

1 The State of Ohio,  
 2 County of Montgomery.  
 3 IN THE COURT OF COMMON PLEAS  
 4 Sam L. O'Neal, etc., )  
 5 Plaintiff, )Case No.  
 6 -vs- )2003-CV-9286  
 7 Kettering Medical Center, )  
 8 Foundation, etc., et al., )  
 9 Defendants. )  
 10 --- o0o ---  
 11 Videoteleconference deposition of DAVID  
 12 FALLANG, M.D., a Defendant herein, called by  
 13 the Plaintiff as if upon cross-examination  
 14 under the statute, and taken before Luanne  
 15 Stone, a Notary Public within and for the  
 16 State of Ohio, pursuant to the agreement of  
 17 counsel, and pursuant to the further  
 18 stipulations of counsel herein contained, on  
 19 Friday, the 27th day of August, 2004 at 2:38  
 20 o'clock P.M., at the offices of Tackla &  
 21 Associates, Ohio Savings Plaza, the City of  
 22 Cleveland, the County of Cuyahoga and the  
 23 State of Ohio.  
 24  
 25

1 APPEARANCES:  
 2 On behalf of the Plaintiff:  
 3 Becker & Mishkind Co., LPA, by:  
 4 David Kulwicki, Esq.  
 5  
 6 On behalf of the Defendant,  
 7 David Fallang, M.D.:  
 8 Adkinson & Associates, by:  
 9 Camille Harlan, Esq.  
 10  
 11 On behalf of the Defendant,  
 12 Kettering Medical Center Foundation:  
 13 Robert Cowdrey, Esq.  
 14  
 15  
 16  
 17  
 18  
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1 PROCEEDINGS  
 2 MR. KULWICKI: ☐ Go ahead and swear  
 3 the witness in, please.  
 4 David Fallang, M.D., being of lawful  
 5 age, having been first duly sworn according  
 6 to law, deposes and says as follow:  
 7 CROSS-EXAMINATION OF DAVID FALLANG, M.D.  
 8 BY MR. KULWICKI:  
 9 Q ☐ Dr. Fallang, my name is attorney  
 10 Dave Kulwicki. I represent the estate of  
 11 Mable O'Neal in a lawsuit that's been filed  
 12 against yourself and Kettering Medical  
 13 Center.  
 14 I'm here today to ask you some  
 15 questions with respect to your involvement  
 16 with Mrs. O'Neal, and I'm going to start by  
 17 having you introduce yourself by stating  
 18 your full name and spelling your last name,  
 19 and, if you would, give us your current home  
 20 address.  
 21 A My name is David James Fallang,  
 22 F-A-L-L-A-N-G, and I live at 4312 Rosedale  
 23 Road in Middletown, Ohio.  
 24 Q Thank you, Doctor. I'm going to  
 25 begin by asking some background information

1 about you, and then we'll turn to the facts  
 2 of this case. If at any time during my  
 3 questioning, you do not understand a  
 4 question that I ask you, please stop me, and  
 5 tell me that you don't understand my  
 6 question. I will restate it to your  
 7 satisfaction at that point in time. Okay?  
 8 A Okay.  
 9 Q And likewise, Doctor, if you --  
 10 if -- if you need to take a break at any  
 11 point in time, we certainly can accommodate  
 12 that. The final rule is that, if you would,  
 13 as you've been doing so far, answer verbally  
 14 as opposed to an uh-huh or an uh-uh or a nod  
 15 of the head, so that our court reporter on  
 16 this end can take down your testimony  
 17 accurately. Fair enough?  
 18 A Yes, sir.  
 19 Q Thank you. Doctor, do you have any  
 20 plans to move from the address that you're  
 21 currently at in the next six months?  
 22 A No.  
 23 Q And, Doctor, tell me, if you would,  
 24 the name of your current practice group.  
 25 A The Surgical Weight Loss Center.

1 Q Is that a d.b.a., or is that an  
 2 incorporated business?  
 3 A That is a d.b.a. The incorporated  
 4 name is Middletown Surgical Associates, Inc.  
 5 Q Are you the only principal in  
 6 Middletown -- I'm sorry, Middletown Surgical  
 7 Associates, Inc.?  
 8 A Yes.  
 9 Q Have you at any time had any other  
 10 physicians practicing under The Surgical  
 11 Weight Loss Center name or the Middletown  
 12 Surgical Associates name?  
 13 A Yes.  
 14 Q Who else has practiced under that?  
 15 A Some years back, a physician named  
 16 Allison Clarey; a little more recently, a  
 17 physician named Derek Martin.  
 18 Q When was the last time Derek Martin  
 19 was employed by either of those two  
 20 entities?  
 21 A Oh, it was probably about a year and  
 22 a half to two years ago.  
 23 Q Do you know where Dr. Martin is  
 24 currently practicing?  
 25 A I believe at Miami Valley Hospital,

1 primarily.  
 2 Q And, Doctor, were you acting within  
 3 the course and scope of your employment with  
 4 Surgical Weight Loss Center when you were  
 5 providing medical care and advice to Mable  
 6 O'Neal in 2002 and 2003?  
 7 A Yes.  
 8 Q Doctor, can you tell me where you  
 9 currently have staff privileges?  
 10 A Riverview Health Institute in  
 11 Dayton, Ohio.  
 12 Q Is that affiliated with Kettering  
 13 Medical Center?  
 14 A No, it's not.  
 15 Q And when did your privileges at  
 16 Kettering Medical Center-Sycamore Hospital,  
 17 when did that -- those lapse?  
 18 A I think they expired in May.  
 19 Q And you anticipated my next question  
 20 which was to understand the nature of the  
 21 termination of those privileges. You are  
 22 suggesting that they simply expired?  
 23 A That's correct.  
 24 Q Was there a conversation at the time  
 25 that you decided to let them expire between

1 yourself and administration at Kettering  
 2 Medical Center that your privileges would  
 3 not be renewed, and inviting you to allow  
 4 them to expire, rather than having them  
 5 revoked?  
 6 MS. HARLAN: ☐ Objection. You can  
 7 answer.  
 8 THE WITNESS: ☐ No.  
 9 BY MR. KULWICKI:  
 10 Q Why did you let those privileges  
 11 expire?  
 12 A I didn't want them anymore.  
 13 Q Okay, and why did you decide that  
 14 you didn't want privileges at Kettering  
 15 Medical Center any longer?  
 16 A Oh, well, for one thing, they were  
 17 always trying to get me to take emergency  
 18 room call, and every -- every time my  
 19 privileges came up for renewal, we had to go  
 20 through a little bit -- a little battle  
 21 about that, and I just didn't want to  
 22 continue them.  
 23 Q Was there anything with respect to  
 24 this particular litigation or the incidents  
 25 underlying this litigation that influenced

1 your decision to allow those privileges to  
2 expire?  
3 MS. HARLAN: ☐ Objection.  
4 THE WITNESS: ☐ No. I never  
5 discussed it with any people from the  
6 hospital.  
7 BY MR. KULWICKI:  
8 Q Thank you, Doctor. Now, prior to  
9 having privileges at Riverview Health System  
10 and besides the privileges you had at  
11 Kettering Medical Center, have you had  
12 privileges at any other hospital, let's say  
13 in the last ten years?  
14 A Yes. I had privileges at Middletown  
15 Regional Hospital and Grandview and  
16 Southview.  
17 Q Where are Grandview and Southview  
18 located?  
19 A In Dayton.  
20 Q And can you tell me what the reason  
21 was for the privileges at Middletown  
22 Regional Hospital terminating?  
23 A Yes. I was having difficulty  
24 obtaining malpractice insurance.  
25 Q And how about with respect to

1 Grandview and Southview Hospitals?  
2 A That was a few years ago, and I  
3 just, again, just didn't want to keep those  
4 privileges up.  
5 Q All right. Doctor, have you been --  
6 have your staff privileges at any hospital  
7 been the subject of any type of disciplinary  
8 proceeding?  
9 A No.  
10 MS. HARLAN: ☐ Objection.  
11 BY MR. KULWICKI:  
12 Q Has your medical license ever been  
13 suspended, revoked or called into question  
14 in any respect?  
15 MS. HARLAN: ☐ Objection.  
16 THE WITNESS: ☐ No.  
17 BY MR. KULWICKI:  
18 Q And, Doctor, has your Board  
19 certification by any specialty board been  
20 revoked, suspended, limited or called into  
21 question in any regard?  
22 MS. HARLAN: ☐ Objection.  
23 THE WITNESS: ☐ No.  
24 BY MR. KULWICKI:  
25 Q With respect to your Board

1 certification, are you board certified in  
2 surgery?  
3 A I'm Board certified in surgery.  
4 Q Any other Board certifications?  
5 A No.  
6 Q And besides your Board certification  
7 in surgery, do you have any other specialty  
8 training, any types of certificates?  
9 A You know, I've taken a few courses  
10 in bariatrics, and, for example, doing  
11 laparoscopic gastric bypasses, very brief  
12 courses. I may have a certificate laying  
13 around somewhere, but -- but no -- no formal  
14 training as in, for example, a fellowship.  
15 Q With respect to your training in  
16 bariatrics, do you -- can you -- can you  
17 tell me the name of your license or  
18 certification?  
19 A Well, no. I mean, like I said, it  
20 was -- it was a course -- for example, I  
21 think about three years ago at the bariatric  
22 meeting in Washington, D.C., I took a course  
23 at that meeting, and it was a cadaver lab  
24 doing laparoscopic bypass training, so those  
25 are typically sponsored by the American

1 Society for Bariatric Surgery, but I don't  
2 know that they have a special name or  
3 institutional designation or anything.  
4 Q Okay. Now, at Riverview Health  
5 System, will you be performing surgery?  
6 A Yes.  
7 Q And what -- what type of privileges  
8 will you have there?  
9 A General surgery privileges.  
10 Q Are you currently spending 50  
11 percent or more of your professional time in  
12 the active clinical practice of medicine?  
13 A Yes.  
14 Q Now, Doctor, I want to turn to the  
15 facts of this case. Have you had a chance  
16 to review your chart with respect to  
17 Mrs. O'Neal prior to today's deposition?  
18 A I glanced over some of the pages  
19 earlier today.  
20 Q And have you had a chance to look at  
21 both your office chart and records from her  
22 subsequent treatment?  
23 A Yes.  
24 Q In addition, have you had a chance  
25 to review any of the depositions that have

1 **been taken in this matter?**  
 2 A Yes, I looked at several of those  
 3 today also.  
 4 **Q And as I recall, the depositions**  
 5 **that have been taken to date involve all**  
 6 **operating room personnel that were present**  
 7 **on the date of her operation; is that -- is**  
 8 **that your recollection as well from what you**  
 9 **reviewed?**

10 A I don't know whether it was --  
 11 whether it was all of them or not. I  
 12 just -- I was given some to review, and I  
 13 reviewed them.

14 **Q All right. Now, in this particular**  
 15 **surgery that you performed on Mrs. O'Neal, I**  
 16 **understand that you used what we'll call, I**  
 17 **guess, surgical towels during the course of**  
 18 **the procedure; fair enough?**

19 A That is fair enough.

20 **Q Who provided the towels to you that**  
 21 **you used during the -- the surgery?**

22 A The hospital.

23 **Q And what was the purpose for using**  
 24 **those towels during this surgery?**

25 A I usually used a towel in the left

1 upper quadrant for retraction.

2 **Q And can you describe the type of**  
 3 **towel that was used in -- in Mrs. O'Neal?**

4 A Well, it was similar to a standard  
 5 surgical draping towel, but it was different  
 6 in the respect that the -- the hospital  
 7 obtained those, as I understood it at least,  
 8 specifically for me to use in that  
 9 situation, because they -- they worked very  
 10 nicely in these very obese patients to help  
 11 me get good exposure, and the typical  
 12 hospital draping towel is usually either  
 13 green or blue. These towels were, I  
 14 believe, a white or a light cream color with  
 15 blue, or I think there were actually maroon  
 16 stripes on them. So, they would be  
 17 distinguished from a normal surgical draping  
 18 towel.

19 **Q Now, in -- in your experience, when**  
 20 **these white or maroon striped towels became**  
 21 **soaked in blood when you were using them for**  
 22 **retraction purposes during this type of**  
 23 **surgery, did they -- were they**  
 24 **indistinguishable from the usual surgical**  
 25 **towels, you know, the bluish ones?**

1 A No. They were very  
 2 distinguishable.

3 **Q Okay, and why were these used**  
 4 **instead of the blue towels?**

5 A Well, in order to -- to allow them  
 6 to be counted, because you have blue draping  
 7 towels, and they don't count those, and,  
 8 then, so you don't know how many you start  
 9 with, how many you end up with or whatever.  
 10 So, since these towels had a specialized  
 11 purpose, they -- they brought in different  
 12 colored towels so that they could be  
 13 counted.

14 **Q And did you have any discussion with**  
 15 **hospital administration about the types of**  
 16 **towels that you wanted them to purchase for**  
 17 **this purpose?**

18 MS. HARLAN: ☐ Objection.

19 THE WITNESS: ☐ I mean, I don't  
 20 remember specifically, but I -- I sort of  
 21 have a general recollection -- recollection  
 22 of talking with the -- it wouldn't be  
 23 hospital administration, but people who  
 24 worked in the OR, and they said they could  
 25 get suitable towels for the purpose that I

1 wanted.

2 **Q Do you remember who you spoke**  
 3 **with?**

4 A No, I don't.

5 **Q If -- if you don't remember the**  
 6 **specific person, do you remember what their**  
 7 **position would be? In other words, was it a**  
 8 **nursing supervisor, or --**

9 A Well, I mean, again, without a  
 10 specific recollection of a conversation, I  
 11 can say that it would most likely have been  
 12 either with Linda Sich who's the OR  
 13 supervisor or probably with Kyle, who was  
 14 the -- I don't know her -- what her exact  
 15 title was, but she was a somewhat lower  
 16 level supervisor, but, I mean, it might have  
 17 been that I talked to one of the other  
 18 nurses, and they went up the chain and  
 19 discussed it. I really -- you know, it's  
 20 been three or four years ago.

21 **Q Our sound just cut out. Three or**  
 22 **four years ago, would you please restate**  
 23 **that?**

24 A Yes. I said it would have been  
 25 three or four years ago, but I don't

1 remember specifically who I talked to. It  
2 might have been a lower level nurse who then  
3 went to her superiors to see if they could  
4 accommodate the -- getting the towels that I  
5 asked for.

6 **Q Thank you. Doctor, is there any**  
7 **documentation that you're aware of that**  
8 **relates to this whole process that we're**  
9 **talking about, the process by which you**  
10 **requested towels and the hospital then**  
11 **obtained towels? In other words, was there**  
12 **a purchase order form, or a memo or a note**  
13 **or a handwritten memo, any -- anything that**  
14 **you could think of in writing that relates**  
15 **to this topic that we're talking about?**

16 A Well, there isn't any that I know  
17 about, but, of course, that would not be  
18 typically something that I would know about.  
19 I mean, that would be an internal hospital  
20 issue in terms of whether or not they had  
21 policies which required documentation of  
22 special requests or whatever, so I don't  
23 know of any.

24 **Q Now, we know now that this**  
25 **particular towel that was involved with**

1 **Mrs. O'Neal did not have any radiopaque**  
2 **tagging or -- or threading in it. Did you**  
3 **know at the time of her operation back in**  
4 **January of 2003 that these towels did not**  
5 **have any radiopaque tagging or threading in**  
6 **them?**

7 A I don't think I knew that. I --  
8 I -- I think that I would have assumed that  
9 they would have fulfilled all the  
10 requirements that such a towel would be  
11 expected to fulfill, which would include the  
12 radiopaque tagging. I don't have -- I don't  
13 specifically remember what I knew at that  
14 time three years ago, though.

15 **Q Okay. Do you recall any discussions**  
16 **either before or -- or after this event**  
17 **wherein you discussed with employees, you**  
18 **know, administration or others, from**  
19 **Kettering Medical Center, discussed with**  
20 **them why -- well, first of all, discussing**  
21 **that you needed to have towels or requesting**  
22 **towels that had radiopaque tagging or**  
23 **threading?**

24 A Well, my recollection, again, is  
25 somewhat vague, but the initial issue was

1 that, you know, I -- I told them I like to  
2 use towels in this capacity, that they --  
3 they served the purpose that I needed for  
4 good closure, and there was -- you know,  
5 there was some discussion that, you know, we  
6 didn't want to use regular draping towels  
7 because they said that they thought they  
8 could get towels that would be satisfactory  
9 for that purpose. I don't think that there  
10 was a specific conversation about whether or  
11 not they would have a radiopaque --  
12 radiopaque stripe. I -- again, I -- I  
13 presume that at the time I simply assumed  
14 that they would.

15 **Q Have you, Doctor, since this**  
16 **incident, have you done any research with**  
17 **respect to surgical towels and, you know,**  
18 **what's available out there on the market?**

19 A No, I haven't. I simply stopped  
20 using them.

21 **Q Certainly from the -- your**  
22 **involvement in the Bowlin litigation, you**  
23 **were aware at the time of Mrs. O'Neal's**  
24 **surgery that it can be dangerous to use**  
25 **surgical towels for this particular surgery**

1 **that do not have any radiopaque tagging or**  
2 **threading in them, correct?**

3 MS. HARLAN: ☐ Objection.

4 THE WITNESS: ☐ Well, I -- I guess I  
5 would put it somewhat differently. I mean,  
6 we put lots of things inside the abdominal  
7 cavity: sponges, laparotomy pads, and in  
8 this case, these towels, and anything that's  
9 put in that is incorrectly counted:  
10 needles, other kinds of devices,  
11 instruments, all kinds of things during the  
12 course of a whole variety of different  
13 operations that the surgeons perform,  
14 anything that you put in that is incorrectly  
15 counted is dangerous.

16 The radiopaque striping would have a  
17 benefit only at some later time to detect  
18 this, but if an -- if an item is retained  
19 because of an incorrect count, the  
20 radiopaque striping doesn't help you unless  
21 somebody somewhere along the line would take  
22 an X-ray.

23 **Q Right.**

24 A So, in many situations, it really  
25 wouldn't be -- be very helpful.

1 **Q** But certainly you understood in  
2 January of 2003 that, in the event a -- a  
3 piece of, or a towel had been left behind  
4 that did not have radiopaque striping, that  
5 it made it more difficult for subsequent  
6 detection, and that that can pose a hazard  
7 to a patient who has retained one of these  
8 towels.

9 MS. HARLAN: ☐ Objection.

10 THE WITNESS: ☐ I think there is  
11 some additional degree of risk, yes.

12 BY MR. KULWICKI:

13 **Q** Okay.

14 A That's why we specified getting  
15 towels that were only to be used for this  
16 purpose.

17 **Q** And -- and you said "we." Are you  
18 talking about you or -- or are there -- were  
19 there other physicians involved in this  
20 discussion?

