#593

COURT OF COMMON PLEAS
CUYAHOGA COUNTY

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ELLIS BROWN, et al.,)
)
Plaintiffs,)
)
vs.) Case No. 325024
) Judge Celebrezze, Jr.
WILLOW PARK CONVALESCENT AND REHABILITATION CENTER, INC., etc., et al.,)
)
Defendants.)

ORIGINAL

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Transcript of videotaped deposition of MARK FRANKEL, M.D., Expert Witness herein, called by the Plaintiff as upon cross-examination, pursuant to Notice of Counsel, pursuant to the Ohio Rules of Civil Procedure, before Loretta Krumheuer, a Registered Professional Reporter and Notary Public within and for the State of Ohio on Friday, September 25, 1998, at Lutheran Medical Center, 1730 West 25th Street, Cleveland, Ohio, commencing at 10:30 a.m. and concluding at 11:50 a.m.

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PROCEEDINGS

MARK FRANKEL, M.D.,

Expert Witness herein, called by the Plaintiffs as upon cross-examination, having been first duly sworn, as hereinafter certified, was examined and testified as follows:

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MS. DIXON: Good morning, Dr. Frankel. As you learned off the record, my name is Debra Dixon. I'm one of the attorneys representing the Plaintiffs in this case.

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CROSS-EXAMINATION OF MARK FRANKEL, M.D.

BY MS. DIXON:

Q. Can I ask you to please state your full name, spell your last name and give your professional address for the record.

A. Mark Frankel. F-R-A-N-K-E-E. 1730 West 25th Street, Cleveland, Ohio 44113.

Q. Dr. Frankel, in order to expedite things -- and I assure you, my goal is not to keep you here for the majority of the day by any stretch of the imagination -- I've been provided a copy of your Curriculum Vitae. If I could ask you to take a quick look at that document and tell me whether or not that

is substantially correct and updated, and if there are outstanding items that you believe are relevant to this particular case, if you can please tell me what they would be?

A. Yes. This is, this is correct,

Q. There are no additional continuing education seminars or courses that you may have taken that you believe are relevant to the facts and circumstances of this Ellis Brown matter, correct?

A. I haven't listed any continuing medical education courses. I don't do that on a CV.

Q. Okay.

A. I've taken numerous ones and in the process of giving one on October the 10th, but I don't list those kinds of things. I mean, I do that kind of thing all the time.

Q. Okay. And what type of continuing education seminar are you preparing to give on October the 10th?

A. That's entitled: Depression in the elderly.

Q. And who, who is the audience for that CLE -- or, I'm sorry --

A. Psychiatrists and primary care physicians,

Q. Have you prepared written materials in anticipation of that?

A. I'm in the process of doing that.

Q. Okay Mr. Rankel, I don't mean to get too far off the beaten path, but let me cover a few preliminary issues with you, if I could. I'm certain you've had your deposition taken before, correct?

A. Yes.

Q. You understand that if at any point in time you don't understand a question I've asked, you're unclear as to where I'm going, please ax me to clarify the question. If you answer, I'll assume that you understood the question and your answer is truthful and correct?

A. Correct.

Q. And you understand you need to answer orally, correct?

A. Correct.

Q. And if at any point in time you receive a page or need a break, please let me know and we'll go off the record and deal with those issues as they come up.

Doctor, let me ask you what preparation you've done in anticipation of this deposition this morning?

A. I reviewed my report.

Q. That's it, correct?

A. I've spoken to Miss Manway.

Q. And for approximately how long?

A. Fifteen minutes.

Q. Okay. I'm going to refer you to your report dated June 29, 1998, and in the first paragraph you identify a variety of records that you reviewed to assist you in preparing your report, correct?

A. Correct.

Q. Are there any documents that you reviewed in preparing your report that are not identified in the first paragraph of your June 29th correspondence?

A. I believe that I received a letter from Miss Manway, and that was the only other thing that I, that I took a look at.

Q. Okay. And just for clarification purposes, other than the deposition of Ellis Brown, you have not reviewed the depositions of any employees or agents of Willow Park, correct?

A. No. That's correct.

Q. And since preparing your report on June 29th of 1998, have you reviewed any additional documents?

A. No.

Q. You referred earlier to a piece of correspondence from Miss Manway, correct?

A. (Nodding head).

Q. Have you received more than one piece of correspondence?

A. Not to my recollection.

Q. Now, you may or may not be aware there are more than -- there's more than one Defense attorney in the case. Miss Manway is one attorney for the Defendants. There is also an attorney, Aric Martin, and an attorney for Thomas Conway, Rose Patti. Have you received correspondence from any of those attorneys?

A. No, I haven't.

Q. And with respect to your correspondence dated June 29, 1998, is it your understanding that you are espousing, or opining, on behalf of Willow Park?

A. Yes.

Q. And does -- you are not rendering opinions on behalf of Tom Conroy personally?

MS. MANWAY: I'll interject here. The Doctor's report is submitted on behalf of all Defendants.

MS. DIXON: Okay.

BY MR. DIXON:

Q. And since June 29, 1998, are there any additional opinions that you hold in this case?

A. No.

Q. I will let you know that there is an issue with respect to attorney correspondence in this case. Other than that, is there any portion of your file that has been removed?

A. No.

Q. Let me ask you, without asking you to divulge the contents, did part of Miss Manway's correspondence include a summary of the facts of this case? And you can feel free to refer to it if you want.

A. I don't have that. I believe that it did.

Q. Okay, Let's move on to your -- you've already identified that your Curriculum Vitae is up to 'date, correct?

A. Correct.

Q. Can you identify, for purposes of the record, your current job description or job responsibilities?

A. I'm the chairman of the Department of Psychiatry, Fairview Health System. And my practice, I'm the director of Transitions Senior Mental Health Service. And, basically, my primary area of practice is geriatric psychiatry.

Q. And does that, generally speaking, deal with inpatient psychiatric patients who are of the geriatric population?

A. A considerable portion of my practice does consist of that.

Q. And when you say a considerable portion of your practice, can you quantify that in terms of percentages for me?

A. In terms of inpatient geriatric psychiatry or --

Q. If you can give me both, both inpatient and outpatient?

A. I would say of my clinical activity, 80 percent of the time is geriatric psychiatry, and probably half of that, 50 to 60 percent of that, is inpatient.

Q. And for clarification purposes, when you say inpatient, you mean here at a more acute --

A. Here at Lutheran.

Q. An acute facility, as the premises of a nursing home?

A, I do consultations at nursing homes, also, but I was referring to inpatient here at the hospital.

Q. Now, the consults that you do in nursing home facilities, is that done on a referral basis or are you actually a medical director?

A. It's a referral basis. I'm a consultant,

Q. And would those be consultants for private patients, correct?

A, Yes. I'm consulted by the patients' attending physician at the nursing home.

Q. And in conjunction with those consultations, do you actually visit or treat patients that are nursing home residents?

A. I go to the nursing home and see the patients

there.

Q. And currently what percentage of your time is actually spent on premises at nursing home facilities?

A. I would say a little under 10 percent.

Q. And for what period of time has that been true, that approximately 10 percent of your time is spent on premises at nursing home facilities?

