

1 APPEARANCES:

2 Caravona & Czack, P.L.L.,
3 By: Michael Czack, Esq.,

4 On behalf of the Plaintiffs.

5 Buckingham, Doolittle & Burroughs, L.L.P.,
6 By: S. Peter Voudouris, Esq.,

7 On behalf of Defendant The Surgery Center.

8 Gallagher, Sharp, Fulton & Norman,
9 By: John B. Robertson, Esq.,

10 On behalf of the Witness.

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Cross-Examination by Mr. Czack
Cross-Examination by Mr. Voudouris

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EXHIBITS:

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Plaintiff's

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1 (Plaintiff's Deposition Exhibit 1
2 and 2 marked for identification.)

3 DURET S. SMITH, M.D.,

4 a Defendant herein, called by the Plaintiffs for the
5 purpose of cross-examination, as provided by the
6 Ohio Rules of Civil Procedure, being by me first
7 duly sworn, as hereinafter certified, deposes and
8 says as follows:

9 CROSS-EXAMINATION

10 BY MR. CZACK:

11 Q. Good morning, Doctor. My name is Mike Czack. I
12 represent Bob Draper in a case captioned Robert
13 Draper versus Duret Smith, M.D., et al. We're here
14 to take your deposition today, Doctor, concerning
15 your care and treatment of Bob Draper back in 1995,
16 '96, 1997. This is a discovery deposition in this
17 case.

18 Have you ever been deposed before?

19 A. Yes.

20 Q. All right. We'll get into that in a second. Can
21 you please give us your full name at this point in
22 time and tell us the address that we are present at.

23 A. My name is Duret Stanford Smith. We're at 14601
24 Detroit Ave., Suite 700, Lakewood, Ohio.

25 Q. And you've been deposed before, so you understand a

1 little bit about what we're going to do here
2 today, but let me go over some ground rules with
3 you, Doctor.

4 If at any time you don't understand one of the
5 questions that I ask you, please just ask me to
6 restate or reask the question. I'd be glad to do
7 that. Okay?

8 A. Okay.

9 Q. You obviously understand you need to answer out loud
10 so the court reporter can take down your response?

11 A. Yes.

12 Q. If at any time during the deposition you wish to go
13 back and clarify or modify or change or do anything
14 with a prior answer, please stop me and I'd be glad
15 to go back and talk about that. Okay?

16 A. Yes.

17 Q. Now, you've provided me -- or your attorney's
18 provided me with a copy of a CV. It appears to be
19 eight pages. Is this CV current and up-to-date --

20 A. Yes.

21 Q. -- that you know of? All right. Who are you
22 employed by, Doctor?

23 A. Orthopaedic Associates, Incorporated.

24 Q. And how long have you been employed at Orthopaedic
25 Associates, Inc.?

1 A. Since December of 1982.

2 Q. And where were you employed prior to that?

3 A. I was a Fellow -- hand Fellow in Tucson, Arizona and
4 prior to that I was a resident.

5 Q. What is your position along with being an employee
6 here at Orthopaedic Associates? Are you also a
7 partner?

8 A. Yes.

9 Q. And how many other partners are there in this group?

10 A. At this time I believe there are eight.

11 Q. You've testified or you've given depositions before?

12 A. Yes.

13 Q. Are those depositions in the context of being an
14 expert witness or as a defendant or both?

15 A. Expert witness and treating physician for my
16 patients.

17 Q. Okay. And some sort of injury claim you've
18 testified on behalf of patients?

19 A. Generally a Workmans' Compensation and some injury.

20 Q. All right. How many times would estimate you've
21 given depositions on behalf of patients in some sort
22 of injury capacity?

23 A. Including injury at work or --

24 Q. Yes.

25 A. -- Workers' Compensation?.

- 1 Q. Worker's Comp, personal injury.
- 2 A. Since I've been in practice, probably 30 to 50
3 maybe.
- 4 Q. Okay. How many times have you testified in a
5 deposition as an expert witness on behalf of another
6 doctor, if any?
- 7 A. I don't think I ever have.
- 8 Q. Okay. And how many times have you been deposed, if
9 any, as a defendant in a case?
- 10 A. This is it.
- 11 Q. This is your first lawsuit?
- 12 A. That's correct.
- 13 Q. Okay. Now, we're sitting here this morning in your
14 offices to talk about Mr. Draper. Did you review
15 anything, any papers, any charts, any records in
16 preparation for this deposition?
- 17 A. I reviewed my chart and the x-rays.
- 18 Q. Your chart regarding Mr. Draper --
- 19 A. That's correct.
- 20 Q. -- and the x-rays regarding Mr. Draper?
- 21 A. That's correct.
- 22 Q. Anything else that you've looked at, Doctor?
- 23 A. No.
- 24 Q. Now, the chart that you have there, I'm going to
25 hand you what's been marked as Plaintiff's Exhibit

1 No. 1, and I'll eventually take a look at your
2 chart real quick, maybe on a break, but that's the
3 chart that you reviewed in preparation for the
4 deposition today?

5 A. I believe this is it, yes. I mean, I believe this
6 is all of it.

7 Q. Okay.

8 A. With the exception of administrative things that
9 don't pertain to the care.

10 Q. Okay. Such as? Bills? Those kind of things?

11 A. Well, no. These things --

12 Q. Affidavits?

13 A. Affidavits and insurance card. That kind of stuff.

14 Q. Did you review the chart for The Surgery Center for
15 Mr. Draper's surgery?

16 A. The chart that The Surgery Center holds?

17 Q. Yes.

18 A. No, I did not.

19 Q. Have you ever seen that chart?

20 A. Yes.

21 Q. All right. Can you tell me when you saw that?

22 A. Some time after the surgery to sign the operative
23 report.

24 Q. That would have been the only time you reviewed it?

25 A. That's correct.

1 Q. Now, you also have x-rays here on the table with you
2 and the folder in front of you, how many x-rays are
3 in there, Doctor?

4 A. That pertain to his hand?

5 Q. Yes.

6 A. One. One set of x-rays with, I think, three views
7 of the hand.

8 Q. Of his right hand. What's the date on those x-rays,
9 if you could take a look at those?

10 A. December 6th, '95.

11 Q. Where were those x-rays taken, Doctor?

12 A. In this office.

13 Q. And you said there's three different views?

14 A. That's correct. Yes, three different views.

15 Q. (BY MR. CZACK) And as far as you're aware, those
16 are the only x-rays that you ordered of Robert
17 Draper's right hand?

18 A. That's correct. To the best of my memory, yes.

19 Q. Let me ask you a couple personal questions before we
20 get into your care, Doctor. Are you married?

21 A. Yes.

22 Q. And you live -- Where do you live? What city?

23 A. Bay Village.

24 Q. How long have you lived in Bay Village?

25 A. Since I've been here, since '82.

1 Q. Again, your CV, I think, you stated gives a pretty
2 thorough presentation of what your medical training
3 and background are. Is there anything you want to
4 add to what's not on your CV?

5 A. No, I think it's pretty complete.

6 Q. Okay. In you're practice here at Orthopaedic
7 Associates, do you have an area of specialty
8 yourself?

9 A. I do.

10 Q. Okay. Can you tell me what that is?

11 A. Hand surgery and upper extremity surgery.

12 Q. And how long have you held yourself out, at least in
13 your practice, as a hand and upper extremity
14 specialist?

15 A. Since I came here. That's what I did my
16 hand fellowship in in Tucson to get that expertise.

17 Q. Okay. Have you done any teaching or lecturing,
18 Doctor?

19 A. Yes, I have.

20 Q. And would the text of that be contained here in your
21 CV?

22 A. Some of it. I teach -- I do a lot of instructing in
23 the Navy. I'm a Navy Reservist and I do a lot of
24 instructing for the people there. And we teach any
25 where from high school students that shadow us to

1 see what orthopaedic surgeons do, to physicians,
2 EMT, paramedics, nurses, residents. They have
3 residency programs in family practice at West Shore
4 Hospital where I'm at at Fairview and surgery
5 residencies at Fairview. I've given some lectures
6 for both of those groups.

7 Q. Okay. Do you do any teaching at Case Western
8 Reserve currently?

9 A. I'm on a clinical faculty there and am on the staff
10 of Metro General Hospital, which is their teaching
11 hospital, which is closest to the west side here.
12 And I'm on the teaching faculty there. I go to
13 conferences periodically.

14 Q. In the last ten years, have you published any
15 articles? I'm looking.

16 A. Ten years, I don't believe so. I've given a
17 presentation on carpal tunnel and some other things
18 at the hand society. Whether or not they've
19 published it, I'm not sure.

20 Q. Okay. Tell me about the carpal tunnel --

21 A. Yes.

22 Q. -- lecture you gave?

23 A. It was a videotape. They have various modes of
24 education. One of the newer ones at that time was
25 videotape. I would make a videotape on carpal

tunnel syndrome and it was complete release of
carpal tunnel syndrome. And then that's presented
at the annual meeting and physicians sign up and six
or seven of them get in front of one monitor and
they watch the tape.

