The State of Ohio, )
County of Cuyahoga. ) SS:

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IN THE COURT OF COMMON PLEAS

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MARCELLA S. STAHM, ETC., )
)
Plaintiff, )
)
-v- ) Case Number 288952
) Judge John L. Angelotta
MT. SINAI MEDICAL CENTER, )
ET AL., )
)
Defendants. )

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DEPOSITION OF HENRY EISENBERG, M.D.
Wednesday, April 3, 1996

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Deposition of HENRY EISENBERG, M.D., one of the Defendants, called by the Plaintiff for examination under the Ohio Rules of Civil Procedure, taken before me, the undersigned, Kathleen Grandillo, Registered Professional Reporter, a Notary Public in and for the State of Ohio, pursuant to agreement of counsel, at the offices of Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., 1001 Lakeside Avenue - Suite 1600, Cleveland, Ohio 44114, commencing at 10:10 a.m., the day and date above set forth.

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APPEARANCES:

On Behalf of the Plaintiff:

Daniel M. Finelli, Esquire
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On Behalf of the Defendants Dr. Bloom and Dr. Eisenberg:

Stephen S. Crandall, Esquire
Jacobson, Maynard, Tuschman & Kalur
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On Behalf of the Defendants William K. Sterin, M.D. and W.S. Wise, M.D.:

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HENRY EISENBERG, M.D.

one of the Defendants, called by the Plaintiff for examination under the Ohio Rules of Civil Procedure, after having been first duly sworn, as hereinafter certified, was examined and testified as follows:

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EXAMINATION

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BY MR. FINELLI:

Q Doctor, my name is Dan Finelli, and I represent the Plaintiffs on behalf of this action which names you as a Defendant. I'll be taking your deposition today. And most importantly you need to be aware that all your responses need to be verbal responses so the court reporter here can take down those responses. If you do not understand a question or you haven't heard it, please stop me and I will repeat it. Otherwise, if you answer it, I will assume and the record will reflect that you understood the question and answered it to the best of your knowledge; fair enough?

A Yes.

Q For the record, can you state and spell your name?

A My name is Henry Eisenberg. It's spelled E-i-s-e-n-b-e-r-g.

Q And do you recall Lawrence Stahm as a patient of yours?

A Yes, I do.
Q When did you first meet Mr. Stahm?
A He was referred to me in 1982.
Q Who referred him to you?
A His physician at that time was Dr. Lee Berman.
Q And do you have a copy of your office records with you today?
A Yes, I do.
Q And when you first saw him, what date was that again?
A His first visit to see me was April 23rd, 1982.
Q And at that time what complaints was Mr. Stahm having?
A He had complaints of difficulty moving his bowels of about two weeks duration, and that was basically the complaint.
Q And did you examine him?
A Yes, I did.
Q And what was the results of your examination?
A Well, I took his medical history. And on my rectal examination and sigmoidoscopy, there was a tender mass in the anterior rectal wall located just above the dentate line. I thought it was submucosal. And I thought it was some type of tumor or infection.
Q Now, looking at the record, your record from April 23rd, do you note that he had tenesmus? Do you see that on

your April 23rd record?
A Yes, I did make a note of that.
Q What is that, Doctor?
A Tenesmus is the sensation that you have to have a bowel movement and nothing happens, usually called a false urge to have a bowel movement.
Q And you also mentioned or notated that the tender mass you palpated was located just above the dentate line?
A That's correct.
Q What is the dentate line?
A The dentate line is the junction between the tiny muscles of the skin and the anus and the columnar mucosal cells of the colonic lining.
Q So approximately how many centimeters would that be from the anal opening?
A It was in the anal canal. It's very low in the rectum.
Q Does that have any significance as to whether a mass is located distal or proximal to that line?
A I don't know what your -- what your question is.
Q I'm just inquiring as to why you mentioned the dentate line, if that has any significance as far as the location of a mass,
A Just that I was describing for my chart and for the record where it was located.

Q Okay.

And by palpation you were able to tell that this was submucosal?

A Both by palpation, but also on the endoscopic exam, it was submucosal as opposed to being a polyp. It wasn't protruding into the lumen.

Q At that point in time, what was your differential diagnosis?

A Well, what I wrote down as carcinoid is one possibility. That's a submucosal type of tumor. And it could also have been an infection, such as an abscess, which is the more common thing.

And then I had some additional history that he had had an episode of bleeding two or three months before these other symptoms. And my suspicion was that possibly he had had a fissure which had since healed and that that may have been -- resulted in his having an abscess at this time.

Q Okay.

Carcinoid you mentioned is a tumor?

A Yes.

Q Is that a cancerous tumor?

A Carcinoids are usually benign, but they do have malignant potential,

Q Are there any tests you can do to rule that out or rule that in as to the etiology of the mass preoperatively?

A Not as to a histologic diagnosis. When we admitted him there were several tests that were done.

Q Those were ordered by you?

A Yes.

Q Do you recall what tests they were?

A I can look,

He had his routine laboratory testing. Let me see.

As I remember, he had a chest x-ray that was normal, and we had a liver spleen scan, which is primarily screening for metastases. And I did a colonoscopy, looking to see if there were other tumors or other growths.. We had had to check his clotting studies because he had had his spleen removed in the past,

Q You mentioned a liver spleen scan which was done which was normal?

A Yes.

Q Correct?

A That's correct.

Q And this was done to check for metastases?

A That's correct.

Q Was that ordered because you were considering that this might be a carcinoma-type mass?

A Well, I didn't know what it was. You asked what I thought was the differential. Carcinoid was one of the possibilities. It was basically to screen and have a base

line if there was a metastasis.
Q So that had to be a consideration, then?
MR. CRANDALL: What did?
Q Metastases?
A Yes.
Q For you to order a liver spleen scan; correct?
A That's correct.
Q *Any* urine epinephrines done to rule out carcinoid?
A No. We don't do that because, in the rectum, carcinoids that occur in the rectum usually don't have any indocin activity as those that occur in the small bowel sometimes do.
Q Okay, All right.
So at this point in time, what do you recommend to Mr. Stahm?
A When I saw him in the office?
Q In the office, yes.
A Well, we talked, I told him that there was a mass, and that in all likelihood it would have to be removed, both because it was causing the symptoms that he had, but also to determine what type of a -- what the mass was, whether it was an abscess that had to be drained or it was a growth, and that he would need to have these tests done, that the surgery would be done in the hospital, that he would have an anesthetic.