A. I would say since 1991.

Q. Would it be fair, then, to say that during that period of time, from 1991 through the present date, when approximately 10 percent of your time has been spent in nursing home facilities, that you would see the patients periodically as opposed to on a daily basis?

A. Oh, yes.

Q. And those periodic visits, would those be once a week or once every two weeks?

A. More like once a month or less often, depending on the need.

Q. And, again, I'm not looking to put words in your mouth, but just based on my experience, I'm assuming that your role is to assist in managing patients' behaviors and/or their medication regimen, correct?

A. That would be correct,

Q. And at some level, then, given the once-a-month

increments that you just referred to, that that would be somewhat of a supervisory role?

A. A consultative role.

Q. Does that also involve patient interviews?

A. Yes.

Q. And does it extend as far as actually providing psychiatric therapy other than drug therapy for those patients?

A. When required it does.

Q. And just so that you and I are on the same page, I'm referring to patient interviews, psychiatric therapy where you would have a dialogue with the patient?

A. Where applicable.

Q. Okay. And would you agree with me that that is, at least as far as nursing home population goes, the least percentage of your time, the actual dialogue therapy with patients, as opposed to the consultations?

A. Well, the consultation requires interviewing the patients, but if you're talking about psychotherapy --

Q. Yes.

A. -- with the patients, if that's what you're referring to, yes, I would agree with that. That's the least percentage of the time. That's rarely applicable to a nursing home patient.

Q. Okay. Now, with respect to your responsibilities here at Lutheran, or within that --

A. Right.

Q. -- the Fairview Medical Group, whose name has changed numerous times, would you agree that a certain percentage of the inpatient geriatric population that you treat is here to regulate behavior and/or medication issues?

A. I would agree with that.

Q. And are -- is it fair, then, to say that at least a certain percentage of those patients are here inpatient from a nursing home facility to get those issues under control?

A. I would agree with that.

Q. Now, with respect to Mr. Brown, you're aware, I green that you are aware from your report, that he was a post CVA/dementia patient, correct?

A. Correct.

Q. And based on your experience within the nursing home population, that's not an unusual patient to be placed in a nursing home facility, correct?

A. I would agree with that.

Q. And would you agree with me that a nursing home has an obligation to fully evaluate a patient prior to accepting him or her for admission?

A. It depends on how you, how you -- what you mean by "fully evaluate."

Q. Let me re -- let me rephrase that question. Would you agree with me that a nursing home facility has an obligation to fully evaluate a patient prior to admission to determine whether or not that home is an appropriate facility for the patient to be placed?

A. Again, it depends on what you mean by "fully evaluate." Nursing homes should try to determine whether the patient is appropriate for them.

Q. In the event that a facility has determined that a patient is an appropriate -- appropriate for that -- for admission to that facility, would you then agree that the nursing home has an absolute obligation to do everything within its power to provide appropriate medical care for that patient?

A. I would agree with that.

Q. And if a nursing home facility believes that they are not able to provide appropriate care and treatment and supervision for that patient, they should not accept the admission?

A. If they know that ahead of time that they're not going to be able to manage the case, then most often they would not accept the patient.

Q. And, conversely, if it becomes clear to the

nursing home facility during the patient's admission that it may, the resident may, not be appropriate for the facility, would you agree they have a duty to find an alternative setting for that resident?

A. That can be very difficult for nursing homes to do, in my experience. I mean, often they would like to move patients to other facilities, but it's, it's -- it can be a very difficult thing to do.

Q. Separate from the logistic problems that may or may not accompany those transfers or changes in a facility, you would agree that a nursing home facility has an ongoing obligation to evaluate whether or not this patient is appropriate for that setting, correct?

A. I would.

Q. You have a copy of your report in front of you, correct?

A. (Nodding head).

Q. We've talked about the first paragraph on page 1 where you identify the documents that you reviewed in preparing your opinions.

A. Okay.

Q. Would you agree that the second paragraph of page 1 simply gives a more detailed history of patient -- a more detailed patient history prior to the time that he arrived at the Willow Park facility?

A. Yes.

Q. I'll ask you to turn to page 2 of your report, And the initial portion of the first paragraph states: "On 11-28-96, Mr. Brown was readmitted to Meridia Southpointe through their emergency room. He apparently had returned home following his discharge from the MetroHealth rehabilitation unit. He was brought to the hospital, according to the discharge summary, because he had become violent and that a family member reported that he was looking for a gun and stated that he was going to kill himself. The diagnosis was delirium secondary to a cerebrovascular accident."

The next sentence says: "The admission history and physical exam noted that he had been on Ativan, 1 milligram, PO, qbs, and PRN, agitation."

A. I assume that the medication -- I'm sorry. I assume that was medication that was being used at home prior to his admission to the hospital.

Q. There is nothing in the medical records to suggest that Mr. Brown had been receiving Ativan prior to that admission, correct?

A. That's, that's a question.

Q. Okay.

A. You're just not certain.

Q. You're asking me that as a question?
A. Yes. I don't recall.
Q. That paragraph goes on to say that he was followed by his attending physician, he was seen by a neurological consultant. The CT scan of the brain was repeated and it showed the right hemispheric stroke, and that a psychiatric consultation by Dr. Victoroff was done. Ultimately, he was discharged from that facility on 12-4-96. He was sent to the Willow Park facility for ongoing rehab, correct?
A. Right.
Q. And the purpose of that paragraph was, again, just to regurgitate the underlying facts and circumstances of --
A. Of that admission to Southpointe. Right.
Q. -- the admission. Okay.
Now, you'll agree with me that Mr. Brown's initial date of admission to Willow Park was 12-4-96, correct?
A. I'm assuming; yeah. That's what it says. I must have gotten that from the medical record.
Q. Okay. And would you agree with me that he was admitted to Willow Park as a post CVA/dementia patient for generalized rehabilitation?
A. I would; yeah. That's my recollection.

Q. Okay. And that Mr. Will -- I'm sorry. Mr. Brown remained at Willow Park from 12-6 -- I'm sorry, 12-4-96 through 12-16-96, correct?

A. Apparently. Yes.

Q. And that on 12-16-96, he was admitted to the psych unit of Marymount Hospital, correct?

A. Okay.

Q. would you agree with me that the purpose of that admit to the Marymount psych unit was to better control Mr. Brown's behavior and to regulate his medications?

A. Yes.

Q. And that during the 12 days that Mr. Brown spent at Willow Park between 12-4 and 12-16-96, he was experiencing a considerable degree of cognitive impairment and some rather sporadic behavioral problems?

A. Yes.

Q. And, in fact, the nurses' notes noted the confusion that he was experiencing and that he was having difficulty following simple commands, correct?

A. Yes.

Q. Now, we've already established the fact that when Mr. Brown was at the Marymount psychiatric facility beginning on 12-16-96, the goal of that admission was to regulate his behavior as well as his medications,

correct?

A. Um-hum. Yes.

Q. Would you agree with me that it's not unusual for a post CVA patient, particularly one with some dementia, to have behavioral problems?

A. That's not unusual.

Q. And it's likewise not unusual for that type of a patient to need some assistance in regulating their medications, correct?

