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IN THE COMMON PLEAS COURT

STARK COUNTY, OHIO

- - -

ORIGINAL

SANDRA J. SHONK, et al.,)

Plaintiffs,)

vs.)

No. 2003CV00056

DOCTORS HOSPITAL OF STARK)
COUNTY, et al.,)

Defendants.)

- - -

Deposition of DAVID M. GRISCHKAN, M.D., an Expert
Witness herein, called by the Plaintiffs for
cross-examination, pursuant to the Rules of Civil
Procedure, taken before me, the undersigned, Stephanie R.
Dean, a Stenographic Reporter and Notary Public in and for
the State of Ohio, at the offices of David M. Grischkan,
24025 Commerce Park Drive, Beachwood, Ohio, on Thursday,
the 15th day of October, 2003, at 10:10 o'clock, a.m.

- - -

1 APPEARANCES:

2 On behalf of the Plaintiffs: (Via Telephone)

3 Thomas J. Henretta, Attorney at Law,
4 401 Quaker Square,
5 120 E. Mill Street,
6 Akron, Ohio 44308.

7 (330) 376-7800

8 On behalf of the Defendant, Dr. Cain:

9 Weston Hurd;

10 By: Pamela E. Loesel, Attorney at Law,
11 2500 Terminal Tower,
12 50 Public Square,
13 Cleveland, Ohio 44113-2241.

14 (216) 687-3225

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1

DAVID M. GRISCHKAN, M.D.

2

of lawful age, an Expert Witness herein, having been first
3 duly sworn, as hereinafter certified, deposed and said as
4 follows:

5

CROSS-EXAMINATION

6

By Mr. Henretta:

7

Q Good morning, Doctor.

8

A Good morning.

9

Q Would you state your full name for the record?

10

A David Michael Grischkan.

11

Q And I'm going to ask you some questions. I

12

represent the Shonks in this matter and I'm going to

13

ask you some questions about the opinions that

14

you're going to give in the trial of this matter.

15

If you do not understand my question or want me to

16

rephrase it, please do so and I will attempt to do

17

that. If you answer my question, I'm going to rely

18

on the fact that you understood it.

19

Fair enough?

20

A Yes. Excuse me? Can I just take a ten second

21

break? I have a doctor's call coming through on a

22

patient.

23

Q Absolutely.

24

(Discussion had off record.)

25

By Mr. Henretta:

1 Q Why don't we talk about the Curriculum Vitae?

2 You had submitted a CV to Defense Counsel,
3 Ms. Loesel, and she sent it over to me.

4 Is the CV that you sent, back whenever you
5 sent it, still current?

6 A It is. There's an additional publication in the
7 year 2000 that relates to hernia surgery, but not
8 pertaining directly to the issues here.

9 Q Other than that then everything is up to date?

10 A Yeah.

11 Q Now you issued a -- you generated a report in this
12 case on February 20, 2003.

13 A Yes.

14 Q That's a report that you had reviewed certain items
15 before you generated that report, right?

16 A Correct.

17 Did you hear my answer? I said yes.

18 Q I guess you didn't hear my next question.

19 What did you review?

20 A I reviewed the Doctors Hospital records, Dr. Cain's
21 outpatient records, reports of Shalowitz and
22 Cooperman, depositions of Dr. Tantri, Cooperman and
23 Cain, I also had some updated records from
24 Dr. Conklin, and that's pretty well it.

25 Q Now since that report, what have you reviewed?

1 A Nothing additional.

2 Q Read any deposition testimony, any transcripts?

3 A None except for the three that I mentioned earlier.

4 Q All right. Did you say you read Dr. Cooperman's?

5 A Yes.

6 Q Okay. Now you were hired by the Weston Hurd Law
7 Firm to give opinions in this case?

8 A Yes.

9 Q Okay. Have you ever worked -- given similar
10 opinions in other cases for -- not similar opinions.

11 Have you been asked by the Weston Hurd firm to
12 give opinions in medical negligent cases in the
13 past?

14 A Yes.

15 Q Do you know on how many occasions?

16 A I couldn't really give you a number honestly.

17 Q Do you remember who the Attorneys were who hired
18 you?

19 A One that comes to mind is Beverly Harris.

20 Q Well, for how many years have you been asked to
21 serve as an Expert Witness on behalf of the firm of
22 Weston Hurd?

23 A I don't know that answer.

24 Q Well, I mean, more than five years?

25 A I don't know.

1 Q You don't know when you started giving opinions for
2 them?

3 A Correct.

4 Q Do you know how much money you have generated as a
5 result of the work you've given them?

6 A No.

7 Q Who keeps records of that so -- we might want to get
8 that information, Doctor.

9 Do you know who maintains those records?

10 A I don't have any idea.

11 Q I mean, they pay you money; don't they?

12 A Their checks haven't bounced, I don't believe.

13 Q Where do you put those when you get them?

14 A They're deposited in my corporate account.

15 Q And would your accountant have a record of those
16 checks?

17 MS. LOESEL: Objection.

18 A No. They're not designated as specific income.

19 By Mr. Henretta:

20 Q So you wouldn't know if you made \$50 working for
21 them or 25,000?

22 MS. LOESEL: Objection.

23 By Mr. Henretta:

24 Q You have no idea?

25 A I don't have any idea.

1 Q But you've done enough -- but you have worked for
2 the Weston Hurd firm over the years, is that a fair
3 statement, in terms of serving as an Expert Witness?

