IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

KATHY BERNAL, Administratrix of the Estate of RENAE BERNAL,

Plaintiff,

vs.

DR. PATRICIA J. LINDHOLM, et al,

Defendants.

Case No. 88-3894

Transcript of Jury Trial.

TRANSCRIPT OF PROCEEDINGS

- - -

BEFORE THE HONORABLE J. RONALD BOWMAN

- - -

APRIL 8 - 18, 1991

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APPEARANCES:

James T. Murray
Attorney at Law
Appearing for the Plaintiff

H. William Bamman
Attorney at Law
Appearing for Defendant Dr. Lindholm

James E. Brazeau
Attorney at Law
Appearing for Defendant Community Health Services

Peter R. Casey, III
Attorney at Law
Appearing for Defendants Dr. Pham and Dr. Gfoeller

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Vicki L. Cohen, RPR, CM
Official Court Reporter

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witness.

MR. BRAZEAU: Next witness to be called is Dr. Bruce Janiak.

(Court Reporter marked Defendant Community Health Services Exhibit A for identification.)

BRUCE JANIAK

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BRAZEAU:

Q. Could you state your name?

A. Bruce Janiak.

Q. What is your profession?

A. Emergency physician.

Q. And what is your present position?

A. Director of the Emergency Department at the Toledo Hospital.

Q. All right. Handing you what has been marked as Community Health Services A, can you identify that for the record?

MR. MURRAY: May I see that?

MR. BRAZEAU: Excuse me, I'm sorry.

A. Yes. This is a copy of my curriculum vitae.

Q. (by Mr. Brazeau) Thank you, Doctor. If you don't

mind, can I hold on to it?

A. Certainly can.

Q. Thank you, Doctor. Perhaps to start this off, can you briefly describe your education including your residency and internship and so on and so forth for the jury?

A. Sure. I went to medical school at the University of Cincinnati from 1965 through 1969, then did an internship at the Cincinnati General Hospital, same campus.

Q. Try to keep your voice up.

A. Then a residency in emergency medicine also at the University of Cincinnati at Cincinnati General Hospital, that was finished in 1972, and then from '72 to '74 I was in the Navy in Pensacola, Florida at the Naval Hospital down there, and then in '74 I moved from Florida up to Toledo to become Director of the Emergency Department at Toledo Hospital.

Q. Can you tell the jury what is emergency medicine?

A. It's the newest medical specialty and it deals with the care and evaluation of patients who present and present in an unscheduled manner to hospital emergency departments to have us try to determine whether or not an acute illness or injury is significant or serious and, if it is, render appropriate initial treatment or sometimes full treatment. It also deals with the -- part of it deals with

pre-hospital care, that is, ambulance services, training of emergency medical technicians, developing training programs protocols for ambulance services such as REMSNO in the Toledo area.

Q. You mentioned it's the newest specialty. What do you mean by that?

A. Well, there is an organization of all the specialties, it's called the American Board of Medical Specialties with its representatives of all the various specialties and that group lets new people into, I guess we call it the club if you want to, in 1979 emergency medicine had petitioned that group of doctors to recognize us, that is emergency medicine, as a specialty free standing of itself and that wish was granted in 1979, so that's what I mean by the newest.

Q. Were you among one of the first members of this specialty that was recognized?

A. That's correct. It just so happened I was born at the right time and entered into this, got interested in it and trained in it and was practicing in it actually for several years before the specialty was created, but I was fortunate enough to get involved in the beginning.

Q. Now, are we talking about an organization that is

just located in Toledo, Ohio?

A. No. The headquarters for the -- there is two groups in almost every specialty and one group deals with social, economic issues dealing with the government and dealing with patient education and physician education, that's called -- usually called a college or society. The college in emergency medicine is the American College of Emergency Physicians, it's located in Dallas and represents approximately 15,000 emergency physicians in the United States.

Q. Are you a member of that organization?

A. Yes, I am a member and have served as president of that organization.

Q. What year were you president of that organization?

A. You took my CV. I think it was 1985. I think it was 1985 - '86.

Q. You holler if you need it back.

A. That's all right.

Q. All right. I should ask you this: Are you board certified in emergency medicine?

A. Yes. The first certification examination was given in 1980 and I took that examination then and passed it.

Q. Now, who develops the test that a physician that

aspires to be an emergency physician will take? Who develops that test?

A. As I mentioned a moment ago, there is two organizations for each specialty; one is that social, economic one. The other one is strictly devoted to testing and those are called the boards in emergency medicine; it's the American Board of Emergency Medicine. That organization's only job really is to develop a test, give a test, and certify physicians as being -- having a certain level of competence in any particular specialty; of course, this one we're talking about is emergency medicine. They're headquartered in Lansing, Michigan.

Q. So is this organization just limited to southeastern Michigan and northwest Ohio?

A. No. It's a national organization.

Q. And are you a member of that national organization?

A. I have passed the test and taken the test. I was also nominated to that board by some of the other organizations and are currently serving as president of the American Board.

Q. Is this a national organization?

A. Yes, it is.

Q. This is the organization that develops and administers the test that any physician that wishes to be an emergency physician has to take in terms of being recognized as board certified?

A. That is correct.

Q. Do you belong to other professional associations?

A. To the local medical association, Ohio State Medical Association, and American Medical Association.

Q. Have you published articles in your area of specialty?

A. Just a few; one that was slightly academic and some others on administrative matters.

Q. Is Defendant Community Health Services Exhibit A, does this fairly state your qualifications and the publications that we briefly discussed?

A. Yes, it does.

Q. Doctor, do you devote three-quarters of your professional time to the active clinical practice of medicine or to its instruction at an accredited university?

A. I was going to answer yes, then you said an accredited university. I do -- if I do teaching, it's at the Toledo Hospital which is not a university but it's affiliated, so I guess the answer is yes.

Q. As a matter of fact, are you a Professor of Medicine at the local medical college?

A. I think it's an Associate Professor, Clinical Associate Professor.

Q. So let me ask my question again just so we're clear.

A. Sure.

Q. Do you devote three-quarters of your professional time to the active clinical practice of medicine or to its instruction?

A. Yes, I do.

Q. Thank you. Now, Doctor, you have been identified as an expert witness in this cause. Do you know who first contacted you?

A. Seems to me somebody asked me that question before and I think because of the history of this case and went from one firm to another, that it originally was Mr. Brazeau from Robison, Curphey.

Q. Myself?

A. You first contacted me.

Q. I was going to ask you if you first --

A. Then something else happened and you could enlighten me more than I could.

Q. Dr. Janiak, you may not recall but have we worked together before?

A. Yes, we have.

Q. All right. And later on in the history of this case, you were contacted by Mr. Casey?

A. Correct.

Q. And so you have reviewed the records then at my request and later on you reviewed the records at Mr. Casey's request?

A. That's correct.

Q. And I take it you expect to be compensated for your services today?

A. I hope so.

Q. All right. And you have reviewed cases -- medical malpractice cases before?

A. Yes, I have.

Q. And you have reviewed cases for patients as well as for physicians?

A. That's absolutely right.

Q. And can you, for the benefit of the jury, tell if you know what ratio there is between your review of cases?

A. I think it's probably 80/20, that is, 80 percent of the time I would be an expert and be in favor of a

physician, and 20 percent of the time for Plaintiffs. It's pretty close to that.

Q. And you have testified in medical malpractice cases before?

A. Yes, I have.

Q. Can you tell us, if you are able to recall, what records you reviewed in this matter?

A. Well, I certainly reviewed the original emergency visit record from Fremont Memorial Hospital and Community Health Services record and then several depositions that are associated with this case, an autopsy report, and an EMS run report.

Q. Just for the sake of the record, Doctor, we'll go quickly through this. Handing you what has been marked as Plaintiff's Exhibit 9 which has already been admitted --

MR. MURRAY: May I see it? Never mind.

Q. (by Mr. Brazeau) Plaintiff's Exhibit 9 which has been previously identified as Community Health Services record, have you reviewed that document before today?

A. Yes, I have.

Q. And handing you what has been marked as Plaintiff's Exhibit 10, Mr. Murray, which has also been previously identified as the hospital records from Memorial

Hospital, you have reviewed that before today?

A. Yes, I have.

Q. And handing you what has been marked as Plaintiff's Exhibit 12C which is the autopsy and coroner's report for Renae Bernal, have you seen that before today?

A. Yes, I have.

Q. Showing you what has been identified previously as Plaintiff's Exhibit 11 which has been identified as the REMSNO report and the EMS report, have you seen that report before today?

A. Yes, that's right.

Q. In addition, what has been marked as Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 as chest x-rays of Renae Bernal taken on December 11th, 1997, we'll look at these a little more closely later on, have you seen these X-rays before today?

A. Yes, sir.

Q. In addition to these records, you have reviewed various depositions taken in this matter as well?

A. Correct.

Q. All right. Now, Doctor, do emergency physicians see patients such as Renae Bernal who comes in with not from an automobile accident but comes in with some sort of disease

going on?

A. Yes, very often.

Q. Could you explain to the jury how that happens in the emergency room, or why it happens?

A. Well, emergency departments are available -- I mean, they're health care that everyone knows it's open twenty-four hours a day and so patients with any unexpected problem or issue that they're concerned about with their health, whether it be physical illness or fever or an injury or even severe emotional stress will frequently come into emergency departments for evaluation, so it's very common to see people like this.

Q. I want to just briefly hand you the records from Memorial Hospital.

A. I think you handed them to me.

Q. You have them up there. Okay. Please feel free to refer to it if you need to.

A. All right.

Q. Okay. Just briefly describe what was going on that brought Renae Bernal to the emergency department at Memorial Hospital on December 7th, 1987?

A. Certainly. The patient presented to the emergency department because of some pain that was sort of in her

abdomen and in her left chest at the same time. Apparently she had not gone to school that day because of pain and all that is recorded. After the nursing evaluation and recording of her vital signs which includes blood pressure and pulse and respirations, the patient was evaluated by the emergency physician. He asked questions and recorded the history, did a physical examination, ordered two laboratory tests, made a diagnosis of acute viral syndrome.

Q. Doctor, who was the emergency physician that conducted that examination?

A. It's my understanding it was Dr. Pham, P-h-a-m.

Q. Based upon your review of that chart, do you have an opinion to a reasonable medical certainty whether the care provided to Renae Bernal on December 7, 1987 at Memorial Hospital was within accepted standards of care?

A. Yes, I do.

Q. And what is that opinion?

A. That this evaluation was within the accepted standard of medical care.

Q. Are you able to express an opinion to a reasonable medical certainty what was the problem with Renae Bernal on December 7, 1987 based on all the evidence?

