SUPREME COURT OF VIRGINIA
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IN THE

# Supreme Court of Virginia

at Richmond

## RECORD No. 770580

FROM THE CIRCUIT COURT OF VIRGINIA BEACH
AT LAW Number L-2873

COURTNEY S. IVES
Appellant

v.

RAMON N. REDFORD, JR. M. D.
Appellee

## JOINT APPENDIX

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II. MOTION FOR JUDGMENT (as finally amended)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

| | | |
|---|---|---|
| COURTNEY S. IVES, Plaintiff | : | |
| v. | : | AT LAW |
| | : | NO. 2873 |
| RAMON N. REDFORD, JR., M.D. 1120 First Colonial Road Virginia Beach, Virginia, Defendant | : | |

AMENDED MOTION FOR JUDGMENT

TO THE HONORABLE JUDGES OF THE COURT AFORESAID:

Comes now the Plaintiff, COURTNEY S. IVES, by counsel, and pursuant to order entered by the Court doth file her amended motion for judgment as follows. The Plaintiff, Courtney S. Ives, moves this Court for a judgment against the Defendant in the sum of Three Hundred Thousand Dollars ($300,000.00) with interest and costs for the following, to-wit:

1. That both the Plaintiff and Defendant are residents of the City of Virginia Beach, Virginia, and the Court has jurisdiction to hear this case.

2. That the Defendant is and has been at all times mentioned herein a licensed physician in the State of Virginia practicing with a specialty

in the field of Gynecology.

3. That the Plaintiff, Courtney S. Ives, was a patient of the Defendant and at all times mentioned herein reposed complete faith and confidence in said Defendant doctor.

4. That the said Defendant doctor was negligent in his diagnosis and treatment of the Plaintiff, Courtney S. Ives' condition, namely carcinoma of the left mammary, on or about November 25, 1975, and had been negligent on a continuing basis for as much as three years preceding the alleged negligence.

5. That said Defendant doctor prescribed Ovulen 21, a medication containing estrogen, after visual symptoms of inversion of the left nipple and a mammogram showing fibrocystic disease of the breasts; confirmed his decision to prescribe said medication in writing on May 3, 1973 and continued to prescribe said medication as late as November 25, 1975.

6. That in view of the Plaintiff's age, visual symptoms and previous diagnosis of fibrocystic disease of the mammmaries this treatment was contra indicated, said contra indication was well known to the general medical community and constitutes

negligence.

7. That on or about November 15, 1974, during the Plaintiff's yearly check up, Defendant doctor in the face of Plaintiff's concern over worsening visual condition assured Plaintiff that there was no need for concern, that there was no need for a mammogram, and prescribed another year's supply of Ovulen 21 and this failure to pursue known and available diagnostic techniques and prescription of contra indicated medication constitutes negligence.

8. That on or about November 25, 1975, after assuring patient ther was no carcinoma Defendant doctor referred Plaintiff to a plastic surgeon for "elective" surgery of a cosmetic nature and prescribed another year's supply of Ovulen, and that this second failure to pursue known and available diagnostic techniques and the prescription of contra indicated drugs constitutes negligence.

9. That within two weeks after Defendant doctor's last reassurance that therewas nothing to be concerned about, Plaintiff underwent a radical mastectomy of the left mammary to attempt to incise

and remove carcinoma of the left mammary.

10. That the Defendant doctor by his negligence has caused a shortening of the life span of the Plaintiff, has caused additional medical expense to the Plaintiff and has caused extreme emotional trauma and pain and suffering to Plaintiff.

11. That the Defendant doctor's negligence was the direct and proximate cause of Plaintiff's injuries of shortened life span, additional medical expenses and extreme emotional trauma and pain and suffering.

WHEREFORE, Your Plaintiff moves thisHonorable Court for judgment against the Defendant in the amount of Three Hundred Thousand Dollars ($300,000.00) as general and special damages and all other relief the Court deems appropriate.

COURTNEY S. IVES

By Louis W. Kershner
Of Counsel

Louis W. Kershner, p.q.
524 Independence Boulevard
Virginia Beach, Virginia, 23462

-OD/bls

III. TESTIMONY

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

| | | |
|---|---|---|
| COURTNEY S. IVES, | : | |
| Plaintiff, | : | |
| v. | : | LAW DOCKET |
| RAMON REDFORD, JR., MD, | : | No. 2873 |
| Defendant. | : | |

Testimony of Dr. Saul Kay and
Dr. Neville Jackson, Dr. James Berger,
and Dr. Lawrence Smith

Taken at the trial of the above-styled cause

Before: The Honorable George W. Vakos,
Judge of the aforesaid Court,
and a jury

Date: December 14, 1976

Place: Virginia Beach, Virginia

APPEARANCES:

LOUIS W. KERSHNER and
STANLEY JONES,
Attorneys for the Plaintiff.

DOUMAR, PINCUS, KNIGHT & HARLAN,
By Thomas J. Harlan, Jr.,
Attorney for the Defendant.

Reported by:
Doris O. Derieux, CSR, RPR.

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THE COURT: You may call your next witness.

MR. KERSHNER: Yes. We call Dr. Saul Kay.

THE COURT: May I see counsel?

(Whereupon, counsel approached the Bench and conferred with the Court out of the hearing of the court reporter.)

THE COURT: Ladies and gentlemen of the jury, since we have some matters to be heard outside your presence which may take a little while, we will let you go to lunch at this point.

Please be back here at two o'clock.

Now, I admonished you yesterday not to discuss the case and so forth, and my admonishment goes with you again today. Do not discuss this case with anyone. Do not discuss it among yourselves. Do not remain around anyone who may be discussing it. Do not talk to any of the litigants, attorneys, or witnesses in this case.

You are free until two o'clock.

(Whereupon, the jury was excused at 12:29 p.m.)

PROCEEDINGS IN THE COURTROOM OUT OF THE PRESENCE OF THE JURY

THE COURT: I understand the purpose of this hearing is to determine whether or not Dr. Kay is qualified to testify in this case as an expert; is that correct?

MR. HARLAN: More specifically as to the standard of care.

THE COURT: Well, I said in this case, and we are talking about the standard of care.

MR. HARLAN: All right.

MR. KERSHNER: Thank you, Your Honor.

DR. SAUL KAY, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KERSHNER:

Q Would you state your full name and address for the Court, please?

A Saul Kay, 322 Charmian Road, Richmond, Virginia.

Q Dr. Kay, are you an MD?

A Yes, sir.

Q Dr. Kay, where did you receive your undergraduate academic training?

A New York University, New York City.

Q Where did you receive your medical degree, if you have one?

A New York Medical College, New York.

Q Have you had any advance academic training past your basic medical degree?

A Yes, sir. I did a two-year internship at Harlem Hospital, New York, a residency in pathology at Fordham Hospital, a two-and-a-half-year residency at New York Pathological School and Hospital, and a two-year internship in cancer at the Columbia Presbyterian Medical Center.

Q When were you first admitted to practice in Virginia?

A 1950, August, to be exact.

Q Where was that, Dr. Kay? Where did you first begin practicing?

A At the Medical College of Virginia, Richmond, Virginia.

Q Do you practice a medical specialty?

A I practice a specialty of surgical pathology.

Q And when were you first admitted or do you acquire an admission to practice that in Virginia as opposed to --

A Well, you need a license, and when you are first brought down, they will accept your National Board accreditation, then you must go through the formality of obtaining reciprocity, which I believe took place in December of that year.

Q December of 1950?

A 1950, that's right.

Q So then you hold the Virginia license?

A I hold the Virginia license. That must be renewed every year.

Q In more than one field?

A Well, the license enables one to practice medicine and surgery. That's all the license states. The specialty to practice is based on Board examinations that you take. Maybe that is what you have reference to.

Q Yes, and the Board examinations are State or Federal?

A No. These are national. These are given by the Society, by the Society of the specific specialty in which you are working.

Q Have you been admitted continuously to practice in Virginia since your first admission in 1950?

A Yes. The license is renewed every year.

Q Dr. Kay, would you recite for us a list of the medical professional societies that you belong to, if any?

A I will just have to remember them. The College

of American Pathologists, the American Association of Pathologists and Bacteriologists, the American Society of Clinical Pathologists, the International Academy of Pathology, the American Society of Cytology, the International Society of Cytology, the Virginia Medical Association, the Richmond Academy of Medicine, the American Medical Association. I may have left some out, but that is --

Q Are you an officer in any of those societies?

A Well, yes. I left out one society. This is the Society of Surgical Pathologists, and I am at the moment president of this.

Q Is that a state or national organization?

A This is an organization that at least has been qualified under Federal laws as being a national organization.

I am past president of the Virginia Society of Pathologists, another society.

Q That was my next question. Have you previously been an officer in any of these societies?

A Yes, sir.

Q Are there any other ones other than your previously being president of the Virginia Society of Pathologists?

A Those are the two where I had been.

Q Would you tell us, Dr. Kay, what your present position and occupation is?

A I am a Professor of Surgical Pathology and head

the Division of Surgical Pathology as Chairman in the Department of Pathology at the Medical College of Virginia.

Q How long have you held that position?

A I was Chairman since 1950 when I came, but I came as an Associate Professor and was promoted to full professorship two years later.

Q Would you describe for the jury and the Court in this particular situation what your duties are in that position as Chairman of Surgical Pathology at the Medical College of Virginia?

A Well, one important duty is the service duty which requires examining every piece of tissue removed in the operating room no matter what the specialty is. So it includes everything on which a patient is operated for.

Another duty is to teach medical students and interns and residents in the specialty which I know and in allied fields concerning that specialty.

And the third very important duty is to carry out research in the field of pathology and allied areas.

Q Would you cover for us, Dr. Kay, specifically all of the areas that you teach, your teaching duties? You said you taught in your specialty and allied fields. Would you tell us all the different things that you teach?

A Well, having residents to come to me for pathology, they have to be taught the things that basically I

do, and since pathology has no strict line, it crosses all specialties. We are what is considered the doctors' doctor, if you will, Lecause we have to do general surgical pathology, we have to do orthopedic pathology, we have to do gynecological pathology, urological pathology, dermatological pathology, neuropathology, and maybe some others which I may have left out, but this gives you an idea that it will encompass all types of specialties, and consequently I give various courses in these different fields.

Q What courses, if any, and where have you given them in gynecological pathology?

A Well, this is outside the medical college, though I did give a course in gynecological pathology. There is one which is a didactic course. This is a national course that is given by the University of Colorado involving gynecological pathology, and I was on their faculty for four consecutive years.

Q Doctor, what, if any, subjects, techniques, et cetera, do you teach that relates to cancer and specifically relate to breast cancer, if any?

A Well, the first thing that we must teach to our residents who are going to be the young pathologists is how to perform a frozen section, which requires going into the operating room, examining the tissue removed by the surgeon, and giving him an opinion as to whether it is benign or malignant, and then after that, assuming that the breast must be removed, the

resident must be taught how to orient the breast, what sections to take, how to examine it, how to carefully perform the cells and the draining area, and as you refer just to the breast pathology, this is what I must teach the residents. It is also very valuable for a surgeon, if a patient is scheduled for an operation, to examine that patient the day before, and when a surgeon asks me to do so, and I have done this on a number of occasions, I will usually take the resident with me who will be on the frozen section for the next day to show him how to examine the patient and make some sort of a diagnosis, obviously, on the patient being operated upon, but also to show him how to examine that breast to come out with a conceivable diagnosis. It actually helps us because when the frozen section has been made, or the biopsy is made, we can sometimes direct the surgeon what we would like him to give us, and so that is really an invaluable aid in looking at a patient beforehand if you are going to prepare the frozen section.

Q Do you specifically teach students how to palpate breasts?

A I do, as I indicated to you, for patients who are going to be operated on the following day, but we also have a tumor Board which meets once a week. Back in the early days we met twice a week because there were different aspects of oncology that we were working with, and when the patient would come in, we would have students there -- these are medical students I am

qualifications of understanding the standard of care, but I --

THE COURT: In Virginia Beach?

MR. KERSHNER: Yes, sir, in Virginia Beach, the same or similar communities.

THE COURT: In Richmond?

THE WITNESS: May I interject, Your Honor?

THE COURT: No. He will get around to the question. I think you can qualify him first.

MR. KERSHNER: Okay. We will qualify Dr. Kay.

BY MR. KERSHNER:

Q Dr. Kay, are you experienced in the diagnosis and care of breast cancer?

A Yes.

Q Would you please tell the Court what makes you feel that you are experienced in that, you personally?

A Well, no breast cancer is ever treated without my say-so in Richmond, if that is what you mean by the qualifications, because the ultimate decision is mine or my staff.

Q The ultimate decision on what to do?

A What to do is mine.

Q And as --

A Well, I should modify that. I mean the surgeon

elects, for example, to do a lumpectomy. I mean, that is his business, but he knows what he is doing.

Q On the basis of your diagnosis?

A Right. I cannot direct the surgeon. For example, he knows if he is going to do a radical mastectomy or a modified radical, or a lumpectomy, or maybe not a lumpectomy at all. I do offer an opinion which he is free to accept one way or the other, or I offer an opinion that I don't believe the patient should be operated on at all, or the patient is inoperable.

Q So you personally deal every day in diagnoses and recommend what to do about real or suspected diagnoses?

A Maybe not every day, but whenever the case comes up, this is what we do on our tumor Board, as well as we have a tumor Board meeting.

Q Okay. Are you familiar with the standard of care of patients in diagnosing and treating breast cancer in the Richmond area?

A Yes.

Q Doctor, you made the statement a little while ago that pathology crosses all specialties. Would you explain that as it may or may not relate to breast cancer?

MR. HARLAN: Your Honor, I don't believe he made that statement as Mr. Kershner says, and I am sure Dr. Kay is particularly articulate.

THE COURT: I think he did make that statement

in relation to pathologists being a doctor's doctor.

MR. HARLAN: I beg your pardon.

THE WITNESS: I can now answer the question?

THE COURT: Yes.

THE WITNESS: This adds to our difficulty in doing homework at night because we have to be prepared to talk with the urologist, the gynecologist, the dermatologist, the specialist who asks us about a particular patient that he may be treating, and so we have to cross the different fields and be up on the literature as to what we think is the entity that we are discussing, and whether that is to use the latest treatment or the modified treatment, and so on.

Does that answer the question?

BY MR. KERSHNER:

Q In the course of those discussions with the physicians and all the specialties you mentioned, do you become aware of what their standard of care is in treating breast cancer?

A Well, we discuss this freely in the Medical College of Virginia. By way of example, Dr. Gumarute, who happens to be the number one surgeon at the Medical College of Virginia brought there for certain aspects of oncological surgeons, he will obtain the biopsies of these patients who are not even from Richmond, from elsewhere, outside of Richmond,

sometimes not even from Virginia, and it may be a particular lesion, for example, and he will discuss with me what I have seen on the slide, and we will discuss what kind of treatment might be tried out on a patient of this sort.

This actually happened just before my coming here, on Saturday morning, as a matter of fact, where a radical calicectomy was done and the specimen had to be handled and taught to the residents. So this is what I meant by specialties crossing.

Q Okay. Dr. Kay, you obviously talk with the doctors in the hospital on these. You talk with doctors out in the community from outside of Richmond. Now, at this juncture, Doctor, I mean in the Richmond community.

Let me back up one question. Do outside doctors practice at the MCV Hospital as the self-contained --

A Well, they have to have privileges, and they are limited. Many of the doctors that I know who may have even been on the staff at one time are now practicing in the various other community hospitals. They do call me from time to time.