21 A No. I just -- I just meant myself  
22 and -- and the people that I talked to about  
23 it.

24 **Q** So, your belief would have been,  
25 since you were asking them to obtain a towel

1 that was going to be part of the surgical  
2 count --

3 A Correct.

4 **Q** -- and that was going to be used  
5 intraabdominally, that you -- you made the  
6 assumption that they would obtain a product  
7 that was made for that purpose.

8 A Well, or at least was consistent  
9 with current standards for that use, yes.

10 **Q** Can -- can we agree that a towel  
11 that did not have radiopaque tagging or  
12 threading in it was not consistent with the  
13 standards for -- applicable to towels that  
14 were being used as you were using this  
15 towel?

16 MS. HARLAN: ☐ Objection.

17 THE WITNESS: ☐ I think that's --  
18 that's a fair statement, yes.

19 BY MR. KULWICKI:

20 **Q** And with respect to those standards,  
21 are you referring to the American  
22 Association of Operating Room Nurses  
23 standards?

24 A Yes.

25 **Q** Are there any other standards that

1 you're aware of that specify or discuss the  
2 use of radiopaque striping or tagging in  
3 towels or sponges or anything else that are  
4 going to be used intraabdominally?

5 A Not that I'm aware of.

6 **Q** Doctor, have you used, to your  
7 knowledge, towels that had radiopaque  
8 tagging or striping or threading in them for  
9 purposes of retraction in a bariatric  
10 surgery?

11 A I -- I don't -- I don't recall for  
12 sure what they were using in Sycamore. When  
13 this occurrence came to pass with  
14 Mrs. O'Neal, I just quit using them  
15 altogether, and I can't recall whether the  
16 hospital on its own began using towels with  
17 radiopaque striping prior to that incident  
18 coming to light or not. I'm sure somebody  
19 in the hospital would know that.

20 **Q** Based on your -- your understanding,  
21 is there any advantage to using surgical  
22 towels that have radiopaque striping,  
23 tagging or threading in them versus towels  
24 that do not have that?

25 A Well, not from a surgical point of

1 view, no.

2 **Q** All right. Now --

3 A The striping, there's typically very  
4 tiny threads, and you wouldn't be able to  
5 know whether they were in there or not  
6 anyway.

7 **Q** In performing this surgery without  
8 any towel, have you found that it is more  
9 dangerous to the patient in any regard?

10 A Well, the exposure's not as good. I  
11 wouldn't go quite so far as to say it's more  
12 dangerous, but, you know, everything  
13 surgeons do has a degree of risk. The  
14 easier that you can make the procedure, the  
15 safer it is. So, you know, you can draw  
16 your own conclusion from that.

17 **Q** Okay. Now, you'll recall from your  
18 review of the -- the depositions of the  
19 nurses, and I think there was a surgical  
20 tech, that there was a discussion about the  
21 use of these towels being a change in  
22 their -- their usual policy. Do you  
23 remember that discussion in the  
24 depositions?

25 A I remember reading about it.

1 **Q Okay. Did you have an understanding**  
2 **that the use of these towels was going to be**  
3 **a change in the normal policy?**

4 A Well, I really didn't know that much  
5 about what the policy was. I mean, I knew  
6 that they were not using towels like this at  
7 that time, and I asked them if -- you know,  
8 if we could, and they said they would look  
9 into it, and they came up with these towels,  
10 but I really -- you know, I don't read those  
11 OR policies. That's not my job. That's  
12 theirs.

13 **Q Okay. Now, Doctor, with respect to**  
14 **this surgery, you know, backing out the --**  
15 **the towel issue, can we agree that it was a**  
16 **successful surgery?**

17 A Yes.

18 **Q There were no intraoperative**  
19 **complications, true?**

20 A That is true.

21 **Q And at least for -- until**  
22 **Mrs. O'Neal started having symptoms of this**  
23 **towel, there were no -- there were no**  
24 **postoperative complications for several**  
25 **weeks, correct?**

1 A That is correct.

2 **Q Now, Doctor, with respect to getting**  
3 **informed consent from patients that undergo**  
4 **bariatric surgery, what -- first of all, how**  
5 **do you go about doing that? Do you -- do**  
6 **you just give it to them yourself in person,**  
7 **or do you show them, you know, a film strip**  
8 **that -- that discusses the risks and**  
9 **benefits, or do you provide them something**  
10 **in writing, or all of the three, or**  
11 **something else, if you could just share that**  
12 **with us?**

13 A Well, I -- I do an informational  
14 session that usually lasts about four or  
15 five hours in length. I go through the --  
16 the history of -- of bariatric surgery, some  
17 of the issues involving causation of morbid  
18 obesity, procedures that used to be done and  
19 have been abandoned, why we're doing what  
20 we're doing now. I have a fairly in-depth  
21 discussion about the -- the actual  
22 performance of the procedure and how we do  
23 it, and then I have a pretty detailed  
24 discussion about the -- the most common  
25 kinds of complications, and that's done in a

1 group setting with, oh, anywhere from five  
2 or ten to sometimes 15 or 20 prospective  
3 patients.

4 Following that, the patients come  
5 back to the office later. They meet with my  
6 PA where he does another similar kind of a  
7 small group session for the patients who are  
8 probably a week or so pre-op, answering  
9 questions, explaining issues and so forth,  
10 and then I meet with the patients  
11 individually myself.

12 I make a special point of discussing  
13 the risks and complications and asking them  
14 if they have any questions, and -- and if  
15 they want to talk about, you know, any other  
16 aspects of the procedure, of course, also.

17 **Q Do you provide the prospective**  
18 **patient with anything in writing with**  
19 **respect to the risks of this procedure,**  
20 **either --**

21 A Well, of course, they have to sign a  
22 written consent for surgery which includes  
23 some mention of risks. I don't remember off  
24 the top of my head exactly how those are --  
25 are listed, and we also have some written

1 information we provide to patients. It's  
2 not -- that information is not oriented so  
3 much towards surgical risk as much as it is  
4 post-operative issues and what patients  
5 might run into and -- and need to look for,  
6 and what it is they might, you know, want to  
7 call us about, and things like that.

8 **Q Now, it's also my understanding that**  
9 **you typically will show a slide show or**  
10 **something during the course of this**  
11 **informational session; is that correct?**

12 A That is correct.

13 **Q And would one of the slides in there**  
14 **list the risks of the procedure?**

15 A I have several slides on the risks,  
16 yes.

17 **Q Do you -- do you still have that**  
18 **slide show?**

19 A Yes. It's in my computer.

20 **Q And is there a way that you could**  
21 **print out those portions of it that**  
22 **reference risks?**

23 A Yes.

24 **Q And -- and I think you were trying**  
25 **to explain this, and I -- I didn't quite get**

1 my arms around it. Would the risks that are  
2 laid out in your slide show presentation,  
3 would those be pretty much the risks of the  
4 surgery that you discuss with the patient,  
5 or would there be risks in addition to  
6 what's set forth in the slide show that you  
7 discuss with the patient?

8 A Well, on our -- on our one-on-one  
9 meeting with the patient, other issues may  
10 come up that might not have been included in  
11 the slide show. The slide show typically  
12 has the -- the risks that we most often  
13 encounter and discuss, such as leaks and  
14 pulmonary emboli, pneumonia, bleeding,  
15 infection, issues like that. I mean,  
16 obviously, as I'm sure you're aware of,  
17 there's no way to include every conceivable  
18 risk, but it has -- it has the most common  
19 ones associated with this specific kind of  
20 surgery. Some of them are generic to all  
21 kinds of abdominal surgery like adhesions  
22 and bowel obstructions, and some of them are  
23 more specifically related to gastric bypass  
24 surgery, for example, stomal stenosis.

25 Q Okay, now, with regard to this

1 one-on-one meeting that you have with the  
2 patient, do you -- first of all, do you  
3 specifically recall the one-on-one  
4 conversation that you had with Mable  
5 O'Neal?

6 A No, I don't -- I don't think that I  
7 do.

8 Q Do you recall her generally as a  
9 patient? In other words, do you have a  
10 picture in your mind's eye of what she looks  
11 like and who she was?

12 A Yes, yes, I certainly do. In fact,  
13 her patient was a daughter -- or her  
14 daughter was a patient of mine as well.

15 Q That's correct.

16 A So, I knew the family from that  
17 experience also.

18 Q And to clarify, do you have any  
19 specific recollection sitting here today of  
20 any risks that you spoke with her about  
21 during this one-on-one meeting that were in  
22 addition to the risks that were discussed as  
23 part of the, you know, the routine  
24 informational session with you and your  
25 PA?

1 A No, I don't have any specific  
2 recollection.

3 Q Now, one of the risks of the  
4 procedure I think you mentioned is pulmonary  
5 emboli.

6 A Correct.

7 Q And is that something that's  
8 mentioned in the slide show presentation?

9 A Well, the slide show actually refers  
10 to DVT, which is deep venous thrombosis, but  
11 in the course of my presentation, I use that  
12 to further talk about pulmonary emboli,  
13 because the -- the deep venous thrombosis in  
14 and of itself is not particularly life-  
15 threatening. It's only when a clot breaks  
16 free and becomes a pulmonary embolus. So, I  
17 always talk about pulmonary emboli --

18 Q You died down. I think -- I think  
19 part of the problem is we lose you every  
20 once in a while, and it sounds like it might  
21 be somebody shuffling paper nearby the --  
22 the conference or the -- what the hell do  
23 you call these things? Nearby this thing.

24 THE VIDEOGRAPHER: Microphone.

25 Q The microphone, good work.

1 A We will -- we will try to minimize  
2 that; won't we?

3 MS. HARLAN: ☐ We certainly will.

4 BY MR. KULWICKI:

5 Q I appreciate that, and, Doctor, if  
6 you could, maybe we should have the court  
7 reporter read back to you where she left off  
8 so that you can make sure you've completed  
9 this response.

10 (At this time the answer was read  
11 back.)

12 BY MR. KULWICKI:

13 Q Do you remember the rest of your  
14 response?

15 A Yes, I said I always talk about  
16 pulmonary emboli, even though the slide  
17 itself only refers to deep venous  
18 thrombosis.

19 Q Okay, thank you. And, Doctor, with  
20 respect to the risk of pulmonary emboli  
21 following a bariatric surgery, can you  
22 quantitate that? In other words, can you  
23 give me a percentage of patients that will  
24 suffer that complication?

25 A Well, the -- I believe my slide has



1 a -- a figure that I gleaned from the  
2 literature about that. I don't remember off  
3 the top of my head exactly what it is. It's  
4 something like, you know, a half a percent  
5 or something like that. I know that in my  
6 practice, I've done about 2500 gastric  
7 bypasses, and I've only had two documented  
8 pulmonary -- pulmonary emboli, and neither  
9 one of those was -- was fatal, fortunately.

10 So, my personal experience, I guess you  
11 would say, is -- is much better than what --  
12 what is in the literature, but there is a --  
13 there is a number on the slide that I got --  
14 I got out of an article somewhere.

15 **Q Okay, and, Doctor, with respect to**  
16 **the risk of -- of pulmonary embolism, is**  
17 **that increased because the patients that you**  
18 **do the surgery on are -- are obese, and**  
19 **because abdominal surgery's involved, and**  
20 **because the patient is somewhat immobilized**  
21 **following the surgery? Are those the three**  
22 **risk factors that increase the risk of PE in**  
23 **bariatric patients?**

24 A Well, I would agree with the first  
25 two risk factors that you mentioned. In my

1 own practice, I -- I don't know that I  
2 would -- that I would include that last risk  
3 factor. We routinely do these operations in  
4 about one hour. We don't use Foley  
5 catheters. We use sequential compressive  
6 devices on the legs to create some increased  
7 blood flow and -- and turbulence. We use  
8 local anesthesia in the abdominal wall at  
9 the end of the procedure to enhance the  
10 patient's postoperative comfort, and -- and  
11 very typically have the patients up and  
12 walking within an hour or two of -- of  
13 surgery. So, you know, and I -- and  
14 frankly, I -- I believe that this aggressive  
15 response at limiting the patient's  
16 inactivity may account for why we've had an  
17 extremely low rate of pulmonary emboli in my  
18 own practice. The first two are correct.

19 **Q Okay, thank you. Incidentally,**  
20 **going back to Mrs. O'Neal's surgery, did you**  
21 **encounter any unusual anatomy during the**  
22 **course of her procedure?**

23 A I really do not have a specific  
24 recollection of her operation.

25 **Q You talk about --**

1 A From the notes and so forth, it was  
2 a pretty routine case.

3 **Q Okay, and you mentioned that**  
4 **routinely, the procedure takes about an**  
5 **hour. Do you remember hers taking roughly**  
6 **about the same amount of time?**

7 A Again, I don't remember for sure.  
8 That would be on the operative record  
9 someplace.

10 **Q Now, with respect to the risk of PE**  
11 **following bariatric surgery, is -- is there**  
12 **a period of time when the risk is highest?**

13 A Well, I would say it's -- it's in  
14 the first several hours, or not -- I'm  
15 sorry, the first several days after surgery,  
16 yes.

17 **Q Okay.**

18 A It's been well documented that the  
19 deep venous thrombi that could eventually  
20 result in a pulmonary embolus are most  
21 likely to form on the operating table.  
22 That's been studied with radioactive  
23 fibrinogen, and, so, that's where these  
24 blood clots really start, which is one of  
25 the reasons why I think it's so beneficial

1 to the patients to have such a brief  
2 operation, but if the clot propagates, then,  
3 and -- and that means it grows, then, then,  
4 over the next several days, maybe out as far  
5 as a week or so, that would be really the  
6 period of risk. Anything that happened very  
7 much after that, I guess I would say I'd  
8 have to question whether it had any direct  
9 relationship to the surgery itself.

10 **Q Thank you. Doctor, in this case,**  
11 **have you had a chance to review the autopsy**  
12 **and the death certificate?**

13 A No, I have not.

14 **Q All right. Postoperatively in these**  
15 **patients, is there something that you do via**  
16 **medications to prophylax against PE?**

17 A Yes. We use a standard regimen of  
18 fractionated heparin.

19 **Q And how long do you -- and let's**  
20 **just talk about Mrs. O'Neal. If you need to**  
21 **refer to your records, please do. How --**  
22 **how long did you have her on fractionated**  
23 **heparin?**

24 A Well, I -- it would be my routine to  
25 start this preoperatively, usually an hour

1 or so preoperatively when they're in the  
2 preoperative holding room, and then I  
3 usually continue this until the patients  
4 leave the hospital, so that would be -- I  
5 don't know how long she was in the first  
6 time. It's usually 20 -- it's usually 48 to  
7 72 hours.

8 **Q And, then, Doctor, with respect to**  
9 **after that point in time, do you give them a**  
10 **prescription typically, or did you give**  
11 **Mrs. O'Neal a prescription for any type of**  
12 **anticoagulant or any other type of**  
13 **medication for --**

14 A No, the heparin is a subcutaneous  
15 shot. There are some surgeons -- I've  
16 talked to surgeons who use Coumadin which is  
17 an oral anticoagulant. In my opinion,  
18 Coumadin is -- Coumadin use in this  
19 situation is really overly aggressive and --  
20 and not appropriate. Certainly, it would  
21 have been in Mrs. O'Neal's case, but -- but  
22 just as a routine I -- I would not advocate  
23 the use of Coumadin, nor is it standard.

24 **Q Okay.**

25 A There are a few surgeons who use

1 it.

2 **Q Now, in -- in addition to medical**  
3 **therapy to protect against pulmonary**  
4 **embolism, do you -- as a treating surgeon,**  
5 **do you have sort of in the back of your mind**  
6 **as you talk to the patient that this is a**  
7 **potential risk, and ask questions pertinent**  
8 **to it? In other words, do you ask the**  
9 **patient: Have you had any foot swelling,**  
10 **leg swelling, lower leg pain, et cetera,**  
11 **to -- to find out whether or not they're**  
12 **experiencing anything consistent with a DVT,**  
13 **or likewise ask them about, you know,**  
14 **shortness of breath, or pain in the chest,**  
15 **or any of those other things that might be**  
16 **consistent with pulmonary embolus?**

17 A Well, we certainly take a medical  
18 history, and we know what medications  
19 they're on. If they have a history of  
20 previous DVT or pulmonary embolus, we would  
21 hope to elicit that, assuming that, when we  
22 ask the question, the patients gave us the  
23 right answer. Sometimes people don't  
24 remember to tell us, but as far as the  
25 things like shortness of breath, most of our

1 patients have shortness of breath, sometimes  
2 severe. It's usually chronic. The same  
3 thing applies to distal swelling. It's one  
4 of the problems that people suffer from when  
5 they're morbidly obese, so those particular  
6 findings quite honestly wouldn't be of very  
7 much value to us, even though we -- you  
8 know, we do a physical exam. We check for  
9 swelling, and we ask about those things.  
10 Much more helpful to us would be any history  
11 of previous DVTs or PEs.

12 **Q I believe Mrs. O'Neal indicated that**  
13 **she had shortness of breath prior to the**  
14 **surgery, but did she have anything that**  
15 **would, in your mind, raise the possibility**  
16 **that she was -- she had a prior history of**  
17 **DVT or PE or even questionably?**

18 A Not that I recall. As I said, I --  
19 I would guess off the cuff that probably at  
20 least 90 percent of our patients have  
21 shortness of breath. It's part of the  
22 problem.

23 **Q Right, and you answered a question,**  
24 **but I'm not sure it was my question. Let**  
25 **me -- let me restate it, and see if maybe I**

1 **can get there. After the surgery, in the**  
2 **course of your follow-up visits, and I know**  
3 **you have several that are -- that are**  
4 **planned where you follow up with the patient**  
5 **and ask how they're doing; in the course of**  
6 **those visits, is one of the things in the**  
7 **back of your mind postoperatively that --**  
8 **to -- to ask the patient about their**  
9 **current -- current condition with an eye**  
10 **towards seeing if they do have any signs or**  
11 **symptoms of DVT or PE?**

12 A Our first postoperative visit is at  
13 two weeks post-op, and to be honest, by that  
14 time, my concern about pulmonary emboli in  
15 these patients is actually quite low.

16 **Q Okay. Thank you. Now, with respect**  
17 **to Mrs. O'Neal's care, did you have an**  
18 **opportunity to review the treatment that she**  
19 **received back home in Mansfield by her**  
20 **primary care doctor and by the physicians at**  
21 **Med Central Health System?**

22 A No, I did not.

23 **Q At the two-week visit, what was your**  
24 **feelings about Mrs. O'Neal's recovery?**

25 A I was -- again, I don't have a

1 specific recollection, but my -- from  
2 reviewing the notes and so forth, she seemed  
3 to be doing pretty well; even better at the  
4 six-week visit.

5 **Q Thank you.**

6 A The one -- the one thing I noticed  
7 at the -- at the two week was that her  
8 weight loss was a little low, but by six  
9 weeks she was back within what we would  
10 normally expect to see which was 28 pounds  
11 of weight loss at six weeks.

