i The State of Ohio, Page 1 INDEX OF OBJECTIONS 2 County of Montgomery. INDEX OF OBJECTIONS 2 3 IN THE COURT OF COMMON PLEAS By MS. ILARLAN 2 4 Stan L. ONeal, etc.,) 3 By MS. ILARLAN By MS. ILARLAN 6 -vs. 1003-CV-9286 6 10/10 97721 7 Foundation, etc., et al.,) 9 10222 123/4 9 Defendants.) 9 1023 1429 11 Videoteleconference deposition of DAVID 11 22/16 149/17 12 FALLANG, MD., a Defendant herein, called by 11 22/16 149/17 13 under the statute, and taken before Luanne 13 42/24 150/17 14 under the statute, and taken before Luanne 15 43/9 14/15 150/3 14 rege 1 BY MS. HARLAN 14				
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3Becker & Mishkind Co., LPA, by:3the witness in, please.4David Kulwicki, Esq.3the witness in, please.55556On behalf of the Defendant,5age, having been first duly sworn according7David Fallang, M.D.:6to law, deposes and says as follow:8Adkinson & Associates, by:9Camille Harlan, Esq.9Camille Harlan, Esq.9QDr. Fallang, my name is attorney1011On behalf of the Defendant,11Mable O'Neal in a lawsuit that's been filed12Kettering Medical Center Foundation:12against yourself and Kettering Medical13Robert Cowdrey, Esq.13Center.1414I'm here today to ask you some1514I'm here today to ask you some1619and, if you would, give us your current home202021A2122212123242424	2	On behalf of the Plaintiff:	2	MR. KULWICKI: Go ahead and swear
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55age, having been first duly sworn according6On behalf of the Defendant,6to law, deposes and says as follow:7David Fallang, M.D.:8Adkinson & Associates, by:99Camille Harlan, Esq.9Q□Dr. Fallang, my name is attorney1011On behalf of the Defendant,12Kettering Medical Center Foundation:12Kettering Medical Center Foundation:11Mable O'Neal in a lawsuit that's been filed13Robert Cowdrey, Esq.14111615questions with respect to your involvement161616171717181818202021212221232424242424	· · ·	•	4	
 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 19 19 10 10 11 12 Kettering Medical Center Foundation: 13 Robert Cowdrey, Esq. 14 15 16 17 18 19 10 10 11 12 A end to the defendant, 13 Robert Cowdrey, Esq. 14 15 16 17 18 19 19 20 21 22 23 24 24			5	
 7 David Fallang, M.D.: 8 Adkinson & Associates, by: 9 Camille Harlan, Esq. 10 On behalf of the Defendant, 12 Kettering Medical Center Foundation: 13 Robert Cowdrey, Esq. 14 15 15 16 17 Center. 14 17 If the problem of the Defendant, 15 16 17 Center. 16 18 18 18 18 18 18 18 18 18 18 18 18 18		On behalf of the Defendant		
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2323Road in Middletown, Ohio.2424QThank you, Doctor. I'm going to				· · ·
24 Q Thank you, Doctor. I'm going to				
2.7 Degin by asning some background mithination	4.4			
	25		25	hegin by asking some background information

Page 5		Page 7
about you, and then we'll turn to the facts	1	primarily.
of this case. If at any time during my	2	Q And, Doctor, were you acting within
questioning, you do not understand a	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.
	:	Q And when did your privileges at
· · · · · ·		Kettering Medical Center-Sycamore Hospital,
		when did that those lapse?
	E	A I think they expired in May.
		Q And you anticipated my next question
	1	which was to understand the nature of the
	1	termination of those privileges. You are
•	4	suggesting that they simply expired?
		A That's correct.
		Q Was there a conversation at the time
	5	that you decided to let them expire between
		ense j'un desiden to net them engine seen ten
Page 6	-	Page 8
		yourself and administration at Kettering
		Medical Center that your privileges would
1		not be renewed, and inviting you to allow
-		them to expire, rather than having them
	1	revoked?
	4	MS. HARLAN: Objection. You can
		answer.
		THE WITNESS: □No.
		BY MR. KULWICKI:
		Q Why did you let those privileges
		expire?
	1	A I didn't want them anymore.
A Yes.	1	Q Okay, and why did you decide that
Q Who else has practiced under that?	14	you didn't want privileges at Kettering
A Some years back, a physician named	15	Medical Center any longer?
Allison Clarey; a little more recently, a	16	A Oh, well, for one thing, they were
physician named Derek Martin.	17	always trying to get me to take emergency
Q When was the last time Derek Martin	18	room call, and every every time my
was employed by either of those two	19	privileges came up for renewal, we had to go
entities?	20	through a little bit a little battle
A Oh, it was probably about a year and	21	about that, and I just didn't want to
a half to two years ago.	22	continue them.
	8	
Q Do you know where Dr. Martin is	23	Q Was there anything with respect to
Q Do you know where Dr. Martin is currently practicing?	23 24	this particular litigation or the incidents
	of this case. If at any time during my questioning, you do not understand a question that I ask you, please stop me, and tell me that you don't understand my question. I will restate it to your satisfaction at that point in time. Okay? A Okay. Q And likewise, Doctor, if you if if you need to take a break at any point in time, we certainly can accommodate that. The final rule is that, if you would, as you've been doing so far, answer verbally as opposed to an uh-huh or an uh-uh or a nod of the head, so that our court reporter on this end can take down your testimony accurately. Fair enough? A Yes, sir. Q Thank you. Doctor, do you have any plans to move from the address that you're currently at in the next six months? A No. Q And, Doctor, tell me, if you would, the name of your current practice group. A The Surgical Weight Loss Center. Page 6 Q Is that a d.b.a., or is that an incorporated business? A That is a d.b.a. The incorporated name is Middletown Surgical Associates, Inc. Q Are you the only principal in Middletown I'm sorry, Middletown Surgical Associates, Inc.? A Yes. Q Have you at any time had any other physicians practicing under The Surgical Weight Loss Center name or the Middletown Surgical Associates name? A Yes. Q Who else has practiced under that? A Some years back, a physician named Allison Clarey; a little more recently, a physician named Derek Martin. Q When was the last time Derek Martin was employed by either of those two entities?	of this case. If at any time during my questioning, you do not understand a question that I ask you, please stop me, and tell me that you don't understand my guestion. I will restate it to your satisfaction at that point in time. Okay?3AOkay.8QAnd likewise, Doctor, if you if if you need to take a break at any point in time, we certainly can accommodate that. The final rule is that, if you would, as opposed to an uh-huh or an uh-uh or a nod of the head, so that our court reporter on this end can take down your testimony accurately. Fair enough?16AYes, sir.17AYes, sir.21QAnd, Doctor, tell me, if you would, the name of your current practice group. A the surgical Weight Loss Center.22VAA.QAnd, Doctor, tell me, if you would, the name of your current practice group. A the surgical Weight Loss Center.23Page 6QIs that a d.b.a., or is that an incorporated business? A That is a d.b.a. The incorporated aname is Middletown Surgical Associates, Inc. A Yes.3QHave you at any time had any other physicians practicing under The Surgical Middletown9Physicians practicing under The Surgical Middletown10Who else has practiced under that? A A Yes.13QWho else has practiced under that? A A Yes.14QWho was the last time Derek Martin B physician named Derek Martin. C16QWhen was the last time Derek Martin B16AYes.13Q

	Page 9		Pag	e 11
1	your decision to allow those privileges to	1	certification, are you board certified in	
2	expire?	2	surgery?	
3	MS. HARLAN: Dobjection.	3	A I'm Board certified in surgery.	
4	THE WITNESS: DNo. I never	4	Q Any other Board certifications?	
5	discussed it with any people from the	5	A No.	
6	hospital.	6	Q And besides your Board certification	
7	BY MR. KULWICKI:	7	in surgery, do you have any other specialty	
8	Q Thank you, Doctor. Now, prior to	8	training, any types of certificates?	
9	having privileges at Riverview Health System	9	A You know, I've taken a few courses	
10	and besides the privileges you had at	10	in bariatrics, and, for example, doing	
11	Kettering Medical Center, have you had	11	laparoscopic gastric bypasses, very brief	
12	privileges at any other hospital, let's say	12	courses. I may have a certificate laying	
13	in the last ten years?	13	around somewhere, but but no no formal	
14	A Yes. I had privileges at Middletown	14	training as in, for example, a fellowship.	
15	Regional Hospital and Grandview and	15	Q With respect to your training in	
16	Southview.	16	bariatrics, do you can you can you	
17	Q Where are Grandview and Southview	17	tell me the name of your license or	
18	located?	18	certification?	
19	A In Dayton.	19	A Well, no. I mean, like I said, it	
20	Q And can you tell me what the reason	20	was it was a course for example, I	
21	was for the privileges at Middletown	21	think about three years ago at the bariatric	
22	Regional Hospital terminating?	22	meeting in Washington, D.C., I took a course	
23	A Yes. I was having difficulty	23	at that meeting, and it was a cadaver lab	
24	obtaining malpractice insurance.	24	doing laparoscopic bypass training, so those	
25	Q And how about with respect to	25	are typically sponsored by the American	
ļ				
	Page 10		Page	e 12
1	Grandview and Southview Hospitals?	1	Society for Bariatric Surgery, but I don't	
2	A That was a few years ago, and I	2	know that they have a special name or	
3	just, again, just didn't want to keep those	3	institutional designation or anything.	
4	privileges up.	4	Q Okay. Now, at Riverview Health	
5	Q All right. Doctor, have you been	5	System, will you be performing surgery?	
6	have your staff privileges at any hospital	6	A Yes.	
7	been the subject of any type of disciplinary	7	Q And what – what type of privileges	
8	proceeding?	8	will you have there?	e le Clesso
9	A No.	9	A General surgery privileges.	
10	MS. HARLAN: \Box Objection.	10	Q Are you currently spending 50	
11	BY MR. KULWICKI:	11	percent or more of your professional time in	- Additional Addit
12	Q Has your medical license ever been	12	the active clinical practice of medicine?	to de la constante
13	suspended, revoked or called into question	13	A Yes.	
14	in any respect?	14	Q Now, Doctor, I want to turn to the	
15	MS. HARLAN: □Objection.	15	facts of this case. Have you had a chance	
16	THE WITNESS: \Box No.	16	to review your chart with respect to	
17	BY MR. KULWICKI:	17	Mrs. O'Neal prior to today's deposition?	
18	Q And, Doctor, has your Board	18	A I glanced over some of the pages	ere colesse
19	certification by any specialty board been	19	earlier today.	
20	revoked, suspended, limited or called into	20	Q And have you had a chance to look at	
21	question in any regard?	21	both your office chart and records from her	
22	MS. HARLAN: Objection.	22	subsequent treatment?	
23	THE WITNESS: \Box No.	23	A Yes.	
1	BY MR. KULWICKI:	24	Q In addition, have you had a chance	
24				<u>p</u>
24 25	Q With respect to your Board	25	to review any of the depositions that have	

	Dec. 12		Dogo 15
1	Page 13 been taken in this matter?	1	A No. They were very
2	A Yes, I looked at several of those	2	distinguishable.
3	today also.	3	Q Okay, and why were these used
4	Q And as I recall, the depositions	4	instead of the blue towels?
5	that have been taken to date involve all	5	A Well, in order to to allow them
6	operating room personnel that were present	6	to be counted, because you have blue draping
7	on the date of her operation; is that is	7	towels, and they don't count those, and,
8	that your recollection as well from what you	8	then, so you don't know how many you start
9	reviewed?	9	with, how many you end up with or whatever.
10	A I don't know whether it was	10	So, since these towels had a specialized
11	whether it was all of them or not. I	11	purpose, they they brought in different
12	just I was given some to review, and I	12	colored towels so that they could be
13	reviewed them.	13	counted.
14	Q All right. Now, in this particular	14	Q And did you have any discussion with
15	surgery that you performed on Mrs. O'Neal, I	15	hospital administration about the types of
16	understand that you used what we'll call, I	16	towels that you wanted them to purchase for
7	guess, surgical towels during the course of	17	this purpose?
18	the procedure; fair enough?	18	MS. HARLAN: □Objection.
19	A That is fair enough.	19	THE WITNESS: \Box I mean, I don't
20	Q Who provided the towels to you that	20	remember specifically, but I I sort of
21	you used during the the surgery?	21	have a general recollection recollection
22	A The hospital.	22	of talking with the it wouldn't be
23	Q And what was the purpose for using	23	hospital administration, but people who
24	those towels during this surgery?	24	worked in the OR, and they said they could
25	A I usually used a towel in the left	25	get suitable towels for the purpose that I
	Page 14		Page 16
1	upper quadrant for retraction.	1	wanted.
2	Q And can you describe the type of	2	Q Do you remember who you spoke
3	towel that was used in in Mrs. O'Neal?	3	with?
4	A Well, it was similar to a standard	4	A No, I don't.
5	surgical draping towel, but it was different	5	Q If if you don't remember the
6	in the respect that the the hospital	6	specific person, do you remember what their
7	obtained those, as I understood it at least,	7	position would be? In other words, was it a
8	specifically for me to use in that	8	nursing supervisor, or
9	situation, because they they worked very	9	A Well, I mean, again, without a
10	nicely in these very obese patients to help	10	specific recollection of a conversation, I
11	me get good exposure, and the typical	11	can say that it would most likely have been
12	hospital draping towel is usually either	12	either with Linda Sich who's the OR
13	green or blue. These towels were, I	13	supervisor or probably with Kyle, who was
14	believe, a white or a light cream color with	14	the I don't know her what her exact
	blue, or I think there were actually maroon	15	title was, but she was a somewhat lower
15		16	level supervisor, but, I mean, it might have
	-	10	
16	stripes on them. So, they would be	17	been that I talked to one of the other
l6 17	stripes on them. So, they would be distinguished from a normal surgical draping	17	been that I talked to one of the other nurses, and they went up the chain and
l6 17 18	stripes on them. So, they would be distinguished from a normal surgical draping towel.	17 18	nurses, and they went up the chain and
l6 l7 l8 l9	 stripes on them. So, they would be distinguished from a normal surgical draping towel. Q Now, in in your experience, when 	17 18 19	nurses, and they went up the chain and discussed it. I really you know, it's
16 17 18 19 20	 stripes on them. So, they would be distinguished from a normal surgical draping towel. Q Now, in in your experience, when these white or maroon striped towels became 	17 18 19 20	nurses, and they went up the chain and discussed it. I really you know, it's been three or four years ago.
16 17 18 19 20 21	 stripes on them. So, they would be distinguished from a normal surgical draping towel. Q Now, in in your experience, when these white or maroon striped towels became soaked in blood when you were using them for 	17 18 19 20 21	nurses, and they went up the chain and discussed it. I really you know, it's been three or four years ago. Q Our sound just cut out. Three or
15 16 17 18 19 20 21 22 23	 stripes on them. So, they would be distinguished from a normal surgical draping towel. Q Now, in in your experience, when these white or maroon striped towels became soaked in blood when you were using them for retraction purposes during this type of 	17 18 19 20 21 22	 nurses, and they went up the chain and discussed it. I really you know, it's been three or four years ago. Q Our sound just cut out. Three or four years ago, would you please restate
16 17 18 19 20 21	 stripes on them. So, they would be distinguished from a normal surgical draping towel. Q Now, in in your experience, when these white or maroon striped towels became soaked in blood when you were using them for 	17 18 19 20 21	nurses, and they went up the chain and discussed it. I really you know, it's been three or four years ago. Q Our sound just cut out. Three or

