

1 IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

2

3 MICHAEL WOOD, ET AL.

4 PLAINTIFFS,

5 VS

Civil Action Law 09-04587

6 JAMES TZENG, ET AL.

7 DEFENDANTS.

8

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10 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
11 [***EXCERPTED TRANSCRIPT/PLAINTIFF CLOSING ARGUMENTS***]

12

Upper Marlboro, Maryland
Tuesday, April 27, 2010

13

14

BEFORE:

15

HONORABLE JULIA B. WEATHERLY, ASSOCIATE JUDGE

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APPEARANCES:

18

For the Plaintiffs:

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PATRICK MALONE, ESQUIRE

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LEONARD W. DOOREN, ESQUIRE

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For the Defendant:

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DAVID ROLING, ESQUIRE

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P R O C E E D I N G S

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(Jury Present At 1:20 p.m.)

THE COURT: Ladies and gentlemen, welcome back from lunch. Now that you've been instructed in the law, counsel will have an opportunity to address you with their closing arguments, and the Plaintiff will go first.

Mr. Malone, are you ready?

MR. MALONE: Thank you, Your Honor. And may it please the Court.

CLOSING ARGUMENTS/PLAINTIFF

MR. MALONE: Ladies and gentlemen, I have to start with something that's pretty strong. We've reached the third anniversary of this injury that Dr. Tzeng caused to Michael Wood, and Dr. Tzeng is still fighting as hard as he can to avoid accountability --

MR. ROLING: Objection.

MR. MALONE: -- for the harm that he caused --

MR. ROLING: Objection.

MR. MALONE: -- to Mr. Wood.

THE COURT: Objection sustained.

MR. MALONE: His effort to hide began on

1 May 24th of 2007, when he realized that he hadn't
2 written up any justification for the surgery that he
3 had done six weeks before, and after the stuff hits
4 the fan, and so he finally comes up with one, in a
5 long, written, typed-up format, that has all kinds
6 of details, that's written at one o'clock in the
7 morning, that he couldn't possibly have remembered.

8 And now, with all of his paid professional
9 witnesses, they still can't get their stories
10 straight. First we heard Thursday morning from one
11 paid witness who said, well, he didn't have any of
12 the two standard reasons for doing this surgery,
13 which are the dizziness and the pain in the arm
14 that's so bad that he can't take it anymore.

15 But Dr. Tzeng must have thought that he
16 had showers of emboli that were getting ready to go
17 down the arm and that was his justification for
18 doing the surgery.

19 Now, then Dr. Tzeng came in on Thursday
20 afternoon, and here's what he said.

21 "QUESTION: Absolutely no evidence this
22 gentleman had emboli on April 7th, 8th,
23 9th, 16th, 26th?

24 "I don't see it clinically," he answers;
25 "but that's not what my expert says."

1 "QUESTION: Well, that's what Dr. Ruben
2 comes up with as his sole, after-the-fact
3 explanation; it wasn't yours, true?

4 "ANSWER: That's not mine, correct. That
5 was not what I was considering at the time
6 I saw Mr. Wood."

7 So, that's story number two.

8 And he was now saying, oh, well, it's
9 chest pain, non-cardiac chest pain, and maybe he
10 would get ischemia in the hand and he would have
11 pain in the hand.

12 Okay. Well, still, do you have a reason
13 for doing the surgery? Do you have disabling
14 symptoms? Sorry, you don't.

15 But then, they saved the scariest one for
16 last, and that's yesterday, and that's the guy who
17 came in, with the white hair, another paid
18 professional witness, who comes in and says, stroke,
19 gangrene, these were the possibilities here.

20 And I guess they're hoping that you
21 forgot, in the meantime, when the first fellow came
22 on, he said, oh, no, it wouldn't be appropriate to
23 scare the man about the possibility of stroke or
24 anything like that because that wasn't realistically
25 in the cards; I'm an emboli man, but I'm not a

1 stroke man. So, they're hoping that you don't see
2 these gaping contradictions in their case.

3 You would also think that in the entire
4 universe of surgeons they would have found one
5 single surgeon, one single textbook, one single
6 article, that says axillary cut-down, that's a good
7 option for doing this surgery and that's the way we
8 do it. But the evidence, there is none.

9 Now, the -- well, my notes are out of
10 order. Whoops. Okay.

11 So why are you here? Why are we all here?

12 You have the opportunity now to stand up
13 for patient safety, to help enforce the rules that
14 protect all patients.

15 Or, you can choose to believe that the
16 doctor never does anything wrong, that we must
17 totally defer to the doctor in every decision they
18 make, even if they come up with all kinds of
19 contradictory reasons and no matter the outcome.

20 So the question for you will be, is what
21 happened to Mike Wood three years ago just some
22 random fluke of fate, or did it happen for a reason?

23 Did it happen because a doctor made a
24 series of bad choices where the doctor put getting
25 some business ahead of taking care of his patient?

1 What happened now on the facts of this
2 case, it's just crystal clear. Sometimes I talk in
3 closing arguments about preponderance of the
4 evidence and how, you know, we win if you only have
5 51 percent in our favor. I don't need to do that
6 because it's so clear what happened here.

7 Dr. Tzeng saw Dr. Fieldson at lunch in the
8 cafeteria of Southern Maryland Hospital. He came up
9 to the room and mentioned that to Mrs. Woods, and
10 she testified about that.

11 So Dr. Fieldson says, I've got this
12 patient with an interesting problem; and Dr. Tzeng
13 says, ah, I'm getting out of cardiac surgery and I'm
14 coming into vascular surgery, I can help with that;
15 well, would you mind going to see him; sure, go
16 ahead. So he volunteers to help.

17 He goes to the hospital room. He doesn't
18 touch the patient. Tony Harris was there, sitting
19 on the radiator. He doesn't touch the patient.

