ADVANCED DISCOVERY

John H. Metz, Esq.
1117 Edwards Road
Cincinnati, Ohio 45208
(513) 321-8844
Fax: (513) 321-6389
E-mail: Metzlegal@aol.com

1. RULE 26
"anything that may lead to discoverable evidence"

INTERROGATORIES

Draft using words that are clear and unambiguous. Avoid "weasel" words.

Now come plaintiffs, by and through counsel, and hereby propound the following discovery requests to Defendant, Mayfield Neurological Institute (hereinafter, "Mayfield") pursuant to Ohio Rules of Civil Procedure 26, 33, 34 and 36 to be answered fully under oath and responded thereto within thirty (30) days after service hereof:

DEFINITIONS

1. "Expert" means a person who has been consulted by a party and whom counsel for such party plans to call as a witness at the time of trial to testify concerning matters requiring expertise, knowledge, skill, education, training, and experience not possessed by ordinary lay people;
2. "Identify" or "identity", when used in reference to a document, means to provide the following: (a) date; (b) identity of author and addressee; (c) type of document (e.g., letter, memorandum, telegram, chart, etc.); (d) title and (e) a summary of pertinent contents. In lieu of summarizing such document, Plaintiff may attach a copy of the document to their answers.
3. "Identify" or "identity", used in reference to an individual person, means to state his or her full name and present or last known address and phone number, his or her present or last known position and business affiliation and his or her position and business affiliation at the time in question.
4. The word "or" appearing in an interrogatory should not be read so as to eliminate any part of the interrogatory, but, whenever applicable, it should have the same meaning as the word "and". For example, an interrogatory stating, "support or refer" should be read, "support and refer" if an answer that does both can be made;
5. When an interrogatory requires you to "state the basis" of a particular claim, state in detail and with full particularity the facts upon which you rely to support your claim and in your answer identify each and every communication, each and every document,

each and every legal theory, and each and every nursing or medical expert that you think supports, refers to, or evidences such claim;

6. As used herein, "you," "your," or "yourself" refers to Defendant and each of Defendant's agents, representatives, and attorneys, and each person acting on Defendant's behalf.

7. The term "document" means any document or thing including, but not limited to, books, magazines, medical journals, records, writings, notes, medical records, letters, correspondence, memoranda, microfilms, drawings, graphs, photographs, charts, tape recordings, data stored in a computer, computer run or printout, and every other data compilation from which information can be obtained.

8. As used herein, "medical records" means all medical reports, hospital records and/or office records including but not limited to nurses' notes, x-ray reports and films, order sheets, progress notes, history and physical examination documentation, medicine sheets, laboratory reports, consultation reports, reports of EKG and EMG findings, discharge summaries, and all other summaries covering findings related to treatment by any health care provider.

9. The term "person" shall include, in singular or plural, any person, partnership, corporation, association or other legal entity.

10. Where appropriate, the singular includes the plural and the masculine includes the feminine and vice versa.

INSTRUCTIONS

1. In identifying a person, set forth:
   (a) his or her name;
   (b) his or her last known business address and his or her last known home address;
   (c) his or her last known phone number; and
   (d) his or her last known employer and position.
2. In identifying a document or written communication:
   (a) state the date of such document or written communication;
   (b) Identify the person(s) who received the document or written communication;
   (c) Identify the person(s) who received the document and each addressee of the document or written communication; and
   (d) state the substance of such document or written communication.
3. In identifying a product or medication, set forth:
   (a) generic and trade name of product;
   (b) dosage of product;
   (c) physician prescribing said product;
   (d) pharmacy or store where product was purchased

(e) date product was purchased; and

(f) date and duration of product use.

4. If any document required to be identified was, but is no longer, in your possession or subject to your control, state what disposition was made of it, and identify any person(s) who currently has possession, custody or control of such document or has knowledge of its current location.

5. In identifying an oral communication:

(a) state the date, place, and circumstances such oral communication was made;

(b) identify each person who was present at or who participated in such oral communication;

(c) state the substance of such oral communication; and

(d) identify each document reflecting, summarizing or memorializing such oral communication, or attach copies of each such document to your answers.

6. Request for production applies to all documents within the possession, custody, or control of or available to you, regardless of whether such documents are currently in your possession or in the possession of your affiliates, agents, accountants, auditors, or representatives, including your attorney.

7. In each instance, this request calls for the production of the original of the document, together with any and all non-identical copies of the original.

8. With respect to responsive documents which you withhold on a claim of any privilege or for any other reason, state for each such document: its name or title; its date; the identity of the author and all person(s) to whom it was addressed or sent; the identity of all persons believed to have received or seen a copy thereof, its present locations; the identity of its present custodians; a brief description of the nature of the document and its contents and the reason it has been withheld.

9. If any document subject to this request cannot be produced because it is no longer in your possession or control or in existence, then for each such document state whether it is missing or lost, has been destroyed, has been transferred to others, or has otherwise been disposed of, and in each instance, explain the circumstances surrounding the disposition thereof and state the approximate date of such disposition.

INTERROGATORIES

1. State the name, address and title/position of each and every person involved in formulating the responses to this discovery.

2. Please list the name, address, title/position, and phone number of each and every person known to this answering defendant (or defense attorney) who has knowledge of the allegations or defenses involved in this lawsuit.

3. List each and every witness, by name, address and title that you intend to call at the trial of the within matter indicating the sum and substance of what they intend to testify to.

4. Please list the name, address, title/position of each and every expert witness this answering defendant intends to call at the trial of this matter and state a brief summary of their expected testimony and the facts upon which they based their expert opinions.

5. State any and all information or facts upon which you base your defense that the Complaint fails to state a cause of action upon which relief can be granted

6. State any and all information or facts upon which you base your defense plaintiff was contributorily or comparatively negligent.

7. State any and all information or facts upon which you base your defense that plaintiff failed to assert a cause of action with the time required by the Statute of Limitations.

8. State any and all information or facts upon which you base your defense that that there were any other negligent persons or entities and were a superseding and/or intervening cause and state their full name, address, title and what you contend they did that was negligent.
9. State any and all information or facts upon which you base your defense that plaintiffs' damages or injuries were the result of an unforeseeable and untoward series of events or constitute an Act of God.

10. State any and all information or facts upon which you base your defense that plaintiffs voluntarily assumed the risk.

11. State any and all information or facts upon which you base your defense that Plaintiff has failed to join indispensable partied needed under Rule 19 or 19.1, the Ohio Rules of Civil Procedure or other laws of Ohio, stating the name, address of such proposed defendants and basis of bringing in such other defendants.

12. State any and all information or facts upon which you base your affirmative defenses.

13. Describe your contention as to the mechanism of death of the decedent.

14. Identify any statements, information and/or documents known to you and requested by any of the foregoing interrogatories which you claim to be work product or subject to any common law or statutory privilege, and with respect to each interrogatory, specify the legal basis for the claim and keep a "privilege log" so that the court can determine what has been omitted or redacted.

REQUESTS FOR PRODUCTION

1. Please produce a curriculum vitae and a bibliography for each and every witness, both lay and expert, which this answering defendant intends to call at the trial of this matter.

2. Produce a true, complete and accurate copy of any and all medical records, including office records and office files, correspondence, logs, charts, phone calls or any other documentation relating to decedent herein or any such communication with decedent's relatives concerning her care and treatment.

3. Produce any and all medical literature upon which you (or any expert on your behalf) intend to cite, rely upon, base any expert opinion upon or use in cross-examination at trial.

4. Produce the index of Policies and Procedures that was in effect in August 2006 for each and every department, division or unit in which decedent was a patient during her last hospitalization at Good Samaritan hospital.

5. Produce any and all hospital policies or procedures, which you claim may be relevant to this case.

6. Produce any and all contracts, memoranda or other documents, which set forth the duties, responsibilities and relationship between this answering defendant and any other defendant herein.

7. Produce any and all contracts, memoranda or other documents that set forth the duties, responsibilities and relationship between this answering defendant and any other individual or entity that this answering defendant contends was in any way responsible for decedent's injuries or death.

8. Produce any and all contracts, memoranda or other documents which set forth the duties, responsibilities and relationship between this answering defendant and any other individual or entity which provided medical or nursing care to Jessica Siegel during August, 2006 while hospitalized at Good Samaritan Hospital.

