

DOC. 259

IN THE DISTRICT COURT OF KNOX COUNTY.

DONNA J. WIEBELHAUS,

Plaintiff.

vs.

D. J. NAGENGAST, M.D.,

Defendant.

Case No. 12018

DEPOSITION OF
DR. GLEN LAU
TAKEN ON BEHALF OF
THE DEFENDANT

Taken at Bryan Memorial Hospital,
1600 South 48th Street, Lincoln, Nebraska,
on November 10, 1993, commencing at 1:15 P.M.

APPEARANCES

For the Plaintiff:

MR. DAVID A. DOMINA
Attorney at Law
2425 Taylor Avenue
P.O. Box 78
Norfolk, NE 68702-0078

For the Defendant:

MR. JOSEPH BATAILLON
Attorney at Law
200 Century Professional Plaza
7000 Spring Street
Omaha, NE 68106-3519

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

STIPULATIONS

It is stipulated and agreed by and between the parties hereto:

1. That the deposition of DR. GLEN LAU may be taken before Michelle S. Benes, RPR, General Notary Public, at the time and place set forth on the title page hereof.

2. That the deposition is taken pursuant to notice.

3. That the original deposition will be delivered to Mr. Joseph Bataillon, attorney for Defendant, and a certification of same will be filed with the Clerk of the District Court of Knox County, Nebraska, setting forth that the deposition was taken and the costs thereof.

4. That all objections except as to form and foundation are reserved until the time of trial.

5. That the testimony of the witness may be transcribed outside the presence of the witness.

6. That the signature of the witness to the transcribed copy of his deposition is waived.

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

INDEX

Appearances	1
Stipulations	3
Reporter's Certificate	60

WITNESS:

DR. GLEN LAU

Direct Examination by Mr. Bataillon 4

Cross-Examination by Mr. Domina 57

EXHIBITS:

MARKED

1. 2/17/93 Memo to La, from Domina	21
2. Dr. Lau's notes from textbook	22
3. Data from the National Cancer Institute	24
4. Dr. Lau's Report - not dated	24
5. Packet of information on D. Wiebelhaus	28
6. Packet of information on D. Wiebelhaus	28

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

DR. GLEN LAU,

Of lawful age, being first duly
cautioned and solemnly sworn as
hereinafter certified, was
examined and testified as follows:

Witness's response to oath: "I do."

DIRECT EXAMINATION

BY MR. BATAILLON:

Q. Would you state your name for the record.

A. Glen Fredrick Lau.

Q. And, Doctor, I need your Social Security Number.

A. 587-28-6741.

Q. And your date of birth?

A. 10-20-29.

Q. Doctor, my name is Joe Bataillon. I represent Dr. Nagengast in a lawsuit that's been filed against him. And I'm going to ask you some questions this afternoon. If you don't understand the questions that I ask, I'd request that you ask me to clarify the questions before you answer. Is that okay?

A. Yes.

Q. Doctor, what is your specialty?

A. Family practice.

Q. And how long have you been doing that?

A. I went into practice in 1964.

Q. Do you have a curriculum vitae, Doctor?

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

- 1 A. Not with me, no.
- 2 Q. You have one at the office, I take it?
- 3 A. I could not one together.
- 4 Q. Okay. Well, then. Let's back up and do this the
- 5 way I'm supposed to do it. When did you graduate from
- 6 college?
- 7 A. Nineteen -- college, excuse me. What level or
- 8 college are you talking about?
- 9 Q. Let's go back further then. Where did you go to
- 10 high school?
- 11 A. Clearwater, Nebraska.
- 12 Q. And what year did you graduate there?
- 13 A. 1947.
- 14 Q. All right. And then where did you go to school
- 15 after that?
- 16 A. Well, I took kind of a convoluted course. I
- 17 spent one year at Norfolk Junior College in Norfolk,
- 18 Nebraska. Spent one year in the Northwest Institute of
- 19 Medical Technology in Minneapolis following that. Then
- 20 after I'd been in the Service, I attended the University
- 21 of Nebraska-Lincoln.
- 22 Q. Okay.
- 23 A. And from there I went to the University of
- 24 Nebraska Medical Center.
- 25 Q. And what branch of the Armed Services were you

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 school, for classes during the day and went back to
- 2 Beatrice and worked at night.
- 3 Q. Then when did you graduate from the University
- 4 of Nebraska-Lincoln?
- 5 A. I did not graduate from the University of
- 6 Nebraska-Lincoln. Completed my Junior year and was
- 7 accepted into medical school.
- 8 Q. All right. When were you accepted to the med.
- 9 school?
- 10 A. 1958.
- 11 Q. Did they have a family practice program then or
- 12 was that just general -- or strike that. You're just
- 13 talking about medical school. All right. 1958, medical
- 14 school. When did you graduate from medical school?
- 15 A. 1962.
- 16 Q. And then did you do a residency or an
- 17 internship?
- 18 A. I did an internship.
- 19 Q. And where was your internship?
- 20 A. At Bruen Memorial Hospital, Lincoln, Nebraska.
- 21 Q. Was it a one-year rotating internship?
- 22 A. Yes.
- 23 Q. And did you have any other specialty training
- 24 after that?
- 25 A. I had one year of surgery residency.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 in?
- 2 A. Marine Corps.
- 3 Q. How long was that?
- 4 A. Two years.
- 5 Q. From what year to what year?
- 6 A. 1951 through '53.
- 7 Q. Did you serve in the Korean conflict?
- 8 A. I was not overseas.
- 9 Q. What was your -- what did you do in the Marine
- 10 Corps?
- 11 A. I was classified as a combat photographer.
- 12 Q. All right. Drafted or were those the days when
- 13 you could join for two years?
- 14 A. No, I was drafted.
- 15 Q. Okay. Then you went to the University of
- 16 Nebraska-Lincoln. What was your major?
- 17 A. Pre-medicine.
- 18 Q. All right. You would have started in the fall
- 19 or '53 or '54?
- 20 A. No, I started in the fall of 1956. After I left
- 21 the Marine Corps, I worked as a laboratory and x-ray
- 22 technician at the Lutheran Hospital in Beatrice, Nebraska.
- 23 Q. For about two years?
- 24 A. Well, actually, I worked there until 1958. I
- 25 continued to live in Beatrice but drove to Lincoln for