1	Page 17		Page 19
1	remember specifically who I talked to. It	1	that, you know, I I told them I like to
2	might have been a lower level nurse who then	2	use towels in this capacity, that they
3	went to her superiors to see if they could	3	they served the purpose that I needed for
4	accommodate the getting the towels that I	4	good closure, and there was you know,
5	asked for.	5	there was some discussion that, you know, we
6	Q Thank you. Doctor, is there any	6	didn't want to use regular draping towels
7	documentation that you're aware of that	7	because they said that they thought they
8	relates to this whole process that we're	8	could get towels that would be satisfactory
9	talking about, the process by which you	9	for that purpose. I don't think that there
10	requested towels and the hospital then	10	was a specific conversation about whether or
11	obtained towels? In other words, was there	11	not they would have a radiopaque
12	a purchase order form, or a memo or a note	12	radiopaque stripe. I again, I I
12	or a handwritten memo, any – anything that	13	presume that at the time I simply assumed
13	you could think of in writing that relates	14	that they would.
		14	-
15	to this topic that we're talking about?	1	Q Have you, Doctor, since this
16	A Well, there isn't any that I know	16	incident, have you done any research with
17	about, but, of course, that would not be	17	respect to surgical towels and, you know,
18	typically something that I would know about.	18	what's available out there on the market?
19	I mean, that would be an internal hospital	19	A No, I haven't. I simply stopped
20	issue in terms of whether or not they had	20	using them.
21	policies which required documentation of	21	Q Certainly from the your
22	special requests or whatever, so I don't	22	involvement in the Bowlin litigation, you
23	know of any.	23	were aware at the time of Mrs. O'Neal's
24	Q Now, we know now that this	24	surgery that it can be dangerous to use
25	particular towel that was involved with	25	surgical towels for this particular surgery
	Page 18		Page 20
1	Mrs. O'Neal did not have any radiopaque	1	that do not have any radiopaque tagging or
2	tagging or or threading in it. Did you	2	threading in them, correct?
3	know at the time of her operation back in	3	MS. HARLAN: □Objection.
4	January of 2003 that these towels did not	4	THE WITNESS: \Box Well, I I guess I
5	have any radiopaque tagging or threading in	5	would put it somewhat differently. I mean,
6	them?	6	we put lots of things inside the abdominal
7	A I don't think I knew that. I	7	cavity: sponges, laparotomy pads, and in
	I I think that I would have assumed that	8	this case, these towels, and anything that's
1 X	i i mink mat i would have assumed that	0	und vady, mydy wyvid, and any unne ulard
8	they would have fulfilled all the	0	
9	they would have fulfilled all the requirements that such a towel would be	9 10	put in that is incorrectly counted:
9 10	requirements that such a towel would be	10	put in that is incorrectly counted: needles, other kinds of devices,
9 10 11	requirements that such a towel would be expected to fulfill, which would include the	10 11	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the
9 10 11 12	requirements that such a towel would be expected to fulfill, which would include the radiopaque tagging. I don't have I don't	10 11 12	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the course of a whole variety of different
9 10 11 12 13	requirements that such a towel would be expected to fulfill, which would include the radiopaque tagging. I don't have I don't specifically remember what I knew at that	10 11 12 13	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the course of a whole variety of different operations that the surgeons perform,
9 10 11 12 13 14	requirements that such a towel would be expected to fulfill, which would include the radiopaque tagging. I don't have I don't specifically remember what I knew at that time three years ago, though.	10 11 12 13 14	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the course of a whole variety of different operations that the surgeons perform, anything that you put in that is incorrectly
9 10 11 12 13 14 15	requirements that such a towel would be expected to fulfill, which would include the radiopaque tagging. I don't have I don't specifically remember what I knew at that time three years ago, though. Q Okay. Do you recall any discussions	10 11 12 13 14 15	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the course of a whole variety of different operations that the surgeons perform, anything that you put in that is incorrectly counted is dangerous.
9 10 11 12 13 14 15 16	requirements that such a towel would be expected to fulfill, which would include the radiopaque tagging. I don't have I don't specifically remember what I knew at that time three years ago, though. Q Okay. Do you recall any discussions either before or or after this event	10 11 12 13 14 15 16	put in that is incorrectly counted: needles, other kinds of devices, instruments, all kinds of things during the course of a whole variety of different operations that the surgeons perform, anything that you put in that is incorrectly counted is dangerous. The radiopaque striping would have a
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1	Page 21	1	Page 23
1	Q But certainly you understood in	$\frac{1}{2}$	you're aware of that specify or discuss the
23	January of 2003 that, in the event a a	$\frac{2}{3}$	use of radiopaque striping or tagging in towels or sponges or anything else that are
4	piece of, or a towel had been left behind that did not have redioneque striking that	4	going to be used intraabdominally?
	that did not have radiopaque striping, that	5	A Not that I'm aware of.
5	it made it more difficult for subsequent	6	
6	detection, and that that can pose a hazard	7	Q Doctor, have you used, to your
7	to a patient who has retained one of these towels.	8	knowledge, towels that had radiopaque
8		9	tagging or striping or threading in them for
9	MS. HARLAN: □Objection. THE WITNESS: □I think there is	10	purposes of retraction in a bariatric
10			surgery? A IIdon'tIdon't recall for
11	some additional degree of risk, yes.		
12	BY MR. KULWICKI:	12	sure what they were using in Sycamore. When
13	Q Okay.	13	this occurrence came to pass with
14	A That's why we specified getting	14	Mrs. O'Neal, I just quit using them
15	towels that were only to be used for this	15	altogether, and I can't recall whether the
16	purpose.	16	hospital on its own began using towels with
17	Q And and you said "we." Are you	17	radiopaque striping prior to that incident
18	talking about you or or are there were	18	coming to light or not. I'm sure somebody
19	there other physicians involved in this	19	in the hospital would know that.
20	discussion?	20	Q Based on your your understanding,
21	A No. I just I just meant myself	21	is there any advantage to using surgical
22	and and the people that I talked to about	22	towels that have radiopaque striping,
23	it.	23	tagging or threading in them versus towels
24	Q So, your belief would have been,	24	that do not have that?
25	since you were asking them to obtain a towel	25	A Well, not from a surgical point of
	Page 22		Page 24
1	Page 22 that was going to be part of the surgical	1	Page 24 view, no.
1 2		1	
	that was going to be part of the surgical		view, no.
2	that was going to be part of the surgical count A Correct.	2	view, no. Q All right. Now A The striping, there's typically very
2 3	<pre>that was going to be part of the surgical count A Correct. Q and that was going to be used</pre>	2 3	view, no. Q All right. Now A The striping, there's typically very tiny threads, and you wouldn't be able to
2 3 4	 that was going to be part of the surgical count A Correct. Q and that was going to be used intraabdominally, that you you made the 	2 3 4	view, no. Q All right. Now A The striping, there's typically very tiny threads, and you wouldn't be able to know whether they were in there or not
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2 3 4 5 6 7	 that was going to be part of the surgical count A Correct. Q and that was going to be used intraabdominally, that you you made the assumption that they would obtain a product that was made for that purpose. A Well, or at least was consistent 	2 3 4 5 6 7	view, no. Q All right. Now A The striping, there's typically very tiny threads, and you wouldn't be able to know whether they were in there or not anyway.
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		1		
	Page 25			Page 27
1	Q Okay. Did you have an understanding	1	group setting with, oh, anywhere from five	
2	that the use of these towels was going to be	2	or ten to sometimes 15 or 20 prospective	
3	a change in the normal policy?	3	patients.	
4	A Well, I really didn't know that much	4	Following that, the patients come	
5	about what the policy was. I mean, I knew	5	back to the office later. They meet with my	
6	that they were not using towels like this at	6	PA where he does another similar kind of a	
7	that time, and I asked them if you know,	7	small group session for the patients who are	
8	if we could, and they said they would look	8	probably a week or so pre-op, answering	
9	into it, and they came up with these towels,	9	questions, explaining issues and so forth,	
10	but I really you know, I don't read those	10	and then I meet with the patients	
11	OR policies. That's not my job. That's	11	individually myself.	
12	theirs.	12	I make a special point of discussing	
13	Q Okay. Now, Doctor, with respect to	13	the risks and complications and asking them	
14	this surgery, you know, backing out the	14	if they have any questions, and and if	
15	the towel issue, can we agree that it was a	15	they want to talk about, you know, any other	
16	successful surgery?	16	aspects of the procedure, of course, also.	
17	A Yes.	17	Q Do you provide the prospective	
18	Q There were no intraoperative	18	patient with anything in writing with	
19	complications, true?	19	respect to the risks of this procedure,	
20	A That is true.	20	either	
21	Q And at least for – until	21	A Well, of course, they have to sign a	
22	Mrs. O'Neal started having symptoms of this	22	written consent for surgery which includes	
23	towel, there were no – there were no	23	some mention of risks. I don't remember off	
24	postoperative complications for several	24	the top of my head exactly how those are	
25	weeks, correct?	25	are listed, and we also have some written	
20				
	Page 26			Page 28
1	A That is correct.	1	information we provide to patients. It's	1.1180
2	Q Now, Doctor, with respect to getting	2	not that information is not oriented so	
3	informed consent from patients that undergo	3	much towards surgical risk as much as it is	
4	bariatric surgery, what first of all, how	4	post-operative issues and what patients	
5	do you go about doing that? Do you do	1	post operative issues and that patients	
1		15	might run into and and need to look for	
		5	might run into and and need to look for, and what it is they might you know want to	
6 7	you just give it to them yourself in person,	6	and what it is they might, you know, want to	
7	you just give it to them yourself in person, or do you show them, you know, a film strip	6 7	and what it is they might, you know, want to call us about, and things like that.	
7 8	you just give it to them yourself in person, or do you show them, you know, a film strip that that discusses the risks and	6 7 8	and what it is they might, you know, want to call us about, and things like that.Q Now, it's also my understanding that	
7 8 9	you just give it to them yourself in person, or do you show them, you know, a film strip that that discusses the risks and benefits, or do you provide them something	6 7 8 9	and what it is they might, you know, want to call us about, and things like that. Q Now, it's also my understanding that you typically will show a slide show or	
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1	Page 29		Page 31
1	my arms around it. Would the risks that are	1	A No, I don't have any specific
2	laid out in your slide show presentation,	2	recollection.
3	would those be pretty much the risks of the	3	Q Now, one of the risks of the
4	surgery that you discuss with the patient,	4	procedure I think you mentioned is pulmonary
5	or would there be risks in addition to	5	emboli.
6	what's set forth in the slide show that you	6	A Correct.
7	discuss with the patient?	7	Q And is that something that's
8	A Well, on our on our one-on-one	8	mentioned in the slide show presentation?
9	meeting with the patient, other issues may	9	A Well, the slide show actually refers
10	come up that might not have been included in	10	to DVT, which is deep venous thrombosis, but
11	the slide show. The slide show typically	11	in the course of my presentation, I use that
12	has the the risks that we most often	12	to further talk about pulmonary emboli,
13	encounter and discuss, such as leaks and	13	because the the deep venous thrombosis in
14	pulmonary emboli, pneumonia, bleeding,	14	and of itself is not particularly life-
15	infection, issues like that. I mean,	15	threatening. It's only when a clot breaks
16	obviously, as I'm sure you're aware of,	16	free and becomes a pulmonary embolus. So, I
17	there's no way to include every conceivable	17	always talk about pulmonary emboli
18	risk, but it has it has the most common	18	Q You died down. I think I think
19	ones associated with this specific kind of	19	part of the problem is we lose you every
20	surgery. Some of them are generic to all	20	once in a while, and it sounds like it might
21	kinds of abdominal surgery like adhesions	21	be somebody shuffling paper nearby the
22	and bowel obstructions, and some of them are	22	the conference or the what the hell do
23	more specifically related to gastric bypass	23	you call these things? Nearby this thing.
24	surgery, for example, stomal stenosis.	24	THE VIDEOGRAPHER: Microphone.
25	Q Okay, now, with regard to this	25	Q The microphone, good work.
<u> </u>			
1	D 20		
1	Page 30	1	Page 32
1	one-on-one meeting that you have with the	1	A We will we will try to minimize
2	one-on-one meeting that you have with the patient, do you first of all, do you	2	A We will we will try to minimize that; won't we?
2 3	one-on-one meeting that you have with the patient, do you first of all, do you specifically recall the one-on-one	2 3	 A We will we will try to minimize that; won't we? MS. HARLAN: □We certainly will.
2 3 4	one-on-one meeting that you have with the patient, do you first of all, do you specifically recall the one-on-one conversation that you had with Mable	2 3 4	 A We will we will try to minimize that; won't we? MS. HARLAN: □We certainly will. BY MR. KULWICKI:
2 3 4 5	one-on-one meeting that you have with the patient, do you first of all, do you specifically recall the one-on-one conversation that you had with Mable O'Neal?	2 3 4 5	 A We will we will try to minimize that; won't we? MS. HARLAN: □We certainly will. BY MR. KULWICKI: Q I appreciate that, and, Doctor, if
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1 a - a figure that] gleaned from the 1 A From the notes and so forth, it was 2 literature about that. I know that in my a pretry vourine case. 3 Q Okay, and you mentioned that 6 parcite, I've done about 2500 gastric 3 Q Okay, and you mentioned that 7 bypasses, and I've only had two documented bour. Do you remember hers taking roughly 8 pulmonarypulmonary emboli, and neither A Again I don't remember for sure. 9 one of those was was fial, fortunately. A Again I, don't remember for sure. 10 would say, is is much on the side that I got 14 following the surgery on are are obes, and 10 Q Okay, and, Doctor, with respect to 15 sorry, the first several hours, or not I'm 11 Igot out of an article somewhere. 15 sorry, the first several hours, or not I'm 12 opt case abdominal surgery's involved, and 15 sorry, the first several hours, so, that's where these 13 because the patient is so merethical 16 do the surgery on are - are obes, and 16 14 to first sors that increnase the risk of PE in 16 36		Page 33		Page 35
3 the top of my head exactly what it is. It's or something like, you know, a half a percent or something like, that. I know that in my or partice, I've done about 2500 gastric 3 Q Okay, and you mentioned that 4 routinely, the procedure takes about an our. Do you remember hers taking roughly about the same amount of time? A Again, I don't remember hers taking roughly about the same amount of time? 5 by assess, and I've out, better than what 12 That would be on the operative record someplace. 10 by our, is - is much better than what 12 That would say it's it's in 14 1 is of an arcicle somewhere. 10 Q Now, with respect to the risk is highest? 13 ther is is of - of pulnoary embolism, is 14 there is a rumber on the slide that i got 12 13 A Well, I would say it's it's in 14 15 Q Okay, and, Doctor, with respect to 16 That increased because the patients that you 16 15 Sorry, the first several hours, or on - it's 16 15 20 Okay, and you mentioned. In my 16 20 Okay. 21 fold ing it's would acreased the risk of PE in 16 16 16 16 21 bloch ing the surgery's involved, and 16	1		1	
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	Page	37	Page 39
1	or so preoperatively when they're in the	1	patients have shortness of breath, sometimes
2	preoperative holding room, and then I	2	severe. It's usually chronic. The same
3	usually continue this until the patients	3	thing applies to distal swelling. It's one
4	leave the hospital, so that would be I	4	of the problems that people suffer from when
5	don't know how long she was in the first	5	they're morbidly obese, so those particular
	•	6	findings quite honestly wouldn't be of very
6	time. It's usually 20 it's usually 48 to		
7	72 hours.	7	much value to us, even though we you
8	Q And, then, Doctor, with respect to	8	know, we do a physical exam. We check for
9	after that point in time, do you give them a	9	swelling, and we ask about those things.
10	prescription typically, or did you give	10	Much more helpful to us would be any history
11	Mrs. O'Neal a prescription for any type of	11	of previous DVTs or PEs.
12	anticoagulant or any other type of	12	Q I believe Mrs. O'Neal indicated that
13	medication for	13	she had shortness of breath prior to the
14	A No, the heparin is a subcutaneous	14	surgery, but did she have anything that
15	shot. There are some surgeons I've	15	would, in your mind, raise the possibility
16	talked to surgeons who use Coumadin which is	16	that she was – she had a prior history of
17	an oral anticoagulant. In my opinion,	17	DVT or PE or even questionably?
18	Coumadin is Coumadin use in this	18	A Not that I recall. As I said, I
19	situation is really overly aggressive and	19	I would guess off the cuff that probably at
20	and not appropriate. Certainly, it would	20	least 90 percent of our patients have
21	have been in Mrs. O'Neal's case, but but	21	shortness of breath. It's part of the
22	just as a routine I I would not advocate	22	problem.
23	the use of Coumadin, nor is it standard.	23	Q Right, and you answered a question,
23		24	but I'm not sure it was my question. Let
25	QOkay.AThere are a few surgeons who use	25	me – let me restate it, and see if maybe I
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12			-
1	it.	1	can get there. After the surgery, in the
2	it. Q Now, in in addition to medical therapy to protect against pulmonary	1 2	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are
2 3 4	it. Q Now, in in addition to medical therapy to protect against pulmonary embolism, do you as a treating surgeon,	1 2 3	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are planned where you follow up with the patient
2 3 4 5	it. Q Now, in in addition to medical therapy to protect against pulmonary embolism, do you as a treating surgeon, do you have sort of in the back of your mind	1 2 3 4 5	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are planned where you follow up with the patient and ask how they're doing; in the course of
2 3 4 5 6	it. Q Now, in in addition to medical therapy to protect against pulmonary embolism, do you as a treating surgeon, do you have sort of in the back of your mind as you talk to the patient that this is a	1 2 3 4 5 6	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are planned where you follow up with the patient and ask how they're doing; in the course of those visits, is one of the things in the
2 3 4 5 6 7	it. Q Now, in in addition to medical therapy to protect against pulmonary embolism, do you as a treating surgeon, do you have sort of in the back of your mind as you talk to the patient that this is a potential risk, and ask questions pertinent	1 2 3 4 5 6 7	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are planned where you follow up with the patient and ask how they're doing; in the course of those visits, is one of the things in the back of your mind postoperatively that
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2 3 4 5 6 7 8 9 10	it. Q Now, in in addition to medical therapy to protect against pulmonary embolism, do you as a treating surgeon, do you have sort of in the back of your mind as you talk to the patient that this is a potential risk, and ask questions pertinent to it? In other words, do you ask the patient: Have you had any foot swelling, leg swelling, lower leg pain, et cetera,	1 2 3 4 5 6 7 8 9 10	can get there. After the surgery, in the course of your follow-up visits, and I know you have several that are that are planned where you follow up with the patient and ask how they're doing; in the course of those visits, is one of the things in the back of your mind postoperatively that to to ask the patient about their current current condition with an eye towards seeing if they do have any signs or
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1	Page 41		Page 43
	specific recollection, but my from	1	understand the question.
2	reviewing the notes and so forth, she seemed	2	BY MR. KULWICKI:
3	to be doing pretty well; even better at the	3	Q Yeah. I'm just wondering if you
4	six-week visit.	4	agree with that opinion, that the cause of
5	Q Thank you.	5	her death was PE related to the retained,
6	A The one the one thing I noticed	6	and they say "sponge," but obviously it was
7	at the at the two week was that her	7	a towel; retained towel with recent GI
8	weight loss was a little low, but by six	8	bleeding contributing.
9	weeks she was back within what we would	9	MR. COWDREY: And I'll object.
10	normally expect to see which was 28 pounds	10	MS. HARLAN: If you qualify
11	of weight loss at six weeks.	11	THE WITNESS: □I I don't think
12	MR. KULWICKI: There was some noise	12	that I have a basis to agree or disagree
13	immediately before you answered that	13	with that. I mean, they're talking about
14	question, and I just want to ask if either	14	the findings that they saw at autopsy, and I
15	counsel interposed an objection.	15	wasn't there.
16	MS. HARLAN: □No.	16	BY MR. KULWICKI:
17	BY MR. KULWICKI:	17	Q Well, okay, then, clinically,
18	Q Okay, thank you. Now, Doctor,	18	Doctor, would you agree that, based on your
19	although you haven't had a chance to review	19	care and treatment of the patient at the end
20	the autopsy, you were involved in	20	of her life, that, in your opinion, she died
21	Mrs. O'Neal's care during her last hospital	21	as a result of PE due to complications of
22	admission, correct?	22	the retained towel?
23	A That's correct.	23	A I don't know that I would agree with
24	Q And let me read to you the	24	that. If she died of a pulmonary embolus as
25	MR. COWDREY: David David,	25	this report suggests, that that raises a
		<u> </u>	
	Page 42		Page 44
1	this is Bob Cowdrey. I've got the chart	1	question I had never considered before in
2	with me if you want me to show it to the	2	terms of what was the actual cause of her
3	doctor, what you're referring to.	3	death, because I guess I assumed it was
4	MR. KULWICKI: Sure, that'd be	4	sepsis. If that was a pulmonary embolus
5	fine. What I'm looking at is the the	5	instead, then, the question arises whether
6	*		
	two-page summary from the postmortem exam.	6	that pulmonary embolus had any relationship
7	two-page summary from the postmortem exam, and it's the first two pages that has the	6 7	that pulmonary embolus had any relationship at all to the retained item.
7	and it's the first two pages that has the	ł	at all to the retained item.
7 8	and it's the first two pages that has the coroner's opinion, so that would be page two	7 8	at all to the retained item. Q And let me ask you, since this is
7 8 9	and it's the first two pages that has the coroner's opinion, so that would be page two signed by Dr. Casto and Dr. Lehman.	7 8 9	at all to the retained item. Q And let me ask you, since this is the only chance I get to talk with you
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-	Page 45		Page 47
1	cause of her death.		Q And we can agree that sepsis
2	The the issue, though, that that	2	increases or can increase the risk of
3	raises in my mind is: How long had that	3	pulmonary embolism, true?
4	clot been there? She was five months	4	A I think I don't know that I would
5	post-op. It's pretty impossible to to	5	agree with that. That's a much more
6	in my opinion, to relate the origin of that	6	complicated answer because sepsis has so
7	clot to her surgery from January. I know	7	many metabolic effects. It could, in some
8	that she had been ill and had bleeding and	8	situations, actually decrease it, depending
9	pneumonia and diverticulitis and things like	9	on the circumstances. I'm not trying to be
10	that, so the question then would be, if she	10	evasive. I just I just couldn't give a
11	died as a result of this pulmonary embolus,	11	blanket agreement to that statement.
12	then, was this was the clot that broke	12	Q Fair enough, but you you
13	free and caused the pulmonary embolus	13	acknowledge that, based on your medical
14	something that preceded her most recent	14	training, that sepsis can create an
15	hospitalization and illness? It might have	15	inflammatory response within the body that
16	been there for several weeks. It's hard to	16	leads to hypercoagulability which can
17	say. I mean, it's impossible to say.	17	increase the risk of pulmonary embolism?
18	Q Okay. Let me – let me parse	18	A That's true. I'm just saying there
19	through that.	19	are situations where it can go in the
20	A Okay.	20	opposite direction as well.
21	Q First, with respect to the your	$\frac{1}{21}$	Q Fair enough, and again those – the
22	opinions and – and that's really what I'm	22	study of that process, the
23	more concerned about, and I'm less concerned	23	hypercoagulability and – and – related to
24	about your interpretation of the autopsy,	24	sepsis would be more within the expertise of
25	and more concerned about opinions that you	25	a hematologist or of an infectious disease
- e'	and more concerned about opinions that you		a nonincorogist of of an infectious disease
_	Page 46		Page 48
1	hold to a reasonable degree of probability,	1	doctor than a surgeon, true?
2	and opinions that you feel comfortable based	2	A I would agree with that, yes.
3	on your training and background in in	3	Q And likewise, we can agree that
4	rendering.	4	immobility, say, from sepsis or from
5	A Correct.	5	inactivity due to weakness and and
6			
~	Q And and what I want to ask you	6	illness can increase the risk of pulmonary
7		6 7	illness can increase the risk of pulmonary embolism, true?
	is, again, the same question, is: Do you	1	
7	is, again, the same question, is: Do you have an opinion here, and and you	7	embolism, true? A Yes.
7 8 9	is, again, the same question, is: Do you have an opinion here, and and you certainly can say: I don't have an opinion,	7 8	embolism, true? A Yes. Q Now, with regard to the testimony of
7 8 9 10	is, again, the same question, is: Do you have an opinion here, and — and you certainly can say: I don't have an opinion, or I don't feel fully qualified to render an	7 8 9 10	embolism, true?AYes.QNow, with regard to the testimony ofthe nurses and the surgical tech that were
7 8 9 10	is, again, the same question, is: Do you have an opinion here, and and you certainly can say: I don't have an opinion, or I don't feel fully qualified to render an opinion. Do you have an opinion as to what	7 8 9 10 11	embolism, true? A Yes. Q Now, with regard to the testimony of the nurses and the surgical tech that were involved in Mrs. O'Neal's operative and
7 8 9 10 11 12	is, again, the same question, is: Do you have an opinion here, and and you certainly can say: I don't have an opinion, or I don't feel fully qualified to render an opinion. Do you have an opinion as to what was the direct and proximate cause of	7 8 9 10 11 12	embolism, true? A Yes. Q Now, with regard to the testimony of the nurses and the surgical tech that were involved in Mrs. O'Neal's operative and and postoperative care, immediate
7 8 9 10 11 12 13	is, again, the same question, is: Do you have an opinion here, and and you certainly can say: I don't have an opinion, or I don't feel fully qualified to render an opinion. Do you have an opinion as to what was the direct and proximate cause of Mrs. O'Neal's death?	7 8 9 10 11 12 13	embolism, true?AYes.QNow, with regard to the testimony ofthe nurses and the surgical tech that wereinvolved in Mrs. O'Neal's operative andand postoperative care, immediatepostoperative care, they acknowledge or they
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^{12 (}Pages 45 to 48)

