IN THE DISTRICT COURT OF KNOX COUNTY, NEBRASKA

COPY

DONNA J. WIEBELHAUS, Plaintiff, vs. D. J. NAGENGAST, M.D., Defendant.

Case No. 12018

Doc. 160

****

D E P O S I T I O N O F

MAX L. FARVER, M.D.

****

A P P E A R A N C E S

DOMINA & COPPLE, P.C.; 10810 Harney Street, Suite 103; Omaha, Nebraska 68154, by Mr. David A. Domina,

for the Plaintiff;

SODORO, DALY & SODORO; 7000 Spring Street; Omaha, Nebraska 68106, by Mr. Joseph F. Bataillon, via telephone,

for the Defendant.

S T I P U L A T I O N

It is stipulated and agreed by and between the above named parties through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Dr. Max L. Parver may be taken at this time and place, that is, the Yankton Medical Clinic, in the City of Yankton, South Dakota, on the 23rd day of November 1993, commencing at the hour of 11:00 AM; said deposition taken before YaVonne C. Slowey, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at the trial or for each of said purposes according to the Rules of Civil Procedure, and insofar as counsel is concerned the reading and signing of the transcript by the witness is waived, as is the notice of the filing of the original with the Attorney for the Plaintiff, Mr. David A. Domina.

It is further stipulated that all objections are reserved until time of trial except as to the form of questions.

MAX L. FARVER, M.D.,

being first duly sworn, testified as follows:

EXAMINATION BY MR. DOMINA:

Q Would you introduce yourself, please.

A I'm Dr. Max Farver.

Q Where do you live?

A In Yankton, South Dakota.

Q And you practice medicine, Doctor?

A That's correct.

Q What is your specialty, if you have one, in the practice of medicine?

A Hematology and oncology.

Q What are hematology and oncology, please?

A That's the study of blood and cancer.

Q How long have you practiced medicine?

A I've been practicing for five-and-a-half years now.

Q You are licensed, I am sure, in the State of South Dakota?

A That's correct.

Q Are you licensed elsewhere?

A No.

Q Can you please describe your educational history for the court and the jury briefly?

A How far back do you want to go?

Q Well, let's start with where you went to undergraduate

school?

A Undergraduate was done at Doane College in Crete, Nebraska. I graduated in 1979 with a Bachelor of Art. I went to Medical School at the University of Nebraska Medical Center in Omaha, graduated in 1983 with the -- with my M.D. Degree. I did three years of internal medicine residency at the University of South Dakota affiliated hospitals, completed that in 1986. Then did a two-year fellowship at the University of Utah in Salt Lake City, the fellowship in hematology-oncology and finished that in 1988 and I have been practicing in Yankton ever since.

Q Are you board certified in a specialty?

A In internal medicine.

Q Doctor, your practice now, hematology and oncology, is that your exclusive work?

A Exclusive except for call responsibilities when I cross cover with the general internists, yes.

Q All right. And you practice in affiliation primarily with the internal medicine group at the Yankton Clinic?

A That's correct.

Q How many physicians are there in the entire clinic?

A Approximately 40, I believe.

Q And in your group?

A Of internists?

Q Yes.
A Ten.
Q And how many of you emphasize oncology in your practice?
A I'm the only one here.
Q You have staff privileges, I'm sure, at several hospitals?
A Just one.
Q And that's Sacred Heart?
A Sacred Heart.
Q In Yankton?
A Correct.
Q May I inquire briefly about your oncology training during the course of your residencies. Could you describe the oncology work you had as a resident?
A As a resident, certainly you'd see the regular mixture of all kinds of diseases, one of the main one of which is of course is cancer, as well as cardiology and all of the other medical specialties. So there was no particular emphasis other than one month during my residency I did work exclusively in oncology as a third-year resident.
Q Doctor, do you routinely care for patients who come to your practice here at Yankton from the Knox County, Nebraska, area?

A Yes.
Q You're acquainted with Donna Wiebelhaus, or you were before her death?
A Yes, I was.
Q Would you tell us how you made her acquaintance, please?
A Actually, it dated back to initially I was introduced to Donna's case by her sister who saw me in one of my outlying clinics in Nebraska, actually in Knox County, in Crofton, Nebraska, and her sister had told me briefly what had happened with Donna and was asking if I had any further recommendations, at that time, without having seen the patient or discussed it with her primary physician.
Q Do you recall when that occurred?
A There is no documentation of it, of course. She simply stopped in the office and we discussed it. I assume that it was sometime just prior-- or, just after the biopsy was obtained, probably September of 1992.
Q When was your next contact with the subject of Donna Wiebelhaus' cancer, then?
A That would have been when she was first referred by herself to see me on October the 15th.
Q Of 1992?
A Of 1992, correct.

Q Do you recall Donna's sister's name, the name of the lady who you saw at Crofton?
A I am sorry. I really -- I really don't remember.
Q All right. And you apparently maintain an outlying clinic or a satellite location in Crofton and go there somewhat regularly?
A At that time, I was. We have closed it November of 1992, it was closed, so this was toward the end. I had been going there for four-and-a-half years twice a week and we'd closed it shortly after that.
Q All right. I want to ask you before we go on with the medical history, I've had just two or three clues in your testimony so far that you have some acquaintance with Nebraska geography so I'm going to inquire about your heritage. Where are you from?
A I'm from Nelson, Nebraska, which is in south central Nebraska.
Q Doctor, when you first met Donna Wiebelhaus on October 15th of 1992, did you have a history of her medical condition?
A I didn't actually have any written reports or formal documentation at the time that I met with Donna. Her husband and sister I believe were all present at that first meeting. We hadn't received any of the information yet from the University of Nebraska, did

not have the path reports or any of the operative reports. Those were still forthcoming.

Q Where did you meet her?

A Here at the Yankton Medical Clinic.

Q Did you discuss her circumstances with her, at that time, and obtain a patient driven history?

A That's correct.

Q What did you learn?

A Well, according to Donna, and I felt and her husband and they certainly seemed to know their dates very well, she stated that she had, of course, been pregnant and there had been a mole present on her right shoulder -- back of her right shoulder that had been irritating or been irritated by her bra that had progressed during her pregnancy for four to five months, apparently, to the point where it had become ulcerated and started to have a foul smell to it. At that time, she had delivered her baby and the mole was then removed surgically. They had told me that this showed a level four melanoma which is a deep invasive melanoma, and I didn't have the path reports at that time but they certainly seem confident of that information and subsequently it was found out to be true and confirmed by the pathology report.

She then went to see Dr. Phillip Bierman who is

an oncologist at the University of Nebraska Medical Center on September 19th, which is only five days I believe after the time that she had had the mole removed. At that time, she was felt to have lumps under the right arm, but there was also apparently an infection present at the site of her original biopsy. Dr. Bierman was uncertain whether or not those lumps represented a tumor or perhaps inflammation from the infection, but he had recommended that she see Dr. Edney who is a surgical oncologist at the University for a wider excision of the primary lesion and an axillary lymph node dissection.

Q Was that surgery done?

A Yes, it was.

Q And were the patients able to report to you at the time of your first visit with them, Doctor, the result of that surgery at the University of Nebraska?

A Apparently there was no further tumor found in the area of the original mole but unfortunately there was one positive lymph node for melanoma under her right arm and they had removed 14 other lymph nodes, with one of those being positive.

Q Doctor, were you able to form a diagnostic impression of the patient from the history she gave you?

A I did. I felt that she had an American Joint

Commission stage Roman Numeral Three malignant melanoma and this would place her at high risk for recurrence.

Q And were you able to articulate, at least for yourself, at that time, a prognosis for her probable future course?

A Well, prognostically stage three melanoma is a rather ominous sign and a large percentage of these people will go on to have relapse and eventually succumb to their disease so my prognosis was rather guarded, at that time.

