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OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al.,	:	
	:	
Plaintiffs,	:	Case No. 2010-10335
	:	
v.	:	Judge Patrick M. McGrath
	:	
THE OHIO STATE UNIVERSITY	:	
MEDICAL CENTER,	:	
	:	
Defendant.	:	

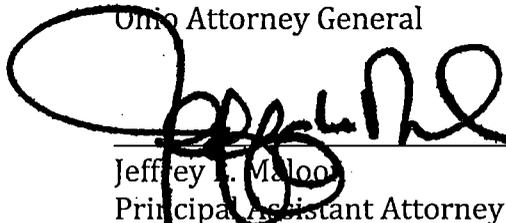
DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs recently sought leave to file a motion for partial summary judgment. Defendant believes the motion is untimely. However, if the Court is inclined to grant Plaintiffs' request, Defendant would like leave to file its own motion for partial summary judgment.

Defendant's motion for partial summary judgment is attached hereto as "Exhibit A."

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General



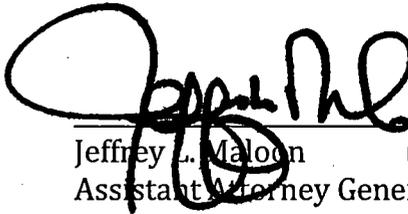
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CERTIFICATE OF SERVICE

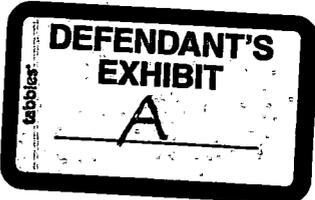
I hereby certify that a true and accurate copy of the foregoing was served via electronic transmission, this 11th day of March 2015, upon the following counsel of record:

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MEDICAL CENTER, :
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 :
Defendant.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Civ. R. 56(C), Defendant The Ohio State University Medical Center ("OSUMC") hereby respectfully moves this Honorable Court for summary judgment regarding three claims asserted by Plaintiffs. The claims at issue are based solely upon inadmissible hearsay and Plaintiffs have failed to produce any admissible evidence in support of the claims. Defendant's memorandum in support of this motion is set forth below.

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General

A large, stylized handwritten signature in black ink, appearing to read "Jeffrey I. Maloon". The signature is written over a horizontal line that separates it from the typed name below.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This medical negligence/wrongful death case involves Michael McNew who died from complications associated with an undiagnosed rare form of acute leukemia several days after a routine hemorrhoid incision. Plaintiffs' allegations center on two physicians who were involved in the evaluation and treatment of the decedent who consulted them for the evaluation of the hemorrhoid. Mr. McNew initially consulted his family physician, Dr. Howard Rothbaum, who examined the area and referred the patient to Dr. Syed Husain, a board certified colorectal surgeon. Dr. Husain subsequently removed the hemorrhoid by incision.

Mr. McNew was not seen or evaluated by either physician during the postoperative period before his death. Plaintiffs' allegations are based solely upon purported telephone conversations between the decedent and a health care provider. Plaintiffs allege that Mr. McNew began to exhibit signs of anemia and that at least one of the providers should have recognized the signs during a telephone call and ordered blood tests within a few days of the hemorrhoid procedure.

The contents of each telephone conversation remain unknown. Neither physician recalls a conversation with the decedent. Plaintiffs rely exclusively on the proposed testimony of Cyrelle McNew, wife of the decedent, to support their allegations. She was not a party to any of the telephone conversations. Ms. McNew's understanding of the conversations is based only upon what she purportedly overheard or was later told by her husband.

Plaintiffs have asked their expert witnesses to develop opinions based upon

several hypothetical fact patterns. Their experts have been asked to address different scenarios of telephone conversations that may have taken place. At this point in the litigation, however, Plaintiffs have yet to provide the evidentiary foundation that will serve as the basis to the hypotheticals.

Defendant's motion for partial summary judgment is directed at the following three theories of recovery alleged by Plaintiffs:

1. Based upon the information provided to Dr. Husain by the decedent during a telephone conversation on September 15, 2009, Dr. Husain should have immediately seen the patient or had him evaluated in a local emergency department;
2. Based upon the information provided by the decedent during a telephone conversation on September 16, 2009, a staff member of either Dr. Husain or Dr. Rothbaum should have asked additional questions of the patient in order to determine whether the patient needed to be evaluated by a physician; and
3. Based upon the information provided by the decedent during a telephone conversation with someone in Dr. Husain's office the morning of September 18, 2009, a staff member should have either consulted Dr. Husain or immediately referred the patient to a local emergency department.

Each of Plaintiffs' theories is based entirely upon inadmissible hearsay. Ms. McNew's proposed testimony regarding the conversations certainly goes to the truth of the matter asserted because without such testimony, Plaintiffs' theories of recovery fail. Plaintiffs must produce something more than hearsay testimony to establish the factual foundation of their claims. In the absence of such proof, Defendant is entitled to summary judgment relative to the theories of recovery set forth above.

II. LAW AND ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

The standard governing summary judgment is set forth in Civ. R. 56(C). Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Civ. R. 56(C)*. See, also, *Dresher v. Burt*, 75 Ohio St.3d 280 (1996).

