GARFUNKEL, WILD & TRAVIS, P.C.
ATTORNEYS AT LAW

411 HACKENSACK AVENUE • HACKENSACK, NEW JERSEY 07601
TEL (201) 883-1030 • FAX (201) 883-1031

FILE NO.: 70236.0081
REPLY TO: New Jersey

WRITER'S EMAIL: rlevy@gwtlaw.com
WRITER'S DIRECT DIAL: (201) 883-1030

By FedEx

March 16, 2009

Michael J. Keating, Esq.
Dughi & Hewit
340 North Avenue
Cranford, New Jersey 07016

Re: Betancourt v. Trinitas Hospital
Docket No. UNN-C 12-09

Dear Mr. Keating:

Enclosed please find transcripts of the Order to Show Cause Hearings held on January 22, February 17, and February 23, 2009, in this matter.

Very truly yours,

RLevy

Rebecca A. Edelman Levy

RAL:jed
Enclosures
cc: Sam Germana, Esq. (Via First Class Mail)(enclosures)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
UNION COUNTY, NEW JERSEY
DOCKET NO. UNN-C-12-09

BETANCOURT

Plaintiff

vs.

TRINITAS HOSPITAL

Defendant

TRANSCRIPT

OF

ORDER TO SHOW CAUSE

HEARING

Place: Union County Courthouse
Two Broad Street
Elizabeth, New Jersey 07207

Date: January 22, 2009

BEFORE THE HONORABLE JOHN MALONE, J.S.C.

TRANSCRIPT ORDERED BY:

REBECCA A. EDELMAN LEVY, ESQ. (Garfunkel Wild & Travis)

APPEARANCES:

JAMES MARTIN, ESQ. AND TODD DRAYTON, ESQ.
Attorneys for the Plaintiffs, Betancourt Family

PHIL CHRONAKIS, ESQ. AND REBECCA A. EDELMAN LEVY, ESQ. (Garfunkel Wild & Travis)
Attorneys for the Defendant, Trinitas Hospital

LYNN COHEN-MOORE
AUTOMATED TRANSCRIPTION SERVICES
P.O. Box 2230
Laurel Springs, New Jersey
(856) 784-4276

I N D E X

January 22, 2009

ARGUMENT

THE COURT **PAGE**

THE COURT: This is the matter of Betancourt v. Trinitas Hospital. The Docket is C-12-09.

Counsels, may I have your appearance for the record, please. We'll start here to my right.

MR. MARTIN: Good afternoon, Judge. James Martin and Todd Drayton on behalf of the Betancourts.

THE COURT: Uh hum.

MR. DRAYDEN: Good afternoon, Your Honor.

THE COURT: Uh hum.

MR. CHRONAKIS: Good afternoon, Your Honor. Phil Chronakis and Rebecca Levy from Garfunkel Wild & Travis on behalf of Trinitas Hospital.

THE COURT: All right, this is an application for a temporary restraining order in connection with this matter, brought the plaintiff, a daughter of Reuben Betancourt who is a patient at Trinitas Hospital.

The plaintiff seeks in this temporary restraining -- in this Order To Show Cause that the court enter an order that would require the hospital to show cause why it should not be enjoined from terminating or discontinuing treatment for Mr. Betancourt, also seeks the appointment of a guardian.

And the purpose of today's order is to

consider the plaintiff's application that pending further proceedings in connection with this matter, that the court enter a temporary restraining order. That temporary restraining order would restrain the hospital from terminating or discontinuing life support treatment for Mr. Betancourt.

I guess the first question that I have, Mr. Martin is what is Mr. Betancourt's current condition and what treatment is he receiving?

MR. MARTIN: Judge, I have to tell you that I have been involved in this matter now for all of three days or so. So I have no medical records, nor do I have much medical information --

THE COURT: That was another concern I was going to express, but I just wanted to know what you, what you did know now.

MR. MARTIN: My understanding in speaking with the family that as a consequence of a, -- one year ago today, coincidentally, Mr. Betancourt had surgery at Trinitas Hospital.

As a consequence of that surgery, something occurred in recovery where he was, needed oxygen for some period of time, lapsed into a coma, and my understanding is that he has not responded or come out of that as yet.

How this fits in sequentially, I don't know, but he's also experienced renal failure.

So he is currently on a ventilator as I understand it and also receiving dialysis treatment for the, with the ventilator.

The family understands in speaking fairly and formally with one or more of the doctors that the intention of the hospital was to discontinue the dialysis.

My understanding medically is the consequence of that is that gentleman's potassium level will increase. Eventually his kidneys will shut down, leading to multi-organ system failure and ultimately death.

THE COURT: Uh hum.

MR. MARTIN: We are here today to ask that the hospital be restrained from taking that action until such time as we could have a hearing.

I was informed this afternoon that that action has already been taken.

So I guess I need to amend my petition and ask the court if it views us favorably, to order the hospital to re-institute that treatment which he should have received today and was denied.

THE COURT: Uh hum.

MR. MARTIN: Again, my understanding is that the proposed action is to discontinue and not re-institute any of the dialysis treatments.

THE COURT: Okay.

I think perhaps I'm not sure what's your view on behalf of the hospital. Is that, -- Mr. Martin's understanding accurate as to the current treatment? Has treatment and/or dialysis or ventilator been discontinued? Is that the situation at the moment?

MR. CHRONAKIS: Judge, Mr. Martin is accurate up until Tuesday, and he's aware that there's been a change since then.

As of Tuesday, the hospital discontinued Mr. Betancourt's dialysis which additionally involved the removal of essentially of a tube from a port, the reinsertion of which would require a surgical procedure to continue the dialysis treatment.

But so that the court's aware importantly and had Mr. Betancourt's dialysis continued from Tuesday, his next treatment so to speak would have been today.

So essentially over the last two days, Mr. Betancourt has not, not received any dialysis treatment that he otherwise would have, but the hospital has

taken the step based on the judgment of the physicians treating Mr. Betancourt to remove the port and to discontinue dialysis.

MR. MARTIN: Judge, may I res… --

THE COURT: And I've had the opportunity to read the papers that were submitted by both sides, and I do understand that Trinitas is taking -- it is their position of the medical staff at Trinitas that the, any further treatment is not warranted in Mr. Betancourt's case, that the continuation of treatment, given his medical condition, his status, would be futile.

And it is the hospital's staff position, the treating physician, that any -- that the treatment is simply medically inappropriate.

MR. CHRONAKIS: Judge, if I might.

And that's certainly essentially the hospital's position except for this I think significant point, especially with Mr. Betancourt's family here.

A lot of the staff at the hospital asked me to make sure the court understood something which doesn't really come through in the papers, which is it is not the case that the physicians at Trinitas are saying this is futile or this is unnecessary as much as it is their belief, as much as they obviously want Mr. Betancourt to improve if he could, and as I know the

family certainly does, it is their belief that continuing dialysis and continuing other life support treatment is actually harming Mr. Betancourt's body. It is causing his dignity to suffer, to the extent that the court would recognize a public interest in dignity when death is inevitable.

It is their professional judgment that Mr. Betancourt cannot improve from his current condition, and we're addressing questions of quality of life, and the judgment in medical practice.

So it is not a matter of saying this isn't going to change the outcome. It is a very difficult but unfortunate matter that Mr. Betancourt's body is deteriorating and suffering and that continued life support as counterintuitive as this might sound to the court, is having at least an immediate harm on other interests of Mr. Betancourt that the hospital and the physicians are trained to address and are reluctant to put it gently to continue that course of treatment over their medical training and judgment.

THE COURT: Okay.

Mr. Martin, you did touch upon and that is, and I appreciate the short period of time that you've had to deal with the matter and not having in hand medical records puts you at somewhat of a

disadvantage.

I guess a concern that I have, though, is the application here is not supported by any medical certifications. It is supported by a family member who is not a medical expert.

I can certainly understand the position being taken by the family, but there is no supporting medical evidence for this application.

MR. MARTIN: Judge, there's been little or no opportunity to obtain -- Judge, all of the physicians that have been involved in his care as I understand it are staff physicians at Trinitas.

The family has identified at least one physician who may be willing to intercede. He'd have to, I guess I don't know the procedure, obtain permission to come onto the Trinitas property because he's not on staff there and he doesn't have privileges.

But that's part of what we would like the restraining order to allow us to accomplish.

I met these folks this afternoon so I've had no prior contact with them but I did speak to an attorney from the hospital yesterday who assured me that no actions were going to be taken pending this hearing.

I'm hearing now for the first time that dialysis has, in fact, been stopped, and that in order to re-institute it, there's some portal that has been removed that requires surgical implantation.

My understanding was that was not going to be done.

THE COURT: Uh hum.

MR. MARTIN: -- until we had an opportunity to air our differences here.

Judge, as -- I mean I understand the -- I haven't had a chance to digest these affidavits, but I understand the position of the physicians. The court needs to understand the position of the family.

They contend that this gentleman, their husband, their father, is indeed responsive.

He's not on and off with responses, that is being suggested to the court, that he does respond to certain stimuli.

They would like an opportunity for some physician at the very least to come in and have the opportunity to confirm that or refute it.

They also believe whether this is -- they will suggest to Your Honor at a hearing that there may be other motivations beyond this myth, frankly, some economic motivation.

There is a sizable medical bill that remains unpaid. They are not people of means, and they question -- they question whether or not that's the true motivation as opposed to some medical motivation for the reactions that are being suggested.

That's something I would suppose we'll air in a hearing, but all they're asking at this point, is that necessary treatment not be suspended or terminated until such time as we have an opportunity to get our act together, if you will, to get a medical affidavit if we can and prepare for, you know, where the arguments of the hospital are.

But to leave this decision in the hands of the hospital seems to me to be a terrible precedent for this court or any other.

THE COURT: All right, thank you, sir.

Counsel.

MR. CHRONAKIS: Judge, just to address a couple of things that Mr. Martin said and to clarify the record.

No action was taken by the hospital subsequent to the filing of the Betancourt's family's papers which I understand came here in yesterday morning or Tuesday night.

There was action taken early in the day

Tuesday at the hospital, and certainly not in response to the prospect of a lawsuit, which I don't know the hospital's aware of.

Judge, regarding the financial motivation, I can assure you having represented Trinitas Hospital for the last nine years at two law firms, that serving an underserved population as Trinitas does here in Elizabeth, there are many cases, countless cases, in which Trinitas provides healthcare services regardless of the financial outcome, and Your Honor must know this.

And certainly in Mr. Betancourt's case, that's no different.

You have affidavits from three physicians, none of whom are addressing anything -- none of whom would be allowed to as licensed professionals, address anything that equates what the proper course of treatment is with what the financial outcome to their hospital is.

The motivation that these physicians have from my dealings with them is that they uniformly believe that Mr. Betancourt unfortunately will not improve from his current position. And the responsiveness to stimuli does not contradict that fact, Judge.

There is medical evidence and it's addressed in the certifications that certain patients have limited reaction to stimuli, especially their eyes will move in response to light. That has nothing to do with the level of brain activity, the ability to be conscious again. And as you're aware, Mr. Betancourt, from reading the certifications, he doesn't respond to pain or the more immediate stimuli.

So what we have here, Judge, as I indicated earlier, is the situation in which unfortunately where I can't, Ms. Levy can't, these good attorneys can't, Mr. Betancourt's family unfortunately can't, you can't, assess or even order that somebody's medical condition be viewed as this or that.

Unfortunately for a number of months before counsel came on the case, Mr. Betancourt's family was given an opportunity to have another physician assess his condition, but I don't know that this needs to become a battle of the experts, so to speak, when you have the un-contradicted, over a number of months, but now before Your Honor, medical testimony.'

The only people who do know are saying that this situation, unfortunately, is not going to improve but it can get worse in terms of Mr. Betancourt's dignity and his internal suffering if the court orders,

and Judge, I hope -- I know you're aware, but I want to emphasize for the record, we don't have a situation where Your Honor would be issuing a restraint against the hospital's actions at this point.

Although some life support continues, it would the situation in which Your Honor was issuing affirmative injunction, and there is a line of authority suggesting that a court should not substitute it's own judgment over the judgment of medical professionals on healthcare issues, that is, to force them to follow a course of conduct that contradicts their medical training and their medical ethics.

And I would, if the court would allow, Ms. Levy could address more specific facts and regulations and authority that the court might consider when addressing this application.

THE COURT: Ms. Levy.

MS. LEVY: I think I also just want to address a little bit more on the certifications.

There were four certifications submitted to the court, one from a neurologist, one from a nephrologist, one from the attending physician and also one from the Medical Director of the hospital.

Each one of these people say the continued treatment of this patient is medically and ethically

inappropriate. They say it is not within the standard of care. In fact, two of the physicians go so far as to categorize any continued treatment as inhumane.

You know, you saw the papers. The doctors describe the patient's condition. It's not just being on a vent. He is septic. He has ulcers on his bone. This is not -- he's in very bad shape.

Unfortunately, there are not cases in New Jersey that address the issue exactly on point that deal with whether physicians should be required to provide surgeries that are against their standard of care.

There was a case, however, that I cited in our papers in Louisiana. It was an Appellate Court, court case, and actually it cites Quinn language which we're all familiar with, a New Jersey case, and the facts are actually very similar.

Although the patient there was only 31, the patient was comatose with end stage renal failure.

And in that case, the physicians decided to remove the dialysis and to take out the ventilator and the patient passed away.

What followed was the court's review of what happened, and in that case the court emphasizes the importance of acknowledging the standard of care in

that particular case, and if I may I'd like to read what the court held or what the court said.

The court said,

"Physicians are professionals and occupy a special place in our community. They're licensed by society to perform this special role. No one else is permitted to use life prolonging technology which is considered by many as fundamental health care.

The physician has an obligation to present all medically acceptable treatment options for the patient or her surrogate to consider and either choose or reject.

However, this does not compel a physician to provide intervention that in his view would be harmful without affect or medically inappropriate."

We have four treating physicians here all who say this treatment is medically inappropriate.

In addition, the American Medical Association The Council on Ethical and Judicial Affairs did publish a report entitled 'Medical Futility and End of Life Care.' And this report discusses the complex issues in dealing with futility.

In fact, I looked for a definition of futility and it's quite hard to find because it's such a value, based on values, and it's really impossible to

find a definition.

But what this report does is in an effort to avoid judicial intervention, it talks about steps that a hospital should take when these situations occur where a family disagrees and is pushing medical personnel to perform medical procedures that the doctors believe is not within the standard of care. And these steps include, and I would like to say that Trinitas has done all the steps.

They've met with the family. They've attempted to transfer to a facility where another physician would care, care for this patient.

The problem is that, the physicians, and I spoke to them, they find it very hard to believe that a physician would take this case at this point. And the family has had time to look for a transfer or another physician.

They've had Ethics Committee meetings. They've had other meetings with hospital personnel.

At the end of the report, it says, if you've tried all these steps and there's still a conflict, it says, and I quote, "the intervention will not be offered." And that's, and that's where we're at right now.

MR. MARTIN: Judge, with all due respect. I

don't know that group is, but who are they to make that decision? And I, I mean I didn't come here to argue the merits, but to just touch upon a response to that.

Well let me start at the beginning.

First of all, in response to one of Phil's comments, I didn't have this conversation with the hospital lawyer yesterday as I was filing the papers. I had it with her on Friday and Monday long before this action was taken on Tuesday.

So the court shouldn't find itself in the position now and have to order some affirmative act that should have never been acted upon, the removal of this port, et cetera.

I had a conversation with a gentleman, I want to say his name was Samuel Germana, Germana, and the last conversation was Monday.

And I realized that we had time constraints and so on. I told him that I would meet with the family one more time, and that if we intended to file this action, I would let him know and I did, in fact, let him know. And then before we ever came here yesterday, I faxed him copies of all of the papers that we proposed to present to Your Honor.

So finding yourself in a position now where

you have to order something affirmative should never, ever have happened.

Insofar as, you know, the medical motivation behind this, how would the doctor -- unless the economics were considered by this committee, how would that doctor who eventually reported to one of the, one of children of the Betancourt family had known that there's a 1.6 million dollar hospital bill outstanding? How would he know that unless that was discussed in that, in that hearing or that meeting that they had?

But the fact of the matter is these are the people that know best.

They've lived with this man, they've maintained a visual for a year. It's a year to day. And who is the hospital to decide that his life should be terminated?

We're not asking for the institution of treatment. We're asking that he be maintained on the treatment he's received.

And what you see happening here; I've seen all the seminars and the video clips on how we're going to handle these matters. The New Jersey Supreme Court in particular has always chosen to air of the side of the patient.

What's happening now is the medical community is trying to conjure a way to combat that.

So instead of saying we're maintaining treatment and we're terminating treatment that sustains life, now we're going to argue that what the court is really doing is forcing us to offer treatment that we shouldn't have to offer. That's just the same horse by a different color.

All we're asking this court to do is to let the man live long enough to conduct a hearing to decide whether or not they have a right to kill him, and that's what this is all about.

MR. CHRONAKIS: Judge. Certainly I can appreciate this is a difficult argument because of how sensitive this is and if it's, if at all for me, it's undoubtedly you know, agonizing for a family to sit here.

If this were my dad or my grandfather or my spouse, I wouldn't be able to maintain the decorum that Mr. Betancourt's family is, and there have been a lot of difficult decisions in how to approach this even over the last 48 hours.

But I have to take issue with the suggestion that what Trinitas Hospital is doing is trying to, you know, hasten or harm Mr. Betancourt or, you know,

unless that's some of the language used by Mr. Miller, it's these physicians have cared for Mr. Betancourt as best they know how as he approaches, you know, as he's in this end of life stage which is difficult for anybody. And they are the only ones among us who can assess with any medical expertise what is happening to Mr. Betancourt.

I would want instinctively any relative of mine to stay alive at all costs.

That is not the only interest before the court, and that is actually not the only interest as to Mr. Betancourt when you have medical professionals swearing before the court that the continuation of life support as much as that might seem paramount to every other consideration is doing active harm to Mr. Betancourt's organs and to Mr. Betancourt's dignity. And certainly those are interests that the family has as well.

I only want to reemphasize one point in response specifically to something that was said which is certainly physicians may be aware of a financial bill.

I am sure, and I'm up here advocating on behalf of the client, that no physician at this hospital and no physician that I know would change his

or her medical judgment depending on the bill.

It's easy enough to understand that given that attorneys generally would not do that, an attorney's bill make people live or die, they just affect people's fortune sometimes and you still wouldn't give different advice to a client depending on if she owed you $1,000 versus $100,000. But physicians, you know, as Ms. Levy pointed out, they're the only members of society who really can sustain life or make decisions regarding life.

This isn't a judgment based on economics, Your Honor. It is a judgment based on what is happening to Mr. Betancourt and the medical training and education and expertise that these physicians alone among the parties have.

Thank you, Judge.

THE COURT: Okay.

The issue before the court at this moment is whether the defendant hospital should be required to reinstate the provision of medical care, namely, dialysis pending some further proceedings in connection with this matter.

Whatever understandings might have been, that is, the state of facts at the moment, there is medical care that has been not provided in the normal

course.

It would have been, I guess, today would have been the day for dialysis.

It is the opinion of the treating physicians as expressed in the opposition papers that medical care is futile. In fact, the provision of it would be harmful and thus violate the standard of care under which the physicians must operate.

The issue before the court is not one that is the subject of reported decisions in this case.

The reported decisions in the case, namely the Conroy case, In Re: Conroy, indicate that the right to make medical decisions in the case of an incapacitated person rests with the guardian or the next of kin.

Here, the next of kin has made a decision, notwithstanding the medical advice that they have received, that treatment should be continued.

What the court is being urged to do by the hospital is to override that choice, the choice made by the next of kin.

On the basis that as I pointed out treatment is medically inappropriate, it is against the standard of care, it is harmful to the patient. For the court to answer the question ultimately as to what needs to

be done, the court needs to be able to determine if those answers given by the hospital that treatment is inappropriate against the standard of care and harmful is accurate.

What I'm presented with by the moving party, the party that has the burden of proof here, is an expression of a belief that the hospital's position expressed through the physicians is incorrect.

It is the belief of the family that treatment is appropriate. It is the belief of the family that treatment would not be harmful. It is their belief that physicians could satisfy and meet their standard of care by providing treatment in this situation.

I'm also mindful of that line of cases which talk about mandatory injunctive relief requiring a party to do something is to be reserved for extreme situations. It is rare that a court using the temporary restraining order procedure should be directing affirmative relief.

Having said all of that, the court's faced with a situation that there is no ability, no opportunity provided to the court to wait and see.

This is an extreme situation. Certainly those standards of Crowe v. DeGioia that talk about

irreparable harm and balancing of hardships weigh very heavily in favor of the plaintiff.

The difficulty that the plaintiff faces by way of proof is that standard in Crowe v. DeGioia that talks about the settled legal right and reasonable probability of success on the merits.

That's not been presented to the court but the circumstances here are, they're extreme.

Mr. Betancourt would have been due for dialysis today as I understand it. That has not been provided based on the medical decision reached by the hospital. Any inaction on the part of the court I fear would be, in and of itself, a decision against the interest of the Betancourt family.

I think we need to move and we need to move quickly but something needs to be done in the meantime to get us to what was the status quo a few days ago.

I'm going to grant the request for the temporary relief.

I am going to reestablish the status quo and require the hospital to resume the treatment that was being provided, the level of treatment that was being provided at the beginning of this week.

I'm also -- I don't think we're in a position

now where I'm going to be setting this matter down for a hearing on the application for maintaining the injunction until the plaintiff provides further information.

So while the order will be in place, I want to give the plaintiff an opportunity to provide more information, obtain physician certification that support the position that the treatment should be continued, sort of join the issue, so to speak.

Get us something from a doctor that indicates that the belief expressed by the Betancourt family that treatment should be continued, that it's appropriate, not harmful, satisfies the standard of care, is in fact true.

With that in hand, I think then I'll be in a better position to address an appropriate time period to set this matter down for a hearing on whether or not to continue the restraint.

I would like, Mr. Martin, to see that, to have that information within a week.

I would like counsel to return here in a week so that we can all then with that information in hand discuss again, so to speak, the continuation, the appropriateness of continuing the restraints, and setting the matter down for a further proceeding.

So I'm going to grant the temporary restraint with the direction that the plaintiff provide supporting information from a physician or physicians with respect to their position and ask that counsel return here a week from today, next Friday, two o'clock, and we'll see where we go from there.

MR. MARTIN: Can I ask one additional consideration?

THE COURT: Yeah.

MR. MARTIN: I don't know how much, if not all of the record will be necessary for a physician's review. But in my experience, if I were to request a copy of the hospital record, it's going to understandably take time.

Is there some way that we could suggest that it be expedited?

THE COURT: It probably wouldn't hurt to have it.

Can records be made available to plaintiff's physician for review?

MR. CHRONAKIS: Certainly if you order that, Judge.

THE COURT: They'll be -- then they'll be available.

MR. MARTIN: Thank you, Judge.

MR. CHRONAKIS: Judge, in the interest of candor, and so that your order can be complete, it's my understanding that there is an DNR issued by the hospital or not issued but directed by the hospital.

MS. LEVY: By the doctor.

On January 14, the physician, Dr. Millman, entered a DNR order on the patient's medical records. So there's been some question about whether they should continue with the DNR or whether that should also be removed.

THE COURT: That should be removed for this week while we're operating under this temporary restraining order.

MS. LEVY: Thank you.

THE COURT: Mr. Martin, you think perhaps you can craft an order? Get that to me. I'll enter it as soon as I get it and fax it right back to you.

So you're going to fax it in and I'll fax it back, and I think counsel understand what the order will be. So as soon as you get it to me, I'll get back to you.

MR. MARTIN: Will do, Judge. Thank you.

THE COURT: Okay.

All right, thank you everyone. See you next week.

MR. MARTIN: Thank you, Judge.

MR. CHRONAKIS: Thank you, Your Honor.

* * *

(Whereupon, proceedings of 1-22-09 concluded)

* * *

CERTIFICATION

I, Lynn Cohen-Moore, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of BETANCOURT V TRINITAS HOSPITAL, heard in the Union County Superior Court, Chancery Division, General Equity Part, on January 22, 2009, Tape dated same date, Index Number 15:08:43 to 15:42:08, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

AUTOMATED TRANSCRIPTION SERVICES

BY: *Lynn Cohen-Moore*

Lynn Cohen-Moore A.O.C. #368

Dated: March 11, 2009

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EUITY PART
UNION COUNTY, NEW JERSEY
DOCKET NO. UNN-C-12-09

BETANCOURT

Plaintiff

vs.

TRINITAS HOSPITAL

Defendant

TRANSCRIPT

OF

HEARING

Place: Union County Courthouse
Two Broad Street
Elizabeth, New Jersey 07207

Date: February 17, 2009

BEFORE

THE HONORABLE JOHN MALONE, J.S.C.

TRANSCRIPT ORDERED BY:

REBECCA A. EDELMAN LEVY, ESQ. (Garfunkel Wild & Travis)

APPEARANCES:

JAMES MARTIN, ESQ. AND TODD DRAYTON, ESQ.
Attorneys for the Plaintiffs, Betancourt Family

PHIL CHRONAKIS, ESQ., REBECCA A. EDELMAN LEVY, ESQ.
AND SAM GERMANA, ESQ. (Garfunkel Wild & Travis)
Attorneys for the Defendant, Trinitas Hospital

LYNN COHEN-MOORE
AUTOMATED TRANSCRIPTION SERVICES
P.O. Box 2230
Laurel Springs, New Jersey
(856) 784-4276

MR. MARTIN: Judge, just by way of organization.

THE COURT: Okay.

MR. MARTIN: So we'll get some direction from Your Honor, I suppose.

I have one physician, Dr. Goldstein, who as you suggested last time we were here, would be allowed to testify by phone. I have him ready anytime after about 10:30.

THE COURT: Okay.

MR. MARTIN: I have family members who are here today and prepared.

Phil mentioned that perhaps there's some doctors that need to get back to the hospital, so we'll need to do them first.

THE COURT: We had also mentioned that we'd be taking witnesses out of order to accommodate people's active schedules, so --

MR. CHRONAKIS: Of course, Your Honor. And we have Drs. Millman and McHugh available to testify. There's one other housekeeping note that I mentioned to Mr. Martin which is Dr. Khazaei who is Mr. Betancourt's nephrologist and therefore key to the dialysis issues is out of the country today, and she will be back tomorrow afternoon.

We were going to ask the court's permission just for her testimony since it is essential to the hospital's position, if the court would continue this hearing possibly on Thursday morning just for, just for her testimony if that works with Your Honor and if that works with counsel or as quickly as possible if we get exigency in this matter, Your Honor.

THE COURT: All right, well I'll have to review the, review the schedule and see what we can work out with that.