Q Did you learn from Mrs. Wiebelhaus or her sister and husband at that first meeting of any efforts they had made to investigate care alternatives, Doctor?

A Well, they were quite anxious about receiving some further care after the surgery, some further form of treatment, and we call that adjuvant treatment where there would be either chemotherapy or some sort of medical intervension to try to prevent the recurrence of her cancer. And to my knowledge, there was no -- this is not really standard therapy for melanoma so what we were looking at was the possibility of investigational trials that was utilizing that kind of therapy to try to improve the cure rate and the duration of remission.

Q And in that connection did you learn of a contact they

had made with the National Cancer Institute to investigate those kinds of adjuvant trials?

A Actually, I think I was the one that had encouraged them to contact the National Cancer Institute. It's very helpful, as far as patient information. They also have information for physicians regarding the kinds of trials that are currently available to patients for their enrollment. From that study we found-- or, from our research with the Cancer Institute we found that there was a contact person at the John Wayne Cancer Institute or Cancer Center in California that was doing some experimental studies with a vaccine for melanoma.

Q During the course of your meeting with the patient, her husband and her sister on that first occasion on October 15th, did you talk with them about your own sense for the probability that treatment of the kind that might be available at the John Wayne Cancer Institute would eventually prove helpful?

A Of course we're very careful when we're dealing with experimental protocols that we try not to make any false claims. I mean that's certainly very important that people enter into these kind of research studies knowing well that there is nothing better to offer elsewhere. There certainly was no promises made that this was going to improve anything other than to

improve our scientific knowledge of whether or not this kind of therapy would actually work.

Q Did Mrs. Wiebelhaus understand, then, at the end of the conversation with you, or do you believe she did, that while the effort at John Wayne Cancer Institute might help, there was certainly no reason to expect that it would, and that a decision to go there would essentially be driven by an awareness that there was no better alternative?

A I feel I made that point. Whether or not they were able to assimilate that information, I am not sure.

Q Okay. Did you recommend a course of treatment for Mrs. Wiebelhaus at that October 15th visit that included care to be directed by you, Doctor?

A I'm sorry, I don't really understand.

Q Okay. On October 15th of 1992 did you suggest to the patient that she embark on a course of care that you would administer or direct from here in Yankton?

A I didn't really recommend that I would be administering the care but I certainly wanted to be kept informed of what was going on and offered to help in whatever way was possible. With most of these research protocols, they are required to be administered in their institutions or by other people that participate with the studies. So as far as being able to help with the

study from the John Wayne Cancer Center, I wasn't able to participate in that study. She had to actually go to California to receive the treatment.

Q Insofar as you were concerned, then, as Mrs. Wiebelhaus' physician or at least a person who was perhaps becoming her physician at the time of this first visit on October 15th, was there anything for you to do while she was involved in this care at John Wayne?

A There wasn't actively anything to do for Mrs. Wiebelhaus other than to maintain an awareness of the literature and any other options that might become available during the time that she was ongoing treatment. Of course that we attempted to do. And to act as a clearing house for information to keep in communication with California and the University of Nebraska and to maintain -- maintain a record here and some sort of contact so we could always -- she would always have somebody to turn to when she was home and having problems.

Q I wanted to be sure I understood correctly, and I think I do now, that she didn't somehow choose not to pursue care at Yankton and to instead pursue care at John Wayne, did she?

A That's correct, and I supported her in that decision.

Q All right. When did you next have contact with Mrs. Wiebelhaus, Dr. Farver?

A A telephone call, I guess I did have a telephone -- there -- call October the 22nd. She was complaining about some upset stomach and we changed her prescription for a sleeping pill. As far as the next time that I actually saw the patient was December 21st, 1992.

Q What were her circumstances then?

A Well, she had been receiving the immunization shots at the John Wayne Cancer Institute and she was worried about a lesion that was developing inside her mouth underneath her tongue. She was worried that it was recurrent cancer. I didn't feel that that was the case and I had recommended that to calm her worry is that we would have Dr. Aanning, who is a surgeon here at the medical -- at the Yankton Medical Clinic, biopsy that, and it was, in fact, benign.

Q And so the biopsy was done and there was no problem with that lesion?

A That's correct.

Q What was your next contact with Mrs. Wiebelhaus, then, after the October 21, 1992 occasion?

A I next saw Mrs. Wiebelhaus on February the 15th, 1993.

Q Was that at the clinic in Yankton?

A Correct.
Q And what were the patient's circumstances then, please?
A At that time, she had been noted to have a recurrence of her cancer that had been biopsied in California. Apparently it had recurred in her mid back under the skin and that had been removed surgically and apparently confirmed by the pathologist in California that that was recurrent tumor, similar to the one that she had removed from her shoulder.
Q And what did you -- what did you do when you saw her on the occasion of the February 15th visit?
A Well, on my visit she was also -- we also noted a lump near her breastbone and at that time we elected to have that removed, as well, to be biopsied.
Q Was that done in a clinical setting here at the clinic or was she hospitalized for that biopsy, Doctor?
A I would assume -- I assume -- I think that was done here in the clinic.
Q And did you then have the excised tissue read by a pathologist?
A That's correct.
Q And did you receive the pathology report back during the ordinary course of your practice?
A Yes.
Q And is it information of the kind upon which a

physician in your practice would ordinarily rely?

A Absolutely!

Q Do you have it before you?

A I do.

Q And what did it report?

A It reported that it was carcinoma, metastatic in the subcutaneous tissue from the upper chest consistent with melano carcinoma which is another term for melanoma.

Q All right. The subcutaneous tissue, Doctor, is where please?

A Beneath the skin.

Q Is the subcutaneous tissue, tissue through which blood flows in a pattern of flow?

A Well, certainly.

Q Doctor, what was the treatment regimen, then, for the circumstances that were confirmed by pathology when the excised tissue was tested?

A Well, at that time I certainly conferred with the study coordinator at the John Wayne Cancer Institute, informed them that we had obviously rapidly progressive disease on our hand despite the treatment that they had been administering, so it's obviously she was a treatment failure from their study standpoint, and we felt that given the gravity of the situation it was

time to switch to systemic chemotherapy.

Q Was that then done?

A That is correct.

Q And who directed the chemotherapy care?

A I did.

Q Where was it administered?

A Here at the Yankton Medical Clinic.

Q Can you describe for the court and the jury, please, what that systemic chemotherapy regimen consisted of?

A It was chemotherapy that was given intravenously that consisted of two medications. One was called DTIC, all capital letters, and the other one was Platinol. They were administered intravenously for three consecutive days and repeated every three to four weeks.

Q What is the -- what is the objective chemically, if you will, of injecting DTIC? What is the interaction you're trying to achieve in the body, Doctor?

A The interaction between both of the chemotherapy drugs is to kill cancer cells that are actively multiplying, thereby hopefully shrinking the tumors and trying to avoid -- at the same time trying to avoid serious side effects.

Q Is there something about the chemical behavior of a cancer cell that's different as it divides and grows from the chemistry and other cells that permits these

drugs to have a chance to work on them?

A The exact answer to that question would win you the Nobel Prize.

Q I don't hope to do that today. Is it believed that that may be the case by some researchers?

A That's true. Cancer cells are obviously a mutation of normal, normal cells. They are actually weaker because of that mutation. They are multiplying more rapidly than normal body tissue. So by selectively pinpointing the cells that are multiplying and doing chromosomal damage to them you hope to kill them and at the same time allow the normal cells a chance to recover and hopefully heal themselves.

Q Melanoma is, of course, one of many forms of cancer, is it not?

A That's correct.

Q And is melanoma, itself, a phrase that is descriptive of a family of cancers or is it a specific and unique disease?

