

Doc. 163

1 THE STATE OF OHIO -
2 : SS:
3 COUNTY OF CUYAHOGA. .

4 - - - - -
IN THE COURT OF COMMON PLEAS
5 - - - - -

6 JOANNE JEFFERS, :
7 administratrix, et cetera, :
8 plaintiffs, :
9

vs.

10 SOUTHWEST GENERAL :
11 HOSPITAL, et al., :
12 defendants. :
13 - - - - -

: Case No. 92-235970-CV
: Judge Pokorny

14 Deposition of MICHAEL FRANK, M.D., J.D., a
15 witness herein, called by the plaintiffs for the
16 purpose of cross-examination pursuant to the Ohio
17 Rules of Civil Procedure, taken before Constance
18 Campbell, a Notary Public within and for the State
19 of Ohio, at Weston, Hurd, Fallon, Paisley & Howley,
20 2500 Terminal Tower, Cleveland, Ohio on Monday, the
21 30th day of August, 1993, commencing at 9:17 a.m.
22 pursuant to agreement of counsel.
23 - - - - -



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25 COURT REPORTERS

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I N D E X

WITNESS: MICHAEL FRANK, M.D., J.D.

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(FOR KEYWORD AND OBJECTION INDEX SEE APPENDIX)

MICHAEL FRANK, M.D., J.D.

of lawful age, a witness herein, called by the plaintiffs for the purpose of cross-examination pursuant to the Ohio Rules of Civil Procedure, being first duly sworn, as hereinafter certified, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. KAMPINSKI:

Q. State your full name, please.

A, I am sorry?

Q. State your full name, please.

A, Michael Frank, F-r-a-n-k.

Q. Do you have a CV with you, Doctor?

A. I do not but I believe Mr. Switzer does,

Q. How much income do you derive annually from testifying and reviewing cases?

A. In terms of percentage or exact amount?

Q. Exact amount,

A. I don't have exact figures. In '92 probably somewhere between \$10,000 and \$25,000, somewhere in there. I know so far in '93 I received somewhere around \$10,000.

Q. What percentage of your income does that constitute?

1 A. Somewhere between five and 10 percent,

2 Q. Of that \$10,000 to \$25,000 last year, how
3 much of it was derived from Saint Paul Insurance
4 Company?

5 A. I have no idea.

6 Q. Did you receive a 1099 from them?

7 A. I may have, I don't recall if I did,

8 Q. How much of it was derived from work on
9 behalf of Weston, Hurd?

10 A. I can't answer that. I don't know that
11 offhand.

12 Q. Have you worked for Mr. Switzer before?

13 A. I believe I had one case with him before.

14 Q. What was the name of that case?

15 A. I don't recall it.

16 Do you remember what that was?

17 MR. SWITZER: Surface versus
18 Southwest.

19 A. Surface versus Southwest.

20 Q. Is that still pending?

21 MR. SWITZER: On appeal.

22 Q. Did you testify in that case?

23 A. I don't think so, I had a report which I
24 generated. I don't know I testified.

25 Q. Were you deposed?

1 A. I don't recall being deposed, I don't think,

2 Q. How much do you charge for depositions?

3 A. \$300 an hour, block to block.

4 Q. Block to block?

5 A. Same as last time we deposed me.

6 Q. I have a short memory, what does block to
7 block mean?

8 A. Portal to portal.

9 Q. Meaning from the time you get up, leave your
10 house, until you get back?

11 A, Until I leave the house is on me. After I
12 leave the house,

13 Q. Well, did you spend some time with
14 Mr. Switzer this morning?

15 A. That doesn't get charged to you. I had a
16 conference with him. The travel time plus the
17 deposition time.

18 Q. When did you leave your house?

19 A. Seven o'clock.

20 MR. SWITZER: In order to
21 avoid any motion, you're only going to be charged
22 for his actual deposition time here today.

23 Q. What time did you get here?

24 A. I got to the office about **ten** after 8:00;
25 ten, quarter after.

1 Q. What did you review for purposes of preparing
2 your report?

3 A. I reviewed a number of depositions, all of
4 which I have here with me. A number of expert
5 reports.

6 Q. What depositions did you review?

7 A. I reviewed the deposition of Randolph Bird;
8 deposition of Mary Jane Berardi; deposition of
9 Diane Atkinson; deposition of Mary Kloetzly;
10 deposition of Dr. Persaud; deposition of Dr. Allen
11 Jones; deposition of nurse Jenny Knopf; deposition
12 of Dr. Jeffrey Binder; deposition of Dr. Banaga.