A. That's correct.

Q. Also, I believe you even alluded in your report later on to the fact that, as I understand it, in the geriatric population, oftentimes medication regulation is done on a trial and error basis, correct?

A. Correct.

Q. And would you agree with me that a more acute facility, such as a hospital or a psychiatric unit, may be -- is a preferable setting to do that medication regulation with this type of a patient?

A. It certain -- it can be.

Q. Do you have an opinion as to whether or not that was a more appropriate setting for this medication behavior regulation with Mr. Brown?

A. For this period of time?

Q. Yes.

A. 12-4 to 12-16, it would seem to me that that was an appropriate admission, and management at Marymount was appropriate.

Q. In the course of your opinions, have you drawn any conclusions as to whether or not, and, again, directing your attention to the timeframe of 12-4-96 through 12-16-96, as to whether or not the -- whether or not Willow Park properly assessed Mr. Brown?

A. From what I recall from the record, I sue no problem in their management of Mr. Brown during -- well, he was there from 12-4 to 12-16. That's right. I saw no problem in their management or assessment of him during that period of time.

Q. And, likewise, you saw no problem with their treatment of his condition during that time, correct?

A. No. I mean, that seemed appropriate to me.

Q. As you sit here today, do you have a recollection as to whether or not there were any signs that indicated to you, as a psychiatrist, that Mr. Brown, again, between 12-4 and 12-16-96, was not an appropriate resident for the Willow Park facility?

A. No. No. I'm not -- no, I don't.

Q. Again, we determined that on 12-16-96 Mr. Brown was admitted to Marymount?

A. Correct.

Q. And is it likewise your understanding that Dr. Ganchorre was, was his treating psychiatrist?

A. She appeared to be the attending psychiatrist; that's correct.

Q. Do you have any dispute as to the condition that Dr. Ganchorre described on admission to Marymount, and, specifically, that Mr. Brown was disoriented, incoherent, and belligerent?

A. No.

Q. We've talked about the fact that in the elderly population medication regulation is oftentimes done on a trial and error basis, correct?

A. Yes.

Q. I'm assuming you didn't have any issue with the combinations of medications that Dr. Ganchorre was attempting to use with Mr. Brown during that admission, correct?

A. Correct.

Q. And would you agree with me that each and every combination of medication is not appropriate for each and every patient that comes through the psychiatric unit, correct?

A. Sure.

Q. And you're aware of the fact that a patient may have, what is commonly referred to as, idiosyncratic

reactions to medications, correct?

A. Yes.

Q. would you agree that increased agitation may be a sign of such an idiosyncratic response?

A. Well, it could be a sign of an idiosyncratic response. It could be a sign that the patient's not responding. It could be just the patient getting worse, so it's very difficult to determine that. Especially on, one, if it's -- if you're referring to one specific event.

Q. Okay.

A. If there's a person, it might make it easier to determine.

Q. So if a patient had been given medication on multiple occasions, and shortly after receiving that medication became increasingly agitated, that would be an important finding?

A. On each occasion, yes, that would be something that would be an appropriate observation.

Q. Would it also be important for you, as a treating psychiatrist, to know that in the absence of a medication a patient to be less agitated, calm, have better cognitive function?

A. I'm not sure exactly what you mean? I mean, if you're -- does that imply that giving the medication is

making them worse, or that that's -- there is no need for them to be on it in the first place?

Q. No. I'm not suggesting they need to be on any medication at all. We've talked about the fact that medication in the population is a trial and error situation, correct?

A. Yes.

Q. And you, as a psychiatrist, routinely alter and re-evaluate patients' medication, correct?

A. Correct.

Q. And we've talked about the fact that if you were to have given, or noted, in a patient several instances of increased agitation after administering that medication, that would be a sign to you that that may not be an appropriate medication for the patient, correct?

A. It may not be; correct.

Q. May not be. And my question is: Is the converse of that true? That in a situation where you're observing a patient and you have given him or her a medication where you believe they may have been increasingly agitated after it, in the absence of that medication if the patient did not become agitated, is that a significant finding for you?

A. I'm still not sure I understand what you're

asking? If the -- you're saying where the medication wears off, the patient gets better?

Q. If you, for example, chose to give them an alternative therapy after observing several instances of agitation --

A, Okay, So you give a drug, a patient gets agitated?

Q. Right.

A. You stop that and change to a different drug?

Q. And the patient is not agitated?

A. Doesn't get agitated, then --

Q. My question is: Is that a significant finding for you, that, perhaps, medication number two is more appropriate?

A, Yes.

Q. And, in that event, would you, as a treating physician, be reluctant to give the patient medication one again if there was a reasonable alternative that, that did not create the agitation?

A. Yes.

Q. And would you also agree that agitation certainly adds to a behavioral problem case?

A. Yes.

Q. So it's important for the treating psychiatrist to use his or her best judgment in prescribing

medication that keeps agitation to a minimum, correct?

A. Of course.

Q. Let me digress for just a moment off of your report.

A. Okay.

Q. Just in general terms, can you explain to me what the importance of charting medication is?

A. Are you talking from the nurses' standpoint or the physicians' standpoint?

Q. I certainly understand that the nurses physically administer the medication. Would you agree that the chart is the best source of the medications that were ordered, as well as the medications that a patient actually received?

A. Well, the chart would be the, really the, only way that you could tell whether the patient got the medication or not and what was ordered.

Q. And would you --

A. I can't think of any other way that you would know that, you know, after the fact.

Q. Would you agree that you, as the physician, should be able to rely on the chart, that if it says that the patient received medication, they did, in fact, receive medication? And, conversely, if it indicates medication that was ordered was not received,

the patient did not receive it?

A. Yes.. In other words, the medication was ordered and it was not, the order --

Q. Given as directed? For example, if you had order --

A. Yes. Give me an example.

Q. You had received medication number one at noon each day. If you opened up the chart and there was no indication the medication was given at noon, you would have no reason to indicate that it had been given?

A. Yes. A specific medication sheet should be signed off. It may not be noted in the nursing notes, but there should be a place in the medical records where every administered medication is given.

Q. In your role here at Lutheran in dealing with these geriatric patients who may, in fact, go back to a nursing home facility, correct?

A. Yes.

Q. When you prepare a discharge summary, transfer summary, is it your full expectation that the orders are followed through at the nursing home facility?

A. You need to make a differentiation between a discharge summary and a transfer.

Q. Let me ask you a predicate question to that. I think it may clear things up.

As it relates to the Willow Park facility, did you receive any -- and, again, just €or clarification -- any copy of their policy and/or procedure manual?

A, No, I didn't.

Q. So you are not aware as to what documents were received on transport as to Mr. Brown between --

A, I would -- go on. I'm sorry,

Q. -- between Marymount back to the Willow Park facility?

A, The only assumption that I can make is that they received the transfer summary. I assumed that, because that's something -- to my knowledge, a nursing home won't accept a patient without the transfer summary.

Q. In the event that more information had been provided on transfer in addition to the transfer summary, would you agree that a, that a nursing home facility has an obligation to review all of those documents, medical records?

A, Can you be a little more specific about what you're referring to?