20 He writes up a note that he reconstructs
21 from other records. He says in the note that he's
22 planning to do an angioplasty, which is the balloon
23 procedure that we know about.

24 The patient comes in a week later and he
25 scares the patient and his wife to death with

1 ominous predictions, "that you might not be so lucky
2 next time." So scary that they sign up immediately
3 for the surgery and they pay money on the
4 barrelhead.

5 Now, he leaves out all the key
6 disclosures. Here's a slide that I showed you in my
7 opening, and it still is true today. I call this
8 the meeting that didn't happen, the things that were
9 not said.

10 "I could ruin your hand by damaging the
11 nerves".

12 Even Dr. Ruben, the first Defense paid
13 witness, he said that yes, this is a normal
14 possibility from this kind of surgery, either from
15 damaging the blood vessel or the nerve, and yes, you
16 should tell patients about that. So that's left out
17 of the picture.

18 "Other doctors do it a different way." In
19 fact, all other doctors do it a different way, with
20 minimal risk of ruining the hand by damaging the
21 nerves because they go through different routes and
22 they don't get anywhere near these key nerves up in
23 the armpit.

24 "I've only done this once or twice." That
25 was left out.

1 And, "you can put this off indefinitely."

2 These are the admitted nondisclosures.

3 The only tiny bit of controversy that we
4 had in the case about what was said and what wasn't
5 said, was the issue of, did he use the "N" word, the
6 nerve word, at all.

7 Mr. and Mrs. Wood said he never said
8 anything about nerve damage.

9 But Dr. Tzeng said; "Yes, I did say
10 something about it."

11 But here is all he said. Take a look.

12 "So what you said was, during dissection
13 there is potential surrounding tissue
14 injury, including nerves?

15 "That's correct.

16 "That's it?

17 "That's correct.

18 "So he's supposed to understand from that
19 that if you're cutting in his armpit he
20 could lose his hand?

21 "ANSWER: He didn't lose his hand.

22 "QUESTION: He could lose the function of
23 the major three fingers of his hand?

24 "ANSWER: I didn't go into that
25 specifically."

1 This is my questioning of Dr. Tzeng last
2 Thursday afternoon.

3 He also admitted, or slipped it in, that
4 he does vaguely remember that there was the
5 discussion about insurance that Mrs. Wood mentioned,
6 that she'd kind of like to -- she's got a good job
7 prospect, to go to work for the school board in
8 September, get insurance in 30 days and they could
9 pay for it, and couldn't they wait that long? Oh,
10 no, you'd better not wait that long.

11 So, actions speak louder than words. He
12 got them there and put them on the conveyor belt for
13 surgery. And the next thing they know, they're
14 talking to his scheduler and they're in there the
15 next week getting the surgery.

16 Now, you'll remember, he was here in Court
17 last Thursday afternoon and he said -- or I said to
18 him something like, you know, you've spent, with the
19 jury, like an hour-and-a-half explaining everything
20 about this case, you couldn't have spent anything
21 like that with them, maybe what, five minutes, 10
22 minutes, 15 minutes; and he said oh, no.

23 And I said, well, come on, Dr. Tzeng, you
24 had a room full of patients in the waiting room.

25 And do you remember the next thing he

1 said? He said oh, no, I remember the day vividly,
2 it was a slow day.

3 Well, that's kind of interesting. You
4 know, I'm willing to accept that maybe it was a slow
5 day on April 16th, 2007, and Dr. Tzeng just needed
6 the business, harsh as it sounds, because there are
7 all of these questions that we don't know answers
8 to, that his lawyer promised in the opening
9 statement that he was going to tell us.

10 And one of the things he was going to tell
11 us, he said, was -- excuse me.

12 "Mr. Malone is correct; he started out as
13 a heart surgeon and then shifted over to
14 vascular care. Dr. Tzeng will tell you
15 about that. He will tell you why he did
16 that."

17 Did we hear anything like that? Here's a
18 guy, on his resume, who says he's trained in heart
19 surgery at the Cleveland Clinic; one of the
20 international premiere heart surgery places, where
21 rich people fly in from all over the country, all
22 over the world --

23 MR. ROLING: Objection.

24 MR. MALONE: -- to get heart surgery
25 there.

1 MR. ROLING: Objection.

2 THE COURT: Sustained.

3 MR. MALONE: And he moves to Southern
4 Maryland, and that's fine. But then, a year before
5 Mr. Wood comes along, he's out of heart surgery and
6 he's suddenly in vascular, and he's not really
7 telling us what's going on.

8 So now we get to April 26th of 2007, and
9 he's doing this surgery in the armpit with the --
10 and let's not mix apples and oranges; yeah, he's
11 done the kidney dialysis cut-down.

12 But in terms of rooting around with this
13 Doppler thing, looking for the artery that had
14 collapsed down, and trying to tell the difference
15 between the artery and the nerves, he told us he'd
16 done that maybe once, maybe twice before, in his
17 life. He'd never done the femoral approach. I'm
18 sorry. He'd done the femoral approach once. He'd
19 never done the elbow approach.

20 So he's doing this unfamiliar surgery, and
21 he violates what he calls, himself, surgery rule
22 101, don't put retractors on nerves. And here's
23 this major, pencil-sized nerve right above the
24 artery, but he's got to get it out of the way to get
25 to that artery.

1 He presses on that nerve for so long and
2 for so hard that he squeezes off the blood supply to
3 the nerve. That had to have taken at least half an
4 hour. That's what Dr. Healy told us, the first day
5 of testimony, and that has not been contradicted.

6 You don't get nerve damage just by
7 touching these nerves; you've got to really whack
8 them quite hard.

9 And he's so sloppy in doing this -- and
10 this is not comfortable, saying this, but the truth
11 has got to be told -- he's so sloppy doing this that
12 he tears apart the other nerve and doesn't even
13 notice it. He closes the wound, pats himself on the
14 back at the wonderful job he's done, and then goes
15 home.