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. Where?
- 2 A. Saint Elizabeth's Hospital, Lincoln, Nebraska.
- 3 Q. All right. And was that a two- or a four-year
- 4 residency?
- 5 A. It was a one-year residency.
- 6 Q. Did they -- that one-year residency program, was
- 7 that -- that wasn't to train you to be a general surgeon,
- 8 was it?
- 9 A. It was part of that, yes, although they didn't
- 10 have a four-year program. It was a one-year program. It
- 11 was general surgery.
- 12 Q. When you finished that, you were supposed to be
- 13 a general surgeon --
- 14 A. No, sir.
- 15 Q. -- a- you were supposed to be one year toward a
- 16 general surgeon?
- 17 A. I was supposed to be one year toward that.
- 18 Q. All right. Was that affiliated, that surgery
- 19 residency, was that affiliated with the teaching
- 20 institution like a university?
- 21 A. No.
- 22 Q. And that was at Saint E's, did you say?
- 23 A. Saint Elizabeth, yes.
- 24 Q. They still don't have that program, do they?
- 25 A. No, they do not.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. When did that Program end, if you know?
- 2 A. I'm not sure.
- 3 Q. Was it designed only to be a one-year program?
- 4 A. Yes.
- 5 Q. Was it designed if a general practitioners and
- 6 physicians that wanted to do general surgery but couldn't
- 7 get into any other program?
- 8 A. I can only give you my impression of why they
- 9 had it. I believe that it probably had a twofold purpose.
- 10 One was to fulfill a requirement for some other specialty
- 11 program such as urology where they would require a
- 12 one-year general surgery residency before going into their
- 13 subspecialty area.
- 14 Q. All right.
- 15 A. The other purpose was probably to better prepare
- 16 general practitioners for entering practice.
- 17 Q. So that they could do relatively simple
- 18 procedures?
- 19 A. Yes.
- 20 Q. How large a residency was it or how many
- 21 residents were there at any single class?
- 22 A. Two.
- 23 Q. All right. Two. Did you start a private
- 24 practice then during this residency or after this
- 25 residency?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 two primary hospitals.
- 2 Q. All right. And you're paid a straight -- a
- 3 salary is that correct?
- 4 A. Yes.
- 5 Q. And how long is your contract? Is it a
- 6 year-to-year thing or a month-to-month, or can you tell
- 7 me?
- 8 A. A year-to-year.
- 9 Q. And you have a contract with them, I take it?
- 10 A. Not really. An informal contract.
- 11 Q. All right.
- 12 A. I work. They pay.
- 13 Q. All right.
- 14 MR. DOMINA: You too much. There not enough.
- 15 A. Right.
- 16 Q. (By Mr. Batallion) Did you sell your practice
- 17 in '89, or how did that work?
- 18 A. No, I did not sell it. I closed my practice and
- 19 informed my patients that I was leaving active practice
- 20 and gave them the choice of physicians to utilize but left
- 21 the choice w to them. And in terms of my arrangement
- 22 with the practice at that time, the practice was evaluated
- 23 for its worth, and I was paid one-fourth of that value.
- 24 Q. By your partners?
- 25 A. By my partners.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. After this residency.
- 2 Q. Where did you start your private practice?
- 3 A. I joined Drs. Wendt and Weston in Lincoln,
- 4 Nebraska.
- 5 Q. And what year?
- 6 A. 1964.
- 7 Q. And you've been in private practice ever since?
- 8 A. I am no longer in private practice.
- 9 Q. What do you do now?
- 10 A. I'm Vice president of a Medical Affairs at Brven
- 11 Memorial Hospital, Lincoln, Nebraska.
- 12 Q. When did you start that?
- 13 A. 1989.
- 14 Q. So you have not actively practiced in the area
- 15 of general practice or family practice since 1989; is that
- 16 correct?
- 17 A. Yes.
- 18 Q. And as Vice President of Medical Affairs, what
- 19 are your duties?
- 20 A. Primarily liaison between the medical staff and
- 21 the administration of this hospital.
- 22 Q. I take it that you were primary -- the hospital
- 23 in which you primarily practiced during your a-(vote
- 24 practice was Brven; is that correct?
- 25 A. I'd say that Brven and Saint Elizabeth were my

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. All right. And who were your partners at that
- 2 time?
- 3 A. Or. Wendt, Or. Weston -- Excuse me. Let me
- 4 back up. I think Or. Wendt had already retired at that
- 5 point. So it would have been Or. Weston and Or. Hinrichs.
- 6 Q. Is that H-E-N-R-I --
- 7 A. It-I-H-R-I-C-H-S.
- 8 Q. What type of practice did you have -- or strike
- 9 that. Did you ever become board certified?
- 10 A. Yes, I did.
- 11 Q. When did you become board certified?
- 12 A. I'm not certain, but I think it was about 1965.
- 13 Q. All right. And when I saw that, you became
- 14 board certified in family practice; is that correct?
- 15 A. Yes.
- 16 Q. All right. When you became -- you think it was
- 17 approximately 1965?
- 18 A. Yes.
- 19 Q. Did you recertify?
- 20 A. Yes, four times.
- 21 Q. All right. And that would have been what, once
- 22 every how often?
- 23 A. You have to be recertified every seven years.
- 24 You're given the opportunity to try the first time in the
- 25 sixth year. I believe that I did that each time.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. Old you ever have to retake the examination?
- 2 A. No.
- 3 Q. Are you still board certified in family
- 4 practice?
- 5 A. Yes, I am.
- 6 Q. When does the certification run out?
- 7 A. I was recertified a year ago.
- 8 Q. All right. Have you published?
- 9 A. Only one paper when I was a senior in medical
- 10 school.
- 11 Q. All right. Can you -- did your practice ever
- 12 substantially change from the time that you started family
- 13 practice until the time you retired? And by that I mean
- 14 as far as your patient census is concerned and the type
- 15 of cases that you saw.
- 16 A. I stopped doing obstetrics approximately three
- 17 years before I left practice. And I expect that over the
- 18 course of 25 years, my surgical practice probably
- 19 diminished by choice.
- 20 Q. Any other changes?
- 21 A. No.
- 22 Q. As far as the general age or wellness of your
- 23 population, that stayed relatively stable?
- 24 A. I would have to say that the average age of my
- 25 patient population probably increased over the years.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. What stage was it. If you can recall?
- 2 A. I don't recall.
- 3 Q. Do you know the Wiegelhauses or the Wiebelhaus'
- 4 family?
- 5 A. No, I do not.
- 6 Q. How well do you know Mr. Domina?
- 7 A. I have met him several times since he is a
- 8 family member of a good friend of mine and a classmate of
- 9 mine.
- 10 Q. And, now, he's obviously not a -- he is a
- 11 classmate of yours?
- 12 A. His relative was a classmate of mine.
- 13 Q. Okay. All right. Who was that?
- 14 A. Dr. Alan Domina.
- 15 Q. All right. And Dr. Alan Domina would be his
- 16 cousin or some such thing, or do you have any idea?
- 17 A. Uncle, I believe.
- 18 Q. All right. And you and Dr. Domina went to
- 19 school together in medical school, is that right?
- 20 A. Yes.
- 21 Q. All right. Has Mr. Domina ever done any work
- 22 for you?
- 23 A. No.
- 24 Q. Were you involved in any of his political
- 25 endeavors with respect to contributions, et cetera?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. All right. But as far as wellness, it would
- 2 change only with respect to age?
- 3 A. That would be my assessment, yes.
- 4 Q. Okay. Old you ever treat patients with
- 5 melanoma?
- 6 A. Yes.
- 7 Q. How many?
- 8 A. I can't -- I can't tell you. At least two that
- 9 I can think of right off the top of my head.
- 10 Q. How long ago are we talking about that you would
- 11 have treated these two patients?
- 12 A. Oh, the first one would have been probably
- 13 twenty years ago. And the last one perhaps five years
- 14 ago. No, strike that. Probably seven or eight years ago.
- 15 Q. Okay. Old each of them present to you with
- 16 melanoma or with a mole that turned out to be malignant?
- 17 A. One of them presented with disease that was
- 18 already metastatic. The other one presented with a mole
- 19 that was diagnosed as being malignant.
- 20 Q. All right. And which one presented with a mole
- 21 that was later diagnosed, number one or number two?
- 22 A. Number two.
- 23 Q. Okay. Old the second patient, the more recent
- 24 patient, what was the outcome, if you can recall?
- 25 A. She was well the last I know -- I knew of her.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. I think I did contribute to his effort, yes.
- 2 Q. All right. And so you've known Mr. Domina for
- 3 quite a while, is that correct? Would that be a fair
- 4 statement?
- 5 A. Definition of quite a while?
- 6 Q. You've known him for at least the last ten or
- 7 fifteen years?
- 8 A. Probably ten years.
- 9 Q. Have you had any business dealings with him at
- 10 all other than this case?
- 11 A. Yes.
- 12 Q. How many, if you can tell me, generally?
- 13 A. I believe that he asked me to evaluate two other
- 14 cases.
- 15 Q. In the nature of medical malpractice or in the
- 16 nature of just general personal injury?
- 17 A. In the nature of malpractice.
- 18 Q. Have you ever served as a witness for either him
- 19 or his firm in the past?
- 20 A. No.
- 21 Q. Have you ever given a deposition in a medical
- 22 negligence case before?
- 23 A. No.
- 24 Q. Have you ever been sued for medical negligence?
- 25 A. Yes.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 O. All right. I assume that your deposition would
2 have been taken in those cases, however?
3 A. Where I was sued?
4 Q. Yes.
5 A. Yes. Yes.
6 O. All right. I've just gotten ahead of myself.
7 Doctor. Just a second. All right. How many times have
8 you been sued for medical negligence?
9 A. Once.
10 Q. How long ago was that?
11 A. I think probably eight, nine, ten years ago.
12 O. And what was the nature of that suit?
13 A. It was alleged that cerebral palsy in a child
14 resulted from a delayed cesarean section.
15 Q. Okay. I assume that your insurance rates went
16 up after that and that's when you decided you wanted to
17 stop delivering babies?
18 A. I think I had already stopped before that.
19 O. You stopped before you were sued?
20 A. Let me correct that. I think I did continue
21 delivering babies at that point, but the suit wasn't filed
22 until many years after the occurrence, the alleged
23 occurrence. I don't believe that my malpractice premiums
24 did go up all that much.
25 Q. At least none that you could tell that would be

