21 A. Yes.

22 Q. You are not one of those people?

23 A. That is correct.

24 Q. Now, the next topic I want to discuss with you is
25 the field of something called pathology, okay?

26 A. Yes.

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2 Q. Pathology is a field of medicine, correct, where
3 people evaluate certain items or specimens that are
4 brought to them for their interpretation and render some
5 kind of opinion, with respect to whatever it is they are
6 seeing, correct?

7 A. Yes.

8 Q. Are you familiar with something called forensic
9 pathology?

10 - A. Yes.

11 Q. Would you agree, sir, that pathologists, compared
12 to you, would be better situated to give an opinion with
13 respect to the specific duration of the existence of a
14 clot, yes or no?

15 A. No, I disagree with that.

16 Q. Sir, you have a list of the things that you
17 reviewed in this case, correct?

18 A. Yes.

19 Q. Did you ever review the pathology specimens in
20 this case, yes or no? Yes or no?

21 THE COURT: Let him think. Can you wait a
22 small amount of hiatus.

23 Q. Sure.

24 A. The report of the pathologist, or actually look at
25 the slides. I don't understand the question.

26 Q. You don't understand. I said pathologist

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2 specimens, is there a difference, sir, between a pathology
3 specimen and a pathology report, yes or no?

4 A. Well --

5 Q. Is there a difference, sir?

6 A. Yes.

7 Q. So, you know that a specimen -- withdrawn.

8 You, sir, reviewed the pathology reports,
9 correct?

10 - A. Yes, I reviewed the report of the pathologist.

11 Q. That's all I asked. You never reviewed the
12 specimens, correct?

13 A. They are not available to anyone.

14 Q. Judge, can I get an instruction?

15 THE COURT: Yes, yes.

16 Doctor, when he says I would like a yes or no
17 it has to be yes or no or you can't answer it in that
18 fashion.

19 THE WITNESS: Yes, your Honor.

20 THE COURT: Did you ever -- what he is asking
21 you, did you ever examine the specimens in the case?

22 THE WITNESS: No, I did not.

23 Q. Sir, did you ever make any effort to go to
24 Columbia Presbyterian, that's here in Manhattan, right?

25 A. Yes.

26 Q. That's closer to this court house than your office

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1 Mayer - Plaintiff - Cross/Hirsch

2 is, correct?

3 A. That is correct.

4 Q. Right. Did you ever get on the A train and go up
5 to Washington Heights to look at the specimens in this
6 case, yes or no?

7 A. I did not.

8 Q. Did you ever speak to the pathologist who reviewed
9 the specimens in this case, yes or no?

10 - A. No.

11 Q. Now, you gave some opinions earlier today with
12 respect to the duration of the existence of some clots
13 that were described in the operative report and also in
14 the pathology report from Columbia Presbyterian, correct?

15 A. Yes.

16 Q. Those are the reports and events concerning the
17 surgical procedures of January 8, correct?

18 A. Yes.

19 Q. The first surgical procedure was in response to
20 what you described as a catastrophic event earlier that
21 day and Mrs. Butler was brought to an operating room and
22 operated on by a vascular surgeon Dr. Nowgrod?

23 A. Yes.

24 Q. Am I correct also during that procedure we have
25 descriptions in the operative report from Dr. Nowgrod
26 concerning what he saw, correct?

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2 A. Yes.

3 Q. And then we also know that Dr. Nowgrod in using
4 his judgment made a determination that later that same day
5 he needed to do another operation on Mrs. Butler's right
6 leg, is that correct?

7 A. Yes, that is correct.

8 Q. Now, I could ask the witness to be shown the
9 operative report which I believe is in Dr. Nowgrod's
10 office records.

11 THE COURT: Do you know what number that is?

12 MR. HIRSCH: I do not.

13 Q. Also I am going to ask the witness --

14 THE COURT: You want the documents given to
15 the witness?

16 MR. HIRSCH: Yes, thank you.

17 Q. Doctor, while you are locating the operative
18 reports of Dr. Nowgrod, could the witness also be handed
19 up the Presbyterian records. I would like to ask him to
20 look at the surgical pathology reports for that date and I
21 will be happy to approach and show them to the witness, if
22 they are not part of the number chart, I think may have
23 been a separate package?

24 THE COURT: Talking about number five.

25 MS. KELMACHER: Just get a page number from
26 Mr. Hirsch.

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2 THE COURT: Let Mr. Hirsch decide.

3 MR. HIRSCH: Thank very much. I just said
4 that because I think those records may be in a separate
5 clip number of pages.

6 MR. HIRSCH: Can I just approach for a
7 second, your Honor?

8 THE COURT: Yes.

9 Q. Doctor, have you located Dr. Nowggrod's operative
10 report?

11 A. Yes.

12 Q. That report is dated January 8, 2000?

13 A. Yes.

14 Q. And there are two separate operative reports; is
15 that correct, for that date?

16 THE COURT: Are you talking about one for the
17 right leg and one for the left leg?

18 MR. HIRSCH: Yes, your Honor.

19 A. Yes.

20 Q. First report is for the left leg, am I right?

21 A. Correct.

22 Q. Doctor, to save time I am going to hand you a
23 copy. I will show it to plaintiff's counsel, a copy of
24 the surgical pathology report that I want to ask you
25 questions about.

26 MS. KELMACHTER: Can you tell me the page

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2 number.

3 Can I find the page?

4 MR. GALLO: She'll find the page. Thank
5 you.

6 Q. The record should reflect I handed Dr. Mayer a two
7 page surgical pathology report from January 8, is that
8 correct?

9 A. Yes.

10 - Q. Now, let me ask you some questions first about the
11 operative report, if I may.

12 Dr. Nowgrod in his report -- by the way, it
13 begins by saying that the patient was seen as an emergency
14 following urgent request for vascular consultation for a
15 rapidly evolving leg ischemia, correct? Am I reading that
16 correctly sir?

17 A. That's what it says.

18 Q. There had been a several week history of back and
19 leg pain, initially felt to be neurogenic. We worked up
20 proceeding for radicular etiology on the day of
21 intervention, left foot ischemia evolved.

22 Do you see that, sir?

23 A. Yes.

24 Q. Now, do you agree or disagree with that statement
25 that on the day of the intervention we called -- that's
26 January 8, the day of surgical intervention, do you agree

1 Mayer - Plaintiff - Cross/Hirsch

2 or disagree with Dr. Nowgrod that on that day left foot
3 ischemia evolved?

4 A. Limb threatening ischemia evolved on the 8th.

5 Q. Sir, again, same instructions. If I am not
6 speaking clearly you let me know.

7 Here is the question again, sir.

8 Do you agree or disagree with these words of
9 Dr. Nowgrod "That on the day of intervention left foot
10 ischemia evolved;" do you agree or disagree with that
11 phrase?

12 A. I can't answer it yes or no.

13 Q. Sir, yes or no, the left foot ischemia evolved on
14 January 8, 2000, in your opinion?

15 A. I can't answer it yes or no.

16 THE COURT: You want to come to the side-bar
17 just for one moment.

18 MS. KELMACHER: Sure.

19 (Whereupon, there was an off the record
20 discussion.)

21

22

23

24

25

26

RICHARD FEIS - OFFICIAL COURT REPORTER

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 MR. HIRSCH: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. HIRSCH:

5 Q Dr. Mayer, let me ask you it this way:

6 Do you agree or disagree with the statement
7 of the treating physician here, the surgeon, when he wrote
8 that "we work up proceeding for a radicular etiology when
9 on the day of intervention left foot ischemia evolved"?

10 Do you agree or disagree with that statement
11 by Dr. Nowygrod?

12 A I can't answer it yes or no.

13 Q Now, do you see then in the next paragraph where
14 it states:

15 At the time of initial evaluation,
16 approximately 1 to 3 p.m. first by the residents and
17 subsequently by the attending, it was clear that there
18 was acute arterial insufficiency and ischemia of the
19 left leg with relatively arterial insufficiency but no
20 ischemia of the right leg.

21 Do you see that?

22 A Yes, I see it.

23 Q Now, I just want you to assume and, in fact, when
24 I ask you to assume, I want to ask you if this comports
25 with your review of the facts in the case that where that
26 note talks about observing things at 1 p.m., am I correct,

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 sir, that, in fact, earlier that morning, according to a
3 note by an orthopedic resident at 8:35 a.m., that the left
4 leg was cool and had a, quote, "mottled," M-O-T-T-L-E-D,
5 close quote, appearance.

6 Are you aware of that fact in the record?

7 A Yes.

8 Q Are you also aware that that same resident wrote
9 four hours and ten minutes later at 12:45 p.m., quote,
10 -"Pulses extremity significant change from this morning,
11 now cold left foot."

12 Are you aware of that entry in the
13 Presbyterian chart?

14 A Yes.

15 Q You would agree, sir, that that represents a
16 significant change as set forth by that resident from 8:30
17 a.m. until 12:45 p.m., correct? Yes or no?

18 A I can't answer it yes or no.

19 Q Do you agree or disagree that, at least,
20 according to the note that that represents a significant
21 change; yes or no?

22 A I can't answer it yes or no.

23 Q You agree, sir, though that your job here is to
24 give opinions not facts, correct?

25 A Factually based opinions.

26 Q No, sir, let me rephrase my question.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 Either it's an opinion -- withdrawn.

3 You would agree that there is a difference
4 between something that is an opinion and something that is
5 a fact, correct?

6 A I can't answer that yes or no.

7 Q Sir, do you know what -- okay.

8 Sir, you were not at Presbyterian on the
9 date in question, correct?

10 A Correct.

11 Q You've never treated Mrs. Butler, correct?

12 A Correct.

13 Q So all you could do is review cases, take data
14 and then you are retained to give your opinion based upon
15 whatever information is given you, correct?

16 A I can't answer that yes or no.

17 Q Okay. Sir, am I correct that earlier today you
18 were asked for certain opinions, correct?

19 A Yes.

20 Q With the foundation that you should only give an
21 opinion if it's based upon a reasonable degree of medical
22 certainty, correct?

23 A Correct.

24 Q Were all of the opinions that you've given to our
25 jury based upon that foundation?

26 A Yes, they were.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 Q Now, let's continue with the operative report and
3 I have some other questions for you about it.

4 Am I correct, sir, that the operative report
5 talks about some old organized and adherent thrombus; is
6 that correct?

7 A That is correct.

8 Q And am I correct, sir, that you gave an
9 opinion -- withdrawn.

10 Am I also correct that the pathology
11 report -- if you could turn to that, please.

12 A Yes.

13 Q Okay. That the pathology report talks about
14 certain specimens that the pathologist reviewed; is that
15 right?

16 A Yes.

17 Q Okay. The first specimen that the pathologist
18 reviewed was the left femoral artery, correct?

19 A Correct.

20 Q And the pathologist wrote that there was a
21 thrombus at that location, correct?

22 A Yes.

23 Q Okay. Then the pathologist writes that the next
24 item is a left posterior tibial artery with an organized
25 thrombus, correct?

26 A Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 Q And if you look at Item E, does that talk about
3 the profundi, could you pronounce the next words for me?

4 A Femoris.

5 Q Femoris thrombus?

6 A Yes.

7 Q With focal early organization; is that right?

8 A Yes.

9 Q So, if we put this into plain English, we have
10 thrombus removed from Mrs. Butler's body by Dr. Nowygrod,
11 correct?

12 A Yes.

13 Q And you told us that the thrombus, as described
14 by Dr. Nowygrod in his report, he describes or at least
15 some of it as old and organized; is that right?

16 A Correct.

17 Q And adherent, is that right?

18 A Yes.

19 Q Now, are those descriptions, sir, pertaining to
20 both left leg and right leg; yes or no?

21 A I can't answer it yes or no.

22 Q Okay. Well, then, let's go to the specific
23 operative report so we could match it up because isn't it
24 fact, sir, that the third of the three thrombi mentioned
25 in the pathology report that profundi femoris thrombus
26 that was taken from the right leg, correct?

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 A That is correct.

3 Q Okay. So we do have thrombus removed from
4 Mrs. Butler's right leg and evaluated by the pathology
5 department at Presbyterian, correct?

6 A Yes.

7 Q Now, you are familiar with how Dr. Nowygrod
8 described that thrombus from the right leg in the
9 operative report, correct? Feel free to look at it if
10 you'd like to.

11 A He described that as a white thrombus which would
12 mean a very old thrombus.

13 Q Okay. Just repeat it again. I think he
14 described it as a what, white?

15 A White colored.

16 Q White colored.

17 And what word did you use next?

18 A That would define an old thrombus that had been
19 there for a period of time.

20 Q Okay. So we have an old thrombus on the right
21 leg, correct?

22 A Yes.

23 Q We have an old thrombus on the left leg,
24 correct?

25 A Old meaning 10, 12 days old, not months old.

26 MR. HIRSCH: Once again, I move to strike

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 that as not responsive to my question.

