1

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

DAYLE YAFANERO, Administratrix of the Estate of Anthony Yafanero, Deceased,

Doc 437

Plaintiff,

-vs-

JUDGE O'DONNELL
CASE NO. 180339

STANLEY T. MECKLER, D.D.S., et al.,

Defendants.

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Deposition of HARVEY M. TUCKER, M.D., taken as if upon cross-examination before Susan M. Cebron, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the Cleveland Clinic Foundation, One Clinic Center Drive, Cleveland, Ohio, at 2:25 p.m. on Monday, March 18, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

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HARVEY M. TUCKER, M.D., of lawful age, called by the Plaintiff for the purpose of cross-examination, as provided by the Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

CROSS-EXAMINATION OF HARVEY M. TUCKER, M.D.

BY MR. KAMPINSKI:

Q. Doctor, would you please state your full name?
A. Harvey Michael Tucker, M.D.
Q. All right. Doctor, you were retained by Mr. Murphy to provide a report and opinion in the Yafanero matter, correct?
A. That's correct.
Q. When is it that you were retained, doctor?
A. In early September.
Q. Of --
A. Of 1990.
Q. Okay. You are looking at what, doctor?
A. I am looking at the letter that I wrote in response to the request -- that I wrote in response to the request by Mr. Murphy that I review some records.
Q. Your letter being September 6, 1990?
A. That's correct.

Q. Do you know how long before that you had been retained?
A. I don't recall offhand. I mean I may have a letter here that says.
Q. Is what you have in front of you, doctor, your entire file?
A. I believe so.
Q. Okay. Can I see it, please? It will make it easier.
A, Here is a letter, also.
Q. That's your letter?
A. That's okay for me to --

MR. MURPHY: Oh, sure.

A. That's from my file.
Q. All right. Doctor, there's a letter here from Mr. Murphy dated August 17, 1990, and that refers to discussions that he had with you some months earlier.
A. Yes.
Q. So would it have been then somewhere in the Summer of '90?
A. I assume so. I honestly don't remember when we first talked about it, but this may have been the earliest written material that I have, I don't know. I would have to look through the

whole file, but that should be fairly representative.

Q. And does that letter then contain all the materials that you received up until the point in time that you dictated your September 6th letter?

A. I believe so.

Q. And in that letter on the first page there are various facts which Mr. Murphy summarizes. Did you rely on those facts for purposes of forming your opinion?

A. No. I reviewed the records that were provided, which are listed in the second page.

Q. Okay. Not included in those records are any depositions, for example, of Mrs. Yafanero.

A. The items that were included that I had in my possession, to the best of my knowledge, at the time that I reviewed these records were what is listed in the letter. If you would like I could just specify what those are.

Q. All right.

A. Dr. Alperin's office records; Dr. Meckler's records; Dr. Rose's office records; Dr. Katz's office records; a letter dated 4/5/90 from one of plaintiff's experts, Dr. Charles B.

Engelberg; a letter dated 7/27/90 from Dr. Engelberg; a letter dated 5/24/90 from Dr. Harry J. Bonnell, one of plaintiff's experts; a letter dated 7/27/90 from Arthur E. Brenner, one of plaintiff's experts; and a copy of Dr. Alperin's deposition testimony.

Q. All right. So the only deposition then that you received was Dr. Alperin's?

A. At the time of this letter that's all that I believe I had in my possession.

Q. Looking at your file quickly, you have since gotten the deposition of Dr. Bonnell and Dr. Simms, as far as depositions go that looks like it?

A. I believe that's all that's in the file.

Q. Have you ever testified for Jacobson, Maynard before, doctor?

A. I have no idea. I honestly don't.

Q. Well, I mean Jacobson, Maynard Tuschman & Kalur represents --

A. I have no idea.

Q. Have you testified before on cases?

A. Oh, yes.

Q. On behalf of plaintiffs or defendants or just defendants?

A. Both. Both plaintiffs and defendants.
Q. But you don't know if you have testified on behalf of Jacobson, Maynard, Tuschman & Kalur?
A. That's correct. I have great difficulty remembering who all of these matchups are and I frankly don't know. I could see in my records easily if I had.
Q. Do you have something that you could refer to that would indicate what cases you've been involved in, who you have been retained by and the nature of those cases?
A. I have records of the cases that I have been involved in as an expert witness or to discuss the case, although I do not retain those records much beyond the time that the matter is resolved in one way or another.
Q. So you're suggesting that you would have pending cases?
A. Active cases that I have been asked to look at, which might amount to two or three at any given moment, or that I have been involved in as far as giving testimony, which is not always the case. And for reasons of space, once the matter has been resolved to the satisfaction of everybody involved or I'm no longer a party to

it, usually 1 don't keep the records much longer than that. So I would say maybe for a year after and that's about it.