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 years ago?
2 A. I believe so. I believe so.
3 O. All right. Was there another attorney
4 representing Dr. Swanson?
5 A. Yes, there was.
6 O. Do you remember who that was?
7 A. It was Fred Kauffman, I believe.
8 O. All right. And your defense to that claim was
9 what, if you can recall?
10 A. That it was not because of a delay. It was due
11 to unknown causes.
12 Q. Am I correct in assuming that you would have
13 handled the prenatal and perinatal care until you thought
14 it was necessary to do a C-section, and then you would
15 have called in Swanson?
16 A. He was called in earlier in the day of the
17 delivery.
18 Q. And then you would have both made the decision
19 with respect to whether to do the C-section?
20 A. Yes, yes.
21 O. All right. Okay. Do you remember the name of
22 that child?
23 A. No, I don't.
24 O. All right. And then how long ago were you
25 contacted in relation to this case by Mr. Domine?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 related to that claim? Is that correct?
2 A. No. That's my feeling, yes.
3 Q. Who represented you in that case, if you can
4 recall?
5 A. A Mr. Lamson from Omaha.
6 O. Did that case go to trial or was it settled?
7 A. Yes, it did.
8 O. Was it tried in Lincoln?
9 A. Yes.
10 O. All right. And I assume you got a defendant's
11 verdict?
12 A. They settled before it went to jury.
13 O. Oh, okay.
14 A. That sought a settlement, and it was settled.
15 Q. How many other defendants were sued besides
16 yourself?
17 A. One other.
18 Q. Was that the hospital?
19 A. No.
20 O. Who was it?
21 A. It was the obstetrician.
22 O. Who was that?
23 A. It was Dr. Steven -- I have a mental block. I'm
24 sorry -- Swanson.
25 Q. And you think that case was tried eight or ten

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. Oh, I think that I was called somewhere in
2 perhaps January. I'm not one hundred percent sure.
3 Q. Of?
4 A. Of this year.
5 O. All right.
6 A. It may have been December of '92.
7 O. And then what materials have you had an
8 opportunity to review?
9 A. I reviewed --
10 O. Let me back up. I got mad of myself main.
11 What materials did you initially review?
12 A. I reviewed a memorandum from David Domine
13 summarizing the chronology of activities. I looked at a
14 pathology report from LCM dated 9/16/92. I read progress
15 notes from UNMC Internal Medicine Clinic dated 9/18/92 and
16 signed 9/22/92 by Phillip Blenman, M.D. I reviewed a
17 surgical pathology report from UNMC reviewing previous
18 tissue slides and dated 9/18/92, signed by J. Linder, M.D.
19 I reviewed copies of handwritten and typed notations,
20 presumably copies from the medical record of Donna
21 Wiebelhaus kept by Dr. Neengast. These two sheets were
22 not labeled. Number six, a bundle of material containing
23 the clinical lab data presumed to be prenatal lab work.
24 Copies of records labeled O. J. Neengast, M.D. and Donna
25 Wiebelhaus. Date of birth 12/10/64. This packet of

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 material included the two sheets described up in number
2 five before that were not labeled. Bundle of material
3 labeled National Cancer Institute, PQG State-of-the-Art
4 Cancer Treatment Information dated 7/6/92. And a record
5 from the UNMC that appears to be the original record of
6 Donna Wiebelhaus while hospitalized in that institution.

7 Q. All right. And do you still have the memo from
8 Mr. Domina reflecting the chronology?

9 A. Yea. I do.

10 Q. Do you have that with you today?

11 A. Yen. I do.

12 Q. Can you show it to me, please?

13 (Exhibit No. 1 was marked
14 for identification.)

15 Q. (By Mr. Batallion) And we can substitute a copy
16 or get you the original back, Doctor.

17 A. All right.

18 Q. Exhibit No. 1 is the memo from Mr. Domina that
19 you would have received back in January of '93; is that
20 correct?

21 A. Yea. It's dated February 17, 1993.

22 Q. But this would have been part of the initial
23 information that you received with respect to your review
24 of this case?

25 A. Yes.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 you what's been marked as Exhibit No. 2, are those the
2 notes that you prepared with respect to your testimony
3 today?

4 A. These are the notes that I took in reviewing the
5 text that I previously mentioned, yes.

6 Q. And is there anything else in those notes
7 besides just a synopsis of that information in the text?

8 A. In terms of material, no. It's all from that
9 text.

10 Q. Okay. And then the other two documents that you
11 have up front here are what?

12 A. One is the packet of material that contains the
13 laboratory, clinical medicine laboratory sheets and
14 handwritten notes taken from -- presumably from Dr.
15 Neogenest's files. At least they're labeled with his
16 name. And the other one is the path report from LCI on
17 the initial evaluation of the tumor, some information from
18 the Medical Center which is a -- at least part of an
19 evaluation done by Dr. Bierman, the examination of the
20 original slides done by the pathologist at the UNMC, and
21 then there's the two sheets that I labeled number five in
22 my data bank here that were not otherwise identified but
23 appear in this other document from Dr. Neogenest.

24 Q. And then the third packet here, what is this?

25 A. This is a packet labeled National Cancer

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 Q. All right. Subsequent to that time did you have
2 an opportunity to review my additional information?

3 A. I have reviewed a copy of the -- a deposition
4 given by Dr. Neogenest.

5 Q. Anything else?

6 A. And I did review some information in a textbook.

7 Q. Which text was that?

8 A. It's the text labeled Cancer Principles and
9 Practice of Oncology by DeVita, Hellman and Rosenberg,
10 Volume 2, 3rd Edition, Copyright 1989.

11 Q. All right. Do you have a paw of the article
12 there, or that's just your notes?

13 A. No, these are just mites that I made from that.

14 Q. Okay. Well, we might as well make an exhibit of
15 everything you've got there, Doctor. It will just make it
16 a lot easier.

17 A. All right.

18 Q. So if you would do your notes first, put them
19 all together there, and we'll make it Exhibit No. 2. The
20 court reporter will mark it for you. You don't have to
21 worry about it. We'll staple it together, and then she'll
22 mark it as Exhibit No. E.