13 Q. The highlights that are in some of the
14 depositions, are these your highlights?

15 A. No.

16 Q. Do you have letters that forwarded these
17 materials to you?

18 A. You mean correspondence covering these?

19 Q. Yes.

20 A. I do but I don't have them with me.

21 Q. Where are they?

22 A. At home.

23 Q. Why didn't you bring them?

24 A. I didn't feel it was part of the deposition
25 documents I should be bringing.

1 Q. You made the decision yourself?

2 A. Yes .

3 Q. You weren't told not to bring them by an
4 attorney?

5 A. No .

6 Q. When did you receive the deposition?

7 A. The date of receipt of each deposition is
8 stamped on the front, if you take a look you will
9 find it.

10 Q. What other information were you given other
11 than the depositions?

12 A. Are we talking prior to preparing my report,
13 which was your original question, or all
14 materials?

15 Q. Prior to preparing your report?

16 A. I received an undated letter to you from
17 Patricia Fanuele. I received a copy of a letter to
18 Christopher Mellino from Dr. Cunan. I received a
19 copy of the Southwest General Hospital Emergency
20 Department agreement. The rules and regulations of
21 the medical staff a Southwest General Hospital and
22 a contract agreement between Southwest General
23 Hospital and Southwest Medical Care Corporation. A
24 copy of the complaint in this case.

25 Q. What information did you receive from

1 Mr. Switzer with respect to the case; what did he
2 tell you about the case?

3 A. I got all this information from Mr. Switzer.

4 Q. What information did he give you not
5 contained in the depositions and materials you just
6 enumerated for me?

7 A. I'm not sure what you are asking. These are
8 the materials he gave me on the case.

9 Q. What did he tell you about the case that is
10 not contained in the materials?

11 A. There is nothing he told me about the case
12 that is not contained in the materials. It's all
13 there.

14 Q. What is in the letters he wrote you?

15 A. They were cover letters to the material. The
16 initial letter was a brief summary of the case,
17 again which is already in this material. The other
18 letters are basically here in this material. This
19 is a deposition, this a report. Trial is scheduled
20 for September 7th.

21 Q. Would you provide me with the letters that
22 you received from Mr. Switzer?

23 A. I will be glad to give them to Mr. Switzer.
24 If he wants to provide them to you, that is fine.

25 Q. So your answer is you won't give them to me?

1 A. You heard my answer.

2 Q. I asked a question, I would like you to
3 respond to it.

4 A. I responded to your question.

5 Q. So the answer is you won't give it?

6 A. I gave you the answer, it's not --

7 Q. Will you give them to me?

8 A. I will give them to Mr. Switzer.

9 Q. Will you give them to me?

10 A. I said I'd give them to Mr. Switzer.

11 Q. If you don't understand a question I ask,
12 tell me, I will be happy to rephrase it. If you do
13 understand, see if you can answer. Can you do
14 that, sir?

15 You have to respond verbally, she
16 can't take down the smirk.

17 A. I wasn't smirking.

18 Q. Yes you were.

19 A. I beg to disagree.

20 Q. You can disagree as much as you want. Now do
21 you understand the question?

22 A. I understand your question. Do you
23 understand my answer?

24 Q. No because it's not responsive to the
25 question.

1 A. If you don't understand my answer, rephrase
2 the question.

3 Q. Will you provide me -- you got that so far?
4 Will you provide me, you got those four words?

5 A. Move on counselor.

6 Q. -- with the letters that Mr. Switzer gave to
7 you, yes or no?

8 MR. SWITZER: The answer is
9 will he send --

10 MR. KAMPINSKI: I'm not asking
11 you any questions. I'm asking the witness who is
12 charging me \$300 an hour,

13 Q. If you would kindly respond to the question
14 we can move on,

15 A. I will provide the correspondence to
16 Mr. Switzer. If he feels you should have them, he
17 will send them to you.

18 Q. The answer is you won't give them to me?

19 A. Move on.

20 Q. You don't tell me what to do, not even in the
21 slightest, understand that?

22 MR. SWITZER: Mr. Kampinski,
23 can we stop? I will send you a copy of the
24 letters. Can we move on?

25 MR. KAMPINSKI: Can I have them

1 now?

2 MR. SWITZER: Yes .

3 -----

4 (Dr, Frank Deposition Exhibits 1 through 5
5 marked for identification.)

6 -----

7 Q. Handing you what has been marked 1 through 5;
8 can you identify those, please?

9 A. These are copies of various letters which
10 Mr. Switzer has sent to me.

11 Q. In number 5, on July 8, '93, Mr. Switzer
12 indicated he would be sending you additional
13 materials, summaries; did you receive those?

14 A. No.

15 Q. Did you ask for them?

16 A. No .

17 Q. Did you receive any additional materials
18 after your report?

19 A. Yes.

20 Q. What did you receive?

21 A. I received a letter to Mr. Switzer from
22 Dr. Quagliarello; a letter to Mr. Markworth; a copy
23 of a letter from Dr. Verdile; copy of a letter to
24 Mr. Switzer from Dr. Kirkwood; a copy of a letter
25 to Mr. Markworth from Dr. Fekety; a copy a letter

1 to Mr. Switzer from Maurene Reidy; and a copy of a
2 letter to Mr. Hupp from Dr. Papsidero; a transcript
3 of the deposition of Dr. Verdile; transcript of the
4 deposition of Dr. Quagiarello; transcript of a
5 deposition of Patricia Fanuele. I believe that is
6 all the material.

7 Also the material that I received
8 before, you asked me about depositions, I did of
9 course receive the medical records as part of the
10 original, even though that is not a deposition.

