

# MALPRACTICE

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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 08 - 08 - 3314 A

MICHAEL K. HICKS

Plaintiff

v.

LOREN J. BORUD, M.D.;  
EDWARD CATERSON, M.D.;  
ERAN BAR-MEIR, M.D.;  
DONALD W. MOORMAN, M.D.;  
SHIRIE C. GALE, M.D.;  
ROBERT DOE, M.D.;  
LORI M. AMERAULT, R.N.;  
SUSAN ROE, R.N.; and  
BETH ISRAEL DEACONESS MEDICAL CENTER

Defendants

COMPLAINT

and

DEMAND FOR

JURY TRIAL

2008 JUL 25 AM 8:35  
MICHAEL J. [unclear]  
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### OVERVIEW

This Complaint represents claims by Plaintiff Michael K. Hicks ("Mr. Hicks") for medical malpractice against Defendants: Loren J. Borud, M.D. ("Dr. Borud"); Edward Caterson, M.D. ("Dr. Caterson"); Eran Bar-Meir, M.D. ("Dr. Bar-Meir"); Donald W. Moorman, M.D. ("Dr. Moorman"); Shirie C. Gale, M.D. ("Dr. John Doe"); Robert Roe, M.D. ("Dr. Robert Roe";, Lori M. Amerault, R.N. ("Nurse Amerault"); Susan Roe, R.N. ("Nurse Susan Roe"); and Beth Israel Deaconess Medical Center ("Medical Center").

Plaintiff alleges that at the time of surgery on June 27, 2008, Dr. Borud was so impaired that he was unable to perform the scheduled surgery. Further, that Dr. Borud abandoned the Plaintiff in the midst of the surgery and left the operating

room without making the necessary arrangement to have another surgeon of equal experience and skill to complete the surgery.

Plaintiff further alleges that no member of the surgical team (anesthesiologist, surgical resident and nurses) intervened to stop Dr. Borud from even starting the surgical procedure, and made no effort to report his impairment to the appropriate authority within the Beth Israel Deaconess Medical Center, or to get a skilled, experienced surgeon into the operating room to manage the Plaintiff's intra-surgical condition and complete the surgery.

Further, Plaintiff alleges that when appropriate authority within the Beth Israel Deaconess Medical Center, in particular Dr. Moorman, became aware of Dr. Borud's abandoning the Plaintiff without completing the surgical procedure, no remedial measure such as, calling another plastic surgeon to complete the procedure, was taken to protect the safety of the Plaintiff.

Further, Plaintiff alleges that what was to be a 1½ hour surgical procedure was transformed into a 6 hour and 44 minutes odyssey, with the surgery being completed by medical personnel who was neither adequately trained, skilled or experienced to intervene in and complete the surgery in a satisfactory manner.

Finally, Plaintiff alleges that this is at least the 3<sup>rd</sup> reported instance of Dr. Borud's impairment due to substance abuse while practicing medicine and that in the present case, Dr. Borud's activities were being supervised by Dr. Moorman.

As a direct consequence of the negligence of the Defendants in the instant case, Mr. Hicks suffered substantial pain and suffering and incurred severe and permanent physical injuries which required a subsequent surgical procedure and will continue to require additional surgical procedures with further pain and suffering and emotional distress.

JURISDICTIONAL ALLEGATIONS  
AND IDENTIFICATION OF PARTIES

1. The Plaintiff, Michael K. Hicks ("Mr. Hicks"), is an adult and presently a resident of 816 Willard Street, Apt. # 307, Quincy, Norfolk County, Commonwealth of Massachusetts 02169.
2. The Defendant, Loren J. Borud, M.D. ("Dr. Borud"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at 110 Francis Street, Suite 5A, Boston, Suffolk County, Massachusetts 02215.
3. The Defendant, Edward Caterson, M.D. ("Dr. Caterson"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
4. The Defendant, Eran Bar-Meir, M.D. ("Dr. Bar-Meir"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
5. The Defendant, Donald W. Moorman, M.D. ("Dr. Moorman"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.

6. The Defendant, Shirie C. Gale, M.D. ("Dr. Gale"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
7. The Defendant, Robert Roe, M.D. ("Dr. Robert Roe"), was at all times relevant to this complaint, a physician licensed to practice medicine and surgery in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
8. The Defendant, Lori M. Amerault, R.N. ("Nurse Amerault"), was at all times relevant to this complaint, a nurse licensed to practice medicine and nursing in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
9. The Defendant, Susan Roe, R.N. ("Nurse Susan Roe"), was at all times relevant to this complaint, a nurse licensed to practice medicine and nursing in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.
10. The Defendant, Beth Israel Deaconess Medical Center ("Beth Israel Deaconess") was at all times a corporation in the Commonwealth of Massachusetts with a business address at c/o Beth Israel Deaconess Medical Center, 330 Brookline Avenue, Boston, Suffolk County, Massachusetts 02215.

### COMMON OPERATIVE FACTS

On information and belief, the common operative facts are as follows:

11. Mr. Hicks had undergone an incomplete cosmetic surgical procedure at the Beth Israel Deaconess Medical Center on December 26, 2007.
12. On April 15, 2008, Mr. Hicks was evaluated by Dr. Borud and a second 'Cosmetic Surgery Agreement' was signed by Mr. Hicks that detailed the surgical procedure to be performed as: "Skin excision / scar revision" with a total price of \$ 2,570 as the applicable fee. The surgeon's fee was USD 750.00; the anesthesia fee was USD 550.00 and the total hospital/operating room fee was USD 2,975.00. The hospital fee of USD 1,270.00 was detailed as exclusive of room charges and states in part: "Should you require an observation or inpatient stay in the hospital, you are responsible for the associated fees, which are \$800 per day for a semi-private room and \$950 per day for a private room."
13. On June 27, 2008, Mr. Hicks was admitted to the Beth Israel Deaconess Medical Center to undergo a "skin excision / scar revision" to be performed by Dr. Borud. Dr. Borud had advised Mr. Hicks that the surgical procedure would last approximately 1 to 1½ hours and to make the necessary arrangement to have a ride home at the time he would be discharged from the Beth Israel Deaconess Medical Center.
14. The surgical procedure was to be started shortly before noon on June 27, 2008. Dr. Borud had a prior surgical procedure on another patient scheduled to be performed at the same hospital in the same operating room assisted by

Dr. Caterson and supported by the same anesthetic and nursing team.

15. Based on information and belief, Dr. Borud presented himself to Mr. Hick's operating room on June 27, 2008 and appeared to be under the influence of certain drug(s).
16. Dr. Borud was known to the Beth Israel Deaconess Medical Center to be under treatment for drug abuse and was practicing medicine at the Beth Israel Deaconess Medical Center under supervision of another physician at Beth Israel Deaconess Medical Center (Dr. Donald W. Moorman). In fact, it has since been disclosed that Dr. Borud had previously been found to be "impaired" by Beth Israel Deaconess Medical Center on at least two other occasions. As such, on June 27, 2008 Dr. Borud was practicing surgery under the supervision of Dr. Moorman who, at the time, was Vice-Chairman of the Department of Surgery at the Beth Israel Deaconess Medical Center as well as the Vice Chair of Education and Quality at the Beth Israel Deaconess Medical Center.
17. The operating room personnel assigned to Mr. Hicks surgery (anesthesiologist, circulating nurse and resident physician) were aware that Dr. Borud was impaired as a result of the conduct he had exhibited during the first surgical case of the day in which he and they had participated. Dr. Borud was observed to have an impaired affect and had committed surgical errors known to the operating room personnel present during his first surgical procedure of the day.
18. Mr. Hicks' surgical procedure was started at approximately 11:30 a.m.. Dr. Borud was assisted by Dr. Caterson and Sophia Verani, a Harvard Medical Student (HMS). Although  
Dr. Borud appeared visibly under the influence of certain

drug(s) and in no condition to perform a surgical procedure, no member of the medical team in the operating room intervened on behalf of Mr. Hicks to cancel what was known to be an elective surgical procedure. Mr. Hicks was placed under general anesthesia and the surgical procedure commenced with Dr. Borud as the lead surgeon.