	No.	e 49		D	
1	that?	e 49	1	Page the towel too, right?	8 21
2	A Yes, I would.		2	A That is correct.	
3	Q What is your role with respect to	ľ	$\frac{2}{3}$	Q Okay, and do you keep track of of	
4	removing towels that are used during the		4	sponges or towels in any way during the	
5	course of this procedure?		5	course of a procedure?	
6	A Well, obviously, if there was an		6	A No, unless there's one that's	
7	object, a towel, a sponge, an instrument or		7	obviously there.	
8	anything else that was known to me to be		8	Q Okay.	
9	retained in the abdomen, I would I would		9	A But, you know, I've been doing this	
10	certainly have a responsibility to to		10	for a very long time. I've seen many, many	
11	remove it.		11	situations where laps, towels, sponges or	
12	Q Okay.		12	whatever, were hidden from view, not easily	
13	A But, of course, the you know, the		13	palpated, and that's why we do the counts.	
14	nature of what we're doing and the process		14	Q After you are done with the bypass	
15	is such that no surgeon can keep track of		15	procedure itself, is it your routine to	1010
16	all the things that are put in the abdomen,		16	conduct a thorough inspection of the	
17	taken out, put in and taken out during the		17	peritoneum before closure?	
18	course of an operation, so that the		18	A No. That's what I just said. I	
19	procedures have been established for these		19	believe that that could be potentially	
20	counts, and surgeons, of course, rely on		20	dangerous. It's certainly meddlesome. It's	144.000
21	them.		21	unnecessary, and I don't think it's good	1010
22	O Well		22	care. Any fragile areas that can be damaged	
23	A I guess I guess I don't I		23	by poking your hands all over the place, you	
24	don't mean to be jumping ahead, but I don't		24	just have to be careful and not do more than	112211
25	believe that I have an independent		25	you need to.	01-10
	Pag	e 50		Page	52
1	responsibility to go searching for things		1	Q Okay. Now, Doctor, with regard to	
2	once I've been told that the count's		2	the Bowlin litigation, my understanding from	
3	correct. I think that would be that		3	your testimony in that case is that there	
4	would be dangerous. It would be meddlesome,		4	was also a change in policy at Middletown	
5	and it would be inappropriate. You could		5	hospital while you were there wherein they	
6	you could cause harm by searching all over		6	went from using the blue towels to white	
7	the thing all over the abdominal cavity		7	towels; is that true?	221.025
8	when you've already been informed that the		8	A That is my recollection, yes.	100000
9	counts are correct.		9	Q And do you know what the purpose was	0000000
10	Q Well, ultimately, it's you that		10	for that change? Is that so that they	
11	places the towel there, correct?		11	the white ones were counted, and the blue	
12	A It's me that places the towel there;		12	ones were not counted? Is that so they'd	
13	that's correct.		13	become part of the count?	
14	Q And I think you said earlier that		14	A That's my understanding, yes.	
15	you just use one towel; is that true?		15	Q Okay, and likewise, at Kettering	
16	A There have been times in the past		16	Medical Center, your understanding was that	
17	where I've used two. Sometimes I would		17	the reason why they used white towels was so	1223.02
18	use I I typically use one in the left	Ī	18	that they would be part of the the	
19	upper quadrant. There have been times when		19	count?	
20	I used a second one. I really pretty much		20	A Correct.	
21	quit using the second one several a few		21	Q Okay. Doctor, have you had any	
22	years ago. I don't remember exactly when.		22	discussions with the administration at	
23	At this time it would have been my routine		23	Kettering Medical Center with respect to	
24	to only use one towel.	2	24	this particular incident?	
25	Q And you would be the one who removes		25	MS. HARLAN: Objection.	

1	Page 53	Τ	Page 55
1	THE WITNESS: □None other than	1	BY MR. KULWICKI:
2	immediately after this with the people in	2	Q Okay.
3	the operating room, but nobody at a higher	3	A I don't remember us saying that, or
4	administrative level.	4	her saying that; I'm sorry.
5	BY MR. KULWICKI:	5	Q Now, with regard to Mr. Kintz, you
6	Q And whom did you speak with in the	6	indicated that you had a conversation about
7	operating room about this?	7	how could there have been a correct count,
8	A Well, I don't remember for sure.	8	and then missed this towel. Do you remember
9	I I I think, you know, I have I	9	what how that conversation went or what
10	recall, I believe, having a conversation	10	the subject matter of that conversation
11	with Linda Sich. You know, it wasn't so	11	was?
12	much in terms of the policy and procedures	12	A I mean, it's sketchy. The only
13	of the hospital as much as it was everyone's	13	you know, I mean, this is very difficult for
14	distress over the the misfortune that had	14	us to comprehend. The only thing that
15	befallen Mrs. O'Neal and her family.	15	that I recall him saying was that, and this
16	I think I've talked to Mr. Kintz who	16	is I'm trying to recall what he said to
17	I believe was the scrub nurse on this case,	17	me, you know, some, a couple of years ago,
18	trying to figure out how we could have a	18	but it seems like he said something like
19	correct count and, yet, have a retained	19	these towels came in packs of two, and he
20	towel.	20	was speculating, of course, but I think he
21	Q And and let me ask you about	21	speculated in terms of whether or not these
22	those, but before I do, can you tell me were	22	towels could have been somehow folded
23	these conversations - were these one-on-one	23	together so that they counted one towel
24	conversations, one with Mr. Kintz and then	24	whereas there were actually two. They could
25	one with Mrs. Sich?	25	have given me the towels which I placed as
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	Page 54		Page 56
1	A Well, I mean, these weren't formal	1	packing, and then when I removed the
2	appointments or anything. These were	2	towel the towel is actually located in
3	informal conversations within the the	3	in a position where it's not easily
4	the confines of the operating room or the	4	viewable. It's not visible. So, if I
5	hallways immediately adjacent where we would	5	saw if I pulled down and saw the corner
6	run into each other, and, for example, I	6	of the towel, and pulled the towel out, gave
7	think I ran into Linda at one point, and she	7	them the towel, and that created a correct
8	said: well, how's Mrs. O'Neal doing, and I	8	count, if they had miscounted at the
9	said: well, not very well, and, you know,	9	beginning and counted one towel instead of
10	sort of, I don't know how you describe it; a	10	two, that could have left a towel in its
11	mutual consolation. Everybody was pretty	11	in its inside the abdomen. When I
12	upset about this.	12	thought I took it out, they thought we had a
13	Q Tell me if, during that conversation	13	correct count, but he thought that could
14	with Linda Sich, whether she made any	14	have occurred if the two towels that came in
15	overture to you or made any assurance to you	15	the pack were incorrectly counted as one.
		16	Does that make sense to you?
16	that the hospital would accept		
16 17	responsibility for this; that, in essence,	17	Q It does.
16 17 18	responsibility for this; that, in essence, it was their responsibility rather than	17 18	A And that's speculation. We don't
16 17 18 19	responsibility for this; that, in essence, it was their responsibility rather than yours.	17 18 19	A And that's speculation. We don't know what happened, really.
16 17 18 19 20	responsibility for this; that, in essence, it was their responsibility rather than yours. MR. COWDREY: Object.	17 18 19 20	A And that's speculation. We don't know what happened, really. MR. COWDREY: And I'll object and
16 17 18 19 20 21	responsibility for this; that, in essence, it was their responsibility rather than yours. MR. COWDREY: Object. THE WITNESS: I don't remember	17 18 19 20 21	A And that's speculation. We don't know what happened, really. MR. COWDREY: And I'll object and move to strike since the doctor's indicated
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16 17 18 19 20 21 22 23	responsibility for this; that, in essence, it was their responsibility rather than yours. MR. COWDREY: Object. THE WITNESS: I don't remember talking I mean, we we may have discussed that. It would be wonderful for	17 18 19 20 21 22 23	A And that's speculation. We don't know what happened, really. MR. COWDREY: And I'll object and move to strike since the doctor's indicated that it is speculative. BY MR. KULWICKI:
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14 (Pages 53 to 56)

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	Pa	ge 57		Pa	age 59
1	the operating room, it would be their	~	1	work in operating rooms know that surgeons	
2	responsibility to make sure that they were		2	don't do counts. It would be impossible to	
3	counting the towels before they gave them to		3	imagine at the end of a case a surgeon	
4	you accurately in order that they can have		4	stopping the operation, and getting down on	
5	an accurate count at the end of the		5	his hands and knees and doing the count	
6	procedure, correct?		6	while the patient's laying there on the	
7			7	operating room table, not to mention what	
	A Well, obviously, if the count at the		8	I've already said, which is that, if the	
8	before the procedure begins is incorrect,			•	
9	then, the subsequent counts are not		9	original count weren't accurate, the other	
10	reliable.		10	counts aren't reliable.	
11	Q And what I'm asking, Doctor, is more		11	So, in order to hold the surgeon	
12	a question of responsibility. That would be		12	responsible, the surgeon would have to do	
13	the responsibility of the hospital personnel		13	all three counts himself or herself, and the	
14	to make sure that the the equipment or,		14	surgeon would also have to keep track of all	
15	in this case, towels are counted properly		15	the additional items added to the count	
16	before they hand them to you, correct?		16	during the course of the procedure. I mean,	
17	A Yeah. I mean, that's not only		17	it's just it's just impossible to imagine	1000
18	correct, but all these counts are the		18	that happening.	
19	hospital's responsibility. Don't forget		19	Q And you took that away from the	
20	that there are additional items added to the		20	conversation with Mr. Kintz?	
21	count during the procedure. So, while the		21	A Yes.	
22	surgeon is is physically performing an		22	Q Okay. Now, Doctor, let's go back in	1014110
23	operation, if additional lap packs are		23	time, and with respect to the Bowlin case,	2042
24	opened, or needles added, or maybe an		24	as I understand there were actually two	
25	instrument is brought in that is needed		25	towels that were left behind in that	
	moti amont is or over in the is nooded				
	Pas	ge 58		Pa	ige 60
1	for brought in from the outside, those		1	particular patient.	
2	are all added to the to the written count		2	A Yes. As I said for for a time,	
3	by the hospital personnel.		3	I I was using two.	
4	The surgeon doesn't have any		4	Q And neither of them had any	
5	opportunity to to be involved in any of		5	radiopaque tagging, striping or threading in	
	those, and the preoperative counts are done				<i>internet</i> in the second s
6			6 7	them, correct?	
7	while I'm sitting out in the surgeon's		-	A Well, that is correct.	
8	lounge waiting for the case to begin. So, I		8	Q And, then, as I understand it, you	
9	mean, I'm not trying to dump on the		9	had one other incident where a sponge was	610 m
10	hospital, but those are counts that I don't		10	left behind in a patient inadvertently and	
11	have any ability to interact with, and,		11	discovered later?	1997 B
12	therefore, I don't think I have any		12	A Yes. That was approximately 20	
13	responsibility for them.		13	years ago.	
14	Q And, Doctor, with respect to to		14	Q Any – any other situations like	AND IN THE REAL PROPERTY OF A DECEMPENT OF A DECEMPENTA A D
15	this whole issue, did anyone from the		15	this where some instrumentation or a sponge	20122
16	hospital admit to you or acknowledge to you		16	or other piece of equipment was left behind	(455A)
17	that the hospital was responsible for what		17	in a patient that that you were the	200100
18	happened to Mrs. O'Neal?		18	attending surgeon for?	23.123
19	MR. COWDREY: Object.		19	A There there is another situation	
20	THE WITNESS: Uvell, I think that		20	that occurred at Middletown that we found	105/15
21	came up in the conversation with Matt.		21	out about several years after after it	
22	BY MR. KULWICKI:		22	occurred that is currently in litigation.	1000
23	Q Tell me –		23	Q Do you know the patient name in that	
24	A But, I mean, he was he was		24	case?	
25	stating the obvious. I mean, people who	1	25	A Yes, I do.	
1					
L					e S

	Dorre 61		Doge 63
1 0	Page 61 Can you share that with us?	1	Page 6: A Not that I recall again. As a
2	THE WITNESS: Can I share that with	2	general rule, some insurance companies
	im? That's confidential information.	3	require it; some don't. We we typically
4	MS. HARLAN: □It's a filed case.	4	view this as an insurance company tactic to
5	THE WITNESS:	5	try to discourage people from having surgery
	name is Coleman, and I can't remember. I	6	for financial reasons, quite honestly.
	vant to say his first name is Ronald, but I	7	Q Sure. And, then, I have that the
	hink that's a movie star, and I'm blocking	8	surgery took place on January 3 of 2003 at
	on his name, so but his last name is	9	Sycamore Hospital, and Mrs. O'Neal was
	Coleman.	10	discharged three days later on January 6th
	3Y MR. KULWICKI:	11	of 2003. Is that a typical period of stay
	1 Is that filed in – do you know if	12	following this type of procedure?
	hat's in Butler County or in Montgomery	13	A It is for my patients.
	County?	14	Q And, then, Doctor, I have that you
	A I think it's in Butler County. I'm	15	performed your two-week follow-up visit on
		16	
	bretty sure it is.	ł	January 20 of 2003, and that Mrs. O'Neal was
	All right. Doctor, back at the time	17	recovering as as planned, and had no
	hat you were doing Mrs. O'Neal's surgery,	18	complaints; is that true?
	and throughout the course of your staff	19	A I think that's what my review of the
~	orivileges at what's the name of the	20	records indicates.
	nospital? Kettering Medical Center, what	21	Q Now, I've got a note here from
	percentage of your time was spent doing	22	January 29 of 2003 where Mrs. O'Neal
	pariatric surgery?	23	contacted you complaining of left
	A Most of it.	24	left-sided pain noted to be deep, and that
25 (Q Ninety-five, 99 percent? Can you	25	radiated into the shoulder and back. First
	D		
	Page 62		Page 64
1 g	rive me a percentage?	1	Page 64 of all, do you recall this particular phone
_ "		1 2	_
2 7	give me a percentage? A Probably probably 90 to 95.		of all, do you recall this particular phone
2 <i>A</i> 3 C	give me a percentage? A Probably probably 90 to 95. Q Okay. Now, let's turn to the	2	of all, do you recall this particular phone call?
2 <i>I</i> 3 (4 (give me a percentage? A Probably probably 90 to 95. Q Okay. Now, let's turn to the chronology of events as they transpired with 	2 3	of all, do you recall this particular phone call? A No. I think my my PA talked to her and then discussed it with me later.
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2 7 3 6 4 6 5 1 6 5	give me a percentage? A Probably probably 90 to 95. Q Okay. Now, let's turn to the chronology of events as they transpired with Mrs. O'Neal. I have here that you had a visit with her in July of '02 which was to	2 3 4 5 6	of all, do you recall this particular phone call? A No. I think my my PA talked to her and then discussed it with me later. Q Okay. And, then, the next visit I have is or contact is February 3 of 2003
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	Page	55	Page 67
1	records in front of me, but I I looked at	1	A It's April the 7th.
2	them, and that sounds about right.	2	Q And it appears that she contacted
3	MR. COWDREY: Doctor, I believe	3	you on that occasion complaining of
4	David, Bob Cowdrey again.	4	left-sided abdominal pain, correct?
5	I believe Dr. Fallang's records are	5	A That is correct. It says, "patient
6	part of this big binder I have here. It	6	called regarding pain in left side
7	should be probably the last thing.	7	consistent with previous diagnosis of
8	MS. HARLAN: 🗆 Yeah. Yeah.	8	diverticulitis. Patient explains pain is
9	THE WITNESS: \Box Here we go.	9	similar to pain she had with diverticulitis
10	BY MR. KULWICKI:	10	for which she was hospitalized. See 3/10/03
11	Q Okay.	11	progress note."
12	A I'm with you.	12	Q Now, it goes on to say something,
13	Q Good, thank you. And, then, the	13	"pain is located in the left lower quadrant
14	next contact I have is February 21 of 2003,	14	and is moderate to severe at times." Do you
15	and and you note that she's doing very	15	have that charted?
16	well at that time, correct?	16	A Let me see. It says, "no blood in
17	A Yes.	17	stool this time," though. "Pain is in left
18	Q And, then, the next contact would be	18	mid to lower quadrant, and moderate to
19	March 6 of 2003, and it appears to me that	19	severe at times." Yes, it does say that.
20	you were notified at that time that	20	Q And, Doctor, is that is that
21	Mrs. O'Neal was admitted to her local	21	where the the towel was ultimately
22	hospital up in – up in Mansfield,	22	located?
23	correct?	23	A The towel, I would say, was in the
24	A I believe that was May the 6th. I	24	mid to upper
25	think you said March the 6th.	25	Q Okay.
-	Page		Page 68
1	Q Yeah. I actually do have March the		A left abdomen, so it's it's
2	6th. Oh, I'm sorry. That wasn't	2	close.
3	communicated to you. My apologies. I'm	3	Q And, then, when's the next contact
4	reading from a chronology I have here, and	4	that you had with Mrs. O'Neal?
5	this is the whole case, not just your care.	5	A 5/2/03. This isn't with her. This
6	So, I apologize.	6	is with Dr. Paul, who I presume to be her
1	A Okay.	1	physician in Mansfield.
8	Q I do have, however, that on March 10	8	Q That's correct, and what do you have recorded for that visit?
9	of 2003, that you were advised that she had	9	
10 11	a CT scan performed during this hospitalization in Mansfield. Do you do	10 11	A It says, "Dr. Paul called. Would like to talk to Dr. Fallang about patient
11	you have anything indicating that in your	11	like to talk to Dr. Fallang about patient. Would like to transfer patient to Sycamore
12	chart?	12	tomorrow, Saturday, 5/3. Paged Dr. Fallang"
14	A No. I have a note that says	13	with cell number.
14	3/10/03, "patient called, returned call to	14	Q And this is after they had detected
16	hospital room. Patient evaluated for	15	the towel in the abdomen via CT, correct?
17	diverticulitis." Complains "Complaint of	17	A I believe that is correct.
18	pain. Will request pain meds from attending	18	Q Do you think it was appropriate for
19	physician." That's all we have on that.	19	Dr. Paul to ask you to take over the patient
20	Q Okay.	20	af this point in time?
21	A It doesn't say anything about a CAT	20	A Probably.
	A REAL AND A CHARTER AND A CONTRACT AND A CARACTER AND A CONTRACT AND A CONTRACTACT AND A CONTRACT		U U
11	· · · ·	22	
22	scan.	22	Q Was there anything A I mean I didn't see her in
23	scan. Q Thank you. Doctor, what's your next	23	A I mean, I didn't see her in
23 24	scan. Q Thank you. Doctor, what's your next contact according to your notes with	23 24	A I mean, I didn't see her in Mansfield, so it would be hard for me to
23	scan. Q Thank you. Doctor, what's your next	23	A I mean, I didn't see her in