16 Later, once he's confronted by the
17 patient's wife, who is insistent about something
18 being wrong here, he finally admits that he may have
19 done something wrong. He finally admits he may have
20 severed the nerve.

21 The patient gets to Dr. Ducic. You've
22 heard about the two surgeries, and the possibility
23 of the third one.

24 And Dr. Ducic has told us that even with
25 this third surgery, even if he robs Peter to pay

1 Paul, to transfer these nerves over, he may get a
2 little bit of sensation back in these dead fingers
3 that have no sensation at all, the key fingers of
4 the hand, but he will never get his strength back.
5 He has a permanent, serious disability.

6 So meantime, back in Dr. Tzeng's camp, he
7 realizes that he has no justification in the record
8 for going straight to surgery.

9 In the operative report, it doesn't say --
10 usually in the -- they tell you why you're doing
11 surgery in the pre-op diagnosis, and there is some
12 kind of justification for this surgery.

13 Now, if he had said symptomatic, you know,
14 subclavian steal -- and that's that dizziness thing;
15 or if he had said arm problems, he would have
16 something in the record to justify it. But he
17 didn't have those and he admits now he didn't have
18 those.

19 And so he writes up a whole new consult
20 note and backdates it, and his experts all rely on
21 it, that May 24th note, and that's a note where he's
22 telling us even things like -- this note dictated at
23 1:58 a.m. on May 24th, 2007 -- he's telling us that
24 he has a temperature of 96, a respiration of 20,
25 heart rate 87. Pretty vivid stuff.

1 He's forgotten, in the meantime, the name
2 of the doctor that had referred him. And there's a
3 blank there, and you'll see that later in the record
4 there is a corrected version of this where
5 Dr. Fieldson's name is plugged in. And that's okay.

6 But what is the whole reason that you
7 write these consult reports? Dr. Tzeng told us, a
8 consult report is a communication tool, it's a way
9 of the specialist telling the generalist you were
10 very kind to send me this patient, here's what I
11 found, here is my plan.

12 He didn't have that. And why would he
13 bother reconstructing one after the fact? It wasn't
14 to talk to Dr. Fieldson. Who was it designed to
15 talk to?

16 So the reconstruction and the
17 embellishment has got to stop. Now it's time for
18 accountability.

19 The first thing the Judge told you, or
20 maybe it was the second thing, when she gave her
21 instructions, and I find this so inspirational
22 because in the United States of America -- and I
23 want to assure you that I'm as patriotic as my
24 adversary, even though I don't wear the flag -- we
25 are unique in the United States of America in our

1 system of justice.

2 She told you that all persons stand equal
3 before the law. Where else in the world would two
4 people who haven't even graduated from high school
5 have any chance at equal consideration against
6 somebody with prestige and education and training
7 and status in the community? But in this courtroom,
8 they are equal, and that is a sacred thing.

9 And not only that, we have a system where
10 it's not just a Judge who might go to the same
11 country club as the doctor who makes the decisions,
12 it's not just some panel of experts who see the
13 doctor in the cafeteria and then are expected to,
14 you know, make some, quote, "reasonable decision"
15 about what happened and whether somebody should have
16 to pay. No, we don't do it that way.

17 Since 1789 we have called in the voice of
18 the community, people who know nothing about the
19 case, and we ask them to reach a fair and impartial
20 verdict, with no sympathy for either side; because
21 we don't want sympathy on our side, we want justice.

22 I will fail completely in this argument if
23 you think that this case is just about some little
24 surgery in a shoulder that went wrong and somebody
25 got hurt. This case is about core values in our

1 community and whether or not we uphold and honor
2 those core values.

3 I was waiting for Court the other morning
4 and right outside this door here there's a panel
5 right down there, the next panel over, and it's a
6 glass sculpture that the Judges of this Court had
7 commissioned after they had the fire in the old
8 building.

9 And it's a set of icons about things that
10 are important in this community. In each -- and
11 there are symbols for each one. Like, it's very
12 interesting, as there's an icon for truth and it's
13 got an image of someone holding their hand up.

14 There's an icon for nurturing family,
15 which is one of the issues in our case, and it's a
16 bird's nest with some eggs in it.

17 There are icons for liberty, and other
18 important things. Honesty.

19 Liberty. What is liberty? The freedom to
20 do what you want, when you want, as long as you
21 don't hurt somebody else.

22 Mike Wood's chosen liberty was hunting,
23 fishing, tubing, four-wheeling with the grandkids,
24 throwing them into the air in the swimming pool and
25 working with his hands and building things. That

1 was his choice of liberty, and that liberty has been
2 stolen from him and he wants to be paid back.

3 And not just liberty was taken from him;
4 but his pride, his dignity as an independent adult
5 male who now cannot pull up his own pants properly
6 and has to have his wife help dress him. His
7 independence.

8 The liability aspect of this case; was
9 there negligence, was there cause of harm? Those
10 are the first four questions on the form. That's, I
11 would suggest to you, quite easy.

12 Let me show you what Dr. Healy discussed
13 in his testimony, just quickly. He talked about
14 rules that surgeons are required to obey for patient
15 safety. There was no real challenge to these.

16 You've got to give the patient the safest
17 option that does the job. Common sense.

18 You've got to avoid cutting near nerves if
19 you don't have to, and ask for help if you lack
20 experience.

21 Dr. Tzeng could have even kept the case
22 and kept the business if he had just called in
23 somebody with experience to work with him on the
24 case.

25 And finally, tell the patient the

1 important facts so that the patient can make an
2 intelligent decision.