A. Are you asking me a retrospective question or

prospective?

Q. Prospective question.

A. One could say that since patients frequently present with this kind of problem, the higher probability is that it's more than half of them, probably 85 - 90 percent of them will have merely a viral syndrome, that those cause these kind of discomforts.

Q. Now, retrospectively or prospectively, do you have an opinion to a reasonable medical certainty whether or not Renae Bernal was experiencing pneumonia on December 7th, 1987?

A. Based on what we know later, I would say that there was a -- much more likely that some of these symptoms were because of a starting pneumonia in this patient.

Q. All right. If it's within reach, I would like to then bring you up to December 11th, 1987 when Renae Bernal presented herself at Community Health Services. Can you reach those records and, if you could, maybe I'll assist you finding Dr. Lindholm's, can you just, for the sake of the jury and the jury's heard some of it already, so briefness is desired, I guess at this point can you describe for the jury what was going on on December 11th, 1987 with Renae Bernal when she came to Community Health Services?

A. Certainly. At this time, the patient is now being

followed up from the initial examination. Now she's complaining of coughing and her predominant pain area is in her shoulder and the left side of her chest and upper back. Her vital signs are repeated. She does not have a fever but the physical examination changed somewhat. The doctor, by the way, did a history and physical examination, found out that she was having this pain and examined her lungs and found that the sounds of her breathing on the left side of her chest were much decreased compared to the right and there was a change in the character of the sounds. There are certain tests you do to determine whether the sounds you hear with a stethoscope are quote normal or not. Dr. Lindholm felt there was a change there so her concern at that time just at that point, as she wrote down, was probable left-sided pneumonitis, which is another word for pneumonia, with possible pleural effusion and she wrote the word "effusion" because of the -- I'm sure because of the decreased sounds.

MR. MURRAY: Your Honor, I'm going to object to what Dr. Lindholm -- him testifying as to what Dr. Lindholm thought, what she meant by that. We have Dr. Lindholm to tell us.

MR. BRAZEAU: Judge, I think a physician that's certainly capable of explaining to the jury

what the medical community commonly understands the words such as effusion to mean.

THE COURT: Objection will be overruled.

Q. (by Mr. Brazeau) Go ahead, Doctor.

A. At any rate, she prescribed an antibiotic for the patient and sent her to the hospital for a chest x-ray, then she gave her instructions to follow up again.

Q. Can we go back a moment to the history?

A. Correct.

Q. Your position at Toledo Hospital is what?

A. Director of the Emergency Department.

Q. And can you describe for the jury what you do as Director of the Emergency Department?

A. Well, I see patients but also I'm responsible for the overall operation of the department which includes almost everything one would do in a modern emergency department. You have to be sure that there are not only physicians available to treat patients but that physicians are credentialed appropriately, that they deliver the correct type of care. That means you do chart analysis, quality assurance we call it. You deal with nursing problems. You prepare budgets. You relate to administration when you need to change staffing or change equipment.

Q. And as Director of the Emergency Services are you involved in the peer review of the work performed by other emergency physicians in the department?

A. Every day.

Q. And can you tell the ladies and gentlemen of the jury what peer review is?

A. Well, it's an analysis by someone who does the same thing that you do. So peer review means doctors reviewing doctors and the way we do that is, well, there are many ways. One way is if a patient comes in and has a complaint, the complaint comes to me and I review what one of my doctors or perhaps even what I have done to make some determination as to whether it seems reasonable in light of the patient's complaint, but we also do it on a regular routine basis by analyzing charts of colleagues. So each month a physician will get ten or fifteen charts of another physician and look at them for appropriateness and quality.

Q. And when you reviewed the chart from Community Health Services at my request, was that similar to what you do on a daily basis at Toledo Hospital as Director of Emergency Services?

A. Yes, it was.

Q. I want to direct your attention specifically to

the history that was taken by Dr. Lindholm and provide to me your opinion, if you have one, to a reasonable medical certainty whether that history that was taken by Dr. Lindholm was a history that you believe was taken within the accepted standard of medical care. First do you have an opinion?

A. Yes, I do.

Q. What is your opinion?

A. That it certainly was within the standards of care expected.

Q. Now, Dr. Lindholm noted in her history that there was a complaint of pain, I believe you mentioned shoulder or the chest. Is pain in the shoulder or chest an unusual symptom for an individual who has pneumonia?

A. No. It's quite common.

Q. And why is that? Explain that to the jury.

A. Because the inside of the lung really doesn't have any nerves. so you can have a pneumonia right in the middle of your chest and you probably wouldn't have any pain, but most pneumonias don't occur in the middle, they occur on the edges of the lungs and the edges of the lungs are covered by a glistening membrane, think of it as a very slippery hunk of balloon that has fluid in it but that hunk of balloon is loaded with nerves so any irritation of that area causes

severe pain whenever it moves and it moves when you breathe. So when you take a breath and those irritated nerves are stimulated more, you feel pain. The most common complaint that we all have is called pleurisy, that's pain when you take a deep breath.

Q. Doctor, I want to draw to your attention to Dr. Lindholm's note that, "the patient had vomited a few times yesterday but not today," today being December 11, 1987. Is that significant to the physician in considering what we are going to do for this patient who has pneumonia?

A. Certainly. When you -- the idea of vomiting itself is very common with many illnesses. So just the presence or absence of vomiting is not a major concern. It's a concern but not a major one. But the fact when you want to give a patient oral medicines, if they continue to vomit, you take a pill and it comes back up, that's going to help so very much, so the idea that the vomiting has stopped and the patient can keep medicines down is an important one or else you can't treat the patient at home.

Q. Is the presence of fevers -- waxing and waning of fevers in an individual a common or uncommon finding in an individual who has pneumonia?

A. It would be extremely rare to have a stable

temperature in any patient. Patient temperature is almost, by definition, goes up and down as the day progresses. Actually our normal body temperature does the same thing.

Q. Now, I want to -- Dr. Lindholm, after she took a history, conducted an examination of the patient which is what you were discussing, she describes Renae Bernal as an obese fifteen-year-old who appears moderately ill and is not coughing during the exam. What does that mean to you when you are reviewing the chart?

A. All physicians use very general terms in describing their overall impression of how sick somebody is, so we might say a patient looks to be in no distress which means they look like all of us do right now. A patient looks slightly ill which is pretty much the way we look right now. Moderately ill may be a patient who is uncomfortable, you are not sure exactly what it is, whether it's their skin color is a little bit off or they just complain that they're uncomfortable. Severely ill would be someone who has got some area that's really giving them a terrible problem. And then the last term would be moribund which means this patient is going to be dead in just a few minutes. So it's a very general way of describing a patient. That will be my first impression of what she said. Not coughing. Merely a way of

saying that this patient does not appear to have significant respiratory distress and nothing is coming up when she coughs and it's really also a very general statement.

Q. You were, when I interrupted you -- to go back and talk about the history -- you were talking about the findings of Dr. Lindholm's listening to the chest with the stethoscope and I'm wondering can you elaborate on the findings of Dr. Lindholm and what those findings mean?

A. Well, she pointed out that the exam was, quote, very remarkable, unquote, so that certainly indicates that it impressed her as being unusual or abnormal. Then she said why. She said because the sounds on one side were decreased and that the patient had what's called egophany which is merely a way of saying that the sounds are heard differently, it's a little bit complicated, you have to read three pages of textbook to understand egophany, it's sound. When the patient makes noises when he is listening to the stethoscope it doesn't sound the way it normally does and it certainly didn't sound the same on both sides. Rales. She says no rales or rhonchi. Both of those noises, rales and rhonchi, are associated also with pneumonia. And the last thing she said was there was no tenderness in the chest wall because sometimes all of these symptoms can come from something that

you didn't even think about like a fractured rib or an irritation of a nerve on the wall of the chest.

Q. Do you have an opinion to a reasonable medical certainty whether the examination that was conducted by Dr. Lindholm was done within accepted standard of care based upon the history that was presented to her?

A. Yes, I do.

Q. And what is that opinion?

A. That it was certainly within the accepted standards of -- as a matter of fact, I thought it was an excellent exam.

Q. Okay, Doctor, now I want to go on and just once again, the jury's heard this before, but for the sake of perspective just briefly discuss the treatment that was prescribed by Dr. Lindholm.

A. First treatment was an antibiotic called Minocin. It turns out that in young people, I'm not talking about infants, I'm talking about somewhere in the teens to somewhere in the forties, in young people there is a particular kind of pneumonia which is more common and unless you can take the bacteria out of the lung and instantly know what they are, which is not a possible thing to do, we assume that most patients in this age group have a pneumonia that is treatable

with a drug like Minocin which happens to be a tetracycline drug. That was the first treatment she did. She gave her something for pain and fever, that is, Tylenol, and she also sent her to the hospital for a chest x-ray and culture of the sputum because if you cough up some of this stuff that's infecting you, sometimes you can make a diagnosis as to what -- exactly what it is that is causing the infection.

Q. Doctor, do you have an opinion to a reasonable medical certainty whether the treatment that was prescribed by Dr. Lindholm, based upon her diagnosis, was within the accepted standard of medical care?

A. Yes, I do.

Q. And what is your opinion?

A. That it was in the standard.

Q. All right. There has been testimony in this case that Dr. Lindholm departed from accepted standard of medical care in not admitting Renae Bernal to the hospital. Do you have an opinion -- what is your opinion regarding whether or not Dr. Lindholm needed to admit or should have admitted Dr. Lindholm to the hospital?

A. My opinion based on --

Q. I better rephrase that. I think I misstated that. I'll rephrase it.

MR. MURRAY: I would ask that he be allowed to answer.

Q. (by Mr. Brazeau) Doctor, do you have an opinion whether or not Dr. Lindholm should have admitted Renae Bernal to the hospital?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that she should have been treated as an outpatient, that is, not admitted.

Q. Can you explain to the jury why you hold that opinion?

A. Sure. First of all, the treatment for this kind of pneumonia is with oral medications. And since you are going to treat the patient with oral medicines, there is no reason to put a person in the hospital, to have to be handed a bill, you can be treated as an outpatient. The other way to look at this is when do you admit someone to the hospital that you think has pneumonia and the answer is if the patient is very, very old and they have pneumonia, you would strongly consider admitting them. If the patient is very, very young, an infant with pneumonia, put them in the hospital. If the patient has some other serious disease underlying like diabetes, AIDS, some type of cancer, diseases that will I

guess reduce their ability to help -- for their own body to help fight the infection, they get admitted. The last category of patient that you admit to the hospital for pneumonia is a patient that is in severe respiratory distress, that is, it is clear from looking at them that their pneumonia has infected such a great portion of their lungs that they're going to need some assistance in breathing. Since this patient didn't fit any of those categories, there was no indication to admit her to the hospital.

