

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

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IN THE COURT OF COMMON PLEAS

IDA NOEL KINNEY,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 484818
)	Kathleen Ann Sutula
LAKEWOOD HOSPITAL ASSOCIATION,)	
et al.,)	
)	
Defendants.)	

- - - - -
THE DEPOSITION OF JOHN F. ZAK, M.D.
FRIDAY, JUNE 20, 2003
- - - - -

The deposition of JOHN F. ZAK, M.D.,
called by the Plaintiff for examination pursuant to
the Ohio Rules of Civil Procedure, taken before me,
the undersigned, Lynn A. Regovich, a Notary Public
within and for the State of Ohio, taken at Lakewood
Hospital, Lakewood, Ohio, commencing at 3:31 p.m.,
the day and date above set forth.

APPEARANCES:

On behalf of the Plaintiff:

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On behalf of the Defendants
Robert J. Sating, Jr., M.D., and
Robert J. Sating, Jr., M.D., Inc.:

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On behalf of the Defendants John F. Zak,
M.D., D.M.D., Nicholas C. Diamantis, M.D.,
and North Coast Center for Oral, Facial and
Cosmetic Surgery, Inc.:

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On behalf of the Defendants John A. DeBin,
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1 JOHN F. ZAK, M.D.
2 of lawful age, called by the Plaintiff for
3 examination pursuant to the Ohio Rules of Civil
4 Procedure, having been first duly sworn, as
5 hereinafter certified, was examined and
6 testified as follows:

7 EXAMINATION OF JOHN F. ZAK, M.D.

8 BY MR. WEINBERGER:

9 Q Doctor, please state your full name and spell
10 your last name for the record.

11 A John F. Zak, Z-A-K.

12 Q And where are you employed, Doctor?

13 A Western Reserve Center for Oral, Facial and
14 Cosmetic Surgery.

15 Q Is that a corporation?

16 A Yes. C-corp.

17 Q And is that the name of the corporation?

18 A That is.

19 Q And was that your employment back on November 1,
20 2001?

21 A Yes, it was.

22 Q I'm assuming you were both an employee and a
23 shareholder of that corporation?

24 A That's correct.

25 Q Is this two-page document a current resume or CV

1 for you?

2 A Yes.

3 Q Are there any changes, additions or
4 modifications that would make it more accurate?

5 A Give me a moment to review it.

6 Q Sure.

7 A The only thing that I'm unsure of, and I haven't
8 looked it up, is after I had left the University
9 of Pennsylvania, I don't know if that ever --
10 when that one retention of informed consent
11 discussion was published by Dr. Bess. He was
12 the primary investigator on it. That would be
13 the only thing really in question I think. It's
14 just unknown to me.

15 Q Are you Board certified?

16 A No, I'm not.

17 Q What is your specialty?

18 A Oral-maxillofacial surgery.

19 Q Is --

20 A We --

21 Q Go ahead.

22 A We concentrate in facial cosmetic surgery.

23 Q Is there a Board certification applicable to
24 your specialty?

25 A There is.

- 1 Q What is that?
- 2 A The Oral-Maxillofacial Surgery American Board.
- 3 Q Have you ever taken the Boards?
- 4 A No, I haven't.
- 5 Q Why is that?
- 6 A Just haven't done it.
- 7 Q You have your office chart in front of you here
- 8 with respect to my client, Ida Noel Kinney?
- 9 A Yes, I do.
- 10 Q It appears that you were referred -- she was
- 11 referred to you and that you initially saw her
- 12 on September 7th of 2001. Go ahead. You can
- 13 refer to it.
- 14 A That sounds correct. Let me just double check
- 15 the date. Yeah. My first entry in our chart is
- 16 September 7th. That's correct.
- 17 Q And then ultimately you determined after
- 18 discussions with her and examining her to do --
- 19 that she needed TMJ surgery?
- 20 A Yes.
- 21 Q And prior to the November 1st, 2001 surgery, did
- 22 you perform an examination of her eyes?
- 23 A Did I perform an examination of her eyes?
- 24 Q Right.
- 25 A Prior to the surgery?

- 1 Q Right.
- 2 A Just a cursory exam. She did give complaints on
3 questioning of what I would have termed an optic
4 neuritis. Her complaints, if you just give me a
5 moment to review my chart, I believe were
6 blurred vision and I recall some discomfort of
7 the eyes, as well as chronic headaches and a
8 diffuse or nondescript head and neck pain.
- 9 Q Now, with respect to her description of optic
10 neuritis, did you refer her out to anyone?
- 11 A Yes, I did.
- 12 Q And who did you refer her to?
- 13 A I believe I referred her to a neurologist,
14 Dr. Dick.
- 15 Q Right.
- 16 A And I also referred her to see -- and I don't
17 recall his name. I can look. To a
18 rheumatologist I believe to evaluate for any
19 systemic autoimmune type disease. Some of the
20 symptoms could have been consistent with
21 something I felt like a multiple sclerosis or
22 something of that nature.
- 23 Q And did you receive information back from either
24 of these two specialists regarding the condition
25 of her eyes prior to surgery?

1 A I know Dr. Dick sent a letter back in I believe
2 it was he commented that most of her symptoms
3 were consistent with a cervical neuropathy if I
4 recall correctly.

5 Q Okay. Are you referring to the letter of
6 October 9, 2001, that he wrote to you?

7 A Yes.

8 Q All right. So going into the surgery of
9 November 1, 2001, what was your plan in terms of
10 the operation?

11 A Sure. Ida had undergone a similar surgery -- it
12 was unclear of the date, but approximately 12 to
13 15 years prior. She -- although she did receive
14 some relief during that time, she did have
15 postoperative temporary and permanent paresis of
16 her cranial nerve 7, which is associated with
17 that operation, or thought to be associated with
18 that operation. And she's had significant -- a
19 significant downturn in her condition regarding
20 her joints. Excessive pain, popping and
21 difficulty opening, I believe, which is why she
22 was referred to us.

23 Q And what was her contemplated surgery?

24 A Well, in that operation when you have someone
25 who's been operated on already for their joints,

1 it becomes somewhat of a tricky operation.
2 These are not patients where they're generally
3 operated on once, they generally -- and will
4 never be operated on again. It's generally when
5 will they need to be operated on again. Their
6 own native disk did not stand the test of time
7 and replacing it with a portion of dermis or
8 some other tissue is asking too much for that to
9 hold up as well. And we discussed this in
10 detail with Ida. And the plan was, I felt from
11 a conservative nature, was to do an
12 arthoplasty/arthrotomy of her joint, removing
13 any fibrous scar tissue and/or disk remnants and
14 replacing it with dermis.

15 Q Did you discuss with her any of the risks or
16 complications that might be associated with the
17 surgery --

18 A In --

19 Q -- prior to surgery?

20 A In detail.

21 Q What would they have been?

22 A Specifically in terms of surgical risks,
23 specifically would be with her incidence of
24 paresis already, would be of an increased risk
25 of possible cranial nerve 7, nerve damage,

1 either permanent/partial and/or permanent and
2 complete.

3 Q I'm assuming that injury to her eye or
4 impairment of her eye sight was not one of the
5 risks that you discussed with her?

6 A No. That is not a direct complication of her
7 surgical treatment.

8 Q Now, we have heard in this case through
9 depositions of other people that there is --
10 there are documents on file in the -- at
11 Lakewood Hospital in or about the operating room
12 referred to as preference cards?

13 A Sure.

14 Q Are you familiar with that?

15 A I'm familiar with it. Yeah.

16 Q Has your counsel shared with you the copies of
17 the preference card documents that we've
18 obtained in this case?

19 A Yeah. Yeah. He showed me those.

20 MR. MINGUS: I showed him
21 the ones that you have in front of you, Pete.

22 Q Is there a preference card, and I'm going to
23 show you the document in a second, is there a
24 preference card that would have been applicable
25 to the surgery that you were going to perform on

1 Ida on November 1, 2001?

2 A You're going to show me?

3 Q Yeah.

4 A Do you want me to look?

5 Q Sure.

6 A This one here would be applicable, and here's a

7 second page to it.

8 Q Okay.

9 - - - - -

10 (Plaintiff's Exhibit Nos. 1 and 2 were marked.)