19. During Mr. Hicks' initial part of his surgical procedure (liposuction), Dr. Borud was observed to have his eyes closed while performing the liposuction and needed to be roused by the assisting surgical resident. This observation repeated itself shortly thereafter.
20. Dr. Borud was observed to again commit surgical missteps such as planning surgery on Mr. Hicks' completed side showing indications that Dr. Borud was disoriented.
21. Sometime between 1:00 p.m. and 1:30 p.m., while Mr. Hicks was under general anesthesia and the surgical procedure was not yet completed, Dr. Borud broke sterility in the operating room (broke scrub) unilaterally and left the operating room. At the time Dr. Borud left, there was not another surgeon equally as experienced and competent to replace Dr. Borud in Mr. Hicks' operating room. At the same time, no member of the medical team in the operating room followed established policy, procedure and protocol which required each of them to contact a qualified member of the plastic surgery department, or the Chairman of the Plastic Surgery department, or some other person so designated by Beth Israel Deaconess Medical Center to receive such complaints, and demand that a qualified plastic surgeon, experienced with Mr. Hicks procedure, be assigned immediately to manage Mr. Hicks ongoing surgical care.

22. Dr. Borud the proceeded to dictate the operative report describing the surgical procedure implying that he was present during the entire procedure. The operative report reads in part as follows:

"All the wounds were closed in layers with a deep layer of interrupted 0 PDS in the SFS system. The skin was closed with a combination of Insoorb staplers, 3-0 Monocryl deep dermal sutures and a running subcuticular 3-0 Monocryl suture.

Dermabond and sterile dressings were applied. The patient tolerated the procedure well, was awakened in the operating room and returned to the recovery room awake, alert with stable vital signs.

Loren J. Borud, MD 24145

I certify that I was present in compliance with HCFA regulations.

Dictated By: Loren J. Borud, MD

MEDQUIST36

D: 06/27/2008 13:32:20

T: 06/27/2008 14:58:45

Job#: 306012

Signed electronically by: DR. LOREN BORUD

On: SAT JUN 28, 2008 3:15 PM"

23. Dr. Catterson, the surgical resident assistant, delegated to fulfill other medical commitments within the Beth Israel Deaconess Medical Center, requested and obtained Dr. Bar-Meir to replace him as the surgical assistant (now as surgeon in charge) in the operating room. Dr. Bar-Meir was a fellow in the Department of Surgery and based on information and belief had not previously performed a surgical procedure as the one planned and in the process of being performed on Mr. Hicks on June 27, 2008. Dr. Bar-Meir

was assisted at the time by the Harvard Medical Student who also had never performed such a surgery.

24. Dr. Moorman was informed of Dr. Borud's condition and instructed Dr. Borud to undergo a drug test. Dr. Borud approached a surgical resident and after admitting that he was under the influence of drug(s), requested the resident to provide urine for the test.
25. Dr. Moorman, aware of Dr. Borud's condition and the fact that Dr. Borud had left Mr. Hicks' operating room while Mr. Hicks was under general anesthesia and the surgical procedure was incomplete, did not make arrangements to have another plastic surgeon come to Mr. Hicks aid to ensure his safety.
26. Several hours later, Dr. Borud accompanied by Dr. Moorman (his supervisor) presented themselves in the operating room while Mr. Hicks was still under general anesthesia and the surgical procedure was being performed by Dr. Bar-Meir. Dr. Borud appeared to have recovered some of his composure. However, Dr. Borud and Dr. Moorman limited their presence in the operating room to mere observance of Dr. Bar-Meir's activities.
27. Neither Dr. Borud nor Dr. Moorman scrubbed to assist or perform the surgical procedure on Mr. Hicks. After several minutes (less than ½ hour), Dr. Borud and Dr. Moorman left the operating room and did not return for the remainder of Mr. Hick's surgery or stay at the Beth Israel Deaconess Medical Center on June 27, 2008.
28. The surgical procedure was concluded at approximately 5:08 p.m. but Mr. Hicks remained under general anesthesia for approximately another hour because the final needle count was incorrect and radiographic films were obtained while  
Mr. Hicks remained anesthetized. Mr. Hicks was finally

33. On July 7, 2008, Mr. Hicks called the office of Dr. Borud on several occasions complaining of chills, pain and some bleeding on the left side of his chest. Nurse Maria Semnack at Dr. Borud's office spoke to Mr. Hicks offering reassurance that his complaints were the natural recovery stage of his surgical procedure. Following several conversations with Nurse Semnack, Mr. Hicks was told that because he was a Gulf War Veteran, his insurance would only cover his care at the Veterans Hospital and he was directed to go there for medical care.
34. Mr. Hicks was evaluated at the Veterans Administration Hospital in West Roxbury and, following several hours of observation and a diagnosis of a postoperative hematoma and, knowing that Mr. Hicks had a postoperative appointment to be evaluated at Dr. Borud's office, was referred back to be treated by Dr. Borud at his office.
35. Upon his arrival to Dr. Borud's office on July 8, 2008, at 110 Francis Street, Boston, Mr. Hicks was treated by Dr. Lin who following his evaluation offered Mr. Hicks the alternative to be admitted to the Beth Israel Deaconess Medical Center 2 days later or perform a drainage of a suspected hematoma under local anesthesia at his office. For informational purposes, 110 Francis Street is across the street from the West Campus of Beth Israel Deaconess Medical Center.
36. Mr. Hicks opted to have Dr. Lin perform the drainage of the suspected hematoma under local anesthesia on site. Under local anesthesia, Dr. Lin drained a hematoma and a large clot estimated to be approximately 1,000cc. in volume. Dr. Lin also told Mr. Hicks that he will make arrangements to have the Boston Visiting Nurse Association make nursing home visits to his home to provide him with wound care.

transferred to the PACU (Post Anesthesia Care Unit at approximately 6:18 p.m.

29. Upon awakening from anesthesia, Mr. Hicks questioned the nurse providing postoperative nursing care to him, why the left side of his chest was larger than the right side of his chest. The nurse responded that she will have somebody check it out and that most likely it was a known side effect of the surgical procedure.
30. Prior to his discharge from the Beth Israel Deaconess Medical Center on June 27, 2008, Mr. Hicks was approached by Dr. Caterson and his permission was requested to perform blood tests for hepatitis and HIV because during the surgical procedure, the Harvard Medical Student (HMS) was injured (stuck) with a sharp surgical instrument. Mr. Hicks agreed to have the tests drawn and performed. He was told that he will be called by hospital personnel in a couple of days to inform him of the results of these blood tests.
31. Dr. Caterson discharged Mr. Hicks home at approximately 8:00 p.m. with a prescription for Duricef 500 mg capsule to be taken one capsule twice a day and a prescription for Vicodin 5mg-500mg tablets to be taken 1-2 tablet(s) by mouth every six (6) hours.
32. At no point in time during Mr. Hicks stay at the Beth Israel Deaconess Medical Center on June 27, 2008 was Mr. Hicks ever informed by any medical or administrative member of the Beth Israel Deaconess Medical Center as to the numerous events that had transpired during the surgical procedure, or the nature or extent of Dr. Borud's impairment. No medical or administrative member informed Mr. Hicks as to the reason why a scheduled 1 to 1½ hour surgical procedure took 6 hours and 44 minutes to be

completed.