4 A I've done cases for them in the past. I can't tell
5 you how many years ago it started.

6 Q Why don't we work with this year? This could take
7 us a long time, Doctor, this morning because I
8 really want to know this and I have a right to know
9 it.

10 How about let's just work your memory if we
11 can.

12 Where can you go to look to find out the
13 deposits you've made as a result of money received
14 from Weston Hurd? Where would you look?

15 A I've already stated the answer to that. It is not
16 designated as specific type income. It's just a
17 deposit as all other deposits into the corporate
18 account.

19 Q I find that hard to believe.

20 Do they give you a 1099? Why don't we start
21 with that?

22 A I don't know.

23 Q Would your accountant know?

24 A I don't believe so.

25 Q He wouldn't know if you got a 1099? Do you know

1 what a 1099 is?

2 MS. LOESEL: Objection, Tom.

3 By Mr. Henretta:

4 Q Hey, we're going to be here all morning just on that
5 issue, what a 1099 is.

6 A You're paying for my time. It's \$500 an hour beyond
7 your deposition time, so just be aware it's on the
8 record.

9 Q Do you know what a 1099 is?

10 A Not really.

11 Q You don't?

12 A No.

13 Q Who is your accountant?

14 A I'm not sure I need to pass that information on.

15 MS. LOESEL: I'm objecting.

16 By Mr. Henretta:

17 Q Well, we'll take it up with the Judge if you're
18 going to be that obstructive here.

19 Who is your accountant?

20 MS. LOESEL: Objection, Tom.

21 MR. HENRETTA: Are you instructing him not
22 to answer?

23 THE WITNESS: I'm just telling you that I
24 do not give out any personal information based
25 on the nature of how this world works these

1 days.

2 MR. HENRETTA: Wait a minute, Doctor.

3 Are you instructing him not to answer?

4 MS. LOESEL: Tom, he has answered the
5 question as he has answered it. I have raised
6 an objection to the question and he has
7 provided you with an answer, and I don't
8 think --

9 MR. HENRETTA: There's nobody to rule on
10 it right now, Pam.

11 MS. LOESEL: I don't think this is
12 something that's material to the issues in the
13 case.

14 MR. HENRETTA: I understand. If he
15 doesn't answer the question, then we'll have
16 to ask the Judge to ask him whether he should
17 answer the question, and that's not going to
18 be on my nickel, so he has to answer who his
19 accountant is.

20 MS. LOESEL: He does not have to answer.

21 He told you --

22 MR. HENRETTA: Okay. Well, I'll ask the
23 Court Reporter to tell him to answer that
24 question. Will the Court Reporter please
25 instruct the witness to answer that, who is

1 your accountant, who does the books for you?

2 THE NOTARY: Would you please answer the
3 question?

4 THE WITNESS: Let me state on the record
5 once again, it is my habit not to give out any
6 personal information which is public record
7 and I will, therefore, not answer this
8 question.

9 By Mr. Henretta:

10 Q How is your income public record?

11 A Because this transcript is public record.

12 Q How is your income a matter of public record?

13 A You're badgering me at this point and I will --

14 Q I just want to know who your accountant is so I can
15 determine the extent of your bias in this case and I
16 have a right to do that.

17 A Part of the rules require you to allow me to finish
18 my answers to your questions, so let me state again
19 that you are badgering me at this point and I will
20 terminate this deposition if you continue in that
21 manner.

22 Q Who is your accountant?

23 A Could you read back the answer, please, that I
24 stated before?

25 MR. HENRETTA: Pam, is he representing

1 himself or what? Who is the Lawyer in this
2 case?

3 MS. LOESEL: I am not his Attorney. He is
4 an Expert for us, and he has told you, Tom,
5 multiple times that he's not going to give you
6 that answer, Tom, so I think you need to move
7 on.

8 MR. HENRETTA: I asked the Court Reporter
9 to instruct him to answer the question. Now
10 either he's going to answer the question or
11 are you telling him not to answer that
12 question?

13 MS. LOESEL: He is an Expert in this case.
14 I am not his Attorney. He has answered on his
15 own behalf and he is telling you he's not
16 giving you that information. That's it, Tom.

17 By Mr. Henretta:

18 Q Let's go back to the books and the records.

19 Where are they maintained?

20 A You're asking personal information which I do not
21 need to divulge at this time. If you want to move
22 on, we'll carry out. If you don't, then I think we
23 need to terminate this deposition.

