IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

Def. 275

- - -

Travis Cates, et al.,

Plaintiffs,

vs.

Cleveland Metropolitan General Hospital, et al.,

Defendants.

Case No. 167835
Judge McManamon

- - -

Video deposition of THOMAS MALLORY, M.D., a witness herein, called by the defendants for direct examination under the statute, taken before me, Maria DiPaolo-Jones, C.M., Registered Professional Reporter and Notary Public in and for the State of Ohio, pursuant to notice, at the offices of the deponent, 720 East Broad Street, Columbus, Ohio, on Monday, April 20, 1992, beginning at 4:37 o'clock p.m., and concluding on the same day.

- - -

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

Charles I. Kampinski, Esq.
Donna Taylor-Kolis, Esq.
Charles I. Kampinski Co., L.P.A.
1530 Standard Building
Cleveland, Ohio 44113

ON BEHALF OF DEFENDANT MARY-BLAIR MATEJCZYK, M.D.:

Robert C. Seibel, Esq.
Jacobson, Maynard, Tuschman & Kalur Co., L.P.A.
1001 Lakeside Avenue, Suite 1600
Cleveland, Ohio 44114

ON BEHALF OF DEFENDANT CLEVELAND METROPOLITAN GENERAL HOSPITAL:

Thomas H. Allison, Esq.
Arter & Hadden
1100 Huntington Building
Cleveland, Ohio 44115

- - -

Monday Afternoon Session

April 20, 1992

- - -

STIPULATIONS

It is stipulated by and among counsel for the respective parties herein that the video deposition of THOMAS MALLORY, M.D., a witness herein, called by the defendants as upon direct examination under the statute, may be taken at this time and reduced to writing in stenotype by the Notary, whose notes may thereafter be transcribed out of the presence of the witness; that proof of the official character and qualification of the Notary is waived; that the examination, reading and signature of the said THOMAS MALLORY, M.D. to the transcript of his deposition are expressly waived by the witness; said deposition to have the same force and effect as though signed by the said THOMAS MALLORY, M.D.

- - -

# I N D E X

- - -



- - -



- - -

Monday Afternoon Session

April 20, 1992

- - -

P R O C E E D I N G S

- - -

VIDEO TECHNICIAN: Doctor, would you please raise your right hand?

Do you solemnly swear that what you're about to say will be the truth, so help you God?

DR. MALLORY: I do.

VIDEO TECHNICIAN: Thank you.

- - -

THOMAS MALLORY, M.D.

of lawful age, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

DIRECT EXAMINATION

BY MR. SEIBEL:

Q. Doctor, would you introduce yourself to the jury, please?

A. I'm Dr. Thomas Mallory.

Q. Doctor, would you explain to the jury why it was necessary to videotape your trial testimony here today?

A. Well, I have a conflict on the date at which I was to appear in court, and it was at my convenience this deposition's being taken.

Q. All right. What specifically are you going to be involved in on May 11th when this case goes to trial?

A. On that particular date I'll be in Mexico at the Mexico Orthopedic Association giving a paper on total joint replacement.

Q. What is your medical specialty?

A. My specialty is orthopedic surgery.

Q. Is your practice in orthopedic surgery concentrated in any specific area?

A. Yes. I have a subspecialty within orthopedic

surgery of joint replacement surgery.

e. Dr. Mallory, if you would, would you describe your medical education and specialty training?

A. I received my doctorate of medicine from the Ohio State University. I went on to spend an additional four or five years in postoperative -- or rather postgraduate training in orthopedic surgery at the Ohio State University, and then I completed a fellowship in hip surgery at Harvard Medical School, and then proceeded with my practice here in Columbus.

Q. How long have you been practicing?

A. Twenty years.

Q. You mentioned you practice here in Columbus. Would you tell the jury about your current practice and what kind of operation you have here?

A. I have a practice exclusively devoted to hip and knee surgery, replacing these particular joints that have become arthritic with artificial implants.

Q. Which hospitals do you practice in?

A. I currently concentrate most of my practice at the Grant Medical Center, although I do have hospital privileges at the Ohio State University Hospital, consulting privileges at Riverside, St. Anthony's Hospital, also at the Children's Hospital.

Q. And what offices do you hold at those hospitals?

A. At the Grant Medical Center I'm the Director of the Joint Implant Center, and also the Director of the Orthopedic Institute.

Q. Now, Doctor, you are a member of quite a number of medical and orthopedic organizations. Would you tell the jury about which organizations you feel are most significant in your field?

A. Well, certainly, to be a member of the American Academy of Orthopedic Surgery is a requirement I think most competent and well-trained orthopedic surgeons aspire to.

But beyond that, because of my special interest in hip and knee surgery, I've been honored to be a member of the Hip Society and also the Knee Society.

These are special groups of surgeons that have established a practice exclusively in these areas, and also who have distinguished themselves in teaching and in research and in publications, and also in development of techniques that are considered such that they would merit membership in these organizations.

Q. Tell the jury about the Board certification process for orthopedic surgery and its significance to you.

A. The Board certification is an important concept for you to understand. What is required to become

Board-certified is that you -- you go through an educational regime of medical school and residency, and then you take a series of examinations, both at the time you finish and then later on.

And the competence of your ability to respond appropriately to the examinations, of course, are important, but also you have to pass a peer review.

So in the process of becoming Board-certified, it may take a period of six to seven years, but as I said earlier, it is the prerequisite for membership in many of these acclaimed organizations.

Q. Are you Board-certified?

A. Yes, I am.

Q. Now, you've published around 80 articles in the medical literature, mostly on the subject of joint replacements. Tell the jury why you devote the time and energy to research and publication in your field.

A. First of all, I have a real keen interest in research. I want to know why certain things work and why other things don't work.

And I was taught early in my training that -- to keep a dialogue or a record or pursue observation of phenomena was a very important characteristic of maintaining competence and communicating within the medical profession.

So as I began to do these operations over and over again, I became interested in knowing which kinds of techniques were good and which were not, and what my own personal experience was.

And then being able to share that with a larger orthopedic community necessitated that I begin to write my experiences.

These articles then, were submitted to journals, and they were subject to refereed editor- -- editorializing, and they have been published, and they are an ongoing method of physician dialogue amongst ourselves as to what is appropriate, inappropriate, and where the cutting edge of science is actually moving.

Q. Have -- Are you involved in actually training other -- other orthopedic surgeons in training?

A. Yes, I am.

Q. And what is your role in that regard?

A. I really train physician orthopedic surgeons at two levels, one is the resident level where they're learning the basics of orthopedic surgery, and then I have a postgraduate fellowship where the individual has already finished his orthopedic training and he comes and spends up to a year, and some men have spent actually a year and a half, with me learning the techniques of hip and knee surgery specific to the area

of my expertise.

Q. Doctor, what is the Mallory-Head Femoral Component?

A. That's a nomenclature given to a device that I've developed with Dr. Head in Dallas, Texas. It's a type of prosthetic device that we use in the hip area. It's our design, and it has enjoyed some popularity in the United States and also in Europe.

Q. It's named after you?

A. It's named after me, yes.

Q. How are you acquainted with Dr. Matejczyk and several other orthopedic surgeons in -- in the group she was with before she left for the Cleveland Clinic last year?