Q. All right. Could you provide a list of that to Mr. Murphy and then he could provide it to me, and since we're going to have a trial on Monday that would have to be done fairly expeditiously.

A. A list of what exactly?

Q. Of all the cases that you do have a record of.

A. I suppose I can.

MR. MURPHY: If you can do it.

A, I can ask my secretary to see what she can come up with. She keeps all the records.

MR. MARMAROS:: I am going to object because if there is a pending case in which some lawyer has asked the doctor to review which for waiver reason he hasn't been identified as an expert in that case, I don't know that there should be -- it might interfere with someone's work product and I would object on that basis.

MR. KAMPINSKI: Well, I assume Mr. Murphy will indicate that if that's a problem. That's why I suggested that he give it to Mr.

Murphy first so if there is a problem you can let us all know. Otherwise you can just send it all.

MR. MURPHY: Okay.

Q. Have you testified, doctor, in failure to diagnose cancer cases before?

A. I really don't recall exactly.

Q. Okay. Do you know Dr. Alperin or his partner?

A. I'm not sure if I have ever met Dr. Alperin face-to-face. I have spoken to him on the telephone about referrals of patients, not related to this case.

Q. When you say referrals you mean by him to the Clinic?

A. That's correct.

Q. All right. By him specifically to you?

A. Perhaps. I don't remember. They might have been directly to me or they might have simply come to the department and it may have been my case that I happened to assume, but I don't recall.

Q. So you have had a professional relationship with him over some period of time then?

A. I couldn't say whether it was more than once or twice over 15 years, but in that sense, yes.

Q. And -- well, how recent has it been?
A. I haven't the foggiest notion.
Q. Okay.
A. I would say it's probably not been within the last year to two years in any event somewhere. Certainly not as recently as within the last year.
Q. Have you spoken to him about this case?
A. No.
Q. Are you in any organizations with Dr. Alperin?
A. Not that I know of.
Q. Okay. With respect to your report, doctor, and, you know, if you need to refer to anything in front of you obviously do so.
A. Uh-huh.
Q. You start off the second paragraph of your report, Page 1, saying "If, in fact, the biopsy site after the original biopsy was completely healed with no evidence of residual disease", what if it was not completely healed and there was evidence of residual disease, would your opinion be different, doctor?
A. If there were evidence of residual disease when Dr. Alperin saw the patient at whatever was his last visit --

Q. May of '87.
A. -- yes, then my opinion would be different.
Q. What would your opinion be if that were the case?
A. That if there were evidence of residual disease it would be necessary to obtain at least an additional biopsy or else to have made referral to someone else who was going to look further into that.
Q. So your opinion then depends upon the factual determination of whether or not there was still something present in his mouth, in Mr. Yafanero's mouth?
A. You have to be a little bit more specific. There was something present.
Q. Okay. Let's back up a minute. When you say residual disease, if there was a portion of the lesion that was initially incisionally excised in December of 1986, if a portion of that remained in May of 1987, would that fall within the ambit of your definition of residual disease?
A. That's a difficult thing to answer yes or no. Let me just say the following. If any of the physical findings that lead a physician or an

oral surgeon to be suspicious of cancer in the mouth were present at the last follow up, then, of course, it's the responsibility of that physician or oral surgeon to go further into diagnosis or arrange for someone else to do it.

There are changes that take place as a result of a biopsy. So that it's fair to say that even if everything were, quote, normal, in the sense that there was no evidence of residual disease, that, of course, there is something there that you can see, that is not normal in the same sense that I hope if I looked in your mouth it would look that way, That's all I am saying.

In fact, when I wrote this I was trying to make clear that if the facts in the case are accurate, that is, that the biopsy site when Dr. Alperin last saw it appeared to be completely healed and he found no evidence of residual disease, then it was not his responsibility to go further.

Q. Well, okay. Let me back up again because I don't want semantics to be a problem here.

A. Right. I don't either.

Q. And let me try to ask it again.

Obviously he was concerned in December of 1986 and that's what led him to do a biopsy to begin with?

A. That seems fair.

Q. Okay. If, in fact, he didn't remove the entire lesion which was biopsied in December of '86, if some portion of that lesion remained in his mouth through May of '87, would that qualify then as what you have been referring to as residual disease?

