Volume I
Pages 1 to 117
Exhibits 1 to 5

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
CIVIL DIVISION
CASE NO: 01-002572 (18)

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SHIRLEY R. DAY, Personal Representative of the Estate of RICHARD FELTON DAY, deceased,
Plaintiff,

vs.

JASON H. FROST, D.O., JASON H. FROST, D.O., P.A., SOUTH BROWARD HOSPITAL DISTRICT doing business as MEMORIAL HOSPITAL PEMBROKE, WOUND CARE GROUP, INC., as a wholly owned subsidiary of RENAL CARE CROUP, INC., MILTON GEDALLOVICH, M.D., MILTON GEDALLOVICH, M.D., P.A., GASTRO CARE, INC., HOWARD I. BAIKOVITZ, M.D., HOWARD I. BAIKOVITZ, M.D., P.A., MITCHELL D. WEINSTEIN, D.O., and URO-MEDIX, INC.,
Defendants.

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DEPOSITION OF BARBARA J. LEVIN, a witness called on behalf of the Plaintiff, taken pursuant to the Florida Rules of Civil Procedure, before Linda A. Walsh, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of Doris O. Wong Associates, 50 Franklin Street, Boston, Massachusetts, on Friday, August 13, 2004, commencing at 10:03 a.m.

PRESENT:

Via Telephone:

Morrow & Milberg, P.A.

(By Mark A. Morrow, Esq.)
499 Northwest 70th Avenue, Suite 108, Plantation, FL 33317, for the Plaintiff.

Via Telephone:

Chimpoulis & Hunter, P.A.

(By Barbara Wohrle, Esq.)
800 S.E. Third Avenue, 2nd Floor, Fort Lauderdale, FL 33316, for the Defendants Milton Gedallovich, M.D., and Milton Gedallovich, M.D., P.A.

Bunnell Woulfe Kirschbaum Keller McIntyre & Gregoire

(By Robert J. Berman, Esq.)
One Financial Plaza, 9th Floor, 100 Southeast 3rd Avenue, Fort Lauderdale, FL 33394, for the Defendants Howard I Baikovitz, M.D., and Howard I. Baikovitz, M.D., P.A.

Via Telephone:

George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens

(By Robert Murray, Esq.)
2866 East Oakland Park Boulevard, Fort Lauderdale, FL 33316, for the Defendant Mitchell D. Weinstein, D.O.

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INDEX



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EXHIBITS



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PROCEEDINGS

BARBARA J. LEVIN

a witness called for examination by counsel for the Plaintiff, having been satisfactorily identified by the production of her driver's license and being first duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORROW:

Q. Would you please state your name, ma'am.

A. Yes. My name is Barbara Jane Levin.

Q. Do you mind if I call you Barbara during the course of this?

A. Please do.

Q. Okay. Could you tell me, please, where you are and the address that you are involved in the practice of nursing?

A. I work at Massachusetts General Hospital. I am the advanced clinician for the orthopedic trauma department.

Q. What's the address at Mass. General?

A. Fruit Street, Boston, Mass.

Q. How long have you been involved in orthopedic trauma?

A. Since 1991.

Q. Have you done any rotations on what would be considered a med surg floor?

A. Yes.

Q. And is that part and parcel of the orthopedic trauma rehab portion of the hospital?

A. No. Actually, we also have med surg overflow on our unit as well as telemetry.

Q. Do you have a copy of the notice of taking your deposition that was sent for this proceeding?

A. Yes.

Q. All right. There is a number of items that are included on there. Could you do me a favor and just tell me what kind of documents that you have that are responsive to that notice of taking depo?

A. Okay. No. 1, the copies of all the materials that have been reviewed, I have reviewed the medical records of Memorial Hospital Pembroke, the complaint and the amended complaint and numerous depositions. Do you want me to go through a list of depositions?

Q. Yes, ma'am. If you would just tell us the names of those individuals?

A. Sure. Howard Baikovitz, Milton

Gedallovich, Betty Simms, Penny Winstel, Mitchell Weinstein, two of his, James Van Gelder, Marie Messina, Shirley Day, two of her depositions, Jess Alaba, Sharon Grant, Karen Rosier, Sandra D'Orazio, Daniel Silvershein, Jonathan Cohen and John Cello.

Q. Can you tell me when it was you were retained in this case?

A. I believe it was approximately March or April of this year.

Q. Obviously this has been a continuing work in progress?

A. That is correct.

Q. You have been submitted a number of the documents in the deposition that you just advised me of, some of them, I would presume, over the last week or so?

A. Yes.

Q. All right. Are there any other documents you have there associated with the notice to produce for this depo?

A. No, I don't believe so.

Q. Do you have any type of literature, any searches, any type of documentation that you have retrieved for purposes of giving your testimony?

A. No, I have not.

Q. Do you have any correspondence there with you from Mr. Berman or his firm associated with your retention and continuing work in this case?

A. Yes, I do.

Q. What does that consist of?

A. My initial contact letter and then various letters that have come with the various documents and depositions.

MR. MORROW: Okay. If we could -- Madam Court Reporter, I would like to make composite Exhibit No. 1 for Plaintiff the correspondence that's just been identified.

MR. BERMAN: Mark, do you mind if we -- unless she has got it all together, do you mind if we do that at the end of the deposition?

MR. MORROW: That's fine.

(Document marked as Levin Exhibit 1 for identification)

Q. Are there any notations that appear on any of those letters, any handwritten messages or anything you have written on themselves?

A. On the letters, no, I have not.

Q. On the hospital records, the complaint and

the amended complaint and the numerous depositions that you have just identified for us, have you made any marks, highlights, notations or placed any type of stickies to identify certain areas?

A. I do have some stickies on the documents just noting for me exactly where a particular page is in case I have to refer to it, but there is no opinions on these stickies.

Q. How many are there? Are there a lot?

A. Well, there is just --

MR. BERMAN: Quite a few.

A. Yes. On the medical records, I mean, just various stickers showing me where the labs are, where the nursing education is, medications.

Q. Are there any similar stickies that appear on any of the testimony that you were provided in this deposition?

A. No.

Q. Have you made any type of report?

A. No, I have not.

Q. Do you have any type of a summary of your opinions or general notice that you are going to be referring to here today?

A. Yes, I do.

Q. Can you tell me a little bit about that. What does that consist of?

A. Well, I had done brief summaries from every deposition, just notes extracting off of the depositions.

Q. Now, are each one of those contained with the individual depositions or are they somewhere that is easily accessible?

A. Yes, with each deposition.

MR. MORROW: All right. Bob, I'm going to obviously want copies of those notes as Plaintiff's Exhibit No. 2.

(Document marked as Levin Exhibit 2 for identification)

MR. BERMAN: Let me just see if I understand her. Did you make separate notes or?

THE WITNESS: These (indicating). Like this right here (indicating).

MR. BERMAN: Okay. That's fine. Well, what we can do is we can make copies of the notes, because I think actually they are fairly well organized. They have at the top of them "Deposition of," and it indicates the witness and then it's just a separate page for each deposition. So actually, I

think that will work nicely. Unlike me, she's organized.

MR. MORROW: I suffer sometimes from the same disease.

Q. Are there any other documents or materials that would have not been identified already in this deposition that you have related to this case?

A. Yes. I wrote notes extracting from the medical records.

Q. How many pages does that encompass?

A. I'll tell you in one minute. I think it's 24 pages.

Q. Are they pretty legible?

A. Yes, they are.

MR. MORROW: All right. I would like to attach a copy of all of those documents as Plaintiff's Exhibit 3.

MR. BERMAN: So you are making all the notes Exhibit 3 or are you separating the earlier depo notices as No. 2?

MR. MORROW: I think we already marked the summaries of the depositions as No. 2.

MR. BERMAN: That's fine.

MR. MORROW: If it's easier to do them all

as a composite, let me know, Bob.

MR. BERMAN: I don't think it matters, frankly.

MR. MORROW: We'll make the notes that you identified specifically from the medical records as Plaintiff's 3.

(Document marked as Levin Exhibit 3 for identification)

Q. Is there any other documentation that you have there in front of you associated with this case?

A. No.

Q. Do you have any type of a listing of cases that you have been involved in over the years from a medical/legal standpoint?

A. No, I do not.

Q. Have you been involved in prior cases where you have served as an expert witness?

A. Yes, I have.

Q. Can you give me an idea of when you first started being involved in medical/legal work?

A. Well, my first case review on having to do with a personal injury claim was back in approximately 1988. I was educating an attorney

about injuries sustained. I think that was a drunk pedestrian who was hit by a car. And then over the years participated in various personal injury claims, educating about orthopedic issues and many motor vehicle accidents.

Q. Have you been involved providing testimony either for or against nursing personnel in the past?

A. Yes, I have.

Q. When is it that you began involving yourself in that area of expert witness work?

A. I think I first testified approximately in the mid-'90s.

Q. Were you actually reviewing cases prior to that where you gave your testimony or was the first case that you were involved in one that you pursued all the way to point where you were being deposed?

MR. BERMAN: Form.

A. I just know that the first time I testified was then. I don't know if I was involved as a reviewer prior to that comment. I don't recall.

Q. But it's possible you were actually reviewing cases and assisting counsel and providing some opinions on medical/legal matters prior to the mid-'90s when you first testified in that venue?

MR. BERMAN: Form. Asked and answered. Go ahead, Barbara. You can answer.

A. Well, I was providing information to counsel prior to the mid-'90s because I was assisting with, as I stated, personal injury claims, and education about injuries sustained in motor vehicle accidents or falls out of a window or pedestrian struck by a car.

Q. Okay. I understand that, and I don't mean to be difficult, but my question was a good deal more specific.

In instances where you have testified either for or against nurses in medical/legal matters, did you involve yourself in those cases prior to the one that you remember giving testimony in sometime in the mid-'90s?

A. Uh-huh. I don't recall if I was involved in any prior to that time. I know in the mid-'90s was the first time I had testified. So I don't know how far prior I was contacted about that one particular case. I'm not sure.

Q. Fair enough.

MR. BERMAN: Mark, excuse me one second. Barbara, please don't go "uh-huh" when you are

listening because it's hard for the court reporter, and it will create a confusing record. Sorry.

MR. MORROW: No problem.

Q. How many cases do you think you have been involved in where the issues have been whether or not nursing staff deviated from the acceptable standard of care of the community?

A. I don't know a total number, but I would say a few cases a year.

Q. So if we start with the mid-1990s call it, and we'll just pick 1995, if that's fair -- that's been nine years -- would that be between 27 and 35 cases?

A. That could be about right.

Q. Well, I don't want to put words in your mouth.

MR. BERMAN: That's what you are doing.

Q. Let me try asking the question again. How many cases have you been involved in since you began working as an expert witness in medical/legal matters?

MR. BERMAN: Form. Asked and answered. You can answer.

A. I don't know a total. I don't keep track

as to how many I have reviewed.

Q. To your knowledge, in any prior case have you been required by court order to disclose a listing or a compilation of any cases that you have been involved in as an expert witness?