A. Actually, we were in an educational circle. As I said earlier, the writing of these papers that I've done has introduced me to a faculty group which gives lectures over the United States, and also in Europe, specific to the area of joint replacement, and it is in those types of encounters that I met Dr. Matejczyk.

Q. And what impact does your acquaintance with Dr. Matejczyk have on your opinions in this case?

A. Well, I do know her, but my opinions stand independent of my relationship with her.

I simply evaluate the situation, hopefully from a

standpoint of a physician and as a scientist, and if the material has credibility, then I speak in behalf of it, if it doesn't, I -- I feel I'm independent of any relationship with her; however, I do know her, and I do respect her.

Q. Over the years you've testified as an expert witness a number of times in -- in other medical malpractice cases, but always for the defense. Would you explain to the jury why?

A. Now, that means that I generally defend or pretty much defend the position of the physician in a malpractice situation. The reason I do that is because I think the physician often times is at a disadvantage.

Why do I say that? Well --

MR. KAMPINSKI: Objection, move to strike.

THE WITNESS: -- I think the disadvantage exists because the physician's position isn't fully understood by the layman.

The tremendous alternatives of dealing with biological systems, of how they change rapidly, of all the data we have to assimilate and -- and make value judgments, and at the same time deal with the knees and the compassionate elements of the -- of the phys- -- of the patient themselves is often difficult,

and I -- I have a -- I have a feeling for that kind of a discourse and I -- I have concentrated my expert witness in these areas.

MR. KAMPINSKI: I'll -- I'll object, and I'll move to strike the answer.

BY MR. SEIBEL:

Q. Now, in all the cases that you review, do you be- -- actually become an expert witness in all those cases?

A. Not all of them, because if I don't think the physician has an appropriate position, I won't defend them.

Q. Through your education, training, experience and expertise, are you familiar with the standards of good and reasonable care that orthopedic surgeons involved in joint replacement surgery should follow?

A. I believe I have a good concept of what standard care is in my area of joint replacement.

Q. Now, Doctor, before we turn to the actual issues in this case, the law says that the jury should hear two additional things; number one, are you licensed to practice in the State of Ohio?

A. I am.

Q. And do you spend at least one half of your professional time in the active clinical practice of

medicine in your field?
A. I do.
Q. And, Dr. Mallory, at my request did you review certain materials in this case?
A. I did.
Q. Tell the jury what you reviewed.
A. I re- -- reviewed certain depositions and hospital charts and other materials.
Q. Based upon those materials, your education, training and experience as an orthopedic surgeon specializing in joint replacements, do you have an opinion, to a reasonable medical certainty, whether -- whether the care rendered to Travis Cates by Dr. Matejczyk beginning on November 13, 1987 met accepted standards of care?
A. I have an opinion.
Q. And what is your opinion, Doctor?
A. My opinion is that it did, in fact, meet the standards of care as I perceive them.
Q. Would you explain to the jury the basis of your opinion?
A. Well, given the situation of patient management, which means that you take a history, you do a physical examination, you evaluate certain laboratory data, you listen to the advice and consultation of peer

physicians, and you render opinions, and then you formulate a management agenda, and then you're attentive to it, and you proceed with the ongoing management of the patient in that particular perspective, I think that Dr. Matejczyk did everything that is characteristic and usual and customary in the care of the individual involved in this case.

Q. Now, specifically, do you have an opinion, to a reasonable medical certainty, whether Travis Cates had a deep knee infection when he came to the hospital on November 13th, 1987?

A. From the information that 1 reviewed, I do not think he had a deep knee infection.

Q. And would you explain to the jury why you feel that he did not have a deep knee infection?

A. I think we have to define -- First of all, "infection" is defined by the presence of -- of organisms or bacteria, or even sometimes viruses in -- in situations where the location of those particular organisms may be on the surface, which is called superficial, or may be deep within the cavity of the body.

And from the information that I reviewed, the indicators were that this infection was on the surface of the knee, and not deep within it.

And the mater
materials I review
was a superficial
Q. What infor
itself did you
conclusion the
A. Now, if
location of
can't do very
What do I mean by
swollen, red, inflamed. And once
body, it can spread throughout the system or
patient, and then they begin to run temperatures, their
blood profile changes, and they -- they have a
completely different pattern about the way in which
they're sick.
However, if that infection stays on the surface,
then all of these indicators of swelling, of
temperature, of feeling very sick, of changing the
blood wouldn't be bothered.
And if you look at the specifics in this case, in
November of '87, when he presented, he had all the
characteristics of a superficial infection.
So based on that objective data, not only what
she said, but how it was supported by the laboratory

and by observation, by other people, would indicate that this simply was a surface infection.

Q. Doctor, what significance does the aspirate of the knee joint have in -- in your conclusions?

A. Well, we must remember that when you aspirate a joint, you go deep in the joint and you draw off fluid, and that fluid reflects the environment.

It's sort of like sampling the air in this room. It will give you the quality of the environment.

And when they pulled this sample off during an aspiration process, it's a very strong indicator as to whether or not there was bugs or no bugs resident deep in the joint.

Q. Would a Gallium scan have been of any benefit in diagnosing whether Mr. Cates had a deep knee infection on November 13th or thereafter?

A. Well, I think we have to understand what a Gallium scan is. It's one of the tests that we do to determine the presence of increased circulation around the joint.

And there are a number of things that can increase the circulation around a joint; could be an infection, of course, it could be rheumatoid arthritis, which this man had, or it could be a mechanical failure of the joint itself.

So if the test was positive, you still would have to go through a differential as to why the test was positive.

It may or may not have been related to the infection, it would have been only additional information, of course, requiring further definition.

Q. At some point should the aspirate of Mr. Cates' knee joint been repeated?

A. It should have been repeated if he had not responded -- Listen to me carefully -- responded well to treatment. And from what I indicate -- was able to -- to derive from the records I reviewed, he did have an appropriate response to the treatment regime that was presented.

And if he had not, had shown any of the indicators of having a deep infection, then he should have been re-aspirated.

Q. Are there risks to re-aspiration?

A. There definitely are.

Q. What are those?

A. Contamination. If the bugs were on the surface and you stick a needle through that area numerous times, you can drive the bugs into the deep cavities of the body.

Q. Mr. Cates was discharged from the hospital on

December 3rd, 1987. Do you have an opinion, to a reasonable medical certainty, whether Dr. Matejczyk met the standards of care in her follow-up care of Mr. Cates?

A. I have an opinion.

Q. What is your opinion, Doctor?

A. I have a -- My opinion is that she did, in fact, meet the standards of prudent care.

Q. Now, would you explain to the jury why you feel that Dr. Matejczyk's follow-up care was appropriate?

A. She continued to observe the wound. She had him come back to the office. She monitored the course of his illness. And she was attentive to him.

Knowing full well that the management of this kind of a condition is observation, probably more important than treatment of drugs and surgery and everything else, is to determine whether or not this infection stays on the surface or all of a sudden radically change, penetrates the body cavity, and becomes an animal of a different nature. And so the key word here is continued observation.

Q. Mr. Cates came into the hospital on January 3rd, 1988 with a number of problems due to infection. Do you have an opinion, to a reasonable medical certainty, as to when Mr. Cates developed the deep knee infections

and infections elsewhere that brought him to the hospital on January 3rd?