3 You know when Judge Weatherly told you
4 about this informed consent doctrine? And I'm going
5 to talk about it a little bit more. But this is a
6 powerful part of freedom in the United States of
7 America because we, each and every one of us, even a
8 Jehovah's Witness who doesn't believe in getting a
9 blood transfusion --

10 MR. ROLING: Objection, Your Honor.

11 MR. MALONE: -- they have a perfect right
12 to that --

13 MR. ROLING: Objection, Your Honor.

14 THE COURT: Overruled.

15 MR. MALONE: -- as long as they are
16 informed of the consequences.

17 The point is, is that it's a fundamental
18 part of freedom to have the final say in what
19 happens to your own body.

20 And don't think that the form here
21 relieves Dr. Tzeng of any responsibility where
22 they -- when they get to the hospital and they have
23 the patient sign, sign the form. That's just the
24 hospital covering itself.

25 The informed consent conversation has to

1 happen back in the doctor's office, and I'll talk a
2 little bit more about that later.

3 But here are the basic rules. And of
4 course, probably the most important one is last,
5 which is putting the patient's interests first.

6 And just to remind you of who Dr. Healy
7 was, Mr. Wood wins this case in any of three
8 different ways.

9 First, if he needed this surgery, if he
10 really needed this surgery, then it should have been
11 done in the accepted way that everybody does it, or
12 he should have been referred to someone else. And
13 that's one.

14 Second, Dr. Tzeng should not have
15 carelessly damaged that nerve when he was in there.
16 You heard Dr. Healy say that is not proper
17 technique, holding a retractor on a nerve for a
18 half-hour or longer.

19 Third, he should have informed the patient
20 that, among many other things, this surgery could
21 have been put off indefinitely.

22 And you know, Mike Wood, as a middle-aged
23 male, who doesn't want to hang around hospitals, if
24 he knew that he could have put this thing off, boom,
25 he would have been out of there.

1 Now, Dr. Healy did one interesting thing
2 in his testimony. He basically threw out a
3 challenge to the Defense.

4 Here's what he said.

5 "QUESTION: Is there any textbook, any
6 article, peer-reviewed literature, that
7 you're familiar with, that says that
8 Dr. Tzeng's approach is one of the
9 reasonable options?

10 "Answer: No."

11 And then he goes on and talks about
12 puncturing in the groin with the percutaneous
13 approach, or at the elbow. He says:

14 "You can also make a small incision at the
15 elbow."

16 That's what he says at the end. But those
17 are the two approaches.

18 So you know, from a lawyer's standpoint,
19 I've put a big fat target out there that would be
20 easy to shoot at if they had any evidence at all.

21 But how did the Defense respond? Well, we
22 asked Dr. Tzeng, in Interrogatory 17:

23 "Identify all medical literature which you
24 regard as reliable authority, supporting
25 any contention by you that your conduct

1 concerning Mr. Wood conformed to all
2 applicable standards of care.

3 "ANSWER: No specific literature of which
4 I am aware at this time."

5 We asked the paid witnesses, can you refer
6 to any objective source?

7 Oh, and by the way, let me be clear on one
8 thing: I paid Dr. Healy to come down here, but he's
9 not in some stable of experts who come into Court
10 over and over and over for the same lawyers.

11 And one of them even stood right here and
12 told you -- or maybe he said it sitting back
13 there -- and I said to him, really, Dr. Ruben, come
14 on, you've got five or 10 current cases with this
15 law firm over here, are you really telling the jury
16 that you can be fair and impartial and objective?
17 Oh, yes. And in fact, he found the question
18 insulting.

19 Well, but none of them could refer to any
20 objective source. They could have scoured the
21 literature and come up with something and it would
22 have been easy to totally shoot down Dr. Healy, if
23 there was any evidence.

24 Or they could have said, you know what, I
25 know Dr. Wye [phonetic] up the Hopkins and he does

1 it exactly like Dr. Tzeng did it with the axillary,
2 and there's a guy over at the University of Maryland
3 and he does it the same way, too, and there's a
4 couple of my colleagues at Suburban Hospital,
5 et cetera, et cetera, et cetera.

6 Did you hear anything like that? No.

7 And the real proof of the pudding, do the
8 Defense experts -- do they do it the way Dr. Tzeng
9 did it? Oh, no.

10 The first one told us, well, I've done it
11 here a couple of times, here just above the elbow,
12 but most of the time I refer them to radiologists,
13 to go through the groin, which is just, of course,
14 what Dr. Healy said that everybody does; you refer
15 them to the radiologist and you either go through
16 the groin, and if that doesn't work, because it's a
17 little tricky, you go through the elbow, you get
18 nowhere near these nerves, the patient's fine.

19 Then the second guy comes in and he says,
20 oh, well, I have my young endovascular guy, the Navy
21 guy, I have him do all of them, or I'll bring in a
22 radiologist, but I've never done it the way
23 Dr. Tzeng did it either.

24 So what are they saying? They're saying
25 pay no attention to what I do, only pay attention to

1 what I say.

2 So let's challenge Mr. Roling. When he
3 comes up here let's have him explain to us why
4 nobody in the world, according to our evidence, does
5 it the way that Dr. Tzeng does it.

6 Now, I know that they said, oh, it's fine,
7 it's fine, we'll give it our blessing. But where is
8 the concrete evidence of other people doing it the
9 way he did it?

10 So he broke these safety rules, and part
11 of his problem was here, in the -- one of the very
12 last questions that I asked Dr. Tzeng.

13 "QUESTION: You didn't collaborate or
14 consult with any of your partners?

15 "ANSWER: I don't see the need."

16 Remember how Dr. Healy told us that team
17 members work together to deliver safer patient care?

18 If he gets a patient who has some kind of
19 problem that he doesn't do every day, well, he
20 brings in a radiologist, or another vascular
21 surgeon, and they'll work together to give the
22 patient the best care.

23 That's not the way they do it at Surgical
24 Associates, Chartered, because they're all out there
25 on their own and they only share expenses, as

1 Dr. Tzeng told us in his video deposition.

2 Now I want to talk for a minute a little
3 bit more about this informed consent, what the Judge
4 told you about. I've put part of it on the board.