Q. Doctor, feel free to take a look at those x-rays and if I don't have them up there correctly, put them in whatever fashion you need to. Let me first ask you a foundation question. Do emergency physicians interpret chest x-rays?

A. Yes, they do.

Q. Is it done frequently, infrequently, rarely, what -- with what frequency?

A. Very, very frequently. Every day, all day.

Q. Do you believe that you are competent to interpret a chest x-ray?

A. Yes, I do.

Q. Could you please take a look at these chest x-rays which have already been admitted into evidence and are these

the chest x-rays that were taken on December 11th, 1987 of Renae Bernal and tell the jury what you see?

A. Well, two things. First of all, there are two x-rays, not one x-ray, and one is taken with an x-ray beam going through the chest. Actually this one is going from the back to the front and you put your chest against it like that so that the heart is closest to the x-ray plate, x-ray film. Then the other x-ray is taken so the x-ray beam goes sideways. It helps to get two views just to get some idea, make it more three-dimensional. As we look at it, it's a very striking x-ray because it's abnormal. The white area over here shouldn't be there. It should be much more identical to this side which looks just fine. So this side, this is the way the patient is facing, this is the right lung, looks real good. The left lung, all this whiteness down here in a portion of the lung called the left lower lobe, not very technical, on the other view which is called the lateral view, it is slightly hazy in the back but it is not very impressive. This patient was heavy, as I understand it, so I would not look at this film and be remarkably impressed by any positive findings on this film but certainly this is an abnormal finding here, and as I have said before, when I see a patient like this my own personal approach, which is my own judgment, I say, well.

maybe there could be an effusion which is just loose fluid inside the chest and there is another x-ray to take with the patient lying flat which makes -- if you can imagine lying flat on your side, the fluid will flow in this direction up and down, you get a better idea of whether it is fluid. So, I -- some physicians would look at this and have a real high degree of confidence that that's fluid and I think that's fine. I would look at it and I would say one more x-ray to prove it to myself and I think that's fine too. So I would say there might be some fluid and there might be some pneumonia in the left lower lobe.

Q. Doctor, taking into consideration the chest x-rays of Renae Bernal which were taken on December 11, 1987 immediately after Dr. Lindholm had seen the patient at Community Health Services, do you have an opinion to a reasonable medical certainty whether Renae Bernal should have been admitted to Memorial Hospital?

A. Yes, I do.

Q. And what is your opinion?

A. She should not have been admitted based on this finding also.

Q. Could you explain why you have that opinion?

A. It's the same reasoning that I went through before

about what patients with pneumonia -- this documents that the patient has pneumonia and supports the physical findings of Dr. Lindholm in the clinic. But with this amount of pneumonia in this patient with those kind findings, patients are treated at home with oral medicine.

Q. All right. Doctor, to summarize, do you have an opinion to a reasonable medical certainty whether or not Dr. Lindholm deviated in any respect from accepted standards of medical care in her care and treatment of Renae Bernal?

A. Yes, I do.

Q. What is your opinion?

A. That she did not deviate.

Q. All right. Now, Doctor, we know retrospectively that Renae Bernal died the following day on December 12, 1987. First of all, do you have an opinion to a reasonable medical certainty as to the cause of Renae Bernal's death?

A. No.

MR. MURRAY: Objection, your Honor.

Withdrawn.

Q. (by Mr. Brazeau) Do you have an opinion?

A. No. I do not have an opinion.

Q. All right. Now, the clinical course of the patient as she was on December 11, 1987 when seen by Dr.

Lindholm and then her death the following day on December 12, 1987 would you consider that consistent with her clinical course on December 11th in comparison to the fact that she died on the following day, December 12th, 1987?

MR. MURRAY: Your Honor, that's so leading.

THE COURT: Rephrase the question.

Q. (by Mr. Brazeau) Doctor -- I will attempt to. Doctor, my question to you is taking into account the condition of the patient on December 11, 1987 when seen by Dr. Lindholm and the fact that the patient died the following day on December 12, 1987, do you believe that the clinical condition of the patient on December 11 is consistent or inconsistent with the fact that she died the following day? First do you have such an opinion to a reasonable medical certainty?

A. Yes, I do.

Q. What is that opinion?

A. That the clinical condition of the patient when seen by Dr. Lindholm was not consistent with a death the following day.

Q. Can you explain to the jury why?

A. Well, pneumonia is -- pneumonias just don't progress that fast and this patient had a condition of being

uncomfortable with pneumonia. One would expect that if you are going to die from pneumonia -- people, by the way, still do, especially the elderly, you have a relatively slow, downhill course. So on one day you are having pain and fever and the next day you are having pain and fever and shortness of breath, then your shortness of breath, despite treatment, gets worse on the third day or maybe the fourth day and then pretty soon you can't move without feeling severe shortness of breath and that's an indication that the lungs are having very poor function. Finally, the color starts to change, you become blue with any exertion and your breathing becomes extremely rapid and that will go on for another day. And, finally, you will probably die from your pneumonia. But to have a patient progress from being what's described as moderately ill to death in twenty-four hours is not consistent with death from pneumonia.

Q. Thank you, Doctor.

THE COURT: Mr. Murray?

MR. MURRAY: Your Honor, may I suggest in view of the technical nature of the --

THE COURT: No, because the doctor has an appointment. Then we're going to continue.

CROSS EXAMINATION BY MR. MURRAY:

Q. Good afternoon, Dr. Janiak. I'm Jim Murray. I met you in your deposition a short while ago?

A. Yes, sir.

Q. Doctor, did you bring your file file with you?

A. No, I did not.

Q. Do you normally bring your file with you when, Doctor, when you do your medical, legal consultations for an attorney or another doctor?

A. No, I do not.

Q. In any event, would you agree with me that as part of your evaluation in this case you reviewed the deposition of Dr. Patricia Lindholm?

A. Yes. I will agree with you.

Q. And would you agree with me that you reviewed the coroner's records including the pathology reports included in the records?

A. Yes. I think I've already said that.

Q. Now, am I correct, Doctor, that today you are speaking then for the Community Health Services clinic?

A. Yes. I think that is correct.

Q. You are not speaking for anybody else today?

A. No. I don't believe so.

Q. Okay. Is it not true, Doctor, that in the period

of Renae's death and today you have had occasions to be approached for consultation by the attorneys for Dr. Pham?

A. Yes. I believe that's correct

MR. CASEY: I think there is only one attorney for Dr. Pham and that was me.

THE COURT: I understand.

Q. (by Mr. Murray) Are you not also at least considering, in some small way, the consultation with respect to Dr. Gfoeller?

A. You are -- I am going to have to ask you is Dr. Gfoeller the radiologist? I just don't remember.

Q. Yes. That's correct.

A. I don't think that I -- maybe I just don't remember, but I don't remember talking with an attorney or discussing testimony to support Dr. Gfoeller or not.

Q. May I direct your attention to the deposition we took on March 18th, 1991, you do remember that?

A. Yes, I do.

Q. Do you remember --

A. I remember taking the deposition. I certainly don't remember the whole content.

Q. I would like to ask you what went on there.

MR. CASEY: If we could have the page.

MR. MURRAY: Page 7.

Q. (by Mr. Murray) Did I not ask you the question, my question was, I believe, "Doctor, you, of course, understand you've been retained as a consultant on behalf of both, as I understand it, both Dr. Gfoeller and Dr. Pham," and do you recall Mr. Casey saying --

MR. CASEY: Wait a minute, your Honor. Wait a minute. What do I have to do with this if I make an objection or a statement during a deposition?

MR. MURRAY: Because of what you said.

MR. CASEY: I'm not a witness. I'm a lawyer here, your Honor.

THE COURT: I understand.

MR. CASEY: This is inappropriate.

THE COURT: What's the foundation? What are you trying to determine?

MR. MURRAY: Your Honor, the record will reflect that there was -- Mr. Casey made the statement that he was --

MR. CASEY: Whoa, whoa. This is what I object to, your Honor.

THE COURT: Objection will be sustained. Go

on. This doctor has been called in the case on behalf of Defendant Community Services.

MR. MURRAY: Your Honor, can I approach the bench?

(Discussion held at the bench off the record.)

Q. (by Mr. Murray) Now, Doctor, in any event, the original undertaking in this case by you was to represent Dr. Pham, was it not?

A. Yes, sir.

Q. And, of course, Dr. Pham is no longer -- are you aware of the fact that Dr. Pham is no longer a party to this suit?

A. I understand that decision was made earlier but I don't know when.

Q. But your decision to testify on behalf of Community Health Service Center was -- that was unrelated to Dr. Pham no longer being a party here?

A. When I got here, I understand that Dr. Pham was no longer a party and I was asked, having reviewed the case, be interested and be available to testify on behalf of Community Health Services and I said fine.

Q. You just found that out today?

A. This morning.

Q. This morning you found that out, that you were going to testify on behalf of Community Health Services?

A. No. I found out that Dr. Pham was not part of the case. I thought that's what you asked.

Q. Let me try to rephrase it. Yesterday afternoon who did you think you were coming down here to testify for?

A. I would say I was still coming down for Dr. Pham yesterday afternoon.

Q. Okay. So between yesterday and today you made the switch from testifying on behalf of Dr. Pham to testifying for the Community Health Center?

MR. BRAZEAU: Your Honor, I'm going to object. I'm at a complete loss to understand the relevance of this.

THE COURT: It's cross examination but that's about as far as we're going to go. I'm going to allow the question and answer to stand, the answer he has given, but that's as far as we're going to go, Mr. Murray, as far as your cross examination is concerned.

Q. (by Mr. Murray) Did you do any further review, Dr. Janiak, between the time -- withdraw that. When did you

find out that you were going to be an expert for the Community Health Clinic as opposed to Dr. Pham?

A. That was decided this morning.

Q. Just this morning?

A. Yes, sir.

Q. So we can take it that you did no further review of anything or any records as part of making that decision?

A. That is correct.

Q. But, in any event, going back to when you were acting as a consultant for Dr. Pham, as part of that consultation you did read Dr. Lindholm's deposition?

A. Certainly. All of these things were so interrelated you couldn't separate them.

Q. The answer to the question was yes?

A. The answer was certainly.

Q. Now, Doctor, you would agree now that you are acting as consultant for the Community Health Clinic, you would agree with me, would you not, that indirectly you are now testifying as a consultant on behalf of Dr. Lindholm as well?

