

**TRIAL TRANSCRIPT OF DR. GEORGE VINCENT DIGIACINTO; 2009 Trial  
Trans. LEXIS 2549**

SUPREME COURT OF NEW YORK, QUEENS COUNTY, CIVIL TERM, PART 10

Index No. 8752/06

November 13, 2009; November 16, 2009

**Reporter**

2009 Trial Trans. LEXIS 2549 \*

LAUREN MORRIS, PLAINTIFF, -against- MARC L. GORDON, M.D. and LONG ISLAND JEWISH MEDICAL CENTER, DEFENDANTS.

**Expert Name:** Dr. Vincent DiGiacinto, M.D.

**Disclaimer**

---

Certain information may have been removed or redacted. LexisNexis, its subsidiaries, affiliates and related entities bear no responsibility whatsoever for such content or any removal or redaction thereof.

**Counsel**

---

**[\*1]** KRAMER, DILLOF, LIVINGSTON & MOORE, ESQS., Attorneys for the Plaintiff, New York, New York, BY: THOMAS A. MOORE, ESQ.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, Attorneys for the Defendants, Lake Success, New York, BY: MARC CITRIN, ESQ.

**Judges**

---

BEFORE THE HONORABLE KEVIN J. KERRIGAN, JUSTICE, and a jury

**Proceedings**

---

1140

[1]MORNING SESSION

[2]THE CLERK: All rise, Supreme Court Part 10 is now

[3]in session. The Honorable Kevin J. Kerrigan is

[4]presiding. Everybody come to order.

[5]MR. MOORE: Good morning, your Honor.

[6]THE COURT: Good morning, everybody.

[7]MR. CITRIN: In order to expedite things when the

[8]witness takes the stand, we've gone through the x-rays,

[9]they aren't in there, I have copies of them, I ask they

[10]be marked Defendant's Exhibit B and C in evidence.

[11]MR. MOORE: No objection, your Honor.

[12]THE COURT: Okay.

[13](Whereupon, the referred to items were marked as

[14]Defendant's Exhibits B and C in evidence by the

[15]Reporter.)

[16]THE CLERK: Ready for the jury, Judge?

[17]THE COURT: Yeah, those are marked?

[18]MR. MOORE: Yes.

[19]THE COURT: Bring the jury out, John.

[20]THE CLERK: All rise. Jury entering.

[21](Whereupon, the jury entered the courtroom.)

[22]THE COURT: Ladies and gentlemen, good morning.

[23]All of you may be seated. Hope you all had a good day

[24] **[\*3]** yesterday. We are now ready to resume our trial. We

[25]will continue on the defendant's case.

1141

[1]For the defendant, Mr. Citrin.

[2]MR. CITRIN: Yes. I call Dr. DiGiacinto.

[3]THE COURT: Okay.

[4]THE CLERK: Step right up, sir, remain standing

[5]for a moment. Raise your right hand.

[6]DR. GEORGE DiGIACINTO, called as a witness by and on

[7]behalf of the Defendant, after having been

[8]first duly sworn, was examined and testified as

[9]follows:

[10]THE COURT: Be seated. Please state your name for

[11]the record.

[12]THE WITNESS: George DiGiacinto.

[13]THE CLERK: Thank you, and your address please.

[14]THE WITNESS: 425 West 59 Street, New York, New

[15]York 10019.

[16]THE CLERK: Thank you, sir.

[17]THE COURT: Mr. Citrin.

[18]MR. CITRIN: May I inquire, Judge?

[19]THE COURT: Yes.

[20]THE CLERK: Can you guys hear?

[21](Whereupon, the jury answered in the affirmative.)

[22]MR. CITRIN: Want to try it?

[23]THE WITNESS: Good morning.

[24]THE OFFICER: In order for it to work you have to

[25]talk directly straight into it. Position it that way.

1142

[1]THE WITNESS: Can we try without **[\*4]** it?

[2]THE COURT: Try without it, just try to speak as

[3]loud as you can.

[4]THE WITNESS: I will.

[5]THE OFFICER: Or put it this way.

[6]THE CLERK: It's off.

[7]THE WITNESS: I'll speak up.

[8]THE OFFICER: Try it that way.

[9]THE WITNESS: Thank you very much.

[10]MR. CITRIN: The hardest part of the day is

[11]getting the microphone to work.

[12]Good morning Judge. Good morning, ladies and

[13]gentlemen of the jury, and good morning, Doctor.

[14]DIRECT EXAMINATION

[15]BY MR. CITRIN:

[16]Q Doctor, what is your medical speciality?

[17]A Neurosurgery.

[18]Q Where did you come from this morning?

[19]A The operating room at Roosevelt Hospital.

[20]Q Doctor, would you tell his Honor and the jury

[21]please about your background and training?

[22]A I graduated from Columbia College in 1966.

[23]Q You have to speak up because Juror Number 6 is

[24]leaning over.

[25]A With a BA degree. In 1970, I graduated from  
1143

[1]Harvard Medical School with an MD degree. From 1970 to 1972

[2]I was a surgical house officer at the Roosevelt Hospital in

[3]New York City.

[4]From 1972 to 1974 **[\*5]** I was a medical officer in

[5]the United States Navy. From 1974 to 1978 I was a

[6]neurosurgical resident at the Neurological Institute at

[7]Columbia Presbyterian Medical Center in New York.

[8]Q And after completing the period of time you spent

[9]at the Neurological Institute in New York, Doctor, what did

[10]you do next?

[11]A I went into the private practice of neurological

[12]surgery in 1978. I was also on staff at Harlem Hospital and

[13]an in instructor in neurological surgery at Columbia.

[14]At that time I was on staff at Harlem Hospital,

[15]St. Luke's and Roosevelt Hospital, which later combined as

[16]well as Columbia Presbyterian.

[17]Q Did there come a time, Doctor, that you became

[18]board certified in the specialty of neurological surgery?

[19]A Yes.

[20]Q And when was that approximately?

[21]A 1981.

[22]Q And what did you have to do to become board

[23]certified in neurological surgery?

[24]A To become board certified in neurological surgery

[25]one must complete an accredited residency in neurosurgery.

1144

[1]During that --

[2]Q Excuse me, Doctor, when Mr. Moore is done, we'll

[3]continue.

[4] [\*6] MR. MOORE: I apologize, Judge, I mislaid

[5]something.

[6]THE COURT: Okay.

[7]Q Please continue, Doctor.

[8]A During your residency, you are allowed to sit for

[9]part 1 of the written boards. When you successfully complete

[10]your residency and the written boards, and after you've been

[11]in practice for 3 years, you're then allowed to sit for the

[12]oral boards. When you pass those, you become board

[13]certified.

[14]Q Doctor, after becoming board certified --

[15]withdrawn.

[16]Aside from your board certification, have you

[17]contributed to a body of writing known as the medical

[18]literature?

[19]A Yes.

[20]Q Approximately how many articles have you

[21]contributed to over the course of your career?

[22]A I think 15 or 20.

[23]Q In addition to board certification and

[24]contributing to the medical literature, Doctor, have you held

[25]any academic appointments?

1145

[1]A I am instructor of neurological surgery at

[2]Columbia Presbyterian.

[3]Q In your capacity as instructor do you have

[4]occasion to teach your specialty?

[5]A Yes.

[6]Q Now, Doctor, aside from all of that, have you over

[7] [\*7] the years have patient care responsibility?

[8]A Yes, I have.

[9]Q And do you continue to have patient care

[10]responsibilities as we speak?

[11]A Yes, I do.

[12]Q Okay. And in case I forgot to ask this earlier,

[13]what does the field of neurosurgery deal with?

[14]A Neurological surgery deals with the diagnosis of

[15]problems involving the nervous system, the brain, the spinal

[16]cord, nerves that leave the spinal cord, treatment of the

[17]structures supporting the nervous system such as the skull,

[18]the meninges.