Q. Sure. And I apologize for the lack of clarity. You've referred to a transfer summary. And certainly there's a transfer summary encompassed in these records?

A, Um-hum.
Q. My question is: If there were additional medical records in addition to the transfer summary --
A. Such as?
Q. Such as also a discharge summary or separate medication order, would you expect the nursing home facility to review those documents on intake?
MS. MANWAY: Are you familiar with nursing home procedure in that regard?
A. No, Really I'm not. I'm not familiar with -- I know that they use, to my knowledge they use, the transfer summary as their initial order. Most nursing homes will just accept that as written and transfer those to the patient's chart and use those as their admission orders, There is, there are, one or two nursing homes in the community that actually call to verify the order with the physician, but that's very, very unusual. Most nursing homes accept that. So I really am not familiar with the procedures of the nursing home in that regard.
Q. And, more specifically, you do not have any working knowledge, as you sit here today, as to what documents were transferred with Mr. Brown, correct?
A, That's correct, I made an assumption in that regard that the transfer summary went with him. And

the reason I made that is that, in my experience, nursing homes won't accept a patient without that document.

Q. And my second -- my follow-up question to that is: Since you haven't reviewed any deposition testimony in this case, you don't know what documents were reviewed by the intake nurse on readmission?

A. No, I don't,

Q. Correct?

A. That's correct.

Q. would you agree with me that whatever were received with that patient, if the nurse had testified that he or she had reviewed all of those documents, they would have an obligation to carefully and accurately transcribe those into the nursing home record?

A. If they reviewed all the documents?

Q. Yes.

A. Again, what -- I'm not -- if you could clarify this for me a bit. What are you looking for aside from the orders that are on the transfer summary? What else?

Q. If a discharge summary had also accompanied the patient?

A. Hospital discharge summary?

Q. Yes

A, That's -- to my -- in my experience, that rarely, if ever, happens, because that's not prepared until after the patient leaves the hospital.

Q. Doctor, that's not the question, though. My question was if it accompanied the patient?

A. If it accompanied the patient, I would assume that they would read through it.

Q. would you agree that if there was any conflict within the documents, the nurse doing that intake has an obligation to obtain clarification from the physician?

A. Yes.

Can I clarify?

Q. Sure,

A. If I can add to that, if I -- my opinion would be that that's primarily the obligation of the attending physician at the nursing home to review the transfer summary if that were to arrive. I mean, the nursing -- again, my experience is the nurses look at the transfer summary, take the orders off that, and the, the actual narrative summary is generally reviewed by the -- prepared for the purposes of the physician for review.

Q. But you don't know what the protocol at Willow Park was, correct?

A. I have no idea what it is. Yeah.
Q. You have an understanding that during Mr. Brown's admission to Marymount between 12-16 and 12-20 of 1996, Ativan was discontinued, correct?
A. I need to refer to this for a moment.
Q. Please. Feel free to refer to that or your file. Sure.
A. Right. I said that on page 3, the Ativan was discontinued later on his day of admission.
Q. And do you know what the basis for the discontinuation for the Ativan was?
A. I couldn't find that in the, in the medical record of the, of the admission, actually,
Q. Would you agree that during, over Mr. Brown's four-day stay at Marymount he became calmer and less agitated?
A. Yes.
Q. That did not change his mental status as far as confusion, though, correct?
A. Right. That's correct. Oh, it says here that, in Dr. Gancchore's discharge summary, there's a statement that she felt that the Ativan and Haldol produced an idiosyncratic reaction in the patient. I went on to state that I didn't find anything in the progress notes that would have substantiated that it

made him worse.

Q. Do you have any reason to disbelieve Dr. Gancchore's impressions, or question her impressions, given that she was the one who treated that patient on-site between 12-16-96 and 12-20-96?

A. Well, all -- I mean, all I know is that I didn't see anything in the chart that substantiated what her impression was in her discharge summary, which wasn't prepared until months after the admission,

Q. Um-hum. Now, you go on in that paragraph to identify the transfer summary, also known as the discharge plan of care and treatment, which accompanies the patient and serves as the initial admission orders from the patient to the nursing home does not indicate anywhere that Ativan should not be used, correct?

A. Yes.

Q. Can you review in your records and pull out what you understand to be the transfer summary.

MS. MANWAY: Let me see if I can help you with it.

A. This is the Meridia initial admission. This is the, this is 1-1 at Huron. Is this it? This looks like it right here. Do you want to see it?

Q. Yes. Please.

A. (Handing).

Q. And you've just handed me a two-page document, correct?

A. Correct.

MS. DIXON: Would you mark that one, please.

(A document was marked for identification as Plaintiffs' Exhibit 1.)

BY MS. DIXON:

Q. Dr. Frankel, I'm going to hand you back what's been marked Plaintiffs' Exhibit 1. Actually, so there's not a confusion, can I put that on the back?

Am I correct in assuming the document that's been now marked as Exhibit 1 has been provided to you by opposing counsel, Miss Manway?

A, Yes.

Q. And you understand that to be the actual transfer summary --

A. A copy of it.

Q. A copy, I'm sorry. I didn't mean to suggest the original. Transfer summary that relates to Ellis Brown on his readmission to Willow Park after his stay at Marymount, correct?

A. Yes.

Q. And, to the best of your knowledge, have you been provided any other copy of the transfer summary related

to Mr. Brown?
A. No, I haven't.
Q. Okay. If, in fact, there had been another copy that was -- had different orders on it, would that change your opinion?
MS. MANWAY: Do you understand the question?
A. No. You mean the transfer summary?
Q. Yes. With a different set of orders, that may affect your opinions in this case, correct?
A. Well, if there's a different transfer summary, it's conceivable it might. I don't know.
Q. Okay..
(A document was marked for identification as Plaintiffs' Exhibit 2.)
BY MS. DIXON:
Q. Dr. Frankel, I'm going to hand you what's been marked Exhibit Number 2, and I'll make the representation to you, this is a photocopy of the original that was obtained at the Willow Park facility during depositions that were taken previously in this case.
MS. MANWAY: I just want to clarify something: There were the two copies of the discharge summary taken from the Willow Park records.

This is a second copy.

MS. DIXON: Let me -- you know --

MS. MANWAY: You represented it was the original.

MS. DIXON: No. Let me -- let me make my record the way I'd like to.

BY MS. DIXON:

Q. What I said on the record, this is a photocopy of an original that was obtained from Willow Park on a day that we were at the facility taking other depositions. And, Dr. Frankel, I just want to be clear, the document you have in front of you, Exhibit Number 1, was the only transfer summary that you have been provided by opposing counsel, correct?

MS. MANWAY: Have you looked through the Willow Park records to determine whether or not there's another --

MS. DIXON: Miss Manway, you know, we have this problem. Speaking objections are not appropriate. If you have an objection, state it in a one-word reason and move on. I'll not tolerate prompting a witness or cluing to him what his answers should be.

BY MS. DIXON:

Q. Dr. Frankel, the question is: Is the document you have in front of you, to the best of your knowledge, the only transfer summary that you've been provided by opposing counsel?