Q. Okay.

A. And then that becomes the property of the American
Society Surgery of the Hand and what they do with
it after that, I wasn't sure.

Q. All right. Have you ever given any lectures on the
surgical procedure you performed on Bob Draper in
December of '96?

A. No.

Q. How about the procedure you planned to perform on
Bob Draper on that date?

A. No. That's not a procedure that you lecture on.

Q. Okay. You're still here full time at Orthopaedic
Associates?

A. Yes.

Q. What privileges do you have?

A. Hospitals.

Q. What hospitals do you have privileges at, Doctor?

A. Lakewood Hospital, Fairview Health Systems, St.
John's West Shore and MetroHealth Systems.

Q. Have you ever had your medical license suspended or

1 taken away?

2 A. No.

3 Q. Have you ever undergone any treatment for drug or
4 alcohol?

5 A. No.

6 Q. Do you have any felony convictions?

7 A. No.

8 Q. Doctor, you saw Mr. Draper, as I understand in
9 looking at your chart, for a period of a couple of
10 years prior to the surgical procedure you performed
11 in 1996, is that correct?

12 A. I believe so. My -- I first saw him in December of
13 '95 and did the procedure December of '96.

14 Q. Okay. You had seen him though prior to 1995 for
15 some other conditions or complaints that he had
16 made, he'd come to see you about?

17 A. No. I believe my partner Dr. Shumer had seen him in
18 the past.

19 Q. Okay. You had not seen him, so the chart --

20 A. That's correct.

21 Q. -- entries for the other dates are from another
22 physician?

23 A. That's correct.

24 Q. All right. Do you know how Mr. Draper came to be
25 seen at Orthopaedic Associates? How he became a

1 patient here?

2 A. He was a neighbor of our former business manager and
3 I'm assuming that's how he came to the practice.

4 Q. Okay. And that person is who?

5 A. James Smith.

6 Q. All right. Mr. Smith's no longer here?

7 A. That's correct.

8 Q. When did Mr. Smith leave?

9 A. I want to say --

10 Q. Approximately?

11 A. -- January of '98 maybe.

12 Q. Okay. A little over a year ago?

13 A. Yes.

14 Q. Okay. And why did Mr. Smith leave Orthopaedic
15 Associates?

16 A. We decided we needed to get a new business manager
17 for various reasons. Just decided it was time for
18 him to go.

19 Q. Okay. Now, Mr. Draper's surgery was done at the --
20 I think it's called The Surgery Center West, is that
21 correct?

22 A. That's correct.

23 Q. And The Surgery Center West is located -- I think
24 they have a -- That office is where?

25 A. Columbia and 1-90. It's on Columbia Road right at

1 1-90.

2 Q. 1-90 in Westlake?

3 A. Correct.

4 Q. How long have you been doing surgeries out of The
5 Surgery Center West?

6 A. As soon as it opened.

7 Q. Okay.

8 A. Maybe two years. I don't know.

9 Q. It's been opened since '95?

10 A. Maybe, yeah. Maybe '94. I'm not sure.

11 Q. Do you know who owns The Surgery Center West,
12 Doctor?

13 A. I believe I do.

14 Q. Okay. And who would that be?

15 A. I believe it's owned 51 percent by Lakewood Hospital
16 at this time and 49 percent by -- the name I know is
17 Columbia --

18 Q. Columbia Health Care?

19 A. Well, yeah. It's now Caritas in this area, but it
20 was Columbia HCA.

21 Q. Okay.

22 A. That's my impression.

23 Q. All right. As of today?

24 A. That's correct.

25 Q. All right. Do you know was it the same back in '96?

1 A. That's correct.

4 Q. Okay. Just so I understand, how do you as a
3 physician here at Orthopaedic Associates, how did
4 you decide whether you wanted to do a surgery here
5 at the hospital or over at The Surgery Center?

6 A. In general when a patient comes in and the
7 decision's made to have surgery, the first thing I
8 do is ask them if they have a preference where they
9 want to go.

10 Q. Okay.

11 A. If they have a preference, we try to accommodate
12 that. If their preference is not necessarily where
13 to go, but when they want it done, then if, let's
14 say, if I've got two cases at Fairview tomorrow and
15 they want it done tomorrow, then we do it at
16 Fairview if their insurance let's them.

17 Q. Okay.

18 A. If I've got two cases at The Surgery Center a week
19 from now and that's the date they want it because of
20 work or whatever, then we would book it at The
21 Surgery Center if they can go there. But it
22 basically is what their priority is, either where to
23 go or the time. **And** some patients have heard or had
24 a bad experience at one place or the other and say,
25 I don't want to go there, I'll go anywhere else, but

1 hospital X, and then we try to accommodate that.

2 Q. Okay. Back in 1996, and maybe it's the same today,
3 what was the procedure that you and your office had
4 to follow to schedule a patient to have that
5 procedure there at The Surgery Center?

6 A. We would call -- This is my impression. Call the
7 scheduling secretary or that's what we do. We use
8 the term. I don't know what their term is. And say
9 Mr. Draper would like to have surgery on such and
10 such a date or to follow Dr. Smith's case or
11 whatever the situation was, do you have
12 availability. And if there is no other case at that
13 time slot, then they would book that. If they said,
14 well, there's no anesthesia or, you know, we don't
15 have enough people to help or whatever how about
16 this date, you know, they would basically -- between
17 my scheduling secretary, the patient, and the
18 scheduling people at The Surgery Center, they would
19 make those decisions.

20 Q. Okay. And to your knowledge, you may not know this,
21 was there any documentation or paperwork that had to
22 be transferred between your office and The Surgery
23 Center before that surgery could take place?

24 A. I believe so.

25 Q. All right. Do you know what it was?

1 A. I think it's just a standard form that says the
2 patient's name, age, insurance, procedure, length of
3 time, anesthesia requested. I can't think of any,
4 but that's my impression of what those papers are.

5 Q. Prior to December of 1996, can you estimate for me
6 how many procedures you performed at that surgery
7 center?

8 A. Three to four hundred maybe.

9 Q. The Surgery Center obviously would be paid for the
10 operating room and any other services or supplies
11 they would provide. Did you as a physician also
12 have to pay a fee to use The Surgery Center?

13 A. No.

14 Q. And --

15 A. Not that I'm aware of.

16 Q. Okay. Orthopaedic Associates you had no ownership
17 interest in that place back in 1996?

18 A. Orthopaedic Associates, no.

19 Q. Is there any other group that you were a part of
20 that had an ownership interest in that?

21 A. I had one share. My impression was as an individual
22 owner of -- my impression, I had one share of the
23 company that owned it or ran it or something like
24 that, which I subsequently sold back to them.

25 Q. Okay. And that was the case in 1996, you had this

1 share in this --

2 A. I'm not sure when I sold it back --

3 Q. Okay.

4 A. -- to be honest with you. I only held it a year or
5 two and it just wasn't -- wasn't making any money,
6 so I was advised to sell it back if they would and
7 they said, fine, we'll take it.

8 Q. And you sold it back to whom?

9 A. I think Columbia.

10 Q. Okay.

11 A. Columbia HCA. Whoever I bought it from is who took
12 it back.

13 Q. I'm interested in knowing, Doctor, back at that time
14 December of '96, to your knowledge were there any
15 policies and procedures or rules and regulations for
16 surgeons operating out of The Surgery Center West?

17 A. Yes.

18 Q. Okay.

19 A. You had to be credentialed by The Surgery Center
20 West.

21 Q. Okay.

22 A. Which is similar credentialing procedure that the
23 hospitals have. A freestanding surgery center, I
24 believe, has JCHO guidelines or guidelines from
25 somewhere that they had to follow on credentialing

and privileging. I'm not sure of any other policies or procedures.

Q. Okay.

A. Well, I'm sorry. There's an infection review.

There's a quality review. Things like that.

Q. All right. Was there actually a written set of guidelines or policies that you were given before you were allowed to operate in that Surgery Center?

A. I don't know to be honest with you.

Q. Okay. Was there any specific operating room rules and regulations that you were bound to follow that The Surgery Center put out that you know of?

A. There may have been regulations and rules. I may have been handed a copy of them. I don't remember.

Q. Okay. Now, the people that assist you there, for example, in Mr. Draper's surgery obviously you've got to have to have the nursing personnel, the anesthesiologist, who were they employed by?

A. I believe the anesthesiology people are a private group that contract with The Surgery Center. I could be wrong.

Q. Okay.

A. The nursing personnel, I believe, are employees of either The Surgery Center or Columbia HCA or whoever

3 owns or runs the management corporation, something
4 like that.

5 Q. Okay. Now, with regard to Mr. Draper's surgery, do
6 you recall how many other surgical personnel were in
7 there assisting you that day?

8 A. I do not.

9 Q. Do you recall the names of any of those individuals?

10 A. I couldn't say with 100 percent accuracy. There is
11 maybe that I remember four to six, possibly eight
12 personnel that are there most of the time and which
13 ones were in the room, I'm not sure.