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1	Dame (A		Doro 71
1	Page 69 looked up there.	1	Page 71 Q Could you get
2	Q Okay. Based	2	A The larger abscess cavity was only
3	A But I did see her when she arrived	3	where the towel was enclosed.
4	at Sycamore, and I mean, she was reasonably	4	Q Could you get a sense about the size
5	stable at that point.	5	of the capsule that was around the towel
6	Q Okay. So, based on the contacts you	6	based on the limited exploration that you
7	had with Dr. Paul, and based on her	7	did?
8	condition on arrival at Sycamore Hospital,	8	A It was exactly the size of the
9	you felt it was reasonable for him to	9	folded towel. If we had a towel and folded
10	transfer her back to your care at that point	10	it up, I guess I could take a ruler and
11	in time, true?	11	estimate that. It was the same shape. In
12	A I – I think so, yes.	12	other words, it was rectangular. It was
13	Q All right, and, then, you took her	13	flat, just like a small, folded-up towel.
14	to surgery on May 3 of '03; is that	14	Q With respect to the abscess, was it
15	correct?	15	your feeling or observation that the abscess
16	MR. COWDREY: I think the records	16	extended beyond the capsule?
17	from the subsequent records are in that	17	A It was my impression that it did
18	binder.	18	not, but but again, I did not do a wider
19	THE WITNESS: □That is correct.	19	exploration.
20	BY MR. KULWICKI:	20	Q Now, you mentioned her anemia, and
21	Q Now	21	did you have a sense or do you now have a
22	A My recollection is she was	22	sense about what was causing her anemia at
23	transferred down on a Saturday, and I took	23	the – prior to this operation?
24	her back to surgery that same day.	24	A Well, we were informed that she had
25	Q And it indicates in – in the op	25	had a diverticular bleeding in Mansfield,
1	Page 70	1	Page 72 and that we I think she had a
$\begin{vmatrix} 1\\ 2 \end{vmatrix}$	note that you both removed the towel, and	2	confirmation of diverticulosis, and, of
$\frac{2}{3}$	you drained the left upper quadrant abscess.	/.	commutation of diverticulosis, and, of
12	Con vou givo ne como sign como idos shout		course diverticular bleeding is
	Can you give us some sign – some idea about	3	course, diverticular bleeding is
4	how big that abscess was?	3 4	intraluminal, so that the blood comes out
4 5	how big that abscess was?A This was a this was a somewhat	3 4 5	intraluminal, so that the blood comes out the lower GI tract.
4 5 6	how big that abscess was? A This was a this was a somewhat difficult situation because of her anemia at	3 4 5 6	intraluminal, so that the blood comes out the lower GI tract. Q Right.
4 5 6 7	how big that abscess was? A This was a this was a somewhat difficult situation because of her anemia at that time, and being a Jehovah's Witness, I	3 4 5 6 7	 intraluminal, so that the blood comes out the lower GI tract. Q Right. A Now, of course, that doesn't prove
4 5 6 7 8	how big that abscess was? A This was a this was a somewhat difficult situation because of her anemia at that time, and being a Jehovah's Witness, I knew that we would not be able to give her	3 4 5 6 7 8	 intraluminal, so that the blood comes out the lower GI tract. Q Right. A Now, of course, that doesn't prove it's from from diverticular disease. You
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1 would have probably been informed of by 1 THE WITNESS: □Can I can I ask 2 Troy. 2 you aclarify clarifying question? Are 3 Q Troy Syour PA? 3 4 A Troy Miller is my PA, and he 4 5 actually is the person who talked to her on 6 6 most of these occasions, and, then, noted 6 7 most of these occasions, and, then, noted 6 7 most of these occasions, and, then, noted 6 9 has a discussion like that with a patient, 9 9 has a discussion like that with a patient, 9 1 ftath. So, that's where I would have goeten 14 1 that she occurse, at the time in dida't 10 15 Q Do you know if you - 15 16 A O too eus, at wit the the in e in - 10 20 by ou know if - at the time in - 11 11 11 16 A Jus going on, aus 12 13 14 20 by ouk know if - at the time in - 12 14 14		Page 73			Page 75
2 Troy. 2 you a clarify clarifying question? Are 3 Q Troy Miller is my PA, and he you asking me what I would have done had I 4 A Troy Miller is my PA, and he you asking me what I would have come had I a and, then, our practice is then, when Troy BY MR, KULWICKI: BY MR, KULWICKI: 9 has a discussion like that with a patient, BY MR, KULWICKI: BY MR, KULWICKI: 10 then he comes to me and says: Well, this 10 out, yes. 11 po you know if you - A No question whatsoever. 12 patient. This is what's going on, and so 11 Q A or question whatsoever. 14 that information. 12 A No question whatsoever. 13 Q Did - did you know - well, strike 16 A I was going to say it's a 17 seem particularly ominous to us. 17 complicated. 10 1 19 that. 0 Did - did you know - well, strike 1 1 19 that. 1 out gift a weat file well that 2 1 20 Mrs. O'Neal's medic	1		1	THE WITNESS: Can L-can Lask	Lage / J
3 Q Troy is your PA? 3 you asking me what 1 would have done had 1 4 A Troy Miller is mPA, and he 3 is would have done had 1 5 acnually is the person who talked to her on 6 most of these occasions, and, then, noted 6 6 most of these occasions, and, then, noted 6 BY MR. KULWICKI: 7 7 and, then, our practice is then, when Troy 8 A I would have done had 1 8 and, then, our practice is then, when Troy 8 A I would have equested 9 has a discussion like that with a patient. 10 that information. 10 A I would have gotten 13 forth. So, that's where I would have gotten 13 Q Do you know if you – 14 that information. 14 that information. 14 that information. 14 that information. 13 Q Do you know if you – 16 A I would mice that a store it was out at at a store it was out at at a store it was out at that would hany e a		1	-		
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5 actually is the person who talked to her on 5 towel? 6 most of these occasions, and, then, noted 6 BY MR, KULWICKI: 7 Most of these occasions, and, then, noted 7 Q Yes, absolutely. 8 and, then, our practice is then, when Troy 8 A I would a ve coupsted 9 has a discussion like that with a patient, 10 then he comes to me and says: Well, this 10 out, yes. 11 is - I had a phone call from - from a 11 Q And - 12 patient. This is what's going on, and so 11 Q And - 13 forth. So, that's where I would have gotten 13 Q Would time be of the essence, 14 that information. 14 that information. 15 Q Do you know if you - 15 Q Do you know if you - 16 A I would on that be of the essence, 19 that. 10 Two was going to say it's a 17 complicated 20 Do you know if you - 16 A I would on that e dalayed. There 19 21 meargent w			1		
6 most of these occasions, and, then, noted 6 BY MR, KULWICKI: 7 Q Yes, absolutely. 8 and, then, our practice is then, when Troy 8 A 9 has a discussion like that with a patient, 9 has a discussion like that with a patient, 10 then be comes to me and says: Well, this 10 out, yes. 11 is - I had a phone call from from a 11 Q And 12 patient. This is what's going on, and so 12 A No question whatsoever. 13 forth. So, that's where I would have gotten 14 that information. 13 Q Mong question whatsoever. 14 that information. 14 that in your mind, that you get that 15 15 Q D you know if you 16 A I was going to say it's a 16 A Dreas adicat ecords from her 16 A I would not have delayed. There 10 that. Yeson particularly ominon to us. 17 complicated. 23 21 diverticula, were yon informed or were you 24 framework of scart tissue in the abdomen					
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9QAnd, incidentally, Doctor, by the way, had you known back in March of 20039report in this case, did you have a10way, had you known back in March of 200310different opinion as to what was the cause11that Mrs. O'Neal had left, mid to lower quadrant pain, and assume that the CT scan at that point in time had shown or disclosed10different opinion as to what was the cause12quadrant pain, and assume that the CT scan at that point in time had shown or disclosed12like her death was probably related to13at that point in time had shown or disclosed13sepsis?14evidence of a retained object, if that had14AWell, sepsis, acidosis, anemia, all15been the facts back in March of '03 when15acting in concert.16Dr. Paul contacted you or when the patient16QAnd did you have do you hold the17contacted you, would you have advised her to17opinion that her sepsis was related to this18towel?19AMy my feeling at the time, and I20remember fairly clearly thinking about this,21was that I could not understand why, with a21MS. HARLAN: □Objection.21was that I could not understand why, with a22R- these left lower quadrant pain2323Q- these left lower quadrant pain2424complaints?24with no evidence of any widespread abdominal	1 .			0	
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	Page 77			Page 79
1	in this pocket where the towel had been, I	1	Remember what sepsis is. Sepsis is	i i i i i i i i i i i i i i i i i i i
2	could not understand why she would become	2	sometimes used as a hazy term or an inexact	
3	septic. I was very confused. I didn't know	3	term, but really what sepsis is, is is a	
4	if this was as a result of her anemia, her	4	bacterial invasion of the bloodstream; in	
5	overall generalized debilitated condition,	5	other words, widespread infection. An	
6	and so forth.	6	abscess is not sepsis.	
7	So, you know, my current opinion,	7	Q I understand.	
8	having looked at this autopsy report, is	8	A So, sepsis is the widespread	
9	that she did not die from sepsis but rather	9	infection, and I was and I was I could	
10	she died from a pulmonary embolus.	10	not understand at the time why she would	
11	At the time I was caring for her on	11	have that when we when we had taken out	
12	her second admission, I was perplexed at how	12	the towel. There wasn't that much pus in	
13	she could be septic when I got a drain. In	13	there, and I put in a drain. So, my my	
14	fact, I remember discussing that issue with	14	opinion when she had the cardiopulmonary	2010
15	some of the nurses caring for her, going	15	arrest was that she was probably septic.	21112120
16	like: How can she be septic? She's got a	16	Knowing now that she had a large saddle	1996-174
	drain in place. I think this was after she	17		
17		18	pulmonary embolus, I don't believe that	114227
18	suffered her respiratory or cardiopulmonary	10	anymore.	1772 H 1
19	arrest.	20	Q Okay, but she	Geo.
20	In retrospect, it appears to me now	3	A Does does that answer your	
21	highly likely that she instead had a	21	question?	
22	pulmonary embolus which was the cause of her	22	Q It does, but she did have an abscess	
23	death, and that she did not, in fact, die of	23	in her belly, correct?	917/74 SV
24	sepsis.	24	MS. HARLAN: Dobjection.	
25	Q I understand that, but with respect	25	THE WITNESS: \Box She she had a	
		1		
~	Page 78			Page 80
1	to, you know, obviously, she could have	1	pocket. Once again, I'm not I'm not	Page 80
2	to, you know, obviously, she could have sepsis at the same time that she had the	2	trying to to debate or or be evasive,	Page 80
2 3	to, you know, obviously, she could have sepsis at the same time that she had the pulmonary embolism, correct?	2 3	trying to to debate or or be evasive, you know. An abscess can be a pocket filled	Page 80
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	"		
hefore. I'm not trying to parse this on	Page 81	1	Page 82 A No, that's different. I thought you
		2	meant an abdominal CT.
			Q Right, I did, I did, and that's why
x ž		_	I was asking about if there was an abdominal
• •			CT.
		-	A I don't believe so.
		-	
•			Q Okay, thank you.A In other words, it's fair to call
			A In other words, it's fair to call this a true abscess with infection.
-			
			Q Thank you. Now, you talked about
			the that this is different from sepsis,
	1		but certainly an abdominal infection can
			beget sepsis, true?
			A That is true.
			Q And the definition of sepsis, how
			how do you define that?
1 1 1			A Well, there are more than there's
			more than one definition. Normally, I
			would – I guess I would define sepsis as an
			overwhelming systemic infection. Well, let
			me just say let's delete the word
1			"overwhelming;" as a systemic infection, and
			the typical way of making a diagnosis of
•			sepsis is with a positive blood culture,
are from specimens collected on 5/3. That		25	but but, quite honestly, physicians in
	Page 82		Page 84
would have been at the time of her surgery.		1	normal practice sometimes use the term
They have moderate gram positive rods on		2	somewhat loosely and say: Well, this
		3	patient is septic, or that patient is
moderate gram positive cocci; and a culture		4	septic, and they're referring to a
		5	constellation of symptoms, and signs, and so
		6	forth and so on, indicating their their
otherwise specified. And, it says, "see		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
	ļ	11	phenomenon whereby the body has an
		12	inflammatory response to foreign objects
			that are left within the body, say, through
			surgery?
			A Well, the body frequently responds
			to foreign objects by an inflammatory
-			response, yes.
			Q Okay, and are you aware or would you
			agree that that inflammatory response can,
			just like an inflammatory response to
read that – was there a CT performed at		21	sepsis, can create a hypercoagulable
Sycamore Hospital during this admission?		22	state?
• • •		23	A I don't know the answer to that. I
A No. not that I recall.	ļ	23	
A No, not that I recall.Q Yeah, I don't have one, but, I mean,		23 24	don't think I've ever read about that.
	They have moderate gram positive rods on gram stain; moderate gram negative rods; moderate gram positive cocci; and a culture result that shows heavy porphyromonas species NOS. I think that means not otherwise specified. And, it says, "see aerobic culture for identification of gram positive cocci. Some organisms on gram stain may have been overgrown on culture." I don't honestly know what they mean by that. I think the the gist of this is that that fluid was, in fact, infected. Q Okay. A That's what we were trying to determine, correct? Q Yes. And, Doctor, if we could, just look at the the radiology from the the May, 2003 admission to Sycamore Hospital Was there I thought you mentioned or I	 you. I'm just saying: Just because this towel was encapsulated in a pocket does not automatically mean the pocket was infected. You could call it a cold abscess; in other words a fluid collection without infection, and and the way to know that would be to look back at the record and see if I if I did any cultures. Q Why don't we do that now, if we could, and I'm certain there was. As I recall, it grew out strep aureus. A Oh, that that is not an an organism. Q Or, I'm sorry, what is it? Staph staph aureus. A Staph aureus, okay. I see, let's see. The date of this is 5/3. Q It's actually a strep constellatus; is that right? A Just a minute. I'm I'm seeing I see two different reports, is what I'm looking at. I have two pages here that demonstrate that that indicate they are from specimens collected on 5/3. That Page 82 would have been at the time of her surgery. They have moderate gram positive rods; moderate gram positive cods; and a culture result that shows heavy porphyromonas species NOS. I think that means not otherwise specified. And, it says, "see aerobic culture for identification of gram positive cocci. Some organisms on gram stain may have been overgrown on culture." I don't honestly know what they mean by that. I think the the gist of this is that that fluid was, in fact, infected. Q Okay. A That's what we were trying to determine, correct? Q Yes. And, Doctor, if we could, just look at the the radiology from the the May, 2003 admission to Sycamore Hospital. Was there - I thought you mentioned or I 	you. I'm just saying: Just because this2towel was encapsulated in a pocket does not3automatically mean the pocket was infected.4You could call it a cold abscess; in other5words a fluid collection without infection,6and and the way to know that would be to7look back at the record and see if I if I8did any cultures.9QWhy don't we do that now, if wecould, and I'm certain there was. As Irecall, it grew out strep aureus.AOh, that that is not an anorganism.12QOr, I'm sorry, what is it? Staphstaph aureus.AStaph aureus, okay. I see, let'ssee. The date of this is 5/3.18QIt's actually a strep constellatus;is that right?20AJust a minute. I'm I'm seeingI see two different reports, is what I'mlooking at. I have two pages here thatdemonstrate that that indicate theyare from specimens collected on 5/3. That25would have been at the time of her surgery.They have moderate gram negative rods;gram stain; moderate gram negative rods;gram stain; moderate gram negative rods;gram stain may have been overgrown on culture."I don't honestly know what they mean byI11I don't honestly know what they mean byII1I don't honestly know what they mean byII1I don't honestly know what they mean byII1