But if we've got a witness available, you may as well as begin there, take care of the doctor, and let him testify, so he can get on his way.

Okay.

MR. CHRONAKIS: Thank you, Judge.

THE COURT: Uh hum.

MR. CHRONAKIS: Your Honor, at this time, Trinitas Hospital will call Arthur Millman to the stand, please.

A R T H U R E. M I L L M A N, M.D., DEFENDANT'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Arthur Edward Millman.

SERGEANT-AT-ARMS: Okay, spell your last

name.

THE WITNESS: M-I-double L-L-M-A-N.

SERGEANT-AT-ARMS: Thank you. Please be seated.

THE COURT: Mr. Chronakis.

MR. CHRONAKIS: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. CHRONAKIS:

Q Good morning, Doctor.

A Good morning.

Q Doctor, can you tell us where you went to college and medical school, please.

A Undergraduate, I went to City College of New York and for medicine, the Albert Einstein College of Medicine.

Q And Doctor, do you have any board certification?

A I'm boarded in Internal Medical and in Cardiovascular Diseases.

Q And how long have you been practicing medicine, Doctor?

A Since 1969.

Q Doctor, what is your specialty?

A Cardiovascular diseases.

Q And can you briefly describe your professional experience since you started practicing

medicine?

A Well, I do general cardiology, noninvasive cardiology and also invasive cardiology, and probably the only cardiac teacher at the moment at the hospital in the training program.

Q How long have you been instructing other physicians?

A Since 1969.

Q Okay. Doctor, where are you currently employed?

A At Trinitas Hospital.

Q And with respect to -- are you familiar with the subject of this matter, Mr. Reuben Betancourt?

A Yes.

Q Do you have any financial interests in the outcome of this case or in Mr. Betancourt's disposition?

A No.

Q And if you can, describe your relationship with Trinitas Hospital in terms of your tenure there?

A I was originally brought in in '77 to be the Associate Director of Cardiovascular Diseases, and in time I became the Chief of Cardiology where I've been ever since.

Q What is your medical relationship with Mr.

Betancourt?

A He's my patient.

Q He's your patient. Are you, -- is it correct to say you're his treating physician?

A I'm the doctor of record at the moment.

Q And how long have you worked with Mr. Betancourt?

A It's got to be about a year by now.

Q Why did you take over Mr. Betancourt's treatment? Or how did you come to --

A Well originally I saw him before he was hospitalized. And then on his most recent hospitalization, he was under the care of the doctors who were taking care of him in the convalescent area elsewhere before he was transferred back to Trinitas, and then the family asked at a later time that I take over his care instead of the doctors who were there and I agreed.

Q Okay, do you know why you were asked to take over his care?

A Well, they knew me. That's part of it, I suppose. But the other part was the doctor was relatively insistent that advanced life support and full resuscitative measures were futile and that he really didn't want to do any more of that.

Q How did -- if you know, how did the Betancourt family know you?
A Oh, I suppose through Jackie.
Q Who is Jackie?
A She's Mr. Betancourt's daughter. She works for me.
Q And what does she do for you?
A She's a medical assistant/secretary.
Q How long has she worked for you?
A I think about two years, I think.
Q Have you ever made Mrs. Betancourt, Jackie Betancourt, aware of your opinions about her father?
A Yes.
Q When was that?
A On multiple occasions.
Q How long ago was the first time?
A Probably eleven months ago, something like that when it became clear that he had a permanent anoxic encephalopathy without any hope of recovery.
Q And does Ms. Betancourt still work with you and for you?
A Yes.
Q What is Mr. Betancourt's current diagnosis?
A Well he has multi-organ system failure. His kidneys have failed, his lungs have failed. He's

intermittently septic.

He has an underlying malignant thymoma which was brought into surgery in the first place, and he has hypertensive heart disease, intermittent congestive failure which is currently under control. And the overwhelming problem is of course the permanent anoxic encephalopathy with total loss of cognizant function.

Q That last part of Mr. Betancourt's diagnosis, Doctor, can you explain that in --

A Well he had an anoxic episode in the hospital after his surgery. He lost all his cognizant brain function.

And initially he was treated aggressively in the hope that perhaps that would come back which sometimes it does.

But if you don't see any change for the better within a few days, the likelihood of return to cognizant function is virtually zero, particularly in the older adult. It's different in children.

Q How old is Mr. Betancourt?

A 73, I think.

Q And Doctor you described an, I believe, an anoxic episode. Can you explain what that is?

A He was -- he extubated himself when he was in the Intensive Care Unit after his operation, and it was a

-- by the time they could get him re-intubated and resuscitated, there had been enough time for lack of oxygen to permanently damage his brain.

Q Doctor, in your medical opinion, what is Mr. Betancourt's prognosis?

A He's terminally ill. He's been dying slowly and painfully.

Q Can you describe the mechanical measures that Trinitas Hospital is using to keep Mr. Betancourt alive currently?

A He's on a ventilator that supports the breathing. He's being dialyzed at least three times a week, that supports the kidneys. He gets antibiotics for treatment of some truly horrific decubitus ulcers and continued antibiotics.

He's receiving nourishment via a peg tube, it's a tube that goes into the stomach and provides access for food, medicines, things like that.

And he gets really aggressive nursing care. They're always turning him from one side or another, desperately trying to treat the decubiti with which he was unfortunately admitted on the current admission which is, must be something like seven months old, something like that.

Q Doctor what, in your medical opinion, is Mr.

Betancourt's neurological state?

A He's in a non-cognitive state. That is there's no higher mental function. None of the things that make us human are present. All that's left is brain stem function and the nervous system, nothing that is aware.

Q Is -- in your opinion, is Mr. Betancourt permanently unconscious?

A Yes.

Q And do you know whether this has been confirmed by any other physician?

MR. MARTIN: Then that would be hearsay I would think?

MR. CHRONAKIS: Beg your pardon?

MR. MARTIN: I would object. That would be hearsay, Judge.

THE COURT: If it's records that he relied upon in reaching his opinion, then indicate what it is, what information he had available to render his opinion.

MR. MARTIN: Judge, if it were records, I would imagine it would be records wherein these physicians have expressed their opinions which would be objectionable if they are complex medical opinions. Additionally, as I understand it, there are a legion of

physicians are going to testifying following. And I would imagine a neurologist, a pulmonologist, et cetera will probably be here to express those opinions. To ask the doctor to simply regurgitate what --

THE COURT: I'm assuming you're right about who we're going to hear from.

MR. CHRONAKIS: Well, Judge, we're not necessarily going to hear from all those types of physicians that you unwrap a mystery. The two-physician assessment is part of not only the guardianship regulations but several cases that are cited in both parties' briefs. But if Your Honor prefers, we can tie this in later based on the testimony of --

THE COURT: We'll just wait for other witnesses then.

MR. MARTIN: Thank you, Judge.

BY MR. CHRONAKIS:

Q Dr. Millman, in your medical opinion, is there any treatment that will improve Mr. Betancourt's condition as you've described it?

A No.

Q Doctor, you made reference, I believe, to problems both with Mr. Betancourt's internal organs as well as with his skin. Can you elaborate on the

latter?

A Well the skin is breaking down, and there are multiple huge ulcers that the wound service at the hospital has been treating aggressively, but despite that, he's developed infection into the bone, that's called osteomyelitis which is a very pernicious thing, and with poor serum proteins and with his general debilitated state, he just doesn't heal, which makes it very difficult.

When someone is at -- always in bed, which, of course, he has to be, since he couldn't possibly stand, since he doesn't function, you get a catabolic state, that is, things start to break down, particularly proteins.

Even when you nourish the patient with food, you still generally have a negative nitrogen balance so that the patient still doesn't feel as well as someone who could move about, can get out of bed, can be ambulated, and this becomes all the worse if you're on dialysis or if you're on a ventilator, or both, and it's compounded by generalized episodes of sepsis and pneumonia, urinary tract infections, all of which he's had.

The skin becomes virtually parchment like and falls apart at the slightest touch.

MR. CHRONAKIS: Judge, may we approach?

THE COURT: Yeah.

(At sidebar)

MR. CHRONAKIS: Judge, we have one photograph, we have several photographs of Mr. Betancourt that we feel are probative, but I'm concerned with at least introducing in the normal course and the way the family might see them because they may be upsetting.

So I would like to first show them to counsel who hasn't seen them and then to Your Honor, and of course then to Dr. Millman to authenticate and testify.

But if nothing else, I want to make the court aware that I just don't want the family to be unnecessarily impacted by photographs which are rather graphic, and I'm only going to introduce one, because I think they may be cumulative after one.

THE COURT: Well, maybe you can just ask the doctor that if he's testifying about the photographs that's shown to him, that he just keep it down on the -- I don't want him holding it up when he's testifying or pointing to anything.

MR. CHRONAKIS: Sure. We're going to ask him that on the record, Judge?

MR. MARTIN: You could just tell him.

THE COURT: Just tell him at this point.

(Sidebar concluded)

MR. CHRONAKIS: Your Honor, I've provided Dr. Millman with a photograph that I'm marking for identification as Defendant's Exhibit 1.

(D-1 marked for identification)

BY MR. CHRONAKIS:

Q Dr. Millman, when was the last time you saw Mr. Betancourt?

A Yesterday.

Q Doctor, if you could turn your attention to the photograph marked as Defendant's Exhibit 1. I ask you if you can determine when that photograph was taken.

A Some time within the last few months. I don't know if it has a date on it. Yeah, it does, 2/13/09.

Q Now Doctor, there's a -- well, do you see the, a label on the photograph with Mr. Betancourt's name?

A Yes.

Q Now what is the July 2008 date on that label?

A Oh, that would be the date of admission.
Q Okay.
And what do you understand this photograph to depict?
A This is a decubitus ulcer, Stage 4.
Q Okay.
A It's as bad as they get.
Q Doctor let me ask you.
What part of Mr. Betancourt's body we're looking at in this picture?
A I think, I can't tell which one but it looks like one of his buttocks, going over the ileac crest, and you can see the bone peeping through.
Q Okay.
What -- when you last saw Mr. Betancourt, did his skin condition look substantially similar to what you're seeing in Defendant's Exhibit 1?
A Yes.
Q Um.
A He has others that are like this. This is only one.
Q Okay, is this -- what is the medical name for what we're looking at?
A It's a decubitus ulcer. It comes from pressure. People who are cognizantly aware usually don't stay in

one spot. They'll move.

If you stay in one spot, something will sure to start hurting and you'll move just so that you'll feel better.

But if you stay in one spot because you have to, then this sort of thing is very common.

You see it particularly in spinal cord injuries and quadriplegics, paraplegics.

Q Doctor, does Mr. Betancourt, I think you mentioned he has more than one. Where else, if any, are?

A They're on both sides. They're present on both sides.

Q Okay.

Where on his body are other ulcers?

A Well sir, it might make it easier if I show you. Over here. They're very large.

Q Are they on any other part of his body besides the buttocks?

A Nothing like this. There are other areas that are more modest.

Q Where are those?

A Well on the arms, the legs, back.

Q And what is -- when you mention the stage 4 ulcer, what is the significance of that?

A That means that it's gone through the entire skin into the subcutaneous tissue. And in this case, it's gone into the bone.

Q And are the ulcers that you described elsewhere on his body of a different stage?

A The other one on the other side is about the same. The others are much milder. The nurses spend an awful lot of time treating this. They're very good at it, and so they limit it as much they can.

Q What do they do to treat it?

A Well they irrigate it, they clean it, they move him off of pressure spots. He's always being rotated from one side to another side.

They keep it very clean and the wound service does a lot of very active care.

Q Doctor, how long have you observed ulcers at any stage on Mr. Betancourt's body?

A From July 3, 2008.

Q Are these ulcers going to heal with time?

A No.

Q Why not?

A He is too debilitated, has too many things wrong with him for this to ever get better.

He's getting the best treatment he can possibly get for this and it really hasn't helped that

much.

Q Doctor, I want to ask you about the dialysis treatment for Mr. Betancourt and start by asking whether in your professional medical opinion, you believe continued dialysis for Mr. Betancourt is medically appropriate.

A It's futile, it won't help.

Q Do you believe that continued dialysis is consistent with generally accepted standards of medical practice?

MR. MARTIN: Judge, I would object. I think the doctor's now testifying outside of his specialty.

BY MR. CHRONAKIS:

Q Doctor.

MR. CHRONAKIS: I'm sorry, Judge. Dr. Millman has testified regarding his vast experience, training and actually educational background in all aspects of internal medicine.

We will have a nephrologist, but Dr. Millman if you prefer me to further back on, is certainly competent to testify regarding dialysis especially in a big picture question like the one that's pending.

MR. MARTIN: Judge, he's being asked to express a standard of care opinion in the area of nephrology in which he has no credentials. There's an

nephrologist who's scheduled to testify.

MR. CHRONAKIS: Judge, again. Internal medicine covers all areas of the internal body, one of which is the kidneys. So I don't know if this is really a legal objection as much as an area of, (clears throat), excuse me, an area, if you'd like me to lay a further foundation.

But I do believe Dr. Millman is competent to testify on the effect of dialysis and the propriety of dialysis as part -- as within his scope of expertise and experience in internal medicine.

MR. MARTIN: Judge, unless there's some foundation laid that he has administered dialysis, treated --

THE COURT: If we could just get some additional evidence with respect to his experience in the area, we'll move on from there then.

MR. CHRONAKIS: Yes, Your Honor.

BY MR. CHRONAKIS:

Q Doctor, are you able to estimate how many patients you've treated or cared for in your nearly 40 year career?

A Tens of thousands. It's a long time.

Q Were any of those patients on dialysis?

A Yes.

Q Can you approximate how many?
A Well it's in the hundreds. It may be higher than that. But it's certainly in the hundreds.
Q And have you had patients on dialysis where both you and a nephrologist are working with a patient?
A Oh certainly.
Q Okay.
Now in your experience in Internal Medicine, do you observe and evaluate issues with patient's kidneys and the use of dialysis?
A Certainly.
Q Did you receive education and training related to treatment of the kidneys and dialysis?
A Yes.
Q In terms of assessing Mr. Betancourt's condition, are you aware of the condition of his kidneys?
A Yes.
Q Are you aware that he has been on dialysis?
A Yes.
Q Are you able to, (clears throat), excuse me, establish a professional medical opinion related to Mr. Betancourt's kidneys and the benefit of dialysis?
A Yes.

MR. CHRONAKIS: If the court would agree that a sufficient foundation has been laid, I would like to resubmit the pending question to Dr. Millman.

MR. MARTIN: Judge, I would -- obviously I would disagree and I would continue my objection.

THE COURT: I'll overrule the objection. I think there is a sufficient foundation established that the doctor is familiar with treating patients with kidney disease and the nature of that treatment. So --

MR. CHRONAKIS: Thank you, Your Honor.

BY MR. CHRONAKIS:

Q Dr. Millman, in your professional medical opinion, is it consistent with generally accepted standards of medical practice to continue dialysis treatment for Mr. Betancourt?

A No.

Q Doctor, are you aware whether a Do Not Resuscitate or DNR order is in place for Mr. Betancourt?

A Not at the moment, it had been.

Q It had been.

Can you explain to the court how that came to be.

A We placed him in the Do Not Resuscitate Capacity

because it was futile to produce cardiopulmonary resuscitation.

It would not offer anything for the better in his case. And then when the court ordered that that be reversed, we followed the court's order.

Q Now when was the Do Not Resuscitate order placed by the hospital?

A Must be about a month ago or something, maybe more.

Q And has it been lifted or --

A Yes.

Q -- not in place since the time of the court's order.

A Yes, once we got the court's order, that's what we did.

Q And just so the record is clear, what is the effect of a DNR order?

A All it means is that if the patient's heart stops or if he has a problem with blood pressure or his breathing becomes worse than it already is, that nothing active be done to change that, that being the natural history of his illness.

Q And, Doctor, in your professional medical opinion, is it consistent with generally accepted standards of medical practice to have a DNR order in

place for Mr. Betancourt?

A It's hard to conceive of a patient who had the problems he has who wouldn't have one.

Q Doctor, do you believe that Mr. Betancourt's illness is irreversible?

A Yes.

Q And do you believe the risks and burdens of continued dialysis outweigh the benefits of such dialysis for this patient?

A I can't think there's any benefit.

Q What in your opinion will happen to Mr. Betancourt if he's continued, if he's continued to be sustained by the medical, excuse me, by the mechanical processes you describe?

A He'll continue in his present course which has been inexorably downhill. All we are doing is prolonging his dying in a painful fashion.

Q In the event that Mr. Betancourt suffered heart failure, do you believe that efforts to resuscitate him would be consistent with generally accepted standards of medical practice?

A Heart failure is probably the wrong word.

Even if the heart had stopped that trying to bring him back that a) probably would be futile, but also would be, I think, contrary to proper medical

care.

Heart failure we have treated from time to time when it appears, and that's not a major intervention. That's just giving a modest medication.

DNR doesn't mean you don't treat. It means that treatment is limited to things that are not so-called heroic in nature.

Q Doctor, do you --

(Phone rings)

MR. CHRONAKIS: I'm Sorry, Judge.

BY MR. CHRONAKIS:

Q Doctor --

(Phone rings three more times)

MR. CHRONAKIS: I don't know what button to press to make this stop ringing, but I will turn the phone off.

BY MR. CHRONAKIS:

Q Doctor. Do you believe that continued care of Mr. Betancourt as you've described, that is the dialysis, the lifting the DNR order, the ventilator, et cetera, do you believe that that continued care is against your professional ethics?

A Yes.

Q Is it against your professional practices?

A Yes.

Q Do you believe it's appropriate?

A I don't think any of these things should be done.

MR. CHRONAKIS: Judge, may I have a moment?

THE COURT: Yes.

MR. CHRONAKIS: Your Honor, I have no further questions at this time.

THE COURT: Mr. Martin.

MR. MARTIN: Thank you, Judge.

CROSS-EXAMINATION BY MR. MARTIN:

Q Dr. Millman, you are the patient's attending physician.

A Yes.

Q Correct? What does that mean?

A Well he's the one who's supposed to coordinate the care, because principally he has so many problems that there are multiple -- a multiplicity of specialists involved in his care, and the doctor of record is supposed to try and coordinate all that.

Q By coordinate, does that include calling in different specialties?

A Yes.

Q To address different medical problems?

A Yes.

Q Are you actively treating him for a cardiac condition?
A No. He's not really had a bad heart.
Q How is it then that a cardiologist becomes the attending physician for a man with these other varying problems?
A The family asked me.
Q When did you become the attending?
A Probably a month or two ago, something like that.
Q And who was attending before that?
A Dr. Kassarochi and Dr. Drew (phonetics). There's a -- they have a formal name which I don't remember but Dr. Kassarochi is the head of their group.
Q And what's their specialty?
A Internal Medicine.
Q When you took over, you took over at the family's request?
A Yes.
Q And that was, I'm sorry, you said a couple of months ago?
A A month or two, something like that.
Q So it was during this particular admission.
A Oh yes.
Q And did you say that when Mr. Betancourt was

admitted, he was admitted with the decubitus ulcers?

A He already had decubiti.

Q He had developed those at a different site.

A Exactly.

Q Have they improved, gotten worse, gotten --

A Worse.

Q And that is despite the treatment that's been given.

A Exactly.

Q Who's treating those, what specialty?

A Dr. Losman, he's a wound care specialist.

Q And I'm sorry, what's his name?

A Losman, L-O-S-M-A-N. Losman.

Q Dr. Losman specializes in the treatment of this condition.

A Yes.

Q Are there protocols in place that the patient is rotated every couple of hours?

A He sees to that and we see it all the time. It's a lot of nursing work and the nurses are very good about that.

Q And are you responsible for bringing that particular physician in?

A He was brought in by Dr. Kassarochi before I

assumed control. But if I had been the doctor of record at that time, I would have done the same thing.

Q Okay.

Now who is responsible for the treatment of this patient's kidney condition?

A Dr. Khazaei.

Q And Dr. Khazaei is a nephrologist.

A Yes.

Q Was Dr. Khazaei already in place when you took over?

A Yes.

Q Who's responsible for his, for the ventilator?

A Dr. Garth (phonetic)?

Q And what's his --

A Specialty, a pulmonologist.

Q And I understand there's G-tube in place.

A Yes.

Q Who's responsible for that?

A I think Dr. Veiana's group put that in. It was either he or his covering doctor if I remember right. He's been there a long time.

Q What's his specialty?

A Gastroenterology.

Q The patient is also seen by a neurologist.
A Yes.
Q And is that Dr. Schanzer.
A Schanzer.
Q Schanzer. What other specialties consult?
A Well Infectious Disease, Dr. Scherer and Dr. Faraz (phonetics) have been seeing him.
Q Tell me then what other than coordinating those particular consults, what direct care do you provide the patient?
A Most of what he needs is provided by the consultants.
From a cardiac standpoint, apart from occasional episodes of heart failure, there's nothing that much for me to do.
Q Did you know this patient before a couple of months ago?
A Yes.
Q How did you know him?
A I saw him in the office.
Q For what condition?
A He was having a chronic cough (inaudible).
Q I take it that you're familiar with the record, the hospital record, in this particular case.

A Yes.

Q Did this patient have a Living Will, an Advanced Directive, any of that?

A I don't remember that.

Q Have you ever discussed that circumstance with this patient?

A I did not.

Q Have you ever discussed it with the family?

A I've mentioned what I thought the proper standards ought to be for the family, yes.

Q I understand from reading the hospital record that was supplied I think it was January 14, you had a conversation with Jacqueline and perhaps other family members, correct?

A I don't remember but we have had such discussions.

Q Were you designated by the hospital to talk to the family prior to discontinuing the dialysis?

A Yes.

Q You were the hospital representative.

A Yes, and I did mention that.

Q Have you had conversations with the family prior to this about --

A Mostly --

Q -- continuing treatment?

A Mostly with Jackie, yes.

Q And what was her expression or her feeling?
A She was very upset about this, which I can understand, and she mostly preferred that her brothers make the decisions.
Q Have you ever talked directly to the brothers?
A Yes.
Q And what is their feeling concerning discontinuing treatment?
A They want all treatment continued.
Q Has any member of the family adopted the position of the hospital insofar as discontinuing dialysis or any of the other necessary treatment.
A No.
Q And you've not had a discussion with the patient himself about his wishes or desire in a circumstance such as this.
A It would be a one-sided discussion.
Q Who gave you permission to place the DNR in the patient's record?
A The hospital said that that could be done without the family's consent.
Q So no one ever discussed that with the family.
A It had been discussed before, and has actually

been placed before, but that was by Dr. Kassarochi's people.

Q And when it was placed before, the family insisted upon it being removed. Isn't that true?

A I don't know.

Q And it was placed without their knowledge on that occasions. Isn't that true?

A I don't believe so. I believe I spoke with Dr. Kassarochi about it and he told me that they did discuss that with the family and that they did obtain consent verbally.

Q Who insisted that it be removed?

A The family.

Q And they insisted that an order that was in place be removed because they never authorized it to be placed in the first place. Isn't that correct?

A That was their position but it's not the position of the doctors who spoke to them.

Q So --

A We have a he said/she said sort of thing.

Q So we find ourself in a circumstance where you don't know what the patient's wishes would be. Correct?

A (No response).

Q Because you never discussed it with him.

A No, I haven't seen him long enough to have such a discussion.

Q You don't whether he had an Advanced Directive or a Living Will yourself. Correct?

A Not to my current knowledge. I would have to look back at the records to find out because we keep things like that.

Q Wouldn't that be something you'd want to know in this circumstance?

A At this point, no, because it wouldn't make any difference.

Q And you've never talked to a family member who ever expressed concern or a willingness to go forward with these, with discontinuing any of these treatments. Correct?

A No. I've spoken with them about discontinuing treatment, making him DNR, and each time I brought this up, I get this resistance.

Q Because the family is not inclined to adopt that position, correct?

A Correct.

Q So we're here because you and/or the hospital wish to impose your standards or beliefs on this family, correct?

A No.

Q Have you taken into consideration that the family doesn't wish to discontinue the treatment?
A Yes.
Q Despite that, you're going ahead on one occasion and stopped the dialysis.
A We would not want to do therapies that are against proper medical practice or against the ethical bases set forth in the statements that the American Medical Association has so nicely codified.

When you have futile therapy in a hopeless case, it is inappropriate to push forward with further therapy, knowing that this can only make things worse.

Q Doctor I appreciate that answer but your answer to my question would be we intend -- we are attempting to impose our wishes over the wishes of the family. Isn't that correct?
A No.

MR. CHRONAKIS: Objection, Your Honor.

THE COURT: Overruled.

BY MR. MARTIN:

Q This man is not brain dead, is he?
A He has no cognitive function. That means that he functions on the level of a microscopic organism. He can react to pain, and that's about it.

Q Have you seen the affidavit of Dr. Schanzer?
A Yes.
Q And you disagree with Dr. Schanzer who says this patient does not respond to pain.
A Yes, he does respond to pain. I know it because I've seen it.
Q You disagree with the neurologist who's treating with him, Dr. Schanzer.
A I have to disagree on that one point.

He doesn't have an cognitive, cognizant response to pain which I think is the way he phrased it in that consultation.

But in terms of the flesh reacting to being irritated, that he stopped.

Q So you disagree with Dr. Schanzer when he says he patient does not respond to pain.
A I told you that I don't think that's what it says there.
Q Well that's what his affidavit says.
A He says he doesn't have any cognizant response to pain.
Q Do you have any special training in neurology?
A No.
Q Do you have any special training in

nephrology?
A Yes.
Q What training is that?
A I did an awful lot of nephrology. I ran a dialysis unit for two years in the service.
Q Do you have any training in wound care, special training?
A No.
Q Any special training in pulmonology?
A No.
Q And the extent of your nephrology is treating patients while you were in the service.
A Then and since but I don't initiate dialysis myself anymore because the field has progressed. I call a nephrologist for that.
Q So you do you hold yourself out as a specialist in nephrology?
A No.
Q An expert in nephrology?
A No. That's why we have people to help us.
Q A PGY-2 is a resident.
A Yes. It means post graduate year 2.
Q I'm sorry?
A It means post graduate year 2.
Q Is this patient awake from time to time?

A There's no cognitive function so he cannot be said to be awake.

Q So if a pulmonology resident visited him on January 22 of this year and found him to be awake, you would disagree with that assessment I take it?

MR. CHRONAKIS: Objection, Your Honor. And there's no foundation for this question. It's not an expert witness. There's nothing in the record to establish what Dr. Millman's being asked to respond to.

MR. MARTIN: Your Honor, I'm going to present him with this. This is a part of the hospital record that I was provided with.

THE COURT: I'm going to overrule the objection.

BY MR. MARTIN:

Q Doctor, I'm going to show it to you because we're at that point.

This is a part of the hospital record for the admission of July of 08 and it's part of the progress record.