9. Produce a copy of each and every policy of liability insurance that may inure to the benefit of plaintiff herein by providing for payment of a part or all of any judgment rendered in favor of plaintiff against defendant. [If there are any insurance policies which defendant has but claims is not applicable, please list.]

10. Produce any and all contracts, memoranda, agreements or other documents which set forth the relationship between Good Samaritan Hospital or TriHealth and any other named defendant herein or entity or persons who provided medical care to Jessica Siegel during August, 2006 while hospitalized at Good Samaritan Hospital.

11. Produce any and all contracts, memoranda, agreements or other documents, which set forth the relationship between Mayfield and the University of Cincinnati School of Medicine, which were in effect in August 2006.

12. Produce any and all W-2 information or other documentation showing payments by this defendant to any other named defendants or for Dr. Nicholas Levine, Dr. Dean Hertzler and Dr. Shah-Nav Khan for any services provided to decedent during August 2006.

13. Produce any and all personnel files or staff files concerning any named defendant herein and the residents Dr. Levine, Dr. Hertzler and Dr. Khan, including, but not limited to, any resident evaluations. which up through August, 2006.

14. Produce a copy of each and every hospital rules, regulation, policy/procedure, by-law or other document, which describes and/or defines the definition and/or the duties and/or responsibilities of an "attending physician" and "admitting physician" that were in effect in July and August, 2006 at Good Samaritan Hospital.

15. If not included in the above requested personnel file, produce a full and complete copy of each and every contract, memorandum, agreement or other document between this defendant and the other physician-defendants and any resident physician (Dr. Levine, Dr. Hertzler and Dr. Khan) herein which were in effect in August, 2006 under which they provided any care, treatment, monitoring or medical responsibility to Jessica Siegel.

16. Produce any and all "log books" in which decedent was logged-in during her hospital in August 2006. (E.g Operation room log book; angio procedure log; radiology log, etc.).

17. Produce any and all statements or other investigations or information, which contain any statements made by decedent or his family concerning her care and treatment.

18. Produce any and all statements or other recordings of information, which contain any statements made by any witnesses regarding decedent, decedent's hospital care or any statements made by decedent's family.

19. Produce any and all "authoritative" texts, journals, or other documents or materials upon which defendant or his witnesses will rely upon or reference in testifying in this matter.

20. Produce any and all information concerning each and every defendant physician (including residents, Levine, Hertzler and Khan) from the National Data Bank.

21. Produce any and all agreements, contracts or other memoranda which sets forth the operating agreement between Mayfield and any other entity or entities as to utilizing resident physicians at Good Samaritan Hospital which was in effect in August, 2006.

22. Produce any and all resident agreements or contracts or other documents under which resident Drs. Nicholas Levine, Dean Hertzler or Dr. Shah-Nav Khan provided any professional services at Good Samaritan Hospital during August 2006.

23. Produce any and all billings for Jessica Siegel from this answering defendant.

24. Produce any and all documents of employment status between Ringer and Good Samaritan Hospital for 2006.

25. Produce any and all correspondence or other evidence of communications between Mayfield (or Dr. Ringer) and any of Jessica Siegel's prior physicians.

26. Produce any and all schedules, calendars or other information, which indicate Dr. Ringer's activities and duties for July and August 2006.

27. Produce any and all billings for Dr. Ringer's activities from August 14, 2006 through August, 23, 2006.

28. Produce a privilege log identifying any statements, information and/or documents known to you and requested by any of the foregoing interrogatories or requests for production which you claim to be work product or subject to any common law or statutory privilege, and with respect to each interrogatory, specify the legal basis for the claim.

Respectfully submitted,

/s/ John H. Metz

John H. Metz [#0019039]
1117 Edwards Road
Cincinnati, Ohio 45208
(513) 321-8844
Fax: (513) 321-6389
E-mail: Metzlegal@aol.com
Attorney for Plaintiffs

Proof of Service

I hereby certify that a copy of the foregoing was served upon all counsel of record by electronic e-mail on this 22nd day of April 2016.

REQUEST FOR ADMISSIONS

Use to narrow issues. If you have an assured clear distance violation:

Civil Rule 30 (C): Document containing request for admission. If a party includes a request for admission in a document containing any other form of discovery, the party shall include a caption on the document that indicates the document contains a request for admission. A party is not required to respond to requests for admission that are not made in compliance with this division.

==========

DISCOVERY DIRECTED TO DEFENDANT: [December 10. 2015]

Including Interrogatories; Request for Production and **REQUESTS FOR ADMISSION**

==========

Now comes plaintiff, by and through counsel, and pursuant to Ohio Rules of Civil Procedure, 26, 33, 34 and 36, hereby submit Plaintiff's Discovery Directed to Defendant: December 10, 2015, to be answered fully and completely under oath within thirty (30) days after service hereof:

INTERROGATORIES:

1. Identify each person by name, address and telephone number, known to you who was an eyewitness to the collision or any aftermath thereof, and for each such person, state whether or not you or anyone acting on your behalf has interviewed such person and whether or not you obtained an oral or written statement and the date and place that the statement was taken, and whether the statement was recorded or handwritten.

2. With respect to each person known to you, not listed in the answer to the preceding interrogatory, who was upon the scene of the collision within two hours after its occurrence, or with respect to any other person who claims to have knowledge of any relevant facts concerning the collision referenced in the Complaint, state the name and address of the person, whether or not you or anyone acting on your behalf has interviewed the person, the person's location at the time of the collision, the substance of the knowledge the person has concerning the collision, whether an oral, recorded or written statement has been taken from the person, and, if so, the identity of the person who took the statement, the identity of each person present when the statement was taken and the date and place that the statement was taken.

3. Provide the name and address of each witness who will testify at trial and state the subject of each witness' testimony.

4. Please list the name, address, title/position of each and every lay witness this answering defendant intends to call at the trial of this matter and state a brief summary of their expected testimony and the facts upon which they based their expert opinions.

5. Provide the name and address of each expert witness who will offer any testimony and state:

a. the subject matter on which each opinion witness is expected to testify;
b. The conclusions and/or opinions of each opinion witness and the basis therefore, including whether written reports have been prepared by the witness(es) and if so, attach copies of the reports, if any;
c. The qualifications of each opinion witness, including a curriculum vitae and/or résumé, if any;
d. The identity of any written reports of each opinion witness regarding this occurrence; and
e. set forth the fee schedule or charges for that expert's time and billing (e.g. charges for review; deposition, report writing; trial testimony).
f. set forth a list of each and every lawsuit (caption and state) in which said expert has testified within the last four (4) years.
g. for each expert witness state with which entity they maintain their liability coverage.

6. If you contend that any other entities or persons are responsible or partially responsible for injury or any other damages to plaintiff, state the name of such person or entity, their address and why you contend they have any responsibility.

7. List each and every motor vehicle collision in which you have been involved as a driver or passenger during the last five (5) years.

8. If your driver's license has ever been suspended, list in which State and for what periods of time.

9. State the good faith factual basis of your first defense in denying that DEFENDANT violated Ohio Revised Code §4511.21 (A).

10. State the good faith factual basis of your First Affirmative Defense and state what acts of "negligence or contributory negligence" you have reference to.

11. State the good faith factual basis of your Second Affirmative Defense that plaintiff has filed to join parties required by Rule 19 and 19.1 of ORCP and state what parties you contend must be joined.

12. State the good faith factual basis of your Third Affirmative Defense.

13. State the good faith factual basis of your Fourth Affirmative Defense.

14. State the good faith factual basis of your Fifth Affirmative Defense that plaintiff has failed to mitigate or minimize his injuries and damages and describe in what way there was no mitigation or minimizing.

15. State in detail the good faith factual basis of your Sixth Affirmative Defense that plaintiff's injuries were caused by other persons, firms or entities or conditions.

16. State the good faith factual basis of your Seventh Affirmative Defense that "Plaintiffs (sic) Complaint fails to state a cause of action."

17. How do you contend the collision occurred.

18. Within 24 hours of the collision did you consume any alcohol? If so, when and how much.

19. At the time of this collision were you using your cellular phone?

20. At the time of this collision was your driver's license contain any restrictions.

21. At the time of the collision were you wearing glasses or contact lenses.

22. At the time of the collision were you under the influence of any drugs, alcohol or medical condition which effected your operation of your vehicle.