5 And please, don't take my word for it.
6 You're going to have a copy of the whole thing. I
7 want you to read the whole thing. I'm just
8 highlighting pieces that I think will be helpful to
9 you.

10 The physician is required to explain the
11 treatment to the patient and to warn of any material
12 risks or dangers, so the patient can make an
13 intelligent and informed decision about whether or
14 not to go forward with the proposed treatment.

15 And then there was this.

16 You must determine if Dr. Tzeng failed to
17 disclose information which a reasonable person in
18 the position of Mr. Wood would consider material or
19 important in deciding to have this particular
20 surgical procedure.

21 So it's really not what doctors think so
22 much that's important; it's what reasonable patients
23 would want to know.

24 Well, I've got a group of them right here.
25 You get to think about what reasonable patients

1 would want to know, and whether or not the things
2 that I showed you, the nondisclosures, should have
3 been said.

4 Here are the ones that were mentioned by
5 the Judge. And she's, of course, not endorsing our
6 case, she's just saying these were -- are
7 allegations.

8 Would a reasonable patient have wanted to
9 know that alternative ways are available to treat
10 this with much lower risk of nerve injury?

11 Would a reasonable patient have wanted to
12 know that there was a lack of urgency in treating
13 this blockage?

14 And, would a reasonable patient have
15 wanted to know that Dr. Tzeng lacked experience in
16 this particular surgery?

17 Now, the funny thing here is, nowhere in
18 this instruction does it say that the patient has a
19 duty to be suspicious of their doctor, or to run out
20 and get a second opinion and ask a lot of questions.

21 Now, if he'd done the right thing, of
22 course he would have said, hey, you've got plenty of
23 time, go get your insurance, go talk to somebody
24 else and come back to me when you're ready, when
25 this arm is really causing you a problem.

1 But he didn't do that. He scared him to
2 death, and they felt under the gun and didn't have
3 time to do that.

4 So let's talk about what's really
5 important in this case. What should he pay for what
6 he did, he and his company?

7 I want to suggest to you, first off, that
8 it's not what you take from a man, it's what you
9 leave him with.

10 Taking a thumb and two fingers at first,
11 and then leaving the entire numb arm and not having
12 positional sense so that you don't even know where
13 the arm is, at first, you know, it doesn't sound
14 like that much of a deal. But it's what you leave
15 the person with, and how it effects their entire
16 life.

17 It's in the jury instructions. But
18 interestingly enough, it goes way back. Paul's
19 letter to the Corinthians says if one part of the
20 body suffers, all of the other parts suffer with it.

21 Well, in our jury instructions we embody
22 that idea, right here. The Judge listed a bunch of
23 things that you need to consider.

24 And the very second one on the list that
25 she said you shall consider is the effect such

1 injuries have on the overall physical and mental
2 health and well-being of the patient.

3 Now, further down on the list is stuff
4 that it's easy to put dollars on, like medical bills
5 and stuff like that. And if that's all we were
6 doing in this case, we wouldn't need you, frankly,
7 as a computer could do that.

8 But we are talking about what the
9 community thinks is important, and what really
10 happened to this man.

11 You heard that this man is a reliable
12 friend. Some of the other things on the glass
13 sculpture I could mention are trust and strength,
14 balance to judgment, integrity, nurturing family,
15 honesty.

16 You heard Claudia Bryant come in and tell
17 us something very important about him. She said it
18 quietly. She said in my experience men show they
19 care by what they do for other people. He's not a
20 talker. He's a doer. He loves doing stuff, loved
21 doing stuff for people.

22 Whether it's snowplowing for the
23 neighbors, without even being asked; cooking at the
24 Elks Club on the Friday nights and getting all the
25 steaks the exact right done, doneness; raising his

1 granddaughter in his own home. All of those things.

2 But now, in essence, he's been forced into
3 a new job. It is just like, on April 26th, 2007,
4 when this man wakes up and he's got this terrible
5 pain in the entire arm, if someone were to tell him
6 the truth, which is, Mr. Wood, I'm afraid you have
7 just suffered a terrible injury that's going to
8 effect you for the rest of your life and it's going
9 to take away all the pleasures that you had in life;
10 you were a doer before, now you're going to be a
11 bystander, you'll ride on the back of the ATV with
12 your wife, you'll be able to get on the boat, but
13 you're not going to be able to fish or hunt or any
14 of the things that you like to do.

15 But the good news is, under our system of
16 justice, if somebody does that wrongfully to you,
17 puts you into a job that you don't want, they have
18 to pay for it, they have to pay a reasonable sum for
19 it; and we're going to bring in a group of citizens
20 to consider what it's worth and they'll have to
21 consider the length of the job that the person is
22 being put in.

23 And so from age 60, you're talking a
24 little more than 20 years; from his current age, now
25 three years later, he's got about 18-and-a-half

1 years. So those are years that he's going to be put
2 into the job that he did not want and did not ask
3 for and did nothing to deserve.

4 And what is it reasonable to pay for that
5 job? I'm going to suggest to you that a fair number
6 is \$50,000 a year, and that would add up to around a
7 million dollars for that job of being required to do
8 a life that you don't want to do. Some of you may
9 think it's worth more than that, but I suggest to
10 you that that is the minimum.

11 Now I want to talk about the other
12 elements. There are things that he cannot do for
13 himself, that other people can do.

14 His wife can help him dress in the
15 morning. She can cut his steak. His sons can plow
16 the -- what do you call it -- the driveway, and
17 repave the gravel road once or twice a year.

18 But we have a very interesting approach
19 under the Maryland law. I want to show you another
20 thing that the Judge instructed you on.

21 If you find from the evidence that because
22 of the Plaintiff's injuries he needs certain
23 services and assistance with his daily living
24 activities, you should award an amount that is
25 reasonable and necessary to pay for such services,

1 without regard to whether he may receive some of the
2 services for free from his family members.