A. To my recollection -- I could review this. Would you like me to look through this?

Q. Actually, let me ask the question a little differently. It will move things along. Is this the only transfer summary that you rendered your opinions based on? The only document identified, as you understood to be, a transfer summary that you relied upon in rendering your opinions?

A. (Nodding head).

Q. The answer's yes?

A. Yes.

Q. Now, let me hand you what's been marked Exhibit Number 2, and, as I explained to you earlier, is a photocopy of an original that was obtained as part of the Willow Park chart. Can you take a look at the document.

A, Yes.

Q. And would you agree with me that that document marked Plaintiffs' Exhibit 2 clearly indicates, "Do not give Ativan at any time?"

A. Well, there's a statement there, and you have that highlighted.

Q. I just did that for your benefit, Doctor.

A. Right. Actually, my -- this looks like the exact same thing with this added to it.

Q. Um-hum.

A. It looks like the same transfer summary with that added to it.

Q. And assuming my representations to be correct, that Exhibit Number 2 is a photocopy of an original document contained in Mr. Brown's Willow Park chart, would you agree with me that the facility was clearly on notice that this patient was not to receive Ativan upon readmission to Willow Park on 12-20-96?

A. Well, that's what it states right here. To my recollection now, I, I think I've seen this before. I believe that I've seen this before.

Q. And when would that have been, Doctor?

A. It probably is in this packet of material.

Q. And how then is it that you came to the conclusion to rely upon Exhibit Number 1 as opposed to Exhibit Number 2, which clearly indicates Mr. Brown should not receive Ativan at any time?

A. Can I take a look through this to make sure that it's in there?

Q. Please, feel free.

A, Something brings that to mind, but,

MS. MANWAY: You may want to refer to your report, because I think you mention it in there.

THE WITNESS: I don't see that I mentioned it in the report, I don't -- is this the entire Marymount?

MS. MANWAY: I'm certain that I gave it to you.

THE WITNESS: Well, the only response I can give you is I can't -- I don't see it in here,

MS. MANWAY: Here it is,

THE WITNESS: Oh, there it is.

MS. MANWAY: Okay.

BY MS. DIXON:

Q. So we've established you've been provided a photocopy?

A. I was. I guess the assumption I made was that since these two are identical, that it's absent in one and in the other, that it was added at a later date and there was no date added to this to indicate when it was there.

Q. But since there's no date, we don't know that it

Q. Please, feel free,

A. Something brings that to mind, but,

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THE WITNESS: Oh, there it is.

MS. MANWAY: Okay.

BY MS. DIXON:

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A, I was. I guess the assumption I made was that since these two are identical, that it's absent in one and in the other, that it was added at a later date and there was no date added to this to indicate when it was there,

Q. But since there's no date, we don't know that it

wasn't contemporaneous, correct?

A. Correct.

Q. Would you agree with me that you then made a decision to rely on the transfer summary in rendering your opinions that did not contain the language, "Do not give Ativan at any time," as opposed to the transfer summary that indicated -- that did have that indication?

A. That would be correct. It was, to my perusal of this, led me to believe that that was the original. That that was added. That not having it dated -- normally when you add anything to a transfer summary, in order to validate, you have to date it. That was not dated. I assumed that somehow it was added later. I relied on this one as, as the accurate transfer summary from the facility. I based my -- that, my statement in my report, on this transfer summary.

Q. Okay. Now, Dr. Frankel, let me ask you, in the event that there is an -- let me rephrase that.

In the event the transfer summary indicating -- as indicated in Plaintiffs' Exhibit 2, "Do not give Ativan at any time," accompanied Mr. Brown on his readmit to Willow Park facility, would you agree with me that the facility was on notice this patient was not to receive Ativan?

A. Yes.
Q. And would you then agree with me that administering Mr. Brown Ativan would be a breach of the standard of care?
A. I wouldn't necessarily agree with that.
Q. And how would you come to that conclusion?
A. The conclusion that I came to, in terms of reviewing the record, was that I saw no indication that the Ativan increased his agitation,
Q. Would you then agree with me that a patient who required being placed in full leather restraints was having a significant episode of agitation?
A. Yes.
Q. And would you agree with me that if a patient had agitation to that level that required full leather restraints after receiving a medication, that would be an extremely significant finding, correct?
A. That the administration of the medication produced that behavior?
Q. Um-hum.
A. If you could -- you know, if there was a cause and effect relationship; yes. There might not necessarily be, but if there was, I would agree.
Q. Would you agree, at a minimum, that might make a psychiatrist that's responsible for treating the

patient at least suspicious about the appropriateness of that medication?

A. Certainly.

Q. As I understood your testimony a few moments ago, the reason you're not clear as to whether or not actually administering the Ativan, even in the face of the "do not give Ativan" order, is a breach of the standard of care because there is nothing that you found within the Marymount records to suggest he was having an adverse reaction to the medication, correct?

A. Rights. Yeah. Exactly. But people -- I'm not quite sure what you mean by "standard of care?"

Q. Well, you've given depositions before, correct?

A. (Nodding head).

Q. And you have rendered opinions in other malpractice-type matters, correct?

A. (Nodding head).

Q. You need to answer orally.

A. Yes.

Q. Okay. And within the context of those types of actions, would I be correct in assuming you have wrestled with, or dealt with, an issue known as what is the standard of care?

A. Yes. But I'm not, not familiar with it for, particularly for, a nursing home.

Q. Okay. So, as 1 understand this testimony, you are not rendering opinions in this case as to what is or is not appropriate as to the standard of care within a nursing home setting?

A. Can you, can you clarify that for me?

Q. Certainly. Doctor, within the confines of your five-page report, are you rendering opinions as to whether or not the standard of care received by Mr. Brown was appropriate?

A. Yes.

Q. You are giving standard of care testimony?

A. Yes.

Q. Correct?

A. Yes.

Q. And my question to you is: We were discussing whether or not giving Mr. Brown Ativan on his readmission to Willow Park, assuming for purposes of the question that the transfer summary included "Do not give Ativan at any time," was a breach of the standard of care, and I believe you said you can't quite answer that because there was nothing in the Marymount record that would have suggested he was having an idiosyncratic, or an adverse, reaction to Ativan, correct?

A. Correct. Let me, let me clarify my answer. If

that's -- if that appears on the transfer summary, "do not give Ativan," it should not be given.

Q. Okay. And in the event that it did appear on -- the words as identified as Plaintiffs' Exhibit 2 appeared on the transfer summary, "Do not give Ativan," and the nursing home facility, through its agents or employees, then gave Ativan, that would be a breach of the standard of care, correct?

A. I guess that it would.

Q. And any wavering, if you will, as to the standard of care and the Ativan administration, on your part, relates back to the fact you aren't able to identify any adverse reaction, or idiosyncratic reaction, with the Ativan as it relates to Mr. Brown, correct?

A, That would be correct.

Q. Would you agree with me, then, if there had been a documented idiosyncratic, or adverse, reaction to Ativan within the Marymount record, that may, in fact, influence the opinions that you've rendered in this case, correct?

A. Yes.

Q. Okay.

(A document was marked for identification as Plaintiffs' Exhibit 3.)