37. The Boston Visiting Nurse Association's nurse first came to Mr. Hicks home on July 10, 2008. Mr. Hicks had to change his own wound dressings on July 9, 2008 and July 10, 2008.
38. On July 17, 2008, Mr. Hicks received a phone call from Dr. Kenneth E. F. Sands, Senior Vice President & Medical Director of Health Care Quality at Beth Israel Deaconess Medical Center, to inquire as to how he was doing and to inform Mr. Hicks that a reporter for the Boston Herald was investigating some story about Dr. Borud and for him not to be surprised by opening the newspaper and finding a story about Dr. Borud. Dr. Sands also informed Mr. Hicks that he wanted to have a meeting with him and that another member of the Beth Israel Deaconess Medical Center administration would be in touch with him to set up such a meeting.
39. Later on July 17, 2008, Dr. Moorman (Dr. Borud's supervising physician) called Mr. Hicks and requested to set up a meeting as previously advised by Dr. Sands. Mr. Hicks informed Dr. Moorman that he had an appointment with Dr. Lin for his follow up care on July 28, 2008. Dr. Moorman insisted for the meeting to take place earlier and he called Dr. Lin's office to change Mr. Hicks' appointment to take place on July 23, 2008 at 8:00 a.m.

It has since been publicized that Dr. Borud's employment at Beth Israel Medical Center was "terminated" sometime between June 30<sup>th</sup> and July 18, 2008 and that the matter had eventually been referred to the Massachusetts Board of Registration in Medicine on approximately July 17, 2008. It is uncertain if the Massachusetts Department of Public Health has yet to be formally notified.

40. In violation of the duty owed Mr. Hicks, the Defendant

Loren J. Borud, M.D., negligently diagnosed, cared for and

- treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
41. In violation of the duty owed Mr. Hicks, the Defendant Edward Caterson, M.D., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
  42. In violation of the duty owed Mr. Hicks, the Defendant Eran Bar-Meir, M.D., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
  43. In violation of the duty owed Mr. Hicks, the Defendant Shirie C. Gale, M.D., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
  44. In violation of the duty owed Mr. Hicks, the Defendant Robert Roe, M.D., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
  45. In violation of the duty owed Mr. Hicks, the Defendant Lori M. Amerault, R.N., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and

- suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
46. In violation of the duty owed Mr. Hicks, the Defendant Susan Roe, R.N., negligently diagnosed, cared for and treated Mr. Hicks and/or failed to care and treat him such that Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures.
47. In violation of the duty owed Mr. Michael K. Hicks, the Defendant Beth Israel Deaconess Medical Center, through its agents, servants, employees or persons for whose conduct it was responsible, negligently diagnosed, cared for and treated Mr. Michael K. Hicks and/or failed to care and treat them such that Mr. Michael K. Hicks suffered substantial pain and suffering and incurred severe and permanent personal injuries which will require additional surgical procedures

#### CAUSES OF ACTION

(Each Cause of Action Specifically Incorporates by Reference All Those Paragraphs Previously Set Forth)

##### First Cause of Action

48. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Loren J. Borud, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. Borud's negligence on June 27, 2008.

Second Cause of Action

49. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Loren J. Borud, M.D., for breach of contract as a result of his failure to treat Michael K. Hicks in accordance with the Cosmetic Surgery Agreement signed on April 15, 2008.

Third Cause of Action

50. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Loren J. Borud, M.D., for negligence/abandonment as a result of his failure to complete the surgical procedure on June 27, 2008 while Michael K. Hicks was under general anesthesia, and leaving the operating room without assuring that another equally experienced surgeon was present to continue and conclude the planned surgery.

Fourth Cause of Action

51. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Edward Caterson, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. Caterson's negligence on June 27, 2008.

Fifth Cause of Action

52. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Eran Bar-Meir, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. Bar-Meir's negligence on June 27, 2008.

Sixth Cause of Action

53. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Donald W. Moorman, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. Moorman's negligence on June 27, 2008.

Seventh Cause of Action

54. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Shirie C. Gale, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. John Doe's negligence June 27, 2008.

Eighth Cause of Action

55. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Robert Roe, M.D., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Dr. Robert Roe's negligence on June 27, 2008.

Ninth Cause of Action

56. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Lori M. Amerault, R.N., for negligence for the pain and suffering and emotional distress he sustained and will continue to sustain as a result of Nurse Jane Doe's negligence on June 27, 2008.

Tenth Cause of Action

57. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Susan Roe, R.N., for negligence for the pain and suffering and emotional distress he sustained

and will continue to sustain as a result of Nurse Susan Roe's negligence on June 27, 2008.

Eleventh Cause of Action

58. This is an action by the Plaintiff, Michael K. Hicks, against the Defendant, Beth Israel Deaconess Medical Center, for the negligence of its agents, servants, employees or persons for whose conduct it was responsible, for the damages suffered by Mr. Michael K. Hicks, including pain and suffering and emotional distress and medical expenses.

Twelfth Cause of Action

59. This is an action by the Plaintiff Michael K. Hicks, against the Defendant, Loren J. Borud, M.D., for negligence for the physical injuries and emotional distress he sustained and will continue to sustain as a result of Dr. Borud's negligence as a result of his failure to protect Mr. Hicks from damage during his surgical procedure on June 27, 2008. Mr. Hicks alleges that while he was unconscious under general anesthesia for the duration of the surgical procedure, such injuries do not ordinarily occur in the absence of negligence when he was under the direct control of Dr. Borud in the operating room on June 27, 2008. (Negligence - RES IPSA LOQUITUR).

DEMANDS FOR RELIEF

60. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Loren J. Borud, M.D., with interest and costs as to the First Cause of Action.

61. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Loren J. Borud, M.D., with interest and costs as to the Second Cause of Action.
62. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Loren J. Borud, M.D. with interest and costs as to the Third Cause of Action.
63. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Edward Caterson, M.D., with interest and costs as to the Fourth Cause of Action.
64. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Eran Bar-Meir, M.D., with interest and costs as to the Fifth Cause of Action.
65. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Donald W. Moorman, M.D., with interest and costs as to the Sixth Cause of Action.
66. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Shirie C. Gale, M.D., with interest and costs as to the Seventh Cause of Action.
67. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Robert Roe, M.D., with interest and costs as to the Eighth Cause of Action.
68. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Lori M. Amerault, R.N., with interest and costs as to the Ninth Cause of Action.
69. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Susan Roe, R.N., with interest and costs as to the Tenth Cause of Action.
70. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Beth Israel Deaconess Medical Center, with interest and costs as to the Eleventh Cause of Action.

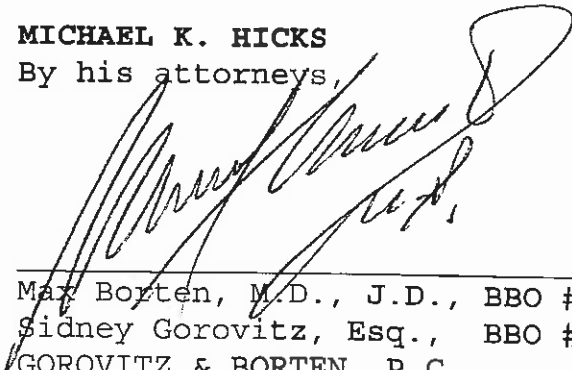
71. The Plaintiff Michael K. Hicks demands judgment against the Defendant, Loren J. Borud, M.D., with interest and costs as to the Twelfth Cause of Action.