A. I did provide a list, gosh, a long while ago on a particular case. But I don't have a current list, and that was for a few years prior.

Q. And you did not retain that list?

A. I may still have it. I don't know. We had an explosion in our house, and I don't know if I still have that. It would be an old list. I don't have a current list.

Q. I'm sorry to hear about the explosion in your house. That's terrible.

A. It was pretty bad. That listing was on my computer, and I lost the computer.

Q. In general do you know how it is that you became involved in the medical/legal sense addressing cases and speaking to standard of care?

A. Yes. I had been reviewing personal injury cases, and an attorney had referred me to a colleague of his who then had hired me to do some case work for him and then word of mouth with the

rest of my work.

Q. How many times have been deposed over the years?

A. When you were asking me before about testifying I was including in the broad scope -- I thought you meant testifying for deposition, not just trial. Because trial I haven't -- I haven't testified often in trial. So my -- the total amount of times for testifying for deposition is a few a year, not testifying in court a few a year.

Q. A few a year since about 1995?

A. I would say probably maybe '98 on I started doing more testifying versus between '95 and '98.

Q. How many times have you actually provided live testimony in a courtroom?

A. I know it's less than ten times. I don't know specifically what number. I don't know if it's six or seven times. I'm not sure.

Q. Do you know if you have retained any copies of the depositions that you have provided over the years?

A. No, I do not have them.

Q. Do you have any trial transcripts from any testimony that you have ever provided in a court of

law?

A. No, I don't have that.

Q. Have you done any work down here in Florida before?

A. Yes, I have.

Q. Can you give me an idea of how many cases you had in Florida?

A. I have no idea.

Q. Would it be more than ten?

A. That I have testified on? No, I don't believe so.

Q. No, that you have been involved in. I said have you done any work down here in Florida.

A. Possibly.

Q. Have you ever done any work for Mr. Berman's firm in the past?

A. Yes, I have.

Q. On how many occasions do you think that you have been involved with that firm?

A. One other occasion.

Q. Is that case closed or is it still pending?

A. It's closed.

Q. What about other attorneys in Florida? Can you tell me any of the other individuals that you

have been involved with over the years in this jurisdiction?

MR. BERMAN: Form.

A. Oh, my gosh. There is -- oh, my gosh. His name slips my mind, north of Naples. One of the firms is McIntosh Sawran.

Q. Can you remember any others?

A. In the Naples area, and my mind has just gone blank as to who that is. There are a couple.

Q. All right. McIntosh, Sawran & Craven, I'm familiar with that firm. Were you involved in that case where you were assisting the defense of a physician or a nurse?

A. Yes.

Q. And the other case that you were involved in with Mr. Berman, was that a case where you have been involved in assisting the defense of a doctor or nurse?

A. Yes.

Q. Of course in this case you were retained for the benefit, I believe, to review this case for Dr. Baikovitz, correct?

MR. BERMAN: Form.

A. Yes.

Q. Do you know if you have ever been involved in this state, in the State of Florida, in a case where you were testifying for the patient?

A. Yes.

Q. How many times have you been involved in this state where you have testified for the benefit of a patient or the plaintiff in a medical malpractice case?

A. I don't know how many times, but I certainly have.

Q. What would you say is the breakdown, when you go back to the mid-'90s and try to think through the medical/legal matters that you have been involved in, percentage-wise who seems to retain you the most, the defense side or people who were making claims against doctors and nurses?

MR. BERMAN: Form.

(Phone sounds)

MR. BERMAN: Hold on one second, please.

(Pause)

BY MR. MORROW:

A. My practice is pretty much divided evenly between 50 percent plaintiff and 50 percent defense.

Q. Do you know what the term Fabre defendant

means in the State of Florida?

A. No, I don't.

Q. Do you have an understanding of why you were retained, what was the basis of that initial contact where you were asked to be a part of defending Dr. Baikovitz in this case?

MR. BERMAN: Form.

A. Yes.

Q. What is that understanding?

A. I was asked to take a look at the delivery of nursing care.

Q. Okay. Were you asked to look at anything else in terms of your chart review and the review of these different depositions?

A. I was asked to look at the entire chart and all of the depositions when I was initially contacted to take a look at the nursing care.

Q. Well, if my understanding is correct, if you are involved in the nursing care only, do you know why you were submitted all of the doctors' depositions in this case?

MR. BERMAN: Form.

A. He gave me -- Mr. Berman gave me everything so I could have an understanding as to what

transpired during the time of Mr. Day's hospitalization.

Q. I understand that. Did you formulate any opinions associated with the nursing care based solely on the depositions that these Defendant Doctors gave in this case?

MR. BERMAN: Form.

A. No.

Q. I am sure that you are not agreeing to provide this service to Dr. Baikovitz gratuitously, correct?

MR. BERMAN: Form.

A. Correct.

Q. So, I mean, you are paid for the time that you spend in working on this case, correct?

A. That is correct.

Q. And I'm sure that's been the case over the years in the majority, if not all, of the other cases where you were retained as an expert witness?

A. Yes.

Q. All right. What is it that you charge for the work that you do on these medical/legal matters?

A. Review of medical records is $130 an hour.

Q. If you need to testify, what do you charge

for predeposition conferences when you speak with the attorneys in defending the case?

A. Predeposition conferences are at my regular hourly rate of $130 an hour.

Q. What is it that you charge for the actual deposition time where you are answering questions such as those that I am posing to you now?

A. $1,100 for a half day.

Q. All right. What if it doesn't take a half a day? What if it takes an hour or an hour and a half; what's the cost?

A. The same.

Q. It's still $1,100 that you would want to be paid for an entire half day even if you don't actually spend an entire half day giving that deposition testimony, correct?

MR. BERMAN: Form.

A. That is how I have everything set up.

Q. Why is that?

A. I have my day broken out into half day/full day.

Q. Why is that?

A. That's how my practice is.

Q. So even if it's not necessary for the

person deposing to spend a half day you expect him to pay you for that time regardless?

A. Correct.

Q. Has that ever been addressed in court before, to your knowledge, in cases where people felt like if you worked two hours maybe that's what you should be paid for instead of a half day?

MR. BERMAN: Objection to form. Argumentative.

A. It has not been an issue.

Q. What about trial time; what is it that you charge if you need to go and give some live testimony at a trial?

A. The same as what I charge for a deposition.

Q. If it's out of state, for example, if you have to come to Florida to give your testimony live at trial in this case, what will be your charges?

A. Travel time, any prep time are at my hourly rate and testifying would still be half day or full day.

Q. So when you say "travel time," if you have to travel on the day before to get down here, would that be a full day's charge?

A. No, it would not. It's charged hourly.

Q. You choose -- you charge hourly for travel, but you charge flat rates and half day or whole day when the opposing party is taking your deposition; is that correct?

MR. BERMAN: Objection to form. Argumentative.

A. My half-day/full-day rates are for opposing counsel as well as my own counsel. Whether it's in deposition or trial they are the same.

Q. But the travel time you limit to the actual time that you are traveling?

A. Correct.

Q. What is the charge for a whole day?

A. $1,800.

Q. If you were to come down here and for some reason not be able to testify on a given day and have to stay over, you would charge an additional full day?

A. I don't understand.

Q. If you were not reached at trial on the day that you expected to testify and had to stay over for another day would that be an additional full day's charge?

A. If I were sitting in court on that day

waiting to testify, yes.

Q. And obviously you would want to be reimbursed for any travel charges that you have, the expense of flights and taxicabs and, if necessary, hotel rooms?

A. That is correct.

Q. Did you require a retainer, something up front to be provided to you prior to your agreeing to review the documents in this case?

A. No, I did not.

Q. How do you track your hours for the work that you might be involved in on a case such as this?

A. I keep a list.

Q. How do you do that? Is that a computer invoice or do you just hand write out however many hours you might spend on a given day reviewing materials?

A. I write it out and then convert it over to a computer.

Q. Do you provide an invoice to Mr. Berman for the time that you have spent?

A. I will be, yes.

Q. Have you done that to this time?

A. Not on this case, no. No.
Q. How many hours do you have in this case?
A. Several. I don't know specifically how many but several.
Q. Would there be any reasons why you could not have determined that number prior to coming here for your deposition today?
A. I didn't sit down and add the hours up.
MR. MORROW: All right. I would like to mark, please, the Exhibit No. 4 for this deposition the notice of taking the deposition of the deponent here. Bob, do you have a copy present with you?
MR. BERMAN: Do you have a separate copy?
THE WITNESS: Uh-huh.
MR. BERMAN: I do, but I have writing on it which I don't want to give.
MR. MORROW: After this is over I can fax up a copy of what I sent and have it --
MR. BERMAN: If we have a separate copy -- she's looking for it now. You may not need to do that.
MR. MORROW: Okay. Why don't we just take a second, if we could.
MR. BERMAN: I believe we have a copy of

the notice, and it will be marked.

(Document marked as Levin Exhibit 4 for identification)

Q. Did you have an opportunity to look through that document?

A. Yes, I did.

Q. Did you make an attempt to identify each of the separate requests that were made there for you to bring or to respond to during the course of this deposition here today?

A. Yes.

Q. Do you have those documents, the ones that either exist or that could be made available here?

MR. BERMAN: I'm sorry. I didn't hear the last part of that question.

MR. MORROW: Does she have those documents --

Q. -- the things that are requested, either the things that exist or could have been made available here so that I could question you about them.

MR. BERMAN: She is not obligated to create things that don't exist, and you know that. Objection to form. Argumentative. She has what she

has.

MR. MORROW: She needs to answer the question one way or another.

MR. BERMAN: Not the way it's phrased. Go ahead. Answer the question.

A. What are you specifically looking for?

Q. Well, you said that you keep a listing, some handwritten notes of the time that you spend on the case as you go through and perform your services, correct?

A. Yes.

Q. Where is that document?

A. I have that in my office.

Q. Is it there where you are right now?

A. No.

Q. Fair question: Why not?

A. I read your No. 7, "Any and all billing records." I haven't billed on this case yet, and it's not a -- so I didn't bring it.

Q. Well, you don't consider your handwritten notes of the time that you spend on the case to be billing records?

MR. BERMAN: Form.

A. No, I didn't consider those official. I

haven't sent that out yet.

Q. Where would you go to set up your bills to send to Mr. Berman?

A. I would place it on to the computer.

Q. From what?

A. From the list that I have.

Q. And why do you consider that list of your time that's been spent on this case to not be billing records?

MR. BERMAN: Asked and answered.

A. I think I misunderstood what your No. 7 was. I didn't bring it because I hadn't billed on it yet.

Q. It doesn't say that. It says, "Any and all billing records referable to her employment or work performed in this case." And that to you is ambiguous or -- I don't understand what was unclear. Because I certainly would like to correct that in the future for other expert witnesses who I may ask to bring documents.

MR. BERMAN: Excuse me. Objection to form. Argumentative. Please don't waste time arguing with this witness.

MR. MORROW: I'm not wasting time. I would

like to know what her interpretation is of that paragraph in that legal document that requests her to bring something with her to this depo.