23. Identify any statements, information and/or documents known to you and requested by any of the foregoing interrogatories which you claim to be work product or subject to any common law or statutory privilege, and with respect to each interrogatory, specify the legal basis for the claim.

REQUEST FOR PRODUCTION

Pursuant to Civil Rule 34 please produce:

1. Any and all information and documents provided to your expert witnesses.
2. Any and all statements of any of the parties or their employees, agents or servants relative to the allegations or defenses in the within matter.
3. Produce a complete copy of each and every policy of liability insurance (not just declaration page) which may inure to the benefit of plaintiff herein by providing for payment of a part or all of any judgment rendered in favor of plaintiff against defendant. [If there are any insurance policies which defendant has but claims is not applicable, please list nonetheless.]
4. Produce any and all repair bills to any vehicle or vehicles involved in this collision.
5. Produce any expert witness's list of cases in which they have testified within the last four (4) years.
6. Produce each and every expert witnesses charges for review; correspondence; deposition; testimony via videotape; testimony at trial; travel time and reimbursed expenses.
7. Produce a copy of your driver's license (front and back).
8. Produce the resume or C.V. of each named defendant.
9. Produce the resume or C.V. of each expert witness you intend to call at trial.
10. Produce any and all photos, videos or other photographic evidence of any of the vehicles, physical locations or parties involved in this collision.

REQUESTS FOR ADMISSION:

Please be advised plaintiff will requests sanctions and costs pursuant to ORCP 26, 26 and 37 if time and expenses are incurred in establishing issues which have no good faith basis in denying.

1. I, DEFENDANT, admit that I was negligent in causing the automobile collision of , November 6, 2013,in Hamilton County, Ohio involving plaintiff, PLAINTIFF.

Response:

2. On November 6, 2013, I, DEFENDANT, did have automobile insurance that provided liability coverage for this collision mentioned above.

Response:

3. I, DEFENDANT, admit that as a direct and proximate result of my negligence PLAINTIFF suffered personal injuries.

Response:

4. I, DEFENDANT, admit that the above injured in #3 that PLAINTIFF suffered are permanent in nature.

Response:

5. I, DEFENDANT, admit that as a direct and proximate result of this collision of November 6, 2013, PLAINTIFF suffered damages.

Response:

6. I, DEFENDANT, hereby admit liability, causation and damages in the within lawsuit.

Response:

7. On or about November 6, 2013, I, DEFENDANT, operated my vehicle into the rear of plaintiff's vehicle.

Response:

8. On or about November 6, 2013, plaintiff's vehicle was at a complete stop in front of me just prior to the collision.

Response:

Respectfully submitted,

/s/ John H. Metz [#0019039]

1117 Edwards Road
Cincinnati, Ohio 45208-3412
(513) 321-8844
Fax: (513) 321-6389
e-mail: Metzlegal@aol.com
Attorney for Plaintiff

Proof of Service

DEPOSITIONS

If you don't know WHERE you are going… you'll never know when you get there.

TARGET: What do you want to establish with this deponent?
What FACTS do you need to establish? [read Jury Instructions]
What CONCESSIONS do you want to get from this witness?
e.g. get doctor to conceded that for proper informed consent he/she would have had to disclose "X";
e.g. get doctor to agree that other specialties perform this procedure/operation [to allow you to get other experts in different fields].
e.g. who supervises whom?
e.g. Insurance – what entity pays for insurance? [piercing the corporate veil]

==========

NOTICE OF DEPOSITION -*DUCES TECUM*

==========

Please take NOTICE that the plaintiff will take the deposition upon cross-examination of the following deponent on said date, time and place:

Deponent:
Date: [Day of week; date; year]
Time:
Place: [address and phone number – in case someone gets lost]

This deposition will be taken by stenographic and/or videotape means pursuant to Ohio Rules of Civil Procedure 30, 32, 34, 36 and Ohio C.P. Sup. R. 12 and will continue from day to day until completion.

DUCES TECUM: Pursuant to ORCP 34, the witness is directed to bring with them the following items:

1. A curriculum vitae including a current bibliography.
2. Any and all contracts, memoranda or other agreements under which you perform any professional services, including but not limited to any personal service contracts with any corporations, hospitals or other entities which were in effect in May, 2012.
3. Any and all documentation which shows any communications between the deponent and any other caregivers (including any named defendant herein) or potential caregivers or consultants relative to plaintiff-decedent.
4. Any and all documents or materials relative to plaintiff-decedent generated that reflect what occurred in May, 2012 or what was said by any caregivers, including nurses and residents, including any personal notes or other recordation or documentation.

PLEASE NOTE: Within forty-eight (48) hours prior to the deposition indicate if any of the above requested items are not going to be produced. Such may cause the deposition to be cancelled.

Respectfully submitted,

/s/ John H. Metz

John H. Metz [#0019039]
1117 Edwards Road
Cincinnati, Ohio 45208-3412
(513) 321-8844 Fax: (513) 321-6389
E-mail: metzlegal@aol.com
Attorney for Plaintiffs

Proof of Service

CONDUCT DURING DEPOSITION

Civil Rule 30 (C) – deponent must answer EVERY question; but for claim of privilege. Attorney can object, but NOT instruct the witness not to answer (but for privilege).

Smith v. Klein, 23 Ohio App.3d 146 (Ohio App. 8 Dist. 1985), 492 N.E.2d 852

What do you do with an overly aggressive defense attorney:
Stop depo and call the judge.

Stop the depo and make a motion – not practical.

No "breaks" while a question is pending.

No "wood-shedding" during break.
Hall v. Clifton Precision, 150 F.R.D.; 1993 U.S. Dist. LEXIS 10782; 27 Fed. R. Serv. 3d 10

---

27 Ohio Misc. 76 (Ohio Com.Pl. 1971)

271 N.E.2d 877

PENN CENTRAL TRANSPORTATION COMPANY, Plaintiff,

v.

ARMCO STEEL CORPORATION, Defendant.

No. 134710.

Court of Common Pleas of Ohio, Montgomery.

April 8, 1971

[271 N.E.2d 878] Bieser, Greer & Landis, Dayton, for plaintiff.

F. Thomas Green, Dayton, for defendant.

DECISION AND ORDER

Page 77

McBRIDE, Judge.

Once upon a time, not many months ago, lawyers and judges played the game of semantics with pleadings and motions. This court does not propose to transfer such abandoned games to interrogatories. These games are contrary to the Civil Rules, particularly 1(B); they appropriate judicial time, badly required in the cause of justice.

Reviewing the interrogatories in this case the court is impressed by the basic problem of what is an interrogatory. So many do not ask a question but demand a narrative dissertation on a broad subject, impossible to incorporate in one statement. For example, we find such directions as: 'describe in detail,' 'state in detail,' and 'describe the particulars,' repeatedly used. In each instance, the direction is an open end invitation without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place.

The dictionaries suggest that interrogatories in the legal sense are questions and answers, such as are customary at trial, which seek to elicit facts and which can be answered in a categorical fashion, fair to the party or witness and suitable for the jury. In this context, many of the separate interrogatories submitted under Rule 33 in this case violate every rule of evidential simplicity and reasonable intelligence. If objections are sustained at trial to double questions and narrative dissertations of great length and with many subdivisions, it is appropriate that this rule be applicable to interrogatories under Rule 33 unless the Rule itself requires another definition.

As a member of the Civil Rules Committee the writer confesses that it never occurred to him that it was necessary to define the word interrogatory; however, from experience of less than a year it is apparent that if this form of discovery is to serve the purpose intended by the rules, a definition must be adopted.

The word interrogatory has no fixed or invariable meaning in the common law, the statutes or the rules. Technically it implies a question in writing. When used in

Page 78

rules in connection with other forms of discovery, such as depositions or demands for exhibits or admissions, the word takes on a more precise meaning and purpose. An interrogatory seeks an admission or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidences, a function reserved by rules for deposition. It does not include exhibits, contracts or the like which may be otherwise obtained or agreed upon. The interrogatory should be a narrow question that is capable of being answered by a categorical statement without a lengthy explanation such as can be explored on deposition. 22 Words and Phrases p. 385. From this definition it is apparent that Rule 33 on interrogatories, limited as it is to the parties, is a preliminary step in discovery and is not a substitute for the comprehensive form of questioning provided by deposition. This is the major difference between the two forms of discovery.