MR. BAMMAN: Objection, your Honor. I don't think that's a proper conclusion that can be brought out before the jury.

THE COURT: Be sustained.

Q. (by Mr. Murray) Dr. Janiak, would you agree with me that to the extent that Dr. Lindholm, by virtue of being an employee --

MR. BRAZEAU: I'm going to object before he finishes his question because I know where it's going.

THE COURT: Come on up.

(The following proceedings were had at the bench out of the hearing of the jury:)

THE COURT: The basis for the objection?

MR. BRAZEAU: The basis for the objection is you are going to ask him whether or not Community Health Services is responsible for Dr. Lindholm.

MR. MURRAY: I bring to the Court's attention, before you rule, pages 80 and 81 of the deposition which I can put into the record entirely if you want. He's got his own corporation, he's got his own employees, I asked him at some length whether he understood the principal-agency relationship and the employer-employee relationship, he did.

MR. CASEY: The fact that the witness may

understand it does not make it competent, Mr. Murray.

MR. MURRAY: His knowledge of the relationship that he is testifying on behalf of Community Health Center and he's got -- you got to realize the significance of this, judge. He has reviewed Pat Lindholm's records. The relevance of this is that he was just testifying that he was formerly a consultant for Dr. Pham, he's now a consultant for Community Health Services which Community Health Services, as Mr. Brazeau has argued time and time again, is only liable vicariously and all I want to establish is that this is a witness who understands that vicarious liability. I mean, not to get into that is just -- he's got his own corporation.

THE COURT: He can't testify in those things. I'm going to instruct on respondeat superior.

MR. MURRAY: The fact that his understanding of it, what is his understanding, that's -- that's all I want to ask.

THE COURT: It's improper. Court's going to

sustain the objection.

MR. MURRAY: I will proffer pages 79, 80, and 81 of the deposition of Dr. Janiak taken March 18, '91 to show what would have -- what would have transpired if I had been allowed to inquire into that subject.

(The proceedings returned to open court as follows:)

THE COURT: Go on, Mr. Murray.

Q. (by Mr. Murray) Doctor, you understood before undertaking this job to act as a consultant suddenly this morning for Community Health Clinic you understood, did you not, that the relationship between the Community Health Service and Dr. Lindholm in this case was that of an employer and an employee?

A. Yes.

Q. You understood that the Community Health Service Clinic was the employer and she was the employee?

A. Yes, sir.

Q. And you understood that, of course, Doctor, because you have a corporation?

MR. BRAZEAU: Objection.

THE COURT: Sustained. Mr. Murray, I told

you about that. Jury will disregard that last statement.

Q. (by Mr. Murray) Was Dr. Pham at any time -- Dr. Gfoeller -- excuse me -- was Dr. Pham at any time between the death of Renae Bernal and as you sit here today, was he ever an employee of any business in which you had an interest?

A. Between what times was that?

Q. Between the death of Renae Bernal and today, was Dr. Pham an employee of any business enterprise of yours?

A. Yes.

Q. Okay. And what's the name of that business enterprise?

A. Professional Emergency Services Incorporated.

Q. Okay. And you are -- still have an interest in that corporation?

A. I do.

Q. And, in fact, Doctor, am I correct that you are the sole shareholder?

A. You are correct.

Q. And how many employees does that corporation of yours have?

A. It varies, but it's approximately thirteen physicians full time and a like number part time.

Q. And these would be emergency room physicians?

A. Most of them.

Q. You are in the business of supplying emergency room physicians to hospitals in Toledo and the general area?

A. No, that's not correct. I have a contract to staff the emergency department at the Toledo Hospital as of December 16th of last year, 1990. I also have a contract to staff the emergency department at Fremont Memorial Hospital.

Q. At some point in time while you were acting as consultant for Dr. Pham, Dr. Pham was a doctor who was actually receiving wages from your corporation?

A. Yes. I believe that's right.

Q. Okay. Would you tell me a little bit about the type of medical support facilities that your corporation gives to these employees?

MR. CASEY: Objection, your Honor. I can see a certain amount of relevancy in this but Dr. Pham isn't even a defendant anymore.

MR. MURRAY: I sat here and listened for probably twenty minutes while he talked about his qualifications, judge. I think I'm entitled on cross examination maybe to touch upon it slightly myself.

MR. CASEY: Except for the fact that it doesn't have anything to do with his qualifications and I don't know the purpose or what it's going after.

THE COURT: I'll allow this last question in that particular area and vein, Mr. Murray, to stand. Go on, Mr. Murray.

Q. (by Mr. Murray) Does this corporate facility provide any hands-on benefit to those people out in the emergency room, any type of support in carrying on their job?

MR. CASEY: Objection.

THE COURT: Be sustained as phrased.

Q. (by Mr. Murray) Am I correct that the purpose of this corporation, Doctor, is not to lend any type of hands-on support to these employees that are doing emergency room services as employees of your corporation?

MR. CASEY: Your Honor, excuse me, but I fail to see what Dr. Janiak's corporation and what his employees do have anything at all to do either with his qualifications or the facts of this case.

THE COURT: What is the relevancy to that?

MR. MURRAY: One, off the top of my head, I imagine would be 601D.

MR. CASEY: Well, that's certainly an issue that this Court has considered, has ruled on. He raised it again this morning, the Court ruled again this morning. Your Honor, I would suggest that it's inappropriate at this point, ask the Court to have Mr. Murray move into a new area.

THE COURT: I'll allow you to continue, Mr. Murray.

Q. (by Mr. Murray) I take it that the operation of this corporation involved at least some of your time, Dr. Janiak?

A. Yes, it does.

Q. It does not involve any time, however, in terms of giving any hands-on medical care or assistance to the employee emergency room physicians that work for your corporation?

A. I guess I'm not sure what you are asking.

Q. I'm asking in the way do you give them -- is the design of this corporation intended to give them assistance with a specific medical problem that they might confront in an emergency room on a given day?

MR. CASEY: Objection, your Honor. This is nonsensical.

(The following proceedings were had at the

bench out of the hearing of the jury:)

THE COURT: Mr. Murray, are you talking about active clinical practice as defined in 601D?

MR. MURRAY: I'm trying to quantify --

THE COURT: I know what you are trying to do but the verbiage is active clinical practice, that's the requirement of 601D and the appropriate statute. Now is that what you are trying to establish?

MR. MURRAY: That would be one, your Honor.

MR. BRAZEAU: If I could make one additional remark. If that was something that Mr. Murray wished to inquire, I think we're long since past that. There was no objections to any of the testimony of Dr. Janiak. I think it's kind of late in the day to kind of raise this issue.

MR. MURRAY: The only way you can raise that issue is by objection? I'm lost.

MR. BRAZEAU: That's what I am saying, correct.

MR. MURRAY: During direct that's the only remedy I have is to -- okay, during direct examination.

THE COURT: Mr. Brazeau, I'm going to allow you, in fact we can take a break if you so desire in the cross examination, and allow you, if you so desire, to go back on direct as to covering the areas of 601D if that's the area we're going to.

MR. BRAZEAU: I don't think it's necessary, your Honor.

THE COURT: I don't really -- why don't you ask the specific questions?

MR. MURRAY: I would like to if I could do so without perpetual objections, your Honor, on cross examination.

(The proceedings returned to open court as follows:)

THE COURT: Go on, Mr. Murray.

Q. (by Mr. Murray) Dr. Janiak, you would agree with me, wouldn't you, that the purpose of this professional corporation of yourself is not to give any actual assistance to the caring emergency room physician on any type of a real-time basis?

THE COURT: Before you say anything, that's not the appropriate area of specialty as provided for a qualification as set forth in 601D.

MR. MURRAY: I'm trying to quantify the time, judge.

MR. CASEY: Why doesn't he just ask the specific question and don't lead up to it. Jump right out and ask it.

Q. (by Mr. Murray) Doctor, is any of your time involved, Doctor --

THE COURT: That's not the question. Ask him the specific question. You raised 601D and just jump out and ask him.

MR. MURRAY: May I approach the bench?

THE COURT: No. In this area 601D. Mr. Murray, I know where you are going, counsel knows where you are going, and we could spend a half hour to determine -- I'm going to make a ruling in a moment. Go on, Mr. Murray. Just ask him the specific question and we'll see what the response is and use the verbiage as set forth and as you stated you are pursuing in 601D which is -- the Court now has placed right in front of it and will ask a question, is that your desire, Mr. Casey, Mr. Brazeau?

MR. CASEY: It would certainly seem to save

a lot of time.

MR. BRAZEAU: Anything to move this matter along.

THE COURT: Court agrees.

Q. (by Mr. Murray) Doctor, you would agree with me, would you not, that the term clinical practice involves more than the direct hands-on care of a patient, would you not?

A. Yes, I would.

Q. So you do other things --

MR. CASEY: Your Honor, I'm going to object because I see now where this is coming from. He's not trying to go into this doctor's qualifications, he's trying to do something on that other person that we're not supposed to mention that the Court has already ruled upon, that's the purpose of this examination and I object.

THE COURT: Is that what you are trying to do, Mr. Murray, determine the qualifications of this witness, Dr. Bruce A. Janiak, or some other person?

MR. MURRAY: No, Dr. Bruce Janiak.

THE COURT: Then please just ask him the

question if that's where we're going. We can take the next two hours on all these other side issues we're looking at and you told me this was leading up to Dr. Bruce A. Janiak's qualifications to give expert testimony as provided for in rule 601D and, if not, I'll make inquiry. I'm going to allow you to do it but we're just going on and on about peripheral matters and you have told me now that we're looking for the qualifications of Dr. Bruce A. Janiak under Ohio Rule of Evidence 601D and please proceed in that area so we can go on to other areas.

Q. (by Mr. Murray) Doctor, do you contend that at least 75 percent of your time is involved in clinical practice?

A. Yes, I do.

Q. And would you include in that 75 percent of your time, would you include in that the supervisory work you do as president of your corporation?

A. Only the supervisory work that deals with the clinical aspects. There is some other not clinical aspects that are not counted.

MR. MURRAY: Then, your Honor, I would like

to inquire into what those clinical aspects are.

MR. BRAZEAU: Your Honor, I think the Court has pointed out that he got the 601D, he gave an answer, and I don't see any reason to go beyond that.

THE COURT: Court agrees. The -- to limit -- the Court, based upon the examination made by Mr. Brazeau and the answers given by the doctor, the questions of Plaintiff, the Court finds and rules that Dr. Bruce A. Janiak is qualified to give expert testimony on the issue of liability in this matter as provided for in statutes and by Evidence Rule 601D. Now, that has been accomplished. If you have an objection to that ruling, it is noted of record and proceed to another area, please, sir.