I had one recently. What he had, he had a breast case, as a matter of fact, and "How do you think I ought to handle this particular thing", given the particular facts that he mentioned.

Q So by this, that is what you mean by the communication?

A Yes.

Q In that particular instance in the course of that conversation with that doctor, did you become aware of what that doctor's standard of care was in treating and the diagnosis of breast cancer?

MR. HARLAN: Objection. Leading, Your Honor.

THE COURT: You are leading.

BY MR. KERSHNER:

Q Doctor, tell me, tell the Court, if you will, what contacts, if any, you had with outside doctors outside of the MCV Hospital, not within the Richmond area, physicians concerning the diagnosis and treatment of breast cancer?

A Well, are you specifying breast cancer?

Q Yes.

A Well, diagnostic problems may occur in any tissue that is removed from a breast, and this will occur in the pathology line, and as most of my residents that I have taught in the space of these twenty-five years are now in the community hospitals in Richmond, and, incidentally, outside of Richmond in the Tidewater area, I will receive slides from them asking me what I think this particular lesion is, and also asking me what treatment I think should be done, what treatment should be carried out for such a particular lesion. This is not only in breasts, as you know.

Q Doctor, do you feel that you know and understand the local standard of care of physicians for diagnosis and treatment of breast cancer in the Richmond, Virginia, area?

A Yes.

MR. HARLAN: We would object to that question as being one of the ultimate facts in issue. It is for the Court to determine whether he is familiar with the standard based on the doctor's recitation of certain facts as articulated. It is not for the doctor to make a self-serving statement that he is because this is a conclusion of law, we respectfully submit, and is the very issue in this case.

THE COURT: And quite premature, the question itself, if it is proper.

MR. HARLAN: Yes.

THE COURT: I sustain the objection.

BY MR. KERSHNER:

Q Dr. Kay, would you give us as many different examples as you can recall of contacts with other doctors in the Richmond area --

THE COURT: All of this might be immaterial unless you can tie it up with Virginia Beach.

MR. KERSHNER: Your Honor may change --

THE COURT: That is the reason why it is

occurring outside of the presence of the jury.

MR. KERSHNER: Your Honor may change my thinking on this. We were trying to go about it in the step-by-step phase to qualify him in Richmond.

THE COURT: I am not concerned with his qualifications in Richmond. We are concerned with whether or not he is qualified to testify as to the standard of care offered patients in the City of Virginia Beach by physicians who practice here in Virginia Beach.

MR. KERSHNER: All right, Your Honor. Respectfully I ask the Court if they are going to expand that quotation to here in Virginia Beach or similar communities.

THE COURT: Or similar communities.

MR. KERSHNER: Thank you, Your Honor.

BY MR. KERSHNER:

Q Dr. Kay, have you published any articles, et cetera, about breast cancer, about medicine in general?

A You mean articles of all pathological nature, you are referring to?

Q Yes.

A I think you have the curriculum vitae. The latest figure there is a hundred and fifteen. There were three others that I didn't add to it because the recent one happened to

be on breast cancers to be published in the American Journal.

Q One of the three that are not --

A Not here.

Q Do you remember the name of that article?

A It was just called "Small Cell Carcinomas of the Breast in the Male Mammary Gland".

Q Doctor, is this the curriculum vitae which you --

MR. HARLAN: You are not going to introduce that in evidence, are you?

MR. KERSHNER: I have every intention of introducing it in evidence.

MR. HARLAN: I object to it.

THE COURT: That is what? The resume?

MR. HARLAN: Yes.

MR. KERSHNER: It is a resume of his qualifications. It is a curriculum vitae, Your Honor, with a hundred and fifteen publications that he has authored that we offer into evidence as probative of his qualifications.

THE COURT: It is self-serving. I sustain the objection. He can testify to all of these.

BY MR. KERSHNER:

Q Doctor, how many publications do you say were listed in this curriculum vitae?

A I think there are a hundred fifteen.

THE COURT: I don't mean to shut you out, but I think we have been over this.

BY THE COURT:

Q Is there anyone in Virginia Beach with your experience and background practicing in your field today?

A Yes.

Q With your experience and background?

A Well, everyone is liable to say that they don't know as much as I do, but I can mention them by name, the pathologists who are practicing in Virginia Beach that I consult with, that I see.

Q With your background, your teaching experience and so forth?

A They are not in teaching hospitals. They can't be equivalent to what I do.

Q We don't have a teaching hospital in Virginia Beach, do we?

A No. You have an affiliation with the one in Norfolk, I think.

Q In 1972, '73 and '74, we had none; is that correct?

A The medical school is how old? You have to tell me.

THE COURT: One year.

MR. KERSHNER: They just had a graduation.

THE COURT: I am involved in a case right now with them. Mr. Harlan knows. He is involved in that case also.

BY MR. KERSHNER:

Q Would you give His Honor the names of some of the physicians you know?

A Well, Larry Smith, the pathologist, whom you know. I don't know whether he was here as a witness. We meet, we discuss pathology, we have combined meetings.

The other one is Stanley Graber at Virginia Beach Hospital. Stanley was from the Norfolk Hospital, and if Virginia Beach is included in the Tidewater area --

MR. HARLAN: Excuse me, Your Honor. Was that Graber?

THE WITNESS: G-r-a-b-e-r.

MR. HARLAN: I am not aware of any physician in Virginia Beach by that name, but I can stand corrected.

THE WITNESS: I have a letter from him. I didn't bring it with me.

MR. HARLAN: That is all right. I will just take the name down.

THE WITNESS: Anyway, Stanley, that is for sure,

because I wrote "Dear Stanley".

They do very well, I can tell, on the basis of diagnoses because in many instances I agree with what they say. They are asking for consults because they want to have a certain amount of security about it, and I can understand that as well.

I received one from Norfolk General the other day which had to do with a location of a particular lesion, and the surgeon wrote to me about it. So if you classify pathologists as physicians, and I think they are, because every time they do anything that they do, they are practicing medicine, I would say, if you asked me, that the standard of care of pathologists in the Tidewater area is like it is in the Richmond area or the Charlottesville area.

MR. HARLAN: Well, we think, Your Honor, that is highly self-serving and we object to that.

THE WITNESS: I wasn't asked the question. I apologize.

MR. KERSHNER: May we approach the Bench?

(Whereupon, counsel approached the Bench and conferred with the Court out of the hearing of the court reporter.)

BY MR. KERSHNER:

Q Dr. Kay, have you ever visited any of the hospitals in the Tidewater area?

A I have been to the Norfolk General area, but I have not visited the hospitals in Virginia Beach.

Q What was going on when you visited the Norfolk General?

A We had a Pathologists' Conference. They called it the Tidewater Conference, as a matter of fact.

Q And from what geographical area were the doctors attending that conference?

A All over Virginia. This is the Roanoke-Charlottesville area, Lunchburg, and Portsmouth. I remember Portsmouth General, in Hampton the Riverside Hospital. These are all people who are members of the Virginia Society for Pathologists.

Q What types of things did you discuss during your meeting?

A Oh, this is quite some time ago. They have slide seminars. They still have them there, but they keep them now as closely-knit things so that we are not invited. We are always welcome. We are not invited as we used to be.

I also gave a course in the Portsmouth Naval Hospital. This was arranged for me through the Medical College in Portsmouth, in which I discussed, as a matter of fact, breasts,

as it happened, and thyroid. This was also some years ago.

Q Doctor, how many students would you say you have taught at MCV?

A Well --

Q Just roughly?

A Eighty to a class then, about a hundred sixty to a class now. If you figure out some twenty-seven years, you will get an average.

Q When they graduate, where do they go?

A Some go to the Tidewater area. Some stay in Richmond. Some go out of the state. So I am happy to say, at least for MCV, that most of the people, or the majority, have stayed in this state because this is our goal, just like our goal is to take classes of about seventy-five to eighty percent, maybe higher now of Virginia people.

Q Doctor, are you an expert palpater of breasts?

MR. HARLAN: Objection. Self-serving.

THE COURT: That is self-serving and very leading, yes. Is he going to say no?

BY MR. KERSHNER:

Q Doctor, you testified that you teach palpation of the breast at MCV. Would you describe what you teach? What do you teach the students?

A Well, the big problem in many breast examinations

is that the patient isn't positioned properly by him. Many of our younger surgeons, for example, who examine patients, the patient is sitting up. To me, in many instances this is worthless. You are going to miss more than you are going to find, and actually there is a film on this which can be seen by lay people.

MR. HARLAN: Your Honor, does this go to his qualifications?

THE COURT: We are still trying to point at one direction, if he is knowledgeable of the standard of care in this community or similar communities, and if he is not familiar with the standard of care in this community but is in another community, then the obligation of the plaintiff is to show the Court that that community is similar to this community, and if he has not practiced in this community, I cannot see how you can qualify him as being familiar with the standard of care in this community.

And we have got one other little matter in that he apparently is a very well-qualified pathologist, but whether or not that would overlap into the field of a practicing gynecologist is the hurdle that you have got to overcome also.

MR. KERSHNER: As the plaintiff sees the situation, Your Honor, we must qualify our expert witness to understand the standard of care as it applies to a

physician, specifically as it applies to a physician dealing with the diagnosis and treatment of mammary cancer, and to do that we must produce to the Court's satisfaction a physician who engages in that line of endeavor and who understands what standards are required of one who engages in that line of endeavor in Virginia Beach or a similar community.

Have I properly stated that, Your Honor?

THE COURT: Yes, in general.

MR. KERSHNER: In that case, Your Honor, it is necessary, I believe, for us to establish that Dr. Kay first engages in that line of endeavor.

THE COURT: Well, I think there you have got problems. Dr. Kay has testified he is a doctor's doctor.

BY THE COURT:

Q Do you see patients, Dr. Kay?

A Like I explained, I see patients on the occasions that I am asked to in consultation.

Q But you do not have patients yourself?

A Patients do not come to me as a rule. There have been exceptions.

Q They do not normally come to you complaining of soreness of the breast or the retracted nipples, or anything of that nature?

A There have been exceptions.

Q Normally?

A Normally they do not. I have had some. Somebody came to me from Washington.

Q Is that what we call a practicing physician of some type who treats patients on a day-to-day basis where you do not?

A No. That I do not. They come to me for advice.

THE COURT: I don't know how you are ever going to qualify him. It is not a matter of someone coming to the defendant in this case for advice. It is a matter of the defendant and how he diagnosed and treated this particular patient in this community based on the standard of care in this community.

MR. KERSHNER: Your Honor, might I pose a hypothetical to see if I --

THE COURT: That is involved, but --

MR. HARLAN: I would object to it, Your Honor.

MR. KERSHNER: If this is again in the area of qualifications, it seems to me that a teacher of a technique that is being employed in this case must, by definition, be aware of what the minimum standard --

THE COURT: We are not talking about the minimum standard. You mentioned this yesterday, and among the cases that I read last night, it struck me in regard to

the minimum standard, in the Fox versus Mason case, an old case, and it is still good law and the law in Virginia, that due care in a lumber camp might be gross negligence at Johns Hopkins, and that is what struck me all of a sudden, that in Richmond where you have a tremendous amount of facilities that are not available in this area, you cannot say that the standard of care is the same.

I am sure that Dr. Kay would like all of his students to be able to perform all the things that he can do in Richmond, but they can't. One of the very glaring things that was pointed out this morning by Dr. Seim is that he does not have the radiation facilities here in Virginia Beach.

Do you have radiation facilities in Richmond, Dr. Kay?

THE WITNESS: Oh, yes.

THE COURT: So how can the standard of care be the same?

MR. KERSHNER: The point is well-taken, Your Honor, and I would argue the situation and the particular technique employed in the instant case are so elementary as to be fundamental, that you will not find a difference in the standard of care between Virginia Beach and Richmond. You will, Your Honor, in --

THE COURT: We have already, by your own witness,

determined that there is a difference. Dr. Berger testified on your examination that he personally would have ordered a mammogram in November of 1974, but that he was sure others in the community practicing would not, and that that was not a violation of the standard of care in his opinion.

MR. KERSHNER: With all due respect to the Court, Your Honor, I don't see what you have just said --

THE COURT: I am not going to argue the point with you. I will allow you to proceed and try to qualify Dr. Kay if you so desire.

MR. KERSHNER: Thank you, Your Honor. Might I have a moment?

THE COURT: It might be an appropriate time to recess for lunch. Let's do that. We will recess until quarter to two.

MR. KERSHNER: Thank you, Your Honor.

THE COURT: Step down, Doctor.

MR. KERSHNER: Thank you.

(Whereupon, the Court recessed for lunch at 1:07 p.m.)

AFTERNOON SESSION

(Whereupon, the Court reconvened at 2:08 p.m.)

PROCEEDINGS IN THE COURTROOM OUT OF THE PRESENCE OF THE JURY

MR. KERSHNER: I stipulated to a three-question series. I would like to amend that to four or five because I have just gotten a few more.

(Whereupon, Dr. Kay resumes the Stand.)

BY MR. KERSHNER:

Q Dr. Kay, have you ever taught any place else other than the University of the Medical College of Virginia?

A I had a conference. This was a national conference held in Williamsburg. As a matter of fact, the medical physicians of Virginia attended. This was a combination of radiology, pathology, and surgery dealing with tumors.

Q What was the subject of —

A Well, the subject that I taught would have to be breasts, and it just occurred to me this was about two or three years ago.

Q Relating to what? Disease of the breast?

A Well, my topic I was assigned to discuss was the diseases or clarification of breast tumors or something like that. I don't recall the exact title. I have to do this again in Williamsburg in February, but this time it won't be on breasts. My colleague will do it and I will be doing something on other areas.

Q And what type doctors attended those conferences?

A Radiologists, surgeons, general practitioners. As a matter of fact, you get credit for it for your educational series, and oncologists, of course, attend.

Q Do you have free-flow exchange, et cetera, of information?

A Well, you do have this, but the usual format is to have an assigned talk for about ten or fifteen minutes, then followed by a panel discussion and so on.

Q Doctor, I am going to ask you three questions.

A Yes, sir.

Q First, would you name for me all of the doctors that you can recollect that you know in the Tidewater area?

A Okay. Give me a little time because I have to remember them, now.

I have mentioned Stanley Graber before and Larry Smith. Those are at Virginia Beach. Actually that is called Minck, M-i-n-c-k. There is Ralph Stevens, Sporber, I forget the first name, Ladiga, L-a-d-i-g-a, David Cohen was the Chairman of

Urology at the Eastern School, and Stanford -- his last name has slipped me -- and there is a Frank Wingfield, there is Richard Clark. That is all that comes to my mind.

Q Not necessarily all, but all you can remember?

A No. If we had a Virginia roster here, I would know.

Q Let me ask you a second question: Do you know the minimum standard of care of a physician in the diagnosis and treatment of breast cancer in the City of Virginia Beach?

MR. HARLAN: Is that the question?

MR. KERSHNER: That is the second question.

MR. HARLAN: I object to it because that is what we are here for you to determine, whether he knows that, Judge. It is self-serving again.

MR. KERSHNER: Whether or not he is qualified?

THE COURT: No. You mentioned minimum. I don't know why you mentioned minimum. What is the difference between minimum and standard of care? I don't know that we require a minimum standard of care.

MR. KERSHNER: Do you know the standard of care is the question, Doctor.

MR. HARLAN: Judge, that goes to the ultimate issue and it is self-serving. That is what we are here to determine.

THE COURT: Counsel will have an opportunity to

cross-examine. I will allow you to answer the question.

THE WITNESS: Yes.

BY MR. KERSHNER:

Q What is that standard of care, Dr. Kay?