Now what is a progress record?

A What the doctor did that day.

Q And this is a pulmonology resident, a PGY-2 pulmonology.

A Yes. It's his pulmonary note.

Q And he would ordinarily make rounds.

A Well with a pulmonologist, yes. I don't know. I can't decipher the handwriting. That's what the number is for because each of them has a number.

Q Okay.

A But the patient has never been awake since his anoxic encephalopathy.

Q I haven't asked -- I haven't asked you a question yet.

This is a round that this pulmonology resident made at ten a.m., correct?

A Uh hum.

Q An S with a circle means subjective.

A Um, yes.

Q What does that mean in this context?

A What they are observing, what they see? And the resident is not trained at the level to be able to assess --

Q You know what? Stop volunteering information. If you could, just please stick with the question. All right.

I know you want to criticize the pulmonologist because he disagrees with you, correct?

A No.

Q Well he says he was at bedside and observed the patient to be awake.

A He does not.

Q What does it say there?

A It says, Number 706 observed the patient to be awake.

Q What did I just say that you say that he does not? I don't understand your answer.

A That's not the pulmonologist. That's the resident trying to learn pulmonology.

Q This is a resident in pulmonology, correct?

A Yes.

Q This is a gentleman who has presumably graduated medical school, correct?

A Yes.

Q He's in his second year of residency, correct?

A Yes.

Q Which means I take it it's a rotating residency at Trinitas.

A (Inaudible).

Q So he is a permanent resident in pulmonology?

A No.

Q Does he round in different specialties?

A Yes.

Q We don't know how long he's been in pulmonology, but we know this is his second year of residency.

A I know how long he's been in pulmonology.

Q And would you think that a medically trained second year resident wouldn't be able to tell the difference between a patient who is awake and not awake?

MR. CHRONAKIS: Objection, Your Honor. I don't mean to be standing in front of you.

THE WITNESS: That's okay.

MR. CHRONAKIS: I want to apologize for that --

Your Honor, Dr. Millman is called as a fact witness to testify regarding his assessment of Mr. Betancourt.

We're now -- certainly he can be confronted with the hospital's record and ask to explain. But we're now having Dr. Millman sort of explain what some pulmonologist who has not testified thought about some record that Dr. Millman did not testify to.

So we're either way outside the scope of direct examination or certainly beyond what a fact witness should be asked.

MR. MARTIN: Judge, first of all if I knew he was a fact witness, I would have had 100 objections to most of his testimony. I thought he was here as an expert.

But be that as it may, I'm asking him to comment on this particular part of the hospital record.

This is not some sophisticated medical opinion. This is a medical doctor's observation of the condition of the patient.

THE COURT: I'm going to overrule the objection. I think it's, I think it's fair cross examination.

The doctor on direct examination indicated in his opinion the patient was not cognitive and is simply being confronted with something in the record to question that opinion.

BY MR. MARTIN:

Q Doctor, is it not the consultant physicians that you called in unless there is some untoward event that requires their attention, would make periodic visits to the patient. Is that how it generally works procedurally?

A It depends on whether their services are still needed.

For Dr. Garth who's the pulmonologist he will see him regularly because he's still on the ventilator. For Dr. Khazaei, who's the nephrologist, she will see him regularly because he's still on dialysis.

For treatment of his infections, both Drs. Losman and the infectious disease people will see him regularly because that's still an active problem.

For treatment of anything else, I would have to call someone else in if there was something that requires someone else's attention.

Q What I'm trying to establish though. What is regularly?

A It varies.

Q Once a day.

A No, it varies with the attending and how often they feel they need to see them.

The infectious disease people, often it's not daily, it's sometimes every other day. You know they have to judge based on the individual patient.

But the nephrologist, it would be at least three times a week. And for the pulmonologist, probably varies. For me, it's daily.

Q The resident then, are they responsible for the day-to-day care of the patient.

A No, he's not on the teaching service.

Q Is the resident someone who routinely or regularly visits the patient?

A No.

Q How is it that this PGY-2 would have seen the patient on January 22?

A He was rotating through pulmonary for that month and would see the patients as part of that rotation just like he would if he were rotating through rheumatology or cardiology or infectious disease, whatever patients were on that service being followed by the doctor who is teaching him, he or she would see on a daily basis as long as they were still being followed by the specialty.

Q Let me show another record on January the 9 of 2008 at 1:26 p.m.

It appears to be -- first of all, do you see a number? Again, this is a PGY-2 pulmonary service.

A Yes. Right. It's the same one.

Q Okay.

A The same doctor. This is the same number.

Q And I'll give you this in a moment.

But the record says that at 1:26 the patient was seen at beside. "He was responsive to touch and verbal stimulus." What does that mean?

A I have no idea since I didn't do it.

Q Well when a patient is responsive to touch, what does that mean to the medical professional?
A If the patient is cognizant, then you'll be able to interpret that.

If they are simply responding in a vegetative manner, then touch response will be if I touch you will --

Q When they say he responded to verbal stimuli, stimulus, what does that mean?
A Ever since his anoxic encephalopathy, I'm assuming here, what I would mean by that is ever since his anoxic encephalopathy he has responded to noise.

So if you call his name or make a sound, drop something, he will turn towards that.

Q Can he communicate?
A No.
Q Does he have a regular sleep cycle?
A No.
Q And he's never awake.
A He's never awake because he's never cognizant. The eyes are open but that doesn't mean you're awake.
Q So when this physician says that he observed on one occasion to be awake, and on another occasion he responded to verbal stimulus and was responsive to

touch, do you disagree with those observations?
A Yes.
Q Doctor, would you -- the same physician, I'm going to show you, talks on another note on January 9 as the patient being arousable. What does arousable mean in this context?
A I don't know.
Q Well do you agree that this patient is arousable?
A No.
Q On January the 19 at 8:25 a.m. this physician says that the patient was awake and responsive.
You wouldn't, in your estimate, find this patient ever to be awake and responsive, would you?
A No, not since the anoxic encephalopathy, unfortunately.
Q Is there a difference between being comatose and being in a persistent vegetative state?
A Neither of them -- I mean persistent vegetative state is a well-defined term.
Comatose there are different levels and it also depends on what you mean by that.
When you don't have any cognitive function, comatose doesn't apply as a concept.

Q What does semi-comatose mean?
A That means that someone is arousable and does have cognizant function. When you don't have cognizant function, people don't talk about coma.
Q I'm going to show you a note from the hospital record on 12/17/08.
Do you recognize who that physician is?
A Yes, that's Dr. Losman.
Q And Dr. Losman says that this patient was non-responsive, was in a semi-comatose state. You would disagree with that I take it.
A I would just put it as vegetative. That's what I would call it.
Q Well there is a medical difference between semi-comatose and persistent vegetative state, is there not?
A Uh hum.
Q And Dr. Losman is what type of a physician?
A He is a wound care specialist.
Q Doctor, as I understand it, strike that. When a physician says that a patient is stable, what does that mean?
A Well it means that their current situation isn't changing, better, worse. It's about the same.
Q Is this patient stable?

A No. There are times when he is. At the moment, he's less stable because he's becoming more septic again, at least as of yesterday.

Q This is something called an inpatient interdepartmental hand-off report. What does that mean?

A You got me.

Q And this physician, -- this person in the interim says that this patient is stable for transfer. What does that mean?

A I don't know. You'd have to ask them.

Q And then on January the 6 of this year, someone entered that this patient was stable for transfer. You don't know what that means.

A Nope.

Q You are his attending physician, correct?

A Uh hum.

Q If this patient were to be transferred, would that not have to be under your auspices?

A It depends on where you're transferring him.

Q Well if he were to be transferred to another institution, would you have to sign off on that

would you participate in that?
A Usually.
Q Have you been actively been participating in trying to transfer this patient to another facility?
A Not any more. The hospital made exhaustive efforts to try and find a place that would accept him for months without success.
So nobody's been trying anymore since they can't find anybody who will take him.
Q Let me show you a note dated January 21, 2009. And I will represent to you that the hospital record that I have I think stops on January 23. So this is the most current that I have.
That there is a social worker by the name of Jessica Oliva or Oliva trying to place him at a facility in New York called Resorts.
A They have tried off and on since he was ready for that sort of thing. But --
Q But you just said that they haven't -- they gave up a couple of months ago.
A Uh hum.
Q Certainly as of January 21, she's still communicating with a place.
A So they --
Q Let me finish the question, Doctor.

She's communicating with a place, that's telling her that they just don't have a bed available.

A The administration told me that no place was willing to take him, bed or no bed. They've tried.

Q The administration is you, is it not?

A No.

Q Are you not part of the administration?

A Nope.

Q You're the chief of cardiology.

A Yup, but that has nothing to do with the hospital.

Q You have privileges at Trinitas Hospital and no other hospital, correct?

A No.

Q Well else do you have privileges?

A Beth Israel, Saint Michaels, UMDNJ.

Q Do you admit patients routinely at either of those physicians (sic).

A No.

Q Facilities?

A No.

Q You admit patients to Trinitas.

A Yes.

Q Your practice is limited to Trinitas.

A Basically.

Q You were designated by Trinitas to speak to the family on behalf of Trinitas.

A No, they asked me to speak on behalf of what his doctors thought was best, not anything having to do with Trinitas, per se.

Q Who asked you to speak with them?

A Mr. Veran (phonetic).

Q Who's that?

A He's CEO.

Q The guy who runs the hospital?

A Yes.

Q What us poor folk would consider the administration, correct?

A He's the administrator for the hospital.

Q This patient doesn't currently have pneumonia, does he?

A Not as of yesterday.

Q He was admitted back in July because they either had or they were concerned that he might have pneumonia.

A He was pneumonia and he had sepsis.

Q Which is a complication of ventilation.

A Can be but it can also be just his underlying chronic lung disease. So --

Q Well in this case do you have an opinion one way or the other?
A No.
Q In the event they did arrest or bring under control that condition.
A At that time.
Q There is nothing, Doctor, as I understand it, correct me if I'm wrong, insofar as his ventilation is concerned. While I realize that ventilation is not -- strike that.
There is nothing extraordinary about that treatment with this patient, is there?
A What --
Q What I mean if there's no conditional machinery, additional personnel required, any additional efforts. He's receiving ventilation as it would be administered to any other patient in need of ventilation?
A Yes.
Q The same thing is true of the dialysis, is it not?
A Yes.
Q He's receiving routine maintenance dialysis.
A Yes, it's not quite the same as it would be for someone else, because there's much more nursing work

that's involved because where he is, he has to go down three flights. Obviously he can't walk. He -- a stretcher, and you can't use the ventilator that way and so they have to have a respiratory therapist ventilate him by hand while this is taking place. So it's a lot of nursing work. I mean they do it three times a week.

Q But that would be true of any patient who would find themselves having to travel three floors.

A If they were on a ventilator. We --

Q So there's nothing --

A I don't think we've ever had this. I don't think we've ever had a patient in his condition who was undergoing chronic dialysis, at least I've never seen it.

Q But other than having to transport him to three floors, there's nothing unusual about the type of dialysis he's receiving.

A Oh no.

Q Or the manner in which --

A It's quite routine.

Q It is your belief, is it not, Doctor, that this, this gentleman will, will die in a matter of months?

A Yes.

Q Regardless of whether or not this treatment is discontinued or not.

A Yes.

Q That's all I have, Doctor. Thank you.

THE COURT: Counsel.

MR. MARTIN: Thank you, Judge.

THE COURT: Redirect.

MR. CHRONAKIS: Your Honor, first of all at this time I would request to move D-1 into evidence.

THE COURT: Okay.

MR. MARTIN: Did you give it to the Judge.

MR. CHRONAKIS: Well I'm asking.

MR. MARTIN: I don't have an objection.

THE COURT: No objection.

MR. MARTIN: No objection.

THE COURT: Okay.

(D-1 placed into evidence).

REDIRECT EXAMINATION BY MR. CHRONAKIS:

Q Dr. Millman, does an attending physician make the final call on patient treatment issues?

A Yes.

Q And you do that for Mr. Betancourt?

A Yes.

Q Now if Mr. Betancourt were awake but in his

condition as you described in terms of his -- if this could be that he were awake and requested dialysis, would you, based on medical judgment and training, would you provide it?

A I would argue against it.

But I don't think that considering his multiple other illnesses that even if his brain were functioning that he would be able to be awake to the point where he could communicate this sort of information. And even had that been true --

MR. MARTIN: Judge, that's way outside of a hypothetical. So I would object.

THE COURT: If you would could confine your answer to the question that was asked.

THE WITNESS: Yeah, I would argue against dialysis under those circumstances.

BY MR. CHRONAKIS:

Q And I want to ask you this doctor.

You were shown part of Trinitas Hospital's record where a PGY-2, a post-graduate year 2 entered some notations on the record.

What, what level of medical experience is a PGY-2.

A It's a second post-graduate year. PGY-1 is the year after medical school. PGY-2 is the second year

after medical school.

Q Is this physician considered a student still?

A Yes, you know, in training.

Q In training.

Are these like the youngest physicians for example on the TV shows they depict in the hospitals are the interns.

A Yes.

Q Doctor, how many years, if you could remind me from your direct testimony, did you say you practiced medicine?

A Since '69.

Q And I know Mr. Martin posed the difficult question of whether Mr. Betancourt would pass in a matter of months no matter what treatment he were or were not provided.

What I want to ask is what condition his body would be in if he were allowed to persist for another few months.

A Things will continue to deteriorate. There would be more ulcers, more pain.

Q What happens if this ulcer gets work. Is there a stage 5?

A No, this is as bad as it gets.

Q All right, in your medical opinion, would the other ulcers increase towards stage 4?
A The nurses will do their damnedest to try and prevent it. My guess is that they probably will be successful. That's a guess.
MR. CHRONAKIS: No further questions, Your Honor.
RECROSS-EXAMINATION BY MR. MARTIN:
Q Doctor, you, you answered counsel's question by saying you would argue against, if you were having a conversation with Mr. Betancourt, you would argue against continuing dialysis.
A Yes.
Q You would not refuse it to that man, would you?
A I've never had a patient in that situation, so it's really hard to know for certain what I would do, but I would strongly argue against it, because it would be a way of prolonging his dying, prolonging his suffering.
And every time this comes up where we have a treatment that's possible, the families and patients, they usually elect to suffer less.
Q In this case, they have not agreed with your --

A No.

Q -- view of the state of affairs.

A Yes.

Q Have you ever participated in a situation like this before, where a family has disagreed and you've gone to court and tried to --

A No.

Q -- force the issue.

And this poor PGY-2, I wish I knew the poor guy's name. For all you know, he's top of the class at Harvard.

A I can answer that one. He is not, or she is not, I'm not sure which it is.

Q Why is that?

A Because (clearing throat) excuse me. We've never had a resident from Harvard -- the attending staff, we have a number of people from Harvard yeah, but not on the residency staff.

Q Whether they're from Harvard or UMDNJ, these physicians are certainly trained in how to assess a patient, make observations of whether he's awake or asleep.

A They're being trained in that. Are they finished? No.

Q All right, Doctor, that's all I have.

Thanks.

THE COURT: I thank you, Doctor, you may step down.

Mr. Chronakis.

MR. CHRONAKIS: We have another witness ready, Your Honor. We have two others, but maybe we can call one other at this time and then discuss --

MR. MARTIN: Judge, could we just -- I have no problem with that.

Could I just have a minute to call Dr. Goldstein and just give him an idea when we're going to get to him which is probably after this witness?

THE COURT: Why don't we just take five minutes, make a call, see about availability and work out a schedule from there.

We'll take five minutes.

(Brief Recess from 10:46:24 to 10:57:02)

SERGEANT-AT-ARMS: Court's in session, remain seated.

THE COURT: All right, Mr. Chronokis, we have another witness of yours available in court?

MR. CHRONAKIS: Yes, Your Honor.

THE COURT: Mr. Martin, your telephone witness still, still available?

MR. MARTIN: I didn't speak directly to the

witness, but as far as I know, yes.

THE COURT: Okay, we'll take, we'll take the witness in the courtroom.

MR. CHRONAKIS: Thank you, Judge.

At this time Trinitas Hospital will call Dr. William McHugh.

SERGEANT-AT-ARMS: Watch your step, please.

Place your left hand on the Bible and raise your right.

W I L L I A M J. M C H U G H, M.D., DEFENDANT'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: William J. McHugh, M-C- capital H-U-G-H.

SERGEANT-AT-ARMS: Thank you.

DIRECT EXAMINATION BY MR. CHRONAKIS:

Q Good morning, Doctor. Please tell the court your educational background, college and medical school?

A Holy Cross College, Down Street (phonetic) University and Medical School in Brooklyn. I did my internship and residency in the Air Force. I remained in the Air Force ten years.

Subsequently, Medical Director at Bell Labs

for a couple of years, and then private practice for the last 30 years.

Q And how long in total, Doctor, have you been practicing medicine?

A If you include med school, 50 years now.

Q And what specialty do you have, if any?

A Internal medicine.

Q How are you currently employed? How are you currently employed? What's your --

A I work four hours a day as Medical Director at the Hospital and six hours a day in my private office with three partners.

Q You're Medical Director of Trinitas Hospital?

A Yes, sir.

Q How long has, have you held that position?

A Four to five years.

Q Can you please explain your involvement with Mr. Betancourt's case.

A My initial involvement was I was assigned to the Prognosis Committee. There were some issues about his remaining in the Intensive Care Unit.

So myself, Dr. Veiana, -- a Prognosis Committee with some input from Dr. Bresher (phonetic) who is Chief of the Intensive Care Unit.

Q Doctor what does the Prognosis Committee at

Trinitas Hospital do?

A Any nurse or doctor can ask for a prognosis consult when the question of liability or likelihood of success for a treatment comes up.

In this case, the patient was in the Intensive Care Unit in a vegetative state, and normally we have three or four patients waiting for Intensive Care beds and the issue came up as to whether he should really remain there when acutely ill people with better survival possibilities were waiting for a bed.

Q Okay. Doctor, when is the last time you saw Mr. Betancourt?

A I actually went to see him yesterday.

Q And does Trinitas Hospital keep physicians' notes and patients' records in the normal course of functioning the hospital?

A Yes, sir.

Q Have you reviewed those physician notes and patient records related to Mr. Betancourt?

A The records are enormous.

I reviewed them last year when I did the Prognosis Committee Review and I reviewed them to some extent yesterday but the entire record is too voluminous to read.

Q And with respect to your role as Medical

Director, how have you been involved with Mr. Betancourt's case?

A Actually, my initial involvement through the Prognosis Committee it's probably because I was Medical Director and not too many people want to spend the time to do that.

And subsequently when the issue of continued treatment came up which was probably in the last month, I became re-involved.

Q Okay.

What -- from your awareness what is Mr. Betancourt's current diagnosis?

A He's in a persistent vegetative state, he's diabetic, he has chronic obstructive pulmonary disease, he has renal failure. He has hypertensive cardiovascular disease with past congestive heart failure, he has multiple major decubiti and osteomyelitis of the bone.

Q In your professional opinion, what is the outlook for Mr. Betancourt?

A There is no outlook. He cannot regain consciousness at this state.

Q Now besides the life support, if you will, to use a layman's term, the ventilator, the dialysis, feeding tube, is there any affirmative treatment that

would improve Mr. Betancourt's condition?

A No. There's nothing possible.

Q In your 50 years of medical experience, have you seen a patient that's been in a persistent vegetative state for as long as Mr. Betancourt has, improve?

A No. This is probably a record. I mean we deal with persistent vegetative state often.

Usually treatment is withdrawn after several days or a week of no responsiveness. It's unusual to see -- I've never seen anyone go quite this long.

Q And in your professional medical opinion, is continuation of the mechanical assistance, the ventilator, the feeding tube, the dialysis, is that medically appropriate in Mr. Betancourt's case?

A Can I comment freely?

This is a state that didn't exist when I started in medicine. These people were dead. He's neither alive nor dead at this point.

We have him on lung support, kidney support, nutritional support, support for his recurrent infectious processes.

We couldn't do this when I started. It's kind of an artifact of modern medicine that this could be continued.

Q In your opinion, is Mr. Betancourt's condition terminal?

A Yes, but it may take some time. And he's been terminal for the last, frankly for the last year.

Q What will happen between now and that time to Mr. Betancourt?

A It depends on how much we continue to intervene.

Q Well let's assume things stay the way they are today, you know, whatever the mechanical sustaining treatment is provided. What will happen to Mr. Betancourt otherwise?

A This could go on for quite a while. I think he'll continue to deteriorate, continue to break down, he will not wake up. He will not become conscious. He'll basically get no better and likely slowly get worse.

Q And what -- Doctor, what specifically will get worse?

A The skin will break down further. You have to realize that the only organ that's functioning really is his heart. Everything else is mechanically supported at this time.

His brain is irreparably damaged. His kidneys don't work. His lungs don't work. His skin is broken down. I guess his liver is working, but everything is irreparably damaged.

MR. CHRONAKIS: Your Honor, may I have a moment?

THE COURT: Beg your pardon?

MR. CHRONAKIS: May I have a moment?

THE COURT: Oh yeah.

MR. CHRONAKIS: Your Honor, I have no further questions at this time.

THE COURT: Mr. Martin.

CROSS-EXAMINATION BY MR. MARTIN:

Q Doctor, in your opinion, is any of the treatment that's currently being administered to this patient doing him harm?

A Only in the sense that we're continuing to treat a hopeless situation.

Q Other than your opinion on that score, there's nothing about the treatment that's ineffective or doing harm.

A It all seems to be ineffective because it's not getting us anywhere.

Q Is any of the treatment doing him harm?

A Yes. I think we're doing damage here.

Q What damage is -- what treatment is doing him damage?

A We're allowing the man to lay in bed and really deteriorate --

Q That's not treatment, is it?
A -- virtually right under our eyes.
Q That's not treatment, is it, Doctor?
A That's because of the treatment.
Q So your opinion is that to continue to keep this man alive is doing him harm.
A Yes.
Q The fact that you need the bed didn't enter into your decision, did it?
A No. In the Intensive Care Unit, yes, sir.
Q That was the motivating force --
A But not on the floor.
Q -- behind the DNR order and attempting to convince the family to discontinue the treatment, wasn't it?
A No.
Q Who's paying his bills?
A I don't know his insurance.
Q Do you know whether or not Medicare is continuing or Medicaid is --
A He's in his 70s. I imagine he has Medicare. I don't know what else he has.
Q Do you know if they're paying the bills?
A Don't. I doubt if the bill would go out until he either passes or is discharged.

Q The record that you say is too voluminous to read, when were you called upon to read it? What stage?

A I think I saw him back in August and I've looked at it periodically in the last week.

Q And why?

A Because I was coming to testify in the last week.

Q Have you -- other than been sitting on this committee that you've described, do you have any direct involvement in his care?

A No, sir.

Q Have you directed any of his cares?

A No, sir.

Q So you've had neither hands on nor participating in calling in consults or directing his care in any way.

A No, I have not.

Q And you've not read his entire record.

A A very good part of it but I haven't read the recent notes.

Q You've read all of the non-recent notes.

A Yes.

Q So are you aware that there are at least some physicians and others in this case that take the

position that he does have some level of responsiveness?

A To my knowledge, people in vegetative --

Q But my question was, are you aware?

A Yes, I am.

Q Have you talked to any of those people?

A No.

Q Have you talked to any of the nurses that are caring for him?

A Yes.

Q Have you talked to any of the family members?

A No.

Q Have you talked to this PGY-2, this poor gentleman --

A I don't know who that was. I might have.

Q Well do you recall speaking to someone who described in the record that he's found this patient on multiple occasions to be awake?

A Wakefulness --

Q Doctor, have you spoken to this particular physician?

A No, I have not spoken to anyone who said he was awake.

Q So you have not called into question this physician's observations.

A No, I would not.

Q And have you spoken to the physician that indicated that on several occasions that this, that he was observably responsive to verbal or verbal stimulus?

A No, I have not.

Q Have you spoken to anyone who's entered into the record his observation that he was responsive to touch?

A He withdraws.

Q I asked you doctor whether or not you've spoken to the individual who's made those observations?

A No, because I'm not sure who made those observations.

Q Because you have not read the entire record.

A No, I've spoken to nine doctors on the case.

Q Doctor, the physicians -- some of the physicians that have signed affidavits or certifications in this case are of the opinion that regardless if this treatment, all of the current treatment is continued, this poor gentleman is going to expire in a matter of months. Do you share that opinion?

A Only in the broader sense. I'm not sure it's a matter of months.

I think he will expire of this condition, but it may take quite a while. They've been successful for the last year in keeping him going.

Q And he's fought right along, hasn't he? He's had all sorts of horrific treatments that he's managed to endure and he continues to thrive, survive rather. Correct?

A He's not fighting. He's just being treated. They're fighting.

Q Well he survived longer than any patient I think you said you've ever seen.

A Longer than anyone I have ever seen.

Q This question is not meant to be offensive so please don't take it that way. I don't know how else to phrase it.

Why are you here? What is your role in this particular proceeding?

A I think my initial involvement was with the Prognosis Committee. I was asked to testify by the hospital lawyer. And that's about it.

Q Have you participated at all in trying to place this patient in another facility?

A No. Those attempts go on regularly. They're done by Social Service.

Q And in this particular case, have those

attempts been ongoing for some time?

A Yes.

Q And there's been difficulty, has there not, finding a facility that's capable of taking a dialysis and ventilator-dependent patient. Is that not true?

A I don't know of any in Jersey. I've been told there's one in New York.

Q And is it after that, what's found to be the state of facts that the hospital decided that perhaps it was time to terminate his treatment?

A No.

In fact, I doubt if anyone in administration is aware of, you know, the social service work.

Q Well.

A That's ongoing, sorry. They continue their work.

Q His treating physicians would certainly be aware that there were attempts to transfer him to some other facility, wouldn't they?

A I would think so.

Q And many of his treating physicians are part of the administration, aren't they? Director of Medicine, Director of Cardiology, Director of Nephrology.

A The Director of Nephrology has nothing to do with the hospital.

Q Well.
A The nephrologists get together and appoint a director. It has nothing to do with the hospital. There's no salary. There's no --
Q Leaving the nephrologist out of it, many of these physicians are intimatately involved in the higher levels of the hospital administration, aren't they?
A Actually no. None of them are administrators.
Q Is the Director of Cardiology --
A They work for the teaching --
Q -- up there in the scheme of things?
A He never comes to or is invited to administrative meetings. He's a teaching physician.

So I wouldn't consider him an administrator. His job is to teach cardiology. He runs a private practice.

Q So you're saying then, Doctor, that there are attempts to transfer this patient to some other facility, and nobody in the administration of the hospital are either aware of it or participating in it?
A The social service workers do their job on a regular basis. I'm sure administration is aware -- well they know he's still there. So obviously no place

was found.