14 Q. All right. Do you remember the first or last names
15 of any of the individuals, to the best of your
16 recollection, there for Mr. Draper's surgery?

17 A. No. I certainly don't know many last names. The
18 first names -- I mean, I know the women by their
19 first names, the guys by their first names, but I
20 don't know very many last names.

21 Q. Okay. Any of the people that were there for Mr.
22 Draper's surgery, are you aware are they still there
23 today? Do you still recognize faces?

24 A. I'm not sure who was there for Mr. Draper's case,
25 but the ones that -- there's only been a few that
have left to take other jobs and I don't know which
-- who's still there or who's not there.

Q. How many times did you see Mr. Draper before you did the surgery in December of '96, Doctor? And feel free to go ahead and look at your chart if you like.

A. I see one, two, three -- I believe it was three times.

Q. And to your knowledge and review of his chart and based on the history that Mr. Draper gave you, did he ever have problems with his -- or did he ever have an injury to his thumb or his right hand or his wrist prior to seeing you that first visit?

A. He had a significant family history of rheumatoid arthritis. His father and a sister, I believe, had rheumatoid arthritis, but I don't see where he had a specific injury to the thumb --

Q. Okay.

A. -- in my notes.

Q. Now, you actually had him as we speak about the rheumatology history or the arthritic history in his family that he told you about, you sent him out to a rheumatologist at St. John --

A. Right.

Q. -- West Shore?

A. That's correct.

Q. Do you know if he ever saw that physician?

A. Do not. I don't see a letter from Dr. Perhala,

1 which is the one that we referred him to.

2 Generally, if we refer someone to another physician
3 and they see them, that physician writes us a note
4 saying I saw your patient, Robert Draper, and this
5 is what I think or this is what examination showed.

6 Q. Okay.

7 A. I do not have that.

8 Q. Did you ever follow up with Mr. Draper and ask him
9 if he saw Dr. Perhala?

10 A. I may have. I don't -- I don't have it notated
11 here.

12 Q. Okay. Now, did you find overall Mr. Draper to be a
13 cooperative and compliant patient?

14 A. Yes.

15 Q. Did you ever have any problems with Mr. Draper while
16 he was a patient of yours?

17 A. No.

18 Q. Now, the first time he saw you for his hand, which
19 would have been the first time he ever saw you, was
20 in December of '95, correct?

21 A. That's correct according to my notes.

22 Q. Who's Dr. Tim Taylor, Doctor?

23 A. Tim Taylor is a primary care and, I believe, he's a
24 pulmonary specialist. He's a pulmonary specialist
25 that sometimes does primary care.

1 Q. All right.

2 A. An internist and a pulmonary specialist.

3 Q. And I received your complete chart from your
4 attorney. I don't see -- You never had any records
5 from Dr. Taylor concerning Mr. Draper, correct?

6 A. I do not.

7 Q. What were the complaints that Mr. Draper made to you
a when he saw you in December of '95?

9 A. Mainly -- main complaint was his thumb, some
10 swelling, decreased grip strength, and some
11 decreased motion.

12 Q. Where in his thumb was he making the complaints
13 and where was the swelling, if you could show me
14 on --

15 A. This joint. (Indicating.)

16 Q. Right there? (Indicating.)

17 A. Yes.

18 Q. Is that where he was complaining of the pain and the
19 swelling was there?

20 A. That's correct.

21 Q. All right. And what is that joint called right
22 there?

23 A. It's called an MP joint.

24 Q. Okay.

25 A. MP for metacarpal phalangeal joint.

1 Q. Okay. Did he tell you how long he had been having
2 that pain and swelling, Doctor?

3 A. My impression was that it was a long time. I don't
4 have the exact time. I'm not sure he told me an
5 exact time frame, but it was a while.

6 Q. Okay. Did he make any other complaints regarding
7 the thumb or the hand or the wrist at that time?

8 A. No. I've just got down that, you know, decreased
9 grip strength, pain, swelling, decreased range of
10 motion.

11 Q. And then you document your physical exam there in
12 your chart?

13 A. Yes.

14 Q. Let me ask you this now, Doctor, other than what's
15 in your chart here today, do you have any
16 independent recollection of this first examination
17 of Mr. Draper?

18 A. Do not.

19 Q. You ordered the x-rays that we have on your desk
20 here today, is that day those x-rays were done?

21 A. That's correct.

22 Q. What do those x-rays show, Doctor?

23 A. They show degenerative arthritis at the MP joint
24 with some bone spurs, I guess, would be a good
25 laymen's term for those abnormalities.

Q. All right. And the spurs were located where? In that same area?

A. Yes.

4 Q. The MP joint?

5 A. Yes, that's correct.

6 Q. Erosive osteoarthritis, when you use the description erosive, what does that mean?

7 A. Erosive, I guess best laymen term would be, eating
8 away. It's eroding away. The base of the root word
9 is erode, so it's erosive, so it's eating away or
10 eroding away.
11

12 Q. That joint area?

13 A. That's correct.

14 Q. Okay.

15 A. Bone on bone is a better way to think of it.

16 Q. That I understand. The x-rays, did the x-rays show
17 at all the STT joint?

18 A. Yes.

19 Q. And what findings, if any, do you see on those
20 x-rays in the STT joint?

21 A. The STT joint shows a little bit of subluxation.
22 That means it's slightly moving out of position.
23 Not horrible and a little bit of early -- early
24 -- early bone spurs would be a better term.

25 Q. And do those x-rays also depict the trapezial first

metacarpal area?

A. Yes.

Q. And what findings do you see on those x-rays in that area?

A. The same. That's the --

Q. All part of the --

A. The STT joint -- The T is the trapezium. S is scaphoid. And the trapezial first metacarpal joint is right next to the -- it's part of the STT.

10 Q. STT joint?

11 A. Yeah. I mean, it's just -- think of it as next door
12 to it. Yeah.

13 Q. Okay. Now, the x-ray you're holding up there,
14 that's the hand x-ray from December of '95 that has
15 the three different views, correct?

16 A. That's correct.

17 Q. The other x-rays that are there, are of what,
18 Doctor?

19 A. His neck and his elbow.

20 Q. Okay. For other conditions he was --

21 A. That's correct.

22 Q. Did *you* order any tests on that first visit?

23 A. No. Because of his family history of rheumatoid
24 arthritis and multiple joint complaints, we sent him
25 to Dr. -- we recommended that he go see Dr. Perhala

as that's his area of expertise.

4 Q. Okay. How would you characterize the quality of
that x-ray? Good quality?

4 A. Yes.

5 Q. And then you recommended that he see Dr. Perhala and
E I see you also talk about seeing him back in three
7 weeks?

E A. That's correct.

c Q. And you may fit him for a splint for the metacarpal
10 phalangeal joint?

11 A. Correct.

12 Q. And what would the purpose of that splint be?

13 A. The problem with the arthritis is when a joint is in
14 motion or moves, that aggravates the pain. And when
15 you immobilize or quiet down the joint, the pain
16 improves.

17 Q. Okay.

18 A. And many arthritic conditions can be treated with
19 splints. And then the question is made, can you
20 live like this or are things bad enough that we have
21 to go to surgery.

22 Q. Now, on that first visit, did you talk to Mr.
23 Draper about surgery?

24 A. I don't have it down here that we did. Generally I
25 give them the option to start with conservative

care, which in this case would be the splint. And then depending on how that goes, if we're heading towards surgery, talk about the surgery at a later date.

Q. And it appears you talk about also that he was not having any success with anti-inflammatories?

A. That's correct.

Q. Do you recall if anybody else was in attendance with Mr. Draper at all during that visit?

A. I don't recall.

Q. Did you look at the x-rays with Mr. Draper on that visit?

A. I generally show the patient the x-rays. Sometimes I'll dictate -- I've shown the patients the x-rays to describe what he has, but I don't see that dictated here. But it's my practice to show them the x-rays.

Q. Okay. When did you next see Mr. Draper, Doctor?

A. According to my office notes, October of '96.

Q. And, again, do you know if he was seen in that room by himself just you and him?

A. I do not.

Q. And what was the purpose of that visit?

A. To basically see how he was doing at that point. It was almost a year since his last visit and he was

1 having more pain and wanted to have the surgery.

2 Q. And the pain was still in the same area that you
3 described earlier?

4 A. That's correct.

5 Q. Was the swelling still present?

6 A. Yes.

7 Q. What did you do then?

8 A. On the October 11th visit?

9 Q. Yes.

10 A. Went over the various options of surgery, and for
11 lack of a better term, a plastic implant, artificial
12 plastic bone, which I -- which is an option which I
13 would not do because of his young age and we
14 know that the plastic will break and fragment
15 and cause other problems. So I told him that I
16 would not recommend that.

17 The other option would be to fuse it to make
18 the joint stiff, which would be no motion, but then
19 no pain, no significant pain.

20 And the other option would be to go in there
21 and do basically what we call a joint clean out, get
22 rid of the bone spurs, clean things up, allow him
23 the motion and see how he did with that.