23 (Exhibit No. 2 was marked
24 for identification.)

25 Q. (By Mr. Batallion) All right, Doctor. Handing

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 Institute. It's materials presumably obtained from The
2 National Cancer Institute as at least their publications
3 provided to me by Mr. Domina.

4 Q. So let's --

5 A. And I have a summary of what I said to Mr.
6 Domina.

7 Q. All right. Why don't you give me this. Let's
8 mark as number -- Exhibit 3 the information from The
9 National Cancer Institute data bank.

10 (Exhibit Nos. 3 and 4 were
11 marked for identification.)

12 Q. (By Mr. Batallion) Doctor, handing you what's
13 been marked as Exhibit No. 3, can you identify that for
14 the record?

15 A. It's the data from The National Cancer
16 Institute, PQG State-of-the-Art Cancer Treatment
17 Information in melanoma.

18 Q. That was provided to you by Mr. Domina's office;
19 is that correct?

20 A. Yes.

21 Q. And that is what? Approximately how many pages
22 long?

23 A. Nine pages.

24 Q. Now then Exhibit No. 4, can you identify that
25 for us?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 A. Yes. This is a report that I prepared and sent
2 to Mr. Domina.
3 Q. All right. When was that report prepared?
4 A. It's not dated. To the best of my recollection,
5 in March, perhaps, of this year.
6 Q. All right. Had you had an opportunity to review
7 Dr. Nagengast's deposition by the time you compiled that
8 report. If you can recall?
9 A. No.
10 Q. All right. And then you -- the rest of your
11 file is Mr. Domina's enclosure letter; is that correct?
12 A. Yes.
13 Q. And that's dated what date again?
14 A. February 19.
15 Q. '93. Is that correct?
16 A. Of '93, yes.
17 Q. Then you have a yellow piece of paper. What's
18 that?
19 A. It's a bill that I generated for making copies
20 of this report, sent to Dave.
21 Q. Okay. And then the last document in your file
22 is what, a compilation of your hours?
23 A. Yes.
24 Q. Okay.
25 A. This sheet is a compilation of my hours.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 A. I don't know. I would estimate that probably
2 all but maybe an hour or 15 minutes and a half maybe.
3 Q. You don't have Dr. Nagengast's whole record with
4 you today; is that correct?
5 A. No, I don't.
6 Q. But you do have a copy of it as far as you know
7 of --
8 A. No.
9 MR. DOMINA: Counsel, I think the witness has
10 said he has a series of notes that he believes are from
11 Dr. Nagengast and a one-page LCM clinical medicine report.
12 MR. BATAILLON: Right.
13 MR. DOMINA: You've asked him if he has the
14 whole record.
15 MR. BATAILLON: And he doesn't know if he does
16 or not.
17 MR. DOMINA: If you mean the patient's lifetime
18 record, which may be what he understands. I'm not sure
19 the two of you are communicating.
20 MR. BATAILLON: That's right.
21 MR. DOMINA: I believe this is to be the entire
22 record related to the period of time during the
23 sentence. I don't know what you mean by "the
24 interrogatory."
25 MR. BATAILLON: I understand. Why don't we just

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 Q. Can I see it, Doctor? Okay. And it looks like
2 you have about seven hours in the case so far; is that
3 correct?
4 A. That was before I looked at the deposition, yes.
5 Q. Okay. This would have been the hours that you
6 would have spent up to the time -- strike that. You have
7 about seven hours in this before you would have seen Dr.
8 Nagengast's office notes but after you would have
9 generated the report; is that correct?
10 A. Well, I saw some of Dr. Nagengast's office
11 reports. That was part of what was sent to me to review.
12 P. I misspoke. The seven hours would be what you
13 had generated up until the time and after you completed
14 the written report; is that correct?
15 A. It would include the report that I generated.
16 yes.
17 Q. But it would have been before you had an
18 opportunity to review Dr. Nagengast's deposition?
19 A. Yes.
20 Q. And I see you did it -- you've got it kind of in
21 spurts. An hour and a half. An hour and a half. An hour
22 and a half. Three quarters of an hour. An hour and then
23 three quarters of an hour. How much of this time would
24 you estimate was spent in reviewing medical records, if
25 you can tell me. If you know?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 make it clear. Let's make another exhibit of the two
2 other packets in your dossier there.
3 MR. DOMINA: One exhibit?
4 MR. BATAILLON: It doesn't matter how you want
5 to do it. There's two different packets, so let's mark it
6 two different exhibits.
7 (Exhibit Nos. 5 and 6 were
8 marked for identification.)
9 Q. (By Mr. Battillon) All right, Doctor, handing
10 you what's been marked as Exhibit No. 5. Can you identify
11 that for us?
12 A. This is some of the material that was provided
13 to me by Mr. Domina.
14 Q. That would have been part of the initial packets
15 or materials; is that correct?
16 A. Yes.
17 Q. And then Exhibit No. 6?
18 A. Also materials provided to me by Mr. Domina
19 which includes primarily information from the University
20 but also includes the two unidentified sheets that I
21 referred to before.
22 Q. All right. And that would have been a part of
23 the initial packet of materials sent to you; is that
24 correct?
25 A. Yes.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

Q. Were there mu other materials sent to you initially other than the information that we have marked as exhibits here?

A. There was a record that I took to be the medical record from the University of Nebraska Medical Center.

Q. Anything else?

A. No.

Q. May I see your report, Exhibit No. 4. Doctor? Do you know Dr. Nagengast's son that practices surgery here in Lincoln?

A. Yes. I do.

Q. Do you know -- how do you know him a- what's your experience with him?

A. Well, I first met him when I oriented him into this hospital as he entered Practice here in Lincoln, Nebraska. Since that time, only through meeting him at committee meetings and --

Q. He's a staff physician here at Brum? Is that correct?

A. Yes.

Q. And he's a general surgeon?

A. Yes.

Q. Would he be qualified, in your opinion, to do m excisional biopsy of a mole?

A. I'm sorry. I missed the last part of it.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

Q. And do you intend to offer mu opinions as to Mrs. Wiebelhaus' prognosis had the biopsy been excised earlier than it was?

A. No.

Q. Do you have mu opinions on that issue?

A. I think I made a statement in my material that I submitted to Mr. Domina, if I may refer to that.

O. Sure.

A. In this case there was some delay between the time the mole was first mentioned in the physician's records and the time of biopsy. At least a month. The lesion was probably already in the vertical growth phase, and we cannot say for sure that the ultimate outcome would have been different if excision had occurred a month earlier. Nevertheless, the delay could very -- would very easily have contributed by allowing increased depth of invasion as well as lymph node metastasis. And then a little bit further down I say that it is my opinion that good medical practice would have dictated excisional biopsy when the change was first brought to the attention of the physician.

Q. Would you agree that examination of the mole may a. may not be indicative of its level of invasion?

A. Yes.

O. All right. So that you could have a completely

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

Excisional biopsy --

Q. -- of a mole?

A. Yes.

Q. All right. And he would also be qualified to do a broadening or a widening of that excision in the event it was found to be a malignant tumor?

A. Yes.

Q. A referral by a general practice physician to Dr. Nagengast's son would be appropriate if the physician believed that there needed to be further treatment from a surgical standpoint for a diagnosed melanoma. Is that correct?

A. Yes.

Q. Did you ever make any referrals to Dr. Nagengast's son, the surgeon here in Omaha or in Lincoln?

A. He was not in practice when I was in practice.

Q. All right, Doctor. It's my understanding that you are being offered as a witness by the Plaintiff to testify on issues of the standard of medical care. Is that your understanding?