A It is specific insofar as it depicts a cancer that is arising from the pigmented cells of the body, the cells that contain melanin. That's where the name "melanoma" comes from. So it can arise from any of the pigmented cells of the skin or actually of the eye.

Q Doctor, is it -- is it always the case with melanoma

that that disease originates in a pigmented cell?

A Yes, it has to.

Q Are pigmented cells found anywhere below the surface of the body?

A Other than behind the retina in the eye, the rest of the pigmented cells are under the skin.

Q How does the disease move from the pigmented cells into the body if it metastasizes or moves inside?

A There is three ways that melanoma would spread. One is by direct invasion where it just simply keeps eating deeper and deeper into the tissues. Another way that it spreads is through the lymphatic system where the lymph drainage would carry the tumor cells away, and obviously in Donna's case there was evidence of that with one of the lymph nodes under her right arm being involved at the time of her initial diagnosis. Melanoma will also be spread through the bloodstream. If it invades the blood vessels it can go anywhere the blood goes.

Q I understand, Doctor, and this is jumping forward some, but I understand that in the course of Mrs. Wiebelhaus' disease it appeared in several diverse parts of her body, some of her abdominal organs, her kidneys, I believe, her liver for sure and her brain. Are those locations that are likely to have received cancerous

cells through blood transport?

A That's -- that's correct. She also had tumors spread to those areas under the skin in her back and on the chest, as well,

Q Again likely as a result of transporting the blood?

A That's correct.

Q May I inquire, Doctor, how is melanoma most commonly seen by practicing physicians, not necessarily oncologists?

A Well, yeah. It's most commonly seen as an abnormal mole that is changing in characteristic.

Q And is an abnormal mole changing in characteristic commonly recognized by physicians, then, as a warning sign that the mole may contain melanoma cells?

A Oh, it's commonly recognized by lay people that that is a warning sign of cancer. It's one of the ten warning signs that the American Cancer Society has tried to make available to the public. And certainly physicians are aware of that, as well.

Q What's the most commonplace form of treatment when a physician is presented by a patient who reports a mole change?

MR. BATAILLON: For the record, I'm going to object. This witness isn't identified as one with respect to the standard of medical care. Doctor, you're certainly

free to answer the question under the circumstances.

THE WITNESS: I understand. Well, typically it would require an examination. One wouldn't prescribe any treatment, of course, until an adequate examination was performed. That's usually done with either a hand lens or some form of magnification, good lighting and certainly getting the patient disrobed and examining not only the mole that apparently is changing but looking at the rest of the skin. If, in fact, there is any suspicion of the lesion meeting the criteria, it should be biopsied.

MR. DOMINA: Doctor, when a physician conducts an examination of the kind that you have just described, if the physician finds the presenting patient to be a person with several moles on the body, is it important to compare the suspected mole with other moles that are available for inspection?

MR. BATAILLON: Same objection.

MR. DOMINA: You may answer.

THE WITNESS: Okay. I -- the individual comparison, there is really no two moles that are the same. I don't feel that comparing one mole to another is really valid. Each one has to be taken on its own merit.

Q In other words, no conclusive diagnosis can be made by a comparison?

MR. BATAILLON: Same objection.
MR. DOMINA: Is that right?
THE WITNESS: That's correct. The -- there are a class of people with a syndrome called Dysplastic Nevi Syndrome that does place them at an increased risk for melanoma, so you would want to try to identify those people.
Q What's a dysplastic nevus, please?
A That's considered as a precancerous lesion. It's a genetic syndrome where the families tend to have a number of cases of melanoma within the family and that they're at high risk for developing melanoma.
Q And what's a nevus?
A A nevus is the medical term for a mole. I'm sorry.
Q Doctor, are there certain groups within the overall population that are recognized by medicine as being persons at a higher risk than others for incurring melanoma?
MR. BATAILLON: I'm going to object again on standard of care.
THE WITNESS: Okay. Typically, the fair-skinned northern European people are at higher risk for developing melanoma. You see less incidents of it in darker-skin people, Hispanics and blacks in particular.
MR. DOMINA: Light hair, light-colored eyes and light

skin then would all suggest a somewhat higher population-- or, risk in the population or is that population?

MR. BATAILLON: Same objection.

THE WITNESS: Correct. But virtually everybody is still at risk. It's all relative.

MR. DOMINA: Okay. Doctor, may I inquire specifically about this case, and I'm -- I am aware from our discussions before you began to testify today of your sense for these questions but I need to ask them on the record and have you respond to them.

In this case assume for me some dates here, if you would, please. Assume that the first presentation by Mrs. Wiebelhaus of this mole to her family physician occurred on the 2nd day of July of 1992 at a time when she was pregnant. Assume that she delivered a full-term baby on August 27th of 1992, that she returned to the doctor intermittently in the intervening period of time and that she returned on at least two occasions after the child was delivered, the second being September 14th of 1992, at which time the mole was excised and the excised tissue was biopsied. A diagnosis was made which identified the existence of melanoma.

I want to ask, first of all, do you have an

opinion, based on those assumed facts, about whether a failure on the doctor's part to diagnose the illness at the time of the July presentation, whether a delay from that July date until the September 14th date of diagnosis caused or permitted this disease to metastasize to parts of Mrs. Wiebelhaus' body where it could not be treated successfully?

A That is a very difficult and very long question and I understand, of course, that that is at the heart of the issue here. It is impossible for me to actually know for certain whether or not that that had an impact. As a matter of course, we would like to always find tumors earlier when they're smaller and thereby have less of a chance of having it already spread.

MR. BATAILLON: Doctor, excuse me, I need to interrupt you.

THE WITNESS: Yes, sir.

MR. BATAILLON: I am going to object that the answer is non-responsive and move to strike his comments.

MR. DOMINA: Would you proceed with relating your opinion, Doctor.

MR. BATAILLON: If he's going to continue with his opinion, then I'm going to object on foundation and that it's an improper hypothetical.

MR. DOMINA: Okay. Now you may proceed.

MR. BATAILLON: You can go ahead, Doctor.

THE WITNESS: Yes, I understand. I'm just trying to organize my thoughts here to pick up where we were -- where I left off.

As I had said earlier, there is no way I can say with absolute certainty whether this had an impact, but as a matter of principal, we would like to always diagnose these tumors sooner, and I guess that's the only way I can answer that question.

MR. DOMINA: Okay. Doctor, without excising a mole presented by a patient as having changed, is there a way to determine whether it contains malignant melanoma?

THE WITNESS: No.

Q You've mentioned in your testimony today while talking about Mrs. Wiebelhaus that her tumor, the tumor identified as cancerous by the pathology work in September of 1992, was a deep tumor. I want to move away from a specific discussion of this patient for just a moment and talk with you briefly about the disease, melanoma, a bit more if I may. You mentioned earlier that there are three ways the disease can adversely affect its host, the patient who has it. Can I talk with you about how malignant melanoma reaches the lymph system and the blood vessels and can

accordingly be transported through those systems?

A Certainly.

Q Would you first describe, mechanically, what happens in the body that would allow malignant melanoma cells to be transported from pigment-bearing structures by the lymph system?

A Well, at some point the tumor would need to invade either the lymph channels or the small blood vessels to gain entry into those systems. Of course the blood vessels are present throughout our entire body's surface and it's just a matter of happenstance, I guess, if the tumor cells would gain entry into the bloodstream and then float downstream randomly going to other tissues.

The lymph system is less well-known by lay people than the circulatory system. It's a one-way street that returns fluid from tissues throughout the body back into the venous system. Along this route there are a number of these lymph nodes that act as filters along the lymph system. It's the same mechanism there. Our body has lymph vessels over our entire body, and it's a matter of the tumor invading through those vessel walls and gaining entry into those channels downstream.