12 MR. KULWICKI: There was some noise  
13 immediately before you answered that  
14 question, and I just want to ask if either  
15 counsel interposed an objection.

16 MS. HARLAN: ☐ No.

17 BY MR. KULWICKI:

18 **Q Okay, thank you. Now, Doctor,**  
19 **although you haven't had a chance to review**  
20 **the autopsy, you were involved in**  
21 **Mrs. O'Neal's care during her last hospital**  
22 **admission, correct?**

23 A That's correct.

24 **Q And let me read to you the --**

25 MR. COWDREY: David -- David,

1 understand the question.

2 BY MR. KULWICKI:

3 **Q Yeah. I'm just wondering if you**  
4 **agree with that opinion, that the cause of**  
5 **her death was PE related to the retained,**  
6 **and they say "sponge," but obviously it was**  
7 **a towel; retained towel with recent GI**  
8 **bleeding contributing.**

9 MR. COWDREY: And I'll object.

10 MS. HARLAN: If you qualify --

11 THE WITNESS: ☐ I -- I don't think  
12 that I have a basis to agree or disagree  
13 with that. I mean, they're talking about  
14 the findings that they saw at autopsy, and I  
15 wasn't there.

16 BY MR. KULWICKI:

17 **Q Well, okay, then, clinically,**  
18 **Doctor, would you agree that, based on your**  
19 **care and treatment of the patient at the end**  
20 **of her life, that, in your opinion, she died**  
21 **as a result of PE due to complications of**  
22 **the retained towel?**

23 A I don't know that I would agree with  
24 that. If she died of a pulmonary embolus as  
25 this report suggests, that -- that raises a

1 this is Bob Cowdrey. I've got the chart  
2 with me if you want me to show it to the  
3 doctor, what you're referring to.

4 MR. KULWICKI: ☐ Sure, that'd be  
5 fine. What I'm looking at is the -- the  
6 two-page summary from the postmortem exam,  
7 and it's the first two pages that has the  
8 coroner's opinion, so that would be page two  
9 signed by Dr. Casto and Dr. Lehman.

10 THE WITNESS: You don't mind if I  
11 skim over the first page; do you?

12 MR. KULWICKI: I do not.

13 THE WITNESS: Okay, I've looked at  
14 both of those pages. You want me to look at  
15 page two?

16 BY MR. KULWICKI:

17 **Q Yes, please, and under the opinion**  
18 **there, it says, "It is our opinion that the**  
19 **cause of Mable O'Neal is pulmonary**  
20 **thromboembolism due to complications of a**  
21 **retained surgical sponge with recent GI**  
22 **bleeding contributing." Do you agree with**  
23 **that?**

24 MS. HARLAN: ☐ Objection.

25 THE WITNESS: ☐ I don't think I

1 question I had never considered before in  
2 terms of what was the actual cause of her  
3 death, because I guess I assumed it was  
4 sepsis. If that was a pulmonary embolus  
5 instead, then, the question arises whether  
6 that pulmonary embolus had any relationship  
7 at all to the retained item.

8 **Q And let me ask you, since this is**  
9 **the only chance I get to talk with you**  
10 **before trial, and I need to understand your**  
11 **opinions, do you have an opinion to a**  
12 **reasonable degree of medical probability as**  
13 **to what was the cause of Mable O'Neal's**  
14 **death as we sit here today?**

15 A Well, as we sit here today, with me  
16 seeing this autopsy report for the first  
17 time, I would say that the cause of her  
18 death appears to be a pulmonary embolism of  
19 the saddle type. That saddle type means  
20 that it's a large clot which folds over the  
21 bifurcation of the pulmonary artery,  
22 implying, first of all, it's a very large  
23 clot occluding both branches of the  
24 pulmonary artery, and making a reasonable  
25 presumption that that was the immediate

1 cause of her death.  
 2 The -- the issue, though, that that  
 3 raises in my mind is: How long had that  
 4 clot been there? She was five months  
 5 post-op. It's pretty impossible to -- to --  
 6 in my opinion, to relate the origin of that  
 7 clot to her surgery from January. I know  
 8 that she had been ill and had bleeding and  
 9 pneumonia and diverticulitis and things like  
 10 that, so the question then would be, if she  
 11 died as a result of this pulmonary embolus,  
 12 then, was this -- was the clot that broke  
 13 free and caused the pulmonary embolus  
 14 something that preceded her most recent  
 15 hospitalization and illness? It might have  
 16 been there for several weeks. It's hard to  
 17 say. I mean, it's impossible to say.  
 18 **Q Okay. Let me -- let me parse**  
 19 **through that.**  
 20 **A Okay.**  
 21 **Q First, with respect to the -- your**  
 22 **opinions and -- and that's really what I'm**  
 23 **more concerned about, and I'm less concerned**  
 24 **about your interpretation of the autopsy,**  
 25 **and more concerned about opinions that you**

1 **hold to a reasonable degree of probability,**  
 2 **and opinions that you feel comfortable based**  
 3 **on your training and background in -- in**  
 4 **rendering.**  
 5 **A Correct.**  
 6 **Q And -- and what I want to ask you**  
 7 **is, again, the same question, is: Do you**  
 8 **have an opinion here, and -- and you**  
 9 **certainly can say: I don't have an opinion,**  
 10 **or I don't feel fully qualified to render an**  
 11 **opinion. Do you have an opinion as to what**  
 12 **was the direct and proximate cause of**  
 13 **Mrs. O'Neal's death?**  
 14 **A Well, it appears that it was a**  
 15 **pulmonary embolism.**  
 16 **Q Okay, and you're basing that**  
 17 **exclusively on the autopsy report that**  
 18 **you've just read during the course of this**  
 19 **deposition?**  
 20 **A That's correct. This is a surprise**  
 21 **to me.**  
 22 **Q Okay. Now, certainly, we can agree**  
 23 **that abdominal surgery increases the risk of**  
 24 **pulmonary embolism, true?**  
 25 **A That is true.**

1 **Q And we can agree that sepsis**  
 2 **increases or can increase the risk of**  
 3 **pulmonary embolism, true?**  
 4 **A I think -- I don't know that I would**  
 5 **agree with that. That's a much more**  
 6 **complicated answer because sepsis has so**  
 7 **many metabolic effects. It could, in some**  
 8 **situations, actually decrease it, depending**  
 9 **on the circumstances. I'm not trying to be**  
 10 **evasive. I just -- I just couldn't give a**  
 11 **blanket agreement to that statement.**  
 12 **Q Fair enough, but you -- you**  
 13 **acknowledge that, based on your medical**  
 14 **training, that sepsis can create an**  
 15 **inflammatory response within the body that**  
 16 **leads to hypercoagulability which can**  
 17 **increase the risk of pulmonary embolism?**  
 18 **A That's true. I'm just saying there**  
 19 **are situations where it can go in the**  
 20 **opposite direction as well.**  
 21 **Q Fair enough, and again those -- the**  
 22 **study of that process, the**  
 23 **hypercoagulability and -- and -- related to**  
 24 **sepsis would be more within the expertise of**  
 25 **a hematologist or of an infectious disease**

1 **doctor than a surgeon, true?**  
 2 **A I would agree with that, yes.**  
 3 **Q And likewise, we can agree that**  
 4 **immobility, say, from sepsis or from**  
 5 **inactivity due to weakness and -- and**  
 6 **illness can increase the risk of pulmonary**  
 7 **embolism, true?**  
 8 **A Yes.**  
 9 **Q Now, with regard to the testimony of**  
 10 **the nurses and the surgical tech that were**  
 11 **involved in Mrs. O'Neal's operative and --**  
 12 **and postoperative care, immediate**  
 13 **postoperative care, they acknowledge or they**  
 14 **state in their depositions that it was their**  
 15 **responsibility to conduct a count at three**  
 16 **different points during the course of that**  
 17 **procedure, and would you agree with that?**  
 18 **A Yes, I would.**  
 19 **Q And -- and I believe, and I don't**  
 20 **want to misquote; I believe that they**  
 21 **further state that it is ultimately their**  
 22 **responsibility to ensure that towels that**  
 23 **are subject to the count and are placed in**  
 24 **the patient are removed, and it's ultimately**  
 25 **their responsibility. Would you agree with**

1 that?

2 A Yes, I would.

3 **Q What is your role with respect to**  
4 **removing towels that are used during the**  
5 **course of this procedure?**

6 A Well, obviously, if there was an  
7 object, a towel, a sponge, an instrument or  
8 anything else that was known to me to be  
9 retained in the abdomen, I would -- I would  
10 certainly have a responsibility to -- to  
11 remove it.

12 **Q Okay.**

13 A But, of course, the -- you know, the  
14 nature of what we're doing and the process  
15 is such that no surgeon can keep track of  
16 all the things that are put in the abdomen,  
17 taken out, put in and taken out during the  
18 course of an operation, so that the  
19 procedures have been established for these  
20 counts, and surgeons, of course, rely on  
21 them.

22 **Q Well --**

23 A I guess -- I guess I don't -- I  
24 don't mean to be jumping ahead, but I don't  
25 believe that I have an independent

1 the towel too, right?

2 A That is correct.

3 **Q Okay, and do you keep track of -- of**  
4 **sponges or towels in any way during the**  
5 **course of a procedure?**

6 A No, unless there's one that's  
7 obviously there.

8 **Q Okay.**

9 A But, you know, I've been doing this  
10 for a very long time. I've seen many, many  
11 situations where laps, towels, sponges or  
12 whatever, were hidden from view, not easily  
13 palpated, and that's why we do the counts.

14 **Q After you are done with the bypass**  
15 **procedure itself, is it your routine to**  
16 **conduct a thorough inspection of the**  
17 **peritoneum before closure?**

18 A No. That's what I just said. I  
19 believe that that could be potentially  
20 dangerous. It's certainly meddlesome. It's  
21 unnecessary, and I don't think it's good  
22 care. Any fragile areas that can be damaged  
23 by poking your hands all over the place, you  
24 just have to be careful and not do more than  
25 you need to.

1 responsibility to go searching for things  
2 once I've been told that the count's  
3 correct. I think that would be -- that  
4 would be dangerous. It would be meddlesome,  
5 and it would be inappropriate. You could --  
6 you could cause harm by searching all over  
7 the thing -- all over the abdominal cavity  
8 when you've already been informed that the  
9 counts are correct.

10 **Q Well, ultimately, it's you that**  
11 **places the towel there, correct?**

12 A It's me that places the towel there;  
13 that's correct.

14 **Q And I think you said earlier that**  
15 **you just use one towel; is that true?**

16 A There have been times in the past  
17 where I've used two. Sometimes I would  
18 use -- I -- I typically use one in the left  
19 upper quadrant. There have been times when  
20 I used a second one. I really pretty much  
21 quit using the second one several -- a few  
22 years ago. I don't remember exactly when.  
23 At this time it would have been my routine  
24 to only use one towel.

25 **Q And you would be the one who removes**

1 **Q Okay. Now, Doctor, with regard to**  
2 **the Bowlin litigation, my understanding from**  
3 **your testimony in that case is that there**  
4 **was also a change in policy at Middletown**  
5 **hospital while you were there wherein they**  
6 **went from using the blue towels to white**  
7 **towels; is that true?**

8 A That is my recollection, yes.

9 **Q And do you know what the purpose was**  
10 **for that change? Is that so that they --**  
11 **the white ones were counted, and the blue**  
12 **ones were not counted? Is that so they'd**  
13 **become part of the count?**

14 A That's my understanding, yes.

15 **Q Okay, and likewise, at Kettering**  
16 **Medical Center, your understanding was that**  
17 **the reason why they used white towels was so**  
18 **that they would be part of the -- the**  
19 **count?**

20 A Correct.

21 **Q Okay. Doctor, have you had any**  
22 **discussions with the administration at**  
23 **Kettering Medical Center with respect to**  
24 **this particular incident?**

25 MS. HARLAN: ☐ Objection.

1 THE WITNESS: □None other than  
2 immediately after this with the people in  
3 the operating room, but nobody at a higher  
4 administrative level.

5 BY MR. KULWICKI:

6 **Q And whom did you speak with in the**  
7 **operating room about this?**

8 A Well, I don't remember for sure.  
9 I -- I -- I think, you know, I have -- I  
10 recall, I believe, having a conversation  
11 with Linda Sich. You know, it wasn't so  
12 much in terms of the policy and procedures  
13 of the hospital as much as it was everyone's  
14 distress over the -- the misfortune that had  
15 befallen Mrs. O'Neal and her family.

16 I think I've talked to Mr. Kintz who  
17 I believe was the scrub nurse on this case,  
18 trying to figure out how we could have a  
19 correct count and, yet, have a retained  
20 towel.

21 **Q And -- and let me ask you about**  
22 **those, but before I do, can you tell me were**  
23 **these conversations -- were these one-on-one**  
24 **conversations, one with Mr. Kintz and then**  
25 **one with Mrs. Sich?**

1 A Well, I mean, these weren't formal  
2 appointments or anything. These were  
3 informal conversations within the -- the --  
4 the confines of the operating room or the  
5 hallways immediately adjacent where we would  
6 run into each other, and, for example, I  
7 think I ran into Linda at one point, and she  
8 said: well, how's Mrs. O'Neal doing, and I  
9 said: well, not very well, and, you know,  
10 sort of, I don't know how you describe it; a  
11 mutual consolation. Everybody was pretty  
12 upset about this.

13 **Q Tell me if, during that conversation**  
14 **with Linda Sich, whether she made any**  
15 **overture to you or made any assurance to you**  
16 **that the hospital would accept**  
17 **responsibility for this; that, in essence,**  
18 **it was their responsibility rather than**  
19 **yours.**

20 MR. COWDREY: Object.

21 THE WITNESS: I don't remember  
22 talking -- I mean, we -- we may have  
23 discussed that. It would be wonderful for  
24 me to say: oh, yeah, I remember that  
25 conversation. I really don't.

1 BY MR. KULWICKI:

2 **Q Okay.**

3 A I don't remember us saying that, or  
4 her saying that; I'm sorry.

5 **Q Now, with regard to Mr. Kintz, you**  
6 **indicated that you had a conversation about**  
7 **how could there have been a correct count,**  
8 **and then missed this towel. Do you remember**  
9 **what -- how that conversation went or what**  
10 **the subject matter of that conversation**  
11 **was?**

12 A I mean, it's sketchy. The only --  
13 you know, I mean, this is very difficult for  
14 us to comprehend. The only thing that --  
15 that I recall him saying was that, and this  
16 is -- I'm trying to recall what he said to  
17 me, you know, some, a couple of years ago,  
18 but it seems like he said something like  
19 these towels came in packs of two, and he  
20 was speculating, of course, but I think he  
21 speculated in terms of whether or not these  
22 towels could have been somehow folded  
23 together so that they counted one towel  
24 whereas there were actually two. They could  
25 have given me the towels which I placed as

1 packing, and then when I removed the  
2 towel -- the towel is actually located in --  
3 in a position where it's not easily  
4 viewable. It's not visible. So, if I  
5 saw -- if I pulled down and saw the corner  
6 of the towel, and pulled the towel out, gave  
7 them the towel, and that created a correct  
8 count, if they had miscounted at the  
9 beginning and counted one towel instead of  
10 two, that could have left a towel in its --  
11 in its -- inside the abdomen. When I  
12 thought I took it out, they thought we had a  
13 correct count, but he thought that could  
14 have occurred if the two towels that came in  
15 the pack were incorrectly counted as one.  
16 Does that make sense to you?

17 **Q It does.**

18 A And that's speculation. We don't  
19 know what happened, really.

20 MR. COWDREY: And I'll object and  
21 move to strike since the doctor's indicated  
22 that it is speculative.

23 BY MR. KULWICKI:

24 **Q But, again, it would be the -- the**  
25 **hospital personnel that are assisting you in**

1 the operating room, it would be their  
2 responsibility to make sure that they were  
3 counting the towels before they gave them to  
4 you accurately in order that they can have  
5 an accurate count at the end of the  
6 procedure, correct?

7 A Well, obviously, if the count at the  
8 -- before the procedure begins is incorrect,  
9 then, the subsequent counts are not  
10 reliable.

11 Q And what I'm asking, Doctor, is more  
12 a question of responsibility. That would be  
13 the responsibility of the hospital personnel  
14 to make sure that the -- the equipment or,  
15 in this case, towels are counted properly  
16 before they hand them to you, correct?

17 A Yeah. I mean, that's not only  
18 correct, but all these counts are the  
19 hospital's responsibility. Don't forget  
20 that there are additional items added to the  
21 count during the procedure. So, while the  
22 surgeon is -- is physically performing an  
23 operation, if additional lap packs are  
24 opened, or needles added, or maybe an  
25 instrument is brought in that is needed

1 for -- brought in from the outside, those  
2 are all added to the -- to the written count  
3 by the hospital personnel.

4 The surgeon doesn't have any  
5 opportunity to -- to be involved in any of  
6 those, and the preoperative counts are done  
7 while I'm sitting out in the surgeon's  
8 lounge waiting for the case to begin. So, I  
9 mean, I'm not trying to dump on the  
10 hospital, but those are counts that I don't  
11 have any ability to interact with, and,  
12 therefore, I don't think I have any  
13 responsibility for them.

14 Q And, Doctor, with respect to -- to  
15 this whole issue, did anyone from the  
16 hospital admit to you or acknowledge to you  
17 that the hospital was responsible for what  
18 happened to Mrs. O'Neal?

19 MR. COWDREY: Object.

20 THE WITNESS: ☐ Well, I think that  
21 came up in the conversation with Matt.

22 BY MR. KULWICKI:

23 Q Tell me --

24 A But, I mean, he was -- he was  
25 stating the obvious. I mean, people who

1 work in operating rooms know that surgeons  
2 don't do counts. It would be impossible to  
3 imagine at the end of a case a surgeon  
4 stopping the operation, and getting down on  
5 his hands and knees and doing the count  
6 while the patient's laying there on the  
7 operating room table, not to mention what  
8 I've already said, which is that, if the  
9 original count weren't accurate, the other  
10 counts aren't reliable.

11 So, in order to hold the surgeon  
12 responsible, the surgeon would have to do  
13 all three counts himself or herself, and the  
14 surgeon would also have to keep track of all  
15 the additional items added to the count  
16 during the course of the procedure. I mean,  
17 it's just -- it's just impossible to imagine  
18 that happening.

19 Q And you took that away from the  
20 conversation with Mr. Kintz?

21 A Yes.

22 Q Okay. Now, Doctor, let's go back in  
23 time, and with respect to the Bowlin case,  
24 as I understand there were actually two  
25 towels that were left behind in that

1 particular patient.

2 A Yes. As I said for -- for a time,  
3 I -- I was using two.

4 Q And neither of them had any  
5 radiopaque tagging, striping or threading in  
6 them, correct?

7 A Well, that is correct.

8 Q And, then, as I understand it, you  
9 had one other incident where a sponge was  
10 left behind in a patient inadvertently and  
11 discovered later?