With this in mind we turn to the instant case.

On January 13, 1971, a motion to compel answers to 101 interrogatories each with many parts was sustained without hearing or consideration of individual questions or of the number involved.

[271 N.E.2d 879] Answers and objections were filed on January 19, 1971 on each of the 101 questions. (16 pages) Plaintiff responded again with a motion to compel discovery and in opposition to defendant's objections to individual questions. (9 pages) To this the defendant on April 5, 1971 asked for protective orders, answered

plaintiff's memorandum and requested and oral hearing on the motion for protective orders. (8 pages) The confusion is compounded by a failure to follow Rule 33(D).

A cursory review of the 'Interrogatories' reveals innumerable directions (as distinguished from questions) commencing with the words, 'describe,' 'state,' 'outline' all the details or particulars of one situation and operation after another. While such words may be used to require a short, categorical response, it is obvious in this case that what the plaintiff seeks is a detailed and comprehensive [27 Ohio Misc. 79] statement, amounting to a lengthy 'white paper,' containing all the evidence on each situation. This brings out the second difference between an interrogatory and a deposition. An interrogatory is a question, not a command.

A direction or command to another party to set forth a picture or history with particulars or a narrative of events by words or drawings is not an interrogatory. Such a command reuqires no categorical response, leaes everything to the discretion of the party so directed, bears no relationship to the simple question and answer at trials as contemplated by the Rules and is improper. This type of discovery requires a deposition and even then may at times be as objectionable as it is at trial.

This conclusion is supported not only by the definition of the word but also by the fact that the court cannot pass upon the sufficiency of the answers to unreasonable commands. If an interrogatory commands the other party to spew out all the intricate details of a complicated situation, the limit of acceptable use of this form of discovery has been violated.

As indicated earlier it is not the form but the substance of the command that is improper. 'List the names and addresses of witnesses to an accident' is in the form of a command, but is essentially an interrogatory that can be categorically answered. It is, therefore, entirely proper.

With these guidelines counsel may resolve their problems on a good portion of the 101 questions and their subdivisions.

What, then, is to be done with the balance? If the court must determine all of the differences and arguments on this effort of counsel at the interrogatory level and before deposition, the trial of this case will inevitably be delayed and judicial time unnecessarily appropriated contrary to the purpose of the Civil Rules which are designed to confine discovery and exchange of information to counsel within their professional responsibilities to the general public.

To avoid such misfortune to the public and to expedite

this case the court invokes and adopts Rule 17 of the Federal Court for the Western Division of the Southern District of Ohio. In addition to the report required in such Rule 17(d), the court requires a statement of the hours counsel consulted together on the problems that have been raised.

The court has the same if not greater right and duty to regulate discovery as it does to control the trial and to impose reasonable limits and conditions, consistent with the rules, to expedite the administration of justice.

As to any matters not disposed of by consultation, the court orders that such matters be subsequently reported and separately stated under Rule 33(D) so that they may be considered and resolved by the court independent of present filings which fail to reveal the required cooperative effort by counsel.

[271 N.E.2d 880] Every effort should be made by counsel to eliminate demands that are not interrogatory in nature and substances as outlined by the court, to reduce the unreasonable volume of interrogatories, to explain to each other what is desired and what will satisfy reasonable requests, to otherwise reduce differences in their professional demands upon each other and to decide what depositions will be taken.

Counsel will advise the court upon compliance with the foregoing order. Arrangements will be made to determine upon memorandum the disputes remaining as well as whether a hearing is required.

ADVANCED DISCOVERY: ISSUES, IDEAS AND RESOURCES

John H. Metz
44th Floor Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 241-8844
Fax: (513) 241-6090

DISCOVERY – the "battleground" of the medical negligence case

In a medical negligence case, possibly more than any other type of litigation, "discovery" is key to winning. A medical malpractice case necessitates a multi-layered cascade of discovery. Unlike a vehicular collision, one must not only "discover" the obvious facts, but also the "facts": which are not recorded in the medical record; communicated between the patient and doctor not otherwise recorded; timing issues not shown in the medical records; background of defendants; background of all experts; medical issues and phantom medical issues which may be raised by defense (to name just a few).

INTERROGATORIES (Ohio Rule of Civil Procedure 30) :

1. DEFENDANT PHYSICIAN: Initial Interrogatories to each defendant may help to establish some basics. However, experience shows that defense counsel rarely provide any "meaningful" information in interrogatories and object to almost everything. Therefore, as a practical matter, interrogatories may not be extremely helpful in this type of litigation.

2. DEFENDANT HOSPITAL: Interrogatories directed to a defendant hospital may be more useful than to an individual physician. You can learn what documents are available which may assist you in proving underlying facts or standards of care.

   Hospitals are accredited by the Joint Commission on Accreditation of Heath Organizations [**JCAHO**], a private organization out of Chicago. [Noted by the Ohio Supreme Court in *Albain v. Flower Hospital* (1990), 50 Ohio St.3d 251, see fn 6].{*note *Albain* overruled by *Clark v. Southview* (1994), 99 Ohio St.3 99, 628 N.E.2d 46}. [Note: Every 2-3 years each hospital is "audited" by the JCAHO. One can request an "audience" with the JCAHO if they have particular concerns about that hospital. If you client feels strongly about an incident, they can certainly file a complaint with the JCAHO. The hospital is supposed to give the public notice that the audit will take place. Realistically the public hardly ever hears of this. Possibly the hospitals do not wish to have people coming in during the audit to challenge the hospital before the JCAHO?]

In Interrogatories or Requests for Production you should request any and all policies/procedures; protocols; rules/regulations concerning whatever medical issues are present in your case. **Caution: It is dangerous to be too specific in you request. If you request something specifically, the defense will take that literally and possibly deny discovery.

e.g. Requesting all policies concerning Pitocin administration. The hospital responded that it had none. The hospital had policies on oxytocin administration. ["A rose by any other name" lesson].

In order to broaden the requests so that you are not short-changed, you may wish to request the **INDEX** of any and all policies/procedures, protocols, etc. This way you can review the entire table of contents and see what that particular hospital names their particular protocols. Then, you can request specific discovery.

3. I have attached hereto sample initial interrogatories

   a) Defendant physician **[See attached]**
   b) Defendant hospital **[See attached]**

DISCOVERY BATTLES:

Don Iler's case of *Nakoff v. Fairview General Hospital* (1996), 75 Ohio St.3d 254, is refreshing to see that there are some cases where the courts will not put up with the "gamesmanship during discovery." Unfortunately many of the lower courts permit discovery abuses simply because they do not wish to deal with it. The defense bar is well aware of this attitude and is why they do not fear trial courts since they will rarely if ever be reprimanded for stonewalling discovery. It is therefore imperative to take up these battles and educate the trial judges so that they can do the right thing and provide the discovery our clients have a right to.

Here are some specific examples of materials and matters which courts have ruled discovery is to be had:

a) **Resident evaluation**: Register v. Willmington Medical Center, Inc., Davis, 337 A.2d 8 (1978)
b) **Hospital Guidelines:** Kalish v. Mt. Sinai Hospital, 279 N.W.2d 783 (Minn. 1978)
c) **Grand Rounds Presentation**: Pindar v. Parke Davis, 337 N.Y.S.2d 452 (1972)
d) **Emergency Room Manual and Nursing Job Description**: Johnson v. Roanoke Memorial Hospital, (Circuit Ct., City of Roanoke, Case No. 97-321 (Virginia)
e) **Tissue Committee Report:** Davidson v. St. Paul Fire & Marine Ins. Co., 248 N.W.2d 433 (1977).
f) **Disciplinary proceedings**: Kenney v. Superior Court, 63 Cal. Rptr. 84 (1967)
g) **Perinatal Mortality Committee Report**: Gureghian v. Hackensack Hospital, 262 A.2d 440 (1970)
h) **Joint Advisory and Quality Assurance committee** subject to disclosure: State ex rel. Fostoria Daily Review Co. v. Fostoria Hospital, 44 Ohio St.3d 111

i) **Medical Review Committee**: - trial court has authority to order such an inspection in camera; State ex rel. Grandview Hospital v. Gorman, 51 Ohio St.3d 94;

j) **Hospital privileges**: State of Wisconsin v. Maroney, 365 NW2d 887; May v. Wood River Township Hosps., 1994 WL 14427 (Ill. App. 5 Dist. Jan.21, 1994)

k) It is incumbent upon the trial court to hold an *in camera* inspection; Gates v. Brewer, 2 Ohio App.3d 347, 442 N.E.2d 72.