**JURY CLAIM**

72. The Plaintiffs claim a trial by jury.

**MICHAEL K. HICKS**

By his attorneys,



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Dated: July 24, 2008

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 08 - 3314A

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 BERNARD T. LEE, M.D.; )  
 LORI M. AMERAULT, R.N.; )  
 MARIA SEMNACK, R.N.; and )  
 BETH ISRAEL DEACONESS MEDICAL CENTER )  
 )  
 Defendants )

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2008 SEP 19 11:07  
 DEPARTMENT OF  
 CLERK OF COURT

PLAINTIFF'S EMERGENCY MOTION, PURSUANT TO MASS. R. CIV. P.  
30 and 30A, FOR LEAVE OF COURT TO TAKE THE AUDIO/VISUAL  
DEPOSITION OF DEFENDANT, ERAN BAR-MEIR, M.D. ON SEPTEMBER 26,  
2008 AND TO COMPEL HIS APPEARANCE

Now comes the Plaintiff in this matter, through counsel, and respectfully moves that this Court ALLOW the "Plaintiff's Emergency Motion Pursuant to Mass.R.Civ.P. 30 and 30A, For Leave Of Court To Take The Audio-Visual Deposition Of Defendant, Eran Bar-Meir, M.D. On September 26, 2008 And To Compel His Appearance."

In support of this Motion, your Plaintiff states the following:

(1) This is a medical malpractice action that was duly and timely commenced with the filing of Plaintiff's Complaint in Suffolk Superior Court on July 25, 2008.

(2) On August 11, 2008, the Plaintiff's Motion to Amend Complaint and File First Amended Complaint was allowed which substituted Defendant Robert Roe, M.D. and Defendant Susan Roe, R.N. with the proper name of Bernard T. Lee, M.D. and Maria Semnack, R.N. respectively.

(3) At the present time, service has been duly made on all of the Defendants as follows:

- (a) Dr. Borud;
- (b) Dr. Catterson;
- (c) Dr. Bar-Meir;
- (d) Dr. Moorman;
- (e) Dr. Gale;
- (f) Dr. Lee;
- (g) Nurse Amerault;
- (h) Nurse Semnack;
- (i) Beth Israel Deaconess Medical Center.

Service on Dr. Lee was made by agreement with Attorney John Cassidy, c/o Ficksman & Conley. Although return of service has not been filed at this time on behalf of Dr. Lee, a Notice of Appearance was duly presented to the Honorable Judge Connolly at the hearing of Defendants' Emergency Motion to Stay Depositions that was held on Friday, August 21, 2008.

(4) At the same time that service of the Summons and Complaint was duly and timely made on Dr. Eran Bar-Meir in

Massachusetts on Thursday, August 28, Dr. Bar-Meir was also served with a Notice of Deposition to be conducted on Friday, September 26, 2008. Notice of the said deposition of Dr. Bar-Meir was also duly served on all counsel of record for all of the Defendants on August 28, 2008. Service on Dr. Bar-Meir was made in accordance with Rule 30(b)(2) based on information and belief that Dr. Bar-Meir would shortly be leaving the country. Please see Paragraph 5 below.

A true and correct copy of the Notice of Deposition for Dr. Bar-Meir is attached hereto as Exhibit A. A true and correct copy of Notice to All Counsel of Record re: the deposition of Dr. Bar-Meir, is attached hereto and designated as Exhibit B.

(5) On information and belief, Plaintiff represents to this court that it was the intention of Dr. Bar-Meir to conclude his plastic surgery fellowship at the Beth Israel Hospital on June 30, 2008, and then to travel with his family throughout the United States over the course of the next three months. At the conclusion of his personal travel through the United States it is Plaintiff's understanding, based on information and belief, that it is the intention of Dr. Bar-Meir that he and his family would promptly return to Israel where he would continue in the practice of medicine. In so doing, Dr. Bar-Meir would clearly be more than 100 miles from the place of Trial; would clearly be outside Suffolk County where the action is pending as well as the United States itself; and, would other wise be unavailable. (See Rule 30(b) of the Mass. Rules. Civ. P.).

(6) If Dr. Bar-Meir is allowed to leave the United States as the Plaintiff believes he intends to do so within days after September 26, 2008 without providing an audio/visual deposition, then the Plaintiff in this medical malpractice action will be at a serious and severe disadvantage which will cause unnecessary, and perhaps, fatal bias and prejudice to the Plaintiff's case. Certainly, the harm that Plaintiff would incur by not being allowed to take Dr. Bar-Meir's deposition and preserve it by audio/visual means far outweighs any viable or credible harm or prejudice that the Defendants could possibly claim they have incurred.

(7) Counsel of record for Dr. Bar-Meir has stated, orally and in writing, that he will not allow Dr. Bar-Meir's deposition to be taken on September 26, 2008 whether stenographically, by audio/visual means or otherwise. Please refer to letter of Atty. Alan Rindler dated September 8, 2008, attached hereto as Exhibit C.

(8) Dr. Bar-Meir was the surgical fellow who was called to the operating room following Dr. Borud (the attending surgeon) leaving (abandoning) the Plaintiff intraoperatively on June 27, 2008, and after Dr. Caterson (the third year resident) had also left the operating room in order to attend to outpatients in a clinic. Upon information and belief, and a review of the applicable medical records and other materials available in this case, it is Plaintiff's understanding that Dr. Bar-Meir then proceeded to complete Dr. Borud's abandoned surgery, taking approximately four hours to complete, and representing a surgical procedure with which he was not familiar or experienced.

(9) Plaintiff represents to this Court that upon information and belief, most or all of the named Defendants have already testified in one capacity or another before a board or panel of Beth Israel Deaconess Medical Center, and some may also have given testimony to various state agencies as part of the state's investigation of the surgery of June 27, 2008, and the subsequent proceedings thereafter.

(10) At the present time, it is only the Plaintiff who has not had the benefit of receiving any testimony under oath from any of the named Defendants, or others. Certainly, most critical of the Defendants would be the testimony of Dr. Bar-Meir due to his extensive participation in the surgery after Dr. Borud had left the Plaintiff, and the closeness of his leaving Massachusetts and the United States and not returning.

(11) Massachusetts Case Law is quite clear that the conduct and scope of discovery is within the sound discretion of the judge. See Solimene v. B. Grauel and Co., 507 NE 2d 662, 399 Mass 790 (1987). Further, the scope and timing of discovery is within the Court's discretion, but the Court has the authority to prevent discovery abuse by the issuance of a protective order. See Cronin v. Strayer, 467 NE 2d 143, 392 Mass. 525 (1984).

In fact, nowhere within the Massachusetts Rules of Civil Procedure, or Massachusetts General Law, is there a ruling or statute which prohibits or precludes the taking of a deposition of any party or otherwise prior to the convening of a Medical Malpractice Tribunal; or, that mandates that an expert letter be presented before the deposition of a Defendant can be taken.

To the contrary, the Massachusetts Appellate Court in Tibbitts vs. Wisniewski, 27 Mass. App. Ct. 729, 542 NE2d 320 (1989) referenced the fact that it was a "... mistaken impression that no response to discovery was required until a Medical Malpractice Tribunal has ruled ...." See Tibbitts, p. 730. The Court went on to argue that a reply, if not a full response, was clearly required. See Spadorcia vs. South Shore Oral Surgery Associates, 17 Mass.App.Ct. 362, 458, NE 2d 775 (1984).