The party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record together with affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material only if its resolution will affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Once the moving party satisfies its burden, the burden then shifts to the party opposing the motion. *Anderson*, supra. Civ. R. 56(E) provides that the non-moving party has a reciprocal burden of responding by setting forth specific facts demonstrating that a genuine triable issue exists. *Civ. R. 56(E)*, *State ex rel. Zimmerman, v. Tompkins*, 75 Ohio St. 3d 447 (1996). The adverse party may not merely rest on its pleadings or allegations but must present evidence creating a genuine issue for trial. Civ. R. 56 (B); *State, ex rel. Mays, v. Holman*, 76 Ohio St. 3d 147, 148 (1996); *Stone v. National City Bank*, 106 Ohio App. 3d 212, 216 (Cuyahoga 1995). As one federal appellate court rather succinctly stated, the opposing party

must “put up or shut up” on the critical issues. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), at 1478.

While the court will view a summary judgment motion in the light most favorable to the non-movant, summary judgment should be granted if the party who bears the burden of proof at trial does not establish an essential element of its case. *McDonald v. Petree*, 409 F.3d 724 (6th Cir.2005)(citing *Celotex Corp.*, supra). The mere existence of a scintilla of evidence in support of the non-movant’s position is insufficient as there must be sufficient evidence on which the jury could find for the non-movant. *Leadbetter v. Gilley*, 385 F.3d 683 (6th Cir. 2004)(citing *Anderson*, supra).

Applying this standard, OSUMC is entitled to partial summary judgment.

B. PLAINTIFFS HAVE THE BURDEN TO PROVE EACH AND EVERY ELEMENT OF A MEDICAL NEGLIGENCE CASE BY A PREPONDERANCE OF THE EVIDENCE.

It is well settled in Ohio that in order to prevail in a medical negligence action, a plaintiff must prove four elements by a preponderance of the evidence. The elements are (1) establishing the relevant standard of care (usually via expert testimony), (2) that a health care provider deviated from the standard of care, (3) the deviation was a proximate cause of the patient’s injury or death, and (4) the extent of harm and damages that resulted from the substandard care. See, e.g., *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976); *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992); *Berdyck v. Shinde*, 66 Ohio St.3d 573 (1993).

C. PLAINTIFFS’ ALLEGATIONS

1. THE TELEPHONE CONVERSATION ON SEPTEMBER 15, 2009.

Michael McNew initially presented to Dr. Rothbaum on Monday, September 14, 2009. He complained of a hemorrhoid that was causing rectal/anal pain since the previous Saturday. The area was not bleeding and there was no itching or burning. Dr. Rothbaum diagnosed the patient as suffering from a thrombosed hemorrhoid and referred him to Dr. Husain.

Mr. McNew saw Dr. Husain the following day, September 15, 2009. During an examination, Dr. Husain identified the thrombosed hemorrhoid which was located over the right lateral aspect of the patient's anus. Dr. Husain proceeded to incise the hemorrhoid and evacuate the thrombosed area. There were no complications. Mr. McNew tolerated the procedure well and left Dr. Husain's office after being instructed to take sitz baths and pain medication as needed.

It is not unusual for a patient to experience bleeding for seven to ten days after a procedure of this nature. See, Deposition of Scott Hockenberry, M.D., page 36, attached hereto. The amount of bleeding varies from patient to patient and some patients can be rather dramatic in describing the bleeding. See, Id., page 37. It is also normal for a patient to experience postoperative pain in the area. See, Id., page 45.

Plaintiffs claim that Mr. McNew was experiencing excessive bleeding from the incision site the evening after the procedure and he telephoned Dr. Husain. Plaintiff's criticism is dependent upon the details of the call made by Mr. McNew and the nature of the advice provided by Dr. Husain.

Plaintiffs' theory of recovery regarding the telephone conversation is best explained by one of their expert witnesses, Scott Hockenberry, M.D., a general

surgeon:

"Q. [by Mr. Maloon] Okay. And I appreciate what you're telling me --

"A. Okay.

"Q. -- but I need to know when I walk out of here today whether you think there was a deviation on the day of the procedure.

[Objection by Mr. Shroyer]

"A. You know, I'm trying to answer you the best I can.

"Q. [by Mr. Maloon] I know you are.

"A. **It depends on what happened during the conversation --**

"Q. Fair enough."

See, Deposition of Scott Hockenberry, M.D., at page 43, attached hereto. (Emphasis added).

Dr. Hockenberry then indicated that the basis of his opinion was Ms.

McNew's recitation of the conversation:

"Q. [by Mr. Maloon] Okay. Then tell me the source, if you have a source, as to the -- as to what happened or what took place during the telephone call.

"A. I think it was -- I think it's commented on in Mrs. McNew's deposition.

See, Id., at page 45, attached hereto.

Ms. McNew was not a party to the telephone call. She stated that she merely overheard her husband's portion of the conversation. She cannot speak to the instructions or advice given by Dr. Husain:

"Q. [by Mr. Schedler] You encouraged him to call. Did you call yourself and speak to someone?

"A. I was with him when he called.

...

"Q. [by Mr. Schedler] As far as what he was told, you didn't hear that, that's what Michael said he was told, right?

"A. Correct."

See, Deposition of Cyrelle McNew, at pages 40-41, attached hereto.

Due to the hearsay involved, evidence of the telephone call on September 15, 2009, is inadmissible.

2. THE ALLEGED TELEPHONE CALL ON SEPTEMBER 16, 2009.

Plaintiffs also allege that the decedent had a telephone conversation on September 16, 2009, with someone from either Dr. Husain's office or Dr. Rothbaum's office, and during the conversation he complained that medication previously prescribed by Dr. Rothbaum commonly known as Tramadol was causing him to experience bruising. Plaintiffs have not established that a call was made, which office was called, or to whom Mr. McNew spoke.