24 Q. Okay. And these were the things that you discussed
25 with him at that visit?

1 A. That's correct.

2 Q. And, again, just so I'm clear, you don't have any
3 independent recollection of that visit other than
4 what you have here in your notes?

5 A. No, I don't believe so.

6 Q. This abnormality or problem he was having in the
7 metacarpal joint there, Doctor, is it visible on
8 examination? Can you actually see it?

9 A. You can see the swelling.

10 Q. All right. How did you leave that appointment with
11 him? What was your understanding that he was going
12 to do?

13 A. Go home and think about the options, the pluses and
14 minuses of each. And then we'd get back together
15 and then answer any of his questions and then
16 proceed from there depending on where he wanted to
17 go. If he had had said, I know you have some
18 concerns about the plastic bone replacement, but
19 that's what I want. I would have told him I'm not
20 going to do that.

21 Q. Okay.

22 A. But I think I made that sufficiently clear in the
23 previous one and he's an educated engineer, so he
24 understood all the stress, strain, and the
25 fragmentation so I didn't think he was heading that

1 way. So the plan was to see him again, go overall
2 of his questions, and then go into the surgery in
3 more detail whichever one he wanted.

4 Q. And, again, looking at your office note for that
5 visit, the only complaint that's made again is in
6 the metacarpal joint?

7 A. That's correct.

8 Q. You talk about the demands on his hand?

9 A. Yeah.

10 Q. What do you mean by that?

11 A. Generally when the joint is that arthritic, in all
12 likelihood without predisposing factors, the
13 patients are in their elder years and don't have to
14 make a living, don't have to do a lot of things
15 around the house, yard, things that demand power,
16 grip, dexterity and things like that. That's what I
17 mean by the demands on his hands of someone his age
18 versus, you know, 60, 70 year old sedentary person.

19 Q. Did you know anything additional about his job other
20 than him being an engineer in terms of how he used
21 his hands, how much he used them, and how important
22 they were?

23 A. No. My -- I was going on the -- his relatively young
24 age for having a joint totally destroyed versus
25 the usual age group that we see with that severe

1 arthritic joint, and the various demands of general
 2 activities of daily living for the two age groups.
 3 He may have told me either his hobbies or whatever
 4 he had to do at his work, but it was mainly the age
 5 differential between the time we usually have to do
 6 that and 39 or whatever he was.

7 Q. Okay. Now, on that October '96 visit, did you make
 E any recommendations to Mr. Draper as to which
 9 surgery?

10 A. I told him I would not recommend the silastic
 11 implant.

12 Q. Okay.

13 A. Plastic bone.

14 Q. All right.

15 A. The other two options, the clean out or the fusion
 16 would basically be up to him.

17 Q. What were the pros and cons of the clean out?

18 A. Clean out you maintain whatever -- you maintain some
 19 motion. That's the big pro. The con is there will
 20 be some pain there. How much is difficult to say.
 21 The pro for the fusion is that without motion at
 22 that joint, there's no bone rubbing on bone and the
 23 pain is much less.

24 Q. Did you make a recommendation one over the other to
 2 Mr. Draper on that day?

1 A. I don't believe so. I have that he's leaning
2 towards arthrotomy because I remember he did not
3 like the fact, as most patients don't, of having
4 what they perceive as joint stiffness, a totally
5 fused and stiff joint.

6 Q. And no other x-rays were ordered at that point? You
7 didn't think x-rays were needed?

8 A. That's correct.

9 Q. So you were satisfied going into surgery with the
10 x-rays from December of '95?

11 A. That's correct.

12 Q. All right. When do you see Mr. Draper again?

13 A. After which visit?

14 Q. After the October '96 visit.

15 A. Oh. I have December -- I think it might be -- I
16 can't read it. December '96 when he was there for
17 pre-op visit.

18 Q. Okay. It looks like maybe December 13th?

19 A. Thirteenth is the way I kind of read it.

20 Q. Okay. Did Mr. Draper ask you about any of the
21 percentages of the likelihood of getting substantial
22 relief from the clean out procedure?

23 A. I don't remember. Well, I would not be able to give
24 him a percentage. When someone asks me that
25 question, I tell them basically I'll know more after

1 I get in there and look and see how bad the
2 joint's destroyed. I'm asked that question mostly
3 when we go in for a knee scope, when someones got
4 arthritis of the knee there's -- you know, it shows
5 up to a certain point on the x-rays. Many times
6 what you see in there is either much better or much
7 worse, so I tell them I can give you a better idea
8 after seeing what's in there.

9 Q. From the period of time say 1991 to 1996, how many
10 clean out procedures in the thumb, in that area
11 would you estimate that you have done?

12 A. I don't believe I've done any. That's an unusual
13 area. The overwhelming vast majority of problems
14 are on at the trapezial first metacarpal joint, the
15 CMC joint, or the base of the thumb.

16 Q. Okay. And have you done any in the area that you
17 had planned for Mr. Draper since then?

18 A. Yes.

19 Q. How many have you done?

20 A. I don't know. The clean out is not the general
21 procedure. It usually -- By the time we see them
22 the joint's totally destroyed and -- this is the
23 trapezial first metacarpal joint, and the patients
24 need a replacement. And what we do now rather than
25 use the silastic or plastic bone, is take a tendon

1 and roll it up into a ball as a spacer. And rather
2 use a plastic, we use one of their own body parts to
3 put in there because of the lack of rejection or
4 foreign body reaction, fragmentation, breaking and
5 things like that. That's generally the overwhelming
6 vast procedure that's done in that area. Not the
7 clean out. By the time we see them, they're way
8 past the clean out stage.

9 Q. Okay. So in planning to do the clean out for
10 him in December of '96, you hadn't done one of those
11 the five years prior --

12 A. Not that I remember.

13 Q. -- of that joint?

14 A. Yeah.

15 Q. All right. All right. So you saw him then on
16 December 13th of 1996 and that was basically his
17 pre-op visit where you and him decided on what was
18 going to be done, correct?

19 A. Correct.

20 Q. And, again, you don't have any independent
21 recollection of that visit other than what's in the
22 notes?

23 A. That's correct.

24 Q. What took place during that visit, Doctor?

25 A. Basically we talk about the procedure, the one that

1 Bob selected, which was the arthrotomy, the clean
2 out type procedure. The procedure, post-operative
3 course, risks and complications, any other questions
4 that he has.

5 Q. Did Bob come to you and say this is what he wanted,
6 or was it a situation where you and him discussed
7 it or you don't recall?

8 A. No, I believe he wanted the arthrotomy.

9 Q. All right. And did you try to talk him out of it,
10 or you went with what he said?

11 A. No, I told him that the arthrotomy was an acceptable
12 way to go. That it may not take care of all his
13 pain. He would have the motion and, again, we would
14 know more after seeing what things looked like.

15 Q. How much relief, if you can tell me, does the
16 arthrotomy really bring to the pain that someone has
17 in that joint?

18 A. That's almost an impossible question to answer.
19 Depends on the amount of arthritis and what's in
20 there that you see at surgery. Sometimes you open
21 up a joint and you think it looks very bad and it
22 actually looks very good. So you can tell the
23 patient that you expect that they'll do very well
24 and get some longevity out of that procedure.
25 Sometimes it's the reverse. You think things look

1 good, you go in there and there's no articular
2 cartilage, no teflon coating for the joint, it's
3 bone on bone, and you can pretty much tell the
4 patient that they're looking at a fusion or
5 something else fairly soon.

6 Q. Any complaints other than in that first metacarpal
7 joint at that visit?

8 A. I don't believe so.

9 Q. Did you review the x-rays with him on that visit?

10 A. I may have shown him what we were going to do. I
11 don't remember.

12 Q. Okay. You don't have that documented, though?

13 A. No.

14 Q. The x-rays would be housed here in your office?

15 A. That's correct.

16 Q. The procedure was apparently scheduled. Did you
17 speak to Bob at that time about where the procedure
18 was going to take place?

19 A. On the 11th -- or the 13th whatever --

20 Q. Yes.

21 A. -- we think it was? I don't believe so. Well, it's
22 my usual practice to say, do you have a preference
23 as to where we do this?

24 Q. Okay.

25 A. And if the answer is, yes, I want it done here,

1 there, anywhere, or you know we're -- when do you
2 want it done? He says, whatever date and whatever
3 facility we're at, we add the case on.

4 Q. Okay. And obviously that took place at some point
5 in time because the surgery was scheduled at The
6 Surgery Center?

7 A. After the decision is made to go to surgery with the
8 patient, I ask them, you know, do you have any
9 preference as to where or when. And then that's the
10 priority. Then I take them into our scheduling
11 office and then the scheduling girl, lady, will call
12 whatever facility they want to go to and then do all
13 the scheduling and paperwork and things like that.

14 Q. And, again, his only complaint at that time was in
15 the first metacarpal?

16 A. MP joint.

17 Q. MP joint?

18 A. Correct.

19 Q. The -- There's a document that I believe was in The
20 Surgery Center West records, Doctor, that indicates
21 the surgery was originally scheduled for December
22 27th. Are you -- And then it was cancelled and
23 obviously rescheduled for the 20th.