Í	Page 85		Page 87
1	know, I am done with everything except some	1	A Yes.
2	issues about credentialing. I note here	2	Q Okay, and are you the sole
3	that defense counsel has some exhibits that	3	shareholder of that corporation?
4	he wanted to ask you about, and they appear	4	A Yes.
5	at first glance to have to do with	5	Q Okay. I take it you're an officer
6	credentialing.	6	of the corporation?
7	Let let me suggest this, and	7	A Yes.
8	and you all there can veto this, but let me	8	Q As as we sit here today, are
9	suggest that we allow the hospital's counsel	9	there any other officers of the
10	to go forward, Mr. Cowdrey to go forward	10	corporation?
11	with his examination. I can then have the	11	A Frankly, I don't remember.
12	opportunity to review what came over on the	12	Q And you mentioned that in the past,
13	fax which I haven't had a chance to really	12	Dr. Clarey and Dr. Martin had worked for
14	read in detail, and, then, I may or may not	13	Middletown Surgical Associates, Inc.; is
		14	that correct?
15	have any additional questions depending on where Mr. Country goes with his examination		
16	where Mr. Cowdrey goes with his examination,	16	A Yes.
17	and if that's offensive to you, tell me, and	17	Q But they were never shareholders of that componentian?
18	I'll be happy to continue with with	18	that corporation?
19	with my questions.	19	A No.
20	MS. HARLAN: □That's fine with me.	20	Q Riverview Health Institute, where's
21	MR. COWDREY: Okay. Yeah, that's	21	that located?
22	fine with me, David. What I'll do is, I'll	22	A In Dayton.
23	go through some questions. Doctor, do you	23	(Inaudible.)
24	want to take a break?	24	MR. KULWICKI: Hang on one second.
25	MS. HARLAN: □No.	25	Hang on. We're having problems hearing you
	D		De ce Où
1	Page 86	1	Page 88
1	MR. COWDREY: And, then, we'll	1	over here. Let me have the court reporter
2	probably take a break at that point, and	2 3	talk to you. Just tell him what you did or did not hear.
3	I'll see whether or not I need to ask any		
4	additional questions, and, then, if you have	4	THE REPORTER: I did not hear the
5	some additional questions, feel free to ask	5	last question.
6	them, okay?	6	BY MR. COWDREY:
7	MR. KULWICKI: DI appreciate that.	7	Q Okay. Doctor, Riverview Health
8	Thank you.	8	Institute, where's that located?
9	CROSS-EXAMINATION OF DAVID FALLANG, M.D.	9	A Dayton.
10	BY MR. COWDREY:	10	Q And that's over next to the old St.
11	Q Doctor, my name's Bob Cowdrey, and I	11	E's Hospital?
12	represent the hospital in this litigation.	12	A Yes.
13	I'd like to follow up with some of the	13	MR. COWDREY: Do you hear me all
14	questions that Mr. Kulwicki asked you, and	14	right now?
		15	MR. KULWICKI: \Box Yes.
15	then I am I will ask you some questions		
	then I am I will ask you some questions about credentialing and insurance.	16	BY MR. COWDREY:
16		16 17	BY MR. COWDREY: Q The how long have you been at
16 17	about credentialing and insurance.		
16 17 18	about credentialing and insurance. Middletown Surgical Associates, Inc.	17	Q The how long have you been at
16 17 18 19	about credentialing and insurance. Middletown Surgical Associates, Inc. is a professional corporation; is that	17 18	Q The how long have you been at Riverview?
16 17 18 19 20	about credentialing and insurance. Middletown Surgical Associates, Inc. is a professional corporation; is that right?	17 18 19	QThe how long have you been atRiverview?AOh, about seven months.
16 17 18 19 20 21	about credentialing and insurance. Middletown Surgical Associates, Inc. is a professional corporation; is that right? A Right.	17 18 19 20	 Q The how long have you been at Riverview? A Oh, about seven months. Q And and who owns that institute?
 15 16 17 18 19 20 21 22 23 	about credentialing and insurance. Middletown Surgical Associates, Inc. is a professional corporation; is that right? A Right. Q And when when was that	17 18 19 20 21	 Q The how long have you been at Riverview? A Oh, about seven months. Q And and who owns that institute? A A variety of business entities.
16 17 18 19 20 21 22	about credentialing and insurance. Middletown Surgical Associates, Inc. is a professional corporation; is that right? A Right. Q And when when was that professional corporation formed?	17 18 19 20 21 22	 Q The how long have you been at Riverview? A Oh, about seven months. Q And and who owns that institute? A A variety of business entities.

	Page 89		Page 91	2.42
1	Q Okay, and you say you've been	1	would that pulmonary embolism, if, in fact,	
2	you've been practicing there for the past	2	it predated her admission to the hospital in	
3	seven months?	3	May of 2003, be related to –	
4	A Yes.	4	MR. KULWICKI: \Box We can't hear you.	
5	Q And do you do bariatric surgery at	5	You're shuffling papers. We can't hear.	
6	Riverview?	6	BY MR. COWDREY:	1000
7	A Yes.	7	Q I'm sorry. Let me let me repeat	
8	Q And and when did you actually	8	it. With with respect to the pulmonary	1
9	start performing bariatric surgery? What	9	embolism and its predating her admission to	
10	what year?	10	the hospital in May of 2003, would that be,	
11	A Oh, in 1997.	11	in your opinion, unrelated to the retained	
12	Q And the bariatric surgery, how's	12	towel?	100
13	that defined? What what do you consider	13	MR. KULWICKI: Dobjection.	24242
14	to be bariatric surgery?	14	THE WITNESS: \Box I mean, the problem	2012
15	A It's surgery intended to induce	15	is that I don't know that it's possible to	10000
16	weight loss.	16	determine what was the originating factor	Stravely.
17	Q And that involves a Roux-en-Y	17	behind the pulmonary embolism or or, in	
18	procedure?	18	other words, the deep venous thrombosis.	
19	A Well, there's a variety of different	19	Certainly, the retained towel would have	1000
20	procedures. I perform Roux-en-Y	20	created additional risk factors, but she	1012/111
21	procedures Roux-en-Y gastric bypasses	21	already had other risk factors. I – I	21W/00
22	pretty much exclusively, but there are other	22	don't think it's possible to know. It's	o prove parts
23	procedures that can be performed.	23	certainly possible that it could have been	
24	Q I believe Mr. Kulwicki had asked you	24	unrelated to the retained towel.	
25	some questions about the coroner's report.	25	Typically, these clots occur; that	1000
				Sec.
	Page 90		Page 92	
1	As you sit here today, is is there a	1	is to say, they first form in the pelvic	
2	question that has now arisen in your mind as	2	veins. All all the inflammatory	
3	to whether this pulmonary embolism that was	3	processes that that existed in this	
4	seen on autopsy predated or preceded her	4	patient, to my knowledge, were in the left	
5	admission to the hospital at Kettering in	5	upper quadrant. It may not be, you know,	1000
6	May of 2003?	6	miles away, but, I mean, anatomically and	
7	A Yes, I would have a serious question	7	physiologically, that makes a difference.	
8	about that.	8	If you have an inflamed mass sitting	Wile Co
9	Q And why do you believe that?	9	on top of a pelvic vein, such as what you	2201263
10	A Well, for one thing, a large	10	might see in Crohn's disease, that vein is	No.
11	pulmonary embolus takes a while to develop,	11	certainly at risk. If you have an inflamed	Trainin in
12	but probably more than that is, it it	12	mass sitting elsewhere that's not	away in
13	appears quite obvious to me now that she	13	contiguous, then, possibly there are some	111111
14	died of a pulmonary embolus rather than of	14	systemic inflammatory factors, but it	12121212
15	sepsis. The pulmonary embolus results from	15	becomes a very difficult question to answer	NAME:
16	the breaking loose of a clot. Frequently	16	with any degree of certainty.	1000
17	these clots are in the pelvic veins, and the	17	Q With respect to this individual,	(1997) 1997
18	issue is that the age of this clot may not	18	Mrs. O'Neal's religious beliefs and her	11111
19	be able to be determined. I mean, I think	19	attitude toward not taking blood products,	101111
20	it almost certainly at this stage in time	20	did that complicate or cause any problems	1. 17 MAN
21	cannot be determined. We can only guess	21	for you in — in treating her in May of 2003	1 and a street
22	about it, but in in my estimation, it	22	when you did the surgery to remove the	
23	certainly could have predated her admission	23	towel?	
24	to her second admission to Sycamore.	24	A Very much so.	
25	Q And in that circumstance, would	25	Q And in in what way was that a	
L		i tertsittetete		

	Page 93		Page 95
complicating situation?	1 450 22	1	recall. It was seven years ago.
			Q I'm going to show you what's been
•		3	marked as Exhibit 3.
			(At this time Defendant's Exhibits 1
•			to 13 were marked for identification
			purposes.)
			BY MR. COWDREY:
-			Q And that – that is page 12 of the
•			credentials manual; at least, that's as -
			as it sits in front of you. It's titled at
			the bottom; is that correct?
			A That's what it says.
* *			Q Okay.
• • •			A Updated $4/24/03$.
			Q Okay.
			A So, this is not the copy that I
			would have received seven years ago.
			Q I understand that, but were you
			aware that you were to provide evidence to
			the hospital of malpractice coverage?
•			A That would be typical, yes.
			Q And and on Exhibit 3 under
			Subsection E, it indicates, at least as of
			the date April 24th, 2003 when this was
their minister or what have you to make sure		25	published, that you were to advise the
	<u> </u>		D 0/
they understand the gravity of the	Page 94	1	Page 96
			hospital of any changes in your professional
			liability coverage; is that correct?
			A That's what it says.
			Q Now, when you first applied for
• • • •			privileges at at Kettering, did you apply
			for general surgery privileges?
	•		A I believe so.
		_	Q Okay. Did you apply for bariatric
		-	privileges the first time you applied in
-			1997?
			A I don't recall.
		12	Q Okay. Were you doing any bariatric
applied for – for staff privileges, did			
they provide you with bylaws of the		13	surgery in 1997?
they provide you with bylaws of the hospital?		14	
they provide you with bylaws of the		14 15	surgery in 1997? A Yes. Q And that was you were doing that
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 they provide you with bylaws of the hospital? A I think so. Q And were you aware that your application for privileges would be on a two-year basis, in in the sense that, if you wanted to renew your privileges, you'd have to ask for a renewal every two years? A I think I recall that. Q And and were you also provided, 		14 15 16 17 18 19 20 21	 surgery in 1997? A Yes. Q And that was you were doing that down at Middletown? A Well, I was doing it at Sycamore also, Middletown and Sycamore. Q So A And and Southview and Grandview and a couple of cases at Kettering. Q Is it your testimony that in 1997
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	 privileges at Kettering and Sycamore in 1997; is that accurate? A That is my recollection. Q And you were provided when you 	complicating situation?ABecause she was extraordinarilyanemic, and we couldn't give her any blood;and that affects hemodynamic function. Itaffects physiologic function in terms ofhypoxia, anaerobic metabolism which resultsin lactic acid, cardiac function. There's awhole range. You don't have to be a doctorto know that your body needs oxygen, andmost people understand that red bloodcells the hemoglobin inside the red bloodcells carries the oxygen. Without them, andI fully respect her religious beliefs, butit is a simple, scientific fact that,without the ability to give her red bloodcell transfusions, her physiologic statuswas severely compromised. I believe thatshe had a hematocrit noted in one of theprogress notes of 16. It's extraordinarilylow. I had several discussions with herfamily about this to to make sure thatthat they would not change their mind. Idiscussed this with the family inconjunction with their spiritual counselor,their minister or what have you to make surePage 94they understood the gravity of thesituation, and that they that they didnot have any change of heart about it.QDoctor, at this point, I want todiscuss with you the your application forprivileges to practice at Kettering. It'smy understanding that you first applied forprivileges at Kettering and Sycamore in1997; is that accurate?A <td>complicating situation?1ABecause she was extraordinarily2anemic, and we couldn't give her any blood,3and that affects hemodynamic function. It4affects physiologic function in terms of5hypoxia, anaerobic metabolism which results6in lactic acid, cardiac function. There's a7whole range. You don't have to be a doctor8to know that your body needs oxygen, and9most people understand that red blood10cells the hemoglobin inside the red blood11cells the hemoglobin inside the red blood12I fully respect her religious beliefs, but13it is a simple, scientific fact that,14without the ability to give her red blood15cell transfusions, her physiologic status16was severely compromised. I believe that17she had a hematocrit noted in one of the18progress notes of 16. It's extraordinarily19low. I had several discussions with her20family about this to to make sure that21that they would not change their mind. I22discussed this with the family in23conjunction with their spiritual counselor,24their minister or what have you to make sure25Page 944discuss with you the your application for5privileges to practice at Kettering. It's6my understanding that you first applied for7privileges at Kettering and Sycamore in8<</td>	complicating situation?1ABecause she was extraordinarily2anemic, and we couldn't give her any blood,3and that affects hemodynamic function. It4affects physiologic function in terms of5hypoxia, anaerobic metabolism which results6in lactic acid, cardiac function. There's a7whole range. You don't have to be a doctor8to know that your body needs oxygen, and9most people understand that red blood10cells the hemoglobin inside the red blood11cells the hemoglobin inside the red blood12I fully respect her religious beliefs, but13it is a simple, scientific fact that,14without the ability to give her red blood15cell transfusions, her physiologic status16was severely compromised. I believe that17she had a hematocrit noted in one of the18progress notes of 16. It's extraordinarily19low. I had several discussions with her20family about this to to make sure that21that they would not change their mind. I22discussed this with the family in23conjunction with their spiritual counselor,24their minister or what have you to make sure25Page 944discuss with you the your application for5privileges to practice at Kettering. It's6my understanding that you first applied for7privileges at Kettering and Sycamore in8<

		Page 97		Page 9
1	Grandview and Southview, correct?		1	A One million, three million.
2	A Well, Grandview and Southview were		2	Q One million per incident?
3	not affiliated at that time. It included		3	A Per incident, three million per
4	Sycamore.		4	year.
5	Q Okay.		5	Q Now, when when you applied for
6	A Grandview and Southview were		6	privileges at Kettering in 1997, what
7	separate.		7	company did you have professional liability
8	Q So, when you applied for privileges		8	insurance with?
9	at Kettering in 1997, you were doing		9	A I don't recall.
10	bariatric surgery at Middletown Regional		10	Q Do you recall what your limits of
11	Hospital?		11	liability were in 1997 when you applied for
12	A Yes.		12	privileges at Kettering?
13	Q You were doing bariatric surgery at		13	A I assume they were one million,
14	Grandview and Southview?		14	three million.
15	A Yes.		15	Q Now, and when I ask when I say
16	Q Okay, and are you sitting here today		16	"you," I'm meaning you as opposed to the
17	telling me that you when you applied for		17	professional corporation. Did the
18	privileges at Kettering in 1997, you asked	ļ	18	professional corporation, Middletown
19	for bariatric surgery privileges in addition		19	Surgical Associates, Inc., also have a
20	to general surgery privileges?		20	separate policy of professional liability
21	MS. HARLAN: □Objection. I think he	ł	21	coverage?
22	said he doesn't recall.		22	A No. I believe it was encompassed in
23	THE WITNESS: That is correct. \Box I		23	the same policy.
24	don't recall how I filled actually, I		24	Q My understanding is that you were
25	usually I didn't fill those forms out.		25	provided privileges in 1997 at Kettering and
25	usuany i chan t ini mose forms out.		20	provided privileges in 1777 at Reitering and
		Page 98		Page 100
1	My office staff typically did that.	Page 98	1	Page 100 Sycamore; is that correct?
12	My office staff typically did that. BY MR. COWDREY:	Page 98	1 2	
	BY MR. COWDREY:	Page 98		Sycamore; is that correct? A That's my recollection.
2	BY MR. COWDREY: Q And and at the time you applied	Page 98	2	Sycamore; is that correct? A That's my recollection.
2 3	BY MR. COWDREY: Q And and at the time you applied for privileges at Kettering-Sycamore in	Page 98	2 3	Sycamore; is that correct?AThat's my recollection.QOkay, and did you provide Kettering
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	 BY MR. COWDREY: Q And and at the time you applied for privileges at Kettering-Sycamore in 1997, your active staff privileges were at Middletown Regional and Grandview, Southview? A Well, I had privileges in Middletown since 1981. My recollection is that I applied at Grandview, Southview and at Kettering-Sycamore at approximately the sam time. Q Now, when you applied for privileges, or while while you were on staff and a privileged and having privileges at Middletown Regional Hospital did they require you to maintain professional liability coverage? A Yes. Q Did did they require you to maintain professional liability coverage for 	e ,	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Sycamore; is that correct?AThat's my recollection.QOkay, and did you provide Ketteringwith any proof of professional liabilityinsurance?AI suppose so.QFor 1997?AI suppose so. Again, I didn't dothat stuff. My office people did all that.QAnd who in your office wasresponsible for providing that informationto the hospital?AIn 1977?Q1997.AI'm sorry, 1997. I can't rememberexactly who was working there then.QHow how many people did you havein the office that worked in the office foryou in 1997?AThere's been a lot of changes sincethen; probably three or four.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	 BY MR. COWDREY: Q And and at the time you applied for privileges at Kettering-Sycamore in 1997, your active staff privileges were at Middletown Regional and Grandview, Southview? A Well, I had privileges in Middletown since 1981. My recollection is that I applied at Grandview, Southview and at Kettering-Sycamore at approximately the sam time. Q Now, when you applied for privileges, or while while you were on staff and a privileged and having privileges at Middletown Regional Hospital did they require you to maintain professional liability coverage? A Yes. Q Did did they require you to maintain professional liability coverage for a certain amount? A Yes. 	e 9	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Sycamore; is that correct?AThat's my recollection.QOkay, and did you provide Ketteringwith any proof of professional liabilityinsurance?AI suppose so.QFor 1997?AI suppose so. Again, I didn't dothat stuff. My office people did all that.QAnd who in your office wasresponsible for providing that informationto the hospital?AIn 1977?Q1997.AI'm sorry, 1997. I can't rememberexactly who was working there then.QHow how many people did you havein the office that worked in the office foryou in 1997?AThere's been a lot of changes sincethen; probably three or four.QWas there one particular personthat - that you would have involved in

25 (Pages 97 to 100)

	Page 101		Page 103
1 1	for privileges? Did you have, like, a	1	laparoscopic procedures?
	lesignated office manager that that would	2	A It looks that way.
	fulfill those duties?	3	Q And that would have been done in
	A Yeah, basically, that's correct.	4	March of 2001.
	Q Okay.	5	A Yes.
	A She left in '97, and I'm trying to	6	Q And in March of 2001, can you tell
	remember when. It would have been a girl or	7	me who was your professional liability
	a woman named Sara Graham, G-R-A-H-A-M. I	8	carrier?
	believe that she's the one that probably	9	A I can't remember. Three of them
	would have done that, or at least overseen	10	have gone bankrupt.
	he process.	11	Q I'm going to show you what's been
	Q Now, my understanding is, and if	12	marked as Exhibit 5.
	your recollection is different, tell me,	13	A Uh-huh.
*	that you voluntarily resigned your	14	Q And that that appears to be a
	privileges at Kettering in 1999; is that	15	certificate of liability insurance which is
-	iccurate?	16	dated at the top March 26 of 2000, correct?
	A More or less.	17	A May 26th.
	Q And, then, you reapplied for	18	Q Is that correct?
	privileges in in 2000, in I believe	19	A May 26th.
-	2000 February of 2000.	20	Q Yeah, May 26th of 2000 is the date
	A That sounds right.	21	on that certificate of liability
	O Do you remember let me show you	22	insurance?
	what's been marked as showing you what's	23	A That's what it says.
	been marked as Exhibit 4, and that describes	24	Q It shows you as an insured, David J.
	privileges that you're requesting; is that	25	Fallang, M.D., correct?
E	privinges and you re requesting, is that		T 00110010 1100 19 000 1 0000
	Page 102		Page 104
	correct?	1	A Yes.
	A I think so.	2	Q The insurance company is American
	Q And that that's your signature on	3	Equity Insurance Company; is that correct?
	he —	4	A Yes.
	A Yes.	5	Q It shows your coverage, \$1 million
6 (Q – the bottom there?	6	each occurrence, \$3 million annual aggregate
	A Yes.	7	with a \$10,000 deductible, correct?
	Q And that indicates what privileges	8	A Correct.
	are you asking for?	9	Q And it shows effective dates of the
10	A Well, this is page two, so I assume	10	policy, May 24, 2000 to May 24, 2001; is
	here's a page one, but on this page, it	11	that correct?
12 s	says, "laparoscopy and laparoscopic	12	A Correct.
13 s	surgery," and "other," it says "Roux-en-Y	13	Q This this certificate of
	gastric bypass, open and laparoscopic," and	14	liability insurance, did you give this or
£	hat has a date notation of 3/26/01.	15	have someone from your office give it to
	And and your initials are next to	16	someone at the hospital?
15 t	Q And and your initials are next to		A I presume so.
15 t 16 (hat date; is that correct?	17	
l5 t l6 (l7 t		17 18	Q And who would have been your who
15 t 16 (17 t 18 /	hat date; is that correct? A Yes.	1	C V
15 t 16 (17 t 18 2 19 (hat date; is that correct? A Yes. Q Okay. The initial page, which is	18	would have been the person in your office
15 t 16 (17 t 18 / 19 (20 1	hat date; is that correct? A Yes. Q Okay. The initial page, which is Exhibit 4, was signed by you February 25th	18 19 20	would have been the person in your office responsible for providing this certificate
15 t 16 (17 t 18 / 19 (20 1 21 c	hat date; is that correct? A Yes. Q Okay. The initial page, which is Exhibit 4, was signed by you February 25th of 2000, correct?	18 19 20 21	would have been the person in your office responsible for providing this certificate of insurance to the hospital?
15 t 16 17 17 1 18 1 19 1 20 1 21 1 22 1	 hat date; is that correct? A Yes. Q Okay. The initial page, which is Exhibit 4, was signed by you February 25th of 2000, correct? A That's what it says. 	18 19 20 21 22	 would have been the person in your office responsible for providing this certificate of insurance to the hospital? A What what when was this done?
15 t 16 17 17 t 18 1 19 0 20 1 21 0 22 1 23 0	 hat date; is that correct? A Yes. Q Okay. The initial page, which is Exhibit 4, was signed by you February 25th of 2000, correct? A That's what it says. Q And, then, you added the request for 	18 19 20 21 22 23	 would have been the person in your office responsible for providing this certificate of insurance to the hospital? A What what when was this done? Q In May of 2000.
15 t 16 17 17 t 18 1 19 1 20 1 21 1 22 1 23 1 24 2	 hat date; is that correct? A Yes. Q Okay. The initial page, which is Exhibit 4, was signed by you February 25th of 2000, correct? A That's what it says. 	18 19 20 21 22	 would have been the person in your office responsible for providing this certificate of insurance to the hospital? A What what when was this done?