Q. (by Mr. Murray) Doctor, you expressed an opinion, did you not, in your deposition that Dr. Lindholm's records here reflect a very good example of recordkeeping by a physician?

A. Yes, I did.

Q. And this is a blow-up of the front page Plaintiff's Exhibit 9?

MR. CASEY: May I make just an observation which the Court could consider an objection? Why do we need to put this piece of paper up on this board when the print isn't big enough for the jury to see from their seats? It's not big enough for the witness to see from his seat, so it's clearly not some sort of assistance to anybody and, therefore, I would object to spending the time and wasting the time as we're doing right now.

THE COURT: I'm going to allow Mr. Murray, for whatever reason Mr. Murray, and I'm not sure what it is, I can't see it to read it. I know -- I don't think the doctor can.

MR. MURRAY: I won't use it, your Honor.

THE COURT: You can use it. I'm just saying I don't know what it's for.

Q. (by Mr. Murray) Dr. Janiak, would you agree with me, without going to your deposition, that you spent quite a bit of time in that deposition telling me what you were going to opine and what you were going to opine was that the emergency room records were a very good example of good recordkeeping?

A. Yes. I said that.

Q. Okay. Now I'm going to hand you --

MR. CASEY: Just for clarification, your Honor. I thought we were talking about the Community Health records, but Mr. Murray said the emergency room records right now. I'm just not sure which record it is.

Q. (by Mr. Murray) Dr. Janiak, let me refer you to those emergency room records. Of course, Doctor, I assume that since up until this morning you were acting as a consultant for Dr. Pham, you would then be familiar with these records, would you not, Memorial Hospital records?

A. Yes, I would but, your Honor, could I ask a question? I'm not sure which record we're talking about.

Q. Right here.

A. These are the emergency records because a minute ago when you asked me -- I thought you were talking about the other records.

Q. In any event, would you agree with me, Doctor, now that you have it in front of you, that that's a good example of recordkeeping?

A. Yes, it is.

Q. Okay. And the type of records that you would want to see with a patient presenting with the type of symptoms

that Renae Bernal presented with?

A. Correct.

Q. Okay. And, Doctor, of course the jury will have this but does it not have, right in the printed form, some very basic things up on the top there?

A. Correct. There is a section that's entitled vital signs and that's what you are pointing to.

Q. Correct. And it has the time that this is done?

A. Correct.

Q. And it has, by time, I mean it is exact time, right 3:35?

A. Correct.

Q. And it has the temperature?

A. Correct.

Q. And it has the pulse?

A. Correct.

Q. And it has the respiration?

A. Correct.

Q. And what does respiration mean?

A. Respiration is a number and it refers to the number of breaths per minute.

Q. Okay. Doctor, while there is not -- and then it shows blood pressure; is that correct?

A. You are right.

Q. Okay. Again that's right in the printed form so nobody could leave those basic things out?

A. That's not true. You could leave basic things out all the time but they're not left out in this record.

Q. They're not left out in this record, are they?

A. That's right.

Q. Why don't you refer, if you will -- by the way, Doctor, I take it from the testimony that you gave that the respiratory rate is a pretty important part of the clinical assessment with respect to attempting to judge how far a pneumonia has progressed?

A. I don't believe I said that. I think respiratory rate is an important part of the assessment and the important vital sign in patients that present with symptoms that refer to their chest, but I don't believe I said it deals with progression of the pneumonia.

Q. Now, we know there is not a one-to-one relationship, Doctor, between respiration rate and respiratory distress; isn't that correct?

A. That is right.

Q. But we also know that there is some correlation between respiratory rate and respiratory distress?

A. Correct.

Q. And we also know, don't we, that one of the ways you can measure respiratory rate is by -- again, by some correlation is by taking the pulse -- I'm sorry, excuse me -- withdraw that -- is by noting the breathing per minute?

A. Correct.

Q. Now, Doctor, we know that that was done on 12/7 1987; is that correct, the heart rate?

A. Yes.

Q. Is that heart rate elevated? Is that respiratory rate an elevated rate?

A. The respiration at 24?

Q. Yes.

A. No.

Q. That's not elevated at all?

A. No.

Q. At least it's noted there?

A. Yes, it is.

Q. Now, would you take your Community Health Service records for me, Doctor, if you still have them there, Plaintiff's Exhibit 9, and share with us any place on there that you find a similar -- a similar recordation on December 11th, 1987.

A. You mean the type of form where it has a place for all the vital signs, is that what you are referring to?

Q. Just find me any respiratory rate, any notation.

A. There is no respiratory rate.

Q. Thanks, Doctor. Doctor, you indicated, Doctor, did you not, in response to your direct testimony that in making these clinical assessments, fever -- the presence or absence of fever is pretty important?

A. No. I believe what I said was you record the temperature but temperature waxes and wanes, goes up and down in the course of illness.

Q. Okay. That being the case, could you direct your attention to Plaintiff's Exhibit 9 and could you tell me what the temperature was on the day -- at least what is recorded there on the day Patricia Lindholm recorded it?

A. Well, it says, "temperature 98," and then it says, "temperature 98, B. Cullen," C-u-l-l-e-n, "LPN".

Q. Does that suggest the nurse took it then?

A. Yes. You asked me about Lindholm and the nurse recorded it.

Q. You think the nurse took that as you read the report?

A. That would be my impression.

Q. Okay. The temperature reflected therein is 98, correct?

A. Correct.

Q. And, of course, that's normal? That's a normal temperature?

A. It's what we laymen refer to as normal temperature.

Q. But we do know, when you have one of these progressing pneumonias, you indicated it can go up and down, right?

A. Yes, it can.

Q. And it can go all the -- to normal and go right back up again?

A. It may indeed.

Q. You would agree with me then that it would be very difficult to rule out the fact that she was experiencing fever simply because it said 98 on that particular moment?

A. Could you rephrase that? I don't understand that question at all.

Q. Therefore, would you agree with me the fact that she had 98 at the time the nurse took her temperature at the clinic cannot be used to rule out the fact that she was having fever before she came to the clinic and would have fever after

she left the clinic?

A. Correct. Absolutely right.

Q. Thank you. And did not, in addition to that simple known fact, Dr. Janiak, is it not a matter of history that was brought to the attention of Dr. Lindholm that she had been having fever at home?

A. Excuse me while I try to --

Q. Take your time, Doctor.

A. Dr. Lindholm reports that the patient's mother felt that she, that is the patient, was having some fevers at home. That is recorded.

Q. Okay. Good. Doctor, you would agree with me, would you not, that Motrin is known to mask fever?

A. I would agree that there has been some reports that if you take Motrin you may decrease the temperature some but it is not a drug -- drug that's used to treat fever.

Q. I understand that. I understand that but, Doctor, you would agree with me that if I have got a fever and I'm taking Motrin for whatever reason, it can operate to mask fever?

A. May operate to reduce the temperature so that it's recorded as normal is that what you are getting at?

Q. Correct.

A. Yes, that would be true.

Q. And, Doctor, pick up the records one more time, will you, and tell the ladies and gentlemen of the jury whether or not a history was given at the Community Health Center on December 11th, 1987 as to whether or not Renae Bernal had been using Motrin for a four-day period prior to presenting herself for a clinical assessment.

A. It says right in the record that she was discharged on Motrin.

Q. Thank you, Doctor. Mr. Brazeau asked you, Doctor, whether you were going to charge and I think you quite properly indicated that you expected to be paid for your services and nobody takes issue with that, but would you share with us how much your charges are?

A. Yes. They are $200.00 per hour.

Q. And, Doctor, would I be missing the boat by a great length if I estimated that you probably done somewhere in the neighborhood of a hundred of these medical legal consultations in the course of your career?

A. I would say that since 1972 I've looked at between 75 and 100 cases in the last twenty years, nineteen years.

Q. All right. Doctor, in any event -- withdraw that. Doctor, would you agree with me that with respect to the

records you reviewed would you agree, Doctor, that putting aside the simple fact that Renae died, that there is nothing in the records that suggests that this was some type of unusual or special agent that was particularly virulent?

MR. CASEY: If the Doctor understands the question, I certainly don't, and I would object on that basis, but if he understands it, he can --

Q. (by Mr. Murray) Do you understand the question, Doctor?

A. I think so but I believe that it was not an unusual agent but a special agent. I think there is things in the record that reflect that, but there is nothing in the record that reflects as to its virulence and virulence refers to its dangerousness, infectivity, strength, power to make you sicker.

Q. With respect to virulence, there is nothing in the record to suggest that this agent was especially virulent?

A. That is correct.

Q. Thank you, Doctor. Did you review the coroner's records?

A. Yes, I did.

Q. Would you agree with me that the coroner's records reflect that the cause of death was bilateral pneumonia?

A. Yes. That -- yes, that is directly on the record from the coroner.

Q. Thank you. Now, Doctor, you did review Patricia Lindholm's deposition. Do you recall the fact that she blamed the radiologist?

A. Yes, I do.

Q. Do you recall the fact that she said that she would have hospitalized this patient but for the gross understatement of the amount of pleural fluid that was verbally relayed to her by the radiologist?

MR. BAMMAN: Your Honor, I'm going to object to this type of questioning with the repeating of the discovery deposition testimony. If Mr. Murray would like to confront the witness with testimony given in this courtroom, I think it's different unless he can show that for some peculiar reason that testimony formed a basis for his opinion.

THE COURT: Mr. Murray, can you do so and will you do so as pointed out by defense counsel? If not, I'm going to sustain the objection.

Q. (by Mr. Murray) Dr. Janiak, you were speaking, of course, of what Patricia Lindholm did, her assessment?

A. With reference to what? I'm sorry.

Q. With reference to her care on December 11th, her clinical assessment on December 11th, 1987?

A. Yes, I was.

Q. You spoke at some great length reading from the record what she meant, did you not? You picked up the record and you went through it, if I recall, and you could read from that and tell us what she meant?

A. I think I just quoted what she did.

Q. Okay. I thought I heard some interpretations of what she -- you are telling the jury that you did not give any testimony then to the effect that you were extracting things from that record what Dr. Lindholm was doing?

A. No. You asked -- as a matter of fact, when I mentioned I think the words I thought Dr. Lindholm meant something, you made an objection or a comment about that but when you just asked me about it now, you said, quote, at great length and I didn't do anything at great length.

Q. Drop the great length. Did you on one occasion?

A. Yes, I did.

Q. And now, Doctor, if you wanted to find out what Dr. Lindholm meant, I assume that you would have read her deposition, too, then as part of preparing for your testimony here today?