The issue was revisited again in the 1994 case of Schell vs. Birnbaum, 1994 WL 878922. In a Medical Malpractice decision offered by Justice Gordon Doerfer, he made specific reference to the Schell case. "Under the mistaken impression that no response to discovery was required until a Medical Malpractice Tribunal had ruled, Plaintiff's counsel did not dignify the Defendant's request for discovery with a reply." (See Schell, p. 17 of the Decision). (Emphasis supplied).

In the 1998 decision of O'Leary v. Nepomuceno, 44 Mass.App.Ct. 683, 693 N.E. 2d 701, the Massachusetts appellate Court reviewed decisions of a Superior Court ruling on allowing discovery prior to the convening of the Medical Malpractice Tribunal. The trial court first denied the Plaintiff's request for relief from Defendants discovery requests and "ordered discovery to proceed according to the tracking schedule of the Superior Court even though no Medical Malpractice Tribunal had been convened." See O'Leary, at p. 685. The trial court then allowed the Defendant's motion for disclosure of the Plaintiffs' expert witnesses even though the

Malpractice Tribunal still had not yet been convened. See O'Leary, at p. 686.

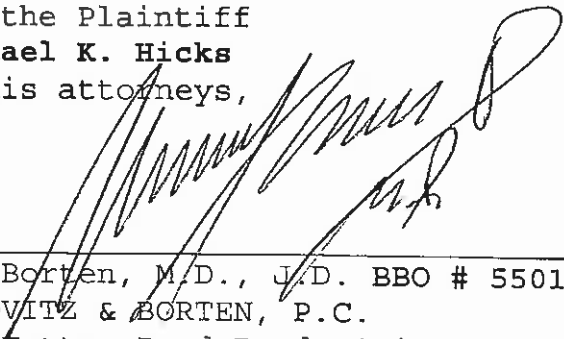
The Appellate Court affirmed the decisions of the trial court and stated: "In light of the inexplicable delay in convening the Medical Malpractice Tribunal and the possibility of the loss of evidence with the passage of time, the judges did not abuse their discretion in ordering the discovery ..." See O'Leary, at p. 686.

In this particular instance, there is no compelling or overriding reason for Plaintiff to be denied the opportunity to take the audio/visual deposition of Dr. Bar-Meir at the present time. By virtue of the doctor patient relationship and the fact - at the very least - that Dr. Bar-Meir is a fact witness with a unique perspective, equity, fairness and the interests of justice dictate that his audio/visual deposition be allowed. The fact that counsel for the Defendants (perhaps the Defendants themselves) might be inconvenienced by attending these depositions is the cost that a civilized, organized society must incur in order to promote the objectives of an established, recognized judicial system.

**WHEREFORE**, your Plaintiff respectfully states that equity, fairness and justice, and the provisions of the Massachusetts Rules of Civil Procedure (including Rule 30 and Rule 30A) permit and allow this honorable Court to order that the deposition of Defendant: Dr. Eran Bar-Meir, take place by audio/visual means on September 26, 2008 and that this Court enter such order.

Respectfully submitted this 10<sup>th</sup> day of September 2008, under  
the pains of perjury.

For the Plaintiff  
**Michael K. Hicks**  
By his attorneys,



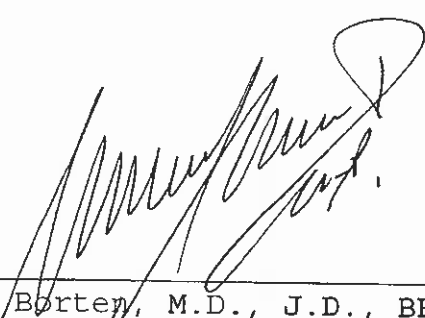
By: \_\_\_\_\_  
Max Borten, M.D., J.D. BBO # 550115  
GOROVITZ & BORTEN, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, MA 02451-2013  
Tel: (781) 890-9095  
Fax: (781) 890-9098



of the Plaintiff, MICHAEL K. HICKS, before a Notary Public of the Commonwealth, at the offices of Gorovitz & Borten, P.C., 395 Totten Pond Road, Suite 401, Waltham, Massachusetts 02451-2013 on Friday, September 26<sup>th</sup>, 2008 at 10:00 a.m. o'clock, and testify as to your knowledge at the taking of the deposition in the above-entitled action.

On the date of your deposition, please bring with you the materials specified in Schedule 'A' attached to this Deposition Subpoena Duces Tecum (Please see attached Schedule 'A').

Hereof fail not as you will answer your default under the pains and penalties in the law in that behalf made and provided.

  
\_\_\_\_\_  
Max Borten, M.D., J.D., BBO # 550115  
Gorovitz & Borten, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, MA 02451-2013  
(781) 890-9095

August 28, 2008

  
\_\_\_\_\_  
Notary Public

My Commission Expires:  
11/28/08

PLEASE CONTACT MAX BORTEN, M.D., J.D. at (781) 890-9095 UPON RECEIPT OF THIS SUBPOENA.

EKA<sup>2</sup>/11

## Schedule A

### DEFINITIONS

- A. The term "documents", as used herein, means and includes originals in each instance (or copies thereof if originals are unavailable) of all writings, records, written, printed, typed or graphic matter, and all tangible things of every type, kind and description, however produced, copied or reproduced, whether draft or final, original or reproduction, signed or unsigned, regardless of whether approved, sent, received, redrafted, erased or otherwise defaced or mutilated, from whomever and wherever obtained, including, without limited the generality of the foregoing, all of the following: abstracts, accountants' work papers, accruals, acknowledgments, admission notes and summaries, affidavits, agreements, analyses, annual reports, appointment books, appointment records, appraisals, articles of incorporation and amendments thereto, audio recordings, whether transcribed or not, audit programs, audit instructions and other audit materials, audit reports, balance sheets, bids, billings, bills, bills of lading, binders, blanks, books, books of account, brochures, budgets, by-laws, cablegrams, calendars, cash flow projections, certificates, certificates of deposit, charts, checks and checking account records, circular, commitment letters, communications, compilations, computer cards, computer printouts, computer programs, computer readouts, computer tapes, confessions, confirmations and responses to confirmations, consultants requests and

EXA<sup>3/11</sup>

reports, contacts, correspondence, CT scans and related reports, court pleadings, covenants, credit analysis reports, data compilations from which information can be obtained or translated through detection devices, data processing cards, disks, and tapes or readable computer-generated interpretations thereof, date records, delivery records, desk calendars, diaries, discharge notes and summaries, drafts, draw or funding requests, drawings, entries, estimates, expense reports, fax receipts and transmissions, field notes, files, filing of record, films, financial analyses, financial statements, forms and form documents, graphs, handbooks, income statements, indices, instruments, intraoffice and interoffice communications, inventory tags and records, invoices, itemizations, joint venture agreements, journals, laboratory notes and reports, leases, ledgers, letters, licenses, liens, logs, mail receipts (registered or certified), mammograms and related reports, management reports, manuals, maps, market studies, medical records of any kind or description, meeting reports, memoranda, memoranda of all conversations including telephone calls, mortgages, minutes, MRI studies and related reports, newspaper, magazine or trade journal articles or advertisements, notations, notes, nursing notes, offers, operating statements, operating room statements and notes, opinions, order forms, orders pamphlets, payroll records, permits, personal statements or interviews or summaries thereof, personnel files, photocopies, photographs, physicians notes, pictures, plans, plats, press releases, pro formas, progress notes, projections, proposals, prospectuses, publications, purchase orders.