11 Q. Did you receive a copy of the deposition of
12 Dr. Cunan?

13 A. No .

14 Q. Did you ask for it?

15 A. No .

16 Q. Do you know why you didn't get it?

17 A. No .

18 Q. Did it matter to you if you had it or not?

19 A. No .

20 Q. You do emergency room work; is that correct?

21 A. I practice emergency medicine.

22 Q. In your opinion, as an emergency room
23 medicine specialist, did Dr. Jones do anything
24 wrong?

25 A. No.

1 Q. Is it his job to get people admitted who he
2 thinks are sick?

3 A. Well, you have to explain what you mean by
4 sick.

5 Q. Sick enough to get to the hospital?

6 A. If you're sick enough to need to be admitted,
7 it's his job to arrange for that.

8 Q. He did his job in that regard, didn't he?

9 A, Yes.

10 Q. Is it his job to make a definitive diagnosis?

11 A, No.

12 Q. You refer in your report to nurse's
13 obligation to be the eyes and ears of the physician
14 I believe is the way you put it, right?

15 A, Yes.

16 Q. To convey important information to the
17 physician?

18 A, That is correct.

19 Q. They are obliged to be patient advocates?

20 A. Correct.

21 Q. What does that mean to be a patient advocate?

22 A, To do what one thinks is best for the
23 patient.

24 Q. For the purpose of seeing that the patient
25 receives appropriate care, correct?

1 A. Correct .

2 Q. Did you receive Dr. Banaga's testimony or
3 deposition?

4 A. I believe I mentioned before that was one of
5 the depositions that I reviewed prior to my
6 report .

7 Q. Her testimony was she was not told of Nurse
8 Knopf's findings with respect to the things she
9 thought were indicative of meningitis, you read
10 that testimony?

11 A. Yes .

12 MR. SWITZER: Objection.

13 Q. If that testimony is accurate, then Nurse
14 Knopf was negligent in failing to inform Dr. Banaga
15 of those findings, was she not?

16 A. That is not true.

17 Q. I think Dr. Banaga said she should have been
18 told of those findings; do you disagree with that?

19 MR. SWITZER: Objection.

20 Q. Do you disagree?

21 A. I disagree with your characterization.

22 Q. Do you agree that Nurse Knopf should have
23 told Dr. Banaga of her findings?

24 A. Not necessarily, no.

25 Q. So that a finding of inability of a patient

1 to put his chin to his chest is not something a
2 nurse should tell a physician?

3 MR. SWITZER: Objection.

4 A, If the physician is not going to examine the
5 patient themselves, if the nurse is relaying
6 information by phone for example, upon which the
7 physician is going to rely, there is no other
8 assessment going on but that, then that is
9 essential to relay to the physician, that is
10 correct. That is not the circumstances we have
11 here.

12 Q. So it's not helpful to a physician to be
13 apprised of what the nurse sees, whether or not
14 he's going to examine the patient or not?

15 A. Helpful and obligatory are two different
16 things.

17 Q. It's not obligatory?

18 A. Absolutely not.

19 Q. There is really no need for a nurse to do an
20 assessment if a doctor is going to do it, right?

21 Ae I'm not sure what you mean by no need. That
22 is not true, All the information that can be
23 gathered can be helpful one time or another.

24 Q. If it's not obligatory what difference does
25 it matter if it's done if you don't have to pass it

1 it on; it may be helpful, if it's helpful, why do
2 it?

3 A. If it's helpful or not obligatory we should
4 eliminate it?

5 Q. You said you don't have to pass it on. If
6 you don't have to pass it on, why do it?

7 A. I said in the circumstances where the
8 physician is making an independent assessment it
9 may not be obligatory to pass it on.

10 For the same reason it is
11 obligatory of a nurse in the triage emergency
12 room --

13 Q. Let's talk about this case. I saw your cute
14 analogies in your report, Your attempt at
15 analogies.

16 A, "Your cute"?

17 Q. Yes, they are cute.

18 You want to stick to my question?

19 MR. SWITZER: What is the
20 question?

21 Q. Why have Nurse Knopf do an examination at all
22 if in fact it's not necessary for her to pass on
23 her findings?

24 A. In fact she may find things that can be
25 useful or helpful for someone looking later,

1 especially other nurses.

2 Q. Not the doctors though?

3 A. It may be useful, helpful to the doctors
4 later,

5 Q. If you don't have to tell the doctor, then
6 how can you determine if it is useful?

7 A. You are saying unless you have a finding
8 which is necessary to tell the doctor it's not
9 helpful to make the finding; that's what you are
10 saying?

11 Q. I'm saying you are willing to say anything
12 you're hired to say?

13 MR. SWITZER: wait a minute,
14 Doctor, Don't answer this.

15 Q. When you testify that a nurse isn't obligated
16 to pass on findings such as can't put chin to chest
17 because any competent doctor is going to do an
18 examination, then my question, it was a simple
19 question, is why in the world have the nurse do the
20 examination in the beginning?