A. I believe I already testified that I did read her deposition.

Q. Did anything in that deposition help you -- help support your opinions?

A. Which opinion was that, sir?

Q. The opinion you gave upon direct examination.

A. I think I've said several things now in the past hour or now.

Q. That this was good, standardized care?

A. Yes. Does anything in the deposition support that?

Q. Yes.

A. No. It was the emergency -- the Community Health Services record that I was referring to when I said this represents good care.

Q. That was -- that was the emergency room?

A. No. It was Community Health Services record.

Q. All right. You would agree with me that you reviewed Pat Lindholm's deposition and utilized that deposition in arriving at the judgments that you made in response to Mr. Brazeau's question that there was no substandard care here?

A. Yes, yes. All those materials put together and

integrated, you are correct.

Q. Now, may we go back to what we were talking to before?

MR. BAMMAN: I object. The witness testified he only commented on those records. He read the depositions but if he has something specific --

THE COURT: I heard the same thing, Mr. Bamman. The doctor has testified that he based his opinion upon the emergency room records.

MR. BAMMAN: Community --

THE COURT: Community Health Service record, that's what he stated he based his opinion on. He said he read the deposition. He based his opinion, if I heard correctly, and I believe, doctor, is that what you testified to?

THE WITNESS: Yes, I did.

MR. MURRAY: All right. Fine.

THE COURT: We all heard it except you, Mr. Murray.

MR. MURRAY: I'm sorry, judge. Please excuse me.

Q. (by Mr. Murray) Are you telling the jury then,

I'll get on to another subject, are you telling the jury that the opinion you rendered here you have rendered by taking the Community Health Service records but you ignored -- but that the Patricia Lindholm deposition, the clinical assessor herself, you did not use that in arriving at your judgment, is that what you are telling us?

A. It's a hard question to answer. Maybe I can answer it this way: My opinion is based on the record. When you look at a record and then you look at a deposition, if you see something in the deposition that's 180 degrees away from the record, then you are going to say, "My goodness. I need to go over this again and think about it." When you look at a deposition in which there is nothing that's inconsistent with the record then, in my view, what I am telling you is my opinion is based on looking at the record and I didn't see anything in the deposition that made me change my mind, better way to put it.

Q. Are you telling me that there is nothing inconsistent then between Dr. Lindholm's deposition that you read and the record?

A. In terms of my opinion, that's correct.

Q. Did you, as part of your foundation, Doctor, did you review not only the x-rays but the x-ray report?

A. I believe I did see the x-ray report, that's correct.

Q. Did you -- so then I am correct the fact -- what you are saying is that you, in rendering your judgment then, you have specifically excluded as a basis for your judgment Dr. Lindholm's blaming the radiologist?

MR. BRAZEAU: Objection, your Honor.

MR. BAMMAN: He didn't say that, your Honor.

THE COURT: It will be sustained. Jury will disregard the question. Court orders it stricken from the record.

Q. (by Mr. Murray) Did you take into consideration the deposition -- any parts at all of the deposition of Dr. Lindholm in arriving at your opinion?

MR. BRAZEAU: Objection, your Honor. I think the question has been asked and answered at least three times.

THE COURT: It has.

MR. MURRAY: Not the entire thing.

Q. (by Mr. Murray) Did you take it into account at all, any part of it at all?

A. Insofar as in the way I already explained to you, yes.

Q. Would you tell me again, because I don't think I understood it.

A. I said when I look at a record and there are depositions in association with the record, I look for major differences between what the record says and what the deposition states.

Q. Good. May you share with me what those major differences were?

MR. BAMMAN: He didn't say there were major differences. He looked for them.

THE COURT: That's correct, Mr. Murray. I don't know how clear the doctor can be in response to your questions. As counsel has stated, they've been repeated over and over and over again as regards to the relationship between the Community Health Services record and the deposition.

Q. (by Mr. Murray) Dr. Janiak, in sharing with the jury your opinion as to whether or not the person making the clinical assessment lived up to the standard of care, would you agree with me that the expressions and feelings and opinions of the clinical assessors would have some relevance?

A. Certainly.

Q. Great. Now, I would like to go over some of those

that you are aware of. Were you aware, Doctor, that in addition to blaming the radiologist she, Dr. Lindholm, clinical assessor who you just made an evaluation of, indicated that she would have hospitalized this patient had she known -- had the x-ray records been accurately relayed to her?

A. Yes, I was.

MR. BAMMAN: Objection.

THE COURT: Question has already been answered. It will stand.

Q. (by Mr. Murray) You were aware of that?

A. Yes, sir, I was.

Q. Were you aware that that actual clinical assessor agreed that the under-evaluation given by the radiologist was gross in terms of its under-evaluation?

MR. BAMMAN: Objection.

THE COURT: Be sustained. This one is sustained.

Q. (by Mr. Murray) Were you aware that the clinical assessor felt that had Renae Bernal been hospitalized and received the in-hospital type therapies available in Fremont, that she probably would have survived her illness?

MR. BAMMAN: Objection.

THE COURT: Basis, Mr. Bamman?

MR. BAMMAN: Because there is no foundation that that fact would have anything to do with the opinion he rendered upon the record from Community Health Service. That is not testimony in this case.

THE COURT: Mr. Murray?

MR. MURRAY: Your Honor, are you suggesting I can't impeach --

THE COURT: I'm asking you to reply to the objection and the basis.

MR. MURRAY: Just one that's too obvious to talk about is to talk -- to cross examine a hired consultant on the basis of what he excluded as part of his foundation, if that's not permissible. I don't understand evidence at all.

THE COURT: Court's going to allow you to proceed but I'm telling you to be -- you are in an area that is -- would you read the question back, Madam Recorder?

(Court Reporter read back as requested.)

A. I was aware that Dr. Lindholm said that in her deposition.

Q. (by Mr. Murray) Thank you, Doctor. Now, Doctor, you mentioned decubitus x-ray and you mentioned that you would have wanted a decubitus x-ray; is that your testimony on direct?

A. Correct.

Q. And do you also recall from Dr. Lindholm's deposition that Dr. Lindholm indicated that she wanted the x-rays not to just confirm the pneumonia but to make some assessment as with respect to the extent of the pneumonia; do you remember that?

MR. BAMMAN: Objection.

THE COURT: Be sustained.

Q. (by Mr. Murray) Would it be of any interest to you to know what significance, Dr. Janiak, the clinical assessor herself had to say about why she wanted the x-rays and the report of those x-rays, would that be of any interest to you?

A. I don't think it would be helpful to know why she wanted them, only because I guess I am making an assumption that she wanted them to see whether or not the patient had pneumonia, so I'm not sure that information would be helpful to me. What was the second part of your question?

Q. Second part is, is it of any interest to you,

Doctor, if the evidence in this case were from the clinical assessor herself, Dr. Lindholm, that that was not the only reason she wanted an x-ray because she had already diagnosed the case as pneumonia, that she wanted the x-ray to determine to what extent the disease had progressed. Now, would that be of any interest to you as the hired consultant talking about standard of care, you want to tell this jury -- fine, we'll get on another subject -- you want to tell this jury that's of no import or no interest to you in terms of --

MR. BAMMAN: Objection. Certainly that's another question and I will object to that question put to this witness.

THE COURT: I'm going to allow it.

THE WITNESS: I may be a little bit densed. I'm confused about when you asked what I wanted to tell the jury.

MR. MURRAY: I'll rephrase it.

Q. (by Mr. Murray) Any time, if you don't understand it, you tell me that and I'll redo it. I'm asking you do you want to tell us here today that in terms of making an evaluation as to whether there was standard or substandard care on the clinical assessment, whether or not you do or do not have any interest respecting what the clinical assessor

herself, Dr. Lindholm, wanted the x-rays for?

A. Yes. I will say I have some interest in wanting to know if I could have that information.

Q. Thank you. Now, I want you to assume for the sake of the next question that the -- withdraw that. Do you recall from Dr. Lindholm's deposition the fact that she opined or she testified that she wanted the x-ray not just to confirm the pneumonia that had already been diagnosed, but to assess the degree to which the disease of pneumonia had progressed?

A. I don't have that specific recollection but I certainly accept it.

Q. Will you accept the fact that she has so testified before you came in here today?

A. Sure.

Q. Now, do you also agree with me that you will recall, will you not, from the -- withdraw that. You actually service Memorial Hospital right now with your employees, don't you?

A. Right now, yes.

Q. So we know darn right well, don't we, I mean, you know for sure that they can do decubitus x-rays down there in Fremont; isn't that correct?

A. That is correct.

Q. I mean, that's not -- you can do that almost anywhere with an x-ray?

A. I don't know any place you can't do that.

Q. Okay. Good. Would you agree with me, Doctor, that the decubitus x-ray would have been useful to determine the quantity of the pleural effusion?

A. No. I'm not aware that that -- it would not be useful to quantify except in a very general way.

THE COURT: Mr. Murray, how long do you expect to be?

Q. (by Mr. Murray) How about the amount of pleural effusion, Doctor?

A. Certainly, a radiologist gives amounts. When they see effusion, they will usually mention something about the amount, it's within a range and it's within their best estimate as to how much fluid might be there.

Q. Doctor, I didn't -- that's not the question. Would the decubitus x-ray be helpful, the lateral decubitus x-ray be helpful in quantifying the amount of pleural effusion, yes or no?

A. Yes.

Q. Thank you. In any event, Doctor, we know the decubitus x-ray was not done in the radiology department; is

herself wanted the pleural effusion quantified as part of having the x-ray?

MR. CASEY: Objection. We don't know that. We know there have been certain questions put but --

MR. MURRAY: I'll withdraw that, your Honor. It's too obvious to the Court.

Q. (by Mr. Murray) Now, Doctor, you indicated that pneumonia progresses over a period of time; is that correct?

A. That's correct.

Q. And, in this case, then if I understood your testimony. that in all probability she had pneumonia starting with Monday December 7th, 1987?

A. I think it was more likely than not that her initial pains were from an early pneumonia, that's what I said, I believe.

Q. On the Friday, the day before, she said, and Saturday, she said she was in the fifth and sixth days of the progression of the disease; is that correct?

A. Looking at it that way, I think that would be right.

Q. Doctor, you don't want to tell this jury, do you, that pneumonia or any other disease fits into some nice little

box in terms of its progression?

A. Every case is completely different.

Q. That's why we have doctors that make an assessment based upon all the information, isn't it?

A. Yes, I believe that's true. Sometimes I wonder why we have doctors.

Q. Doctor, you would agree with me, upon review of those records, would you, that there was no patient negligence here?

A. Yes, I would.

Q. Neither on the part of the deceased, Renae Bernal, nor her parents?

A. I didn't see any evidence of that.

MR. MURRAY: No further questions.