A I would place it at the very least as good as a fourth-year medical student.

Q Do you know what the standard of care is of a fourth-year medical student?

A I teach these students this particular subject under discussion, this and other subjects, but this is taught, so I know what they are. At least I am supposed to know at that examination.

MR. KERSHNER: No further questions.

THE COURT: You may cross-examine.

MR. HARLAN: Judge, I don't see how he has established this doctor is aware of the standard of care of the practice of reasonable gynecological medicine here in the City of Virginia Beach. He has never practiced here. He is from a teaching institution. The fact that he says he knows the standard of care is obviously by supposition because he is here. This is what it ought to be, not what it is. We are standing trial for what it is, not what it ought to be.

THE COURT: What it is in Virginia Beach.

MR. HARLAN: Yes, sir.

BY THE COURT:

Q Do you know what it is not, what it ought to be based on what you said a fourth-year medical student or what you know a fourth-year medical student should comply with down in Virginia Beach? Do you know what the standard of care is for a gynecologist?

A Well, I was asked about a physician.

Q Do you know about a gynecologist?

A I wasn't asked about a gynecologist.

Q I am asking you.

A Oh! I couldn't conceivably know what every specialty would have to do. That is why I call it a physician, and a physician in medical school is taught medicine and that is how I answered it.

MR. HARLAN: Is that your answer?

THE WITNESS: Right.

MR. KERSHNER: May I argue before you rule for a moment?

THE COURT: Yes, sir. I wasn't getting ready to rule. I was going to allow Mr. Harlan to complete his cross-examination.

MR. HARLAN: Well, Judge, I feel this is --

THE COURT: Do you want to cross-examine any more?

MR. HARLAN: I would not want to cross-examine. Really, I just don't think he has made it out.

THE COURT: All right. Do you want to argue?

MR. KERSHNER: Your Honor, the case law holds -- all the cases before were all clear that the local standard is the same or similar communities. None of those cases, I believe, Your Honor, had any strong suggestion or any strong outline for how you go about the indicia. It isn't like domicile. When we approach a question of domicile, we can go to a law textbook and say "Here are fifty or sixty suggested indicia on domicile". The cases make that naked statement. One of them says he didn't have any testimony that he knew about for the same or similar communities.

The statement that the witness has just made, Your Honor, is more probative of what the standard of care is than any other kind of evidence that could be adduced, and if I may, I will state, if one doctor says "I know another doctor and I know what he does", that may not be the standard of care. No doctor can say "I know every doctor in the community and I know what he does".

The doctor is in a bad position to testify to the standard of care about what is the absolute probative criteria in order to practice in Virginia Beach. The

physician must graduate. He must, obviously, have knowledge of the four-year medical student, and that is a minimum requisite, to be able to practice definitionally. He cannot practice if he hasn't gotten that far.

We have a man in front of us, Your Honor, who says "In Virginia I teach at the Virginia Medical School. I know what the level of competent standard of care is of the four-year medical student and the doctor must get to that level before he can practice."

Therefore, definitionally the standard of care has to be that of a four-year medical student or higher, Your Honor, and that is why my original question was framed with "Do you know the minimum standard of care". Definitionally the man can't practice unless he is at the level of a four-year medical student, and that is all we are asking the Court, to set that minimum standard of care with the four-year medical student.

THE COURT: I think we have been over that. In the Fox case I mentioned earlier due care in a lumber camp might be gross negligence at Johns Hopkins. Due care in Richmond or in Virginia Beach might be negligence in Richmond depending on the facilities, and basically, according to the cases, the state of the art, and I think all the witnesses have testified that the practice of medicine is an art, the big state of the art in Virginia

Beach, and I don't think we even have to go that far, to be perfectly frank with you.

Dr. Kay is obviously qualified as a very eminent pathologist. He does not see patients except on occasions where someone will either come in or he is called to see someone in consultation. He is not practicing medicine in the sense of the defendant here, and, as such, I do not believe that he is qualified. Even if he were, in Virginia Beach, at least, the Court refused to allow you to qualify Dr. Smith, who is a pathologist, and based on that alone, I would say that Dr. Kay is not qualified.

MR. KERSHNER: Thank you, Your Honor. We respectfully except.

THE COURT: All right, sir.

I assume Dr. Kay is going to remain.

Do you have other matters?

MR. KERSHNER: Yes, Your Honor. I think, if Mr. Harlan agrees, that Dr. Kay will remain and we will qualify Dr. Jackson.

THE COURT: Dr. Kay, you may step down.

MR. HARLAN: Consistent with your ruling, I wonder, since the jury is out, that should Mr. Kershner call Dr. Kay to the stand to testify as to other matters, if the Court would consider instructing Dr. Kay that his

testimony is not to touch upon the standard of care.

THE COURT: Well, when and if. I don't know. I can't tell you what the plaintiff or how the plaintiff is going to proceed in his case, and if he is called back, of course we will so advise him.

MR. KERSHNER: And, as I understand, Your Honor, by juggling the witnesses and bringing Dr. Jackson on to testify, we aren't prejudicing any right to recall, et cetera, by agreement that we are going to call Dr. Jackson.

THE COURT: Oh, it is no problem there. This is all outside the presence of the jury at this point.

I assume you are going to call Dr. Jackson to qualify him along the same lines as --

MR. KERSHNER: The standard of care, yes, sir.

THE COURT: Is there any question regarding the doctor's qualifications that would have to be taken up outside of the presence of the jury?

MR. HARLAN: Yes, sir, very definitely.

THE COURT: Is he here?

MR. KERSHNER: Yes, sir.

THE COURT: All right.

(Witness excused.)

MR. KERSHNER: Mr. Jones will conduct the questioning of Dr. Jackson, if it please the Court.

THE COURT: All right.

DR. NEVILLE J. JACKSON, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q Would you state your name for the Court, please?

A Neville James Jackson.

Q And your address?

A 407 Woodroof Road, Newport News, Virginia.

Q Are you a medical doctor?

A Yes.

Q Where did you receive your undergraduate degree?

A At the Newcastle Medical School in England.

Q What postgraduate appointments did you hold?

A Internship equivalency of the internship appointment for one year, instructorship in anatomy, and then resident appointments.

Q Do you have any postgraduate appointments in your specialty?

A I have the diploma of the Royal College of Surgeons of England, the Royal College of Surgeons and Physicians in Canada, and the diploma of the American Board of Surgery.

Q Are they gained by examinations?

A Yes.

Q When and where did you commence the practice of surgery?

A After completing formal training, I first practiced as a responsible surgeon in Canada.

Q What appointments have you held since then?

A I was Assistant Professor of Surgery at the University of Saskatchewan Medical School, Saskatchewan, Canada. I was Clinical Professor of Surgery at the Brooklyn Cumberland Medical Center, that is Downstate Medical Center in New York, Director of Surgery at the Foothills Hospital, Calgary, Alberta, Canada. I did private practice for some years, and I am currently the Chief of Surgery at the Veterans Hospital in Hampton, Virginia.

Q Have you been engaged in teaching and research since graduation?

A Almost continuously.

Q Who do you teach?

A Mainly graduate students or the surgical residents. I teach surgery.

Q Where are these residents from?

A Generally from the area surrounding the medical

school.

Q What is the name of that medical school?

A The name is the Eastern Virginia Medical School.

Q Are you a teacher at that school?

A Yes, sir.

Q What is your rank?

A Assistant Professor in Surgery.

Q Where do you teach the residents?

A Principally in the Veterans Administration Hospital in Hampton.

Q How many residents do you have there a year under your supervision?

A Well, they would take three monthly periods at any given time. We go through two general residencies and one plastic surgical residency.

Q How many would that be in a year?

A This would be eight, sometimes ten because occasionally the rotation is short, eight to ten residents, that is thirty-five through any service in the course of a year.

Q Did you have occasion to teach breast examinations and diagnoses with these residents?

A Yes, sir.

Q Are you currently engaged in the treatment of patients?

A Yes, sir.

Q Do you treat cancer patients?

A Yes, sir.

Q When did you last operate on a cancer patient?

A When? Monday, yesterday.

MR. HARLAN: Excuse me, Your Honor. There are various types of patients and various types of cancer.

THE COURT: You will have an opportunity to cross-examine.

MR. HARLAN: Well, I am objecting.

MR. JONES: Let the Judge make the ruling, please.

THE COURT: I overrule the objection. You will have a chance to cross-examine. If it is not brought out, I am sure you will have an opportunity to do so.

BY MR. JONES:

Q Do you have any special responsibility for cancer patients in your hospital?

A I am responsible for all the surgical cancer patients, but I am also Chairman of the Hospital Tumor Board which oversees the whole cancer program and the other services as well.

Q Have you had much experience with breast cancer?

A Yes, sir.

Q Have you seen any cases of breast cancer recently?

A Two, in females.

Q How recently was that, Doctor?

A That was eighteen months, two years ago.

Q Prior to that, how many cases of breast cancer had you treated?

A It is difficult to pull out an accurate figure here. I think the average general surgeon probably encounters and deals with himself somewhere on the order of six to ten breast cancer patients in the course of a year, but there were, I would say, approximately eight cases a year while I was in practice in Calgary and in other places, in New York and so on, and this is an average general surgeon's experience.

MR. HARLAN: Excuse me, Judge. I would object to what an average general surgeon's experience would be. I would like to know what this surgeon's experience is. That is the whole aspect of it.

THE COURT: I think he said approximately eight per year and this is the general surgeon per se.

MR. HARLAN: I think he said the average general surgeon.

THE COURT: You will have an opportunity to cross-examine.

BY MR. JONES:

Q Do you work in any other hospitals in the

Tidewater area?

A No, sir.

Q Why not?

A I have a full-time contract with the Federal Government and the medical school, which precludes me working outside of the Veterans Hospital.

Q Have you applied for privileges in any other Tidewater hospital?

A No, sir.

Q Is that for the same reason?

A For the same reason.

Q Have you been invited to apply for privileges in any other hospital?

A It has been suggested that I should apply to Norfolk General and change my status to part-time surgeon with the Veterans Administration and obtain possible privileges at Norfolk General Hospital.

Q Why do you say part-time? What significance is that?

A If I have a part-time contract with the Federal Government, then I would be able to engage in private practice.

Q Did I ask you have you been invited to apply at any other hospitals?

A This has been suggested.

Q Who suggested that to you?

A The Chairman of the Department of Surgery at EVMS.

Q At the Veterans Administration in Hampton do you have contact with other physicians from the Tidewater area?

A Yes, sir.

Q Would you explain that?

A We have some part-time staff members and consultants who work with our services and also work in their own practices or in other medical activities outside the hospital.

Q How many part-time people would you say are on at the Hampton Hospital?

A On the order of twenty, twenty-four or thirty.

Q Are those active people?

A Those are people who come in regularly for part of their working week, as it were.

Q Are there actually more than that connected with the hospital?

A Well, we have a large percentage of consultants, some of whom attend fairly regularly, others who don't at all.

Q Do you have a hard core of twenty-five doctors from the community?

A Somewhere on that order. I can't quote exact figures without --

Q Have you been able to form any impression about the general standard of practice prevailing in the Tidewater area

from your contacts with these people?

MR. HARLAN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. JONES:

Q Do you think there is anything special, unique or peculiar to medicine and surgery as practiced in the Tidewater area?

MR. HARLAN: Objection, Your Honor.

THE COURT: What is the basis of your objection?

MR. HARLAN: The Tidewater area. It is the community of Virginia Beach.

THE COURT: Or similar community.

MR. HARLAN: Yes, sir.

THE COURT: Sustain the objection.

MR. JONES: Are you confining me to the City of Virginia Beach, Your Honor?

THE COURT: Or a similar community.

MR. JONES: Or a similar community.

THE COURT: He is talking about a similar community. Of course, the burden is on you to show that that community is similar to Virginia Beach, and that would be part of your qualifications through this witness.

MR. JONES: Your Honor --

THE COURT: I think it might be helpful if we

prefaced all our remarks by talking about the nature involved and not the present one.

MR. JONES: All right. I would like to point out to Your Honor that the pathologist admitted that he considered the standard to be the same for Hampton, Virginia Beach --

THE COURT: In pathology.

MR. JONES: In pathology.

THE COURT: We are not concerned with pathology.

MR. JONES: We are not?

THE COURT: You are not, but at this point your qualifications as to the standard of care, you are not talking about the standard of care in pathology.

MR. JONES: Can I approach the Bench, Your Honor?

MR. HARLAN: Why approach the Bench? The jury is not here.

(Whereupon, counsel approached the Bench and conferred with the Court out of the hearing of the court reporter.)

BY MR. JONES:

Q Doctor, do you understand the term "Tidewater area"?

A Generally, yes.

Q What would you think someone meant by the term "Tidewater area"?

A Well, this would extend from the Virginia Beach-Norfolk area up to Richmond, including the so-called Peninsula. I don't know a specific geographic area in Tidewater, but it is a general term, as I understand it.

Q Do you consider it a common community?

A I think most of the area seems to have something in common.

MR. JONES: Would Mr. Harlan stipulate that he knows the standard of care in Hampton?

MR. HARLAN: No, sir.

MR. JONES: I want a ruling on that, Your Honor.

THE COURT: On --

MR. JONES: On Hampton alone. He has testified that --

THE COURT: At this point he testified that he has practiced in Hampton in the Veterans Hospital.

MR. JONES: All right. In Hampton in the Veterans Hospital, but they have outside people coming in.

THE COURT: Is this in 1974 and prior thereto?

MR. JONES: '74 onward, sir, yes.

THE COURT: Oh, no, prior thereto.

THE WITNESS: I came to this area in 1974.

BY THE COURT:

Q When?

A August.

Q August of '74?

A Yes.

Q Were you familiar with Virginia Beach then?

A No, sir.

Q Were you familiar with Virginia Beach in November of '74?

A Only as a locality.

Q I mean the practice of medicine in Virginia Beach.

A No, sir.

MR. JONES: Your Honor, he is familiar with the surgeons who come and go in that hospital. They are from a community --

THE COURT: We are talking about an incident that occurred in November of 1974.

Dr. Jackson, in Virginia Beach the question, if it gets to that point, will be whether or not you knew the standard of care practiced by physicians, whether it be Hampton or Virginia Beach, in November of '74, not somewhere else, but, all right, let's say Hampton in November of '74, the standard of care that would apply to treatment and diagnosis and treatment by physicians in the City of Hampton in November of 1974.

THE WITNESS: Well, all I can say there, sir, by that time I had formed an impression that the standard prevailing was generally in line with those that I had been familiar with outside.

THE COURT: Were you familiar with the standards in Virginia Beach at that time?

THE WITNESS: Not specifically, sir.

THE COURT: Do you know whether or not the standards were the same at that time?

MR. HARLAN: Judge, if he is not familiar with the standards in Virginia Beach --

THE COURT: He can say.

MR. HARLAN: I am just -- all right.

THE WITNESS: Now, about November, '74 -- I am sorry, sir. I am not quite clear.

THE COURT: Do you know whether or not Hampton is similar to Virginia Beach as far as the standards of care -- well, you wouldn't be if you are not familiar.

MR. JONES: Can I help the Court for a moment? I think that is all he has to say, he knows the standard of care in Hampton because it is part of -- Virginia Beach and Hampton are both part of the Tidewater area. That is the area. The standard would be the same.

THE COURT: Do you know whether there were any common facilities in November of '74 that were used by

the City of Virginia Beach and the City of Hampton, such as we presently have, that is, the Eastern Virginia Medical School?

THE WITNESS: Not that I was directly associated with.