Q Doctor, are there generally-recognized measurements

descriptive of the size of melanoma tumors that are diagnostically significant in determining whether an invasion into either of the blood or the lymph system has occurred?

A I believe your question should ask, is there prognostic significance.

Q I think I said "diagnostic"?

A You said "diagnostic".

Q You're right and I apologize.

A The answer is that yes, there is a staging system that has direct prognostic implications.

Q And you referred to Mrs. Wiebelhaus' disease as having appeared to you to have been a stage three illness when you saw her?

A That is correct, but a level four. It gets rather complex. It had a level four, Clark's level four depth of invasion.

Q The larger the number, the deeper the invasion?

A Correct. That was level four of five possible levels.

Q Okay. Do oncologists generally have any consensus, Doctor, about what might influence the repetity (sic.) of growth in a mole that contains malignant melanoma?

A Well, there is one association with estrogen and high estrogen states, of course, and this was perhaps the case with Mrs. Wiebelhaus where she was pregnant and

obviously had very high levels of estrogen in her body at the time of the original presentation.

Q Is it thought that estrogen may accelerate the growth?

A That is correct.

Q Besides the presence of extraordinary levels of estrogen, are there other known factors that influence the repetity (sic.) of the growth of a malignant tumor originating in a mole? There may not be.

A I'm not aware of one. If you're trying to lead me to one, I'm not aware of it.

Q No, I am not, and I should say that you were quite observant upon entering the room to note that I had a book on the subject and I am not quizzing you on that book. I didn't lay it there for that reason, either. I expected to have a little time to look at the terms again.

May I ask you this, then, Doctor: Is there any way to work backwards from a surgery and clinically determine tumor size back to an earlier point in time when the tumor may have been a smaller size?

A No, there is no way. We have difficulty predicting the future and the past. There is no way that we can work backwards and determine when the tumor originated and I believe that's what you're trying to ask. That just is not possible.

Q Or perhaps beyond when it originated, and there may have been some ambiguity in my question. I think you're going to give me the same answer but let me ask you: is there away to work backwards from a determined tumor depth, that is, one determined upon excision and measurement, back to a point in time when the tumor may have reached some level of invasion into the body?

A No, I feel that that's totally impossible.

Q Okay. Thank you. I want to return to Mrs. Wiebelhaus' course of treatment with you now, if I may. You took us, in the course of your work with her, to mid February of 1993 and then we detoured a bit to talk about the disease. After your February 15th, 1993 visit with her and the initiation of chemotherapy at a sequence of three days on and three to four weeks off; is that correct?

A That's correct.

Q How long did that regimen of treatment continue?

A We continued until early July, I believe, with that regimen.

Q Doctor, what is the -- what did the chemotherapy do to this lady? How did it affect her?

A As in side effects or as in positive effects for the tumor?

Q Let's talk about the positive effects for the tumor

first, please.

A Well, initially, her liver tests were elevated. She had had a Cat Scan performed at Lutheran Hospital in Norfolk that had shown tumors within her liver. After receiving the chemotherapy for just one month her liver test, blood test, had returned to normal. After we had completed three or four cycles of this chemotherapy, a cycle being one months--

Q Three days and three days?

A The three days and the three days and the whole month. After three -- four cycles we repeated the Cat Scan and there was an actual decrease in the size of the tumors within her liver, so we were quite pleased that we were able to have a partial response with the chemotherapy, halting the course of disease and actually causing it to regress a little bit.

Q And was it apparent to you, Doctor, at the time you initiated the chemotherapy, that that kind of success was the best you could hope for?

A With this particular disease, we're looking at response rates in a 30 to 40 percent range so she was the exception rather than the rule. Most people with this stage of disease at the time we started the chemotherapy do not respond to the chemotherapy.

Q So she actually got some relief from the disease as a

result of the treatment?

A Correct.

Q You mentioned that there were some side effects to the chemotherapy. What were they?

A Well, most prominently she had quite a bit of nausea and vomiting with the chemotherapy and for several days afterwards and that was very difficult to manage.

Q She had hair loss?

A Correct.

Q Eventually losing all of her hair, of course?

A She lost all of her hair as a result of the radiation, not necessarily because of the chemotherapy.

Q And the radiation came later?

A It came --

Q Much later?

A -- much later.

Q All right. Doctor, aside from the discomfort that would have been present with Mrs. Wiebelhaus' nausea, did she have any pain associated with the disease when the chemotherapy was initiated?

A I'm not aware of pain being of a big problem until once again later in the course of her disease when there was tumor within the bones.

Q Okay. I'm sure that her emotional anxiety about her condition continued, of course?

A Not only her anxiety but her husband and her extended family's.

Q All right. Doctor, during the course of the chemotherapy process, how often would you see this lady?

A I would examine her on a monthly basis and she would come here to the office for the three consecutive days of intravenous chemotherapy and then she also had blood counts done in between times so I would actually see her once and she would be here four to five times a month.

Q What was the status of Mrs. Wiebelhaus' health separate and apart from her cancer in February of '93?

A Well, she was still quite active. She was a physically active person and despite being on treatment she actually went on to play softball and to be quite physically active and led what I would consider a normal life in between times, in between time of the treatments.

Q Being sick for a little while afterwards each time?

A Correct.

Q After you discontinued the chemotherapy treatment in July; is that right?

A Correct.

Q What was the next treatment regimen you instituted?

A What happened in July was that we had found that she had two areas within the brain that appeared to have cancer that had spread. At that time, the chemotherapy had obviously not been working for the brain metastasis and it was time to institute internal beam radiation therapy.

Q Is chemotherapy a treatment for melanoma that is expected to work on disease in the brain?

A No. In fact, brain metastases are very difficult to get at with chemotherapy. The drugs do not cross into the brain and do not deliver meaningful doses to brain tumors.

Q Is that because of the way the body protects the brain?

A That's correct.

Q When did the external radiation for the brain tumors begin?

A I had spoken with Dr. Zahra on July the 26th and he was going to see her on July the 27th, the next morning, at 10:30.

Q Is he one of your colleages here at the Yankton Clinic?

A No. Dr. Zahra is affiliated with the Carson Regional Radiation Center in Norfolk, Nebraska.

Q And was the radiation therapy administered there?

A That's correct.

Q Were you ever present during those treatments

themselves, Doctor?

A No, I wasn't.

Q Are you familiar with how they are administered and performed?

A I'm quite familiar with it.

Q All right. And can you describe for the jury how that work is done, please?

A The radiation is performed using a linear accelerator, which is a rather large machine that generates high energy radiation beams. And basically the patient is positioned on a table. The beam is aligned with the target organ, and in this case that was the brain, and the machine is simply turned on for a specified dose and that dose is repeated on a daily basis for a number of days. She also had radiation at the same time to an area in her sacrum which is just above the tailbone area that she was having pain there and we had found tumor in that region, as well, so she received radiation not only to the brain but to this other area that was painful.

Q As the radiation therapy was being administered, did you continue to see Mrs. Wiebelhaus, from time to time, or did you simply receive reports from the physicians in Norfolk?

A I had received reports from Norfolk and at this time --

I don't believe I actually saw her during the -- there was once that I saw her during the course for treatment, I guess.

Q When was that?

A August the 9th, 1993.

Q And what were her circumstances, at that time, please?

A She was having more weakness in her left leg. She was falling. She was finding it very difficult to hear. She had been having difficulty with her hearing all along but it had gotten much worse and she had become practically deaf. She had had very poor appetite and she was obviously failing quite rapidly.

Q Was the hearing loss a side effect of one of the treatments for the cancer, Doctor?