Plaintiffs point to the fact that Mr. McNew stopped taking the Tramadol as evidence that he must have spoken to someone. However, we have learned during discovery that Tramadol does not cause bruising, which makes it extremely unlikely that a health care provider would have advised the decedent to stop taking the medication.

Plaintiffs have not produced any evidence that a call was made to either physician's office on September 16. Mr. McNew's cellphone bill does not reflect a

call made to either physician's office. Plaintiffs have failed to produce any documents such as a diary maintained by the decedent, or another telephone bill, to prove the call was made. Further, Defendant has no evidence of receiving a call on September 16.

Plaintiffs once again rely upon the decedent's wife in an attempt to prove the call was made and to establish the specific contents of the conversation. Similar to the previous call, Ms. McNew was not a party to the conversation and making the hearsay even more tenuous, she was not even present when the call was purportedly made:

"Q. [by Mr. Schedler] When you said that you discussed with Mike that he should call the doctor, did you actually witness his half of the conversation with a doctor or not?

"A. No."

See, Deposition of Cyrelle McNew, at page 45, attached hereto.

In describing the conversation, Ms. McNew is only able to relay what she was told by her husband later that day:

"Q. [by Mr. Schedler] So did Michael ever say anything to you about speaking with Dr. Rothbaum or someone in his office on the 16th about this mark on his arm?

MR. SHROYER: Karl, she is not sure which doctor he called. That is an element of confusion in your question.

"Q. [by Mr. Schedler] Michael called a doctor as far as you understand, correct? Or at least you discussed with Michael that he should call a doctor?

"A. Right.

"Q. Did he discuss with you after speaking with a doctor that he had talked to someone about this mark on his arm?

"A. He told me he called and that they said just stop taking it if it is causing bruising.

"Q. Okay. And when you say 'it,' you mean Tramadol?

"A. Right"

See, Id., at pages 46-47, attached hereto.

Interestingly, even though Plaintiffs have repeatedly alleged that this telephone call occurred on September 16, 2009 – and Ms. McNew testified as such during her deposition, Plaintiffs have recently changed the date of the purported conversation from September 16 to September 17. See, Plaintiffs' Motion for Leave to File Motion for Partial Summary Judgment, Exhibit A, page 3, filed February 27, 2015. Regardless of this confusing change, Plaintiffs' testimony is completely hearsay and inadmissible. Ms. McNew was not present and cannot testify that a phone call actually took place or testify to the contents of any purported conversation between Mr. McNew and an unidentified individual.

3. THE TELEPHONE CONVERSATION DURING THE MORNING OF SEPTEMBER 18, 2009.

Regarding the conversation that took place during the morning of September 18, the decedent's cellphone bill indicates that a two-minute telephone call was made to Dr. Husain's office. Ms. McNew was not present at the time of the call. Whether Mr. McNew spoke to anyone or merely left a message remains unknown. What transpired during that conversation, assuming one took place, also remains unknown. Plaintiffs cannot state if Mr. McNew spoke to a receptionist, nurse,

nurse's aide, or a physician. Plaintiffs' allege, however, that Mr. McNew advised the individual that he was either experiencing shortness of breath at the time of the call or that he had experienced shortness of breath while walking up a flight of stairs the previous evening.

Again, Plaintiffs must rely on Ms. McNew's secondhand knowledge of the conversation - this time, supplemented by her handwritten notes that were made at a later date:

"Q. [by Mr. Schedler] On the morning of the 18th, what occurred, if anything?

"A. In the morning Mike called Dr. Husain's office.

"Q. Do you have a note on that?

"A. I do.

"Q. Why don't you read the note verbatim and we will talk about it.

"A. All right. So - well, there are different notes. One doesn't say the specifics about when he called the other one.

"Q. Why don't you read both notes.

"A. Okay. The handwritten one says, 'He didn't take the Oxycodone until hearing from Dr. Husain. And I spoke with Dr. Husain at 3:00.'

"Q. Okay.

"A. And then the other note said, which is what happened in more detail, is that 'Mike reported the shortness of breath to Dr. Husain's office in the morning. And stopped the Oxycodone. And Dr. Husain didn't call back by the time that I had returned home and so I called the office and Mike was in excruciating pain.'

See, *Id.*, at pages 50-51, attached hereto.

Plaintiffs have taken this testimony and developed two hypothetical fact patterns. In the first scenario, Defendant's experts were asked to assume Dr. Husain's office was advised that Mr. McNew had experience an episode of shortness of breath while walking up a flight of stairs the night before. After receiving responses to that question, Plaintiffs then asked the experts to change the hypothetical to the assumption that Mr. McNew was experiencing shortness of breath during the actual telephone conversation. Plaintiffs have yet to produce any evidence to establish a foundation to either hypothetical question. Even Ms. McNew's own recitation of the information relayed to her regarding this phone call cannot provide a foundation for a claim.

D. LAW AND ARGUMENT

Hearsay is defined as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." *Evid. R. 801(C)*. In the absence of a recognized exception, hearsay testimony is inadmissible. *Evid. R. 802*.

Plaintiffs may point to *Evid. R. 803(6)* which refers to statements made for the purposes of a medical diagnosis or treatment, in an attempt to persuade the Court that Ms. McNew's testimony fits within an exception. *Evid. R. 803(6)* does not apply to the facts presented.