THE COURT: Do you know the tunnel fare at that time? Didn't we kind of keep these two areas apart?

MR. JONES: Your Honor, can we qualify him as knowing the standard of care in Hampton, then put on another witness to testify about the Tidewater area and its geography?

THE COURT: We are not concerned with geography. We are concerned with the standard of care in this community or a similar community, that is with the same facilities and the same standard, and the only way he can testify is for him to know what the standard was here. Otherwise there could not be a similar community.

MR. JONES: Down in Virginia Beach Dr. Redford doesn't know what the gynecologist down the hall knows. He can't tell you if his life depended on it. Now, how can he tell us what is going on at Virginia Beach?

I am sorry, Your Honor.

THE COURT: I think this is the law. You might not agree with it. The doctor has pointed out very vividly the problem with the law as it is written, but

that is the law. That is what we must all abide by.

MR. JONES: Your Honor is ruling that Virginia Beach, Norfolk, Portsmouth, Newport News and Hampton are not one complete Tidewater community?

THE COURT: Well, we go to the Bly case. In that case I believe he was from Abington, Pennsylvania, testifying in Prince William County about an incident that occurred, I believe, in Washington, D.C., some other area, anyway, and the Court generally has stated that the only way he could have qualified for him to have knowledge of the practice in the two communities in order to testify, that they are similar, and that he only has knowledge of the practice in one. So how can you testify that they are similar?

MR. JONES: Abington by itself is a community. We don't have a city called Tidewater, but these are cities, Your Honor, and I understand they are considered a community. The mode of life, the way of living, the standard of doctors doesn't change when you reach a certain city down there and you cross that street and it is a sign that says "Virginia Beach" or something.

THE COURT: I will allow you to qualify him as to Hampton, if that is the case, but I don't believe you have done it so far, that is, in the city where the Veterans Hospital is generally.

MR. JONES: We put on evidence --

THE COURT: We are talking about a fact in Virginia. He sees patients every day, he is called upon to diagnose and treat those patients, and we are talking about the standard of care as applied to that particular type of physician, and especially a gynecologist who is a practicing physician, who sees patients every day, who is called upon to diagnose and treat those patients, and whether or not he knew the proper standard of care that is applied in this community or similar communities.

MR. JONES: I keep losing sight of the fact, Your Honor, that one time I believe I heard you say the standard of a physician, and I just understood you to say the standard of a gynecologist. I don't know which way to move.

THE COURT: Well, when they asked the question of Dr. Berger regarding the standard of care, that was opened up, in my opinion, by the defendant's cross-examination, so I allowed you to proceed with it, but in this case you are attempting to qualify Dr. Jackson as an expert, and I am sure he is, but it has to be in the particular field in a particular community or a similar community, not a similar field, but in a similar community.

The Little versus Cross case is sort of a recap

of the whole law on this case in this area, and I am sure you gentlemen are familiar with it. It was just recently decided in March of this year, and it was affirmed even more recently.

MR. JONES: Let me recap what he had to say for you so far. He does see patients, he does diagnose, and the point I brought in about the outside part-time people coming in, these twenty-five coming and going all the time on a study basis and a total of a hundred from time to time that he has contact with, and I would say that if you would like me to continue from that point and take it up --

THE COURT: Well, I think the best thing you can do right now is to put on all the evidence you want for the record, but I am reading from the "Bly" case at page 652, and it almost falls right in with what we are doing right now. This is reciting some of the things that occurred in the case there after counsel for the plaintiff attempted to show by Dr. Gerstley the standard of medical practice, a Board certified obstetrician-gynecologist who practiced in the locality similar to Prince William County. When Dr. Gerstley admitted he was unfamiliar with Prince William County, the Court ruled that "A similar community" standard had not been met, and the defendant's further objection was

sustained. That's it.

MR. JONES: But they were talking about some place in Prince William County, Virginia.

THE COURT: It doesn't make any difference. Dr. Jackson stated in November of 1974 that he was not familiar with Virginia Beach and the standard of care here.

MR. JONES: But if --

MR. KERSHNER: Not that I am into the argument, I am not, but may I ask the Court to clarify the case that that particular decision came from?

THE COURT: Abington.

MR. KERSHNER: Yes. I thought that earlier we had confused that, and the Court does understand this is not a state.

THE COURT: Yes, sir.

MR. KERSHNER: Thank you, Your Honor.

MR. JONES: I live at the north end of Virginia Beach and I know some doctors, and I can safely say I know something about the north end of Virginia Beach. I know Virginia Beach. You can't say just because I don't know something about the south end of Virginia Beach that --

THE COURT: Oh, I have no problem about that and it is no question we have what we call a national standard

for physicians. No question about that. They all must take -- what is it?

MR. HARLAN: Board examinations.

THE COURT: Board examinations that are national, but our Supreme Court has refused as recently as a few months ago to go along with the national standards, and they have required the Courts to apply the very strict local community rule, and I can't change that, and I am not going to. Our Supreme Court said they would not change it. If the Legislature wants to do it, it is going to be their prerogative.

MR. JONES: I request a ruling from the Court on what constitutes Tidewater. Is Virginia Beach in Tidewater, Virginia? From the standpoint of what? What constitutes Tidewater as regards what? I don't know.

MR. HARLAN: Excuse me, Your Honor, I think --

THE COURT: I have used the words "Tidewater" and "Hampton Roads" since almost the day I was born, but I can't honestly tell you what they mean. Hampton Roads is that body of water out there. The area of Hampton Roads, I assume, covers any area that touches on that body of water, but merely because it is Tidewater, if that is, and you want to include Williamsburg and go that far, that does not mean that it is a similar community.

MR. HARLAN: How about Washington, D.C.? The Potomac River is affected by the tides, too.

THE COURT: Tidewater, if I remember correctly, is the lowland from the mountains down.

MR. JONES: You would suggest that Virginia Beach is not homogeneous?

THE COURT: With whom?

MR. JONES: Why are you holding us to that same standard?

THE COURT: I am holding you to the standard that the Supreme Court has suggested. If you would like to reoffer the evidence for the record, I am going to allow you to do so. At this point Dr. Jackson is not qualified to testify as to the standard in this community or similar communities since he didn't know this community in November of 1974.

MR. KERSHNER: Just a moment, Your Honor.

MR. JONES: I would like to get his qualifications and maybe the Court will rule again.

THE COURT: All right.

BY MR. JONES:

Q Dr. Jackson, can you tell this Court about your experience with the part-time physicians in Hampton, what type of relationship you had with them?

A Well, for instance, on our orthopedics service, I have two part-time surgeons who work with us on a regular basis and have --

THE COURT: Excuse me. I don't mean to keep interrupting, but I think it should be limited to '74. It is not what even today is --

MR. JONES: We will stipulate on him that anything prior to his coming in, he has no knowledge of that.

MR. HARLAN: I think the Court's point, if I may --

THE COURT: His knowledge of the physicians in Hampton in November of '74, which is the last, apparently, allegation of any negligence in this case, or am I wrong?

MR. KERSHNER: We alleged negligence, Your Honor, all the way through November, '74, through November, '75. The original allegation of negligence, Your Honor, is that the defendant was negligent on November 25, 1975, and for three years preceding.

THE COURT: All right.

MR. HARLAN: Of course, you have the statute of limitations to plead for part of it.

BY MR. JONES:

Q Would you explain for the jury and the Court

your duties as a professor and a faculty of the Eastern Virginia Medical School?

THE COURT: First, when did you become a professor?

THE WITNESS: In August, '74.

The principal responsibility is teaching my specialty, general surgery, vascular surgery, principally to graduate students, some undergraduate committees, and general faculty duties of an administrative nature.

BY MR. JONES:

Q Are you skilled in the diagnostic techniques concerning breast cancer?

A I have experience and knowledge of that field.

Q Would you tell the Court how you obtained sufficient experience and knowledge?

A Well, basically taught at a medical school, and these fields are developed by practice and instruction on the graduate level, principally by practice over a period of time.

Q And how many years have you been practicing that?

A The skills and breast examinations?

Q Yes.

A Since I graduated in 1953.

Q Do you teach the skills in the management of breast cancer and diagnosis as part of your duties at the

Eastern Virginia Medical College?

A Yes.

Q Do you teach basic diagnostic techniques for the recognition of breast cancer?

A Yes.

Q Are you familiar with the Medical College of Virginia?

A Oh, I am familiar with it by name and met some people from there.

Q Are you personally acquainted with any of their graduates?

A I have met several graduates as residents, and I have one graduate who is on my surgical staff.

Q Have you had occasion to receive any referrals for breast surgery in particular?

A We have had two cases of breast cancer in the hospital since I have been there. I can't recall how one of them got to us. One was referred by transfer from another VA institution elsewhere in the country. The chances are the other case was seen in our clinic by one of our physicians.

Q Do you have lady veterans occasionally in the hospital?

A Yes. We have a few.

Q And these were ladies we are speaking of?

A These were female breast cancer.

Q Do you hold any kind of liaison with any medical groups that deal with cancer, and, if so, could you explain what they are?

A Well, I mentioned the Tumor Board, and I am also on the American College of Surgery Board in the hospital.

Q Have you published any articles, papers, so forth, on breast cancer or its management?

A No, sir.

Q You have not?

A No.

Q Is it safe to say that you don't know the standard of care for a gynecologist in Tidewater, Virginia?

A Yes, sir, it is safe.

MR. HARLAN: With that statement, Judge, we would ask the Court to consider that this witness cannot be qualified.

MR. JONES: We are not working this case on the basis of his, but of someone in gynecology. Your Honor set a position earlier --

THE COURT: We will make the determination, right or wrong, after he is finished.

BY MR. JONES:

Q From your association with outside people at the Veterans Hospital, would you say that you know the minimum

standard of care for diagnosis and detection of breast cancer in Hampton, Virginia?

A I have a general impression of the standard prevailing, such as I can absorb in two years in the area.

Q Doctor, you said that you didn't know the standard of care for a gynecologist in Virginia Beach?

A Yes, sir.

Q Would you explain that statement to me?

A Well, what is there to explain? I mean, I don't know what the standard of gynecology was or is in any sense that I can base any statement under oath on. I have a general impression of what goes on, but this is just my osmosis. I have had no dealings with gynecologists in Virginia Beach.

Q Would you say that -- do you know what the minimum standards of a gynecologist are to live up to in the City of Hampton?

THE COURT: That is a minimum for the gynecology Boards?

MR. JONES: The minimum standards, I said, Your Honor.

MR. HARLAN: I haven't objected to that one. It is not what he thinks they are, but what the standard is.

THE COURT: It is not the minimum standard. It is the standard.

MR. HARLAN: Exactly.

MR. JONES: Doctor, do you know the minimum standard?

MR. HARLAN: Objection.

THE COURT: Sustain the objection. It is not the minimum standard. It is the standard in the area.

MR. JONES: If the minimum is less than the standard, I don't think --

THE COURT: It is the standard of care. I am not concerned with the minimum standard. I am concerned with the standard of care.

MR. JONES: I would assume the minimum standard is what is set by the National Board.

THE COURT: I would assume that most physicians in this area and other areas exceed that standard, and if it is exceeded in this area, then we expect the defendant to have exceeded that standard.

BY MR. JONES:

Q Doctor, do you have any knowledge of the standard of care for cancer at Riverside Hospital and in Newport News?

A Indirectly, and the standard seems to be very good. That's all I can say.

Q Do you have any knowledge of the standard of care for the treatment of cancer or a diagnosis of cancer at Norfolk General?

A From my knowledge of the surgical staff at Norfolk General, again I think this is of a very high standard.

Q Do you have a personal acquaintance with the surgical staff at Norfolk General? You do, don't you, Doctor?

A Yes, sir.

MR. HARLAN: Object to the leading.

BY MR. JONES:

Q Do you have a personal acquaintance with the surgical staff at Norfolk General?

A Some limited with the staff, yes.

MR. JONES: I would like to ask the Court to rule.

THE COURT: Wait a minute. I am going to allow Mr. Harlan a chance to cross-examine.

MR. JONES: Yes, sir, Your Honor. I have a couple more questions.

BY MR. JONES:

Q In your experience with cancer patients, Doctor, do you follow up your own patients after operations?

A As a rule, yes.

Q Would you explain "as a rule" to me, please?

A Well, occasionally the patient will move from the area or develop complications which require follow-up from

another different kind of physician, or occasionally I move and follow-up becomes no longer possible.

Q Do you have an oncologist at the Veterans Hospital?

A Yes, sir.

Q Does he do all of the follow-up there?

A He follows his own patients and primarily is concerned with chemotherapy on more advanced tumors. He may well follow patients of ours who are also being followed in the surgical clinic, making it a dual follow-up. We work very closely together.

Q Did you say you follow your own patients?

A Yes, sir, when possible and when practical.

Q The patients that you treat surgically, what percentage of them would you say you follow?

A Well, the objective is a hundred percent. When necessary some patients follow minor procedures or procedures in which sequelae are anticipated when discharged, and when we go in to see them again, the cancer patients, we always arrange follow-up and try to maintain this through our clinic and through the Tumor Board.

Q Would you defer to the opinion of an oncologist, Doctor?

A It would depend what the opinion was on. I can't defer to anyone's opinion on a blanket basis, but if he

was knowledgeable and talking sense, then I would probably defer to his opinion on specific problems. However, I take it you are considering a sort of consultative process, and I don't think anyone is bound by the outcome of any one consultation looking for information, exchanging information.

Q Is an oncologist superior to you in prognostication of life expectancy for cancer victims?

A It would depend on the oncologist and his nature and information in that area. Some oncologists, yes; some, no.

Q Would he have to rely on the same type of information that you have available to you?

A In general for the results of long-term studies of treatment in a large number of patients. We also have to rely on the reports and publications from large centers or combined center studies which come out in literature from time to time and which no individual oncologist or surgeon can hope to develop out of his own practical experience. So we have to rely on the tumor literature like for this information on long-term follow-up.

Q Would you describe how the facts on prognostication are determined in the literature?

A Well, by following —

MR. HARLAN: Are we still qualifying or getting into something else?

MR. JONES: I am suggesting that we are going to — will you stipulate he is qualified, Mr. Harlan, to

prognosticate about cancer? If not, we will just keep right on going.

MR. HARLAN: I am just wondering whether we are qualifying him as to the standard of care.

THE COURT: That is where we are.

MR. JONES: Well, I think we will kill the whole thing, if you don't mind.

THE COURT: I think we are getting a little far afield anyway. The real question is diagnosis.

MR. JONES: And damages. Is the prognostication on damages?

THE COURT: At this point he is not qualified as an expert on the standard of care in this community or in the standard of care of breast cancer.

MR. JONES: All right. I want to pose that.

THE COURT: Well, that is why the evidence is right there.

BY MR. JONES:

Q Do you have knowledge of the standard of care for cancer treatment?

THE COURT: Not treatment. That is two different things.

MR. JONES: The diagnosis of breast cancer, Doctor?

THE WITNESS: I know --

MR. HARLAN: Excuse me. If I may, it is a rather broad question. I object to it because it is so broad.

MR. JONES: I think it is relevant.

THE COURT: I am allowing it. Go ahead, Doctor. You may answer.

BY MR. JONES:

Q Do you have any knowledge of the standard of care for the diagnosis of cancer?

A Personal knowledge. I have knowledge of my own personal standard, the standard of my associates, and we have the standard that we try to teach.

MR. JONES: I would like to get Your Honor to rule on what Tidewater is and whether he is qualified.

THE COURT: I don't know what Tidewater is.