11 - - - - -

12 Q Actually, the way we're going to mark this is we

13 took Nurse Posey's deposition, and she

14 identified these two documents as Exhibits 1 and

15 2, now we're putting the labels on those two

16 documents.

17 A Okay.

18 Q And let me hand them back to you. They've been

19 marked as Exhibits 1 and 2 to the Posey

20 deposition. Are those the two preference card

21 documents that would be applicable to the TMJ

22 surgery that you were going to perform on

23 November 1st, 2001?

24 MR. ALLISON: Objection.

25 Q Go ahead.

1 A Do I answer, or no?

2 Q Sure.

3 MR. MINGUS: Go ahead. I'm
4 objecting, the question is multiple parts, but
5 go ahead.

6 A Let me make sure I understand the question. Are
7 you asking me, is this the procedure that I
8 performed on Ida and is this the list that would
9 be appropriate for that procedure?

10 Q Yes.

11 A Is that what you're asking?

12 Q Yes.

13 A Yes.

14 MR. ALLISON: Objection.

15 MS. REINKER: Could we have
16 those marked?

17 MR. WEINBERGER: They are
18 marked.

19 MS. REINKER: I'm sorry.
20 Copies made. Is that possible? We don't --

21 MR. WEINBERGER: You don't have
22 the documents?

23 MS. REINKER: I don't have
24 them marked from the other day. I don't know
25 what he's referring to. If you want to show me

1 those two, maybe I can pick them out of the
2 pile.

3 MR. ALLISON: Says, "TMJ
4 Arthrotomy" on one place and "With graft" on the
5 other page. They should have been in the stuff
6 I sent you.

7 MS. REINKER: I think they
8 were in here at the end of mine. I thought they
9 were. Here we go. That's one of them. I think
10 I've only got one side. I'm sorry.

11 MR. ABBARNO: I'll just run
12 and make copies of it.

13 MS. REINKER: Is this the
14 other side?

15 MR. ALLISON: It's not the
16 other side. It's page 2. Or Exhibit 2.

17 (Off the record.)

18 BY MR. WEINBERGER:

19 Q Okay. You've got copies of the exhibits. Let's
20 look at Exhibit 1. Is this the preference card
21 that was in effect as of November 1, 2001?

22 MR. ALLISON: Objection.

23 A When someone says objection -- this is the first
24 time I'm doing a deposition. Does that mean I
25 answer or don't answer?

1 MR. MINGUS: You can answer
2 unless I instruct you otherwise. They're
3 objecting because there's no judge here to rule
4 upon everything.

5 A Okay. Excuse my ignorance.

6 Q It's okay.

7 A Can you repeat the question.

8 Q Yes. Exhibit 1, was this preference card on
9 file at the hospital and in effect on November
10 1, 2001, the date of --

11 A I don't know.

12 Q -- Ida's surgery?

13 A I don't know.

14 Q Is there something that you can do at this point
15 to determine what the preference card looked
16 like as of November 1, 2001?

17 A No.

18 Q Why is that?

19 A Because preference card -- I have not been privy
20 to a preference card until I was shown it by my
21 attorney.

22 Q Do you know how a preference card like this in
23 Exhibit 1 says Zak, Diamantis and Frazee, do you
24 know how something like this gets prepared?

25 A My understanding of a preference card is that

1 it's basically an evolutionary process. It's
2 something that evolves over time working with
3 surgeons as to what their preference is, wishes,
4 wants, do's, don'ts, with regarding a particular
5 surgery.

6 Q And do you know who it is that provides the
7 information that ends up on a document like
8 this?

9 A I think it's gathered from a lot of sources.

10 Q Like?

11 A Like if we're asked a particular question
12 regarding a particular suture or an instrument
13 in that case, I think they're initially gathered
14 and the basis or foundation for it is either
15 from another hospital with a service similar
16 that does procedures like that, or they gather
17 it from similar type surgeons working in that
18 area that may also do that procedure.

19 And then it's gradually adapted over time.
20 Again there's errors and omissions. It's still
21 being worked out. We have been there six years
22 and preference cards, if you will, are still not
23 where they should be.

24 Q Well, is it your understanding that a preference
25 card is information for the staff or the people

1 that are going to staff an operating room so
2 that they know what supplies and solutions and
3 instruments should be available for you in the
4 operating room?

5 A It's to assist the circulating staff to be ready
6 for the case so they have to make as few trips
7 as possible out of the room during the case.

8 Q So would it be fair to say that some of the
9 information that would be on the preference card
10 would come from information gathered from you
11 directly, or from your office staff?

12 A It may or may not have.

13 Q Now, is there somebody other than yourself, is
14 there somebody in your office who you believe
15 would be responsible for communicating to
16 somebody what information needs to be put on the
17 preference card?

18 A No. My office has very little contact with the
19 hospital other than to schedule a case.

20 Q Okay. And what about at the hospital, do you
21 know the names of any individuals at Lakewood
22 Hospital prior to November of 2001 who you
23 believe would be responsible for gathering the
24 information and putting information on a
25 preference card?

1 A I wish it was as controlled and uniform as that.
2 But no, my understanding is that it's more of a
3 random gathering from multiple sources, from
4 multiple people, and that's why I think
5 appropriately described it as an evolutionary
6 process.

7 Q Now, before November 1, 2001, did you ever look
8 at the preference card that was on file for TMJ
9 arthrotomy surgery that's designated under your
10 name?

11 A Not before or after. Again, I wasn't entirely
12 sure this even existed.

13 Q Okay. So I just want to make sure that I
14 understand your testimony. Are you saying that
15 you never saw Exhibit 1 or what may have been on
16 file as a preference card similar to Exhibit 1
17 for this type of surgery before November 1,
18 2001?

19 A At Lakewood Hospital, no.

20 Q How about at another hospital?

21 A I may have seen them, you know, in passing.
22 Again, it's not really a doctor-oriented sheet.
23 It's not something the doctor is asked to
24 review. It's not something that is laid out for
25 us to review or to sign off on. You know, I've

1 seen them laying around. Whether it was for the
2 procedure I was doing, for another doctor. You
3 do see them around the hospital, but I did not
4 see this one, for that matter, any of our pick
5 lists at Lakewood Hospital prior to this.

6 Q Pick list meaning what?

7 A Preference cards. Sorry.

8 Q That's okay. Now, at some point did you learn
9 that Hibiclens had been instilled into Ida's
10 right eye?

11 A Yes.

12 Q When did you first learn that?

13 A I was called into the room and was told that.

14 Q So this was before you began the operation?

15 A Yes.

16 Q Who called you into the room?

17 A I don't recall specifically who called me into
18 the room. It would have been somebody in the
19 operating staff that was in the room when it
20 occurred.

21 Q All right. And where were you when you were
22 called?

23 A I believe I was waiting outside the operating
24 room near the scrub sinks.

25 Q So tell me what happened when you got into the

1 -- first of all, tell me what you were told.

2 A Again, this is on recollection, but it was,
3 Dr. Zak, can you come into the room, the scrub
4 nurse has dripped Hibiclens into the patient's
5 eye.

6 Q And you don't know who told you that?

7 A I don't recall who told me that. Might have
8 been a collection of people.

9 Q What happened next?

10 A I was somewhat in a state of shock, you know,
11 what do you mean that Hibiclens has gotten into
12 the patient's eye. And it was explained that
13 during the scrubbing procedure that it was
14 dripped into the patient's eye. I said, what
15 have you done? I believe they said that, we've
16 cleaned the eye. And I said, let's rinse it
17 again with copious amounts of balanced saline
18 solution.

19 Q Now, can you identify who you had this
20 discussion with when you got into the operating
21 room?

22 A No, I can't. Again, it was, you know, an
23 operating room. If you've ever been in an
24 operating room, there are anywhere from three to
25 six people milling about. Who specifically I

1 had the conversation with, I can't recall.