24 Q We have a right to determine the extent of your bias
25 and that's why I'm going down this avenue, Doctor.

1 I'm not trying to pry unnecessarily.

2 A That's exactly what you're doing and you are
3 badgering in the course of doing that.

4 MS. LOESEL: Tom, you have the right to
5 ask him what his hourly fees are. That is
6 standard. He's more than happy to give you
7 that.

8 MR. HENRETTA: I have a right to know how
9 much he's earned from your firm. If he can't
10 remember, I have a right to find out where it
11 is.

12 MS. LOESEL: He said that the checks are
13 not calculated and are not kept separate in
14 the accounting so there is no way to make that
15 determination and that is what he has told
16 you, and I think you need --

17 MR. HENRETTA: But the checks come from
18 Weston Hurd to his account.

19 MS. LOESEL: When they're deposited in the
20 account, he has no way of knowing where
21 they're from.

22 By Mr. Henretta:

23 Q Doctor, where do you put those checks, in what
24 account?

25 A As I indicated earlier, those checks are pooled with

1 patient checks, insurance checks and all other means
2 of income and they are deposited in the bank.

3 Q I can't believe you operate that way, but that's not
4 a question.

5 Where is your bank?

6 A Huntington Bank.

7 Q Franklin?

8 A Huntington Bank.

9 Q What, out of Cleveland?

10 A That's where I bank.

11 Q And how many accounts do you maintain?

12 A You know, I'm not going to get into this. If you
13 want to ask me questions pertaining to my expertise
14 in this case, we'll continue, otherwise, for the
15 third time, I will tell you that I will terminate
16 this deposition if you persist.

17 Q First of all, I want to get over the bias issue
18 before I move on to your opinions and that's where
19 we are stuck right now.

20 A Listen, we are stuck, and I have the option of
21 cancelling this deposition, so please proceed,
22 otherwise, on the record I will state again that you
23 are badgering and we will terminate this deposition.

24 MS. LOESEL: And, Tom, I'm telling you to
25 move on right now. I mean, you have the right

1 to ask bias questions with regards to his fees
2 and how frequently he's done testimony.
3 You've got that information.

4 MR. HENRETTA: We'll terminate, we'll have
5 to take it up with the Court. That's all I
6 can do. I think I have a right to go further.
7 If the Judge says I don't, then I don't.

8 MS. LOESEL: You need to move on and ask
9 some additional questions.

10 MR. HENRETTA: I want this bias issue
11 resolved before we go to trial. And if we
12 have to Subpoena documents, I guess we will
13 because clearly I have a right to know how
14 much Weston Hurd has paid this witness over
15 the years.

16 THE WITNESS: Not enough.

17 By Mr. Henretta:

18 Q How many Expert cases do you review in a calendar
19 year, do you have any idea?

20 A Probably an average of about six, maybe seven.

21 Q Six or seven a year.

22 Do you do any for Plaintiffs?

23 A Yes.

24 Q Who are some of the Plaintiff's Attorneys that hired
25 you?

1 A There's Michael Djordjevic in Akron, Paul Kaufman in
2 Cleveland, and I think a firm named Becker &
3 Mishkind in Cleveland as well.

4 Q Who are some of the other Defense firms that you've
5 served as an Expert Witness for?

6 A I've worked with Reminger, I've worked with probably
7 Buckingham Doolittle, Gallagher Sharp, and I did
8 some work with Jacobson Maynard when they were still
9 in business.

10 Q And those are all in addition to Weston Hurd?

11 A They're not all encompassing. These are the ones
12 that come to mind.

13 Q Do you have in your mind a split or a percentage of
14 how much Plaintiff and how much Defense you've done
15 in the past?

16 A I think overall I probably do about 80 percent
17 Defense, probably about 20 percent Plaintiff.

18 Q And your hourly rate for that type of work, Doctor?

19 A I have, yes.

20 Q What's that?

21 A Did you ask if I have an hourly rate?

22 Q Well, what do you charge for that?

23 A \$350 an hour.

24 Q Do you charge that 350 for all work, or do you break
25 it down that depositions cost one rate, trial

1 testimony is another rate, you know?

2 A No, it's pretty well a standard rate.

3 Q 350 across-the-board?

4 A Yeah, except for trial, I have flat rate for an
5 entire day.

6 Q What is that?

7 A That's 4,000 for the entire day on average.

8 Q When you say an entire day, that means you have to
9 go to the Courthouse and wait and you never know
10 when you're going to be called -- if you're called
11 in the middle of the afternoon, you're still out the
12 entire day, right?