[19]The spine, for example, with herniated discs or

[20]spine fractures as well as treatment of any problem that

[21]might involve peripheral nerves leaving the spinal cord or

[22]brain.

[23]Our charge is to evaluate a patient, to

[24]evaluate studies, including radiographic. And when

[25]appropriate, to treat such patients with problems surgically.

1146

[1]Q Have you over the course of your career treated

[2]patients who have developed acoustic neuromas?

[3]A Yes, I have.

[4]Q To your knowledge and understanding what are

[5]acoustic neuromas?

[6]A An acoustic neuroma is a tumor, the nerve sheath, [\*8]

[7]something called a Schwann growing off the vestibular portion

[8]of the 8th cranial nerve.

[9]Q Does it grow from within or out, if I understand?

[10]A I don't understand.

[11]Q Where does the tumor originate?

[12]A In one of the cells, the supporting cells called

[13]the Schwann cells.

[14]Q Have you had occasion over the course of your

[15]career to operate on patients who have developed acoustic

[16]neuromas?

[17]A Yes, I have.

[18]Q Approximately how many patients with acoustic

[19]neuroma have you operated on?

[20]A On the order of 25 to 30.

[21]Q And do you still care for patients today who

[22]suffer from this condition?

[23]A Yes, I do.

[24](Whereupon, Official Court Reporter Linda Calderon

[25]relieved Official Court Reporter Angela Spinelli.)

1147

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q And just as a small aside, Doctor, I want you to

[4]assume that last Friday there was a neurologist here,

[5]Lawrence Shields, and at page 774 to 775 of the trial

[6]testimony he told this Court and jury that as a practicing

[7]neurologist, he tells the neurologist what he wants, and if

[8] [\*9] they don't what he wants, he doesn't use them.

[9]Do you have an opinion with a reasonable degree of

[10]medical probability as to whether or not this is the way

[11]surgical interaction takes place between a neurosurgeon and

[12]neurologist?

[13]A I do have an opinion.

[14]Q And what is it?

[15]A It's an exchange between the neurosurgeon and the

[16]neurologist, but I never had a neurologist come to me and say

[17]this is what you have to do.

[18]I will have him come and present a problem and

[19]discuss it, but I thought about after reading that I don't

[20]think I ever had a neurologist come to me and say this is

[21]what you have to do.

[22]Q Now, Doctor, did there come a time that we asked to

[23]you review this case in order to determine not only the

[24]quality of the care provided by Dr. Gordon to Dr. Morris but

[25]also whether or not, regardless of when between February 10,  
1148

[1]2003 and March of 2005, the acoustic neuroma was diagnosed,

[2]whether the treatment options would have been different and

[3]whether with reasonable medical probability the outcome for

[4]Dr. Morris would have been different?

[5]A You did ask me [\*10] to evaluate records in that fashion,

[6]yes.

[7]Q All right. In order to allow you to conduct this

[8]analysis, did we provide you with certain materials?

[9]A Yes, you did.

[10]Q Did we provide you with the records of Dr. Gordon?

[11]A Yes, you did.

[12]Q Did we provide you actually with the MRI films

[13]which are now evidence that came to Dr. Morris?

[14]A Yes.

[15]Q Did we provide you with the inpatient record of Dr.

[16]Morris of April 27, 2005 to Columbia?

[17]A Yes.

[18]Q Did we provide you --

[19]MR. MOORE: Why doesn't he tell us --

[20]objection. Objection, I'm sorry.

[21]THE COURT: I'll sustain.

[22]Q Doctor, aside from what we have already talked

[23]about, what else did we provide you with?

[24]A You provided me with a number of radiographic

[25]studies, MRI scans, et cetera. You provided me with the  
1149

[1]deposition testimony of Dr. Gordon, of Dr. Morris. I

[2]received multiple reports from many other doctors, and it

[3]would be hard for me to enumerate them, neurologists --

[4]Q Let me ask you --

[5]A internists.

[6]Q I tell you we provided with you a copy of --

[7] **[\*11]** MR. MOORE: Objection.

[8]MR. CITRIN: Judge, I'm allowed to refresh his

[9]recollection.

[10]THE COURT: I will overrule.

[11]MR. MOORE: That's leading.

[12]Q Doctor, would it refresh your recollection if I

[13]asked you whether we provided you with the records of Dr.

[14]Stubjen?

[15]A I saw Dr. Stubjen's, yes.

[16]Q And the records of Dr. Samton?

[17]A Yes.

[18]Q And the records more recently of Dr. Golfinos?

[19]A Yes.

[20]Q And the records of Dr. -- hold on a second -- the

[21]records of Dr. Jamieson?

[22]A Yes.

[23]Q Have we also sent you the trial testimony that was

[24]available to the time it was available?

[25]A Yes.

1150

[1]Q And have you read the trial testimony of the

[2]plaintiff's expert, Dr. Lawrence Shields?

[3]A Yes, I have.

[4]Q And the testimony of Dr. Gordon?

[5]A Yes, I have.

[6]Q And the testimony of Dr. Block?

[7]A Yes, I have.

[8]Q And the testimony of the plaintiff?

[9]A Yes, I have.

[10]Q Now, I'm going to ask you for the purposes of the

[11]next series of questions to assume certain facts; and,

[12]Doctor, as I said before, if **[\*12]** any fact that I ask you to

[13]assume is not in accordance with your understanding of the

[14]facts as you found them to be, please let me know and I will

[15]adopt your understanding of the facts, okay?

[16]A Should I do it ongoing or wait until the end?

[17]Q Stop me as soon as there is a problem, okay?

[18]A Yes.

[19]Q I want you to assume, Doctor, that Lauren Morris  
[20]was first diagnosed with migraine headaches at 5 years of  
[21]age.  
[22]I want you to further assume she continued to  
[23]suffer from migraines till her early teens.  
[24]I want you to assume the migraines remitted or  
[25]stopped and then returned when she was in her late teens  
1151  
[1]towards the beginning of college.  
[2]That during her early years she was treated for  
[3]these migraine headaches by a Dr. Donat who never ordered an  
[4]imaging study of her brain.  
[5]I want you to assume that while in college, at SUNY  
[6]Binghamton, Lauren Morris suffered a migraine that was so  
[7]severe that she needed to go to Binghamton emergency.  
[8]Assume, please, that she was seen and evaluated by  
[9]an emergency room doctor in that ER and was treated with  
[10]medication **["13"]** for the migraine, but this doctor ordered no  
[11]imaging studies of her brain.  
[12]Assume that just before medical school, while  
[13]working as a research assistant at Mount Sinai, she had  
[14]another migraine which was so severe migraine that she had to  
[15]go to the Mount Sinai Hospital ER.  
[16]Assume that in the ER was seen and evaluated by a  
[17]Mount Sinai physician who treated her migraine, but who also  
[18]did not order any imaging studies of her brain.  
[19]Assume that after this she came under the care of a  
[20]Dr. Patrick Stubjen, a neurologist at New York Cornell, and  
[21]remained under his care for migraines between 1998 and 2002.  
[22]Assume that during this period of time, although

[23]her migraines were coming with increasing frequency, Dr.

[24]Stubjen never ordered imaging studies of Dr. Morris' skull at

[25]any time over those 4 years.

1152

[1]Assume also during this period of time that Dr.

[2]Morris, who was by now in medical school at the New York

[3]College of Osteopathic Medicine, began attending the clinic

[4]at her school for treatment by pain management doctors at

[5]that clinic. And assume this happened at about 2000.

[6] **[\*14]** Assume that during that period of time, Dr. Morris

[7]came under the care of an osteopathic pain management

[8]specialist, Dr. Dennis Dowling -- let me stop for a second,

[9]Doctor.