21 MR. MARKWORTH: Objection.

22 MR. SWITZER: You don't need
23 to answer the question considering the editorial
24 comment.

25 MR. KANPINSKI: Which part?

1 The part that he'll say anything he's hired to say
2 you want to take out?

3 MR. SWITZER: I want to take
4 that out.

5 Q. No, that is true, isn't it? Is it Doctor or
6 Lawyer; which do I call you?

7 MR. SWITZER: There are
8 things Mr. Kampinski you are entitled to ask, that
9 is not it.

10 Q. You will say anything you're hired to say?

11 A. That's a question?

12 Q. Yes,

13 A. That doesn't deserve an answer.

14 Q. Because of the obviousness of the answer?

15 A, Because it doesn't deserve an answer,

16 Q. Because of the obviousness of the answer?

17 A. It's an insult. It's an obvious insult. Now
18 move on.

19 Q. That is the third time you told me to move
20 on.

21 A, I will tell you again when you do this.

22 Q. You're in no position to tell me to do
23 anything.

24 A. I'm in a good position to tell you to do
25 that. If you don't like it don't ask questions

1 like that .

2 Q. Does that mean you are not going to answer
3 questions?

4 A. Move on.

5 MR. SWITZER: He's not going
6 to answer that question.

7 Q. What is the purpose of the nurse doing an
8 assessment if she doesn't have to pass on findings
9 to a physician, just for the heck of it? Is there
10 a reason for that, why do you rationalize her
11 having to do that if in fact she doesn't have to
12 pass on the information, if in fact you're not here
13 just to give testimony to assist a particular
14 defendant, regardless of the merits of the
15 testimony?

16 MR. SWITZER: Hold on, you're
17 not going to answer the question.

18 Q. Do you understand the question?

19 MR. SWITZER: Mr. Kampinski,
20 he's not going to answer.

21 Q. Do you understand it, sir?

22 MR. SWITZER: You don't have
23 to answer that question either.

24 MR. KAMPINSKI: Whether he
25 understands it?

1 MR. SWITZER: Why are you
2 saying this stuff, you're here to ask his opinions
3 only .

4 MR. KAMPINSKI: No, bias and
5 honesty is perfectly acceptable.

6 Q. You learned that in your law education, bias
7 and honesty, credibility, all those things are
8 appropriate for me to inquire into, aren't they?

9 MR. SWITZER: From his law
10 school --

11 MR. KAMPINSKI: Sure.

12 MR. SWITZER: --

13 instruction?

14 MR. KAMPINSKI: Yes.

15 MR. SWITZER: Are you asking
16 about his law school instead of medicine?

17 MR. KAMPINSKI: Could you read
18 back the last five or six questions one at a time.
19 See if we can get through it.

20 MR. SWITZER: You might as
21 well not waste your time, He's here pursuant to
22 Rule 26, you can ask his opinions and grounds for
23 the opinions.

24 MR. KAMPINSKI: Are you going
25 to interrupt me **anymore?** **Are you instructing him**

1 not to answer?

2 MR. SWITZER: No.

3 -----

4 (Question read as follows: What
5 is the purpose of the nurse doing an assessment
6 if she doesn't have to pass on findings to a
7 physician, just for the heck of it? Is there a
8 reason for that, why do you rationalize her
9 having to do that if in fact she doesn't have to
10 pass on the information, if in fact you're not
11 here just to give testimony to assist a
12 particular defendant, regardless of the merits of
13 the testimony?)

14 -----

15 MR. SWITZER: There are two
16 or three questions in that. Which one do you want
17 him to answer?

18 MR. KAMPINSKI: All of them.

19 MR. SWITZER: Why don't you
20 answer why a nurse has to do an assessment.

21 A. The nurse is responsible for delivering
22 patient care. That includes making an assessment
23 to provide the information helpful, may be helpful
24 to the physician later about the patient.

25 Q. It was your testimony a few minutes ago she's

1 not obligated to pass the information on?

2 A, That remains my testimony.

3 Q. How can it be helpful if she doesn't pass it
4 on?

5 A, You are saying it can't be helpful if she
6 writes it down, someone accesses it later? It
7 can't be helpful if she tells other nurses or
8 nurses know about it? That is obvious from its
9 very nature it can be helpful in those purposes,
10 helpful without being passed on immediately to a
11 physician.

12 Q. Nurse Knopf testified she told Dr. Banaga of
13 this finding; you read that?

14 A. Yes.

15 Q. Dr. Banaga testified Nurse Knopf did not tell
16 her of that finding; you read that?

17 A. I read that,

18 Q. Who is lying?

19 MR. MARKWORTH: Objection.

20 A, I have no idea.

21 Q. Does it matter to you?

22 A, In what way does it matter? What are you
23 asking?

24 Q. Any way; as a lawyer, a doctor, as a person,
25 does it matter, do you care?

1 A. Yes. Someone is not recounting correctly.
2 Whether someone is lying --

3 Q. Why do you care? What difference does it
4 make? Does it matter to your testimony one way or
5 the other?

6 A, No, it doesn't matter to my testimony.

7 Q. Does it matter if someone is lying for the
8 purpose of your opinion?

9 A. For the purpose of my opinion, in terms of
10 this case, no, it doesn't matter.

11 Q. I'm trying to get the parameters if you care
12 if someone is lying in a case for the purpose of
13 your testimony. Obviously you don't,

14 A. That is not what we just said.

15 Q. That is what you said.

16 Did you rely on Dr. Banaga's
17 testimony as to what kind of an examination she did
18 for purposes of your opinions?

19 A, Yes.

20 Q. Well, if she were lying, Doctor, Lawyer,
21 about what Nurse Knopf said to her, why wouldn't
22 she lie about her examination?