Would they liked to have transferred? I'm sure they would. He's been there quite a while.

Q And has he been stable for transfer since the middle and late January?

A He could probably be transferred.

Q And if he were transferred, it would be to a facility that had to be capable of administering both dialysis and continuing the vent.

A Yes.

Q Okay.

MR. MARTIN: That's all I have for him.

MR. CHRONAKIS: Your Honor, the hospital has no further questions.

THE COURT: Thank you, Doctor.

THE WITNESS: Thanks, Your Honor.

MR. CHRONAKIS: Your Honor, we have another witness ready, but I defer to the court as I would like to proceed. But certainly if we can get the physicians back to the hospital.

THE COURT: That's fine.

MR. MARTIN: As far as I know, my -- Dr. Goldstein is back in his office. So it's not critical that we get him at a particular time.

THE COURT: All right, we'll take the

witnesses here then so they can get back.

MR. CHRONAKIS: Your Honor, we would call Dr. Bernard Schanzer to the stand, please.

SERGEANT-AT-ARMS: Remain standing.

Place your left hand on the Bible and raise your right.

B E R N A R D S C H A N Z E R, DEFENDANT'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Bernard Schanzer, S-C-H-A-N-Z-E-R.

DIRECT EXAMINATION BY MR. CHRONAKIS:

Q Good morning Doctor. Can you tell the court about your education, please.

A I went to City College. After that, I went to the University of Brussels in Belgium. I did a residency in Internal Medicine, and then I was in the service. And then I completed my residency in neurology.

Q You are a neurologist.

A Correct.

Q And how long have you been practicing medicine that focused on neurology?

A Thirty-nine (39) years.

Q Thirty-nine (39) years. Are you familiar

with Mr. Betancourt who is the subject of today's hearing?

A Yes.

Q And how did you -- well, I'm sorry. Strike that.

What's your current employment status?

A I'm in private practice within a group and we practice in the area.

Q Okay, what's your relationship with Trinitas Hospital?

A I am the Chief of Neurology at Trinitas.

Q Okay, and how long have you held that position?

A Thirty (30) years.

Q Um.

A Nobody else wants the job.

Q Doctor, how did you become familiar with Mr. Betancourt?

A As part of our group, we -- our neurologists were affiliated with Trinitas and also with Rahway Hospital and after the tragic event that occurred to Mr. Betancourt, we were asked to see him in consultation and the initial consultation was, I think, last year, by one of my partners, Dr. Cow (phonetic), who saw him after he had had a anoxic event.

That's where he had been extubated and developed a, went into coma.

Q Were you asked to conduct a neurological consultation after that?

A We've seen him periodically and the last time I saw him was last December.

Q And when would you say the first time you saw him was, Doctor?

A Possibly last January after my partner had seen him initially and after he saw him subsequently on several occasions.

Q Have you ever spoken with Mr. Betancourt's family?

A Yes.

Q Do you remember who?

A As part of the Prognosis Committee and the last time at the urging of the Director of Affiliated (phonetic) Care, where the family, there was a family meeting in which I was present.

Q Okay.

What's your -- you know, please describe your relationship with Mr. Betancourt's family.

A This is a very difficult situation for all of us who are concerned here.

And in terms of my relationship with them, I

would go and see him and unfortunately we did not have any good news, and the last time that I saw them in December, which was the first time that they made me aware that they thought that we were terrorizing them when they saw me, because whenever I would see them, I'd give them bad news.

And, you know, unfortunately, it's a very bad situation and you know, I really felt very bad about that, you know, because our intent as physicians is to inform people and you know, to alleviate, if we can, suffering and pain.

You know, obviously there are suffering and I think the family is suffering. The patient is in a vegetative state. I don't think that he is aware of any, of his environment and he's not in any pain. But the family is in a great deal of pain.

And after that last session, you know, we had made recommendations at that time, that you know, they would -- they should either seek outside opinions, if possible, you know, just to reassure them that what was being done was fair and in the best interest of all concerned.

Q Thank you, Doctor.

Can you describe for the court your findings and conclusions from your neurological evaluations with

Mr. Betancourt?

A I don't have my last note. If anybody has it, it was probably in December, in December of '08.

Q Doctor, I have part of the medical record that was produced in this case which is a consultation record from you but I believe it's a July 2008 consultation. Would that be of any assistance?

A Right, because his status really has not changed significantly.

Q Do you feel that you would be able to recall more about your neurological evaluation if you were able to see these documents?

A It would help.

MR. CHRONAKIS: Your Honor, may I --

MR. MARTIN: I don't have an objection to refreshing his recollection.

THE COURT: Show the Doctor, then.

MR. CHRONAKIS: Yes, July 16.

THE WITNESS: So that --

BY MR. CHRONAKIS:

Q Well Doctor, after you've had an opportunity to read it, let me know when you're done.

(Doctor is reading over his notes)

A Yes.

Q Doctor, does reading your notes from July,

2008, does that refresh your recollection of your findings as to Mr. Betancourt's neurological condition?

A Yes.

Q Okay, and can you describe for the court what that is.

A I felt that he was in a vegetative state, and I think that as was mentioned before, he's been in a persistent vegetative state.

And at this point, looking at a year after, we can say that he's in a permanent vegetative state.

And you know what is the difference?

A vegetative state is somebody who's unaware of self and of his environment.

It become persistent by definition if it lasts for more than a month.

And then the question comes in as to in terms of prognosis. So that when we talk about a permanent vegetative state, then we're making a statement of prognosis beyond the descriptive term of the patient's condition.

So that at this point, he's in a permanent vegetative state having continued to be this for over a year.

Q Doctor, in your 39 years as a neurologist, have you seen a patient in a vegetative state for a year whose condition has improved?

A No.

Q Now there's been some testimony and some dispute, if you will, about whether Mr. Betancourt is awake at points.

What's your opinion as a neurologist?

A So that by definition he's awake, but he's not alert.

Q All right, and what does that --

A Or that there's no awareness and that's important. He's got some brain stem function.

If he did not have any brain stem function, which is the criteria for awakeness, he would not be able to sustain any type of survival, okay, would have remained in a coma.

The fact that he's gone into a vegetative state, indicates that there's been -- that there's some brain stem function, and this is part of the function that remains.

Q When Mr. Betancourt is awake as you've defined it, is he able to respond to verbal stimulus?

A No.

Q Is he able to speak?
A No.
Q When Mr. Betancourt is awake in your terms, does he respond to pain?
A There are some reflex responses to pain. There are no awareness of, as far as we can tell, of pain.
Q And from a neurological prospective, what's the difference between those two, between a reflex response and an awareness of pain?
A The very fact that you have brain stem function, right, you have some basic reflexes which are still present.

For example, I described a sucking response when I saw him in July which is a reflex response that if you apply something -- something about his lips, for example a child when you apply a nipple or, it will suck on it. So that this is a very basic reflex and it does not have anything to do with consciousness.

Q Does this sucking sound or the sucking reflex or the awareness of pain, or excuse me, the reflex response to pain, does that indicate that Mr. Betancourt may be improving?
A It's not -- he's not improving. He's -- you know, the important question here is, you know, is that this

is a status. Time is the best guide as to what's happening to him, and he's been in this state for a year. There has been no improvement and the chances of his improving, you know, coming back to a cognizant sleeping (phonetic - accent) state are nill.

There are reported cases of somebody coming out and awakening after ten years. And all of these events have to be investigated.

But in our experience and, you know, this is not -- nothing is 100 percent. When you say probability we're talking about 90 percent, 95 percent, 99 percent. In this case, 99.9 percent the probability of his ever coming back to a cognitive state are nill.

Q How does Mr. Betancourt respond to touch?

A When I examined him in July, and as to this note, I applied pressure to his nailbed which is a significant stimulus and a pain stimulus, there was no response.

So but at times you may find that there may be some withdrawal, right, but these are again basic reflexes that you may see.

As an example, somebody who's brain dead and that's considered, and this is not the case here. But somebody who is brain dead may have some basic spinal

reflexes. That does not mean that that patient is alive or has a prognosis of coming back, because in New Jersey at least, brain dead is considered dead. But you can still see some spinal reflexes being present. So that this is not a significant factor here.

Q I want to go back, if you will, Doctor, to the discussion about whether Mr. Betancourt is awake.

First of all, just to put it in lay person's terms, is Mr. Betancourt permanently unconscious?

A At this point, at this point, he is in a permanent vegetative state and by this we mean that he has sustained significant injury to his cortical part of the brain. That's the thinking brain. That's the part of the brain that makes you aware, makes you, makes us look at each other, talk to each other, communication with each other, and that has been irreversibly damaged.

Q Doctor, when you say he's awake but not alert, does that have any correlation with Mr. Betancourt waking up?

A By awake, we mean that there's, you know, a -- he will open his eyes, for example. All right.

But that doesn't mean that he sees or I mean maybe he sees, but there's no appreciation of his environment. There's no appreciation of self.

Q Now, Doctor there was a review of Mr. Betancourt's medical record in which a second year post-graduate resident or intern at the hospital made a notation on his chart that Mr. Betancourt was awake.

Are you able to give an opinion on what this would mean in the context of neurology?

MR. MARTIN: I object. Judge, we're asking him now to interpret what someone else meant by that observation.

THE COURT: I'm going to sustain the objection as to what somebody else meant by the word "awake." Perhaps the doctor has -- if he were to use the word "awake" what he would mean but --

MR. CHRONAKIS: Your Honor, I feel like we went through a series of questions in which Mr. Martin was able to pose that exact line of inquiry to Dr. Millman, that is, what does this mean here? Why would this person say this? I'm only asking to receive the same latitude that the court previously granted.

THE COURT: I'll -- sustaining the objection.

BY MR. CHRONAKIS:

Q Doctor, what would you understand if you saw Mr. Betancourt's chart and there was a notation by a PGY-2 that indicated that Mr. Betancourt was awake?

MR. MARTIN: I'm objecting to it. Perhaps

the question should be is there some medical significance to the term "awake," or asking his opinion on what it would mean to him.

THE COURT: Well I think time it was phrased what it would mean to him but --

MR. MARTIN: But we're still asking what this particular author meant when he --

THE COURT: What does the word "awake" mean to this witness, and I'll allow him to answer that.

THE WITNESS: What -- you know, what somebody else sees and observe and the term that we use sometimes are really vague, so that, and I would hope I was not one of the preceptors, you know, you have two eyes. You know, when somebody says he's awake, what did you see? You know, you say somebody's awake. What does that mean? Right. So I really am not sure. Did he -- you know, he walked in, he saw something.

MR. MARTIN: Again, he's reading the mind of the author. What does "awake" mean to you, Doctor?

THE COURT: The question, Doctor, is what does --

THE WITNESS: To me, awake is somebody who opens his eyes.

BY MR. CHRONAKIS:

Q And with seeing the reference in Mr.

Betancourt's medical chart to someone observing him as "awake," would that contradict your assessment of Mr. Betancourt?

A No.

MR. CHRONAKIS: May I have a moment, Judge?

THE COURT: Yeah.

MR. CHRONAKIS: Your Honor, no further questions at this time.

THE COURT: Mr. Martin.

CROSS-EXAMINATION BY MR. MARTIN:

Q Doctor, I, I'm sorry. I have your note. I think you may have it in front of you. But the note of 7/16/08, it's called a consultation report, and I take it when you see the patient, you were asked to see the patient.

A Yes.

Q Because your specialty was unavailable, the other physicians, you obtained a history, and I take it you got that from the chart because you weren't able to communicate with the patient.

A Correct.

Q And you did a neurological exam.

A Correct.

Q How long were you in this patient's presence?

A Fifteen, twenty minutes.

Q Did you speak to the family at that point?

A I have no recollection if I did.

Q I was unable to find another consultation note from you. That doesn't mean that it's not there because everybody's described the hospital records as three feet high. But --

A So you haven't read it either.

Q Pardon?

A So you haven't read the chart either.

Q But you did mention that you saw him in December.

A Yes.

Q And would you have made a consultation note? Should there be a note in December somewhere?

A There should be a note in the chart, yes.

Q Any other notes other than those two?

A And there were some other notes by my partners.

Q How many times have you personally seen this patient?

A The last time was in December.

Q Would that the second time since this admission in July?

A I may have seen him another few times. But --

Q And on those occasions, did you make notes?

A Every time that I would have seen him, I would have made a note.

Q So then since July you may have seen him how many times?

A Maybe two or three times.

Q Now you've also indicated you talked to the family.

A We had a meeting with the family, with some members of the family in December.

Q Have you talked to them before that at all?

A I had spoken to them because there had been a previous meeting also with the Affiliated Care Committee and we had spoken to them. So that we have spoken to them on more than one occasion.

Q On that previous meeting, the meeting before December, did that -- was the subject matter of that meeting terminating life support?

A It was -- from my -- my input, my input is not to terminate or not terminate life support but to inform them as to the condition of the patient.

Q Was the purpose of meeting, was one aim or the topic of the meeting, was that the subject of discussion?

A From the patient about their choices and that

there are -- and what the prognosis was.

Q Did the family make it clear that their wishes were not to terminate?

A Correct.

Q And have you discussed with the family their impressions of the observations they've made of their husband and father?

A As of our last meeting, I don't remember. I remember their opinion of what they wanted, but not as to their observations.

Q They expressed to you, for instance, that they believe that Mr. Betancourt does respond to certain verbal stimuli.

A This is -- unfortunately the misconception that people may have --

Q Have they expressed that?

A Wait, wait.

Q No, no.

A You asked me a question. Let me answer it.

Q No, you're not answering it so I would object to your answer.

THE COURT: The question is what did the family say?

BY MR. MARTIN:

Q Have they expressed that to you?

THE COURT: Whether you agree with it or not, it's a question of what did they say.

THE WITNESS: Can you ask your question again then?

BY MR. MARTIN:

Q Has the family expressed to you that they believe that Mr. Betancourt does respond to verbal stimuli?

MR. CHRONAKIS: Objection, Judge.

THE WITNESS: Okay, I don't remember.

MR. CHRONAKIS: Doctor.

THE WITNESS: I don't remember.

MR. CHRONAKIS: It's either this will be discarded as hearsay and the family can come testify or the doctor should be allowed to testify to the content of the conversation, not limited to a yes or no that allows Mr. Martin to put in the family's testimony.

MR. MARTIN: Judge, he wasn't responding to the content of the conversation. He was about to express his views or explanation for what he thinks I'm getting at. That's --

MR. CHRONAKIS: Judge, the question provides the content of the conversation. That's why it's either hearsay or should be allowed a full response.

MR. MARTIN: First of all, it's not hearsay.

Secondly, the family -- I fully intend to put the family on, they would have testified to all of this by now.

THE COURT: With that, I will allow the answer.

BY MR. MARTIN:

Q And your answer was you don't recall.

A Correct.

Q You say in your note that he has no response to pain.

A Correct.

Q Meaning that when you attempt to inflict some, in this case you squeezed his fingernail bed.

A Right.

Q Which would ordinarily elicit a pain response.

A You could try it on yourself. Take a pin and apply pressure to your nailbed. It's a significant stimulus.

Q And he had no response to that.

A Correct.

Q Doctor, in your opinion, he's not experiencing pain.

A There is a reflex to pain and there may be and I did not get a response when I saw him then, but his

perception of pain, he has no perception of pain. So it may induce a reflex, but they are not -- and at the time when I (inaudible) him, it did not induce any response. And by this I meant a reflex response.

Q It means he doesn't feel pain, is that what you're saying?

A And there's no perception of pain, correct.

Q Okay.

What kind of treatment are you administering, what specific treatment?

A In this case, prognosis.

Q All right, so you're not actively directing any --

A Correct.

Q -- of his day-to-day care.

A Correct.

Q And your observations of this patient's care would be limited to those visits that you made.

A Correct.

Q During the 15 or 20 minutes that you spend examining him.

A Correct.

Q And at some point in time, you came to the conclusion that he's in a permanent vegetative state, correct?

A Well I said persistent. At this point, I'm saying permanent, permanent vegetative state.

Q Persistent and permanent are interchangeable.

A No, they're not.

Q What's the difference then?

A Persistent is a description of what's happening. Permanent is a prognosis, a prognosis statement.

Q Okay -- understand that there are progressions, that patients oftentimes progress from a vegetative state to a persistent vegetative state, correct?

A Well, if the vegetative state persists, okay, for over a month, then it becomes persistent.

Q So after a period of time that a patient is deemed to be in a vegetative state, after the expiration of some period of time, whether it be a month or somewhat longer, it's then deemed to be persistent.

A Correct.

Q And persistent, does that mean irreversible?

A Persistent does not mean irreversible.

Once it becomes permanent, then in our experience, then it becomes permanent. In other words, irreversible.

Q What's the difference between persistent and

permanent?

A Persistent is that yes some people have awakened from persistent vegetative states. From permanent, probably, in our experience, none.

Q This hospital record or some of the affidavits and if you care, I'll show them to you, describe this patient as being in a persistent vegetative state.

A Correct.

Q Would you agree with that?

A Yes.

Q Okay.

Now have there been documented cases of people emerging from persistent vegetative states?

A Yes.

Q They are few and far between, correct?

A Correct.

Q But nonetheless there are records of that occurring.

A Correct.

Q And I take it on some occasions that may a result of a misdiagnosis.

A Correct.

Q And would that mean to correctly to assume that there are occasions when neurologists perhaps will

examine the same patient and reach different conclusions as to the state of that client neurologically?

A They may.

Q So are we saying, Doctor, that whether we use the term permanent or persistent, really it's a prediction.

A No. No. I'm going to repeat myself, okay. Permanent means after a period of time. In this instance, after a year's time we have somebody who's been in a persistent vegetative state and now he's in a permanent state.

The chances of this becoming reversible are nill.

Q Yet there have been people who have come out of it after many more years than this patient has been in that condition?

A Correct.

Q Correct?

A There is hearsay and, you know, the anecdotal events but --

Q Well there are documented events in the literature.

A Correct.

Q And we're talking about patients that have

been in a persistent vegetative state much longer than Mr. Betancourt, correct?

A Correct.

Q And --

A Did they say --

Q I conclude from that --

A I'm sorry.

Q -- because that prediction, that estimation, whatever the prognostication, is not -- you can't be absolute, can you?

A I can be absolute that somebody who's been in a persistent vegetative state will remain in a persistent vegetative state and it will be permanent. They may survive in that vegetative state and the question is, do you want to continue that?

But in terms of prognosis, in terms of what to do, right, you've gotta be aware of that. You cannot say you know, he's in a persistent vegetative state after one year and he's going go out, get up and walk and talk.

You have to realize that this patient is in a permanent vegetative state at this point and this is where you're at and you have to decide what you want to do.

Q And that is your opinion that he is in

permanent vegetative state and will not respond, correct?

A Correct.

Q And in those other documented cases where the patient has emerged from that condition, there were physicians who enjoyed the same opinion as you in those circumstances, correct?

A Wouldn't -- now --

Q Can you answer that yes or no.

A No, I cannot say yes or no because I've got to clarify, I wish to clarify.

Q The question is this.

Have there been neurologists involved in the treatment or care of those patients who have shared your opinion, that that particular patient would never emerge?

MR. CHRONAKIS: Objection, Judge. I don't know that Doctor, excuse me.

THE WITNESS: Schanzer.

MR. CHRONAKIS: Yeah, Schanzer. Thank you, sir, is here to qualify --

THE COURT: I'm going to sustain the objection. I don't know that he's not testified that he's familiar with the facts and details of those other cases.

BY MR. MARTIN:

Q Are you? Are you? I mean these are documented cases. I can go to the literature today and find them, correct?

A Yes, you may, and there is a case of someone who stayed in a persistent vegetative state for 25 years.

Q In that particular -- you're familiar with that case.

A It was a case that was followed by Dr. Posner for -- who's a very well-known neurologist. But that patient stayed in a permanent vegetative state.

Q And emerged.

A He did not emerge. He remained in that state.

Q I'm asking you about cases, documented cases, where the patient was in that condition and emerged from that condition.

A The -- I don't know any of those cases which have been well-documented.

Q Okay.

Those patients who have emerged from that condition, some of them have done it spontaneously, some of them have done it gradually.

A You're talking about spectrum and it depends when. We know that people who have been in a vegetative state who have awakened from it. But that's usually most of

the time with trauma, with children, and not going on this length of time.

In this condition, and --

Q I'm sorry. With due respect, I didn't ask you that.

A No.

Q I didn't ask you anything other than do patients who emerge sometimes spontaneous and sometimes it's gradual.

A It may be either.

Q Okay.

So in those cases where it's gradual, what period of time -- when does the recovery process begin? Is there some predictable length of time that they will gradually emerge?

A It depends on several factors, what was the cause of the persistent vegetative state and how much injury has occurred.

Q Is this patient stable neurologically?

A What do you mean by stable neurologically?

Q Is the condition worsening, improving or remaining the same?

A As of July, and my recollection is the evaluation in December, there have been no change neurologically.

Q You may not be able to answer this. If you

can't, tell me.

In a given month, how many medical professionals, and I'm including in that, physicians, nurses, technologists, nurses aides, et cetera, how many medical professionals come in contact with this patient? Do you have any idea?

A I have no idea.

Q In a given day. There are three shifts. How many per shift? Any idea?

A I think probably like three to four per shift. There are three shifts. Multiply it, right.

Q Three or four nurses.

A Right.

Q Then we have residents. We have consulting physicians, attending physicians, et cetera, right.

A (No verbal response).

Q You have to say verbally just so it comes out.

A Yes.

Q Okay.

Would I be correct in assuming that nurses and residents who see the patient more frequently, do see the patient more frequently than perhaps you as a consulting neurologist?

A Correct.

Q You indicated that this patient does not react to verbal stimulus.
A Correct.
Q Cannot speak or communicate.
A Correct.
Q And is that because of the vent?
A No. Because there are people who are on the vent who can communicate.
Q If one of the nurses charged with this man's care says that he cannot always communicate, how would you -- would you agree with that?
A I would say re-evaluate the patient.
Q I'm sorry.
A I would say re-evaluate the patient. It does not make sense.
Q So suggesting that the patient may communicate, you would disagree with that.
A Correct.
Q And there are different ways of communicating either --
A Right.
Q -- verbally or with eye contact or movement, et cetera, correct?
A I think that, you know, you could answer the question by simply going to the patient's bedside and

not only I but all of you would be convinced.

Q Well this person apparently wasn't. So I'm just asking you whether or not -- in your opinion that's not possible.

A I cannot comment on anybody else's observation.

Q Have you ever talked to Mrs. Betancourt about any response her husband may have when she's present?

A We went through with that once more and I don't remember any specific communication.

Q Doctor, just bear with me a minute. I think I'm finished.

Doctor last question.

The fact that in your opinion he's in a permanent vegetative state does not translate to brain death, does it?

A Correct.

Q Okay. That's all I have, thanks.

REDIRECT EXAMINATION BY MR. CHRONAKIS:

Q Doctor, since the first time you evaluated Mr. Betancourt in 2008, has his neurological activity changed in your assessment?

A There has been no improvement in his neurological status.

Q Now I believe we're going to hear testimony that people who have visited, strike that actually.

Doctor if your neurological evaluation is inconsistent with a nurse's, who usually wins out in that conflict?

A You know, I'm responsible for my observations and our training is a little different so that you know I've seen people who are totally unresponsive and somebody has routinely written awake and alert. And, you know, that's you smile and you, you know, go on.

Q Doctor, I believe we're going to hear testimony and understandably convinced and convincing testimony, if you will, that members of the patient's family have seen Mr. Betancourt let's say respond to music or maybe move when music is played.

Are you able to explain something like that consistent with your evaluation?

A In a vegetative state there may be some responses but they are not purposeful, they're not repetitive so that if you're going to make a sound, then the eyes are going to open. But this is a reflex response. This is not a cognitive response.

Q What about if somebody walked into Mr. Betancourt's room and yelled, "Dad" or something to get Mr. Betancourt's attention while he's in the condition he's in now and his eyes moved, you know, towards the speaker's voice, how would you reconcile that with your

assessment?

A Very often patients who are in a vegetative state, and this is the mistake that is often made and I think by the nursing staff, the PGY-2, is that you say something and there's a response that occurs. The eyes open and you say you think that there is cognition. These are really reflex responses, reflex responses to sound.

Which if you hear a bell and the telephone rings, you wake up, you go and you answer the phone. You're able to carry on a conversation.

In this situation, what you hear maybe is the bell, but there's no awareness that the telephone rang and there's no ability even if you could talk, okay, if he wasn't on a vent, if he didn't have a trach, he still would not be able to carry on a conversation.

Q Doctor, Mr. Martin asked you some questions regarding other cases of patients in persistent vegetative states. Are you aware of the medical history of any of those patients to whom Mr. Martin was referring?

MR. MARTIN: He's already testified that he's not aware of them.

THE WITNESS: No.

MR. MARTIN: He hasn't read the case studies.

BY MR. CHRONAKIS:

Q In your medical opinion, if a patient were in a persistent vegetative state who couldn't eat on his own, couldn't breathe on his own, couldn't expel waste on his own, whose skin was breaking down, is this the type of case where the patient would then awake from the persistent vegetative state in your opinion?

MR. MARTIN: Object, Judge. Same thing. If he doesn't know the condition of those patients that have emerged, then how can he answer?

MR. CHRONAKIS: Judge, this is not one of the supposedly documented but undocumented for this hearing cases that Mr. Martin referred to.

I'm asking in his opinion of a separate patient in a persistent vegetative state.

MR. MARTIN: Well then that's been asked and answered as to this patient. We can't get any more conclusive than that.

THE COURT: I think that's -- we've covered that. He has answered that.

MR. CHRONAKIS: Judge, I have no further questions at this time.

MR. MARTIN: I just have one, Doctor.

RECROSS-EXAMINATION BY MR. MARTIN:

Q You were, you were just talking about reflex

responses. Earlier you said they are not repetitive, they are not purposeful. That's why you describe them as reflex, neurologically reflex responses, correct?

A Correct.

Q Okay. If they were repetitive, they would be something other than that, wouldn't that?

A Well then they would become purposeful. If you see that occurring then they may be significant.

Q Okay.

MR. MARTIN: That's all I have. Thanks.

MR. CHRONAKIS: Thank you, Doctor.

THE WITNESS: Thank you.

THE COURT: Thank you.

All right, I'd like to figure out for a moment where we are schedule-wise.

You still have your witness.

MR. MARTIN: We can call him.

MR. CHRONAKIS: I have Dr. Veiana from the hospital here in the Courtroom. I would think it's a fairly short testimony on the level of Dr. McHugh's, the previous witness.

MR. MARTIN: That's fine.

THE COURT: Well, my concern is I have available this morning for you and there is something

scheduled this afternoon.

I know you talked about having a witness available but not until the latter part of the week, till after Wednesday.