Evid. R. 803(6) permits a health care provider to testify regarding comments made by the declarant. Examples include assault victims' statements made to physicians, nurses, paramedics, and social workers. See, e.g., *State v. Ridley*,

2013Ohio 1268, 2013 Ohio App. LEXIS 1171 (March 29, 2013); *State v. Diggie*, 2012 Ohio 1583, 2012 Ohio App. LEXIS 1396 (April 9, 2012), *State v. Jillson*, 2012 Ohio 1034, 2012 Ohio App. LEXIS 974 (March 16, 2012); *State v. Hazel*, 2012 Ohio 835, 2012 Ohio App. LEXIS 727 (March 2, 2012). In this case, neither Dr. Rothbaum nor Dr. Husain has a recollection of a telephone call made to his office or that he participated in a conversation with Mr. McNew. In the absence of any recollection of the declarant's comments, neither physician can offer testimony pursuant to Evid. R. 803(6).

Plaintiffs may also take the position that Ms. McNew's testimony is admissible because it is not being used for the purpose of establishing the truth of the matter asserted, but is being offered to explain Mr. McNew's conduct. For example, they may claim that Ms. McNew can testify about the purported conversations because her testimony will explain why her husband stopped taking Tramadol. They may then rely on cases that have held statements used to explain a person's conduct are not considered hearsay. See, e.g., *State v. Mason*, 143 Ohio App.3d 114, 757 N.E.2d 789 (8th District 2001), and cases cited therein.

If Plaintiffs take this position, their argument is seriously flawed for several reasons. Defendant is not disputing Mr. McNew's conduct. Whether the decedent stopped taking the Tramadol is a non-issue. In addition, one cannot use a third party (Ms. McNew) to describe the contents of a certain conversation in an effort to explain the declarant's (Mr. McNew's) conduct. In the *Mason* case and other cases decided thereunder, the declarant was available to testify and subject to cross examination. The party taking issue with the hearsay testimony had the ability to test the declarant's statement. Here, Defendant does not have that opportunity

Finally, the testimony of Ms. McNew is inadmissible because it does not fit within the exception of Evid. R. 804(B)(5), regarding a statement by a deceased or

incompetent person. Evid. R. 804(B)(5) was promulgated in response to the abrogation of the "dead man's" statute. *Johnson v. Porter*, 14 Ohio St.3d 58, 471 N.E.2d 484 (1984). As Justice Wright stated in *Eberly v. A-P Controls, Inc.*, "Evid. R. 804(B)(5) was promulgated to level the playing field: if the adverse party may testify, the decedent may testify from the grave through hearsay **to rebut the testimony by the adverse party.**" *Id.*, 61 Ohio St.3d 27, at 30. (Emphasis added).

Evid. R. 804(B) states in pertinent part:

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (5) The statement was made by a decedent or a mentally incompetent person, where all of the following apply: (a) the estate or personal representative of the decedent's estate . . . is a party; (b) the statement was made before the death of the decedent . . . ; **(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent . . .**" (Emphasis added).

The party seeking the admission of the testimony must satisfy all three elements of the rule in order for the testimony to be admitted. *Eberly*, supra. Plaintiffs cannot satisfy the third element as neither Dr. Rothaum nor Dr. Husain has offered testimony regarding the telephone conversations. Neither physician recalls a conversation. And, neither physician has testified to any specific complaint or instruction that was given during a conversation. Thus, there is nothing for Plaintiffs to rebut and, therefore, Evid. R. 804(B)(5) is not appropriate, nor does it allow Plaintiffs to circumvent the hearsay rule.

Plaintiffs' case is built entirely upon hearsay for which the Rules of Evidence allow only narrow exceptions. Their documentary evidence suggests that just one telephone call was made. In the absence of other evidence, Plaintiffs are forced to

continually rely upon Ms. McNew's hearsay testimony; testimony that the Rules of Evidence specifically exclude.

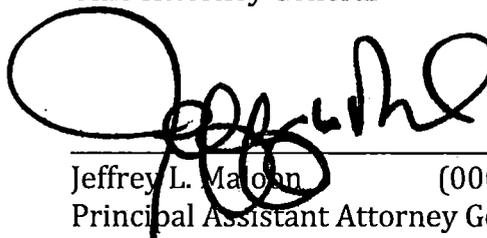
V. CONCLUSION

Based upon the foregoing and pursuant to Civ. R. 56(C), Defendant The Ohio State University Medical Center is entitled to summary judgment regarding the following theories of recovery presented by Plaintiffs:

1. Based upon the information provided to Dr. Husain by the decedent during a telephone conversation on September 15, 2009, Dr. Husain should have immediately seen the patient or had him evaluated in a local emergency department;
2. Based upon the information provided by the decedent during a telephone conversation on September 16, 2009, a staff member of either Dr. Husain or Dr. Rothbaum should have asked additional questions of the patient in order to determine whether the patient needed to be evaluated by a physician; and
3. Based upon the information provided by the decedent during a telephone conversation with someone in Dr. Husain's office the morning of September 18, 2009, a staff member should have either consulted Dr. Husain or immediately referred the patient to a local emergency department.