24 A. I see that.

25 Q. Are you aware of that? Do you know why that was

1 cancelled or --

2 A. I have no idea.

3 Q. Okay.

4 A. It says -- I believe the patient, because it says
5 will call Paul to reschedule.

6 Q. Okay.

7 A. So that leaves me to believe that Mr. Draper
8 cancelled it for some reason.

9 Q. Okay. But you don't have any recollection of that
10 or any knowledge to know why that took place?

11 A. No.

12 Q. All right. All right. So now the surgery's
13 scheduled for the 20th. Do you know how many
14 surgeries you had scheduled that day out there,
15 Doctor?

16 A. Do not.

17 Q. There would be a record somewhere out there that
18 would show the number of surgeries if you had other
19 surgeries?

20 A. There would be.

21 Q. Okay.

22 A. Yeah, it would be the surgery schedule.

23 Q. Okay. Do you recall whether you did other surgeries
24 prior to Mr. Draper that morning?

25 A. Do not.

1 Q. Do you recall what time Mr. Draper's surgery was
2 scheduled for?

3 A. I do not.

4 Q. You've reviewed the two-page operative report that
5 you dictated on this case?

6 A. Briefly, yeah.

7 Q. Generally, what's the range of time that this
8 surgery would take to --

9 A. To do?

10 Q. -- do?

11 A. I would think between half hour and an hour
12 depending on how extensive things were.

13 Q. Okay. And in terms of this surgery, I've asked you
14 about this, about the office visits, also, do you
15 have any independent recollection of anything that
16 occurred during that surgery other than what's in
17 your operative report?

18 A. No.

19 Q. Was there any other physicians other than the
20 anesthesiologist that were present in that operating
21 room assisting you?

22 A. No.

23 Q. And we talked about the nurses and any surgical --

24 A. Scrub techs.

25 Q. -- assistants, whoever else was in there, you don't

recall any of the names of any of those people? You might recognize their faces, but you don't remember any of the names, correct?

4 A. I'm not sure I -- I don't know who was in the room
5 at that time. I mean if -- I know their names and
6 faces, but I don't know who was there.

Q. And with regard to this surgery, do you have any
7 handwritten notes other than the operative report?

8 A. No.

10 Q. But we don't know if you had a surgery before this
11 or if you came there. Generally, would you go there
12 and do a number of surgeries on a particular day?

13 A. Yes.

14 Q. For convenience purposes?

15 A. Correct.

16 Q. All right. Now, do you have any -- What was your
17 usual and customary practice in terms of preparing
18 for a surgery such as Mr. Draper's? And I want to
19 ask you specifically first in talking with your
20 operating room staff, what kinds of things would you
21 discuss with them preoperatively concerning the
22 procedure?

23 A. What instruments would be needed if there was
24 anything out of the ordinary. I have my hand set
25 that encompasses most of the instruments I need to

1 do probably 95 percent of my cases.

2 Q. Okay.

3 A. If we -- In addition to that, if we are going to use
4 a certain drill or a saw or a special tool, we would
5 have them get that. But other than that -- or if
6 x-ray would be needed or something additional, we
7 would let them know that those things were needed
8 for the case.

9 Q. Did you need any special tools for this case?

10 A. Other than -- not other than what was on my hand
11 set.

12 Q. This is a hand set you take with you out to the --

13 A. No, a hand set when I started going there. I
14 basically got together with them and said I need
15 these instruments to do the vast majority of my
16 cases and we'll call that my hand tray.

17 Q. All right.

18 A. And that's what we use.

19 Q. That was housed out there?

20 A. That's correct.

21 Q. Okay. Any x-rays taken that day?

22 A. In the operating room?

23 Q. Yes.

24 A. No. Not that I'm aware. I don't believe so.

25 Q. All right. And when you appear there and get ready

1 to do Mr. Draper's surgery, would you speak to the
2 staff about what your plans were?

3 A. Not unless it was an unusual case. If there were
4 special instruments, I would make sure we had those.
5 And if it was x-ray, make sure x-ray was going to be
6 called and be there on time. And if there were
7 certain implants you were going to use, you'd make
8 sure that those were there, but for something like
9 this there was nothing out of the ordinary.

10 Q. All right. So this was -- You would just generally
11 classify as an usual case --

12 A. Correct.

13 Q. -- as opposed to an unusual case?

14 A. Correct.

15 Q. Would you speak to the anesthesiologist or any of
16 the nurses in terms of prepping the patient before
17 the surgery?

18 A. The anesthesiologists don't prep the patient.
19 The surgical assistant -- whoever's assisting me
20 would prep -- you mean, clean the hand and get it
21 ready?

22 Q. Mm-hmm.

23 A. That would be whoever's assisting me.

24 Q. Okay.

25 A. There'd be nothing -- They know that: whenever I do

1 anything from a finger tip to a wrist, they prep
2 from the finger tips to the elbow.

3 Q. Okay.

4 A. And there's a tourniquet placed on the bicep area to
5 keep the blood out of the field. And that's what I
6 basically do for all my hand cases that we're going
7 to do under general anesthesia.

8 Q. Okay. Now, when you show up at The Surgery Center
9 that day, do you bring the patient's chart with you?

10 A. No.

11 Q. Do you bring the patient's x-rays with you?

12 A. I believe we did bring his. What's in the chart at
13 The Surgery Center are my notes, so I don't have to
14 bring those.

15 Q. So you did not have the x-rays with you, the actual
16 x-rays themselves?

17 A. No, I believe the x-rays were there.

18 Q. All right. You believe they were or do you remember
19 for a fact that they were? And I know you may
20 not --

21 A. I believe with a reasonable degree of medical
22 certainty they were there.

23 Q. All right. Were those x-rays in the operating room
24 with you?

25 A. Yes.

1 Q. And were those x-rays up on a view box?

2 A. View board, yes.

3 Q. All right. And were those x-rays referred to during
4 Mr. Draper's surgery by you?

5 A. What I do is put them up on the board, take a look
6 at them before we do the case, and if need be during
7 the case, review back to them which we did not have
8 to do.

9 Q. You did not have to --

10 A. (Indicating.)

11 Q. All right. Do you recall speaking to Mr. Draper at
12 The --

13 A. Yes.

14 Q. -- Surgery center?

15 A. (Indicating.)

16 Q. Tell me about that.

17 A. When the patient is next, if you will, for a surgery
18 or first, I go in there, talk to the patient. Ask
19 if anyone's going to be waiting outside to talk to
20 me after surgery.

21 Q. Okay.

22 A. Ask them if they've had any trouble taking any pain
23 medication in the past. We give them a prescription
24 for pain medicine to go home with. Ask them what
25 works for them. Ask them if they have any other

1 questions, things like that prior to surgery.

2 Q. Do you remember having this conversation with Mr.
3 Draper that day specifically or --

4 A. No. It's just that -- you know, no one goes into the
5 operating room until I see him and talk to him.
6 That's my practice.

7 Q. In December of '96 when the surgery took place, did
8 The Surgery Center West have an operating room
9 policy for surgical site verification that you know
10 of?

11 A. I don't know.

12 Q. Did your group here at Orthopaedic Associates have
13 an in-house policy concerning surgical site
14 verification?

15 A. I'm not aware of any.

16 Q. Do you recall discussing with Mr. Draper that day
17 the exact area of where he was having his problems
18 in his thumb?

19 A. I don't recall if I did or didn't.

20 Q. Do you recall if anyone -- Would anyone in that
21 operating room have reviewed those x-rays with you
22 before the surgery began?

23 A. I don't know.

24 Q. So as I'm understanding it then, the surgical
25 assistant, the circulating nurse, scrub nurse,

1 anesthesiologist, you would not normally discuss
2 with them the actual surgery that you're going to
3 perform? You would have them just get prepared for
4 what they need to do and you would go in and do what
5 you need to do?

6 A. Unless -- The only one I would talk to would be the
7 scrub nurse. Again, if there was special
8 instruments that we needed or something special or
9 the surgical assistant if this was going to be
10 something out of the ordinary or something like
11 that.

12 Q. Do you have a copy of the consent form that Mr.
13 Draper signed, Doctor, in your chart for that
14 surgery?

15 A. I don't see it.

16 Q. I'm going to hand you what's been marked as
17 Plaintiff's Exhibit 2, which has been given to me by
18 one of the other parties in the case. It's the
19 records from Surgery Center West that were provided.
20 The first page is the operative consent form. What
21 surgery did Mr. Draper sign as he consented to,
22 Doctor?