A. Yes.

Q. Any other issues that you intend to talk about other than the standard of medical care rendered in this case?

A. No.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

normal looking mole that could be a Clark's IV melanoma, would you agree with that?

A. Possibly.

MR. DOMINA: Are you talking about hypothetically?

MR. BATAILLON: Hypothetically.

A. Hypothetically, yes.

Q. (By Mr. Bataillon) All right. But you haven't done mu research with respect to the doubling rate a. any of the issues with respect to causation in this case. Is that correct?

A. No, only reading the one text and not all of that.

O. All right. And so you're not prepared to offer mu opinions one way or another as to whether or not it would have made a difference in the outcome. Is that correct?

A. That's correct.

Q. All right. Well, let's talk then just a minute about the standard of medical care with respect to Dr. Nagengast. What I'd like to do, Doctor, is ask you what criticisms, if mu, you have as far as Dr. Nagengast's care is concerned, and if there's more than one, then we can go back and talk about them individually. So if you can list your opinions with respect to Dr. Nagengast.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. Uell. I was always taught that in the case of a
2 pigmented lesion on the skin, that if there was change,
3 any kind of a change, color change, elevation, size, that
4 the prudent thing to do at that point would be excisional
5 biopsy. The criticism I have is that apparently that was
6 not done.
- 7 Q. All right. Any other criticisms?
- 8 A. M.
- 9 O. Now, when you talk about a pigmented lesion,
10 you're talking about a mole in common parlance?
- 11 A. Uell, there can be moles without pigment.
- 12 Q. Okay.
- 13 A. I'm talking about lesions that have b—
14 pigment as part of their structure.
- 15 O. Okay. Does it matter whether the mole is raised
16 or if it's flat with the surface of the skin?
- 17 A. I'm not sure I understand what you mean by
18 difference.
- 19 O. Well, I appreciate that. When we talk about
20 pigmented lesion, do we mean that it has to be an area of
21 the skin that is raised, the lesion has to be raised, or
22 can it just be a brown spot on the skin?
- 23 A. A nevus can be a brown spot on the skin.
- 24 Q. All right. And you were -- you used the word
25 nevus, and that would be the medical definition then of

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Patient or -- strike that. Can you give us a garden
2 variety, Doctor. I want you to look at a mole case? How
3 does that usually occur, if you could tell us in a
4 hypothetical?
- 5 A. It would have been my policy that if I was asked
6 to look at a mole and was told that it had changed in some
7 way, I would have excised that mole.
- 8 Q. Okay. At that time or whenever the patient
9 would let you do it?
- 10 A. I would have advised doing it right then.
- 11 O. All right. And you can't recall a patient ever
12 saying to you I want to wait?
- 13 A. I cannot recall that.
- 14 Q. If a witness said to you I want to wait, what
15 would you do?
- 16 A. If there was change, obvious change, I would
17 tell them that it would be my best feeling that a delay
18 should not occur.
- 19 Q. And would you tell them why?
- 20 A. Yes.
- 21 Q. What would you tell them?
- 22 A. That because of the change, the likelihood of
23 this being a malignant lesion was increased, and that if
24 that were true, that the very earliest removal possible
25 would be prudent.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 the pigmented lesion that you had referred to?
- 2 A. Yes.
- 3 O. Did you in your practice remove these pigmented
4 lesions from time to time?
- 5 A. Yes.
- 6 Q. And of all the pigmented lesions that you
7 removed, only two turned out to be melanoma. Is that
8 correct?
- 9 A. Yes.
- 10 O. All right. And one had already progressed to a
11 metastatic stage; is that correct?
- 12 A. Yes.
- 13 Q. And the other one apparently not?
- 14 A. That's correct.
- 15 Q. How many pigmented lesions do you think you
16 removed in your years of family practice?
- 17 A. I don't think that I could give you an accurate
18 estimate. I would guess that I probably removed fifteen
19 or twenty a year. Multiply that by twenty-five, and you
20 might have a ballpark figure.
- 21 O. Sure. I understand. Did any of the patients
22 that you talked to elect to delay removing the lesion ever
23 that you know of?
- 24 A. I do not recall that ever happening.
- 25 Q. All right. What generally would you tell the

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 O. All right. But if the patient wanted to delay,
2 the patient delays; right?
- 3 A. Yes, but I would have documented that.
- 4 Q. All right. You would have documented that the
5 patient wants to wait?
- 6 A. That they refused excision at that time and
7 elected to wait, yes.
- 8 O. All right. And there's really nothing you can
9 do about that as a physician; is that correct?
- 10 A. Not if they refused, right.
- 11 O. I assume that every pigmented lesion that you
12 removed was one that had reported to you some change; is
13 that correct?
- 14 A. Not necessarily.
- 15 O. What other pigmented lesions would you have
16 removed?
- 17 A. If this was a pigmented lesion in an area that
18 was likely to be irritated by clothing or by some function
19 of the work that they performed, I might have removed that
20 even though there were no changes. If there were a mole
21 on the palm of the hand or the sole of the foot, I would
22 have removed that.
- 23 O. And that wouldn't have been so much for the
24 potential of malignancy but as a convenience of the
25 patient; is that correct?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 A. Except for those in the hand and the foot.
2 There's a higher incidence of malignancy in those lesions,
3 and I would not have done that just for their convenience.

4 Q. But if they had one that was irritated by
5 clothing, then that would have been one that you would
6 take off mostly for the patient's convenience?

7 A. Mostly, or if there was another chance.

8 Q. I understand. For them to bring it to your
9 attention, does that automatically mean that there's a
10 chance?

11 A. No.

12 Q. Old W.W. ever have a Patient that came to you --
13 that nu--can remember that came to you and asked you to
14 look at a mole that you do not believe had an idea that
15 there was a chance that a mole could be cancerous?

16 A. Would W.W. restate that?

17 Q. Have W.W. ever had a Patient that came to you
18 that asked to you check a mole that you believe, either
19 directly or indirectly, had an idea that that mole had a
20 chance to be cancerous?

21 MR. DOMINA: I'll object on foundation. Go
22 ahead.

23 A. I believe that that occurred.

24 Q. (By Mr. Batallion) How many times do you think?

25 A. I have no estimate.

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

1 the Patient's failure to follow your advice?

2 A. I think it's my responsibility to emphasize to
3 that patient the importance of doing that. But if they
4 still refused, then I would document that refusal in my
5 record.

6 Q. If you told the patient that it was malignant,
7 that there was a chance that it could be malignant, would
8 that be enough do you think?

9 A. That simple statement, I don't believe that.
10 would be enough.

11 Q. All right. How much do you got to do, Doc?

12 A. I think you're obliged to tell him not only that
13 this could be malignant but that the natural history of
14 malignant melanomas is very bad; that there is no good
15 treatment. Once a lesion like that becomes metastatic,
16 their risk is much higher if they delay.

17 Q. All right. And you think you did that in each
18 and every case of anybody that ever refused?

19 A. I don't recall anybody specifically that
20 refused.

21 Q. All right.

22 A. But I believe it would have been my practice to
23 do that.

24 Q. As far as Dr. Nagengast's record is concerned,
25 when is the first time -- strike that. Based on your

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

1 Q. Would you agree with the statement that most
2 patients that come to you and ask you to check a mole have
3 an idea that the mole could be cancerous?

4 A. It's my feeling --

5 Q. Ten.

6 A. -- that from some article that they read or some
7 experience that they've had, either family member or
8 something like that, that they are sensitized about a
9 pigmented nevus and that would prompt them to ask me about
10 a lesion.

11 Q. And its potential of being cancerous?

12 A. And their concern for that potential.

13 Q. All right. Would you agree that most of those
14 patients that come in and ask you to check a mole then at
15 least in the back of their mind have the idea that there's
16 a chance that the mole could be cancerous?