I think those were the considerations.
Q And then did he agree with that plan?
A Yes, he did.
Q Okay.
And then he is admitted to Mt. Sinai Hospital on April 25th, 1982; correct?
A That's correct.
Q And on April 26th, 1982 you do surgery on Mr. Stahm?
A That's correct,
Q Okay. Doctor, I would like to show you an operative sheet which has your name on it at the bottom. I have highlighted it with yellow marker.
Other than the highlight, can you tell me if that reflects your operative record of April 26th, 1982?
A This is a copy of my -- copy of the operative note, yes.
Q Okay.

MR. FINELLI: Do you want to mark that as Plaintiff's Exhibit A.

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(Plaintiff's Exhibit A was marked for identification.)

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Q Now, Doctor, looking at that operative report, the preoperative diagnosis, you have a couple of rule outs. First you mentioned rectal tumor mass, and then you

say rule out squamous cell carcinoma; correct?

A That was my preoperative diagnosis, that it was a mass, and I thought that the likely possibilities in my experience were to rule out that it might be a squamous cell carcinoma or a carcinoid.

Q Or you also mentioned leiomyosarcoma?

A Yes.

Q Those are the three you mentioned preoperatively?

A That's correct.

Q Had you had experience with all three of those tumors?

A Well --

Q Prior to this?

A The first, squamous cell, is the most common of the three. With carcinoid tumors I've had a fair experience. Leiomyosarcoma, I've not -- I've had only very *limited experience.

Q Okay.

Had you had previous cases that involved leiomyosarcoma?

A I've been in private practice of colorectal surgery since 1974, so it's more than 20 years. Mr. Stahm is the only patient that I've had with this diagnosis.. In my residency training I can remember only one other case. So I've basically had limited experience. They're rare

tumors, as you probably know.

Q Can you explain to me, then, the procedure you performed on Mr. Stahm on April 26th?

A I excised the mass. I think the operative report is pretty clear. You don't want me to read the entire report, do you?

Q First you did a colonoscopy?

A The colonoscopy was to help screen to see if there were other -- since I was thinking of carcinoid, some of the patients that I've treated that have carcinoids, they have been multiple, so that was part of the reason for doing this.

But also to be sure, since he had had the bleeding, that there wasn't something else that was causing bleeding. So that was done first.

And then we did the spinal anesthetic, and we excised the lesion,

Q Okay.

Dr. Bove was your assistant surgeon?

A Yeah. He pronounces his name Bove.

Q You mention in the operative report that this was clearly a submucosal lesion --

A Let me see.

Q -- located in the anterior rectal wall.

I think it's the last paragraph, second sentence. Or

third sentence.
A That's correct.
Q Where it states, "This is clearly a submucosal 1esion"?
A That's correct.
Q You mention that upon your clinical findings of examination and excision of the mass?
A Yes.
Q That's how you based that. Okay.
So the lesion was limited to the bowel wall; correct?
A Uh-huh.
Q It did not extend outside of the bowel wall?
A No.
Q And did it extend to the subserosa1 layers?
A There's no serosa at this point in the rectum.
Q Okay.
How many layers are there in the rectum?
A Well, the serosa is the peritoneal reflection, so this is well below that. There's no serosa. Normally there would be four layers. But in the anal canal there's no serosa. So you have mucosa, submucosa and muscularis. But there's no serosa at this point.
Q And you previously mentioned the tumor was submucosal, the tumor did not extend to the muscularis?
A No, I don't believe so.

Q Then you excised the tumor completely; correct?
A Yes.
Q And you had a frozen section done?
A Yes.
Q How is that performed?
Do you excise parts of the tumor and give it to someone who takes it to pathology while you're standing by in the operating room?
A No, it wasn't done -- we didn't want to cut into it, so we gave the pathologist the entire piece, the entire growth. And I described it as being well defined, that the mass appeared to be well defined. And, as I remember it, it was encapsulated, so that it's probably -- I'm not supposed to be making gestures -- but it was, as the measurements said, approximately 3 by 3 and a half by 4 centimeters. This mass was given to the pathologist and then they did the sectioning, so that we wouldn't be cutting into it in the event that it was malignant, to contaminate the wound. or possibly spread tumor cells.
MR. FINELLI: Off the record.
(Off the record discussion.)
(Recess taken.)
MR. FINELLI: Back on the record.
BY MR. FINELLI:
Q Doctor, we were talking about how you passed the

tumor along for a frozen section, and you said you give the tumor or the mass to someone in total, you don't slice it yourself; correct?

A That's correct.

Q And at that time you said it was very well defined; correct?

A Yes, it was.

Q And did you feel at that time you had excised the whole tumor, the whole mass?

A Yes, I did.

Q And is a frozen section examination done immediately when you give that mass to someone?

A Yes, it is.

Q Okay.

So were you apprised of the findings on frozen examination while you were still in the operative room?

A Yes, I was.

Q And what did the frozen section show?

A Well, their initial report was that it might be a sarcoma, but they weren't entirely sure. And, basically, they wanted to wait for the frozen sections. I didn't think there was anything more that 1 could remove or that I would proceed with any more radical surgery at that time, so we closed the incision.

Q Okay.

If I draw your attention to your office note of April 26th, '82 where you mention you had a colonoscopy performed, and that was normal to descending colon; is that correct?

A That's correct.

Q And then a little further down you have FS, arrow, sarcoma; does that stand for frozen section?

A Yes, it does.

Arrow sarcoma, that's correct.

Q Okay.

You're thinking at the time of the frozen section was sarcoma?

A Well, they weren't certain. That was raised as a possibility, and we wouldn't base a surgical judgment or a diagnosis on the basis of a frozen section.

Q While in the operating room, if you were told that the frozen section was sarcoma, would you have changed your surgical procedure any way?

A No.

Q You would have done exactly what you did, sutured him, repaired him and ended the surgery the same way?

A That's correct.

Q Do you know who read the frozen section?

A I don't remember. I believe it was Dr. Wise, but I'm not absolutely certain.

Q Doctor, I would like to show you a report. It looks like a pathology report dated April 26th, 1982, the Mt. Sinai Medical Center.