2 Q Did you determine from this conversation who was
3 responsible for dripping the Hibiclens into the
4 patient's eye?

5 A It was the scrub nurse. That's his, in this
6 case, job to prep the patient.

7 Q Mr. Malumphy?

8 A Yes.

9 Q Did you say anything to Mr. Malumphy when you
10 came into the room and discovered this?

11 A I believe I did.

12 Q What did you say?

13 A I believe it was, "Goddamn it, Bill, how could
14 you do that."

15 Q Okay. And what was his response?

16 A I don't think there was much of a response other
17 than I wanted to focus my efforts on taking care
18 of the patient at that point, not chastising
19 anyone for what was obviously an accident.

20 Q Well, it wasn't an accident that he was
21 scrubbing the patient's face with Hibiclens, was
22 it?

23 A I don't know.

24 Q I mean, it wasn't an accident that he was
25 scrubbing the patient's face, that's his job,

1 right?

2 A Correct. That's his job.

3 Q It wasn't an accident that he was using
4 Hibiclens to do that, was it?

5 A Was it an accident?

6 MR. MINGUS: Objection. Go
7 ahead.

8 Q I mean, do you have any information to suggest
9 that he didn't know that he was using Hibiclens
10 to scrub the patient's face?

11 A No. Hibiclens is a pink solution, you know what
12 it looks like, and if you're going to use it,
13 you should use caution.

14 Q So you then suggested that additional rinsing of
15 the patient's eye take place with balanced
16 saline solution?

17 A I did it myself in fact.

18 Q How did you do that?

19 A How did I do it?

20 Q Yes.

21 A It comes in a squeeze bottle, approximately four
22 to six ounces in volume, and you squeeze the
23 solution, hold the eyes open, squeeze the
24 solution and irrigate in such a manner that
25 anything in the eye will run out onto the cheek.

1 I did that multiple times.

2 Q Now, the patient was asleep when this happened?

3 A Patient was asleep during this time. That's
4 correct.

5 Q When you came into the room you observed the
6 patient I take it?

7 A Uh-huh.

8 Q Yes?

9 A Yes. I'm sorry.

10 Q And did you examine her eye?

11 A Yes.

12 Q What did you see?

13 A At that time I was looking at the patient after
14 I believe she had been addressed already by
15 others, and there was nothing extraordinary
16 about it, about the exam, there was no obvious
17 Hibiclens in the eye at that time, but, again, I
18 asked for copious amounts of irrigation to
19 continue.

20 Q And when you first saw her, was there -- was the
21 eye taped?

22 A When I first saw her, no. I came into the room
23 after the incident had begun.

24 Q Now, did you discover whether or not the
25 incident took place while her eyes were taped,

1 or not taped?

2 A I can't comment. All I can comment is when I
3 came into the room the eyes were un-taped.

4 Q You know that you dictated in your operative
5 note a report of this incident having occurred
6 with her eyes un-taped?

7 A Correct.

8 Q Did you seek information from anyone -- did you
9 ask anyone whether or not this occurred while
10 her eyes were taped or un-taped?

11 A I looked at that, and it is unclear to me where
12 that was. I noted that both in my op-note as
13 well as in my clinical note in the patient's
14 chart. I can't recall anyone specifically
15 telling me that, but I believe that's what was
16 conveyed to me.

17 Q By whom?

18 A I don't have a particular individual's name to
19 put to that.

20 Q So you're saying that you wrote this information
21 in your office notes and dictated in the
22 operating room record note because you believe
23 somebody told you that this incident occurred
24 with her eyes un-taped?

25 MR. MINGUS: Objection.

1 MR. ALLISON: Objection.

2 MR. MINGUS: You may answer.

3 A Again, I don't recall where I gleaned that
4 particular information, but as memory serves me
5 that was what was conveyed to me.

6 Q Now, you have done these type of operations at
7 Lakewood Hospital before November 1, 2001?

8 A Many times.

9 Q Did you have any communication with anyone at
10 Lakewood Hospital prior to November 1, 2001, as
11 to your preference on whether Hibiclens would be
12 used to scrub the patient's face prior to the
13 operation?

14 A For that particular operation, no.

15 Q Did you ever tell anyone at Lakewood Hospital
16 prior to November 1, 2001, that you did not want
17 Hibiclens to be used to scrub a patient's face?

18 A No, I don't think I have ever -- in contrast to
19 your first question, I don't think I've had that
20 conversation either. There are some instances
21 where I deem it appropriate to use it regarding
22 surrounding the particular type of case.

23 Q Well, do you believe it is appropriate -- it was
24 appropriate to scrub a patient's face with
25 Hibiclens on November 1, 2001, for this type of

1 surgery?

2 A If a fair amount of caution is used, I think
3 it's appropriate.

4 Q And I assume you mean enough caution so that
5 Hibiclens doesn't end up in the patient's eye?

6 A Yeah, it's not --

7 MR. ALLISON: Objection.

8 A That's not a terribly difficult thing to ensure,
9 that it doesn't get into the patient's eye.

10 Q Now, since this incident has occurred, have you
11 instructed anyone at Lakewood Hospital that
12 Hibiclens should not be used on your patients'
13 faces to scrub the face prior to surgery?

14 MR. MINGUS: Objection.

15 MR. ALLISON: Objection.

16 MR. MINGUS: Go ahead.

17 A Go ahead?

18 MR. MINGUS: Yeah.

19 A Instructed them, no. The only operation that we
20 do on the face that we would specifically
21 instruct that not be used would be something in
22 very close proximity to the eye that we do.
23 Blepharoplasty, that is surgery on the eyelid
24 where you have to prep right to the lid --
25 morphin of the lid. That I feel would be

1 inappropriate to use in that operation. But in
2 any operation where an autograft, which is an
3 autogenous bone graft, say coming from the
4 patient's hip, or somewhere else in their body,
5 and using it in the jaws of the face or the
6 mandible, anywhere where there's an infection,
7 anywhere there is a reasonable distance from
8 that and the eye, I think it would be
9 appropriate to use with some caution. I would
10 prefer that Betadine would be used, but I at the
11 same time would not vehemently object to someone
12 using Hibiclens if they were using caution.

13 Q Now, your office records indicate that on
14 November 5, you filed a formal complaint on
15 behalf of the patient with Lakewood Hospital; is
16 that right?

17 A Yes.

18 MR. MINGUS: Objection to
19 form. Go ahead.

20 MR. ALLISON: Objection.

21 A The note that you're --

22 MR. MINGUS: Just answer his
23 question.

24 A What was the question? I'm sorry.

25 MR. MINGUS: Yes or no,

1 whether the incident report was filed.

2 MR. WEINBERGER: I didn't --
3 that wasn't my question.

4 Q The question is does your office records
5 indicate that Dr. Zak filed a formal complaint
6 on behalf of the patient of Lakewood Hospital?

7 A It was my understanding -- this is my --

8 MR. MINGUS: Okay.
9 Objection. Go ahead.

10 MR. ALLISON: Objection.

11 MR. MINGUS: Just -- just
12 answer -- he's asking whether it was filed.

13 MR. WEINBERGER: No. No.
14 That's not what I'm saying.

15 Q I'm asking whether or not your records
16 indicate --

17 MR. MINGUS: Okay.

18 Q -- that Dr. Zak filed a formal complaint on
19 behalf of the patient with Lakewood Hospital?

20 MR. ALLISON: Objection.

21 MR. MINGUS: Objection.

22 He's asking for a yes or no answer. Go ahead.

23 Q Do you understand the question?

24 A I'm confused here by you guys. Sorry.

25 MR. WEINBERGER: Okay. First of

1 all, it may or may not call for a yes or no
2 answer, so I object to your instructing him to
3 say yes or no, but let me rephrase the question.
4 Is it a fact that your office records for this
5 patient indicate on November 5, 2001, "Dr. Zak
6 filed a formal complaint on behalf of patient
7 with Lakewood Hospital regarding Ida Noel's
8 care." Is that true?

9 A The office note does reflect that. It's written
10 by my secretary who's at the front desk.

11 Q And who is that person?

12 A AR, I believe, stands for Ashley Ross.

13 Q Did you file a formal complaint with the
14 hospital?

15 A It was my understanding that --

16 MR. ALLISON: Objection.

17 MR. MINGUS: Objection.

18 A -- the complaint was filed.

19 Q Tell me what does that mean?

20 A I'm sorry?

21 Q What does it mean that a formal complaint was
22 filed?

23 MR. MINGUS: Okay.

24 Objection.

25 MR. ALLISON: Objection.

1 MR. MINGUS: You're not to
2 talk about the substance of any complaint, but
3 go ahead and tell him what it means by the
4 complaint.