17 A. I don't know if most of them do, but certainly I
18 would think that that would be the primary reason for
19 asking for it.

20 Q. All right. And if you told a patient that you
21 thought the mole should be removed, you would expect the
22 patient to follow your advice?

23 A. Yes.

24 Q. And if the patient does not follow your advice,
25 is it your opinion that you would not be responsible for

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

1 review of his record alone, when is the first time that
2 you believe there is a documented change in this mole?

3 A. May 17.

4 Q. Sum. Go ahead and look at the record.

5 A. The only notation indicating a change was made
6 on 8-31-92 when the notation says mole ulcerated.

7 Q. All right. And you believe that at least he
8 should have recommended excision at that time?

9 A. Based only on his record?

10 A. Yes.

11 A. Based only on his record, yes, that would have
12 been reasonable.

13 Q. All right. Now, based on everything that you've
14 reviewed, do you have an opinion as to when he should have
15 recommended the mole to be excised?

16 A. Yes.

17 Q. When?

18 A. In the 22nd of August, which is the first
19 notation referring to the mole on the back.

20 Q. Okay. And you do you believe he should have
21 recommended excision in the 22nd of August?

22 MR. DOMINA: Just a minute.

23 A. Excuse me. I'm in error. The first notation
24 was 7-9-92.

25 Q. (By Mr. Batallion) 7/9/92?

MICHELLE S. BENES, RPR, JS WURN & ASSOCIATES, (402) 475-3376

- 1 A. Yes.
 2 Q. All right.
 3 MR. DOMINA: So the record is clear. Is that the
 4 dau he should have first recommended excision?
 5 O. (Bu Mr. Batallion) That was after your
 6 attorney, Mr. Domina, flipped you back in the record a
 7 little ways. I take it?
 8 A. Yes.
 9 O. All right. Now, let's talk about --
 10 A. But I highlighted it. Go ahead. I'm m u .
 11 O. Let's talk about 7-e-92.
 12 A. Yes.
 13 O. Why do you believe that there should have been a
 14 recommendation to excise on 7-9-92?
 15 A. From some information that at that time it was
 16 referred to as being somewhat irritated. And I don't
 17 recall the source. It may have been the H & P in the UNMC
 18 material that I no longer have.
 19 Q. Old you have a chance to review Mrs. Nagengast's
 20 a Mrs. Wiebelhaus' deposition?
 21 A. No.
 22 Q. If the mole is on a interferes with her bra
 23 a strap, that could irritate it; is that correct?
 24 A. Yes.
 25 Q. And if that is the cause of the irritation, you

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES. (402) 475-3376

- 1 strap, how high is your level of suspicion of a cancerous
 2 lesion?
 3 A. It would depend a little bit on the appearance
 4 of that lesion when I examined it.
 5 O. All right. And what would you be looking for?
 6 A. I'd be looking for variation in the color. I'd
 7 be looking for variation in elevation. I'd be looking for
 8 variation in the circumference; that is, indentations a?
 9 the circumference of the lesion.
 10 O. All right.
 11 A. Any satellite lesions.
 12 O. Anything else?
 13 A. Evidence of inflammation, redness.
 14 Q. All right. What else -- is there any specific
 15 color you'd be looking for one way or another?
 16 A. No. Just a variation in color within the lesion.
 17 O. All right.
 18 A. Generally, it's darker but not always.
 19 Q. So if the color was uniform in tone or uniform
 20 in color, then that would say to you that it may not be
 21 cancerous?
 22 A. That would decrease my suspicions.
 23 O. And then if it's not elevated very much or
 24 depending on the elevation, that would also decrease your
 25 suspicion; is that correct?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES. (402) 475-3376

- 1 would recommend its excision because it causes irritation?
 2 A. Yes, because it could be the cause of that
 3 irritation, but it could not also.
 4 Q. But it's not clear at least at this time?
 5 A. Yeah.
 6 Q. In July 97
 7 A. Yes.
 8 O. You would certainly recommend that the patient
 9 watch it. If she doesn't want it excised --
 10 A. Yen.
 11 O. -- to see if it changes?
 12 A. Ten.
 13 Q. All right. Would you expect that if there are
 14 changes, the patient would report to you the changes on
 15 subsequent visits?
 16 A. I would expect that, yes.
 17 Q. Do you think it's necessary for the physician
 18 then to go back and examine the mole each time even if
 19 there's no complaint?
 20 A. I think that depends on the level of the
 21 physician's suspicion.
 22 O. If she does not report -- if the patient in this
 23 case does not report to the physician any changes in the
 24 mole that she's aware of when she sees him on July 9,
 25 1992, other than that it's being irritated by her bra

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES. (402) 475-3376

- 1 A. If it were flat, it would decrease the
 2 suspicion. If it were elevated, it would increase.
 3 O. And the circumference. What about the
 4 circumference? The size or --
 5 A. If it's uniform and smooth at its circumference,
 6 it would decrease your suspicion. If it were irregular,
 7 indented, it would increase your suspicion.
 8 Q. And then, of course, if there were satellite
 9 moles, how would you --
 10 A. If there were small areas of pigmentation
 11 outside of the primary lesion, little satellites, that
 12 would certainly increase your suspicion.
 13 O. And if not, then it would decrease your
 14 suspicion?
 15 A. I don't know that that would have a negative
 16 value.
 17 Q. And inflammation. If the mole is, let's say, on
 18 the bra strap, what does that tell you?
 19 A. It would probably increase my suspicion that
 20 this may be a mechanical irritation.
 21 O. All right. You believe that Dr. Nagengast
 22 should have recommended excision on that day for what
 23 reason other than the irritation?
 24 A. The history that the patient gave that it had
 25 changed.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES. (402) 475-3376

- 1 O. And you can't remember where that history --
 2 your knowledge of that history -- and from?
 3 A. No, I can't.
 4 Q. Do you remember what the change was that was
 5 reported?
 6 A. It seemed like it had grown some in size and
 7 that there was some redness.
 8 O. Well, the redness is -- could be explained by
 9 the irritation by the bra strap?
 10 A. Could be, yes.
 11 O. This growth in size would be explained, in your
 12 opinion -- the growth in size would be an indication of an
 13 increased likelihood of cancer in your estimation?
 14 A. Certainly increase your suspicion, yes.
 15 O. If the patient reflected that she had never
 16 really paid much attention to it and didn't know whether
 17 it had gotten larger or smaller in July 8, the only reason
 18 that you would recommend excision would be continued
 19 irritation, would that be correct?
 20 A. I believe so, without any other factor there.
 21 Q. Sure. All right. And that is something that's
 22 completely w to the patient with respect to how much
 23 irritation he or she is willing to put up with, is that
 24 correct?
 25 A. I think if there was -- again, if there was m
 t