A Yes, it was. The Platinol chemotherapy does have hearing loss as one of the side effects. We had followed -- we had watched that, actually, and had done some special testing, audiograms, had documented that she was starting to have some hearing loss before she had the brain tumors, but I was also concerned that with the location of her tumor that there could have been effect, a direct effect of the cancer and perhaps the radiation therapy was also causing some hearing loss.

Q Doctor, did you diagnose the presence of the tumors in

the brain?

A Yes.

Q And did it then become your responsibility to inform Mrs. Wiebelhaus and her family about the presence of those tumors?

A That's correct.

Q Was that done here at the Yankton Clinic?

A Yes, it was.

Q And can you tell the jury how she reacted to that news, please?

A Well, at the time Donna had come to see me earlier in the day complaining of these -- of headaches, nausea and vomiting, and I had ordered a Cat Scan of the head to be performed at Sacred Heart Hospital. She went to the hospital, had the x-rays that was requested performed and then brought the films, the pictures back with her for my review. I looked at them in front of the patient and their family and informed them that it showed some very large tumors and actually showed them the pictures.

Q So they actually observed you in the process of making the diagnosis from the films?

A That's correct.

Q And how did Donna react to that news?

A Donna was, for lack of a better word, I would say that

she was numb. She didn't seem to respond much, at all. I think that she had probably suspected that something serious was going on.

Q Doctor, at the time of the August 9th visit with Mrs. Wiebelhaus, was there any change made in her treatment regimen?

A At August 9th she was in the middle of her treatments.

Q Her radiation treatments?

A Her radiation treatment. We felt that at that time it was best to continue with the radiation and had planned on continuing with systemic chemotherapy after that was completed.

Q By the time of the August 9 visit you mentioned she was nearly totally deaf and was having some trouble with walking and falling. Was she requiring assistance to walk, at that time?

A Yes, she was. She would basically lean on either her husband or a sister that were almost always in attendance with her and use them to help get her around.

Q Was Mrs. Wiebelhaus rational, at that time?

A Yes, she was.

Q And I understand there would have been a communication limitation as a result of her hearing but was she able to communicate with you about her circumstances?

A We could communicate. She would understand what I said. It would have to be spoken in a very loud, very direct manner, but we were still able to fully communicate.

Q And so she could respond verbally to you and understand your questions?

A That's correct.

Q When did you next see Mrs. Wiebelhaus, Doctor?

A August the 23rd, 1993, she came in after having had a MRI scan of her spine.

Q And what did it show?

A It showed that there were several areas of tumor involving the spine and also some of the vertebra.

Q Doctor, was there readily observable deterioration in her condition during the two weeks that intervened between those August visits?

A She had deteriorated to the point where I felt that she would no longer be able to tolerate chemotherapy. She was obviously at a point where she was nearly terminal. And at that point I referred her to the hospice program for palliative care to try to take care of her symptoms and no efforts were going to be made to artificially extend her life, at that point.

Q Did Mrs. Wiebelhaus participate in the decision to decline efforts to artificially extend her life?

A Yes, she did.
Q Was Mrs. Wiebelhaus admitted to some facility to reside, then, or was she able to return home?
A She returned home and through the use of visiting nurses and through the hospice portion they were able to administer that care at her home -- at her sister's home, I believe, near Crofton, Nebraska.
Q By the time of the August 23rd visit, this is August 23rd of '93, is it?
A Correct.
Q Was Mrs. Wiebelhaus having physical pain?
A Yes, she was.
Q And what was the cause of that pain?
A The pain was a result of the tumors within the bone that was causing bone pain and there was also, as I had mentioned, tumors within the spine that was causing compression of nerves and pain.
Q Was there anything done to relieve the pain symptoms?
A Well, we were giving radiation to the area of the sacrum and we were also giving narcotics.
Q What kinds of narcotics?
A We had initially started with Percocet, which is an oral kind of narcotic, and then shortly thereafter we had went to Morphine.
Q Did the narcotic medication eliminate the pain symptom?

A It made it tolerable. I don't feel that Donna was ever pain free but she certainly seemed to be more at ease with the pain. The narcotics, themselves, were not without side effects. She had constipation requiring enemas for elimination, which is a very common side effect of narcotics.

Q Doctor, how long was Mrs. Wiebelhaus able to remain at home before she was admitted to the hospital?

A She was admitted to Sacred Heart Hospital on September the 13th, 1993.

Q And so she was home for approximately three weeks from August 23rd to September 13th?

A Correct.

Q You saw her during that three-week period of time?

A No. The hospice team provides me with eyes and ears within the home setting and I received reports back from the hospice nurse, as far as her condition, and orchestrated any adjustments in her medication and care plan through the hospice team.

Q And the care during that three weeks was, including your work, was palliative care to attempt to make her as comfortable as possible?

A That is correct.

Q Was Donna aware that she was in the final stages of this illness?

A She was.
Q When Donna returned to the hospital on September 13th of 1993, what were her circumstances, Doctor?
A She was extremely dehydrated. She was unable to keep any fluids down without vomiting, and as a result of not being able to take anything orally she had not been taking her pain medicines, so she was in a considerable amount of pain, as well as being severely dehydrated.
Q She became an inpatient, then, at Sacred Heart?
A That's correct.
Q And what care did you initiate there?
A We placed an I.V. and gave her I.V. fluids as well as intravenous Morphine.
Q And that was for pain management purposes?
A That's correct.
Q How long was she in the hospital?
A She expired the following day.
Q So something like 24 hours or thereabouts?
A It was a little more than 24 hours but less than 48.
Q I'd be remiss, I think, if I didn't ask you to describe, if you would, the pain that she experienced during those final hours of her life?
A The pain was worse on admission. Once we were able to get the I.V., Morphine started, we were giving her a very generous dose of Morphine. The following morning

my notes on the hospital chart indicated that her pain was better but it was not totally relieved. She seemed to be more comfortable but it wasn't perfect yet. At that time we increased the Morphine slightly and she expired approximately 12 hours later.

Q Doctor, was Donna conscious up to shortly before her death?

A She was conscious but not for the last few hours.

Q Doctor, during the course of your work with Mrs. Wiebelhaus, you were, of course, familiar with the care she had received at the University of Nebraska Medical Center in September of '92, then with the care she received at the John Wayne Cancer Institute, --

A Correct.

Q -- all of the care she received from you, the care she received in Norfolk from the physicians who were responsible for her radiation therapy, and then finally the care at Sacred Heart Hospital in Yankton at the time of her death, were you not?

A That's correct.

Q Do you have an opinion concerning whether or not all that care was, in fact, medically necessary in an effort to manage Mrs. Wiebelhaus' melanoma and treat it?

A I feel that the care rendered at the University of

Nebraska with the surgery that was performed was necessary. The care that was rendered in California at the John Wayne Cancer Institute was experimental in nature and probably did not have an impact upon the ultimate outcome.

Q And therefore may not have been necessary?

A May not have been necessary.

Q All right. What about the care you rendered?

A Well, I think that the subsequent care with her chemotherapy and radiation was necessary and followed standard practice.

Q Would that also be true of the care in Norfolk?

A Yes.

Q And the care at the time of the final hospitalization?

A And her admission to hospice, yes.

Q All right. Doctor, based on your education and training and experience, your treatment and care of this patient and her history, do you have an opinion concerning whether or not the fatal illness that this lady suffered and its course, which you have described in your testimony today, had its origin in the mole that Mrs. Wiebelhaus presented to her family physician, a mole that appeared on her right shoulder during her pregnancy in the summer of 1992?

A I believe that was the source for the tumor that

eventually spread, yes.

MR. BATAILLON: I'm going to -- I assume that the question was a yes or no question so I'm going to object that it's non-responsive and then object on foundation to the answer.

MR. DOMINA: All right. And so we'd get that sequence right, I probably did ask you a yes or no question. Do you have an opinion?