MR. MARTIN: Yes, Your Honor. Yes.

THE COURT: And I'm looking at my schedule as to when I can next fit you in and it's looking like Monday.

I'm just -- I hear that we have family members. You have a doctor that we're going to be doing on -- after Wednesday, another doctor to do for the plaintiff and we have a physician in the courtroom. So I'm just trying to figure out scheduling everybody, getting everybody in.

I'm assuming the family could be available some day other than today.

MR. MARTIN: Yes.

THE COURT: Okay.

Now the defense has -- your witness is after Wednesday.

MR. CHRONAKIS: We have one after Wednesday. We have one who is ready here.

THE COURT: How about Mr. Martin?

MR. MARTIN: Cover by phone and that is I was supposed to start a trial in Middlesex today. They're

holding it until tomorrow.

THE COURT: Uh hum.

MR. MARTIN: If I start -- it's a medical malpractice case. It'll go about three weeks, two weeks.

And then they're holding a case in Trenton for me. It's supposed to start Monday after that.

The Middlesex judges are nice people. I just have to talk to them.

THE COURT: Beg your pardon?

MR. MARTIN: I said they're generally nice people who will work with you. I could probably ask them to have Monday morning off or something but I just need to find out what judge I'm assigned to and work with him or her.

The Trenton judges are totally unreasonable, but the Middlesex people are okay.

THE COURT: (Laughter). We're going to put this together one other time. I guess we just need to pick out when that's going to be. And like I said, for me, Monday's looking good.

MR. MARTIN: I just need to maybe over the lunch hour, the break, whatever, if I can find out who the judge is, I can call and say can I have Monday morning off. They generally accommodate us.

THE COURT: Okay. We need probably a couple more hours.

MR. CHRONAKIS: Most of that will be at Mr. Martin's discretion although I'm hopeful if the court has the time to get Dr. Veiana in, I think we'll be quick and it's somewhat hard to schedule although I appreciate --

THE COURT: I'm thinking we can get him in now and then everybody else will have to be some other time and the some other time will be Monday.

Just again looking at the schedule, I can do like 9:30 to 11:30 on Monday or the entire afternoon. So I don't know whether the two-hour block that's available on Monday morning is going to do it, or would it be better just to leave it, start in the afternoon and have -- of course you need to find out from my colleague how kind he or she is going to be to you.

MR. MARTIN: I mean I just need to make a -- I hope I can identify who that is and just make a phone call.

THE COURT: All right, let's get the doctor on now.

MR. CHRONAKIS: Thank you.

THE COURT: We've got a witness in the courtroom. We'll have him testify.

MR. CHRONAKIS: Thank you, Your Honor.

Trinitas Hospital will call Dr. Paul Veiana.

SERGEANT-AT-ARMS: Watch your step please. Place your left hand on the Bible and raise your right.

P A U L V E I A N A, M.D., DEFENDANT'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Paul Veiana, V-E-I-A-N-A.

SERGEANT-AT-ARMS: Thank you.

DIRECT EXAMINATION BY MR. CHRONAKIS:

Q Good morning, Doctor.

A Good morning.

Q Can you tell the court about your educational background, please.

A I graduated from Brooklyn College and Touro College in New York. I went to VA (phonetic) School and I went to Medical School in Mexico. I did a residency in Texas and three years at Saint Elizabeth Hospital, and I've practiced in the area since 1985.

Q Okay.

And what is your specialty?

A Internal Medicine.

Q Internal Medicine, thank you.

What's your current relationship with

Trinitas Hospital?

A I am an active medical staff member. I also happen to be the President of the Medical staff.

Q Are you employed by Trinitas Hospital?

A No, I'm not.

Q Do you have any financial interests in the outcome of this hearing?

A None whatsoever.

Q And are you familiar with Mr. Betancourt, the subject of this hearing?

A I am somewhat familiar.

Q Okay, how did you become familiar with Mr. Betancourt?

A Throughout my -- ~~one of my~~ duties is to go through the Prognosis Committee. I was asked to render an opinion about his medical condition somewhere's in I guess August or so.

And then again I was asked to render another opinion about his care. Since there were multiple physicians who were involved on the care and we felt that there was some inappropriate care that we were doing to Mr. Betancourt, and so as part of our medical staff I would try to support our physicians making what we consider to be moral decisions in order to provide the best care for our patients.

Q Okay, did you have the opportunity to evaluation Mr. Betancourt?

A I did that yesterday.

Q Okay.

And have you reviewed Mr. Betancourt's patient records?

A No, sir. I only reviewed maybe two or three weeks of laboratory works.

I am aware when it first came up for discussion what they were then and what they are now, and my evaluation yesterday compared to what was discussed in the previous meetings that I had.

Q Okay.

And based on your evaluation and those documents you reviewed in those meetings, what was your professional medical opinion of Mr. Betancourt's diagnosis?

A Well there were multiple diagnoses. One that he is in a persistent vegetative state. He also has --

MR. MARTIN: Judge, I --

THE WITNESS: I'm sorry.

MR. MARTIN: I'm sorry, Doctor, I don't mean to interrupt you but Judge I would object because now we're just repeating the diagnosis of other people.

This physician has examined the patient and

has an opinion of his own. Obviously I don't object to it.

THE COURT: That's the question based upon review of the record and his own evaluation, what is his opinion as opposed to what do the records say.

MR. CHRONAKIS: Yes, Your Honor.

MR. MARTIN: But he said he didn't review the records, just some lab --

THE COURT: Reviewed some records, some lab reports over the last several weeks and had done a previous review of some records.

MR. MARTIN: Yes, Your Honor.

THE WITNESS: If I may clarify what my job is as an internist. I look at the patient as a total person, not as a brain, not as a heart, not as a kidney, but I look at him as Mr. Betancourt.

I evaluated him on Tuesday which, I'm sorry, on Monday while he was wheeling down to dialysis which took four people while he was being ventilated by hand. He was stuck several times which he did not flinch.

For us to maintain what I consider to be a normal homeostatic electrolyte balance and to keep his body warm and really not treating Mr. Betancourt, we are treating just a body, because Mr. Betancourt, at least in my opinion, from examining yesterday, he has

contractures of both lower extremities. He's got flexion of both lower extremities. He cannot move his hands.

His eyes open but they're not purposeful movement. He has sagging of the skin. He has three large decubitus ulcers. He has a, his albumin level which tells about nutrition is 1.7. He's getting 2500 calories a day. He's being dialyzed. Essentially, we are very good in keeping a body at a homeostasis without having the person be able to respond to the environment. This is essentially what we have done.

As an internist, I deal with the family, and unfortunately I did not deal with this family, but we need to keep in mind it is very difficult, at least in my opinion, because anything that a patient does a family interprets as a purposeful movement. I do that myself with my own father.

So it's very difficult to detach ourselves from reality and really what it is that the patient has.

So in my opinion as an internist looking at Mr. Betancourt as a total person, there is no reason to think that he'll come out from this state.

As of yesterday, he had three blood cultures done because he spiked a temperature. His decubitus

ulcers are going into his bones. And I'm sure he has osteomyelitis of those areas.

The skin is sagging. It has no muscle tension whatsoever. So whatever reflexes or, that we've talked about are totally inappropriate because it depends on the state of the metabolic state that he's in.

If you examine him the day before he gets dialysis, you're going to get one kind of response because B1/creatine (phonetic) is elevated so it's (inaudible).

If you do it right after dialysis, then you'll get a different response. That's because we have done such a good job in maintaining his homeostatic state, but we're not keeping Mr. Betancourt alive. We're keeping a body that we are everyday violating by doing blood, blood cultures, sticking needles and I don't know what the outcome is.

As a Christian, I believe that there is some value that we should hold very dearly. We don't like to desecrate a body if we don't have to, if there is no chances that there is going to be any hope of recovery.

BY MR. CHRONAKIS:

Q Thank you, Doctor.

Doctor, in your professional medical opinion,

would continuing dialysis and the ventilator, the feeding tube, would this as you call it, desecrate Mr. Betancourt's body while keeping him alive?

A Maybe the best way that I can do this because we can go on forever because the definition what a family sees and what we as a professional see is different.

But as a doctor I can tell you that this is not going to change. We're only actually desecrating the body by sticking needles and drawing blood, then we need to give blood, because we're taking so much and we can't address the problem.

If it was my father, I would have stopped this seven months ago because I don't think this is appropriate at least from my belief and this is what I tell my patients when we come to this.

It's a very difficult decision, and what I usually say it takes no luck to say it's time to stop and then to continue. And it's a decision, it's a personal decision.

No matter what we do, no matter how good we are in keeping the electrolytes in balance, and the ulcers we cannot make it go away because his nutritional state is not going to improve. No matter how many calories we give him, it's not going to improve. He's not absorbing it. So we can give him

10,000 calories a day, it is not going to help.

Q And Doctor while you're on that point, why is it that the patient is not absorbing nutrients even though he's being, he's provided them?

A His body is in a catabolic state. Your GI tract is made of miles and miles absorbant (phonetic) area. On this particular patient that area has decreased significantly so no matter what we give him through the tube, it goes right through and that causes the ulcers to get worse, the infections to get more aggravated, and there is no other way, at least as or right now that we can improve that nutritional state.

And just by looking at his albumin, even though we're giving him all this, we haven't been able to budge it in the past, at least through the ones that I looked at which is six to eight weeks.

Q Doctor, in your experience at Trinitas and otherwise, are you trained or required by your profession to maintain a certain standard of care for your patients?

A Yes, we are.

Q And does the continued mechanical support of Mr. Betancourt meet or is consistent with that professional standard of care?

A No it's not because there's no -- at least from my

opinion, there is no chance that he's going to recover. We are just in a sense doing something that we should not be doing.

MR. CHRONAKIS: Your Honor, no further questions at this time.

Thank you, Doctor.

CROSS-EXAMINATION BY MR. MARTIN:

Q Doctor, that's your view based upon one examination which was yesterday, correct?

A Yes, sir.

Q And a limited review of the records which were some recent lab results, correct?

A Yes, sir.

Q That's the extent of the involvement you've had with this patient?

A In some things you don't need to be involved for a year to know that -- that the --

Q That is the extent, Doctor?

A But that is the extent, sir.

Q Believe me, I'm not trying to argue with you. I just want to understand your testimony.

A Uh hum.

Q And I'd like you to understand that my clients -- and that's why we're here.

A Uh hum.

Q Okay.

I look at this record, Doctor, and I find that there are a number of people, whether they be nurses, technicians, nurses aides, interns, physicians, whoever, who have made entries in this record that seem to contradict some of the opinions that you have.

A If you allow me, Mr. Martin. The reason we have doctors is that we oversee those professionals, because ultimately we take the responsibility.

Some of these people are in training. They don't have the full gamut of clinical experience. That is why they have attendings. That is why we have specialists, and depending again, on the day that they saw the patient, their clinical acumen may not reflect exactly what the patient status is at that time.

Q Well the day that you see the patient may influence your opinions because on the day you see a patient the patient may react differently than perhaps the next day when I see the patient. Fair?

A Would you describe to me by what you mean by reacting?

Q Well, my reaction or my view of the patient may differ than yours.

A Would you be more explicit?

Q Well as a general rule, you and I may look at

the same thing and it's possible --

A In medicine, there is only one way that we look at it.

I saw him yesterday before he was being dialyzed so when I touched him, his B1 was probably over 100. His creatine was probably a little bit elevated and so were his electrolytes, so he was more hyperactivity where if I examined him five hours later after his dialysis, maybe the reaction would be the same. It doesn't change what the outcome is and what the diagnosis are.

The only reason Mr. Betancourt is here is because we are very good in maintaining homeostasis.

Q Doctor, I realize your position in this case and I appreciate how many times you've now expressed your position, but I'd really like you to answer my question.

A Yes, sir.

Q It is possible, is it not, that two medical professionals can see a particular patient on different days and arrive at different conclusions?

A Same specialty.

Q No. Two nurses.

A Again it depends on their training and their exposure.

Q Is your answer yes?
A I -- you need to be more specific.
Q I can't be.
A Then I can't --
Q Progress notes are completed by physicians, are they not?
A There are physicians who are in training. There are physicians who are specialists and in different specialties.
Q Dr. LaComas (phonetic), what's his name (turning pages). Comens, LaCollas (phonetic), one of the attending or one of the treating physicians here.
A He may be a resident. I don't know who he is.
Q Well he's been -- were you here for the --
A No, I wasn't.
Q All right, well it's been testified to that he is I want to say the wound specialist but he is a physician involved in the direct care of this patient.

When he says that this patient is semi comatose, he's wrong, isn't he, in your opinion?
A In my opinion, yes.
Q When a nurse says that he responds to painful stimuli, she's wrong, in your opinion.
A Again, depending what she means by responds to painful stimuli.

Like I explained before, you may touch and he may withdraw, that doesn't mean it's a conscious behavior.

Q When you read the record for this patient and it says he responds to painful stimuli, do you agree or disagree with that?

A I did not read the record. I don't know who made that entry.

Q When someone says that his oral intake or his nutritional intake is good, that he's consuming 100 percent of his food, he's tolerating the meals.

A When was that, sir?

Q January 21, 2009.

A He's got a peg tube going in at 50 ccs an hour. I don't know how he's eating.

Q So you disagree with that as well.

A I mean I think if you look at the two things --

Q When someone says on January the 4 of 2009 that he can't always communicate, it seems to suggest that there's occasions where he can. I take it if that's what the author meant, you'd disagree with that.

A Yes, I do.

Q When they say on January the 4, 2009 that he's tolerating his feedings well. That he has no form of distress, you disagree with that.

MR. CHRONAKIS: Objection. Judge I have no objection to the form of the question as much as can we be informed as to who is saying these things. I want to know so that when I sum up to you, I can decide if this is a 30-year physician versus a nurse or a 30-year physician versus a 4-year physician.

MR. MARTIN: Right now these are sort of anonymous medical opinions.

THE WITNESS: May I make a comment about what --

THE COURT: Wait, wait, wait.

MR. MARTIN: No, doctor.

THE COURT: One moment.

MR. MARTIN: I can only show you the record and tell you that there are names are, Marisel Moux, M-O-U-X. It looks like Chioma Uhuo, U-H-U-O, and there's a series of names. I'm reading from the patient record, the typewritten portion of the chart you gave me.

MR. CHRONAKIS: I can't tell you whether they've been practicing 10 minutes or 10 years.

MR. MARTIN: I don't know that it should matter but --

BY MR. MARTIN:

Q Doctor, when, when someone suggests that he

responds to painful stimuli, you disagree with that.
A Well again if you're just asking, I disagree.
Q The word -- to a medical professional, the word "obtunded" o-b-t-u-n-d-e-d, I'm not sure I'm pronouncing it right.
A Uh hum.
Q That means that a patient's level of consciousness is dull, correct?
A That's what the definition of the word is.
Q And if someone described this patient's level of consciousness as dull, you would disagree with that.
A Again, I don't know who's making this and what context they're being used.
Q But you would disagree with it.
A Again, you need to be more specific.
Q Doctor, you -- you at one time were President of the Executive Committee of the Hospital?
A I'm still is.
Q What does that mean?
A Executive Committee, we meet all the different heads of the Department and we try to do what's best for the patients in the hospital.
Q Who do you report to?
A I don't report to anyone except the Board of

Trustees.

Q And when these records describe in various places that this patient is stable, do you agree with that?

A No, he's not stable.

Q And do you think, Doctor, that even with the continued treatment that this patient's going to die in the near future?

A Yes, he is.

Q That's all I have. Thanks.

MR. CHRONAKIS: No further questions, Your Honor. Thank you, Doctor.

THE COURT: Thank you, sir. You can step down.

We can use the next few minutes to try to find the, first of all, find the availability of your witness next week. If you can reach out and make a call and try to put together the schedule for the wrap-up of the case.

(Pause in proceedings)

SERGEANT-AT-ARMS: Superior Court's in session. The Honorable John Malone presiding.

THE COURT: You can be seated, sir.

All right this is Docket F-33881-07, it is a request to stay an eviction… --

(Whereupon, Judge proceeded with new case; record in the matter of Betancourt v Trinitas concluded for the day)

CERTIFICATION

I, Lynn Cohen-Moore, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of BETANCOURT V. TRINITAS HOSPITAL, heard in the Union County Superior Court, Chancery Division, General Equity Part, on February 17, 2009, Tape Number 032-09, Index #9:40:28 to 12:30:29, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

AUTOMATED TRANSCRIPTION SERVICES

BY: Lynn Cohen-Moore

Lynn Cohen-Moore A.O.C. #368

Dated: March 11, 2009

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
UNION COUNTY, NEW JERSEY
DOCKET NO. UNN-C-12-09

BETANCOURT

Plaintiff

vs.

TRINITAS HOSPITAL

Defendant

TRANSCRIPT

OF

HEARING

Place: Union County Courthouse
Two Broad Street
Elizabeth, New Jersey 07207

Date: February 23, 2009

BEFORE

THE HONORABLE JOHN MALONE, J.S.C.

TRANSCRIPT ORDERED BY:

REBECCA A. EDELMAN LEVY, ESQ. (Garfunkel Wild & Travis)

APPEARANCES:

JAMES MARTIN, ESQ. AND TODD DRAYTON, ESQ.
Attorneys for the Plaintiffs, Betancourt Family

PHIL CHRONAKIS, ESQ., REBECCA A. EDELMAN LEVY, ESQ.
AND SAM GERMANA, ESQ. (Garfunkel Wild & Travis)
Attorneys for the Defendant, Trinitas Hospital

LYNN COHEN-MOORE
AUTOMATED TRANSCRIPTION SERVICES
P.O. Box 2230
Laurel Springs, New Jersey
(856) 784-4276

I N D E X

February 23, 2009

THE COURT: All right, we've sort of been doing things out of order, I don't -- so I don't know what order we're in.

MR. MARTIN: Judge, I guess we're going to take some of my --

THE COURT: Okay.

MR. MARTIN: -- my witnesses at this point.

THE COURT: All right.

MR. MARTIN: Dr. -- I'm sorry Dr. Goldstein who is the nephrologist who is available by telephone. And I have three (3) members of the family that would like to testify.

THE COURT: Okay. Is there any preferred time to try to get a hold of the doctor?

MR. MARTIN: I don't know.

I think he's -- he said he was available all afternoon so --

THE COURT: Okay um.

MR. MARTIN: Maybe we can put one of the witnesses on and I'll ask Todd maybe to contact him, just to make sure he's not with patients or something.

THE COURT: Okay, a good idea and then we'll get an idea of, of availability.

On the defense side? I think when we left

there was one (1) more witness that was going to be called? Is that still the case?

MR. CHRONAKIS: Yes, Your Honor, Dr. Khazaei, Trinitas Hospital's nephrologists should be arriving at about 2:30, 2:45.

THE COURT: 2:30 by phone or --

MR. CHRONAKIS: No, Your Honor, she'll be -- she'll be here.

THE COURT: Oh she will physically be here around 2:30, okay.

MR. CHRONAKIS: Yes, so we would ask if it works out with the schedule, to maybe make her the next witness at that point, you know, at whatever point we are in the proceedings if that works.

MR. MARTIN: That's not a problem.

THE COURT: Okay I said we -- everyone's been very accommodating on just sort of taking folks out of turn so I think we can just keep doing that. All right, we'll take a perhaps a family member now.

MR. MARTIN: Jacqueline, you wanna come first?

J A C Q U E L I N E B E T A N C O U R T, PLAINTIFF'S WITNESS, SWORN

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Jacqueline Betancourt.

DIRECT EXAMINATION BY MR. MARTIN:

Q Jacqueline, how are you related to Ruben Betancourt?

A He's my father.

Q How many other children did your father have?

A Two.

Q What are their names?

A Robin Betancourt and Elvis Betancourt.

Q They're your brothers who are here in court?

A Yes.

Q And your mother's here as well; correct?

A Yes.

Q And what's her first name?

A Maria Betancourt.

Q If I recall in reading the records, your father is currently 73 years of age?

A 73, yes.

Q Was he retired at the time that this incident occurred?

A Yes.

Q What did he do during the course of life? What was his occupation?

A Um, he worked in the Singer Factory for over 15

years and then he also had another job where he worked as -- like it was like loading and packing and stuff like that company. He worked there like almost ten (10) years also.

Q Fair to say that his -- the course of his work-life it was physical labor that he was involved in?

A Yes.

Q Before this incident with -- where he had the surgery at Trinitas, just generally what do you know about the state of his health?

A Well he had problems -- he had diabetes -- he was diabetic. He had high blood pressure. But besides that, he had no other problems.

Q The diabetes and the blood pressure were they being managed?

A Yes.

Q By who? Who was his doctor?

A He was going to the clinic at first. He was seeing the doctors there. And then he had some doctors that were seeing him at the clinic and then he was seeing Dr. Remolena (phonetic) for his pulmonary doctor and as a PCP I think he was seeing Dr. Plowca (phonetic) who was managing his diabetes and his blood pressure.

Q Were they under control, those conditions?
A Yes.
Q What was his level of activity in terms of you know what did he do from -- in his daily life prior to this incident?
A Prior to this?
Q Yeah.
A He was always active, he was always working and he would make time for the family. We were always going out and stuff like that.

He was always taking an interest in you know our -- our lives. If I needed something with my car, or anything to be fixed, or with my daughter, he was involved with her and everything like that.

Q Do you live at home?
A I live next door to my mom.
Q So how often would you see your father? Let's say in the last five (5) years?
A Everyday.
Q Talk to him everyday?
A Yes.
Q How about your brothers? Where do they live in terms of where your father is?
A They live with my parents, they live next door.
Q Okay. Describe your family relationship.

A Uh, we were a close family. Everything my father did was basically for us. It was -- he was dedicated to my mother and to us.

My father never really went out socially anything. It was basically work and he would come home and dedicate himself to our -- his family.

Q What do you do for a living?

A I work as a medical assistant.

Q For whom?

F For Dr. Millman.

Q Dr. Millman's one of the physicians that testified here.

A Yes.

Q Correct?

A Yes.

Q What's his specialty again?

A Cardiologist.

Q Dr. Millman is the attending physician, in other words he's the one that admitted your father at least took over your father's care at the hospital. Is that right?

A Yes.

Q And have you had discussions with Dr. Millman about what's been proposed here?

A Um, basically no. We've talked about what was

said in the meeting. They basically told him to tell me what was going on with the meeting and after what was gonna to be done. But basically we don't really sit down and talk about it.

Q Okay.

I'm going to get back that but before I get off track, let me just ask you this.

Some -- at some point in time and I forget the date but it is, as I understand it, its well over a year ago your father was diagnosed with a condition that -- that caused him to be admitted to Trinitas for purposes of surgery, correct?

A Well actually he was in the hospital and he went in for a cough. He was having blackouts.

When he went in through the emergency room we took him into the hospital because he was having blackouts. He had two (2) incidents that day.

When we took him into the hospital, they basically -- he had a cough that wouldn't go away so we took him to the hospital 'cause he had those two (2) blackouts at a time and they discharged him.

They basically told him it was a cough and that it was nothing to worry about. He had to see a pulmonologist and they had to do other studies but we were not told that he had a tumor, we were not told of

anything.

The day -- well actually a week after he was discharged from the doctor's office, they had ordered a chest x-ray and a week later when we went to the pulmonologist' office he's the one who actually caught me very off guard 'cause we didn't expect this.

He said to me, "did you see the cancer doctor?" And I said, "what are you talking about?" He said, "Well we did a chest x-ray of your father and it came out to be that he has a tumor, and a very large tumor in his chest."

Q Was your father aware of that before you talked to him?

A Not at all.

Q You sure of that?

A I'm positive.

Q Now there are occasions when you know fathers hear things and don't want to shield the family are you sure?

A My father never complained, never complained about anything.

Q So ultimately just to fast-forward a little bit, he was admitted to the hospital for purposes of having surgery, correct?

A Yes.

Q And it was on the Thymus gland?
A The thymus gland, yes.
Q Um, who did that surgery?
A Dr. Cotianus (phonetic).
Q And were you present in the hospital when the surgery was done?
A Yes.
Q Did you have a chance to talk to Dr. --
A Cotianus?
Q Cotianus after the surgery?
A Yes. After he did the surgery basically he told us the chances were very high, and he was gonna try to remove the whole tumor, and it was about a six (6) hour surgery and it was very successful.

He said that everything went very well and that you know after that, he was gonna have chemotherapy or radiation. They were supposed to do radiation and he was supposed to be up and -- you know he was supposed to be fine.

Q Now something occurred after that, correct?
A Yes. Um --
Q Tell us -- tell us what happened and how you learned about it.
A Well my father was in ICU post-op from the surgery. It was not even three (3) to five (5) days

after the surgery and supposedly -- I saw him the night before this happened Saturday. Saturday afternoon, I saw him.

When we went to go see him he was post-op he had -- they had intubated him with a tube and I guess they do that for purposes after surgery.

He was doing fine, and they had restraints on him -- on his hands, which we thought it was normal but you know we didn't say anything about it.

Q Let me stop you for a moment, when you say he was doing fine, was he awake?

A He was awake and he was alert. We asked him if he was in pain, he would nod or he would say yes, no. He was blinking, he was up and alert as if nothing.

Q Okay. Yet his hands were restrained?

A Yes.

Q How were they restrained?

A They had -- he had two (2) things on his hands that were holding his hands down from his bed-side, and he had the tube inside of him. And, of course, he would constantly like move around, you know 'cause the tube I guess was like in his way and stuff like that. But we would tell him you know calm down, it'll come out soon, just relax.

Q All right, and what happened then after

that?

A Well that afternoon we went home, I went home and that was a Saturday; that Sunday -- no that was a Saturday. Sunday I wasn't there to see him, and then my brothers were there with him and I didn't go Sunday to see him 'cause I was with my daughter.

That Monday afternoon, it was around 11:00 in the morning. We didn't get any phone calls, we didn't get anything, I went to go see my father in ICU.

When I went to go see him I found him with his eyes rolled back and he wasn't act -- reactive or anything.

Q What'd you do?

A I asked a nurse what had happened and nobody could explain to me what had happened.

And Dr. Cotianus came in and he said to me he didn't understand what had happened. He said he was alert, he was up and that he didn't know why he was in this condition.

Q I know you said your father's eyes were rolled back. So was he responsive at all? Were you able to --

A No.

Q -- get his attention in any way?

A Not at all.

Q All right, what happened next?
A And Dr. Cotianus said that during the night he had went into cardiac arrest and that he had self-extubated his tube, which I didn't believe that, because my father was restrained. He had restraints on him.
Q But other than you walking into the room, did anybody tell you about that?
A Nobody called us, nothing. That's the first thing I said to him. Why didn't we get a phone call? And he said, Well, I didn't want to bother the family, it was late at -- in the night. I said I don't care if it would have been 3, 4, 5, 6:00 in the morning you could have called us; this is something that doesn't go like this. Nobody called us, no nurses let us know anything.