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. No.
 2 Q. -- on August 22?
 3 A. No.
 4 Q. Do you have any recollection as to how much
 5 information he imparted to Mrs. Wiebelhaus as to whether
 6 she should have had the mole excised?
 7 A. No, I don't.
 8 O. Do you have any recollection of what his
 9 deposition was with respect to how much information he
 10 imparted to her?
 11 A. I don't recall that, no.
 12 A. All right. Let me ask you hypothetically,
 13 Doctor, if Dr. Nagengast indicated that in his opinion
 14 that this mole should be removed because there is a
 15 possibility that there could be malignancy and the patient
 16 indicated that she wanted to wait until after her
 17 delivery, which was within a week or two, do you believe
 18 that he breaches the standard of care with that
 19 information from a hypothetical standpoint?
 20 A. I believe that he should have advised against
 21 waiting and that he should have documented that in his
 22 record.
 23 Q. In what respect? You mean, he has advised
 24 excision, and then he's supposed to put something more?
 25 She refused?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 other indication for suspicion, then it could have been
 2 elective, yes.
 3 O. Now, the next time the mole is noted in Dr.
 4 Nagengast's record is August what?
 5 A. Twenty-two.
 6 O. Now, and as I understand you correctly that
 7 if the physician's level of suspicion would be primarily
 8 that the mole was irritated because of a mechanical
 9 mechanism, that in your opinion he would not be obligated
 10 to go back and check the mole each time the patient came
 11 in. If the patient did not complain about it?
 12 A. I believe that's probably right.
 13 Q. All right. But if the physician had a
 14 continuing index of suspicion that there might be some
 15 malignancy, then you would say that he at least should ask
 16 the patient about it or would it matter?
 17 A. If he had a suspicion of malignancy, he should
 18 have removed it when that suspicion arose in his mind.
 19 Q. He sees the patient then in August 22, and at
 20 that time -- I got to get to it, Doctor, I'm sorry. All
 21 right. At that time he indicates in his record that he
 22 advised excision, is that correct?
 23 A. Yes.
 24 Q. You have any reason to believe that he did not
 25 advise excision --

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. If she refused. If he advised her against
 2 waiting and she still refused, then I personally would
 3 have documented both of those pieces of information.
 4 Number one, that I had advised against waiting, and number
 5 two, that she did refuse.
 6 Q. When you did your record, did you use a soap
 7 method?
 8 A. I'm not familiar with that.
 9 Q. All right. When you did -- when you wrote your
 10 records when you were in your family practice, did you
 11 have a standard way in which you documented office visits?
 12 A. Are you referring to written records, typed
 13 records?
 14 Q. Yes, Yes.
 15 A. We did both. In the early part of my practice,
 16 we had written notations. Probably in the mid portion we
 17 switched to a dictated, typed record.
 18 Q. Did your record look, as far as content, any
 19 different than Dr. Nagengast's record?
 20 A. Not a great deal.
 21 Q. Things were put -- are put down in a shorthand
 22 method, would that be a fair statement?
 23 A. I believe so.
 24 Q. I mean, you don't try to do a narrative of
 25 everything that occurred in any given situation?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. Again, it depends on my feeling as to the
2 seriousness of the situation and the implications that are
3 involved.
4 Q. How much difference is it going to make if she
5 waits a week, can you say?
6 A. I can't say.
7 Q. I believe in your report you indicated that you
8 believed that at least by the time the mole was first
9 visualized, that it was probably in its vertical phase?
10 A. It could have been.
11 Q. Why do you say that?
12 A. The history of it being elevated or raised I
13 think would indicate that it's entered into its vertical
14 phase.
15 Q. And that would mean that it was probably Clarks
16 IV at that point?
17 A. I don't know that that means Clarks IV, but it
18 certainly -- it certainly would indicate, I think, that it
19 has gone beyond Clarks I.
20 Q. Now, after you advised excision, how many more
21 times do you have to advise excision before the wtlmt --
22 I mean, do you have to note it every time you see the
23 patient that you've advised excision?
24 A. If I make that recommendation, I would document
25 it.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. How do you explain that phenomena?
2 A. There's probably several ways of explaining it.
3 The mental status of the wtlmt at the time, fear,
4 doesn't allow them to assimilate all the information. It
5 may be simply the volume of information that's presented
6 to them that they don't recall. Sometimes they just don't
7 understand. In spite of being very succinct and definite,
8 unless you can get them to bring that same information
9 back to you, it's sometimes difficult to know what they
10 really understand.
11 Q. And what they don't?
12 A. That they don't.
13 Q. Do you have -- See, I have a hard time with
14 this case, Doctor, and I need to know where you're coming
15 from on this. And, frankly, I've got to know whether you
16 really believe this or not, and I suspect you probably do,
17 but I want to know for sure. If you tell a patient that
18 you want the mole -- that you think the mole ought to be
19 excised, you would expect the wtlmt to follow your
20 opinion, right?
21 A. I would.
22 Q. And you couldn't imagine when a patient would
23 refuse to follow your recommendation if you said there's a
24 chance that that could be malignant cancer? Is that right?
25 A. I'd probably have difficulty understanding that.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. Do you think most physicians would document it
2 after they've refused your first piece of advice?
3 A. I have no way of knowing that.
4 Q. All right. Documentation is kind of an
5 individual style, is it not, Doctor, how much you
6 document?
7 A. I believe so.
8 Q. All right. And it depends a lot on how much you
9 trust the patient?
10 A. Is that a question?
11 Q. Yes.
12 A. I would think that would influence your
13 documentation, yes.
14 Q. Would you agree, Doctor, that with respect to
15 patients, that subsequent events many times colors their
16 recollection of what occurred prior to a traumatic event?
17 A. Would you rephrase that?
18 Q. Well, let me put it to you this way. There's
19 been a number of studies where surgical consents were
20 obtained and then after the surgery occurred, that the
21 patients have little, if any, recollection of what was
22 actually told them prior to the surgery. Are you familiar
23 with that literature?
24 A. I'm not familiar with that literature, but I
25 believe that to be true.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 Q. Why they would ever do that, right?
2 A. Yes, yes.
3 Q. And now what you're saying is even after you
4 tell them that, you have an additional obligation to say
5 you could die from cancer?
6 A. I believe so.
7 Q. How far do you go to tell them that malignant
8 cancer can kill them?
9 A. I think you have to go beyond just saying that
10 this could be malignant.
11 Q. Why?
12 A. I think that -- because in that statement you
13 say this could be malignant, and that's not telling them
14 that really this is malignant. You don't know at this
15 point.
16 Q. That's right.
17 A. But if they say, m. I want to wait. If you're
18 index of suspicion is high that this really has a very
19 good chance of being malignant, then I think you have to
20 take that next step and tell that patient I don't believe
21 that it's prudent for you to wait to do anything about
22 this. I believe that the chances of this being malignant
23 are too great for that.
24 Q. So in that instance then you're forcing the
25 issue with them?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. I would force the issue. If my index of
2 suspicion was high. I would force the issue.
3 Q. And I —rum that your thinking is that no
4 reasonable person would refuse to have it excised?
5 A. No re—able, completely informed Patient would
6 refuse.
7 Q. And by definition, when a patient refuses,
8 then you haven't done your job of reasonably informing
9 them?
10 M. DOMINA: Objection. Argumentative. You're
11 creating a circle. That's not a fair question.
12 MR. BATAILLON: He can answer it unless you're
13 instructing him not to.
14 MR. DOMINA: I'm certainly not doing that.
15 A. Would you repeat your question, please?
16 Q. (By Mr. Bataillon) You're saying by definition,
17 as I understand it, that if the Patient refused, then you
18 didn't do a reasonable job of informing them that they
19 should have the mole excised?
20 A. Yes. I believe that I need to take that next
21 step and do more fa— than.
22 Q. You've never had a Patient refuse to have a mole
23 excised in your recollection?
24 A. That I recommended excision for?
25 Q. Yes.

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 reviewing?
2 A. (Non-responsive.)
3 Q. That's a convoluted question. Did you take any
4 other notes besides Exhibit No. 2 is my question?
5 A. No.
6 Q. And Exhibit No. 2 is from DeVita, D-E capital
7 V-I-T-A's book on oncology: is that correct?
8 A. Cancer. It's labeled Cancer with a subtitle.
9 Q. And it says 3rd Edition, 1989, according to your
10 notes?
11 A. Yes.
12 Q. Why did you go to this text?
13 A. Well, it was the newest text in our library.
14 frankly.
15 Q. On cancer?
16 A. On cancer.
17 Q. Did you look at any other texts or do any other
18 literature search?
19 A. I did not.
20 Q. And I assume that you believe that this text is
21 a definitive enough pronunciation of what cancer is that
22 you would rely upon it?
23 A. Yes.
24 Q. All right. Was there anything that you read
25 that you disagreed with?