THE WITNESS: Oh, yes.

MR. DOMINA: And what is your opinion?

MR. BATAILLON: And I'll object on foundation.

THE WITNESS: My opinion was as previously stated, I believe that the ultimate tumors that had spread originated from the primary mole on her right shoulder.

MR. DOMINA: Thank you very much. I have no further questions. Do you want to take just a two-minute break and let the doctor get up and stretch and maybe me, too, for just a second before we start.

MR. BATAILLON: Okay.

(At which time a short break was taken).

(The following proceedings were had after the break).

* * * * *

EXAMINATION BY MR. BATAILLON:

Q Doctor, my name is Joe Bataillon and we're doing this

telephone deposition basically pursuant to my notice and I have some questions for you this afternoon.

A Okay.

Q Do you have any time constraints today, Doctor?

A I'm all yours.

Q All right. For the afternoon or I had understood that we were only good till 1:00?

A I believe there might be another meeting on this -- in this room at 1:00 so we do, but I'm meeting with -- I'm in that meeting so they can't--

Q I'll attempt to get this finished as expeditiously as possible then, Doctor.

A Okay. Very good.

Q The other question I have is whether you are available for if there is a trial on December 20th or thereabouts just before Christmas, whether you're available to come to Center, Nebraska, to testify?

A That can always be arranged, yes.

Q All right. And the other question I have is all of the x-ray film, there has been at least two or three CT Scans that you mentioned and there is an MRI and I assume some plain film?

A That's correct.

Q Where is all of that; do you know? Is it in one place?

A No, it's not.

Q One of the CT Scans was obtained at Luteran Hospital in Norfolk.
A I know she's had a number of chest x-rays performed out at John Wayne. She's had at least one chest x-ray done in the hospital in Creighton, Nebraska. There are also CT Scans we performed here locally are at Sacred Heart Hospital, and plain chest x-rays would be available here at the Yankton Medical Clinic.
Q Sacred Heart Hospital is in Yankton; is that correct?
A That's correct.
Q The chest film that you have available at your clinic, do you have the ability to make copies of that film?
A Yes, we do.
Q I assume that either -- let me ask Mr. Domina. Is it okay if I ask him to make copies by letter?
MR. DOMINA: Yes, it is.
MR. BATAILLON: Okay.
MR. DOMINA: I have no objection to your having copies of any of these records. Of course of particular concern to the doctor would be those in his possession, but no, none at all.
MR. BATAILLON: All right. So the only film that the clinic would have would be the chest x-ray film that you earlier described?
THE WITNESS: There are several chest x-ray films but

that is all that we have in our possession.

Q And Doctor, do you have your medical record with you there?

A Yes, I do.

Q And that medical record would include your notes, as well as all of the laboratory findings and then also the correspondence that you would receive from various treating facilities and institutions; is that correct?

A That is correct.

Q How big a file is it for our estimation?

A It's approximately two inches thick.

Q Doctor, what I would like to do is ask you, and this is up to you, I'd like to get a copy of that complete record if at all possible. The way we usually do it is to have either your office make a photocopy of it or for you to give it to the court reporter, she'll make a copy of it and then return the original to you within a day or so, so it's kind of up to you how you would like to proceed.

A I really don't care. Whatever is most expeditious. It would probably be easiest, sir, for my own people to copy it since they're familiar with how our records are put together.

MR. BATAILLON: All right. Can we stipulate, then, for the record, Mr. Domina, that Dr. Farver will have his

staff make a complete copy of the record that's before him there, that the court reporter will get a copy of it or get that copy and we'll mark that as Exhibit Number 1.

MR. DOMINA: So stipulated.

MR. BATAILLON: And Exhibit Number 1 will then be the complete medical record from your clinic; is that correct, Doctor?

THE WITNESS: That is correct. I'll have to talk with -- confer with my administrator. I'm not sure if it's within our -- within our rights to forward some of the correspondence that we have. I'm not quite sure what the status is on that legally.

MR. DOMINA: Insofar as the patient and her husband are concerned, there is no objection, Doctor.

THE WITNESS: As long as the patient or family would concur, I have no problem with forwarding the entire medical record.

MR. BATAILLON: And then I can -- I would like to ask the court reporter, then, whether you would make contact with the doctor to make arrangements to pick up the original or the copy.

COURT REPORTER: Yes, I would.

MR. BATAILLON: Doctor, you are a board certified internist; is that correct?

THE WITNESS: That is correct.
Q Do you have a curriculum vitae, Doctor?
A There is one, yes.
Q All right. Can you make a copy of that available to the court reporter when she picks up the copy of the record?
A I can. It hasn't been updated in some time since I haven't had to apply for a job for five-and-a-half years.
Q I understand, Doctor. I just need to get a little bit of a background as far as your practice is concerned. Can you--
A That would be fine.
MR. BATAILLON: All right. Then we'll mark that as Exhibit Number 2?
MR. DOMINA: Agreed.
MR. BATAILLON: Doctor, did you take a -- your -- strike that. Your fellowship in Utah, what was that fellowship in?
THE WITNESS: It was in hematology, oncology at the University of Utah, Salt Lake City.
Q All right. Did you become board eligible, then, for hematology and oncology?
A That's correct.
Q All right. Did you ever take the board?

A No, I didn't.
Q Is there a reason you didn't take the boards?
A I don't like taking tests.
Q I don't blame you, Doctor. All right.
A No, there was really no reason that I -- other than time constraints, as far as not taking the boards.
Q Are there any updates that are required, as far as your board certification, with respect to internal medicine is concerned?
A No, there isn't.
Q Are they recommending one every seven years; is that right or wrong?
A I believe that mine is for lifetime.
Q You say there is approximately 40 physicians in your group; is that correct?
A Correct.
Q What's the name of your group again, Doctor?
A The Yankton Medical Clinic, P.C.
Q And can you give me an idea what the breakdown of the physicians is? Are they mostly family practitioners, internists or what?
A Actually they're mostly internists. There is about -- these are all approximations. We keep adding people every day, it seems. There is six general internists, approximately five family practitioners, three

obstetricians, gynecologists, three surgeons, three orthopedic surgeons, a cardiologist, a pulmonologist,
A a gastroenterologist, a neurologist, and myself in hematology/oncology.
Q Is there any group comparable to your size in your geographic area, and that would include down to Norfolk, to the best of your knowledge?
A No, sir, there isn't. There is a group in Sioux Falls that is approximately twice our size but the Yankton Medical Clinic is the second largest medical facility -- medical clinic in the State of South Dakota.
Q The Sacred Heart Hospital, how many beds does it have; do you know?
A One hundred forty-four (144) beds.
Q I'm just going down the notes of your deposition, Doctor. I have some other questions that I'm going to be asking you.
A Sure.
Q But I have to ask you some questions that were brought up in your direct examination by Mr. Domina. You do not recall which sister initially introduced you to Donna Wiebelhaus' case; is that correct?
A I don't recall her name but I had a lot of contact with that sister. It's the one that she lived with in Crofton. I'm just not certain as to her name.

Q Are you aware of any sister that she has that is a nurse?
A No, I'm not.
Q Are you familiar with anybody else in Donna Wiebelhaus' family besides this sister and her husband?
A Her brother-in-law frequently accompanied them, as well.
Q Do you know his name?
A No, I don't.
Q In the first visit that you had with Donna Wiebelhaus the name of her sister that came with her is not documented; is that correct?
A That is correct.
Q Do you know whether her sister was with her the entire examination or simply came up to the clinic with her?
A She was present in the room all the time.
Q Do you currently have any other satellite clinics in Nebraska?
A No, sir.
Q Was the only satellite clinic in Nebraska the Crofton clinic?
A That's correct.
Q You closed that in November of '92?
A Correct.
Q I just thought I'd let you know that I had burned up my

car in Nelson, Nebraska.