THE COURT: All right. Mr. Brazeau and Mr. Casey and Mr. Bamman, will you approach?

(Discussion at the bench off the record.)

THE COURT: We're going to stand in recess for fifteen minutes, folks, and we'll return.

(Recess.)

THE COURT: Mr. Casey, sir?

MR. CASEY: Thank you, your Honor.

CROSS EXAMINATION BY MR. CASEY:

Q. Dr. Janiak, to try and clear up any confusion over this, you were first contacted concerning involvement in this case by Mr. Brazeau; is that correct?

MR. MURRAY: Your Honor, objection. That's leading.

MR. CASEY: Well, actually, your Honor, it's kind of foundation stuff that's already been testified to but this is cross examination as I understand it.

THE COURT: I want you to lay a groundwork first for that last statement, then the Court will rule, Mr. Casey.

MR. CASEY: What statement?

THE COURT: That you just made about the cross.

Q. (by Mr. Casey) Dr. Janiak, you were originally -- who originally retained you in this case? Who originally asked you to look at the record?

A. As I said, it was Mr. Brazeau.

Q. And that was on behalf of whom, what Defendant?

A. I would have to go back to the file but I think it was --

Q. Community Health?

A. I think it was Community Health and not Dr. Pham.

Q. And then subsequently, did I --

MR. MURRAY: Objection, your Honor, again, as leading.

MR. CASEY: How is it leading?

Q. (by Mr. Casey) I -- subsequently did I contact you?

THE COURT: Be overruled.

Q. (by Mr. Casey) Did I contact you?

A. Yes.

Q. For what purpose?

A. That was to look at the records on behalf of Dr. Pham.

Q. All right. And did you look at the records on behalf of Dr. Pham?

A. Yes, I did.

Q. And did you look at the report on behalf of Community Health Service?

A. Yes, I did.

Q. Your review of the records on behalf of Community Health Service did that occur at some time prior to today?

A. Yes.

Q. To your knowledge, is Dr. Pham a Defendant in this

case at this point?

A. To my knowledge, he is not.

Q. Did I ask you to review this case on anybody else's behalf?

A. No.

MR. CASEY: I would like to proceed on cross examination, your Honor.

MR. MURRAY: I would object, your Honor.

THE COURT: Would you make further inquiries, Mr. Casey, in the relationship of what it was and what the relationship was between Dr. Pham and Dr. Janiak, if there was any, other than answering inquiries for you? Proceed into that further.

MR. CASEY: Oh sure, your Honor.

Q. (by Mr. Casey) Dr. Janiak -- if I may preface this, your Honor -- Dr. Janiak, you previously testified in answer to Mr. Murray's question that you have had some professional relationship and, in fact, an employer-employee relationship with Dr. Pham?

A. That is correct.

Q. All right. Now, at the time that I first contacted you concerning involvement in this case, all

right --

A. Yes.

Q. -- did you or your corporation have any involvement with the emergency room at Fremont Memorial Hospital?

A. Not at all.

Q. Did you know Dr. Pham at that time?

A. I never heard of him at that point.

Q. All right. Had you completed your review of this matter prior to did you say it was --

MR. MURRAY: Objection, your Honor. This is leading.

MR. CASEY: How is that leading?

THE COURT: It's overruled. Go on, Mr. Casey.

Q. (by Mr. Casey) Had you completed your review of this matter prior to the time that you came into some sort of an arrangement with Fremont -- the emergency room at Fremont Memorial Hospital?

A. Yes, with the exception of the review of the depositions of, I think it was Dr. Lindholm, and then one of the other experts but not Dr. Pham; that had been earlier.

Q. All right. And in your capacity in your

involvement, Doctor, in this case, have you ever spoken to Dr. Pham personally about this case or anything related to it?

A. No, I never have.

MR. CASEY: All right. Is that sufficient, your Honor?

THE COURT: The Court is going to allow the examination as if on cross examination.

MR. CASEY: Thank you, your Honor.

Q. (by Mr. Casey) Now, Dr. Janiak, you have testified that --

MR. MURRAY: Your Honor, may I, for the record, that's over my objection.

THE COURT: Yes, sir. Court notes objection of Mr. Murray as to that allowance. Does that cover it, Mr. Murray?

MR. MURRAY: Later, judge, I would like to put my reasons in. I don't want to delay things now.

Q. (by Mr. Casey) You were asked some questions by Mr. Murray concerning decubitus x-rays?

A. Correct.

Q. Now, the x-rays that we've been talking about so far, this one is called an AP view?

A. Yes, or PA.

Q. PA, and these like this?

A. Yes.

Q. And that's like this?

A. Yes.

Q. And this is a lateral view?

A. Yes.

Q. And that is like this?

A. Yes.

Q. What is a decubitus view?

A. That's when the patient is lying on their side, doesn't a make any difference which side, right or left, and you take an x-ray like this PA view but the patient is like on one side, this is in an upright position, patient is standing up.

Q. Now, you have indicated to the ladies and gentlemen of the jury in response to Mr. Murray that in this type of situation a patient such as presented by Renae Bernal that it would be your practice to ask for a decubitus view?

A. Correct.

Q. And it is the physician who requests the type of view, isn't it?

A. That's right.

Q. All right. Now, do you have -- and do you have an opinion to a reasonable degree of medical probability, Doctor, as to whether or not Dr. Lindholm, in asking for the views that she asked for, whether she departed from accepted standard of care?

A. Yes, I do.

Q. What is that opinion?

A. No departure.

Q. Why?

A. It's merely a judgment decision. I am more comfortable doing it one way and that may reflect my own radiological imperfections not being able to read them as well as others. A lot of doctors take these views and make a decision and it's perfectly reasonable.

Q. Now, you have reviewed the post -- the report of the post-mortem examination of Renae Bernal?

A. Yes.

Q. The autopsy?

A. Yes, I have.

Q. And based on your training and experience, Doctor, does that autopsy report reflect a medical condition known as empyema? I'm saying that wrong, aren't I?

A. The correct is empyema.

MR. MURRAY: Your Honor, I have another objection.

THE COURT: Which is?

MR. MURRAY: Which is I have no -- the deposition is very clear, extremely clear as to what Dr. Janiak was going to and not going to testify regarding and this is a subject matter in which he made it clear he would not be testifying to and I can show you the citation.

MR. CASEY: To begin with, that's not correct, your Honor, but I am on cross examination and I'm entitled to explore things with the witness.

THE COURT: That's correct. You may continue. Objection will be overruled.

Q. (by Mr. Casey) What is an empyema?

A. Empyema is -- well, first you have to think of the chest and the lung as an organ within the chest, think of each lung separately and you have all this tissue and then surround the tissue -- all right, surround the tissue with a collapsed balloon and you have a balloon with no air in it and you surround the lung with it. In that space is a little bit of fluid. These two surfaces are nice and smooth. We talked

before about pleurisy, when it gets irritated, those surfaces rub, that causes pain, and effusion is when there is fluid that collects in that space. If there is pus, yellow thick stuff in that space, it's called empyema.

Q. And does the autopsy, as you read it, Doctor, describe any empyema in the body of Renae Bernal?

MR. MURRAY: Your Honor, objection, two grounds. Not only no preparation for this because it was not indicated, this goes outside the area. He explicitly told me he would not go beyond the discovery deposition. In addition to that, he's not qualified to speak to it. I can show you that, too.

MR. CASEY: Well, I think he's as qualified to speak to it as Dr. Wilson was but Mr. Murray went into this on his own witness.

MR. MURRAY: Objection, your Honor. This is stip --

THE COURT: I don't know of any such stipulation you keep referring to. I don't have any stipulation if there was --

MR. MURRAY: No, your Honor. I'm saying I can bring it to the attention of the Court if

necessary.

THE COURT: It hasn't been made part of this record.

MR. MURRAY: Your Honor, I'm asking for the opportunity to make it a part of the record so that the Court can rule based upon what the man has indicated he was going to limit his examination to and based upon his statement as to his qualifications. He explicitly said, and I can get the citations for you, that he would not be talking about cause of death and in fact said he wasn't qualified to.

MR. CASEY: I haven't asked him anything about cause of death, your Honor.

THE COURT: Objection overruled.

Q. (by Mr. Casey) Did you see any evidence of empyema as reflected in the autopsy?

A. I did not.

Q. Do you see anything in the autopsy reflecting broken ribs?

A. I don't remember anything like that. I frankly didn't even look for that.

Q. Let me ask you there is a portion of the

miroscopic examination of the autopsy, let me read this to you. You've read the microscopic report of the autopsy?

A. Yes.

Q. Let me read this to you. Microscopic --

MR. MURRAY: Judge, I object to Mr. Casey reading material out of an exhibit. If he is going to ask a question --

MR. CASEY: It's for the basis of my question, your Honor.

THE COURT: Mr. Murray, this is -- the Court has ruled. It is cross examination. I allowed you an extended period of time on cross examination. I'm not going to restrict it as you just requested as long as it is forming the basis and the foundation for his examination or his cross examination. You may continue, Mr. Casey.

MR. CASEY: Thank you, your Honor.

Q. (by Mr. Casey) The microscopic section reads "microscopic examination of the lungs showed all alveoli in the left lower lobe filled with neutrophils and fibrin. This is a classic microscopic appearance of lobar pneumonia in the transitional stage between read and gray hepatization." Do you recall reading that in your review?

A. Yes.

Q. Can you explain to us, Doctor, what is being spoken of when they talk about this transitional stage between red and gray hepatization?

MR. MURRAY: Objection for the same grounds.

THE COURT: Be overruled.

A. Certainly I'm not a pathologist, but what that means is it's a way of the pathologist saying that when the lung was real -- it goes from red to gray as you get better from pneumonia and when he is saying it's transitional, it's saying that it was -- it looks a particular way when it's between the two. So when you first get pneumonia, if you cut into your lung, it looks kind of red and when pneumonia is getting better, it looks sort of gray and he says it's transitional, which means it's getting -- turning gray, going from red to gray, and then after that it will come back to normal which is a pink color. So all he is saying is that this lung has started to heal. It's a dumb way to say it but that's how we say it.

Q. It's getting better?

A. Yes.

Q. Turning your attention to the death of this young woman. As you look at the clinical picture as described by

Dr. Lindholm in her notes, okay, of her examination?

A. Yes.

Q. And you look at this PA view x-ray, do you see the picture of a person that you would expect to die from pneumonia within thirty hours?

A. No.

MR. MURRAY: Objection, your Honor. He's already indicated he's not a pathologist.

MR. CASEY: That doesn't require a pathologist, Mr. Murray.