A. I have an opinion.

Q. What is your opinion, sir?

A. My opinion is, based on the records I reviewed, that as of December the 30th, at least at the last time Dr. Mate- -- Matejczyk examined the patient, that his wound, by all categories thus expressed, was still superficial.

Something then changed that whole profile, and certainly later in the month he became an entirely different kind of a patient with a serious, deep, septic process. But something changed the environment for that individual between, as I say, December the 30th and subsequently.

MR. SEIBEL: Okay. I have nothing further. Your witness.

- - -

CROSS-EXAMINATION

BY MR. KAMPINSKI:

Q. Doctor, you've got -- My name's Charles Kampinski. I represent Travis Cates. We haven't met before, Doctor.

You've got sitting on the floor, apparently, the materials that you were provided to review; is that

correct?

A. That's right.

Q. If you would, why don't you just put them up on the table, and then maybe indicate for the jury what -- what it is you were sent to review.

You can just go through them and -- and let us know what they are.

A. I was given the records of the Metro General Hospital in regards to Travis Cates, 1/3/88 through 1/23/88.

This is my deposition given in September.

These are correspondence to the Defendant's attorney.

This is a deposition of a Dr. Richard Binkhortz, Jr. (sic).

This is a deposition of William Bohl.

The deposition of a Mary-Blair Matejczyk.

Deposition -- or rather a letter from one Jerome Levine, M.D., and his CV, and his deposition.

Outpatient records from what I assume to be Metro General Hospital.

Q. Which -- which dates are those, Doctor? The ones you told us before were January and February.

A. I'm not really sure what this is. Starts with July 30th, 1979.

Q. Okay.
A. And runs through April loth, 1989.
Q. All right.
A. All right.
This is my CV.
The correspondence. Correspondence. Correspondence.
Deposition from a Roberta Persaud.
And hospital records, again, from Metro General 11/13/87 to 12/2/87 regarding Patient Cates.
Q. All right. What time do you have, Doctor?
A. Beg your pardon, sir?
Q. What -- what time do you have?
What -- what time are we taking the deposition now?
A. 1 have seven minutes after 5:00 o'clock.
MR. KAMPINSKI: Okay. Why don't we just go off the record for a minute, give me a chance to look through the materials that you have there.
VIDEO TECHNICIAN: Going off the record.
(Recess taken.)
VIDEO TECHNICIAN: We're back on the record.
BY MR. KAMPINSKI:
Q. All right. Doctor, you didn't indicate that you

had received the deposition -- excuse me -- of Mr. Cates. Did you ever receive that, sir?

A. I don't believe that I did.

Q. Did you ask for it?

A. No, I don't think I did. I remember that I didn't.

Q. All right. You indicated in response to one of Mr. Seibel's early questions that you wouldn't be available for trial, that's why we're here in your office in Columbus taking this deposition, that you had a conflict in the trial date and you were going to Mexico, right?

A. Right.

Q. Where are you going in Mexico?

A. Mexico City.

Q. The trial originally was scheduled in September, do you recall that, of 1991?

A. Okay.

Q. Yeah. And you were going to be videotaped at that time, too.

A. Right.

Q. All right. Were you going out of the state at that time --

A. No.

Q. -- as well?

Okay. You just didn't want to come to Cleveland to testify, right?

A. I'm a busy orthopedic surgeon, I'd rather do it here, it's more convenient for me.

Q. Okay. As a matter of fact, I think the early letters from Mr. Seibel that I'm looking at indicated that, you know, they would take your deposition here if, in fact, you became involved in the case.

A. That's right.

Q. All right. And that was one of the requirements you had, you wanted to be deposed here, correct?

A. That's right.

Q. All right. His letter sending the materials to you appears to be dated on August 10th.

Maybe you could help me out, I just saw it here a second ago. August 10th of 1990. Do you see that anywhere, Doctor, when you received all the depositions?

A. You mean when I first received the materials?

Q. Yes, sir.

A. Oh, boy. That would be a hard one to really nail down.

Q. Well, I think -- I think the letter's in there somewhere.

A. I really -- Perhaps here.

Q. It could be here. Yeah. August loth?
A. August loth, 1990, right.
Q. All right. And, apparently, you received that, there's a stamp on there, the 13th?
A. The 13th, yes.
Q. All right. And when did you call Mr. Seibel back, does it indicate?
On the 16th?
A. Yes.
Q. All right. So that you reviewed all these materials then, between the 13th and the 16th?
A. No.
Q. No?
Well, I mean, he -- he sends you a letter on the 20th, four days later, indicating, and -- and I'll quote this, you can read along with me, "Thank you for agreeing to be an expert witness in the above-referenced matter, I received your message last week that you will defend Dr. Matejczyk's care in this case."
And that, apparently, was in a phone call you made on the 16th, right, three days after you received the material?
A. Perhaps.
Q. Okay.

A. I don't know what this means. I didn't put that on there (indicating).

Q. All right. Well, when did you review all the materials?

A. I don't know. Sometime be- -- before we're talking right now.

Q. Well, between the 13th and the 20th you made a decision to defend her care. Correct?

A. Yes.

Q. Actually, it would have been between the 13th and a week before the 20th. So could you tell the jury when it is you reviewed all these materials and you decided to be an expert on behalf of Dr. Matejczyk?

A. I can't really be specific on that.

Q. Well, did it matter to you what was in the materials in terms --

A. It did.

Q. -- of your decision?

A. It did.

Q. Well, Mr. Seibel says in his letter to you August 20th, "Please put your findings that Dr. Matejczyk met the standard of care applicable to the circumstances of this case into a concise and succinct letter addressed to me."

A. And when did I send that letter out?

Q. September loth, Doctor.

My question though is, I mean, is that typically what happens, that an attorney tells you what to put in the letter?

MR. SEIBEL: Objection — overruled

THE WITNESS: No. That may be the way you look at it, but as far as I'm concerned, I put in the letter what I believe to be true.

BY MR. KAMPINSKI:

Q. Okay. Your relationship with Dr. Matejczyk was over how many years in terms --

A. Five years.

Q. Okay. And you would see her at these various conventions you went to?

A. That's right.

Q. And did the two of you speak at any of them together or --

A. We were on several committees and panels and presentations together.

Q. Okay. And that certainly wouldn't sway you one way or another in terms of the care that she rendered Mr. Cates, would it?

A. Well, perhaps the fact I knew who she was gave me a certain bias but, again, I stand on my professional integrity, I -- I evaluated the Case on the basis of

its merits.

Q. Uh-huh.

In the cases that you reviewed -- And you did say that all of the ones you've been involved in have been for the defendants.

A. That's true.

Q. How -- how many would you say those are?

A. I wouldn't have any idea.

Q. Are we talking about hundreds, dozens, you don't know?

A. I have no idea.

Q. Okay. In those cases that you've looked at that you told Mr. Seibel where you opted not to testify because you felt the physician's position was not defensible, have you in those cases indicated that to the injured party who might also be under some disadvantage?

MR. SEIBEL: Objection. Overruled

THE WITNESS: No, because they never contacted me. I'm not a judge.

BY MR. KAMPINSKI:

Q. Well, but that's --

A. I think everybody's subject to a fair trial. Why should I present opinions only as they relate to my opinions about situations?