3 Q All I asked you was --

4 THE COURT: Well, on the left, if you are
5 talking about the left.

6 MR. HIRSCH: All I asked was do we have an
7 old one on the left, yes or no. I didn't ask him for
8 time periods yet, but I'll get to that.

9 THE COURT: Do you characterize the thrombus
10 on the left leg -- would you characterize that as
11 old?

12 Q Yes or no?

13 A I can't give a yes or no answer to that.

14 Q Okay, fair enough.

15 Did you say this morning that it was old,
16 yes or no?

17 A I said --

18 Q Did you say it, yes or no?

19 THE COURT: I believe he said two weeks.

20 MR. HIRSCH: I know. I asked him if he used
21 the word "old." I'll get to the "two weeks," I'm not
22 there yet.

23 A I can't remember if I recall if I used the term
24 "old" or not.

25 Q Okay, fair enough.

26 Now, you gave an opinion, sir, this morning,

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 correct me if I'm wrong, and I just want to simplify this
3 as best I can, that the old clots on the left, in your
4 opinion you said that they were there, I think you said
5 from 10 to 12 days; was that your testimony this morning?

6 A Yes.

7 Q Okay. Now, and I don't mean to be disrespectful
8 to you, sir, is it 10, is it 11, is it 12?

9 A Well, I have no answer to that except to say it's
10 well over a week. In all medical probability in the 10 to
11 12 day range.

12 Q Okay. And that's for the left leg?

13 A Correct.

14 Q Okay. Am I correct, sir, that the pathology
15 report that's in evidence does not give a time as you just
16 gave our jury, yes or no?

17 A No, it does not give the time.

18 Q Okay. And if -- I would want you to assume that
19 no where in any medical record that's been admitted into
20 evidence before our jury does it ever state anywhere a
21 time period. I just want you to assume that, okay?

22 A Okay.

23 Q Okay. You said about 30 seconds ago that this
24 thing was there for, did you say well over one week? Did
25 you just say that? I want to use that as a foundation for
26 my next question.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 Did you say well over one week, about 25,
3 make it 40 seconds now?

4 A I don't recall. I might have said that, but --

5 Q Okay. Well, what is it, what's the time period,
6 sir?

7 A I feel the arterial --

8 Q Not what you feel. I don't mean to interrupt.
9 You're not here to tell us what you feel. We want
10 opinions, if you have them, that are based upon a
11 reasonable degree of medical certainty.

12 Do you have an opinion with that foundation
13 to answer my question?

14 A Yes.

15 Q Tell the jury what is the time period, sir.

16 A The clot in the left leg was there for 10 to 12
17 days as the patient was being misdiagnosed with a pinched
18 nerve.

19 MR. HIRSCH: Move to strike as totally
20 unresponsive.

21 THE COURT: That's stricken from the record.
22 He said a couple of times 10 to 12 days. Go
23 on to something else or stay on that. We have the 10
24 to 12 days. He said that a couple of times.

25 MR. HIRSCH: Thank you, your Honor.

26 Q As of January 8th, sir?

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 A Yes.

3 Q Ten days would take us to December 30th; is that

4 correct?

5 A That's correct.

6 Q Okay.

7 A Or the 29th, I believe.

8 Q Ten days takes us to December 29th?

9 A I believe so.

10 Q Okay. And 12 days takes us to December 27th, is

11 that correct?

12 A Yes.

13 Q Are you stating that this clot did not occur in a

14 time period less than ten days? Are you able to state

15 that with a reasonable degree of medical certainty?

16 A Yes.

17 Q You are?

18 A Yes. Yes.

19 Q Did this clot exist on December 26, 1999 which

20 would be day 13?

21 A Given the --

22 Q Yes or no?

23 A Given the clinical absence of symptoms --

24 Q Yes or no, do you have an answer?

25 THE COURT: Listen to the question.

26 Q I'll repeat it. Yes or no. I wasn't clear. Do

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 you have an opinion, yes or no, whether these old clots
3 were there, as you say, on December 26, 1999? Do you have
4 an opinion?

5 A Yes.

6 Q Yes or no?

7 A Yes.

8 Q You have an opinion. Okay.

9 And your opinion is that they did not exist
10 on December 26th based upon a reasonable degree of medical
11 certainty, is that your opinion, sir?

12 A Yes.

13 Q Okay. Let's talk about the right leg.

14 Do you have an opinion, with that same
15 foundation, how long were the clots, the old clots in
16 existence on the right leg?

17 THE COURT: Old clots or clot?

18 MR. HIRSCH: Old clots.

19 A It's hard to answer definitively because, as I
20 testified earlier, it was in a side branch of the major
21 artery, so it was not producing symptoms in the leg to any
22 extent, so it's hard to date the onset of the thrombus
23 because it was organized. I would feel probably it's of
24 the same age, but, in the absence of symptoms, I can't
25 date it precisely.

26 Q Sir, am I correct then that what you say is that

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 you date something in connection with symptoms; is that
3 what you just said?

4 A That's just one factor of dating it.

5 Q Okay.

6 A The character --

7 Q What other factor did you use in this case other
8 than symptoms to date these clots?

9 A Characteristic of the clot being adherent, white,
10 organized and growing into the wall of the vessel are very
11 important determinants in determining the age of a clot.
12 The clinical history is also important in using symptoms
13 to date the age of the clot, all of which would put the
14 onset on December 27th in my opinion.

15 Q Sir, remember when you were an expert and
16 testified in a case just a year ago named Esposito against
17 Abbott in the state of Connecticut; remember that case?

18 A I do not recall it.

19 Q Well, let me tell you a little, and see if it
20 refreshes your recollection.

21 In that case you gave opinions --

22 MS. KELMACHER: Objection.

23 THE COURT: Sustained.

24 MR. HIRSCH: I can't refresh his
25 recollection.

26 THE COURT: You could ask him -- you want to

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 ask him what the case was about?

3 MR. HIRSCH: Yes.

4 THE COURT: All right.

5 MR. HIRSCH: I'm trying to refresh his
6 recollection.

7 Q Does the name sound familiar at all whatsoever
8 Esposito against Abbott?

9 A It does not.

10 Q Carrie Esposito, 31-year old woman, problem with
11 the lower extremity; sound familiar?

12 A It might be, I don't really recall it offhand.

13 Q Sir, is it not true that in another case --

14 MS. KELMACHER: Judge, Judge, can we.

15 MR. HIRSCH: If you want to make an
16 objection, make it, don't make a speech.

17 MS. KELMACHER: Judge, may we approach?

18 THE COURT: Not at this time.

19 The objection is sustained, however.

20 MS. KELMACHER: Okay.

21 Q Sir, under oath, at a deposition, not in front of
22 a jury, under oath, sir, did you say --

23 MS. KELMACHER: Judge, may we approach?

24 MR. HIRSCH: Judge, could she sit down?

25 THE COURT: Sustained.

26 Under oath were you asked this question and

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 did you give this answer.

3 MS. KELMACHER: Exactly.

4 MR. HIRSCH: As a foundation to that
5 question, your Honor, I want to ask another question
6 and then I will read from the transcript.

7 THE COURT: Very well, very well.

8 Q Doctor, is it your opinion -- withdrawn.

9 Do you have an opinion, sir, as to when the
10 arterial occlusion in the lower left extremity of Bridget
11 Butler formed?

12 A When it first occurred because we agree --

13 Q Excuse me, if you can't say yes or no, you tell
14 us, sir?

15 A I can't answer it yes or no.

16 Q Sir, I'd like to read to you from a deposition of
17 March 2, 2004 in the case of Esposito against Abbott,
18 deposition of David A. Mayer M.D., March 11, 2004, page
19 90, line 16.

20 I'm going to read the questions, I'm going
21 to read the answers. I'll ask you to listen and then I'll
22 ask you if you were asked those questions and did you give
23 those answers.

24 "QUESTION: Now, getting back to your
25 opinion as to when this arterial occlusion in the
26 right lower extremity formed, I think you said it was

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 on August 30, 1999; is that correct?"

3 And your answer was: "Yes.

4 "QUESTION: And what is the basis for your
5 opinion? Once again, I'm referring to your report
6 where you say that, you know, you had certain things,
7 you know, had certain things been done in all
8 probability salvage of the extremity would have been
9 seen?

10 "ANSWER: Yes.

11 "QUESTION: What's the basis for that?

12 "ANSWER: Well, we know there was an acute
13 event that occurred on 8/30, August 30th, where there
14 was a sudden or acute cramping and numbness in the
15 leg. That's documented actually even in Dr. McHugh's
16 records, and we know she talked to Dr. Gerhard the
17 covering physician about it on that day, so that would
18 be the basis for picking 8/30 as the initial event.

19 "And as we said, the arterial ischemia or
20 lack of blood flow may not have been in a finalized
21 state on 8/30. It may have been over a week or two.
22 The thrombosis progressed until it became critical and
23 it was an evolving phenomenon. Certainly by 11/4, you
24 know, we know even Dr. Abbott diagnosed the numbness
25 in the foot and the symptoms were very, very obvious
26 by now.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 "So it's my, the basis of my opinion is
3 that if there's distal thrombosis in the three runoff
4 vessels of the leg, the only hope for fixing that is
5 by putting in TPA or urokinase or one of the clot
6 dissolving agents. You can't bypass it or anything
7 because all the vessels are closed from about mid calf
8 or ankle level down, so the only hope for that to be
9 successful is to do it early after the event, within
10 the first week or two. If the clot is allowed to sit
11 for many weeks or a couple months it becomes organized
12 and actually grows into the walls of the vessels and
13 becomes fixed. And then you could put in the
14 urokinase, the TPA, all you want and nothing is going
15 to happen.

16 And that was the problem here. It was the
17 failure to diagnose it early doomed the patient to
18 lose her leg because the only available treatment was
19 ineffectual."

20 Sir, were you asked those questions and did
21 you give those answers at that deposition; yes or no?

22 A I can't say one way or the other. It sounds
23 familiar. I don't know if I gave that exact answer. I
24 don't know.

25 MR. HIRSCH: May I show it to the witness in
26 case he's doubting I read it accurately?

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 MS. KELMACHER: No, he's agreeing, you read
3 it accurately.

4 THE COURT: Show it to the witness.

5 Q Is this your testimony?

6 THE COURT: Is that a certified copy of the
7 transcript?

8 MR. HIRSCH: We've already agreed it doesn't
9 have to be.

10 THE COURT: Doctor, did you give, do you
11 remember those questions and give those answers?

12 Why don't you give him the transcript.

13 THE WITNESS: I don't recall the questions
14 and the answers or the case.

15 Q Okay.

16 A But there's nothing in there that I think is
17 unreasonable, and I would disagree that I might have said,
18 but I can't remember exactly questions and answers over
19 two years ago.

20 Q Sir --

21 THE COURT: Wait, excuse me.

22 So, you do not disagree that you could have
23 very well given -- could have been asked those
24 questions and given those answers at a proceeding such
25 as that?

26 THE WITNESS: Correct, but I can't

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 definitively state that, no.

3 Q Dr. Mayer, is it a fact, sir, that in that case
4 it takes weeks or months for the clot to grow and reach
5 the stages as described in our case, yes or no?

6 MS. KELMACHTER: Objection to the form.

7 A In this case it took 12 days, which is over a
8 week.

9 THE COURT: Doctor, Doctor, you don't
10 - answer. The objection is sustained.

11 Q Doctor, isn't it a fact that you give the time
12 period to February whatever it is, you are being asked by
13 the plaintiffs' lawyer; yes or no?

14 MS. KELMACHTER: Excuse me.

15 THE COURT: Please don't make --

16 MS. KELMACHTER: Objection. Objection.

17 THE COURT: Is there an objection?

18 MS. KELMACHTER: Objection.

19 THE COURT: The objection is sustained.

20 MR. HIRSCH: Judge, I am standing here, and
21 I hear plaintiffs' counsel make comment and I would
22 ask she did not do it.

23 MS. KELMACHTER: I didn't hear something and
24 I asked him -- they talk all the time, Judge.

25 THE COURT: All right, just try to calm
26 down, and, if you can't hear something, just raise

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 your hand.

3 MS. KELMACHTER: Okay.

4 MR. HIRSCH: Thank you, Judge.

5 Q Now -- and if I asked you this a minute ago
6 forgive me, but you have the same time period for the clot
7 on the right leg in our case as the left leg?

8 A I answered that it's difficult to give a precise
9 time period to the absence of symptoms, but because the
10 clot is also organized, you know, it's there for many
11 days, but exactly when it's hard to say. Obviously, the
12 left leg has had an acute event where severe pain in the
13 leg occurred, and we could date the time of the clot to
14 the 27th of December in '99. We don't have that luxury on
15 the left leg because the clot was in the side branch and
16 the patient didn't have symptoms.