Respectfully submitted,

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Assistant Attorney General

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Daniel R. Forsythe, Esquire

1 A. Well, the timing, and also to thrombose
 2 would require platelets, which he didn't have many
 3 of, so I would find it hard to believe that he
 4 could rethrombose it, to be honest.
 5 Q. Okay. So if Dr. Husain advised
 6 Mr. McNew after the procedure, and I'm talking
 7 about the day of the procedure, that hey, you can
 8 continue to have pain in this area for up to seven
 9 days, was that within the standard of care?
 10 A. Yeah. I mean, it should be getting
 11 better every day, but it can be sore for a week,
 12 sure.
 13 Q. And have you had an occasion where you
 14 have actually prescribed pain meds for the
 15 incision procedure?
 16 A. Usually not. Usually for an incision,
 17 they don't require it; excision, yes.
 18 Q. Dr. Husain prescribed Oxycodone, I
 19 believe; is that right?
 20 A. It was either Oxycodone or Hydrocodone,
 21 yes.
 22 Q. One of the two.
 23 A. Yes.
 24 Q. Below the --

1 A. Ten milligrams, I think.
 2 Q. Okay. Below the standard of care to
 3 prescribe that med?
 4 A. No.
 5 Q. And is it unusual in your experience,
 6 after the incision procedure, for patients to need
 7 to take pain medication for three to four days?
 8 A. Again, for just an incision, that's a
 9 little unusual. For an excision, most people take
 10 pain medicine for a few days.
 11 Q. I think we can agree that different
 12 patients have different pain tolerances; is that
 13 fair?
 14 A. Yes.
 15 Q. Okay. For example, somebody might have
 16 the incision procedure and go home and feel really
 17 good, not have much pain at all, and someone else
 18 might have the same procedure and be in pain for
 19 three, four, five days.
 20 A. I agree.
 21 Q. It's just different. It's patient
 22 whatever.
 23 A. Patient variability, we'll call it.
 24 Q. Okay. Great. We'll agree with that.

1 Okay. Let's talk a little bit about
 2 your procedure in this type of procedure with
 3 postoperative bleeding. What is it that you tell
 4 your patients as to the amount of or how long they
 5 should expect to bleed after the incision
 6 procedure?
 7 A. I tell them personally to expect some
 8 spotting and to leave gauze on there to basically
 9 protect their clothes, but not to expect a lot of
 10 bleeding.
 11 Q. And how long do you tell them that they
 12 can expect to see the spotting?
 13 A. Usually until it heals up --
 14 Q. And how long --
 15 A. -- and that can take a week.
 16 Q. So it would not be unusual for you to
 17 have a patient undergoing this incisional
 18 procedure and continuing to bleed, to some degree,
 19 for a week?
 20 A. Right. Actually as it's healing, the
 21 tissue that's healing it is called granulation
 22 tissue, and that in itself can bleed a little bit,
 23 spotting, as it's healing.
 24 Q. Dr. Husain testified in this case that

1 he believes a patient undergoing through this
 2 process can have some bleeding, some amount of
 3 bleeding for up to seven to ten days.
 4 A. I would agree with that.
 5 Q. And, again, I think it's -- what did we
 6 say, patient -- what did we say we were going to
 7 use?
 8 A. For pain --
 9 Q. Yeah.
 10 A. -- pain tolerance? I suggested patient
 11 variability.
 12 Q. Perfect. Let's use that, patient
 13 variability.
 14 I think when it comes to patients who
 15 are describing the amount of bleeding that they're
 16 suffering, some can be rather dramatic about that
 17 and others can kind of push it under the carpet a
 18 little bit.
 19 A. You mean how they describe their
 20 bleeding?
 21 Q. How they would describe their bleeding.
 22 A. I would agree with that, yes.
 23 Q. Now, with the incision procedure,
 24 Doctor, we're talking about, is it unusual in your

1 through five layers of gauze, I would want to know
2 is it still bleeding, have you been able to stop
3 it. I would have talked to the patient, told them
4 what measures to use to stop it, hold pressure on
5 it, see if you can stop it. And, if you can't
6 stop it, I would think he would need to be seen.

7 That's my opinion what a physician
8 should do when talking to a patient on the phone
9 about bleeding. Bleeding's very difficult to
10 treat over the phone. But, you know, the first
11 night after surgery you'd expect a little
12 bleeding, so I think he should be given some
13 instructions on how to get it to stop and, if he's
14 unsuccessful getting it to stop, I think he should
15 be seen.

16 Q. Let me --

17 A. And he agrees with that in his
18 deposition, actually.

19 Q. Yeah, but let me phrase it the way that
20 I can understand it, Dr. Hockenberry, for a
21 minute, please.

22 I think what you're saying is that
23 assuming the patient called and said that he's
24 saturating through five layers of gauze, you

1 A. The conversation's not recorded in the
2 medical record. If he said a couple cups of blood
3 is fine, don't worry about it, I think that's a
4 deviation.

5 Q. Okay. Now, you said that the
6 conversation's not recorded in the medical
7 records. You remember looking at Mr. McNew's
8 telephone bill, correct?

9 A. Yes.

10 Q. There's no indication that there was a
11 phone call made on the 16th or the evening of the
12 16th, correct?

13 A. I didn't really look at the 16th.

14 Q. Okay.

15 A. If you have a copy of it, I can look at
16 it.

17 Q. I do.

18 A. Oh.

19 Q. I don't see an indication that he
20 called, at least from his cell phone, to speak to
21 Dr. Husain that evening.

22 A. It looks like there was a phone call
23 to -- a 19-minute phone call to a Massachusetts
24 number, but that's --

1 believe Dr. Husain deviated from the standard of
2 care because you would have wanted him to have the
3 patient re-evaluated; is that fair?

4 A. I think that was the safest thing to
5 do, unless he says look, I held pressure on it,
6 now it's stopped and I'm no longer bleeding. But
7 I think when somebody's actively bleeding, I think
8 the best care is to be seen by a physician.

9 Q. Okay. And I appreciate what you're
10 telling me --

11 A. Okay.

12 Q. -- but I need to know when I walk out
13 of here today whether you think there was a
14 deviation on the day of the procedure.