5 A You want to know what a complaint is?

6 Q That's a good start. Yeah.

7 A Sure. A complaint, as I see it, from a surgeon
8 to a hospital official would be something -- an
9 event that occurred in the hospital.

10 Q And was this a written document that was filed?

11 A That's how it's supposed to be filed.

12 Q And did you prepare such a document?

13 A No, I don't prepare it. I requested that it be
14 prepared.

15 Q Who did you request prepare it?

16 MR. ALLISON: Objection.

17 MR. MINGUS: Objection. I
18 think you're getting into peer review stuff now,
19 Pete, that is protected from discovery. So I'm
20 going to instruct him not to answer. There's
21 reference in the records to it and inquiry along
22 these lines is not appropriate.

23 Q Doctor, I'm going to ask you a specific
24 question. Okay. Listen to the question.

25 A Sure.

1 Q In a complaint -- in this complaint filed with
2 the hospital, was a description of an injury to
3 Ida Noel included in that complaint?

4 MR. MINGUS: Objection.

5 MR. ALLISON: Objection.

6 MR. MINGUS: You don't have
7 to answer that.

8 MR. WEINBERGER: Okay. Let me
9 explain why I asked it that way. Under the
10 Johnson versus University Hospitals case, a
11 description of an injury, of an injury, within a
12 complaint, if it is in fact a peer review
13 document is discoverable.

14 MR. MINGUS: Okay.

15 MR. ALLISON: Objection as to
16 the characterization of the case.

17 MS. REINKER: Join on the
18 objection.

19 MR. ABBARNO: Objection.

20 MR. MINGUS: My
21 understanding of the case is if there is
22 reference to it in other parts of the record,
23 that then you're not entitled to get into the
24 substance of what is in the complaint, and in
25 his op note he notes the incident and notes his

1 findings with regard to the eye. So you are not
2 entitled to inquire into the substance of any
3 incident report.

4 MR. WEINBERGER: Okay. I'm
5 assuming then that I don't have to go through
6 the formalities of instructing him to answer the
7 question in order to preserve this for purposes
8 of Motion to Compel?

9 MR. MINGUS: That's correct.

10 MR. ALLISON: Pete, I think
11 too it's a little bit unclear because, as the
12 record states, Dr. Zak filed a formal complaint.
13 He testified that he didn't, even over
14 objection, file any written documents. I mean,
15 there's no -- no evidence of any written
16 documents were filed so I don't know what "Filed
17 a formal complaint means." I know you asked
18 him.

19 MR. WEINBERGER: You know, off
20 the record.

21 (Off the record.)

22 BY MR. WEINBERGER:

23 Q Is it your understanding that this entry in your
24 record refers to a written document that was
25 filed with the hospital?

1 MR. ALLISON: Objection.

2 Asked and answered.

3 THE WITNESS: Should I
4 answer?

5 MR. MINGUS: Objection. Go
6 ahead.

7 A Go ahead and answer. Yes, it was my intention
8 that a written complaint about the incident be
9 filed.

10 Q And did you ever see that document?

11 A I recall signing a document, which I believe to
12 be an incident report, however, I did not read
13 it to its content and I did not fill out its
14 content.

15 Q But you recall that it was prepared for your
16 signature?

17 A Yes.

18 MR. ALLISON: Objection.

19 Q Have you seen an incident report or a complaint
20 form in general? Have you seen a form --

21 MR. MINGUS: Objection. Go
22 ahead.

23 Q -- for Lakewood Hospital?

24 A I can't recall ever seeing one physically and
25 saying, oh, there's an incident report form and

1 making a conscious note that that's what it was.

2 Q So, do you know whether or not this incident
3 report that you signed, that somebody else
4 prepared, was on a form provided by the
5 hospital?

6 MR. ALLISON: Objection.

7 MR. MINGUS: Objection.

8 A Answer.

9 MR. MINGUS: Go ahead.

10 A I -- again, I was under the assumption that
11 that's how it was prepared and that's what was
12 prepared regarding the incident. I don't -- I
13 can't recall reading a piece of paper that
14 verified my assumptions.

15 Q Who prepared the report?

16 A I'm not sure.

17 Q Well, it would have been somebody from your
18 office?

19 A No. No. It would have been someone from the
20 hospital.

21 Q Somebody from the hospital prepared the report?

22 A Yes. Would have been either the head charge
23 nurse on duty that day, that's who I would
24 assume prepared it.

25 Q So let me back up then. Is it your

1 understanding then that somebody from your
2 office communicated with somebody from the
3 hospital?

4 A I did.

5 Q Okay.

6 A Not someone from my office.

7 Q All right. So you called someone from the
8 hospital?

9 A No. I believe right after surgery, if my memory
10 serves me, right after surgery I recall
11 approaching the head charge nurse, and I don't
12 recall who that was. That individual changes at
13 Lakewood Hospital quite often.

14 Q What did you say to that nurse?

15 A That I wanted an incident report filed regarding
16 the incidents surrounding her case.

17 Q What did you say should be in the incident
18 report?

19 MR. MINGUS: Objection.

20 MR. ALLISON: Objection.

21 MR. MINGUS: You don't have
22 to answer that.

23 Q Without telling me what you said, let me ask you
24 this: Did you give this person information to
25 put in the incident report? Don't tell me what

1 you might have said, but did you provide
2 information?

3 MR. MINGUS: Objection.

4 MR. ALLISON: Objection.

5 THE WITNESS: Answer?

6 MR. MINGUS: Yeah.

7 A I don't recall specifically what I told her, but
8 I would imagine I had to give her some
9 information so she could file the report.

10 Q And is it your understanding then somebody at
11 the hospital, a charge nurse or someone else
12 then prepared a report, transmitted it back to
13 you for your signature?

14 MR. MINGUS: Objection.

15 MR. ALLISON: Objection.

16 A That's my recollection.

17 Q And, as you sit here today, you cannot recall
18 whether or not you read the report to determine
19 whether it was accurate?

20 A No.

21 MR. MINGUS: Objection.

22 MR. ALLISON: Objection.

23 Q But you signed it?

24 A I definitely remember signing a document.

25 Q And do you understand that you were signing the

1 document to ensure the accuracy or verify the
2 accuracy of what was in the report?

3 MR. ALLISON: Objection.

4 MR. MINGUS: Objection. Go
5 ahead.

6 A Repeat your question.

7 Q Was it your understanding that you were being
8 asked to sign the document so that you could
9 verify the accuracy of what was contained in the
10 document?

11 MR. ALLISON: Objection.

12 MR. MINGUS: Objection. Go
13 ahead.

14 A No. Signature, I assume the signature was
15 nothing more than a formality. Whoever's
16 requesting the report needs to sign it.

17 Q Well, why would you need to sign it?

18 A So that the hospital knows who's logging the
19 complaint against whoever the individual or the
20 incident is that it's, you know, making a
21 complaint against.

22 Q Was this a complaint specifically against
23 Mr. Malumphy?

24 MR. MINGUS: Objection.

25 MR. ALLISON: Objection.

1 MS. REINKER: Objection.

2 MR. MINGUS: Okay. You
3 don't have to answer that. You're starting to
4 get into the substance of peer review.

5 Q Did you have any discussions with Mr. Malumphy
6 about this incident after the operation was
7 completed?

8 A I don't believe there was any discussion with
9 him.

10 Q At any time?

11 A Afterwards, no.

12 Q Other than your one statement to him?

13 A Correct.

14 Q Now, we know that at some point after the
15 discovery of this incident and after treatment
16 of the eye with flushing that you proceeded with
17 the operation?

18 A That's correct.

19 Q How was -- what occurred as far as the eye is
20 concerned during the operation? Was it taped,
21 was it patched, was any further treatment done?
22 That's what I'm trying to find out.

23 A Yeah. After the flushing was complete?

24 Q Yes.

25 A The eye was examined, it appeared to be

1 minimally irritated as your eye would be if you
2 got over-the-counter soap in it. We deemed that
3 all visible signs of Hibiclens was removed. I
4 believe anesthesia then placed ophthalmic
5 ointment and taped the eyes. And we elected to
6 continue on with the case.