I went around 11, 11:30 if I wouldn't have gone into see him, nobody had made any attempts to call the family, call any of us. They had all our numbers, cell phones. They had my work number. They knew I worked for Dr. Millman, they knew I was right across the hall.

Q All right. That -- Jacqueline from that point on, has your father ever been able to communicate with you?
A Um, there was little things like he would move his

head around and he would look at us and stuff like that; but like physically talking, no.

Q I want -- I'm gonna admittedly jump around a little bit, but I have a couple of points I just want to cover.

At some point in time, your father was discharged as I understand it from Trinitas to another facility. Where was that?

A He was sent to Kindred Hospital in Rahway. It's in Rahway Hospital but its one of their floors, fourth floor which they deal with patients that are on the ventilating machine.

They kind of wean them off. They send them there to wean them off the machines.

Q And was he ever weaned from the machine?

A Yes. He was weaned off several times. He was weaned off I would say more than two (2) times, three (3) times off the machine.

Q And how long was he in Rahway?

A In Kindred, he was there a couple of months, I would say about four (4) months.

Q Tell us a little bit about his condition while he was there.

A While he was there, he was you know he was alert. You know he was off the machine, they had got him off

the machine so he was breathing on his own, everything like that he was responding well to his medications. At that time he wasn't on dialysis or anything his kidneys were functioning, everything.

Q How about responding to you? Was he able to do that?

A We would call him, we would say dad, dad, dad and he would turn his head and look at us and move his head around and we would walk in the room and we would call him and he would look at us and you know he would move his hands and stuff like that.

Q And you've heard from some of the physicians that have testified suggest that that's a just a response to noise or something of that nature. Why don't you think that's what was happening?

A That's not a response, that's not a reflex.

If we go into the room and we call him dad, dad, dad he would turn and look for us and focus on us and look directly at us.

Q Are you talking about on one occasion? Or how often was that?

A This was different occasions he would do this. Even when he was -- they sent him to JFK Hospital when he was doing rehabilitation.

He had a speech therapist, he had a physical

therapist and they were telling he could grab the ball and hold it. They had him sitting up in a chair while they bathed him and everything. So --

Q So I take it he left Rahway.

A He went to Rahway and then went to JFK Hospital.

Q How long was he in JFK?

A He was in JFK Hospital I would say about three (3) months.

Q Why is it that he left JFK?

A He left JFK because they had said that the therapy that they supplied was basically too intense for him at one -- one moment.

They said that you know they did advanced therapy and it was too -- too advanced for him and then they sent him back to -- I think he went to -- well actually from there they had sent him to a nursing home; I'm not sure or to the hospital and back again. No actually he went to -- he went -- he was in JFK then he went into ICU and then he went back to Trinitas.

Q Why ICU?

A Um, his blood sugar had dropped. His levels had dropped and then they -- they had him there for a couple of days and then after that they told us basically that you know he was there a couple of months and they couldn't keep him there and they sent him back

to Trinitas.

Q At the admission that we're talking about now? In July of this year?

A I think so, yes.

Q All right, as I looked at the records that were supplied, he was admitted sometime in July and he's remained in Trinitas ever since.

A Yes.

Q What was his condition when he was admitted to Trinitas in July?

A When he was admitted in July he was basically, you know, the same. He was alert but he wasn't speaking or anything like that but he was alert. He would move his head around and stuff too. They had taken him off the vent machine. So he was basically -- I don't -- for some reason, I don't know why, every time he ended up in Trinitas after each admission, every time he went he in, they put him on the ventilator machine and they wouldn't be able to take him off.

Like we would ask them he was off the machine for a couple of months, why all of sudden? And they would say well we're trying to wean him off and he can't come off the machine. Which I find very hard because in JFK he was off the machine; in Kindred they managed to take him off the machine. In the nursing

homes that they were in, he was off the machine.

Q As -- as you go forward from Kindred. In terms of his responsiveness to you or other family members, how did that develop?

A Well basically he was, you know, looking at us, he was doing stuff like he would move his head around and they kept telling us it was reflexes. He would move his arms. Nurses would come in and he would close his mouth really shut.

He would -- actually when they went to go clean him too he would close his legs, move his legs and close them. I guess he was -- I don't know if he was in shock or if he was scared or we would see the different reactions.

When doctors would come in he would have his eyes like bulge open and he had like this face. We would come in on several occasions when he would have a mad face, he would just be upset.

I mean it was just different occasions we would come in and we'd find different expressions on him.

Q When you say that he would clench his mouth closed, in response to anything in particular?

A When he would see the nurses and the doctors come in, he would clench his mouth very shut. He would

automatically just go straight to his mouth and clench it.

Q Was he being administered medications orally?

A No, because they were -- they had put in a central line, and basically all his medications had gone in before that.

Q Since he went in in July, has he had the breathing tube? Or has it been in and out?

A It's been in and out.

Q Okay. Um --

A No when he was in July it's been in, they haven't taken it out. He's been on the breathing machine.

Q Jacqueline when we first came here some three (3) weeks ago, whenever it was, it was in response to a couple of things, one of which we discovered there was a do not resuscitate order in your father's file. Were you aware of that before we were here in court?

A No.

Q Did you ever authorize it?

A Well what happened was they had told us that they had held a meeting and my brother had went to the meeting. They had wanted all of us to attend and we didn't go. I didn't go 'cause it was too much for us. Every time we went to the meetings you know it's too much for us to handle, my mom doesn't want to go

neither. So my brother went to the meeting. They said that my brother had agreed and they had -- they had signed papers that he had put a DNR. He said he never did that. He never spoke to them regarding a DNR or anything.

Q Yeah. Is this the DNR that we're talking about from a couple of weeks ago or did they put one in before?

A This is before.

Q All right when was that?

A That was when they had that January 14th meeting, prior to that January 14th meeting. Prior to that, a couple, a think like a couple of months before that.

Q All right, so now when you found out a couple of months before that that order was there, what -- what did you do about it?

A My -- my brothers went and my mom and they told them to take off the DNR, that they had never agreed, they had never said to put the DNR, so it was taken off.

Q It was taken down.

A Yes.

Q Now a second one was put in?

A A second one was put in after their meeting. And we weren't aware of it.

Q Did you know?
A No.
Q Did any family member ever become aware of it before it was done?
A No.
After the fact that they did it, that's when they told Dr. Millman and Dr. Millman had told me that they had put the DNR and they had put everything else and that basically they didn't need the family's consent, that they could do it.
Q Were you ever told prior to it happening that the dialysis was going to be stopped at a specific day or time?
A No. They never let us know.
Q Was stopping dialysis something that was discussed with you?
A No.
Q Now my understanding is --
A When everything happened, when the meeting happened I called Dr. Khazaei that day and I spoke to her and she said to me, these were her words to me. "Don't worry. Nothing's gonna happen, they're gonna have a meeting with the family and let you guys know what was made, the decision before they do anything."
After that they never let us know and they

just shut the port -- the cath -- the port where he has the dialysis that's when they put the DNR into effect and they didn't let us know at all, anything.

Q I know -- I understood Dr. Millman to say that he was, I don't know if designated is the appropriate term, but he was asked to speak to the family about stopping the dialysis.

A Yeah he told us that they were gonna start -- stop the dialysis and that -- that that was the decision that was made in the meeting.

Q And he never told you the date and time they were gonna do that?

A He didn't tell us that.

Q It was after that that you called us?

A Yes.

Q Your father didn't have a Will, correct?

A No.

Q Nor an advanced directive, or anything of that nature?

A No.

Q You've asked us to oppose what the hospital is proposing to do here and that's to discontinue the dialysis. Why?

A Because we --

Q Do you understand his condition?

A Yes.

Q Do you --

A We understand the condition and we feel that we understand what's happened to him and they say that dialysis is doing him harm, but the dialysis is not doing him harm.

I mean you know we're just trying to keep him where he's comfortable where he can -- you know why can't we make that decision? We want to make that decision. We're his family members, that's what he has a family for, for us to make the decision whether you know he's ready to go or not.

Q Do you have a sense, Jacqueline, what your father's decision would be were he to have a vote in this?

A If he was here right now and if it was the other way around where it was one of us in his position, he would be doing the same thing I'm doing right now.

Q Why do you say that?

A Because my father is a fighter. He will not give up. My father's been through a lot and he has not given up.

MR. CHRONIKAS: Your Honor, may we approach?

THE COURT: Mr. Chronikas you can --

(Discussion at Sidebar).

MR. CHRONIKAS: Judge, would it be appropriate to ask without Ms. Betancourt on the stand?

THE COURT: I'm sorry?

MR. CHRONIKAS: Would it be appropriate to do this without Ms. Betancourt on the stand. I don't want to have any overhearing.

I want to speak freely without saying anything that would upset Ms. Betancourt.

MR. MARTIN: You want her to leave?

MR. CHRONIKAS: Just for a moment.

THE COURT: Can you step down for just a moment? Sorry.

MR. CHRONIKAS: Judge, I know there's no jury here so a motion to strike part of this testimony may be inappropriate but I do want to ask that the testimony regarding this patient's care at JFK, at Kindred, the testimony regarding his medical condition, not her observations, of course, but you know what other physicians said and other physicians concluded, I would suggest that that's either incompetent testimony or complete hearsay. Meaning we have no way of knowing what happened at JFK or Kindred other than this witness's say-so and this is not a trained medical personnel who should be telling you what Trinitas'

doctor said.

So if it's not a motion to strike, I'd at least ask Your Honor to limit if not exclude that testimony from consideration.

And also, I'm sorry, and also to the extent we're here on a preliminary injunction motion and governed by the Crowe standards really goes to a little beyond maybe likelihood of success.

MR. MARTIN: I'm not clear on what doctors' testimony you're objecting to? The surgeon?

MR. CHRONIKAS: No, no I'm objecting to a description that asked this court to find as fact of what happened at other hospitals.

MR. MARTIN: She's only described what she's seen.

MR. CHRONIKAS: Well, to say a conclusion like this hospital determined he could be weaned off the ventilator and therefore Trinitas didn't or you know he was moved to ICU for this reason, I don't know that this witness can testify to.

MR. MARTIN: Well, it was obvious that they determined he was capable of being weaned from the ventilator; they took him off of it.

She can -- I mean she knows why when he returned he was returned to ICU because his blood sugar

dropped. I don't know that that's not factual.

MR. CHRONIKAS: I'm just concerned that --

MR. MARTIN: Well, in terms of the surgeon, the reason I asked the surgeons -- about the conversation with the surgeon afterwards, you know, whether it's true or not, the family's of the opinion that that surgery went successfully, and I mean there was some suggestion here by Dr. Millman that he has this malignant tumor and he's gonna die of the tumor.

And as far as the family is aware whether, you know, this treatment -- the family's impression is that he successfully survived that surgery and could have expected to recover. That was the only point for that.

MR. CHRONIKAS: Maybe -- maybe it goes to the weight of the evidence then, Judge.

THE COURT: I think it does.

I mean probably the only thing of JFK testimony was the -- the weaning off of the ventilator and I guess how successful that really was.

But again, she could at least observe the periods of time that she saw that there were occasions when he wasn't on the ventilator. So --

MR. CHRONIKAS: But the -- I'm sorry.

THE COURT: I mean how -- how successful it was may be a -- a medical opinion but at least -- at least I think I understand that there were periods of time that she saw her father off the ventilator so -- so that it's -- she's competent to say that.

MR. MARTIN: Again, my only point in bringing that up is that he's had good periods and bad periods.

MR. CHRONIKAS: I understand.

The only other thing, Your Honor, is if Mr. Martin were willing to stipulate that Ms. Betancourt and the other family members don't have any formal medical training, I could avoid a somewhat unpleasant or not to be disrespectful, you know, question on cross, meaning I think we all would agree on that. But I don't want to stand up and say so you're not a doctor are you? Cause it would seem disrespectful. Is that --

MR. MARTIN: I honestly don't know if it would be or not. I don't think it would be.

MR. DRAYTON: I mean she works for Dr. Millman so --

THE COURT: What does -- I think I missed that. What does she do for Dr. Millman?

MR. CHRONIKAS: He said, I think Dr. Millman

testified that she was an assistant and then he said maybe secretary and he didn't say only secretary, I couldn't quite.

THE COURT: Yeah, I believe he used the word assistant and some -- so I don't --

MR. CHRONAKIS: Certainly physician's assistant is -- maybe I can ask -- maybe I can ask.

MR. MARTIN: Yeah, maybe you can ask.

THE COURT: If you want to just clarify that as to what her job with Dr. Millman is.

MR. MARTIN: One of her brother's a banker; I don't know what the other one is.

MR. CHRONIKAS: Can he stipulate as to the other two?

MR. MARTIN: Sure.

THE COURT: Okay.

MR. CHRONIKAS: I have some questions then.

THE COURT: All right fine.

(End of Discussion at Sidebar).

CROSS-EXAMINATION BY MR. CHRONAKIS:

Q Good Afternoon, Ms. Betancourt. My name is Phil Chronakis. I know I've seen you here before and I'm an attorney for Trinitas Hospital, and I know this is difficult so I just have a few questions regarding your responses to Mr. Martin's questions.

You testified that at certain points you observed your father clenching his mouth or making eye contact with you or other members of your family. Do you recall what dates those were?

A These were more than one (1) occasion. This wasn't like a one (1) incident time that this happened. This would be different occasions. Every time we walked into the room he had a reaction. Every time nurses came in he had a difference face; he had a different reaction.

I mean us as the family members dealing with him day to day seeing him and going in to visit him and dealing with this, we would know.

Physicians walk in five (5) minutes and they leave. They don't have time to look at that, they don't have time -- they don't even give us the time of day to talk to them.

Q But this is happening as soon as you're walking in, right?

A When we're there with him he has different reactions. I mean if we're there and nurses walk in he'll take his mouth and he'll clench it really tight and then once they try to do like exams or if they have to administer anything, he'll clench his hands really tight against his chest. He'll clench his legs.

Q When's the last time you observed the clenching of his mouth or hand?
A This happens on different occasions like I said.
Q When's the last time, Ma'am?
A I'm not sure.
Q Well, would you agree that your father has become less responsive?
A No, because he has different moments. When we go in there's different reactions on different days. Not every day, he's gonna look at you, not -- you know.
Q Now I understand you are -- you work with Dr. Millman.
A Yes.
Q What's your -- what work -- kind of work do you do with him?
A Medical Assistant, secretarial work.
Q Okay. Is -- is it all secretarial work? Or is there any medical?
A Medical Assistant also.
Q Okay, and what do you do as a Medical Assistant?
A EKG's, we put the blood work away. Basically he does everything, he does the blood work, he does his chest x-rays, he does everything so basically we just assist. We do EKGS, if he needs a translator I go in

the rooms with him. You know if he needs to do an exam I'll go in with him if it's a female and stuff like that.

Q Do you have any professional medical training?

A No. I went to school for Medical Assistant.

Q Do you know what the medical standard is for weaning a patent off a ventilator?

A No.

Q No.

Has it occurred to you that one reason that your father has not been off a ventilator since returning to Trinitas last July is because his condition is worsening medically?

A No. Because before they used to make an effort. They used to come in and the physical -- the respiratory therapist used to come in and used to tell us, oh we've tried to wean him off the machine for a couple of hours and you know it didn't work. After a while they stopped doing that.

Nobody has come back to us with any output or anything like that. Basically they walk in five (5) minutes and then walk out.

Q Ms. Betancourt, you understand that if despite your wishes that he be -- your father be weaned

off the ventilator, you understand that if Trinitas followed those wishes and he's not medically appropriate for weaning, he would be unable to breathe, correct?

A Yes.

Q You would want that?

A No.

Q Now you described your father as a hard-working man, correct?

A Yes.

Q Very active? Um, given the condition he's been in for over a year, what you've observed, what the physicians from Trinitas testified about last week, as an active robust man, do you think this is a condition he would want to stay in?

A Like I said, if it was the other way around, and it was the children or one of us that was in his position, he would do the same thing that we're doing right now. 'Cause his wishes -- my father's a fighter. My father has not given up. He's been through surgery, he's been through chemo; he's been in and out of nursing homes. My father would do the same thing that we're doing right now.

Q Are you telling the court that if your father observed one of his children decomposing in a hospital

bed, with skin being permanently removed and bone being exposed, that he would insist on his children continuing in that condition?

A First of all those, ulcers that he received on his back, he had them there when he was here in Trinitas hospital.

We asked for the right bed that he has now to prevent these ulcers and they told us that he was not eligible to get that bed. Until he had ulcers in that stage he was eligible for it.

So maybe these ulcers would have been prevented if they would have got him the bed a long time ago and not waited till the last resort and the last minute which is now where these ulcers are beyond, you know, the care that they are at that he would probably not had these ulcers on his back.

Q And as you said these ulcers are somewhat beyond care and I think you heard the physician's testimony last week.

So do you think your father would want you or any of his children to subsist in that condition?

A My father would do what we're doing right now.

Q And I think you testified that your father would want his family to keep him where he's comfortable. Is that correct?

A Yes.

Q Now I take it from the responses you gave Mr. Martin that you believe that your father is aware when his family is present?

A Yes, he is.

Q That he is responsive to physical stimulus? Meaning he's responsive to touch, sound and sight?

A It depends what your physical stimulus is. I mean you have to clarify more.

Q Sometimes.

A Sometimes, yes.

Q And you believe that your father is capable of recovery?

A Do I? I'm not a med... -- I'm not a physician I can't tell you that.

Like you said, I don't have medical background, so I can't tell you that.

Q But what do you think? Is your father going to wake up?

A My father is in the state --

MR. MARTIN: Judge, this is just guess- work at this point.

THE WITNESS: Yeah, basically my father is in the situation that he's in because of a hospital error, okay.

So you can't tell us to judge whether, oh if he's in pain or if he's not in pain or whether this is something that he would, you know, we would agree with.

I'm not a physician I can't tell you. I don't have the physical -- physician background, medical background.

BY MR. CHRONAKIS:

Q I understand that. I'm asking you just about your observations like you gave to Mr. Martin.

Is it your observation that your father responds to touch?

A Yes, my father on different occasions he will.

Q If you believe your father is aware of his surroundings and able to respond to touch, wouldn't it follow that he is suffering from the decomposition of his body?

A No.

Q No?

A No.

Q And you wouldn't want him to be suffering. Is that correct?

A I wouldn't put anybody to suffer, if it was your family member, would you put them in this situation if you knew you were suffering?

Q Well uh --
A Thank you.
Q I don't think that's the question for today.
A And no one would ever put anyone in that position to suffer.

If I thought my father was suffering, we wouldn't be having him in the hospital where he's at in that position that he's in.

Q Ms. Betancourt, were you involved in your family's retention or hiring of Dr. Goldstein?
A Were we involved with what?
Q Were you -- did you take part in the decision to hire Dr. Goldstein?
A Yes.
Q Did you meet with him?
A Yes. No, no. Sorry.
Q Yeah. Did you speak with him by phone?
A No.
Q I have no further questions and I want to say thank you.

REDIRECT EXAMINATION BY MR. MARTIN:

Q Jacqueline I just want to clarify something.

Counsel asked you about what your intentions are. And if I understand your earlier testimony, what you're asking in this matter is that the family be

given the right to make the decisions that the hospital is trying to make. Is that right?

A That's all we're asking. Yes, yes.

Q You're not trying to perpetuate anyone's suffering?

A No.

Q And as I understand it, you don't believe your father is suffering?

A No one knows, we don't know.

We're just trying to decide. I mean that's what he has family members for. That's what he has loved ones for, you know, to decide what happens with him.

I mean I don't think the hospital should have the right to come in and say well you know this is what we decide. This is what's gonna happen next.

Q Is that what's taken place in this case?

A Yes.

Q That's all I have, thanks.

MR. CHRONAKIS: No further questions, Your Honor.

THE COURT: Thank you. You may step down.

MR. CHRONAKIS: He's ready to go?

MR. MARTIN: Judge, we can do the doctor now or --

THE COURT: He's available? Do they need to get the -- get doc --

MR. MARTIN: Dr. Goldstein, please.

MR. DRAYTON: I'll give you his telephone number if you want to bring him in on speaker.

THE COURT: Why don't you provide that to the clerk.

(Pause in Proceedings).

(Telephoning Dr. Goldstein).

(Via Telephone)

ANSWERING MACHINE: -- Diagnostic Associates. We're out of the office. Drs. Goldstein, Curran (phonetic) and Brown.

If this is a Doctor or a medical emergency, please press Zero.

If you know your party's extension, please press it now.

To make an appointment, please dial Number 2.

If this a pharmacy refill, please dial Number 3.

If you have any billing questions, please call 732-382-0091 which is our billing office or you can please hold.

(Telephone rings two times)

RECEPTIONIST: Doctor's Office. Tia speaking.

Can I help you?

THE COURT: Hi, I'd like to speak to Dr. Goldstein please. This is Judge Malone calling.

RECEPTIONIST: Sure, hold on a second.

THE COURT: Absolutely.

RECEPTIONIST: Thank you.

(Pause in Proceedings).

RECEPTIONIST: Okay, Judge Malone. Hold on a second.

THE COURT: Sure.

RECEPTIONIST: I'm gonna transfer you.

(Telephone rings once)

DR. GOLDSTEIN: Dr. Goldstein.

THE COURT: Dr. Goldstein. Hi. This is Judge Malone.

DR. GOLDSTEIN: Yes, Your Honor. How are you?

THE COURT: I'm well thank you and yourself?

DR. GOLDSTEIN: I'm fine thank you very much.

THE COURT: Good, good.

I have you on the speakerphone in the courtroom. Present in the courtroom are Mr. Betancourt's family, and their attorneys and the attorneys for Trinitas Hospital.

I understand you're going to be testifying in

this matter?

DR. GOLDSTEIN: Yes, Sir.

THE COURT: Okay. I guess we're ready to get going. I need to swear you in first.

C A R L G O L D S T E I N, M.D., PLAINTIFF'S WITNESS, SWORN:

THE COURT: And would you please state your full name.

THE WITNESS: Carl Goldstein.

THE COURT: Thank you.

Mr. Martin.

DIRECT EXAMINATION BY MR. MARTIN:

Q Dr. Goldstein. This is Jim Martin can you hear me?

A Yes, Sir, I can.

Q Doctor, let me just start with a little background if I may.

You are licensed to practice medicine I take it in the State of New Jersey?

A I am.

Q Where is your practice?

A I am in Westfield, New Jersey in Union County.

Q And what's the nature of your practice?

A I'm a nephrologist, and I am engaged in the full-time private practice of nephrology seeing patients in

an office environment, hospital environment, and dialysis unit.

Q Do you have privileges at Trinitas Hospital doctor?

A Incumbently, I do not.

Q Are you board certified?

A I am.

Q In what area?

A Internal medicine and nephrology.

Q And how long have you been board certified?

A I was board certified in Internal Medicine in 1981 and in Nephrology in 1984.

Q Doctor, just briefly. Could you just give us the benefit of your educational and your -- well your educational background.

A I graduated Cornell University with a major in Biochemistry and Sociology.

I graduated from the Washington University School of Medicine with an MD.

I did an internship and residency at the University of Minnesota and a three (3) year fellowship in renal diseases at the University of Pennsylvania.

Q The fellowship followed your residency?

A Yes, Sir.

Q And who did you study -- study under in

Pennsylvania?

A Who were the faculty members in Pennsylvania? The Chairman of the Department at that time was Zalman Agus, A-G-U-S.

Q And the fellowship was devoted entirely to renal disease and nephrology?

A Yes.

Q And when did you set up your practice here in Jersey?

A I joined an existing practice in July of 1984.

Q And have you been practicing in your specialty since then?

A I have.

Q Okay.

All right, Doctor. At my request did you have an opportunity to examine Ruben Betancourt?

A I did.

Q And that was when? Do you recall the date?

A That was a week ago Saturday.

Q Doctor, I had asked you to examine Mr. Betancourt with the view that there was a proposal that dialysis treatment was going to be discontinued. Did you understand that?

A I did.

Q And tell me a little bit about your

familiarity with dialysis.

A I am trained in the performance of dialysis as a treatment technique. It's an integral part of the practice of nephrology.

I have been providing dialysis care both in the hospital setting, in the dialysis unit setting either as a trainee or as an attending physician since 1981.

I'm a Professor at Robert Wood Johnson Medical School and teach Nephrology included in which would be the principals and practice of dialysis.

Q Doctor, in addition to examining Mr. Betancourt, did you have an opportunity to review his record?

A I had an opportunity to review his current hospital chart as of a week ago Saturday and selected older records which you were kind enough to send to me.

Q Contained in the records that you did review, were there treatment plans?

A I believe there were.

Q Were you in agreement with the plans as they were noted?

A Mr. Martin let me just ask you clarify that.

Are you speaking now specifically to the

dialysis treatment plan?

Q Yes. You know, you're right. Let me just -- doctor you're not here I take it holding yourself out as an expert in neurology, pulmonology, cardiology or any other area are you?

A No, just nephrology.

Q The opinions that I would like to discuss with you would obviously be limited to your specialty.

A Fair to say.

Q Tell me. The dialysis treatment that Mr. Betancourt has been receiving, is there anything -- how would you describe it?

A Mr. Betancourt developed renal failure which was properly recognized. His current plan of care as overseen by his treating nephrologist to my eye comports in every way with the prevailing standards of care.

He was evaluated clinically in a very appropriate fashion and a timely and thorough fashion. The treatments to support him metabolically, in other words the provision of dialysis as a life-supporting treatment in the presence of kidney failure was properly constructed, was provided in a timely fashion and certainly in the interim period covered by his present medical record over the past several weeks, the

record reflect the dialysis treatment to be individually assessed and prescribed, to be well tolerated with respect to Mr. Betancourt's general comfort as described by the nurse, the stability of his blood pressure.

And they appear to be effective in terms of the achievement of the goals of treatment of removing excess fluid and withdrawing waste products, that evaluation being evidenced by his blood tests performed from time to time.

Q Doctor is there anything about the treatment as you understand that you would describe as extraordinary?

A No, I would describe Mr. Betancourt's current course of dialysis treatment as replacement -- renal replacement therapy, kidney replacement therapy in the normal course.

Q Is there anything about the treatment as you understand it that you would consider harmful to the patient?

A No. No, not in any way whatsoever.

Q Anything about it that you consider dangerous?

A No, not at all.

Q Does the patient seem to be tolerating the

treatment?

A He is evidently tolerating the treatment well.

Q And is the treatment in your opinion effective?

A Yes, in achieving the goals of dialysis, it has been very effective.

Q Doctor that's all I have, thank you.

A You're welcome.

THE COURT: Mr. Chronakis.