17 THE COURT: You mean you don't have the
18 luxury in the right leg?

19 THE WITNESS: Right leg, excuse me, your
20 Honor.

21 Because of the lack of symptoms we can't
22 date it precisely.

23 Q And this, sir, this is all your opinion,
24 correct?

25 Do these time periods -- this is your
26 opinion, correct.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 THE COURT: He said --

3 A Yes.

4 Q Is that clear?

5 A Yes, that is correct.

6 Q Now, let me ask you about salvageability of the
7 leg, okay?

8 A Yes.

9 Q Did you tell this jury that it was more likely
10 than not that the leg was salvageable on January 7th,
11 2000?

12 A Yes, that's what I told the jury.

13 Q You stand by that opinion?

14 A Yes.

15 MR. HIRSCH: Could I just have that
16 transcript back for a second, Judge?

17 THE COURT: Sure.

18 (Handing.)

19 Q Sir, when you say "more likely than not," are you
20 saying more than 50 percent?

21 A Yes.

22 Q Okay. So, in our case you're saying that one day
23 before that, on January 7th, it was in your opinion more
24 than 50 percent likely that intervention could have
25 salvaged the leg, that's your opinion?

26 A Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 Q Sir, again, I want to read to you from that same
3 deposition, and this is page 133, line 24. You were asked
4 the following questions and did you give the following
5 answers. Now it says here:

6 "QUESTION: Right. In your opinion after
7 November 1, 1999, with a reasonable degree of medical
8 certainty, the patient's condition was not treatable
9 at that point in time?

10 There's colloquy.

11 Then it says: "Not successfully treatable
12 at that time; is that correct?

13 "ANSWER: Well, I just think it's under a 50
14 percent threshold that you could salvage it, but
15 there's a certain percentage of success, and it could
16 still be achieved.

17 "QUESTION: Could you be more precise on the
18 likelihood of successful treatment in your opinion on
19 November 1, 1999?

20 "ANSWER: I think there was a reasonable
21 chance to salvage the extremity still at that date,
22 but much lower than having it done earlier.

23 "QUESTION: We've established the extent it
24 was less than 50 percent; is that correct?

25 "ANSWER: Yes."

26 Sir, were you asked those questions, did you

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch
2 give those answers under oath swearing to tell the truth
3 at a deposition, Esposito against Abbott, March 2, 2004?

4 A I have no recollection of the questions or the
5 answers.

6 Q Again, I'd like to show you the transcript. Look
7 at it. Did I read that correctly, sir?

8 A Could you -- did you read the line, "I think
9 potentially it was salvage because it wasn't dusky or
10 cyanotic or irreparably ischemic"?

11 Q I'm not asking --

12 A I thought you read that. I thought I heard that
13 because that was the condition on 11/7. I think it's
14 consistent.

15 MR. HIRSCH: Judge, Judge.

16 THE COURT: Did you read the questions and
17 answers exactly as he did there?

18 MR. HIRSCH: I sure did.

19 THE WITNESS: I think he read them out of
20 context and eliminated the key sentence that shows
21 it's consistent with my testimony today.

22 THE COURT: Doctor, all he's asking you with
23 respect to these questions that he asked you the
24 questions and the answers, do you remember being asked
25 those questions and giving those answers, if you
26 remember?

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 THE WITNESS: I don't remember, but it
3 appears like I did from the transcript, if this is a
4 valid transcript.

5 THE COURT: All right.

6 Q Sir, I want to follow up on what you just read
7 because I'm going to read the next question and answer.

8 I'm going to continue, your Honor, on page
9 134, the last question I had read was:

10 "QUESTION: We've established the extent it
11 was less than 50 percent?

12 "ANSWER: Is that correct?"

13 MR. HIRSCH: I'll tell you, I don't like
14 this either.

15 Q And your answer was: "Yes." That's where I had
16 left off.

17 Let me go to the next questions and answers,
18 please:

19 "QUESTION: Was it less than 10 percent?

20 "ANSWER: I just can't give a number to it
21 because we don't have an arteriogram or any, you know,
22 there's no way to quantitate it at that point.

23 "QUESTION: So you don't have an opinion
24 whether her leg was salvageable on November 1, 1999,
25 do you?

26 "ANSWER: Well, I think" --

1 Dr. Mayer - By Plaintiffs - Cross/Hirsch

2 MS. KELMACHER: Judge, Judge.

3 MR. HIRSCH: Could she sit down?

4 THE COURT: Is there an objection?

5 MS. KELMACHER: Yes, Judge.

6 MR. HIRSCH: I'm not finished, I have one
7 more question and answer, then I'm done with this.

8 THE COURT: All right. Come to the side
9 please.

10 (Whereupon, an off-the-record discussion is
11 had out of the hearing of the jury.)

12 (Continued on next page.)

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1 Mayer - Plaintiff - Cross/Hirsch

2 THE COURT: Mr. Hirsch, you may proceed with
3 your next question.

4 MR. HIRSCH: Thank you, your Honor.

5 Q. I am just going to start again so we are all on
6 the same page.

7 On page 133, line 14 you had been asked this
8 question.

9 "QUESTION: Could you be any more precise on
10 - the likelihood of a successful treatment to -- in your
11 opinion, on November 1 1999?

12 "ANSWER: I think there was reasonable chance
13 to salvage the extremities to that date, but much lower
14 than having it done earlier.

15 "QUESTION: You established the extent, it
16 was less than 50 percent, is that correct.

17 "ANSWER: Yeah.

18 "QUESTION: Was it less than 10 percent?

19 "ANSWER: I just can't give a number to it
20 because we don't have the arteriogram or anything else,
21 there is no way to quantitate it at that point.

22 "QUESTION: So you don't have an opinion
23 whether the leg was salvageable on November 1, 1999, do
24 you?

25 "ANSWER: Well, I think it potentially was
26 salvageable because it wasn't dusky or cyanotic or

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1 Mayer - Plaintiff - Cross/Hirsch
2 irreparable ischemic at this point, but clearly the
3 golden window of opportunity had passed where you are
4 very likely to have a good outcome. I can't quantitate
5 the percentage to you at that point."

6 Doctor, were you asked those questions and
7 did you give those answers?

8 A. Yes, it appears so.

9 Q. Now, to put all this together, isn't it a fact,
10 sir, that in the Esposito case, eight days before the same
11 catastrophic event that Mrs. Butler suffered, you
12 testified under oath that has been eight days before that
13 event, it was less than 50 percent of a chance of the
14 likelihood of salvaging the leg.

15 But in our case you come here and you tell us
16 that this lady's leg could have been salvaged within one
17 day, is that correct, sir?

18 THE COURT: Is that your testimony, Doctor,
19 yes or no?

20 THE WITNESS: No, that's not my testimony.

21 Q. Okay.

22 Now, Doctor, I just read to you something.

23 A. I do not need to explain --

24 Q. Sir, sir.

25 A. You won't allow me, sir.

26 THE COURT: No, no, wait.

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1 Mayer - Plaintiff - Cross/Hirsch

2 Q. I would like an instruction to this witness,
3 please?

4 THE COURT: Please don't argue. You have you
5 read it. He has testified about it. Now it will be
6 the jury's decision. There is no reason to read it
7 again.

8 MR. HIRSCH: I am not reading it again. I
9 was moving on.

10 THE COURT: All right, all right.

11 Q. Sir, you just heard me use the word dusky, yes or
12 no?

13 A. Yes.

14 Q. Cyanotic?

15 A. Yes.

16 Q. Irreparably ischemic at this point?

17 A. Yes.

18 Q. Sir, you reviewed the medical records in our case,
19 correct?

20 A. Yes.

21 Q. And you would agree with me, sir, yes or no, that
22 there was absolutely no evidence that Mrs. Butler's leg
23 was dusky or cyanotic at any point, at any time before the
24 morning of January 8, 2000, correct?

25 A. I agree with that.

26 Q. In fact, sir, you would agree with me that based

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1 Mayer - Plaintiff - Cross/Hirsch
2 upon the evidence in our case, various physicians during
3 that period felt her leg, her left leg, correct, you
4 assume those are the medical records in our case, correct,
5 yes or no?

6 A. The majority of physicians did not document any
7 vascular exams on the leg.

8 MR. HIRSCH: Judge, I'm going to ask you to
9 give an instruction to this gentleman to either answer
10 the question or be held in contempt.

11 MR. KOPFF: Objection. Move to strike.

12 THE COURT: There is no reason to shout, Mr.
13 Hirsch.

14 Doctor, just answer it yes or no. If you
15 can't say I cannot answer it in that form.

16 THE WITNESS: Yes, your Honor.

17 THE COURT: All right.

18 Q. You understand that, Judge -- I mean, Doctor, you
19 got that.

20 I just hope he knows your instruction, Judge.

21 THE COURT: Mr. Hirsch, please, it is very
22 argumentative. He understands it yes or no or I can't
23 answer it that way.

24 Q. Let me ask the question again, sir; based upon the
25 records, and in this case doctors examined Mrs. Butler's
26 legs on various occasions between December 27, 1999 and

1 Mayer - Plaintiff - Cross/Hirsch

2 January 7, 2000, correct?

3 A. Yes.

4 Q. And there was no discoloration of Mrs. Butler's
5 lower left extremity during that time, correct?

6 A. I can't answer that yes or no.

7 Q. Sir, if I were to tell you that the Butlers
8 themselves have testified to that, could you then answer
9 my question yes or no?

10 - A. I can't answer that yes or no.

11 Q. I want you to assume that the Butlers testified
12 that there was no discoloration in the lower left
13 extremity, okay, just assume that. Does that change your
14 opinions in any way?

15 A. No, it does not.

16 Q. I want you to further assume that the leg remained
17 warm and was never cold or abnormal in temperature, does
18 that change your opinions in any way?

19 A. You are asking me to assume that?

20 Q. Is that first time, sir, you heard that?

21 A. No; I didn't understand the question.

22 THE COURT: Please.

23 Q. I am asking you to assume that.

24 THE COURT: He is asking you to assume that.

25 All right.

26 Q. Okay?

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1 Mayer - Plaintiff - Cross/Hirsch

2 A. Yes.

3 Q. Does that comport with your review of the records
4 in this case, sir?

5 A. Yes, it does.

6 Q. So it is beyond an assumption, correct, you've
7 seen that yourself in the records, correct?

8 A. I seen very poor vascular documentation or no
9 vascular documentation.

10 - Q. Move to strike?

11 THE COURT: Sustained.

12 A. In the record.

13 THE COURT: Did you-- let me ask.

14 MR. HIRSCH: Judge, I will move on to
15 something else. I made my point.

16 Q. The word model as it appears in any medical record
17 describing Mrs. Butler's lower left extremity on the
18 morning of January 8, 2000, correct?

19 A. That is correct.

20 Q. The first time that Mrs. Butler's pulse status in
21 her lower left extremity is described as pulslessness is
22 on January 8, 2000, correct?

23 A. Incorrect.

24 Q. Pulselessness, sir, no pulses?

25 A. That is correct. You are incorrect.

26 Q. I am incorrect?

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1 Mayer - Plaintiff - Cross/Hirsch

2 A. Yes.

3 Q. So there's a record here that it was pulseless
4 before January 8, is that what you are saying?

5 A. Yes.

6 Q. Sir --

7 A. I would not happy to say what record.

8 Q. There is no question?

9 A. Allow me to say.

10 THE COURT: There is no reason to argue back
11 and forth.

12 MR. GALLO: I don't need to argue he is not
13 to speak unless there is a question.

14 THE COURT: Let him finish.

15 Let him answer.

16 THE COURT: You said that you believe that
17 there is a record of that; is that correct?

18 THE WITNESS: That is correct, your Honor.

19 THE COURT: Next question.

20 Q. And that's pulselessness, right, just so we agree
21 on terms, no pulse?

22 A. That's correct.

23 Q. There is no evidence whatsoever that the left
24 lower extremity was paralyzed between December 27, 1999
25 and January 7, 2000, correct?

26 A. Correct.

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1 Mayer - Plaintiff - Cross/Hirsch

2 MR. HIRSCH: Thank you.

3 THE COURT: Mr. Kopff.

4 MR. KOPFF: Thank you, Judge.

5 MR. HIRSCH: I gave him the pathology report.

6 MS. KELMACHER: Leave it there, I will give
7 it back to you. We don't have to pull the page again.

8 MS. KELMACHER: Thank you.

9 May I have that transcript, the one he was
10 - just using?

11 THE COURT: She wants to see the transcript
12 you have.

13 MR. HIRSCH: Sure.

14 Just removing a Post-it.

15 THE COURT: Sure.

16 MR. HIRSCH: I might have scribbled some
17 words.

18 MS. KELMACHER: I won't look at the
19 scribble.

20 CROSS-EXAMINATION

21 BY MR. KOPFF:

22 Q. Good afternoon, sir.

23 A. Good afternoon.

24 Q. My name is Peter Kopff, I represent Dr. Peter
25 Wistreich, the emergency room physician, Dr. Marc London,
26 who is a neurologist, and Dr. Mark Weidenbaum, who is an

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1 Mayer - Plaintiff - Cross/Kopff

2 orthopedic surgeon. How are you?