BY MS. DIXON:

Q. Dr. Frankel, I'm going to hand you what I've marked as Plaintiffs' Exhibit 3, which is a page from the Marymount record. For your convenience I have highlighted relevant portions. If you note on 12-16-96, at approximately 7:15 p.m., would you agree with me that Mr. Brown received a dosage of Ativan?

A. I'm sorry. I was looking at this and didn't hear you.

Q. No problem. Let me repeat the question.

I'd just indicated that I'd handed you a copy of a page of Mr. Brown's medical record from Marymount --

A. Right.

Q. -- that's been marked as Plaintiffs' Exhibit 3. I asked you to direct your attention to 12-16-96, which that's part of that record, the 7:15 entry.

A. Right. 1915.

Q. Okay. And would you agree with me that at the time of that entry, or somewhat contemporaneous to that, Mr. Brown received a dosage of Ativan, correct?

A. Yes.

Q. Would you agree, likewise, that shortly thereafter Mr. Brown became agitated to the point that he required full leather restraints?

A. No.

Q. You wouldn't?

A, No.

Q. Can you explain that?

A. I can. He was given -- he was obviously agitated and given the Ativan, according to my interpretation of this statement. He was given the Ativan and put right into restraints as part of the same actual treatment protocol. That's very commonly done. Medicated and then put in restraints. So I wouldn't assume by reading this that the Ativan had anything to do with his agitation.

The way I interpret this is he was agitated, he was medicated and put in restraints, 30 minutes later he was given Haldol because he was still agitated. That would be my interpretation of this.

Q. When he was given the Haldol he was still in leather restraints, correct?

A. Correct.

Q. Would you -- if your interpretation of that entry was not correct, would you agree that Dr. Gancchore may have some suspicion, if not a reasonable belief, that Mr. Brown may be having an idiosyncratic reaction?

A. You would have to ask Dr. Gancchore that.

Q. And just so that I have some clarification to your role here --

A. Go ahead.

Q. You're not looking -- you're not looking to look over Dr. Gancchore's shoulders and say that her medication evaluation of Mr. Brown, or her observations of Mr. Brown, while an inpatient were not accurate, correct?

A. It does not appear as if she observed that. I mean, those are nursing notes. My, my interpretation of that is that Dr. Gancchore was not present at the time that medication was administered or Mr. Brown was put in restraints.

Q. But you don't know what opportunity she may have had to discuss his condition with the nursing staff or make observations of her own, correct?

A. I don't, but normally, in a hospital setting, the nursing notes would indicate that the doctor called or that the doctor actually saw the patient, and that, that didn't appear to be present in that note. But I'm not trying to look over her shoulders or be critical of her management of the case,

Q. Okay. Now, within the nursing home population, would you agree with me that if a patient is admitted to a -- as a resident to a nursing home facility and shortly thereafter develops incontinence either of bowel or bladder, that that's a sign of deteriorating status?

A, It might be.
Q. That would be an important information for you as a psychiatrist, correct?
A, Yes.
Q. would you agree with me that a nursing home has a duty to develop a care plan as to incontinence for that patient?
A. Yes.
Q. would you also agree with me that determining the source of that incontinence is critical for the welfare of the patient, as well as the treatment of that patient?
A, That sometimes is impossible to do. You know, the most extensive kind of workup.
Q. Would you agree --
A. But you should attempt to do it.
Q. That there is an attempt?
A. You should attempt to do that.
Q. Is there anywhere in the Willow Park records, and directing your attention to the admission, the readmission on 12-20-96, to prepare a care plan for Mr. Brown as it relates to incontinence of bowel and bladder?
A, I don't recall.
Q. Okay. And, again, for clarification, are you

here to testify to the standard of care other than the drug therapy that Mr. Brown received while, while a patient at Willow Park?

A. I don't know,

Q. Do you have an opinion as to whether or not it is a breach of the standard of care for Willow Park to fail to develop a care plan as it relates to incontinence?

A. I'm not, I'm not sure. I don't -- I couldn't say absolutely.

Q. So you do not have an opinion as to whether or not failure to formulate a care plan as it relates to incontinence is a breach of the standard of care, correct?

A. That's -- I would say that's correct,, I'm -- my recollection is -- actually, I don't recollect that the incontinence was a long-term problem for him, but I may be incorrect about that.

It's been a long time since I reviewed these nursing home records, so I don't recall.

Q. But you have had a full opportunity, if you would have chosen, to review the records before your deposition today?

A, That's correct.

Q. And whether by direction from opposing counsel or

your own choice, you decided not to do that, correct?
A. My own choice.
Q. Now, Dr. Frankel, if it becomes clear to a nursing home staff that a patient's condition is deteriorating, they have an obligation to increase their level of observation of that patient to ensure that he is not a harm to himself or others?
A. Yes.
Q. Would you agree that a failure to increase that level of observation in a patient who is deteriorating is a breach of the standard of care?
A. I guess.
Q. Now, directing your attention to 12-27-96, when Mr. Brown was a patient at Willow Park, are you aware of the fact that there was a telephone order for Risperdal, .5 milligrams, PRN, in addition to his routine Risperdal that he was receiving twice daily?
A. Are you taking that from my report?
Q. No. I'm taking it right from the Willow Park records, Doctor.
A. Let me just review what I have here.
Q. Sure. Take your time.
A. No. I, I have no recollection of that. I mean, I'm not disputing it, but I don't have any recollection of it.

Q. Well, tell me --

A. Risperdal is a drug used to decrease agitation in a patient. It's not effective on a PRN basis, in my view

Q. But in a patient who is already receiving it twice daily, if a patient is using it long term on a twice-daily basis, is that something that's used or generally accepted to control behavior?

A. On a two-times-a-day basis, over a length of time, yes, Risperdal can be a very effective drug for that.

Q. If that patient has increased problems with agitation, can additional doses of Risperdal --

A. In my opinion, Risperdal is not an effective drug on a PRN basis to control agitation.

Q. Are there other physicians, that you're aware of, or other schools of thought that you're aware of, that increasing Risperdal will decrease agitation?

A. Increase -- I didn't say -- increasing the standard, the regular dose of Risperdal over time might decrease agitation. There are people that believe that PRN doses of Risperdal are effective. I'm sure there are. I don't.

Q. In the event the physician did believe increased doses of Risperdal would decrease a patient's agitation

and the nursing staff received a phone order to give it PRN in addition to the twice-daily doses, would you agree that failure to give those doses, additional doses, would be a breach of the standard of care?

A. So that you're asking if, if the drug is ordered on a PRN basis --

Q. Um-hum.

A. -- and the patient is agitated and they don't get it?

Q. Right.

A. Okay., Again, that depends upon how you define "agitation." Whether the patient is unmanageable. It depends on the individual circumstances., I mean, you certainly -- it could be a breach of the standard of care, and it -- and, and it might not. Again, depending on the individual circumstances.

Q. Doctor, would you --

A. Because it's not a drug that's ordered on a regular basis. It's ordered as needed, and that interpretation of "as needed" is going to be made by the nursing staff rather than by a physician on-site.

Q. Dr. Frankel, would you agree that a nursing staff distributing medication that there is no current order in that patient's chart for would be a breach of the standard of care?