[10]Do you recall being provided with the 2005 office

[11]records of Dr. Dowling as part of what we submitted to you

[12]for your review?

[13]A Yes.

[14]Q During that period of time, this is now in or

[15]around 2000, Dr. Morris' migraines were so severe she was

[16]taking 20 to 30 antimigraine pills a month.

[17]Assume further that as a result of Dr. Dowling's

[18]manipulative therapy, Dr. Morris was able to reduce her

[19]headache medications from 20 to 30 pills to 2 to 3 pills.

[20]But assume during that period of time, while

[21]treating her for migraine, neither Dr. Dowling nor any of the

[22]other doctors at the New York College of Osteopathic Medicine

[23]ever ordered any imaging studies of Dr. Morris' brain.

[24]Assume that by December of 2002, Dr. Morris asked

[25]Dr. Gordon to become her neurologist to treat her for

1153

[1]migraine headaches, and he agreed.

[2]And assume that he remained Dr. Morris' treating  
[3]neurologist from February 10th of '03 **[\*15]** to March 30th of 2005.  
[4]And assume that prior to the first examination that  
[5]Dr. Gordon performed on Dr. Morris, he had her fill out a  
[6]lengthy patient questionnaire.  
[7]Have you seen that questionnaire, Doctor?  
[8]A Yes, I have.  
[9]Q All right. And assume further that in addition to  
[10]the written questionnaire, Dr. Gordon supplemented the  
[11]information on this questionnaire with a verbal interview at  
[12]the time of the first visit, and Dr. Gordon learned that one  
[13]of the things that would trigger Dr. Morris' migraines were  
[14]stress.  
[15]And assume that during that period of time, Dr.  
[16]Gordon performed multiple neurological evaluations on Dr.  
[17]Morris, and all of those neurological evaluations were  
[18]absolutely normal.  
[19]Assume that while under his care, there were times  
[20]with the various medications which Dr. Gordon prescribed  
[21]would work to help treat Dr. Morris' migraines and other  
[22]times he needed to change the medications and/or the dosages.  
[23]And assume, sir, that as late as January 3, 2005,  
[24]Dr. Morris reported that Dr. Gordon's treatment was working  
[25]and her headaches were improving.

1154

[1] **[\*16]** Assume that according to Dr. Gordon's records, at  
[2]one time in mid to late 2004, specifically October 18, 2004,  
[3]Dr. Morris reported that while on a migraine controlled  
[4]medication, Topamax, she experienced mood swings.  
[5]So at that point, Dr. Gordon contacted Dr. Wilkes,

[6]the plaintiff's treating psychiatrist, to coordinate their  
[7]treatment in order to try and treat both the mood swings and  
[8]the migraines.

[9]And assume that a decision was made to hold the  
[10]dosage of Topamax and ultimately to reduce it. And on this  
[11]treatment, the reduced Topamax dosage, the mood swings  
[12]stopped.

[13]Now, further assume that although there is nothing  
[14]in Dr. Gordon's records to indicate that Dr. Morris ever  
[15]complained to him about gait disturbance or ataxia, Dr.  
[16]Morris testified that she complained of ataxia and mood  
[17]swings on one occasion.

[18]But assume that once the Topamax dosage was held  
[19]and then reduced, the ataxia and mood swings went away.

[20]Now assume from the middle to the end of 2004, Dr.  
[21]Morris was experiencing very specific types of stress.

[22]By the way, Doctor, did we also provide you with a  
[23] **[\*17]** copy of the office records of Dr. Morris's treating  
[24]psychiatrist, Dr. Wilkes?

[25]A Yes, you did.

1155

[1]Q Assume she was under stress with her residency  
[2]program; that she was experiencing sleep deprivation from  
[3]having to be on call to the ER for 24 hours at a time.  
[4]Assume that she had been in an auto accident where  
[5]she rear-ended another car and didn't report it to the other  
[6]driver or the police, and she has told the Court and jury she  
[7]felt very guilty about that.

[8]She was also having a tremendous amount of  
[9]difficulty trying to establish a relationship with a man that

[10]would last.

[11]And she was under stress, as she has told us and

[12]the records reflect, in anticipating the medical boards that

[13]she had to take.

[14]And she was under further stress in February

[15]of 2005 when she learned she actually failed those boards.

[16]And she shared these stressors with both Dr. Gordon

[17]and Dr. Wilkes, her psychiatrist, as her migraine headache

[18]increased in frequency.

[19]And assume further that although the migraines were

[20]coming with greater frequency, Dr. Gordon documented that

[21]they [\*18] were the same types of pain that Dr. Morris had always

[22]suffered from.

[23]You recall seeing that entry in Dr. Gordon's

[24]records?

[25]A Yes, I do.

1156

[1]Q And assume that while she was under Dr. Gordon's

[2]care, Dr. Morris was also under the care of this board

[3]certified psychiatrist, Dr. Wilkes.

[4]And assume that at various times, in 77 visits

[5]between 2002 to 2005, Dr. Morris would complain to Dr. Wilkes

[6]about her migraines.

[7]And assume at no point did Dr. Wilkes ever order

[8]any sort of imaging study of Dr. Morris' brain.

[9]Assume that in September of 2004, Dr. Morris went

[10]to her internist, a Dr. Marcus, for treatment of a cold.

[11]And assume that although during the course of that

[12]visit Dr. Morris told Dr. Marcus that she was concerned she

[13]had a brain tumor, Dr. Marcus performed no neurological

[14]evaluation and ordered no imaging studies of her brain.

[15]By the way, did we send you a copy of Dr. Marcus'

[16]records as well?

[17]A Yes, you did.

[18]Q Assume that on March 22, 2005, in an effort to get

[19]better relief from her migraines, Dr. Morris returned to her

[20]pain management **[\*19]** specialist, Dr. Dowling.

[21]At the time of that visit, Dr. Dowling performed a

[22]complete neurological evaluation on Dr. Morris and found that

[23]the neurological examination was completely normal.

[24]He took a history of migraine headaches, which is

[25]essentially the same history she had given the other doctors

1157

[1]she had seen for treatment of this condition over the years.

[2]Assume that after the normal neurological

[3]examination, Dr. Dowling performed manipulative therapy which

[4]was designed to try and give Dr. Morris migraine relief, and

[5]at the end of that visit Dr. Dowling gave Dr. Morris a copy

[6]of an article which he had written.

[7]He recommended that she change the pillow she slept

[8]on and scheduled her for another treatment one week later.

[9]He did not order any imaging studies of her brain.

[10]And assume on March 25, 2005, Dr. Morris saw Dr.

[11]Samton, a neurologist at New York Cornell.

[12]Dr. Morris gave her essentially the same history of

[13]migraines she gave all of her other doctors except she told

[14]Dr. Samton that she had no relief from migraines at any time

[15]over 11 years. And in this **[\*20]** courtroom before this Court and

[16]jury indicated that that was not entirely accurate, as she

[17]had believed been relieved at different times from her

[18]migraines.

[19]Assume that Dr. Samton performed a full

[20]neurological evaluation of Dr. Morris, which was completely

[21]normal.

[22]And assume at the time of that visit, Dr. Samton

[23]diagnosed the plaintiff as suffering from migraine headache

[24]and prescribed all new antimigraine medications for the

[25]plaintiff.

1158

[1]And assume that she told Dr. Morris to stop taking

[2]over-the-counter medications. And she ordered an MRI.

[3]By the way, Doctor, is that MRI ultimately the

[4]films that you've had an opportunity to review?

[5]A Among others, yes.

[6]Q After ordering the MRI, Dr. Samton gave Dr. Morris

[7]an appointment for 2 weeks later.

[8]And assume that on March 28, 2005, the MRI was done

[9]showing what you have now had a chance to see what it shows.

[10]And, Doctor, by the way, we have marked those into

[11]evidence. Do you feel, sir, it would be helpful to the Court

[12]and jury and your understanding of some of the things you

[13]will talk about today **[\*21]** to actually see those MRI films?