MR. BERMAN: She's already answered that. Answer it one more time, please.

A. I thought it meant any formal billing that I had sent out, and as I stated, I had not sent out a bill as of yet.

Q. Do you have any reasonable ability to give us a breakdown of the hours that you have spent to date from your recollection on this case dating back to March of 2004?

A. I don't know specifically how many. I don't know.

Q. Do you have with you a copy of your curriculum vitae?

A. Yes, I do.

MR. MORROW: I would like to mark that please as Plaintiff's Exhibit No. 5.

(Document marked as Levin Exhibit 5 for identification)

Q. How many cases are you involved in right now?

A. I don't know.

Q. Do you have a list somewhere of the cases that are active and ongoing that you may need to give testimony on or continue to do some work on?

A. Well, there is some cases that are coming up from years ago versus recent. So I don't have a total number, no.

Q. Could you create or do you have a list of those cases somewhere at your disposal?

MR. BERMAN: Asked and answered.

A. No, I don't.

Q. How do you track the cases that you work on?

A. I always receive a notice letting me know whether or not a case is open or closed, and the kinds of work that I do is in so many different areas that when I'm notified that something is closed I shred it.

Q. Do you keep calendars or other documents that show you when you might have depositions or when trials might be set on the cases that you are working on?

A. Yes, I do.

Q. Do you have that there with you for us to look at and discuss today?

A. No.
Q. Why not?
A. A calendar? I have a calendar with my family events on them, and I mark off time when I won't be around. That's where my calendar is.
Q. I understand that your family things are private. I have no interest in those, but would you agree with me that one of the things that I requested would be any calendars that might show cases that you were involved in to this date?
MR. BERMAN: Objection to form. Predicate.
A. I mean --
MR. BERMAN: It assumes facts not in evidence. You can answer.
A. I marked out a sticky that may go on the month explaining when I would be utilized for a particular matter, but that's not something that is kept.
Q. For things that are scheduled from this point forward on these other cases will you agree with me that there will be notations on your calendar if there were times and dates that you needed to set aside to be available?
MR. BERMAN: Form, predicate.

A. That actually goes on a red sticker that goes on my calendar.

Q. But it's there. It's accessible for you to review and kind of plan your schedule out in the future for things you may need to do, correct?

A. Yes. But if things are switched or time goes by, those come off.

Q. But you don't have that? Whether there is things on there or not, you did not bring that with you here today for your depo?

A. No.

Q. To your knowledge, have you at any time in the past been made privy to a printout identified as an Idex document that has a listing of the deposition testimony and the cases that you have been involved in over the years?

A. No, I have not seen that.

Q. Have you spoken with anybody other than Mr. Berman in this case?

A. Yes.

Q. Can you tell me who it was that you might have been involved with giving information or background on this case or speaking about the work you would be performing?

A. Well, I spoke with his nurse, Jane, because she had -- she was trying to forward some information to me and -- but it didn't have anything to do with opinions. And, also, his secretary when I had a question or I was looking for some materials or maybe even just Mr. Berman, nothing substantive.

Q. Have you had any kind of contact with Dr. Baikovitz?

A. No, I have not.

Q. To your knowledge, have you had contact with any of the other expert witnesses that have been retained on this case?

A. No, I have not.

MR. MORROW: Did you guys hear that?

MR. BERMAN: What?

A. It sounded like a door.

MR. MORROW: I asked a question. Did you hear it?

MR. BERMAN: She answered it.

MR. MORROW: I'm sorry, I didn't hear any answer on the end. Was that a yes or a no?

MR. BERMAN: It was a no.

MR. MURRAY: I didn't hear an answer either, Bob. Sorry.

MR. BERMAN: The answer was no.

Q. During the course of your professional career -- how long have you been involved in nursing?

A. For approximately almost 20 years.

Q. Since roughly 1984. What kind of different positions have you had over that time frame?

A. I worked on a general orthopedics floor, orthopedic oncology, cardiac and medical intensive care unit, home care nursing, nursing at community hospitals within Boston and outside of Boston, work over at nursing homes and orthopedic trauma unit.

Q. Have you ever worked for or with in particular any gastroenterologists?

A. Yes.

Q. Could you tell me when and what fashion you were associated with them?

A. When I worked in the cardiac and medical intensive care unit we had the endoscopy unit right next to us. So some of our patients would go there for procedures. Some of the procedures were done at bedside. So then; as well as the current time, every so often we do have patients who go down for various procedures, and they will come back up to

us.

Q. So you are comfortable in terms of looking at the nurses' care provided to a patient who was, to some degree, being overseen by a gastroenterology specialist?

MR. BERMAN: Form, predicate.

A. Yes.

Q. I would presume that also over those years you have had access to patients that had wound care issues?

A. Correct.

Q. Is it fair for a nurse in that setting, a nurse associated with wound care or from a gastroenterology standpoint, to presume that the doctors under whom they are working will actually read the chart of the patient?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. You want the doctor to read the chart. The chart is used as a communication tool, as one communication tool.

Q. But do you expect that? I mean, can you rely on a physician actually looking at the chart of the patient, as a nurse?

MR. BERMAN: Form.

A. I can't state what each individual physician's practice is, but as I stated, the chart is to be utilized as a communication vehicle.

Q. Does the things that a nurse writes in the chart, the notations that are made, they are to communicate with doctors, correct, among other things?

A. Yes, correct.

Q. And you would expect that for a patient the doctor would know where in a chart to look for specific information that he might or she might require?

MR. BERMAN: Form.

A. Well, you would want the physician to be able to look through the chart to find out the information that he's looking for.

Q. Because that's why you put it there, correct?

A. That is one reason.

Q. Likewise would you expect a doctor to examine a patient?

MR. BERMAN: Form.

THE WITNESS: Is that the end of his

question?

MR. BERMAN: Yes.

THE WITNESS: Oh.

A. I guess it depends upon the circumstances. Each circumstance is different and each physician and physician's specialty is different as to what their role is in particular delivery of care.

Q. Well, specifically in terms of a gastroenterologist that is treating a patient, would you expect a gastroenterologist to examine a patient?

A. Yes.

Q. You would expect a gastroenterologist to after performing a procedure on a patient provide follow-up care, correct?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. The doctor would do a follow-up.

Q. Have you been in the room before when doctors actually asked patients questions? I think in this, the medical field, it's called taking a history.

A. Yes.

Q. Would you agree that that's part of what

doctors are supposed to do? You have been in the rooms and in the treatment areas. Have you seen that before where doctors actually ask patients questions?

MR. BERMAN: Form.

A. Yes.

Q. Usually the patient is either answering those questions or if they can't answer the questions that's noted in the chart that the person wasn't responsive, correct?

MR. BERMAN: Form, predicate.

A. Yes.

Q. Doctors are also pretty frequently coming to you as a nurse and asking you things about patients, too, aren't they?

A. Yes.

Q. And do they come and ask you kind of specific things that might be associated with the care and treatment that they are providing to a particular patient?

A. Sometimes.

Q. Just sometimes they do that?

A. Well, communication goes both ways. So a nurse can bring it to the physician's attention or

the physician can go and ask a nurse if he has questions.

Q. When you looked through this chart did you see anything in the chart that appeared to be absent or missing from the documents that you would have expected to be there?

A. Absent such as?

Q. As not there, meaning not present in the chart.

A. A sheet for accuchecks.

Q. Anything else?

A. A plan of care having to do with the wound.

Q. Okay. Anything else?

A. Plan identifying specifics with pain.

Q. When you say "specifics with pain," what do you mean by that?

A. Location of pain, intensity, if the pain medication assisted the patient or not.

Q. Anything else?

A. That was absent, yes. When Mr. Day was noted to have an Demerol allergy on April 26, that documentation did not continue throughout the chart. And he was administered Demerol on April 29 and other times --

Q. Let me just stop you there for a second. We'll come back.

Who is it that writes orders about what medication is going to be provided to any given patient? Is it the nurses that write that?

A. No. The physician does.

Q. It's the doctor that decides what kind of medication that the patient is going to get and then writes how much the patient is going to get, correct?

A. That is correct.

Q. Did you see any evidence -- did any of the specialists or any of the treating physicians on this case ever discontinue the use of that Demerol?

A. I believe it was after -- I don't know if it was the first or the second surgery, and then it was rewritten. I don't recall the specifics on that date. But it was marked on the med sheets that the patient had an allergy to Demerol.

Q. I understand that. But my specific question is, ma'am, did you see any doctor's note or order that discontinued its use?

A. I am just looking. I don't think so.

Q. That was pretty apparent to you it looks

like. When you went through the chart you saw the notations that there appeared to be a Demerol reaction or allergy?

MR. BERMAN: Form.

A. Yes, on the medication sheet.

Q. That wasn't hidden from you. It was just right there in the chart, and doing a good job in looking through the chart you found that, correct?

A. Yes.

Q. Just like anybody else that would have looked at that chart that was competent, they would have seen that was noted there and understood that that was an issue with this patient, correct?

MR. BERMAN: Form.

A. I don't know if the physician went through and necessarily read the medication sheets.

Q. But if he had looked or they had looked or anybody had looked, it would have been seen, and it would have been there easily discernible, correct?

MR. BERMAN: Form.

A. It would have been seen if someone had looked, correct.

Q. Is it your understanding that over the years doctors frequently want to know if their

patients are allergic to different types of medication?

A. Yes.

Q. Why is that? Why would they want to know something like that?

MR. BERMAN: Form.

A. They want to know so then they do not prescribe it, and that they would know -- they would also ask what type of allergy the patient has to the medication.

Q. What kind of problems could that cause, giving a patient a medication that he or she is allergic to?

A. It could cause many different problems depending upon the patient.

Q. Okay. With Demerol what would that be? Would that be a lowering of the blood pressure?

A. It could.

Q. You would agree with me that in a patient such as Mr. Day the lowering of his blood pressure after the 26th would be a bad thing, wouldn't it?

MR. BERMAN: Form, predicate.

A. I just want to find that document. After the 26th, yes. He was having lower blood pressure.

Q. So you certainly wouldn't want to give a patient a medication that would continue to drop that low blood pressure, correct?

MR. BERMAN: Form.

A. Well, it depends upon the patient. Each patient may react a little differently and dose related, too.

Q. What about this patient?

MR. BERMAN: Form.

A. Originally he was going to be placed on the morphine pump. Because of his low blood pressure they had decided against it and -- so I'm not sure. I'm not sure why the Demerol was administered after there was a notation about an allergy. I don't know. He was also given pills.

Q. Basically they didn't go with the morphine pump because he had low blood pressure, but they went ahead and gave him a medication that he was allergic to that might have a side effect of actually lowering his blood pressure, right?

MR. BERMAN: Form.

A. True.

Q. What is Toradol?

A. Toradol is a nonsteroidal medication in an

intravenous form.