A. No. Because when you look in someone's mouth and there is a lesion present, sometimes it's very obvious that what you're dealing with clinically at least is a larger, it's large, it's fungating, it is eroded, it is invading things around it and, of course, you still don't know for certain until the biopsy has been done whether it is cancer or not, but one is highly suspicious of it.

In many cases more often than not what you see is something that isn't supposed to be there but you honestly don't know what it is, and you use your clinical judgment and a decision is made that a biopsy should be obtained.

A biopsy is obtained, I am not speaking

necessarily of this case now, but just in a general way now, the biopsy is obtained, the biopsy is something other than cancer, then what's left of the lesion, unless it changes, gets bigger, begins to erode, begins to do something it hadn't done before, one would presume then that this is not -- it's residual disease, but it isn't residual cancer, because you have already identified that it was not cancer.

Q. Well, a pathologist can only examine what's submitted to him?

A. Agreed.

Q. And if only a portion of a lesion is presented to a pathologist he can't say with any assurance what is in the remainder of the lesion, would you agree with that?

A. If only a portion is submitted, that is true.

Q. So that what you're saying then wouldn't necessarily be applicable to any lesion that was left in a person's mouth that hadn't been submitted?

A. Except that if it were cancer and we have a period of months involved here, one would be -- one would expect there to be some worsening,

some negative changes about what was left in the mouth.

Obviously if you've got a very large lesion and you're not going to do major surgery to find out what it is you take a representative slice, that would be an incisional biopsy, and as long as it is representative, if the pathologist says well, there is no cancer in that specimen and, in fact, says it is and he named something else that isn't cancer.

If it's something that does not have to be removed in and of itself, assuming it is not cancer, then you leave it there and all you are interested in is it getting bigger, is it breaking down, is it beginning to erode, is it beginning to invade anything that it didn't before and, of course, you are suspicious that maybe what we didn't biopsy has cancer and we now have to biopsy again.

But if what you left doesn't change and you already know that the representative biopsy was not cancer, then that would be acceptable in the sense that no evidence of residual disease, meaning any cancer in this case specifically, the word disease here refers to cancer.

Q. Pseudoepitheliomatous hyperplasia is a reaction to something, isn't it, or can be?
A. It can be a reaction to something.
Q. And inflammatory changes or abnormal cells can also be a reaction to something, correct?
A. Well, pseudoepitheliomatous hyperplasia is often reaction to something that is going on in the region.
Q. And if there is inflammatory cells aside from --
A. Well, that is part of pseudoepitheliomatous hyperplasia. Inflammation is part and parcel of that diagnosis.
Q. So the two of them are not distinct?
A. No, they are not distinct, but let me make sure we get this right.

Inflammation can exist in the absence of pseudoepitheliomatous hyperplasia. But pseudoepitheliomatous hyperplasia includes inflammation as part of it.

Q. The margins were not free and clear in this case, were they, doctor?
A. Of what?
Q. Of inflammatory changes?
A. That's correct.
Q. And there is nothing on the slides or in the

reading that would indicate what it is, if anything, that the pseudoepitheliomatous hyperplasia was a result of, correct?

A. Well, that's usually true. Yes, that's usually true, but that's usually the case.

Q. And it can be secondary to some other process?

A. It can be.

Q. If you assume, doctor, that the lesion in December of 1987 was incisionally biopsied, that it was not entirely removed, that only a small portion of it was, in fact, removed, that the remainder of the lesion stayed pretty much the same, that Dr. Alperin indicated in his records that he would, in fact, remove it if it didn't get better, that his records subsequently reflected that it didn't get better, and that he didn't remove it for whatever reason, and that the lesion still remained, and that he then told the family that there was nothing more to worry about, nothing to be concerned with, and that it was not necessary to return for any additional appointments.

Now, first of all, those are not the facts you assumed for purposes of your opinion, are they?

A. They are not the facts that I assumed, nor are they necessarily the facts that were reflected in the material that was sent to me.
Q. Okay. Let's assume that those are the facts.
A. All right.
Q. Would not it be incumbent upon the surgeon under those circumstances to continue to follow that patient up?
MR. MURPHY: Just note an objection to the assumed facts. You can answer.
Q. And you understand --
A. Yes, I understand. If I accept all of the assumptions that you have made exactly as you have made them?
Q. Yes, sir.
A. I think that it would be incumbent on the surgeon to continue to follow the patient.
Q. Or biopsy?
A. Well, follow could be biopsy or it could mean just watch it to see if there are changes that are worrisome that means that you should biopsy.
It's always a judgment when you decide to take a biopsy. But as long as it was being

observed and as long as -- at some intervals, and as long as there were no changes from what had now become not normal but a customary finding in this particular patient, one would not be remiss in not taking an additional biopsy as long as there were follow-up.