3 A. How are you.

4 Q. Sometime on December 27, 1999 the patient
5 exhibited the first symptoms of arterial ischemia, would
6 you agree?

7 A. Yes.

8 Q. Now, I think you said the iliac artery clot
9 formed, correct?

10 - A. Yes.

11 Q. And that can happen acutely or chronically, would
12 you agree?

13 A. In various clinical settings I would agree.

14 Q. It's more common to occur chronically than
15 acutely, would you agree?

16 A. Yes.

17 Q. We know that it can occur without any symptoms,
18 such as happened in the right leg of Bridget Butler, would
19 you agree?

20 A. No, I wouldn't agree. The right leg was not in
21 the iliac artery.

22 Q. The fact that clot forms in an artery, that can
23 happen either with or without symptoms, true?

24 A. That might be true.

25 Q. Well, we know that it happened in the right leg in
26 an artery of Bridget Butler without any symptoms, correct?

1 Mayer - Plaintiff - Cross/Kopff

2 A. Yes.

3 Q. And it was there a length of time, it wasn't there
4 just one day, it was there longer, correct?

5 A. Yes.

6 Q. Arterial ischemia is less common than say venous
7 problems, would you agree?

8 A. Not necessarily, I wouldn't agree.

9 Q. Are you familiar with antiphospholipid antibody
10 syndrome, is it correct that it's far more common to have
11 a venous clotting than an arterial clotting, do you agree
12 with that?

13 A. I would agree with that.

14 Q. Would you agree that with a 41 year old patient in
15 the general population it is unusual to have arterial
16 clotting, would you agree with that, that age?

17 A. Unless they had a high coaguability syndrome I
18 would agree.

19 Q. If you have a hypercoaguable syndrome you know
20 that you look for clotting and you actually treat it with
21 Coumadin, correct?

22 A. That is correct.

23 Q. But if we are talking the general population, it's
24 uncommon to have a young woman of 41 come in with arterial
25 occlusion or arterial ischemia, would you agree?

26 A. Unless they were heavy smoker or there was some

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1 Mayer - Plaintiff - Cross/Kopff

2 arterial sclerotic cause it would be unusual.

3 Q. Arthrosclerotic cause does not apply to this case?

4 A. It doesn't appear to, no.

5 Q. Now, she has diabetes, she is at higher risk of
6 arthrosclerotic disease, correct?

7 A. Yes.

8 Q. If we are back in 1999, in 41 year old it would be
9 unusual -- uncommon to have arterial ischemia in a 41 year
10 old, correct?

11 A. Just in general?

12 Q. Yes, in general?

13 A. As a general statement, or in the context of
14 someone?

15 Q. I am asking a general question. You can't answer
16 that's fine.

17 A. In a general population it would be unusual.

18 Q. The clot can form on the wall, sometimes there is
19 an injury or pathology on the wall and the clot can form,
20 is that correct?

21 A. Yes.

22 Q. It's called a thrombosis if that occurred,
23 correct?

24 A. Yes.

25 Q. And it can also form by an embolism, meaning it
26 traveled through somewhere else, correct?

1 Mayer - Plaintiff - Cross/Kopff

2 A. Yes.

3 Q. In this case you don't know whether it formed as a
4 thrombosis or an embolic event, correct?

5 A. There's no evidence for embolic event, so it
6 appears to be a spontaneous thrombosis secondary to the
7 hypercoagulability.

8 Q. Normally though a sudden onset, that particular
9 fact would suggest an embolic event, correct?

10 - A. Certain instances.

11 Q. A thrombotic event is in general more commonly
12 chronic, it builds up over time until there's a symptom,
13 correct?

14 A. In the absence of hypercoagulability, but with
15 hypercoagulability thrombus can occur acutely, so I
16 wouldn't agree with that statement.

17 Q. Now, an organized clot can indicate that it has
18 been there for months, would you agree with that?

19 A. Days, weeks or months, it's difficult to say
20 which.

21 Q. Judge, I know I only question him a little bit.
22 But, sir, can you answer my questions yes or no?

23 A. I will try.

24 Q. So the fact that a clot is organized is consistent
25 with being there for months, would you agree?

26 THE COURT: It could be there for months.

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1 Mayer - Plaintiff - Cross/Kopff

2 Q. Right.

3 A. I can't answer that yes or no.

4 MR. KOPFF: I am going to read from Esposito
5 against Abbott, the deposition of David A. Mayer, March
6 2, 2004, pages 19 and 20.

7 "QUESTION: When you say this --" this is
8 question, line 20 on page 19.

9 "QUESTION: When you say that the arterial
10 - occlusion occurred on August 30th, 1999 are you talking
11 about the complete occlusion or some type of partial
12 occlusion?"

13 Answer page 19, line 24.

14 "ANSWER: Well, I would say there was a
15 complete occlusion at that time to produce those
16 traumatic symptoms that she had. So whether any
17 progression occurred after that, you know, is -- we'll
18 never know because there was no angiogram or
19 documentation. But that looks like the sentinel event
20 and, you know, in a young person they are going to have
21 some collateral vessels channelled. So, the leg can
22 remain viable for a few weeks and still potentially be
23 salvageable, even in they have a major occlusion.

24 "You know, sometimes in an older person with
25 the same occlusion, the leg would be purple and
26 gangrenous within a few days, so I think there was a,

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2 certainly a window of opportunity in the first week or
3 two after August 30, if, to recognize the lack of
4 arterial flow in the leg, and have a shot at
5 revascularizing it with the TPA and the clot, clot
6 dissolvers.

7 "So, once a clot sits, sits, you know, months
8 in the leg it becomes organized and the PTA doesn't
9 work anymore and the efforts become futile at that
10 - point."

11 Sir, did you give that answer to that
12 question on March 11th, 2004 in a deposition in the
13 Eposito case?

14 A. I appears so.

15 Q. So in your mind, sir, organized clot can be there
16 for months, do you agree?

17 A. It can be but in this case --

18 Q. Just yes or no.

19 THE COURT: He said it can be.

20 A. In this case we do have arteriograms so --

21 THE COURT: Doctor --

22 A. -- comparing the two cases like apples and oranges,
23 they have no bearing on one another.

24 THE COURT: Doctor --

25 Q. Can I have the comment stricken?

26 THE COURT: Yes, stricken.

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1 Mayer - Plaintiff - Cross/Kopff

2 The question is can it be that's all.

3 If you can answer.

4 Q. Doctor, for --

5 THE COURT: Is there an answer or you can't?

6 A. Yes; an organized clot can be there many days, a
7 week, two weeks, months, depending how long the patient
8 is neglected and not treated properly.

9 MR. KOPFF: Move to strike the last part.

10 THE COURT: Overruled.

11 Q. You reviewed counsel -- did counsel give you the
12 record of Dr. Dotto?

13 A. Yes.

14 Q. You discussed that with her?

15 A. I don't recall if we -- was that the
16 rehabilitation physician? Or if you are refreshing my
17 memory.

18 Q. Can I have the witness given Exhibit C?

19 A. It sounds familiar. A lot of records in this
20 case.

21 Q. That was the gynecologist who she saw in August of
22 1999 correct?

23 THE COURT: Is that what you are referring
24 to, is that you are referring to, the gynecologist?

25 MR. KOPFF: I'm not here to answer questions,
26 doctor.

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1 Mayer - Plaintiff - Cross/Kopff

2 THE COURT: Are you referring to the records
3 of the gynecologist? Is that the records you are
4 referring to? There are many doctors mentioned here.
5 You are referring to the records of the gynecologist?

6 MR. KOPFF: Yes, Judge.

7 THE COURT: August, September '99, yes.

8 THE WITNESS: Yes, I have seen those records,
9 sir.

10 Q. Doctor, is birth control pills, is there a
11 contributing factor to a hypercoagulability syndrome, yes
12 or no?

13 THE COURT: Can it be, yes or no?

14 THE WITNESS: It can be.

15 Q. In the Esposito case did you list that as the
16 contributing factor in Carrie Esposito's
17 hypercoagulability syndrome, sir?

18 MS. KELMACHER: Objection to form.

19 THE COURT: Yes. Sustained as to form.

20 THE WITNESS: I can't recall.

21 THE COURT: No, please don't answer.

22 THE WITNESS: Sorry.

23 Q. Question page 12, line 24?

24 "QUESTION: Now, Doctor, referring back to
25 your note of why did a 30 year old woman have arterial
26 ischemia, did you ever find out an answer to that?"

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1 Mayer - Plaintiff - Cross/Kopff

2 Answer page 13, line 4?

3 "ANSWER: Certainly a theory, yes."

4 Line 5.

5 "QUESTION: What are was your theory?

6 "ANSWER: It looks like a hypercoagulability
7 problem, from probably an unmeasurable genetic
8 hypercoagulability syndrome. I know her basic screen
9 for hypercoagulability was negative that the
10 hematologist drew on or about the time of the
11 amputation. But in view that, the rest of her vessels
12 on angiogram and the specimen autopsy looked fairly
13 clean, yet you would think that this would either be an
14 embolic process or a hypercoagulability process, so
15 possibly contributing factors were the birth control
16 pills and smoking."

17 Sir, is that the answer?

18 MS. KELMACHER: Finish the answer.

19 MR. KOPFF: The rest of it.

20 "But we may never know the exact etiology of
21 the arterial thrombosis in this case, for certain, that
22 is."

23 Sir, did you list birth control pills?

24 THE COURT: No.

25 Doctor, were you asked those questions and
26 did you give those answers?

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1 Mayer - Plaintiff - Cross/Kopff

2 THE WITNESS: It appears so.

3 THE COURT: All right.

4 Q. Sir, was it true when you said under oath that a
5 hypercoagulability syndrome can be caused by birth control
6 pills?

7 THE COURT: Sustained, sustained.

8 Were you done? Were you asked those
9 questions and did you give those answers?

10 THE WITNESS: Yes.

11 Q. When you analyzed this case were the clinical --

12 THE COURT: Which case?

13 Q. The clinical presentation.

14 THE COURT: Mr. Kopff.

15 MR. KOPFF: This case, I am just gesturing at
16 Dr. Dotto's chart.

17 THE COURT: All right.

18 You are talking about the case involving Mrs.
19 Butler?

20 Q. Yes, Bridget Butler.

21 THE COURT: Next question.

22 Q. The clinical presentation is critical to your
23 analysis, correct?

24 A. Yes.

25 Q. Did Bridget Butler ever have a discomfort in her
26 left leg prior to December 27, 1999?

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1 Mayer - Plaintiff - Cross/Kopff

2 A. Yes.

3 Q. When was that, sir?

4 A. That was in August 31, 1999, or several days
5 previous to that.

6 Q. Sir, wasn't it September 15, 1999 she come blind
7 of left calf pain for four days?

8 A. Yes, I should be corrected on that. September
9 15th, '99, correct.

10 - Q. She was, according to the history she was taking
11 Provera, a birth control pill, which she stopped taking
12 four or five days prior to that. She started taking it on
13 or about August 31 and stopped take it when she felt pain
14 four or five days prior to September 15, 1999 correct?

15 MS. KELMACHER: Objection.

16 THE COURT: Sustained.

17 The chart, Doctor, does the chart indicate
18 the period of time in which the birth control pills
19 prescribed to Mrs. Butler, does the chart indicate
20 that?

21 THE WITNESS: The chart indicates -- does not
22 indicate when she stopped the birth control pills.

23 THE COURT: Does it indicate a period of time
24 in which the birth control pills were prescribed for
25 her, the chart itself?

26 THE WITNESS: Not to my reading.

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1 Mayer - Plaintiff - Cross/Kopff

2 Q. Doctor, look at 9/15/99 the left calf pain times
3 four days.

4 Can you read that?

5 A. Yes.

6 Q. Under it doesn't it say stopped Provera and
7 aspirin four or five days ago?

8 A. I really can't read the writing so I can't answer
9 that.

10 Q. Would that finding be consistent with a chronic
11 presentation of arterial clotting, sir?

12 A. I would say --

13 THE COURT: What presentation, the one in
14 September of 1999.

15 Q. When I said, Judge, chronic, meaning what was seen
16 on December 27 had been going on for months, would you
17 agree, sir, with that clinical evidence, yes or no?

18 A. Could you just rephrase the question. I didn't
19 understand it.

20 Q. The patient had pain September 15, a few days
21 before, is that correct?

22 A. Yes.

23 Q. It was in the same leg that we eventually find
24 arterial disease, true?

25 A. Yes.

26 Q. That finding is suggestive of a possible chronic

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1 Mayer - Plaintiff - Cross/Kopff
2 problem going on between September, October, November and
3 December 1999, correct?