13 A Right. I block off an entire day.

14 Q You don't schedule any patients?

15 A No.

16 Q Do you have some sense of what your charges to date
17 have been on this particular case up until this
18 morning?

19 A I really don't. It would probably be loosely
20 somewhere around \$2,000 or something like that.

21 Q I want to ask you now, Doctor, about your
22 professionalism in this regard.

23 Have you ever been named as a Defendant in a
24 medical negligence case?

25 A Yes.

1 Q Do you know on how many occasions?

2 A Four times.

3 Q Sir?

4 A Four times.

5 Q Four?

6 A Yes.

7 Q I need to know a little bit about that.

8 Of those four times, did those cases go to
9 trial?

10 A Two did.

11 Q Two, is that what you said?

12 A Two out of the four.

13 Q What about the two that didn't go to trial, do you
14 know what the disposition was?

15 A The first two went to trial. As I indicated, they
16 were early in my practice. The third one I was
17 actually named but not really a party to the suit,
18 it involved more radiology, misdiagnosis, so I guess
19 I was just -- is the term written out, whatever the
20 case.

21 Q Okay.

22 A The fourth one was with a P.I.E. case on a gastric
23 stapling that they settled against better judgment.
24 They were actually going bankrupt at the time and
25 were looking to settle every case.

1 Q Didn't they have consent policies then or what?

2 A They did not in my case, and we officially objected
3 to the settlement, but they went ahead and did it.

4 Q What was the issue in the case that was settled?

5 A It was a gastric stapling case from morbid obesity.
6 In those situations, the literature clearly shows a
7 48 percent leak rate from the staple lines, and in
8 this case the patient leaked, had to have a second
9 procedure to drain and consequently sued on that
10 basis.

11 Q Was there an informed consent issue raised in that
12 as well?

13 A Not at all.

14 Q And so there was one that was paid out.

15 Was there another one that there was a
16 settlement on, Doctor?

17 A No. No. 3 was dismissed. As I indicated I was just
18 named but never really a party to the suit. No. 4
19 was settled, and the first two went to trial and
20 both were unanimous verdicts, very unanimous in my
21 favor.

22 Q For the Defense?

23 A Yes.

24 Q So the one dismissed where you were a nominal party,
25 two, the trial, unanimous defense verdicts and one

1 settled --

2 A Begrudgingly.

3 Q -- insured by P.I.E. without your consent?

4 A Correct.

5 Q Thank you, Doctor.

6 Since your report of February, 2000, I know
7 you've read some additional deposition transcripts.

8 Did you review any additional literature prior
9 to your testimony today?

10 A The answer is yes, but just in the mode of waiting
11 for surgery cases to start and sitting in the
12 library.

13 Q What did you read; do you recall?

14 A I would just come through a number of journals
15 waiting for a surgery to start and came across some
16 articles that may or may not have some basis for
17 some of the issues in this case.

18 Q That's what I meant. Did you conduct any real
19 research in order to prepare for today's testimony?

20 A As I indicated, it was not research in the sense of
21 looking for specific issues in this case, but just
22 in the course of reading to kill some time, I came
23 across some articles.

24 Q I have done that myself on occasion. I read about
25 bankruptcy cases every now and then and it has

1 nothing to do with my practice.

2 Now let me talk a little bit about
3 Dr. Cooperman and his -- first his report, but I
4 suppose primarily his testimony.

5 Have you had the opportunity to thoroughly go
6 over his testimony?

7 A Yes.

8 Q And I want to talk about the criticisms you have of
9 Dr. Cooperman's findings and conclusions and
10 opinions that he's going to render in this case
11 which Ms. Loesel was able to elicit from him,
12 testimony.

13 A I'm sorry, could you repeat that?

14 MR. HENRETTA: Did the Court Reporter get
15 that long question?

16 THE NOTARY: Yes.

17 By Mr. Henretta:

18 Q I guess I was focusing on your reading of
19 Dr. Cooperman's testimony, and my question is, the
20 criticisms you have of his findings and conclusions
21 and of his opinions that he is going to give in this
22 case.

23 A You're asking a very broad question that I find hard
24 to answer.

25 Do you have some specifics or some issues --

1 Q Do you have any criticisms of his findings?

2 A Well, again, you're asking too broad a question. I
3 didn't memorize his entire deposition.

4 Q So nothing stands out that you can recall?

5 A That's not what I said.

6 Do you want me to read back my answer?

7 Q I heard you. What about informed consent opinions,
8 do you have an opinion on that?

9 A Are there any aspects of that informed opinion
10 you're asking me?

11 Q He said the informed consent was improper.

12 What did you think?

13 A I disagree with that.

14 Q Then tell me why.

15 A It was an appropriate informed consent.

16 Q Why?

17 A Because in my Expert opinion it was appropriate.

18 Q It's appropriate because it's appropriate. That
19 sounds like tautology.

20 Why is it appropriate?

21 A Because it was appropriately written.

22 Q Well, in what respect?

23 A In respect that I did not see anything that was
24 inappropriate.

25 Q Okay. All right. Fair enough.

1 I guess that's the same as my earlier comment
2 which is not a question.

3 How about his opinions on standard of care,
4 did you go over those? There's two broad areas in
5 this case.

6 A Your question states a word named broad and it's so
7 broad that I can't give you a specific answer.

8 Do you have a page you want to cite or a
9 specific question --

10 Q I guess maybe you didn't read his deposition
11 testimony.

12 MS. LOESEL: Objection.

13 By Mr. Henretta:

14 Q You don't have any criticisms -- you don't know
15 whether or not you have criticisms of what
16 Dr. Cooperman said?