[14]A I think it would be a good starting point, yes.

[15](The following is transcribed by Angela Spinelli.)

[16](Continued on next page.)

[17]\*\*\*

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1159

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q Okay.

[4]THE COURT: Let me indicate to the members of the

[5]jury that the parties have stipulated and agreed that

[6]Defendant's Exhibit B and Defendant's Exhibit C are in

[7]evidence, they are the MRI films.

[8]MR. CITRIN: Okay, thank you, Judge.

[9]Q Now, I'm going to ask you, Doctor, to assume a

[10]couple of other things, and then I'll shut up, okay.

[11]I want you to assume that from the records of

[12]Dr. Golfinos, we have heard that in a letter that Dr.

[13]Golfinos wrote to a Dr. Mogliner, he says that Lauren Morris

[14]is a 31-year old right handed woman who came to see me

[15]because of complaints of headache on the right side of her

[16]head following resection of an acoustic neuroma.

[17]She worked as Long Island Jewish as a

[18]psychiatry resident. She went to medical school at the New

[19]York College of Osteopathic Medicine. She [\*22] had life long

[20]headaches beginning in childhood, migraines as well,

[21]headaches in the past are always quite severe, however,

[22]always affected the right side of her head.

[23]Now, do you -- are you familiar with that --

[24]A Yes.

[25]Q -- portion of that record?

1160

[1]I want you to assume further that Dr. Golfinos  
[2]in the impression section says, quote:  
[3]"I think that Lauren Morris has a new headache  
[4]and pain syndrome following successful suboccipital resection  
[5]of a large left-sided acoustic neuroma with facial nerve  
[6]preservation.  
[7]"What is unusual in this case is that her  
[8]right-sided headaches have completely gone, in a sense they  
[9]are cured, however, they have been replaced by left-sided  
[10]pain syndrome.  
[11]"I accept this to be occipital neuralgia, it  
[12]could be related to trauma or damage to the occipital nerve,  
[13]it's hard to explain how she felt it immediately  
[14]postoperative, generally one would expect formation of a  
[15]neuroma on left -- on left occipital neuralgia, following  
[16]surgery.  
[17]"After reviewing current MRI scans, I do not  
[18]see any other indications or anything [\*23] else wrong."  
[19]Have you seen that letter, by the way, Doctor?  
[20]A Yes, I have.  
[21]Q Going back to the latter of part or the earlier  
[22]part of Dr. Golfinos' records, assume that he says she has  
[23]never had pain on the left side of her. And you are familiar  
[24]with Dr. Golfinos' having taken that history?  
[25]A Yes.  
1161  
[1]Q All right. Now, re you also familiar with the  
[2]records of Dr. Jamieson?  
[3]A Yes.  
[4]Q Okay. And are you familiar with this entry in her

[5]records, quote:

[6]"Lauren Morris is a 32-year old female comma

[7]headaches due to left acoustic and now neuralgic post-op

[8]pain, her examination is remarkable for deafness."

[9]You remember reading that?

[10]A Yes, I do.

[11]Q Doctor, do you also remember reading from Dr.

[12]Jamieson's record, quote:

[13]"Now has bilateral periorbital headache

[14]triggered by stress and fatigue."

[15]And I want you to assume further that after the

[16]surgery, in addition to having bilateral headaches -- by the

[17]way, what are bilateral headaches?

[18]A It means on both sides of the cranium, both sides

[19]of the head.

[20]Q Assume [\*24] even after the surgery and after the

[21]removal of the acoustic neuroma Dr. Morris was having

[22]headaches on both sides of her head and was still being

[23]treated with a drug called Maxalt; are you familiar with that

[24]drug?

[25]A Yes.

1162

[1]Q What type of drug is that?

[2]A It is used for treatment of migraine headaches.

[3]Q Doctor, you're familiar with the fact --

[4]withdrawn.

[5]From what you reviewed, from all the records

[6]you reviewed, did Dr. Morris continue to receive --

[7]THE WITNESS: Oh, I'm very sorry, your Honor, I

[8]really thought I didn't do that.

[9]MR. CITRIN: Reminds me to turn mine off.

[10]THE WITNESS: I don't know how to do it. I really

[11]thought it was on silent.

[12]It's off. I really apologize, your Honor.

[13]THE COURT: Okay.

[14]Q Okay?

[15]A Yes.

[16]Q All right. Doctor, after the surgery of April 27,

[17]2005, and up to and including the time Dr. Morris was being

[18]seen by Dr. Golfinos and Dr. Jamieson, did she continue to

[19]require the use of antimigraine medication?

[20]A The records I reviewed indicated that she did,

[21]yes.

[22]Q Okay. Now, **[\*25]** and this is just briefly on this first

[23]question, Doctor, assuming all of the facts as I've asked you

[24]to assume them to be, assuming the facts that you know from

[25]the records that you've reviewed, do you have an opinion with  
1163

[1]a reasonable degree of medical certainty from a neurosurgical

[2]standpoint as to whether or not it represented reasonable

[3]medical judgment on the part of Dr. Gordon not to order an

[4]MRI while he was caring for Dr. Morris?

[5]A I do have an opinion.

[6]Q And what is it, sir?

[7]A That was an appropriate judgment.

[8]Q An appropriate judgment?

[9]A It was appropriate not to order an MRI scan based

[10]on the information available.

[11]Q Can you explain to the Court and jury briefly on

[12]this point why?

[13]A The presence of migraine headaches in a patient  
[14]with a normal neurological examination does not require that  
[15]any kind of imaging study of the brain, be it MRI or anything  
[16]else be done. It is not the standard of care to have that  
[17]done in such a patient.

[18]Q Let's talk about the subject of acoustic neuromas  
[19]or schwannomas. First of all, do you have an opinion [\*26] with a  
[20]reasonable degree of medical probability as to the normal  
[21]growth rate or pattern of these particular types of tumors?

[22]A I do.

[23]Q What is it and explain why?

[24]A The acoustic neuroma or schwannoma is historically  
[25]very, very slow growing tumors. Over years it may not grow  
1164

[1]at all. Over years it may grow at an infinitesimal rate.

[2]It may grow on the order of 1 millimeter a  
[3]year. It is known to be extremely slow growing -- found in  
[4]multiple reviews of patients in my own 25 years, with totally  
[5]static acoustic neuromas.

[6]Q Have there been patients in your experience,  
[7]Doctor, you have followed who have had acoustic neuromas that  
[8]you haven't operated on?

[9]A Yes, many times.

[10]Q Now, Doctor, I want you to assume there's been  
[11]testimony in this courtroom by Dr. Shields that acoustic  
[12]neuromas grow more rapidly in women; did you read that?

[13]A Yes, I did.

[14]Q Well, do you have an opinion with a reasonable  
[15]degree of medical probability as to whether or not that  
[16]particular piece of information is accurate?

[17]A I do have an opinion.

[18]Q And what **[\*27]** it is?

[19]A My opinion is it is not accurate.

[20]Q Why is that? Explain that?

[21]A In my knowledge of the literature having been

[22]involved with patients for 36 years really since starting my

[23]residency, I've never been exposed to any literature that

[24]indicates it's more rapidly growing in women. I've never

[25]seen any study that showed that. So I believe that's not a

1165

[1]true statement.

[2]Q Now, you've told us that these tumors sometimes

[3]don't grow; is that correct?

[4]A That's correct.

[5]Q And sometimes they grow slowly?

[6]A That's correct.

[7]Q Do they sometimes grow rapidly?

[8]A Rarely they can, yes.

[9]Q And is there with reasonable medical probability

[10]any rule of thumb that you doctors use to determine

[11]approximately how quickly if an acoustic neuroma is growing

[12]it is expected to grow each year?