15 MR. SHROYER: Asked and answered.
16 Go ahead.

17 A. You know, I'm trying to answer you the
18 best I can.

19 Q. I know you are.

20 A. It depends on what happened during that
21 conversation --

22 Q. Fair enough.

23 A. -- okay?

24 Q. Fair enough.

1 Q. I don't think Dr. Husain was in
2 Massachusetts that evening, but maybe we'll hear
3 that in the case.

4 A. Well, these days -- well, these days,
5 with cell phones, you know, people take their
6 phone with them and, when they move, no telling
7 where they are --

8 Q. Yeah.

9 A. -- but yeah, I don't see that that cell
10 phone call was made.

11 Q. Okay. Then tell me the source, if you
12 have a source, as to the -- as to what happened or
13 what took place during that telephone call.

14 A. I think it was -- I think it's
15 commented on in Mrs. McNew's deposition.

16 Q. Right. Okay. All right. And
17 that's --

18 A. That's her testimony.

19 Q. And that's the source of the facts, as
20 you will, as to what happened?

21 A. As to that phone call and the amount of
22 bleeding, yes.

23 Q. Okay. Got you. Now, other than the
24 amount of bleeding, do you have any indication

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1 A. I did. I believe I have it. I haven't looked
2 for it in a long time.
3 Q. Do you know how many pills were dispensed?
4 A. How many total in the bottle?
5 Q. Yeah.
6 A. No. But I do remember there was a note in the
7 record.
8 Q. We will get to that. So it's fair to say, I
9 guess, do you have any notes of Michael taking
10 Oxycodone on the 15th?
11 A. No. I have a note on the 15th that Mike
12 increased his dose of the Oxycodone. So he must
13 have been taking it before the 16th.
14 Q. When you say increased, what does that mean?
15 A. Well, he increased dose from one to one and a
16 half tablets every six hours. There was a range
17 that he could take.
18 Q. So as far as the 15th goes, you don't have any
19 notification of what he took as far as Oxycodone
20 goes. You do know that he took a Tramadol after
21 he left Dr. Husian's office, correct?
22 A. Right.
23 Q. Do you know if he took any more Tramadol that
24 day?

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1 A. I recall that he was trying to take the
2 non-narcotic as much as possible rather than the
3 other. So he must have taken more. Well, I
4 don't know.
5 Q. When you say the non-narcotic?
6 A. The Tramadol was the non-narcotic. Because he
7 was hoping to work, if possible, even from home.
8 Q. Did he return to work on the 15th?
9 A. No.
10 Q. Did he go to his office to work on the 16th?
11 A. I don't think he ever went to his office again
12 after he went to see Dr. Husian.
13 Q. Did he work from home, do you know?
14 A. No. He spoke to his boss and she encouraged him
15 to rest.
16 Q. Okay. Who was his boss?
17 A. His boss then was Cecelia and I don't exactly
18 remember her last name, Marpaw. I'm not sure.
19 I could find it probably if I needed to.
20 Q. So on the 16th, do you have any notation in your
21 notes of what drugs, if any, Michael took? You
22 said there was a note that he increased the
23 dosage of Oxycodone from one to one and a half
24 tablets on the 16th; is that correct?

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1 A. Right.
2 Q. That is every six hours?
3 A. Yes.
4 Q. Is there any other notation in your notes about
5 how many Oxycodone he might have taken that
6 particular day?
7 A. No.
8 Q. Is there any notation for that particular day
9 regarding his physical condition including
10 symptoms or what kind of pain he was
11 experiencing, what activity level he was able to
12 sustain, anything at all?
13 A. Well, he was having a bleeding situation.
14 Q. Okay. What does your note say exactly?
15 A. The bleeding concerns started the evening of the
16 procedure.
17 Q. Okay. Tell me about that?
18 A. He was told that he would have some spotting and
19 he was saturating gauze, so I encouraged him to
20 call the office, which he did.
21 Q. Tell me about when you say saturating gauze,
22 tell me what you mean by that?
23 A. Well, the blood was really soaking through more
24 than five layers of gauze quickly.

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1 Q. Did you have to replace the dressing?
2 A. Yes. He was changing quite frequently.
3 Q. How many times?
4 A. I don't know how many times.
5 Q. More than once?
6 A. Oh, yes.
7 Q. You encouraged him to call. Did you call
8 yourself and speak to someone?
9 A. I was with him when he called.
10 Q. He got on the phone and called somebody?
11 A. Right. And we discussed that he would explain
12 clearly that he was saturating five plus layers
13 of gauze.
14 Q. You heard what he said?
15 A. Right.
16 Q. Did you make a note of what he said?
17 A. Did I make a note in my notes?
18 Q. Yes.
19 A. Yes.
20 Q. What does it say?
21 A. It says, "Mike called Dr. Husian and explained
22 that he was 'saturating through five plus layers
23 of gauze not just spotting.' And he was told to
24 see what happens."

1 Q. Is that an exact quote?
2 A. Yes.
3 MR. SCHEDLER: As far as what he was
4 told, you didn't hear that, that's what Michael
5 said he was told, right?
6 A. ~~Correct.~~
7 Q. Was there any more to the conversation that you
8 can recall even though it may not be written
9 down in your note?
10 A. I recall it was very brief.
11 Q. Do you recall what time of day this was?
12 A. It was later in the day or in the evening.
13 Q. Do you recall what Michael's condition was
14 overnight on the 15th going into the 16th?
15 A. Well, on the 15th, he also started to take baths
16 that are recommended, and I notice something
17 like a mark on his arm.
18 Q. Okay.
19 A. And he said that he must have scratched himself
20 and that was it.
21 Q. Describe the mark on his arm?
22 MR. SHROYER: At that time?
23 A. At that time it was reddish and it was -- I
24 don't know.