17 Did you take notes when you read that
18 deposition testimony?

19 A Actually I did.

20 Q Do you have those handy?

21 I need to run to the men's room, so if you
22 could pull that out and we'll do it that way,
23 Doctor?

24 A Sure.

25 Q Fair enough?

1 A Fair enough.

2 (Recess taken.)

3 - - -

4 By Mr. Henretta:

5 Q You took some notes on this, Doctor?

6 A Yes.

7 Q How many pages is that do you have?

8 A It's just one citation on the front page.

9 MR. HENRETTA: I wonder if we could mark
10 that as an Exhibit, Stephanie.

11 A To save you the trouble, it just says the patient's
12 weight is 160 to 170 pounds.

13 By Mr. Henretta:

14 Q That's the note?

15 A That's the note.

16 Q You didn't really note any -- that note references
17 what document, though? That's the note from
18 Dr. Cooperman?

19 A Something he noted.

20 Q Dr. Cooperman?

21 A Yes.

22 Q That's the only note you took?

23 Is that on Dr. Cooperman's testimony?

24 A Yes.

25 Q No notes on his opinions?

1 A No.

2 Q How about did you underline or highlight the
3 testimony?

4 A No.

5 Q How much time did you spend looking at it; do you
6 know?

7 A I don't recall. I don't keep a clock.

8 Q Okay. It takes a while to read through it. I mean,
9 do you think you looked at it for a half hour maybe
10 or longer?

11 A I don't know.

12 Q And you took no notes on it and you have no yellow
13 highlight documentation? All of the thoughts you
14 have regarding Dr. Cooperman's testimony are in your
15 head, they're not written down anywhere?

16 A Correct.

17 Q Fair enough. Let's go with this area then we'll go
18 back to some of your conclusions.

19 Have you done any laparoscopic procedures?

20 A Yes.

21 Q And in the last five years how many?

22 A I'd probably say about 100 to 150.

23 Q And can you talk about the variety of those
24 procedures?

25 A The bulk of them would have been gallbladders,

1 appendices and just diagnostic laparoscopies.

2 Q I want you to tell me a little bit about the trocar
3 you used in those procedures, or do you use
4 different ones?

5 A We'll use some different ones depending on which
6 manufacturer gives us the best deal at the hospital.
7 We've used Marlow, US Surgical, Ethicon.

8 Q Before you select a size of trocar, what are some of
9 your considerations?

10 A Could you repeat?

11 Q Trocars comes in different sizes; don't they?

12 A Yes.

13 Q Okay. And you know Dr. Cain used a 12 millimeter
14 trocar?

15 A Yes.

16 Q Is there an election on the part of the physician as
17 to the size of the trocar?

18 A There's really only two sizes we use and both sizes
19 must be used.

20 Q What are they?

21 A The twelves and the fives.

22 Q When is the five used?

23 A I'm sorry, when?

24 Q Yes. Under what circumstances?

25 A Fives are typically used for grasping, for cutting,

1 for most any kind of manipulation, for retracting.
2 The twelve would be used more for the camera
3 insertion.

4 Q From the records that you reviewed in this case, do
5 you know whether or not Dr. Cain's trocar had a
6 shield on it?

7 A I don't know if a specific name was assigned to the
8 type of trocar.

9 Q So you don't know whether or not there was a shield?

10 A Most of them have shields.

11 Q I'm specifically asking on this one do you know
12 whether or not --

13 A Well, rather than guessing, let me turn to the op
14 note and we'll --

15 Q That's what I want you to do, please. Thank you.

16 A He just makes reference to a Veress needle insertion
17 and 12 millimeter trocar inserted through the
18 incision. There's no specification. But I can tell
19 you that virtually all of them have a plastic
20 shield.

21 Q Now he used a disposable trocar.

22 Do you use those?

23 A Yes. That's standard.

24 Q Do you know whether or not the trocar Dr. Cain used
25 had a vent on it to ascertain whether the tip of the

1 trocar was back inside the cavity, the abdominal
2 cavity?

3 A I don't know.

4 Q I want to go to your report and that's the only
5 report you've given to Weston Hurd; isn't it?

6 A Correct.

7 Q You didn't write another one?

8 A No.

9 Q Let me just look.

10 A You mean you didn't memorize it?

11 Q You said that even if the trocar remained perfectly
12 on the midline.

13 Now do you we know whether or not this trocar
14 remained on the midline from your reading of the
15 records?

16 A Based on the nature of the injury it appears that it
17 did not remain in the midline.

18 Q And then you said in your report even if it did
19 remain on the midline, injuries to the bowel,
20 bladder and vascular structures can still occur.