3 Well, now, why is that? The law, when
4 someone has wrongfully hurt you, and put you in a
5 position of where you need services, the law doesn't
6 let the Defendant take advantage of the fact that
7 you might have family members who can do that for
8 you.

9 We're all equal in an American court of
10 law. If Bill Gates needed somebody, because of an
11 injury, to cut his food and help him get his shoes
12 and socks on, he would be entitled to the reasonable
13 cost of what that would be, the same as a single
14 mother would be entitled to the same amount of
15 reasonable costs.

16 The wrongdoer must pay for the harm he
17 caused and is not allowed to take advantage of the
18 resources that the victim has.

19 And the wisdom of the law on this is that
20 it also provides a savings account, of sorts, for
21 Mr. Wood; so that, God forbid, if something happens
22 to his family members he'll have the money there to
23 pay other people.

24 And it also lets him be generous, so that
25 getting part of his pride back is something that you

1 can do here when you pay for this, because you can
2 give him the money so he can say to a friend of his,
3 would you help me with my Christmas tree lights this
4 year; and by the way, I'll pay you good money to do
5 it, even though it's going to take several days to
6 put them up. He can do that now.

7 Now, we had a calculation on what that
8 would cost. And it's an average figure, four hours
9 a day. But I think this is a better number that
10 puts it in perspective; \$21,900 a year. That's four
11 hours a day, at \$15 an hour.

12 You've got a huge array of services that
13 this man was doing for himself and for his family
14 members, that easily add up to that amount; changing
15 the oil on all his cars, power washing the house,
16 the deck, grilling three times a week, snaking out
17 the toilet.

18 I mean, the list went on and on and on --
19 and that's a lot more than I do at my house --
20 mulching, vegetable gardening, rototilling, all of
21 the stuff that it takes two hands to do.

22 Now, there were a few other items that
23 you'll see on the verdict form, and let me just talk
24 about those briefly.

25 This item of help for daily activities,

1 that's a lot, \$492,000. And you know what, we want
2 every penny of it. He deserves it.

3 This other item here, this \$36,000, what
4 that has to do with is those things like this other
5 paid expert for the Defense that comes in and says,
6 you know, I don't do these therapies and I don't
7 even know how to use these assistive devices, but he
8 needs these assistive devices and he needs some
9 marriage counseling and other counseling, and stuff
10 like that. So we said fine, he should get whatever
11 he should get, and that adds up to \$36,000.

12 Now, their figure, just so you understand
13 the difference, Mr. Roling is going to show you a
14 figure of \$58,000 for this stuff here.

15 Now, why would we want less on that, than
16 they say? Well, the difference is that they say
17 that this man and wife can take care of his entire
18 house, year-round, for 10 hours for the entire year,
19 plus having a handyman come by five times a year to
20 do weeding. 10 hours, for the entire year. You'd
21 use that up with a couple of snowfalls doing your
22 snowplowing. An absolutely ridiculous number.

23 But we didn't want to double-count, so we
24 took out those things, for the handyman and whatnot,
25 and that's why we have the lower number there.

1 Now, you'll also see, on the form here,
2 you'll see past medical expenses, you'll see the
3 exhibits. That's money out of their pocket. It
4 adds up, if I did the math right, to a little under
5 \$33,000. It's not a big deal. It's not a huge part
6 of the case, but it's there.

7 You've heard Mr. Wood say, tell us about
8 the conversation with Dr. Ducic and about doing this
9 third surgery that might restore a little bit of
10 sensation to the fingers. That's \$10,000. So we've
11 got that down on future medical.

12 So we've got past medical, 33; future
13 medical, 10; daily care needs, that's \$492,000,
14 whatever you think it's worth; future counseling,
15 \$36,000.

16 And then you've got the big item, the loss
17 of enjoyment of life and all the things that go with
18 that. And then you have what is called loss of
19 consortium.

20 Now, I want to just leave you with one or
21 two thoughts:

22 Mike Wood has worked very hard to overcome
23 the injury that Dr. Tzeng inflicted on him.

24 He has been able to hire other guys to run
25 his backhoe and his bob-cat and he has become a

1 supervisor and he's made enough money doing that
2 that he's not asking for a single penny from
3 Dr. Tzeng for the disruption to his business.

4 But he does insist on every dollar that
5 he's entitled to for the disruption to his life and
6 to his marriage and to his loss of freedom and
7 dignity and independence and pride.

8 No compromise on that. Dr. Tzeng hasn't
9 done anything to deserve any compromise.

10 So some people think that life just
11 happens at random. Some people think we're put here
12 for a reason. Some people think that, may think,
13 that you're here on the jury, out of all of the 50
14 people, that it was completely random. Some people
15 might think you're here for a reason.

16 I think that if you decide that you are
17 here for a reason, that you will find the
18 strength -- and it takes strength to render justice
19 in this case -- I think that you will find the
20 strength to do what is right without regard to the
21 status of the parties, without any unfair deference
22 to the educated and the powerful.

23 But just do the right thing under the law,
24 and to render a verdict that you can take pride in
25 and a verdict that will answer the question: Are

1 you here to enforce justice and are you here to
2 enforce accountability for the rules to protect
3 patient safety.

4 Thank you.

5 -----

6 THE COURT: Counsel?

7 MR. MALONE: May I go now?

8 THE COURT: Please.

9 MR. MALONE: Thank you.

10 THE COURT: And hopefully, not too
11 terribly long a rebuttal.

12 MR. MALONE: All right.

13 THE COURT: Thank you.

14 REBUTTAL CLOSING ARGUMENT/PLAINTIFF

15 MR. MALONE: I want to start first with a
16 real stretch, a real stretch that we heard from my
17 friend and colleague, Mr. Roling: Dr. Greenbaum
18 knows how to make people independent.