MR. JONES: You have made a blatant statement of --

THE COURT: I told you when I was a youngster Tidewater to me was all the flat land from the mountains to the sea.

They are separate communities. Therefore you must establish that the standard is the same in these two communities.

MR. JONES: Is the Court ruling --

THE COURT: Yes, sir.

MR. JONES: All right. We respectfully except to the Court's ruling.

Thank you, Your Honor.

BY MR. JONES:

Q I have two questions. Doctor, do you know Riverside Hospital?

A Yes, sir.

Q How does it stack up with Norfolk General?

A I think --

THE COURT: Now, his testimony earlier is that he indirectly knew. I wrote that down, "Indirectly familiar with Riverside through acquaintances." Is that correct, Doctor?

THE WITNESS: Yes, sir.

THE COURT: He doesn't know. It is hearsay.

MR. JONES: Mr. Harlan?

MR. HARLAN: Judge, I would not cross-examine at this time and see what the Court is going to rule. I just don't see any evidence that the standard of care in this community has been present. Therefore, there is nothing really to cross-examine on at this time. The doctor has been very candid, as usual.

BY THE COURT:

Q Doctor, do you have personal knowledge of the standard of care used by gynecologists in the diagnosis of cancer of the breast in matters in the City of Hampton?

A Not having had any patient referred to a gynecologist, I can't really give a --

Q Well, when they are referred, it is usually because of a suspicion or something of that nature, is it not?

A Yes.

Q Do you have any experience from a personal knowledge, or are you in any way familiar with their initial workup before you get it?

A I would anticipate that it is --

Q Not what you think they do. Do you know what they do?

A I know what they are supposed to do, but I can't say what Hampton gynecologists do before we see the patient, or what even gynecologists in my previous area have practiced if it comes to that, except that whatever they did seemed to be satisfactory.

Q In your practice generally, when you receive a patient, whether it be referred by a physician or by, say, another patient, or anyone, there is usually indication of cancer, is that correct?

A Or other disease requiring surgical treatment,

yes.

THE COURT: The Court is of the opinion that Dr. Jackson is not qualified to testify to the standard of care in the diagnosis of breast cancer by gynecologists either in Hampton or in Virginia Beach.

MR. KERSHNER: Thank you, Your Honor. We note our exception to the Court's ruling and we would solicit the Court's advice on how to proceed from here.

MR. HARLAN: Well --

THE COURT: The only thing I am going to do is take a five-minute recess. I can't give you advice, Mr. Kershner.

MR. KERSHNER: Thank you.

(Whereupon, the Court recessed at 3:12 p.m. and reconvened at 3:53 p.m.)

THE COURT: All right, Mr. Kershner.

MR. KERSHNER: Your Honor, if it please the Court, I would like to fully understand your ruling on the qualifications of the witnesses.

Is it my understanding that Your Honor has ruled that in spite of the evidence that the plaintiff has put on to qualify the plaintiff expert witnesses to testify to the local standard of care in this case, Your Honor

has found them not qualified, and I would ask Your Honor if his ruling is that plaintiff's experts are not qualified to testify to the standard of care for the diagnosis and treatment of female breast cancer as to the standard of a physician in Virginia Beach or a similar community? Do I understand Your Honor correctly in that ruling?

THE COURT: The Court has held that they are not qualified to testify as to the standard of care in the diagnosis and treatment of breast cancer in Virginia Beach or similar communities. That is the ruling, that is correct.

MR. KERSHNER: And the Court has so held in this case?

THE COURT: In this case, yes, sir.

MR. KERSHNER: Thank you, Your Honor, and we except to the Court's ruling and I note our exception.

Your Honor, in view of the Court's ruling that the plaintiff's experts are not qualified to testify to the standard of care, we have no other witnesses to testify to that standard of care.

MR. HARLAN: Your Honor, based on the representations made by Mr. Kershner that he has no further medical expert witnesses to testify as to the standard of care in the City of Virginia Beach or similar

communities, other than those two witnesses that we have already heard evidence on and the Court has made its ruling, and because this is a medical malpractice case, and because plaintiff cannot proceed successfully in this case, and unless he has someone to set that standard of care and testify, we respectfully move at this time that the Court strike the plaintiff's evidence and enter up summary judgment on behalf of the defendant for these reasons.

THE COURT: Is it the plaintiff's position at this point that you want the Court to rule on this particular question?

MR. KERSHNER: Yes, Your Honor, as long as the Court has ruled that our two experts are not qualified to set the standard of care.

THE COURT: You have no one else?

MR. KERSHNER: We have no one else to set that standard of care, Your Honor, and we feel that without the witnesses that the Court has excluded, we could not carry the burden. Of course, we feel we would have carried the burden had the Court ruled correctly and allowed their testimony.

THE COURT: Well, as I probably referred to earlier in my comments to the doctors, I am in no way endorsing the law that we have in Virginia. I am only

applying the law, and generally counsel are familiar, but if the parties are not, maybe I can just refer to it just briefly.

There have been two recent cases on that point in Bly versus Rhoads, 216 Virginia 645, and Little versus Cross, 217 Virginia 71. The Court has reiterated the ruling of law as it applies in Virginia concerning the standard of care, the burden regarding the standard of care on the plaintiff in a case similar to this. It recognized in one of the cases, I believe it is the Bly case, there is such a thing as what is known as a National Standard for determining malpractice, but they have refused to change the standard in Virginia, which is the same or similar community standard, and they go into some of the reasons behind it, and I am not one to question those reasons.

The reasons basically are, and I am reading from Bly versus Rhoads, page 652, "It has been long relied upon by lower courts, the legal and medical professions, and the public, and if for no other reason we reject a challenge for change because of basic concept dictated maintenance of the established law."

Well, it is stated right in there, if there is any change in the standards rule that applied to such litigation, they shall be made by the Legislature and

not the courts, and this Court cannot legislate the rule of law; that is, you must establish evidence concerning the standard as it is exercised in this or a similar community.

If the plaintiff has no other evidence concerning this aspect of the case, then it would be appropriate for this Court to grant summary judgment as requested by the defendant.

I recognize the fact that the plaintiff obviously has not presented all the evidence concerning all aspects of the case, but if the plaintiff cannot, shall I say, jump this hurdle, the rest of the case really is moot.

MR. KERSHNER: We understand Bly versus Rhoads and Little versus Cross, Your Honor. We accept your ruling.

With all due respect to the Court, we feel, of course, with the evidence that we have presented, the Court has misinterpreted the mandate of the Supreme Court.

Thank you, sir.

THE COURT: I assume you will note your exception to the Court's ruling.

MR. KERSHNER: We note our exception to the Court's ruling.

THE COURT: Summary judgment on behalf of the defendant will be entered by this Court.

MR. KERSHNER: Thank you, Your Honor.

MR. HARLAN: All right, sir. Thank you.

THE COURT: Bring the jury out, please.

(Whereupon, the jury resumed its place in the Jury Box at 4:00 p.m.)

PROCEEDINGS IN THE COURTROOM IN THE PRESENCE OF THE JURY

THE COURT: I commented earlier to one of the physicians that if I kept you locked up much longer I might have to use one of them to revive you, but, seriously, we have been working while you were locked up, and I might explain some of the things that have happened in this case.

As you probably have gleaned from the evidence, the burden in a medical malpractice case to establish negligence is upon the plaintiff, and to establish negligence in a medical malpractice case, the plaintiff must first establish what the standard of care in this or a similar community is, and, secondly, to establish that the physician in question did not live up to that standard of care. The only way that the plaintiff can establish the standard of care in a situation such as this is to call physicians who are familiar with the standard of care exercised by physicians in this or a

similar community.

The plaintiff, unfortunately, has been unable to bring to us persons who are qualified to testify as regards the standard of care practiced by physicians in this or a similar community, and failing to do this, the plaintiff must fail in their case.

After we determined that the plaintiff did not present evidence concerning the standard of care in this or a similar community, the defendant made a motion for summary judgment in his behalf, and the Court has granted that motion.

So for all intents and purposes as far as you ladies and gentlemen are concerned, you can go.

All right. Thank you very much for your attention both in the court and your tolerance while you were required to sit here and wait in the Jury Room.

I assume you will be called when you are needed again, except Mr. Burns. Mr. Burns, because of my promise to you, I will excuse you until after the holidays.

Thank you very much. You are excused to go.

(Whereupon, the jury was released at 4:03 p.m.)

THE COURT: Mr. Harlan, will you present an order to the Court embodying generally the decision and the

judgment for the defendant?

MR. HARLAN: Shall I put on that order that the order was entered this date?

THE COURT: Yes.

MR. HARLAN: All right, sir.

THE COURT: Court is adjourned.

MR. HARLAN: Thank you, Your Honor.

MR. KERSHNER: Thank you, Judge.

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(Court reconvened at 10:10 a.m. December 14, 1976.)

PROCEEDINGS IN THE COURTROOM IN THE PRESENCE OF THE JURY

THE COURT: Good morning, ladies and gentlemen of the jury. I believe we are ready to proceed with Dr. Berger.

Mr. Kershner has completed his direct examination of Dr. Berger. Mr. Harlan was to start this morning with cross-examination.

Mr. Harlan.

MR. HARLAN: Thank you, sir.

CROSS-EXAMINATION

BY MR. HARLAN:

Q Good morning, Dr. Berger.

A Good morning, Mr. Harlan.

Q Doctor, in listening to some of the answers given to questions posed by Mr. Kershner, if you will recall, yesterday he put a photograph of Mrs. Ives' breasts taken immediately before surgery, or a day before surgery in Virginia Beach General Hospital, and asked you to put an adjective, if

you would, as to the type of retraction that you saw in that photograph, and I believe that you said it was minimal to moderate retraction and that you had seen more serious retractions than that; is that correct?

A That is correct.

Q All right, sir. And you also had in your operative report that the specimen was two by three centimeters, and I ask you if that is a best approximation based on your surgical trained eye, or did you actually measure it with a centimeter rule?

A That is an approximation.

Q All right, sir. And therefore, if the pathologist, who has measured it with a rule and has told us that it was two by two by one, and there may be an additional attachment about two centimeters, you would not disagree that the specimen could have been two by two by one point two, would you?

A The pathologist measures it. I don't.

Q Yes, sir. So the answer to my question?

A That is correct.

Q All right. Thank you.

Now, again Mr. Kershner asked you by looking at these color photographs, which are in evidence, of Mrs. Ives' breasts, just looking at the photographs, could you make a diagnosis, I am paraphrasing him, but I thought he asked you that

question, and, as I understood it, your reply was, or rather than making a diagnosis, could you tell what was causing the nipple retraction, and your answer was, one, well, it could be a congenital retraction; that is, Mrs. Ives could have had it from the time she reached puberty, which, of course, we rule out in this case because this is not the first; secondly, that it could have been caused by an inflammation or an infection, either ongoing in the breast at the time the photographs were taken, or something that had subsided and left some sort of scar tissue causing retraction; is that correct?

A That is correct.

Q And the third possibility, of course, was cancer --

A That is correct.

Q -- just looking at the photographs.

Now, in the case of the second possibility, that is to say, the case of looking at the photographs that it might have been an infection or something like that, the treatment for that, as I understood it, would be no treatment at all, that you would essentially watch it to see if the condition worsened.

A That is correct.

Q All right. And that you further elaborated if it were an infection that the inflammation could subside and the nipple return to its original state, or that because of scar tissue it could stay retracted basically in the same format as it had when you first saw it.

A That is correct.

Q These are some of the possibilities. All right.

Now, I think you also told us what you would do in examining a female's breast, that if you had felt a mass, you would get a xerogram and you would use that xerogram to differentiate between a benign and a malignant mass; is that correct?

A That is correct.

Q All right, sir. And routinely, I think you said, three to four years ago you used the xerogram more or less routinely.

A That is correct.

Q And since that time you are not using the xerogram as much as you were at that time.

A That is correct.

Q All right. Now, with respect to why you are not using the xerogram or the mammography as much as you did three or four years ago, is it not true that there have been some studies that indicate that the xerogram itself can cause or light off, if you will, if that is adequate terminology, a condition of cancer in some person's breast, at least it is thought to be so?

A There is some question about it, but it is not definite.

Q That is one of the reasons why you --

A That is one of the big reasons I only use it now

when I really need it.

Q And basically all medicine, surgery or otherwise, is balancing risks, isn't it?

A That is true.

Q And trying to give the risk that is the most favorable to the patient?

A That is true.

Q So a mammogram could very well be indicated and you would prescribe it today knowing what you know, that there is some slight possibility based on some of the statistical studies of carcinogenic complications?

A That there is some risk.

Q Some risk. Now, today, therefore, that is, in 1976, if you palpated a lump in a person's breast, and I do remember your saying that if you had had the patient a long time and she had fibrocystic disease and you had biopsied it a couple of times and found no cancer, then she presented herself a third time, then based on her history you would feel justifiable in not biopsying the third lump.

A Well, there are a lot of factors there.

Q I understand. I am making it very simple and perhaps I shouldn't.

A Well, you know, if she didn't want any more surgery, if she was willing to take the chance, this was another situation. If I felt strongly about it, I might even aspirate it,

I don't know. There are a lot of factors in here, but I might under certain circumstances watch a lump in the breast when the patient has had previous fibrocystic disease, previous biopsies which all turn out to be benign and not cancerous.

The point I am making is that based on what you as the treating physician do with a particular patient is judgmental to a great extent based on her history and your findings of the particular patient that you are dealing with, and a lot depends upon the specific patient and the specific findings which vary very often from patient to patient.

Q Based, of course, on your experience and training.

A That is true.

Q It is a matter of judgment?

A That's right.

Q I believe you also said that just in the abstract, as Mr. Kershner put that photograph of the breast in front of you, that based on what you see in the photographs and assuming that there was no lump palpated, and assuming further that a xerógram would be negative, your present inclination would be to watch that breast?

A That is true.

Q All right. And you would be watching for a change in that breast, would you not?

A I would.

Q And the type of change you would be watching for

would be one that would be clinically determined to be an increase in the severity of the symptoms as opposed to a change for the better?

A The appearance of a lump, the presence of a positive mammogram or xerogram, and the worsening of the retraction.

Q Thank you, sir. And you would be watching, I think you told us you would be watching before you got another xerogram, three to six months. As a general rule you would do this?

A That is correct.

Q All right. Now, regarding your individual experience with xerograms, I understood you to say that your experience is that persons have received more false positive reports than you have false negative reports; is that correct?

A That is correct.

Q That so interpreting it, so I can understand what you are saying, is that you have had more reports that have affirmed the presence of cancer via the xerogram that turned out to be untrue based on biopsy than those that said there was not cancer that subsequently you discovered there was cancer.

A That is correct.

Q All right. So to distill those individual statistics regarding the reports, positive and negative reports from mammograms and xerograms that you have personally experienced,

you would be able to state that the negative reports are statistically more accurate than the positive reports?

A Yes. That is correct.

Q Based on your own experience?

A Right.

Q Now, regarding the lump or the mass that you had excised from Mrs. Ives' breast, there is no way that you or anyone else can say how fast that particular lump grew; isn't that true?

A It is absolutely no way in an individual patient of saying how fast it grows.

Q And this opinion of yours is based on being the actual treating physician of Mrs. Ives?

A That is correct.

Q On seeing the breast and its condition and the lump; is that not correct?

A That is correct.

Q Plus your thirty odd years of experience as a surgeon who has, in the course of his practice, frequently, is that not an adequate word, numerous times performed surgery on female breasts?

A We do more breast surgery than any other type of surgery in our office.

Q So the answer to that question that I just posed to you is true?

A True, yes, empirically.