Q. Well, maybe I misunderstood. I -- I thought you said earlier that one of the reasons you -- you help doctors, or that you only help doctors, is you feel they're somewhat disadvantaged. If --

A. I feel they're dis- -- Yes, I do.

Q. If -- Well, let me finish my question.

A. Sure.

Q. If -- If, in fact, you saw, and apparently you have seen, instances where an injured party's disadvantaged, why wouldn't you come to their assistance?

MR. SEIBEL: Objection. overruled

THE WITNESS: I -- That's just not my style. You know, people have opinions, and I give my opinions in situations where I feel that the physician is right about what they're about.

BY MR. KAMPINSKI:

Q. Okay. And when they're wrong, you don't give an opinion.

A. That is true.

Q. Doctor, did the records that you reviewed reflect that Mr. Cates in the admission of November did, in fact, have a deep knee infection?

A. In November of when?

Q. In -- in his admission, November of '88, sir.

A. It's '88?

MR. SEIBEL: It's '87.

BY MR. KAMPINSKI:

Q. '87, I'm sorry.

A. 87?

Q. Yeah. Didn't they reflect that the -- I mean, what you said is that based upon what you reviewed, and you said that a number of times in your direct tes- -- testimony, "materials that I reviewed," materials that I reviewed indicated it was superficial on the surface, didn't they indicate that it was a deep knee infection, Doctor?

A. Who are "they"?

Q. Well, the physicians that -- that saw him at the time.

A. Dr. Matejczyk?

Q. Well, what does the clinical resume for the November 13th visit indicate, Doctor?

A. By who?

Q. Dr. Battersby.

A. Who's he?

Q. I thought he -- you said you read his deposition in this case.

A. I -- I might have, but I'm not really familiar with -- with who he was.

Is he the resident?

Q. Well, why don't you -- why don't you get the clinical resume, Doctor, and tell the jury what the admitting diagnosis was,

A. Who is this gentleman now?

Q. Well, here, I'll show you. Well --

A. Why don't you show me what you have.

Q. Sure. Dr. Battersby, orthopedics. Did you ever see that before?

A. No, I have not seen this.

Q. Okay. And would you tell the jury what that is and what page -- well, the -- the numbers might not be the same, but why don't you just tell the jury what that is, first of all, that you're looking at.

A. This is a history that a -- probably a house officer takes when a patient comes into a hospital.

Q. Well, you'll excuse me, Doctor, but this was dictated subsequent to his discharge, wasn't it? I mean, what's it got --

A. All right, this is a -- Yeah, I'm sorry. This is a discharge note, 2/12/87.

Q. I'm sorry, 12/2/87.

A. 12/2/87.

Q. So after he was discharged, this was dictated, correct?

A. That's right.
Q. All right. And --
A. But, again, I'm not really clear who this gentleman was. Has he given a deposition, this man?
Q. Yes, sir.
A. Did I have that?
Q. I don't know. I didn't send you the materials.
A. I don't think I reviewed this.
MR. SEIBEL: You did not.
THE WITNESS: I don't know this man. I never reviewed his deposition.
BY MR. KAMPINSKI:
Q. Well, could you please tell the jury why it is your attorneys wouldn't have provided you with a deposition of an orthopedic surgeon who, in fact, did see Mr. Cates --
A. I -- I --
MR. SEIBEL: Objection. He's a resident.
MR. KAMPINSKI: Excuse me. Let me finish my question.
BY MR. KAMPINSKI:
Q. -- at the time that Mr. Cates was in the hospital in November, if you're -- I mean, in fairness to you, if you're going to be asked questions about this, don't

you think you ought to be provided the materials pertinent to the questions you're going to be asked?

A. I can only review the material that was sent to me.

Q. All right. That's fair.

Would you tell the jury what the diagnosis was by Dr. Battersby?

A. Infected right total knee arthroplasty.

Q. All right. And that's not superficial, that's total knee, correct?

A. Beg your pardon?

Q. That's not just a superficial infection being described there, that's --

A. It could be. An infection could happen anywhere. It could be on the surface, or it could be deep.

Does it say superficial or deep? It just says "infected." It's a generic term.

Q. And you don't think that that means total knee, huh?

It says "total knee," doesn't it?

A. I know, but it doesn't say to me whether it's deep or superficial. It makes a heck of a difference in terms of how you manage the patient.

Q. All right. What would -- Why don't you read on Page 2 of that the impression of Dr. Battersby, and

then maybe you can let us know if it was superficial or total -- total knee infection.

A. The impression was an infected right total knee, admitted for possible removal. I&D -- or Infectious Disease will be consulted, Cardiology will be consulted.

Q. All right. So that's not a superficial infection he's describing, that's a total knee infection, isn't it, Doctor?

A. Again, an infected right total knee replace, or total knee is an infected total knee: it could be superficial or deep. It doesn't say either way. That's the way I understand it.

Q. But you've never seen this before, and this was in the records?

A. I've never seen that, no, sir.

9

And I'm not familiar with who this physician is. Is he a student or is he a staff man with the graduate qualifications that we've been talking about? I don't know.

Q. Well, how about Dr. Meyer, you ever hear of Dr. Meyer?

A. Yes, I did.

Q. And who is he?

a. He was an orthopedic resident that aspirated the

knee.

Q. A resident's a physician, isn't he?

A. He's a physician in training.

Q. Okay. Well, I mean, he's a -- he's an M.D.

A. He's an M.D. --

Q. He's got his M.D. degree.

A. -- but he's training to develop an expertise in an area such as orthopedics.

Q. Uh-huh. And was it his opinion set forth in the record that this was an infected right total knee?

A. I do not recall his -- no, I don't recall his name.

Q. Okay. Doctor, you mentioned that one of the ways that you would differentiate between a -- whether the infection was deep or whether it was superficial was if it was red, swollen -- I'm sorry, did you say purulent, purulent drainage?

A. That would be a -- a factor depending on where the drainage was coming from.

Q. Well, if it was coming out of the -- out of the wound, I mean, that would be an infection that --

A. If it was coming off the surface of the wound versus the sinus track.

Q. I see.

A. There's a difference.

Q. Okay. Did you review the records to see if there was purulent drainage, if there was fever, if there was swelling in the knee?

A. As I understand from my review, that there was drainage from a superficial ulcer, and that there was an associated erythema around, but the joint, as 1 recall, was not particularly swollen. I don't remember, though, exactly what the -- But I do know that Dr. Meyer was impressed enough to aspirate the knee.

Q. And -- and I take it that's one of the things you were relying on in terms of your conclusion that this was a superficial wound,

A. That's -- Put a lot of emphasis on that.

Q. Right.

I think, as a matter of fact, you said it's a very strong indicator.

A. That's right.

Q. All right.

Well, Doctor, here's a note dated November 14th, the day after he came in, actually, in two places there's a reference to "probable septic right knee," talking about the prosthetic knee. And then again, it's by the same individual, I believe this is Dr. Blinkhorn, I could be wrong, but it says "probable

septic prosthesis right knee with superficial furuncle over right patella."

So that it was that doctor's opinion as well that the knee was septic. Could you tell the jury what "septic" means?

A. It means totally infected. Profoundly infected.

Q. All right. Now, did you review this part of the record, Doctor?

A. This record I did not review, as I said.

Q. Well, this is dated November 14th, 1987.

A. Well, it was not -- I -- it just wasn't available to me. But I -- I don't think that I would be impressed with what he said because I don't know that he would have said that if he didn't know what the cultures were going to show.