MR. CHRONAKIS: Thank you.

CROSS-EXAMINATION BY MR. CHRONAKIS:

Q Doctor my name is Phil Chronakis, I'm an attorney for Trinitas Hospital and if you -- if you cannot hear me please let me know I'll try to keep my voice up.

A Thank you.

Q First of all, how much are you being paid by the Betancourt family for your testimony today?

A I am not being paid for my testimony at all. I'm being paid for my time and my time as an expert in this and every other matter in which I've served is $300 an hour.

Q Did you receive $300 an hour to conduct the examination of Mr. Betancourt?

A I did.

Q And the same rate to write your affidavit?
A I did.
Q And the same rate for your time today?
A Yes, Sir.
Q Now did Mr. Betancourt's family or representatives ask you what your opinion would be based on existing medical records before they retained you?
A I have not spoken with Mr. Betancourt's family. My communication has solely been with Mr. Martin.
Q Well, what I want to find out doctor is if your opinion had be -- had been that Mr. Betancourt would not benefit from further dialysis, would you be testifying today?
A I can't answer that one way or another.

I can tell you that the request to review the records was not prejudiced, it was open-ended.

Mr. Martin asked for an opinion regarding the standard of care and the execution of dialysis treatments for Mr. Betancourt.

He asked me to examine him, to render an opinion as to his tolerance and the general success with which these dialysis treatments were performed. He did not hold out any specific opinion that he regarded as expected.

Q Doctor, how many times have you testified as an expert before?

A If you'd clarify please. Deposition in court?

Q In any legal proceeding in any part.

A I've testified in court about four (4) times and I've probably been deposed as an expert maybe thirty (30).

Q Have you ever provided testimony that continued dialysis would be inappropriate?

A To the best of my recollection as we sit here together today, no, I don't believe so.

Q Are there any circumstances under which you would imagine continued dialysis would be inappropriate?

A Inappropriate. Could you rephrase?

Q Yes. Inconsistent with professional, medical guidelines to continue.

A The provision of dialysis care is a medical treatment which is provided at the request and with the consent of the patient and/or his legal representative.

There may be circumstances under which a physician or group of physicians may regard the overall prognosis of a patient as being guarded, but in those circumstances the provision of dialysis is still like

nutrition a fundamental life-saving tool.

Q Doctor, are you familiar with something called the Renal Physician's Association?

A I am.

Q Are you a member?

A I am not currently a member.

Q You have been a member?

A In the past, I was.

Q How about the American Society of Nephrology?

A I am a member of the American Society of Nephrology.

Q Well then I would like to ask you a couple of questions about their guidelines for the appropriate initiation and withdrawal of dialysis.

Doctor, unfortunately since we're not together in person, I can't show you a document but I have provided it to counsel I don't know that it'll be necessary to introduce as an exhibit, Your Honor.

And counsel will correct me if I'm wrong but I'm reading from a February 2000 pamphlet called 'Shared Decision Making in the Appropriate Initiation and Withdrawal from Dialysis', put out by the Renal Physician's Association and the American Society of Nephrology and it's a part of the clinical practice guideline. I don't imagine that you're familiar with

this particular publication off-hand, doctor.

A Off-hand, no.

Q Okay. Well then I'll read you part of it and it -- and specifically on page -- I'm on page 30 of Section 4 of that document, which is entitled: 'Recommendation Number 6 Withholding or Withdrawing Dialysis.'

One of those -- "one of the four (4) standards under which it is appropriate to withhold or withdraw dialysis from patients are patients who have irreversible profound neurological impairment such that they lack signs of thought, sensation, purposeful behavior, an awareness of self and environment."

Are you familiar with that standard, Doctor?

A Let's agree first of all it's a guideline. I'm -- fair for me to assume that you're not trying to raise that to the level of a standard of care?

Q I'm just asking if you are familiar with it?

A Well, you called it a standard, I just want to be careful here.

Am I familiar with the notion of elective withdrawal from dialysis? Yes I am.

Q You don't disagree with that guideline?

A That it may be appropriate to do so? No, I don't.

Q Under that -- under that and some of the other guidelines in that section, there is a sentence, well there's a section called 'Rationale,' and there's a sentence that says,

"Conversely, physicians are not ethically obligated to offer or deliver treatment that is not medically indicated."

Do you have any dispute with that particular sentence, doctor?

A As a general statement, no.

Q Okay.

Now you conducted one examination of Mr. Betancourt, correct?

A That's correct.

Q Um, and I think but I want to clarify that you agree with Mr. Martin that you're not able to comment on Mr. Betancourt's neurological state?

A I am not offering any testimony with regard to his neurological state.

Q And is it correct that you're not offering any testimony with respect to any other of Mr. Betancourt's organs besides his kidneys?

A No, I'm not.

I'm offering testimony only on the provision of dialysis care and his renal failure.

Q Okay.

Would you be willing to assume care of this patient to continue to provide dialysis for him?

MR. MARTIN: Judge that's beyond this -- the purpose of this hearing.

MR. CHRONAKIS: I -- I -- I strongly disagree, Your Honor.

If the doctor is here and has a sworn affidavit and is giving sworn testimony that dialysis should continue, I think I'm entitled to explore the depth of his conviction.

MR. MARTIN: We're not here to ask this physician to take over the care of this patient.

THE COURT: Okay.

I think we can ask that question without asking whether he would take over the case.

MR. CHRONAKIS: It's a condition. I'm not asking him to take over the case.

THE COURT: Well then the hypothetical of whether he would consider taking over the case I'm -- I don't see the appropriateness of that question. Just --

BY MR. CHRONAKIS:

Q Doctor, based on your examination of Mr. Betancourt, as best you can tell, do you expect Mr.

Betancourt to recover from his current state?

MR. MARTIN: Are we talking about from renal

circumstance notwithstanding a patients overall prognosis, if a family makes a request of continued dialysis care, and they feel that there is a benefit that accrues to them or the subject patient, I would continue to provide that treatment and certainly continue to work with the family toward achieving the best possible clinical outcome.

Q Doctor, you said that if the family feels there is a benefit, you would continue to provide it.

What if the entire group of physicians not just the nephrologist but the physicians who treated Mr. Betancourt as a whole person, not just one organ, what if they collectively felt that there was no benefit to continued dialysis? Who would prevail in your mind?

MR. MARTIN: Judge, I object.

MR. CHRONAKIS: I'm not sure the basis of objection, Your Honor.

MR. MARTIN: Again, you're asking for this doctor to comment, although you're coming in from a different direction, on the overall condition and prognosis of this patient.

We're -- we're here to talk about whether or not stopping or removing dialysis treatment is harmful,

detrimental, appropriate, et cetera. And that's the limit of this doctor's expertise and testimony.

THE COURT: I didn't -- I didn't hear the question that way. I heard it as a follow-up to the doctor's statement that if the family requested the continued treatment that he would continue to provide the treatment.

I think this is just a follow-up to that. Would his opinion be the same in the face of contrary opinions from the medical team that was treating the patient? Would he nevertheless continue to accept the family's request for continued treatment? Is that the question?

MR. CHRONAKIS: Yes, Your Honor.

THE COURT: Okay.

Doctor I don't know if you got my question but --

DR. GOLDSTEIN: Your Honor, I should answer that?

THE COURT: If you can.

THE WITNESS: Yeah, I think ultimately physicians are in the service and employ of the patients not other consulting physicians. The family holds the ultimate adjudication in that regard.

BY MR. CHRONAKIS:

Q Doctor, have you ever told a family of a patient you treated that continued dialysis is futile?

A I have.

Q I'm sorry?

A The question have I ever told a family? Have I ever been in a situation where I felt dialysis was futile and did I communicate that to the family?

Q Yes, Sir.

A I have been in that situation.

Q What -- what were the circumstances if you can remember? Or what were -- strike that.

What was the patient's condition that you led you to conclude and advise the family that continued dialysis was futile?

A Well in the course of 25 years of practice, I've had that conversation for a wide array of medical illnesses. Cancers, cardiac disease, there is no one unique circumstance under which I proffered that recommendation.

Q Have you ever had a patient in a persistent vegetative state with renal failure issues?

A I don't believe so.

Q And when you mentioned cancer, was that kidney cancer?

A No, no not necessarily, cancer of a variety of forms.

Q Well what -- what makes cancer in another part of the body result in a conclusion that dialysis is futile.

A In persons whose cancer has spread to a point where other vital functions are irrevocably compromised that would be one; a patient with metastatic cancer, sepsis and shock.

Q Is that -- is the -- and you'll forgive my medical, my lack of medical lingo, but is the issue there that the cancer is terminal or will become terminal?

A As well as other complicating features.

Q Okay. So if you believed the patient had a terminal condition or complications and a terminal condition, you would not favor the continuation or initiation of dialysis?

A Well favor is an opinion, the issue before us is I would counsel the family, I would provide them with my best medical opinion as to the value of dialysis but the choice is theirs, and I've been in circumstances where I may have held an opinion that dialysis was futile and a family represented their interest to continue and I respected that opinion, that

request.

Q Doctor. Thank you very much. I have no further questions.

THE COURT: Mr. Martin.

REDIRECT EXAMINATION BY MR. MARTIN:

Q Doctor, very quickly.

The document that you were asked about which is entitled, 'Clinical Practice Guidelines' under the American Renal Physician's Association.

The -- the recommendation that counsel talked about section of that document has two (2) four (4) separate sections and it talks about patients with decision-making capacity, patients who lack that capacity, patients who leave advanced directives, and people -- patients who have irreversible neurological conditions.

As a practicing nephrologist, if a physician or I'm sorry if a patient directs you to discontinue that treatment and you deem the circumstances appropriate, do you do that?

A Elective withdrawal of dialysis is certainly something which I have overseen but in those circumstances and in fairness we all hold a different sense of what we consider to be quality of life. And I don't believe the physician, nor a health care

institution, is necessarily empowered to impose that opinion on a family.

The document you're looking at are guidelines. Now in nephrology as well as elsewhere in medicine there are a lot of guidelines.

Guidelines are general recommendations developed by large numbers of physicians to provide some framework within which decisions can be made. It's not a standard of care and it's not a mandate. It's just a guideline.

So I think in these very difficult circumstances where patients have an advanced or complex disease, the decision to continue treatment, you know, we still live in a free society and if a family represents that they believe there is quality of life and that treatment should be provided, I don't feel it's a physician's place nor a hospital's place necessarily to unilaterally say no.

I believe we are all enjoying the privilege of attending the sick and those wishes need to be respected.

Q Can we agree doctor that these, these recommendations are in essence general and, and certainly contextual? And by that I mean dependant upon the circumstances of a particular patient and case?

A Absolutely. They did not write those thinking Mr. Betancourt specifically.

Q And lastly doctor have you and -- have you and I even ever met?

A No.

Q Have you ever testified for me before in any matter?

A No.

Q Have you ever been retained by my office in any matter?

A No.

Q Okay.

Doctor that's all I have. Thank you.

A You're welcome.

RECROSS EXAMINATION BY MR. CHRONAKIS:

Q Doctor, just one question.

When you -- when you just testified that these guidelines were not written with Mr. Betancourt in mind, what do you make of the guideline that discusses patients who have irreversible, profound neurological impairment in light of prior testimony in this hearing that that's exactly Mr. Betancourt's condition?

A I was responding to Mr. Martin's comment that these guidelines are contextual and that they are very

dependant on specific circumstances.

I believe these are general guidelines that were developed in the normal course by doctors. I don't think they were developed specifically for this patient. They didn't know Mr. Betancourt when they wrote these guidelines.

Q I'll agree they didn't know them but if -- if the description in the guidelines matches the description of Mr. Betancourt's medical condition or at least the Trinitas' Hospital's physicians view of that condition, you would agree they would apply here?

MR. MARTIN: Judge, I object to that question that's the issue in dispute here. And as I understand this witnesses' testimony, he does not make neurological decisions.

MR. CHRONAKIS: Well, Judge, we all agree on that, but if Mr. Martin was within his rights to question him about these guidelines and say do these or don't these apply to Mr. Betancourt, I think I am as well.

MR. MARTIN: My -- my questions had to do with the role of a nephrologist in terms of these guidelines.

To ask him to accept the testimony which is in dispute in this case and then make a decision upon

it is outside of the bounds of fairness.

MR. CHRONAKIS: Judge, there is no dispute in this case about Mr. Betancourt's neurological condition unless we are going to associate the testimony of a neurologist with nothing.

MR. MARTIN: Well certainly that's why we're here. The family disputes it.

THE COURT: Well right but that's not the issue. That's not the dispute regarding this question and I think the question here really gets to whether guidelines represent a standard of care or whether they're guidelines.

I think the doctor really has expressed his opinion on the difference between standard of care and guidelines. So I've heard it.

MR. CHRONAKIS: Thank you, Judge. Doctor, thank you I have no further questions.

DR. GOLDSTEIN: Thank you.

THE COURT: All right, Dr. Goldstein, that concludes your testimony in connection with this matter.

I'm going to disconnect you now.

DR. GOLDSTEIN: Thank you, Your Honor.

THE COURT: You're welcome, goodbye.

MR. MARTIN: So is your doctor here or do you

want me to go?

MR. CHRONAKIS: Doctor is here so if --

THE COURT: Okay we'll switch up then to the defendant's side.

MR. CHRONAKIS: Judge, we're gonna at this time call Dr. Maria Khazaei to the stand please.

M A R I A S I L V A K H A Z A E I, M.D., DEFENDANT'S WITNESS, SWORN

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Maria Silva-Khazaei.

SERGEANT-AT-ARMS: Spell your last name.

THE WITNESS: K-A-H-Z-A-E-I.

SERGEANT-AT-ARMS: Thank you. Please be seated.

DIRECT EXAMINATION BY MS. LEVY:

Q Good Afternoon, Dr. Khazaei, I'm Rebecca Levy. I'm an attorney for Trinitas Hospital. I'm just gonna ask you a few questions.

Can you describe your educational background related to your practice of medicine?

A I finished medical school, did an internship in Internal Medicine at St. Barnabas in Livingston. Then proceeded to do three (3) years of Clinical Nephrology at Robert Wood Johnson and then back to Trini -- to

St. Barnabas Medical Center for transplant training for two (2) years.

Q Are you licensed to practice medicine in the State of New Jersey?

A Yes, I am.

Q Are you board certified?

A I'm board eligible.

Q In what specialty?

A Nephrology. I'm board certified in internal medicine.

Q Okay. Can you describe your professional experience as it relates to the practice of nephrology?

A I did clinical training as I said at -- I did my fellowship in nephrology at Robert Wood Johnson University Hospital in New Brunswick in clinical nephrology and then I did kidney transplant nephrology at St. -- St. Barnabas in Livingston and I started my practice two (2) years after my -- the termination of my clinical training.

I had two (2) children and I stayed home for two (2) years and then went back to work.

Q Who is your current employer?

A I'm self-employed.

Q Are you employed by Trinitas Hospital?

A No, I am not.

Q Are you paid by Trinitas Hospital?
A No.
Q Do you have any financial interest in the outcome of this particular case?
A No, I do not.
Q Are you being paid to testify today?
A No.
Q How long have you been Mr. Betancourt's nephrologist?
A I have been Mr. nephrologists since the initiation of this -- this current admission when I was called in for consult.
Q As it relates to nephrology, what is Mr. Betancourt's current diagnosis?
A End stage renal disease.
Q Okay. Can you please describe Mr. Betancourt's current condition as it relates to nephrology?
A He has end stage renal disease which means his filtration rate of his kidneys are less than 10.
Q Will this ever improve?
A I don't think so, not in my professional opinion, no.
Q Okay.
So it's safe to say that his -- Mr.

Betancourt's prognosis is -- it's not going to get any better than -- than it is today?

A As far as his kidney function goes?

Q Correct.

A No.

Q When did Mr. Betancourt begin receiving dialysis?

A I don't recall the exact date.

Q Okay.

Why was the dialysis commenced?

A Upon admission Mr. Betancourt had a -- an initial diagnosis of acute renal failure I thought because of most likely at that point he had what we call acute tubular necrosis which is a condition where the kidney tubular stop working because of a variety of conditions -- reasons; sepsis, hypertension, medications and so-forth.

Q Was there any discussion with the family when you commenced dialysis as to whether it may or may not be a futile treatment?

A Not at the initiation of treatment, no.

Q At some point later on in the treatment, was there any discussion with the family about the appropriateness in continuing dialysis?

A Uh, no.

Q In your professional medical opinion, do you believe continued dialysis for Mr. Betancourt is medically appropriate at this time?

A No, I do not.

Q Okay in your professional medical opinion is it contrary to generally accepted standards of medical practice to continue Mr. Betancourt's dialysis?

A Yes, I do.

Q In your professional medical opinion, do you believe the dialysis is merely prolonging an imminent dying process?

A Yes.

Q Would you describe Mr. Betancourt's condition as terminal?

A From a, what point of view?

Q Um.

A From a general point of view?

Q From a general point of view.

A Yes, I do.

Q Okay.

Do you believe the continued care of this patient is inappropriate, unsafe, and against your personal professional practice in --

MR. MARTIN: Judge, you know I'm a little late at the gate here but these questions are all very

leading.

MR. LEVY: Your Honor, we don't believe these are leading, they don't imply a yes answer. These questions are at the very heart of our entire case.

MR. MARTIN: Well be that as it may they are leading, Judge, but maybe I'm too little too late at this point.

THE COURT: I'm sorry what was that Mr. --

MR. MARTIN: I said maybe I'm too late at this point but they are very leading.

MS. LEVY: Your Honor, she -- her answer could be no to these questions.

We're asking her yes or no questions and she can say yes or she could say no.

THE COURT: She could.

MR. MARTIN: That drinks. You know what? Just go ahead. At this point it doesn't matter. I'm sorry.

THE COURT: I'm gonna overrule the objection I'll allow the question if you recall the question.

DR. KHAZAEI: I forgot the question.

HE COURT: Oh okay.

DR. KHAZAEI: What was the question I forgot it.

THE COURT: Repeat your question please.

BY MS. LEVY:

Q I'll -- I'll separate it.

Do you believe the continued care of this patient is inappropriate?

A Yes.

Q Do you believe that continued dialysis is against your professional practice and efforts?

A Yes.

Q Do you believe that continuing dialysis -- I'm sorry, strike that. Do you believe the dialysis treatment should be discontinued?

A Yes.

Q No further questions.

CROSS-EXAMINATION BY MR. MARTIN:

Q Doctor, are you personally in charge of the dialysis treatment that's being administered to this patient?

A Yes, Sir.

Q How long has he been receiving dialysis at your direction?

A Since the initiation of my consult.

Q And that was on this admission?

A On this admission. Yes.

Q So it's about since July?

A Yes.

Q Thereabout?

A Yes.

Q And the treatment that you're administering it to him is it harming him?

A In what way?

Q Well in any way?

A It's prolonging his life.

Q No that's no what I asked, is it harming him?

A Is it hurting him is your question?

Q Yes.

A No, I don't think so.

Q Is the treatment, is it to be considered maintenance dialysis treatment? Is that what the --

A It is maintenance dialysis treatments.

At times if -- there are times that he tolerates the treatments very well and there are times that I cannot do what we call ultra-filtration which is removal of fluid because his blood pressure doesn't tolerate it.

Q And is that unique to Mr. Betancourt or does that happen with other patients?

A No, it happens with other patients.

Q Okay.

So overall is the treatment that you have

been administering been effective insofar as that treatment is concerned?

A It's effective in removing fluid and effective in controlling his electrolytes status yeah absolutely.

Q The -- the affidavit that you signed in this case.

A Um hmm.

Q I take it you were approached by someone and asked to prepare it?

A Yes.

Q Did you prepare it or did someone prepare it for you?

A Someone prepared it and I signed it.

Q Do you have affiliation with any hospital other than Trinitas?

A No.

Q And the name of your practice is what?

A Premier Nephrology and Hypertension.

Q What is the Trinitas Linden Dialysis Center?

A It's a dialysis center that is affiliated with the hospital.

Q And do you work there as well?

A I have patients there, yes.

Q You are board certified or board eligible you said.

A Yes.

Q Have you taken the certification exam?

A Not yet, no.

Q And how long have you been practicing nephrology?

A Eight (8) years and two (2) kids.

Q I hear ya.

I guess what I want to ask you and I don't know how to ask this delicately perhaps but the treatment -- the dialysis treatment that you are administering as I understand your testimony will not cure Mr. Betancourt's renal condition. Is that fair?

A That's fair.

Q Nor will it result in its death, will it?

A It might.

Q The dialysis treatment itself?

A Yes.

Q And how is that?

A I don't know if in his condition, I can't foresee the future, but there are patients that when they are on dialysis specifically in these types of cases as Mr. Betancourt, if we are dialyzing them with an unstable blood pressure and their blood pressure drops, they can have a miocardial infarction and die on the machine.

Q But again that's not unique to Mr.

Betancourt.

A No it's not.

Q That can happen with any patient, correct?

A Correct.

Q So there's nothing about what you're doing that will barring some unforeseen or untoward event, there's nothing about what you're doing in terms of treatment that will result in his death. You're sustaining him --

A I don't practice medicine to kill anyone.

Q Okay. All right that's why -- I didn't mean to suggest that. Thank you.

MS. LEVY: Okay, no further questions.

THE COURT: All right doctor, thank you. You can step down.

(Pause in Proceedings).

MR. MARTIN: Judge, we're calling Robin Betancourt.

R O B I N B E T A N C O U R T, PLAINTIFF'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Robin Betancourt.

SERGEANT-AT-ARMS: Thank you.

DIRECT EXAMINATION BY MR. MARTIN:

Q Robin, I believe your sister's already testified. So we know you are Ruben Betancourt's son, correct?

A Yes.

Q How old are you, sir?

A 36.

Q What do you do for a living?

A I'm a Union Sheet-metal worker.

Q Where do you live?

A With my father in 315 Christine Street.

Q How long have you lived with your father?

A All my life.

Q I take it living with each other, you would see each other daily. Is that fair?

A Yes.

Q Tell me a little bit and your sisters already testified about his occupation and so on.

But prior to this -- this event where he had the surgery in Trinitas what was his overall condition, his attitude, his approach to life, et cetera. Tell us a little bit about your father.

A I mean my father, you know I love my father very much and you know he was pretty much practically only my really -- real friend.

You know we used to go out to the flea

markets, we used to collect watches together, coins and, you know, see the cars and you know we used to discuss about various things that happened on the news.

Q Jacqueline talked about blood pressure and diabetes, et cetera.

Were either of those conditions, as so far as you were aware, disabling or limiting him in any way?

A No.

Q Was he able to do work around the house and that type of thing?

A Yes. Uh huh.

Q You -- do you have an opinion as to what your father's wishes would be in this case?

A Well pretty much 'cause I remember -- I remember the Terry Shiavo case and my father -- me, my father, all of my family we were with the family you know when --

Q What do you mean by that you were with the family?

A Because it was -- it was the family members that you know they wanted to keep Terry Shiavo alive and then it was the -- the, I believe the husband with the doctors that want to -- wanted to discontinue his life -- her life and we -- you know we -- you know we were

just talking about it and you know my father says the father -- the husband really shouldn't have the decision or the doctors any decision to do that to her. It should -- it should be the right of the family.

Q Since your father has been in the hospital this last occasion since July, have you visited him?

A Every single day.

Q And have you had occasion to observe him in terms of his ability to react or respond in anyway?

A Yes.

Q Tell us what you've observed.

A I mean, I remember before my father went into surgery I promised my father that you know after all this happened, you know after all this that I would take him to the Island of Margarita you know off the coast of Venezuela you know to just you know just to for vacation and all that. And I remember you know several, for several occasions I used to tell my father come on get up we're gonna go to Margarita Island and I used to see I'd always see my father's expression and he frowns and on one occasion he started tearing out of his left eye.

Q Robin, again you've sat through the testimony of many of the doctors and they would suggest that this is a -- a reflex response as opposed to something that

-- that's actually a conscious response, for lack of a better term. How do you know that that's not what's going on?

A No 'cause every single time my father has different expressions. I mean, I'm there when doctors, nurses come in and you know they surround my father's bed. You can see my fathers eyes open up you know as if he's scared. When I'm there I -- because they had -- he's connected to a pulse oximeter that measures the pulse and you can see the pulse and when I'm there he knows that I'm there cause you know I talk to him and then I sit down, and I can see that's he's a little bit relaxed because his pulse lowers and also with my mother.

Q Is your father medicated? Does he have pain medication and that type of thing?

A Uh, no.

Q Does he appear to you to be in pain in any way?

A No.

Q When's the last time you saw him?

A Yesterday.

Q How was he?

A He was relaxed. I was there, I put -- I always put some music on and you know listen to -- I put on

the TV cause he always used to listen to and watch the soap operas, Spanish soap operas, and every time I put it on the little TV that I brought into the hospital I can see him. He's like more relaxed by the pulse and also that you know you can just tell cause he closes his eyes and he's like sometimes like he's thinking. I --

Q Robin, what is it that you would like the court to do in this case?

A To ultimately give us the decision to decide whether we terminate my father's life.

Not -- it shouldn't be the case of the hospital nor Trinitas -- nor the physicians but ultimately the family members.

Q Given all of the occurrences that you -- you've been involved in and your sister has testified about, do you trust the physicians to make that decision in this case?

A No.

Q Okay, that's all I have. Thanks.

MR. CHRONAKIS: Your Honor, I have no questions. Thank you, Mr. Betancourt.

THE COURT: Thank you, Sir, you can step down.

MR. MARTIN: Judge, I -- I had proposed to

call Mrs. Betancourt. I mean I would represent to you that her testimony would be along the same lines.

THE COURT: Similar.

MR. MARTIN: I'd be happy to do that unless you want to just -- I guess I'm asking you to make my decision. That's not fair either.

Pardon?

MR. DRAYTON: She'll need an interpreter.

MR. MARTIN: Judge, she will need an interpreter. I didn't anticipate her testifying. Her daughter or one of her sons can interpret for her. Maybe I shouldn't, Your Honor, just to make it -- and I'll make it brief.

If it's all right, unless you object to one of the children interpreting.

MR. CHRONAKIS: I don't object but --

MR. MARTIN: We can approach?

(Discussion at Sidebar).

THE COURT: First of all, I do have some concerns about using a non-certified interpreter.

MR. CHRONAKIS: Who's gonna interpret?

MR. MARTIN: Either her daughter or one of the sons.

THE COURT: It's -- it's --

MR. MARTIN: They're Argentines so I think

it's Spanish.

THE COURT: Oh it's Spanish. We could try but maybe we should just back up before we get to an interpreter and that is -- I'm assuming it would be somewhat cumulative to what the son and daughter have said.