CONTENTION INTERROGATORIES

It is typical for defense to ask your "contentions" in initial interrogatories, BEFORE any discovery is had. Courts have allowed a party to defer responding to contention interrogatories until after particular discovery has been completed or a later time when the party is more likely to have the requested information FRCP 33(c). Responses to interrogatories that prematurely seek evidence about a party's contentions may be deferred (FRCP 33(c); ***In re Convergent Technologies Securities Litigation***, **108 F.R.D. 328,** (N.D. Cal. 1985).

DEPOSITIONS:

– * Agree to MARK MODLIN - PHOTOS if lots of witnesses e.g. NURSES - photo ID of each - attach to depo

1. DEFENDANT

It is helpful to issue a Notice *Duces Tecum* so that the defendant brings with them not only the original medical records but other tangential materials which may be helpful. [See attached Notice of Deposition]

You may want the doctor's personal calendar to find out if they were out golfing or at a ballgame, etc. when being called. Their operation schedule may tell you if they are in a hurry to get to their next case, etc.

Always ask if they have made any "personal notes" or summaries or other recordations concerning the case. – * HOUSEWORTH NURSE

A. DEPOSITION OF DEFENDANT PHYSICIAN:

i) Authoritative Texts:

Historically defenses always woodshed their witnesses that there is no book that is "authoritative." Given the relatively recent change in Evidence Rule 706 which states:

"Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art are admissible for impeachment if the publication is either of the following:

(A) Relied upon by an expert witness in reaching an opinion;

(B) Established as reliable authority

(1) by the testimony or admission of the witness;

(2) by other expert testimony, **or**
(3) by judicial notice.

This now does not require one to have the adversary hold the key to their own cross-examination as it used to when the witness themselves had to admit something was an authority.

However, we still have experts that refuse to acknowledge anything as an "authoritative" text. Many of these witnesses do not know what "authoritative" means in the law. It may be useful to be aware of ***Williams v. O'Brien,*** 1992WL348218 (Ohio App.2 Dist.), Case No. 12344, Nov. 25, 1992) which addressed that very definition.

The *Williams* court was addressing a physician who refused to acknowledge his own book as "authoritative." The Court stated:

"An 'authoritative' medical treatise or text is one which may be a standard in its field or one written by one recognized as an authority in his field of endeavor. An expert witness may not escape cross-examination from an authoritative test, monograph, or article merely because he has not himself read the material or does not agree with the entire text. As long as the witness recognizes the author as a respected authority or otherwise admits that the text is regarded as a standard in his profession, the witness may be subjected to cross-examination from this literature."

There are some basic "authorities" which should be asked about in most cases. For example:

The Merck Manual
Harrison's Principles of Internal Medicine
Cecil Textbook of Medicine
Campbell's Operative Orthopedics
Nelson Textbook of Pediatrics
Williams Obstetrics
Schwartz Principles of Surgery
Sabiston Textbook of Surgery
Miller: Anesthesia
Gregory: Pediatric Anesthesia

ii) STANDARD TRUISMS

There are certain questions which present a no-lose situation:

a) Does the standard of care include the duty to reduce the risk of harm to the patient as far as reasonably possible?
b) Did (the patient) deserve to have the standard of care provided to him/her that maximized his/her chance of survival?

c) Do you recall being taught in medical school: "First do no harm?" - Do you practice that standard?

d) Are you familiar with the JCAHO? Do you agree that the medical record should incorporate: "all significant clinical information pertaining to a patient." [JCAHO Manual, Medical Records Service standards]

e) Informed Consent: "If the risk of the procedure outweighs the benefit to the patient, that IS sub-standard care?"

f) What did you learn from this case? [If they say they have learned something, it can show they were deficient; if they say they learned "nothing" the jury may see that this was a pure waste and the doctor did not even benefit from this case].

g) In reviewing the case, would you have done anything differently if you had the chance?

h) Was this patient a good patient? – were they compliant? (best to know now if they are going to blame your client).

i) When giving this patient the risks of the procedure, did you give them YOUR statistics in doing this procedure or the national statistics? [i.e. if this particular doctor has never had a complication, can he honestly tell the patient that the risk is "zero"?]

iii) Defendant's personal statistics

The hospital keeps track of its physicians via coding. Each hospital may call it different things, but the hospital (and doctor) will have statistics as to how many hernia surgeries he did last year, etc. Lay the groundwork in his deposition and follow-up with the hospital in discovery.

2. DEFENSE EXPERT WITNESS

Once again, it is advisable to issue a Notice *Duces Tecum* to expert witnesses. Make sure they bring their "billings" with them. So many claim they don't have it or don't know what it is if you just ask them without requesting the documents ahead of time.

Get the expert's C.V. and examine it for all relevant topics. It is helpful to search the expert on the internet because sometimes articles or chatroom offerings are not listed on their CV.

** Make sure you ask with which company he carries his malpractice insurance and whether he has been a defendant in a medical malpractice suit.

[Attached hereto is an outline for discovery deposition of a defense expert.]

RESEARCH TIPS:

- ***Audio-Digest:*** provides a cassette and some reference citations; many specialities covered: Anesthesia; Surgery; Obstetrics; Neurology; Emergency Medicine; Pediatrics; etc.

- Look at the hospital's website as to whether they have a medical library on-line. Many times they will and may even list the resouces they have available (e.g. videotapes, etc.)

- When researching the expert's articles look at the index and read other articles that appear in that journal written by other authors. Rarely does the expert know of these other articles which may not agree with their opinions. It is great cross-examination material since it comes from the same source.

Look to professional organizations. Many expert witnesses do not realize that their organizations have published standards, guidelines, protocols, etc. For example:

American College of Emergency Physicians

American College of Surgeons (including pamphlet on "Informed Consent" – "Patients should understand the indications for the operation, the risks involved, and the result that it is hoped to attain."

American Association of Neurological Surgeons [have "ethical guidelines" that mandate that their members must testify "appropriately" or be subject to professional sanctions.

Look to the internet for any defendant hospital's website. This may provide you substantial information which the defendant's witnesses themselves may not even know. (i.e. number of patients seen per year; hospital bed population; etc)

Good discussion of discovery regarding experts: See: *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980); *Guilloz v. Falmouth Hosp. Assn. Inc.*, 21 F.R.Serv.2d 1367 (D.Mass. 1980).

Discovery Battles:

INCIDENT REPORTS:

Privilege is subject to strict construction. (*Koller v. W.E. Plechaty Co.*, 6 Ohio Misc. 57, 216 N.E.2d 399 (1965)

Mere transfer of document from a client to an attorney does NOT make the document privileged. (*Parkhurst v. City of Cleveland*, 36 Ohio Ops.321, 77 N.E.2d 735.

While the work product doctrine applies to material prepared in anticipation of litigation, it does NOT apply to materials prepared in the ordinary course of business without regard to litigation. (*In re Keogh*, 151 Ohio St. 307, 85 N.E.2d 550 (1949); *City of Dayton v. Smith*, 109 Ohio App.383, 166 N.E.2d 256 (1959).

Pursuant to JCAHO hospitals ordinarily makes "reports and investigations of all incidents involving....patient, personnel, or visitor injury." [IM8.1.2.3, Management of Information]. This is a JCAHO requirement for their hospital security. Therefore these "reports and investigations" are NOT privileged, because they are clearly made in the ordinary course of business regardless of litigation.
- Staff witness' statement to counsel for defendant hospital is not privileged (*Samaritan Foundation v. Goldfarb*, 62 USLW 2341 (Nov. 17, 1993))

MEDICAL RECORDS:

ORC 3701.74: Hospital has the duty to provide "complete" medical records.