Q. Well, wait a minute. Wait a minute.

Let's not confuse. When you say "cultures," there were different cultures involved in this case, correct?

A. Well, you've got to remember -- Well, let's put this in perspective, these are house officers, orthopedic surgeons in training. They are the first, triage of the patient. They come in and they are taught to make observations. And they make observations on what they know and what they don't

know. And they -- they do a history.

And that's what this is, as I understand it. But it's not a final diagnosis, it's an opinion about what the -- I think he lists about four or five different possibilities of the causes of this man's illnesses --

Q. Excuse me, Doctor.

A. -- not just one.

Q. Excuse me. My -- my only question, sir, was there were different cultures involved, were there not?

A. There were, as I understand it, a superficial culture and a deep culture.

Q. And the superficial would be swab, correct?

A. Would be a swab, right.

Q. Yeah. And what did that grow out?

A. It grew out staphylococcus aureus.

Q. And what kind of infection is that, Doctor?

A. I beg your pardon, sir?

Q. What kind of an infection is that, bacterial?

A. It's a bacterial infection, yes, sir.

Q. All right. And is it the same infection that was later grown out in January when he was returned to the hospital?

A. I believe it was, yes.

Q. Yes.

And it was the same, of the same specificity,

wasn't it?

A. Same type.

Q. Yeah.

And that -- and there's no question but what -- he was totally septic when he was admitted in January of 1988, is there?

A. Yes. From what I could review.

Q. All right. Was there in the record an indication by the initial physicians, that is in the November hospitalization, that they were going to do a repeat aspiration, that you can recall?

A. I can't specifically recall.

Q. All right. But it's your testimony, I take it, that in the absence of the aspirate initially coming up with something positive, there's no need to do another aspirate.

A. Remember, I had mentioned that the clinical course is important.

Q. I'm sorry, you're right.

A. And the patient did well, according to the observations that I was privy to, on the course of treatment.

Q. Yeah.

A. So to re-aspirate the knee would have not been indicated.

Q. Okay. Mr. Seibel ran you through very quickly the, I mean, what he did is he asked you, basically, two questions about Dr. Matejczyk's follow-up care, one was your opinion, which you gave, and you said it was fine during the month of December of 1987, and two, he said why, and you indicated well, she kept seeing him, right? And that was good medical care in this kind of a circumstance.

First of all, he was discharged without any antibiotic, correct?

A. That's right.

Q. All right. How many times did she see him in the month of December?

A. As I recall, two or three.

Q. And did she do any additional surgery during that period of time?

A. I think she did, yes.

Q. Yeah.

And she removed something that was on the surface of the knee.

A. That's right.

Q. And -- and she also took, once again, a culture, did she not?

A. A culture, yes.

Q. And was this from the surface of the knee as

well?
A. Yes, it was.
Q. It was a swab.
A. It was a swab.
Q. And just so the jury understands, that's where you take, what, a -- a cotton ball or -- or a -- something with cotton on it and you take a specimen off of the -- the wound itself, and then you submit it for analysis.
A. That's true.
Q. Would you tell the jury what it grew out?
A. Again, I think it grew out staphylococcus aureus.
Q. And -- The same staph that he came back with on January 3rd?
A. Most likely.
Q. She didn't start him with any antibiotics, did she?
A. No.
Q. She didn't admit him to the hospital, did she?
A. No.
Q. You then said, and 1 tried to write this down as carefully as I could, that in your opinion, as of December 30th, his wound was superficial, and that it became infected, that is, into the body as you described it, later in the month.

Well, when later in the month did it become septic? I mean, we're talking about December 30th, Doctor.

A. We're talking about January now. He comes back into the hospital --

Q. January 3rd.

A. Yeah, comes back in January 3rd a sick man.

Q. Sure. Real sick.

A. And if --

Q. Almost -- almost dying.

A. Almost dying, right. He was -- Re had all the signs of a deep infection.

Q. Sure.

A. And I don't think there was any question in anybody's mind that that was what one calls a deep infection.

Q. All right.

A. Different kind of a patient profile than what we saw in December.

Q. Yeah.

My question though, was when did he get this totally septic condition later in the month of December if, in fact, she saw him on December 30th?

A. I -- I -- I was referring to January. Later in January.

Q. Well, wait a minute. I mean, there were only three days in January, then.
A. Well then, let's say it was early in January.
Q. Doctor, did you review the -- the records for the January admission?
A. Very superficially.
Q. All right. Well, let me show you the discharge summary from the January admission. Did you ever look at that, Doctor?
A. I never did.
Q. All right. If you'd look at it now with me. This is by a Dr. Glenn Butt, and it's a three-page clinical -- I'm sorry, four-page clinical resume fair- -- five-page clinical resume fairly detailed, and it goes into his past medical history, and this is before there was any lawsuit.

And in the, I guess the second full paragraph of the history -- And a history is an important part of a chart for a patient, isn't it?
A. It is.
Q. All right. Dr. Butt said "The patient has an infected right prosthetic knee, which was infected two months ago, which has grown mezlocillin resistant staph aureus."

Now, this is Dr. Butt who saw him throughout

January, and it was his opinion in -- in January of '88 that in November of 1987 he had a totally infected right knee prosthesis.

MR. SEIBEL: Objection." overruled

MR. ALLISON: Objection./

THE WITNESS: Roes it say "totally infected"?

BY MR. KAMPINSKI:

Q. Huh? I think so.

A. What's it say? Or does it say "infected"?

Q. I see. You're drawing a distinction between one kind of infection --

A. Absolutely.

Q. -- and another kind of infection.

A. I sure am.

Q. All right. But the infection you're saying he had was really not important, right?

A. It's important.

Q. Yeah.

A. It re- -- it requires further observation.

All right. We're not arguing about the fact that this is an infected knee, it's the location and the severity of the infection during the period of time that I was asked to review, which is specifically November/December of 1987. And it's my position that

at that time this was still considered a superficial infection.

Q. Doctor, you're insured by PIE, are you not?

A. That's true.

MR. SEIBEL: Objection. Move to strike.

BY MR. KAMPINSKI:

Q. All right. They are a mutual insurance company, correct?

A. As I understand it.

Q. Meaning --

MR. SEIBEL: Mr. Kampinski, may I have a continuing objection?

MR. KAMPINSKI: Sure.

MR. SEIBEL: Yeah.

BY MR. KAMPINSKI:

Q. Meaning that you are an owner of the company. As a mutual insurance company, that means all the insureds are owners, correct?

A. I guess so.

Q. All right. Dr. Matejczyk is also insured by PIE. Correct?

A. I don't know. 1 didn't know what her insurance carrier was.

Q. I see.

A. 1 had no privy to t

Q. Where did your -

review?

A. I believe We

Q. Who paid them?

A. I don't know.

Q. Isn't it a fact, Doctor

judgment is assessed against Dr.

by PIE, that has a monetary impact o.

it?

A. Not very much.

Q. But some.

Doctor, if -- if Mr. Cates' knee was draining,

sore, swollen, inflamed, red, and he had a fever during

the period of time that Dr. Matejczyk was seeing him in

December, was her care and treatment appropriate of

him?

A. I would like to know a little more about it. I

would like to know what the deep culture showed, had

the knee been aspirated, and all those things.