12 A Yes. That was approximately 20  
13 years ago.

14 Q Any -- any other situations like  
15 this where some instrumentation or a sponge  
16 or other piece of equipment was left behind  
17 in a patient that -- that you were the  
18 attending surgeon for?

19 A There -- there is another situation  
20 that occurred at Middletown that we found  
21 out about several years after -- after it  
22 occurred that is currently in litigation.

23 Q Do you know the patient name in that  
24 case?

25 A Yes, I do.



1 **Q Can you share that with us?**  
 2 THE WITNESS: Can I share that with  
 3 him? That's confidential information.

4 MS. HARLAN: ☐ It's a filed case.

5 THE WITNESS: ☐ Okay. Yeah, his  
 6 name is Coleman, and I can't remember. I  
 7 want to say his first name is Ronald, but I  
 8 think that's a movie star, and I'm blocking  
 9 on his name, so -- but his last name is  
 10 Coleman.

11 BY MR. KULWICKI:

12 **Q Is that filed in -- do you know if**  
 13 **that's in Butler County or in Montgomery**  
 14 **County?**

15 A I think it's in Butler County. I'm  
 16 pretty sure it is.

17 **Q All right. Doctor, back at the time**  
 18 **that you were doing Mrs. O'Neal's surgery,**  
 19 **and throughout the course of your staff**  
 20 **privileges at -- what's the name of the**  
 21 **hospital? Kettering Medical Center, what**  
 22 **percentage of your time was spent doing**  
 23 **bariatric surgery?**

24 A Most of it.

25 **Q Ninety-five, 99 percent? Can you**

1 give me a percentage?

2 A Probably -- probably 90 to 95.

3 **Q Okay. Now, let's turn to the**  
 4 **chronology of events as they transpired with**  
 5 **Mrs. O'Neal. I have here that you had a**  
 6 **visit with her in July of '02 which was to**  
 7 **assess, you know, to discuss the surgery.**  
 8 **This is a pre-op meeting, and on that same**  
 9 **date she had a psychiatric evaluation. I**  
 10 **want to ask you: Was -- was it your**  
 11 **standard practice to have a psychiatric**  
 12 **evaluation for your bariatric patients?**

13 A No.

14 **Q Why did you get one in her case?**

15 A I don't remember specifically, but I  
 16 can tell you that, generally speaking, the  
 17 only reason we would get one is if the  
 18 patient's insurance company required it. My  
 19 opinion is that they're pretty much a waste  
 20 of time.

21 **Q Was there anything in her history**  
 22 **that made it necessary for her to have a**  
 23 **psych evaluation as opposed to it being done**  
 24 **as a matter of routine by an insurance**  
 25 **company that required it?**

1 A Not that I recall again. As a  
 2 general rule, some insurance companies  
 3 require it; some don't. We -- we typically  
 4 view this as an insurance company tactic to  
 5 try to discourage people from having surgery  
 6 for financial reasons, quite honestly.

7 **Q Sure. And, then, I have that the**  
 8 **surgery took place on January 3 of 2003 at**  
 9 **Sycamore Hospital, and Mrs. O'Neal was**  
 10 **discharged three days later on January 6th**  
 11 **of 2003. Is that a typical period of stay**  
 12 **following this type of procedure?**

13 A It is for my patients.

14 **Q And, then, Doctor, I have that you**  
 15 **performed your two-week follow-up visit on**  
 16 **January 20 of 2003, and that Mrs. O'Neal was**  
 17 **recovering as -- as planned, and had no**  
 18 **complaints; is that true?**

19 A I think that's what my review of the  
 20 records indicates.

21 **Q Now, I've got a note here from**  
 22 **January 29 of 2003 where Mrs. O'Neal**  
 23 **contacted you complaining of left --**  
 24 **left-sided pain noted to be deep, and that**  
 25 **radiated into the shoulder and back. First**

1 of all, do you recall this particular phone  
 2 call?

3 A No. I think my -- my PA talked to  
 4 her and then discussed it with me later.

5 **Q Okay. And, then, the next visit I**  
 6 **have is or contact is February 3 of 2003**  
 7 **wherein you or your office called**  
 8 **Mrs. O'Neal to follow up about her**  
 9 **complaints of left-sided pain; is that**  
 10 **correct?**

11 A I believe that that was also Troy  
 12 Miller, my PA, that did that follow-up call,  
 13 yes.

14 **Q And she noted that her left-sided**  
 15 **pain was better, but it was aggravated by**  
 16 **coughing, and you suggested that she should**  
 17 **see her primary care doctor, a GI**  
 18 **specialist, correct?**

19 A I believe that is correct.

20 **Q All right, and I think you tried to**  
 21 **call her, or your office tried to call her**  
 22 **on February 3, but that actual instruction**  
 23 **was actually communicated on February 4, the**  
 24 **following day of 2003, correct?**

25 A Yeah. I mean, I don't have these



1 records in front of me, but I -- I looked at  
 2 them, and that sounds about right.  
 3 MR. COWDREY: Doctor, I believe --  
 4 David, Bob Cowdrey again.  
 5 I believe Dr. Fallang's records are  
 6 part of this big binder I have here. It  
 7 should be probably the last thing.  
 8 MS. HARLAN: ☐ Yeah. Yeah.  
 9 THE WITNESS: ☐ Here we go.  
 10 BY MR. KULWICKI:  
 11 **Q Okay.**  
 12 A I'm with you.  
 13 **Q Good, thank you. And, then, the**  
 14 **next contact I have is February 21 of 2003,**  
 15 **and -- and you note that she's doing very**  
 16 **well at that time, correct?**  
 17 A Yes.  
 18 **Q And, then, the next contact would be**  
 19 **March 6 of 2003, and it appears to me that**  
 20 **you were notified at that time that**  
 21 **Mrs. O'Neal was admitted to her local**  
 22 **hospital up in -- up in Mansfield,**  
 23 **correct?**  
 24 A I believe that was May the 6th. I  
 25 think you said March the 6th.

1 **Q Yeah. I actually do have March the**  
 2 **6th. Oh, I'm sorry. That wasn't**  
 3 **communicated to you. My apologies. I'm**  
 4 **reading from a chronology I have here, and**  
 5 **this is the whole case, not just your care.**  
 6 **So, I apologize.**  
 7 A Okay.  
 8 **Q I do have, however, that on March 10**  
 9 **of 2003, that you were advised that she had**  
 10 **a CT scan performed during this**  
 11 **hospitalization in Mansfield. Do you -- do**  
 12 **you have anything indicating that in your**  
 13 **chart?**  
 14 A No. I have a note that says  
 15 3/10/03, "patient called, returned call to  
 16 hospital room. Patient evaluated for  
 17 diverticulitis." Complains -- "Complaint of  
 18 pain. Will request pain meds from attending  
 19 physician." That's all we have on that.  
 20 **Q Okay.**  
 21 A It doesn't say anything about a CAT  
 22 scan.  
 23 **Q Thank you. Doctor, what's your next**  
 24 **contact according to your notes with**  
 25 **Mrs. O'Neal?**

1 A It's April the 7th.  
 2 **Q And it appears that she contacted**  
 3 **you on that occasion complaining of**  
 4 **left-sided abdominal pain, correct?**  
 5 A That is correct. It says, "patient  
 6 called regarding pain in left side  
 7 consistent with previous diagnosis of  
 8 diverticulitis. Patient explains pain is  
 9 similar to pain she had with diverticulitis  
 10 for which she was hospitalized. See 3/10/03  
 11 progress note."  
 12 **Q Now, it goes on to say something,**  
 13 **"pain is located in the left lower quadrant**  
 14 **and is moderate to severe at times." Do you**  
 15 **have that charted?**  
 16 A Let me see. It says, "no blood in  
 17 stool this time," though. "Pain is in left  
 18 mid to lower quadrant, and moderate to  
 19 severe at times." Yes, it does say that.  
 20 **Q And, Doctor, is that -- is that**  
 21 **where the -- the towel was ultimately**  
 22 **located?**  
 23 A The towel, I would say, was in the  
 24 mid to upper --  
 25 **Q Okay.**

1 A -- left abdomen, so it's -- it's  
 2 close.  
 3 **Q And, then, when's the next contact**  
 4 **that you had with Mrs. O'Neal?**  
 5 A 5/2/03. This isn't with her. This  
 6 is with Dr. Paul, who I presume to be her  
 7 physician in Mansfield.  
 8 **Q That's correct, and what do you have**  
 9 **recorded for that visit?**  
 10 A It says, "Dr. Paul called. Would  
 11 like to talk to Dr. Fallang about patient.  
 12 Would like to transfer patient to Sycamore  
 13 tomorrow, Saturday, 5/3. Paged Dr. Fallang"  
 14 with cell number.  
 15 **Q And this is after they had detected**  
 16 **the towel in the abdomen via CT, correct?**  
 17 A I believe that is correct.  
 18 **Q Do you think it was appropriate for**  
 19 **Dr. Paul to ask you to take over the patient**  
 20 **at this point in time?**  
 21 A Probably.  
 22 **Q Was there anything --**  
 23 A I mean, I didn't see her in  
 24 Mansfield, so it would be hard for me to  
 25 answer that question, not knowing how she

1 looked up there.  
 2 **Q Okay. Based --**  
 3 A But I did see her when she arrived --  
 4 at Sycamore, and I mean, she was reasonably  
 5 stable at that point.  
 6 **Q Okay. So, based on the contacts you**  
 7 **had with Dr. Paul, and based on her**  
 8 **condition on arrival at Sycamore Hospital,**  
 9 **you felt it was reasonable for him to**  
 10 **transfer her back to your care at that point**  
 11 **in time, true?**

12 A I -- I think so, yes.

13 **Q All right, and, then, you took her**  
 14 **to surgery on May 3 of '03; is that**  
 15 **correct?**

16 MR. COWDREY: I think the records  
 17 from the subsequent records are in that  
 18 binder.

19 THE WITNESS: □ That is correct.

20 BY MR. KULWICKI:

21 **Q Now --**

22 A My recollection is she was  
 23 transferred down on a Saturday, and I took  
 24 her back to surgery that same day.

25 **Q And it indicates in -- in the op**

1 **note that you both removed the towel, and**  
 2 **you drained the left upper quadrant abscess.**  
 3 **Can you give us some sign -- some idea about**  
 4 **how big that abscess was?**

5 A This was a -- this was a somewhat  
 6 difficult situation because of her anemia at  
 7 that time, and being a Jehovah's Witness, I  
 8 knew that we would not be able to give her  
 9 any blood. So, what I did at the time of  
 10 that exploration is, as carefully as I -- as  
 11 I was able to, get straight to the towel,  
 12 and the abscess that I described describes  
 13 the encapsulated towel space itself. In  
 14 other words, the towel was -- was  
 15 encapsulated in -- in five months' worth of  
 16 scar tissue, had some cloudy fluid around  
 17 it. I tried to gently slip the towel out,  
 18 put a small drain or a -- a drain. I forget  
 19 what -- I think I used a Jackson-Pratt; put  
 20 some kind of a drain into that pocket where  
 21 that towel was, and then closed. I did not  
 22 do a full exploration which I felt at the  
 23 time, and of course in retrospect would  
 24 continue to feel, would be very dangerous in  
 25 a patient unable to receive blood.

1 **Q Could you get --**

2 A The larger abscess cavity was only  
 3 where the towel was enclosed.

4 **Q Could you get a sense about the size**  
 5 **of the capsule that was around the towel**  
 6 **based on the limited exploration that you**  
 7 **did?**

8 A It was exactly the size of the  
 9 folded towel. If we had a towel and folded  
 10 it up, I guess I could take a ruler and  
 11 estimate that. It was the same shape. In  
 12 other words, it was rectangular. It was  
 13 flat, just like a small, folded-up towel.

14 **Q With respect to the abscess, was it**  
 15 **your feeling or observation that the abscess**  
 16 **extended beyond the capsule?**

17 A It was my impression that it did  
 18 not, but -- but again, I did not do a wider  
 19 exploration.

20 **Q Now, you mentioned her anemia, and**  
 21 **did you have a sense or do you now have a**  
 22 **sense about what was causing her anemia at**  
 23 **the -- prior to this operation?**

24 A Well, we were informed that she had  
 25 had a diverticular bleeding in Mansfield,

1 and that we -- I think she had a  
 2 confirmation of diverticulosis, and, of  
 3 course, diverticular bleeding is  
 4 intraluminal, so that the blood comes out  
 5 the lower GI tract.

6 **Q Right.**

7 A Now, of course, that doesn't prove  
 8 it's from -- from diverticular disease. You  
 9 can have the same thing from an ulcer or  
 10 something like that, but we were not  
 11 involved in that diagnostic effort. So, we  
 12 were informed that she'd had diverticular  
 13 bleeding, had been in the hospital. The  
 14 bleeding had stopped, and they were giving  
 15 her iron to try to get her blood counts  
 16 built back up, and that was my understanding  
 17 of why her blood counts at that time were so  
 18 low.

19 **Q Were -- were you informed of that by**  
 20 **Mrs. O'Neal, or did you -- were you informed**  
 21 **of that by medical records or by your**  
 22 **conversation with Dr. Paul or a combination**  
 23 **of any of those or something else?**

24 A Well, I think it was a combination.  
 25 I mean, most -- most of that I believe I

1 would have probably been informed of by  
2 Troy.

3 **Q Troy is your PA?**

4 A Troy Miller is my PA, and he  
5 actually is the person who talked to her on  
6 most of these occasions, and, then, noted  
7 those conversations in the -- in the chart,  
8 and, then, our practice is then, when Troy  
9 has a discussion like that with a patient,  
10 then he comes to me and says: Well, this  
11 is -- I had a phone call from -- from a  
12 patient. This is what's going on, and so  
13 forth. So, that's where I would have gotten  
14 that information.

15 **Q Do you know if you --**

16 A Of course, at the time it didn't  
17 seem particularly ominous to us.

18 **Q Did -- did you know -- well, strike**  
19 **that.**

20 **Do you know if -- at the time in --**  
21 **in early May of 2003, did you have access to**  
22 **Mrs. O'Neal's medical records from her**  
23 **earlier hospitalization at the hospital in**  
24 **Mansfield?**

25 A No, we did not.

1 **Q Okay. Now, with respect to this**  
2 **diverticula, were you informed or were you**  
3 **aware when you cared for Mrs. O'Neal during**  
4 **the first week or eight days of May of 2003**  
5 **that her diverticula were not bleeding and**  
6 **were thought by her GI consultant to not be**  
7 **the cause of her rectal bleeding?**

8 A I do not believe that I knew that.

9 **Q And, incidentally, Doctor, by the**  
10 **way, had you known back in March of 2003**  
11 **that Mrs. O'Neal had left, mid to lower**  
12 **quadrant pain, and assume that the CT scan**  
13 **at that point in time had shown or disclosed**  
14 **evidence of a retained object, if that had**  
15 **been the facts back in March of '03 when**  
16 **Dr. Paul contacted you or when the patient**  
17 **contacted you, would you have advised her to**  
18 **come down so that you could do further**  
19 **investigation at that point in time with**  
20 **respect to --**

21 MS. HARLAN: ☐ Objection.

22 BY MR. KULWICKI:

23 **Q -- these left lower quadrant pain --**  
24 **complaints?**

25 MS. HARLAN: ☐ Objection.

1 THE WITNESS: ☐ Can I -- can I ask  
2 you a clarify -- clarifying question? Are  
3 you asking me what I would have done had I  
4 known in March that there was a retained  
5 towel?

6 BY MR. KULWICKI:

7 **Q Yes, absolutely.**

8 A I would -- I would have requested  
9 that she come back so that we could take it  
10 out, yes.

11 **Q And --**

12 A No question whatsoever.

13 **Q Would time be of the essence,**  
14 **that -- in your mind, that you get that**  
15 **towel out?**

16 A I was going to say it's a  
17 complicated question. It's actually a  
18 simple question, but I think the answer may  
19 be complicated.

20 I would not have delayed. There  
21 would be no point in delaying, but I must  
22 honestly tell you that a sterile towel that  
23 simply is residing within an encased  
24 framework of scar tissue in the abdomen  
25 would not, in my opinion, constitute an

1 emergency. There's no point in delaying.  
2 There's no reason not to go in and take it  
3 out right away. I can't think of anything  
4 good that would happen, but I wouldn't  
5 consider that to be a surgical emergency. I  
6 would do it expeditiously, but not on an  
7 emergent basis.

8 **Q Doctor, before you saw the autopsy**  
9 **report in this case, did you have a**  
10 **different opinion as to what was the cause**  
11 **of her death? In other words, did you feel**  
12 **like her death was probably related to**  
13 **sepsis?**

14 A Well, sepsis, acidosis, anemia, all  
15 acting in concert.

16 **Q And did you have -- do you hold the**  
17 **opinion that her sepsis was related to this**  
18 **towel?**

19 A My -- my feeling at the time, and I  
20 remember fairly clearly thinking about this,  
21 was that I could not understand why, with a  
22 completely encapsulated towel with --  
23 although I did not do a full exploration,  
24 with no evidence of any widespread abdominal  
25 sepsis or abscessed cavity, and with a drain

1 in this pocket where the towel had been, I  
2 could not understand why she would become  
3 septic. I was very confused. I didn't know  
4 if this was as a result of her anemia, her  
5 overall generalized debilitated condition,  
6 and so forth.

7 So, you know, my current opinion,  
8 having looked at this autopsy report, is  
9 that she did not die from sepsis but rather  
10 she died from a pulmonary embolus.

11 At the time I was caring for her on  
12 her second admission, I was perplexed at how  
13 she could be septic when I got a drain. In  
14 fact, I remember discussing that issue with  
15 some of the nurses caring for her, going  
16 like: How can she be septic? She's got a  
17 drain in place. I think this was after she  
18 suffered her respiratory or cardiopulmonary  
19 arrest.

20 In retrospect, it appears to me now  
21 highly likely that she instead had a  
22 pulmonary embolus which was the cause of her  
23 death, and that she did not, in fact, die of  
24 sepsis.

25 **Q I understand that, but with respect**

1 Remember what sepsis is. Sepsis is  
2 sometimes used as a hazy term or an inexact  
3 term, but really what sepsis is, is -- is a  
4 bacterial invasion of the bloodstream; in  
5 other words, widespread infection. An  
6 abscess is not sepsis.

7 **Q I understand.**

8 A So, sepsis is the widespread  
9 infection, and I was -- and I was -- I could  
10 not understand at the time why she would  
11 have that when we -- when we had taken out  
12 the towel. There wasn't that much pus in  
13 there, and I put in a drain. So, my -- my  
14 opinion when she had the cardiopulmonary  
15 arrest was that she was probably septic.  
16 Knowing now that she had a large saddle  
17 pulmonary embolus, I don't believe that  
18 anymore.

19 **Q Okay, but she --**

20 A Does -- does that answer your  
21 question?

22 **Q It does, but she did have an abscess  
23 in her belly, correct?**

24 MS. HARLAN: ☐ Objection.

25 THE WITNESS: ☐ She -- she had a

1 to, you know, obviously, she could have  
2 sepsis at the same time that she had the  
3 pulmonary embolism, correct?