4 A. No, I don't agree with that.

5 THE COURT: Do you have a question?

6 MR. KOPFF: Almost done, Judge.

7 I am just trying to find a question here.

8 Q. Doctor, did you read the testimony of Steven
9 Brenner, MD, produced as an expert by the attorney
10 Kelmachter, January 19, 2006?

11 A. What field was he in, sir?

12 Q. Orthopedic surgery.

13 A. Yes, I read the testimony.

14 Q. Let me see if you agree or disagree. This is a
15 question by the judge, page 1894, line 11:

16 "QUESTION: Doctor, are you saying there was
17 an occlusion that you can say with a reasonable degree
18 of medical certainty there was an occlusion began in
19 September 1999?

20 "ANSWER: Yes."

21 Do you agree or disagree with the sworn
22 testimony of Dr. Brenner to this jury?

23 A. My opinion disagrees with that.

24 Q. Now, sir, is it true that if there is arterial
25 ischemia, nerve manifestation will be a late
26 manifestation?

1 Mayer - Plaintiff - Cross/Kopff

2 A. Dependant upon the degree, not necessarily.

3 Q. In general does the body shunt -- does the body
4 being magnificent that it will shunt to protect certain
5 organs and structures if there is an ischemia?

6 A. I really can't answer that yes or no.

7 Q. In other words, it will try to preserve nerves,
8 for instance, at the expense of other organs, it may not
9 be given oxygen, can you answer that?

10 A. No.

11 Q. Do you know, what happens with a global hypoxia
12 in humans?

13 A. No, I am not familiar what you mean by global
14 hypoxia.

15 Q. If there is insufficient oxygen, doesn't the body
16 shunt to key organs, the brain, the heart, so forth to
17 keep us alive?

18 A. Yes.

19 Q. It's known like a divers reflex, correct?

20 A. Yes.

21 Q. Doesn't that happen also with the nervous system,
22 isn't is that one of the parts of the body that the body
23 he is designed to sustain and keep alive, if possible?

24 A. I've seen nerve function diminishing.

25 Q. Just say yes or no.

26 A. Quickly, four to six hours arterial ischemia.

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1 Mayer - Plaintiff - Cross/Kopff

2 THE COURT: Doctor, can you answer yes or no?

3 THE WITNESS: No, I can't answer it yes or

4 no.

5 Q. Doctor is antiphospholipid antibody syndrome a
6 common syndrome or is it uncommon?

7 A. It's one to five percent of the population
8 carriers the antibodies for their own antiphospholipid so
9 it is more common than generally thought.

10 - Q. Well, are you saying that if somebody carries
11 antibody they have to -- they have to syndrome?

12 A. No, I am not.

13 Q. So a small percentage of people that carry the
14 antibodies have the syndrome, true?

15 A. A smaller percentage.

16 Q. Let's get an answer.

17 Do you agree it is an uncommon syndrome, yes
18 or no.

19 MS. KELMACHER: Objection, asked and
20 answered.

21 THE COURT: Have it again.

22 Is it an uncommon syndrome?

23 THE WITNESS: I am not sure what your
24 uncommon means statistically. If you can clarify
25 that.

26 (Continued on next page.)

1 Dr. Mayer - By Plaintiffs - Cross/Kopff

2 CROSS-EXAMINATION (Continued)

3 BY MR. KOPFF:

4 Q Now, sir, you testified earlier that you made a
5 reference that doctor -- have you spoken to Dr. Diuguid
6 about this case?

7 A I have not.

8 Q Okay. Did you review his record?

9 A Yes.

10 Q And is there a point in his record where the
11 patient told him that she had taken birth control pills?

12 A I don't recall that. It sounds familiar though.

13 Q Didn't you say in your direct testimony that
14 Dr. Diuguid had ruled out birth control pills as a
15 possible cause; didn't you say that, sir?

16 A I don't recall saying that.

17 Q Okay. But you agree with me if the patient never
18 told him about birth control pills, then he would not have
19 considered that etiology, correct?

20 A I would agree with that, yes.

21 Q And you are not aware of any place in his chart
22 that says she took birth control pills, correct?

23 A I really would have to look at the records. I
24 couldn't comment on that.

25 MR. KOPFF: One last thing, Judge.

26 Nothing else, Judge, thank you.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 THE COURT: Mr. Dugan.

3 CROSS-EXAMINATION

4 BY MR. DUGAN:

5 Q How do you do, Doctor?

6 A How are you?

7 Q Sean Dugan,, I represent the neurologist, a
8 neurologist in the case, Dr. Adams --

9 A Yes.

10 Q -- who saw the patient on the 7th, okay.

11 Doctor, you are telling us as a surgeon that
12 in your surgical opinion Mrs. Butler had a blood disorder,
13 right?

14 A A blood clotting disorder, yes.

15 Q That blood disorder made her blood clot within
16 her blood vessels, right?

17 A Yes.

18 Q I notice the picture which was shown was not
19 marked for identification, but it's a picture of a male
20 with some red lines on it, right?

21 A Yes.

22 Q It looks like the red lines are pretty thick like
23 a trunk in the middle of the body, and then as they branch
24 down, coming down into the legs and into the feet, it
25 looks like that thick trunk gets smaller and smaller
26 narrower and narrower, accurate?

- 1 Dr. Mayer - By Plaintiffs - Cross/Dugan
- 2 A Yes.
- 3 Q And does the red line represent an artery?
- 4 A Yes.
- 5 Q So that means, Doctor, that in this situation
- 6 blood is pumped, we already heard, from the chest, the
- 7 heart, away from the heart. We've heard the word distal,
- 8 to the heart, down to the toes, right?
- 9 A Yes.
- 10 Q And that's through the arteries?
- 11 A Yes.
- 12 Q In this case, I think you told us that a lump, a
- 13 thrombus, a clot formed in the iliac artery down by the
- 14 groin area, somewhere?
- 15 A Probably above that up in the abdomen.
- 16 Q Well, below the bifurcation?
- 17 A Yes.
- 18 Q Somewhere right below the bifurcation or down
- 19 further based on the records you've seen?
- 20 A It looks like somewhere between the bifurcation
- 21 and the groin.
- 22 Q Is my finger in the general area of what you are
- 23 telling us, that the blood clot probably first formed in
- 24 the iliac artery (indicating)?
- 25 A Yes.
- 26 Q Now, your theory is that this blood dyscrasia had

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 been affecting this woman for the prior year and a half
3 before this was discovered to be a blood clot on January
4 8th, 2000, right?

5 A Yes.

6 MS. KELMACHER: Objection to form.

7 Objection to form.

8 THE COURT: Overruled.

9 Can you answer in that form, Doctor?

10 - A Yes.

11 THE COURT: All right.

12 Q What was happening over that prior year and a
13 half according to what you are telling us is little clots
14 of blood were being formed inappropriately in that artery
15 and being sent down through the body, right?

16 A Not necessarily. No, I'm not saying that
17 exactly.

18 Q Well, you are not saying -- or are you saying
19 that only one clot formed during the prior year and a
20 half -- withdrawn.

21 During the prior year and a half before
22 January 8th, 2000, you are saying clots were forming
23 improperly in her blood vessels, right?

24 A There's no evidence in the arteries that they
25 were forming before November 27, '99. I'm not saying
26 that.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 MR. HIRSCH: I'm sorry.

3 THE COURT: Before November 27th of 1999.

4 Q Before November 27th of 1999, there's no evidence
5 that clots were forming as a result of this blood disease?

6 A Only in the veins, not in the arteries.

7 Q Okay, let me finish it.

8 Before November of 1999, there's no evidence
9 that clots were forming in the arteries before November of
10 1999?

11 A In my opinion, yes, that's correct.

12 Q Okay. Now, these clots that form as a result of
13 the blood disease, they don't only go down to the feet
14 they would go throughout the body, right, fingers, wrists,
15 hands, toes; right?

16 A Not necessarily, no.

17 Q Okay. They could?

18 A It's possible.

19 Q Okay. Let's talk about the veins just for a
20 moment.

21 On July 10th, 1998, you already spoke about
22 that saphenous vein being removed from the right leg that
23 was about 17 inches of vein, right?

24 A Yes.

25 Q From top to bottom, right?

26 A Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 Q And that vein was sent to the pathology
3 department at Nyack Hospital, and there's no reference to
4 blood dyscrasias or clots or any such thing in that
5 pathology report; you agreed on that, right?

6 A Yes.

7 Q Then we know that Dr. Gorenstein examined the
8 veins with a duplex scan on November 17, 1998, coming
9 forward in time, right?

10 A Yes.

11 Q And on Dr. Gorenstein's examination of the venous
12 system there were no evidence of clots, right?

13 A Correct.

14 Q So your theory --

15 A Excuse me.

16 Q Go ahead.

17 A What was the date of that examination?

18 Q I believe the last one of Dr. Gorenstein was
19 November 17, 1998 that was a duplex.

20 A The clot head was gone by then, correct.

21 Q And that was a duplex scan, right?

22 A Yes.

23 Q It's a good scan to rule out the presence of
24 clots and veins, right?

25 A Correct.

26 Q You agree now there were no clots detectable to

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 medicine in November of 1998?

3 A After the 17th or whenever he did that study,
4 correct.

5 Q After November 17, 1998. We have before November
6 at November 17, 1998 no evidence of clots in veins,
7 right?

8 A Yes.

9 Q Right leg, left leg, abdomen, no where, right?

10 - A Correct.

11 Q Okay. Now, you agree, sir, that the longer this
12 disease process persists in a patient from its initial
13 presentation the lesser the likelihood of successful limb
14 salvage; you agree with that, sir?

15 A Generally, yes.

16 Q Okay. In this case you agree with it too after
17 reviewing the records, right?

18 A Yes.

19 Q Okay. And that's because the more diseased these
20 blood vessels are and the more clots that are being formed
21 and the bigger the clots that are being formed, the less
22 likely it is that a leg a limb can be salvaged, right?

23 A That's as a general statement, yes.

24 Q And it applies to this case, right?

25 A Correct.

26 Q Okay. I want to move forward to the age of the

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 clots, and just so that we agree, and tell me if you think
3 it's being tricky or confusing, you are telling us that
4 you think the clots formed 10 to 12 days before they were
5 discovered on January 8th, because of what happened to
6 this patient on December 27th, right?

7 A Yes, I basically think --

8 Q No, no. Is that a fair statement what I just
9 said? They occurred on the 27th?

10 A They occurred on the 27th in my opinion when the
11 patient had the acute symptoms.

12 Q And the 27th happens to be 12 days before they
13 were discovered on January 8th, right?

14 A Yes.

15 Q Now, listen carefully. If we had the exact same
16 presentation, sir, not on the 27th but let's go back
17 Christmas Eve, December 24th of 1999, if that happened,
18 your opinion to the jury would be the clots were 15 days
19 old that were discovered on January 8th, right?

20 A It's hard to say. It's possible.

21 Q Well, no, no, no, Doctor, do you understand my
22 question?

23 A It's a hypothetical question, so I --

24 Q Do you understand it?

25 A Yes.

26 Q Okay. The exact same presentation three days

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 earlier, December 24th, had that happened, you would have
3 told us that the clots formed then because of the clinical
4 presentation on December 24th, right?

5 A That might be true.

6 Q Okay. And let's go the other way. Had this
7 exact same clinical presentation happened not on December
8 27th, but let's come forward to December 30th, you would
9 have said the clots started forming nine days earlier on
10 December 30th, right?

11 A It's hard to say. It might be the case.

12 Q Doctor, with your theory, what you are telling
13 us, what I said is an accurate statement, isn't it, sir?

14 A We can't move it forward too much because the --

15 Q That's why I'm only taking it forward three
16 days.

17 A Right, that would be about it. Because, the clot
18 had to have been there at least a week or ten days because
19 of the nature of the clot.

20 Q So if you listen to what I said, December 30th
21 she goes to the hospital with what -- she, in fact, went
22 to the hospital with on December 27th, if she did that on
23 December 30th, you would have told us that's when the clot
24 formed?

25 A That might be so.

26 Q Okay. Now, I think, sir, you already looked at

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 the pathology report in the Presby chart, it's on page 861
3 if you want to look at it again, if you need it.

4 But my question is, sir, that when the
5 pathologist, the expert in pathology who is an expert in
6 dating these clots looked at what was removed from
7 Mrs. Butler's leg on January 8th, the pathologist told us
8 the clot was red, right? Old clots that are adherent.