23 A. Arthrotomy and debridement, right thumb.

24 Q. And that's the surgery that you and him discussed in
25 your office on the prior operative visits?

- 1 A. Correct.
- 2 Q. And that's the surgery that you had requested be
3 done on that particular day at The Surgery Center,
4 correct?
- 5 A. When you say that's the surgery --
- 6 Q. That you indicated was --
- 7 A. Was scheduled?
- 8 Q. Right.
- 9 A. This here? (Indicating)
- 10 Q. Yes.
- 11 A. This just says arthrotomy debridement, right thumb.
12 There are three joints in the thumb.
- 13 Q. Okay.
- 14 A. This wasn't specific as to which joint --
- 15 Q. Okay.
- 16 A. -- it was on.
- 17 Q. What was your intention before you went in there in
18 terms of which joint you were going to operate on?
- 19 A. To operate on the MP joint. The one --
- 20 Q. The area where Mr. Draper --
- 21 A. That's correct.
- 22 Q. -- had the swelling and the pain?
- 23 A. That's correct.
- 24 Q. All right. Now, is there a date on there when Mr.
25 Draper would have signed that consent form?

1 A. It's dated 12-20-96.

2 Q. By looking at that consent form then you can't --
3 it's not specific as to what joint was going to be
4 operated on, correct?

5 A. That's correct.

6 Q. All right. And you don't recall -- Well, strike
7 that. Anything unusual, to your recollection, that
8 occurred during that surgical procedure, Doctor?

9 A. No. Other than we operated on the trapezial first
10 metacarpal joint.

11 Q. And obviously as the surgeon you have the ultimate
12 responsibility for what occurs during the surgery,
13 correct?

14 A. That's the captain of the ship doctrine that --

15 Q. Okay.

16 A. -- still holds, yes.

17 Q. Okay.

18 A. I believe that's correct, let me put it to you that
19 way.

20 Q. The x-rays that you had present in the operating
21 room, now you said you don't recall referring back
22 to those x-rays at any time during this procedure?

23 A. Correct.

24 Q. Would those have been within your view or sight from
25 where you were at the operating table?

1 A. Yes.

2 Q. Is there any particular reason you didn't refer to
3 those x-rays?

4 A. Not that I can think of.

5 Q. And at any time during this surgery, did any of the
6 other personnel or staff in that operating room with
7 you ever make mention or question whether you were
8 operating on the proper joint?

9 A. No, not that I'm aware of.

10 Q. Okay. And am I correct in understanding that other
11 than the nursing staff preparing the site from the
12 finger tips to the elbow in draping off that area,
13 is there any other surgical site markings that you
14 would have made on Mr. Draper's thumb prior to doing
15 the operation?

16 A. No.

17 Q. Is there any surgeries that you do that you provide
18 a surgery site marking?

19 A. No. Well, I shouldn't say that. When we go in to
20 take pins out and things like that, we're trying to
21 find something. What we will do is under x-ray
22 identify it and then put a mark on the skin.

23 Q. Okay. And I'm correct, Doctor, in stating that the
24 surgery that you discussed with Mr. Draper being
25 done, the debridement at the MP joint, that is not the

1 surgery that took place on that day?

2 A. That's correct.

3 Q. Why is that?

4 A. I wish I knew.

5 Q. Okay.

6 A. We operated on the trapezial first metacarpal joint.

7 I've asked myself that a lot. Don't know.

8 Q. Okay. Can you tell me, Doctor, is there any
9 literature that supports the necessity of doing an
10 arthrotomy debridement of the MP joint? Is there any
11 literature you can cite?

12 A. Well, there's no specific literature. If there is a
13 bony problem with a joint that would benefit from
14 debridement, it's not -- it's not something that's
15 in the literature. It's something you learn in
16 training. If you have arthritis in a joint, you
17 operate on the joint to take care of it. It's not
18 like -- And like I said, that is a highly unlikely
19 joint to be arthritic. It's not like hips and knees
20 where there's literally tons of papers about that.
21 Unusual site to operate on. There's no papers that
22 I'm aware of that talk about debridement of the MP
23 joint of the thumb.

24 Q. Do you think if you had looked at the x-rays in the
25 operating room that would have alerted you to --

A. I did look at the x-rays in the operating room.

Q. Okay. Earlier you stated you don't believe you looked at the x-rays.

4 A. No. I put the x-rays on the board.

5 Q. Okay.

6 A. I said I didn't refer to them during the case --

Q. Okay.

8 A. -- which is different than I didn't look at the
9 x-rays.

10 Q. All right. Good. I want to make sure -- Good. I'm
11 glad you stated that. I wasn't clear. You looked
12 at them prior to the case beginning --

13 A. That's correct.

14 Q. -- but then during the surgery you didn't --

15 A. I don't remember.

16 Q. -- refer to them?

17 A. Don't remember.

18 Q. Okay. Tell me about the procedure you did end up
19 performing in the wrong area. Tell me what that
20 procedure was.

21 A. It's the same procedure that we planned to do up
22 here. An arthrotomy is basically, by definition,
23 opening up the joint and cleaning it out of debris,
24 synovium, bone spurs, things like that in lay terms.
25 Closing it back up, sewing the skin, putting

3 a dressing on.

4 Q. So it's basically the same procedure you planned on
5 performing in the MP joint just at another joint?

6 A. That's correct.

7 Q. And what were your findings in that joint when you
8 opened Mr. Draper up?

9 A. He had some early arthritis chondromalacia, some
10 synovitis that we cleaned up.

11 Q. And how would you characterize the extent of the
12 synovitis and early arthritis?

13 A. Mild to moderate.

14 Q. Do you believe, Doctor, that anyone else is
15 responsible for your operating on the wrong site?

16 A. I have no opinion on it.

17 Q. Do you recall how long this procedure ended up
18 taking, Doctor?

19 A. I don't. I can look at the tourniquet time and that's
20 a rough -- I don't have the sheet that --

21 Q. Okay.

22 A. -- from there that has tourniquet up and tourniquet
23 down, but I would think half hour to 45 minutes
24 maybe, something like that.

25 Q. Okay. Now, an arthrotomy at the STT joint was never
discussed with Mr. Draper prior to surgery?

A. We did it at the trapezial first metacarpal. Not

1 the --

2 Q. The trapezial first -- You never discussed that with
3 Mr. --

4 A. That's correct.

5 Q. -- Draper prior to that surgery?

6 A. That's correct. Can I make a call here?

7 Q. Sure.

8 (Short break taken.)

9 Q. Doctor, my last question related to the fact that
10 you never discussed a procedure with Mr. Draper on
11 the trapezial first metacarpal prior to December
12 20th, '96. It's my understanding looking at your
13 chart there were never any complaints made in that
14 area either, were there?

15 A. That's correct.

16 Q. Is that area an area that you commonly see
17 arthritis?

18 A. Yes.

19 Q. And is that an area that's commonly operated on for
20 arthritic problems?

21 A. Yes.

22 Q. Do you or can you cite any literature for me that
23 discusses the necessity of operating on that area?

24 A. I can't cite it. I've done research and it's one of
25 the things I did in my fellowship. We did trapezial

1 implants, which is one of the procedures you do for
2 that -- for arthritis of that joint.

3 Q. Okay.

4 A. So I read a lot of the literature about that, but it
5 mainly dealt with implants.

6 Q. Implants.

7 A. The rest of the literature, the overwhelming
8 literature about that joint, is that the plastic
9 implants scilistic implants had many problems and
10 things like that. Now, the current literature on
11 that is to replace it with a tendon, someone's own
12 body tissues, and things like that. There's not a
13 whole lot, if anything, other than in those articles
14 it mentions debridement as an early option or
15 something of that nature. They also talk about
16 fusing that joint as well, but most of the
17 literature now deals with using a tendon implant and
18 a reconstruction and things like that.

19 Q. Okay. Was debridement at the first -- the trapezial
20 first metacarpal joint of Mr. Draper's indicated in
21 this case?

22 A. Probably not. He had arthritis in there, but if he
23 were seeing me for just that joint, I would not
24 operate.

25 Q. Okay. And as we sit here today, you've obviously

read your operative report, anything in your operative report that needs, as you read it after the fact, that needs any correction or modification?

I'm not saying there should be, but --

A. I don't know.

Q. Just so I understand, there's nothing that stands out as glaring to you as being unusual?

A. Trapezial first metacarpal joint and then I've got arthrotomy scaphiod trapezial x-ray. The STT joint is right there, but it was primarily the trapezial first metacarpal joint that was done. The STT joint, like I said, is right there so that's a -- you can call it a secondary procedure, if you will.

Q. Okay.

A. But small bony spurs.

Q. Okay. But the secondary procedure you're talking about with the STT joint, something was actually done in that area also even though I know they're right --

A. Yeah. What you do is you just extend the incision or sometimes you can stretch things open, take a look in there, and if there's something in there that -- some synovial tissue or other tissue or it's inflamed or if there's a little bony spur, you can reach in and get that. It's just like you're here,

1 you look over here, there's something there, you
2 take it. So technically it's a procedure in that
3 joint, but it was not the main thing. It was sort
4 of an extension, if you will, of the primary
5 procedure.

6 Q. Okay. And was there pathology in that STT joint?

7 A. I'd have to look. I believe so. It says, rongeurs
8 was used to clean out quite a bit of hypertrophic,
9 hyperemic synovial tissue, which is arthritis
10 tissue.

11 **a.** Okay. Now, the pathology report, which I believe is
12 in your chart, talks about one of the specimens -- I
13 just was wondering about this, a ganglion cyst?