A I think I've burned up a few cars there myself.

Q All right. As far as your initial history of Mrs. Wiebelhaus, did she indicate how long she had had the mole on her back?

A Well, initially she had said four to five months.

Q Do you know whether she had that mole before that four- or five-month period?

A I would have no information to indicate either way.

Q All right. Is my understanding correct that it's your opinion that there is no standard treatment for stage three melanoma?

A I don't know, the point where she had had surgery and removal of the local lymph nodes, there is no standard care -- standard therapy beyond that point.

Q All right. And chemotherapy is not generally recommended until it becomes stage four; is that correct?

A That is correct, and until such time you have measurable disease to determine whether or not the therapy is effective.

Q Do you know whether she had had a CT Scan or an MRI of her entire body before February of '93?

A Yes, sir, I -- she had a CT Scan performed at the University of Nebraska in October of 1992 during the

process of their initial staging.
Q And apparently those were negative; is that correct?
A That is correct.
Q You didn't have a chance to review that film?
A I have not seen those films but I do have the radiology reports from the University.
Q You would assume that the University still has those films?
A Yes, sir, I would.
Q As far as the John Wayne Cancer Center is concerned, did they correspond with you, at all, with respect to the care they were rendering to Mrs. Wiebelhaus?
A Yes, they did.
Q And that would be part of your file; is that correct?
A That is correct.
Q Am I -- I'm sorry, I'm stuttering here, Doctor. On December 21st, 1992, she presented with a lesion in her mouth. Am I correct in my understanding that you would not have recommended biopsy were it not for the fact that she was very anxious about it?
A That is correct. The lesion had no suspicious characteristics to it. The surgeon that examined her and ultimately did the biopsy also felt that it was benign appearing.
Q As far as -- I'm going to skip forward to February

15th. You had no contact with her, then, between December 21st, 1992, and February 15th; is that correct?

A That is correct.

Q And presumably she was receiving treatment through the John Wayne Institute, at that time?

A That is correct.

Q And they sent you some information with respect to a recurrent mole in the mid back area or was that reported by her?

A I believe that was reported by the patient and then subsequent documentation came from the John Wayne Cancer Center.

Q But she presented to you on February 15th because she had felt a lump in her breastbone; is that correct?

A That's correct.

Q I -- I'm looking at the report and I'm not sure whether that would be considered a mole or a subcutaneous lesion. Can you clarify that for me?

A It was subcutaneous. When I felt it, it was five millimeters in size. It was hard. And my clinical examination on the date of February 15th stated that it was subcutaneous meaning that the skin was in tact over the top of this lump.

Q Did it appear to be -- did the skin appear to be

discolored, at all?

A No, sir, but you could see that the lesion, itself, was immediately beneath the skin and did have kind of a dark gray appearance to it.

Q So it would not be considered a mole in the true sense of the word?

A That's -- that's correct.

Q And the biopsy, pathology reports indicated that it was -- did you say melano carcinoma?

A That's correct. That's an old fashioned term for melanoma.

Q And you've never had or your pathologists have never had an opportunity to review tissue sample from any of the other biopsies; is that correct?

A That is correct.

Q So there is really no way to know whether this biopsy resembled the other two other than the diagnosis of melano carcinoma?

A That is correct.

Q And when this was documented, the biopsy was documented, I assume that that would have been on or about the 15th or 18th of February 1993?

A I believe it occurred the same day, the 15th of February.

Q And the biopsy report, the pathology report was on the

15th, also? It was reported on the 15th?
A Reported on the 16th.
Q Then you scheduled her for a consult on the 18th to talk to her about chemotherapy?
A That is correct.
Q And when did her chemotherapy then start?
A It started that same day, February the 18th.
Q You talked to her about the chemotherapy that you planned and she decided to accept your recommendation and start the first course that day?
A That is correct.
Q Had you talked to her about chemotherapy on the 15th?
A Yes, I had, because the original -- at that time, she had had a recurrence on the lower back and we had obviously felt that we were getting close to the time where we were going to need to consider chemotherapy and there was also the suspicion that she had involvement of her liver and not only did we do the biopsy but we also got the Cat Scan I think of her abdomen during that same time frame.
Q And that CT Scan was done in Norfolk, did you say?
A That is correct.
Q Is there a reason it wasn't done in Yankton, if you can recall?
A Oh, I can recall. The Cat Scan was down for its

quarterly maintenance and wasn't going to be available for that day for any routine scanning, for any scanning, at all, even emergency scans. The patient and their family were quite anxious to have the scan performed so the closest center with a Cat Scan or comparable was Norfolk and that's why we referred her to Norfolk to have that procedure done.

Q The only records that you've reviewed with respect to this case would be the records that are in your file; is that correct?

A That is correct. Everything that has ever been forwarded to me, either by fax or by mail, is present in her file.

Q Have you had an opportunity to review the records of Dr. Nagengast?

A I have not.

Q You did not review any records from the Creighton, Nebraska, hospital either; is that correct?

A I did review the actual chest x-ray film on one occasion but I have not seen any other of the written records.

Q The CT that was done on or about the 15th of February '93, did that show what appeared to be a lesion on the liver, if you can recall?

A My notes of the 18th state that when I looked at it I

felt that there were more than one area of cancer in the liver.

Q And you didn't document the size of those lesions -- I'll withdraw the question and ask it again. As far as the CT Scan is concerned that you reviewed, do you recall the size of the lesion in the liver?

A My notes from February 18th state that the lesion was rather large and was located in the caudate lobe of the liver which -- and there was other suspicious areas that were smaller scattered throughout the rest of the liver, but at least one lesion was described as being large.

Q And generally speaking, what strikes you as large from a centimeter standpoint?

A Oh, something greater than five centimeters.

Q How many other suspicious areas do you think there were, approximately?

A Probably less than a half dozen, less than six.

Q And they would, by definition, be under five centimeters, probably?

A Yes. I didn't -- I didn't officially interpret the Cat Scan --

Q I understand that.

A -- other than to just look at it. It was obvious that this was consistent with metastatic cancer and the

actual dimensions for my recording purposes wasn't as important as the assessment.

Q I understand. I'm just trying to get an idea of what you recall. Doctor, were there any other areas that you believed had some evidence in that CT Scan of metastasis?

A I didn't see any other areas within the abdominal CT Scan that was suspicious, no.

Q And I take it, then, it was simply an abdominal CT Scan as opposed to a full body scan?

A That is correct.

Q The chemotherapy that you rendered, do you have an opinion as to whether or not it extended her life appreciably?

A No, I really don't know if we extended her life. I believe we did improve the quality of her life for a short while, but whether or not that translated into a longer life expectency, I really don't know.

Q How long do you think that it improved the quality of her life?

A Well, she obviously had good quality of life for about five -- five months after the initiation of the therapy.

Q And the chemotherapy was initiated in February of '93; is that correct?

A Correct.
Q I need to ask you about the doctor that did the radiation therapy. He's located in Norfolk; is that correct?
A That is correct.
Q And his name is -- would you spell his name, Doctor?
A It's Dr. Zahra, Z as in zebra, a-h-r-a.
Q Thank you, Doctor. I assume that you refer patients to him, from time to time?
A Frequently.
Q The CT Scan, did the CT Scan show invasion in-- or, strike that. When was the CT done that showed invasion to the sacrum and the brain, approximately?
A I can tell you exactly in just a moment. The CT Scan of the brain was performed July -- no, excuse me, July 26th, 1993. Due to her having pain in the sacral region she had subsequently had an MRI scan of the sacrum and lower spine. That was performed after Dr. Zahra had evaluated her down in Norfolk and the MRI was actually done at Luteran Hospital in Norfolk. It would have been sometime in August of '93.
Q And your file probably has reports, radiology reports from each of those; is that correct?
A We don't have the radiology reports from Norfolk, no.
Q All right. The day that you diagnosed the brain tumor,

would that have been July 26th, 1993?