Q. What does it do?

A. Toradol is also used for pain. It can be used as an anti-inflammatory agent.

Q. Do you recall what meds he was admitted with, what type of medication he was taking before he came to the hospital?

A. Yes. He was taking both Motrin and ibuprofen, and he was also on blood pressure medicine.

Q. What kind of blood pressure medicine was he on?

A. At home, let me just find it.

Q. Can you find that?

A. I am trying to find it right now.

Q. I think if you go to the emergency room notes under "Emergency Department, Patient Assessment Sheet," there is a notation on Page 1 of 3 there that identifies meds.

A. These are the ones he had in the emergency room.

MR. BERMAN: Well, tell him.

A. The ongoing assessment says the ones that he was administered in the emergency room versus

what he came in with.

Q. He was administered Glucotrol, Lasix, potassium, Lipitor --

THE STENOGRAPHER: I'm sorry.

MR. BERMAN: Slow down.

A. Hold on.

MR. BERMAN: Slow down, please.

THE STENOGRAPHER: Repeat those. I'm sorry.

Q. Let's do it this way: To your understanding, what was he administered in the emergency room?

A. Pepcid, Rocephin, Demerol, potassium. He was on Glucotrol at home. And I am just trying to find which -- he was also on Lipitor at home.

Q. What does that do?

A. Lowers your cholesterol level.

Q. To your knowledge, was he taking any medication for high blood pressure prior to being admitted to the hospital?

A. Yes, I believe he was.

Q. What was he taking?

A. That's what I am trying to find. I think he was taking Norvasc. I believe that's what he was

on.

Q. What does that medication do?

A. It's an anti-hypertensive agent.

Q. That means it lowers his blood pressure, in layman's terms?

A. Yes.

Q. Do you see evidence that he was provided any of that medication during the course of his hospital stay?

A. Of any of the meds that we just discussed?

Q. No. The blood pressure lowering medication.

A. Yes.

Q. When does it look like he was given that medication?

A. On April 24.

Q. Are there any other dates that it appears he was given that medication?

A. The Norvasc?

Q. Yes, ma'am.

A. The 25th, not on the 26th, held on the 28th.

Q. What about the 27th?

A. The page that I have for the 27th is

circled, and then it says, "Held on the 28th."

Q. I'm looking at that, but we can't tell from this chart whether or not that medication was given on the 27th, can we?

MR. BERMAN: Form.

A. Correct.

Q. But we do know that there is an actual order that was in to hold it on April 28th? That's noted right there in the MARs --

A. Okay.

Q. -- 4/28?

A. Uh-huh.

Q. Was that a "correct"? I'm sorry.

A. Yes.

MR. BERMAN: She disregarded my instructions and went "Uh-huh."

MR. MORROW: What's that? I'm sorry. I didn't hear.

MR. BERMAN: I just said she disregarded my instructions and went "uh-huh."

Q. Could you reanswer that, please?

MR. BERMAN: She did say, "Yes."

MR. MORROW: She did, okay.

Q. Would you agree with me that on the 27th

the administration of a medication like Norvasc to a patient in Mr. Day's condition would not be a good thing?

MR. BERMAN: Form.

Q. I didn't hear. Was there an answer?

A. No. I'm just trying to find the -- I was just trying to find the vital sign sheet for -- and your question was specific to the 27th? Is that what you had --

Q. Correct.

A. Yes, this would be something that we would obtain parameters from a physician to find out what blood pressure parameters there would be to know when to hold the medication.

Q. But in your opinion as a nurse would that be a bad medication to give a patient like Mr. Day on the 27th?

MR. BERMAN: Form.

A. It would lower his blood pressure unless I would ask the physician whether he would want it administered or not.

Q. Is there any evidence, though, that a physician clearly discontinued that medication or set parameters or asked the nursing staff to come

and speak with any number of these folks before administering it again?

A. No.

MR. BERMAN: Form.

Q. But we do have a hold for April the 28th?

A. Yes.

Q. Would it be important for a treating physician, a specialist or an attending or otherwise to take a look at the accucheck sheets of a diabetic patient such as Mr. Day to see what kind of blood sugars he was running?

MR. BERMAN: Form.

MS. WOHRLE: Join.

MR. MORROW: I'm sorry. I got a beep. Did she say yes or no?

MR. BERMAN: She didn't answer yet.

A. It would be important for Mr. Day's treating physician to be aware of what his blood pressure -- blood sugars are.

Q. What about any doctor that's involved with him; isn't that a pretty relevant piece of information for a diabetic, what his fasting blood sugars -- or blood sugars are?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. I can't speak for all of the physicians, but that is an important thing to review.

Q. Which portion of the chart regarding the accucheck did you find not to be in your set of documents there when you reviewed them?

A. There weren't any accuchecks performed.

Q. None at all?

A. Correct.

Q. And the only blood sugars we see, where do they appear in the nursing note?

A. They are in the lab results.

Q. So it doesn't appear that other than through the lab work the fasting blood sugars were being checked, correct?

MR. BERMAN: Form.

A. Yes.

Q. Is there an order in this instance -- wasn't there a request that those blood sugars be taken and be documented?

A. Yes, there was.

Q. And who was it that initiated that order, do you know?

A. That order was originated on April 27. I

don't know who it is.

Q. But it's your understanding that the first request for serial blood sugars to be drawn was made on April, when, 27th?

A. Correct.

Q. Would you agree with me that in this patient, at least from a nursing standpoint, it would have been interesting to know what was taking place with Mr. Day's blood sugars really from the date of admission through the 27th when that order was issued?

MR. BERMAN: Form.

A. I'm not going to say it's going to be interesting. It would be important to know what his blood sugars are because upon admission Dr. Jaraki was holding his blood sugar medicine and thus you do want to follow the accuchecks.

Q. What is it that those accuchecks tell a person that might be reviewing this chart, a trained physician? What would you want to know that information for?

A. You want to see where the patient's blood sugar is, whether it's high, whether it's low.

Q. Why is that? What can happen if a patient

such as Mr. Day has a very high or elevated blood sugars?

A. He could become very sick.

Q. In what fashion?

A. He could -- I mean, there's diabetic ketoacidosis. There is diabetic comas. You could go one way or the other with your blood sugar.

Q. What if it gets very, very low? The same thing, you could have the same type of responses where you could just go into a coma for the most part?

A. You could.

Q. What was the first blood sugars that we saw in this chart for Mr. Day?

A. I think it was in the emergency room. Let me just turn to the page. Yes, in the emergency room. It was 328.

Q. How does that rate on the scale? Is that high?

MR. BERMAN: Form. You can answer.

A. That blood sugar is elevated.

Q. Could you quantify that for us? What are the parameters that blood sugars should be in the average adult male?

A. Well, in the average adult that is not a diabetic versus who is?

Q. Let's go with who is. A diabetic male, where should his blood sugars be to be considered normal?

MR. BERMAN: Excuse me. Objection to form and predicate. Improper hypothetical. You can answer.

A. On the 27th according to what the physician had written Mr. Day would be treated if he had a blood sugar higher than 180. So he had wanted a blood sugar lower than 180.

Q. But that's well down the line, on the 27th, after he's had the first surgical procedure, he's been scoped and now there's been the discovery of the wound in his perirectal area, correct?

A. Yes.

Q. I'm talking about at the start, back when it got rolling. On the 23rd you said it was 328. Likewise in general parameters would that be considered markedly elevated for a blood sugar?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. Yes, it would be high.

Q. Was that blood sugar receded the following day?

A. Yes, it was.

Q. What was it at that occasion? I think it's about 7:00 in the morning on the 24th, correct?

A. Yes, it was. It was 300.

Q. And that's still high, isn't it?

A. Yes, it is.

Q. In fact isn't there a little notation next to it that says "M1"?

A. Yes.

Q. What does "M1" mean in the chart?

A. That this level was called to Marie.

Q. What is it identified as next to where it says "M1" colon?

A. Panic value rechecked and called to Marie on April 25. So it was called the day after.

Q. What does the term "panic value" mean to you as a nurse?

A. That this is a blood sugar certainly outside of the norm.

Q. Was that blood sugar rechecked during the course of that day?

A. No, it was not.

Q. Do you know what time it was that Dr. Gedallovich performed the procedure on Mr. Day, the upper endoscopy, to discover this pyloric channel ulcer?

A. I believe it was late in the afternoon.

Q. So we have a blood sugar here of 300 at 7:00 in the morning, and no blood sugar was requested or done apparently prior to that procedure that took place in the late afternoon of the 24th of April, correct?

A. Correct.

Q. Likewise was there a blood sugar that was done through the evening or the night hours after that procedure took place on the 24th?

A. No, there was not.

Q. How about the following morning, the day after Dr. Gedallovich performed his upper endoscopy, and released this patient from I guess -- strike that. Let me rephrase that.

The next day, the next morning, April 25, how long had it been at that time since a reported blood sugar appears in the chemistries of this chart?

A. The last time had been April 24 at 6:55

a.m.

Q. So that's about 48 hours?

A. Yes.

Q. Was there any evidence in your review of the chart that Dr. Gedallovich asked there to be some blood sugars drawn on his patient?

A. I did not see that.

Q. All right. Well, let's move forward. Let's get up to the afternoon of April the 25th. There was some blood tests that were performed, but was there a glucose that was done on Mr. Day?

A. No, there was not.

Q. Okay. Do you know when it was on the 25th that Dr. Baikovitz happened to come by and spend his time in follow-up with Mr. Day?

A. I believe that was -- I think it was early afternoon.

Q. Did you see any reference in Dr. Baikovitz's progress notes that he had come to the realization that this patient now hadn't had a fasting blood sugar done since the morning of the 24th at 6:55 a.m.?

MR. BERMAN: Form.

A. I don't see that.

Q. Is there an order to have that done?

A. No, there is not.

Q. Do you have any progress notes on the 25th written by Dr. Baikovitz's hand?

A. Yes.

Q. What do we see there? Could you tell me what you make of that note, what it says?

MR. BERMAN: Form.

A. "2:50 p.m., GI; no further bleeding; abdomen nontender; hemoglobin 10.1" --

Q. How would he know that? I'm sorry to stop you and interrupt you. But how would he know what this patient's hemoglobin might be at 2:50 p.m. on April the 25th?

A. He may have spoken with a nurse or he may have checked the lab results.

Q. How would he have done that?

A. He may have called the lab. He may have gone on to the computer to check the lab results. I don't know how he personally obtained them.

Q. Do you think it could have been in the chart there for him to read?

MR. BERMAN: Form.

A. It could have been.

Q. Either way we know that he at least knows what the hemoglobin is, correct?

A. Yes.

Q. Is there any mention there in any way, shape or form of what Mr. Day's blood sugars are?

MR. BERMAN: Form. Asked and answered.

A. Not in this note.

Q. Let's go and look at his physician's order.

MR. BERMAN: Whose order?

MR. MORROW: The same doctor I have been asking about, Dr. Baikovitz. We just looked at his progress note. Now let's take a look at his corresponding order, if there is one, for the 25th of April.

MR. BERMAN: Thank you.

A. There are none.

Q. There is not a single order there that you see for Dr. Baikovitz. Are you sure?

MR. BERMAN: Form.