THE COURT: Objection be overruled.

Q. (by Mr. Casey) Why not?

A. Well, the primary -- well, we coordinated two things in your question; one was the clinical picture. I didn't see anything there that would indicate the patient was dying within thirty hours; and then you look at the x-ray and you can see that, as we pointed out, there is part of this one lobe of the lung that is involved which is also corroborated in the autopsy report. The rest of the lung looks pretty good and we know that many people are walking around with only one lung, I mean, they have them removed for surgical reasons. People used to have lungs removed for tuberculosis all the time and when they walk in and you see them with only one

lung, you can't look at them and see they have one lung, they don't look sick, they're doing all right, so we know with a pretty clear lung on the right and probably at least half, if not more of the lung on the left, not showing up as being diseased on an x-ray, that that's not consistent with somebody who is about ready to die.

Q. Now, you read the autopsy report concerning the findings of the left lung at the time of death?

A. Correct.

Q. All right. And you will recall that the pathologist also reported on the condition of the right lung after death?

A. Correct.

Q. All right. Now, what do you make of his reports concerning the condition of the right lung?

A. Well, I guess to make it fairly simple, he indicated that there was some disease in the right lung but it weighed a lot less and when you get any organ that gets real sick, it gets a lot of fluid in it, so the weight of the left lung was one and a half times that of the right lung, so that one had a lot more fluid in it, the right lung was relatively normal. There also was a little bit of pneumonia in that lung as I remember, but it was relatively normal.

Q. Now, if you put together -- you have testified that based on the clinical picture as reported by Dr. Lindholm on the 11th, based on that clinical picture, you would not have hospitalized this patient?

A. Yes.

Q. And then if we plug in, as I understand your testimony, if we plug in these x-rays, you still would not have hospitalized this patient?

A. That's right.

Q. Is there anything in this x-ray that is alarming to you in terms of the immediate well being or prospective death of the patient?

A. Nothing.

Q. Nothing?

A. Nothing.

Q. How much pleural effusion -- would you agree with me, Doctor, that it's difficult from such an x-ray to quantify the amount of pleural effusion if it's present?

A. It certainly is difficult for me.

Q. All right. And you read x-rays every day?

MR. MURRAY: Objection, your Honor. He says it's difficult for him. He shouldn't testify to it.

MR. CASEY: He answered my question. That was the question I put to him.

THE COURT: I understand.

Q. (by Mr. Casey) And you read x-rays every day?

A. Yes.

Q. There is a certain art to the reading of x-rays, isn't there?

A. That's right.

Q. There is a lot of judgment involved in the reading of x-rays, particularly this kind of x-ray?

A. That's right.

Q. All right. Would you say there is 1500 cc's of pleural effusion shown on that x-ray?

MR. MURRAY: Objection.

THE COURT: Overruled.

A. I think I would go back to my original comment that I don't think I could quantify it that well, and I would do what I told you I did before. I would take that other film called a decubitus but I wouldn't be able to put a number on it.

Q. Would you say that there is perhaps 300 cc's in that film?

A. I would say it would be consistent. If somebody

told me that there were 300, I would say, well, I believe that's consistent.

Q. All right. So, in point of fact, it's very difficult to make any judgment from that x-ray as to quantity?

A. Correct.

Q. Now, you have the records there of Community Health Service, I think it is. Is the x-ray report done by Dr. Gfoeller in there? It might be in the Memorial Hospital record. You have it, okay. I'm going to turn this other one on. The first part of this report relates to clinical diagnosis, correct?

A. Correct.

Q. All right. And does that reflect the question that's being asked by the clinician of the radiologist?

A. That's information the clinician gives to the radiologist which basically says this is what I think is going on and that's my reason for ordering this particular film.

Q. All right. And this particular report states "pneumonia semi colon R. O." Does that mean rule out?

A. Yes.

Q. "Rule out pleural effusion, purpose of exam, same"?

A. Correct.

Q. All right. Now, I want you to look at those x-rays. This report reflects "the heart is normal in size and shape." Do you agree with that?

A. Yes.

Q. "There is pleural effusion in the left lower chest obscuring the diagram." Do you agree with that?

A. I have no reason to disagree with that.

Q. "Whether or not there could be underlying infiltration one could not tell"?

A. Certainly will agree with that.

Q. "The lung markings in the left upper lung field and in the right lung are in normal limits and there is no sign of congestive failure"?

A. Right.

Q. Is that compatible with those x-rays?

A. That's right. You can tell that from both the size of the heart and then there is little lines that you see, you have to be up close, you couldn't see them from there, but there are lines that appear in a horizontal fashion in what's called angled here, that would be there if there was congestive failure.

Q. "The right lung and diaphram are clear"?

A. Yes, correct.

Q. "The bony thorax is normal"?

A. Yes.

Q. What is the bony thorax?

A. That refers to the ribs, the spine in the back and the collar bones on both sides and anything else the radiologist can see when they look.

Q. So the impression given by the radiologist in this case, Dr. Gfoeller, was, one, normal heart. Do you agree with that?

A. I agree.

Q. And, two, pleural effusion in the left lower chest and one could not rule out an underlying infiltration. Do you agree with that?

A. I don't have any reason to disagree with that.

Q. If one clinician read -- if one person read such an X-ray as having one amount of pleural effusion and another physician read that same X-ray as having a different amount of pleural effusion, would either of them have been negligent?

A. Not at all.

Q. In fact, you previously testified that what the radiologist does in this instance is give his best estimate?

MR. MURRAY: Objection.

A. Correct.

MR. MURRAY: Objection, your Honor. Can we qualify him as a radiologist now?

MR. CASEY: That's what he said, Mr. Murray, in response to your question, Mr. Murray.

MR. MURRAY: With no warning, he's now been qualified as a pathologist and radiologist.

THE COURT: Objection will be sustained.

Q. (by Mr. Casey) All right. For the clinician's purposes, what is the important information that is on those x-rays, a clinician such as Dr. Lindholm, examining a patient such as Renae Bernal?

A. Two pieces of information. One is there is something happening which is probably pneumonia in the left lower lobe of the lung; and the second piece of information is the rest of the chest looks all right.

MR. CASEY: Okay. Thank you, Doctor. Thank you, your Honor.

THE COURT: Mr. Bamman, sir?

MR. BAMMAN: No questions.

THE COURT: Any redirect?

MR. BRAZEAU: No, your Honor.

THE COURT: You may step down.

MR. MURRAY: Your Honor at this time I

would ask for an opportunity for recross examination.

THE COURT: You had the opportunity to cross examine the witness and the request is denied. We've been here an extended period of time.

MR. MURRAY: For the record, could I ask to recross on just the subjects that -- the new subjects that were brought up particularly in this view and I'm asking the Court to exercise if nothing else --

THE COURT: Can you do that? Can you limit to new matters just brought up?

MR. MURRAY: Yes.

THE COURT: I will allow that within the discretion of the Court, but I'm limiting it to that and the first time that that bound is exceeded, the consent will be withdrawn. You may proceed to that point in the interest of fairness.

MR. MURRAY: Thank you.

RECROSS EXAMINATION BY MR. MURRAY:

Q. Doctor, you granted us you are not a pathologist?

A. Absolutely.

Q. And would you agree with me then that it might be

of some interest to the jury to hear from the coroner and/or the pathologist?

MR. CASEY: Objection, your Honor. What does that have to do with it?

THE COURT: Sustained. Go on, Mr. Murray. Remember the rules are we're going to matters -- strictly new matters brought out on the cross examination by Mr. Casey.

MR. MURRAY: Very good, your Honor.

Q. (by Mr. Murray) Did you take the opportunity to consult with Mr. Casey during the break between cross examination and --

MR. CASEY: Objection.

THE COURT: Sustained.

Q. (by Mr. Murray) You went through a history, Dr. Janiak, of -- in response to some of the questions about who you testified for in response to Mr. Casey's questions. Is it not also true, sir, that you have consulted with Mr. Casey personally a couple of times?

MR. CASEY: That's not a new area, your Honor.

THE COURT: Be sustained.

Q. (by Mr. Murray) Doctor, do you recall in your

deposition that you told me that you would not be speaking about --

MR. CASEY: Objection, your Honor.

THE COURT: Sustained.

Q. (by Mr. Murray) Would you agree with me, Doctor, that with respect to the things just elicited by Mr. Casey that --

MR. CASEY: What things? Vague, your Honor.

THE COURT: Be sustained.

Q. (by Mr. Murray) With respect to the opinions elicited by Mr. Casey that Dr. Patricia Lindholm would, based upon your review of her deposition, disagree --

MR. CASEY: Objection, your Honor. He's asking about what somebody else would agree or disagree with him.

THE COURT: The objection will be sustained. Mr. Murray, sir?

Q. (by Mr. Murray) Dr. Janiak, now that you have shared with us the history of having previously consulted with Mr. Casey --

MR. CASEY: I'm going to object already, your Honor. I mean, where are we going here? The Court allowed Mr. Murray recross examination for a

very limited purpose. He hasn't yet hit on that purpose.

THE COURT: Mr. Murray, I allowed you to do that and I was very careful on that, and in the interest of justice, I allowed you, which is unusual in my discretion, to recross even though there was no redirect, and I asked you to limit yourself to items and I instructed you to limit yourself to new items brought out on the cross examination by Mr. Casey. Please do that.

MR. MURRAY: One question, your Honor, was clearly brought out.

Q. (by Mr. Murray) Dr. Janiak, it was clearly brought out that you would -- that you had had previous consultation with Mr. Casey?

MR. CASEY: Objection, your Honor. He went into our --

THE COURT: That was discussed on your own cross examination.

Q. (by Mr. Murray) Doctor, do you expect to be paid for these previous consultations that you had with Mr. Casey?

MR. CASEY: Of course he does.

A. I don't know what you mean by "previous

consultations".

THE COURT: It is conceded.

MR. CASEY: Conceded.

A. I probably have been paid. I don't expect to be paid any more.

Q. (by Mr. Murray) In your deposition, Doctor, did you not mention $250.00 an hour rather than $200.00?

A. I don't remember. Whatever it says there. I just don't remember.

Q. So, you wouldn't dispute it if I said it was $250.00?

A. I wouldn't argue with you.

MR. MURRAY: No further questions.

THE COURT: Wait a minute. Anything further?

MR. CASEY: No.

THE COURT: Now you may step down, Doctor. Thank you. Now, ladies and gentlemen of the jury, we're going to and I apologize to you so very sincerely about keeping you sitting in that box all day, we're going to take a recess for an hour now. I hope there is some refreshments some place that you can get now. If not, I have water.