Q As a matter of fact, your office in Virginia Beach does, perhaps, more breast surgery than any other surgical group here; isn't that true?

A I can't answer that question.

Q All right. Now, regarding the opinion that you gave yesterday, and you said to Mr. Kershner, "With hindsight, Mr. Kershner", regarding that opinion that you now with hindsight gave concerning the cause of the nipple retraction, he asked you could you tell us what was probably causing the nipple retraction in '73, and your answer was "With hindsight this was probably the tumor"; remember that?

A Yes.

Q All right. With regard to your response to Mr. Kershner's question, you are not saying at the same time that since the tumor was causing the retraction in '73, that mass would have been palpable in '73, are you?

A Not by any means.

Q And then you are not saying it would have been palpable in '74, are you?

A No, sir.

Q All right. Would you agree that this is an infiltrating --

A Ductal carcinoma.

Q Would you agree that these ductal carcinomas, based on your thirty odd years' experience as a surgeon with

them, grow at a very unpredictable and irregular rate?

A Right. It varies with the individual patient. They can grow very rapidly in a period of a few short weeks, and they can take a long, long, long time to grow without spreading, just growing locally.

Q So that we can have the benefit of your thinking on the other side of the coin to that, we would also ask you would you agree that they can sometimes lie clinically undetectable and dormant for a long period of time?

A That is correct.

Q As many years as to go back five years, for example, prior to the surgery?

A Yes. We have seen that.

Q So this could have been lying dormant, clinically undetectable as early as 1970, could it not?

A That is true.

Q Do you agree with the proposition based on your experience in surgery that sometimes a tiny tumor, tiny in the sense of size, can be particularly virulent in the sense that it throws off a lot of metastasizing seeds whereas a large tumor may be relatively benign in the sense that it doesn't throw off as many seeds?

A That is perfectly true.

Q So size has got nothing to do whatsoever with the ability to metastasize; is that correct?

A That is true.

Q And, of course, it is very likely, or it is possible or within the realm of what your experience is, that if this tumor existed in 1970, the metastases could have occurred at that time; isn't that correct?

A That is correct.

Q All right. But getting back to Mrs. Ives, there is no clinical evidence of metastases whatsoever at this time; isn't that true?

A None at all.

Q Now, had Dr. Redford referred Mrs. Ives to you in April of 1973, Dr. Berger, and had she had nipple retraction, no palpable lump, and a negative mammogram in 1973, would you have biopsied her breast at that time?

A I probably would have watched her.

Q All right, sir. Assume that in November of 1973 she was presented to you again by Dr. Redford, and this time the retraction was the same, had not changed, it was no palpable mass, and she had a second negative mammogram, would you have biopsied at that time?

A I would have continued to watch it.

Q And you would be watching, I think you told us, for some change for the worse?

A Right.

Q Now, in November of 1974, or in this area

generally in 1974, there was, I think you will agree, medical thinking at that time regarding mammograms that started to be developed which you have already described to us, the thinking that there was some conversity as to mammograms and the doctors had better, based on some vague studies, go a little bit easy in recommending mammograms unless it was clinically, absolutely necessary; isn't that correct?

A That is correct.

Q So had Mrs. Ives been presented to you in November of 1974, and you had known that in April of 1973 she had a retraction, no mass, and a nipple inversion, that in November of 1973 she had the same retraction, unchanged, no mass, and a negative mammogram, and also a negative mammogram in April of '73, would you feel that if the symptoms were exactly the same in November of '74 that a mammogram was indicated by you?

A Under the circumstances, I probably would have gotten another mammogram irrespective of the risk.

Q All right. Now, would you feel that a biopsy was indicated?

A No, if the mammogram was negative and if there was no mass.

Q All right. Now, had Mrs. Ives in fact been biopsied and found to have some slight infiltrating ductal carcinoma in 1973, would you have performed the same operation on her in '73 that you performed in '75?

A In '73 I think most surgeons and I would have also done a radical mastectomy at that time, the same operation that I did in '75.

Q Did your decision to perform a radical mastectomy on Mrs. Ives in '75 -- did Dr. Redford participate in any way in that decision?

A No.

Q In other words, this is what he consulted you for?

A That is correct.

Q Doctor, do you have an opinion stated with reasonable medical certainty based on your examinations of Mrs. Ives, based on your surgical excision of a cancer, and removal of her left breast, which, incidentally, contained forty-five nodes, three of cancer, and based on your training as a surgeon and your thirty odd years' experience with breast cancers in women, do you have an opinion, stated with reasonable medical certainty, whether or not her life expectancy would be any different had the cancer of the breast been removed in '73 instead of '75?

A Since she had no negative nodes at all following the operation and the pathologist's report in '75, I don't think it would have made a darn bit of difference whether she had a radical mastectomy in '73 or in '75.

Q So her life expectancy, in your opinion, stated

with reasonable medical certainty, is no different?

A It is no different.

Q All right, sir. Doctor, finally, I take it from time to time you have the unfortunate experience of seeing ladies who come into your office who, despite constant visualization by various practitioners, not only have cancer of the breast but have metastases to the nodes; isn't that correct?

A That is true.

Q And this is an area where, unfortunately, those people have a much, much dimmer outlook on life than does Mrs. Ives?

A That is correct.

MR. KERSHNER: Objection, Your Honor, conclusion as to Mrs. Ives' outlook.

THE COURT: Overruled.

MR. HARLAN: Thank you. That is all the questions I have.

REDIRECT EXAMINATION

BY MR. KERSHNER:

Q Good morning, Doctor. Thanks for coming back.

A Good morning, Mr. Kershner.

Q Doctor, in the area of treatment and diagnosis of Mrs. Ives, yesterday you were able to recall that you had done

some operations on Mrs. Ives for various reasons. You said roughly it was in the late sixties or early seventies, I believe, Doctor.

A I think I gave you the time, Mr. Kershner. I have a chart here of one of the operations, if you want it.

Q I am not as interested in that exact time, but she had been consulting you since then for follow-ups?

A That is true.

Q Doctor, do you recall that Mrs. Ives came to you in early December of 1975 for one of the routine vein injections, that you --

A I don't recall, but I can look it up.

Q That is what Mr. Harlan is doing.

A Let's see. On October 3, 1975, I injected one of her veins and told her to return in a few months.

Q Thank you, Doctor. Is the copy you are looking at similar to a copy I show you now?

A Yeah. That is correct.

Q So in October of '75 --

A October 3.

Q October 3rd you gave her a vein injection and told her what?

A Return in a month. I can't quite read when I told her to return, but it was a matter of months.

Q A matter of months?

A Yes.

MR. KERSHNER: I ask this be admitted as Plaintiff's 16.

(Whereupon, Dr. Berger's report was admitted in evidence and marked as Plaintiff's Exhibit No. 16.)

BY MR. KERSHNER:

Q And that same record, if we go further down, I believe, Dr. Berger, shows she returned when?

A On 12/5/75.

Q And would you tell us what your notes reflect from the 12/5/75 visit?

A Blood pressure was taken and history and physical done. This was in preparation for her surgery on the 9th of December.

Q Now, Doctor, it appears from your records that you --

MR. HARLAN: Excuse me, Your Honor. This is redirect examination and I don't believe this has been covered on direct. It wasn't covered on cross, but I object to it.

MR. KERSHNER: Your Honor, I carefully copied down the areas that Mr. Harlan covered on cross-examination and he covered diagnosis, he covered visits, he covered

what was done, he covered analysis of the mass, he covered virtually everything on cross-examination, and that was covered in direct. I think he has opened up every field we opened..

THE COURT: I don't recall a visit other than the visit on December the 5th. I think that is perfectly proper. You can re-examine on that.

MR. KERSHNER: And this is the only visit that I am going to re-examine on, Your Honor.

THE COURT: All right.

BY MR. KERSHNER:

Q Back to the December 5th visit, I am interested in eliciting from you the circumstances under which Mrs. Ives came. You made some testimony to Mr. Harlan about Dr. Redford's involvement in the decision to do surgery. I think we are interested in under what circumstances Mrs. Ives came to the office that day, and what connection, if any, Dr. Redford had with that visit.

MR. HARLAN: Excuse me, Your Honor. I don't mind the question, but I do mind the questions misquoting me. I made no reference to Dr. Redford as to the surgery. My questions were directed to Dr. Berger.

THE COURT: There was a question whether or not Dr. Redford had anything to do with the decision.

MR. HARLAN: Oh, in the decision making, and the answer was no.

MR. KERSHNER: That is the way I meant it.

MR. HARLAN: Oh. Okay.

BY MR. KERSHNER:

Q Do you recall the circumstances under which she came to see you?

A I don't know what you mean by circumstances, Mr. Kershner. You mean how she came to me or why she came to me?

Q Yes. Was it a referral from Dr. Redford?

A I mentioned previously I wasn't sure how she came other than I knew she came because she was an old patient of mine and I had taken care of her previously for her veins.

Q And did you have any advance information about her breast condition in the day or two prior to her office visit?

A I can't recall. I really can't.

Q Do you recall who suggested or who initiated the breast examination when she came to your office?

A She came specifically for a breast examination.

Q She came specifically for a breast examination?

A That is true.

Q Dr. Berger, you testified to Mr. Harlan about life expectancy, and I think that I am paraphrasing you correctly, you said since no negative nodes were involved it is your opinion

that she is not a darn bit worse off than she would have been had this same operation been performed two years ago.

A That is my feeling.

Q It is, then, your expert opinion, Doctor, that the nodes of the lymphatic glands are all that have to do with the prognosis for life expectancy?

MR. HARLAN: I object to the leading.

THE COURT: It is a leading question.

MR. KERSHNER: Your Honor, this is Mr. Harlan's witness on life expectancy.

THE COURT: It is still a leading question. He is your witness.

MR. JONES: He introduced the copies, Your Honor.

THE COURT: It is a leading question. I sustain the objection.

MR. KERSHNER: Thank you, Your Honor.

BY MR. KERSHNER:

Q What are the factors involved in prognosis for life expectancy after excision of a malignant tumor of the breast, Dr. Berger?

A Well, the only one we have that we can say with reliability is the presence or absence of lymph nodes involvement, and also the number of lymph nodes involved. That is the only one we can say for sure.

Q If I understand your testimony, lymph nodes are the only criteria for life expectancy?

A Or the only reliable criteria.

Q You testified to Mr. Harlan that if this condition had been diagnosed and operated on in November of '73 that it was your feeling that most, or all, or most surgeons would have performed the radical mastectomy.

A Yeah. Most of the surgeons were doing radical mastectomies, not a modified radical mastectomy at that time.

Q And why was that, Dr. Berger, though the answer may be obvious to you?

A Well, it was recently work done at that time by a Dr. Krilgen in Cleveland, and he was becoming more conservative in his treatment of breast cancer, and from about '72, '73 on, the ideas about doing less radical procedures for breast cancer were becoming more apparent. The results apparently were the same whether one had a modified radical mastectomy or whether one had a radical mastectomy, based, you know, upon the lesion, the size of the lesion, where it was, whether it was forked, and so on, but a small freely movable lesion we now treat with a modified radical rather than a routine radical mastectomy only because we save the muscles that involve the chest wall and go into the arm.

Q And do I understand you to say, in other words, the advancement of the medical theories in the '73 area had not gotten to this point yet?

A It had not gotten to me.

Q What would you have done, Doctor, in Mr. Harlan's hypothetical question in November of 1974?

A Let's see. I have been doing modified radicals now for about a year and a half, so I would have done a radical at that time, because we are now some two years past November of '74. I have been doing the modified radicals for about a year and a half.

Q Doctor, you testified to Mr. Harlan that in your experience tiny tumors would be particularly virulent while big ones might not be virulent.

A Right. It is an individual thing.

Q Was that testimony directed towards Mrs. Ives' case in particular?

A Just a general statement.

Q That was a general observation on tumors?

A That is correct.

Q You testified to Mr. Harlan, I believe, that metastases could have occurred at any time during this period.

A That is correct.

Q Doctor, as a general observation like the one you gave Mr. Harlan, take a tumor that is very small at any given point in time, not selecting the absolute point but the point at random, and it grows larger at a point at random, I think you testified earlier it does metastasize to some extent constantly

all the time, did you not, Doctor?

A No, I did not. I said we have no way of knowing, either based on the size of the tumor, the location or anything else, when it is going to metastasize. Anything can happen, but we have no way of knowing when it is going to metastasize, where it is going to metastasize, or whether it is going to metastasize at all. By hindsight when we do the surgery, then we can say, "Well, all right. It has not metastasized or spread to the regional nodes because the pathologist has looked at it and there is no involvement of the regional nodes histologically on examination under the microscope."

Q In your expert opinion, then, Doctor, assuming a growing cancer and an irregularly growing cancer from one point to another, is there a point in that growth where it's more likely to metastasize than not?

A I would say just on the basis of simple arithmetic the longer it stays there, the more chance it has to metastasize. That is a general statement, now, does not apply to Mrs. Ives or anyone else.

MR. HARLAN: Then I object to the general statement and move that it be stricken if it doesn't apply to Mrs. Ives.

THE COURT: You will have an opportunity to cross-examine.

BY MR. KERSHNER:

Q Dr. Berger, you testified that the class of cancer, ductal carcinoma, for the record I think everybody has introduced testimony of infiltrating ductal carcinoma, grows at an unpredictable rate, could have grown in a few short weeks, could have grown in a long time, could have been latent for a long time, and clinically undetectable.

Doctor, in your expert opinion, can you say that Mrs. Ives' cancer grew to two by three, which was your estimate, in a few short weeks?

A I can't answer that question. I have no idea. I would say that on the basis of what I know, and specifically with Mrs. Ives, she had a very small tumor, originally not palpable on the basis of the records that I have, and that it grew very, very, very slowly over a period of years when the retraction of the nipple was first noticed. Again, this is hindsight.

Q Your hindsight tells you that she had a very, very small tumor that grew slowly until you were able to palpate it?

A That is correct.

Q And you palpated it on that December 5th, 1975, visit?

A I did.

Q Did you palpate it on the first try, Dr. Berger?

A I did.

MR. HARLAN: I object to any further leading, Your Honor.

BY MR. KERSHNER:

Q When you palpated it the time you palpated the lump on December 5th, Dr. Berger, what, if any, exclamatory statement did you make to Mrs. Ives?

A What did she ask me? I can't tell you that question. I can't recall specifically to know what I said to her a year ago.

Q All right, Doctor, if you can't recall what you said, nobody is trying to --

A No.

Q But you have testified now that at least on hindsight --

MR. HARLAN: Your Honor, I object to the leading again, sir. He is still on redirect. This is his witness.

THE COURT: That is a leading question.

MR. KERSHNER: Thank you.

BY MR. KERSHNER:

Q Doctor, you testified to Mr. Harlan in answer to his hypothetical of the visual symptoms without the palpable mass

that you would watch it, that you would watch for a change, the change that you would watch for was the appearance of a lump, the presence of a positive mammogram, or worsening of the visual symptoms, and that you would have the patient back every three to six months to do this.

A That is correct.

Q And you went on to testify --

MR. HARLAN: He is asking leading questions, Your Honor.

THE COURT: I don't know what he is --

MR. HARLAN: He is testifying.

MR. KERSHNER: I haven't asked the question yet, Your Honor.

MR. HARLAN: Then I would object to his testifying.

THE COURT: Overrule the objection.

BY MR. KERSHNER:

Q In that same question Mr. Harlan asked you in November of 1974 would you have gotten another mammogram.

A That is correct.

Q And I missed your answer, Doctor. What did you say?