EXA 4/11

receipts, recordings, records, records of account, referral notes and memorandum, regulations, releases, rent rolls, reports, requisitions, research, resolutions, reversals, security instruments, sketches, specifications, statements, statistical data or records, stenographic or handwritten notes or transcripts of such notes, stock certificates or records, studies, submissions, summaries, surveys, system analysis, tabulations, tag control documents, tapes or tape records, tax returns and records, telecopies, telegrams, telephone records and invoices, telexes, texts, time records, title reports, policies and commitments, training manuals, transcripts, travel records, receipts and voucher, treasury bills, valuations, video recordings, warehouse receipts, wire records or transfer, writing or work papers, X rays and related reports, as well as any other matter or media similar to any of the foregoing, however classified or denoted, along with all non-identical (or, by reason of subsequent annotation, no longer identical) copies, drafts or versions thereof and all copies thereof containing any commentary, notations or markings whatsoever.

- B. The term "all documents" means every document as above defined known to you, and every such document which can be located by you or discovered by your reasonably diligent efforts.
- C. The term "relating" or "related to" shall include, but not be limited to: referring to, relating to, concerning, embodying, connected with, commenced on,

EKA<sup>5/11</sup>

responding to, showing, describing, analyzing, reflecting, constituting, illustrating, depicting, summarizing, mentioning, recording, evidencing, supporting, contradicting and rebutting, either directly or by inference.

- D. The term "possession, custody or control" includes the joint or several possession, custody or control not only by the Defendant, but also the joint or several possession, custody or control by each or any officer, director, managing agent, or other person acting or purporting to act on behalf of Defendant.
- E. The term "person" means any natural person, corporation, partnership, proprietorship, association, organization or group of natural persons.
- F. The term "communications", means and includes all discussions, conversations, meetings, conferences, contracts, telephone conversations, inquiries, interviews, negotiations, advertisements, agreements, understandings, cards, letters, correspondence, telegrams, telexes, cables or other forms of written or verbal intercourse, however transmitted, including reports, notes, memoranda, lists, agenda and other records of communications.
- G. The term "Plaintiff" means Michael K. Hicks.
- H. The term "Patient" means Michael K. Hicks.
- I. The term "you" or "your", and Defendant, means and includes Eran Bar-Meir, M.D., together with your

Ex A 6/11

representatives, contractors, subcontractors, employees, agents, consultants and all others operating under your direction, supervision or control.

- I. Identify or requests for Identity when used in reference to a document, means to state the type of document (e.g., letter, memorandum, contract, communication, telegram, policy manual, etc.) or some other means of identifying it; its date, author or authors, addressee or addresses, if any; and its present location or custodian. If any such document is no longer in your possession or subject to your control, identify and identity also means to state what disposition was made of it and the date of disposition.
- J. Relate to or Relating to mean a request for every document which reflects, defines, discusses, describes, sets forth, contains, underlies, comments upon, forms the basis for, analyses, refers to, or mentions in any way the subject matter of the paragraph containing the term.
- K. You or Your refers to Eran Bar-Meir, M.D., as well as to any of his corporate affiliates, divisions, subgroups, subsidiaries, parent corporations, predecessors-in-interest, successors, assignees, agents, legal representatives, trustees, consultants, and all representatives and other persons acting on his behalf, and its present and former officers, directors, servants and employees.

EXA 7/11

These document requests are deemed to be continuing as to require the filing of supplemental responses in the event that the Deponent or its representatives (including counsel) locate additional documents not identified in its response or otherwise produced at the time of the deposition.

If any privilege is claimed with respect to the production of any document to be produced, then identify with respect to each such document:

- (a) the documents author;
- (b) the documents addressee;
- (c) the person(s) to whom copies of the document were furnished;
- (d) the documents date; and
- (e) the documents subject matter.

If any of the document requests presented below should be objected to by Eran Bar-Meir, M.D., then counsel for Eran Bar-Meir, M.D., shall:

(a) identify that portion of the request claimed to be objectionable and set forth the nature and basis of the objection in sufficient fashion to permit the Court to rule on the validity of the objection;

(b) identify any document withheld from production pursuant to an objection with sufficient particularity and in sufficient detail to permit the Court to determine whether the document falls within the scope of the objection; and

(c) produce all documents responsive to that portion of any request that is not claimed to be objectionable.

Ex A8/11

If any documents or file requested to be identified was, but no longer is, in your possession, custody or control, or was known to you but is no longer in existence, then with respect to each and every such document or file:

- i. State the nature of the document or file;
- ii. State the date of the document or file;
- iii. Identify the persons who sent and received the original and any copies of the document or file;
- iv. State in as much detail as possible the contents of the document or file; and
- v. State the manner, reason for and date of disposition of the document or file.

Please produce the following Documents:

Request No. 1: All medical records, examination notes, surgical notes, order sheets, patient histories, admission and discharge summaries, referral reports, consultations, hospital notes, transportation records and any other records or documents of any type or description, without limitation, pertaining to the care and treatment you provided to Michael K. Hicks.

Request No. 2: Copies of all statements, written or otherwise, of any type or description, without limitation, prepared by you on your behalf which concern the complained of incident of the care and treatment provided to Michael K. Hicks by you pertaining to the care and treatment you provided to Michael K. Hicks that is(are) in your possession.

EXA 9/11

Request No. 3: Copies of all statements, written or otherwise, of any type or description, without limitation, prepared by you on your behalf which concern the complained of incident of the care and treatment provided to Michael K. Hicks by you pertaining to the care and treatment Loren J. Borud, M.D. provided to Michael K. Hicks that is(are) in your possession.

Request No. 4: Copies of all statements, written or otherwise, of any type or description, without limitation, prepared by you on your behalf which concern the complained of incident of the care and treatment provided to Michael K. Hicks by you pertaining to the care and treatment Edward Caterson, M.D. provided to Michael K. Hicks that is(are) in your possession.

Request No. 5: Copies of all statements, written or otherwise, of any type or description, without limitation, prepared by you on your behalf which concern the complained of incident of the care and treatment provided to Michael K. Hicks by you pertaining to the care and treatment Donald W. Moorman, M.D. provided to Michael K. Hicks that is(are) in your possession..

Request No. 6: Copies of all statements, written or otherwise, of any type or description, without limitation, prepared by you on your behalf which concern the complained of incident of the care and treatment provided to Michael K. Hicks by you pertaining to the care and treatment Lori M. Amerault, R.N. provided to Michael K. Hicks that is(are) in your possession.

EXA10/11

CERTIFICATE OF SERVICE

I, Max Borten, M.D., J.D., hereby certify that on August 28, 2008, a true and correct copy of the following documents: "Deposition Subpoena of Dr. Eran Bar-Meir and Notice of Deposition to All Counsel", has been served upon the following persons via first class mail, postage prepaid.

George E. Wakeman, Jr., Esq.  
Adler, Cohen, Harvey, Wakeman et al  
75 Federal Street - 10<sup>th</sup> Floor  
Boston, MA 02110

John P. Ryan, Esquire  
Sloane & Walsh  
Three Center Plaza  
Boston, MA 02108

Vincent P. Dunn, Esquire  
Melick, Porter & Shea  
28 State Street  
Boston, MA 02109

Susan D. Murphy, Esq.  
c/o Murphy & Riley  
141 Tremont Street,  
Boston, MA 02110

John Cassidy, Esq.  
c/o Ficksman & Conley  
98 N. Washington St.  
Boston, MA 02114



Max Borten M.D., J.D. BBO# 550115  
Sorovitz & Borten, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, MA 02451  
Tel: 781-890-9095  
Fax: 781-890-9098

EXA 11/11

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 08-3314A

---

MICHAEL K. HICKS

Plaintiff

v.