A. Yes.

Let me make sure I understand this: That the nursing staff gives a drug that's not ordered?

Q. Right. And then subsequently obtains an order,

A. (No response).

Q. Let me ask this question a little more cogently. I think it will help both of us.

A. Right.

Q. Would you agree with me that there are no circumstances where it is acceptable for nursing staff to take it upon themselves to give a patient prescription medication absent a physician's order?

A. I would agree with that.

Q. Would you likewise agree that the physician's order needs to either be given prior to or contemporaneously with administration of that medication?

A. I would agree with that.

Q. And that it would be a breach of the standard of care for a nursing staff to give medication absent a physician's order and then, subsequent to that administration, obtain a physician's order for that?

A. Have the physician write an order to cover that administration?

Q. Yes. Would you agree that's a breach of the

standard of care?

A. Yes.

Q. And if that were to have happened, that scenario that I just described, during the time that Mr. Brown was a patient at Willow Park, would you agree that the nursing home had fell beneath the standard of care?

A. Yes.

MS. DIXON: Do you mind if we go off the record for just a moment.

(Discussion had off the record.)

(A document was marked for identification as Plaintiffs' Exhibit 4.)

MS. DIXON: Dr. Frankel, I have a few follow ups, and we'll be done in about ten minutes.

THE WITNESS: Okay.

BY MS. DIXON:

Q. Would you agree that it's important to read the physicians' orders in conjunction with the transfer sheet?

A. Again, you have to --

Q. Assuming, assuming that those records came to the facility with the patient, you should read the --

A. Well, the transfer summary are the -- that really is the physician's orders.

Q. Um-hum. Have you had an opportunity to review the physician's orders as they relate to Mr. Brown's Marymount stay from 12-16 through 12-20-96?

MS. MANWAY: I think there's something in the air here. He's a little bit unclear what you're referring to when you say "physician's orders."

MS. DIXON: Miss Manway, if Dr. Frankel doesn't know what physician's orders are, I think we have bigger problems in this case.

BY MS. DIXON:

Q. Doctor, are you familiar with what I mean by "physician's orders?"

MS. MANWAY: Are you referring to the documents?

MS. DIXON: You know, you don't need to clarify. I'll handle my questions myself.

A. I assume I am -- the physician's orders are the orders the doctor writes when the patient's in the hospital.

Q. And they're maintained within the charts?

A. In the medical records; correct.

Q. And those are separate from nurse's notes? Those are the portions of the records the actual treating physician completes, correct?

A. Yeah. That's part of the ongoing medical record. That's the -- what the nurses need to use in order to, you know, order proper tests, medications, and so forth.

Q. Okay. Now, if you recall a little bit earlier we struggled through Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2, which were two separate copies --

A. Transfer summaries.

Q. -- of the transfer summaries. Right. One had an indication, "Do not give Ativan at any time"; one was silent on that, correct?

A. Correct.

Q. Let me hand you what I've had marked as Plaintiffs' Exhibit 4, which is, as I understand it, the physician's orders of Dr. Ganchhore. I've highlighted a relevant portion for you. Can you review that and read into the record what the entry is?

A. All right. "Discharged today via ambulance back to Willow Park Nursing Home. Discharge instructions: Nursing home not to give Ativan. Noted on transfer form. Risperdal 1 milligram, BID."

Q. Based on your review of this entry contained on Exhibit Number 4, would you agree that we don't have any reason to suspect Dr. Ganchorre was not correct in her indication that 'Do not give Ativan' was instructed

on the transfer summary as noted on Plaintiffs' Exhibit Number 2?

A. You're asking me to make an assumption that I feel I have no ability to make.

Q. Well, you've made assumptions at it relates to the transfer sheet, that if it was not made contemporaneous there would be some date indication -- or, there should have been a date indication and it was not made contemporaneous --

A, I would add -- I would add --

Q. Wouldn't you --

A. Where it says "noted on transfer forms" looks like it was added in afterwards8

Q. So we would have to have two documents that were supplemented post facto?

A, It seems to me what you need to do is ask Dr. Gancchore this question; not me. It is -- what seems to be on this -- again, you're asking For an opinion on a -- maybe a handwriting expert might offer a better opinion, It looks to me as if she's writing, "DC instructions: Nursing home not to give Ativan," and then it adds in here separately, you know, squeezed in above that, "noted on transfer form."

So, I mean, that could just as easily have been added into that. I think that, that there is no way I

can accurately answer that question.

Q. Okay. So you wouldn't have an opinion one way or the other?

A. I would not render an opinion on that at all.

Q. Dr. Frankel, in your experience with the geriatric population, are you aware of urinary tract infections causing confusion?

A. Yes.

Q. And that's commonly known?

A. Common.

Q. Okay. Now, would you agree that Mr. Brown's mental status was markedly improved on his discharge from Marymount at the time of his readmit to Willow Park on 12-20-96?

A. It certainly appeared that way from the medical record, that his -- he was doing a lot better.

Q. And, in fact, Dr. Ganchorre, on her discharge summary, stales, quote, "Patient's behavior had improved tremendously."

Do you need a copy to refer to? (Handing). Correct?

A. I've got the same one here, but -- yeah.

Q. And would you, likewise, agree that during Mr. Brown's readmit to Willow Park, 12-20-96 through January 1 of '97, he experienced again a considerable

deterioration of his mental status?

A. Yes.

Q. Do you have an understanding of what Mr. Brown's current mental status is?

A. At the present time?

Q. Yes.

A. As we speak today?

Q. Yes.

A, I have no idea.

Q. And, likewise, you are not familiar with what his mental status was during his stay at the Fairfax Nursing Facility, correct? That was the new facility he was discharged to from Marymount the second time?

A. My only -- no. I really don't. I, I think I have some documents from a deposition that was taken of Mr. Brown, and that would only be from having looked at that. I have no idea how he's doing at the present time.

Q. Okay. And would you agree that a patient in a nursing home has the right to refuse medications?

A. It depends on the situation, again.

Q. Are you familiar with the Nursing Home Bill of Rights?

A. I'm somewhat familiar with it. It depends on whether the patient is deemed competent or not.

Q. Are there any circumstances under which you can think of where it would be appropriate for a nursing -- to use physical force to administer medications?

A. Yes.

Q. Okay. Can you describe for me what those circumstances would be?

A. Yes. A patient whose behavior is aggressive, destructive, possibly life-threatening to others or to himself, it might be necessary to forcibly administer medication.

Q. Would there be any circumstances you can think of where it would be acceptable for a nurse to physically assault a patient?

A. No.

Q. In the event that Mr. Brown was, in fact, assaulted during his stay at Willow Park, you would agree that would be a gross breach of the standard of care, correct?

A. Hypothetically, if he were assaulted, I would agree that that would be a gross breach of the standard of care.

Q. And have you had an opportunity to review Mr. Brown's emergency room records for January the 1st of 1997?

A. Yes, I have.

Q. And are you aware of the fact that the -- that that record indicates that Mr. Brown received a punch or a strike to his eye?

A. Well, I don't know that it said a punch. My recollection was that there was a contusion.

Q. And am I correct that you are not rendering any opinions in this case as to whether or not there was an assault on January 1st, '97, correct?