Q. So under my assumed facts, however, the failure to follow-up or do something at that point in time, and that point in time being May of '87, would be a failure within the appropriate standard of care, would it not?

A. I agree with that.

Q. Do you know why it is that you didn't receive the deposition of Mrs. Yafanero? Did you ask for it?

A. 1 don't know if I received it or not.

Q. Well, I mean it is not here.

A. Then I don't know anything about it, to tell the truth.

Q. So you don't know what her testimony was?

A. I don't believe so. I don't recall. I frankly don't recall all of the testimonies I read in here. They are there.

Q. Sure. Doctor, in your report you further go on to say that, I guess it's the second sentence in

the first paragraph, "The record does not confirm that nothing was there."

There's a bunch of negatives in there.

A. Uh-huh.

Q. What were you trying to say there?

A. I was being very specific. As I recall, and I can check this, but as I recall, Dr. Alperin's office record for the visit, his last visit, someone wrote, I am assuming, I don't know who it was, something to the effect the lesion looks the same or the site looks the same as it did in January.

Q. Right.

A. It doesn't say, quote, there's nothing there at all. It doesn't say there's nothing but a scar from the biopsy.

Q. It implies just the reverse, actually.

A. Well, I don't think you can make -- I don't think I can jump to any conclusions from that because in January the description was, to paraphrase, that it looked like what he expected it to look like following a biopsy in the sense that --

Q. In the record?

A. Well, I don't remember the exact quotation.

MR. MURPHY: Why don't you find the records?

A. I believe the January note said something to the effect that it's healing well -- well, I better not. Let me just look it up, if I can lay my hands on it quickly.

MR. MURPHY: Here's another copy, doctor.

A. Thank you. Perhaps my recollection is not good. It's better that we did look at this.

Q. Because I don't want you to confuse the deposition.

A. I don't want to do that either. Obviously we need to be as precise as possible.

There is a stamp here for January 2nd, and I can -- it looks like "slight" --

Q. Irritation?

A. "Irritation".

Q. Okay.

A. "Slight irritation, return six weeks for check. February 13th, patient did not show. January 9th, filled out Worker's Comp. May 2nd, quote, area looks the same as January 2nd. No change."

Now --

Q. Why don't you go to the entry before the January 2nd one as well.
A. Okay. Let's see. This looks like something 18.
Q. December?
A. Okay. Right. December 18th. "Copy of path sent to Dr. Meckler. Area getting better. Advised to check area if not better two to three weeks, will remove area, copy of report given to patient, return two weeks for a check."

Now, in January when, in fact, having reviewed that note, on January 2nd, if there is Dr. Alperin's slight irritation, it doesn't say it's better, but slight irritation is not a big deal after a biopsy has been done in the area, and one must, I am assuming, because of the way 1 know people write notes, that if Dr. Alperin on January 2nd had seen some worsening of the area, having already said that he would remove it, that it certainly was not any worse than what it looked like on December 18th, and the statement about in May which says it looks the same as in January again implies that there was nothing more than just slight irritation.

Q. Also nothing less, though?
A. I can't argue with that. But exactly that is

the reason why when I tried to phrase my report so as not to imply something that couldn't be supported in the record that I said. The record does not confirm that nothing was there, but Dr. Alperin has testified, and this was information that was provided to me, that the note in his chart which states something to the effect that the lesion is the same was written by an office personnel and does not really describe his findings. He alleges that the area was healed except for a small scar and that he, therefore, had no further concern.

Q. Okay. The point I was trying to make earlier in terms of your indicating the record does not confirm that nothing was there --

A. Right.

Q. -- does that then mean that for purposes of your opinion and your report you then assume a accuracy of the testimony of Dr. Alperin as set forth in his deposition?

A. Well, two things. I assume that that is accurate. I also assume that had there been something worrisome to Dr. Alperin, having already stated he would remove it, that in January he would not have simply written two

words, slight irritation.

So you can take that, you know, it's the old story is the glass half full or half empty. Slight irritation could be very serious when there had been nothing there at all before.

On the other hand, slight irritation on the face of what might have been a cancer was not biopsied and is now healed to me is not a pejorative or not a negative. It is a positive, it looks okay.