A. Correct.

Q. Well, there is some things that are written on the 24th. Let's take a look, if you would, please, at the first actual physician's order for April the 25th.

MR. BERMAN: You are talking the 25th or the 24th? You just switched.

MR. MORROW: I'm probably not paying a good enough attention to this chart.

Q. Would you please look -- let me backtrack.

MR. MORROW: Was she looking in April the 24th?

MR. BERMAN: No. She was looking at the 25th.

MR. MORROW: If I said the "24th," I misspoke.

MR. BERMAN: I thought so.

Q. What is the first order contained for April the 25th?

A. The first order was by Dr. Jaraki.

Q. All right. And what does it say?

A. "Potassium and magnesium level in the morning. Demerol 25 to 50 milligrams IV every four hours. Give Lasix as ordered."

Q. That's a.m. I guess that means the same thing in medical terms as it does everywhere else. He's there in the morning, correct, or that order is written in the morning?

A. Yes.

Q. What time did Dr. Baikovitz stop by?

A. He was in the afternoon, approximately 2:00.

Q. Do you have any reason to believe that that order --

A. 2:50 p.m.

Q. -- of April 25th, 2000, in the a.m. was not in the chart for Dr. Baikovitz to see when he came in?

MR. BERMAN: Form and predicate.

MR. MORROW: I'm sorry. Did she answer that question?

MR. BERMAN: No.

A. No, I didn't. I would think it would have been in the chart, but I'm not certain since this was either a verbal order or a telephone order. And I don't know when -- actually, it would have been there because Nurse Messina -- I apologize -- had written it on the -- she worked the night shift.

Q. Is there any evidence that Dr. Baikovitz appreciated the fact that the patient he was following up on had been given a medication earlier that same day that he was allergic to?

MR. BERMAN: Form.

A. The Demerol allergy was not noted until April 26. So it was after that date.

Q. Do you know whether or not Dr. Baikovitz --

THE OPERATOR: Excuse the interruption. I have a Ms. Barbara Wohrle. I am returning her to the conference. She said she was cut off. Hold on, please.

(Pause)

THE OPERATOR: Ms. Wohrle, are you there with us?

MS. WOHRLE: Yes.

THE OPERATOR: Thank you. There's your party.

MS. WOHRLE: Our electricity went out when you said, "Are there any orders on the 25th?"

MR. MORROW: If you don't mind, maybe go off the record for a second.

(Discussion off the record)

BY MR. MORROW:

Q. Do you remember what I was asking you? I believe I said something about was it noted that he had an allergy to Demerol, and you said, I think, "Well, that wasn't charted until quite a bit later on the 27th," correct?

A. No. I stated it was not charted until the 26th.

Q. Okay, the next day. How was that discovered?

A. I don't know.

Q. But he does, at least from the chart, have an allergy to this medication? And we know it was given to him on April the 25th, correct?

MR. BERMAN: Asked and answered.

Q. Will you agree with me that it was given to him on April the 25th, 2000, sometime in the morning?

A. I am just pulling out the med sheets for the 25th. I don't see Demerol given on that date.

Q. So it doesn't appear on the MARs?

A. The writing at the top of my sheet is faded. I'm just trying to read this. He was given Percocet on the 25th.

Q. He was given it appears to be Percocet later that day, about 1 p.m.?

A. Yes.

Q. Can you tell from his chart whether or not he received Demerol?

MR. BERMAN: You are talking about on the

25th, correct? Correct?

MR. MORROW: Yes, sir.

MR. BERMAN: I just wanted to make sure.

A. I don't know. I don't know what that says.

Q. What types of signs or symptoms of an allergic reaction might be present if a patient was given a medication that they were allergic to such as Demerol in this case?

A. There are different signs that patients can have. They can drop their blood pressure. It could cause confusion. It doesn't have to be so-called an allergy. It could be an adverse reaction.

Q. Is that the kind of thing --

A. Nausea, vomiting.

Q. Those type of adverse reactions as you have described, are those the kind of things that a doctor might be looking for if they were to go in and visit with the patient and find out how they are doing?

MR. BERMAN: Form, predicate.

A. I don't know if they are looking for it. If there is something that is not right, they will investigate further. But also the nurse has to communicate if there's been a problem at

administering the medication to a patient and what the reaction would be, and she would communicate this by speaking with a physician as well as documenting it in the record as to what the reaction would be.

Q. Would you expect a physician examining and speaking with a patient to be able to determine if that patient was having an adverse physical reaction to a medication?

MR. BERMAN: Form, predicate.

A. Not necessarily, if it wasn't pointed out to him, because perhaps the reaction occurred earlier.

Q. But if it was apparent, would you expect a physician examining a patient to be able to identify that that was a problem?

MR. BERMAN: Form, predicate. It assumes facts not in evidence.

MS. WOHRLE: Join.

A. It depends what you mean by "apparent." When the physician goes in to do his assessment, if he finds that there's -- you know, perhaps if there were some confusion, he would perhaps ask -- he would ask the nurse if the patient had been given

any medication to cause this confusion.

Q. Does it appear to you that Mr. Day had been given Demerol at any time prior to that? Didn't he receive some on the 23rd as well?

A. Yes.

Q. Was there ever anything charted here other than the 23rd, 24th or 25th by anyone that he was exhibiting signs of an adverse reaction to that medication?

A. No.

MR. MURRAY: Bob, this is Robert Murray. I'm sorry. I couldn't hear her answer.

MR. BERMAN: It was no.

MR. MORROW: I didn't hear her answer at all. What was it? No.

MR. BERMAN: Yes, it was no.

MR. MORROW: We are not getting it on this end. We are not making it up to be difficult. We can't hear her.

MR. BERMAN: Did I say you were making it up?

MR. MORROW: Yes.

MR. BERMAN: You are hallucinating.

MR. MORROW: It wouldn't be the first time.

Q. Do you recall what the white blood count was for Mr. Day when it was first drawn on him?

A. Yes. His white blood cell count was 38,800.

Q. Where is that rated? Is that high or okay or what?

A. That's a high level.

Q. How high is that? What are the parameters in terms of what the white blood count is supposed to be in a patient such as Mr. Day?

A. Well, each facility has their own parameters. Very commonly it's between 5,000 and 10,000 is normal. Some hospitals are 5,000 to 12,000 is normal. I was just going to look up what is normal for this hospital. This hospital is 4.5 to 11,000 is normal as their reference range.

Q. If it was 38,800, that would be three times, at least, higher than it should be, correct?

A. Yes.

Q. What does that mean as a nurse if you see a lab such as that on a patient? What does that mean generally?

MR. BERMAN: Form.

A. It means that something is going on with

the patient which warrants further investigation.

Q. Such as? What kind of things would cause a patient's white count to be actually more than three times what it should be?

A. Infection can. Going along with infection, sepsis.

Q. What is sepsis?

A. An overwhelming infection.

Q. So it's a different type of infection, a worse one?

MR. BERMAN: Form, predicate.

Q. Right.

A. Yes.

Q. What was his white blood count on the 24th?

A. 35,200.

Q. All right. That's still three times higher than it should be, correct?

A. Yes.

Q. What was the blood count on the 25th?

A. There was not one.

Q. Do you know why?

A. No, I don't.

Q. Is there any evidence that Dr. Jaraki -- excuse me -- Dr. Gedallovich following the procedure

that he performed on Mr. Day requested that a white blood count be done on this patient to see if it was still now three times higher than it should be?

MR. BERMAN: Form. And you are guilty of a Freudian slip, my friend.

MR. MORROW: Move to strike. This case is about slips. There is plenty of them.

MR. BERMAN: Move to strike that. We can both -- we can agree that we can strike both those comments physically from the record?

MR. MORROW: Yes, absolutely.

A. I am sorry. Your question was?

Q. Is there any evidence that after Dr. Jaraki -- excuse me.

MR. MORROW: Can I strike that one, too, Bob?

MR. BERMAN: I'm not going to comment on it.

MR. MORROW: Because actually we know who did the upper endoscopy.

Q. Who is the person who actually stuck a camera down Mr. Day's throat?

MR. BERMAN: Why are you wasting time with this? Come on. Let's get to the issues in the

case, Mark, please.

Q. -- on the 24th on this patient?

A. Dr. Gedallovich did the endoscopy.

Q. Is there any evidence that Dr. Gedallovich requested a follow-up white blood count of this patient?

A. Dr. Gedallovich is the consult. That's the primary physician's responsibility to follow the patient as a whole.

Q. Is there any evidence that Dr. Gedallovich requested a white blood count as follow-up to his endoscopy of his patient on April the 24th?

A. No.

Q. No white blood count was done at all for April the 25th, correct? At least it doesn't appear in the labs.

MR. BERMAN: Form. Asked and answered.

A. Correct.

Q. And we know that Dr. Baikovitz came into that room sometime in the latter part of the day of April the 25th. Did he make any notations whatsoever in the progress notes about these two readings of an elevated white count in this patient?

A. No.

Q. Did he make any orders whatsoever about doing any additional labs or blood counts to determine if the white blood count was still high?

MR. BERMAN: Form. Asked and answered.

A. No.

Q. In fact he didn't make any orders at all about this patient?

MR. BERMAN: Asked and answered.

A. Correct.

Q. This is a patient with a blood sugar that has a panic value reported in the lab. This is a patient that has a white blood count that's three times higher than it should be, correct?

MR. BERMAN: Form. Asked and answered.

A. Correct.

Q. And this is also a patient that showed -- do you know what "bands" are when they report differentials for these automated blood counts?

A. Yes.

Q. What are those? What things do the bands identify when they look through this blood sample?

A. It indicates a left shift of the white blood cells.

Q. What does that mean?

A. It can be indicative of an infection or certainly a process that's going on.

Q. And the first time that Mr. Day's were done, just how high were the bands?

A. They were 47.

Q. What would be the range? Zero would have been normal, correct?

A. Yes.

Q. And the highest that you could go and still be normal here would be, what, a five?

A. Yes.

Q. So this was nine times higher than it should have been on the first day, the April the 23rd blood test, correct?

A. Correct.

Q. When they came back on the next day which was the 24th they had dropped a little bit. Now they were only eight times higher than they should have been, correct?

MR. BERMAN: Form.

A. Close.

Q. Well, I guess we are a point off. So I'll say, what, 7.75. They were still just tremendously elevated, correct?

MR. BERMAN: Form.

A. Yes, they were.

Q. Now, what were the bands on April the 25th?

A. There weren't any done.

Q. Do you know why?

A. No, I don't.

Q. Will you agree with me that if a consulting physician wants a test done they have every right to perform it, correct?

MR. BERMAN: Form, predicate.

MS. WOHRLE: Join.

A. Every facility is different with regard to consultants writing primary orders. That is something that could be communicated to the primary physician.

Q. Has anything been provided to you in the form of a policy or procedure or any testimony to establish that in this case the consulting physicians were not allowed to request automated blood counts of their patients?

MR. BERMAN: Form.