7 Q At any point during the operation did you
8 yourself inspect the eye, remove the tape and
9 inspect the eye?

10 A I don't recall specifically doing that, however,
11 midway through the surgery the patient is --
12 scrub is broken, the patient is re-prepped
13 again. So although I have no specific notes in
14 there regarding the exam, I would imagine that
15 we did.

16 Q Do you recall what observations you made?

17 A Nothing remarkable, which is probably why we
18 didn't make any notation.

19 Q What about after surgery, did you -- did you
20 inspect the eye after surgery?

21 A Certainly. Yes.

22 Q When did you first inspect the eye after
23 surgery?

24 A When the operation was over and the patient was
25 still asleep on the operating table.

1 Q And what was your observations at that time?

2 A Very similar to the initial observations.

3 Minimal redness or irritation, no obvious signs
4 of injury, no obvious signs of any foreign body
5 in there.

6 Q Where was the redness or irritation?

7 A In the white of the eye, sclera of the eye.

8 Q All the way around the white of the eye, or one
9 side?

10 A As I recall it was just near the canthus, the
11 lateral canthus, which is the outer corner of
12 the eye.

13 Q All right. What about after she was out of
14 recovery, did you -- strike that.

15 At what point in time was the tape removed
16 from the eye?

17 A Immediately following the surgery so we could
18 examine the eye.

19 Q And then what, did you re-tape the eye after
20 that?

21 A Yes, I believe anesthesia re-taped the eye.

22 Q And how long did that tape remain on the eye at
23 that point, after that point?

24 A I don't know. The patient went to
25 post-operative recovery where she was under the

1 care of the anesthesia department at that time.

2 Q When is the next time that you saw the patient?

3 A Immediately following the operation, taking her
4 to recovery, we -- my partner and I then went to
5 our office, we had other patients there waiting,
6 we began to perform our day. And we went over
7 at the end of that portion when we were called
8 by -- and I'm not sure whether it was post-op
9 recovery or whether it was the floor, but it was
10 much later in the afternoon. During that time
11 she was, as I said, in recovery.

12 Q So you were called to see the patient?

13 A No. We were called to get an update on the
14 patient.

15 Q And what were you told?

16 A At that time that -- I don't think I took the
17 call, actually. I think my partner took the
18 call.

19 Q And do you know what he was told?

20 A That she had some mild to moderate surgical
21 discomfort associated with this operation and
22 that she did have some mild to moderate
23 complaint of her eye.

24 Q And did your -- you're talking about
25 Dr. Diamantis?

1 A That's correct.

2 Q Did he go to see the patient at that time?

3 A I don't recall which one of us saw her, but yes,
4 one of us did go see her.

5 Q And what was done at that -- was she in a
6 regular room at this point or still in recovery?

7 A I believe she was still in recovery.

8 Q And what happened there?

9 A I wasn't there.

10 Q So you think your --

11 A I think it was Dr. Diamantis that saw her
12 actually.

13 Q Did Dr. Diamantis inform you what he observed
14 her about, specifically about her eye?

15 A I don't think we really had any discussions
16 regarding it.

17 Q And then after -- when is the next time you saw
18 her?

19 A I went to see her on the floor that, I believe,
20 evening, early evening, I saw Ida. She was --
21 her exam was not particularly out of the
22 ordinary for someone having that type of
23 surgery. It's a major surgery to undergo and
24 requires a lot from not only the surgeons but
25 also the patient. She seemed appropriately

1 managed, her complaints were not out of the
2 ordinary at that time.

3 Q Did you examine her eye?

4 A Yes.

5 Q And what did the examination reveal?

6 A What I recall is her, you know, vision was
7 within normal limits. Her extraocular muscles
8 were intact, her pupils were equal, reactive,
9 accommodated to light and there was still that
10 residual redness present.

11 Q When you went to examine her in her room that
12 evening, was the eye taped or un-taped?

13 A I don't recall specifically.

14 Q Now, was she complaining about pain in the eye?

15 A That was not her chief complaint.

16 Q I didn't ask about her chief complaint.

17 A Well, at that time I informed her of the
18 incident, so we had discussions regarding that.

19 Q Let's start, first of all, was she complaining
20 of pain in her eye?

21 A I don't recall.

22 Q And you say you informed her of the incident?

23 A Yes.

24 Q What did you tell her?

25 A That the scrub solution was dripped into her

1 right eye prior to surgery beginning, that we
2 flushed it appropriately and that we were
3 obtaining an ophthalmologic consult.

4 Q Did you tell her who was responsible for the
5 solution dripping into her eye?

6 A I may have --

7 MR. MINGUS: Objection. Go
8 ahead.

9 A I may very well have said the scrub nurse. I
10 don't think I gave a name.

11 Q Now, in the hospital records, somebody wrote
12 what is on the first line indicates brief op
13 note. Is that your handwriting?

14 A That's my handwriting. Yes.

15 Q And you noted in that progress note what with
16 respect to this incident?

17 A "Complications zero surgical," however I listed
18 a positive Hibiclens expression into an un-taped
19 right eye prior to surgery.

20 Q And is this your handwriting on the first
21 post-operative day?

22 A Yes, it is.

23 Q Would you slowly read that note --

24 A Sure.

25 Q -- into the record?

1 A The entire note?

2 Q Yes.

3 A Just the highlighted portion?

4 Q The whole note.

5 A Sure. I'll spell out what the acronyms and
6 abbreviations mean.

7 Q Fine.

8 A "Post-operative day number one, status
9 post-bilateral joint reconstruction. Doing well
10 surgically. Positive complaint of right eye
11 pain. Pupils are equal, reactive and
12 accommodate to light. Extraocular muscles
13 intact. There is minimal positive right
14 scleredema. Visual acuity is within normal
15 limits. Incisions are clean. There is zero
16 active hemorrhages. Patient is afebrile. All
17 vital signs are stable. Groin incision is
18 intact."

19 My assessment and plan was "Patient with
20 right corneal abrasion, status post-bilateral
21 TMJ reconstruction secondary to Hibiclens in
22 right eye." Ophthalmology consult, number 2,
23 "Continue IV pain medicines with pain service to
24 consult."

25 Q Now, you made the diagnosis of right corneal

1 abrasion?

2 A Diagnosis or assumption is probably a better
3 word. I'm not an ophthalmologist. I was giving
4 my clinical impression.

5 Q But from your observations, your clinical
6 impression was that this was a right corneal
7 abrasion?

8 MR. MINGUS: Objection. Go
9 ahead.

10 A I have no basis to make that diagnosis, but
11 that's what I put in the note.

12 Q Secondary to or as a result of the Hibiclens?

13 A Right.

14 Q Now, did an ophthalmologist consult with her in
15 the hospital?

16 A Yes.

17 Q And who was that?

18 A Dr. Sating.

19 Q And did you have discussions with Dr. Sating
20 after his -- after an examination that he
21 performed on her?

22 A Did I personally have a discussion with him, no.

23 Q Were you informed about what his findings were?

24 A I read his consultation.

25 Q So while she was in the hospital you did not

1 have any discussions with Dr. Sating?

2 A Nor have I ever.

3 Q Okay. You're really trying to make this fast,
4 aren't you?

5 MR. ABBARNO: Normally you
6 don't want a witness to anticipate your next
7 question. Except on Fridays.

8 Q Did you have any further discussions with Ida in
9 the hospital regarding her eye?

10 A Other than that evening? Just regarding the eye
11 you're specifically requesting? I don't recall
12 specifically, but again, if it was something out
13 of the ordinary, something extraordinary, I
14 would have made either a documentation of it or
15 a mental note of it.

16 Q And did you --

17 A No.

18 Q Now, you -- she then followed up with you in
19 your office?

20 A On Monday. She was discharged on Saturday, the
21 3rd, she followed up with me Monday, the 5th.

22 Q Did she have complaints about her eye on Monday
23 the 5th?

24 A Can I refer to my notes?

25 Q Absolutely.

1 A Our office notes on the 5th reflect from my
2 secretary that she made specific complaints
3 while waiting to see me regarding her general
4 care. It says here, "Ida made it very clear
5 that she was not happy with hospital care but
6 had nothing but positive remarks regarding
7 Dr. Zak and WRC staff."