9 MR. DUGAN: Did you take the affirmative
10 - nod?

11 I know it's getting late in the day. Every
12 time I stand up it's late in the day.

13 Q You've got to answer verbally. Did you say yes
14 to the question that the pathologist told us the clot was
15 red?

16 A That was one of the clots that was removed, not
17 all of them.

18 Q Well, let's look at Part A, the clot removed from
19 the left femoral artery that was red, right?

20 A Yes.

21 Q And the clot removed from the left posterior
22 tibial artery that was red, correct?

23 A They use that description.

24 Q R-E-D in color, right?

25 A Yes.

26 Q Old clot that's adherent to the wall and white in

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 color, as you were telling us earlier, that tends to be a
3 more friable, more hard substance; fair statement?

4 A Yes.

5 Q Okay. But in this case we know the pathologist
6 Dr. Bennett (phonetic) at Presby tells us the clot removed
7 from the left femoral artery is not only red in color but
8 it's soft in consistency; right?

9 A It was a combination of small amount of fresh
10 clot, but mainly old, large, old organized clot.

11 Q Did I accurately state that Dr. Bennett told us
12 this clot in the left femoral artery was red in color and
13 soft in consistency?

14 A That I'd have to look at.

15 Q Sure. Go ahead, sir, page 861 bottom right.

16 MR. HIRSCH: I think I handed him the two
17 pages.

18 A I think it wasn't located in the chart.

19 THE COURT: I think Mr. Hirsch states he
20 handed you the two pages.

21 THE WITNESS: This only goes up to 717,
22 unfortunately.

23 MR. HIRSCH: It's not up there.

24 Judge, could I approach? I think I handed
25 him the two pages so he had it.

26 MR. DUGAN: I'm sorry, Judge, may I?

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 THE COURT: Sure, if Mr. Hirsch wants to
3 assist.

4 MR. DUGAN: Thank you.

5 THE COURT: Yes.

6 Q Don't mix them up. In your right hand we have
7 the pathology report from the January 8th, 2000 procedure,
8 right?

9 A Yes.

10 - Q And, Dr. Bennett was the pathologist who
11 specializes in looking at these things, right?

12 A Yes.

13 Q And he tells us that, Part A, that clot removed
14 from the left femoral artery is both red in color and soft
15 in consistency, did I accurately recite that?

16 A Yes.

17 Q Part C, which is the clot removed from the left
18 posterior tibial artery, again is red in color and soft in
19 consistency, right?

20 Part C, toward the bottom of page 861, sir.

21 A Yes.

22 Q Okay. Now, the arteriogram which was done on
23 January 8th, tells us that the left iliac artery was
24 occluded and that's what we pointed to before, right?

25 A Yes.

26 Q And "occluded" means, in this instance,

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 completely filled with blood clot, shut off?

3 A Yes.

4 Q Now, we know the left iliac artery, I'm pointing
5 to the right side, this is what your counsel gave you, the
6 left iliac artery feeds the sciatic nerve on that side of
7 the body, right?

8 MR. HIRSCH: Could we get an answer?

9 A Well, it doesn't directly feed the sciatic nerve,
10 no.

11 Q Well, blood that gets to the sciatic nerve and
12 keeps that sciatic nerve alive comes through the left
13 iliac artery; fair statement?

14 A Probably comes through a combination of the
15 profundi, the deep femoral branches and the internal iliac
16 artery, not really the main iliac artery.

17 Q Okay. The left internal iliac artery you are
18 telling us has some feeding of the sciatic nerve?

19 A Yes, yes.

20 Q And if a nerve doesn't get sufficient blood
21 supply, it, like the rest of the body, will not be able to
22 do its function well?

23 A Yes.

24 Q And, will create certain problems for the
25 patient, perhaps?

26 A Correct.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 Q Such as deliver terrible, excruciating nerve
3 pain?

4 A Well --

5 Q Is that a fair statement, what I just said,
6 Doctor?

7 A I couldn't answer that yes or no.

8 Q You can't tell me that it's -- that if the
9 sciatic nerve is not properly nourished with blood from
10 the arterial tree, if it's not properly nourished, it's
11 not going to cause the patient to have horrible sciatic
12 pain?

13 A I would disagree with that. I don't think there
14 is such a clinical syndrome. There are so many collateral
15 extra channels that feed the sciatic nerve that I've never
16 heard of a sciatic nerve being ischemic from an iliac
17 occlusion. I don't think that's exists.

18 Q When you say ischemic, ischemia is a result of an
19 artery being blocked off with clots, right?

20 A Yes.

21 Q And what is distal or further from the heart away
22 from the blockage, in other words, the leg, the lower leg,
23 the foot, is not going to get sufficient blood supply
24 through the blocked artery, right?

25 A Correct.

26 Q And that will cause the patient to have certain

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 symptoms, right?

3 A Yes.

4 Q Those symptoms may include things like losing
5 warmth in the foot, right?

6 A Yes.

7 Q Losing color in the foot, right?

8 A Yes.

9 Q And the reason that it generally happens in the
10 foot first, if, in fact, there's an arterial occlusion
11 higher up, is because the foot is furthest away from the
12 heart, is the last to get the blood dribbling down in
13 smaller and smaller quantities, right?

14 A Well, not necessarily. I disagree with that.

15 Q Would you agree that generally speaking if
16 there's an arterial occlusion higher up, generally
17 speaking the furthest -- the part of the body furthest
18 away from that blockage will receive the greatest
19 punishment, if you will?

20 A I disagree with that.

21 Q Doctor, do you agree that the presence of pulses
22 in the lower extremity indicates blood flow?

23 A Yes.

24 Q Okay. That doesn't mean that there's sufficient
25 blood flow, but it does indicate blood flow?

26 A Correct.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 Q Okay. Now, Doctor as tissues die distal to the
3 blockage as a result of inadequate blood supply, the
4 creatine phosphokinase lab value will increase, right?

5 A Yes.

6 Q And that's called the CPK value?

7 A It can increase with muscle death.

8 Q Okay. And as the CPK value increases higher and
9 higher, that's indicative of more and more tissue death,
10 right?

11 A It can be an indicator.

12 Q Okay. And if the CPK value is multiples of what
13 it should be, is multiples of the top part of the normal
14 range that you spoke about this morning in a different
15 context, that means that the tissues are not salvageable;
16 is that a fair statement, sir?

17 A I wouldn't necessarily agree with that.

18 Q Is it generally a fair statement that as the CPK
19 lab values increase the probabilities of limb salvaged
20 decrease?

21 A That I would agree with, yes.

22 Q And as a matter of fact, you know the CPK value
23 in this case was four times the upper limit of normal,
24 right?

25 A On which date are you referring?

26 Q On the date at issue, the morning of January

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 8th.

3 A Yes.

4 Q All right.

5 And you know that blood was drawn on January
6 7th?

7 A Yes, but it was --

8 Q Now, if the blood is drawn on January 7th and the
9 CPK value is four times the upper limit of normal, is that
10 some evidence to our jury that that limb was not
11 salvageable as of the time the blood was drawn; fair
12 statement, sir?

13 A Are we speaking for me to assume that or --

14 Q You just told us you know that the CPK value
15 reported at 11:14 a.m. on the 8th of January was four
16 times the highest level that it should have been, right?

17 A I didn't know that was drawn on the 7th.

18 Q Well, didn't you just say that? I asked you
19 that.

20 THE COURT: I think he said --

21 A I said it reported on the 8th. I thought it was
22 drawn on the 8th.

23 Q Can you show me where it's indicated where it was
24 drawn?

25 Let me ask you this. If something is to be
26 ordered stat or fast, the order for that lab is stamped

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 stat, right, S-T-A-T?

3 A Or the doctor writes "stat" and in the order or
4 something like that, right.

5 Q But the CPK value reported at 11:14 a.m. on
6 January 8th is not ordered stat, is it?

7 A I didn't see that it was, but I thought it was
8 drawn on the morning of the 8th.

9 Q Well, in order for it to be back at 11:14 on the
10 morning of the 8th, 11:14 a.m., it would have had to have
11 been done stat, right?

12 A I thought the date and time on the report was
13 when it was drawn not when the reading came in. You'd
14 have to check with the laboratory. I can't answer that.

15 Q Assume it's that the lab indicates when it's
16 reported out 11:18 a.m. Assume that. Assume, it's not
17 stat?

18 MS. KELMACHER: Objection.

19 THE COURT: Yes, I'm going to sustain the
20 objection.

21 MR. DUGAN: On the assumption.

22 THE COURT: Well, do you know, do you have
23 any document at all to indicate when the blood was
24 drawn?

25 I don't have a problem with you asking him
26 if the blood was drawn and January 7th and you have

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 that reading on January 8th, I don't have a problem
3 with that. You have to demonstrate it was drawn on
4 the 7th.

5 Doctor, when you looked at the hospital
6 records, did you see when the blood was drawn? Is
7 there anything in the record to indicate when the
8 blood was drawn?

9 THE WITNESS: The only time I saw, your
10 Honor, was the 8th, the date that it was reported.

11 THE COURT: But that doesn't say it was
12 drawn on the 8th, correct?

13 THE WITNESS: I believed --

14 MR. DUGAN: Judge, could I have my
15 cross-examination, please.

16 THE COURT: Yes, all right.

17 THE WITNESS: I believe it does indicate it
18 was drawn on the 8th.

19 THE COURT: Yes. Go ahead, Mr. Dugan.

20 Q Doctor, 75 percent of your surgeries you told us
21 are generally surgical procedures as opposed to vascular?

22 A Yes.

23 Q That includes surgeries for gallstones and
24 hernias and removal of skin cancers, that sort of thing,
25 right?

26 A Yes.

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 Q Twenty-five percent are vascular-related
3 procedures of your procedures, right?

4 A Of the actual surgery I see.

5 Q Of the actual surgeries?

6 A Many hundreds.

7 Q Okay. That's fine.

8 A Hundreds of patients through my vascular lab per
9 year for diagnosis.

10 Q We're talking about surgery.

11 What percent of that 25 percent of vascular
12 procedures are vein stripping procedures that you've done
13 over your career?

14 A Well, I would consider that, I am considering
15 that in the 75 percent of the general surgical procedures.

16 Q Okay.

17 A I'm calling the vascular the artery procedures.

18 Q So, the vein stripping is in the 75 percent?

19 A That's correct.

20 Q Doctor, the practice that you have includes many
21 patients who are diabetic, right?

22 A Yes.

23 Q Of that diabetic patient population some of those
24 patients have lost their leg below their knee, right?

25 A Correct.

26 Q Are the vast majority of those patients who want

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 to work and of working age back at work in your practice?

3 A With below-knee amputations?

4 Q Yes, below-knee amputation.

5 A The majority are back at work.

6 Q Because it's --

7 A Above knee, not, very few. It's harder to

8 rehabilitate.

9 Q And in this case we know we're talking about a

10 below-knee amputation, correct?

11 A Yes, that's right. It also depends on the type

12 of work they were doing.

13 Q Now, you have patients that you operate on. Now

14 go to your hundred percent of operative procedures, okay,

15 vascular, nonvascular?

16 A Okay.

17 Q You have patients who are on Coumadin therapy,

18 right?

19 A Yes.

20 Q They take Coumadin every day of their life,

21 right?

22 A Yes.

23 Q And you operate on them, right?

24 A Yes.

25 Q And that's a standard procedure that you do,

26 operate on patients with Coumadin under appropriate

1 Dr. Mayer - By Plaintiffs - Cross/Dugan

2 precautions, right?

3 A Correct.

4 Q No reason in the world not to operate on a
5 patient on Coumadin under appropriate conditions, right?

6 A Well, that -- I don't know you could give a
7 general answer to that. I can't answer yes or no.

8 Q Well, a patient being on Coumadin therapy, the
9 Coumadin is not what you doctors call a contraindication
10 to doing surgery, right?

11 A Not in a life-threatening emergency situation,
12 but normally you have to let it wear off before you do
13 elective surgery.

14 Q You let the Coumadin wear off?

15 A Yes.

16 Q You take the patient off Coumadin for a certain
17 number of hours or days, whatever?

18 A You would put them on a Heparin drip which would
19 be an interim measure to anticoagulate them in the vein,
20 take them off the Coumadin, and just stop the Heparin
21 around the surgery and restart it after and then
22 re-Coumadinize them.

23 Q And you do that with some frequency yourself,
24 right?

25 A Yes.

26 Q Doctor, aside from those patients that you told

1 Dr. Mayer - By Plaintiffs - Cross/Dugan
2 us about -- one last thing, Doctor, let's come forward to
3 January 8th, 2000 again when Dr. Nowygrod did this
4 emergency procedure on this patient; okay?

5 A Yes.

6 Q You agree that was an emergency procedure?

7 A Yes.

8 Q A totally unanticipated finding, if you will,
9 during that procedure was that the right leg, the blood
10 vessels in the right leg were also clotting up, right?

11 A Yes.

12 Q And what the surgeon was able to do on the right
13 leg, was essentially pick the clot out of the artery?

14 A Yes.

15 Q And can you tell us just in two sentences, in one
16 sentence, how does the surgeon actually get that clot
17 out?

18 A You put a catheter, a fine filamentous catheter
19 past the clot, blow up a little balloon and then pull it
20 back with the balloon inflated and that gets the clot out.