Do you have a copy of this?

A Yes, I do.

Q Under gross description --

MR. FINELLI: Do you have this, Steve?

MR. CRANDALL: Yes, I do. Thanks.

Q -- where it says frozen section, do you see where I am referring to, Doctor?

A Yes, I do.

Q Okay.

And then it has cellular lesion; correct?

A That's correct.

Q Under that is a name, S. Myrick. Who would that be, Dr. Myrick?

A I don't know. It's possible that he was a resident who was working with Dr. Wise. I don't know who that is.

Q Okay.

Would that have been the person that read the frozen section?

A I don't know who that was, so I can't tell you.

Q Did you speak to the pathologist that read the frozen section, do you recall?

A Yes, at the time.

Q You did?
A Uh-huh.
Q Do you recall the contents of that conversation?
A I think it's basically what it says, definitive diagnoses deferred pending paraffin, which would be permanent sections.
Q Okay.
A That's what we were told, that they were suspicious that it might be a sarcoma, but they could not make a definitive diagnosis on the frozen section. That's what it says and that's what my memory of it was that happened.
Q Okay.
So then you finished the procedure and he goes to recovery room in satisfactory condition?
A That's correct.
Q Looking back on this pathology report, going further down under microscopic description, there's a diagnosis and it reads, "Leiomyoma of rectum, excision biopsy," correct?
A That's correct.
Q Under that is W.S. Wise, M.D., with a signature?
A Yes.
Q Okay.
Is that Dr. Wise that read that microscopic description?
A Yes. Dr. Wise was the attending pathologist and that

was his diagnosis.
Q Bid you talk to Dr. Wise at all after the surgery regarding the pathology diagnosis?
A I can't remember whether I did or not.
Q Okay. Again, looking at the sheet there, the pathology sheet on your microscopic description, there's a sentence, "The edge of specimen seems ragged in one area consistent with the possibility of incomplete removal at the edge."
Do you see where I am reading?
A Yes.
Q What would that mean?
A I don't know what it would mean. My thought was that we had removed this completely, that there weren't any areas where the tumor had been violated.
Q Okay.
Could that mean that one of the margins was not completely free of mass, tumor mass?
A No. I think that could be where they took a section to do the frozen. See, this is the microscopic, it was cut into to do the frozen section, and I suspect that that is what they're seeing on the microscopic which was done later.
Q Okay.
So that would not mean that the margins of the mass

were clear of tumor?
A Please rephrase the question.
Q You're saying that that probably refers to the section where they took a section out for frozen section?
A I think so, yes.
Q So then my question is, are you saying that that sentence would not mean that the margins of the tumor mass that you excised were free from tumor mass?
A Well, I thought that It was free, that it was well encapsulated and well defined and that we had removed it completely. The only place where it would have been ragged or cut would have been where they opened it to do the frozen section as we talked about before,
Q Okay.
If the margin was not free, would there be any significance to that, if it was benign leiomyoma?
A Well, that was the other factor. Because it was benign, or that was the diagnosis that was told and that I relied on, in my mind then and now, I don't see that it would made any difference,
Q Okay.
Would it have made any difference or become significant if the margins were not free if this was a leiomyosarcoma?
A I don't know. I can't answer that.

Q If it was a leiomyosarcoma and the tumor margins were not free from tumor, would you have done anything further surgically?

A If I had been told this tumor is a leiomyosarcoma and we think there is tumor at the margin, I think I would have re-excised it, Now, whether I would have done a local excision or radical excision, I don't know. I don't know how to answer that. That was not the situation that I was in.

Q But at least you would have done a wider local excision?

A That's probably what I would have done, yes.

Q But you did nothing because you relied on the pathology diagnosis; is that what you're saying?

MR. CRANDALL: Not only that, but he had said earlier what he thought caused that ragged edge.

Q Okay.

A You mean as far as re-excising it, I didn't see that there was a need based on the report that I had and the fact that I thought it was completely removed.

Q Those two things; you thought the margins were free and you relied on the diagnosis of benign leiomyoma?

A That's correct.

Q So you didn't do anything further surgically at that

time?
A That's correct.
Q Fair enough,
And then several days after the surgery he was discharged home to follow-up with you in your office at a later date; correct?
A He was discharged on the 29th.
Q Okay.
And not to be laborious in going through all these follow-up visits, your next visit, is that May 7th, 1982, postoperative?
A That's correct.
Q And was the basis of that visit Mr. Stahm was doing well, healing nicely?
A That's what it says. He was moving his bowels well on examination and was healing nicely.
Let's see. And he was to return to work on May 10th and to come back in two weeks for the final postoperative visit.
Q Okay. Let me go back to the surgery once more.
You said you didn't do anything further surgically because you thought the free margins -- the margins were free of tumor and you relied on the pathology diagnosis of benign leiomyoma.
MR. CRANDALL: Objection.

Go ahead. He's already answered this a couple times.

Q My question is, is that customary for surgeons to rely on the pathology diagnosis as far as whether they do anything further surgically?

A Yes.

Q At that time, in 1982, as a surgeon, you would have relied on the pathology diagnosis?

A That's my practice and the practice of every surgeon I know, yes.

Q And then your next visit is November 19th, 1982, Mr. Stahm's visit?

A No. There was a visit May 21st, the second immediate postoperative visit,

Q Things seemed to be okay there?

A Yes.

Q Looking at that visit, that office note, you have the letters PS arrow. Do you see that, Doctor?

A Yes.

Q What is PS?

A That's my abbreviation for a proctosigmoidoscopy, which was an examination of the rectum, was healed and he had a scar present at the surgical site.

Q Can you define what type of procedure that is, what

type of instrument is used?
A Well, it doesn't specify. I believe that that was a disposable rigid sigmoidoscope as opposed to flexible sigmoidoscope.
Q And with that scope you would be able to reach the site of the surgery to examine it?
A Yes, that's correct.
Q Okay.
And then the last time you see him in 1982 is November 19th; correct?
A That's correct, yes.
Q And your PS, or proctosigmoidoscope, is normal?
A That's correct.
Q 20 Centimeters?
A Yes.
Q And you mention there's no recurrence?
A That's correct.
Q Your next visit is '83. I can't tell the date from my note.
A June 25th, 1983.
Q Again, you mention there's no recurrence and the proctosigmoidoscope is normal to 20 centimeters?
A That's correct.
Q And subsequent to that, then, you would like to see him on a yearly basis?