23 MR. MARKWORTH: Objection.

24 A, She might if she were lying.

25 Q. If she were lying about her examination,

1 would that affect your opinion?

2 A. Yes, it would.

3 Q. Bow is that?

4 A. If she were lying about her examination, in
5 terms of what she tested, if they did not test the
6 neck which is a critical point here, then her
7 examination would not have been consistent with the
8 standard of care required of her.

9 Q. Would that have contributed to cause
10 Mr. Jeffers' death, that failure?

11 A. Not unless we assume that the examination of
12 the emergency physician before and Dr. Binder after
13 was also erroneous.

14 Q. What if we assume that the examination of
15 Nurse Knopf was accurate?

16 A. Okay .

17 Q. That Dr. Banaga is just an incompetent liar?

18 MR. MARKWORTH: Objection.

19 Q. Can we assume that for the sake of answering
20 the next question?

21 A. For a hypothetical.

22 Q. If you want to make it hypothetical that is
23 all right.

24 If that were the case, would that
25 **failure to adhere to appropriate standard of care**

1 in examining Mr. Jeffers' neck have contributed to
2 cause his death?

3 A. Again, the finding which you are talking
4 about from Jenny Knopf was not the critical
5 finding. The findings documented before and after,
6 unless we assume that Dr. Banaga would have found
7 something entirely different, then no, it would
8 not.

9 Q. Could you explain to mean why in the world
10 your attorney who gave you all these materials
11 didn't give you the testimony of Mrs. Jeffers who
12 was in the room when Dr. Banaga did her alleged
13 examination; can you tell me why that is?

14 A. You have to ask him.

15 Q. I'm asking you.

16 A. I don't know.

17 Q. As a man who is interested in giving an
18 opinion based upon the facts and the information,
19 you're aware of, I assume, the fact that there are
20 only two or three people in the room when he was
21 examined by Dr. Banaga?

22 A. That is right.

23 Q. One of them is dead, right?

24 A. That is correct.

25 Q. You read the testimony of one of them, right,

1 Dr. Banaga?

2 A. That is correct.

3 Q. Which is contradicted by a nurse in the
4 nurse's testimony in this case?

5 A. I believe not.

6 Q. We have just gone through the contradictions
7 I'm referring to is what she was or wasn't told?

8 A. That contradiction, that is correct.

9 Q. Sure. Yet, in terms of the examination you
10 are not interested in hearing the testimony of the
11 other individual who was in the room, who was most
12 familiar with Mr. Jeffers and his symptoms and his
13 problems, that is Mrs. Jeffers?

14 A. Problem that you have, even if Dr. Banaga had
15 not done any examination, the examination both
16 before and after show that what was being done was
17 adequate under those circumstances.

18 Q. Do you understand my question?

19 A. Your question is contributed to his death.

20 Q. My question now is why in the world you're
21 not interested in the facts. That is my question.

22 A. Mr. Switzer determines what he's going to
23 send me. The decision is based on what information
24 I need to know, the facts. That when he sends me
25 information I'm going to charge him for it. He's

1 in charge of managing the case, He decides the
2 information that is going to be helpful to me, I'm
3 not in a position to question him. Certain items I
4 know are important I will ask him for, If he had
5 not sent me the medical record. Certain reports he
6 sent me without sending me depositions, Those are
7 decisions which I'm not really in a position to say
8 this obviously I should be reading.

9 Q. So Mrs. Jeffers' testimony was not important
10 to YOU?

11 A, Are you telling me there is something in her
12 testimony which is important in terms of my opinion
13 here?

14 Q. What do you care, you never asked for it?
15 If you would have cared, you would have asked for
16 it, sir, You didn't ask for it, you don't care
17 what she said,

18 A. You're testifying here?

19 Q. No, I'm asking you a question.

20 A. Doesn't sound Like a question to me.

21 Q. Do you care what she had to say?

22 A. I care if there is something she had to say
23 which bears upon my opinion in this case,

24 Q. How do you know that unless you read it?

25 A. Mr. Switzer determines that, sends it to me.

1 Q. You rely on the lawyer who hired you, who
2 represents Southwest General, to send you
3 information which may be contradictory to your
4 opinion?