Lost Records: - Presumption of negligence: Sweet v. Sisters of Providence, 881 P.2d 304 (1994); DeLaugher v. Lawrence Cty. Hosp. 601 So.2d 818 (MS 1992);

Missing Nursing Notes: spoilation of evidence; Battochi v. Washington, 581 A.2d 759 (1990);

Absence of nursing note leads to jury instruction that it was NOT done

- Dent v. Perkins, 598 So.2d 1101 (La. 1992)

Charting by "exception" was negligent: Lama v. Borras, 16 F.3d 473;

Doctor has "duty to describe accurately and fully in his report of operation everyting of consequence that he did " and observed and should have been dictated immediately after surgery: Patrick v. Sedwick, (1964), 391 P.2d 453

Doctor has duty to provide "truthful information"

- Aufrichtig v. Lowle, N.Y. Ct. App. May 4, 1995; see also Araicevich v. Plumb Creek Med., 819 F. Supp. 2d 929 (CO 1993);

Surgeon must disclose damage done during surgery:

- Morris v. Pavlatos, (Ill. Cir. Ct., Lake Cty, March 21, 1995, No. 93L1018; citing Hammond v. Aetna, 243 F.Supp. 793 (Ohio).

Hospital had duty to maintain medical records: - Lost EKG tracings:

Fox v. Cohen, (1980), 84 Ill.App.3d 744, 406 N.E.2d 178

- see also: Collins v. Westlake Community hospital (57 Ill. 2d 388, 312 N.E.2d 614 (1974) – court permitted jury to draw an inference from the absence of documented observations that no observations had been made.

Request hospital LOGS:

In addition to your client's medical records there are other hospital documents which may be useful in proving necessary facts. E.g. The operating room has an "operative log" which will list information which will not be in your client's records.
Additionally, there will be an anesthesia log. (Check to see the ASA classification of the patient; does it match the anesthesia record?).

Transcription logs:

Physicians dictate into the hospital's transcription system. These systems keep a transcription LOG. If you have questions as to whether there was a second or "replacement" report, you can double check using the dictation log.

At the bottom of the Operative Report (and other documents) it will have "D" which means date "dictated" and a "T" which is the date it was "transcribed."

** If there is a question of altered records it may be worthwhile to take the depositions of the medical records personnel. These people are professionals and have professional certification. Every hospital has "approved abbreviations" and approved manner in which to "correct" an error in the records. Not infrequently, there will be corrections that do not comport with the hospital's procedure. This is interesting to get into to since the medical records personnel will probably agree with you that the physician or nurse failed to correct the record properly. The issue of "late entries" also can be important and "how" they should be charted.

***LOOK* AT THE FACE SHEET**

The "face sheet" may not look very interesting since it involves International Classification of Diseases or CPT codes for billing purposes. However, it there is a question as to WHAT the doctor really did or really diagnosed these findings may be contrary to what the doctor put in the record. Get the ICD/CPT books and cross-check to make sure your diagnosis is appropriate.

***NOTE: Not only the code number are important; but the LETTERS can be very important. The preface "E" before a number can mean that the problem may have been due to negligence or a "misadventure". Therefore, if you have an "E", make sure you follow-up and check out that particular code.

MEDICAL MALPRACTICE RESEARCH VARIOUS CASES/TOPICS

ATTENDING TO PATIENTS:

Patient Unattended **falls in bathroom** "Routine Nonmedical Care" standard applied:
Landes v. Women's Christian Assn. 504 NW2d 139(1993 IA)

Automatic doors close on patient; nurse liability
McDonald v. Aliquippa Hosp. 606 A.2d 1218 (1992)

Slip and fall - nurse abandons patient in shower:
Pierce v. Mercy Med. Hosp. 847 P.2d 822 (1992)

Heating pad PRN" patient burned Dr. accuses nurse
Beckham v. St. Paul Fire & Marine, 614 So.2d 760) LA 1993

Nurse negligence: **injection** vicarious liability of hospital.
Mann v. Health Care Auth of Huntsville, 653 So.2d 941 (1995) = right buttock

Independent Duty? - Whenever a nurse has reason to believe that appropriate procedure are not being followed she has the concomitant responsibility to make that fact known to the appropriate authorities. Bates v. Meyer 565 So.2d 134 (Al 1990)

NURSES' TESTIMONY/ OPINIONS:

NURSE **CHANGES TESTIMONY** & NOTES: CREDIBILITY ISSUES;
- Georgia Osteopathic Hosp. v. O' Neal, 403 SE2d 235 (Ga 1991)

COURT HOLDS : "**Charting by EXCEPTION**" policy = negligent
Lama v. Borras 16 F.2d 473, PR (1994)

Nurse expert's testimony as to cause of death excluded
Phillips v. Alamed Co., 588 So.2d 463 (1991 AL)

Nursing **PROTOCOLS** excluded in death case: reversible error issues:
See Dixon v. Hardey, 591 So.2d 3 (1991)

Care Allegedly provided without **Proper Supervision**:
Araicevich v. Plumb Creek Med. 819 F.Supp.2d 929 (1993 CO)

This case presents a illustration of how convenient it is of physician either not to recall seeing a patient or to change their testimony when it is apparent that their testimony does not comport with the fats or testimony of others. *Regan Report of Nursing Law*, Vol. 34, No. , Nov. 1993 p.4

MEDICAL RECORDS – Conveniently Missing, Changed, Lost, Destroyed, etc.

Moskovitz v. Mt. Sinai Med. Ctr., (1994), 69 Ohio St.3d 638, 635 N.E.2d 331:

> "An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm."

"It is textbook law that the fabrication of false documents is an admission by conduct in that the person fabricating the document gives grounds for believing that his case is weak."
– Harris Trust and Sav. Bank v. Ali, 425 N.E.2d 1359 (1981)

DeLaugher v. Laurence Cty Hosp. 601 So.2d 818 (MS 1992)

No Independent Recollection: Atkins v. Lee, 603 So.2d 937 (AL1992)

Physician tampered with records: May v. Moore, (Ala.1982), 424 So.2d 596

Nurse's **missing notes** spoliation of evidence: Battochi v. Washington Hosp. 581 A.2d 759 (1990)

NURSING NOTES – Absence of Note:
Dent v. Perkins, 598 So.2d 1101, LA 1992 - absence of a note in charge led jury to conclude it was never done.

Failure to chart circulation - amputation proximate cause:
Dillon v. Medical Center Hospital. 648 NE2d1375 (Ohio 1993).

Lost Medical Medical Records: Hospital liable: Bondu v. Gurvich, 473 So.2d 1307

"Original Records" are "critical" – Pavlinko v. Yale-New Haven Hosptial (1984), 470 A.2d 246

TESTIMONY:

NURSE'S TESTIMONY ON "***ROUTINE PRACTICE***": Elias v. Suran, 616 NE2de 134 (1993)

Unsupervised CRNA - Lax hospital policy: Mitchell v. Amarillio Hops. 855 SW2d 857 Tx 1993

Nursing testifying as to doctor's malpractice: Nowak v. High, 433 SW3d 602, GA1993:
See also McCorick v. Avret 271 SE2d 832 (198) - sterilized needle

Tye v. Wilson 430 SE2d 129, post-operative intubated patient; since care overlaps
OK for doctor to testify as to nursing standard.

Nurse's opinions on physician's malpractice prohibited:
Fields v. Curators of Univ. of Mo., 848 SW2d 589 (MO 1993)

Doctor expert on nursing practice? Must expert state standard of care?
Minster v. Pohl, 426 SE2d 204, 1992)

Doctor testifies as to national standard of nursing care: McMillan v. Durant 439 SW2d 829, SC 1993

*** Physician retract opinion; nurses were not negligent; doctors can do it:
Galloway v. Baton Rougg en Hosp. 583 So.2d 1169 (LA1991)
Expert testimony fails $9.5 judgment reversed
Northern Trust v. Upjohn 572 NE2d 1030 - nurse not qualified to testify

Trial court abused its discretion in qualifying the plaintiff's witnesses, Drs. as "experts' regarding the standard of care for intern, resident and nurses. Bahr v. Harper-Grace Hospital, 497 NW2d 526 (1993)

MONITORING:

COMPARTMENT SYNDROME:
Must nurse perform tests not ordered?;
see Northeast Ala. Reg. Med. Ctrn v Owens 584 So.2d 1360, Al 1991 re: neurovascular tests not ordered by doctor.

Was apnea monitor on or off; Expert testimony
Dent. v. Memorial Hospital. 408 SE2d 473 (GA19991) - the law does not require "magic words" to constitute a case saving pert opinion. magic words alone, not matter how often repeated do not make a fact.