A At this point he was more than a year after having had a benign -- what I thought was a benign tumor removed. And that was the plan, to have him come in for an annual examination, yes.

Q If we move ahead to 1985, what is the date you see him in 1985, Doctor?

A July 5th, 1985.

Q And you note there that he's having rectal pain times two weeks?

A That's correct.

Q You do a proctosigmoidoscope?

A Uh-huh.

Q And what is your finding with that?

A What I found was that he was tender at the site of the scar from the surgery, and I thought that his pain sounded like he night have a fissure, which is a tear of the rectal lining.

Q Where would the fissure have been, at the site of the previous --

A At the scar.

Q Is that usual?

A A scar in the rectum, it's not unusual to be the site of a fissure because of the nature of the scar. And people that have had rectal surgery, when they do get a fissure, that's usually where it occurs, at the site of the scar.

Q Does that raise a concern for recurrence as well?
A No, I don't see In my note that I was concerned about a recurrence. And I prescribed basically treatment for a fissure, that he should have sitz baths and use a stool softener and to return in approximately a month.
Q Okay.
In that note there you have tender over anterior anal scar?
A That's correct,
Q And then there's something?
A Question fissure.
Q Question fissure?
A I thought it was a fissure.
Q And, because of that, you then want to see him in one month's time?
A Yes.
Q And you see him on August 3rd, 1985?
A That's correct.
Q How is he at that visit?
A He said he was improved, some improvement, but he was still sore.
And the examination on that date showed that there was in fact a fissure, and at that point I added metronidazole treatment, which is an antibiotic that he would take for two weeks and then come back, which he did,

Q Okay.

You didn't palpate any mass?

A No, there was no mass, and I was not suspicious that there was recurrence at that time.

Q The next visit is August 17th?

A August 17th.

Q 19853

A Yes.

He felt much better. On examination, the fissure was healing. And I advised he take another week treatment of the metronidazole, which was an antibiotic, which had seemed to be effective, and that he would return a year later.

Q And then you don't see him for a following year, until 1986?

A Well, when he came back was sooner than the year. The next visit was April of '86.

Q All right.

Any complaints at that time?

A At that time he was complaining of soreness and pain.

And on my examination there was at that date a tender mass, which I was suspicious that there was a recurrence of the leiomyoma.

Q Where was the mass palpated?

A In the anterior rectal wall, in the same area where he had had the previous surgery.
Q Okay.
Approximately same size?
A On that note I didn't describe the size.
But, as my memory of it, was that it was about the same size, yes,
Q Again, did you think it was submucosal?
A Yes.
Q So at that time you thought he had a recurrence of the leiomyoma?
A Yes.
Q Why did you thfnk he had had a recurrence? Did you think that possibly, "Geez, he has a recurrence, maybe I didn't get it all in 1982"?
A No, that's not what I thought. I thought that it was a recurrence.
Q What's the incidence of recurrence with leiomyoma?
A I don't know. These aren't common enough that I or anyone else has a series enough to be able to answer your question.
Q Do you know the incidence of leiomyosarcoma?
MR. CRANDALL: Recurrence?
A Re --
Q Recurrence.

A Again, I don't have personal experience and I don't think there's very much literature to answer that question.
Q Okay.
With a recurrence in 1986, were you suspicious that this may be a malignant leiomyosarcoma instead of a benign leiomyoma?
MR. CRANDALL: Preoperatively?
Q Yes, preoperatively,
A No.
Q Why not?
A Well, my knowledge of it and understanding was that it was a benign tumor. That's what I had been told. I wasn't -- there are benign tumors that can recur. Carcinoid, which we talked about earlier, as an example, that they can occur.
Q Okay.
What were your recommendations to Mr. Stahm at that time?
A I told him that it looked like the growth had come back again or recurred and that it should be excised again, And since he had had it done before, I thought he was pretty familiar with the procedure.
Q All right.
And you planned to admit him to the same hospital, Mt. Sinai Medical Center?

A Yes.
Q And he was admitted on April 29th?
A That's correct.
Q 1986?
A That's correct.
Q Doctor, I'm going to show you an operative report dated April 29th, 1986. Is that your signature at the bottom?
A Yes, it is.
Q Is that an accurate copy representation of the operative report of April 9th, 1986, minus the highlighted yellow areas?
A It is.
I'm looking for my original copy, which looks like it's gotten misplaced,
MR. CRANDALL: It's an accurate copy, Dan, yes.
Q Okay.
And on April 29th, 1986 you did perform surgery on Mr. Stahm?
A That's correct.
Q And what was your preoperative diagnosis?
A Preoperative diagnosis was recurrent leiomyoma of the rectum and anal canal,
Q Okay.

A Benign.
Q You're looking at the report; correct?
A I'm looking at my operative note, yes.
Q The first paragraph, do you see where it says, "Our suspicion was that this was a recurrence of the previous tumor"?
A Yes, I do.
Q And after that is typed, "And raised the possibility of a transformation to a leiomyosarcoma"?
A That's correct.
Q Did you dictate that?
A Yes, I did.
Q Okay.
So let me ask you again, were you concerned about the recurrence being a leiomyosarcoma? Preoperatively?
A Yes, that was part of the concern. I had been originally four years previously and was relieved to find out that it was benign.
But the fact that it had come back, I dictated this in the preoperative note, and the -- I think that went on the report to the pathologist as well, that it was a recurrence and made it somewhat more suspicious.
Q And what type of surgical procedure did you do at that time?
A Let me just read over the note.