A. I would have no way of rendering an opinion regarding that.

Q. And, again, just because I'm slightly confused as to what your role is going to be in this case, is the primary thrust of your opinions as it relates to the medication issues in this case as opposed to the standard of care, of overall care and treatment within the nursing home?

A. I would say primarily it's the medication management.

Secondarily, I -- in reviewing the record, my recollection of reviewing the record and preparing this report, I didn't see any significant breach of care on the part of the nursing home in managing this very difficult patient.

Q. Okay. But nursing homes deal with difficult patients all the time, correct?

A. Some more difficult than others; correct.

Q. And now that we've had a full opportunity to review certain, what I consider, critical portions of this record, is there anything that you've seen or reviewed today that have changed any of the opinions that you've outlined in your June correspondence?

A. No.

Q. And the fact -- well, actually, Doctor, let's go back over the Ativan for just a moment, if we could, You stated earlier that you rendered your opinions based on the transfer summary that was silent as to "Do not give Ativan," correct?

A. Can you be specific on which opinion?

Q. Actually, let's deal with the exhibits. Let's look at Plaintiffs' Exhibit Number 1. It's a two-page document. Right here.

A. Right.

Q. As I understand your testimony, when you rendered your opinions in your correspondence dated June 29, 1998, specifically when you stated that the, quote, "The transfer summary, also known as the discharge plan of care and treatment, which accompanied the -- accompanies the patient and serves as the initial admission orders for the patient to the nursing home, does not indicate anywhere that Ativan should not be

used."

A. That's correct.

Q. You were relying on the document which we have identified as Plaintiffs' Exhibit 1, correct?

A. That's correct. It was my assumption -- do you want me to go on?

Q. Sure.

A. It was my assumption that this document came from Marymount Hospital, and this was in the packet of material that was the Marymount admission. As you recall, we located this in the Willow Park records. So this was at Willow Park. This came from the hospital. I assumed that this is the accurate transfer summary since it was in the hospital portion of the medical records that I reviewed.

Q. And in the event that assumption was in error, that may influence your opinion as to whether or not the standard of care was breached, correct?

A. Hypothetically, if that was in error, then it might.

Q. Just a moment, please.

Just a few follow-up questions, Doctor.

A. Sure.

Q. Would you agree with me that a nurse, at intake at a nursing home facility, has a duty to accurately

transfer the physician's orders that are contained on a transfer summary?

A. Yes.

Q. And in the event that that was not accurately transferred, that may be a breach of the standard of care, correct?

A. (Nodding head). Well, it's a breach of something. I'm not sure if it's standard of care, but certainly it's not a good thing.

Q. Now, other than Miss Manway's correspondence, has any portion or any documents been removed from your file here?

A. Not to my knowledge.

Q. And, just in narrative form, what is it that Miss Manway, or any other counsel for the Defendant, has told you about the facts or circumstances surrounding --

MS. MANWAY: Objection.

Q. -- surrounding this case?

MS. MANWAY: That correspondence is now the subject Of a pending motion before the Court.

MS. DIXON: I'm not asking about the correspondence.

MS. MANWAY: I'm --

MS. DIXON: I'm asking what you told him. Your communications with Dr. Frankel are not privileged.

MS. MANWAY: They're protected under the --

MS. DIXON: Mysterious Mitrovich motion that's pending.

BY MS. DIXON:

Q. Is there anything that's in Miss Manway's correspondence that you've relied upon in rendering your opinions?

A. No, there isn't.

Q. Is there any outside sources that you've gone to or reviewed in, in preparing your opinions? For example, any authoritative texts, things of that nature?

A. The BDR is the only thing I've looked at.

Q. Would you agree that the PDR does indicate that one of the potential side effects of Ativan is agitation?

A. Yes.

Q. Are you personally or professionally acquainted with Dr. Gancchore?

A. No, I'm not.

Q. Do you have an understanding of her reputation

within the psychiatric community?

A. No, I don't.

Q. Have you ever --

A. I've heard of her name, but I don't know her.

Q. Sure. Just a few general questions to complete the deposition.

Prior to the Ellis Brown matter, have you ever rendered opinions on behalf of any of the Defense counsel in this case, their clients or their law firms?

A. No. Not that I'm aware of.

Q. Sure.

A. Are they all from the same law firm? No.

Q. No?

A. No.

Q. And on approximately how many prior occasions have you rendered opinions in medical/legal matters?

A. When you say render an opinion, help me with that, what you mean by that.

Q. I think the stumbling block comes -- I'm assuming, because there may be files that you reviewed but you don't ultimately render opinions in?

A. Are you talking about -- an opinion would be just, just what we're doing today?

Q. Preparing a letter?

A. Preparing a letter? I would say that in the

course of my entire practice, are we talking about civil litigation?

Q. Yes.

A. Criminal defense?

Q. Civil litigation.

A. Civil litigation, I can only think of two or three times I've ever done it. To be safe, because I've been in practice a long time, let's say I've done it five times.

Q. And have those been instances -- and I understand you're dealing with estimations, I'm not looking to --

A. Right. Yeah.

Q. -- corner you on that, do those involve issues involving geriatric patients, or psychiatric patients as a whole?

A. I would say that within the last year, this is the -- I've done one other on a geriatric case. Prior to that, it's been years since I've done any at all. Any at all.

Q. And in the event this case moves forward to trial on November 30th as scheduled, do you intend to testify live?

A. I'm sorry. What was the date of trial?

Q. I believe it's November the 30th.

MS. MANWAY: We haven't made a

decision about that yet, have you?

A. Yeah, I haven't even given that a bit of thought, to tell you the truth. Is there a way I can avoid testifying live?

Q. Tell her to write a check. Other than that, I don't know.

MS. DIXON: I appreciate your time. I don't have any further questions.

MS. PATTI: Would you mind if I ask one question about the last page of his report?

MS. DIXON: Sure. Sure. He's testifying on your behalf.

MS. PATTI: I know. Just to clarify something. It's just the last page,

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DIRECT EXAMINATION OF MARK FRANKEL, M.D.

BY MS. PATTI:

a. Dr. Frankel, will you please look at the last page of your report?

A. Yeah,

Q. And the very -- the first sentence there. I just wanted to clarify, because Miss Dixon had asked you a question about the incident. You said you couldn't comment on that, but you had made some type of comments on that. Would you tell us what that is?

A. Yeah. I would say that I don't think you can rely on the description given by this individual because of his level of impairment. I mean, you would need some other kind of -- some observation of the event by a third party in order to really understand what occurred that day. That's all I meant.

MS. PATTI: Thank you, Dr. Frankel.

MS. DIXON: Actually, that brings up a follow-up question.

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RECROSS-EXAMINATION OF MARK FRANKEL, M.D.

BY MS. DIXON:

Q. In the event that there had been some corroboration by a third party, would that make you more or less likely to believe the patient's version?

A. Well, I mean, it would depend on, you know, the third party and what they said and how they described it. But certainly -- I mean, you know, it would seem to me that, that that's what you would certainly need in order to determine what went on in that event.

NS. DIXON: Okay, Thank you.

A. That episode.

MS. DIXON: Thank you.

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