19 This lady, you've heard yesterday, is a
20 litigation consultant 100 percent of the time. She
21 never lays hands on a single patient. She jets
22 around the country and she comes up with life care
23 plans, which is a device that only exists in the
24 lawsuit world. She does not implement them to
25 follow through with the success of her care plans.

1 She told us that, well, maybe she's done
2 that once in 500 times that she's done these life
3 care plans.

4 And so she has no way -- because she's not
5 an occupational therapist, physical therapist, she's
6 not a physical medicine doctor, she doesn't do
7 counseling of patients with physical disabilities --
8 she has absolutely no way of knowing the
9 independence that she can provide with a one-handed
10 lawnmower and some button pull-ups that she
11 personally has never used.

12 Now, what's the difference between her and
13 the doctor, that -- and I did, it was straight up.

14 We asked this doctor to examine Mr. Wood.
15 Why? Because he is a specialist in the exact kind
16 of disability that he has. The specialty is called
17 physical medicine and rehabilitation. That was this
18 Dr. April.

19 All day long, every day, he treats
20 patients who have either spinal cord injuries,
21 arm/leg injuries, whatever they are.

22 He's familiar with what happens with
23 people depending on where the injury is and how old
24 they are, how adaptable they are.

25 And what he told us was, given the nature

1 of this injury, the location of the injury, being
2 high in the arm so that the whole arm winds up
3 getting hurt, and the unfortunate fact that he's not
4 a young, spring chicken, and it's hard to relearn
5 things, these adaptive devices are definitely worth
6 a try, but they are very unlikely to help, and he
7 knows that from his personal experience of working
8 with hundreds and thousands of patients.

9 Now you can take that on the one hand, or
10 you can take the professional litigation consultant
11 who jets around the country and who never treats or
12 sees these patients that she does the care plans
13 for, on the other hand. Your choice.

14 Now, Dr. Ducic, they've told quite a
15 stretch about him. First off, Dr. Ducic told us
16 that with this nerve injury being high up in the
17 arm, as opposed to low down in the arm, you're going
18 to have a bigger injury, because when you cut, or
19 otherwise kill a nerve up here, it's got to
20 regenerate over the course of the entire arm, and
21 that could not happen here with any success.

22 If it had happened down here, in the
23 wrist, if he'd done it where he should have done the
24 surgery, or in the elbow, there would be less
25 distance to travel and maybe more likelihood of

1 getting a success. That's what he told us on
2 page 31 and page 32.

3 Then at the end, where Mr. Roling tried to
4 suggest that Dr. Ducic didn't see that anything was
5 done wrong, I asked him a final question.

6 Mr. Roling asked you about, when you go
7 back and you do these redo surgeries, it's normal to
8 find swelling and scarring? That was Mr. Roling's
9 question. It's normal to find swelling and scarring
10 in an area where somebody else has operated.

11 My question is:

12 "QUESTION: When you found that median
13 nerve swollen up to about twice its normal
14 size, and hardened in this area here, was
15 that a normal finding of a prior surgery?

16 "ANSWER: It is not a normal finding.

17 "QUESTION: That's a finding of an injury?

18 "ANSWER: That is a finding of an abnormal
19 nerve at the site of the operative
20 previous intervention."

21 And then I asked him about finding the
22 other nerve separated, and he said that's not a
23 normal finding either.

24 Dr. Tzeng didn't favor us with any
25 description in his operative report of what he did

1 to protect the nerves. So of course, we can't
2 figure out how it is, exactly, that he came to
3 damage the nerve.

4 We do know, from the length of that
5 damaged area where the blood supply is choked off,
6 it's about the length of a retractor blade. That's
7 what Dr. Healy told you.

8 And we know that he had to get underneath
9 that nerve to get to that artery. And so that is
10 the most logical explanation, since he hasn't told
11 us.

12 And of course, his operative note -- and
13 it's funny that Mr. Roling would rely on the
14 operative note -- this operative note either didn't
15 tell the truth straight out, or it is terribly
16 sloppy because it describes no injury.

17 Here he is, right there in the field, he's
18 working there, he's cut a nerve and doesn't tell
19 anybody about it. He's supposed to. He told us, if
20 you see an injury you're supposed to describe it and
21 say what happened.

22 So we are a little handicapped in the
23 case, but that's -- who's fault is that? Because he
24 didn't tell us what he was supposed to tell us.

25 Now, on the have-gun-will-travel lady,

1 Dr. Greenbaum, I wanted to say a couple more things.

2 Do you think that it was mere sloppiness
3 that she thought that 10 hours a year would replace
4 the hundreds of hours that this man spent around his
5 house, not just maintaining his home but making it
6 clean and respectable and attractive?

7 And not just attractive, but gorgeous, I
8 imagine, at Christmas, the way Mrs. Wood has
9 described it, you know, framing the A's and getting
10 all the lights around and spending literally days
11 doing that.

12 She did a very superficial study of the
13 case. And when you do a superficial study, you come
14 out with a superficial result. She didn't do a
15 respectful study that considered the true nature of
16 the man and the true nature of the disability.

17 She didn't tell us anything about, you
18 know, rototilling, the gardening, and what he'd do
19 to replace that, and what he'd do to replace the
20 ability to do the Christmas tree lights and what he
21 would do to replace the ability to change the oil in
22 his cars and what he would do to replace the washing
23 the windows once a month and power washing the house
24 and the deck and grading the gravel road and weeding
25 and mulching his flower beds.

1 None of that, she addressed. But that's
2 the way they do it. That's the way they play the
3 game; you do a little superficial thing and you hope
4 that people don't notice that you're really not
5 talking about the real person.

6 Mr. Roling didn't answer my challenge. I
7 said, if this was okay -- and this was the heart of
8 the case -- if this was okay, to cut in this armpit,
9 how come no doctor says I do it that way or I know
10 doctor so-and-so who does it that way, or this
11 medical textbook says it's okay to do it that way?
12 Not one shred of evidence.