Q Sure.
A It was basically similar to the operation four years earlier. I think the only differences are that we had to deal with scar. And I describe using the traction suture SOS to have the wound defined, and again we did the frozen section examination --
Q Okay.
A -- in a similar manner as it had been done before.
Q Was the tumor well defined again?
A Yes, it was.
Q And you mentioned it was submucosal in location?
A Yes, it was in the same location where it had been before.
Q Submucosal?
A Yes.
Q Where it was in 1982?
A That's correct.
Q So that this lesion was limited to the bowel wall once again?
A Yes, it was.
Q It did not extend outside of the bowel wall?
A No.
Q It did not extend into the muscularis?
A No, it didn't.
Q And frozen section confirmed that it was a leiomyoma;

is that correct?
A Yeah. I have in my note that it appeared grossly to be leiomyoma. Actually, there were two or three individual leiomyoma. Now, that must have been told to me by the pathologist, because I don't remember -- I thought it was one mass that we removed. And the frozen section diagnosis this time was consistent with leiomyoma. There wasn't the question of a possible sarcoma that there had been at the first operation.
Q Okay.
A And I think the size -- I didn't describe the measurements this time, but the pathology measurements were pretty similar size wise to what had been removed in the first operation.
Q Okay.
And you didn't slice the tumor before giving it for frozen section?
A No, I did not.
Q Again, you handed It in total?
A Yes.
Q And you were confident that the tumor had been completely excised?
A Yes, I was.
Q In fact, during this procedure you provided a margin of at least one and a half to two centimeters around the

lesion; is that correct?
A That's correct.
Q You did not do that in 1982; correct?
A Well, I think that I did do a margin. I didn't describe what it was. Here, I think because I was more suspicious and there had been that question of the complete excision the first time, I think we made greater effort to have it completely excised the second time.
Q And with the knowledge on frozen that this was leiomyoma, you didn't feel the need to do anything further surgically?
A No, sir.
Q Okay.
Let me hand you, Doctor, an operative report or pathology report dated April 29th, 1986. The operative report dated April 29th, 1986 I would like to mark as Plaintiff's Exhibit B.

(Plaintiff's Exhibit B was marked for identification.)

Q Under gross description, there is a notation FS. Would that be frozen section?
A Yes.
Q Following that it states it is consistent with leiomyoma, lesion of rectum?

A Yes.
Q And then in parentheses, "See WKS"?
A I see that.
Q Okay.
Would that be Dr. Sterin?
A Yes.
Q And then further down there's what appears to be a final diagnosis; number 1, leiomyoma, excision from anal rectal area; correct?
A That's correct.
Q And number 2 is fragment of rectal mucosa with underlying submucosal and smooth muscle tissue; correct?
A Yes.
Q And further down is W.K. Sterin, M.D., with his signature?
A Yes.
"Q Did you talk at all with Dr. Sterin following the surgical procedure about the pathology diagnosis?
A Well, we talked to him in the operating room when he gave me the frozen section result.
Are you asking did I talk to him after this?
a Yes, after the final pathology diagnosis was made.
A I don't remember.
Q Regarding your conversation with him on the frozen, do you recall the contents of that, other than it being a

leiomyoma?

A It seemed to be, both on the -- as we review the record and my memory of it, there was even -- he was more certain that this was benign this time than they had been the first time. And I reminded him that this was a recurrence, that I was more suspicious this time, but he was confident that. that was the diagnosis. As my memory of this. It was 10 years ago.

Q I understand that,

Dr. Sterin did not read the pathology in 1982, however.

MR. CRANDALL: Objection.

If you know.

Q If you know.

A Well, the pathologist was clearly different, it was Dr. Wise, so I don't know whether Dr. Sterin read the -- I assumed that he looked back --

MR. CRANDALL: I don't want you to assume anything.

A I don't know.

MR. CRANDALL: If you don't know, just tell him that.

A I don't know.

Q So you're not aware of whether Dr. Sterin had reviewed the '82 slides?

A I assumed that he did. I can't answer that for certain that he did.
Q Fair enough.
Did he comment to you on the histology?
A I don't remember whether he did or not.
Q Did you question him regarding the diagnosis of leiomyoma, as to whether this could be a leiomyosarcoma?
MR. CRANDALL: Which conversation are we talking about? He said he only remembers one discussion about the frozen section.
Q Right. During that conversation.
A Just as I said, as you saw in the operative note, I had suspicions that it might be a leiomyosarcoma. And I think in our slip that we fill out to have the history that I had indicated, and I do remember telling Dr. Sterin that this is a recurrence, that we had some suspicions, but he's the expert. The pathologist is the expert. We listen to what they say.
Q Okay.
A We don't usually argue with them.
Q Is it fair to say your suspicions regarding a leiomyosarcoma were more heightened in '86 dealing with a recurrence than they were in 1982?
A Well, I think it was different. In '82 I didn't know what it was, I mean, there were a whole list of

possibilities, some of which we discussed., The fact that we then knew it was a leiomyoma, or I thought that it was a leiomyoma and it has recurred, there are situations with leiomyomas that are benign or that are considered to be benign that recur. So either it's recurred, it's benign and it's recurred, or it's recurred and now it's malignant. That's what my concerns were.

Q And the frozen section had come back leiomyosarcoma?

MR. CRANDALL: In '86, you're talking?

Q In 1986, when you excised the mass, would your surgical procedure have been different or would you have done anything further surgically?

A All right, At the time of the surgery at '89?

MR. CRANDALL: '86.

Q '86?

A '86, there, that there would have been any need to excise more locally, I imagine you're saying if he had said on frozen said this is a leiomyosarcoma, would I do anything different?

Q Would you have done anything different?

A Not at that time, Because I thought it was excised locally and I, according to the pathology report, locally it was excised completely.

Q Excuse me, Doctor. Where does that say that? How do

you have that information?
A That's implied, There's no notation that it's not excised completely, but by excising margins, in my mind it was excised completely locally.
You're asking a hypothetical question, what I would have done differently.
Q If the frozen section in 1986 was leiomyosarcoma --
MR. CRANDALL: And you've already answered him, what you did.
A At that time, on the date of surgery, I wouldn't have done anything differently.
MR. CRANDALL: Okay.
Q So if it's a leiomyosarcoma, you were confident that that was a wide local excision?
A Yes.
Q Would you have done anything differently at a later date if it was a leiomyosarcoma?
A I understand your question. I'm not sure that even had I been told by the pathologist, or if I knew for a certain fact it was a leiomyosarcoma, what would be effective treatment to recommend to the patient,
The problem with the situation as to doing a radical surgery where this growth was located, both in '82 and in '86, a radical excision would have required a permanent colostomy. And my training, my experience and my belief is

that you don't do a radical surgery that involves a permanent colostomy for a benign tumor,

And, even beyond that, if you think the tumor has been removed completely, usually you don't recommend such a radical operation.