21 (Continued on next page.)

22

23

24

25

26

1 Mayer - Plaintiff - Cross/Dugan

2 Q. And that seemed to be the ethicacis (sic) in
3 treating the right leg in this case?

4 A. Yes.

5 MR. DUGAN: Doctor, I have nothing further.

6 THE WITNESS: Thank you.

7 THE COURT: Ms. Kelmachter.

8 REDIRECT EXAMINATION

9 BY MS. KELMACHTER:

10 Q. Good afternoon, Doctor.

11 A. Good afternoon.

12 Q. I am going to try to be very brief and just hit
13 some of the issues that may have come up.

14 I use this word brief a lot. Can you just
15 briefly clarify for the jury why your board certification
16 is not specifically in vascular surgery?

17 A. Yes. I mentioned, seems like a long time ago, but
18 this morning, I trained before the area of vascular
19 fellowships, vascular fellowships were generally
20 considered a prerequisite to sit for the subspecialty
21 board of vascular surgery. I got certified by the
22 American Board of Surgery.

23 And one of the counsels was correct in that I
24 submitted an application requesting to sit for the
25 vascular surgery examination and in the early 1980s, but
26 they would not allow me to sit for it because I hadn't

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2 done a vascular fellowship and I hadn't performed a 150
3 major arterial bypasses per year. They set that arbitrary
4 number, and a new surgeon in practice,, I was a young
5 surgeon then, would not have that vast number of cases per
6 year.

7 So my training and experience is identical to
8 that of a trained vascular surgeon, but because I missed
9 the vascular fellowship era by a year or two that was the
10 reason.

11 Q. But your practicing included general surgery and
12 vascular surgery, correct?

13 A. That is correct.

14 Q. You were asked about the fact that you testified
15 in states like Connecticut, Texas and Missouri and
16 different counties in New York and you were found
17 qualified to testify each and every time?

18 MR. GALLO: Objection.

19 THE COURT: Overruled. You can answer.

20 A. Yes, I have never been disqualified in any venue
21 for offering opinions in the field of vascular surgery.

22 Q. Now, I would just like to go to some questions
23 that Mr. Dugan had. I know it is late in the day, it may
24 have been confusing.

25 Mr. Dugan asked you some questions with
26 regard --

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1 Mayer - Plaintiff - Redirect

2 MR. HIRSCH: Objection, Judge.

3 THE COURT: Just ask the question.

4 Sustained. Just ask the question.

5 Q. He asked you a question about the dating of the
6 clot and I believe you used the date of November 27, 1999.

7 Did you mean November or December 27, 1999?

8 A. I meant, excuse me. We're all getting a little
9 tired. I think I meant December 27, 1999.

10 - Q. With regard to that testimony, could you tell the
11 jury what the significance is of the symptomatology that
12 Mrs. Butler presented with from December 27th through
13 January 7th, to your opinion, with regard to the age of
14 the clot?

15 A. The acute event that occurred on the morning of
16 December 27, was Mrs. Butler tried to get out of bed and
17 the leg basically gave way, had severe pain in the hip and
18 leg with numbness.

19 In my opinion, that coupled with the findings
20 of fixed, organized, adherent clot and white clot, showing
21 that the process that the surgeon found on the 8th was an
22 old process, both combined to date the initiation of the
23 arterial thrombosis on December 27.

24 Q. Just tell us how is it that there was
25 symptomatology in the left but there was clotting found in
26 the right without symptomatology, just clarify that.

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2 A. In the left leg clot was in the main artery, the
3 main drag that went from the abdomen down to the lower
4 leg, in the iliac arteries, and eventually the outflow
5 arteries below the knee.

6 On the left side the clot was in a side
7 artery --

8 THE COURT: You mean the right side?

9 THE WITNESS: Yes, your Honor.

10 THE COURT: Okay. You said the left side
11 when you just described that. Then you said the left
12 side again.

13 THE WITNESS: Thank you, your Honor.

14 On the right side the artery was found -- the
15 clot was found to be in the deep femoral artery, which
16 is an outpouching, a side branch off the main artery so
17 the clot could sit there and the patient could still
18 experience normal flow, right down to the foot, with
19 minimal or no symptoms. So that's why one leg was very
20 symptomatic, the other was not.

21 Q. Now, you were asked again to look at the pathology
22 report, specifically with regard to the surgical specimens
23 after the January 8 surgery.

24 Could you tell us in what way you used this
25 pathology report in coming to your opinion, with regard to
26 the age of the clots?

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1 Mayer - Plaintiff - Redirect

2 A. That with the pathology of course the operative
3 surgeon Dr. Nowgrod said very clearly that there was some
4 fresh red clot but the majority of clot was old, organized
5 and fixed.

6 On the morning of the 8th we can assume
7 fresh, a small amount of fresh clot completely eliminated
8 the outflow and flow into the foot, which is why it became
9 purple and mottled. The presence of some red clot on that
10 day, and in the specimen does not in any way mitigate or
11 change the fact that the clot was at least 12 days old.
12 That would be the best way I can explain it.

13 Q. Doctor, a few moments ago Mr. Dugan asked you a
14 question about the fact that there was no clotting between
15 the DVT in November of 1998, what impact did that have
16 with Coumadin, at point in time, have on that fact that
17 there was no clotting?

18 A. Certainly while the patient is on Coumadin you
19 wouldn't expect any clotting. So between that period and
20 November 17th of 1998 you wouldn't expect any clotting.

21 Q. Doctor, you had an opportunity to see
22 Dr. Gorenstein's records with regard to the post vein
23 stripping surgery, would that be correct?

24 A. Yes.

25 Q. Can we agree, just for purposes of time, rather
26 than looking at the whole note, that the only finding on

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2 the first post-operative visit on the 14th of July was
3 redness in the leg, would that be correct?

4 A. Yes, I think in the thigh area.

5 Q. With regard to the symptomatology that Mrs. Butler
6 had after the vein stripping surgery, in terms of the
7 pain, how much of that would you attribute to the vein
8 stripping and how much to the fact that she ended up with
9 a DVT?

10 - A. The DVT could well have occurred early
11 postoperatively, you know, we really can't say exactly,
12 but a lot of that pain may have been due to the DVT and
13 not to the post-operative state of the leg.

14 Q. Doctor, you were asked a number of questions with
15 regard to the surgical pathology from the vein stripping
16 surgery.

17 Judge, just to save time can I show him a
18 copy of that record?

19 THE COURT: Yes.

20 Q. Doctor, with regard to the pathology record, what
21 did they look at and what did they not look at?

22 A. So they are basically, the vein is stripped out,
23 again, we say with the stripper through the vein and the
24 ball at the end so the vein is traumatically stripped out,
25 and they are basically just looking at segments of the
26 vein, documenting that the vein has been removed. The

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2 pathologist is not doing microscopic sections of the vein
3 to see if there is clotting or conditions of the vein.
4 It's more of a perfunctory rapid examination.

5 Q. Doctor, you were asked whether, in fact, in the
6 early 1980s patients remained overnight for even vein
7 stripping surgery and you weren't given a chance to
8 explain why that occurred.

9 A. Well, then there was no ambulatory surgery, even
10 when we took like a lymphoma, a little bump off somebody
11 they would stay overnight. And when you get a hernia they
12 would stay a week, you know. So obviously, it was obvious
13 that patients could do better when they started walking
14 around, going home. Vein stripping is one of those
15 operations that we get patients up immediately and moving
16 and out of the hospital the same day.

17 Q. Doctor, you testified in response to a question by
18 one of the defense attorneys that there was strong
19 clinical evidence that Mrs. Butler had the APS at the time
20 of her July 1998 vein stripping surgery.

21 Why is that your opinion?

22 A. It's my opinion because it's extremely unusual to
23 get a deep venous thrombosis in a healthy otherwise
24 ambulatory patient after minor surgery.

25 And in all medical likelihood the patient had
26 antiphospholipid syndrome at that time.

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2 Q. In fact, you were asked if it were not true that
3 if the APS had been diagnosed in 1998 Mrs. Butler would
4 have had a lifelong -- she would have been placed on life
5 Coumadin, lifelong, and I believe, your Honor, that was
6 correct,, do you remember giving that testimony?

7 A. Yes.

8 MR. GALLO: Objection, that wasn't the
9 question.

10 MS. KELMACHER: I am doing the best I can.
11 You want to object?

12 THE COURT: We will try to rephrase the
13 question.

14 Q. Doctor, you were specifically asked, and now I
15 have been reminded it was Mr. Gallo who asked you if in
16 fact the APS had been diagnosed in 1998, what would the
17 lifelong treatment have been?

18 A. Well, given that it was an episode of thrombosis
19 with antiphospholipid syndrome, the patient would have been
20 on lifelong Coumadin, in all medical likelihood, further
21 thrombosis in the veins and the arteries would have been
22 avoided, and the amputation would have been avoided.

23 Q. Now, you were asked specifically, I believe, by
24 Mr. Hirsch, about the January 8, 2000 note from Dr.
25 Nowggrod. What did it mean when it said that she had a
26 left foot ischemia evolving. I believe it was evolved or

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2 evolving?

3 MR. HIRSCH: Objection. Excuse me, evolved.

4 THE COURT: Evolved.

5 MS. KELMACHTER: I'm sorry.

6 Q. Just what did that note mean in the context of the
7 hospital record?

8 MR. HIRSCH: Judge, I have no objection if
9 she reads the whole sentence, not taking four words.

10 MS. KELMACHTER: I did not intend to do that.

11 THE COURT: Read the statement as it appears.

12 Q. What did the note mean when it said left foot
13 ischemia evolved?

14 MR. HIRSCH: Same objection, read the whole
15 thing if you want.

16 MS. KELMACHTER: Hand to it me I will read
17 it.

18 THE COURT: You want to do it quickly, you
19 have a copy?

20 MR. HIRSCH: Happy to give her my copy.

21 MS. KELMACHTER: Yes, I will read it
22 exactly.

23 Q. What was your understanding of the meaning the
24 operative report when it said, I am reading this exactly
25 "Workup proceeding for a radicular etiology when on the
26 day of intervention left foot ischemia evolved," what did

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2 that mean in the context of the operative report?"

3 A. So, this is my understanding of it. The word
4 evolved doesn't mean a sudden event. It doesn't mean the
5 patient was absolutely fine and woke up on the 8th and
6 suddenly the foot turned purple. Evolved means to me
7 there was ongoing progressive lack of circulation in the
8 leg and then it evolved on the 8th. That's my
9 interpretation of evolved.

10 - Q. You were asked questions with regard to the note
11 of the resident, vascular resident at 8:30, the foot was
12 found to be in a different condition than it was found at
13 1 p. m. when it was cold. Why is that significant and
14 what is the significance of that fact?

15 THE COURT: That on January 8.

16 Q. January 8, I am sorry?

17 A. Well, I would say that's consistent with the
18 evolving status of the foot and that the arterial ischemia
19 rapidly progressed in a negative direction, a bad
20 direction on the 8th precipitating an emergency in the
21 early afternoon.

22 Q. Doctor, just to be clear, with regard to the CPK
23 index, is there anything with regard to those findings
24 that changes your opinion in any way with regard to the
25 salvageability of the limb prior to January 8, of 2000?

26 MR. DUGAN: Objection.

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2 THE COURT: You can answer that.

3 A. No, it does not change my opinion. Admittedly on
4 January 8, Dr. Nowggrod was up against a very difficult
5 problem where limb salvage was very difficult and
6 problematic. But we have to remember the foot was still
7 warm and viable on the 7th. It was only mottled and non
8 viable on the 8th. So there still was a window of
9 opportunity, even as late as the 7th, to successfully
10 intervene.

11 Q. Would you agree the sooner the intervention the
12 better the outcome?

13 MR. HIRSCH: Objection.

14 THE COURT: Sustained.

15 Q. Would it be correct to say that in your opinion
16 within a reasonable degree of medical certainty the sooner
17 the intervention the better likelihood or probability of
18 an excellent outcome, would that be correct?

19 MR. HIRSCH: Objection.

20 THE COURT: Overruled.

21 Q. Generally --

22 THE COURT: In the leg.

23 Q. Generally with regard to salvaging a leg or a
24 limb?

25 A. Yes, I would agree with that statement.

26 Q. Now, following with regard to the questions,

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2 Mr. Hirsch asked you a number of questions from a
3 deposition Esposito against Abbott?

4 First of all, from what was read to you from
5 that deposition, was there anything inconsistent in that
6 testimony with what you've testified here.

7 MR. HIRSCH: Objection.

8 MR. KOPFF: Objection.

9 THE COURT: Sustained.

10 - Q. Doctor, with regard to that testimony, was that
11 the same factual scenario we have here?