14 A. Yeah.

15 Q. But I don't note it anywhere in your operative
16 report that you talk about removing or excising a
17 cyst.

18 A. Yeah, I know. That surprised me, too. Many times
19 when you've got a lot of arthritic tissue and soft
20 tissue, think of it as -- that would be a tough
21 analogy. The synovial tissue, which lines the
22 joint, may sometimes encompass and surround a cyst
23 or foreign body or something like that. So what you
24 see is the covering, if you will, of the cyst and
25 you -- even under my magnification what you see is

1 synovial tissue, you take it out, and when they cut
2 it open there was a cyst inside it. That's the only
3 thing I could see. There was certainly no large --
4 usually if it's large, they'll say -- like they did
5 on top, 5 by 5 by 2 centimeter, millimeter which is
6 a small thing. But unless they say a cyst measuring
7 such and such, then it's not a fairly large thing.

8 Q. All right. Any unusual occurrences or complications
9 during that surgery that may have distracted you?

10 A. None that I can think of.

11 Q. All right. What were -- This operation that you
12 did, Doctor, obviously on this particular day you
13 did not realize what occurred, correct?

14 A. That's correct.

15 Q. All right. What were your discharge instructions
16 for Mr. Draper?

17 A. My discharge instructions would be what they always
18 are, keep it clean, dry, elevated, wiggle the
19 fingers, call if you have any problems. And they're
20 instructed on, you know, fever and things like that.
21 Anything that -- Basically I tell them, you have any
22 questions, any problems whatsoever, call me.

23 Q. All right.

24 A. If I'm not there, there's two partners 24 hours a
25 day.

Q. All right. And you didn't hear from him until his office visit a couple of days later, is that correct?

4 A. That's correct. And my impression was that none of
5 my partners did either.

6 Q. All right. Tell me about that visit, Doctor.

7 A. We saw Bob, took the dressing off, and then it was
8 apparent from where the incision was that we
9 had operated on the joint proximal to that.

10 Q. Was he making any unusual complaints concerning pain
11 or problems of that area that you wouldn't have
12 expected or --

13 A. Unusual problems -- just the pain from surgery.

14 Q. Okay.

15 A. Yeah.

16 Q. All right. You took the dressing off. You looked.
17 You saw the incisions were at a different area than
18 what you had planned. What did you guys do then,
19 you and Mr. Draper?

20 A. I told him that we operated on the joint proximal to
21 that and even though there was some arthritis in
22 there, the joint we meant to operate on was the
23 smaller one. And I told him that my recommendation
24 would be, since he's in a post-op time frame, to
25 minimize any down time. To go back to the operating

1 room and operate on the metacarpal phalangeal joint.
2
3 Thereby, his down time away from his job and
4 everything else would be extended by a week or
5 whatever time it took us to get him back to the
6 operating room so that he would be rehabilitating
7 and out of commission, if you will, a shorter time
8 frame then he would if he let that heal and had it
9 done at a later date.

10 Q. Okay. And you would have done that surgery -- How
11 soon do you think you could have done that surgery?

12 A. Whenever he wanted to.

13 Q. All right. Any other discussions that you recall
14 having with him that day?

15 A. Not that I can think of.

16 Q. Did any other physician come into the room or any
17 other employee of Orthopaedic Associates at that
18 time?

19 A. I don't know. Well, usually what happens sometimes
20 is when the patient's put in a room, they see that
21 there's a dressing on. They'll take the dressing
22 off before I get there so that when I get there, the
23 dressing's off and I can see the patient rather than
24 having to take the dressing off. I don't know
25 whether I took the dressing off or one of our
employees did.

1 Q. Did you tell Mr. Draper why that happened, the --

2 A. I have no idea why that happened.

3 Q. Did you tell Mr. Draper that he would have
4 eventually needed surgery in the --

5 A. I told him he had arthritis in that joint and that
6 eventually, especially given the history, that this
7 joint will burn out or become arthritic at some
8 point. That that joint would have needed to be
9 cleaned out. And, again, said that my
10 recommendation would be to minimize your down time,
11 to go back and do the MP joint.

12 Q. What was Mr. Draper -- What do you recall Mr. Draper
13 saying during that visit, if anything, about any of
14 the issues you've discussed?

15 A. He wasn't in favor of having the surgery at that
16 point, you know, to go back to the operating room at
17 that point.

18 Q. Did he explain why?

19 A. I don't believe so.

20 Q. Okay. Anything else that you recall Mr. Draper
21 saying at that point?

22 A. I think it was like, why did you operate here
23 instead of here? Something like that. I believe.
24 I mean, I can't quote him word for word.

25 Q. I understand.

A. I mean, that would only be a natural reaction.

Q. Okay.

A. I would ask that.

Q. Anything else that you remember talking to him about on that visit other than what you've told me here today and what's in your note?

A. Keep it clean and dry. I don't let patients get it wet, get their wound wet, for two days after the stitches come out. So I tell them keep it clean and dry. To move the thumb so it doesn't stiffen up and we'll see him in a week and take the stitches out. If he decided that, yes, I do want the surgery call right away we'll accommodate you and get you in.

Q. What happened from there then?

A. We saw him, I believe, the following week to -- December 30th, so January 7th. Took the stitches out. Had him do range of motion, and like I say, have him keep things dry for two days after the sutures come out and then start working on range of motion.

Q. Then you saw him it looks like the last --

A. February 3rd, '97. And I talk about his range of motion, flex 15 degrees of extension full, supination and pronation. Much less pain as when I first saw him. He's having more tenderness at the

3 MP joint. Had him increase his activity as pain
4 tolerates. We're going to see him in three to four
5 weeks. Sooner if he had any problems.

6 Q. And did you ever hear from Mr. Draper again?

7 A. Through you.

8 Q. Other than through me, did you ever hear from Mr.
9 Draper?

10 A. I don't believe so.

11 Q. Do you know if Mr. Smith, your former business
12 manager, ever talked to Mr. Draper about this whole
13 issue?

14 A. Oh, I'm sure he has.

15 Q. I'm asking do you personally --

16 A. Mr. Smith has not informed me of any follow up.

17 Q. Okay. Okay. Did you ever ask Mr. Smith?

18 A. I've not spoken to Jim in -- since --

19 Q. Since he left?

20 A. -- January. Yeah.

21 Q. Okay. Prior to him leaving did you ever speak to
22 Jim, hey, have you seen Bob Draper? How's Bob
23 doing? What's Bob doing?

24 A. No. Jim came to me and said Bob said, tell your guy
25 to get a lawyer.

Q. Okay.

A. I remember that conversation.

- 1 Q. All right. Anything else you remember that Jim and
2 Bob had conversations about?
- 3 A. Not that I can think of.
- 4 Q. Okay. Did you ever ask Jim, hey, he's your neighbor
5 do you see him? How's he doing?
- 6 A. Yeah. Jim says he's not happy. Get a lawyer.
- 7 Q. Anything else? How's his condition?
- 8 A. I don't remember those. I may have asked how he's
9 doing. I don't know.
- 10 Q. The surgery that you did do, Doctor, what would the
11 normal post-op recovery period be before all the
12 pain and healing are gone?
- 13 A. Well, the -- I told Bob he's never going to be
14 totally pain free, so there's going to be a certain
15 amount of pain that I would be able to tell him
16 better once we saw what was in there.
- 17 Q. Okay.
- 18 A. But the healing for any soft tissue procedure and
19 for most bony procedures is six weeks. And t en
20 your limiting factor on function, activity is pain,
21 pain threshold, and commitment to the therapy
22 basically.
- 23 Q. Now, you say you told Bob the pain's not going to go
24 away in that area?
- 25 A. I told Bob he would never be pain free, totally pain

1 free.

2 Q. But he didn't have any pain in that joint before the
3 surgery?

4 A. I'm talking about the MP joint.

5 Q. Okay. I'm talking about the area that you operated
6 on.

7 A. Oh, I see what you re saying. Okay.

8 Q. I'm sorry.

9 A. What was the quest on?

10 Q. The normal post-op course --

11 A. Oh, I see.

12 Q. -- that you would expect --

13 A. For that --

14 Q. -- a patient for that area that you did?

15 A. About six weeks.

16 Q. All right. And would you expect the pain that he
17 was having post-operatively to go away in that area
18 or would that be something he would continue?

19 A. No, that would be -- should get back to his previous
20 state. Basically, an arthrotomy is you open the
21 joint up, clean it out, sew back shut, and then have
22 your normal soft tissue healing time frame and then
23 things should be pretty much back to normal.