[13]A I think I mentioned the number, around

[14]1 millimeter a year. Some people think perhaps up to 1.5,

[15]but generally accepted studies following this is around

[16]1 millimeter a year, if at all.

[17]Q Now, Doctor, do you have an opinion with a

[18]reasonable degree **[\*28]** of medical probability as to whether or not

[19]from everything you learned this acoustic neuroma was present

[20]in Dr. Morris long before she became a patient of Dr.

[21]Gordon's?

[22]A I do have an opinion.

[23]Q What is your?

[24]A That it was present.

[25]Q Without having anyone prior to Dr. Gordon having  
1166

[1]ordered an imaging study, is there any way one can estimate

[2]how large the acoustic neuroma was in terms of its actual

[3]dimensions at the time that Dr. Morris first saw Dr. Gordon?

[4]A It is essentially impossible.

[5]Q Okay. And so in order to try and make that

[6]judgment, how in this case did you do that?

[7]A Well, I used several factors. Number 1, I

[8]mentioned it may be exactly the same, so I could see a scan

[9]in 2003 that looked the same, it may be 1, 1 and a half or

[10]2 millimeters smaller, which in essence would not be a

[11]significant difference whatsoever.

[12]The one piece of information that we can

[13]extrapolate from the MRI scan done was there was no

[14]surrounding edema, evidence of swelling. That would be the

[15]only way we could say this was not growing rapidly.

[16]If the [\*29] size of a growth changes rapidly, it

[17]will cause reaction around itself. And that is manifested on

[18]the surface of the brain by something called brain edema,

[19]which would be shown on an MRI scan which was not at all

[20]present on the MRI scan.

[21]MR. CITRIN: Your Honor, with the Court's

[22]permission, I think at this point it would be helpful

[23]for the doctor to come down from the witness stand, set

[24]up the view box and look at a couple of these MRI films.

[25]THE COURT: Okay.

1167

[1]Q Previously marked Defendant's Exhibit B and C, if

[2]you would go through the films with our jury and the Court

[3]and tell us what there is to be seen.

[4]MR. CITRIN: Judge, any way everybody can kind of

[5]gather around a little to see what there is to be seen?

[6]THE COURT: Can all the jurors see the shadow box

[7]from where you're seated?

[8]A This is an MRI scan of Lauren Morris performed on

[9]the date we discussed -- not sure if you heard about MRI

[10]scans.

[11]Q Tell us about that, we haven't?

[12]A Basically, this particular view gives us

[13]cross-sections.

[14]THE COURT: We'll move some jurors to the second

[15] **[\*30]** row to see better.

[16]A So we're basically going to look at slices or

[17]cross-sections. If you visualize the section going through

[18]the head and then moving up, I think 5 millimeters or

[19]7 millimeters basically, we're going to have a stack of

[20]slices, a little like chopping off, I guess, bologna and

[21]putting it back together.

[22]So we're going to see images that are literally

[23]just a cross-section through. That's one of the good things

[24]that the MRI scan does. When we look at these images, it's

[25]as if I am looking at you.

1168

[1]So, I'm going to get confused now. This is the

[2]right and this is the left. So I'm not confused when --

[3]there is a little marker that says left there. We're

[4]starting down. These are the teeth. And as we're coming up  
[5]we're going to get closer and closer to a section that will  
[6]go right through the ear and ear canal.  
[7]That's our area of interest because we're  
[8]looking for growth on the 8th cranial nerve. If you look  
[9]closely here you can see a density that is a little darker  
[10]than the rest of the brain. And it is not in the brain, it  
[11]is on the surface of the brain, and that **[\*31]** is in the region of  
[12]the 8th cranial nerve or the region where an acoustic neuroma  
[13]would sit.  
[14]There's another term cerebellopontine angle.  
[15]This is the cerebellum. That is the component that's another  
[16]way of knowing where it is. It is on the left side.  
[17]Now we'll go to exhibit -- cranial nerve equals  
[18]8 nerves -- C. I was looking at Exhibit B. And you'll have  
[19]a little easier time seeing it now because now the patient  
[20]has been given contrast. There is a substance called  
[21]gadolinium that makes certain types of tissue light up more.  
[22]You can see on this study in the area in the  
[23]cerebellopontine angle on the surface of the brain not within  
[24]the brain that this thing is lit up, and you can see it's  
[25]very bright, and it is relatively homogenous, meaning it  
1169  
[1]looks all the same.  
[2]This again is the left cerebellopontine angle  
[3]mass that we described as an acoustic neuroma. The finding  
[4]on MRI scan is almost diagnostic. By that I mean there are  
[5]possibilities of other tumors, of tumors. But by far the  
[6]leading candidate would be an acoustic neuroma.  
[7]Q Now, Doctor, you mentioned earlier **[\*32]** before we put

[8]the MRIs up on the view box that one of the things that told  
[9]you in your review that this was a slow growing tumor was a  
[10]lack of edema or swelling; is that right?

[11]A That is correct.

[12]Q Could you show the Court and jury please, what you  
[13]would be looking for and where in particular you'd be looking  
[14]for it?

[15]A It is easier to see without the contrast so let me  
[16]put Exhibit B up again. So we'll go back to the interface,  
[17]the area where the tumor is touching the brain. And if there  
[18]were edema, this area would look very white.  
[19]It would look much whiter. These areas of  
[20]edema are normal, but there is specifically no edema in the  
[21]brainstem where we anticipate seeing it. Again, that lack of  
[22]edema tells me it is not a rapidly growing tumor.

[23]Q Anything else you need to point out before we move  
[24]on?

[25]A I think that's basically what we need to see.  
1170

[1]Q Okay. Thank you. Can you resume the witness  
[2]stand. All right, now, Doctor, 8th cranial nerve controls  
[3]what?

[4]A Primarily hearing and balance.

[5]Q And, Doctor, you've told us earlier how the  
[6]acoustic [**\*33**] neuromas grow out of a cell from the 8th cranial  
[7]nerve; is that correct?

[8]A Yes.

[9]Q Doctor, what, if anything, does the way these  
[10]tumors grow, what does it mean in terms of a surgeon's  
[11]ability to remove them without causing damage to the 8th

[12]cranial nerve?

[13]A The tumor is very intimately involved with the 8th

[14]cranial nerve, and it is basically part of the nerve. As the

[15]tumor grows, it tends to envelope the nerve, and it's

[16]surgically impossible to distinguish tumor from nerve.

[17]As I say, it is -- just wraps around it in

[18]contradistinction to one of the other nerves, the nerves

[19]which always lies on top of it or use the term draped over

[20]it. So this tumor and nerve basically become one. As the

[21]tumor grows.

[22]Q Doctor, in terms of the removal of these tumors,

[23]broadly, what are the 2 general areas of treatment options

[24]open to the patient, in general?

[25]A Well, I'm going to make it 3. One is to observe

1171

[1]the tumor and not do anything. The second is to have

[2]microsurgery for removal of the tumor. And third is treat it

[3]with radiosurgery.

[4]Q Tell the Court and jury in **[\*34]** a tumor that is timely

[5]diagnosed and appropriately treated, are there risks to the

[6]patient in the performance of stereotactic radiosurgery?

[7]A Yes.

[8]Q Explain to the jury what those are?

[9]A Let's talk specifically about what we're talking

[10]about, the acoustic neuroma. The goal of the radiation is to

[11]arrest the growth of the tumor. It is not designed to take

[12]the tumor out, it is not designed to make the tumor

[13]disappear.

[14]The goal, as I stated, is to stop it from

[15]growing any further. It may shrink, it may continue to grow.