5 A. I rely upon him to do that, yes, I do.

6 Q. If he didn't do that it was his fault, not
7 yours?

8 A. Absolutely.

9 Q. How much do you charge him?

10 A. \$200 an hour,

11 Q. You charge me more than you charge him?

12 A. I charge anybody for the deposition \$300 an
13 hour.

14 Q. Is it you don't like me as much as him?

15 A. The fee and the charge has not changed at all
16 since the last time we went over this.

17 Q. So you don't like me any better now than you
18 did then?

19 A. It's not relevant. I think you are doing a
20 job.

21 Q. Did Dr. Banaga diagnose an external ear
22 infection or internal ear infection?

23 A. I would have to check the record, see what
24 she put down.

25 Q. You have to check the record?

1 A. Yes. I didn't memorize it.

2 Q. Isn't that an important piece of information?

3 A. I believe so. I reviewed the record, I
4 didn't memorize it.

5 Q. You don't know what the diagnosis was?

6 A. It was one or the other.

7 Q. Which one?

8 A, I know she told the nurses that the emergency
9 room felt it was an otitis.

10 Q. She told the nurses that the emergency room
11 felt it was an otitis; what does that mean?

12 A. I'm repeating what was in the depositions
13 from the nurses.

14 Q. From the nurses?

15 A. Yes.

16 Q. What nurses?

17 A. Randy Bird.

18 Q. You have memorized this?

19 A. No. I haven't memorized it.

20 Q. Go ahead. Who else?

21 A. I believe Jenny Knopf recalled that as well.

22 Q. So they testified that Dr. Banaga told them
23 that the emergency room said it was an otitis; is
24 that an internal or external ear infection?

25 A. She said bilateral acute otitis media.

1 Q. What is that?

2 A. Infection of the middle area.

3 Q. Internal?

4 A. The middle ear, as opposed to the inner ear,
5 for example, which has been erroneously
6 characterized in some of the materials here.

7 Q. By whom?

8 A. I'm not sure. I have seen it said an inner
9 ear infection, perhaps by you, I don't know. Inner
10 ear is not middle ear.

11 Q. Is it an external ear infection?

12 A. No .

13 Q. What is it?

14 A. What is what?

15 Q. The infection?

16 A. Middle ear infection.

17 Q. How do you treat that?

18 A. Antibiotics, analgesics, decongestants.

19 Q. What kind of antibiotics?

20 A. A variety of antibiotics.

21 Q. Was the one that was prescribed the
22 appropriate one?

23 A. Not one I would normally use for otitis
24 media .

25 Q. I don't care what you would use, quite

1 frankly. I don't know if you have a good practice,
2 medium practice, great practice, bad practice.

3 A. What did you say?

4 Q. I don't know what kind of practice you have,
5 I don't care, So I don't know why you are
6 interjecting what you do or what you wouldn't do
7 your here as an expert, presumably here to tell us
8 what the world community would do, what is
9 appropriate for them, whether or not standards of
10 care were met or weren't met.

11 A. The world community?

12 Q. Yes ,

13 A. I don't think so.

14 Q. The universal community?

15 A. I don't think so.

16 Q. Was **it** the appropriate antibiotic for the
17 condition that she diagnosed in the Cleveland
18 community?

19 A. It was not the most appropriate antibiotic,

20 Q. Was **it** appropriate at all?

21 A. It might have been.

22 Q. Was **it** or wasn't **it** to a reasonable degree of
23 medical certainty the appropriate antibiotic for --
24 what did she diagnose?

25 A. Bilateral acute otitis media.

1 Q. Was it an appropriate antibiotic for that?

2 A. Not for that alone, no.

3 Q. Well then why didn't she change it to an
4 appropriate one?

5 A. I can hazard a guess what she did in terms of
6 whether she would --

7 Q. Let me withdraw. To a reasonable degree of
8 medical certainty did she deviate from the
9 appropriate standard of care in not prescribing an
10 appropriate medication for the diagnosis she made?

11 A. In not prescribing a different antibiotic?

12 Q. Yes, sir.

13 A. No,

14 Q. So she did a good job leaving it then?

15 A. She did an acceptable job.

16 Q. Did an acceptable job?

17 A. That is correct.

18 Q. Are you an infectious disease specialist?

19 A. No.

20 Q. Of course that doesn't prevent you from
21 offering testimony as to medication for diseases,
22 does it?

23 A. No, of course not.

24 Q. You testify about a lot of things, don't you?

25 A. I don't testify very much at all,

1 Q. Render opinions about a lot of things, don't
2 you?

3 A. Not very much.

4 Q. Was Dr. Binder negligent?

5 A. I'm not sure.

6 Q. Why not?

7 A. Because I'm not an ear, nose and throat
8 specialist.

9 Q. Are you a house physician specialist?

10 A. I don't think I would characterize myself as
11 a house physician specialist. I'm not sure what
12 that is.

13 Q. Are you a nurse specialist?

14 A. What is that?

15 Q. I don't know.

16 A. I'm not a nurse.

17 Q. You are here to render opinions about nurses?

18 A. Yes, I am.

19 Q. You rendered opinions about house physicians?

20 A. Yes, I am.

21 Q. What is it about Dr. Binder that causes you
22 any difficulty?

23 A. I'm not a specialist in ear, nose and
24 throat, I know there are things ear, nose and
25 throat physicians do or practice that I'm not

1 familiar with, decisions which I don't always
2 understand.