MR. MARTIN: I asked Todd to asker her, I think maybe she wants to testify. It may be catharsis (phonetic) or something but or whatever that word is. I -- and I apologize about the interpreter up until today she had said that she was not inclined and then today in the hall she said she would like to. So --

MR. CHRONAKIS: You're talking about his sister or the wife?

MR. MARTIN: Wife, his wife.

MR. CHRONAKIS: I mean obviously it's not up to me, Judge. But we'd be happy to stipulate that there may be more issues than just, you know, I understand that the wife may want to confront or has every right to testify. But we would certainly stipulate that she would -- that she wants Mr. Betancourt to be kept on life support and then --

MR. MARTIN: But -- but she wants to testify.

MR. DRAYTON: She was really afraid and nervous coming into the weekend, and you know she was

really upset but apparently she's settled and she wants to --

THE COURT: Yeah then we'll have to check then on the availability of an interpreter and see if we can -- 'cause if it's Spanish then I --

MR. DRAYTON: It is Spanish.

MR. MARTIN: Do you have a problem with the daughter doing it?

MR. CHRONAKIS: I'll leave that to the court. I mean I --

THE COURT: I'm the one who has got a problem with the family doing it.

MR. DRAYTON: Right.

I don't doubt that they would tell the truth but I don't know how it helps the integrity of a pretty serious.

MR. MARTIN: I need a bathroom break anyway at this point.

THE COURT: All right well we'll make the call and see if there's somebody available.

I'd hate, I'd hate to keep this open. We'll arrange for the interpreter another --

MR. MARTIN: Well if that's going to be the case, we'll just go ahead --

THE COURT: Do we have any other witnesses?

MR. DRAYTON: No.

THE COURT: Okay, I guess we figure then do either one of you have any thoughts to submitting anything further in -- in writing, any law any anything?

MR. DRAYTON: Judge, you did give this --

THE COURT: Yeah, the last time you were here.

MR. CHRONAKIS: I mean I think maybe you saw from both briefs there is a finite amount of law if the court were inclined and certainly if Mr. Martin and Mr. Drayton agreed we could maybe have brief closing statements that address a few legal standards that there are.

MR. MARTIN: Um hmm. That's fine.

The only -- I do have those hospital records that I had referred to with the doctor that I'll put in evidence just so that you have them.

MR. CHRONAKIS: Sure, that's fine.

THE COURT: Please find out about the interpreter.

MR. MARTIN: Thank you, Judge.

(End of Discussion at Sidebar).

(Pause in Proceedings).

SERGEANT-AT-ARMS: THE CLERK: Court's in

session. Remain seated.

THE COURT: Swear in the interpreter.

M I L I A D E M A T I S, INTERPRETER, SWORN TO INTERPET SPANISH TO ENGLISH:

THE INTERPRETER: Iliana Martis (phonetic), Spanish Interpreter.

G E O R G E P E R E Z, INTERPRETER, SWORN TO INTERPRET SPANISH TO ENGLISH:

THE INTERPRETER: George Perez (phonetic), Spanish Interpreter.

THE COURT: Thank you.

M A R I A B E N T A C O U R T, PLAINTIFF'S WITNESS, SWORN:

SERGEANT-AT-ARMS: Please state your full name.

THE WITNESS: Maria Betancourt.

THE COURT: Thank you, you may be seated.

DIRECT EXAMINATION BY MR. MARTIN:

Q Mrs. Betancourt you are Ruben Betancourt's wife. Is that correct?

A Yes.

Q How long have you been married?

A Thirty-sever (37) years.

Q And how many children do you have?

A Three (3).

Q And you live where?
A 315 Christina Street.
Q And how long -- and is that in Elizabeth?
A Yes. (Without interpretation).
Q How long have you lived in Elizabeth?
A I've been living here 20 -- 36 years when my son was born.
Q Who lives with you currently?
A My two (2) children, the boys.
Q And where does Jacqueline live?
A Next door to me.
Q How often do you see each other in the course of a day or a week?
A You mean all together? All of us together?
Q How often do you -- do you have some interaction with your children?
A Every day.
Q How about when your husband was home before this incident? How often would he see and interact with the boys or Jacqueline?
A Every day.
Q Mrs. Betancourt do you -- do you know that one of the issues that -- that we've discussed in this case is what your husband's wishes would be concerning continuation of care? Do you understand that that's

something we've been talking about?

A Yes, I understand.

Q After thirty (30) something years of marriage, do you believe that you know what he would be thinking if he were here and we could ask him?

A To continue living until God wished.

Q How often do you see your husband now?

A Every day.

Q Do you speak to him?

A Yes.

Q Does he react when you speak to him?

A When I speak to him, like four (4) days ago, he reacts. He gets like very emotional. He starts breathing in very deeply and whenever I put my hand on his head.

Q How often does something like that occur?

A Still. Still to this day, I tell the nurse because he reacts like that when I touch him or talk to him, and I tell the nurse and she doesn't do anything.

Q Has he been reacting to your voice or to your touch since he's been in the hospital since July?

A I -- I see it a lot more now because when I go between his legs to put cream in his private parts he closes his legs quickly.

Q Do you observe how he reacts to the children? Does he react to the children?

A When he sees -- when I talk to him about his children, he opens his eyes.

Q Mrs. Betancourt, do you realize that the doctors believe in their opinions that your husband's reactions are involuntary?

A Yes. I believe that the doctors don't care anymore whether he reacts or not. For them, it's all the same.

Q Do you believe his reactions to you are involuntary?

A They are real because there is something I have told my children, and they don't want to understand. When I put cream in his parts, his thing gets up.

Q Okay.

A Um hmm.

Q Can I infer from that answer that you believe you know he knows you're there and he is reacting to you as supposed to doing something involuntary?

A Yes.

Q Do you think he knows you're in the room when you are there?

A Yes.

Q That's all I have. Thanks.

THE COURT: Any questions?

MR. CHRONAKIS: No questions, Your Honor. Thank you.

THE COURT: Okay, Mrs. Betancourt you may step down.

MS. BETANCOURT: Okay.

THE COURT: Both the interpreters are excused thank you for your assistance.

THE INTERPRETER: Thank you, Your Honor.

(Pause in Proceedings).

THE COURT: Mr. Martin, any additional witnesses?

MR. MARTIN: No, Judge, although I did in fairness to -- to everyone, the hospital records at least the sections that I have referred to with the defendant doctors are all here. I marked them P-1 and 2 and 3 with today's date if -- and the sections that I specifically asked questions about have tags on them.

THE COURT: Okay fine. Um hmm.

(P-1, P-2, and P-3 marked for identification and placed into evidence)

(Pause in Proceedings).

THE COURT: I'll just bring them up.

MR. MARTIN: Thank you, Judge.

THE COURT: All right any -- anything further from the defendant.

MR. CHRONAKIS: No further witnesses, Your Honor.

THE COURT: Or where there any other exhibits. I have the one photo.

MR. CHRONAKIS: Your Honor, if -- if Mr. Martin and Mr. Drayton would consent, I would provide Your Honor with a copy of the guidelines to which some questions were addressed to Dr. Goldstein. Would that be helpful?

MR. MARTIN: Judge, I think I would object only for a couple of reasons.

Number one (1). These are sections it's not a complete copy of the guidelines so I don't know what precedes it or what follows it for the most part.

And secondly no I guess on that basis I would object.

MR. CHRONAKIS: I'm -- Your Honor, maybe this is unnecessary because I'm advised these were already faxed to the court.

MR. MARTIN: Oh, okay.

MR. CHRONAKIS: In which case I'm sure it's part of the record.

MS. LEVY: To you, I sent them to you.

THE COURT: There's probably a copy in the file.

MS. LEVY: He said we may admit them. We sent them to him.

MR. CHRONAKIS: We sent them to him. Did we not send them to court?

MR. MARTIN: You did send them to us, I've seen them before.

MS. LEVY: Yeah.

MR. MARTIN: It is what it is.

THE COURT: Yeah. Any other thoughts on wrapping this up? Is any further submissions or --

MR. CHRONAKIS: Judge, I don't -- for the reasons I stated earlier, I don't think any written -- any additional written submissions are necessary but if the court would indulge perhaps a brief summation by both sides, we could close the hearing.

THE COURT: Well plaintiffs I don't know if you had anything else that you wanted to submit in writing?

MR. MARTIN: Judge, I think we've probably both -- you know, there's so little in terms of law out there we've probably beat it to death in terms of the submissions.

THE COURT: I -- okay. I just wanted to give you chance.

All right then we'll -- I guess we'll just sum up. I'll hear from the defense first.

MR. CHRONAKIS: Thank you, Your Honor.

Judge, we're here, I guess, on a motion but essentially the issue that's come out through the -- through the testimony over the last two (2) weeks is whether a family with all sincerity and feeling, whether a family can direct physicians to provide care that those physicians determine violate their professional medical judgment as to standard of care and their professional medical ethics.

And the Appellate Division just eight (8) years ago, as well as Judge Pressler, currently point out that a court, although this doesn't address what a family can do, but that a court should not direct a physician to provide medical care that contradicts his or her medical judgment.

And we feel that that standard is crucial and somewhat dispositive of a lot of the issues in this case, Judge.

And I -- and I hope to frame my comments by pointing out that this is not a dialysis case if you will. This is not about Mr. Betancourt's kidneys or

whether dialysis should or shouldn't be continued.

This is a much broader scope of medical care that's going on and a much broader request for relief by the plaintiff as well as by Trinitas Hospital.

What you have here in terms of the evidence before you, Your Honor, is you heard from five (5) physicians either employed by or associated with Trinitas Hospital, a neurologist, internists, nephrologists, essentially someone who's a cardiologist, the medical director, they have years and years and years of medical experience between them.

On the other side of that you have the testimony of one nephrologist who is experienced but as well as the testimony of sincere and heartfelt testimony of a number of family members who think they know what Mr. Betancourt would have wanted and the sort of scattershot review of medical records in which we have anonymous nurses or second year post-medical student putting in documentation that is somewhat inconclusive.

So the weight of the evidence in terms of medical evidence, professional evidence, is overwhelmingly in Trinitas' favor.

And it's important to note that all the Trinitas physicians who testified, their professional

role everyday is to preserve life. They have no agenda here to end Mr. Betancourt's life.

They sincerely feel that keeping him at least functioning with mechanical medical care is offensive to their professional standards.

So you have, you know, the balance between the medical testimony on one side and the small piece of medical testimony on the other side and -- and family testimony.

You also have in terms of Dr. Goldstein you have five (5) physicians who to different degrees have been treating Mr. Betancourt for close to a year or over a year in some cases versus a physician who saw him once and a nephrologist that is.

So there's no neurological evidence before you to contradict Dr. Schanzer, there's no cardiological, there's pulmonological, there's no general internists to say anything in response to Trinitas' evidence.

So you have doctors treating Mr. Betancourt's overall condition, versus one doctor who was able to tell you that he can keep the kidneys functioning through dialysis. And one of the issues that came up throughout the hearing, Your Honor, and something of course important for your consideration is whether Mr.

Betancourt is aware, whether he can feel pain, whether he sees and comprehends, whether his brain functions make him actually what we consider you know alive and aware and alert.

And of course Trinitas' physicians state that it's their medical opinion that he does not. Dr. Goldstein of course did not opine on that issue as it's outside his medical expertise.

The family understandably wants their father, their husband to be alive and they gave indications that they believe he is.

But we have a sort of contradiction here. Either one of these two (2) has to be true, Judge. Either it is the case as Trinitas' physicians testify that Mr. Betancourt does not feel pain, does not respond to stimulus, is not aware, in which case he is as Dr. Veiana mentioned just a pair of organs or a group of organs that are being kept alive artificially, or it is the case that as Mr. Betancourt's family sincerely believes that he is aware, that is able to respond to stimulus, that he is functioning.

And if that's the case, based on the medical testimony and the records we saw with respect to Mr. Betancourt's ulcers and his body's state of decomposition, he is feeling pain, he is probably

feeling intense pain.

Either way we have a condition, either one of no life or one of an agonizing continuing life that lends itself to the Trinitas physician's conclusion that continuing to preserve what is at that point loosely called life, is offensive to their professional medical judgment.

And another contradiction that Your Honor may have hit upon is that Dr. Goldstein and understandably an expert is paid you know to work, doesn't mean his testimony was persuaded by being paid, but he is the only person who testified who is being paid by the hour for this proceeding.

But Dr. Goldstein testified that he would not find dialysis medically you know not medically indicated for Mr. Betancourt because even despite the RNA's standards that specifically list neurological impairment to a degree of a lack of awareness, which is the standard that the only neurologist in this case testified to, despite that guideline and despite that medical evidence this patient should continue on dialysis. Whereas Dr. Goldstein said that perfectly awake and aware patients who are walking around and functioning completely but have terminal cancer, dialysis would be futile.

And I -- and I submit to the court that that is a significant contradiction that either undermines Dr. Goldstein's credibility or enhances Dr. Khazaei's credibility when she says that continuing dialysis is not medically indicated.

Indeed, Judge, she noted that continued dialysis could be harmful to Mr. Betancourt. It's not a cure-all.

The -- the one piece of testimony that I thought was the most persuasive without bias was Dr. Veiana reminding us all that the goal here and the goal at Trinitas of course is not to simply keep Mr. Betancourt's organs functioning. This is not a heart and a brain and a pair of kidneys, et cetera, breathing and feeding abilities.

They are trying to treat Mr. Betancourt as a whole person. And too much of the testimony from at least in part certainly Dr. Goldstein's testimony loses sight of that fact.

We can't have a group of organ specialists come in, Judge, and tell you individually I can keep the brain going, I can make the heart pump, I can make the breath take, I can make the kidneys flush. That's not the same as somebody being alive or being within the standard of care that these doctors have been

trained in.

Um, so the issue of whether dialysis is harming the patient or helping the patient is -- is far too narrow or myopic to really address the issues before the court.

Similarly, I think there was testimony regarding maybe on cross-examination of one of the Trinitas physician's that it -- it's believed that Dr. -- Mr. Betancourt would expire sometime in the near future and we don't know whether that's months or years. So what's the difference?

Well there's a huge difference here especially from the physician's perspective. It's not -- it doesn't make it medically appropriate and it doesn't make it within the standard of medical ethics to say that a patient will completely decompose and his organs will completely shut down as a justification to mechanically keep him alive.

And that is what the physicians are trying to indicate to the court in their affidavits and their testimony and their responses on cross-examination. There are things worse than -- in terms of these doctor's views, there are things worse than natural death. And one of the things that worse in these doctor's views and maybe in an objective questioning

worse than that would be to be kept alive and have your body and your integrity or your dignity start to suffer harm to the point where that's what your family's left with.

And the physicians, that's the point they're trying to make. It is not keep life going at all costs when some of the costs are really offensive to the practice of medicine.

We know that although undoubtedly sincere we know that at best we're guessing at what Mr. Betancourt's wishes were. There's no evidence one way or the other.

So we know what the family's wishes are and normally they would be given deference but the family does not have the right -- to get back to the main theme, the family has a right to insist on medical treatment being provided or not provided that is within the standard of care the physician would provide.

The family's wishes do not trump a doctor's judgment. You cannot make physicians practice medicine in a way that offends their education or training, their Hippocratic Oath, and their sense of ethics.

So of the various procedures that are within those physicians medical training, Trinitas has provided them at this stage with the persistent

vegetative state having sustained for a number of months, over a number of months.

These physicians are saying this is outside our -- our medical, professional judgment, outside the standard of care. And to go back to the Appellate Division case, Judge, which is you know among the few New Jersey cases that address this, it is no one's right. You know it is suggested that the court not exercise the right, it is not the family's right, it is not a lawyer's right to go to a hospital and say you will do this no matter, you know, no matter how you feel about it.

The Trinitas' physicians, not all of whom work for Trinitas, none of whom are being paid, were unanimous in their conclusions about Mr. Betancourt's medical condition, medical prognosis and what should be done.

And that's contradicted by a physician who did one (1) exam, addressing you know one (1) particular part of the body.

You did hear testimony today, very sobering testimony regarding Mr. Betancourt's life. You know his relationship with his family, his work history, and you know what a -- what a good man he had been to his family.

And I think Your Honor heard that there was a question posed on Ms. Betancourt's cross-examination about you know I said well this is what your father would want, I think Ms. Betancourt said to me well if it was your dad what would you want? And I agree with the implication in her question. If it were my dad, I would be up on the stand saying the same things, I wouldn't be convinced. I would take every blink of the eye, and every movement of the hand as proof that my dad could hear me and understand me and was still alive.

And that's, you know, I readily concede that, Judge, but that unfortunately is not how medicine is practiced. That is not how the legal system operates.

We only have the weight of the evidence which is five (5) physician's un-contradicted testimony about the neurological condition which is probably the most important in terms of Mr. Betancourt's out -- outlook versus testimony from the family which has no medical value but certainly emotional value and one (1) physician whose testimony is limited.

So, Judge, to put this quickly in context of these standards under Crowe v. DeGioia, we have really the three (3) that -- that bear mentioning are you know

the likelihood of success on the merits.

And if the merits are what is going to be determined as medical necessity or what is going to be determined as medical indicated or you know what's the standard of law for deferring to a physician's judgment versus a family's wishes, we're guided by the Couch (phonetic) case requesting that a court not substitute its judgment or not impose its judgment on a -- on a physician or medical official.

And given the testimony of the physicians, the weight of the evidence would be strongly in Trinitas' favor as to what the medical -- appropriate medical course is. So Trinitas would have a strong likelihood of success on the merits.

Of course the moving party has the burden of proof there and I don't know how the Betancourt family would show a likelihood of success on the merits on a medical issue.

In terms of irreparable harm, and I know Your Honor made mention of this at the initial hearing where we argued the TRO Motion application. It might seem academic to say well there's no harm more irreparable than you know Mr. Betancourt would expire and therefore we've got that nailed down.

But I think after hearing the testimony over

two (2) days, Your Honor, Trinitas is trying to point out to you that there is irreparable harm in terms of Mr. Betancourt never being in the hospital anymore, never being in a persistent vegetative state, but actually expiring and there is the irreparable harm to Mr. Betancourt that the doctors have pointed out to you about keeping him alive. Either that he's possibly suffering which is irreparable harm, or that he has no consciousness of what's going on other than his body decomposing to a horrific condition which Your Honor saw visual evidence of which is all over his body and getting worst. And that harm is also irreparable.

There is more than the length of someone's life to consider. There is also the dignity, and the family's memories and these should be considered in -- in weighing the irreparable harm which again the plaintiff would have to prove.

And finally the balancing of the equities you know you have two -- two (2) goals that are sort of passing each other. They don't really meet direct -- head on.

There is certainly the equity of the family's wishes since we don't know what Mr. Betancourt's wishes since there is no legal document compelling the court either way. We have the family's wishes and we have

the doctor's medical judgment saying we cannot continue this.

And that worst -- the balance of the equities stays in equipoise which would mean that the plaintiffs could not sustain their burden of proof there.

I just want to conclude -- conclude, Your Honor, by telling the court and telling Mr. Betancourt's family who's sat through what must have been a very, very difficult proceeding that there's nothing here goal oriented or academic about Trinitas' position that's taken here.

This is what the doctors really do feel are best, this is in no way with disrespect to Mr. Betancourt or his family. And everyone I have talked to and including myself and counsel at the table cannot imagine how difficult this is and we -- and our -- our respect and our wishes go out.

But in now way does that undermine or take away from the doctor's firm belief and professional judgment that this is the right course of action and of course our firm's firm belief that advocating that position is the correct legal standard.

Thank you, Your Honor.

THE COURT: Thank you.

Before I forget I know you did submit a legal

memo in response earlier. I -- it's not in the file and I'm -- I'm fearful that I may have misplaced it, now I might just have left it home but if you can just -- if you have one now that'll be fine you can -- you can leave it. But otherwise just fax one in tomorrow.

MR. CHRONAKIS: May I approach or --

MS. LEVY: Take him this one.

THE COURT: That's an extra copy? Great.

MR. CHRONAKIS: Yes, Your Honor.

THE COURT: All right thank you.

Mr. Martin.

MR. MARTIN: Judge, I -- I guess I should start by responding to some of the comments but without getting too far off mark.

We -- we've heard testimony from however many it's been four (4) or five (5) of the physicians. All of whom were associated with Trinitas. None of whom have privileges at any other institutions. Some of whom are in the hierarchy of the bureaucracy at the hospital.

This is a circumstance where the Betancourt family wasn't asked for their input, they were told. They were never asked, they were told we're gonna discontinue life support for your father.

They were told by physicians who were involved in all manner of things that would do nothing but cause you or I, or any reasonable or rationable -- or rational person to distrust them.

From the very event -- I mean this event occurred sometime during the evening of -- of one (1) day and the family was never notified that something terrible is too -- too inconsequential a word. Something absolutely devastating happened to their father and they're not even told.

His daughter walks in and discovers him in that condition the next day. There are DNR -- DNR orders put in the man's file without -- forgetting the families permission, without their knowledge, that they stumble upon and have -- and have removed. One of which was put in after we filed this action.

There are -- there are affidavits that have been submitted in this case that are -- that I submit to you on the one hand they're cookie cutter affidavits. If you put them side by side they all have the same language, they all say the same thing, they I'm sure were all authored by the same person; but they can't even agree this group of -- of learned physicians whether the man is in pain or not.

That contradiction wasn't something that I

raised, that contradiction is within their own affidavits. Some of the physicians, most of them say he's not but there are one (1) or two (2) references in one of the other affidavits that say he is.

We have the testimony or the affidavit and testimony of one (1) neurologist in this case and that's Dr. Schanzer. Dr. Schanzer has seen this physician (sic) twice since July. For a grand total on each of those visits if you -- if you accept his testimony's absolutely accurate 15 minutes on each of those occasions.

He can't explain the contradictions in their own records. These aren't contradictions that the family raised or that -- that Todd and I interjected into this case; it comes from the record. The contradictions of their own employees who were there everyday, the nurses, the technicians, the residents, and -- and this poor PGY2 whoever he is, I hope I didn't get him fired but the man is a medical -- is medically trained; he was certainly competent enough to be hired by this hospital and his observations certainly contradict the testimony of the hospital itself.

I don't know whether or not these -- these observations made by these individuals are -- are real

or perceived but those contradictions are in their own records. It's not something that we invented, introduced, or brought up. They're in the records that were given to us in this case.

Who could say that the Betancourt family is wrong? Who could fault them for saying we're not gonna let this group of individuals make the decision -- the life or death decision insofar as our father is concerned. All that they ask in this case, all that they've ever asked is for the right to make that decision themselves.

The standard of care in this case is not whether or not there's a bed available in ICU which is what one of the -- one of the physicians suggested. That the -- that this all started apparently when Mr. Betancourt was in ICU and they only had four (4) beds and they needed it and we all know that he's not gonna recover, so let's get him out of ICU. That shouldn't be the driving force of whether a man is -- is given the right to live or die.

If the family is suspicious, if the family recoils from the dictates of this hospital, who could -- could fault them given all that's gone in this case?

They only ask for the right to make that

decision themselves and they've never been given that right, or afforded that opportunity. It's been dictated to them.

And even after this action was started, even after they came to me and said would you and Todd do something to -- to protect our father's rights, protect our family, protect our rights in this case, even after that, this hospital lied to us.

Because even after they knew this action was going to be filed, they went ahead and discontinued the dialysis while this matter was pending.

Who could trust this group of individuals? And all they ask from you is the right to make that decision themselves when they have an opportunity to have a sober view of things, perhaps get input from physicians that they do trust and they're in a position to make this and under circumstances in an environment where they can make a cogent decision for the right reasons.

The -- the standard of care in this case, I submit to you is what the last physician I'm sorry I forget her name, but the nephrologist in this case testified to. It's -- it's the Hippocratic Oath, do no harm.

There is nothing that's going on in this case

with the treatment of this man that is harmful to him. They resent having to sustain him apparently but there's nothing that they're doing that is doing him any harm. There's nothing that violates any standard of care of any discipline in medicine. I don't care what they suggest in these affidavits. Not one of them was able to say on the stand that there's something that's going on with this patient, there's some treatment that's being directed towards him that is doing him harm.

They resent the fact for whatever their reasons, they resent the fact that they are being asked to keep him alive. But there's nothing they're doing to him that's harmful.

The family, I suggest to you, provides the other side of the coin.

You know counsel has argued that we've had un-contradicted testimony from five (5) physicians. Well the contradictions first of all come from their own records, and secondly come from the family.

The family's not prepared to say that this man is not aware of what's going on. The family's not prepared to say that he's in a persistent vegetative state depending on how you define that term and there's no agreement between the doctors on how that term is

even defined.

They're suggesting to you, Your Honor, exactly what Dr. Schanzer said that there are repetitive -- repetitive instances where he is responsive and Dr. Schanzer said if that were the case then he would have pause for thought concerning his opinions. In no uncertain terms he said if there was a repetitive response, then his opinions would be suspect.

The family provides that testimony. The family's not anxious to keep this man alive if they believe he's suffering.

Again, the only thing they ask is the right to make that decision themselves and not be dictated to by the institution whose -- whose motives are certainly suspect.

The case law -- I mean we've submitted the briefs and I'm not gonna regurgitate all of that but I suggest to you, Judge, that the Job's (phonetic) case is the -- is the controlling case here. And that case says that it is not the court's place to make the decision. The court doesn't make the call in this instance.

They appoint a guardian, preferably a family member to -- to be responsible for making that life or

death -- or death determination. It's not something the institution should be making. It's not something the court should be making. It should be someone with a familiar relationship with the patient or at least a close personal friend or someone who would be in a position to -- to cogently make -- make that decision considering not only the hospital's wishes and desires but also the patient's wishes and desires.

And there's nobody better to make that in this case I suggest to you than his daughter. And that's all we're asking is that she be appointed a guardian and be afforded the opportunity in the right atmosphere in the right environment to make a cogent decision on her father's behalf, on her family's behalf.

THE COURT: All right as I had indicated to counsel that I would not be rendering a decision now at the -- at the close of the summations.

I am going to take time to review the exhibits and my notes and then I'll provide a decision in this case.

I realize, of course, that it is important to both sides. It is important to have it done as promptly as possible and I will keep that in mind as I conduct this review.

I'll be in touch with counsel when -- when this decision is ready to be issued so that we can depending on what form it is how -- how it can be transmitted to -- to the parties. So I'll be in touch. Thank you very much.

MR. MARTIN: Thank you.

MS. LEVY: Thank you, Judge.

CERTIFICATION

I, Lynn Cohen-Moore, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of BETANCOURT V TRINITAS HOSPITAL, heard in the Union County Superior Court, Chancery Division, Civil Part, on February 23, 2009, Tape Number 037-09, Index 13:53:25 to 16:11:02, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

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BY: *Lynn Cohen-Moore*

Lynn Cohen-Moore A.O.C. #368

Dated: March 11, 2009