21 A Correct.

22 Q That's a direct quote.

23 Are you saying that penetration by the trocar
24 of the retroperitoneal in the wall or membrane is an
25 acceptable risk of this surgery?

1 A It is a known and acceptable risk.

2 Q Is there any data on that in terms of percentage of
3 occurrence that you're aware of?

4 A There is, but I don't have any specific numbers that
5 I can throw at all or cite any articles, but it's
6 been well documented.

7 Q Now you talk about -- let me see here. Did you
8 mention abdominal organs in your report?

9 Let me rephrase it, Doctor.

10 The injuries to the common iliac artery and
11 vein which I believe occurred in this case; is that
12 fair?

13 A It's the right iliac.

14 Q Right iliac, okay. And the vein behind it or
15 beneath it?

16 A It's actually a little bit beneath and behind.

17 Q Are those structures outside the abdominal cavity?

18 A Well, you know, if you're being a 100 percent
19 purist, it's in the retroperitoneum which is
20 adjacent to the abdominal cavity. But for practical
21 purposes, it's part and parcel of the abdominal
22 cavity because it's not separated by any kind of
23 distance.

24 Does that answer your question?

25 A I think so.

1 Q But? I guess -- what do you mean I'm being a
2 purist? You mean by saying those organs are not
3 within the abdominal cavity?

4 A Let me apologize. I did not mean you being a
5 purist. I'm saying in general if someone is a
6 purist, you may say that there are two compartments
7 in the abdomen, one is the intra-abdominal
8 compartment, the second is the retroperitoneal
9 compartment. But for all practical purposes, the
10 separating membrane is so thin, like millimeters,
11 that in essence you have truly one compartment which
12 is why once you enter the abdominal cavity, it's
13 very easy to enter the retroperitoneum as well.

14 Further, if you have a segment of bowel that
15 is sitting at the bottom of the abdominal cavity,
16 it's really sitting on top of the retroperitoneum,
17 if that makes any sense.

18 Q Is that present in this case what you just said?

19 A Yes. It's present in every case. That's normal
20 anatomy.

21 Q So I guess another question is, and I hope it's not
22 the same question, is the transversing the right
23 iliac artery and piercing the underlying vein is
24 also -- or is an acceptable risk in this procedure?

25 A It is a known and acceptable risk.

1 Q Let me jump ahead.

2 How was that communicated to the patient in
3 this case? Twice you said known acceptable risk,
4 but how did Dr. Cain, in your opinion, translate
5 that known acceptable risk to his patient?

6 A I wasn't there at the time. I can't comment on
7 that.

8 Q So all we have is the consent form?

9 A Correct.

10 Q So your reading of the consent form, I guess, would
11 be the only thing you'd have, unless you had an
12 independent conversation with Dr. Cain, and I don't
13 expect you talked to him, did you?

14 A No.

15 Q And I know you didn't talk to Sandra Shonk. There
16 are two versions of what happened in that room as to
17 the consent form, and the doctor said "I did what I
18 was supposed to do," and the patient said, "No, he
19 didn't."

20 I just want to know from your reading of the
21 consent form what conclusions have you drawn?

22 A With regards to what?

23 Q Well, whether or not there was an appropriate
24 consent.

25 A It's a very appropriate consent.

1 Q Why do you say "very appropriate consent"?

2 A Because it does everything that it should do.

3 Q All right. And I take it then you disagree that the
4 doctor had, along with informing his patient who
5 comes in for a tubal ligation, which I guess in a
6 perfect world would have one small opening, and she
7 comes out with a very long scar from the sternum to
8 the pubis area, that he did not have to -- or he
9 should not have or did not have a duty to inform her
10 that a full laparotomy may result from this
11 procedure that he's going to undergo?

12 A Absolutely.

13 Q Well, what do you mean absolutely? Without
14 question?

15 A Without question, absolutely.

16 Q Absolutely that he should have told her about a
17 laparotomy or that he didn't have to?

18 A No, that's just a different approach what he
19 discussed on the consent form --

20 Q Can you find where he talked that a laparotomy may
21 result from maybe a failed procedure?

22 A I never said that it was discussed.

23 Q But you don't think he had a duty to tell her that a
24 laparotomy might occur?

25 A There's a statement that basically says, A, that

1 there may be injuries to the surrounding structures.
2 Additionally it says if there's an unexpected
3 condition during the procedure, that the doctor has
4 the right to proceed with whatever other means to
5 repair that or fix it as he sees fit.

6 Q And you believe that satisfies the informed consent
7 issue?

8 A It has for me for 23 years.

9 Q What do you mean it has for you? How do you know it
10 has?

11 A I've not been sued on any inform consent issues.

12 Q The trocar in this case went into the abdominal
13 cavity and essentially through the peritoneum; is
14 that right?

15 A Yes.

16 Q Do you have any sense of the distance from the point
17 of entry to the deepest injury that you noted on the
18 record? Do you know what I mean by that?