Q. Well, obviously, they weren't by her.

A. Well, then I -- I don't --

Q. You don't what?

A. I don't think that's the way the case was

presented to me.

A. No, I -- I understand that. But my question is, if, in fact, that was the presentation, would your opinion be different?

A. Is that a hypothetical situation?

Q. No, it's a factual situation, sir.

I'll ask you to assume those facts to be true for purposes of answering the question.

A. Assuming that those were all present -- Would you give those characteristics to me again, please?

Q. Absolutely. Draining, sore, swollen, inflamed, red and a fever.

MR. SEIBEL: Can we get a time frame for your hypothetical?

MR. KAMPINSKI: I 'chink I gave it to him. In December of 1987.

MR. SEIBEL: Anytime during December of --

MR. KAMPINSKI: That's right.

MR. SEIBEL: -- 1987?

THE WITNESS: I'd be seriously concerned about that wound.

BY MR. KAMPINSKI:

Q. Well, I mean, what would your concern be?

A. That this is a serious infection of a deep nature. I'd want to study it further before I drew a

conclusion.

Q. Well, the question then is, would her care that she rendered or failed to render in December of 1987 be appropriate if those were, in fact, the presenting symptoms?

A. If it stopped there without the other information that we've talked about in this deposition, I would be concerned about her conclusions, but that wasn't all the information that was presented to me, there were other factors.

Q. Well, Doctor, do you remember being deposed in this case? Your deposition was taken in this case, do you remember that, sir?

A. Yes. Right.

Q. And it was taken on September 16th, 1991.

A. Correct.

Q. Right here in your office, correct?

A. Right.

Q. And there was a court reporter, you were sworn in, you were sworn to tell the truth, correct? You recall that?

A. I sure do.

Q. Do you remember the following questions and the following answers, Page 35, Line 2, "Question: Okay. If the wound didn't look healed or healing on the 30th,

say it was red, inflamed, swollen, would that change your opinion in this case?

"Answer: Yes.

"Question: How would it change your opinion?

"Answer: Then I would -- Then I would have not agreed with the treatment.

"Question: Okay. It would be inappropriate or below the standard of care?

"Answer: Yes."

Do you recall those questions and answers, Doctor?

A. (Witness nodded.)

Q. Okay. Is that still your testimony today?

A. Yes. I think I answered the question the same way.

Q. Well, I -- I -- I wasn't sure you did, which is --

A. Yeah.

Q. -- why I wanted --

A. Yeah.

Q. -- to refresh your recollection.

That is your opinion.

A. Yeah, it sure -- certainly is.

Q. And then Dr. Matejczyk would have been negligent, wouldn't she? According to what you just said.

A. In what regard?
Q. Well, in failing to do either further workup, hospitalize him, provide some treatment, as opposed to sending him out the door on December 30th.
A. Was that the characteristic of the wound on the 30th?
Q. I believe it was.
MR. SEIBEL: That would be a factual dispute.
THE WITNESS: I'd like to see -- I don't recall that that was written in those specific terms, that that was a description of the wound that Dr. Matejczyk reflected in her office notes.
BY MR. KAMPINSKI:
Q. Well, you know, once again, I'll go back to the -- the fact that you weren't provided with Mr. Cates' deposition. I mean, could you please tell the jury why it is your attorneys didn't give you that, or why you didn't ask for it?
MR. SEIBEL:: Objection. overruled sustained
THE WITNESS: I don't know.
BY MR. KAMPINSKI:
Q. Well, I mean, if --
A. I can't answer that.
Q. -- if you're trying to analyze what something

looked like at a specific point in time, do you just automatically accept the word of the physician as opposed to try to gather all the evidence?

And if there's a dispute in the evidence, I mean, you wouldn't be the appropriate person to render an opinion as to a factual dispute, would you?

A. I -- Is there a documentation that gives another opinion as to how the wound looked on December the 30th that I wasn't exposed to?

Q. Well --

A. Because it was my understanding that Dr. Matejczyk saw the patient in her office at that time and felt that the wound was --

Q. Doctor, I'll show you Page 42 of Mr. Cates' deposition, and you can read along with --

A. Okay, sure.

Q. -- with me, if you would.

Question -- And this is a question by Mr. Seibel, and he -- he asked this question on May 9th, 1990 before he even got you involved, before he sent you any of the materials.

"Question: In between the time you were discharged from the hospital and until you again saw Dr. Matejczyk, what was your general physical condition as it relates to your knee?

"I couldn't get around on it.

"Why not?

"Because it was draining, swore, swollen inflamed, red.

"Were you having any fevers?

"I would say yes."

Now, could you tell me why -- why it is you weren't given that information, Doctor?

MR. SEIBEL: Objection. overruled

MR. ALLISON: Objection.

THE WITNESS: Is -- is this a physician?

BY MR. KAMPINSKI:

Q. No, this is Mr. Cates. It's his knee.

A. Oh, he's the patient,

Q. Yes, sir.

A. And he's making these observations himself.

Q. Yeah.

A. Did -- did he take his temperature?

Q. Yes, he did.

MR. SEIBEL: Objection. That's not true.

MR. ALLISON: Objection.

MR. KAMPINSKI: Well, his wife did.

BY MR. KAMPINSKI:

Q. Is that okay?

A. How high was it?

Q. Well, do you want to answer my questions or --

A. Well, I've -- I've got to have some information to answer your questions.

Q. Well, why weren't you given this information?

I mean, why are we sitting here now for your deposition that's going to be presented to a jury at trial and you're trying to obtain information as to this case that you've rendered an opinion on.

I mean, isn't that really the question? Why weren't you given this, Doctor, so that you could render a full and complete opinion to this jury?

A. I can't answer that.

Q. Well, maybe you can answer this question for me, is the diagnosis of a deep knee infection difficult most of the time?

A. It depends on the information you have presented.

Q. Well, do you need a high index of suspicion if, in fact, you have a possible deep knee infection?

A. It's one of the most difficult diagnosis to make.

Q. Okay, that was my earlier question.

My question now is, do you need to have a high index of suspicion if there's a potential infection?

A. Always.

Q. Okay. And if there is a delay in the diagnosis of a deep knee infection, that can have devastating effects on the patient, can't it?

A. It can.

Q. All right. When you were deposed, Doctor, you were asked -- and -- and I think you mentioned your CV before, and that contains these 80-plus articles that you've authored, and I think one of the reasons you said that you did that is to share your experience and to indicate what's appropriate and not appropriate, correct?

A. As I see it, yes.

Q. Sure.

A. In my observations.

Q. Okay. And to lend your expertise to other physicians out there who might, you know, be interested in reading your --

A. opinions.

Q. Sure.

And when your deposition was taken, you were asked about which of the articles you felt pertained to this particular case. Do you recall that?

A. Yes, I do.

Q. Okay. And I think, and you can refer to your CV if you want to, Doctor, and on Page 24 of your

deposition what you indicated was that references 2, 13, 22, 24 and 29 were the appropriate references in your CV that might apply to this case.

And I -- I -- and I read that correctly, didn't I, 2, 13, 22, 24 and 29?

A. Right.

Q. Okay. I looked at your CV, Doctor, and one of the things that jumped out at me was a reference that you didn't tell us about, and that was No. 44. Would you please tell us what 44 is?

A. It's titled "Infections in Total Joint Replacement," it was published in the Ohio State Medical Journal in 1986, and co-authored by Dr. Hayter and myself.