Q. So you are interpreting that to say it looks okay?

A. I am forced to interpret because I was not present and I have to go on whatever material was provided.

Q. So once again, if, in fact, it was the same as before the biopsy, that would then change your impression of what it looked like?

A. Well, again, that's a little difficult to say, but the description of the lesion before the biopsy is a great deal worse than slight irritation.

Q. Okay. But are you reading the slight irritation to mean --

A. That that's all that's left.

Q. As opposed to that being the incision line that he was talking about?
A. How can I put this because I don't want to be misleading. On the contrary, I want to be precise.
Q. Let me stop you. Are you guessing here, because you weren't there, I wasn't there.
A. That's correct. Neither of us was there.
Q. So wouldn't it be best then to rely or to make assumptions based upon the people who did have an opportunity to observe it, one being apparently Dr. Alperin?
A. Uh-huh.
Q. And two, perhaps the family members who were in a position to see it?
A. Well, this may not be appropriate for me to get into, but you have asked me a question so I am going to answer it.
Q. Sure.
A. Of all the people present at a time like this, by far the most reliable source will be the surgeon or physician in question simply because, one, that's his business; two, he is in the business of deciding what's going on; and three, he has no emotional content about it such as a

family member may well have.
Q. Except, doctor, what we're confusing here is that he does, in fact, have an emotional aspect because what you're doing is you are relying upon his testimony given after he has been sued.
A. But I am also relying upon what is in the record which can be interpreted to mean that there is, quote, only slight irritation left as opposed to there's some irritation that wasn't there before. It doesn't say that.
Q. So you can interpret it then that way, too?
A. I suppose one could interpret it any way one wanted to, but the way I phrased it in this letter is because there are some bits of information that cannot be gleaned directly and only from the record. Therefore, it becomes a matter of who believes who, I suppose, But that's true, too.
Q. The second page, doctor, and I apologize if we have already been through this but I want to make sure I fully understand your opinion, your report, you start out that paragraph by, quote, assuming these two issues as stated above?
A. Correct.

Q. The two issues being one that was described as an incisional biopsy was, in fact, an excisional biopsy, and that is that it was all removed, and two, that there was no evidence of any remaining lesion in May of '87; am I accurately stating that?

A. Almost. The two issues that are assumed in that statement are, one, that it was Dr. Alperin's opinion the last time he saw this lesion that there was nothing worrisome going on there that required further intervention or biopsy.

And second, that the description of the biopsy by the pathologist, which measured something in the neighborhood of nine centimeters, if I remember, is accurate, then using that against Dr. Alperin's original measurement and description of the original lesion, this could not have been just incisional in the sense that it was a little piece of a large lesion. This had to be all or very close to all of the lesion that was originally described and observed at the time of the biopsy, and those I am again depending on the record, of course, in both cases, because I never saw the slides, either.

Q. Well, when you say all or close to all, it makes a big difference if it is all or close to all.
A. Sure it does. But it also makes an even bigger difference when you say incisional biopsy, if you mean let's say a 10 centimeter lesion of which you take out one centimeter or if you talk about a one centimeter lesion of which you take out nine millimeters --
Q. Well, nine millimeters was the entire slide which contained material in elliptical portions,
A. It's measuring the greatest dimension of what was removed.
Q. Right. And that may have only included a very small portion of the lesion, though, doctor.
A. Well --
Q. And to take it even further --
A. Do we have a copy of the path report?
MR. MURPHY: You got it there someplace.
You know where it is? I think it is clipped to the copy of your letter that you were referring to.
A. No.
Here we go. The -- make sure we do this right.

The pathology report reads, "Received in formalin is a pale, gray locally hemorrhagic mucosal ellipse measuring .9 centimeters in greatest diameter bisected entirely."

That means that the pathologist cut it lengthwise so that he was able to look at the entire nine millimeters from one end to the other.

In point of fact, we seldom look at all of what is submitted anyway. They don't often do serial sections through the entire lesion unless there is some reason to be suspicion.

A .9 centimeter is a fairly good sized, if you wish, incisional or excisional biopsy. Now I can't say that the whole lesion was removed, but I can say that this is more than just taking, I mean sometimes we just take a tiny little piece with a cup forceps, which is very tiny.

So if slightly less than a centimeter was taken from the greatest dimension of this lesion you are looking at what ought to be great representative of what's in there, and that's all there is to say.

Q. But that wasn't the question, though, doctor.

The question as it arose was whether or not the two issues you assumed was that the entire lesion had been removed, and, you know, that's the part I think you responded to me by saying --

A. My impression was that the size of the original lesion was such that a nine millimeter biopsy would include all or nearly all of it.