[16]Radiation may not control the growth of the tumor.  
[17]In addition, you're exposing the brain to  
[18]radiation, so the -- out of necessity because the location of  
[19]the tumor, the 8th cranial nerve is going to receive the same  
[20]radiation that the tumor does, moreover, the surrounding  
[21]brain unavoidably will be exposed to radiation.  
[22]There are several potential problems from that.  
[23]We'll talk about. Damage to the hearing. Which occurs in a  
[24]very measurable number of patients. But aside from the  
[25]tumor, there are 2 entities called radiation necrosis, where  
1172

[1]some [\*35] of the surrounding brain can be destroyed. Fairly  
[2]shortly after or a year later or 2 years later. Or even  
[3]longer than that.  
[4]There's also the risk although very unusual of  
[5]inducing malignancy from the radiation itself. So that the  
[6]stereotactic radiosurgery is not totally without risk both in  
[7]terms of tumor persistence and growth as well as other types  
[8]of damage.

[9](Whereupon, Official Court Reporter Linda Calderon  
[10]relieved Official Court Reporter Angela Spinelli.)

[11]  
[12]  
[13]  
[14]  
[15]  
[16]  
[17]  
[18]  
[19]

[20]

[21]

[22]

[23]

[24]

[25]

1173

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q And, Doctor, in terms of microsurgery, are there

[4]risks to the patient in the performance of that sort of

[5]treatment even with at the time of diagnosis or an early

[6]diagnosis of the tumor?

[7]A Yes, there are.

[8]Q And could you explain to his Honor and the jury

[9]what those risks are?

[10]A Well, you are going through surgery under general

[11]anesthesia, you are having an opening into the surface of the

[12]brain and to the spinal fluid space.

[13]In performing the surgery, you're near the

[14]structures [**\*36**] of the brain stem, you're near several of the

[15]cranial nerves, most specifically the 8th and 7th nerve.

[16]Possibility of damaging those during surgery certainly

[17]exists.

[18]The possibility of developing infection, failure of

[19]wound healing, leakage of spinal fluid, pain postsurgery are

[20]among some of the problems that we tend to deal with in this

[21]type of surgery.

[22]Q And, Doctor, is that true with reasonable medical

[23]probability, are all of those risks of both stereotactic

[24]surgery and open microsurgery, are all of those risks with  
[25]reasonable medical probability risks that the patient is  
1174

[1]exposed to no matter when the tumor is diagnosed?

[2]A Yes.

[3]Q Now, Doctor, I will read to you something that was

[4]said here last Friday, it's from page 911 of the official

[5]trial transcript, and it pertains to Dr. Morris in this case,

[6]and this is the testimony of Dr. Shields:

[7]"QUESTION: And the two options were, as you

[8]told us Friday, either microsurgery or stereotactic

[9]radiosurgery; true?

[10]"ANSWER: Yes.

[11]"QUESTION: And those were the two options

[12]that were available throughout the [\*37] period of time that

[13]the patient was under Dr. Gordon's care; true?

[14]"ANSWER: Yes."

[15]One other quote and then I want to ask you

[16]some questions:

[17]"QUESTION: You would agree with me -- this is

[18]page 913 of the official trial transcript.

[19]"QUESTION: You would agree with me there is a

[20]substantial body of information from doctors who deal

[21]with acoustic neuromas, neurosurgeons or radiologists or

[22]radiation oncologists, there are a substantial number of

[23]those that would say up to 3 centimeters and greater

[24]diameter, an acoustic neuroma can be -- and Dr. Shields

[25]interjects:

1175

[1]"ANSWER: In its greatest diameter.

[2]"QUESTION: In its greatest diameter, an

[3]acoustic neuroma can be radiated; true?

[4]"ANSWER: Yes.

[5]"QUESTION: And we can agree in terms of its

[6]greatest diameter here, this acoustic neuroma was at the

[7]time of diagnosis 3 centimeters, correct?

[8]"ANSWER: Yes."

[9]First, Doctor, did you have occasion in

[10]preparing for today to actually measure the acoustic

[11]neuroma in this case.

[12]A Yes, I did.

[13]Q And can you tell the Court and jury the results [\*38] of

[14]your measurements?

[15]A In the precontrast study it appeared to be about

[16]2.8 or 2.9 centimeters. On the contrast study, which always

[17]lights it up, it is somewhere around 2.9. So it was right on

[18]that variation.

[19]I could not find any diameter in any films that I

[20]could in any way call greater than 3 centimeters even on the

[21]contrast study.

[22]Q Do you have an opinion with a reasonable degree of

[23]medical probability -- first of all, do you agree with what

[24]Dr. Shields said about stereotactic surgery being available

[25]to this patient given the fact that the greatest diameter of  
1176

[1]this tumor never exceeded 3 centimeters while under Dr.

[2]Gordon's care?

[3]A I do have an opinion.

[4]Q And what is that?

[5]A I do agree with that statement.

[6]Q And why is that?

[7]A In my experience, radiation oncologists are very  
[8]willing to treat tumors up to and even a little bit more than  
[9]3 centimeters at this time and throughout the past, and at  
[10]the time that was diagnosed in Dr. Morris.

[11]Q And, Doctor, do you have an opinion with a  
[12]reasonable degree of medical probability for **[\*39]** Dr. Morris in  
[13]this case, as between stereotactic radiosurgery and open  
[14]microsurgery, which would have been the more definitive  
[15]surgery?

[16]A Well, certainly the open microsurgery is more  
[17]definitive because you are actually removing the tumor.

[18]Q And, Doctor, you indicated that you had reviewed  
[19]other MRI films over the years after '05; is that correct?

[20]A Yes.

[21]Q And for Dr. Morris?

[22]A Yes.

[23]Q And, Doctor, do you have an opinion with a  
[24]reasonable degree of medical probability as to whether or not  
[25]on any of those films there is any evidence at all of tumor  
1177

[1]regrowth?

[2]A I saw no evidence at all.

[3]Q And that's a good thing for her?

[4]A Yes.

[5]Q Throughout the course of Dr. Gordon's care of this  
[6]patient, do you have an opinion with a reasonable degree of  
[7]medical probability as to whether or not both stereotactic  
[8]surgery and/or open microsurgery were available to the  
[9]doctors who ultimately were treating her?

[10]A I do have an opinion.

[11]Q And what is that?

[12]A That either was available to the patient throughout

[13]the time that Dr. [\*40] Gordon was seeing the patient.

[14]Q Doctor, do you have an opinion, from everything you

[15]have read, with reasonable -- with a reasonable degree of

[16]medical probability for Dr. Morris in this case, given her

[17]history, given the findings on the MRI, her outcome would

[18]have been any different had surgery been done at any time

[19]between February 10, 2003, and I will open it up as far as

[20]the date of the surgery, April 25, 2007, do you have an

[21]opinion?

[22]A I do have an opinion.

[23]Q And what is your opinion, sir?

[24]A That there would be no difference in outcome had

[25]surgery been done in 2003 and any time through the date of  
1178

[1]the surgery.

[2]Q Could you explain to his Honor and the jury,

[3]please, why it is you say that?

[4]A We have discussed the issue of tumor growth. And

[5]we have agreed or I have stated that you cannot say that the

[6]tumor was any smaller in 2003 than it was when it was

[7]operated on.

[8]If it was smaller, it was minutely smaller, 1 or

[9]2 millimeters or 3 millimeters. And even if the tumor was

[10]2.5, 2.6, 2.7, 2.8 centimeters at the time of surgery, the

[11]surgical approach, [\*41] the surgical technique, the risk of

[12]surgical complications would have been exactly the same. The

[13]surgery would have been the same, the risk of the facial

[14]nerve would have been the same, the risk to hearing would

[15]have been exactly the same given that spread of tumor sizes,  
[16]if there was any difference at all.

[17]Q Let's take it separately one nerve at a time.

[18]Doctor, with reasonable medical probability, why  
[19]would the outcome have been the same with regard to the 8th  
[20]cranial nerve; can you focus on that?