Failure to monitor intubated patients:
Physician testimony on nursing standards; Tye v. Wilson, 430 SE2d 129 GA, 1993)
Failure to fully communicate = Baptist Med. Center. V. Wilson, 618 So.2d 1335 AL 1993)

Failure to follow orders: Patient arrests - resulting coma
Sullilvan v. Sumrall 618 So.2d 1274 (MS 1993

"Constant Observation" means just that "CONSTANT observation":
- Thayer v. Jackson Brook, 584 A.2d 653 (ME 1991).

Failure to document and communicate:
Ketchum v. Overlake Hosp. 804 P.2d 1283 (WA1991)

Good charting - bad **communication**:
Critchfield v. McNamara, 532 NW2d 287, (NE 1995)

Failure of nurse to **communicate:** George v. LDS Hops., 797 P.2d 1117 (UT 1990)

Nurse fails to communicate: - **Vital Signs**
White v. Methodist Hosp. South, 844 SW2d 642 (TN1992)

Recovery room Nurse fails to monitor patient
Eyoma v. Fallco, 589 A.2d 653 (NJ 1991)

Pt complaint of "strange feeling" **failure to communicate**:
Cassandra P. v. Center for Women's Health 25 Cal.RPTR.2D 667 (1993)

Should OR nurses know whether standard of care is violated?
Volger v. Dominguez, 624 NE2d 56 IN 1993)

Who has responsibility to monitor **OR blood loss**?
- Uhr v. Lutheran Gen. Hosp. 589 NE2d 723, IL 1992)

Asleep on duty - record impacts delay in delivery case: St. Paul Med. Center v. Cecil 842 SW2d 808 Tx 1992)

Doctor improperly orders **discharge**; should nurse intervene?: NKC Hospital, Inc. V. Anthony, 849 SW2d 564 KY 1993:

Nurse monitors infection; **failure to report condition** of infection to doctor;
Booth v. Silva, 626 NE2d 903 (1994)

Nursing negligence superceding cause of death: Dent v. Perkins, 629 So.2d 1354 ILA1993)

RN's failure to **notify doctor of changes**; Proximate cause issue
Flores v. Cyborksi, 629 NE2d 74 (1993)

Nurse fails to call doctor; deterioration of patient; death;
Guzeldere v. Wallin 593 NE2d 629 (1992)

Implementing doctor's order is not defense
Bremner v. Charles, 850 P.2d 1148 (OR 1993) = question a doctor's orders.

NURSES' TESTIMONY/ OPINIONS:

Nurse expert's testimony as to cause of death excluded
Phillips v. Alamed Co., 588 So.2d 463 (1991 AL)
Nursing **PROTOCOLS** excluded in death case: reversible error issues:
See Dixon v. Hardey, 591 So.2d 3 (1991)

OPERATING ROOM: Can doctors rely on nurse's sponge counts?
VanHook v. Anderson 824 P.2d 509 (WA 1992) - Yes.

Sponge count: Holger v. Irish, 851 P2d 1122 (991)

Loose screw left in patient; vicarious liability issue
Unnicutt v. Wright, 986 F.2d 119 MS 1993)

OBSTETRICS:
Garcia v. Providence Med. Center 806 P.2d 766 (QA 1991) = failure to use FHM.

Chater v. Central Vermont Hosp. 583 A.2d 889 *VT 1990 - Fetal monitor delay "Proximate cause" issue
OB: Failure to call for help fetal distress
Fairfax Hosp System v. McCarty, 419 SE2d 621 (1992 VA)
OB: Failure to monitor FHR: Miles v. Box Gutte 489 NW2d 829 (1992)
OB: Failure to determine breech position: MD or RN duty?
Alvis v. Henderson Obstetric, 592 NE2d 678 (1992)
OB: Fetal distress Scott v. Capital Ara Comm. Health plan 594 NYS2d 370 (1993)

HOSPITAL LIABILITY:
Nurses - not same standard as physicians
Alef v. Alta Bates Hosp. 6 Cal. Rptr. 2d 900 (CA992

Court upholds nurse's refusal to float: Winkleman v. Beloit Memorial Hosp. 483 NW2d 211 WI 1992)

Negligent IV site selection: Standard of care Deese v. Carroll City Cty Hosp., 416 SE2d 127 (1992)

Nurse gives Meds. IM instead of IV Pharmacy failure to give directions; Gasen v. East Jefferson Gen. Hosp. 628 So.2d 256 (1993) Vibramycin 100m g

---

Failure to "spoon feed" patient - no expert needed Beverly Enterprises v. Nichols, 441 SE2d 1 VA 1994

Nurse puts wrong toe-tag on wrong body, can she rely on police ID?
Jordan v. Brantly, 589 So.2d 680 (1991)
Failure to restock crash cart: delay and death
Dixon v. Taylor, 431 SE2d 778 NC 1993)
Hospital liability:
nurse stabbed in elevator:
Mundy v. Dept. of Health & Human Res. 620 So.2d 811 (1993)
Hospital liable for rape of patient:
Samuels v. Southern Baptist Hosp. 594 So.2d 571 (LA 1992)

Hospital filed to comply with own rules:

Pederson v. Dumouchel, (1967), 431 P.2d 973 (Sup. Ct. Washington)

Siderails down: -Kadyszewski v. Ellis Hops. 595 NYS2d 841 (1993)

Siderails left down pt falls from bed = ordinary negligence or malpractice?
Robinson v. Medc. Centr of Cent. GA, 456 SE2d 254 (1995)
Nurse assists pt to bathroom - injury
Oxford v. Upson v. Upson county Hops. 438 SW2d 11 (1993)

Is your patient complaining of "Pain" or Burning"? - burns plaster cast of paris
McLain v. Glennwood Reg. Med. Center 601 SE2d 240, LA 1992

Is RN practice of Medicine negligence *per se*?
Turek v. St. Elizabeth Com Health Ctrn 488 NW2d 567 (NE 1992)

HOSPITAL ISSUES:
Peer Review: not applicable
Roach v. Spingfield Clinic 623 NE2d 246 Ill. 1992).

Incident Report: Medicated pre-op patient falls; incident reported excluded from evidence;
Atkins v. Pottstown Med. Center, 634 A.2d 258 (1993)

Surgeon not liable for CRNA; Borrowed servant Harris v. Miller, 438 Se2d 731 (NC 1994)

AGENCY NURSE: Employee -vs- Independent Contractor;
Trauma Nurses .v Board of Review 576 A.2d 285 9NJ 1990

Nurse supervisor changes doctors orders termination: Frank v. South Asubrurrand , 628 NE2d 953 IILL 1993)

LPN breaches patient confidentiality = is it medical malpractice? Wyatt v. St. Paul, 86 SW2d 505, 1994)

Hospital "Self-insured:: Nurse Insurer liable: Wake County Hosp. v. Nation Casualty, 804 F.Supp2d 768 NC 1992)
Nurse's right to pick own atty: Davenport v. St. Paul, 978 F.2d 97 MS 1992

PLEADINGS:
Morris v. Children's Hospital Medical Center; 73 Ohio App.3d 437, 597 N.E.2d 1110
- general "notice" allegation of nursing negligence sufficient to raise *respondeat superior* liability as to hospital.