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. Not in my recollection.
2 Q. More than likely you would remember that. I take
3 it?
4 A. I would think so.
5 Q. All right. But you would agree, however, that
6 the ultimate decision on whether or not to have a
7 procedure done is the patient's decision: is that correct?
8 A. The patient has the right to refuse anything.
9 yes.
10 Q. Doctor, do you have any other opinions about the
11 care that was rendered by Dr. Neengast to this patient
12 that we haven't discussed this afternoon?
13 A. Okay. In relationship to the mole itself --
14 a. Yes.
15 A. -- or to anything else in the record?
16 Q. No, with respect to the care that he rendered in
17 relation to this lawsuit.
18 A. No.
19 Q. All right. Let me look at my notes. We can
20 take a short break, Doctor, but I think I'm finished.
21 (At this time a brief recess
22 was taken.)
23 Q. (By Mr. Bataillon) Doctor, did you do any other
24 notes while you were reviewing the medical record to help
25 you refresh your recollection as to what you were

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

- 1 A. No.
2 Q. Are there any other texts that you would
3 consider reliable in this area that you would consult with
4 respect to pigmented lesions?
5 A. No. I'm sure there are many others, but I'm not
6 familiar with them.
7 Q. All right. Have you ever taught?
8 A. Yes.
9 Q. Did you teach in a clinical setting or in a
10 didactic setting?
11 A. Clinical setting.
12 Q. And, of course, you would not have used any text
13 as far as your --
14 A. M--
15 Q. What text did you usually keep in your office as
16 far as referring to patient care? Nelson's on pediatrics?
17 A. I had Nelson's on pediatrics.
18 Q. Harrison's --
19 A. Harrison's.
20 Q. -- in internal medicine?
21 A. What was the last one?
22 Q. Harrison's on internal medicine?
23 A. Yes.
24 Q. Anything else that you can think of?
25 A. I subscribed to the Medical Clinics of North

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 America, Surgical Clinics of North America, Pediatric
 2 Clinics of North America, New England Journal of Medicine,
 3 JAMA.

4 Q. But as far as texts?

5 A. But as far as texts --

6 Q. Those were probably the only two?

7 A. Those were probably the main ones. I had Con's
 8 textbook on treatment in my office.

9 Q. Old MU rely on those from time to time when you
 10 did your practice?

11 A. Yea.

12 Q. Old MU find them generally to be informative?

13 A. Yes.

14 Q. All right.

15 MR. BATAILLON: I don't have anything further.

16 Thank MU, Doctor.

17 III. DOMINA: I have just three or four questions
 18 I'd like to ask you, Doctor.

19 CROSS-EXAMINATION

20 BY MR. DOMINA:

21 Q. DeVita's work on cancer is in the Bruen Hospital
 22 library?

23 A. Yes.

24 Q. A typical patient load for a family practitioner
 25 physician in a practice setting like Dr. Nagengast's on a

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 facts not in evidence, and it's not an appropriate
 2 hypothetical for the facts in this case. You can answer,
 3 Doctor.

4 A. Assuming that I had all that information, that
 5 there was change, I would have recommended excision.

6 Q. (By Mr. Domina) And if, as a matter of fact,
 7 those things occurred in this case but excision was not
 8 recommended or counseled by the defendant physician, do
 9 you have an opinion concerning whether or not the standard
 10 of care was breached?

11 A. Yes.

12 Q. And your opinion?

13 MR. BATAILLON: Same objections.

14 A. Can I answer?

15 MR. DOMINA: Yes.

16 A. I believe that it was breached, yes.

17 MR. DOMINA: No further questions.

18 MR. BATAILLON: Doctor, you have a right to read
 19 and sign the deposition, and it's up to you, whatever you
 20 want to do.

21 MR. DOMINA: I'll get you a copy of it, so you
 22 can have reading and signing.

23 A. Okay.

24 (Deposition concluded at 2:37 p.m.)

25

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

1 full dau of active clinical practice could be 30 to 40
 2 patients a day?

3 MR. BATAILLON: Objection. Foundation. You can
 4 answer, Doctor.

5 A. I think that would be a reasonable estimate.

6 Q. (By Mr. Domina) And, Doctor, just two more
 7 questions then. Assuming, hypothetically, that a
 8 twenty-seven-year-old female withint presented herself in
 9 a family practice physician's office in a clinical setting
 10 complaining that she had a changed condition in a mole on
 11 her right scapula which had been examined a few days
 12 earlier by her sister who was a registered nurse; assume
 13 she told the physician that she'd had the mole for as long
 14 as she could remember, but that it had become sensitive,
 15 started to trouble her, had perhaps changed in color, she
 16 wasn't sure, perhaps grown, she wasn't sure, but that her
 17 sister the nurse had examined it and said you better take
 18 this to your doctor and tell him about the changes and ask
 19 him to look at it.

20 Assuming those facts, do MU have an opinion
 21 concerning what the standard of care would require of the
 22 examining physician?

23 A. YR.

24 Q. What's your opinion?

25 III. BATAILLON: Objection. Foundation. 26 --

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

CERTIFICATE

1 I, Michelle S. Benes, Registered Professional
 2 Reporter, General Notary Public, duly commissioned,
 3 qualified, and acting under a general notarial commission
 4 within and for the State of Nebraska, do hereby certify
 5 that:
 6

7 DR. GLEN LAU

8 was by me first duly sworn to tell the truth, the whole
 9 truth, and nothing but the truth; that the foregoing
 10 deposition was taken by me at the time and place herein
 11 specified and in accordance with the within stipulations;
 12 that I am not counsel, attorney, or relative or either
 13 party or otherwise interested in the event of this suit.
 14 IN TESTIMONY WHEREOF, I have hereunto set my
 15 hand officially and attached my notarial seal at Lincoln,
 16 Nebraska, this ____ day of November, 1993.

17
 18
 19
 20
 21
 22
 23
 24
 25
 GENERAL NOTARY PUBLIC

MICHELLE S. BENES, RPR, JS WURM & ASSOCIATES, (402) 475-3376

21 subscribed in my presence and sworn to before
22 me this ____ day of _____, 1994.
23
24

25 GENERAL NOTARY PUBLIC
State of Nebraska

Page 60

1 C E R T I F I C A T E
2 STATE OF NEBRASKA)
3) ss.
4 COUNTY OF LANCASTER)
5

6 I, Paula J. Xort, Registered Professional
7 Reporter and General Notary Public, duly
8 commissioned, qualified, and acting within and for
9 the State of Nebraska, do hereby certify that

10 DR. GEORGE GAMMEL
11 was by me first duly sworn to tell the truth, the
12 whole truth, and nothing but the truth: that the
13 foregoing deposition was taken by me in machine
14 shorthand and later reduced to typewritten form
15 with computer-aided transcription; that said
16 deposition was taken pursuant to stipulation
17 hereinabove set forth; and that I am not counsel,
18 attorney, or relative of any of the parties or
19 otherwise interested in the event of this suit.

20 IN TESTIMONY WHEREOF, I have hereunto set
21 my hand and attached my notarial seal at Lincoln,
22 Nebraska, this ____ day of _____, 1994.
23
24

25 GENERAL NOTARY PUBLIC