And there's no proof that it would offer him a cure, so I'm not sure what I would have done differently surgically.

Q Okay.

You mentioned radical surgery if it was benign. My question is, if it was carcinoma, leiomyosarcoma, at a later date would you have done anything further surgically?

MR. CRANDALL: Objection.

Go ahead,

A Well, that's what I'm trying to answer. It would be a dilemma as to what to recommend. There's no evidence that doing a radical resection of the rectum and a colostomy would enhance -- would have enhanced his likelihood of surviving the tumor, so I don't think I can answer that. I don't know.

Q And when you mentioned radical excision, are you talking about abdominal peritoneal resection?

A A radical resection for this growth, in this location, that's what it would involve. It would have required an abdominal peritoneal complete excision of

rectum and anus and the necessity for a permanent colostomy.

Q And are you saying that in 1986 this tumor that was submucosal, not extending outside of the bowel wall, if it was a leiomyosarcoma, what you're saying is that a peritoneal resection done at that time would not have been curative?

MR. CRANDALL: Objection.

A I said I don't know if it would have been. I don't think there's any evidence to suggest one way or other because the tumor is so rare, I mean, accepted treatment would be local excision. There's no evidence that a radical excision would have improved the likelihood of survival had we known it were a sarcoma.

I didn't know that. But you gave me this hypothetical situation. If I'm going back and doing this over again, I'm not sure. If you ask for probability, I don't think I know or anyone else can answer that question, whether it would have changed the survival outcome or increased the likelihood of his being cured of it.

Q 1986, if this was a leiomyosarcoma, if you would have known, would an abdominal peritoneal resection versus a local wide excision increased the likelihood of non-recurrence?

MR. CRANDALL: Objection.

A I don't think that it would have. I can't give a document or series or evidence. My opinion is, is that it wouldn't. And I'm not sure that I would have done such a radical operation, even had I known that was the diagnosis or had a different diagnosis,

Q Okay.

His admission in 1986, was a liver spleen scan done at that time?

A No.

Q Why not?

A I didn't see that there was a need to do it at that time,

Q In '82 you did?

A Well, we talked about the possibilities. We did it in '82, it was normal,. and I thought that I was dealing with a benign tumor. I didn't see a need to repeat it.

Q And in 1986 you completely relied on the pathology diagnosis of benign leiomyoma?

A Yes, I did.

Q Any clinical presentation at that time that would have changed your total reliance on the pathologist?

A I don't think so.

Q Okay.

And it was customary at that time for surgeons such as yourself to rely on the pathology diagnosis?

A It was customary then and it still is customary,
Q Even though you had a raised suspicion of leiomyosarcoma in 1986?
A Yes.
Q Okay.
Looking at your office note, Doctor, of April 29th, 1986, at the bottom of that note you have pathology with an arrow; correct?
A Yes.
Q And then you have written leiomyoma benign?
A That's correct.
Q And because of that you didn't do anything further surgically?
A I didn't think there was any need to do anything further surgically.
Q And then Mr. Stahm was discharged on May 3rd, 1986?
A Discharged from Mt. Sinai, yes.
Q When did you see him in follow up, then?
A He was seen in the office May 17th, 1986, things seemed to be going satisfactorily, and I suggested he come back in three months.
Q And then you saw him on August 9th, 1986?
A That's correct.
Q And you did a proctosigmoidoscope?
A Uh-huh.

Q Which was normal?
A That's correct.
Q Then next on February 14th, 1987?
A That's correct,
Q Again?
A That was the next visit. Everything seemed to be fine.
Q And at that time you recommend seeing him on an annual basis once again?
A Yes.
Q And the next visit is February 6th, 1988, approximately one year later?
A That's correct.
Q Everything normal?
A Yes, sir.
Q Next visit, March 18th, 1989; correct?
A That's correct.
Q Everything normal then?
A Yes.
Q No recurrence?
A None that I could see, no.
Q You also have a note here that's circled, Very proud of 8-month-old son"?
A That's correct.
Q Did he discuss that with you, do you recall?

A Yes, he did.
Q Do you recall how old Mr. Stahm was at that time?
A Well, he's approximately the same age that I am, so in 1988 or '89 he was 47, I believe.
Q Okay. He must have been very proud.
A Yes.
Q So much so that you made a note in your office notes regarding that; correct?
A Yes.
Q And then you see him 1990, May 26th?
A Yes.
Q How are things then, at that time?
A At that visit he said there was some discharge of mucous but no bleeding, and he had had regular bowel movements.

My examination was normal. I reassured him and suggested that he come back in a year, assuming that there would be no more trouble.

Q Then the next visit is April 5th, 1991, and it looks like he might have some complaints at that visit?
A At that time he had pain, but no bleeding, and he had had loose stools for about five or six days.

On my examination he had a superficial fissure, which I thought was due to the diarrhea. I had him do sitz baths and use donnatal to stop the diarrhea.

Q Superficial fissure, where would that have been located?
A At the anal -- at the anus. I didn't make the note whether was in the scar or not, and I can't tell you today where it was,
Q Were you thinking of recurrence at that time?
A No, I was not.
Q And why is that?
A Well, there wasn't any sign of it on my examination, and none of these symptoms suggested that he had a recurrence.
Q So none on exam meaning there was no palpable mass?
A Yes.
Q What would have caused the rectal pain, Doctor?
A I thought it was caused by a fissure, which was a tear.
Q And you were confident with that diagnosis to the effect that you didn't need to see him until one year later?
A That's correct.
Q And you see him June 6th, 1992. Any problems at that time?
A Well, he still had the diarrhea, but he also was taking several medications, and he was having a lot of trouble with his back and with disks. He had had a

previous operation for a cervical disk. And what I thought, and seemed reasonable, was that he had had back pain from disks, disk disease in his back.

Q Okay.

Any prostate exam at that time?

A I would have examined the prostate, but I didn't make any note, so I believe it was normal at that time.

Q But you are stating that you did examine the prostate?

A Yes, I did.

And the sigmoidoscopic exam in '92 was normal. The scar was not enlarged and there was no mass.

Q Okay, Next visit is July 10th, 1993?

A That's correct.

Q Any complaints at that time?

A At that time he said that he had discharges of mucous and he had had increased soreness since the prior exam, which I think had been a year ago, actually, looking at it.