A. No.

Q. You have been doing this a long time. You have worked in the orthopedic trauma center so you

know about wounds and what they can do if they get infected, correct?

A. Yes.

Q. Especially wounds in the perirectal area?

A. Yes.

Q. And they are particularly susceptible for infection simply because of their location, right?

A. Correct.

Q. Do you see anywhere in this chart that any person, nurse, candy striper, attending physician, consulting physician, janitor, anybody in this hospital made a notation of the wounds that were discovered on Mr. Day prior to its discovery on the morning of April the 26th?

MR. BERMAN: Form.

A. No.

Q. Likewise you have been doing this a long time. If you see a diabetic patient -- Mr. Day was diabetic, correct?

A. Yes.

Q. If you see a diabetic patient with a white count as high as 38,000 with a left shift and 47 percent bands along with an elevated blood sugar, do you think he has an infection?

MR. BERMAN: Form.

A. That would be something that the physicians would determine, whether or not he has an infection at that time.

Q. From a nursing standpoint, though, are you going to take a look at the patient to see if there are any outward signs or symptoms of an active infection in a patient such as I have just described to you?

A. Yes.

Q. Because those readings are pretty alarming, aren't they?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. They are elevated, yes.

Q. But I used a different term. I understand that they are elevated. We went through that. One is three times higher, the other is nine times higher. Are they alarming?

MR. BERMAN: Form.

A. They are red flagged to keep a close eye on my patient.

Q. Are those panic values?

MR. BERMAN: Form.

A. Was that a question?
Q. Yes, ma'am.
MR. BERMAN: Yes.
Q. Are those panic values?
A. Well, one in the hospital's description is considered a panic level. The others do not state that.
Q. I am asking you. I know what the chart says. In your mind is that a panic value of 38,800?
MR. BERMAN: Form.
A. It would be something important to watch. I don't know if I would use the word "panic," but certainly I would be watching and following up with my patient.
Q. From review of this chart is there any evidence that any of the consulting physicians attempted to determine prior to the morning of April the 26th what the source of infection was that could potentially cause these elevated white counts, the shift to the left, the high bands and the elevated blood sugar?
MR. BERMAN: Form.
A. I don't see anything documented, but as I said before, a consulting physician, that's not

their role. Their role is to consult on the specific things such as in this case GI. You have Dr. Jaraki who is the primary care physician who is monitoring the patient, his health care entirely, who is the one requesting these various blood tests and following the patient.

Q. Where does the gastrointestinal tract begin?

A. From the esophagus all the way down to the rectal area.

Q. Where was this wound found to have been festering in Mr. Day on the morning of the 26th?

MR. BERMAN: Form.

A. It was on the scrotum and the perineal area -- perianal area.

Q. Is the perianal area also inclusive of the rectum?

A. Well, the anal is the outside area, not specifically inside.

Q. So your testimony is no, that's just not part of that area?

MR. BERMAN: Form, argumentative.

MR. MORROW: I didn't ask her where it was. I wanted to know if it was part and parcel inclusive

of the rectal?

A. I don't believe that includes the rectum.

Q. Was there any evidence that there was actually rectal involvement with this infection on the morning of the 26th?

A. Inside the rectum, no.

Q. Was there a rectal performed that morning by Dr. Gedallovich?

A. No.

Q. But that is part and parcel of the GI tract, correct, the rectum?

A. Yes.

Q. Do you agree with me that even though you are a nurse, and I understand that you are not a doctor, but if you go in and find a patient that needs emergency treatment for whatever reason, you have a duty to try to obtain that treatment for that patient, correct?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. Yes.

Q. You are not allowed to walk in a room and say, "Oh, that's not something that's my job. That's another type of nurse" or "That's a doctor's

role so I am just going to write down what I see in the chart here and not do anything to try to get that patient the care that he or she needs," correct?

MR. BERMAN: Form.

A. Is that a hypothetical?

Q. No. In fact in here it looks to me like it's exactly what happened.

MR. BERMAN: Form. Move to strike.

MS. WOHRLE: Join.

Q. Does a nurse have the right to find a patient that is in an emergency situation that needs emergent care and simply write it in the chart, walk out of the room and say, "That's not my job"?

A. No, she can't do that.

Q. That would just be wrong, wouldn't it, to ignore obvious signs of an emerging problem in a patient on the part of a nurse?

A. That violates the nursing process.

Q. Who is held to a higher standard in terms of duty to a patient in your opinion, a nurse or a doctor?

MR. BERMAN: Form.

MS. WOHRLE: Join.

A. I don't really understand the question.
Q. Can nurses diagnose?
A. Nurses can make nurses' diagnoses, and that's what the nursing process is about.
Q. They can make nursing diagnoses. Can they make other medical diagnoses?
A. No.
Q. Can they call for consultants to be involved on a case?
A. The nurse will go back to the primary care physician and explain what is going on.
Q. That's not my question.
MR. BERMAN: Excuse me. Don't interrupt her.
Q. Can a nurse call for a consult on a patient?
MR. BERMAN: Excuse me. Don't interrupt her. Let her finish, then re-ask the question. Finish your answer, please.
A. A nurse would take the findings and go report that to the primary care physician and ask that the primary care physician come and evaluate the patient and make a plan of care as to what would transpire next and who would be contacted to come

visit this patient.

Q. So she can take some steps, but that really wasn't my question. Listen to my question because it's very clear and precise.

Can a nurse call for a physician consult on a case? Can a nurse request directly, not by going somewhere and writing and calling and talking -- can a nurse request a physician consult on a case?

MR. BERMAN: Form. Asked and answered.

A. If requested to do so by the physician.

Q. That's not my question. My question is real simple. We'll try it one more time.

Can a nurse request a consult on a case?

A. She cannot initiate a consult, but she can follow the directions of a physician to place the call for a consult.

Q. So the answer to my specific question, though, is no, is it not?

MR. BERMAN: Form. Asked and answered. You can answer.

Q. Correct?

A. We do not initiate our own contacts to consultants.

Q. Do nurses other than ARNPs dispense

medication through their own volition?

A. No.

Q. There has to be an order from a doctor to do so, correct?

A. That is correct.

Q. Do nurses go to school as long as doctors do to learn of a specific specialty?

MR. BERMAN: Form.

A. No, they do not.

Q. You told me that there were a number of things that were missing from the chart, the accucheck, the plan of care, the specifics obtained and the Demerol allergy. Was there anything else that you found that was not in this chart?

A. I think the med sheets for the 26th, but I'm not sure.

Q. Anything else?

A. I think that's it. Well, I mentioned wound care plan, wound document, and actually, there would be some type of telemetry sheet following the heart rhythms, the rate, whether or not there is any ectopy, and that would be in there, too.

Q. Wasn't there evidence of some tachycardia that occurred prior to the discovery of this wound?

A. Yes.

Q. And that sheet doesn't appear in the chart, correct?

A. Correct.

Q. But it's noted, is it not, that there was such an occurrence?

A. Yes.

Q. And when did that occur?

A. I thought I had read something on the 25th. I know it occurred on the 26th. I think I had seen something on the 25th.

Q. Is that an important occurrence in a patient such as Mr. Day, the occurrence of this elevated heart rate?

A. Well, it's an abnormal heart rhythm, and that is important.

Q. Do you know what time was charted it having occurred on the 25th?

A. Yes. 11:14 a.m.

Q. So that too occurred before Dr. Baikovitz ever set foot into his hospital room, correct?

A. Yes.

Q. Is it referenced in any way in the progress notes?

A. No. I don't know if it had been placed in the chart by that time.

Q. We know that it occurred supposedly at what time in the morning?

A. 11:14.

MR. BERMAN: Mark, excuse me. Off the record.

MR. MORROW: Sure.

(Discussion off the record)

MR. BERMAN: Thank you.

BY MR. MORROW:

Q. You have a listing, I believe you said earlier, of opinions in this case?

A. I have opinions, yes.

Q. If you would please tell me what they are?

A. Sure. As I stated before with regard to this patient being a diabetic, there were no accuchecks that were performed on the patient's medications, the Glucotrol was also being held. This patient had intake and output measured, yet there were no hats in the toilet to collect any of the diarrhea and observe anything that Mr. Day was excreting, and you would need to do that.

Q. Let me stop there. I don't mean to

interrupt you. Are you about to move on to another opinion?

A. Yes.

Q. Let me ask you quickly about the hats in the toilet. Is that something the nursing staff should have initiated on their own or one of these gastrointestinal doctors have requested there be retention of this material that was being evacuated for testing?

A. This would be something within the scope of nursing to perform. Nursing should automatically be putting the hat there since they know that he is guaiac positive, and that he was having diarrhea, that they would need to observe this.

Q. If it hadn't been done by the 24th would it be incumbent upon the physician to say, "Hey, let's get a hat, please, in the commode"?

A. The physician may not even know. They may think that the stool is being observed by the nursing staff.

Q. Is there any evidence that there was particularly on the 25th some notations made about there actually being some bloody evacuations?

MR. BERMAN: Form.

A. There were notations.

Q. All right. And is there any evidence that Dr. Baikovitz appreciated that at 2:50 p.m. on the 25th in his progress notes?

A. He actually states, "No further bleeding."

Q. Does that contradict what's written in the chart by the nurse?

MR. BERMAN: Form.

A. Are we -- I'm sorry. Which date are we on? The 25th?

Q. The 25th there is a note that we had gone through on the afternoon attended by Dr. Baikovitz there is no further bleeding. I imagine you have looked at that. Does that contradict the documentation in the chart by the nurses?

MR. BERMAN: Form.

A. Actually, the nurse doesn't note blood on the 25th.

Q. That's Nurse Messina that you are referencing?

A. Yes.

Q. When is her notation of the bloody rectal evacuation?

A. That was on the 24th.

Q. What time?

A. Well, 6 a.m. she makes a reference of -- has numerous bloody rectal evacuations and then there is a nurse that comes in at 8 a.m.

Q. What about 4/24 at 23:30 just before midnight on April the 24th?

A. "Evident for some rectal bleeding."

Q. So that's charted there, too, correct?

A. Yes.

Q. And between the time that that's noted in the chart at about 11:30 at night on the 24th and when Dr. Baikovitz sees this patient the next day, are there any other physicians that actually go and examine him, Mr. Day?

A. Dr. Jaraki is in. I'm not sure what time, though.

Q. Is he as a primary care doctor responsible for addressing issues associated with rectal bleeding?

A. He would be observing everything on the patient.

Q. Who is more acutely able to deal with and address and respond to a notation in the chart such as rectal bleeding?

A. They both can.

Q. Who is going to be more trained? Who is going to be the specialist that addresses the issue of rectal bleeding, a primary care doctor or a gastroenterologist?

MR. BERMAN: Form.

A. They both can.

Q. Who would you prefer, to treat a patient that has rectal bleeding, a primary care physician or a specialist who has been trained in the GI system such as these gastroenterologists?

MR. BERMAN: Form.

A. This patient was having melena, and they can both -- they are both trained to monitor that.

Q. My question was, what would your preference as a nurse be, to have the primary care doctor take a look or have the specialist involved in this area take a look?