Q. Okay. And that seems to be right on point, doesn't it, infections in total joint replacement?

A. Yes.

Q. Okay. Doctor, you've told this jury now twice under oath that the aspiration and deep knee joint, which apparently was negative in this case, was a very strong indicator that there was no deep knee infection,

And then I think on -- on the other occasion that I asked you, you said something even stronger than "very strong indicator." I mean, that's the conclusive evidence in this case.

I'm now quoting, sir, from your article that you authored in February of 1986, and if you want to, you can read along with me. And this is what you disseminated for purposes of other physicians becoming knowledgeable and indicating what's appropriate and inappropriate.

And I quote: "They also pointed out the difficulty of relying on joint aspiration and arthrography, which has a high false-positive and false-negative rate."

Do you recall writing that, Doctor?

A. Who are "they"?

Q. Well, you're -- you're referring to a recent study by Cherney and Amstuts.

A. Charnley.

Q. Right, Charn- -- Oh, I'm sorry.

A. And that article is specific to hip infections, not knee infections.

Q. Well, this is all joint infections. As a matter of fact --

A. No.

Q. -- on -- on the next -- on the next page you're dealing with a femur.

A. And that's a hip.

Q. All right.

A. And we do know that aspirations in hip infections are not as accurate as they are in knee because the joint is much deeper and it's much more difficult to get a good aspiration of a hip joint than it is a knee joint.

Q. Is it also difficult in a knee joint?

A. Not necessarily, because a knee joint is much more superficial. Much easier to get a needle into the knee joint than it is the hip joint.

Q. Well, presumably, these aspirations are done where you get aspirate out, and that's the point, that's the point you were making to the jury, whether it's hip or knee.

A. That's right.

Q. Right.

So if you get aspirate out and you get false-negatives in the hip, are you suggesting to this jury you can't get --

A. No.

Q. -- false-negatives in the knee? Is that your testimony under oath here, sir?

A. If you get a -- if you get a good aspiration out of either joint, that's a good indicator. It's just difficult to get a good aspiration out of a -- out of the hip joint.

Q. Well, that's not what it says,
A. And that's what I'm trying to say in that article.
Q. Doctor, that's not what it says. It says "They also pointed out the difficulty of relying on joint aspiration and arthrography...," not of getting an aspirate out, but on relying on them, "...which has a hol- -- high false-positive and false-negative rate."
In other words, they're getting aspirate out, it's how it's being read that's the problem, Correct, sir?
A. No, the problem is if they can't get a good aspirate out, therefore, the material isn't always indicating what's present in the joint.
Q. Well, you also told --
A. And that's what I meant when I wrote the article.
Q. Sure.
You also told Mr. Seibel that Gallium scanning, I'm not sure what you said about it, you just said it would have to be further evaluated.
You go on to say "Radionuclide scanning has been of benefit, particularly when combining technetium and Gallium scanning," right?
So it would have been of benefit in this case, wouldn't it, Doctor?

A. It could have been, but again, it's not all inclusive.
Q. It wasn't done, was it?
A. Wasn't done.
Q. You then go on to make suggestions for physicians in that article, and you make the following suggestions: "Not all of these patients will have obvious signs of infection so that a high index of suspicion is required."
Do you recall that?
A. Yes.
Q. All right. That would be true in this case too, wouldn't it?
A. Yes.
Q. Okay. "Most often a patient with an infected joint will have pain unrelieved by rest," correct?
A. That's right.
Q. All right. Did you seek to determine if that was true in this case?
A. I believe he was complaining of pain.
Q. Yeah.
A. He had pain in a lot of joints.
Q. All right. And "Treatment with oral antibiotics alone is to be condemned, as it may lead to either partial suppression or, worst of all, creation of

antibiotic resistance of the organism involved, or superinfection that would greatly reduce the chances of a successful outcome," correct?

A. Right.

Q. How was he treated?

A. I believe he was treated with antibiotics.

Q. Oral or IV?

A. I think it was IV --

Q. How about --

A. -- -amicin.

Q. How about when he was discharged, any antibiotics?

A. No.

Q. None at all.

A. No.

Q. You go on to say, "A delay in treatment of days to weeks may negatively influence the chances of successful eradication of infection."

Do you agree with that, Doctor?

A. Yes.

Q. That "It can then spread to the surrounding bone with the resulting osteomyelitis producing further bone loss as well as making it more difficult to cure the infection," correct?

A. Correct.

MR. KAMPINSKI: That's all I have. Thank you, sir.

CROSS-EXAMINATION

BY MR. ALLISON:

Q. Dr. Mallory, as you know, my name is Tom Allison, and I just have a few questions for you today. And you also know that I represent the hospital in this case.

A. Yes.

Q. And that includes the infectious disease physicians and residents and fellows that were involved in Mr. Cates' care.

Doctor, would you agree with me that an orthopedic surgeon is trained to evaluate surgical wounds and to assess healing and whether or not an infection is present in any surgical wound or surgical incision?

15

A. Yes. I agree with that.

Q. And -- and they're qualified, "they" being orthopedic surgeons, are qualified by training and experience to make judgments on whether or not a surgical wound is healing?

A. I agree with that,

Q. And whether or not it's infected.

A. I agree with that.

Q. Would you also agree with me, Doctor, that the person in the best position to make the determination of whether a wound is healing and whether a wound, surgical wound may be infected, is the physician that actually looks at that wound as opposed to someone else --

A. That's --

Q. -- a layman?

A. That is true.

Q. And especially if that's the surgeon that's been involved in this particular individual's care for a period of time, four or five or six weeks.

A. I agree with that.

Q. So that wouldn't you agree with me, Doctor, that Dr. Matejczyk was in the best position to evaluate the status of healing and whether or not Mr. Cates' knee was infected on December 30th of 1987?

MR. KAMPINSKI: Objection. wldman

THE WITNESS: I agree with that.

BY MR. ALLISON:

Q. And the observation by Dr. Matejczyk on December the 30th of 1987, I believe you stated for -- before was an important factor in determining the rationale of treatment and whether or not there should be a continued use of antibiotics; is that correct?

A. I agree with that,

Q. Okay. Now, in your practice you have a hospital practice and you also have your office here where we are today; is that right?

A. That is true.

Q. And in your hospital practice situation there are infectious disease consultants that you may call upon from time to time to consult with you on your patients in the hospital; is that right?

A. That is right.

Q. But in your office situation you don't have an infectious disease physician readily available to look at your patients when they come in for a follow-up visit, do you?

A. No.

Q. And there is nothing inappropriate with an orthopedic surgeon following up a surgical incision in his or her own right in evaluating whether the wound is healing and whether or not it's infected without needing to consult an orth- -- a -- an infectious disease specialist every time; is that correct?

MR. KAMPINSKI: Well, let -- let me just object, because those aren't the facts in this case. -but go ahead.

I'm sorry, go ahead.

THE WITNESS: No, I don't think that's inappropriate for the orthopedic surgeon to make judgments on wound integrity.

BY MR. ALLISON:

Q. Doctor, you don't have any criticisms of the care and treatment rendered to Mr. Cates during November and December of 1987 by the infectious disease physicians at Cleveland Metropolitan General Hospital, do you?

MR. KAMPINSKI: ~~Objection.~~ withdraw

THE WITNESS: It appears to be appropriate to me.