A I said I would have.

Q Doctor, you testified about negative, false

negative and false positive mammograms. I believe you said that you had, from your experience with many, many of these things, you had had more false positive reports than false negative reports; is that correct?

A That is correct.

Q Doctor, would you tell the jury in your thirty years' experience of -- well, mammography hasn't been around for thirty years. I apologize.

In your experience with mammography, can you tell the jury how many false negative reports you have gotten?

A Mr. Kershner, I haven't the faintest idea. I can only tell you it has been my feeling that we have had more false negatives than false positives. So there is no way in the world, as many mammograms and xerograms that I have ordered, that I can tell you exactly how many or even approximate how many false negatives or false positives.

Q Doctor, I understand that, and I respect your position you can't say exactly how many. Nevertheless, I need to try to get an answer. More than twelve false positives?

A More than twelve, oh, yeah. If you want an approximation, I can give it to you, but you must understand it is only an approximation.

Q Yes, sir, and what we want is only a rough approximation.

A I would say maybe I have seen about thirty or

forty or fifty, somewhere around there, false positives, and maybe about ten or twelve false negatives. You know, this is a very rough approximation.

Q A rough approximation of a three to one ratio, more false positives, about that?

A About that, yes.

MR. HARLAN: I get a five to two ratio, not a three to one.

THE COURT: Well, the jury heard the testimony that was given.

MR. HARLAN: All right. Excuse me.

BY MR. KERSHNER:

Q But did you testify, I think, that while you don't know the exact number, that a dozen or more false negatives?

A About that.

Q A significant number of people who had cancer that don't show on the mammogram?

A Well, it depends upon how many mammograms you do, Mr. Kershner. If you do a thousand, then twelve out of a thousand is not a lot. If you do twenty-four or fifty, then it is a significant number.

Q I quite agree with you, Doctor.

MR. HARLAN: Your Honor, could we not have Mr. Kershner agree or disagree and just ask the question?

BY MR. KERSHNER:

Q The testimony, then, Doctor, is that it is not statistically important?

A What?

Q The ratio, the number of false negatives to this large number of mammograms you do?

A Well, I don't know whether it is statistically important or not. The only thing I know, it is a tool of diagnoses and we use it, and we don't depend entirely upon it, but we do use it as a tool with other methods of diagnoses, like palpation, visual appearance. They all go together, you know, to either make a diagnosis for surgery or make a diagnosis which tells us to wait and watch, or make a diagnosis to tell us not to operate, but it is one of the tools, and it is not really significant, but coupled with other tools, it is important in the final answer, the final conclusions as to what you are going to do.

Q It is in itself not significant?

A Alone it is not important, not vital, but it is important using other tools of diagnoses.

Q Doctor, going to the radiation question, which you testified there is kind of a raging controversy, two schools of thought, what is your current position on the radiation, xerogram, mammography?

MR. HARLAN: Objection. Irrelevant.

THE COURT: Sustained.

MR. KERSHNER: Why is it irrelevant?

THE COURT: You can ask him what is the result if he knows.

MR. KERSHNER: Do you know, Doctor, what the --

MR. HARLAN: Well, Your Honor, it would be, respectfully, also irrelevant because what is now happening in 1976 --

THE COURT: I think you are right. It would have to be back in '72, '73, '74.

BY MR. KERSHNER:

Q Was there a consensus of medical opinion about radiology or radiation dangers from these treatments in the '73-'74 time frame?

A No. This has only been in the last year or year and a half that there has been some question. Now, there is a question as to the dangers of mammography and xerography.

Q So in November of 1974 in the general medical community, there wouldn't have been any worry about radiation effects?

A Well, I don't know. It depends upon how knowledgeable you were at that time about the effects. In other words, my information came to me about maybe a year, year and a half ago, and part of it came through medical papers and part of

it came through the local newspapers and things like Reader's Digest, and at that time I felt that I was only going to do it when it was really indicated. Now, somebody else may have had some other information on the figures earlier than that. So, again, it is an individual thing.

Some doctors at that time may have been doing only mammography and xerography under certain circumstances and not doing it routinely. Others may have been doing it routinely. So in my particular instance, I slowed up, I guess about a year or a year and a half ago, and I don't do it as much. I tend more upon feeling and palpation and looking at the breast.

Q In November of 1974 would you have been worried about mammography two years ago?

A Not two years ago.

Q Doctor, you testified to Mr. Harlan about the size of the tumor, that it was two by three. Mr. Harlan asked you whether that was the sight diagnosis.

MR. HARLAN: Your Honor, I didn't ask him about a sight diagnosis. I said a sight measurement.

BY MR. KERSHNER:

Q What did Mr. Harlan ask you about your estimate of the size of the cancer, Dr. Berger?

A He asked me if I measured it, and I said no, I didn't, that it was an approximate size, you know, based on just

looking at it and feeling it.

Q Doctor, just for the record --

A I neither measured it at the time I examined the patient in the office, nor did I measure it when I took it out at surgery.

Q That was your estimate of the size?

A That was just an estimate.

Q And what I am showing you here, Doctor, purports to be page two of your analysis report at or about the time of the operation?

A That is correct.

MR. KERSHNER: Thank you.

Your Honor, I would like to have that marked as Plaintiff's Exhibit 17.

THE COURT: Have you seen that?

MR. HARLAN: Yes, sir. I have no objection.

THE COURT: Plaintiff's No. 17.

(Whereupon, Dr. Berger's analysis report was marked as Plaintiff's Exhibit No. 17.)

BY MR. KERSHNER:

Q Doctor, do you know of your own knowledge the approximate date -- I withdraw that question, Doctor. I asked you that question yesterday. I am sorry.

Dr. Berger, there has been a lot of testimony on cross-examination about what would be done differently in a hypothetical situation in relation to the standard of care, and I ask you now, Doctor, as an expert general surgeon practicing in Virginia Beach for thirty years, do you know what the standard of care in Virginia Beach is for a surgeon in the Virginia Beach community in diagnosing cancer of the breast?

MR. HARLAN: Objection. Irrelevant.

THE COURT: Overrule the objection.

MR. HARLAN: Your Honor, I would like to state my grounds. The defendant is not a surgeon. The defendant is a gynecologist. We are standing on trial here for allegedly falling below a standard of care for a gynecologist practicing as measured by a reasonable gynecologist and not by a surgeon, and very respectfully, Your Honor, we ask the Court to reconsider its ruling because there is different training in the field and so forth.

THE COURT: It has been opened up. Overrule your objection.

BY MR. KERSHNER:

Q Do you need me to repeat the question, Dr. Berger?

A Well, I don't know what you mean by the standard of care. I can only speak for my standard, what I do and what I

don't do under certain circumstances.

THE COURT: Are you familiar with the community standards?

THE WITNESS: Yes.

BY MR. KERSHNER:

Q Or other surgeons in the community as to what they do or should be expected to do?

A Well, on the basis of what I do. In other words, I feel that what I do is of good care, and I would think that that would apply to other general surgeons.

Q Well, do you feel you are in a position to evaluate another general surgeon?

A Well, I have to on numerous occasions.

MR. KERSHNER: Is Your Honor satisfied that the answer to the question is yes?

THE COURT: Have you got any questions, Mr. Harlan?

MR. HARLAN: No, sir.

THE COURT: All right.

BY MR. KERSHNER:

Q Doctor, I am going to give you a hypothetical situation.

THE COURT: He hasn't spoken to the question. He just said yes to the question of "do you know the

standard". Then you ask him what is the standard.

BY MR. KERSHNER:

Q Doctor, what is the standard of care?

A What is the standard in what respect?

THE COURT: Detection of breast cancer, Doctor.

THE WITNESS: I am not sure what you mean by detection of breast cancer. What do you mean, how to make the diagnosis?

THE COURT: Yes, the steps to go about making a diagnosis.

MR. HARLAN: Excuse me, Your Honor. May we approach the Bench? I ask the Court if we could have a hearing out of the presence of the jury.

THE COURT: Yes, sir.

Step into the Jury Room for a minute.

(Whereupon, the jury retired to the Jury Room at 11:02 a.m.)

PROCEEDINGS IN THE COURTROOM OUT OF THE PRESENCE OF THE JURY

MR. HARLAN: Your Honor, very respectfully, we have listened carefully yesterday to the testimony of Dr. Berger. Dr. Berger's testimony has been couched in

what he would do exclusively, what Dr. Berger would do.

With all due respect to Dr. Berger, that is not, legally speaking, the standard of care.

THE COURT: The standard of care as to a surgeon and the question was asked in that vein, not if he were a gynecologist, but what would a general surgeon practicing in this community do.

MR. HARLAN: Let me -- this was asked over my objection, but --

THE COURT: I understand.

MR. HARLAN: In other words, I have never asked Dr. Berger as to what the standard of care is of a general surgeon in this area. I have asked his opinion under certain things, what he would do. I have asked him as to other things.

THE COURT: What he would do, that is the standard of care.

MR. HARLAN: No, sir. No single doctor, I respectfully submit, can set the standard of care for other doctors. We are not interested in what Dr. Berger does. He is not measured by what a gynecologist would do. The standard of care is that as practiced by average reasonable physicians in the same calling.

Now, there is a big difference, Judge, and I have never -- you said I opened the door. I respectfully

submit I have not opened the door. There is nothing in the record to indicate that I asked Dr. Berger --

THE COURT: You asked him what he would do in a given situation.

MR. HARLAN: Yes, sir.

THE COURT: You asked him if he is aware of the standard of care of a person in his situation in this community as a general surgeon. You opened the door and I am going to allow the question.

MR. HARLAN: All right, but that is the point. I understand what your thinking is, Judge, but I am just saying to you that I don't believe it is in the record, and if it isn't in the record, then you may be committing error.

THE COURT: I do the best I can. You opened the door. I am going to allow the question.

MR. HARLAN: I just would like to state for the record I don't believe I have opened the door and I --

THE COURT: We will take a five-minute recess.

(Whereupon, the Court recessed at 11:05 a.m. and reconvened at 11:15 a.m., and the jury resumed its place in the Jury Box.)

PROCEEDINGS IN THE COURTROOM IN THE PRESENCE OF THE JURY

BY MR. KERSHNER:

Q Dr. Berger, you just testified that you do know what the standard of care is for surgeons in the Virginia Beach community in diagnosing cancer of the breast.

MR. HARLAN: Your Honor, it is understood that the defendant has a continuing objection to this entire line of questioning for the reasons stated.

THE COURT: I understand.

MR. HARLAN: Thank you, sir.

BY MR. KERSHNER:

Q Now, Dr. Berger, I am going to construct a hypothetical situation to outline the actions of a general surgeon in the City of Virginia Beach within confines of that hypothetical situation, and ask you if the actions of the general surgeon within that hypothetical situation meet the standard of care.

THE COURT: Not a hypothetical. That is not the question.

MR. KERSHNER: An actual situation, Dr. Berger.

THE COURT: In this situation.

BY MR. KERSHNER:

Q In this situation the plaintiff approaches the doctor in April of 1973 with a visual condition of retraction of the nipple, in which you have testified that there are three causes, congenital, inflammation or infection for cancer. The congenital cause is ruled out through verbal diagnosis.

A That is correct.

Q There are, then, by your testimony, two possible diagnoses left for cancer, inflammation and infection, and by your testimony there is roughly a fifty-fifty chance either way.

A mammogram is done. The mammogram is negative. The mammogram report is negative. It reports cystic disease, without cancer. The patient is sent away and told to return in six months for further watching, for further evaluation.

The patient does return six months later in November of 1973.

THE COURT: Anything regarding palpation?

BY MR. KERSHNER:

Q The patient is palpated in April of 1973 and no palpable mass is found.

A Right, and a negative xerogram right at this time.

Q You get a mammogram, which is the only thing available, radiographic test. You get a mammogram, you palpate, you do not find a palpable mass, there is no discharge from the

nipple, the nipple retraction is there, it is noted.

The patient returns in six months and essentially the same procedure is repeated. The visual retraction is still there. It has changed little or none. It appears on gross examination, as the pathologist said, about the same. It is palpated, there is no palpable mass, there is no discharge, there is no pain reported.

Another mammogram is ordered. This mammogram comes back, the same one, I think, as we have in evidence. That reports cystic disease but no suspicion at that time of cancer.

A year elapses and the patient returns to the general surgeon in Virginia Beach for examination of the breast and possible breast cancer. A palpation is done at that time in November of 1974, and no palpable mass is found. There is no discharge, there is no pain, but the persistent retraction of the nipple is there, and the persistent retraction of the nipple is noted on the doctor's records. He is not ordering a mammogram in November of 1974.

Does that action fall outside of the standard of care for a general surgeon in the City of Virginia Beach in the diagnosis of breast cancer?

A I don't think so, Mr. Kershner. I think it is a matter of opinion. I would have done it. Somebody else who is offering a good standard of care might not have done it.

Q You would have done it?

A I probably would have done it. Someone else might not have done it.

Q Someone else might not have done it. Thank you, Doctor.

Doctor, one last question. To your knowledge did Dr. Redford in this case ever diagnose that the patient had cancer?

A I think that if he would have diagnosed it, he would have referred her to surgery. I would assume he did not diagnose it.

MR. KERSHNER: Thank you.

RECROSS-EXAMINATION

BY MR. HARLAN:

Q Just one question. In 1975, of course, when Dr. Redford did in fact refer her to surgery, you are not saying that he did not diagnose it then in the sense of the mammographic study?

MR. KERSHNER: Objection. There is nothing in the record that says that Dr. Redford referred anybody to surgery.

THE WITNESS: Would you repeat the question?

BY MR. HARLAN:

Q Yes, sir. The last question that Mr. Kershner

asked you was in the context of around this time, '73, '74, '75. I am asking you specifically in November of 1975 Mrs. Ives was presented to you, and at that time it was on referral from Dr. Redford, and Dr. Redford essentially at that time, as I understand it from the record, referred her to you because of potential surgery based on the mammogram that was positive at that time.

A As I said, I am not exactly sure how she came. I don't know whether she came as an old patient, I can't be sure of that, or whether the referral from Dr. Redford was indirect.

Q Your best recollection whether it was direct or indirect, it was some sort of referral?

A That is correct.

MR. HARLAN: All right. Thank you very much. I have no further questions. Thank you so much.

MR. KERSHNER: I am through with the witness, Your Honor.

THE COURT: Thank you very much. You may step down. You may be excused.

(Witness excused.)

(Excerpts from testimony of Dr. Lawrence Smith.)

DIRECT EXAMINATION

BY MR. KERSHNER:

**********

Q Would it be fair to say, I think I heard this term used, that a pathologist is the doctor's doctor?

A That is what -- yeah. Some people say that, yes.

**********

Q Doctor, do you understand the standard of care in pathology?

A I hope so, yes.

Q You do? Do you understand the standard of care in pathology in Virginia Beach?

A I am not quite sure what you are saying, but I think I do.

Q What I am asking you is what a pathologist should know, what he has to do to live up to his professional responsibility. Do you know in Norfolk also or just in Virginia

Beach?

A Yes. We circulate information and interesting cases between all pathologists in the Tidewater area. So I have an idea of what the practice of -- what level the practice of pathology is at in other Tidewater cities.

Q And is it pretty generally the same all over the Tidewater area?

A Yes.

Q No particular city that is higher or lower standardwise than Virginia Beach?

A In my opinion Virginia Beach is as high or higher than any of the cities in the Tidewater area.

Q So if you took a Virginia Beach pathologist and one from any one of the other Tidewater areas, you expect the Virginia Beach pathologist to be --

A Just as good or better.