13 This case was, overwhelming, that he did
14 the wrong thing. And you can only vote for
15 Dr. Tzeng if you say that each doctor is free to
16 follow his own standards and we don't care what it
17 says in the jury instructions; and it says that
18 doctors are required to follow the reasonable
19 standards in the community.

20 If you think it's okay to go off the
21 reservation and invent new procedures, then you have
22 to vote for him; but not if you follow the jury
23 instructions.

24 Now, the one point where he came kind of
25 close to addressing that, was fairly early in his

1 discussion, where he says books -- well, books don't
2 operate on patients.

3 Come on. Let's get serious here. What
4 does a book do? A book, unlike an expert who's
5 hired to stretch the truth for money, and who knows
6 that he's going to get his bread buttered by doing
7 it well in this case, so he'll get the next case and
8 the next case and the next case from the same law
9 firm, a book is there to help patients get better
10 care. It provides objective evidence of what the
11 medical standards are.

12 It's not written for the courtroom. And
13 it's not influenced by relationships that
14 doctor witnesses may have with the lawyers who hire
15 them.

16 So why didn't we hear anything from a
17 single book, or article, or anything like that?

18 And here's another peculiar thing in this
19 case: Why did we keep hearing about witnesses who
20 didn't show up in Court?

21 Other than Dr. Tzeng, every single person
22 that he brought into Court was one of these paid
23 testimonial experts with long track records with his
24 law firm. Every single one of them; Grogan,
25 Greenbaum, Salander, Ruben.

1 But Dr. Fieldson, he kept saying, sent the
2 patient there because he thought that Dr. Tzeng was
3 the most appropriate person.

4 Well, if that's true, why not bring in
5 Dr. Fieldson to give the endorsement and he could
6 have said exactly that? He could have sat right
7 here and said, you know, I know who all the vascular
8 surgeons are down there and I decided that Dr. Tzeng
9 would be the appropriate one here. Well, we didn't
10 hear that, did we?

11 We didn't hear any of Dr. Tzeng's
12 colleagues come in and say yep, he's our vascular
13 guy, he's the one that we like to have patients --
14 do these surgeries on; and by the way, we think his
15 approach on the -- in the armpit, that's the right
16 approach. So there's other witnesses we didn't hear
17 from.

18 And if you want to say that you're going
19 to make a patient independent with these little
20 devices and whatnot, the way to do it would be to
21 bring in a witness who says, who can say honestly,
22 you know, I just haven't prescribed these for people
23 in litigation, life care plans; I've walked the
24 walk, I have trained patients, I've taken patients
25 exactly like Mr. Wood and I've made them completely

1 independent, one-handed. Any witness like that?

2 We know what that kind of person is. We
3 know it's an occupational therapist that does that
4 kind of training, under the supervision of a
5 physical medicine doctor, like Dr. April, that we
6 brought in. No such testimony like that.

7 No surgeon came in who said, gee, I'd do
8 it exactly the same as Dr. Tzeng. A lot of holes.
9 A lot of holes. And it's a lot of shell games.

10 And I'm not going to -- I don't have time
11 to touch on everything. There's a lot of shell
12 games with -- and I'll just mention a couple -- on
13 the Defense case. One of the things they say is,
14 well, he said the word nerve, so that's it, that's
15 enough.

16 Now, remember, if Dr. Tzeng said nerves,
17 all he said was surrounding tissue. He said
18 nothing -- and he admitted it -- he said nothing, I
19 could kill your hand by doing this surgery.

20 Now, you've got to decide, would a
21 reasonable patient want to know that? So just
22 saying nerves is a shell game.

23 Another shell game is when you say, oh,
24 he's qualified, he's qualified to do the surgery;
25 and why do we know that? Because Southern Maryland

1 Hospital gave him privileges.

2 Now, privileges is a different issue than
3 qualifications. Of course a hospital will give you
4 privileges. That doesn't mean that a patient
5 wouldn't want to know that this is the first or
6 second or third time you've done the surgery.

7 That's all we're saying; just be up front
8 with the guy, tell him the truth. Tell him
9 truthfully, you don't really need this surgery now,
10 you've got time to wait, I haven't done too many of
11 these, you might want to consult with somebody else.

12 We know what would have happened if that
13 had occurred.

14 This approach I use, nobody else does
15 that, nobody anywhere does it the way I do it, so
16 you might want to talk to somebody else, Mr. Wood.

17 If honesty would have been followed in
18 this case, we know what would happen, what would
19 have happened. We wouldn't be here and he'd be out
20 ATV-ing and fishing with a two-handed fishing pole
21 and shooting his rifle and throwing those grandkids
22 up in the air and holding that little baby, the
23 great-granddaughter that he has. Try holding a
24 grandchild with one hand.

25 So no sympathy. Just a realistic

1 appraisal of the evidence, and then you'll see that
2 the harm that was done to this man by the negligence
3 of this doctor, in several different ways, is
4 profound and requires a full measure of justice.

5 Thank you.

6 THE COURT: Thank you, counsel.

7 (EXCEPTED TRANSCRIPT CONCLUDED)

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REPORTER'S CERTIFICATE

I, Debbie K. Klapaska, an Official Court Reporter for the Circuit Court of Prince George's County, Maryland, do hereby certify that I stenographically reported the proceedings in the matter of Wood, et al. Versus Tzeng, et al., CAL-09-04587, in the Circuit Court of Prince George's County, Maryland, on Tuesday, April 27th, 2010, before the Honorable Julia B. Weatherly, Associate Judge.

I further certify that pages 1 through 46 constitute the official transcript excerpts of the proceedings as transcribed by me from my stenographic notes to the within typewritten pages in a complete manner to the best of my knowledge and belief.

In witness whereof, I have affixed my signature, this 7th day of June, 2010.

Debbie K. Klapaska
Official Court Reporter

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