On examination, then, in July of '93, there was a mass with tenderness. And, again, I was concerned whether this was infection in the scar or possible abscess or another recurrence,

Q And that was on the right anterior lateral wall?

A Yes.

Q Same location as the two previous --

A Well, this was more lateral. The previous ones had been in the midline.
Q The first portion of your note mentions discharge of mucous. What would have been the etiology of that?
A I don't know. Usually that's -- mucous by itself is not a worrisome symptom.
Q Unless it's associated with something else?
A Unless there's bleeding with it, yes, that's correct.
Q So at that time you're concerned about an abscess versus a recurrence and you put him on antibiotics?
A Yes.
Q Was there a palpable mass at that time?
A Yes. That's what I described. I could feel a tender mass, yes.
Q And then you next see him a few weeks later on July 24th, and he's still having discharge of mucous; correct?
A That's correct.
Q And your note reflects questionable mass versus scar?
A That's correct,
Q And you changed antibiotics?
A Yeah. I didn't think the Keflex had cleared up the infection, and he had had success with -- he had taken a flagyl metronidazole in the past, and I wanted him to use that and then to come back. And my thought was if it wasn't better it would have to be excised a third time.

Q Your working diagnosis at that time was still infection or abscess?
A Or possible recurrence. It says versus recurrence.
Q So you put him on flagyl, and you note, "Return in three weeks"?
A That's correct,
Q Subsequent to that visit, did you ever see Mr. Stahm again?
A I never saw him after that last visit, no.
Q Okay.
Did you attempt to contact him?
A No. I assumed that he had gone somewhere else. But I never received any inquiries to ask for the records or follow-up reports. I think that we may have called him, but I don't remember that for certain.
Q And you never saw him again as a patient?
A I never saw him as a patient or otherwise after that date, no.
Q Did you ever talk to him after that date?
A I don't think so.
Q Ever talk to his wife Marcella?
A No.
Q Doctor, I'm going to show you a surgical pathology report from University Hospitals with a date of procedure 12-9-93.

MR. FINELLI: Do you want to see that, Steve?

Q Do you have a copy of that?

A No, I haven't seen this.

Q Okay.

MR. CRANDALL: What do you want to ask him about this stuff, Dan?

MR. FINELLI: I want to ask him about the bottom notation.

MR. CRANDALL: Do you need this back? I can get copy.

Let me make sure it's the same one.

I don't have this one.

MR. FINELLI: You don't have this?

MR. CRANDALL: No, huh-uh.

MR. HUPP: Off the record.

(Off the record discussion.)

Q Doctor, this is a pathology report from University Hospitals on Mr. Stahm regarding the perirectal mass that was biopsied. The diagnosis, reveals low grade leiomyosarcoma. Do you see that?

A Yes, I do.

Q Okay. Underneath that is a note that reads, "The bottom line review of the previous resection specimens, Mt. Sinai Medical Center, SH2-SH6-2628, show a similar

lesion."

Do you see where I am reading, Doctor?

A Yes, I do.

Q As a physician, how would you interpret that sentence?

MR. HUPP: Objection,

MR. CRANDALL: Note one for me, too.

Q Do you see where I am referring to?

A I do see what you are referring to. I hadn't seen this previously. I'm not an expert pathologist. I'm not --

Q Do you have an opinion as a physician reading that?

MR. CRANDALL: Opinion as to what? I don't know what you're trying to get him to do here.

Q What it refers to --

MR. CRANDALL: He can read that sentence back to you and tell you what it says.

MR. HUPP: Objection.

A It says, "Show a similar lesion."

It's describing mitotic figures, but I don't think that there was any mitotic figures in the tissue that we submitted.

The other factor is it's a different type of

biopsy. This was done by a needle biopsy, where I had excised the entire mass,

Q You mentioned your excisions did not show mitotic activity. Did you just say that?

A Not to the same extent,

You asked me what my opinion was, and I don't think there were described that many mitotic figures in the pathology material that we had from my operations.

Q So from your operations in '82 and '86, you're aware of the amount of mitotic activity present?

A I said I don't remember. I don't think they described the same. So to me it doesn't sound like it's the same. It says it shows a similar lesion, but I don't think that there were that number of mitotic figures in the material from the 1982 and 1986 operations.

Q Okay.

And you're basing that on what, the pathology reports?

A On my knowledge of the reports that I had from the Mt. Sinai pathologists.

And you asked my opinion, there is a possibility that from 1982 to 1986 to when this was done in 1983 --

Q 19931

A -- '93, that things could have changed.

Q What could have changed? I don't understand.

A It could have been a benign tumor that changed into a malignant tumor. That is a possibility.
Q So it's also a possibility it could have been leiomyosarcoma in '82, in '86 and '93?
A That's also a possibility.
Q It's very important to make that differentiation, is it not?
A Well, I personally cannot do that. I mean, that's the role of a pathologist to do it.
Q But you would agree that the prognosis of a leiomyoma versus a leiomyosarcoma is dramatically different?
MR. HUPP: Was the question the prognosis?
Q The prognosis?
A I'm not even sure of that.
Q You're not sure of that?
A No.
Q Okay.
MR. CRANDALL: Are you done with this?
Q Subsequent to your visit with Mr. Stahm on July 24th, 1993, did you become aware at any point in time what happened with Mr. Stahm regarding his medical condition?
A No. I never received any progress reports or requests for my records either from University or whoever

E the subsequent physicians were. So that 1 think the next
2 thing I heard about it was when I received your request for
3 the records and when I saw his obituary in the newspaper.
4 Q That is the first you had learned of Mr. Stahm, then,
5 as far as expiring?
6 A Yes.
7 Q You never discussed his medical findings with Mrs.
8 Stahm or the family subsequent to July 24th, 19931
9 A No.
10 Q Subsequent to July 24th, 1993, did you ever discuss
11 Mr. Stahm's medical condition with Dr. Wise or Dr. Sterin?
12 A You mean after --
13 Q After your last visit. Did you ever talk to the two
14 pathologists about his medical condition?
15 A No.
16 Dr. Wise, I believe, moved to the Boston area and Dr.
17 Sterin, I think, is retired.
18 MR. CRANDALL: So your answer is no?
19 A No.
20 Q You never had any conversation with them?
21 A No, I have not had.
22 Q Either of those two?
23 A No.
24 Q Now, Doctor, the '82 excision, you mentioned the
25 margins were clear; correct?