8 MR. ALLISON: Objection.
9 Move to strike. Nonresponsive.

10 Q Go ahead.

11 A I'm just reciting the note here.

12 Q Right. Go ahead.

13 A And then the clinical portion of the note which
14 is made when she comes back to the clinical
15 portion of our office states, "Patient in for
16 routine follow-up visit. Status
17 post-arthroplasty with dermal graft, healing
18 well, removed running suture, patient tolerated
19 procedure well. Cleaned incision with saline
20 and peroxide, applied Bacitracin. Margins
21 intact. Bilateral minimal edema, wound care
22 instructions given to patient. Patient will
23 return to clinic on Thursday for routine
24 follow-up." Again, she made no specific
25 complaints about her eye at that visit.

1 Q Now, did you have discussions with her about her
2 eye on that day?

3 A The only other discussion that we had with her
4 about her eye was her follow-up with her
5 ophthalmologist, and that was it.

6 Q So did you suggest to her on this first office
7 follow-up visit that she see her
8 ophthalmologist?

9 A That was suggested before discharge.

10 Q And then did you receive information from her or
11 anyone about her follow-up with an
12 ophthalmologist after that?

13 A Just from her. "Ida asked if we knew of an
14 alternate ophthalmologist for her to see."

15 Q Did she tell you why she wanted to see an
16 ophthalmologist?

17 A Just that her relationship with Dr. Sating
18 wasn't working out.

19 Q Did she tell you why?

20 A Not specifically.

21 Q So did you give her the name of someone else?

22 A I did.

23 Q And who was that?

24 A Dr. Clifffel.

25 Q And did you receive information either directly

1 from Dr. Cliffel or from the patient regarding
2 what Dr. Cliffel's findings were?

3 A Sure. The patient followed up on -- two days
4 later, which would have been what is that,
5 Wednesday? Or no, she phoned. She phoned in.
6 That she saw the ophthalmologist and said that
7 there were no abrasions to the cornea. So my
8 preliminary diagnosis was wrong, according to
9 that. That she had an irritation to her eye and
10 was very happy. That's what the note says.

11 I then saw her on the 8th in which she, I
12 believe, reiterated that, or excuse me, I
13 misspoke. She had not yet asked to be referred
14 to an alternate ophthalmologist. On the 8th she
15 came in and said that her relationship wasn't
16 working out and she wanted the name of another
17 ophthalmologist and that's when we gave her
18 Dr. Cliffel's name. Dr. Cliffel never sent any
19 report to me. We had to request it and we did
20 request it and he faxed a report and I was -- I
21 was, you know, able to interpret some of it and
22 I got the rest from Ida that there was no
23 current therapy or care being pursued for her.
24 Q Did you learn from either Dr. Cliffel's notes or
25 from Ida that the assessment that Dr. Cliffel

1 made was that she had possible herpes in her
2 eye?

3 A Ida made the comment that she might have herpes
4 in her eye, which would be known as a herpetic
5 keratitis.

6 Q And did you notice when you got Dr. Clifffel's
7 notes that he mentions questionable herpes?

8 A I have to check my file. If you have it right
9 there, it might facilitate me. He has it right
10 here very clearly at the end of the page,
11 questionable herpes.

12 Q Now --

13 MR. ABBARNO: I'm sorry, what
14 are you looking at?

15 MR. WEINBERGER: (Indicating).

16 MR. ABBARNO: Thanks.

17 MR. WEINBERGER: Off the record.

18 (Off the record.)

19 BY MR. WEINBERGER:

20 Q In follow-up visits that Ida had with you, did
21 she discuss with you the condition of her eye
22 and other physicians that she had seen for her
23 eye?

24 A No. Not really. She -- Ida followed up with us
25 on a very amicable basis for about eight months.

1 Mainly for joint therapy, physical therapy and
2 rehabilitation from her joint surgery. And the
3 last conversation regarding a specific doctor's
4 comments was Dr. Clifffel's.

5 Q Are you familiar with a condition known as
6 Hibiclens keratitis?

7 A Am I familiar with it?

8 Q Yes.

9 A I only know it on a cursory basis to be
10 irritation of the cornea secondary to Hibiclens
11 exposure.

12 Q Were you ever informed in this case that
13 somebody made a diagnosis of her condition as
14 being that in this case?

15 MR. MINGUS: Objection.

16 Q Other than what you learned from counsel.

17 A No.

18 Q Currently, are you a defendant in any other
19 malpractice cases?

20 MR. MINGUS: Objection.

21 Continuing objection to any other cases?

22 MR. WEINBERGER: Certainly.

23 MR. MINGUS: You may answer.

24 A I'm sorry, what am I answering?

25 Q Currently are you a defendant, are you a party

1 in any other malpractice cases?

2 A My practice has one other case that is pending
3 at present.

4 Q Are you a defendant in that case?

5 A Yes.

6 Q The name of the patient is what?

7 A Brian Gourtney, G-O-U-R-T-N-E-Y.

8 Q Is that pending in Cuyahoga County?

9 A Stark County.

10 MR. WEINBERGER: That's all the
11 questions I have.

12 MR. ALLISON: Susan?

13 MS. REINKER: Yeah. Dr. Zak,
14 I represent Dr. DeBin and the anesthesia group
15 in this case. I just have a couple questions
16 for you.

17 THE WITNESS: Sure.

18 EXAMINATION

19 BY MS. REINKER:

20 Q It's my understanding that you did not observe
21 the prep occurring, the surgical solution
22 running into the eye over an un-taped eye; is
23 that correct?

24 A That's absolutely correct.

25 Q By the time you got in the room the incident had

1 already occurred and some treatment had already
2 begun?

3 A Yes.

4 Q So wherever you got this information about the
5 eye being un-taped, you don't recall where that
6 came from?

7 A No.

8 Q But it's not your own personal observation?

9 A Was not my personal observation.

10 Q Okay. The type of tape that's used to hold
11 eyelids shut during surgery, it's my
12 understanding it's a silk tape, a fabric tape,
13 or it's one of the choices?

14 A One of the choices. It varies from location to
15 location.

16 Q And the purpose of taping the eyes shut is to
17 prevent them from getting dried out during the
18 surgery, or do you know the purpose?

19 A My understanding is the purpose is to prevent in
20 general corneal abrasions.

21 Q Okay. The tape -- the tape is not -- the way
22 the eye is taped it's not intended to produce a
23 watertight shield; isn't that correct?

24 A Again, depends on the tape option utilized.

25 Q Okay. A silk tape would not --

1 A A silk tape would not produce an occlusive
2 barrier. No.

3 Q In this case, the surgery was being performed
4 fairly close to the eye, I mean, you're
5 operating on her face, correct?

6 A We're operating of the face.

7 MR. MINGUS: Objection. Go
8 ahead.

9 A In front of the ear.

10 Q In this area over here (indicating)?

11 A Yes.

12 Q I'm indicating on myself.

13 A Yeah.

14 Q Once the incident had completed and the flushing
15 of the eye had been completed and surgery began
16 again, or the surgery began, would the eye be
17 covered with a drape?

18 A The eye is not actually in the field.

19 Q I'm just wondering where would the drape start
20 once you start the surgery?

21 A The drapes start where the prep ends, and the
22 drape for this surgery would be at the malleolar
23 buttress, not all the way to the eye, and then
24 the eye is covered.

25 Q So when you're doing the actual surgery in this

1 case, you could not have observed her eye
2 directly because it would have been under the
3 drape?

4 A That's correct.

5 Q But at some point during the procedure you're
6 going to do the other side?

7 A Taken down, observation made, continued.

8 Q Head would be turned in the other direction?

9 A Yeah. Absolutely. Yeah.

10 Q So it would be pretty hard not to observe her
11 right eye during that part of the case where
12 you're moving her head to the other side?

13 A Exactly.

14 Q Treatment had already started before -- when you
15 entered the operating room, the treatment I
16 think you indicated had already begun, the
17 flushing of the eye?