	Page 105		Page 107
1	Q And your wife's name?	1	Surgical Associates.
2	A Is Teresa Fallang.	2	Q It says "David J. Fallang M.D.,
3	Q And this policy of insurance that	3	d.b.a. Middletown Surgical Associates"; is
4	that was written by American Equity	4	that right?
5	Insurance Company, did it provide coverage	5	A Yes.
6	for bariatric surgery?	6	Q And it's it's hard to read, but
7	A As far as I know, but I don't have	7	it appears as if the company that's
8	the policy in front of me. I think it did.	8	providing the insurance is Admiral Insurance
9	Q Did – did you ever actually review	9	Company.
10	the policy of insurance that American Equity	10	A Yes.
11	provided to you to to determine whether	11	Q And and that shows a date,
12	or not it did provide coverage for your	12	effective date of the policy as being July
13	bariatric surgery?	13	25th, 2001 through July 25th, 2002; is that
14	A Probably not.	14	right?
15	Q I'm going to show you what's been	15	A Yes.
16	marked as Exhibit 6, and that is a letter	16	Q And I guess what I'm interested in
17	from Mr. Manchur at Kettering Medical Center	17	is, if you look at the previous certificate
18	indicating that you had been - your	18	of insurance which had American Equity as
19	privileges had been approved?	19	the company do you see that?
20	A Üh-huh.	20	A Yes.
21	Q Is that correct?	21	Q If you compare those two
22	A That's what it says.	22	certificates, you have one certificate which
23	Q Okay, and that – that letter is	23	shows coverage up through May 24th of 2001,
24	dated May 4, 2001?	24	and then the next certificate indicates your
25	A Okay.	25	coverage starts on July 25th, 2001; is that
ļ		ļ	
1	Page 106	1	Page 108
$\begin{vmatrix} 1\\ 2 \end{vmatrix}$	Q Is that right? A It says.	2	A It looks like it.
$\frac{2}{3}$	Q And and, so, you're aware that,	$\frac{2}{3}$	Q Did you have another insurance
4	when the spring of 2003 rolls around, you're	4	policy that provided coverage for that gap
5	going to need to apply for for renewal	5	between May of 2001 and July of 2001?
6	privileges, correct, since it was over two	6	A I don't think so.
7	years?	7	Q So, you you were uninsured for
8	A Okay.	8	some period of time, then?
8 9	Q Is that right?	° 9	A It looks that way.
10	A Yeah, as far as I know.	10	THE VIDEOGRAPHER: Mr. Cowdrey,
11	Q With respect to the insurance policy	11	you've got a little less than five minutes
12	that was written by American Equity, were	12	left on this tape.
12	you aware of any restrictions or exclusions	12	BY MR. COWDREY:
14	on that policy when it came to your ability	14	Q The your office manager in 2001,
14	to perform surgery, whether it be general	14	would that have still been Teresa Fallang?
15	surgery or bariatric surgery?	16	A Yes.
17	A Not to my knowledge.	10	Q And would she have been the person
17		18	that you would have designated to provide
10	Q And I'm going to show you what's been marked as Exhibit 7, and that appears	10	this type of information, insurance
20	to be another certificate of insurance; is	20	information to the hospital?
20	to be another certificate of insurance; is that correct?	20 21	A Yes.
21		21 22	
22	A It appears to be.Q And – and who is the insured on	22 23	Q All right, and with respect to this Exhibit 7 which shows Admiral Insurance
23 24	Q And – and who is the insured on that?	23 24	
24		24 25	Company as being the insurance company providing insurance, professional liability
1/3	A Myself as well as Middletown	40	REEDEVILLEEVILLEVILLEVILLEVILLEVILLEVILLE
:/ }	A IVLYSCH AS WELL AS IVHUUICIUWII	120	REFERENCESSEN ARROADER MAANUUL, HERUSAUUNNAUSSAUSSAUSSAUSSAUSSAUSSAUSSAUSSA

27 (Pages 105 to 108)

	Page 109		Page 111
1	insurance to you, was there any particular	1	purchasing the the professional liability
2	restriction or exclusion issued by Admiral	2	coverage for yourself, it also provides
3	concerning the performance of bariatric	3	coverage for your professional corporation.
4	surgery?	4	Is that paid paid for by a check?
5	A It doesn't say so. I don't recall,	5	A Usually.
6	you know, the text of the policy. I mean,	6	Q Okay, and Teresa Fallang is your
7	this is the binder, and it doesn't have any	7	office manager. Does she have the ability
8	exclusions on it.	8	to write checks and sign checks, or is or
9	Q Do you do you happen to have	9	are the checks signed by yourself?
10	these policies somewhere that were issued by	10	A I don't remember signing any
11	the various insurance companies?	11	particular check.
12	A I assume so. They're not in my car.	12	Q Well, does Teresa have the ability
13	I don't know where they are. I don't do	13	to actually sign a check?
14	this stuff. Yeah, I assume they're at the	14	A Yes.
15	office someplace.	15	Q On behalf of yourself?
16	Q Who's your office manager now?	16	A I don't know on behalf of myself.
17	A The same person.	17	It's on behalf of the business.
18	Q Teresa?	18	Q Well, for example, if we looked at
19	A Uh-huh.	19	Exhibit 7 and the coverage afforded by
20	Q Okay. Would Teresa be the	20	Admiral Insurance Company, would would a
21	individual that would have the actual	21	check have been written from a personal
22	policies of insurance that – that were	22	account, David Fallang, or from the
23	-	23	
23 24	issued by these various companies for your	$\frac{23}{24}$	corporate account?
24	professional liability?	25	A From the corporate account.
23	A That's my best guess, yes.	20	Q And your testimony is Teresa would
	Page 110		D
		1	Page 112 p
1	Q So, as as you sit here today,	1	Page 112 have had the authority to sign that check?
1 2		1 2	have had the authority to sign that check? A Yes.
	with respect to this policy issued by	1	have had the authority to sign that check? A Yes.
2	with respect to this policy issued by Admiral Insurance Company, you're not aware	2	have had the authority to sign that check?A Yes.Q Okay. Would you have known back in
2 3 4	with respect to this policy issued by Admiral Insurance Company, you're not aware that there was any restriction or exclusion	2 3	 have had the authority to sign that check? A Yes. Q Okay. Would you have known back in July of 2001 as to how much your insurance
2 3 4 5	with respect to this policy issued by Admiral Insurance Company, you're not aware that there was any restriction or exclusion on that particular policy concerning the	2 3 4 5	 have had the authority to sign that check? A Yes. Q Okay. Would you have known back in July of 2001 as to how much your insurance premiums were for coverage through Admiral
2 3 4	with respect to this policy issued by Admiral Insurance Company, you're not aware that there was any restriction or exclusion on that particular policy concerning the performance of bariatric surgery?	2 3 4 5 6	 have had the authority to sign that check? A Yes. Q Okay. Would you have known back in July of 2001 as to how much your insurance premiums were for coverage through Admiral Insurance Company?
2 3 4 5 6 7	with respect to this policy issued by Admiral Insurance Company, you're not aware that there was any restriction or exclusion on that particular policy concerning the performance of bariatric surgery? A No. They usually put the exclusions	2 3 4 5 6 7	 have had the authority to sign that check? A Yes. Q Okay. Would you have known back in July of 2001 as to how much your insurance premiums were for coverage through Admiral Insurance Company? A I guess I don't know.
2 3 4 5 6 7 8	with respect to this policy issued byAdmiral Insurance Company, you're not awarethat there was any restriction or exclusionon that particular policy concerning theperformance of bariatric surgery?ANo. They usually put the exclusionsand restrictions on the binder.	2 3 4 5 6	 have had the authority to sign that check? A Yes. Q Okay. Would you have known back in July of 2001 as to how much your insurance premiums were for coverage through Admiral Insurance Company? A I guess I don't know. Q Well, let me ask you this.
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28 (Pages 109 to 112)

Ì	Page 113		I	Page 115
1	A After millions of phone calls, lots	1	for sure. I think that they were from	
2	of forms to fill out, applications to fill	2	Pennsylvania or something, but I don't know	
3	out. I mean, it's just an unbelievable	3	where these guys are from.	
4	nightmare.	4	Q Okay, as – as things went along,	
5	Q And I guess my question to you is:	5	did it become more difficult to obtain	
6	You you delegated that responsibility	6	insurance coverage for bariatric surgery?	
7	to to Teresa to shop around for insurance	7	A Everything. Bariatrics is very	
8	coverage, and how much it would cost?	8	difficult, yes.	
9	MS. HARLAN: Objection.	9	Q And why is that?	
10	THE WITNESS: Yes.	10	A Because people like our friend in	
11	BY MR. COWDREY:	11	Cleveland keep suing us. It is well	
12	Q And who ultimately determined what	12	known that was a flip answer.	
13	insurance company you would buy coverage	13	It is well known, and I cannot	
14	through?	14	explain to you the reasons why, but it is	
15	A I don't know how to answer that	15	well known that bariatrics is probably the	
16	question.	16	worst specialty as far as medical	
17	Q Well, I mean, did you –	17	malpractice, and and I believe that	
18	A What ultimately determines whether	18	the there's there was a guy that spoke	
19	you're going to buy a new car? If your wife	19	at the American Society Society for	
20	wants a new car, you get a new car.	20	Bariatric Surgery, and I believe he said	
21	Q Not so in my family, but go ahead.	21	that the average full-time bariatric surgeon	
22	What I'm interested in then is, with respect	22	gets sued something like 2.3 times per year,	
23	to your professional liability coverage, did	23	whereas the average obstetrician/	
24	you make the ultimate decision as to what	24	gynecologist gets sued something like 2.5	
25	insurance company you would go with?	25	times per career. It's just horrible.	
ļ				4
		1		
	Page 114			Page 116
1	A I mean, I guess as the president of	1	Q And and I take it that one of the	Page 116
2	A I mean, I guess as the president of the corporation, I had the authority to say	1 2	Q And and I take it that one of the reasons for that is because you're dealing	Page 116
2 3	A I mean, I guess as the president of the corporation, I had the authority to say no, but in reality, it was so difficult to	3	Q And and I take it that one of the reasons for that is because you're dealing with high risk patients?	Page 116
2 3 4	A I mean, I guess as the president of the corporation, I had the authority to say no, but in reality, it was so difficult to find any coverage at all, and it was so	3 4	 Q And and I take it that one of the reasons for that is because you're dealing with high risk patients? A I assume that to be true, but I I 	Page 116
2 3 4 5	A I mean, I guess as the president of the corporation, I had the authority to say no, but in reality, it was so difficult to find any coverage at all, and it was so complicated, and like I said, I mean, this	3 4 5	 Q And and I take it that one of the reasons for that is because you're dealing with high risk patients? A I assume that to be true, but I I must tell you, this is what I do for a 	Page 116
2 3 4 5 6	A I mean, I guess as the president of the corporation, I had the authority to say no, but in reality, it was so difficult to find any coverage at all, and it was so complicated, and like I said, I mean, this stuff has turned into a nightmare that	3 4 5 6	 Q And and I take it that one of the reasons for that is because you're dealing with high risk patients? A I assume that to be true, but I I must tell you, this is what I do for a living. I've done it for some time. I love 	Page 116
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29 (Pages 113 to 116)

	D 11	_	Doge 110
1	Page 11 cholecystectomy; is that correct?	7	Page 119 forever, assuming, of course, the insurance
2	A Yes.	2	company didn't go bankrupt.
3	O And that would involve	3	The claims made policy only covers
3 4	laparoscopic a request for laparoscopic	4	claims made during the policy period or an
5	procedures with respect to Roux-en-Y?	5	incident that you might notify the insurance
6	A Yes.	6	company of. So, if something bad happened,
7	Q And, then, also a request for open	7	and you called your insurance company and
8	Roux-en-Y gastric bypass, correct?	8	said: You need to know about this, that
9	A Yes.	9	would be equivalent to having the claim a
10	Q Okay, and showing you what's been	10	claim reported, I guess you could say.
11	marked as Exhibit 9, this is an agreement	11	Q And Exhibit 10 shows that you have
12	that you signed with the hospital on April	12	coverage with Evanston under policy number
13	19, 2003 concerning malpractice coverage; is	13	MM-4025 with a policy period of July 25,
14	that correct?	14	2002 to July 25, 2003, correct?
15	A Yes.	15	A That's what it says.
16	Q And that indicates that if if	16	O And it shows a certificate of holder
10	your current coverage is cancelled,	17	at the bottom being Kettering Medical
18	terminated or restricted in any way, you	18	Center; is that right?
19	would notify Kettering Medical Center of	19	A That's what it says.
20	that.	20	Q And – and would Teresa have
21	A Yes.	21	provided this certificate of liability
22	Q Showing you what's been marked as	22	insurance to the hospital?
23	Exhibit 10, this is a certificate of	23	A I assume so.
23 24	insurance dated at the top, right-hand side	24	Q Well, did you personally provide
24 25	July 25th of 2002; is that correct?	25	this certificate to – to the hospital?
	Oury Aster of Mound in their correct.		
	Page 11	8	Page 120
1	A Yes.	1	A No. Sometimes – I think sometimes
2	Q That shows a new insurance company	2	the insurance broker provides it. Again, I
3	providing coverage for Middletown Surgical	3	mean, I didn't do this stuff, but I think
4		1 4	
	Associates and Dr. David J. Fallang,	4	sometimes it comes directly from the broker,
5	correct?	5	or if not, then it comes, I guess, from our
6		5 6	or if not, then it comes, I guess, from our office.
	correct? A Yes. Q That new insurance company is	5	or if not, then it comes, I guess, from our office. Q And and how would the broker know
6 7 8	correct? A Yes. Q That new insurance company is Evanston; is that right?	5 6 7 8	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance
6 7 8 9	correct? A Yes. Q That new insurance company is Evanston; is that right? A Yes.	5 6 7 8 9	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to?
6 7 8 9 10	correct? A Yes. Q That new insurance company is Evanston; is that right?	5 6 7 8 9 10	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody
6 7 8 9 10 11	correct?AYes.QThat new insurance company isEvanston; is that right?AYes.QThat's a claims made policy?AThat's what it says.	5 6 7 8 9 10 11	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him.
6 7 9 10 11 12	correct?AYes.QThat new insurance company isEvanston; is that right?AYes.QThat's a claims made policy?AThat's what it says.QOkay, and did you, or do you, as you	5 6 7 8 9 10 11 12	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10,
6 7 9 10 11 12 13	correct?AYes.QThat new insurance company isEvanston; is that right?AYes.QThat's a claims made policy?AThat's what it says.	5 6 7 8 9 10 11 12 13	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of
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6 7 9 10 11 12 13 14	correct?AYes.QThat new insurance company isEvanston; is that right?AYes.QThat's a claims made policy?AThat's what it says.QOkay, and did you, or do you, as yousit here today, understand the difference	5 6 7 8 9 10 11 12 13	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of operations, et cetera, it says, "coverage extends to David J. Fallang, M.D. while
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6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	 correct? A Yes. Q That new insurance company is Evanston; is that right? A Yes. Q That's a claims made policy? A That's what it says. Q Okay, and did you, or do you, as you sit here today, understand the difference between a claims made policy and an occurrence policy? A I think I do, yes. Q All right, and what's your understanding of that difference? A An occurrence policy covers any 	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of operations, et cetera, it says, "coverage extends to David J. Fallang, M.D. while performing services on behalf of the named insured." Is that what it says? A Yes. Q Were there any restrictions that you
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	 correct? A Yes. Q That new insurance company is Evanston; is that right? A Yes. Q That's a claims made policy? A That's what it says. Q Okay, and did you, or do you, as you sit here today, understand the difference between a claims made policy and an occurrence policy? A I think I do, yes. Q All right, and what's your understanding of that difference? A An occurrence policy covers any adverse event or allegation of adverse event 	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of operations, et cetera, it says, "coverage extends to David J. Fallang, M.D. while performing services on behalf of the named insured." Is that what it says? A Yes. Q Were there any restrictions that you were aware of under this under this
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	 correct? A Yes. Q That new insurance company is Evanston; is that right? A Yes. Q That's a claims made policy? A That's what it says. Q Okay, and did you, or do you, as you sit here today, understand the difference between a claims made policy and an occurrence policy? A I think I do, yes. Q All right, and what's your understanding of that difference? A An occurrence policy covers any adverse event or allegation of adverse event that occurs during the policy period. Even if the policy changes, expires or whatever, 	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of operations, et cetera, it says, "coverage extends to David J. Fallang, M.D. while performing services on behalf of the named insured." Is that what it says? A Yes. Q Were there any restrictions that you were aware of under this under this insurance policy issued by Evanston
6 7 8 9	 correct? A Yes. Q That new insurance company is Evanston; is that right? A Yes. Q That's a claims made policy? A That's what it says. Q Okay, and did you, or do you, as you sit here today, understand the difference between a claims made policy and an occurrence policy? A I think I do, yes. Q All right, and what's your understanding of that difference? A A occurrence policy covers any adverse event or allegation of adverse event that occurs during the policy period. Even 	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	or if not, then it comes, I guess, from our office. Q And and how would the broker know who to provide this certificate of insurance to? A I don't know. I guess somebody would have to tell him. Q Now, this certificate, Exhibit 10, indicates in the space under description of operations, et cetera, it says, "coverage extends to David J. Fallang, M.D. while performing services on behalf of the named insured." Is that what it says? A Yes. Q Were there any restrictions that you were aware of under this under this insurance policy issued by Evanston concerning bariatric surgery?