LOREN J. BORUD, M.D.;  
EDWARD CATERSON, M.D.;  
ERAN BAR-MEIR, M.D.;  
DONALD W. MOORMAN, M.D.;  
SHIRIE C. GALE, M.D.;  
BERNARD T. LEE, M.D.;  
LORI M. AMERAULT, R.N.;  
MARIA SEMNACK, R.N.; and  
BETH ISRAEL DEACONESS MEDICAL CENTER

Defendants

---

NOTICE OF DEPOSITION

To: ALL COUNSEL OF RECORD

George E. Wakeman, Jr., Esq.  
Adler, Cohen, Harvey, Wakeman et al  
75 Federal Street - 10<sup>th</sup> Floor  
Boston, MA 02110

Ex B 1/3

John P. Ryan, Esquire  
Sloane & Walsh  
Three Center Plaza  
Boston, MA 02108

Vincent P. Dunn, Esquire  
Melick, Porter & Shea  
28 State Street  
Boston, MA 02109

Susan D. Murphy, Esq.  
Murphy & Riley  
141 Tremont Street,  
Boston, MA 02110

John Cassidy, Esq.  
c/o Ficksman & Conley  
98 N. Washington St.  
Boston, MA 02114

PLEASE TAKE NOTICE THAT the Plaintiff, MICHAEL K. HICKS will take the deposition of: Dr. Eran Bar-Meir on Friday, September 26<sup>th</sup>, 2008, at 10:00 a.m., at the office of:

Max Borten, M.D., J.D.  
Gorovitz & Borten, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, Massachusetts 02451-2013

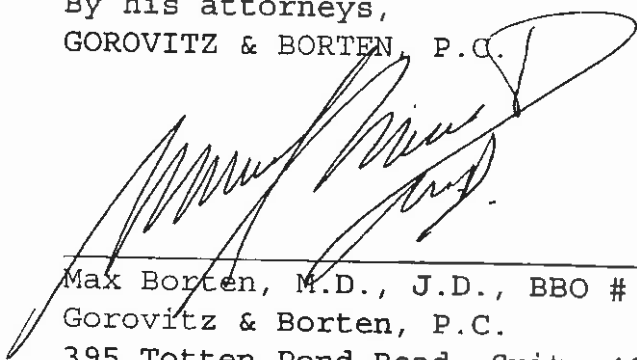
pursuant to Rules 30, Rule 30(a), Rule 30(b)(1), Rule 30(b)(2), Rule 30(b)(5) and Rule 34 of the Massachusetts Rules of Civil Procedure.

Said deposition will be taken before an officer authorized by the laws of the Commonwealth of Massachusetts to administer oaths and will continue from day to day until completed.

Ex B<sup>2</sup>/3

You are invited to attend and to cross-examine.

Michael K. Hicks  
By his attorneys,  
GOROVITZ & BORTEN, P.C.



---

Max Borten, M.D., J.D., BBO # 550115  
Gorovitz & Borten, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, MA 02451-2013  
(781) 890-9095

DATED: August 28<sup>th</sup>, 2008

EB 3/3

Alan B. Rindler  
 Douglas A. Morgan\* (RI)  
 Paul R. Greenberg  
 Joan F. Renehan  
 Julie A. Marinilli  
 Gerald M. Coakley  
 Kerri M. Morcy\* (RI)  
 Jean E. Corcoran  
 Shana M. Solomon  
 Angela N. Roy  
 \*Also Admitted

**RINDLER • MORGAN**  
 A PROFESSIONAL CORPORATION

133 Portland Street, Suite 500  
 Boston, Massachusetts 02114-1728  
 Phone: (617) 975-0680  
 Fax: (617) 973-0665  
 Fax: (617) 973-0526

Julie A. Marinilli  
 jmarinilli@rindlermorgan.com

September 8, 2008

**VIA FACSIMILE & FIRST CLASS MAIL**

Max Bortcn, Esq.  
 Gorovitz & Borten  
 395 Totten Pond Road  
 Suite 401  
 Waltham, MA 02451

Re: Michael K. Hicks v. Loren J. Borud, M.D., et al  
 Civil Action No. 08-3314A  
 Our File No. 08185

Dear Attorney Borten:

Please allow this letter to confirm our conversation today in which I informed you that we would not agree to your request for Dr. Bar-Meir's deposition, currently noticed for September 26, 2008, to be taken by audio-visual means. Furthermore, please be advised that we will be seeking a protective order given that Dr. Bar-Meir's deposition is being sought at this early stage of discovery without the proffering of plaintiff's expert letter(s) and before a medical malpractice tribunal will be convened.

I plan to serve a Motion for a Protective Order on you by close of business tomorrow, Tuesday, September 9, 2008. Given the abbreviated timetable we are contending with, I would appreciate your providing me with any opposition by or before close of business this Friday, September 12, 2008. If I do not receive an opposition or otherwise hear from you by that time, I will file my Motion emergently on Monday, September 15, 2008, so that the Court will have sufficient time to provide a ruling before this deposition is scheduled to go forward.

EXC 1/2

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,



Alan B. Rindler  
Julie A. Marinilli

JAM/jac

cc: John P. Ryan, Esq.  
Vincent P. Dunn, Esq.  
Susan D. Murphy, Esq.  
Paul McTague, Esq.  
George E. Wakeman, Esq.  
John Cassidy, Esq.

EXC<sup>2/2</sup>

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION NO.: 2008-3314A

MICHAEL K. HICKS,  
Plaintiff,

v.

LOREN J. BORUD, M.D., EDWARD  
CATERSON, M.D., ERAN BAR-MEIR,  
M.D., DONALD W. MOORMAN, M.D.,  
SHIRIE C. GALE, M.D., BERNARD T. LEE,  
M.D., LORI M. AMERAULT, R.N., MARIA  
SEMNACK, R.N. AND BETH ISRAEL  
DEACONESS MEDICAL CENTER,  
Defendants.

RECEIVED  
FEB 13 11 3:46

**DEFENDANTS' EMERGENCY MOTION FOR PROTECTIVE ORDER  
TO STAY DEPOSITIONS**

NOW come the defendants in the above-captioned matter, Loren J. Borud, M.D., Edward Caterson, M.D., Donald W. Moorman, M.D., Shirie C. Gale, M.D., Bernard T. Lee, M.D., Lori M. Amerault, R.N., Maria Semnack, R.N., and Beth Israel Deaconess Medical Center (hereinafter "defendants") and pursuant to Mass. R. Civ. P. 26(c), 26(d) and 30(a) request that this Honorable Court issue a Protective Order staying the thirteen (13) depositions noticed by counsel for the plaintiff and directing the parties to cooperate in the scheduling of these depositions within the next 120 days. As grounds for their motion, the defendants state the following:

**BACKGROUND**

This matter arises out of allegations of medical malpractice related to a surgical cosmetic procedure that the plaintiff underwent on or about June 27, 2008. The plaintiff alleges that the

defendants were negligent with respect to the treatment and care that was provided. The plaintiff filed suit on or about July 25, 2008, alleging that he has suffered physically and emotionally as a result of the defendants' negligence.

On or about August 5, 2008, slightly more than one week after filing suit, the plaintiff, through counsel, served deposition notices for six non-party witnesses. (Copies of the Notices are attached hereto as Exhibit A). It appears that counsel served the witnesses with subpoenas. The depositions are noticed to take place on August 20, 21, and 22, 2008, less than a month after suit was filed. Subsequently, on or about August 12, 2008, the plaintiff, through counsel, served deposition notices for seven additional non-party witnesses. (Copies of the Notices are attached hereto as Exhibit B). These depositions are noticed to take place on August 25 and 27, 2008.