A Yes, sir.

Q And you indicated that it was a large brain tumor. Can you estimate the size?

A The radiology report of the CT Scan from July 26, 1993 indicated that the tumor was -- there was a two-centimeter mass in the right frontal lobe and then another area that was two by three centimeters in the posterior aspect of the left temporal lobe.

Q And that report was from Norfolk?

A No, that CT Scan was performed at Sacred Heart Hospital and was interpreted by Dr. Messner.

Q And can you spell his name for the record?

A M-E-S-S-N-E-R.

Q Is he a general radiologist, to the best of your knowledge?

A Yes, he is.

Q As opposed to a neuro radiologist?

A That's correct.

Q You saw her then on September 9th, 1993 and she was having some weakness of the left leg; is that correct?

A Yeah, that is correct.

Q What is the explanation for that, if you can tell me?

A Well, our concern was that in the region where these brain tumors were located and the swelling from the

tumor could have been affecting her motor abilities and thereby resulting in weakness.

Q Did she -- did you ever do a bone scan on her?

A Not to my knowledge.

Q She had -- I notice here that there was apparently an MRI done on August 23, 1992 and that showed the tumors in the spine and the vertebra; is that correct?

A No, it was 1993.

Q Oh, I'm sorry. Okay. And where was that done?

A That was performed at Luteran Hospital in Norfolk, Nebraska.

Q Do you have a radiology report for that one?

A No, I do not. I have secondhand information from Dr. Zahra who included an interpretation with some of his communication.

Q All right. Thank you. And when you -- when you -- when you learned of the tumors in the spine and vertebra, that's when you decided that there was no further efficacy for the chemotherapy, correct?

A That is correct.

Q And you referred her to hospice. Which hospice was that, Doctor?

A That was the Sacred Heart Hospital's hospice program.

Q And is that -- do they have satellite facilities outside of Yankton or was that in Yankton?

A It's in Yankton and it covers a 25-mile radius from Yankton.

Q Do they -- did they have her in the hospice facility in Yankton for a time and then let her go home?

A No, she was cared for at home.

Q From the time she was referred to hospice?

A That's correct. Their initial visit, I believe, actually occurred at home.

Q What is the title for the hospice program if I needed to get their record?

A I believe it's just Sacred Heart Hospice-- or, the Sacred Heart Hospice Program. The clinical coordinator for the hospice program is Mary Pistulka, P-I-S-T-U-L-K-A, and she is a nurse, an R.N..

Q She was also -- Mrs. Wiebelhaus was also being seen by the visiting nurses from the Crawford area?

A Crofton.

Q All right.

A The visiting nurses are all associated with Sacred Heart Hospital and the hospice program.

Q So there wouldn't be a separate agency that would still be part of the hospice program?

A No, they would all be -- it would all be under the one organization.

Q Which is Sacred Heart?

A That's correct.
Q The Morphine that you were giving, was that oral or intramuscular injection?
A It was oral and it was liquid Morphine that was taken orally.
Q And the first time that you knew that she was not able to take the liquid Morphine was when she came to the hospital?
A That is correct.
Q What was the date of that again, Doctor? I didn't hear that.
A September 13th.
Q September 13th --
A 1993.
Q -- is that correct? And then she died on September 14th, 1993?
A Yes, sir.
Q Do you know how long she was unable to take any fluids before being admitted to the hospice?
A My Admission History and Physical indicates that she had been nauseated and vomiting for three to four days prior to coming to the hospital.
Q Did she have respiratory arrest or cardiac arrest or both, if you know?
A It's kind of hard to separate the two. We didn't have

her on active monitoring, cardiac or otherwise. We continued with the hospice-type of therapy while in the hospital so I really don't know. It was not witnessed by myself or other -- other staff.

Q Do you know whether anybody did witness her demise?

A The family was in constant attendance throughout this -- that time, so I'm sure that the family members were present.

Q You would, as far as the Yankton Clinic is concerned, you would have been Donna Wiebelhaus' primary provider; is that correct?

A That is correct.

Q Are there any physicians that you know of that would recommend chemotherapy with stage three melanoma?

A Not after complete surgical excision, no.

Q Theoretically, would there be any efficacy in chemotherapy with stage three melanoma?

A That issue has been tried in clinical studies and proven not to have any benefit.

Q So that some physicians have tried it but there doesn't appear to be any substantial increase in the survivability after administering chemotherapy?

A Not with our standard chemotherapy, no.

Q That would have been the same chemotherapy that you instituted on February of '93; is that correct?

A That is correct.

Q And the chemotherapy would have been done under your supervision?

A Yes, sir.

Q My record ends on April 23, 1993 and I assume that you have -- your record continues until the 15th of September at least, '93; is that correct?

A Yes, it does.

MR. BATAILLON: I don't have any further questions, Doctor. I think I've finished in time for your meeting.

THE WITNESS: Thank you.

MR. DOMINA: Doctor, you have a right to read your deposition and sign it before it's used if you want or you may waive that right if you prefer.

THE WITNESS: I'll waive that right.

MR. DOMINA: Thank you very much for your help.

(No further proceedings were had).

CERTIFICATE OF REPORTER

I, YaVonne C. Slowey, Certified Professional Reporter, do hereby certify as follows:

1. That the deponent aforenamed was duly sworn prior to the taking of this deposition.

2. That I took down in shorthand, correctly, the testimony of said deponent and have caused the same to be transcribed, and that this deposition is a true and correct record of the testimony given by said deponent at the time I affix my signature to this certificate.

3. That the cost for reporting and transcribing the original and one copy of deposition is in the sum of $255.90, plus tax, said sum to be advanced and paid to YaVonne Slowey, Registered Professional Reporter, 2505 Burleigh Street, Yankton, South Dakota 57078, prior to the use of said deposition at trial.

4. That the original of the transcript of this deposition is to be filed with the Attorney for the Plaintiff, Mr. David A. Domina.

5. That a copy is to be delivered to Mr. David A. Domina, Omaha, Nebraska, Attorney for the Plaintiff; and Mr. Joseph F. Bataillon, Omaha, Nebraska, Attorney for the Defendant.

6. I further certify that I am not related by

consanguinity or affinity within the fourth degree to any party, his attorney, or any employee of any of them; that I am not financially interested in this action, and that I am not the attorney or employee of any party.

To all of which I have verily affixed my signature this 8th day of December 1993.

YaVONNE C. SLOWEY, RPR
2505 Burleigh Street
Yankton, South Dakota 57078
(605) 665-8410

My commission expires: October 6, 1997.

IN THE DISTRICT COURT OF KNOX COUNTY, NEBRASKA

DONNA J. WIEBELHAUS, Plaintiff, vs. D. J. NAGENGAST, M.D., Defendant.	CASE NO. 12018

YaVonne C. Slowey, Registered Professional Reporter, General Notary Public, does hereby certify that on the 23rd day of November 1993 the deposition of Dr. Max L. Farver was taken in the above-captioned case on behalf of the Plaintiff; that the original deposition was transcribed and delivered by mail to Mr. David A. Domina, attorney for the Plaintiff, on the 10th day of December 1993; and that the costs of said deposition assessed to the Plaintiff are in the amount of $274.43.

YaVonne C. Slowey, RPR
General Notary Public

My commission expires: 10-6-97.

SLOWEY COURT REPORTING SERVICE
2505 BURLEIGH STREET
YANKTON, SD 57078
(605-665-8410)

I N D E X