MR. BERMAN: Form. Asked and answered. You can answer it again.

A. They both can.

Q. I understand they both can. The question is predicated on the word "preference." Who would you prefer?

MR. BERMAN: She's answered it. One more time.

A. They both can.

Q. Do you understand what I mean by "your preference"?

A. Yes.

Q. And your preference would be that both of them do it?

A. Both of them can monitor the patient.

Q. Okay. What else other than the hats -- by the way, after Dr. Baikovitz left is there any order, is there any note, "Hey, I need some stool sample done if there is any more bleeding that occurs on this patient"?

MR. BERMAN: Form.

A. No.

Q. That would be in the order section. He didn't write any orders, did he?

MR. BERMAN: Form.

A. Correct.

Q. What else do you have on your opinion sheet there? How many do you have?

A. I have a few more. The nursing staff failed to assess the patient with regard to the

odor, the drainage and the wound.

Q. When do you think that odor appeared?

MR. BERMAN: Form, predicate.

A. Well, according to Mrs. Day on the night of the 24th going into the 25th she noted some odor and some drainage, and she was asking the night nurse about it and further asked the head nurse about it in the daytime.

Q. Is there any evidence in this chart that Dr. Baikovitz when he went in and examined this patient on the 25th noticed an odor in his room?

A. No.

Q. Is there any documentation about there having been the occurrence of odor in the room in the progress notes and by Dr. Baikovitz?

A. No.

Q. Is there any evidence that Dr. Baikovitz asked the patient or his wife, if she was present, whether or not they had noticed any unusual odors in the room?

MR. BERMAN: Form.

A. Well, I don't know if the wife was there, but no, there is nothing documented.

Q. Will you agree with me that at least, I

don't know if your experience would include this, but there is quite a difference between a festering gangrenous wound, the smell of that, as opposed to consequential drainage from a cauterization procedure done in the upper GI tract?

MR. BERMAN: Form.

A. Well, Mr. Day was coming in with melena stools from having all of that ibuprofen and Motrin. So it's not just the cautery that may be contributing toward the melena in the stool. It's just the fact that he had these nonsteroidals beforehand.

Q. Does an infected wound smell different from melena?

A. Yes, it does.

Q. And it is a relatively significant difference, is it not?

A. That's up to the person's nose and how well they smell.

Q. You would expect a gastroenterologist to know the difference between the smell of an infected wound and melena, wouldn't you?

A. Yes.

Q. Okay, "Failed to assess as to the odor."

What's next?

A. Drainage.

Q. And you are saying they failed to assess that drainage as well, correct?

A. Yes.

Q. When you looked at the entry that was made by Nurse Messina you didn't know what she was talking about?

A. Which entry are we talking about?

Q. Pick one. Which was the first one that you saw. Was that the 24th?

A. Correct.

Q. You looked at that and, what, you didn't think it was really descriptive enough?

MR. BERMAN: Form.

A. Correct.

Q. And you would like to see things in there such as what?

A. Measurement of, you know, if this patient had bloody evacuations. I know in her deposition she stated that there were no BMs during the night and that she relies on the patient if there is some drainage that the patient himself will have to clean himself up. And certainly if there is something

going on the nurse needs to take those objective findings and communicate that with the physician.

Q. Because the physician needs to know things like color, consistency, the amount, all kinds of things about what it was that was evacuated from Mr. Day's bowels, correct?

MR. BERMAN: Form.

A. That is correct.

Q. Is there any evidence in the chart that either Dr. Gedallovich or Dr. Baikovitz ever asked those questions of anybody?

A. I don't know if they did or not. They didn't write that.

Q. So the answer is there is no evidence in this chart that, in the progress notes or in the orders, Drs. Gedallovich or Baikovitz ever appreciated that this had taken place and asked questions similar to those that you had when you read that entry, correct?

MR. BERMAN: Form.

A. They may have asked and just not documented it. I don't know. But certainly they do write afterwards "No further bleeding."

Q. Is there any evidence that they even knew

that this was even taking place?

MR. BERMAN: Form.

Q. I'll limit it because that's compound. Is there any evidence that Dr. Baikovitz specifically was referring to the bloody rectal evacuations that are charted by this Nurse Messina on the morning of the 24th?

MR. BERMAN: Form.

A. I don't know. I know that the information that was communicated by the nursing staff to he and Dr. Jaraki happened to have been about the potassium. There is nothing specific about the rectal drainage.

Q. In fact it's actually called rectal bleeding, isn't it, Nurse, on the 24th at 23:30? It doesn't say "melena." It doesn't say "Evacuation." It doesn't say "Drainage." It says, "Evidence for some rectal bleeding," correct?

A. That is correct.

Q. You didn't have any problem finding that in the chart?

A. Correct.

Q. It's actually one of those nursing notes that's written very well, and it's very easy to

read, isn't it?

MR. BERMAN: Form.

A. I saw it there.

Q. But it's easy. It's not something you had to go looking for. If you were trying to find out what was going on with this patient and you looked in the notes, it was just right there for you to see, correct?

MR. BERMAN: Form.

A. It was in the notes, yes.

Q. And it occurred at the same time that another relatively significant event took place where this patient ripped his IVs out of his arm and wanted to go home?

MR. BERMAN: Form.

A. Yes.

Q. This patient got out of bed on the night of the 24th at some time around 11:30, ripped his IVs out of his arm, had rectal bleeding and wanted to go home?

A. That is correct.

Q. Is there any reference to that change in mental status on the 25th when Dr. Baikovitz comes in and pens his 15 or 20 word progress note?

MR. BERMAN: Excuse me. Objection to form and predicate.

A. There is no reference.

Q. Let me re-ask that question because Bob has a fair objection.

Is there any reference to the change in mental status that occurred during the early morning hours of the 25th and the late, late hours of the 24th in Dr. Baikovitz's progress note?

MR. BERMAN: Form and predicate.

A. No.

Q. Keep going. We got through the drainage. What else do you have there?

A. "Failed to assess the patient's wound."

Q. Does that mean failed to discover it or you mean failed to assess it after it was discovered?

A. Both.

Q. Who was it that actually discovered this wound? Wasn't it one of the morning nurses on the 26th?

A. I believe it was Mrs. Day who pointed this out to the morning nurse.

Q. Would you agree with me that there is evidence in Mrs. Day's deposition testimony that had

been in existence for a significant period of time up to and including 24 hours prior to its discovery?

MR. BERMAN: Objection to form and predicate. It assumes facts not in evidence.

A. I don't understand your question.

Q. If you look at Mrs. Day's depo, and you did that, didn't you?

A. Yes, I did.

Q. Did you see evidence in there that in fact this wound had started to show some signs of its creation late on the 24th according to her, just according to Mrs. Day?

MR. BERMAN: Form, predicate.

A. I did see that on the night shift. She spoke with a night nurse as well as a head nurse or nursing supervisor on the 25th.

Q. And there is evidence on the 25th as well that she was pointing this wound out to somebody?

MR. BERMAN: Form.

A. That is correct.

Q. Will you agree with me that if it existed on the 24th and it existed on the 25th, the nurses as well as the doctors failed to identify that it was there?

MR. BERMAN: Form and predicate. It assumes facts not in evidence.

MS. WOHRLE: I'll join.

MR. BERMAN: You can answer.

THE WITNESS: Oh.

MR. BERMAN: Unless I tell you not to answer, you answer them.

THE WITNESS: I'm sorry.

A. On the 25th the nursing staff didn't even give him a bath that day. He had refused. So they did not note it, and further they were not -- they were giving rationale to Mrs. Day as to why this was occurring because he was not moving around in the bed.

Q. I think maybe you didn't hear my question. The doctors didn't find it either, did they, on the 24th?

MR. BERMAN: Form, predicate. It assumes facts not in evidence.

MS. WOHRLE: Join.

A. I don't see that the doctors were informed that there was a process going on that they would need to evaluate the patient there.

Q. Okay. That's not my question. Is there

any -- actually, do it this way: Would you please point to any location in the chart where any of the doctors involved in the care of this patient noted the existence of a wound on Mr. Day's perianal or perirectal area prior to the morning of April 26th?

A. They did not. There is no documentation.

Q. What else do you have?

A. With regard to the wound after it's discovered the nursing staff failed to monitor it and failed to make a plan of care as to how would they treat this wound, how would they mark the wound to find out if it was growing and what would they do about it as well as initiate a stat consult to the wound care team.

Q. I'm sorry. I couldn't hear the end of that.

A. As well as the nursing staff had the duty to place a stat consult to the wound care team, nurse to nurse.

Q. Is that something that a physician can do, too, ask the wound care folks to get involved, if you know?

A. Perhaps they can. Perhaps they can.

Q. You would actually presume that, wouldn't

you, that a physician in a hospital such as this could ask the wound care center there be involved and consult on a patient?

MR. BERMAN: Form.

A. If the physician is aware that they actually have a wound care team. Not all facilities have a wound care team.

Q. Is there any evidence on the morning of the 26th that Dr. Gedallovich said he wanted a full evaluation and a care plan developed by wound care as to this patient?

A. Not by the wound care team, no.

Q. What else do you have there?

A. That the nursing staff in whole failed to follow the nursing process. Also, they failed to document, having to do with the wound and its growth, the change in appearance. Also pain level; specifics, where is the pain located, is the pain medication working, and evaluating the patient as to where the pain is occurring.

Q. This patient also came to the hospital with some pain, didn't he?

A. Yes, he did.

Q. He had low back pain, correct?

A. Yes.
Q. Was there ever any determination that you saw up until the morning of the 26th as to what was the cause of that back pain that was making this gentleman take so much of the over-the-counter pain medication?
MR. BERMAN: Form.
A. No.
Q. By anybody?
MR. BERMAN: Form.
A. He has a history of back pain, and he didn't know that -- no. The answer is no.
Q. But it was readily apparent that he was taking a tremendous amount of over-the-counter medication to try to alleviate that very back pain, correct?
MR. BERMAN: Form.
A. Yes.
Q. Did any of the doctors ever find out what that was, that back pain that started this process?
MR. BERMAN: Form.
A. Not that I saw.
Q. Did anybody try? Does there appear to be any type of abdominal CTs or other such testing

performed to try to find out what was going on?

MR. BERMAN: Form.

A. I did not see that.

Q. Nurses can order abdominal CT scans, can they?

A. No, they cannot.

Q. Who does that?

A. The physician.

Q. Which one? Who in this case would have the authority, as you know it generally, at a hospital to order an abdominal CT scan of this patient?

MR. BERMAN: Form, predicate. Improper hypothetical.

A. All physicians can.

Q. How do they do that? They just write it in the orders?

A. And/or call.

Q. There was no abdominal CT scan performed on Mr. Day during his stay at this hospital, correct?

A. Correct.

Q. Okay. Other items that you consider to be deviations by the nursing staff?

A. Yes. They failed to follow the chain of command when he started having ventricular

tachycardia. There is a prolonged period of time when the nurse was unable to reach Dr. Jaraki. And she herself stated in her testimony that as time went by and she needed somebody she would go up the chain of command and that would include calling a nursing supervisor and calling other people if necessary, and she did not do that.