[21]A The anatomical difference between the distribution  
[22]of tumor and nerve in 2005, 4 or 3 and the relationship of  
[23]the tumor to the nerve would have been exactly the same. We  
[24]mentioned several times the possibility of it being a couple  
[25]of millimeters smaller.  
1179

[1]Again, through my surgical experience and through  
[2]the literature, there is essentially no difference in  
[3]operating on tumors in the spectrum that we might allow if  
[4]there was any difference in size.

[5]Q And the same question with reasonable medical  
[6]probability as to the facial nerve, separate --

[7]A Exactly the same **[\*42]** statement.

[8]The facial nerve is stretched over a 2.7 centimeter  
[9]tumor, like it's stretched over a 2.9 centimeter tumor, and  
[10]the difference in that size, which is really minute, would  
[11]not change the surgical approach. The likelihood of  
[12]preserving the facial nerve or not preserving the facial  
[13]nerve.

[14]MR. CITRIN: Thank you.

[15]I have no further questions.

[16]THE COURT: Thank you, Mr. Citrin.

[17]Cross-examination, Mr. Moore.

[18]MR. MOORE: Thank you, Judge.

[19]CROSS-EXAMINATION

[20]BY MR. MOORE:

[21]Q Good morning, Doctor.

[22]A Good morning.

[23]MR. MOORE: Good morning, ladies and

[24]gentlemen.

[25]Q What you just said to this jury is that with  
1180

[1]reasonable medical probability no matter when in the

[2]25 months that this woman was seeing Dr. Gordon, no matter

[3]when the tumor would have been discovered and properly

[4]treated either by radiotherapy or microneurological surgery,

[5]the outcome would have been the same; you have said that

[6]under oath to this jury, correct?

[7]A Yes.

[8]Q When did you, with all your qualifications, and I

[9]don't question them for a moment, [**\*43**] and all your education, and

[10]I don't question it for a moment, and all of your schooling,

[11]which I don't question for a moment, and all your

[12]certifications, which I don't question for a moment, when did

[13]you decide to make that statement under oath to this jury and

[14]Court?

[15]A As I reviewed the records available.

[16]Q You, Doctor, mentioned the literature, correct?

[17]A Yes.

[18]Q Peer reviewed articles and recognized textbooks in

[19]particular specialties are the hallmark of that concept, the

[20]literature; correct?

[21]A Yes.

[22]Q The literature -- withdrawn.

[23]Isn't it a fact, sir, that the literature in  
[24]neurological surgery and applicable related fields says that  
[25]your statement is blatantly false; isn't that true?  
1181

[1]A No, sir.

[2]Q I'm going to have a lot of questions about that

[3]last answer, Doctor, but let me for now go to something else.

[4]You said to this jury that you read Dr. Block's

[5]testimony?

[6]A Yes.

[7]Q Correct?

[8]A Yes, sir.

[9]Q And you know Dr. Block to be a lovely gentleman,

[10]don't you?

[11]A Yes.

[12]Q A doctor, considerate, **[\*44]** but quite old and hard of

[13]hearing, right?

[14]MR. CITRIN: Objection.

[15]MR. MOORE: If he knows.

[16]MR. CITRIN: Quite old and hard of hearing?

[17]THE COURT: I will sustain.

[18]Q Did you know he was 80 years old and has great

[19]difficulty hearing?

[20]MR. CITRIN: What does that have to do with

[21]anything?

[22]MR. MOORE: I'm just asking if he knows.

[23]MR. CITRIN: Objection.

[24]THE COURT: That question I will allow.

[25]A I did not know the doctor's age and I'm -- I

1182

[1]thought he was around that age, but I'm not aware of his

[2]hearing problem.

[3]Q And you swore under oath you read his testimony

[4]here in this courtroom; is that your testimony to this jury?

[5]Did you swear before this jury that you read his testimony

[6]and did you say that on questioning by Mr. Citrin?

[7]A Yes, I did.

[8]Q From that testimony as to when he graduated from

[9]medical school, you would know that if he wasn't 80, he was

[10]around 81 to 79 -- the other way -- 79 to 81, I apologize,

[11]right, Doctor?

[12]A I think I misunderstood your question. I thought

[13]you meant as a personal matter I knew [\*45] that.

[14]I read his testimony and I could extrapolate that

[15]testimony --

[16]Q That answer is false, but -- because you know I

[17]caught you?

[18]MR. CITRIN: Objection.

[19]THE COURT: Sustained.

[20]I will strike that remark from the record.

[21]MR. MOORE: Thank you, Judge. It was a bit of

[22]a temper.

[23]THE COURT: Mr. Moore, when I'm talking, you

[24]can't talk.

[25]The jury is directed to disregard that

1183

[1]statement.

[2]Q Doctor, the fact is that when I brought that up,

[3]you said you read Dr. Block's testimony, you realized that

[4]you would have been able to tell from that testimony his

[5]approximate age; isn't that true?

[6]A I don't really recall that part of the testimony,

[7]sir.

[8]Q Would you answer my question?

[9]A If I had read it and taken notes, which I didn't,

[10]and was looking for that, I gather I would have been able to

[11]extrapolate it from that.

[12]I don't recall that part of the testimony. I

[13]wasn't trying to pay attention to that part of the testimony.

[14]MR. MOORE: Can we strike that answer, Judge,

[15]please?

[16]MR. CITRIN: Objection.

[17] [\*46] MR. MOORE: I move to strike that answer as

[18]not responsive.

[19]MR. CITRIN: I object.

[20]MR. MOORE: The same rule for Dr. Shields,

[21]Judge, can we strike that, please?

[22]THE COURT: I will strike that comment about

[23]the same -- I think he said the same rule as Dr.

[24]Shields.

[25]MR. MOORE: Yes, like striking Dr. Shields,

1184

[1]can we strike that last statement?

[2]THE COURT: I'm striking that comment about

[3]Dr. Shields.

[4]MR. MOORE: Can we strike the answer is my

[5]humble --

[6]THE COURT: That's what we should get back to,

[7]your request that the answer be stricken.

[8]I'll strike the answer.

[9]The jury is directed to disregard the answer

[10]as not being responsive to the particular question.

[11]Q Now, Doctor, can you answer this question possibly,

[12]possibly yes or no? And if you can't, would you tell us?

[13]Even a cursory reading of Dr. Block's testimony

[14]would allow you to tell his approximate age --

[15]MR. CITRIN: Objection.

[16]Q true?

[17]MR. CITRIN: I object to the line of

[18]questioning. What does Dr. Block's --

[19]THE COURT: Overruled.

[20]You can answer **[\*47]** that question.

[21]A I would say a cursory reading --

[22]Q Is the answer a resounding yes?

[23]A Probably a no.

[24]Q Is the answer a resounding yes to this question?

[25]Even a cursory reading of Dr. Block's testimony  
1185

[1]would allow you to tell that he was hard of hearing?

[2]A I have to say no, sir, because of the way I do a

[3]cursory reading.

[4]Q That statement you just made is false; true?

[5]A No, sir.

[6]Q In any event, I assume -- withdrawn.

[7]You were asked a long assumption question by Mr.

[8]Citrin, correct?

[9]A Yes, sir.

[10]Q I assume he went over it with you prior to you

[11]getting on the witness stand, did he?

[12]A He did not.

[13]Q You wouldn't just say yes or agree with the tenor

[14]of a long assumption question unless you knew all the

[15]assumptions were valid, or would you?

[16]A I would not.

[17]I can't answer that yes or no, but I would be glad

[18]to explain, if I may? I didn't understand the question which

[19]is why I'm afraid to say yes or no, I might get it backwards.

[20]I would be glad --

[21]Q Are you afraid to say yes or no lest you not **[\*48]** tell

[22]the truth, or are you afraid to say yes or no because of the

[23]implication of the yes or no?

[24]Which is it?

[25]MR. CITRIN: Objection to the form of the

1186

[1]question.