MR. HARLAN: I object to any further leading.

BY MR. KERSHNER:

Q Doctor, may I get back for a moment, please, to being a doctor's doctor, and relate it specifically to cancer and breast cancer situations? You are my witness and I am not allowed to lead you. The area I want to explore is the interrelationship --

MR. HARLAN: I object to it. I object to the leading connotations of the speech. Respectfully I ask

the Court to tell Mr. Kershner to ask the question and not give the doctor a speech.

THE COURT: I think he is getting to the question.

MR. HARLAN: Excuse me, but he is attempting to do indirectly what he is not supposed to do directly. He is telling the doctor the area that he is going to question before he starts the question, which is leading.

MR. KERSHNER: I think I can rephrase it to satisfy Mr. Harlan.

BY MR. KERSHNER:

Q Doctor, in a general breast cancer situation, I am not relating this question to breast cancer in this case, would you explain for me the interworkings, the intertwining relationship of the pathologist, the surgeon, the radiologist, and referring physician, if you please, so that the jury will have a consensus of what goes on in the course of diagnosis and treatment of breast cancer?

MR. HARLAN: I object to the question on the ground it hasn't been any foundation established to show that this particular doctor, although very well-qualified in the field of pathology, would know the interrelationship between.

THE COURT: As pertains to pathology?

MR. KERSHNER: Yes, sir.

THE COURT: I overrule the objection.

MR. HARLAN: But he asked the relation between all. That isn't the way the question is asked.

THE COURT: No. The question was as it pertains to him as a pathologist.

MR. HARLAN: Oh, all right.

MR. KERSHNER: Let's go back to --

MR. HARLAN: You asked the question regarding his relationship with other physicians as a pathologist.

THE WITNESS: I think I know what you are getting at. Would you like me to describe sort of a course of events that happens in a family doctor?

THE COURT: How is your office connected in this course of events?

THE WITNESS: All right. If a family doctor suspects breast cancer, he would generally refer to a surgeon. The surgeon would bring the patient into the hospital, would operate, and remove the lump. It would be sent to me. I would perform a section, very quickly observe it under the microscope, tell him whether it is benign or malignant, and then based on that information, he would proceed with either a radical, taking off the entire breast, or doing nothing more.

BY MR. KERSHNER:

Q You tied in, I believe, the admitting physician, the surgeon, and did you comment on where the radiologist comes in there?

A No, I didn't, but I will be glad to.

Q If you please.

A If the surgeon feels it is going to be useful information, he may order an X-ray of the breast, a technique of X-ray of the breast to gain additional information.

Q Is it fair to say that all four of the --

MR. HARLAN: I object to the leading.

THE COURT: It is a leading question.

BY MR. KERSHNER:

Q Dr. Smith, what relationship do these doctors have with each other? How would you characterize the four specialties together?

A The specialties are tied together in this situation by cooperation. It is an endeavor where we try to get together and do what is best for the patient.

Q All four of you are then working --

MR. HARLAN: Objection to the leading.

BY MR. KERSHNER:

Q Tell me, will you, Dr. Smith, what is the

admitting physician's role in this scenario that we have just outlined?

A Well, I would say his role is that of discovery. He became suspicious and so set in motion a chain of events in which other things happen to either confirm or deny his suspicions.

Q And what does he do next?

MR. HARLAN: Your Honor, are we asking for the standard of care of a referring physician? If we are, I object because the witness's competence lies in pathology and not in gynecology.

MR. KERSHNER: We are not asking for the standard of care. What we are trying to do at this point in the game is demonstrate for the jury how the various specialties fit together.

MR. HARLAN: Then we are talking about in general and not as it refers to Mrs. Ives?

MR. KERSHNER: I consider these questions to be strictly qualifying questions.

MR. HARLAN: If they are general questions, I object to them because we are not here to try the general public. We are here on Mrs. Ives' case against Dr. Redford.

THE COURT: I sustain the objection unless he is qualified also as a general practitioner or general physician.

BY MR. KERSHNER:

Q Dr. Smith, you said you practiced general medicine from 1963 to 1969?

A No, that is not correct. In Virginia you are licensed as a physician. You are able to practice medicine and surgery. I could go out and theoretically do an appendectomy, although, of course, I wouldn't do it, but I was in training that whole period of time as a pathologist. I have never practiced family medicine, if that is what you are asking.

Q But you are licensed to practice?

A Theoretically.

Q There is nothing to keep you from doing it?

A Yes.

Q Dr. Smith, do you see patients?

A That is a difficult question to answer. As a pathologist I see patients, or at least various parts of patients in my practice, but not -- it is infrequent that I would see whole patients.

Q Back to the doctor's doctor. Are you experienced in palpating breasts?

A My answer to that would have to be no. I am not experienced in palpating breasts.

Q Have you had any formal training in it whatsoever?

A Well, in medical school and in my internship I did, and I still do it occasionally when I am asked to, but that

is a rare event.

Q What type of understanding is the rare event, on what type of an occasion would you be asked to palpate someone?

A If a physician would like me as a pathologist, for instance, to come in the operating room and feel this lesion before he takes it out, I have done that rarely. I would like to say this, too, since you asked this question: I do, of course, get the specimen as it is sent to me after it has been excised, and at that point I would feel it, but it is rare for me to feel it on the patient.

Q Do you work with cancer cases as a pathologist?

A Yes.

Q And what percentage, rough estimate percentage of the situations that you come into contact with day by day relate to some kind of cancer as opposed to some other area of pathology?

MR. HARLAN: That is irrelevant.

MR. KERSHNER: It is qualifications, Your Honor.

THE COURT: Overruled.

MR. KERSHNER: We stipulate the qualifications of the doctor is not necessary.

MR. HARLAN: Your Honor, there are some other areas --

MR. JONES: We stipulate he is the best pathologist in the State of Virginia, Mr. Harlan.

MR. HARLAN: Is he asking me a question, Judge?

THE COURT: He stipulated he is a qualified doctor.

MR. JONES: We don't want you to stipulate he is the best one in Virginia.

THE COURT: All right.

BY MR. KERSHNER:

Q Doctor, the question was for a rough generalization of the percentage of your practice devoted to cancer as opposed to all other kinds of pathology.

A That is almost an impossible question to answer. So much of my -- if you will ask me how many specimens a day do I see that have cancer in them, I might be able to give you an answer, but, of course, there are enormous numbers I have also seen where sections have been taken which don't have, so I don't know what answer to give you.

Q At the risk of being leading, is it a bunch of them?

A Yes. I see a fair amount of what are recognized to be cancer.

Q And a fair amount of work relating to breast cancer or to the --

MR. HARLAN: Object to the leading, Your Honor.

THE COURT: He is leading.

BY MR. KERSHNER:

Q What knowledge is it necessary for you to have as a pathologist about effect or lack of effect of drugs, chemical substances, et cetera, on human tissue?

A Could you make it more specific than that?

Q What knowledge must you possess to adequately perform as a pathologist about drugs, chemical substances, et cetera, and their effects on human tissue?

A Well, to perform intelligently I have to have some knowledge that there is a relationship between drug "A" and this type of disease or that sort of thing.

Q Specifically, are you familiar with estrogen and progestin compounds?

A Yes. I am familiar with them.

Q Doctor, in order for you to perform your pathological specialty correctly, what level of knowledge must you possess about the other specialties that you have testified you work with, the radiologist, the admitting physician?

A Well, obviously, I don't in radiography, for instance, I don't possess the same qualities as a radiologist. I should know in general what they do and have, perhaps, some very small knowledge of what goes on in those areas, but I wouldn't qualify myself as a physician in any of the other areas.

Q And I understand that. How deeply do you have to go into what they do, et cetera, in order to be able to

intelligently work with them?

A Well, the most intelligent thing I can do is go ask a radiologist if you have, say, a question about something in radiology, which I do, and the same with a good OB-GYN man, or anybody else.

Q Let's take radiology. Do you know what the standards of care in Virginia Beach are for a radiologist?

MR. HARLAN: Your Honor --

THE COURT: Not what they are, just do you know.

MR. HARLAN: May I approach the Bench on this one?

THE COURT: All right.

(Whereupon, counsel approached the Bench and conferred with the Court out of the hearing of the court reporter.)

BY MR. KERSHNER:

Q The question was, do you know in Virginia Beach, for instance, because of your association with them, what the standard of care is of a radiologist? Would you be able to describe it if you were asked? You are not going to be asked, but do you know?

MR. HARLAN: Well, I object to it on another ground, because it is so broad. As to what? With what

respect? I further object because he is not a radiologist.

MR. KERSHNER: Your Honor, the foundation has been well-laid. The witness was asked was it necessary to work in concert in a team effort on one specific problem. He testified yes, and he went through the sequence of events of the admitting physician, the surgeon, the radiologist, the pathologist all working together. We went on to question him about how much knowledge of these other specialties that --

THE COURT: I overrule your objection. You may respond to the question, Doctor.

MR. KERSHNER: Let's make the question easier, Dr. Smith.

THE COURT: Let's let him respond to the question.

THE WITNESS: Say it again.

BY MR. KERSHNER:

Q Do you know what the standard of care is for a radiologist in Virginia Beach?

A If I say yes to that and then you ask me some specific question, I would probably not be able to answer that question. In general I have some ideas, yes.

Q Do you know what the standard of care is in breast cancer for a radiologist?

MR. HARLAN: Your Honor, I have a continuing

objection to this line of questioning and move that the question and the answer be stricken, and we ask the Court so we won't have to keep jumping up to note that it is a continuing objection.

MR. KERSHNER: I withdraw that question and ask one more, if I may.

BY MR. KERSHNER:

Q In either simplest terms, you are a licensed physician in Virginia Beach, though you don't practice; you testified to that.

A That's right.

Q Do you know what the standard of care for a practicing physician, just a GP, is in Virginia Beach in the diagnosis and treatment of breast cancer?

MR. HARLAN: I have another objection.

THE COURT: I have sustained the objection. I can't see where even if he knows it would make any difference if he cannot testify since he is not a practicing physician.

MR. HARLAN: Right. I am anticipating something and may I approach the Bench?

THE COURT: I have sustained the objection.

MR. HARLAN: All right.

MR. KERSHNER: Medical standards in general are

the same all over Tidewater. I believe he testified to that.

MR. HARLAN: Objection.

THE COURT: Leading.

MR. KERSHNER: I believe I have --

THE COURT: Leading.

MR. KERSHNER: Yes.

BY MR. KERSHNER:

Q Do you know how much better Virginia Beach doctors are overall than Hampton doctors?

A I believe you asked me before about a pathologist, and I can say about their standard of care, not the standard of care, the level of practice for a pathologist in the whole Tidewater area. Now, if you are going to ask in another area, I would have to defer to a specialist in that area.

MR. KERSHNER: Your Honor, I think Mr. Harlan stipulated to present him as an expert in pathology and qualified.

MR. HARLAN: You refused the stipulation, Mr. Kershner.

THE COURT: Well, I think he is qualified as an expert in pathology and qualified.

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# C E R T I F I C A T E

STATE OF VIRGINIA

CITY OF VIRGINIA BEACH, to-wit:

I, Doris O. Derieux, CSR, RPR, certify that the foregoing is a correct transcript of testimony and excerpts of testimony of Drs. Saul Kay, Neville Jackson, James S. Berger and Lawrence Smith taken at the trial of the aforementioned cause in the said Court on December 14, 1976.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

Given under my hand this _____ day of _____, 1977.

_____
Court Reporter

IV. ORDER GRANTING SUMMARY JUDGMENT

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

| | | |
|---|---|---|
| COURTNEY S. IVES | : | |
| Plaintiff | : | |
| v. | : | AT LAW NO. 2873 |
| RAMON N. REDFORD, JR., M.D. | : | |
| Defendant | : | |

O R D E R

Whereupon the plaintiff called two medical witnessess, DR. SAUL KAY, Chairman of Surgical Pathology, Medical College of Virginia in Richmond, Virginia, and DR. NEVILLE K. JACKSON who came from out of state to Hampton, Virginia for the first time in August of 1974 to accept the position of Chief Surgeon of the Veterans Administration Hospital, Hampton, Virginia, which witnesses were called to testify as to that standard of care by which the defendant, DR. RAMON N. REDFORD, should be measured, and, while out of the presence of the jury, gave their testimony before the Court as to their knowledge of what that standard of care as exercised by a physician specializing in gynecology practicing

in the City of Virginia Beach, Virginia, or similar community, for the years 1973, 1974 and 1975 would be, specifically relating to the diagnosis and treatment of breast cancer, which standard is the only standard by which the conduct of DR. REDFORD, the defendant herein, could be measured, and;

WHEREAS, after a statement made in open court by Plaintiff's counsel that no other expert witnesses were to be offered by the plaintiff to set such standard of care, and;

WHEREAS, it was understood and agreed by defendant's counsel and plaintiff's counsel, that should these two expert witnesses be qualified to testify as to what such standard of care would be, that their testimony would have shown a standard of care other than that practised by DR. REDFORD in the management of the plaintiff in this case and;

WHEREAS, after the plaintiff presented the factual data for the court, out of the presence of the jury, concerning these two medical witnesses' knowledge of what the standard of care for a physician specializing in gynecology, practicing in Virginia Beach, Virginia, or a similar community in 1973,

1974 and 1975, would have been, specifically as it relates to the diagnosis and treatment of breast cancer, and, after each of the witnesses stating that they had never practiced medicine in the City of Virginia Beach, Virginia, at any time, the defendant, by counsel, moved the Court to strike the plaintiff's evidence and to enter summary judgment on his behalf, which motion, after having been fully heard and maturely considered by the Court, the Court being of the opinion that neither of these two medical witnesses proffered by the plaintiff were qualified to testify as to such standard of care inasmuch as neither DR. NEVILLE K. JACKSON nor DR. SAUL KAY had ever practiced medicine in the City of Virginia Beach, Virginia, at any time, nor were they gynecologists and that, therefore, the Court was of the opinion that under the Doctrine of Bly v. Rhoades, 216 Va. 645, and Little v. Cross, 217 Va. 71 they were not qualified to express any opinion concerning the standard of care applicable in this case and, therefore, that motion of the defendant is sustained, to all of which action of the court the plaintiff, by counsel, notes her exception.

## VI. CERTIFICATE UNDER RULE 5:49

I certify that twenty copies of this Appendix were filed with the Clerk of the Supreme Court of Virginia and that three copies of the Appendix were mailed or delivered to opposing counsel on or before the day on which the Brief of the Appellant was filed.

_____

Louis W. Kershner
Counsel for Appellant

## V. ASSIGNMENTS OF ERROR

I. The Trial Court erred in refusing to qualify Dr. Neville Jackson. The Trial Court's reason that he had never practiced in Virginia Beach, Virginia, was error as a matter of law.

II. The Trial Court erred in refusing to qualify Dr. Saul Kay. The Trial Court's reason that he had never practiced in Virginia Beach, Virginia, was error as a matter of law.

III. The Trial Court erred in refusing to qualify Dr. Neville Jackson because he was not a gynecologist.

IV. The Trial Court erred in refusing to qualify Dr. Saul Kay because he was not a gynecologist.

WHEREUPON, it is considered and ORDERED by the Court that the said plaintiff take nothing for her motion for judgment and that the said plaintiff go hence without day and that the defendant recover of the said plaintiff his costs of court herein expended.

Enter this the 7 day of January 1977

George W. Vakos
Judge

We ask for this:

Thomas J. Harlan, Jr.
Counsel for defendant

Seen, objected and excepted to:

Louis W. Kershner
Counsel for plaintiff