3 Q. Do you know whether Dr. Banaga received a
4 restful sleep that evening?

5 A. Which evening are you talking about?

6 Q. The evening she saw Mr. Jeffers?

7 A. I know she was called to examine him, do her
8 initial assessment after midnight. Was called
9 again about his vomiting around 3:00.

10 Q. Did she come to see him?

11 A. With the call or examining him?

12 Q. When she was called around 3:00?

13 A. No, she didn't come to see him.

14 Q. Was she really far away you think?

15 A. She was somewhere in the hospital.

16 Q. Ever been out to that hospital?

17 A. No.

18 Q. Do you think the nurses did a real good job
19 in the morning when they didn't tell anybody about
20 the emesis at 7:00 a.m.; do you think they did a
21 good job?

22 A, They didn't tell anybody?

23 Q. Yes.

24 A. I understood they told each other in report.

25 Q. I feel relieved that they told each other.

1 What did they do about it? I think in your report
2 you said it's not their job to diagnose and treat,
3 so the fact that they told each other, is that real
4 helpful?

5 A. You have a symptom and problem which is
6 ongoing.

7 You have a patient for example who
8 has a broken arm, has pain in his arm.

9 Q. Did Mr. Jeffers have a broken arm?

10 A. In the morning --

11 Q. Did he have a broken arm? I asked you to
12 talk about this case, as opposed to going on a lark
13 and frolic of your own.

14 A. We will talk about this case. Mr. Jeffers
15 had vomiting as one of his complaints not only from
16 when he was admitted, this was part of his
17 history. The fact he had a symptom, manifestation
18 of that symptom, which was consistent, which
19 persisted, and the symptoms he had before doesn't
20 mean every time a patient has that symptom someone
21 should be notified.

22 Q. Is vomiting a symptom of otitis media,
23 Doctor, Lawyer?

24 A. Very common.

25 Q. Is it?

1 A. Extremely common.

2 Q. So that the physician who testified in this
3 case, infectious disease physician, for example,
4 they don't know what they are talking about?

5 A. Not about that they don't. The infectious
6 disease specialist who testified in this case said
7 he gets maybe one or two cases of otitis a month.
8 I have seen 500 cases in the last two years.

9 Q. Good thing we have got you around then.

10 A. It is because you want to get to the truth of
11 this also, I'm sure.

12 Q. Unlike you, you don't really care about the
13 truth?

14 A. Just like me.

15 Q. You don't care about truth. You don't care
16 about anything but lining your pockets, do you?

17 MR. SWITZER: Let's stop this
18 Mr. Kampinski. Don't even answer that.

19 Q. Isn't that what this is all about for you,
20 M.D., J.D.?

21 A. Does that mean you don't have any substantive
22 questions about this case?

23 Q. It means I'm waiting on an answer.

24 A. It means to me you don't have anything you
25 need to ask about, you are falling back upon smears

1 and insults, That is not what we are here for.

2 Q. When it comes to you it is.

3 MR. SWITZER: When it comes
4 to him it is what? Are you going to finish the
5 question? What was the question?

6 Q. The question is whether or not he admits he's
7 a prostitute. That is the question,

8 MR. SWITZER: Deposition is
9 stopped from Mr. Kampinski's standpoint. You have
10 any questions?

11 MR. KAMPINSKI: Are you not
12 going to allow me to continue to question?

13 MR. SWITZER: Not acting like
14 this.

15 MR. KAMPINSKI: He hasn't
16 answered it yet,

17 MR. SWITZER: We are stopping
18 the deposition. Any questions, John?

19 MR. KAMPINSKI: It's a fact,
20 isn't it?

21 MR. JACKSON: I do,

22 MR. SWITZER: Ask a question,
23 John.

24 MR. KAMPINSKI: I'm not done.

25 MR. SWITZER: Yes, you axe,

1 MR. KAMPINSKI: No.
2 MR. SWITZER: Any questions,
3 John?
4 MR. JACKSON: When we resolve
5 this I do have.
6 MR. SWITZER: It's been
7 resolved. Any questions?
8 MR. KAMPINSKI: No, I don't
9 think we resolved it at all, Mr. Switzer.
10 MR. SWITZER: Any questions?
11 MR. JACKSON: I said yes, I
12 do. I can't talk over everybody here.
13 MR. SWITZER: It's done.
14 MR. KAMPINSKI: No, I'm not
15 done with questions.
16 MR. SWITZER: We are done.
17 MR. KAMPINSKI: I will keep
18 asking questions.
19 MR. SWITZER: We won't be
20 here.
21 MR. KAMPINSKI: You can tell
22 him not to answer each and every question from your
23 standpoint.
24 MR. SWITZER: Any questions,
25 John?

1 MR. JACKSON: Yes.

2 MR. SWITZER: Go ahead,
3 John.

4 MR. JACKSON: You want me to
5 proceed?

6 MR. SWITZER: Yes.

7 -----

8 CROSS-EXAMINATION

9 BY MR. JACKSON:

10 Q. As it relates to Dr. Binder, my understanding
11 is you are not going to render any opinions to a
12 reasonable degree of medical certainty whether or
13 not he met the accepted standard of care?