Q. So that's one of the issues you assumed.

A. That's correct.

Q. And the other one was that there was nothing there in May of '87?

A. Not nothing.

Q. Well, that there was nothing --

A. That concerned Dr. Alperin by its appearance.

Q. Well, but that's begging the issue.

A. On the contrary. That's precisely the issue, counselor.

Q. In other words, we just leave it up to his judgment one way or the other and that's what goes?

A. In fact, that's what is at issue in this whole trial, isn't it, is whether or not his judgment was correct. Any physician is faced with making judgments all the time.

Case in point, I don't want to diverge --

Q. That's fine.

A. Case in point, I treat a lot of cancer of the larynx. It is such that we often radiate it for cure because that gives good cure rates, not a hundred percent, it's about 80 percent. Then we are faced with having to look at that without biopsying it for some period of time.

The decision to biopsy it again is made by the judgment of the observer, that there are changes from what he has learned to accept as the situation after radiation in a given patient that look worrisome to him. There isn't a fixed schedule, there isn't you always biopsy at this point or you always biopsy at that point. The surgeon or the following physician has to make judgments.

There are many patients that I follow with cancer, not even a situation like this in which there was no proven cancer, but, in fact, where I know the patient did have a cancer and we treated them in some way, whether it be surgery or not, where a strange physician looking at this would have to say gee, this doesn't look right, because he's never seen it before.

So the answer is there is a judgment involved here, and when I discharge a patient it's because in my judgment the risk that there will be recurrent cancer there or persistent cancer is now as close to zero as it's going to get, and then the patient leaves and I tell them if there are any changes that you observe that are worrisome then you come back and we look at it again.

Now, again, this doesn't apply directly to this case, obviously, but I think it is germane.

The answer is yes, it is the surgeon's judgment as to whether you biopsy again.

Q. How about the surgeon's credibility, is that an issue in this case, doctor?

A. It's not an issue I can address. That's not for me to decide.

Q. Did you assume that Dr. Alperin knew the difference between an incisional and an excisional biopsy?

A, I presume that he does.

Q. And what is the difference, doctor?

A. Excisional biopsy means that a sufficient quantity of tissue is taken that the surgeon

feels that all of the visible lesion was included in it and that none of the visible lesion was left.

An incisional biopsy means something less than that.

Q. You were also -- all right. Before I get to that.

You go on in your report in the last paragraph or the last sentence of that first paragraph on Page 2 to say "It is my opinion that", and then you say "if Dr. Alperin, in fact, carried out an excisional or complete biopsy and, in fact, observed that the area had healed completely."

So once again you are going back to the assumption regarding the two issues that you started that paragraph out referring to, correct?

A. Yes.

Q. Okay. And we've already covered that if those assumptions are not accurate then your opinion would, in fact, be different?

A. If those assumptions are not correct, then this is not a valid opinion.

Q. Okay. Doctor, since you wrote your report I

notice that you received additional materials.
A. Yes.
Q. Do you have any additional opinions in this case?
A. Not -- based on the other materials that I have reviewed I have seen nothing that changes my opinion.
Q. Okay. But do you have any additional opinions as it relates to Dr. Landsman, for example, and in large part I think the additional materials pertained to him?
A. I don't even know, really, which one of the physicians involved in this is Dr. Landsman.
Q. If, in fact, a family physician, general practitioner, saw a lesion that was worrisome to him, and whether he measured it accurately or not described as three-by-three centimeters in August of '87, which would have been a few months after Mr. Yafanero was last seen by Dr. Alperin, would he have a right to rely at that point in time on being told that Dr. Alperin had already biopsied the area and that the biopsy was negative and do nothing further? Could he rely on the specialist, that is Dr. Alperin, at that point?

MR. MARMAROS: Objection.

A. That's difficult to answer in a straightforward fashion. Dr. Landsman --

Q. Yes.

A. -- if I understand the facts in the case or the allegations in the case had never seen that lesion or Mr. Yafanero I guess before -- that may not be correct, but he hadn't seen what was in his mouth.

Q. That's correct.

A. And was not aware of what it looked like at the time that Dr. Alperin first saw it and decided to biopsy it and had not seen it before this date in the vicinity of the time that Dr. Alperin last saw it and said that in his opinion it was okay.