4 A That is true.

5 **Q And sitting here today, even in  
6 retrospect, do you -- do you maintain the  
7 opinion that she probably had sepsis at the  
8 time of her death in May of 2003?**

9 A No, I do not believe that.

10 **Q Well, did you -- did you look? I --  
11 I -- excuse me. I'm -- I'm confused. I  
12 thought you said that, when you performed  
13 this surgery in May of 2003, that you  
14 located an abscess.**

15 A There was -- as I said, there was a  
16 pocket of scar tissue encapsulating the  
17 towel.

18 **Q Yes.**

19 A There was a small amount of cloudy  
20 fluid around it, and, you know, I can't  
21 remember of the top of my head whether we  
22 cultured that, and it grew anything or -- or  
23 whatever, but I put a drain in it, and, of  
24 course, we were treating her with  
25 antibiotics too.

1 pocket. Once again, I'm not -- I'm not  
2 trying to -- to debate or -- or be evasive,  
3 you know. An abscess can be a pocket filled  
4 with fluid. There are things that we in  
5 surgery call cold abscesses, a pocket of  
6 purulent fluid where nothing ever grows.  
7 Those used to be seen with tuberculosis.  
8 Those are occasionally still seen in  
9 situations like cat scratch fever. So --  
10 so, I think you could call what she had  
11 around this towel an abscess. That does not  
12 automatically imply that it had bacteria in  
13 it, but it very well may have. I mean, I  
14 don't remember if we cultured it or not.

15 **Q And when you talk about an abscess,  
16 that is indeed -- that's an infection,  
17 correct?**

18 A That's why I'm saying, not -- that  
19 is not necessarily the case. I guess I'd  
20 have to get out a medical dictionary to see  
21 if there's an official definition. We  
22 normally think of an abscess as being an  
23 infected pocket of fluid, but, you know,  
24 this is a very complex case, and I've  
25 learned something today I didn't know

1 before. I'm not trying to parse this on  
2 you. I'm just saying: Just because this  
3 towel was encapsulated in a pocket does not  
4 automatically mean the pocket was infected.  
5 You could call it a cold abscess; in other  
6 words a fluid collection without infection,  
7 and -- and the way to know that would be to  
8 look back at the record and see if I -- if I  
9 did any cultures.

10 **Q Why don't we do that now, if we**  
11 **could, and I'm certain there was. As I**  
12 **recall, it grew out strep aureus.**

13 A Oh, that -- that is not an -- an  
14 organism.

15 **Q Or, I'm sorry, what is it? Staph --**  
16 **staph aureus.**

17 A Staph aureus, okay. I see, let's  
18 see. The date of this is 5/3.

19 **Q It's actually a strep constellatus;**  
20 **is that right?**

21 A Just a minute. I'm -- I'm seeing --  
22 I see two different reports, is what I'm  
23 looking at. I have two pages here that  
24 demonstrate -- that -- that indicate they  
25 are from specimens collected on 5/3. That

1 would have been at the time of her surgery.  
2 They have moderate gram positive rods on  
3 gram stain; moderate gram negative rods;  
4 moderate gram positive cocci; and a culture  
5 result that shows heavy porphyromonas  
6 species NOS. I think that means not  
7 otherwise specified. And, it says, "see  
8 aerobic culture for identification of gram  
9 positive cocci. Some organisms on gram  
10 stain may have been overgrown on culture."  
11 I don't honestly know what they mean by  
12 that. I think the -- the gist of this is  
13 that that fluid was, in fact, infected.

14 **Q Okay.**

15 A That's what we were trying to  
16 determine, correct?

17 **Q Yes. And, Doctor, if we could, just**  
18 **look at the -- the radiology from the -- the**  
19 **May, 2003 admission to Sycamore Hospital.**  
20 **Was there -- I thought you mentioned or I**  
21 **read that -- was there a CT performed at**  
22 **Sycamore Hospital during this admission?**

23 A No, not that I recall.

24 **Q Yeah, I don't have one, but, I mean,**  
25 **I have a CT -- CT of the head.**

1 A No, that's different. I thought you  
2 meant an abdominal CT.

3 **Q Right, I did, I did, and that's why**  
4 **I was asking about if there was an abdominal**  
5 **CT.**

6 A I don't believe so.

7 **Q Okay, thank you.**

8 A In other words, it's fair to call  
9 this a true abscess with infection.

10 **Q Thank you. Now, you talked about**  
11 **the -- that this is different from sepsis,**  
12 **but certainly an abdominal infection can**  
13 **beget sepsis, true?**

14 A That is true.

15 **Q And the definition of sepsis, how --**  
16 **how do you define that?**

17 A Well, there are more than -- there's  
18 more than one definition. Normally, I  
19 would -- I guess I would define sepsis as an  
20 overwhelming systemic infection. Well, let  
21 me just say -- let's delete the word  
22 "overwhelming;" as a systemic infection, and  
23 the typical way of making a diagnosis of  
24 sepsis is with a positive blood culture,  
25 but -- but, quite honestly, physicians in

1 normal practice sometimes use the term  
2 somewhat loosely and say: Well, this  
3 patient is septic, or that patient is  
4 septic, and they're referring to a  
5 constellation of symptoms, and signs, and so  
6 forth and so on, indicating their -- their  
7 belief that this patient has infectious  
8 problems that may not show up on a positive  
9 blood culture.

10 **Q Doctor, are you aware of a**  
11 **phenomenon whereby the body has an**  
12 **inflammatory response to foreign objects**  
13 **that are left within the body, say, through**  
14 **surgery?**

15 A Well, the body frequently responds  
16 to foreign objects by an inflammatory  
17 response, yes.

18 **Q Okay, and are you aware or would you**  
19 **agree that that inflammatory response can,**  
20 **just like an inflammatory response to**  
21 **sepsis, can create a hypercoagulable**  
22 **state?**

23 A I don't know the answer to that. I  
24 don't think I've ever read about that.

25 MR. KULWICKI: All right. You

1 know, I am done with everything except some  
2 issues about credentialing. I note here  
3 that defense counsel has some exhibits that  
4 he wanted to ask you about, and they appear  
5 at first glance to have to do with  
6 credentialing.

7 Let -- let me suggest this, and --  
8 and you all there can veto this, but let me  
9 suggest that we allow the hospital's counsel  
10 to go forward, Mr. Cowdrey to go forward  
11 with his examination. I can then have the  
12 opportunity to review what came over on the  
13 fax which I haven't had a chance to really  
14 read in detail, and, then, I may or may not  
15 have any additional questions depending on  
16 where Mr. Cowdrey goes with his examination,  
17 and if that's offensive to you, tell me, and  
18 I'll be happy to continue with -- with --  
19 with my questions.

20 MS. HARLAN: ☐ That's fine with me.

21 MR. COWDREY: Okay. Yeah, that's  
22 fine with me, David. What I'll do is, I'll  
23 go through some questions. Doctor, do you  
24 want to take a break?

25 MS. HARLAN: ☐ No.

1 MR. COWDREY: And, then, we'll  
2 probably take a break at that point, and  
3 I'll see whether or not I need to ask any  
4 additional questions, and, then, if you have  
5 some additional questions, feel free to ask  
6 them, okay?

7 MR. KULWICKI: ☐ I appreciate that.  
8 Thank you.

9 CROSS-EXAMINATION OF DAVID FALLANG, M.D.  
10 BY MR. COWDREY:

11 **Q Doctor, my name's Bob Cowdrey, and I**  
12 **represent the hospital in this litigation.**  
13 **I'd like to follow up with some of the**  
14 **questions that Mr. Kulwicki asked you, and**  
15 **then I am -- I will ask you some questions**  
16 **about credentialing and insurance.**

17 **Middletown Surgical Associates, Inc.**  
18 **is a professional corporation; is that**  
19 **right?**

20 A Right.

21 **Q And when -- when was that**  
22 **professional corporation formed?**

23 A 1981.

24 **Q Okay, and it's still in existence as**  
25 **we sit here today?**

1 A Yes.

2 **Q Okay, and are you the sole**  
3 **shareholder of that corporation?**

4 A Yes.

5 **Q Okay. I take it you're an officer**  
6 **of the corporation?**

7 A Yes.

8 **Q As -- as we sit here today, are**  
9 **there any other officers of the**  
10 **corporation?**

11 A Frankly, I don't remember.

12 **Q And you mentioned that in the past,**  
13 **Dr. Clarey and Dr. Martin had worked for**  
14 **Middletown Surgical Associates, Inc.; is**  
15 **that correct?**

16 A Yes.

17 **Q But they were never shareholders of**  
18 **that corporation?**

19 A No.

20 **Q Riverview Health Institute, where's**  
21 **that located?**

22 A In Dayton.

23 (Inaudible.)

24 MR. KULWICKI: Hang on one second.  
25 Hang on. We're having problems hearing you

1 over here. Let me have the court reporter  
2 talk to you. Just tell him what you did or  
3 did not hear.

4 THE REPORTER: I did not hear the  
5 last question.

6 BY MR. COWDREY:

7 **Q Okay. Doctor, Riverview Health**  
8 **Institute, where's that located?**

9 A Dayton.

10 **Q And that's over next to the old St.**  
11 **E's Hospital?**

12 A Yes.

13 MR. COWDREY: Do you hear me all  
14 right now?

15 MR. KULWICKI: ☐ Yes.

16 BY MR. COWDREY:

17 **Q The -- how long have you been at**  
18 **Riverview?**

19 A Oh, about seven months.

20 **Q And -- and who owns that**  
21 **institute?**

22 A A variety of business entities.

23 **Q Okay, are you an owner of that -- a**  
24 **part owner of that institute?**

25 A Yes, sir. Five percent.

1 **Q** Okay, and you say you've been --  
 2 you've been practicing there for the past  
 3 seven months?  
 4 **A** Yes.  
 5 **Q** And do you do bariatric surgery at  
 6 Riverview?  
 7 **A** Yes.  
 8 **Q** And -- and when did you actually  
 9 start performing bariatric surgery? What --  
 10 what year?  
 11 **A** Oh, in 1997.  
 12 **Q** And the bariatric surgery, how's  
 13 that defined? What -- what do you consider  
 14 to be bariatric surgery?  
 15 **A** It's surgery intended to induce  
 16 weight loss.  
 17 **Q** And that involves a Roux-en-Y  
 18 procedure?  
 19 **A** Well, there's a variety of different  
 20 procedures. I perform Roux-en-Y  
 21 procedures -- Roux-en-Y gastric bypasses  
 22 pretty much exclusively, but there are other  
 23 procedures that can be performed.  
 24 **Q** I believe Mr. Kulwicki had asked you  
 25 some questions about the coroner's report.

1 **As you sit here today, is -- is there a**  
 2 **question that has now arisen in your mind as**  
 3 **to whether this pulmonary embolism that was**  
 4 **seen on autopsy predated or preceded her**  
 5 **admission to the hospital at Kettering in**  
 6 **May of 2003?**  
 7 **A** Yes, I would have a serious question  
 8 about that.  
 9 **Q** And why do you believe that?  
 10 **A** Well, for one thing, a large  
 11 pulmonary embolus takes a while to develop,  
 12 but probably more than that is, it -- it  
 13 appears quite obvious to me now that she  
 14 died of a pulmonary embolus rather than of  
 15 sepsis. The pulmonary embolus results from  
 16 the breaking loose of a clot. Frequently  
 17 these clots are in the pelvic veins, and the  
 18 issue is that the age of this clot may not  
 19 be able to be determined. I mean, I think  
 20 it almost certainly at this stage in time  
 21 cannot be determined. We can only guess  
 22 about it, but in -- in my estimation, it  
 23 certainly could have predated her admission  
 24 to -- her second admission to Sycamore.  
 25 **Q** And in that circumstance, would --

1 **would that pulmonary embolism, if, in fact,**  
 2 **it predated her admission to the hospital in**  
 3 **May of 2003, be related to --**  
 4 **MR. KULWICKI:** ☐ We can't hear you.  
 5 You're shuffling papers. We can't hear.  
 6 **BY MR. COWDREY:**  
 7 **Q** I'm sorry. Let me -- let me repeat  
 8 it. With -- with respect to the pulmonary  
 9 embolism and its predating her admission to  
 10 the hospital in May of 2003, would that be,  
 11 in your opinion, unrelated to the retained  
 12 towel?  
 13 **MR. KULWICKI:** ☐ Objection.  
 14 **THE WITNESS:** ☐ I mean, the problem  
 15 is that I don't know that it's possible to  
 16 determine what was the originating factor  
 17 behind the pulmonary embolism or -- or, in  
 18 other words, the deep venous thrombosis.  
 19 Certainly, the retained towel would have  
 20 created additional risk factors, but she  
 21 already had other risk factors. I -- I  
 22 don't think it's possible to know. It's  
 23 certainly possible that it could have been  
 24 unrelated to the retained towel.  
 25 Typically, these clots occur; that

1 is to say, they first form in the pelvic  
 2 veins. All -- all the inflammatory  
 3 processes that -- that existed in this  
 4 patient, to my knowledge, were in the left  
 5 upper quadrant. It may not be, you know,  
 6 miles away, but, I mean, anatomically and  
 7 physiologically, that makes a difference.  
 8 If you have an inflamed mass sitting  
 9 on top of a pelvic vein, such as what you  
 10 might see in Crohn's disease, that vein is  
 11 certainly at risk. If you have an inflamed  
 12 mass sitting elsewhere that's not  
 13 contiguous, then, possibly there are some  
 14 systemic inflammatory factors, but it  
 15 becomes a very difficult question to answer  
 16 with any degree of certainty.  
 17 **Q** With respect to this individual,  
 18 **Mrs. O'Neal's religious beliefs and her**  
 19 **attitude toward not taking blood products,**  
 20 **did that complicate or cause any problems**  
 21 **for you in -- in treating her in May of 2003**  
 22 **when you did the surgery to remove the**  
 23 **towel?**  
 24 **A** Very much so.  
 25 **Q** And in -- in what way was that a

1 **complicating situation?**

2 A Because she was extraordinarily  
3 anemic, and we couldn't give her any blood,  
4 and that affects hemodynamic function. It  
5 affects physiologic function in terms of  
6 hypoxia, anaerobic metabolism which results  
7 in lactic acid, cardiac function. There's a  
8 whole range. You don't have to be a doctor  
9 to know that your body needs oxygen, and  
10 most people understand that red blood  
11 cells -- the hemoglobin inside the red blood  
12 cells carries the oxygen. Without them, and  
13 I fully respect her religious beliefs, but  
14 it is a simple, scientific fact that,  
15 without the ability to give her red blood  
16 cell transfusions, her physiologic status  
17 was severely compromised. I believe that  
18 she had a hematocrit noted in one of the  
19 progress notes of 16. It's extraordinarily  
20 low. I had several discussions with her  
21 family about this to -- to make sure that --  
22 that they would not change their mind. I  
23 discussed this with the family in  
24 conjunction with their spiritual counselor,  
25 their minister or what have you to make sure

1 they understood the gravity of the  
2 situation, and that they -- that they did  
3 not have any change of heart about it.

4 **Q Doctor, at this point, I want to**  
5 **discuss with you the -- your application for**  
6 **privileges to practice at Kettering. It's**  
7 **my understanding that you first applied for**  
8 **privileges at Kettering and Sycamore in**  
9 **1997; is that accurate?**

10 A That is my recollection.

11 **Q And you were provided -- when you**  
12 **applied for -- for staff privileges, did**  
13 **they provide you with bylaws of the**  
14 **hospital?**

15 A I think so.

16 **Q And were you aware that your**  
17 **application for privileges would be on a**  
18 **two-year basis, in -- in the sense that, if**  
19 **you wanted to renew your privileges, you'd**  
20 **have to ask for a renewal every two years?**

21 A I think I recall that.

22 **Q And -- and were you also provided,**  
23 **in addition to the bylaws, also provided**  
24 **with a credentials manual?**

25 A I assume so. I mean, I don't

1 recall. It was seven years ago.

2 **Q I'm going to show you what's been**  
3 **marked as Exhibit 3.**

4 **(At this time Defendant's Exhibits 1**  
5 **to 13 were marked for identification**  
6 **purposes.)**

7 **BY MR. COWDREY:**

8 **Q And that -- that is page 12 of the**  
9 **credentials manual; at least, that's as --**  
10 **as it sits in front of you. It's titled at**  
11 **the bottom; is that correct?**

12 A That's what it says.

13 **Q Okay.**

14 A Updated 4/24/03.

15 **Q Okay.**

16 A So, this is not the copy that I  
17 would have received seven years ago.

18 **Q I understand that, but were you**  
19 **aware that you were to provide evidence to**  
20 **the hospital of malpractice coverage?**

21 A That would be typical, yes.

22 **Q And -- and on Exhibit 3 under**  
23 **Subsection E, it indicates, at least as of**  
24 **the date April 24th, 2003 when this was**  
25 **published, that you were to advise the**

1 **hospital of any changes in your professional**  
2 **liability coverage; is that correct?**

3 A That's what it says.

4 **Q Now, when you first applied for**  
5 **privileges at -- at Kettering, did you apply**  
6 **for general surgery privileges?**

7 A I believe so.

8 **Q Okay. Did you apply for bariatric**  
9 **privileges the first time you applied in**  
10 **1997?**

11 A I don't recall.

12 **Q Okay. Were you doing any bariatric**  
13 **surgery in 1997?**

14 A Yes.

15 **Q And that was -- you were doing that**  
16 **down at Middletown?**

17 A Well, I was doing it at Sycamore  
18 also, Middletown and Sycamore.

19 **Q So --**

20 A And -- and Southview and Grandview  
21 and a couple of cases at Kettering.

22 **Q Is it your testimony that in 1997 --**  
23 **well, let me ask you, first of all: When**  
24 **you applied for privileges at Kettering,**  
25 **that also involved the satellites Sycamore,**



1 **Grandview and Southview, correct?**  
 2 A Well, Grandview and Southview were  
 3 not affiliated at that time. It included  
 4 Sycamore.

5 **Q Okay.**

6 A Grandview and Southview were  
 7 separate.

8 **Q So, when you applied for privileges**  
 9 **at Kettering in 1997, you were doing**  
 10 **bariatric surgery at Middletown Regional**  
 11 **Hospital?**

12 A Yes.

13 **Q You were doing bariatric surgery at**  
 14 **Grandview and Southview?**

15 A Yes.

16 **Q Okay, and are you sitting here today**  
 17 **telling me that you -- when you applied for**  
 18 **privileges at Kettering in 1997, you asked**  
 19 **for bariatric surgery privileges in addition**  
 20 **to general surgery privileges?**

21 MS. HARLAN: ☐ Objection. I think he  
 22 said he doesn't recall.

23 THE WITNESS: That is correct. ☐ I  
 24 don't recall how I filled -- actually, I  
 25 usually -- I didn't fill those forms out.