24 Q. Would you expect any residual impairment or
25 symptoms --

- 1 A. No.
- 2 Q. -- in that joint?
- 3 A. Absolutely not.
- 4 Q. Would the surgical procedure you did on the
5 trapezial first metacarpal be problematic in doing
6 the MP joint later on?
- 7 A. No.
- 8 Q. Whether it be a fusion or --
- 9 A. No.
- 10 Q. -- a debridement?
- 11 A. No. No.
- 12 Q. And February 3rd of '97 was the last time you saw
13 Mr. Draper, is that correct?
- 14 A. That's correct.
- 15 Q. Based on the findings the last time you saw Mr.
16 Draper, would he still be a candidate to have the
17 MP --
- 18 A. Oh, yes.
- 19 Q. -- joint repaired?
- 20 A. Sure.
- 21 Q. After this surgery was done on December 20th of '96,
22 what surgery would you have recommended after that?
23 When you talk to him post-operatively and said we did
24 the wrong the area --
- 25 A. The surgery intended.

Q. The original debridement?

A. Right.

Q. All right. Would he have eventually needed a fusion in that area?

A. In his MP joint?

Q. -- in your opinion? Yes.

A. Absolutely. Yeah, Unless, and this is what I tell him, the longer you wait to have an implant done, there may be an implant that -- by that I mean a false joint, you know, a hinge or something, there may be an implant that will not breakdown. Will not react with your body, and will work. There's always that hope. The likelihood of that happening isn't there, but, yeah. Unless there is some, I don't want to use the term miracle new joint implant, he's heading towards a fusion.

Q. Okay. Do you believe Mr. Draper is going to be a candidate for future surgery on the trapezial first metacarpal joint?

A. That will depend on how long he lives. If he lives long enough, I anticipate he'll get some arthritis there. If he, you know, takes up certain activities that will aggravate that, that will be sooner than later. Whatever -- you know, if he wants to go out and do physical labor and really be abusive to the

1 hand or take up racquetball or something that's
2 going to put a lot of stress on that joint, that
3 will be sooner than later.

4 Q. Okay.

5 A. But he had evidence of arthritis there and the
6 natural progression is for that to happen.

7 Q. Doctor, do you believe Mr. Draper did anything to
8 either cause or worsen the injuries in his thumb
9 since this surgery?

10 A. Since the surgery?

11 Q. Mm-hmm. That you know of.

12 A. I've not seen him.

13 Q. Okay.

14 A. Oh. You mean, do I think he's taken up any of those
15 things?

16 Q. Mm-hmm.

17 A. I don't know of any.

18 Q. Okay.

19 A. I doubt that he would.

20 Q. Have you ever performed, and I know you've told me
21 you've never been a defendant in a lawsuit before,
22 have you ever performed any other wrong site
23 surgeries in your career?

24 A. Never.

25 Q. Have you ever taken steps to speak to any of the

other people present in the operating room from Mr. Draper's December 20th, '96 procedure?

A. I don't know what you mean by taking steps.

4 Q. Have you ever gone to talk to anybody to discuss
5 what happened, any of the nurses, the
6 anesthesiologist, anybody that was there?

A. Well, it wouldn't pertain to anesthesia. I don't
8 think -- I don't remember it. I mean, you know the
9 captain of the ship doctrine is the captain of the
10 ship doctrine. There's no use trying to point
11 fingers.

12 Q. I understand that. I'm not saying that you are.
13 I'm just -- The only question I'm asking, because
14 eventually I want to speak to these people, have you
15 talked to any of the nurses or the other staff that
16 were in the operating room about what happened that
17 day?

18 A. It would -- My recollection it would be along the
19 lines of we're being sued for this.

20 Q. Okay.

21 A. And that's about all I can remember.

22 Q. All right. Well, I would assume when you knew you
23 were being sued or you thought you were going to be
24 sued and you did speak to these people or this
25 person, they would have asked you why? I would

assume that would be the next logical question. Why
are we being sued, and you would have said?

A. Oh. I don't know.

Q. Okay.

A. I mean, my impression is that when there is a suit
like this, you name everybody that you can find in
the chart. That's my impression.

Q. Did you speak to any of the nurses about what
happened that day?

A. I believe I told them, yes, we operated -- I
operated on the wrong site.

Q. Okay.

A. That's about the extent of it.

Q. Okay. And did they -- And, again, I'm just trying
to find out what that discussion was. I'm not
trying to trick you.

A. There's not a whole lot you can say.

Q. Did they say anything to you why, you know, what
happened or geez maybe we did this or --

A. No, I don't believe so. I mean, I was the guy that
did it.

Q. All right. Do you recall having, before that
surgery, having any photographs in the operating
room before the surgery began?

A. There were no photographs.

Q. Okay. Of other people other than Mr. Draper?

A. Photographs in the operating room?

Q. Right. That you may have been discussing and looking at with any of the hospital or the surgical staff?

A. Not that I can think of. Photographs of the operative site or --

Q. No. Of either yourself or other people?

A. No.

Q. Okay. Give me just one second, Doctor. Let me just look through my notes. Okay?

A. Mm-hmm.

MR. CZACK: We can go off the record.

(Short break taken.)

Q. (BY MR. CZACK) Doctor, do you have any information about physicians that Mr. Draper has followed up with since he left Orthopaedic Associates?

A. I do not.

Q. I don't have any further questions, Doctor. Thank you.

A. Thank you.

CROSS-EXAMINATION

BY MR. VOUDOURIS:

Q. Dr. Smith, my name is Peter Voudouris. We met earlier. I'm here on behalf of The Surgery Center

1 West. I just have a few questions for you this
2 morning regarding the surgery on December 20th,
3 1996.

4 As I understand from your earlier testimony, on
5 that morning prior to surgery you had an opportunity
6 to look at your progress notes?

7 A. Yes.

8 Q. And that would be your custom and your routine?

9 A. Not with every case. Generally if I've seen a
10 patient relatively soon, I don't need to refer to
11 the notes. Sometimes there will be a cancellation
12 or something and I've not seen the patient for a
13 while, they don't want to come back in for another
14 visit, I'll review the notes.

15 Q. But the best of your recollection you looked at your
16 progress notes prior to the surgery?

17 A. To be honest, I can't remember.

18 Q. All right. To the best of your recollection, did
19 you look at the films prior to the surgery that
20 morning?

21 A. Yes.

22 Q. You had an opportunity to do that?

23 A. Yes.

24 Q. And I understand that the scrub nurses know when Dr.
25 Smith has a surgery he's operating on the -- either

the hand or the upper extremity, so they'll scrub or prep the hand from the tip to the fingers to the elbow, correct?

4 A. That's correct. Yeah.

5 Q. I believe you testified that the only time you
6 talked to the circulating nurses or the scrub nurses
7 about the surgery that you were about perform is if
8 it required some type of special instrument, or if
9 it was an out-of-the-ordinary surgery, correct?

10 A. That's the only time I would initiate.

11 Now, sometimes they'll come to me and say, are we
12 going to have to use your whole hand dressing, or is
13 this -- can we get away with something smaller or
14 what do you want to use for suture? What do want
15 for various things?

16 Q. You don't recall any of that type of conversation
17 happening?

18 A. I do not. No.

19 Q. And, again, you didn't use any special instruments
20 or this wasn't an out-of-the-ordinary procedure,
21 correct?

22 A. That's correct.

23 Q. Do you have any information or knowledge that any
24 employee of Surgery Center West mislead you into
25 performing surgery on the wrong joint?

A. Do I have any knowledge, no, I don't have any knowledge.

Q. That's all I have, Doctor. Thank you.

A. Thank you.

MR. CZACK: Nothing. I just want to look at the x-ray when we're done. I'm all through. Thanks, Doctor.

THE WITNESS: Thank you.

THE VIDEOGRAPHER: Doctor, at this time you have the right to view the videotape in its entirety or do you waive that right?

THE WITNESS: I'll waive it.

THE VIDEOGRAPHER: You also have the right to read the transcript when it's completed or do you waive that right?

THE WITNESS: I'll waive it unless counsel says --

MR. ROBERTSON: I think we'd like to have the Doctor read the transcript.

THE WITNESS: Okay.

- - -

(Deposition concluded at 9:28 a.m.)

I have read the foregoing transcript of my deposition taken on Wednesday, April 7th,, 1999 from page 1 to page 75 and note the following corrections

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PAGE:	LINE:	CORRECTION:	REASON:
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DURET S. SMITH, M.D.

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1 THE STATE OF OHIO,)
2) SS: CERTIFICATE
3 COUNTY OF CUYAHOGA.)

4 I, Kerri L. Simmons, a Stenographic Reporter
5 and Notary Public within and for the State of Ohio,
6 duly commissioned and qualified, do hereby certify
7 that DURET SMITH, M.D. was by me, before the
8 giving of his deposition, first duly sworn to
9 testify the truth, the whole truth and nothing but
10 the truth; that the deposition as above set forth was
11 reduced to writing by me by means of Stenotype and
12 was subsequently transcribed into typewriting by
13 means of computer-aided transcription under my
14 direction; and that I am not a relative or attorney
15 of either party or otherwise interested in the event
16 of this action.

17 IN WITNESS WHEREOF, I hereunto set my hand
18 and seal of office at Cleveland, Ohio, this 30th day
19 of April, 1999.

20 
21 Kerri L. Simmons, Notary Public
22 Within and for the State of Ohio
23 1511 Terminal Tower
24 Cleveland, Ohio 44113

25 My Commission Expires: October 26, 2002.