18 A Yes.

19 Q Do you recall was that Dr. DeBin, Michael Kovach
20 or do you remember who?

21 A It would have been one of those two. Mr. Kovach
22 is a CRNA.

23 Q He's an AA.

24 A Oh, I'm sorry. He's going to get angry if he
25 hears that.

- 1 Q Since you're operating on the patient's face,
2 did you observe any active herpetic lesions
3 anywhere on her face?
- 4 A None. No.
- 5 Q Any open herpes?
- 6 A Not that I made observation of.
- 7 Q If she had such lesions, would that be a
8 contraindication for your surgery?
- 9 A If somebody -- an active herpetic lesion, sure,
10 I think for everyone's protection we would avoid
11 the surgery.
- 12 Q So if she had an open herpes sore somewhere on
13 her face, you wouldn't have done --
- 14 A No, I would have postponed it until they became
15 inactive.
- 16 Q When she went to the recovery room, I think
17 after the surgery was concluded, the tapes were
18 removed over the eyes and you looked at the
19 eyes?
- 20 A Yes.
- 21 Q And did you testify you thought the eye was then
22 re-taped after that?
- 23 A I believe it was.
- 24 Q Okay. I just want to point something out to
25 you. If you look at the recovery room,

1 post-anesthesia care unit record?

2 A Just give me one moment to get there.

3 MS. REINKER: Ronald, that's
4 the sheet I'm referring to. Do you know which
5 sheet I'm talking about, Pete?

6 MR. WEINBERGER: Yes.

7 A Yeah.

8 Q Right at the very top line there's a line for
9 dressings where they describe and they talk, if
10 I remember, you got my copy there, she has ice
11 packs on isn't it her jaws and her hip are the
12 only --

13 A Tape gauze to the face.

14 Q Look at the line above it where --

15 A Dressings, location, bilateral jaw and left hip.

16 Q Okay. So from that it would appear there was
17 not a dressing on the eye at the time she
18 arrived in the recovery room.

19 A There was no notation of it.

20 Q If she had one, they probably would have written
21 down an eye shield?

22 A That would have been the correct thing to do.

23 Q Okay. The November 5th office note, the notes
24 in your chart, the clinical notes, are they in
25 your handwriting or someone else's?

1 A None of the notes are my handwriting.

2 Q Did you see that day on 11-5 --

3 A Yes.

4 Q -- who would have written the note, the

5 handwriting?

6 A One of my assistants. That looks like Luce

7 Gonzales, the signature.

8 Q Okay. You did see her but --

9 A Yes.

10 Q Mr. or Miss Gonzales?

11 A Miss Gonzales. Yeah. All of our assistants

12 write the notes. If there's something pertinent

13 that definitely needs to be put in, we make

14 special attention to that and they do that.

15 Q Now, the comment about a complaint, formal

16 complaint, that was written the same day?

17 A That's correct. By the front office staff, the

18 receptionist.

19 Q Was that -- if that was done that day, was it at

20 -- because the patient wanted it done that day?

21 A Yeah. Again, this is before Ida saw me. She's

22 waiting in our waiting room and talking with the

23 receptionist at that time and apparently

24 expressed her displeasure with certain things

25 that occurred at the hospital for her.

1 Q Okay. And was -- if any formal complaint was
2 written, around that time, was it after
3 November 5th because of the patient's complaint
4 to you on November 5th?

5 MR. MINGUS: Objection. Go
6 ahead.

7 Q If you recall.

8 MR. ALLISON: Objection.

9 A I recall asking for an incident report. We're
10 back to this discussion again. I recall asking
11 for an incident report immediately following the
12 surgery.

13 Q Okay. And do you know whether it was done after
14 or before 11-5?

15 MR. ALLISON: Objection.

16 A I can't say for sure.

17 MS. REINKER: That's all I
18 have. Thanks.

19 THE WITNESS: Sure.

20 MR. ALLISON: Dr. Zak, my
21 name is Tom Allison. I represent Lakewood
22 Hospital. We met right before your deposition.
23 I do have just a few questions for you.

24 EXAMINATION

25 BY MR. ALLISON:

1 Q First I want to start with your office notes
2 with respect to your November 5th, 2001
3 follow-up visit with Miss Kinney?

4 A Yes.

5 Q You've indicated to us that you examined her on
6 that day and then a Miss Gonzales, I think one
7 of your assistants, wrote the note?

8 A Correct.

9 Q Then there's a second note one right below that
10 that says, November the 7th, 2001. Is that also
11 written by Miss Gonzales does it appear?

12 A It appears to be her same handwriting.

13 Q That note states, "Patient phoned in to state
14 that she saw her ophthalmologist and he said
15 that there were no abrasions to her cornea and
16 she had an irritation to her eye and was very
17 happy." Is that what that says?

18 A That's what it says.

19 Q And do you have any reason to believe that
20 Miss Gonzales did not accurately note what
21 Miss Kinney would have told her on November
22 the 7th?

23 A I would have no reason to do that.

24 Q Then on the following day, November the 8th,
25 Miss Kinney was actually in your office for

1 follow-up; is that right?

2 A That's what it says.

3 Q Do you recall that visit?

4 A Just by reading the note.

5 Q Okay. Nothing beyond what's in the note?

6 A When I read the note it does stir my memory as
7 to our conversation and me suggesting
8 Dr. Cliffel as an alternate ophthalmologist.

9 Q Do you recall what was -- what do you recall
10 about that conversation with her that led you to
11 suggesting Dr. Cliffel?

12 A I had asked her how -- what the status of her
13 condition was surrounding her eye, was she
14 comfortable with the ophthalmologist attending
15 the case, and I believe she stated that she
16 would prefer to see someone else.

17 Q She just called the day before and was very
18 happy?

19 A Uh-huh.

20 Q Do you have any further recollection about what
21 happened between the 7th and the 8th?

22 A No, I don't.

23 MR. ABBARNO: Objection.

24 Q What?

25 A No, I don't. Nothing that was brought to my

1 attention.

2 Q Nothing further you can recall about that

3 conversation?

4 A Nothing was brought to my attention.

5 Q In your practice, have you ever personally used

6 Hibiclens as a scrub on a face?

7 A In my private practice?

8 Q In any practice.

9 A Well, just to enlighten you about scrubbing a

10 patient, as a rule of thumb, a private practice

11 clinician does not scrub the patient. That's

12 done by a scrub nurse.

13 Q Sure.

14 A In residency training it is the primary job of

15 the resident physician to scrub a patient. So

16 in residency training I was requested to use

17 Hibiclens in joint arthroscopy and other facial

18 procedures thousands of times.

19 Q Okay. Including the type of procedure that you

20 would have prepped for Miss Kinney?

21 A Joint arthrotomy.

22 Q You did your residency at University Hospitals

23 of Cleveland; is that right?

24 A That's correct.

25 Q What is an ORIF mandible with reconstructive

1 plating? What kind of procedure is that?

2 A It's a description of -- an ORIF is an acronym
3 for open reduction internal fixation of -- I'm
4 sorry, read the rest?

5 Q Mandible with reconstructive plating.

6 A Yeah. So what you're looking at is you're
7 looking at a mandible that, for whatever reason,
8 has lost its integrity, be it cancer, be it
9 infection. And the open reduction internal
10 fixation refers that you are making an extra
11 facial incision, that you are gaining access to
12 the mandible from that incision, and you are
13 reconstructing it with plates and/or autogenous
14 bone graft or foreign implants.

15 Q And the bone that you're operating on, the
16 mandible, is the lower jawbone?

17 A That's correct. Yes.

18 Q I believe you testified already that in your
19 opinion it's appropriate and within the standard
20 of care to utilize Hibiclens as a surgical scrub
21 agent on a patient's face; is that correct?

22 A Depends on the location of the face that's being
23 operated on and what the procedure specifically
24 is at hand. All these procedures are not all
25 the same.

1 Q Let's specifically talk about the type of
2 procedure that you performed on Miss Kinney on
3 November the 1st, 2001. It is your opinion that
4 it was appropriate and within the standard of
5 care to use Hibiclens as the scrub, surgical
6 scrub agent on her face; is that correct, for
7 this procedure?