1 My office staff typically did that.

2 BY MR. COWDREY:

3 **Q And -- and at the time you applied**  
 4 **for privileges at Kettering-Sycamore in**  
 5 **1997, your active staff privileges were at**  
 6 **Middletown Regional and Grandview,**  
 7 **Southview?**

8 A Well, I had privileges in Middletown  
 9 since 1981. My recollection is that I  
 10 applied at Grandview, Southview and at  
 11 Kettering-Sycamore at approximately the same  
 12 time.

13 **Q Now, when you applied for**  
 14 **privileges, or while -- while you were on**  
 15 **staff and a privileged -- and having**  
 16 **privileges at Middletown Regional Hospital,**  
 17 **did they require you to maintain**  
 18 **professional liability coverage?**

19 A Yes.

20 **Q Did -- did they require you to**  
 21 **maintain professional liability coverage for**  
 22 **a certain amount?**

23 A Yes.

24 **Q And do you remember what -- what**  
 25 **amount Middletown required you to have?**

1 A One million, three million.

2 **Q One million per incident?**

3 A Per incident, three million per  
 4 year.

5 **Q Now, when -- when you applied for**  
 6 **privileges at Kettering in 1997, what**  
 7 **company did you have professional liability**  
 8 **insurance with?**

9 A I don't recall.

10 **Q Do you recall what your limits of**  
 11 **liability were in 1997 when you applied for**  
 12 **privileges at Kettering?**

13 A I assume they were one million,  
 14 three million.

15 **Q Now, and when I ask -- when I say**  
 16 **"you," I'm meaning you as opposed to the**  
 17 **professional corporation. Did the**  
 18 **professional corporation, Middletown**  
 19 **Surgical Associates, Inc., also have a**  
 20 **separate policy of professional liability**  
 21 **coverage?**

22 A No. I believe it was encompassed in  
 23 the same policy.

24 **Q My understanding is that you were**  
 25 **provided privileges in 1997 at Kettering and**

1 **Sycamore; is that correct?**

2 A That's my recollection.

3 **Q Okay, and did you provide Kettering**  
 4 **with any proof of professional liability**  
 5 **insurance?**

6 A I suppose so.

7 **Q For 1997?**

8 A I suppose so. Again, I didn't do  
 9 that stuff. My office people did all that.

10 **Q And who in your office was**  
 11 **responsible for providing that information**  
 12 **to the hospital?**

13 A In 1977?

14 **Q 1997.**

15 A I'm sorry, 1997. I can't remember  
 16 exactly who was working there then.

17 **Q How -- how many people did you have**  
 18 **in the office that worked in the office for**  
 19 **you in 1997?**

20 A There's been a lot of changes since  
 21 then; probably three or four.

22 **Q Was there one particular person**  
 23 **that -- that you would have involved in**  
 24 **making sure that appropriate information was**  
 25 **given to the hospital when you were applying**

1 for privileges? Did you have, like, a  
 2 designated office manager that -- that would  
 3 fulfill those duties?  
 4 A Yeah, basically, that's correct.  
 5 Q Okay.  
 6 A She left in '97, and I'm trying to  
 7 remember when. It would have been a girl or  
 8 a woman named Sara Graham, G-R-A-H-A-M. I  
 9 believe that she's the one that probably  
 10 would have done that, or at least overseen  
 11 the process.  
 12 Q Now, my understanding is, and if  
 13 your recollection is different, tell me,  
 14 that you voluntarily resigned your  
 15 privileges at Kettering in 1999; is that  
 16 accurate?  
 17 A More or less.  
 18 Q And, then, you reapplied for  
 19 privileges in -- in 2000, in I believe  
 20 2000 -- February of 2000.  
 21 A That sounds right.  
 22 Q Do you remember -- let me show you  
 23 what's been marked as -- showing you what's  
 24 been marked as Exhibit 4, and that describes  
 25 privileges that you're requesting; is that

1 correct?  
 2 A I think so.  
 3 Q And that -- that's your signature on  
 4 the --  
 5 A Yes.  
 6 Q -- the bottom there?  
 7 A Yes.  
 8 Q And that indicates what privileges  
 9 are you asking for?  
 10 A Well, this is page two, so I assume  
 11 there's a page one, but on this page, it  
 12 says, "laparoscopy and laparoscopic  
 13 surgery," and "other," it says "Roux-en-Y  
 14 gastric bypass, open and laparoscopic," and  
 15 that has a date notation of 3/26/01.  
 16 Q And -- and your initials are next to  
 17 that date; is that correct?  
 18 A Yes.  
 19 Q Okay. The initial page, which is  
 20 Exhibit 4, was signed by you February 25th  
 21 of 2000, correct?  
 22 A That's what it says.  
 23 Q And, then, you added the request for  
 24 additional privileges involving the  
 25 Roux-en-Y gastric bypass and the open and

1 laparoscopic procedures?  
 2 A It looks that way.  
 3 Q And that would have been done in  
 4 March of 2001.  
 5 A Yes.  
 6 Q And in March of 2001, can you tell  
 7 me who was your professional liability  
 8 carrier?  
 9 A I can't remember. Three of them  
 10 have gone bankrupt.  
 11 Q I'm going to show you what's been  
 12 marked as Exhibit 5.  
 13 A Uh-huh.  
 14 Q And that -- that appears to be a  
 15 certificate of liability insurance which is  
 16 dated at the top March 26 of 2000, correct?  
 17 A May 26th.  
 18 Q Is that correct?  
 19 A May 26th.  
 20 Q Yeah, May 26th of 2000 is the date  
 21 on that certificate of liability  
 22 insurance?  
 23 A That's what it says.  
 24 Q It shows you as an insured, David J.  
 25 Fallang, M.D., correct?

1 A Yes.  
 2 Q The insurance company is American  
 3 Equity Insurance Company; is that correct?  
 4 A Yes.  
 5 Q It shows your coverage, \$1 million  
 6 each occurrence, \$3 million annual aggregate  
 7 with a \$10,000 deductible, correct?  
 8 A Correct.  
 9 Q And it shows effective dates of the  
 10 policy, May 24, 2000 to May 24, 2001; is  
 11 that correct?  
 12 A Correct.  
 13 Q This -- this certificate of  
 14 liability insurance, did you give this or  
 15 have someone from your office give it to  
 16 someone at the hospital?  
 17 A I presume so.  
 18 Q And who would have been your -- who  
 19 would have been the person in your office  
 20 responsible for providing this certificate  
 21 of insurance to the hospital?  
 22 A What -- what -- when was this done?  
 23 Q In May of 2000.  
 24 A I believe that would have been my  
 25 wife.

1 **Q** And your wife's name?  
 2 **A** Is Teresa Fallang.  
 3 **Q** And this policy of insurance that --  
 4 that was written by American Equity  
 5 Insurance Company, did it provide coverage  
 6 for bariatric surgery?  
 7 **A** As far as I know, but I don't have  
 8 the policy in front of me. I think it did.  
 9 **Q** Did -- did you ever actually review  
 10 the policy of insurance that American Equity  
 11 provided to you to -- to determine whether  
 12 or not it did provide coverage for your  
 13 bariatric surgery?  
 14 **A** Probably not.  
 15 **Q** I'm going to show you what's been  
 16 marked as Exhibit 6, and that is a letter  
 17 from Mr. Manchur at Kettering Medical Center  
 18 indicating that you had been -- your  
 19 privileges had been approved?  
 20 **A** Uh-huh.  
 21 **Q** Is that correct?  
 22 **A** That's what it says.  
 23 **Q** Okay, and that -- that letter is  
 24 dated May 4, 2001?  
 25 **A** Okay.

1 **Q** Is that right?  
 2 **A** It says.  
 3 **Q** And -- and, so, you're aware that,  
 4 when the spring of 2003 rolls around, you're  
 5 going to need to apply for -- for renewal  
 6 privileges, correct, since it was over two  
 7 years?  
 8 **A** Okay.  
 9 **Q** Is that right?  
 10 **A** Yeah, as far as I know.  
 11 **Q** With respect to the insurance policy  
 12 that was written by American Equity, were  
 13 you aware of any restrictions or exclusions  
 14 on that policy when it came to your ability  
 15 to perform surgery, whether it be general  
 16 surgery or bariatric surgery?  
 17 **A** Not to my knowledge.  
 18 **Q** And I'm going to show you what's  
 19 been marked as Exhibit 7, and that appears  
 20 to be another certificate of insurance; is  
 21 that correct?  
 22 **A** It appears to be.  
 23 **Q** And -- and who is the insured on  
 24 that?  
 25 **A** Myself as well as Middletown

1 Surgical Associates.  
 2 **Q** It says "David J. Fallang M.D.,  
 3 d.b.a. Middletown Surgical Associates"; is  
 4 that right?  
 5 **A** Yes.  
 6 **Q** And it's -- it's hard to read, but  
 7 it appears as if the company that's  
 8 providing the insurance is Admiral Insurance  
 9 Company.  
 10 **A** Yes.  
 11 **Q** And -- and that shows a date,  
 12 effective date of the policy as being July  
 13 25th, 2001 through July 25th, 2002; is that  
 14 right?  
 15 **A** Yes.  
 16 **Q** And I guess what I'm interested in  
 17 is, if you look at the previous certificate  
 18 of insurance which had American Equity as  
 19 the company -- do you see that?  
 20 **A** Yes.  
 21 **Q** If you compare those two  
 22 certificates, you have one certificate which  
 23 shows coverage up through May 24th of 2001,  
 24 and then the next certificate indicates your  
 25 coverage starts on July 25th, 2001; is that

1 right?  
 2 **A** It looks like it.  
 3 **Q** Did you have another insurance  
 4 policy that provided coverage for that gap  
 5 between May of 2001 and July of 2001?  
 6 **A** I don't think so.  
 7 **Q** So, you -- you were uninsured for  
 8 some period of time, then?  
 9 **A** It looks that way.  
 10 THE VIDEOGRAPHER: Mr. Cowdrey,  
 11 you've got a little less than five minutes  
 12 left on this tape.  
 13 BY MR. COWDREY:  
 14 **Q** The -- your office manager in 2001,  
 15 would that have still been Teresa Fallang?  
 16 **A** Yes.  
 17 **Q** And would she have been the person  
 18 that you would have designated to provide  
 19 this type of information, insurance  
 20 information to the hospital?  
 21 **A** Yes.  
 22 **Q** All right, and with respect to this  
 23 Exhibit 7 which shows Admiral Insurance  
 24 Company as being the insurance company  
 25 providing insurance, professional liability

1 insurance to you, was there any particular  
2 restriction or exclusion issued by Admiral  
3 concerning the performance of bariatric  
4 surgery?

5 A It doesn't say so. I don't recall,  
6 you know, the text of the policy. I mean,  
7 this is the binder, and it doesn't have any  
8 exclusions on it.

9 Q Do you -- do you happen to have  
10 these policies somewhere that were issued by  
11 the various insurance companies?

12 A I assume so. They're not in my car.  
13 I don't know where they are. I don't do  
14 this stuff. Yeah, I assume they're at the  
15 office someplace.

16 Q Who's your office manager now?

17 A The same person.

18 Q Teresa?

19 A Uh-huh.

20 Q Okay. Would Teresa be the  
21 individual that would have the actual  
22 policies of insurance that -- that were  
23 issued by these various companies for your  
24 professional liability?

25 A That's my best guess, yes.

1 Q So, as -- as you sit here today,  
2 with respect to this policy issued by  
3 Admiral Insurance Company, you're not aware  
4 that there was any restriction or exclusion  
5 on that particular policy concerning the  
6 performance of bariatric surgery?

7 A No. They usually put the exclusions  
8 and restrictions on the binder.

9 THE VIDEOGRAPHER: Mr. Cowdrey, you  
10 only have about a minute left on this tape.

11 MR. COWDREY: Do you just want to  
12 stop now.

13 THE VIDEOGRAPHER: Unless you --

14 MR. COWDREY: Let's go ahead and  
15 stop.

16 THE VIDEOGRAPHER: The time is  
17 4:36 p.m. We're going off the record. This  
18 is the end of tape one.

19 (At this time a short recess was  
20 had.)

21 THE VIDEOGRAPHER: □□The time is 4:45  
22 p.m. We're going back on the record. This  
23 is the beginning of tape 2.

24 BY MR. COWDREY:

25 Q Thank you. Doctor, when it comes to

1 purchasing the -- the professional liability  
2 coverage for yourself, it also provides  
3 coverage for your professional corporation.  
4 Is that paid -- paid for by a check?

5 A Usually.

6 Q Okay, and Teresa Fallang is your  
7 office manager. Does she have the ability  
8 to write checks and sign checks, or is -- or  
9 are the checks signed by yourself?

10 A I don't remember signing any  
11 particular check.

12 Q Well, does Teresa have the ability  
13 to actually sign a check?

14 A Yes.

15 Q On behalf of yourself?

16 A I don't know on behalf of myself.  
17 It's on behalf of the business.

18 Q Well, for example, if we looked at  
19 Exhibit 7 and the coverage afforded by  
20 Admiral Insurance Company, would -- would a  
21 check have been written from a personal  
22 account, David Fallang, or from the  
23 corporate account?

24 A From the corporate account.

25 Q And your testimony is Teresa would

1 have had the authority to sign that check?

2 A Yes.

3 Q Okay. Would you have known back in  
4 July of 2001 as to how much your insurance  
5 premiums were for coverage through Admiral  
6 Insurance Company?

7 A I guess I don't know.

8 Q Well, let me ask you this.

9 A Would I have known back then? Well,  
10 I don't --

11 Q Let me ask you this. When you were  
12 looking for insurance coverage, professional  
13 liability coverage, did you shop around for  
14 coverage when it came to the insurance  
15 companies and how much your premiums were?

16 A Yes.

17 Q And did you have anybody in the  
18 office doing that for you, or did you do  
19 that yourself?

20 A She did most of that.

21 Q So, Teresa would have been the  
22 person who, for lack of a better word,  
23 solicited insurance companies, and what type  
24 of coverage they would provide you, and how  
25 much that coverage would cost?

1 A After millions of phone calls, lots  
2 of forms to fill out, applications to fill  
3 out. I mean, it's just an unbelievable  
4 nightmare.

5 **Q And I guess my question to you is:**  
6 **You -- you delegated that responsibility**  
7 **to -- to Teresa to shop around for insurance**  
8 **coverage, and how much it would cost?**

9 MS. HARLAN: ☐ Objection.

10 THE WITNESS: Yes.

11 BY MR. COWDREY:

12 **Q And who ultimately determined what**  
13 **insurance company you would buy coverage**  
14 **through?**

15 A I don't know how to answer that  
16 question.

17 **Q Well, I mean, did you --**

18 A What ultimately determines whether  
19 you're going to buy a new car? If your wife  
20 wants a new car, you get a new car.

21 **Q Not so in my family, but go ahead.**  
22 **What I'm interested in then is, with respect**  
23 **to your professional liability coverage, did**  
24 **you make the ultimate decision as to what**  
25 **insurance company you would go with?**

1 A I mean, I guess as the president of  
2 the corporation, I had the authority to say  
3 no, but in reality, it was so difficult to  
4 find any coverage at all, and it was so  
5 complicated, and like I said, I mean, this  
6 stuff has turned into a nightmare that --  
7 and it kept getting increasingly worse as  
8 time went on, that sometimes any coverage at  
9 all determined what company we picked.

10 **Q And -- and --**

11 A Three of my companies went  
12 bankrupt.

13 **Q And which companies were those? Do**  
14 **you remember?**

15 A Well, PICO was one of them. PHICO  
16 was another one, and I believe Frontier. I  
17 had PICO for many years. That's the company  
18 I started in practice with.

19 **Q Is it -- is that the one out of**  
20 **Columbus?**

21 A Oh, I don't remember. I -- it might  
22 have been.

23 **Q The PHICO is a different company**  
24 **than PICO, correct?**

25 A That's correct. I don't remember

1 for sure. I think that they were from  
2 Pennsylvania or something, but I don't know  
3 where these guys are from.

4 **Q Okay, as -- as things went along,**  
5 **did it become more difficult to obtain**  
6 **insurance coverage for bariatric surgery?**

7 A Everything. Bariatrics is very  
8 difficult, yes.

9 **Q And why is that?**

10 A Because people like our friend in  
11 Cleveland keep suing us. It is well  
12 known -- that was a flip answer.

13 It is well known, and I cannot  
14 explain to you the reasons why, but it is  
15 well known that bariatrics is probably the  
16 worst specialty as far as medical  
17 malpractice, and -- and I believe that  
18 the -- there's -- there was a guy that spoke  
19 at the American Society -- Society for  
20 Bariatric Surgery, and I believe he said  
21 that the average full-time bariatric surgeon  
22 gets sued something like 2.3 times per year,  
23 whereas the average obstetrician/  
24 gynecologist gets sued something like 2.5  
25 times per career. It's just horrible.

1 **Q And -- and I take it that one of the**  
2 **reasons for that is because you're dealing**  
3 **with high risk patients?**

4 A I assume that to be true, but I -- I  
5 must tell you, this is what I do for a  
6 living. I've done it for some time. I love  
7 it, and I don't understand it. I mean, we  
8 do a lot of good, but it may be that. It  
9 may be high expectations. I -- I really  
10 don't get it.