14 A. That is correct.

15 Q. As relates to Dr. Jones, it is your belief
16 that he did in fact meet the standard of care of an
17 emergency room physician within his specialty?

18 A. That is correct.

19 Q. Are you aware that Dr. Banaga, through
20 counsel, has attempted to file a third-party
21 complaint against Dr. Jones bringing him into the
22 lawsuit as a party?

23 A. I was not aware of that.

24 Q. Are you aware that Dr. Banaga is insured by
25 Saint Paul Insurance, which also insures Southwest

1 General Hospital?

2 A. I was not aware of that.

3 Q. You're aware that the experts who have
4 testified on behalf of Dr. Banaga have indicated
5 that Dr. Jones' care and treatment was appropriate,
6 are you aware of that?

7 A. Some of them have, yes, I'm aware of that.

8 Q. Would you characterize the attempt by
9 Dr. Banaga to file a complaint against Dr. Jones
10 given that status of information as frivolous?

11 MR. MARKWORTH: Objection.

12 A. Are you asking me the legal analysis of
13 this?

14 MR. MARKWORTH: Objection.

15 Q. Yes.

16 MR. SWITZER: As a lawyer?

17 Q. As a lawyer and let's talk about as a
18 physician. Doctor didn't do anything wrong, the
19 experts that they retained indicated he didn't do
20 anything wrong, yet in light of that they file a
21 complaint trying to draw him into the lawsuit.
22 Would that not strike you as a physician first, as
23 an expert, as a frivolous act?

24 A. As a physician I can't ignore the fact
25 **frivolous is an entirely different type of**

1 standard, I would characterize it as unwarranted,
2 unjustified from the physician's standpoint, From
3 the attorney's standpoint it probably is tactical,
4 I'm not sure I could characterize it as frivolous,
5 or colorable justification.

6 Q. So that I'm clear, I think I'm done as far as
7 questions, you have --

8 MR. KAMPINSKI: Put this on the
9 record, I'm calling my associate. Get a hold of
10 the judge in the Jeffers case. Tell him
11 Mr. Switzer has stopped me from asking Dr. Frank
12 any questions. I questioned him for almost an
13 hour, we are not through the factual pattern, he
14 won't let me ask him any questions. We are now in
15 Mr. Switzer's office, See what the judge wants to
16 do, If he wants to prevent Dr. Frank from
17 testifying, if Mr. Switzer doesn't let me ask
18 questions.

19 How will they get through to us
20 here, Mr. Switzer?

21 MR. SWITZER: Dial my number,
22 241-6602.

23 MR. KAMPINSKI: I am sorry,

24 BY MR. JACKSON:

25 Q. Doctor, as it relates to Dr. Binder, so I'm

1 clear, you will not render opinions at the trial of
2 this matter indicating that Dr. Binder did or did
3 not deviate from accepted standards of care in his
4 treatment of Mr. Jeffers?

5 A. That is correct.

6 MR. JACKSON: No further
7 questions at this time. I may have others
8 depending on the result of the court's intervention
9 regarding the questions by Mr. Kampinski.

10 MR. MARKWORTH: I have no
11 questions at this point in time.

12 MR. SWITZER: I guess we are
13 done.

14 -----

15 (Dr. Frank Deposition Exhibits 6 through 8
16 marked for identification.)

17 ------

18

19

20

21 -----

22 (Deposition concluded; signature not waived.)

23 -----

24

25

ERRATA SHEET

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I have read the foregoing transcript and the
same is true and accurate.

MICHAEL FRANK, M.D., J.D.

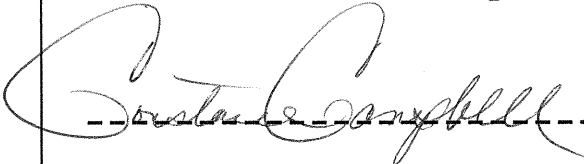
1 The State of Ohio, -

2 County of Cuyahoga, : CERTIFICATE:

3 I, Constance Campbell, Notary Public within
4 and for the State of Ohio, do hereby certify that
5 the within named witness, MICHAEL FRANK, M.D. J.D.
6 was by me first duly sworn to testify the truth in
7 the cause aforesaid; that the testimony then given
8 was reduced by me to stenotypy in the presence of
9 said witness, subsequently transcribed onto a
10 computer under my direction, and that the foregoing
11 is a true and correct transcript of the testimony
12 so given as aforesaid.

13 I do further certify that this deposition was
14 taken at the time and place as specified in the
15 foregoing caption, and that I am not a relative,
16 counsel or attorney of either party, or otherwise
17 interested in the outcome of this action.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand and affixed my seal of office at Cleveland,
20 Ohio, this 31st day of August, 1993.

21 
22 -----

23 Constance Campbell, Stenographic Reporter,
24 Notary Public/State of Ohio.

25 **Commission expiration: January 14, 1998.**

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