TRIAL: Adverse Inference: - hospital failed to call a witness
- Routh v. St. John's Mercy Med. Center, 785 S.W.2d 744 (MO 1990)

APPEAL: Substantial evidence criteria needed to uphold verdict on appeal
Silvis v. Hobbs, 824 P.2d 1013 (MT 1992)

Does judgment for nurse require judgment of hospital
Eversole v. Oklahoma Hosp. 818 P.2d 456 (OK 1991)

OHIO - MISC. CASES

OHIO: Expert's bias/prejudice; **same insurer** – *Ede v. Atrium S. OB-GYN, Inc.*, 71 Ohio St.3d 124; *Davis v. Immediate Med. Serv.*, (1997) 80 Ohio St.3d 10
OHIO: Expert's bias/prejudice; **similar pending negligence case** against him is probative and admissible to prove bias: *Oberlin v. Akron Gen. Med. Ctr.* (2001) 91 Ohio St.3d 169
OHIO:- loss of chance of survival issue:
see *Roberts v. Ohio Permanente Med. Group*, (1996), 76 Ohio St.3d 483, 668
Also see: N.E.2d 480. *Safranic v. Belany*, 623 NE2d 611
OHIO: Stinson v. England (1994) 69 Ohio St.3d 451, 633 N.E.2d 532
- no causation "possibilities"- even for defense
OHIO: nurse fails to follow "doctor's policy" death results:
Hartman v. Riverside Methodist, 577 NE2d 112 (Ohio 1989)
OHIO: Failure to timely report test results: cause of stillbirth?
Clancy v. Euclid Gen. Hosp. 584 NE2d 763 (OH 1989(
OHIO: Expert testimony is required to establish nursing negligence,
Ramage v. Central Ohio Emerg. 592 NE2d 828
OHIO: Failure to repeat vitals - paralysis: Proximate cause issue,
Porter v. Lima Mem. Hosp. 995 F.2d 629 (Ohio 1993)
- whether nurse had duty to immobilize patient.
OHIO: CRNA's cannot be supervised by podiatrists,
Lakeland Anesthesia Group. v. Medical Bd., 585 NE2d 577 (1990)
Ohio CRNA sues board med. Illegal practice of med issue:
State v. State Med. Bd., 600 NE2d 270 (1991)

DEATH AFTER ER treatment; Proximate cause issue: Godeauz v. Ryne Brank hops. 606 So.2d 948 (9192)
Dead bodies: Brown v. Delaware Val. Tans. Pragra, 615 A.2d 1379 PA 1992:

Nurse refuses to "stay out of it " Termination:
Kirk v. Mercy Hospital, 851 SW2d 617, (Mo1993)

HEALTH CARE STANDARD-SETTING ORGANIZATIONS:

Burnett v. Spokane Ambulance 1997 LEXIS 169 (Wash. 1997) - JCAHO

Bays v. St. Luke's Hospital, 825 P.2d 319 (Wash. App. 1992) JCAHO

Pedroza v. Skagit Valley Hospital, 677 P.2d 166 (Wash. 1984) - Corporate Negligence

Darling v. Charleston Community Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965)

Purcell v. Zimbelman, 18 Ariz. App. 75, 81, 500 P.2d 335 (1972)

ACGME standards:
Colorado State Board of Medical Examiners v. Samayoa, 887 P.2d 8, 1994 Colo. LEXIS 883 (Colo. 1994)

Floyd v. University of Minnesota, 1993 Minn. App. LEXIS 896 (Minn. Ct. App. 1993) - resident sued for termination of residency; ACGME requirements are not incorporated into the residency agreement. Plaintiff lost.

Magrinat v. Trinity Hospital, 540 N.W.2d 625 (N.D. 1995)
- angioplasty - Surgery Dept. policy/procedures; **hospital required to follow its own policies.**

Owens v. Rado, 659 So.2d 87 (Ala. 1995); MSJ reversed; expert's affidavit citation to national affiliations was sufficient.

Duvall v. Laidlaw, 490 N.E.2d 1004, 1007 (Ill. App. 1986) - relied on national organizational standards

Shilkret v. Annapolis Emergency Hospital Assoc, 349 A.2d 245, 245-47 (Md. App. 1975) - relied on national organizational standards and JCAHO standards.

EMTALA does not apply to individual physician: Almond v. Town of Messena, No. 78340 (N.Y. Div. 3d), Jan. 8, 1999).

PNEUMOTHORAX: Wolpa v. Southern California Orthopedic Institute,. No. LC033512 (L.A. Superior Ct. Van Nyes, Jan. 6).

Villagomez v. De Fiorand-Brown, Tex. (Feb. 4, 1999)
Hospital liability; improper discharge; unsanitary conditions; infection;

HMO LIABILITY: Shannon v. McNulty (1998 Pa., Super. LEXIS 2823 (Oct. 5) - HMO may be liable under vicarious liability and corporate negligence:

RES ISPA LOQUITUR

18

Byrne v. Boadle, (Court of Exchequer, 1963, 2 H. & C. 722, 159 Eng. Rep. 299 - barrel of flour; "the fact of its falling, is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there arny facts inconsistent with negliggence it is for the defendant to prove them.".

1st Case to announce/apply ***Byrne v. Boadle***:
Scott v. Lond & St. Katerhine Docks, Co (1865(, 3 H. & C. 596, 159 Eng. Rep. 665:
"There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Rogow v. United States, USDC SDNY, 1959, 173 F. Supp. 547: [crash of B-52; weather not a factor; crash killed pltf's husband a freelance writer on board]]
"the cases teach that plaintiff need not negate every other possible cause for a crash. She must only show that such an accident does not usually occur wihtout negligent maintenance or operation. This she has done."

Ayers v. Parry , USCA, 3rd Cir., 1951), 192 F.2d 181
[surgeon/anesthetist/malpractice] - res ipsa not applied.

Ybarra v. Spangard (1944), 25 Cal.2d. 486, 154 P.2d 687; [affirmed on later appeal:
Ybarra v. Spangard (1949) 93 Cal.App.2d 43, 208 P.2d 445]
- [several doctors who have patient under anesthesia can be liable under *res ipsa*]
followed in: **Oldis v. La Societe Francaise de Beinfainsance Mutelle** (1955), 1236 Cal. App. 2d 461, 279 P.2d 184; **Frost v. Des Moines Still College of Osteopahty** (1956), 248 Iowa 294, 79 N.W.2d 306.

Timbrell v. Suburban Hospital (1935), 4 Cal.2d 68, 47 P.2d 737
[burns on body after awaking from anesthesia]

U.S. v. James J. Masters, C-1-94-717

The Use of Expert Evidence in Res Ipsa Loquitur Cases (1959), 5 Vill.L Rev. 59; Note (1958) 106 U.Pa.L. Rev. 731.

Conspiracy of Silence: **Agnew v. Parks** (1959) 172 Cal.App.2d 746, 343 P.2d 118 - suit brought against group of physicians who refused to testify.

WEBSITES:

www.hlm.nih.gov = National Library of Medicine
http://www.ncbi.nlm.nih.gov/pubmed = PubMed / Medline
http://path/upmc.edu/spp/train.htm = Society for Pediatric Pathology
http://forensicpanel.vservers.com/letter.php3
http://www.acep.org/library/index.cfm/id/22 = American College of Emergency Physicians
http://www.medvideo.com/vjcts/about-vjcts.html = Video Journal of Cardiothoracic Surgery
http://www.ctsnet.org/ = The Cardiothoracic Surgery Network
http://www.acc.org/ = American College of Cardiology
http://www.amedeo.com/medicine/fra/jorthtra.htm = The Medical Literature Guide
http://www.jpedsurg.org/scripts/om. = Journal of Pediatric Surgery
http://www.comquest.com/bet-tzedek/nursing.html = Nursing Home Law
www.nejm.org = New England Journal of Medicine
www.ama-assn.org = AMA Physician Sheet Online Doctor Finder
http://www.nlm.hih.gov/research/visible/photos.html = The Visible Human Project
www.uchs.edu/sm/chs/browse_f.html = the visible female **WEB SITES:**

ACOG: **www.acog.com/from_home/pub-list.htm**

American College of Surgeons: **www.facs.org/**

American Heart Association: www.amhrt.org/index.html

Joint Commission on Accreditation of Healthcare Organizations: **www.jcaho.org**

University of Washington Medical Center:
www.washington.edu/medical/amc_admin/msbylaws/index.html

Department of Health & Human Services: www.os.dhhs.gov/search

Emergency Medicine: **www.hscsyr.edu/~EMERGMED/LEGAL/medleg.html.**

Dr. Mariani: marianip@mailbox.hscyr.edu

REPRODUCTION MEDICINE: www.asrm.com

www.RnGMedCons.com = Medical Legal Internet Directory 888-486-2245

WWW.SPORTSMEDICINE.COM
www.//count51.med.harvard.edu/AANLIB/home.html = the Whole Brain Atlas
http://www.scoi.com = Southern California Orthopedic Institute Home Page
http://www.eyenet.org/ = American Academy of Opthalmology
http//:www.asahq.org/ = American Association of Anesthesiologists

http://www.yahoo.com/Health/Medicine/Pediatrics = Pediatrics
www.pharminfo.com/drugdb/db_mnu.html = Drug Database
http://www.medmedia.com/oo4/.htm = Wheeless'Textbook of Orthopaedics
http:www-sci.lib.uci.edu/HSG/MedicalSurgery.html = Martindale's Health Science Guide; Anesthesiology & Surgery Center