11 MR. COWDREY: Do you want to show  
12 him Exhibit 8?

13 MS. HARLAN: ☐ I did.

14 BY MR. COWDREY:

15 **Q Doctor, I've put in front of you**  
16 **Exhibit 8, which is, again, the second page**  
17 **of a document for signature on it, and it's**  
18 **dated April 19, 2003; is that correct?**

19 A Yes.

20 **Q And that appears to be a request for**  
21 **privileges that you signed; is that**  
22 **correct?**

23 A That's what it appears to be.

24 **Q Okay, and this involves, again, a**  
25 **request for a Roux-en-Y gastric bypass**

1 **cholecystectomy; is that correct?**  
 2 A Yes.  
 3 **Q And that would involve**  
 4 **laparoscopic -- a request for laparoscopic**  
 5 **procedures with respect to Roux-en-Y?**  
 6 A Yes.  
 7 **Q And, then, also a request for open**  
 8 **Roux-en-Y gastric bypass, correct?**  
 9 A Yes.  
 10 **Q Okay, and showing you what's been**  
 11 **marked as Exhibit 9, this is an agreement**  
 12 **that you signed with the hospital on April**  
 13 **19, 2003 concerning malpractice coverage; is**  
 14 **that correct?**  
 15 A Yes.  
 16 **Q And that indicates that if -- if**  
 17 **your current coverage is cancelled,**  
 18 **terminated or restricted in any way, you**  
 19 **would notify Kettering Medical Center of**  
 20 **that.**  
 21 A Yes.  
 22 **Q Showing you what's been marked as**  
 23 **Exhibit 10, this is a certificate of**  
 24 **insurance dated at the top, right-hand side**  
 25 **July 25th of 2002; is that correct?**

1 A Yes.  
 2 **Q That shows a new insurance company**  
 3 **providing coverage for Middletown Surgical**  
 4 **Associates and Dr. David J. Fallang,**  
 5 **correct?**  
 6 A Yes.  
 7 **Q That new insurance company is**  
 8 **Evanston; is that right?**  
 9 A Yes.  
 10 **Q That's a claims made policy?**  
 11 A That's what it says.  
 12 **Q Okay, and did you, or do you, as you**  
 13 **sit here today, understand the difference**  
 14 **between a claims made policy and an**  
 15 **occurrence policy?**  
 16 A I think I do, yes.  
 17 **Q All right, and what's your**  
 18 **understanding of that difference?**  
 19 A An occurrence policy covers any  
 20 adverse event or allegation of adverse event  
 21 that occurs during the policy period. Even  
 22 if the policy changes, expires or whatever,  
 23 any claim ever made for any situation or  
 24 any -- any incident that -- that occurred  
 25 during that policy period would be covered

1 forever, assuming, of course, the insurance  
 2 company didn't go bankrupt.  
 3 The claims made policy only covers  
 4 claims made during the policy period or an  
 5 incident that you might notify the insurance  
 6 company of. So, if something bad happened,  
 7 and you called your insurance company and  
 8 said: You need to know about this, that  
 9 would be equivalent to having the claim -- a  
 10 claim reported, I guess you could say.  
 11 **Q And Exhibit 10 shows that you have**  
 12 **coverage with Evanston under policy number**  
 13 **MM-4025 with a policy period of July 25,**  
 14 **2002 to July 25, 2003, correct?**  
 15 A That's what it says.  
 16 **Q And it shows a certificate of holder**  
 17 **at the bottom being Kettering Medical**  
 18 **Center; is that right?**  
 19 A That's what it says.  
 20 **Q And -- and would Teresa have**  
 21 **provided this certificate of liability**  
 22 **insurance to the hospital?**  
 23 A I assume so.  
 24 **Q Well, did you personally provide**  
 25 **this certificate to -- to the hospital?**

1 A No. Sometimes -- I think sometimes  
 2 the insurance broker provides it. Again, I  
 3 mean, I didn't do this stuff, but I think  
 4 sometimes it comes directly from the broker,  
 5 or if not, then it comes, I guess, from our  
 6 office.  
 7 **Q And -- and how would the broker know**  
 8 **who to provide this certificate of insurance**  
 9 **to?**  
 10 A I don't know. I guess somebody  
 11 would have to tell him.  
 12 **Q Now, this certificate, Exhibit 10,**  
 13 **indicates in the space under description of**  
 14 **operations, et cetera, it says, "coverage**  
 15 **extends to David J. Fallang, M.D. while**  
 16 **performing services on behalf of the named**  
 17 **insured." Is that what it says?**  
 18 A Yes.  
 19 **Q Were there any restrictions that you**  
 20 **were aware of under this -- under this**  
 21 **insurance policy issued by Evanston**  
 22 **concerning bariatric surgery?**  
 23 A Not that I remember.  
 24 **Q This policy of insurance, do you**  
 25 **still have -- do you actually still have --**

1 strike that.  
 2 Would Teresa still have the policy  
 3 of insurance that Evanston issued for this  
 4 policy year?  
 5 A I guess so. I don't know that as a  
 6 fact.  
 7 Q If you'll look at Exhibit 12, skip  
 8 over Exhibit 11, Exhibit 12 is another  
 9 certificate of liability insurance which is  
 10 dated July 8th of 2003; is that correct?  
 11 A Yes.  
 12 Q And that shows the insured as David  
 13 J. Fallang, M.D.; is that correct?  
 14 A Yes.  
 15 Q And the certificate holder on the  
 16 bottom, left-hand side is Sycamore  
 17 Hospital?  
 18 A Yes.  
 19 Q And, again, do you know whether  
 20 Teresa would have provided this to the  
 21 hospital?  
 22 A I think so.  
 23 Q And this shows a different  
 24 malpractice policy number being MM 807001  
 25 with an effective date May 7, 2003 to May 7,

1 2004; is that right?  
 2 A That's what it says.  
 3 Q And what was the reason why the  
 4 policy number changed? Do you know?  
 5 A No.  
 6 Q You had the same coverage; is that  
 7 correct?  
 8 A It looks like it to me.  
 9 Q Was there any restriction or  
 10 exclusion of coverage under this policy  
 11 number MM 807001 with respect to bariatric  
 12 surgery that you were aware of?  
 13 THE REPORTER: You know what? I  
 14 can't hear you again.  
 15 THE WITNESS: I'm sorry. I said it  
 16 does -- it has no restrictions on the -- on  
 17 the certificate, but it's my recollection  
 18 that this did not cover bariatrics.  
 19 Q And -- and you indicated that this  
 20 particular policy of insurance which is  
 21 noted by the certificate of Exhibit 12, your  
 22 recollection is this did not afford coverage  
 23 for bariatric surgery?  
 24 A I think that's the case.  
 25 Q And -- and did you advise Kettering

1 hospital that this policy of insurance  
 2 issued by Evanston with a date on the  
 3 certificate of liability insurance of July  
 4 8, 2003 that you did not have coverage for  
 5 bariatric surgery?  
 6 A (At this time the witness shook his  
 7 head.)  
 8 Q Why not?  
 9 A I don't know.  
 10 Q Weren't you required to do that?  
 11 A Well, you've given me a previous  
 12 document that said so, but we get -- we get  
 13 lots of things to sign. We have these huge  
 14 packets of bylaws and all those kinds of  
 15 things, and I don't recall what all of those  
 16 things say.  
 17 Q But you acknowledge that you did  
 18 sign an agreement on April 19, 2003 where  
 19 you indicated to the hospital that, if your  
 20 coverage was changed, restricted, you would  
 21 certainly notify the hospital of that,  
 22 correct?  
 23 A Correct.  
 24 Q And as you sit here today, you did  
 25 not, in fact, notify the hospital of the

1 change in coverage with respect to your  
 2 professional liability coverage; is that  
 3 right?  
 4 MS. HARLAN: ☐ Objection.  
 5 THE WITNESS: ☐ That appears to be  
 6 true.  
 7 BY MR. COWDREY:  
 8 Q And the last exhibit that I'll show  
 9 you, Exhibit 13, indicates that you  
 10 submitted a resignation from the medical  
 11 staff of Kettering Medical Center dated May  
 12 5th of 2004; is that right?  
 13 A That is correct.  
 14 Q So, you -- you'd earlier testified  
 15 about your privileges lapsing. As it turned  
 16 out, you actually resigned your privileges,  
 17 correct?  
 18 A Yes. They were about to lapse.  
 19 Q And -- and when you say they were  
 20 about to lapse, what do you mean by that?  
 21 A Well, the -- the renewal period was  
 22 coming up, and as I previously stated, I  
 23 chose not to continue having privileges  
 24 there.  
 25 Q With respect to the certificate of

1 insurance which has been marked as Exhibit  
2 12, since -- since it's your understanding  
3 that this insurance policy issued by  
4 Evanston did not provide coverage for  
5 bariatric surgery, I take it your premiums  
6 were significantly different than the  
7 premiums you'd paid in the past.

8 A Significantly higher.

9 Q Significantly higher or lower?

10 A My recollection is that these were  
11 about \$180,000 a year. I mean, they just --  
12 they just have kept going up and up and up  
13 over the last six or seven years.

14 Q Okay. I guess my question to you  
15 is: When you obtained this policy of  
16 insurance through Evanston which had --  
17 which is noted by their certificate on  
18 Exhibit 12, was this policy of insurance,  
19 since it did not provide coverage for  
20 bariatric surgery, cheaper than the previous  
21 policies of insurance that you'd had  
22 providing professional liability coverage?

23 A Not that I recall. I mean, you had  
24 so many applications out there with  
25 quotations all over the place, it's -- it's

1 probably in the office.

2 MR. COWDREY: Okay. Why don't we  
3 take a break for a couple minutes here,  
4 David, if you don't mind, and let me kind of  
5 collect my thoughts. Is that all right?

6 MR. KULWICKI: ☐ No problem.

7 MR. COWDREY: Okay.

8 THE VIDEOGRAPHER: ☐ The time is 5:04  
9 p.m. We're going off the record.  
10 (At this time a short recess was  
11 had.)

12 THE VIDEOGRAPHER: ☐ The time is 5:08  
13 p.m. We're going back on the record.

14 BY MR. COWDREY:

15 Q Doctor, just a follow-up question.

16 I -- I know I asked you a question as to  
17 whether or not you ever notified anybody  
18 from the hospital about the fact that your  
19 insurance policy with Evanston did not  
20 provide coverage for bariatric surgery. Did  
21 you ever have any in -- informal discussions  
22 with anybody at the hospital about the fact  
23 you didn't have coverage for bariatric  
24 surgery?

25 A Not about that fact, no.

1 very difficult to remember.

2 Q With respect to this particular  
3 lawsuit, the O'Neal lawsuit, did you notify  
4 the Evanston Insurance Company of this  
5 potential claim?

6 A I believe we did, yes.

7 Q Do you remember when you first  
8 notified them of the claim?

9 A I don't remember, no.

10 Q Did you notify them of the claim  
11 before the lawsuit was filed?

12 A I don't think so.

13 Q So, your recollection is, when you  
14 got served with the suit papers from the  
15 court is when you would have submitted the  
16 claim to Evanston?

17 A I mean, I think we just turned that  
18 over to the attorneys, and they do it.

19 Q Did you get a letter from Evanston  
20 denying coverage for this claim?

21 A I believe so.

22 Q Okay, do you have a copy of that  
23 somewhere?

24 A The same as all the other places. I  
25 don't keep it myself, but I believe it's

1 Q What -- what -- did you have  
2 informal discussions with anybody at the  
3 hospital about malpractice insurance in  
4 general?

5 A Oh, yes.

6 Q Who did you talk with?

7 A I talked with -- well, who's the  
8 CEO? I'm locking on it.

9 Q Mr. Perez?

10 A No, not Perez. The guy --

11 Q Fred?

12 A Fred Manchur and Richard Haas.  
13 Richard Haas is the VP in charge of  
14 Sycamore, and we had a number of discussions  
15 about the crisis and the problems. There  
16 were meetings that many of the medical staff  
17 attended. I voiced my opinions about what I  
18 thought people should do, and we had a lot  
19 of discussions. It's a very difficult  
20 problem, as you may know.

21 Q What -- what -- what particular  
22 opinions did you express to those  
23 individuals?

24 A I expressed the opinion that I  
25 thought the hospital should either,



1 preferably, drop the requirement for  
2 malpractice insurance, or at minimum lower  
3 it. I know a number of surgeons, first of  
4 all, surgeons who've gone out of business.  
5 The guy in Middletown I shared office space  
6 with for 17 years is 49 years old. He had  
7 to quit. He couldn't -- he couldn't -- he  
8 went to managed health care, and with the  
9 increasing malpractice premiums, he couldn't  
10 stay in business. I mean, this guy's got a,  
11 you know, a kid in the sixth grade or  
12 thereabouts, and he's less than 50 years  
13 old, and he had to quit practicing surgery.

14 I know that Mike Keller at Sycamore,  
15 a general surgeon, expressed to me that he  
16 wasn't sure he was going to be able to  
17 continue in practice. John Bullmaster told  
18 me if Kettering would allow it, he would --  
19 he would drop his insurance, particularly  
20 after they passed the so-called tort reform  
21 where they eliminated the joint and several  
22 liability requirements.

23 I -- I opined that I thought that  
24 the hospital, certainly the medical staff  
25 but also the hospital would be better off if

1 they just didn't require it for medical  
2 staff privileges. I was told that they --  
3 Kettering was -- being a Seventh Day  
4 Adventist hospital had not only Fred Manchur  
5 and Richard Haas's Frank Perez's opinions to  
6 consider, but also Board members from the  
7 Seventh Day Adventist community outside of  
8 the state, and, you know, that that wasn't  
9 going to happen, and, you know, my opinion  
10 is that, just as in other parts of the  
11 country, we're facing a huge crisis.  
12 There's going to be a crisis of physician  
13 availability. I've been, you know,  
14 certainly feeling as though my entire career  
15 in the last several years has been  
16 threatened with extinction, and, you know,  
17 one of my -- one of my friends at Sycamore  
18 told me that they'd done an investigation  
19 into the -- some of the stuff revolving  
20 around bariatrics, and that I had the lowest  
21 complication rate of any surgeon on the  
22 staff doing these procedures, and, yet, you  
23 know, these people are trying to drive me  
24 out of business.

25 So, you know, that's my personal

1 opinion, and I guess you could call it a  
2 political opinion, if -- if you will, but  
3 we -- Fred and Richard and I had many -- a  
4 number of discussions about these issues.  
5 Who knows -- who knows what's going to  
6 happen next.

7 **Q At least as of May 5th, 2004 when**  
8 **you submitted your resignation from the**  
9 **medical staff at Kettering Medical Center,**  
10 **the hospital still had a requirement that**  
11 **you have professional liability coverage for**  
12 **a million dollars and \$3 million?**

13 A Which I indeed had.

14 **Q Except you didn't have coverage for**  
15 **bariatric surgery?**

16 A I believe that that is true.

17 MR. COWDREY: Thanks. David, you  
18 can ask some questions if you want to follow  
19 up.

20 MR. KULWICKI: I do.

21 RECROSS-EXAMINATION OF DAVID FALLANG, M.D.  
22 BY MR. KULWICKI:

23 **Q Doctor, are you suggesting that you**  
24 **concealed the fact that you didn't have**  
25 **coverage for bariatric surgery from the**

1 **folks at Kettering Memorial Hospital or**  
2 **Medical Center?**

3 MS. HARLAN: ☐ Objection.

4 THE WITNESS: ☐ I don't believe I  
5 was suggesting that, no.

6 BY MR. KULWICKI:

7 **Q Did you just feel that the right**  
8 **questions weren't asked of you by the**  
9 **Kettering Medical Center credentialing**  
10 **people?**

11 A I filled out my credentialing  
12 paperwork as I believed, and again, I didn't  
13 do it personally, but through my office, we  
14 filled that out, and we sent them what  
15 was -- what we understood to be required,  
16 and we didn't -- we didn't volunteer any  
17 extraneous information, and that was it.

18 **Q With respect to the credentialing**  
19 **process, did you also submit information**  
20 **with respect to litigation that you had been**  
21 **the subject of?**

22 A As far as I know, we submitted it.  
23 If it was required in their admission  
24 packet, again, I never personally filled any  
25 of these out, but I assume, if it was

1 requested, we submitted whatever was  
2 requested.

3 **Q And do you know if the case that you**  
4 **spoke of today, the Coleman case, do you**  
5 **know if that had been filed -- well, do you**  
6 **know when that had been filed?**

7 A I don't recall, no.

8 **Q All right. The Exhibit 13 that you**  
9 **looked at, a copy of your resignation**  
10 **letter, it appears to me that there's a**  
11 **substantial gap between the first sentence**  
12 **and the last sentence. Do you recall**  
13 **whether or not the original of this had more**  
14 **language in there?**

15 A Your question implies that there is  
16 an original that's someplace. Oh, you mean  
17 like the -- the one with the ink signature?  
18 No, I mean, no, we haven't, like, you know,  
19 erased anything or whited it out or  
20 anything. Again, I mean, I just signed this  
21 stuff. I assumed that they put that space  
22 in there so that the letter looks better.

23 **Q Well, who prepared this document?**

24 A It's signed "TLF" which I assume  
25 stands for Teresa Lynn Fallang, who is my

1 wife.

2 **Q Okay. So, you're not aware of any**  
3 **information that's been redacted or removed**  
4 **from this -- this exhibit?**

5 A Or concealed, no.

6 **Q A couple of questions. Going back**  
7 **to the medical record, if you could take a**  
8 **look at that, there are a couple of**  
9 **consultations that took place during**  
10 **Mrs. O'Neal's May, 2003 admission. One of**  
11 **them appears to be by a Dr. Iberico,**  
12 **I-B-E-R-I-C-O. What specialist --**

13 A Mariano Iberico.

14 **Q I'm sorry?**

15 A Mariano Iberico, he is a  
16 pulmonologist and intensivist.

17 **Q Okay, and that was my question, his**  
18 **specialty. There also appears to be a**  
19 **consultation by Dr. Schoonover,**  
20 **S-C-H-O-O-N-O-V-E-R. What specialty of**  
21 **medicine is he?**

22 A I -- I don't know him. Dr. Iberico  
23 asked him to consult, but I believe that  
24 he's a neurologist.

25 **Q It appears that he consulted after**

1 **Mrs. O'Neal had already arrested, correct?**

2 A That appears to be the case, yes.

3 **Q Now, also, so I understand these**  
4 **records, there is a Discharge Summary in**  
5 **here, and I'd like you to find that, if you**  
6 **could, Doctor.**

7 A Okay.

8 **Q As I look through the chart, I find**  
9 **only one document that appears to be a**  
10 **Discharge Summary from the May, 2003**  
11 **admission, and it appears to have the word**  
12 **"Discharge Summary" at the bottom. It's**  
13 **signed by you, and it appears to be dictated**  
14 **on September 15 of 2003 and transcribed that**  
15 **same day. Is that -- is that what you**  
16 **consider to be the Discharge Summary?**

17 A Yes.

18 **Q Is it unusual for you to wait**  
19 **roughly, like, four months to dictate a**  
20 **Discharge Summary?**

21 A Well, first of all, I don't  
22 typically dictate the discharge summaries;  
23 my PA does, and the Discharge Summary cannot  
24 usually be completed until the chart's  
25 available, and sometimes the charts are out

1 to other physicians to sign. In this case,  
2 this chart may have been held up someplace  
3 waiting for the autopsy report. It may have  
4 been in risk management, so it -- it would  
5 be a little unusual. I think I'd get in  
6 trouble with the medical records people if  
7 all my discharge summaries were four months  
8 after discharge, but, of course, this was an  
9 unusual situation, so my guess is that this  
10 chart was off someplace else being held and  
11 perused and completed.

12 **Q Even though the physician's**  
13 **assistant dictates the -- the discharge**  
14 **note, you signed it, correct?**

15 A That's correct.

16 **Q And that would indicate that you**  
17 **agree with it, fair enough?**

18 A No. It would indicate that I signed  
19 it.

20 **Q Well, do you disagree with it?**

21 A I haven't read it.

22 **Q Ever?**

23 A I don't know if I read it back then.  
24 I probably did. I haven't read it recently.

25 **Q Okay. Well, why don't you read it**

1 now, if you would.  
 2 A Okay.  
 3 **Q To yourself.**  
 4 A Okay. Okay, I've read it.  
 5 **Q Is there anything in it that you**  
 6 **consider to be inaccurate?**  
 7 A There's nothing that I could point  
 8 out as being accurate -- as being  
 9 inaccurate, sorry.  
 10 **Q Now, in the text of the Discharge**  
 11 **Summary, there's a notion or a mention of**  
 12 **"blood culture did note hemolytic strep**  
 13 **which would explain the continued decrease**  
 14 **in the hematocrit." Did I read that**  
 15 **correctly?**  
 16 A Yes.  
 17 **Q What does that mean, hemolytic**  
 18 **strep?**  
 19 A Well, it's a classification of  
 20 streptococcal bacteria, beta -- they're  
 21 typically called beta hemolytic strep.  
 22 **Q And the term, hemolytic, means that**  
 23 **the strep is actually, in a sense, eating**  
 24 **blood cells?**  
 25 A I wouldn't say that, no.