Following receipt of the notices and consultation with counsel for the other defendants, counsel for Dr. Borud contacted the plaintiff's counsel and requested that the depositions be postponed until after the convening of a Medical Malpractice Tribunal. This would help to accommodate defense counsels' conflicting schedules and to provide time for all of the defendants and the witnesses to obtain and confer with counsel should they so desire. Plaintiff's counsel declined to agree to postpone the depositions until after the Medical Malpractice Tribunal. Plaintiff's counsel did indicate that he would postpone the currently noticed dates if he were provided with firm alternative dates for the taking of these depositions. While defense counsel certainly appreciate this offer, the sheer number of defendants, nine (9) and deponents, thirteen (13), create a logistical rescheduling challenge that simply cannot be met prior to the currently scheduled depositions which are to begin on August 20, 2008.

From a procedural standpoint, this case is in its infancy. To date, the plaintiff has not filed returns of service for any of the defendants and most of the defendants have not yet

answered the complaint. The plaintiff did not seek leave of court to conduct the depositions. The discovery deadline assigned by the Court does not expire until July, 2010.

### ARGUMENT

Pursuant to Mass. R. Civ. P. 30(a), a plaintiff seeking to take a deposition prior to the expiration of 30 days after making service must obtain leave of court. Further, pursuant to Mass. R. Civ. P. 26(c), a Court can issue any orders that are necessary relative to discovery in order to protect a party from oppression, embarrassment, annoyance, or undue burden or expense; and pursuant to Mass. R. Civ. P. 26(d), upon motion, “for the convenience of parties and witnesses and in the interests of justice” a Court may issue orders with respect to the timing and/or sequence of discovery.

In the present matter, the plaintiff is seeking to take depositions prior to the expiration of thirty days after making service of the complaint and summons. Therefore, he is required to obtain permission from this Court, a step he failed to take before noticing the depositions. *See* Mass. R. Civ. P. 30(a). The defendants requested that the plaintiff voluntarily postpone the depositions so the parties and witnesses could work together to schedule them at a mutually convenient time. Due to plaintiff counsel’s insistence that he will not reschedule the depositions until he has received firm alternative dates, the defendants were compelled to seek involvement from this Court.

The defendants do not wish to stall or unduly delay the commencement of discovery in this case. However, given the fact that the matter was filed less than one month ago and that the case relates to a procedure that was performed less than two months ago, the defendants do not believe that the plaintiff has an immediate and dire need to complete the depositions on the dates noticed. Therefore, the defendants would object to the plaintiff seeking leave of court to conduct

the depositions pursuant to Rule 30(a). Further, many of the counsel for the defendants are not available on the dates noticed due to pre-existing vacation plans, trial schedules and other ineluctable obligations. In addition, it is unclear whether the subpoenaed witnesses have had an opportunity to obtain and consult with counsel, should they elect to do so. For these reasons and in light of the fact that the discovery deadline does not expire for two years and the fact that it does not appear that the plaintiff is alleging life-threatening injuries necessitating immediate discovery, the defendants believe that a brief stay is both reasonable and necessary.

The defendants believe that all counsel can work together to ensure that the depositions noticed by the plaintiff proceed in a timely fashion and without undue delay. To this end, the defendants request that the Court assist the parties in resolving any dispute related to the depositions by ordering that all counsel work together to schedule and hold the depositions within the next 120 days. Given the nature and timing of the plaintiff's allegations and the tracking order applicable to this case, the plaintiff will not be prejudiced in any conceivable manner by such an order. Further, given that discovery is often stayed pending review by the Medical Malpractice Tribunal convened pursuant to G.L. c. 231, §60B, a process that is taking increasingly long to complete, such an order will actually benefit the plaintiff by allowing substantial discovery to occur prior to the convening of a Medical Malpractice Tribunal. The defendants also ask that in order to comply with at least the spirit of G.L. c. 231, §60B, the plaintiff be ordered to provide an expert letter or letters outlining the allegations against the defendants before proceeding with depositions.

#### CONCLUSION

WHEREFORE, for the foregoing reasons, the defendants in the above-captioned matter respectfully request that this Honorable Court issue a Protective Order staying the depositions

presently noticed by plaintiff's counsel and issue an Order requiring that counsel work together to schedule the depositions within the next 120 days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan Donnelly Murphy, hereby certify that on August 18, 2008 in accordance with Superior Court Rule 9A(e), I served the within documents(s)

1. Defendants' Emergency Motion For Protective Order To Stay Depositions;

on counsel for Plaintiff, Max Borten, Esquire  
Gorovitz & Borten, P.C.  
395 Totten Pond Road, Suite 401  
Waltham, MA 02451-2013

by facsimile and by overnight mail;

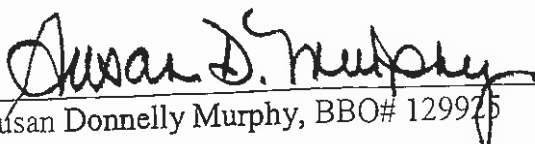
and upon all other counsel of record, by faxing a copy of same to the following parties of interest:

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Max Borten, M.D., J.D.  
Sidney Gorovitz, Esquire

HAND DELIVERY

9.12.08  
24

September 10, 2008

Clerk for Civil Business (Courtroom 304-A Session)  
C/o Suffolk Superior Court  
Three Pemberton Square  
Boston, MA 02108

MICHAEL J. SESTINI  
CLERK/CIVIL REGISTRAR  
2008 SEP 10 AM 9:27

Re: Michael K. Hicks v. Loren J. Borud, M.D et al  
Suffolk Superior Court Civil Action No.: 08-3314A

Dear Sir/Madam:

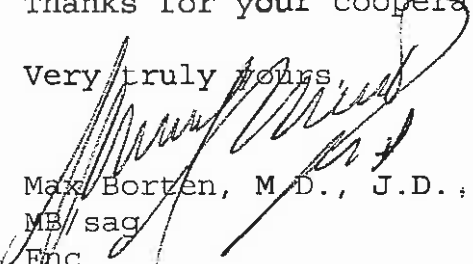
In accordance with our prior telephone conversation on Monday afternoon, enclosed please find the following:

- (a) "Plaintiff's Emergency Motion Pursuant to Mass.R.Civ.P. 30 and 30A, For Leave Of Court To Take The Audio-Visual Deposition Of Defendant, Eran Bar-Meir, M.D. On September 26, 2008 And To Compel His Appearance."

Please schedule this Emergency Motion for hearing on Friday, September 12, 2008, at 2pm. Service of notice of the scheduling of the Emergency Motion shall be made by fax transmission, first class mail and telephone contact.

Thanks for your cooperation.

Very truly yours,

  
Max Borten, M.D., J.D.,  
MB/sag  
Enc

cc: All Counsel As Per Certificate Of Service

**CERTIFICATE OF SERVICE**

I, Max Borten, M.D., J.D., hereby certify that on September 10, 2008, a true and correct copy of the foregoing has been served upon the following persons via facsimile and first class mail, postage prepaid.

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c/o Adler, Cohen, Harvey, et al  
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Boston, MA 02110

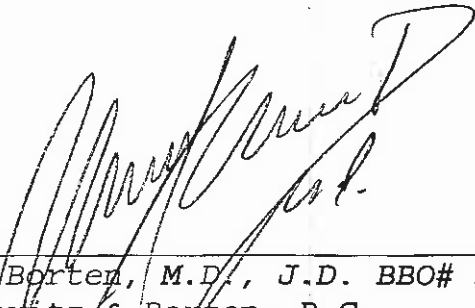
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