1 Q. It didn't go all the way to his hand nor did it
2 go all the way to his shoulder; is that
3 accurate?
4 A. Right.
5 Q. That was the first time that you had ever
6 noticed this, correct?
7 A. Right.
8 Q. Anything else in your notes about the events of
9 the night of the 15th going into the 16th?
10 A. That night, no.
11 Q. Anything that you recall, independent of what is
12 in your notes, about that period of time that
13 seemed significant in hindsight?
14 A. He was still looking pale and kind of sick, but
15 I think I didn't know. He had just seen all-
16 these doctors.
17 Q. He was taking the Oxycodone one and a half
18 tablets every six hours beginning on the 16th,
19 right? He started taking one and a half tablets
20 every six hours for pain?
21 A. He might have started taking it on the 16th.
22 Q. Do you have a note that identifies what happened
23 on the 16th, in your notes?
24 A. On the 16th, I have a note that Dr. Husian

1 Q. Do you have any kind of notation of it?
2 A. No.
3 Q. Was it on one arm or both arms?
4 A. At that time at least it was only definitely one
5 arm.
6 Q. Are you able to recall -- are you able to sort
7 of visualize him sitting in the tub and seeing
8 this mark on him in your mind; do you recall?
9 A. I remember his arms were stretched out and I saw
10 it.
11 Q. Okay.
12 A. Because it was -- it was on inside of his arm
13 near the elbow.
14 Q. It was on the crook of his elbow, correct?
15 A. Right.
16 Q. It was on -- I don't know which way he would be
17 facing in the bathtub, but does that help you
18 remember which arm it was?
19 A. That's what I'm trying to picture. He was
20 sitting in the tub and I saw it. I could have
21 seen it on either arm though. I'm not sure.
22 Q. So there is a mark on the inside of his elbow on
23 one arm and you recall it being reddish?
24 A. Right.

1 called to see how Mike was.
2 Q. Okay. Go ahead.
3 A. And I don't remember that too much. But it says
4 that -- I don't remember the actual call but I
5 remember talking about what was said actually.
6 ~~I don't remember what time the call was.~~
7 Q. Anything more in your note about the 16th?
8 A. And that the doctor was told he was still
9 bleeding but not as much as the previous night
10 and that was the end of it.
11 Q. That's your note?
12 A. Right.
13 Q. You don't remember what time of day this call
14 was, correct?
15 A. For some reason I think it was early, but I'm
16 not sure.
17 Q. And evidently based on that notation, the
18 bleeding, although he was still bleeding, it
19 ~~wasn't bleeding as much; is that correct?~~
20 A. Right.
21 Q. Did you talk to Dr. Husian or did Michael talk
22 to Dr. Husian?
23 A. Michael did.
24 Q. ~~Did you witness his half of the conversation or~~

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1 not?
 2 A. ~~That's what I don't remember.~~
 3 Q. At this point, were you maybe in and out of the
 4 house taking kids to preschool or kindergarten?
 5 A. Right. I might have been working. I do
 6 remember Mike was always changing gauze. So he
 7 was still bleeding and needing to change it.
 8 Q. Other than that notation, do you have any
 9 recollections or any notes about events on the
 10 16th?
 11 A. I do. So on the 16th, at one point, I started
 12 thinking about the mark on his arm. And it
 13 looked darker to me. And I was wondering if it
 14 was more like a bruise. And so I discussed with
 15 Mike that he should call the doctor about it.
 16 Q. Okay.
 17 A. And then he told me that he did.
 18 Q. Do you know, first of all, I assume -- go ahead.
 19 I didn't mean to cut you off.
 20 When you said that you discussed with
 21 Mike that he should call the doctor, did you
 22 actually witness his half of the conversation
 23 with a doctor or not?
 24 A. No.

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1 Q. Do you know which doctor Michael called?
 2 A. We discussed that maybe he should call Dr.
 3 Rothbaum. Because he prescribed Tramadol. We
 4 thought that it seemed to occur when he started
 5 taking the Tramadol.
 6 Q. Okay. So did Michael ever say anything to you
 7 about speaking with Dr. Rothbaum or someone in
 8 his office on the 16th about this mark on his
 9 arm?
 10 MR. SHROYER: Karl, she is not sure
 11 which doctor he called. That is an element of
 12 confusion in your question.
 13 BY MR. SCHEDLER (CONT'D):
 14 Q. Michael called a doctor as far as you
 15 understand, correct? Or at least you discussed
 16 with Michael that he should call a doctor?
 17 A. Right.
 18 Q. You discussed with him maybe you should call Dr.
 19 Rothbaum. You believe he called a doctor on the
 20 16th, but you are not sure which one?
 21 A. Right.
 22 Q. Did he discuss with you after speaking with a
 23 doctor that he had talked to someone about this
 24 mark on his arm?