1 **Q Well, when a --**  
 2 A It's a classification of -- of  
 3 bacteria. Quite honestly, I mean, I'm a  
 4 general surgeon. You would have to, I  
 5 guess, ask an expert in microbiology where  
 6 that name came from. I mean, hemolysis  
 7 means destruction of red blood cells; that  
 8 is correct, but that wasn't your question.  
 9 If you're asking me whether beta hemolytic  
 10 strep eat red blood cells, I -- I don't  
 11 think that is the case, but, you know,  
 12 that's -- that's not an area in which I am  
 13 an expert.  
 14 **Q Okay. In any event, with respect to**  
 15 **the decrease in hematocrit, that would be a**  
 16 **drop in -- in the red cell production due to**  
 17 **the strep; is that -- is that what that's**  
 18 **saying?**  
 19 A Well, I wouldn't particularly agree  
 20 with that connection. That's what it says,  
 21 yes.  
 22 **Q Okay.**  
 23 A I don't -- I don't know that the  
 24 beta hemolytic strep has anything to do with  
 25 the drop in hematocrit levels.

1 **Q Well, what do you think was causing**  
 2 **her decline in hematocrit levels during the**  
 3 **May, 2003 admission?**  
 4 A Well, I stated in my -- in my  
 5 progress note that I thought it was probably  
 6 due to hemodilution from giving her IV  
 7 fluids. It's also been my experience in  
 8 caring for -- for seriously ill patients  
 9 that even relatively small amounts of blood  
 10 drawn for testing purposes, to get a CBC and  
 11 so forth, over time in a sick patient  
 12 particularly can gradually result in -- in a  
 13 decrease in their -- their overall count.  
 14 In a patient like this, of course,  
 15 with -- with everything being so complex  
 16 and -- and interwoven, I mean, it's really  
 17 hard to say whether this decrease in her  
 18 hematocrit is all due to hemodilution, or,  
 19 you know, 83 percent due to hemodilution,  
 20 and two percent due to hemolysis, and five  
 21 percent due to blood draws. I mean, there's  
 22 just no way to know.  
 23 Most of the time, sick patients in  
 24 the Intensive Care Unit who are getting  
 25 blood drawn have a gradual decrease over

1 time in their -- in their hematocrit until  
 2 they begin to improve, and, then, things get  
 3 better. My opinion is that most of her  
 4 decrease in hematocrit was due to  
 5 hemodilution from giving her fluids because  
 6 we couldn't give her red cells. We had to  
 7 give her something to try to maintain her --  
 8 her intravascular volume.  
 9 **Q So, in other words, she still had**  
 10 **the same amount of red blood circulating; it**  
 11 **just was diluted by saline or whatever else**  
 12 **was given to her?**  
 13 A Right. The same amount or -- or a  
 14 similar amount. In other words, we -- we  
 15 did not note any blood loss from anywhere.  
 16 She wasn't bleeding from her colon. She  
 17 wasn't bleeding from her nose or her ears,  
 18 like someone, for example, with DIC; that is  
 19 disseminated intravascular coagulopathy,  
 20 might have. So, there was no obvious source  
 21 of blood loss, and again, I mean, you know,  
 22 it's possible that, if she had a  
 23 hemolytic -- a beta hemolytic streptococcal  
 24 blood-borne infection, that that could  
 25 result in some hemolysis. You know, I'm --

1 I'm not really sure. You'd have to ask  
2 somebody more expert in that area.  
3 **Q And -- and likewise, Doctor, with**  
4 **respect to the issue of expertise, with**  
5 **regard to dating the blood clots that were**  
6 **found in her lungs, again, would that be a**  
7 **matter that would be more within the**  
8 **specialty of a pathologist as opposed to a**  
9 **surgeon such as yourself?**

10 A Well, I -- I think so. I mean,  
11 you -- you -- there's a lot of ways to date  
12 things. You can date it by inference  
13 clinically, but, obviously, a -- you know,  
14 some other kind of analysis might be more  
15 accurate. I -- I don't -- you know, I don't  
16 know that much about how they date blood  
17 clots.

18 **Q Now, with respect to Mrs. O'Neal's**  
19 **religion and -- and her refusal of blood**  
20 **products, did you know that she was a**  
21 **Jehovah's Witness before the original**  
22 **bariatric surgery, the -- whenever that was,**  
23 **the gastric bypass of January 3 of 2003?**

24 A Yes, I did.

25 **Q And that was an elective procedure,**

1 true?

2 A Yes.

3 **Q Elective on her part, but also**  
4 **elective on your part; in other words, you**  
5 **had the legal right to refuse to undertake**  
6 **surgery on that particular patient if, you**  
7 **know, you felt like it was too dangerous**  
8 **because she was a Jehovah's Witness, right?**

9 MS. HARLAN: ☐ Objection.

10 THE WITNESS: ☐ That -- that is  
11 true, and many -- and many surgeons would  
12 refuse to offer these patients the care that  
13 they need.

14 BY MR. KULWICKI:

15 **Q And, now, with regard to the refusal**  
16 **of blood products, there are other patients,**  
17 **other than Witnesses, that refuse blood**  
18 **products, true?**

19 A Not many.

20 **Q Well, there are --**

21 A I'm sure there must be. There must  
22 be some. Well, you answer the question,  
23 then. I mean, there must be some somewhere.  
24 I don't know that I've ever ran -- run into  
25 any, particularly when they're in dire

1 straits.

2 **Q Now, I've heard about this, or you**  
3 **mentioned this Adventist or Seventh Day**  
4 **Adventist. I'm not familiar with that**  
5 **particular religion. Do they have any**  
6 **prohibitions against use of blood**  
7 **products?**

8 A No, they don't, but they don't  
9 believe in eating meat. They're  
10 vegetarians. I -- I assume Charles F.  
11 Kettering was a Seventh Day Adventist.

12 **Q Have you had the opportunity to**  
13 **review the blood labs from the admission to**  
14 **the Mansfield hospital?**

15 A No.

16 **Q Did you detect any bleeding at any**  
17 **time during the May 3 admission, whether**  
18 **rectally from diverticula or otherwise?**

19 A I don't believe so, no.

20 **Q Can you estimate --**

21 A Only a small amount of blood loss  
22 during the surgical procedure.

23 **Q That was my next question.**

24 A Oh.

25 **Q I don't see you having estimated**

1 that in your op note. Maybe we should  
2 revisit that. Do you give an estimate of  
3 blood loss during that -- that procedure?

4 A I -- I normally don't estimate it.

5 That's usually something that the anesthesia  
6 personnel do, but I do recall the case, you  
7 know, reasonably well, and I -- I know I was  
8 being as -- as careful as I humanly knew how  
9 to be to minimize my dissection, minimize  
10 any bleeding, and I would describe her blood  
11 loss during surgery as minimal.

12 **Q Tell me, if you would, Doctor, in**  
13 **your opinion, what role, if any, you felt**  
14 **that her refusal of a transfusion had in her**  
15 **ultimate outcome, now that you know that it**  
16 **was a PE that killed her.**

17 A It may have had a very significant  
18 role. The reason I say that is because she  
19 suffered a cardiopulmonary arrest, which, in  
20 retrospect, I think is most likely the  
21 direct result of the pulmonary embolus, but  
22 she didn't die immediately. Some people  
23 will have an acute catastrophic outcome from  
24 a large pulmonary embolus like that and  
25 simply die on the spot. This patient did

1 not. She survived for a period of some  
2 hours afterwards, but with a very  
3 compromised hemodynamic state, because this  
4 blood clot was occluding blood flow to the  
5 lungs, thus further diminishing her capacity  
6 to oxygenate what few red blood cells she  
7 had left.

8 Had she been willing, and again,  
9 this is not a criticism of her religion;  
10 it's just my opinion about the -- the facts  
11 of the case, but had she been willing or her  
12 family been willing to decide for her to  
13 receive red blood cells, then, she would  
14 have had a much improved hemodynamic  
15 condition, first of all, in terms of  
16 intravascular blood volume, but secondly,  
17 and possibly more importantly, a much  
18 improved state of oxygen-carrying  
19 capability, so that when people suffer from  
20 anoxia or hypoxia from some condition like  
21 sepsis or like a pulmonary embolus, and  
22 their body tissues, their brain, their  
23 kidneys are not receiving enough oxygen,  
24 maximizing their oxygen-carrying capability  
25 is extremely important.

1 So, had this patient been able to  
2 receive red blood cells, her outcome might  
3 have been dramatically different.

4 **Q It's possible?**

5 A In fact, you may notice in my  
6 progress notes, somewhere in there, I  
7 believe I read that I thought this patient  
8 was actually improving significantly on the  
9 6th. I believe she was awake. She was  
10 sitting up, I think in a chair in the  
11 Intensive Care Unit. We had a little  
12 conversation, and then some time either  
13 later that night or in the middle of the  
14 night on the 7th or something, I think is  
15 when this -- this cardiopulmonary arrest  
16 occurred, which -- which contributed to my  
17 bewilderment as to how she could suddenly  
18 become so septic when I had just seen her,  
19 and I thought, you know, she was getting  
20 better, and frankly, I was beginning to have  
21 a little optimism, even though her  
22 hematocrit had drifted down to about 16,  
23 that we -- you know, that we might be able  
24 to slip by this -- this -- you know, this  
25 horribly dangerous situation and -- and that

1 she would survive.

2 Now, in retrospect, it seems clear  
3 to me that what happened is that she threw  
4 this pulmonary embolus, but had she had good  
5 oxygenation with normal red cell numbers and  
6 hemoglobin with oxygen-carrying capability  
7 and hemodynamics in terms of the force of  
8 blood passing through the heart over these  
9 blood clots and into the lungs, she may very  
10 well have survived this large pulmonary  
11 embolus.

12 **Q It -- it's possible; is that what  
13 you're saying?**

14 A It's possible.

15 **Q Okay.**

16 A It is possible, yes.

17 **Q Now, with respect to the refusal to  
18 obtain or accept a transfusion, you've  
19 related to me that it was a contributing  
20 factor or may have been a contributing  
21 factor to her death after the arrest. Was  
22 it a factor before the arrest?**

23 A Probably so. Again, I mean,  
24 we're -- we're really out in an area where  
25 no one can ever know the truth for sure, but

1 certainly her overall condition and  
2 stability, I think, would have been improved  
3 had she had normal oxygen-carrying  
4 capability. It's just, all the  
5 physiological functions that you can think  
6 of that the body carries out require energy,  
7 and energy requires oxygen, and, so, there's  
8 just such a panoply of -- of misalignments  
9 of the physiology that occur because of  
10 hypoxia and -- and -- which would be  
11 certainly the case with somebody with a  
12 hematocrit of 16. I don't see a direct  
13 connection between that and the pulmonary  
14 embolus, but certainly her overall  
15 physiological condition would have been much  
16 better.

17 **Q Okay, and, again, with regard to  
18 your opinion and characterizing your  
19 opinion, is it fair to say that it's your  
20 opinion that it's possible that, had she had  
21 a transfusion before the arrest, that she  
22 may have had a better outcome?**

23 A Yes.

24 **Q Okay. Now, with respect to the  
25 chronology of events in this case, we know**

1 that the patient in January of 2003 had a  
2 surgery, and that a towel was left at that  
3 point in time, that she complained of pain  
4 in the area of the towel -- in the area of  
5 the retained towel, meaning the left mid to  
6 lower quadrant. She complained of pain in  
7 that area beginning in the end of January of  
8 2003, and on a few occasions leading up to  
9 her admission in May of 2003, at which time  
10 the towel was discovered as well as an  
11 abscess in the area of the towel.

12 Can we agree that, in all  
13 likelihood, that if Mrs. O'Neal did not have  
14 a towel in her belly, that she would not  
15 have needed to be hospitalized in May of  
16 2003 for surgery?

17 MS. HARLAN: ☐ Objection to the  
18 chronology of events which is different, I  
19 think, than even the question was.

20 MR. KULWICKI: Well, you know what?

21 THE WITNESS: I'm not sure what I'm  
22 supposed to answer.

23 MS. HARLAN: ☐ I don't think he asked  
24 you to agree -- I don't think he asked you  
25 to agree with that chronology. He then went

1 BY MR. KULWICKI:

2 Q And can we agree that the reason  
3 that it was discovered in all likelihood is  
4 because the patient was having symptoms  
5 related to that towel?

6 MS. HARLAN: ☐ Objection.

7 THE WITNESS: ☐ Well, I mean, you  
8 know, it's possible, but the problem is, I  
9 wasn't in Mansfield. They diagnosed her as  
10 having diverticulitis which also causes  
11 symptoms in that same area. I'm not in a  
12 position to say that their diagnosis was  
13 incorrect, and that it, in fact, was the  
14 towel that was causing her symptoms. It's  
15 certainly possible, and I think it lends  
16 itself to -- to immediate speculation, but  
17 there's no way for me to know that that's  
18 true. How do we know that she didn't also  
19 have diverticulitis and that that was the  
20 cause of her lower abdominal pain?

21 BY MR. KULWICKI:

22 Q Well, I mean, I'm looking at the  
23 Discharge Summary, Doctor, from -- from this  
24 admission, and it says, "The patient was  
25 admitted with a diagnosis of retained

1 on to another question.

2 THE WITNESS: Okay.

3 MS. HARLAN: But my objection is to  
4 the stated chronology of events.

5 MR. KULWICKI: ☐ Fair enough.

6 THE WITNESS: ☐ Someone tell me what  
7 to do.

8 BY MR. KULWICKI:

9 Q Well, here -- here, let me take  
10 over. I'll withdraw the question, and let  
11 me ask you a different one.

12 Doctor, can we agree that, if  
13 Mrs. O'Neal did not have a retained towel,  
14 that she would not have needed to undergo  
15 surgery in May of 2003?

16 A Yes, or at least she wouldn't --

17 MS. HARLAN: ☐ Objection.

18 THE WITNESS: ☐ She would not have  
19 needed to undergo surgery to remove the  
20 towel. The exact timing of it is a  
21 different issue.

22 MS. HARLAN: ☐ Or other type of  
23 surgery.

24 THE WITNESS: It might not have been  
25 discovered for three years. You never know.

1 foreign body with possible abscess in the  
2 left upper quadrant," and, I mean, in fact,  
3 you agree that she had an abscess. You --  
4 you tested that fluid, and she did have an  
5 abscess, true?

6 A I agree with that.

7 Q And she was having symptomatology in  
8 that area when she arrived at Kettering  
9 Medical Center in -- in May of 2003, true?

10 A That is true.

11 Q And the reason why she was  
12 transferred to you is because the physicians  
13 in Mansfield determined that she had a  
14 retained towel that was, you know, causing  
15 her some difficulty, true?

16 A Well, determined -- they determined  
17 that she had a retained towel, and -- and no  
18 one could blame them for not wanting to deal  
19 with the consequences of that retained  
20 towel. All I'm saying is that, we don't  
21 know -- I mean, I'm not saying you're wrong.  
22 I'm just saying I don't know that she also  
23 did not have, or that she did not also have  
24 diverticulitis as they diagnosed. I mean,  
25 it's not a -- it's not an illogical

1 conclusion to say: Well, the diverticulitis  
2 diagnosis, you know, maybe that was wrong,  
3 but I'm just saying I'm not in a position to  
4 say so.

5 **Q Now, as a general --**

6 A Obviously -- they obviously made  
7 that diagnosis and felt that they had a  
8 reason for making it. Were they incorrect?  
9 Possibly, but I -- I can't say that they  
10 were.

11 **Q All right. You don't have any**  
12 **criticisms of those physicians, true?**

13 A I do not. I've never seen their  
14 records. I don't know what they did.

15 **Q With respect to diverticula as a**  
16 **general surgeon, would you expect that**  
17 **diverticula in the lower descending colon or**  
18 **the sigmoid colon would generate pains in**  
19 **the left side?**

20 A Oh, absolutely. That's -- that's  
21 the classic location for symptoms of  
22 diverticulitis, but you must also remember,  
23 diverticulosis, which is the condition in  
24 which these small outpouchings of colonic  
25 mucosa protrude through the muscular wall of

1 the colon, diverticulosis can occur  
2 throughout the entire colon. The most  
3 common area for diverticulosis or for  
4 diverticulitis to occur is in the left side,  
5 and that would create an elevated white  
6 blood cell count, left mid and lower  
7 abdominal pain, and -- and similar symptoms  
8 to what Mrs. O'Neal had described.

9 **Q Well, the fact is, is that merely**  
10 **having diverticulosis doesn't mean that a**  
11 **patient's having diverticulitis, correct?**

12 A That is absolutely correct.

13 MR. KULWICKI: Okay. I think we've  
14 beaten this horse long and hard. I'm done.  
15 If Mr. Cowdrey has any questions, I -- I  
16 cede the floor.

17 MR. COWDREY: I don't have any  
18 questions, and I just want to make sure the  
19 court reporter up there has my name,  
20 address, phone number and stuff like that.

21 (At this time a discussion was held  
22 off the record.)

23 MS. HARLAN: ☐ He'll read.

24 THE VIDEOGRAPHER: What about  
25 viewing the videotape?

1 MS. HARLAN: We don't need to view  
2 the videotape.

3 THE VIDEOGRAPHER: Thank you very  
4 much.

5 MS. HARLAN: Thanks.

6 THE VIDEOGRAPHER: It's 5:40 p.m.  
7 We're going off the record. We're off the  
8 videotape.

9 --- o0o ---

1 C E R T I F I C A T E  
2 S T A T E O F O H I O S S:  
3 C O U N T Y O F C U Y A H O G A }

4 I, Luanne Stone, a Notary Public  
5 within and for the State of Ohio, duly  
6 commissioned and qualified, do hereby  
7 certify that the within-named witness, DAVID  
8 testify to the truth, the whole truth and  
9 nothing but the truth in the case aforesaid;  
10 that the testimony then given by the  
11 above-referenced witness was by me reduced  
12 to stenotype in the presence of said  
13 witness; afterwards transcribed; and that  
14 the foregoing is a true and correct  
15 transcription of the testimony so given by  
16 the above-referenced witness.

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

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

1       IN WITNESS WHEREOF, I have hereunto  
2 set my hand and affixed my seal of office at  
3 Cleveland, Ohio this ----- day of  
4 -----, A.D., 2004.

5  
6  
7  
8       \_\_\_\_\_  
9       Luanne Stone - Notary Public  
10      In and for the State of Ohio  
11      My commission expires 3/27/08  
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