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	e 121	Page 123
1 strike that.	1	hospital that this policy of insurance
2 Would Teresa still have the policy	2	issued by Evanston with a date on the
3 of insurance that Evanston issued for this	3	certificate of liability insurance of July
4 policy year?	4	8, 2003 that you did not have coverage for
5 A I guess so. I don't know that as a	5	bariatric surgery?
6 fact.	6	A (At this time the witness shook his
7 Q If you'll look at Exhibit 12, skip	7	head.)
8 over Exhibit 11, Exhibit 12 is another	8	Q Why not?
9 certificate of liability insurance which is	9	A I don't know.
10 dated July 8th of 2003; is that correct?	10	Q Weren't you required to do that?
11 A Yes.	11	A Well, you've given me a previous
12 Q And that shows the insured as David	12	document that said so, but we get we get
13 J. Fallang, M.D.; is that correct?	13	lots of things to sign. We have these huge
14 A Yes.	14	packets of bylaws and all those kinds of
15 Q And the certificate holder on the	15	things, and I don't recall what all of those
16 bottom, left-hand side is Sycamore	16	things say.
17 Hospital?	17	Q But you acknowledge that you did
18 A Yes.	18	sign an agreement on April 19, 2003 where
19 Q And, again, do you know whether	19	you indicated to the hospital that, if your
20 Teresa would have provided this to the	20	coverage was changed, restricted, you would
21 hospital?	21	certainly notify the hospital of that,
22 A I think so.	22	correct?
23 Q And this shows a different	23	A Correct.
24 malpractice policy number being MM 807001	24 25	Q And as you sit here today, you did
25 with an effective date May 7, 2003 to May 7,	2.5	not, in fact, notify the hospital of the
Pag	e 122	Page 124
1 2004; is that right?	1	change in coverage with respect to your
2 A That's what it says.	2	professional liability coverage; is that
3 Q And what was the reason why the	3	right?
4 policy number changed? Do you know?	4	MS. HARLAN: Dbjection.
5 A No.	5	THE WITNESS: \Box That appears to be
6 Q You had the same coverage; is that	6	true.
7 correct?	7	BY MR. COWDREY:
8 A It looks like it to me.	8	Q And the last exhibit that I'll show
9 Q Was there any restriction or	9	you, Exhibit 13, indicates that you
10 exclusion of coverage under this policy	10	submitted a resignation from the medical
11 number MM 807001 with respect to bariatric	11	staff of Kettering Medical Center dated May
12 surgery that you were aware of?	12	5th of 2004; is that right?
13 THE REPORTER: You know what? I	13	A That is correct.
14 can't hear you again.	14	Q So, you you'd earlier testified
15 THE WITNESS: I'm sorry. I said it	15	about your privileges lapsing. As it turned
16 does it has no restrictions on the on	16	out, you actually resigned your privileges,
17 the certificate, but it's my recollection	17	correct?
18 that this did not cover bariatrics.	18	A Yes. They were about to lapse.
19 Q And and you indicated that this	19	Q And and when you say they were
20 particular policy of insurance which is	20	about to lapse, what do you mean by that?
21 noted by the certificate of Exhibit 12, your	21	A Well, the the renewal period was
22 recollection is this did not afford coverage	22	coming up, and as I previously stated, I
23 for bariatric surgery?	23	chose not to continue having privileges
24 A I think that's the case.	24	there.
25 Q And – and did you advise Kettering	25	Q With respect to the certificate of

31 (Pages 121 to 124)

		1	
	Page 125		Page 127
1	insurance which has been marked as Exhibit	1	probably in the office.
2	12, since – since it's your understanding	2	MR. COWDREY: Okay. Why don't we
3	that this insurance policy issued by	3	take a break for a couple minutes here,
4	Evanston did not provide coverage for	4	David, if you don't mind, and let me kind of
5	bariatric surgery, I take it your premiums	5	collect my thoughts. Is that all right?
6	were significantly different than the	6	MR. KULWICKI: No problem.
7	premiums you'd paid in the past.	7	MR. COWDREY: Okay.
8	A Significantly higher.	8	THE VIDEOGRAPHER:
9	ē , ē	9	
	Q Significantly higher or lower?	-	p.m. We're going off the record.
10	A My recollection is that these were	10	(At this time a short recess was
11	about \$180,000 a year. I mean, they just		had.)
12	they just have kept going up and up and up	12	THE VIDEOGRAPHER: The time is 5:08
13	over the last six or seven years.	13	p.m. We're going back on the record.
14	Q Okay. I guess my question to you	14	BY MR. COWDREY:
15	is: When you obtained this policy of	15	Q Doctor, just a follow-up question.
16	insurance through Evanston which had	16	I I know I asked you a question as to
17	which is noted by their certificate on	17	whether or not you ever notified anybody
18	Exhibit 12, was this policy of insurance,	18	from the hospital about the fact that your
19	since it did not provide coverage for	19	insurance policy with Evanston did not
20	bariatric surgery, cheaper than the previous	20	provide coverage for bariatric surgery. Did
21	policies of insurance that you'd had	21	you ever have any in informal discussions
22	providing professional liability coverage?	22	with anybody at the hospital about the fact
23	A Not that I recall. I mean, you had	23	you didn't have coverage for bariatric
8		24	•
24	so many applications out there with	\$	surgery?
25	quotations all over the place, it's – it's	25	A Not about that fact, no.
	. Page 126		Page 123
1	very difficult to remember.	1	Q What – what – did you have
2	Q With respect to this particular	2	informal discussions with anybody at the
3	lawsuit, the O'Neal lawsuit, did you notify	3	hospital about malpractice insurance in
4	the Evanston Insurance Company of this	4	general?
5		5	A Oh, yes.
1	potential claim?		
6	A I believe we did, yes.	6	Q Who did you talk with?
7	Q Do you remember when you first	7	A I talked with well, who's the
8	notified them of the claim?	8	CEO? I'm locking on it.
9	A I don't remember, no.	9	Q Mr. Perez?
10	Q Did you notify them of the claim	10	A No, not Perez. The guy
11	before the lawsuit was filed?	11	Q Fred?
12	A I don't think so.	12	A Fred Manchur and Richard Haas.
13	Q So, your recollection is, when you	13	Richard Haas is the VP in charge of
14	got served with the suit papers from the	14	Sycamore, and we had a number of discussions
15	court is when you would have submitted the	15	about the crisis and the problems. There
16	claim to Evanston?	16	were meetings that many of the medical staff
17	A I mean, I think we just turned that	17	attended. I voiced my opinions about what I
18	over to the attorneys, and they do it.	18	thought people should do, and we had a lot
19	Q Did you get a letter from Evanston	19	of discussions. It's a very difficult
20		20	-
1	denying coverage for this claim?		problem, as you may know.
21	A I believe so.	21	Q What – what – what particular
22	Q Okay, do you have a copy of that	22	opinions did you express to those
23	somewhere?	23	individuals?
24	A The same as all the other places. I	24	A I expressed the opinion that I
25	don't keep it myself, but I believe it's	25	thought the hospital should either,
	<u>^</u>		

	Decc 140		B 121
1	Page 129 preferably, drop the requirement for	1	Page 131 opinion, and I guess you could call it a
2	malpractice insurance, or at minimum lower	2	political opinion, if if you will, but
3	it. I know a number of surgeons, first of	3	we Fred and Richard and I had many a
4	all, surgeons who've gone out of business.	4	number of discussions about these issues.
5	The guy in Middletown I shared office space	5	Who knows who knows what's going to
6	with for 17 years is 49 years old. He had	6	happen next.
7	to quit. He couldn't he couldn't he	7	Q At least as of May 5th, 2004 when
8	went to managed health care, and with the	8	you submitted your resignation from the
9	increasing malpractice premiums, he couldn't	9	medical staff at Kettering Medical Center,
10	stay in business. I mean, this guy's got a,	10	the hospital still had a requirement that
11	you know, a kid in the sixth grade or	11	you have professional liability coverage for
12	thereabouts, and he's less than 50 years	12	a million dollars and \$3 million?
13	old, and he had to quit practicing surgery.	13	A Which I indeed had.
14	I know that Mike Keller at Sycamore,	14	Q Except you didn't have coverage for
15	a general surgeon, expressed to me that he	15	bariatric surgery?
16	wasn't sure he was going to be able to	16	A I believe that that is true.
17	continue in practice. John Bullmaster told	17	MR. COWDREY: Thanks. David, you
18	me if Kettering would allow it, he would	18	can ask some questions if you want to follow
19	he would drop his insurance, particularly	19	up.
20	after they passed the so-called tort reform	20	MR. KULWICKI: I do.
21	where they eliminated the joint and several	21	RECROSS-EXAMINATION OF DAVID FALLANG, M.D.
22	liability requirements.	22	BY MR. KULWICKI:
23	I I opined that I thought that	23	Q Doctor, are you suggesting that you
24	the hospital, certainly the medical staff	24	concealed the fact that you didn't have
25	but also the hospital would be better off if	25	coverage for bariatric surgery from the
2000	but the the hospital would be better off ff		
	Page 130		Page 132
1	they just didn't require it for medical	1	folks at Kettering Memorial Hospital or
2	staff privileges. I was told that they	2	Medical Center?
3	Kettering was being a Seventh Day	3	MS. HARLAN: Objection.
4	Adventist hospital had not only Fred Manchur	4	THE WITNESS: \Box I don't believe I
5	and Richard Haas's Frank Perez's opinions to	5	was suggesting that, no.
6	consider, but also Board members from the	6	BY MR. KULWICKI:
7	Seventh Day Adventist community outside of	7	Q Did you just feel that the right
8	the state, and, you know, that that wasn't	8	questions weren't asked of you by the
9	going to happen, and, you know, my opinion	9	Kettering Medical Center credentialing
10	is that, just as in other parts of the	10	people?
11	country, we're facing a huge crisis.	11	A I filled out my credentialing
12	There's going to be a crisis of physician	12	paperwork as I believed, and again, I didn't
13	availability. I've been, you know,	13	do it personally, but through my office, we
14	certainly feeling as though my entire career	14	filled that out, and we sent them what
15	in the last several years has been	15	was what we understood to be required,
16	threatened with extinction, and, you know,	16	and we didn't we didn't volunteer any
17			extraneous information, and that was it.
	one of my one of my friends at Sycamore	17	
18		17	
18 19	one of my one of my friends at Sycamore told me that they'd done an investigation into the some of the stuff revolving		Q With respect to the credentialing
	told me that they'd done an investigation into the some of the stuff revolving	18	Q With respect to the credentialing process, did you also submit information
19	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest	18 19	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been
19 20	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest complication rate of any surgeon on the	18 19 20	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been the subject of?
19 20 21	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest complication rate of any surgeon on the staff doing these procedures, and, yet, you	18 19 20 21	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been the subject of? A As far as I know, we submitted it.
19 20 21 22	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest complication rate of any surgeon on the	18 19 20 21 22	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been the subject of? A As far as I know, we submitted it. If it was required in their admission
19 20 21 22 23	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest complication rate of any surgeon on the staff doing these procedures, and, yet, you know, these people are trying to drive me out of business.	18 19 20 21 22 23	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been the subject of? A As far as I know, we submitted it.
19 20 21 22 23 24	told me that they'd done an investigation into the some of the stuff revolving around bariatrics, and that I had the lowest complication rate of any surgeon on the staff doing these procedures, and, yet, you know, these people are trying to drive me	18 19 20 21 22 23 24	Q With respect to the credentialing process, did you also submit information with respect to litigation that you had been the subject of? A As far as I know, we submitted it. If it was required in their admission packet, again, I never personally filled any

^{33 (}Pages 129 to 132)

		Page 135
Page 133 requested, we submitted whatever was	1	Mrs. O'Neal had already arrested, correct?
requested.	2	A That appears to be the case, yes.
Q And do you know if the case that you	3	Q Now, also, so I understand these
spoke of today, the Coleman case, do you	4	records, there is a Discharge Summary in
		here, and I'd like you to find that, if you
		could, Doctor.
	4	A Okay.
	3	Q As I look through the chart, I find
	1	only one document that appears to be a
	1	
		Discharge Summary from the May, 2003
		admission, and it appears to have the word
-		"Discharge Summary" at the bottom. It's
		signed by you, and it appears to be dictated
	8	on September 15 of 2003 and transcribed that
× ×		same day. Is that is that what you
		consider to be the Discharge Summary?
—		A Yes.
		Q Is it unusual for you to wait
	1	roughly, like, four months to dictate a
		Discharge Summary?
		A Well, first of all, I don't
	ŧ	typically dictate the discharge summaries;
		my PA does, and the Discharge Summary cannot
0		usually be completed until the chart's
stands for Teresa Lynn Fallang, who is my	25	available, and sometimes the charts are out
	т	Page 136
		to other physicians to sign. In this case,
	5	this chart may have been held up someplace
		waiting for the autopsy report. It may have
		been in risk management, so it it would
	E	be a little unusual. I think I'd get in
		trouble with the medical records people if
· •		all my discharge summaries were four months
		after discharge, but, of course, this was an
· ·		unusual situation, so my guess is that this
•		chart was off someplace else being held and
		perused and completed.
		Q Even though the physician's
		assistant dictates the the discharge
÷ •		note, you signed it, correct?
		A That's correct.
· -		Q And that would indicate that you
Q Okay, and that was my question, his		agree with it, fair enough?
specialty. There also appears to be a	18	A No. It would indicate that I signed
consultation by Dr. Schoonover,	19	it.
S-C-H-O-O-N-O-V-E-R. What specialty of	20	Q Well, do you disagree with it?
	21	A I haven't read it.
medicine is he?		
medicine is he? A I I don't know him. Dr. Iberico	22	Q Ever?
A I I don't know him. Dr. Iberico	22	Q Ever?
	 know if that had been filed well, do you know when that had been filed? A I don't recall, no. Q All right. The Exhibit 13 that you looked at, a copy of your resignation letter, it appears to me that there's a substantial gap between the first sentence and the last sentence. Do you recall whether or not the original of this had more language in there? A Your question implies that there is an original that's someplace. Oh, you mean like the the one with the ink signature? No, I mean, no, we haven't, like, you know, erased anything or whited it out or anything. Again, I mean, I just signed this stuff. I assumed that they put that space in there so that the letter looks better. Q Well, who prepared this document? A It's signed "TLF" which I assume stands for Teresa Lynn Fallang, who is my Page 134 wife. Q Okay. So, you're not aware of any information that's been redacted or removed from this this exhibit? A Or concealed, no. Q A couple of questions. Going back to the medical record, if you could take a look at that, there are a couple of consultations that took place during Mrs. O'Neal's May, 2003 admission. One of them appears to be by a Dr. Iberico, I-B-E-R-I-C-O. What specialist A Mariano Iberico, he is a pulmonologist and intensivist. Q Okay, and that was my question, his 	know if that had been filed well, do you5know when that had been filed?6AI don't recall, no.7QAll right. The Exhibit 13 that you8looked at, a copy of your resignation9letter, it appears to me that there's a10substantial gap between the first sentence11and the last sentence. Do you recall12whether or not the original of this had more13language in there?14AYour question implies that there isan original that's someplace. Oh, you mean16like the the one with the ink signature?17No, I mean, no, we haven't, like, you know,18erased anything or whited it out or19anything. Again, I mean, I just signed this20stuff. I assumed that they put that space21in there so that the letter looks better.22QWell, who prepared this document?23AIt's signed "TLF" which I assume24stands for Teresa Lynn Fallang, who is my25vife.12QA couple of questions. Going back6to the medical record, if you could take a7look at that, there are a couple of8consultations that took place during9Mrs. O'Neal's May, 2003 admission. One of10them appears to be by a Dr. Iberico,11I-B-E-R-I-C-O. What specialist12AMariano Iberico.13QI'm sorry?14A

34 (Pages 133 to 136)

Page 137 Page 137 1 now, if you would. 1 2 A Okay. 3 Q To yourself. 4 A Okay. (Nay., I've read it. 5 Q Is there anything in it that you 5 6 consider to be inaccurate? 4 7 A There's nothing that I could point 8 out as being accurate as being 9 9 inaccurate, sory. 10 O Now, in the text of the Discharge 10 Q Now, in the text of the Discharge 10 drawn for testing purposes, to get a CBC and 11 Summary, there's a notion or a mention of 12 "blood culture did note hemolytic strep 12 which would explain the continued decrease 16 adc-rad intervoven, I mean, it's really 15 correctly? 15 hard to say whether this decrease in her 18 strep? 15 hard to say whether this decrease in her 19 A Well, when a 14 In a patient like this, of course, 17 Q And the term, hemolytic, means that 15 you know, 83
3 Q To yourself. 3 May, 2003 admission? 4 A Well, I stated in my in my 5 Q Is there anything in it that you 5 6 consider to be inaccurate? 4 A Well, I stated in my in my 7 A There's nothing that I could point 6 8 naccurate, sorry. 6 caring for for seriously ill patients 9 inaccurate, sorry. 9 that even relatively small amounts of blood 10 Q Now, in the text of the Discharge 9 that even relatively small amounts of blood 11 Summary, there's a notion or a mention of 10 drawn for testing purposes, to get a CBC and 12 "blood culture did note hemolytic strep. 10 decrease in their their overall count. 13 decrease in their their overall count. 11 In a patient like this, of course, 14 In a patient like this, of course, 12 mation say whether this decrease in her 14 Is a classification of 10 and and interwoven, I mean, it's really 15 correctly? Mat does that mean, hemolytic, means that 16
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25 A I wouldn't say that, no. 25 blood drawn have a gradual decrease over Page 138 1 Q Well, when a 2 2 A It's a classification of of 1 time in their in their hematocrit until 2 A It's a classification of of 2 time in their in their hematocrit until 2 A It's a classification of of 2 they begin to improve, and, then, things get 3 bacteria. Quite honestly, I mean, I'm a 4 they begin to improve, and, then, things get 4 general surgeon. You would have to, I 5 better. My opinion is that most of her 4 decrease in hematocrit was due to 5 hemodilution from giving her fluids because 6 that name came from. I mean, hemolysis 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 If you're asking me whether beta hemolytic 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
Page 138Page 138Page 141QWell, when a1time in their in their hematocrit until2AIt's a classification of of1time in their in their hematocrit until3bacteria. Quite honestly, I mean, I'm a2they begin to improve, and, then, things get4general surgeon. You would have to, I5better. My opinion is that most of her5guess, ask an expert in microbiology where6themodilution from giving her fluids because6that name came from. I mean, hemolysis6we couldn't give her red cells. We had to7means destruction of red blood cells; that7give her something to try to maintain her8is correct, but that wasn't your question.9QSo, in other words, she still had9QSo, in other words, she still had10the same amount of red blood circulating; it11think that is the case, but, you know,11just was diluted by saline or whatever else
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11 think that is the case, but, you know, 11 just was diluted by saline or whatever else
112 that's that's not an area in which I am 112 was given to her?
0
13 an expert. 13 A Right. The same amount or or a
14 Q Okay. In any event, with respect to 14 similar amount. In other words, we we
15 the decrease in hematocrit, that would be a 15 did not note any blood loss from anywhere.
16drop in in the red cell production due to16She wasn't bleeding from her colon. She
17 the strep; is that is that what that's 17 wasn't bleeding from her nose or her ears, 18 l'in a strep; is that is that what that's
18 saying? 18 like someone, for example, with DIC; that is
19 A Well, I wouldn't particularly agree 19 disseminated intravascular coagulopathy,
20 with that connection. That's what it says, 21 weg and again I mean you know
21 yes. 22 of blood loss, and again, I mean, you know, 22 it's possible that if she had a
22 Q Okay. 22 it's possible that, if she had a 23 homelytic strentococcel
23AI don't I don't know that the23hemolytic a beta hemolytic streptococcal24beta hemolytic strep has anything to do with24blood-borne infection, that that could
24beta hemolytic strep has anything to do with24blood-borne infection, that that could25the drop in hematocrit levels.25result in some hemolysis. You know, I'm
25 the drop in hematoern levels.