A Yes.
Q If the margins were completely clear of tumor in 1982, is it possible to have a recurrence of the same tumor in 1986?
A Yes.
Q Doctor, how old are you?
A I've got a birthday coming up next week. I'm 53, I'm still 53.
Q And your date of birth?
A 1942.
Q 19421
A Yes.
Q What is the date?
A My birthday is in April. I'm going to be 54 in about two weeks.
Q April, what?
A 19th.
Q Social Security number?
A 015-34-6324.
Q Are you married?
A Yes, I am.
Q Family?
A I have two daughters.
Q Okay.
First marriage?

A First and only,
Q For both you and your spouse?
A Yes.
Q And where is your address, Doctor?
A Business, you want?
Q Business?
A 6770 Mayfield Road in Mayfield Heights.
Q And, starting with high school, can you give me your education?
MR. CRANDALL: I have a CV if you want to look at it.
MR. FIMELLI: Sure.
Can you give me a copy of this, then?
MR. CRANDALL: You can have that one.
Q Did you do a fellowship at the Cleveland Clinic in '72 and '73 in colorectal surgery?
A That's correct.
Q What year did you start private practice?
A I started private practice July of 1974.
Q Was that a solo practice or partnership?
A I went into practice with Dr. Howard Ganz who was a general surgeon, was also my father-in-law. He's now deceased.
Q *Any* other partners from that time forward?
A Yes. I had an association with Dr. Graham Lampert

who is also a colorectal surgeon for a period of about seven or eight years. He left to have his own solo practice.

And I had an associate up until two or three months ago, Dr. David Firestone, who is a general surgeon, who wanted to go into practice by himself.

Q Okay.

You were never associated with Dr. Malgieri?

A James Malgieri.

Q Yes.

A I know who he is, because he's on the staff of Hillcrest Hospital.

Q Were you ever associated?

A Oh, no.

Q And you are currently a visiting surgeon at Mt. Sinai as you were in 1974 to the present, that hasn't changed?

A No.

Q Okay.

Visiting surgeon means what?

A Surgical staff.

Q So you have operative privileges there?

A That's correct.

Q Any other association with Mt. Sinai from '82 forward?

A As far as what?

Q As far as an employee or salaried teaching physician.
A Never received a salary from Mt. Sinai.
Q Never received any monies from Mt. Sinai?
A No.
Q Are you on any committees at Mt. Sinai?
A I've been in the past, I'm not right now.
Q What committees were they?
A I've been on the utilization committee and on the -- what used to be called -- I think it was called the tissue committee and they changed the name to the quality assurance committee, but I haven't been for the last few years.
Q How do you currently keep abreast with medicine?
A Well, I attend medical meetings and I read journals.
Q What journals do you read?
A Diseases of Colon and Rectum is the specialty journal for colorectal surgery. I sometimes read the New England Journal of Medicine. The JAMA, Journal of the American Medical Association, and Archives of Surgery,
Q *Any* texts you utilized in your practice as far as reference?
A No one specific textbook, no.
Q *Any* texts that you utilize more frequently than the others?
A No.

Q No one or two texts?
A No, sir.
Q You do refer to surgical texts, though?
A On occasion, yes.
Q And your last seminar was when, in medicine?
A Well, that's hard to answer. I go to tumor conferences almost every week and mortality complications we have every month. The last large meeting of colorectal surgeons was in Montreal last spring, a year ago in May I attended that, and I'm planning to go to the next one in July.
Q You mentioned subsequent to your last visit with Mr. Stahm you had no communication with Dr. Wise or Sterin. Any communication with Dr. Bloom?
A Well, he had asked for a copy of the records of my records when Mr. Stahm went to see him as a physician, which I had sent, but I don't think that we've had any recent communication, or even if I talked to him while he was treating Mr. Stahm.
Q I'm not following you. You did talk to him while he was treating --

MR. CRANDALL: No.

A No.
Q No?
A I said he -- there's a request that he had asked for

the charts, I knew that he was the physician, but I don't remember, I had no reason to discuss things with him.

Q Have you reviewed any articles or journals, records or texts for the preparation of this deposition?

A Just the medical record and chart that I have, yes.

Q And since you've been named as a Defendant in this case, have you discussed this case with anyone other than your attorney?

A I have discussed it with another pathologist who I know.

Q Who would that have been?

A That's Dr. Edward Siegler.

Q On how many occasions?

A Once. He's the retired chairman of pathology at Mt. Sinai.

Q Was he the chairman of pathology in 1982 at Mt. Sinai?

A I'm not certain of that. I'm pretty certain that he was in '86, but I don't know whether he was in 1982 or not.

Q Did you meet with him or just talk to him on the phone?

A It was a conversation we had. Ed is also my patient and we happened to discuss this matter at that time.

Q Do you recall the contents of that conversation?

A I remember asking him if he knew about this particular case and if he knew about the problem in diagnosing leiomyomas versus leiomyosarcoma, and on his own initiative he reviewed the literature and sent me some articles relevant to this.

Q To your recollection, do you know if he reviewed the pathology slides or mentioned to you that he reviewed the pathology slides?

A I don't know whether he did or not.

Q And that was one conversation you had with him?

A Yes.

Q Subsequent to treating Mr. Stahm, in your practice, have you had any patients with leiomyosarcomas?

A He's the only patient in my 22 years of practice who has had this condition.

MR. FINELLI: No further questions.

MR. HUPP: I have no questions.

MR. CRANDALL: He'll read this. You can send it to me.

MR. FINELLI: Dr. Eisenberg, thank you.

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(Deposition concluded.)

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The State of Ohio, )
) SS: CERTIFICATE
County of Cuyahoga. )

I, Janice M. Wicinski, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named HENRY EISENBERG, M.D. was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by him/her was by me reduced to stenotypy in the presence of said witness, afterwards transcribed upon a computer, and that the foregoing is a true and correct transcript of the testimony so given by him/her as aforesaid,

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio on this 10th day of September, 1997.

Janice M. Wicinski

Janice M. Wicinski, Notary Public
in and for the State of Ohio.

My Commission expires 8-9-02.