19 A I don't think your question makes sense, with all
20 due respect.

21 Q Okay. How far is it from the point of entry on this
22 woman, if you can tell from your reading, to the
23 organs that were damaged in inches or millimeters?

24 A That's an inappropriate question because once the
25 belly is blown up, that distance is magnified

1 tremendously.

2 Q I think she was insufflated with four plus liters.

3 Do you have any idea what that distance would
4 be?

5 A No. It would be different for every patient.

6 Q Once there's proper I guess insufflation, and I
7 think there was enough CO2 in order to properly
8 insufflate her, are we talking one inch, two inches,
9 three inches? Do you have any idea?

10 A It would be different for every patient.

11 Q What would be some of the factors that would make it
12 different?

13 A Size of the patient, how much you've insufflated,
14 how much distention you get in the distensibility of
15 the abdominal wall.

16 Q I didn't hear the last one.

17 A It depends on the distensibility of the abdominal
18 wall.

19 Q What's that mean?

20 A Some patients will distend a lot more than others.

21 Q Is that from the insufflation?

22 A Yes.

23 Q Is it enough for you to make any determination on
24 that distance we talked about if he -- I think you
25 noted her weight, didn't you, 160 to 175?

1 A Correct.

2 Q How does that enter into the picture here in terms
3 of the distance? What kind of a factor is that?

4 A It has no factor in relation to the distance
5 essentially.

6 Q Would obesity?

7 A I'm sorry?

8 Q Could you repeat that? My question was would
9 obesity?

10 A Only to the degree you might need longer
11 instruments.

12 Q Did you have any sense from reading her records or
13 the testimony of Dr. Cain whether or not there was
14 any gross abnormality with respect to her organs?

15 A There was not.

16 Q Tell me about the pressure that you use when you
17 insert a trocar, if you can.

18 Maybe put it another way, Dr. Cain agrees that
19 the injuries in this case could have been caused by
20 an improper insertion of the trocar.

21 MS. LOESEL: I'm going to object to that,
22 Tom, because he said he didn't know what
23 caused the injury, but if you're asking a
24 hypothetical question --

25 MR. HENRETTA: I think he said it could

1 have, and I believe he also said that
2 excessive force -- he wasn't sure, but
3 excessive force and pressure can also cause
4 this problem.

5 MS. LOESEL: I'm going to object to that
6 again, but go ahead.

7 By Mr. Henretta:

8 Q If more force than is necessary to insert the trocar
9 and enter the abdominal cavity after insufflation is
10 done, couldn't that cause this injury, Doctor?

11 A Potentially, but bear in mind that you have to apply
12 force to overcome the force of the insufflation.

13 Q Explain that, please.

14 A Basically when you insufflate the abdomen, you're
15 blowing it up under pressure. The force you exert
16 has to overcome that pressure so it's not the same
17 for everybody. There's not an applied force that's
18 too much or too little, it's a force that's applied
19 to overcome that specific resistance.

20 Q How do you determine when you're performing a
21 procedure, at least after the insertion of the
22 Veress needle and beginning to insert the trocar,
23 how can you tell when there has been insertion --
24 and I'm going to call it the safe area, and I know
25 that's a layman's term, but the doctor I imagine

1 needs to get into this area that's been insufflated
2 to then insert a camera so he can see or she can see
3 what they need to do.

4 How do you know that you are in that -- is
5 "safe area" okay for you, Doctor?

6 A I apologize, but I'm somewhat confused.

7 Q You have a Veress needle that you insert through the
8 umbilicus and that insufflates the area, gives you
9 room to work, correct?

10 A Yes.

11 Q Or not?

12 A Yes.

13 Q Then through the same incision you insert a trocar?

14 A Correct.

15 Q When do you know or how is it -- what signals do you
16 get that tell you that the trocar is in the area
17 where you need to work? I mean, is there a popping
18 sound or anything like that that lets you know you
19 got through the right membrane?

20 A There's a little bit of a pop, there's also a feel.

21 Q Okay. What's the feel?

22 A I can't really describe it.

23 Q It's a sense you have from your experience?

24 A Yeah.

25 Q But sometimes you hear a pop?

1 What is that popping through, what membrane?

2 A I'm not really sure I'd call it a pop.

3 Q Is that the abdominal wall?

4 A No, that's the peritoneum, fascia peritoneum.

5 Q Do you think that pressure or force in this case was
6 a contributing factor to the injury that occurred?

7 A No.

8 Q No?

9 A No.

10 Q Why not? Why do you say that?

11 A Because even the most careful of hands when you're
12 not applying much pressure, you can still injure a
13 bladder, bowel, vascular structures and so on.