8 A Not my preference, but within the standard of
9 care if caution is used.

10 Q And if you would have come in prior to the time
11 that you did and noted that Mr. Malumphy was
12 using Hibiclens to scrub Miss Kinney's face on
13 November 1st, 2001, that was something that you
14 would have allowed him to go ahead and proceed
15 to do; is that correct?

16 A Yeah. I would not have objected to it. I would
17 probably have reminded him that if he is going
18 to use that particular scrub solution, that you
19 have to use a little bit of care. Something
20 that he knew already.

21 Q Now, these preference sheets that Mr. Weinberger
22 marked and then showed to you earlier, I think
23 you described those as evolving documents,
24 constantly evolving documents; is that right?

25 A That's a fair statement. Yes.

1 Q And although with respect to the preference
2 sheets that may exist at Lakewood Hospital for
3 your practice for you and your partners,
4 Dr. Diamantis and Dr. Frazee, you don't know
5 where they originally started; is that right?

6 A That's correct.

7 Q How long have you been in practice, in private
8 practice at Lakewood Hospital?

9 A Approximately five years.

10 Q So we're talking about what, 1990 --

11 A 8.

12 Q 8. Okay. Were Dr. Diamantis or Frazee in
13 practice there prior to that, or did you all
14 kind of come as a group to Lakewood?

15 A No. We started the practice. There was no
16 practice prior to us.

17 Q You don't recall how the original pick lists or
18 preference cards, you know, started at Lakewood
19 Hospital, whether it was you, whether it was
20 Dr. Diamantis, whether it was Dr. Frazee, or
21 from some other source; is that right?

22 A I know that it wasn't me.

23 Q Okay. Was there one of your other partners that
24 may have been more involved in that type of
25 communication with the hospital?

1 A They may have been. If they were, I wasn't
2 aware of it.

3 Q Were there preference lists at University
4 Hospitals when you were there in your residency?

5 A Sure. For the particular surgeon who was the
6 attending surgeon of record.

7 Q And when you were involved in those procedures
8 as a resident, did you refer to the preference
9 lists to determine what type of instrumentation
10 or other materials, supplies, et cetera that
11 might be needed?

12 A No. That was the circulating nurse that would
13 do that.

14 Q How did you know what scrub to use?

15 A Because they put it out.

16 Q So whatever was there was what you used?

17 A You got it.

18 Q Mr. Weinberger asked you questions about the
19 information that you might have given the head
20 nurse on the day of surgery following the
21 surgery. Do you recall that?

22 A Recall Mr. Weinberger asking me that question?

23 Q Yes.

24 A Yes, I do.

25 Q Doctor, do you believe that you provided any

1 information to that head nurse that is not
2 contained in the medical record, either in your
3 dictated operative report or in your hand
4 written progress note?

5 MR. MINGUS: Objection. Go
6 ahead.

7 A Let me make sure I understand your question.
8 Are you summing that everything that's
9 contained in those other two documents would
10 have been contained in the incident report?

11 Q No. That's not my question.

12 A I misunderstood your question.

13 Q That's fine. My question was do you believe
14 that there was anything you told the head nurse,
15 as you recall that conversation, that is not
16 present in the operative report or in your
17 progress notes that are in the record?

18 MR. MINGUS: Objection. Go
19 ahead.

20 A No, I don't believe there's anything not
21 included in there.

22 Q Did you ever have any -- I know you said you
23 never talked to Dr. Sating. Did you ever talk
24 to Dr. Cliffl about Miss Kinney's ophthalmic
25 situation?

1 A No. I made some attempts to call his office.
2 He's a difficult fellow to get a hold of. We
3 did get him to fax that information to us, but I
4 never had a conversation directly with him.

5 Q That would be the one page of his records --

6 A Yes.

7 Q -- that you referred to earlier that's in
8 your --

9 A Records as well.

10 Q -- office chart?

11 A That's correct.

12 MR. ALLISON: Thank you,
13 Doctor.

14 THE WITNESS: Sure.

15 MR. ABBARNO: Dr. Zak, I'm
16 Ken Abbarno, I represent Dr. Sating. Just a
17 couple of quick questions for you.

18 THE WITNESS: Sure.

19 EXAMINATION

20 BY MR. ABBARNO:

21 Q In your notes it indicates that Miss Kinney had
22 some dissatisfaction with one of the
23 ophthalmologists who was looking after her after
24 this incident?

25 A Uh-huh.

1 Q Is that right?

2 A Yes, I believe so.

3 Q Do you know whether her dissatisfaction was with
4 Dr. Sating, Dr. Mann or Dr. Coseriu? And when I
5 say that, she saw Sating in the hospital but saw
6 two eye doctors actually after the hospital
7 setting and I'm wondering if she expressed to
8 you who she was dissatisfied with.

9 A Yeah. You know, Dr. Mann is someone who's
10 unbeknownst to me, so I really wasn't even aware
11 that she saw a Dr. Mann.

12 Q Until I just brought that to your attention?

13 A Until you just brought it to my attention.

14 Q How about Coseriu, C-O-S-E-R-I-U?

15 A Never heard of him.

16 Q Would it be fair for me to assume then looking
17 at your note of November 8th, we don't know
18 whether this discussion with regard to an
19 ophthalmologist was relative to Dr. Sating or
20 perhaps one of the other eye doctors that she
21 would have seen in the interim?

22 A Sure. If the chronology is such that she saw
23 any of those people prior to the 8th, I suppose
24 it could be any of them.

25 Q And do you recall any specifics that Miss Kinney

1 would have relayed to you about any
2 dissatisfaction with an ophthalmologist who had
3 seen her? Did she give you a name, did she give
4 you a specific reason why she was dissatisfied,
5 anything like that?

6 A I can't recall a specific reason other than that
7 she wished to be referred to another
8 ophthalmologist.

9 MR. ABBARNO: I don't have
10 anything further. Thanks.

11 EXAMINATION

12 BY MR. WEINBERGER:

13 Q Doctor, your testimony today was that you don't
14 have a recollection of what information was on
15 the incident report that was transmitted to you
16 for your signature, correct?

17 MR. ALLISON: Objection.

18 MR. MINGUS: Objection. Go
19 ahead and answer.

20 A Could you repeat the question?

21 Q Yes. As you sit here today, you do not know
22 what information was on the incident report that
23 you signed, correct?

24 MR. ALLISON: Objection.

25 MS. REINKER: Objection.

1 MR. MINGUS: Objection. Go
2 ahead.

3 A Correct.

4 Q So you have no idea as you sit here today
5 whether or not the information that was on the
6 incident report was similar to or covered the
7 information that's in the medical records,
8 right?

9 MR. ALLISON: Objection.

10 MR. MINGUS: Objection. Go
11 ahead.

12 A When I answered that question for the other
13 gentleman, I was answering that in reference to
14 if I was to prepare it today, it would be the
15 same information that was included in those
16 reports.

17 Q I understand. But since you don't know what was
18 on the incident report, you don't know whether
19 that information is the same or different from
20 what is in the medical records?

21 A I have no way of knowing that.

22 MR. ALLISON: Objection.

23 Q Now, Doctor, you indicated to Mr. Allison that
24 you believe, although not your preference, it
25 was within the standard of care to use Hibiclens

1 to scrub this patient's face, correct?

2 A Due to the location of the incision, with care,
3 yes, I think it was appropriate.

4 Q It was not within the standard of care, in fact
5 violated the standard of care to drip the
6 solution into her eye, didn't it?

7 MR. ALLISON: Objection.

8 MR. MINGUS: Objection.

9 THE WITNESS: Answer?

10 A If that's what occurred, yes. Again, I did not
11 witness the actual scrubbing procedure so I have
12 difficulty making comments on exactly what
13 happened.

14 Q All right. So I want you to assume that during
15 the scrubbing procedure done by the scrub nurse
16 when he was scrubbing her face, that Hibiclens
17 dripped into her eye. Assuming that to be the
18 case, that would be a violation of the standard
19 of care, wouldn't it?

20 MR. MINGUS: Objection.

21 MR. ALLISON: Objection.

22 THE WITNESS: Answer?

23 MR. MINGUS: If you have an
24 opinion, you may answer.

25 MR. WEINBERGER: Well, wait a