Q. Well, I'm not sure he said that. In his record --

A. That's my understanding of what happened. I don't know if it is exactly accurate or not.

Q. Okay. Go ahead.

A. Then Dr. Landsman is again put into a position of making a judgment. He saw something in the mouth. If a physician saw something in the mouth and there was no previous history that

anyone had observed it, biopsied it, said anything about it, and maybe there's not even an idea of accurately how long it's been there, then, of course, that would raise some concern and you got to find out what it is, or find someone who will find out what it is.

Q. So he has to refer or follow it up if, in fact, he has no previous history about anything being done about it?

A. Well, whether he should accept the patient's statement, I presume that's where this came from --

Q. Sure.

A. -- that Dr. Alperin biopsied this and said that it's nothing to worry about or not, that, again, that's a very difficult thing to say. I wasn't there and I don't know what the patient said.

Q. No. Let's assume that that's accurate.

A. I believe that a general practitioner or a nonsurgeon given that information and the implication that this is about the way it was when Dr. Alperin said don't worry about it, that I don't suppose you would call the patient a liar and you might or might not decide to checkup on that.

If this is a family physician, he might have requested or night have received records from another treating medical practitioner or physician, but, I mean, patients give me histories, and unless they don't seem to fit the situation that I'm dealing with I usually assume that what they tell me is their understanding of what's correct.

Q. Well, I have asked you to assume the correctness of the communication.

A. Yes.

Q. But my real question is, did he have a right then to rely on Dr. Alperin's having biopsied it and the findings in that regard?

A. Yes, I believe so.

Q. Okay. Are there any specific articles that you relied on for purposes of your opinion in this case, doctor?

A. No.

Q. And once again, you don't have any opinions pertaining to this case other than what are set forth in your report?

A. I'm not sure what you're referring to. Specifically opinions regarding what or about what do you mean?

Q. Well, about any issue that would be relevant to you in analyzing this case.

MR. MURPHY: I am going to object to that. If you want to ask him any questions, you can.

MR. KAMPINSKI: No. I want to ask him exactly what I asked him because, see, in accordance with the rules, any opinions he has are supposed to be set forth in a report.

Q. We got a trial a week from today. I don't want to walk into the courtroom and find you have other opinions that are not in your report. I mean, that's my concern.

A. I understand.

Q. If I walk out of here --

A. Allowing for some details that I have not available to me at this time, I believe that the opinion I have set forth in the letter is my opinion regarding the matters in this case.

Q. Okay. Just to turn around the conversation that I asked you to assume with respect to Dr. Landsman, if, in fact, he was concerned about the lesion, regardless of what he was told with respect to Dr. Alperin's involvement, seeing it and having a concern about it, would he have an

obligation then to follow up with a referral?

MR. MARMAROS: Objection.

A. I can answer the question, though?

Q. Oh, yes.

A. That's all. I just don't want to interfere here.

Every physician has a responsibility to use his judgment in any situation pertaining to a patient's well-being. If -- a lot depends on what it looked like.

Q. Two-by-three centimeters, leukoplactic?

A. I understand that, and that describes something that certainly could be a cancer. If this is a physician who is not especially expert in that type of problem and who perhaps does not see this sort of problem on a regular basis, but just occasionally in his practice because he has a different specialty interest, he, I guess, has to make a judgment whether the fact that this has been seen and biopsied within some period of time and that it's his impression that this hasn't changed appreciably since the doctor last saw it that he doesn't have a responsibility to push it further.

You always have the option, of course, to

call up the biopsying surgeon and say, you know, this looks a little funny to me, do you want to take another look at it and do you think you need to get another biopsy. You certainly can do that.

Whether you have a responsibility to do it, very difficult to say in a case like this, to be fair.

Q. What is your understanding of Dr. Alperin's competence -- well, maybe that's the wrong word -- Dr. Alperin's experience with respect to oral cancers and their treatment?

A. As I said, I don't know Dr. Alperin personally in that sense, and I know that he is an oral surgeon and I believe he is board certified, and that being the case, he should be -- he should have certain background and experience in the management of oral cancer, and not ever having observed him in practice personally I can't really comment on whether he does or doesn't.

But an oral surgeon who is board certified should be competent to recognize lesions that are at risk for cancer and to carry out appropriate diagnostic studies to find out if that is.

I will go back to the statement that I made, if the facts are as they occurred as I understand them, then it seems like he did that, that he carried out appropriate evaluation and diagnostic effort on behalf of this patient, and I believe if he is board certified and licensed by the State of Ohio to practice in that specialty that he should be competent. I don't know if he is because I don't have any observed facts.