12 A. It was not.

13 Q. Very, very briefly from your recollection, how was
14 that different?

15 A. Well, the patient did not have any proven
16 hypercoaguable syndrome. And the patient also never had
17 an arteriogram. So we never knew the anatomy or what we
18 were dealing with.

19 Here we have a hypercoaguability patient and
20 a roadmap and an arteriogram where we know exactly what is
21 going on.

22 So the cases, although on the surface are
23 somewhat similar, since both cases an arterial problem is
24 misdiagnosed as a pinched nerve, to the detriment of the
25 patient, they are not really similar in other aspects or
26 comparable.

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2 Q. In fact, was there ever a diagnosis or a finding
3 in this matter that Mrs. Butler a dusky leg or foot?

4 A. In this case?

5 Q. Yes.

6 A. Only on the 8th was it dusky.

7 Q. With regard to the testimony, with regard to
8 testimony that was read from that transcript, does it
9 always require months for -- months for a clot to become
10 organized?

11 A. No, it does not.

12 Q. What period of time can a clot become, as you
13 described, adherent and organized?

14 A. Well, generally within a week or two period. If a
15 clot, once it organizes, if you let it go for months it
16 actually can incorporate into the wall of the vessel.
17 Obviously hopefully the diagnosis is made well before that
18 so the patient can be successfully treated.

19 Q. Doctor, can you tell us whether or not there is a
20 difference between peripheral vascular disease and what
21 Mrs. Butler had?

22 A. Yes, peripheral vascular disease, as we mentioned,
23 the vessels are calcified, they have plaques, they have
24 underlying narrowings. The surgeon observed himself here
25 that the vessels were soft and pliable and normal. So this
26 was clearly an arterial thrombus through

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2 hypercoagulability and not underlying peripheral vascular
3 disease.

4 Q. Now, Doctor, just with regard to the question of
5 the clot in the right leg. The clot in the iliac artery,
6 why is that different in terms of symptomatology than the
7 clots that occurred in the left leg?

8 MR. DUGAN: Objection.

9 THE COURT: Overruled.

10 - A. Because it was in the deep femoral artery that
11 supplies the muscles of the thigh, which is also supplied
12 by the main artery. So the symptoms were absent because
13 it had not been propagated into the main artery at that
14 time.

15 Q. Just two very short things.

16 You were asked questions with regard to
17 Dr. Dotto's records. Was there any significance in terms
18 of your evaluation as to the fact that from the record, it
19 seemed to indicate that for some period of time, less than
20 two weeks, Mrs. Butler took birth control pills?

21 A. That's really a very brief time. It's less than
22 one cycle, a pill. So it is not going make someone have a
23 hypercoaguable state in that short period of time, in my
24 opinion.

25 Q. Mr. Kopff asked you questions with regard to that
26 and you testified that the records are not suggestive of a

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2 chronic problem of arterial insufficiency that started at
3 that time. Why did you say that, what was the basis of
4 that testimony?

5 A. It was transient muscle cramping in the calf that
6 subsequently went away and it wasn't present for two
7 months. So if you were getting artery occlusion it would
8 be ongoing and worsening, as we saw between December 27
9 and January 8 in this case. So it was effernescent (sic)
10 or short term, most likely muscle related.

11 Q. I just want to go back.

12 You were asked by Mr. Kopff about
13 examination, I believe it was Mr. Kopff about examinations
14 that were done during the period of time leading up to
15 January 8 and you testified that the doctors that --
16 withdrawn.

17 The question you were asked about the
18 touching of the leg. And you testified that you could not
19 state specifically what the exams were because the doctor
20 did not do a vascular examination. What do you mean?

21 MR. KOPFF: Objection.

22 Q. Withdrawn.

23 You said that the notes did not show the
24 doctors did a vascular examination, what did you mean
25 by that testimony?

26 MR. KOPFF: Objection.

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2 THE COURT: Overruled.

3 A. Basically the notes that were documented in the
4 medical records demonstrated that Dr. Wistreich, Dr.
5 London, Dr. Kubik --.

6 MR. HIRSCH: Objection, Judge. Excuse me,
7 there is an objection.

8 THE COURT: I know there is an objection,
9 come to the side-bar please.

10 (Whereupon, there is an off the record
11 discussion at sidebar.)

12 THE COURT: Objection sustained.

13 MS. KELMACHER: I have no further questions,
14 your Honor.

15 THE COURT: Mr. Gallo.

16 MR. GALLO: Three questions.

17 RE-CROSS-EXAMINATION

18 BY MR. GALLO:

19 Q. Doctor, you were just asked some questions as to
20 whether APS was diagnosed in 1998 where the patient would
21 be on lifelong Coumadin?

22 Would you defer to a hematologist on that
23 issue?

24 A. That I am certain of.

25 Q. Pardon?

26 THE COURT: Next question.

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2 Q. Doctor, you also indicated that on questioning by
3 Ms. Kelmachter about the importance of getting out of bed
4 following the vein stripping surgery, getting up and
5 around.

6 Doctor, the patient did not get up and around
7 following the surgery, they have more of a risk to develop
8 a DVT? Yes or no?

9 A. You mean if they are not?

10 - Q. Yes.

11 A. I don't understand.

12 THE COURT: We had this some times.

13 MR. GALLO: She just asked this question.

14 THE COURT: We had this some times, we will a
15 allow it again. Go ahead.

16 Couch it in terms of this case.

17 THE COURT: If you can.

18 Q. Doctor, if the patient like Ms. Butler could not
19 get up and around following the vein stripping surgery are
20 they more likely to develop a DVT?

21 A. She walked up home the same day of the surgery so
22 she clearly --

23 THE COURT: Yes or no, Doctor.

24 Q. Yes or no.

25 A. I can't answer the question.

26 THE COURT: You can't answer the question.

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2 Next question.

3 Q. Doctor, on questioning by Ms. Kalmachter, it
4 indicated that you had the same training or identical
5 training as a board certified vascular surgeon?

6 Doctor, is it true that board certified
7 vascular surgeons do an additional three years of surgery
8 specifically devoted vascular surgery, yes or no?

9 MS. KELMACHTER: Objection to form.

10 THE COURT: Overruled. If you can answer.

11 Q. Yes or no?

12 A. I am not sure if it is two or three years but
13 that's in 2006 not in 1978 when I trained.

14 Q. I am just asking you a yes or no question. My
15 last question, doctor.

16 You indicated to Ms. Kelmachter that during
17 the vein stripping surgery the veins were traumatically
18 removed. Is it your testimony that even though the veins
19 were traumatic, the vein was traumatically removed it's
20 still a trivial or simple procedure?

21 THE COURT: I thought we got rid of the word
22 trivial.

23 Did you say doctor, did you use the word
24 trivial? And if you did, was that what you mean?

25 THE WITNESS: I don't recall using it, it's
26 not what I mean. And I called it a minor procedure.

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2 Q. Doctor, is a vein stripping surgery a traumatic
3 procedure, to use your words?

4 A. No, it is not.

5 Q. Didn't you just testify, upon questioning by Ms.
6 Kelmather you used the word traumatic?

7 A. I said the lining of the vein is traumatized with
8 the stripper not the patient. There's is a distinction.

9 MR. GALLO: I have no further questions.

10 - Thank you.

11 MS. ARCIERO: Nothing, Judge

12 RECROSS EXAMINATION

13 BY MR. HIRSCH:

14 Q. Dr. Mayer, with respect to the condition of Mrs.
15 Butler's right leg on January 8, of 2000, there was more
16 than one thrombus noted in the right leg, correct?

17 A. I believe you have to refresh my memory.

18 Q. Let me read this to you. I know it is late.

19 Page 7 of the operative report.

20 "Of note at this time as well, there was
21 occlusive probably thrombotic areas of the right profunda
22 femoral and the right peroneal and posterior tibial
23 vessels?

24 A. Yes, I recall that.

25 Q. So there was more than a small thrombus in a
26 single location in the right leg, correct?

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2 A. Yes.

3 Q. Three locations, correct?

4 A. Yes.

5 Q. Now just very briefly, this other case, the
6 Esposito case, which you just answered questions, and you
7 made a distinction between the two cases.

8 Correct me if I am wrong, in each case there
9 was a date in which there was a sudden event where a
10 patient had significant pain in the lower extremity,
11 correct?

12 A. Yes.

13 Q. Then there was a later date in which there was
14 evidence of a total occlusion of an artery in that
15 extremity, correct?

16 A. I really can't remember the specifics of the
17 Carrie Esposito case to comment on that.

18 Q. Did I mishear you a if minutes ago under oath, you
19 told all of us that you were able to distinguish the facts
20 of the two cases, did you say that, sir, about two minutes
21 ago, yes or no?

22 A. I said --

23 Q. Yes or no, did you say that, sir, that you were
24 able to distinguish between the two cases?

25 A. I didn't say I remember comprehensively -- come
26 me.

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2 Q. I didn't ask you that, sir?

3 Two minutes ago did you tell all of us you
4 are able to distinguish the facts of Esposito vis-a-vis
5 Butler?

6 A. I said they were totally different cases and I
7 explained why.

8 MR. HIRSCH: Thank you, sir.

9 THE COURT: Mr. Kopff.

10 RECROSS EXAMINATION

11 BY MR. HIRSCH:

12 Q. Doctor, did you tell attorney Kalmachter that you
13 ruled out arterial disease in September 1999 in Bridget
14 Butler?

15 A. That I personally rule, you mean? My opinion is
16 that she did not have arterial disease, that's what I told
17 her.

18 Q. You gave --

19 THE COURT: Yes, she did not have it.

20 Q. There was a doppler done that was a venous done,
21 correct?

22 A. Yes.

23 Q. And it was negative?

24 A. Yes.

25 Q. And yet you ruled you ruled out arterial disease
26 without doing an -- without any basis of an arterial

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2 doppler, correct? Yes or no?

3 A. No, incorrect.

4 Q. That was good practice by you to rule it out
5 without a doppler, right?

6 THE COURT: Rephrase that. Rephrase it.

7 Q. On September 15, 1999 there was a duplex doppler
8 of the left lower extremity which showed that there was no
9 disease in the venous system, correct?

10 - A. Yes.

11 Q. There is no evidence as to what the status of the
12 arterial system was, correct?

13 A. Except the pain went away and it never came back
14 for months.

15 Q. There was no doppler done?

16 A. Totally different. The patient --

17 THE COURT: The question is, I think, Doctor,
18 the question is simply at that time, was an arterial
19 doppler done at that time?

20 THE WITNESS: No.

21 THE COURT: All right.

22 Q. You gave an opinion without any benefit of an
23 arterial doppler, correct?

24 A. My opinion is based on the clinical.

25 Q. Yes or no?

26 A. State of the patient.

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2 Q. You gave an opinion no arterial doppler --

3 THE COURT: Excuse me, you said that there is
4 no, there was no arterial doppler done but yet you gave
5 an opinion that there was no problem, no blood flow
6 problem to the artery; is that correct?

7 THE WITNESS: Of yes.

8 THE COURT: All right. Mr. Kopff.

9 MR. KOPFF: Nothing else, Judge.

10 THE COURT: Mr. Dugan.

11 MR. DUGAN: I have nothing.

12 MS. KELMACHER: Just that two small things.

13 THE COURT: I'll hold you to it.

14 REREDIRECT EXAMINATION

15 BY MS. KELMACHER:

16 Q. Why is it your opinion that there is no indication
17 of arterial disease in September of 1999?

18 MR. KOPFF: Objection, asked and answered.

19 THE COURT: I believe it was asked and
20 answered. You just brought it up again.

21 I will let him answer it again.

22 THE WITNESS: The patient after this doppler
23 had continued to have cramping in the calf on walking,
24 either some walking, what we call caudication. Then
25 the patient should have had an arterial doppler and a
26 workup but the pain totally disappeared. And that

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2 undoubtedly was muscular, nothing to do with the severe
3 symptoms that she came in with in December, and it was,
4 in my opinion, not related to arterial disease at that
5 time.

6 Q. Doctor, with regard to the number of clots in
7 right leg, does that change your opinion?

8 A. No, even with some distal thrombi in two of the
9 runoff vessels, the patient still had one continual runoff
10 vessel into the foot, which would account for the lack of,
11 relatively lack of symptoms in the leg.

12 MS. KELMACHTER: Nothing further, Judge.

13 THE COURT: Doctor, you may step down.

14 All right, members of the jury, that is all
15 the testimony you will hear here today.

16 I ask you again not to discuss the case.
17 Keep an open mind. And I ask you to be here tomorrow
18 at 9:45.

19 Mr. Cheung, I would ask you to be here at
20 9:30 so we can discuss your situation with you.

21 All right. We will still see you tomorrow at
22 9:45. Mr. Cheung 9:30.

23 (Whereupon, the trial was adjourned.)

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