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1 A. He told me he called and that they said just
 2 stop taking it if it is causing bruising.
 3 Q. Okay. And when you say "it," you mean Tramadol?
 4 A. Right.
 5 Q. Did he do that?
 6 A. He stopped taking the Tramadol.
 7 Q. When was that?
 8 A. That was on the 16th.
 9 Q. Okay. Anything else that happened on the 16th
 10 that either is the subject of a note or which
 11 seems significant in retrospect that we haven't
 12 talked about?
 13 A. That's when I have the note that he increased
 14 the Oxycodone from one to one and a half tablets
 15 every six hours.
 16 Q. Is it fair to say you are not sure what time of
 17 day he made that switch?
 18 A. Correct.
 19 Q. Anything else that happened on the 16th, which
 20 was either the subject of a note or that seems
 21 significant in retrospect, that we have not
 22 talked about?
 23 A. No.
 24 Q. On the 17th, do you have any note that describes

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1 any events on the 17th?
 2 A. No.
 3 Q. Independent of what is written down in your
 4 notes, do you have any recollection of any
 5 events that occurred on the 17th that seem now
 6 to be significant in retrospect regarding
 7 Michael's condition or other events related to
 8 his condition?
 9 A. I just recall that we had been to doctors. We
 10 had spoken to doctors and it was a day that I
 11 wanted to see what happened. Whether he
 12 improved or what happened, but things were not
 13 good.
 14 Q. When you say "not good," what you mean?
 15 A. He was still in the same condition in a lot of
 16 pain and still had a mark on his arm. And I was
 17 thinking, Well, he stopped taking the Tramadol
 18 so that should improve.
 19 Q. What was?
 20 A. Maybe it was working its way out of his system.
 21 Q. Had his bleeding status changed from the 16th to
 22 the 17th, do you recall?
 23 A. I recall that he was still bleeding, because I
 24 know that I remember seeing every day that there

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1 was blood in the tub. I remember he was still
2 changing the gauze pads.
3 Q. Was it your understanding that he taking
4 repeated sitz baths during the day?
5 A. Yes.
6 Q. How many times was he doing that, do you recall?
7 MR. SHROYER: I want her to read the
8 note on the 17th to fully answer your question.
9 A. Oh, right.
10 Q. Is there a note on the 17th?
11 MR. SHROYER: There is a note on the
12 17th.
13 A. There is a note that I'm remembering now that it
14 was in the evening of the 17th, that he was
15 having shortness of breath when -- he reported
16 to me this is what happened. He reported to me
17 that he was having shortness of breath due to a
18 side effect of the Oxycodone when he was
19 climbing the stairs. I remember that he walked
20 up the stairs into the bedroom and said, "I'm
21 having shortness of breath from the Oxycodone."
22 Q. Okay. Do you remember what time that was?
23 A. No. But I remember it was in the evening.
24 Q. And when he said it was because of the

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1 Oxycodone, did you understand him to be saying
2 that that was something that he was told by a
3 physician or that he just assumed was being
4 caused by the Oxycodone?
5 A. That he assumed that it was being caused by the
6 Oxycodone.
7 Q. Did you suggest to him that he do anything in
8 regard to this feeling of shortness of breath?
9 A. I said, "We'd better call the doctor."
10 Q. What did he say?
11 A. He said that it is from the medication and when
12 he was resting it didn't seem to be happening
13 so much. So we waited until the morning, I
14 think, I said, Let's call first thing in the
15 morning.
16 Q. That is on the night of 17th, which is Thursday
17 night and on the morning of the 18th -- first of
18 all, I'm assuming there is no other note about
19 the 17th, correct?
20 A. Right.
21 Q. On the morning of the 18th, what occurred, if
22 anything?
23 A. In the morning Mike called Dr. Husian's office.
24 Q. Do you have a note on that?

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1 A. I do.
2 Q. Why don't you read the note verbatim and we will
3 talk about it.
4 A. All right. So -- well, there are different
5 notes. One doesn't say the specifics about when
6 he called the other one.
7 Q. Why don't you read both notes.
8 A. Okay. The handwritten one says, "He didn't take
9 the Oxycodone until hearing from Dr. Husian.
10 And I spoke to Dr. Husian at 3:00."
11 Q. Okay.
12 A. And then the other note said, which is what
13 happened in more detail, is that "Mike reported
14 the shortness of breath to Dr. Husian's office
15 in the morning. And stopped the Oxycodone. And
16 Dr. Husian didn't call back by the time I had
17 returned home and so I called the office and
18 Mike was in excruciating pain."
19 Q. Are you reading verbatim now?
20 A. No, I'm talking.
21 Q. Why don't you read it first then we will talk
22 about what your memory is.
23 A. All right. "Mike stopped taking the Oxycodone.
24 Cyrelle called Dr. Husian's office in the

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1 afternoon, because he had not called. The
2 receptionist was very surprised we hadn't heard
3 from him. And Dr. Husian -- we spoke to Dr.
4 Husian around 2:00 and explained that the
5 shortness of breath seemed to occur once the
6 dose of Oxycodone was increased. Cyrelle
7 explained that Mike was having bruising, so we
8 stopped taking Tramadol and then stopped taking
9 the Oxycodone due to the shortness of breath.
10 And Cyrelle explained that Mike was in extreme
11 pain and could not talk.
12 Dr. Husian asked to talk to Mike and
13 Mike talked to him at one point but handed the
14 phone back to Cyrelle who explained he was in
15 too much pain."
16 Q. You are reading?
17 A. "Mike was talking very slow. Dr. Husian said
18 the Oxycodone would not cause the shortness of
19 the breath and he needed a painkiller. Husian
20 muttered something about where we lived and how
21 long it would take for us to get to his office.
22 And then if the shortness of breath persists he
23 should make an appointment with a cardiologist.
24 But he should increase the dose of the Oxycodone