Q. What does he refer patients to you for, doctor?

A. For different kinds of lesions in the head and neck. I don't remember specifically what he sent them for.

Q. Cancers?

A, More than likely they would be cancers. I honestly don't remember the case or two that would be involved, but I would expect they would be because that's the kind of thing that he does that I might be called upon to take care of. It could have been a tumor in the parotid gland or something like that.

I honestly don't remember. I would have to look and see. But they would probably be tumors or cancers of some kind in the head and neck.

Q. Does that indicate to you that he's not all that comfortable with treating cancers?

A. Well, now, the issue here is not treating it. The issue here is diagnosing it, and I don't know what he chooses to treat. Oral surgeons do not often do major head and neck surgery. I can define what I mean by that if you're interested.

Q. Some of them pull wisdom teeth, for example?

A. That's correct. And others do partial glossectomies or even remove parts of jaws. For example, the oral surgeon that I work closely with at the Cleveland Clinic does do that kind of work.

But by the same token, not every otolaryngologist is competent to do head and neck surgeon either. But every otolaryngologist ought to be competent to examine a patient, see if there is something suspicious and follow that through to at least a diagnostic conclusion, and I would hold an oral surgeon to the same responsibility.

MR. KAMPINSKI: I think that's all I have.

MR. MURPHY: One thing you may want to inquire of the doctor would be patient

responsibility, Mr. Yafanero to follow up if he had recurrences or other problems after that.

MR. KAMPINSKI: I think I asked the doctor about any other opinions with respect to his report. Now, that's the purpose of the local rule, Mr. Murphy.

MR. MURPHY: I am telling you now that I will ask Dr. Tucker regarding the patient having responsibility to follow up for his own well-being, just as I have asked your own experts.

MR. KAMPINSKI: Is there anything else that you're going to ask the doctor that is not in his report?

MR. MURPHY: I just told you.

MR. KAMPINSKI: Anything other than that?

MR. MURPHY: Besides patient responsibility to follow up or come back to Alperin? Nothing that I can think of now.

Since you seem to look at it as an issue I will probably have the doctor read Mrs. Yafanero's deposition. If that changes anything I will let you know, but your hypo pretty much assumed everything that she said.

Q. Do you believe that a patient has a right to rely on what he's told by his physician?
A. To rely on it?
Q. Yes, sir.
A. To the exclusion of any other thing or just simply to rely that the statement is probably accurate as far as the physician can determine?
Q. Sure. When you tell a patient that in your opinion he's okay and not to worry about something, you would expect them to rely on you to that extent, wouldn't you?
A. To that extent, yes.
Q. And if, in fact, he does so, you wouldn't fault him for doing that, would you?
A. I will just answer your question.
Q. Sure.
A. No, I would not fault the patient for relying on the patient's -- on the doctor's opinion.
Q. So that if Mr. Yafanero was told by Dr. Alperin that he need not be concerned about the lesion that still existed in his mouth in May of 1987 and remained the same until shortly before it erupted in March of 1988, you wouldn't find fault with Mr. Yafanero in that regard, would you?

MR. MURPHY: I object because that's an incomplete hypothetical. You would want Mr. Yafanero to come back.

MR. KAMPINSKI: I think it is real complete.

A. As you stated the question, I would not fault Mr. Yafanero.

Q. Just so there is no confusion, Mr. Murphy is implying somehow that Dr. Alperin told him to come back if there were changes, and my question to you assumed that there were none, that it remained the same. So there is no difference there in your answer given that hypothetical?

A. I will agree that if the lesion as far as Mr. Yafanero could observe it in his own body did not change at all, that he could detect from the way it was when Dr. Alperin last looked at it and said we biopsied it, it is not cancer, I don't think you have anything to worry about, that if there were no changes of any kind, then obviously he would have no reason to do anything else.

MR. KAMPINSKI: That's all I have.

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(Off the record.)

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MR. MARMAROS: Upon Mr. Kampinski's request and with his permission I am putting this objection outside of his presence on the record.

We are objecting to the letter dated January 16, 1991 sent by Mr. Murphy to Dr. Tucker and the contents thereof.

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HARVEY M. TUCKER, M.D.

C E R T I F I C A T E

The State of Ohio,) SS:
County of Cuyahoga.)

I, Susan M. Cebron, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named HARVEY M. TUCKER, M.D., was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and was subscribed by said witness in my presence; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this _____ day of _____, A.D. 19 ___.

_____
Susan M. Cebron, Notary Public, State of Ohio
1750 Midland Building, Cleveland, Ohio 44115
My commission expires August 16, 1993

LAWYER'S NOTES

PAGE	LINE	