14 Q I'd like to ask you about the opinions that you're
15 going to give in this case.

16 Do you have some sense of what opinions you're
17 going to give? I know you need questions from
18 Counsel, but --

19 A That's a good conclusion.

20 Q What are your questions going to be with respect to
21 the standard of care?

22 A I have no questions.

23 MS. LOESEL: You mean his opinions?

24 MR. HENRETTA: Did I say questions? I
25 mean his opinions.

1 THE WITNESS: I'm sorry. You need to ask
2 a specific question. I have trouble with
3 these very broad questions.

4 By Mr. Henretta:

5 Q So all we know is -- what you're telling us is
6 Dr. Cain, after a complete review of the records,
7 did everything he was supposed to do correctly?

8 A Without a doubt.

9 Q And that he properly informed the patient of all
10 known and intended risks of this procedure?

11 A Yes.

12 Q Are there any other opinions other than those two
13 that you're going to give in this case?

14 A It depends on the questions you ask.

15 Q I'm asking, are you going to give any more opinions
16 because if that's all you're going to give, that's
17 fine with me because when we go to Court, if you
18 give more, then I think we may have a problem. But
19 if that's all you're going to give, then that's
20 fine. I want to know what opinions you're going to
21 give.

22 A Obviously if you ask me questions in different areas
23 I will have different opinions based on those
24 questions.

25 Q Give me the opinions you're going to give in this

1 case. You've told me two.

2 Are there any more?

3 A Are there any other questions you would have of
4 me --

5 Q I want to know what opinions you're going to give.

6 A Now, remember, you're supposed to let me finish my
7 answers.

8 Q If that's all you're going to give, I'm going to
9 rely upon the fact that the opinions you're going to
10 give in this case is that Dr. Cain performed the
11 surgical procedure properly and did not violate the
12 standard of care in his profession. He further
13 fully informed his patient as to the intended known
14 risks and, therefore, did not violate any standards
15 of care regarding informed consent. If that's what
16 you're going to give, fine.

17 Are there other opinions?

18 A There may be other opinions depending on the
19 questions you ask of me.

20 Q Fair enough.

21 (Recess taken.)

22 - - -

23 By Mr. Henretta:

24 Q Doctor, is the insertion of the trocar when one is
25 about to perform any one of the number of

1 laparoscopic procedures -- let me put it this way.
2 The insertion of the Veress needle to insufflate the
3 area and the insertion of the trocar, those are not
4 peculiar to an OB-GYN practice, correct?

5 A Just clarify for me what you mean by "peculiar."

6 Q They're not unique to it. I'm sorry, wrong word.

7 A No.

8 Q You've done a variety of procedures, and even when
9 you're not performing a tubal ligation, you proceed
10 essentially the same way?

11 A Correct.

12 Q And I guess I want to go back to this informed
13 consent issue again.

14 Do you see any evidence anywhere on the form
15 or out of Dr. Cain's testimony, and I don't mean the
16 hospital Medicaid form, I'm talking about
17 Dr. Cain's -- or the hospital consent form, did you
18 see any indication that Dr. Cain indicated to his
19 patient, Sandra Shonk, that a laparotomy may result
20 in his procedure?

21 A I'm reading directly from the record again. The
22 informed consent signed by the patient and Dr. Cain,
23 about two-thirds of the way down from the top it
24 says, and I quote, "If any unexpected condition
25 occurs during the operation/procedure which in my

1 doctor's opinion needs treatment in addition to or
2 different from that to which I gave consent, I will
3 allow my doctor to do, at that time, whatever he or
4 she believes is in my best interest."

5 Q Do you see the word "laparotomy" anywhere?

6 A No.

7 Q I think a clear reading of Dr. Cain's testimony will
8 indicate that he didn't use that word either.

9 A Correct.

10 Q And your opinion is that he can rely upon that one
11 paragraph you just read as covering a laparotomy?
12 In other words, that language, in your opinion,
13 would tell the patient that a laparotomy may result
14 and she's consented to it?

15 A Absolutely. It's pretty clear.

16 MR. HENRETTA: Well, Doctor, thank you for
17 your time. Thank you for the indulgences when
18 I needed to take a break.

19 MS. LOESEL: Tom, he has the right to read
20 his deposition transcript and I would say --

21 THE WITNESS: We'll read.

22 - - -

23 (Deposition concluded at 11:10 o'clock, a.m.)

24 - - -

25

C E R T I F I C A T E

STATE OF OHIO,)
) SS:
SUMMIT COUNTY.)

I, Stephanie R. Dean, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named Witness, **DAVID M. GRISCHKAN, M.D.**, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the Witness was by me reduced to Stenotypy in the presence of the Witness; afterwards transcribed by computer-aided transcription, and that the foregoing is a true and correct transcription of the testimony so given by the Witness as aforesaid.

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed my seal of office at Akron, Ohio, on this 16th day
of October, 2003.

Stephanie R. Dean, Notary Public
in and for the State of Ohio.

My commission expires August 30, 2005.

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