MR. ALLISON: Thank you, Doctor, that's all I have.

MR. SEIBEL: Doctor, a few more questions before we wrap this up.

- - -

REDIRECT EXAMINATION

BY MR. SEIBEL:

Q. I want to clear something up that Mr. Kampinski talked about on cross-examination.

Would you pull out the copy of the records, the Metro records, from November and December that I sent you almost two years ago now? And turn to the tab of Discharge Summary.

Now, while you may have forgotten that you looked

at that document, isn't that, in fact, the -- the document that Mr. Kampinski suggested I never sent you?

A. It is.

MR. KAMPINSKI: Well, wait. I -- I'm going to object to the leading nature of the question since the Doctor's testified that he never looked at it, and your suggesting that he somehow forgot and now he's remembered in the last two minutes I think is inappropriate, Mr. Seibel.

BY MR. SEIBEL:

Q. Doctor, is that the document that Mr. Kampinski discussed with you on cross-examination?

A. This is the specific document that he presented to me.

Q. All right. Now, was it reasonable for the doctors who were treated Mr. Cates to initially suspect a deep knee infection in him?

A. Certainly.

Q. What is the significance of Mr. Cates' status as a -- as a mezlocillin resistant staph aureus carrier?

A. Well, I think it's important to point out that this gentleman was found to be harboring this particular organism, staphylococcus aureus --

MR. KAMPINSKI: Excuse me. Excuse me.

Objection. This goes beyond the scope of cross.

MR. SEIBEL: Well, you discussed staph aureus extensively on cross-examination --

MR. KAMPINSKI: All right.

MR. SEIBEL: -- and I asked him about that.

MR. KAMPINSKI: I -- I object. This goes beyond the scope of cross.

THE WITNESS: He had the -- he had this --

BY MR. SEIBEL:

Q. Let's -- let's stop a minute and repeat the question.

A. All right, please.

Q. What is the so --

MR. SEIBEL: And you can have your objection.

MR. KAMPINSKI: Fine.

BY MR. SEIBEL:

Q. What is the significance of Mr. Cates' status as a mezlocillin resistant staph aureus carrier?

MR. KAMPINSKI: And -- and let me object because that never came up in cross-examination, that he was an alleged staph aureus carrier. So this

does go beyond the scope of cross.

THE WITNESS: Well, I think we need to define what a carrier is.

A carrier is a person who has an organism resident in all parts of their body, and the eradication of that particular organism is almost impossible.

And if you know the situation here, you know that one of the things that was discovered during this period of time, November and December of '87, that Mr. Cates was, in fact, a carrier, and that the staphylococcus aureus organism was identified not only in the knee wound, but in his ear, and in his nose, and on his skin. So he really had the organism everywhere.

BY MR. SEIBEL:

Q. Did the standard of care compel the doctors treating Mr. Cates to -- to order a Gallium scan for him during November and December of 1987?

A. I'm sorry?

Q. Did the standard of care compel the doctors treating Mr. Cates in November of 1980 -- November and December of 1987 to get a Gallium scan for him?

A. I don't think so.

Q. Would you tell the jury why not?

A. Because the infection had already been identified

on the surface. And as I say, the Gallium scan would have not differentiated between a superficial and a deep infection.

Q. Now, Doctor, I want you to assume for purposes of -- purposes of this question that Mr. Cates did not complain to Dr. Matejczyk of swelling, redness, or fever, or drainage when she last saw him on December 30th, 1987 before he became infected.

Now, assuming those facts to be the case, does that change your opinion at all about your support of Dr. Matejczyk's care?

A. Well, it was my understanding that those particular elements were not present to any severe degree in the December 30 evaluation by Dr. Matejczyk. So I agree with her not doing anything further than what she did because of the way in which that condition was presented at that time.

MR. SEIBEL: I have nothing further.

MR. KAMPINSKI: Just a very few more questions, and I'll be done.

- - -

RECROSS-EXAMINATION

BY MR. KAMPINSKI:

Q. The -- the page you have open before you, just so

there's no confusion, earlier you -- you tried to indicate that on that discharge summary "infected right total knee arthroplasty" didn't necessarily mean deep knee infection, correct?

A. That's right.

Q. All right. But if it said "septic right knee" that would mean it, right?

A. Septic is another word for infected.

Q. Well, but --

A. Usually has a more serious connotation.

Q. Sure, because that does --

A. But it doesn't differ- -- May I finish?

Q. Sure.

A. -- doesn't differentiate between superficial and deep.

Q. Well, Doctor, sepsis is -- is an infection of the bloodstream, isn't it?

A. That's right.

Q. So that's not superficial, that's very deep, isn't it?

A. Yeah, but sepsis of the bloodstream is not sepsis of the knee. They're -- they're terms --

Q. Well, how does it get into the bloodstream?

A. -- they're terms that are used interchangeably, but they don't mean the same thing.

Q. So if it said "septic total knee," that would indicate to you that it was deep knee?
A. It would mean that it's an infected knee.
Q. Deep knee, as opposed to superficial?
A. It could be superficial or deep.
Q. "Septic" could mean superficial, that's your testimony under oath, sir?
A. No, I'm saying that a lot of times the term "septic" is used interchangeably for -- for infected, and a septic process involves a infection of the bloodstream, septicemia, and it's a misnomer to use it in a joint description.

And it usually is used to emphasize that this is a serious infection --

Q. Okay. Wouldn't --
A. -- and serious infections generally mean that there's both superficial and deep involvement.
Q. Okay. Would you turn to the second page of that discharge summary, sir?

And the first line of Hospital Course, right there (indicating), "Infectious Disease saw the patient for probable septic total right knee with superficial furuncle over right patella."

So that would be, according to what you've just indicated, a deep, serious infection that he had when

he was seen in November; is that correct, sir?
17
A. Possibly the way you would read that, but the word is prefaced by the word "probable," which means it wasn't all inclusive.
Q. Okay. And if, in fact, it was a septic total right knee, then what would be the appropriate treatment for that, Doctor?
A. Would have been to extirpate the prosthesis and to radically debride the wound.
Q. When you say "extripate," that means remove it.
A. Remove it, yes, sir.
Q. And that wasn't done, was it?
A. In this situation it wasn't done because it was perceived to be a superficial infection.

MR. KAMPINSKI: Okay. Thank you. That's all I have.

MR. ALLISON:: Nothing further, thank you.

MR. SEIBEL: Nothing further.

VIDEO TECHNICIAN: Doctor, you have the right to view the videotape, or you can waive the right.

THE WITNESS: I waive it.

(Signature waived.)

- - -

(Thereupon, the deposition was concluded at 5:47 o'clock p.m., on Monday, April 20, 1992.)

- - -

# CERTIFICATE

- - -

The State of Ohio, )
) SS:
County of Franklin, )

I, Maria DiPaolo-Jones, C.M., Registered Professional Reporter and Notary Public within and for the State of Ohio, hereby certify that the foregoing is a true and accurate transcript of the deposition testimony, taken under oath on the date hereinbefore set forth, of THOMAS MALLORY, M.D.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which the deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in the action.

Maria DiPaolo-Jones

Maria DiPaolo-Jones, C.M.,
Registered Professional
Reporter and Notary Public
in and for the State of Ohio.

My commission expires:
June 19, 1996.

- - -