Q. What was the date that that occurred?

A. All those telephone calls to Dr. Jaraki was on April 26th, but there was also ventricular -- there were ventricular beats on the 25th, and I don't see that those were communicated either.

Q. But they are charted, are they not?

A. It's on a rhythm strip. There is no notation about them. They also --

Q. There is no notation that allows you to discern that there was a V-tach on the 25th in the chart, as you see it, correct?

MR. BERMAN: Form. You cut her off.

MR. MORROW: I'm sorry.

MR. BERMAN: I know. That's okay. Go ahead. Finish your last answer.

A. They failed to document what they should when it comes to "here we have a patient in

telemetry who is supposed to be monitored," observed with a heart rhythm, the rate, any ectopy, and that would be documented on a sheet, not just rhythm strips that are done some are every eight hours, some are every four hours. You need consistent documentation talking about if there is any ectopic beats.

Q. The V-tach that occurred on the 26th, does it appear to coincide with the cleaning of the wound?

A. Well, cleaning of the patient. I don't know necessarily of the wound.

Q. Does it appear to coincide with that cleaning that started being done that morning?

A. I understand that to be.

Q. What time was that done?

A. I believe that was between 8:00 and 8:15.

Q. Was there any reference that you recall to that V-tach by the first physician that was present on the scene after this wound was discovered?

A. I don't know if that was communicated to the first physician after it occurred.

Q. Well, that first physician would be Dr. Gedallovich, correct?

A. That is correct.

Q. And his progress note of April the 26th doesn't reference the occurrence of any V-tach at all, does it?

A. That is correct. I don't know if he had access to that information.

MR. BERMAN: I need to take a break. You said 10 or 15 minutes. I am calling my office.

MR. MORROW: I'll tell you what. Why don't we do this: Let's take a break. I'm almost done unless she has a whole lot of other opinions.

Q. How many more of these after chain of command do we have?

A. A few more.

Q. Two or 14? I need to know. If you can help me, please.

A. I think five. Yes, about five.

MR. BERMAN: Do you want to take a break or do you want to ask them?

MR. MORROW: Either way. Let's do that. Let's go off the record and start making phone calls, Bob.

MR. BERMAN: Let me do that.

(Recess taken from 12:19 to 12:23 p.m.)

BY MR. MORROW:

Q. Are there any other opinions that you have there that we could kind of run through and summarize real quick?

A. Yes. We talked about pretty much -- well, actually, we didn't talk about it. Communicating changes to the physician. It certainly is the nursing responsibility that if they see something abnormal, assess a patient and find something, it's up to them to communicate all of those findings to the physician.

Q. Next?

A. They failed to act as a patient advocate with regard to calling the wound care nurse and also when the patient had ventricular tachycardia and also implementing a plan of care for this wound. This was a gentleman who had been up walking around and then had this wound on the 26th.

They failed to initiate a plan, as I said before. There was no notations of aerating the wound or turning the patient or obtaining a mattress for the bed.

Q. Does that kind of go back to wound care?

A. Yes.

Q. Are there any new opinions that we haven't had an opportunity to hear from you about, that we haven't gone over?

A. Yes. They administered the medication Toradol, and this patient had a history of renal failure. And also it's very important for a nurse caring for a patient to know what his history is. And Nurse Messina stated she didn't know that the patient was diabetic.

Q. Was there any discontinuation of the Toradol by a physician?

A. I don't recall. I can look.

Q. That would be something that a physician could do, correct? They could say, "Hey, wait a minute. Here is a guy with renal failure. Maybe we should DC the Toradol"?

MR. BERMAN: Form.

A. Yes, but a nurse prior to administering the medication needs to know what the side effects can be and know what the patient's history is before she administers the medication.

Q. Agreed. And a doctor should monitor the patient to see what medications they might be on, correct?

MR. BERMAN: Form.

A. Yes. It's teamwork.

Q. Did any of the physician members of this team identify that as a potential problem and address it through orders?

MR. BERMAN: Form.

A. Not that I saw.

Q. Does that surprise you?

MR. BERMAN: Form.

A. Well, it surprises me that a nurse would administer this medication.

Q. What about a doctor letting it be given to his patient?

MR. BERMAN: Form.

A. I understand what you are saying, but it's the nurse who is actually doing the administering. So she has to be aware of the patient's history as well as the physician.

Q. But nobody caught it? I mean, to shorten it up, nobody figured this out, right?

MR. BERMAN: Form.

A. Correct.

Q. What else?

A. Those are my opinions.

MR. MORROW: We are real short on time here. I have to be at a mediation pretty soon. Bob, why don't you go ahead, and do what you need to do.

MR. BERMAN: Okay.

CROSS EXAMINATION

BY MR. BERMAN:

Q. Barbara, could you state for the court and jury -- tell us about your background.

A. I am the advanced clinician of the orthopedic trauma department at Mass. General Hospital. I have my bachelor of science in nursing and advanced certifications in orthopedics and legal nursing.

Q. You have years of clinical experience in taking care of patients such as Mr. Day?

A. Yes, that is correct.

Q. At my request did you review various materials including the medical records and depositions in this case?

A. Yes, I did.

Q. And did you formulate opinions with respect to the nursing care that was offered this patient in this case?

A. Yes.

Q. The opinions that you have with respect to the nursing care, are they within a reasonable degree of nursing probability?

A. Yes, they are.

Q. And could you please state for the court and jury what your opinions are regarding the nursing care that was delivered in this case by the nursing staff at Memorial Pembroke period?

MR. MORROW: I object to the form.

A. Briefly, the nursing staff, they are the eyes and ears for the physician. And if you have a patient and/or the significant other stating to you complaints and concerns that they have with their loved one, it's your responsibility as a nurse to further evaluate this patient, and aside from evaluating the patient, communicating all of your findings to the physician as well, and in this case I don't see that that was done. And further, they failed to follow the chain of command and communicate changes and document about what was transpiring with his wound.

Q. What do you mean by "the chain of command"?

A. Chain of command, if you can't -- if you can't reach the physician then contacting your

charge nurse, your nursing supervisor and/or other physicians that could assist you in a matter.

Q. Do you see any indication in this record that that was done in this case?

A. No, I do not see that.

Q. Do you have any other opinions with regard to the delivery of the nursing care?

A. There was very poor documentation and very poor monitoring of this patient. The nursing staff is stating that there is some bloody drainage. There is no measurements taken, and this information is not even communicated to the physicians.

Q. Are there any other opinions that you have?

A. With regard to delivery of medications, as I mentioned earlier, and failing to follow physician orders and failing to be a patient advocate.

Q. Could you explain what you mean by there was a failure to be a patient advocate?

A. The nursing staff knew that there was something going on with this patient; such as when the wound was discovered, the nursing staff had a duty to then follow and figure out the plan of care that would be delivered. And, also, the nurse stated that she knew this was not a decubitus, what

would be done, what would the plan be. There was a consent form signed stating that these were decubitus, yet the nurse knew that these were not decubitus wounds. It's her responsibility to find out what process is going on to best identify a plan of care for her patient.

Q. And do you have any other opinions?

A. As I stated before, the communication factor, that when a patient's family is making complaints you have to investigate. You have to assess your patient and then communicate these findings to the primary care physician and figure out a plan of care.

Q. Do nurses act as the eyes and ears of a physician?

A. Yes, they do.

Q. Is it the nurse's responsibility to do that function?

A. Yes, absolutely.

Q. In your opinion, did the nurses appropriately act as the eyes and ears of the physician in this case?

A. No, they did not.

Q. Explain the basis for your opinion?

A. The nurses document that there is some bloody drainage. That was not communicated to the physician. According to the patient's wife she was making complaints to the nursing staff. They did not carry these complaints over and document them nor did they communicate these findings about the drainage, about the foul odor to the physicians as well.

Q. Were there any -- was there any documentation at all of any foul odor in the nursing notes.

A. There was documentation on the 26th and also on the 27th and yet there was no further documentation on the 26th. Once the wound was found and the foul odor there were no more entries having to do with the wound, the odor, the peeling scrotum.

Q. There was no entry of a foul odor at any time, however, or any indication of a wound documented prior to the morning of the 26th, was there?

A. That is correct.

MR. BERMAN: That's all I have.

MR. MORROW: Does anybody else have any questions?

MR. MURRAY: This is Robert Murray. I have none.

MS. WOHRLE: I have none.

MR. MORROW: Just a quick follow-up.

REDIRECT EXAMINATION

BY MR. MORROW:

Q. Would you agree with me that doctors also have their very own eyes and very own ears?

A. Yes.

Q. And that they can look at a chart just as easily as a nurse can?

MR. BERMAN: Form. Asked and answered.

A. They can look at a chart.

Q. Likewise they have lips. They could talk. They could ask the patient questions, can't they?

MR. BERMAN: Form.

A. Yes, they can.

MR. BERMAN: Asked and answered.

Q. Does it appear from your review of the deposition testimony that Mrs. Day was at Mr. Day's bedside almost really continuously on the 23rd, 24th and 25th?

MR. BERMAN: Form.

A. She had left for a period of time, and I believe that's when one of the physicians had come in to consult in the afternoon.

Q. That would be Dr. Baikovitz on the 25th or Dr. Gedallovich involved sometime on the 24th --

A. Yes.

Q. -- if you remember?

A. Correct.

Q. Because I think she did say that she saw a person that came in the room while she had gone to the bathroom and came back out, and he was already leaving. Do you remember her testimony?

MR. BERMAN: Form.

A. Yes, I do recall that.

Q. Is there any evidence that Dr. Baikovitz had any contact with Shirley Day during the 25th of April.

A. No.

Q. Is there any evidence that Shirley Day was a poor historian and not able to respond to questions regarding her husband's condition?

A. I don't see that.

MR. MORROW: Okay. That's all I had.

MR. BERMAN: No further questions. We will read.

(Whereupon, the deposition was concluded at 12:35 p.m.)

CERTIFICATE

I, BARBARA J. LEVIN, do hereby certify that I have read the foregoing transcript of my testimony, and further certify that said transcript (with/without) suggested corrections is a true and accurate record of said testimony.

Dated at _____, this ____ day of _____, 2004.

_____

* * * * *

On this ____ day of _____, 20___, before me, the undersigned Notary Public, personally appeared _____ and proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed above.

_____

Notary Public

My commission expires: _____

COMMONWEALTH OF MASSACHUSETTS)

SUFFOLK, SS. )

I, Linda A. Walsh, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that there came before me on the 13th day of August, 2004, at 10:03 a.m., the person hereinbefore named, who was by me duly sworn to testify to the truth and nothing but the truth of her knowledge touching and concerning the matters in controversy in this cause; that she was thereupon examined upon her oath, and her examination reduced to typewriting under my direction; and that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this ____ day of August, 2004.

_____

Notary Public

My commission expires 3/28/2008