	Page 14	1	Page 143
1	I'm not really sure. You'd have to ask	1	straits.
2	somebody more expert in that area.	2	Q Now, I've heard about this, or you
- 3	Q And and likewise, Doctor, with	3	mentioned this Adventist or Seventh Day
4	respect to the issue of expertise, with	4	Adventist. I'm not familiar with that
5	regard to dating the blood clots that were	5	particular religion. Do they have any
6	found in her lungs, again, would that be a	6	prohibitions against use of blood
7	matter that would be more within the	7	products?
8	specialty of a pathologist as opposed to a	8	A No, they don't, but they don't
9	surgeon such as yourself?	9	believe in eating meat. They're
10	A Well, I I think so. I mean,	10	vegetarians. I – I assume Charles F.
11	you you there's a lot of ways to date	11	Kettering was a Seventh Day Adventist.
12	things. You can date it by inference	12	Q Have you had the opportunity to
13	clinically, but, obviously, a you know,	13	review the blood labs from the admission to
14	some other kind of analysis might be more	14	the Mansfield hospital?
15	accurate. I I don't you know, I don't	15	A No.
16	know that much about how they date blood	16	Q Did you detect any bleeding at any
17	clots.	17	time during the May 3 admission, whether
18	Q Now, with respect to Mrs. O'Neal's	18	rectally from diverticula or otherwise?
19	religion and and her refusal of blood	19	A I don't believe so, no.
20	products, did you know that she was a	20	Q Can you estimate
21	Jehovah's Witness before the original	21	A Only a small amount of blood loss
22	bariatric surgery, the whenever that was,	22	during the surgical procedure.
23	the gastric bypass of January 3 of 2003?	23	Q That was my next question.
24	A Yes, I did.	24	A Oh.
25	Q And that was an elective procedure,	25	Q I don't see you having estimated
	Page 14	2	Page 144
1	true?	1	that in your op note. Maybe we should
2	A Yes.	2	revisit that. Do you give an estimate of
3	Q Elective on her part, but also	3	blood loss during that that procedure?
		1	• •
3	Q Elective on her part, but also elective on your part; in other words, you had the legal right to refuse to undertake	3	blood loss during that that procedure?
3 4 5	elective on your part; in other words, you had the legal right to refuse to undertake	3 4	blood loss during that that procedure? A I I normally don't estimate it.
3 4 5 6	elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you	3 4 5	blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you
3 4 5	elective on your part; in other words, you had the legal right to refuse to undertake	3 4 5 6	blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia
3 4 5 6 7	elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you know, you felt like it was too dangerous	3 4 5 6 7	blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you know, reasonably well, and I I know I was
3 4 5 6 7 8 9	elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you know, you felt like it was too dangerous because she was a Jehovah's Witness, right?	3 4 5 6 7 8	blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you know, reasonably well, and I I know I was being as as careful as I humanly knew how
3 4 5 6 7 8 9 10	elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you know, you felt like it was too dangerous because she was a Jehovah's Witness, right? MS. HARLAN: □Objection.	3 4 5 6 7 8 9	blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you know, reasonably well, and I I know I was being as as careful as I humanly knew how to be to minimize my dissection, minimize
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	<pre>elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you know, you felt like it was too dangerous because she was a Jehovah's Witness, right? MS. HARLAN: □Objection. THE WITNESS: □That that is true, and many and many surgeons would refuse to offer these patients the care that they need. BY MR. KULWICKI: Q And, now, with regard to the refusal of blood products, there are other patients, other than Witnesses, that refuse blood products, true? A Not many. Q Well, there are A I'm sure there must be. There must be some. Well, you answer the question,</pre>	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	 blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you know, reasonably well, and I I know I was being as as careful as I humanly knew how to be to minimize my dissection, minimize any bleeding, and I would describe her blood loss during surgery as minimal. Q Tell me, if you would, Doctor, in your opinion, what role, if any, you felt that her refusal of a transfusion had in her ultimate outcome, now that you know that it was a PE that killed her. A It may have had a very significant role. The reason I say that is because she suffered a cardiopulmonary arrest, which, in retrospect, I think is most likely the direct result of the pulmonary embolus, but she didn't die immediately. Some people
3 4 5 6 7 8	<pre>elective on your part; in other words, you had the legal right to refuse to undertake surgery on that particular patient if, you know, you felt like it was too dangerous because she was a Jehovah's Witness, right? MS. HARLAN: □Objection. THE WITNESS: □That that is true, and many and many surgeons would refuse to offer these patients the care that they need. BY MR. KULWICKI: Q And, now, with regard to the refusal of blood products, there are other patients, other than Witnesses, that refuse blood products, true? A Not many. Q Well, there are A I'm sure there must be. There must</pre>	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	 blood loss during that that procedure? A I I normally don't estimate it. That's usually something that the anesthesia personnel do, but I do recall the case, you know, reasonably well, and I I know I was being as as careful as I humanly knew how to be to minimize my dissection, minimize any bleeding, and I would describe her blood loss during surgery as minimal. Q Tell me, if you would, Doctor, in your opinion, what role, if any, you felt that her refusal of a transfusion had in her ultimate outcome, now that you know that it was a PE that killed her. A It may have had a very significant role. The reason I say that is because she suffered a cardiopulmonary arrest, which, in retrospect, I think is most likely the direct result of the pulmonary embolus, but

36 (Pages 141 to 144)
2 3 4 5 6 7 8	Page 145 not. She survived for a period of some hours afterwards, but with a very		
2 3 4 5 6 7 8			Page 147
3 4 5 6 7 8	hours afterwards, but with a very	1	she would survive.
4 5 6 7 8		2	Now, in retrospect, it seems clear
5 6 7 8	compromised hemodynamic state, because this	3	to me that what happened is that she threw
6 7 8	blood clot was occluding blood flow to the	4	this pulmonary embolus, but had she had good
6 7 8	lungs, thus further diminishing her capacity	5	oxygenation with normal red cell numbers and
7 8	to oxygenate what few red blood cells she	6	hemoglobin with oxygen-carrying capability
8	had left.	7	and hemodynamics in terms of the force of
	Had she been willing, and again,	8	blood passing through the heart over these
i U '	this is not a criticism of her religion;	9	blood clots and into the lungs, she may very
	it's just my opinion about the the facts	10	well have survived this large pulmonary
1 · · · · · · · · · · · · · · · · · · ·	· · · ·	11	embolus.
E	of the case, but had she been willing or her	12	
	family been willing to decide for her to	1	Q It it's possible; is that what
	receive red blood cells, then, she would	13	you're saying?
	have had a much improved hemodynamic	14	A It's possible.
	condition, first of all, in terms of	15	Q Okay.
	intravascular blood volume, but secondly,	16	A It is possible, yes.
1	and possibly more importantly, a much	17	Q Now, with respect to the refusal to
	improved state of oxygen-carrying	18	obtain or accept a transfusion, you've
	capability, so that when people suffer from	19	related to me that it was a contributing
20	anoxia or hypoxia from some condition like	20	factor or may have been a contributing
	sepsis or like a pulmonary embolus, and	21	factor to her death after the arrest. Was
	their body tissues, their brain, their	22	it a factor before the arrest?
1	kidneys are not receiving enough oxygen,	23	A Probably so. Again, I mean,
ſ	maximizing their oxygen-carrying capability	24	we're we're really out in an area where
1	is extremely important.	25	no one can ever know the truth for sure, but
	Page 146		Page 148
1	So, had this patient been able to	1	certainly her overall condition and
	receive red blood cells, her outcome might	2	stability, I think, would have been improved
	have been dramatically different.	3	had she had normal oxygen-carrying
ŧ	Q It's possible?	4	capability. It's just, all the
E Contraction of the second se	A In fact, you may notice in my	5	physiological functions that you can think
•	progress notes, somewhere in there, I	6	of that the body carries out require energy,
-		7	· · · · · · · · · · · · · · · · · · ·
1	believe I read that I thought this patient		and energy requires oxygen, and, so, there's
	was actually improving significantly on the	8	just such a panoply of of misalignments
1	6th. I believe she was awake. She was	9	of the physiology that occur because of
8	sitting up, I think in a chair in the	10	hypoxia and and which would be
	Intensive Care Unit. We had a little	11	certainly the case with somebody with a
	conversation, and then some time either	12	hematocrit of 16. I don't see a direct
	later that night or in the middle of the	13	connection between that and the pulmonary
	night on the 7th or something, I think is	14	embolus, but certainly her overall
14	when this this cardiopulmonary arrest	15	physiological condition would have been much
14 15		16	better.
14 15	occurred, which which contributed to my	17	Q Okay, and, again, with regard to
14 15 16	bewilderment as to how she could suddenly	* '	
14 15 16 17	bewilderment as to how she could suddenly	18	
14 15 16 17 18	bewilderment as to how she could suddenly become so septic when I had just seen her,	18	your opinion and characterizing your
14 1 15 1 16 1 17 1 18 1 19 2	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting	18 19	your opinion and characterizing your opinion, is it fair to say that it's your
14 15 16 17 18 19 20	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting better, and frankly, I was beginning to have	18 19 20	your opinion and characterizing your opinion, is it fair to say that it's your opinion that it's possible that, had she had
14 15 16 17 18 19 20 21	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting better, and frankly, I was beginning to have a little optimism, even though her	18 19 20 21	your opinion and characterizing your opinion, is it fair to say that it's your opinion that it's possible that, had she had a transfusion before the arrest, that she
14 15 16 17 18 19 20 21 22	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting better, and frankly, I was beginning to have a little optimism, even though her hematocrit had drifted down to about 16,	18 19 20 21 22	your opinion and characterizing your opinion, is it fair to say that it's your opinion that it's possible that, had she had a transfusion before the arrest, that she may have had a better outcome?
14 15 16 17 18 19 20 21 22 23	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting better, and frankly, I was beginning to have a little optimism, even though her hematocrit had drifted down to about 16, that we you know, that we might be able	18 19 20 21 22 23	your opinion and characterizing your opinion, is it fair to say that it's your opinion that it's possible that, had she had a transfusion before the arrest, that she may have had a better outcome? A Yes.
14 15 16 17 18 19 20 21 22 23 24	bewilderment as to how she could suddenly become so septic when I had just seen her, and I thought, you know, she was getting better, and frankly, I was beginning to have a little optimism, even though her hematocrit had drifted down to about 16,	18 19 20 21 22	your opinion and characterizing your opinion, is it fair to say that it's your opinion that it's possible that, had she had a transfusion before the arrest, that she may have had a better outcome?

	Page 149		Page 151
1	that the patient in January of 2003 had a	1	BY MR. KULWICKI:
· 2	surgery, and that a towel was left at that	2	Q And can we agree that the reason
3	point in time, that she complained of pain	3	that it was discovered in all likelihood is
4	in the area of the towel in the area of	4	because the patient was having symptoms
		5	related to that towel?
5	the retained towel, meaning the left mid to	6	MS. HARLAN: □Objection.
6	lower quadrant. She complained of pain in that area beginning in the end of January of	7	THE WITNESS: \Box Well, I mean, you
7		8	know, it's possible, but the problem is, I
8	2003, and on a few occasions leading up to	9	
9	her admission in May of 2003, at which time		wasn't in Mansfield. They diagnosed her as
10	the towel was discovered as well as an	10	having diverticulitis which also causes
11	abscess in the area of the towel.	11	symptoms in that same area. I'm not in a
12	Can we agree that, in all	12	position to say that their diagnosis was
13	likelihood, that if Mrs. O'Neal did not have	13	incorrect, and that it, in fact, was the
14	a towel in her belly, that she would not	14	towel that was causing her symptoms. It's
15	have needed to be hospitalized in May of	15	certainly possible, and I think it lends
16	2003 for surgery?	16	itself to to immediate speculation, but
17	MS. HARLAN: □Objection to the	17	there's no way for me to know that that's
18	chronology of events which is different, I	18	true. How do we know that she didn't also
19	think, than even the question was.	19	have diverticulitis and that that was the
20	MR. KULWICKI: Well, you know what?	20	cause of her lower abdominal pain?
21	THE WITNESS: I'm not sure what I'm	21	BY MR. KULWICKI:
22	supposed to answer.	22	Q Well, I mean, I'm looking at the
23	MS. HARLAN: □I don't think he asked	23	Discharge Summary, Doctor, from from this
24	you to agree I don't think he asked you	24	admission, and it says, "The patient was
25	to agree with that chronology. He then went	25	admitted with a diagnosis of retained
		I	
	D 150		D. 150
1	Page 150	1	Page 152
1	on to another question.	1	foreign body with possible abscess in the
2	on to another question. THE WITNESS: Okay.	2	foreign body with possible abscess in the left upper quadrant," and, I mean, in fact,
2 3	on to another question. THE WITNESS: Okay. MS. HARLAN: But my objection is to	2 3	foreign body with possible abscess in the left upper quadrant," and, I mean, in fact, you agree that she had an abscess. You –
2 3 4	on to another question. THE WITNESS: Okay. MS. HARLAN: But my objection is to the stated chronology of events.	2 3 4	foreign body with possible abscess in the left upper quadrant," and, I mean, in fact, you agree that she had an abscess. You – you tested that fluid, and she did have an
2 3 4 5	on to another question. THE WITNESS: Okay. MS. HARLAN: But my objection is to the stated chronology of events. MR. KULWICKI: □Fair enough.	2 3 4 5	foreign body with possible abscess in the left upper quadrant," and, I mean, in fact, you agree that she had an abscess. You – you tested that fluid, and she did have an abscess, true?
2 3 4 5 6	on to another question. THE WITNESS: Okay. MS. HARLAN: But my objection is to the stated chronology of events. MR. KULWICKI: □Fair enough. THE WITNESS: □□Someone tell me what	2 3 4 5 6	foreign body with possible abscess in the left upper quadrant," and, I mean, in fact, you agree that she had an abscess. You you tested that fluid, and she did have an abscess, true? A I agree with that.
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4	Page 153	1	Page 155
1	conclusion to say: Well, the diverticulitis		MS. HARLAN: We don't need to view
2	diagnosis, you know, maybe that was wrong,	2	the videotape.
3	but I'm just saying I'm not in a position to	3	THE VIDEOGRAPHER: Thank you very
4	say so.	4	much.
5	Q Now, as a general	5	MS. HARLAN: Thanks.
6	A Obviously they obviously made	6	THE VIDEOGRAPHER: It's 5:40 p.m.
7	that diagnosis and felt that they had a	17	We're going off the record. We're off the
8	reason for making it. Were they incorrect?	8	videotape.
9	Possibly, but I I can't say that they	9	000
10	were.	10	
11	Q All right. You don't have any	11	
12	criticisms of those physicians, true?	12	
13	A I do not. I've never seen their	13	
14	records. I don't know what they did.	14	
15	Q With respect to diverticula as a	15	
16	general surgeon, would you expect that	16	
17	diverticula in the lower descending colon or	17	
18	the sigmoid colon would generate pains in	18	
19	the left side?	19	
20	A Oh, absolutely. That's that's	20	
21	the classic location for symptoms of	21	
22	diverticulitis, but you must also remember,	22	
23	diverticulosis, which is the condition in	23	
24	which these small outpouchings of colonic	24	
25	mucosa protrude through the muscular wall of	25	
	Page 154		Page 156
1	the colon, diverticulosis can occur		CERTIFICATE
2	throughout the entire colon. The most	2	STATE OF OHIO SS:
3	common area for diverticulosis or for	3	COUNTY OF CUYAHOGA}
4	diverticulitis to occur is in the left side,	4	I, Luanne Stone, a Notary Public
5	and that would create an elevated white	5	within and for the State of Ohio, duly
6	blood cell count, left mid and lower	6	commissioned and qualified, do hereby
7	abdominal pain, and and similar symptoms	7	certify that the within-named witness, DAVID
8	to what Mrs. O'Neal had described.	8	testify to the truth, the whole truth and
9	Q Well, the fact is, is that merely	9	nothing but the truth in the case aforesaid;
10	having diverticulosis doesn't mean that a	10	that the testimony then given by the
11	patient's having diverticulitis, correct?	11	above-referenced witness was by me reduced
12	A That is absolutely correct.	12	to stenotype in the presence of said
13	MR. KULWICKI: Okay. I think we've	13	witness; afterwards transcribed; and that
14	beaten this horse long and hard. I'm done.	14	the foregoing is a true and correct
15	If Mr. Cowdrey has any questions, I I	15	transcription of the testimony so given by
16	cede the floor.	16	the above-referenced witness.
17	MR. COWDREY: I don't have any	17	I do further certify that this
18	questions, and I just want to make sure the	18	deposition was taken at the time and place
19	court reporter up there has my name,	19	in the foregoing caption specified and was
20	address, phone number and stuff like that.	20	completed without adjournment.
21		21	I do further certify that I am not a
	(At this time a discussion was held		
22	off the record.)	22	relative, counsel or attorney for either
22 23	off the record.) MS. HARLAN: □□He'll read.	22 23	relative, counsel or attorney for either party, or otherwise interested in the event
22 23 24	off the record.) MS. HARLAN: □□He'll read. THE VIDEOGRAPHER: What about	22 23 24	relative, counsel or attorney for either
22 23	off the record.) MS. HARLAN: □□He'll read.	22 23	relative, counsel or attorney for either party, or otherwise interested in the event

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1 2 3 4 5 6 7 8 9 10 11	Page 157 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio this day of , A.D., 2004.	
12 13 14 15 16 17 18 19 20 21 22 23 24		
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