[2]THE COURT: I will sustain.

[3]THE WITNESS: I'm sorry?

[4]THE COURT: Doctor, you don't have to answer

[5]it.

[6]Q Doctor, you said you were afraid to say yes or no,

[7]right?

[8]A Because I'm not sure of the question.

[9]Q Excuse me, did I ask you because?

[10]MR. CITRIN: Objection.

[11]A Okay --

[12]THE COURT: I'm not sure he was even finished

[13]with the question.

[14]THE WITNESS: I apologize.

[15]THE COURT: Doctor, don't begin answering

[16]until the question is completed.

[17]Q You have heard that one before, haven't you, what

[18]the judge just said?

[19]A Yes, I have.

[20]Q And you have -- I will ask very few questions in

[21]this area, but you have a lot of experience in court, right?

[22]A Yes, I do.

[23]Q In any event, Doctor, you agree that -- and forgive

[24]me -- an opinion --

[25]MR. MOORE: Sorry, Judge.

1187

[1]Q -- an opinion is only as good as the assumptions

[2] [\*49] upon which that opinion or opinions is or are based; would

[3]you give me a yes to that, please?

[4]A Yes.

[5]Q Thank you.

[6]And you realize that Dr. Block gave a no to that?

[7]MR. CITRIN: Objection.

[8]MR. MOORE: Judge --

[9]THE COURT: I'm going to sustain.

[10]MR. MOORE: Respectfully except and say it's

[11]in the record.

[12]MR. CITRIN: Objection.

[13]MR. MOORE: But I will move on. Judge, I will

[14]move on.

[15]MR. CITRIN: Excuse me, I move to strike Mr.

[16]Moore's comment.

[17]THE COURT: I will strike the comment.

[18]MR. MOORE: Fine, fine.

[19]Q Did you see that I asked Dr. Block that question?

[20]Not -- I don't pretend that I asked it in the very

[21]same words -- but in substance?

[22]A I don't recall seeing it, which is not to say it's

[23]not there, sir, I don't recall it.

[24]Q In any event, sir, are you aware that the

[25]assumptions by Mr. Citrin left out cardinal information that  
1188

[1]any objective person would need to know before they gave an

[2]objective opinion; are you aware of that?

[3]MR. CITRIN: Objection to the form of the

[4]question.

[5] **[\*50]** THE COURT: Overruled.

[6]You can answer.

[7]A I'm aware that Mr. Citrin did not --

[8]Q Are you aware of that, Doctor?

[9]You want me to repeat the question?

[10]A I'm aware he didn't read the entire record into

[11]that question. And I'm sure there are multiple pieces of

[12]information that were not included.

[13]Q Did I ask you that, Doctor?

[14]A I'm not sure, sir.

[15]Q So why did you answer?

[16]A I thought that was responsive to your question.

[17]Q Let me ask you again, sir:

[18]Were you aware in that long assumption question

[19]that Mr. Citrin, on behalf of Long Island Jewish Medical

[20]Center and its director of neurology, the defendants in this

[21]case, left out very important information that would be

[22]necessary for an objective answer on the subject?

[23]Are you aware of that? That's all I'm asking you.

[24]MR. CITRIN: Judge, I object to Mr. Moore's

[25]characterization, very important.

1189

[1]THE COURT: I'll sustain.

[2]MR. MOORE: No, I -- is that why you are

[3]sustaining it, Judge?

[4]THE COURT: Sustained.

[5]Q Doctor, would you say objectivity requires

[6] **[\*51]** knowledge of all important and pertinent information?

[7]A I would agree with that, yes.

[8]Q Therefore, if you give an opinion based on

[9]insufficient information, that opinion may not be correct;

[10>true?

[11]A As a generalization, it may or not be true.

[12]Q Well, Doctor, it's true unless there is an amazing

[13]coincidence as follows:

[14]Without the requisite information you made the

[15]right decision anyway, otherwise it's true; correct?

[16]A I did not understand that question, sir.

[17]Q Without appropriate information, a correct opinion

[18]could be given but that would be just a coincidence, the

[19]person happened to give the right opinion but didn't have the

[20]requisite information; true?

[21]A True.

[22]Q But, Doctor, the time-honored concept is that we

[23]don't rely on coincidences, correct?

[24]A I guess not, correct.

[25]Q So, therefore, Doctor, it's true, isn't it, that if

1190

[1]you don't have the requisite information, barring

[2]coincidence, you are not going to give the correct opinion.

[3]That follows, Doctor, literally as night follows day; true?

[4]A I think you have to be more **[\*52]** specific about what

[5]you're talking about before I can answer that question, sir.

[6]Q Doctor, that was a general question and as a

[7]general principle it is, Doctor, universally true; correct?

[8]A As a generalization, yes.

[9]Q Do you realize, Doctor, you have just contradicted

[10]yourself?

[11]MR. CITRIN: Objection.

[12]THE COURT: I'll sustain.

[13]Q In any event, sir, Dr. Block -- withdrawn.

[14]Did anybody ask you before you got on the witness

[15]stand whether a left acoustic neuroma could cause right-sided

[16]head pain in a patient?

[17]A Yes.

[18]Q And I assume you had an answer?

[19]A Yes.

[20]Q Was it yes, no or maybe?

[21]A No, and incredibly rare, if at all.

[22]Q No, incredibly rare, if at all.

[23]Doctor, is it no, or incredibly rare? Those are

[24]absolutely different; yes or no?

[25]A I would say no in my own experience and in the  
1191

[1]literature that I am aware of.

[2]Q We are going to get to the literature, Doctor, we

[3]are going to get to the literature.

[4]Your answer is no; is that correct?

[5]A Correct.

[6]Q Well, that was the answer -- **[\*53]** does this refresh your  
[7]recollection?

[8]That was the answer that Dr. Block gave when Mr.

[9]Citrin questioned him; correct?

[10]A I believe that is true, yes.

[11]Q And he gave the opposite answer when I questioned

[12]him; isn't that also true?

[13]MR. CITRIN: Objection.

[14]MR. MOORE: If he knows?

[15]THE COURT: I'll overrule.

[16]A I don't recall that testimony, sir. But I would be

[17]glad to show -- I wouldn't argue with it if it is there. I

[18]would be glad to look at it, I just don't recall.

[19]Q Doctor, would you do me a favor --

[20]MR. CITRIN: Objection.

[21]THE COURT: Sustained.

[22]Q You are aware surely, and just to highlight it in

[23]your mind, just before I went to Dr. Jamieson's records, I --

[24]in fact, let's get it.

[25](Whereupon, there was a pause in the proceedings.)

1192

[1]MR. MOORE: Give me a moment, your Honor, I'm

[2]sorry.

[3]THE COURT: Okay.

[4](Whereupon, there was a pause in the

[5]proceedings.)

[6]Q "QUESTION:

[7]MR. CITRIN: Page and line?

[8]MR. MOORE: I'm just about to give it.

[9]Q Question on page 1052, line 15. Me of Dr. **[\*54]** Block:

[10]"QUESTION: If, if you said that right-sided

[11]headache could not be caused by a left acoustic neuroma,

[12]that would not be true.

[13]Can you answer that question as posed; yes or

[14]no?

[15]"ANSWER: A right-sided headache can be caused

[16]by an acoustic neuroma, not a right-sided migraine

[17]headache, sir."

[18]Are you saying that you, giving the opinion

[19]that you a little while ago gave on this subject to this

[20]jury, did not know that sworn testimony by Dr. Block on

[21]the exact same issue; Doctor, yes, no or maybe?

[22]Is that your testimony?

[23]MR. CITRIN: Objection.

[24]What's the question?

[25]Objection.

1193

[1]THE COURT: Overruled.

[2]MR. MOORE: What?

[3]THE COURT: I overruled the objection.

[4]MR. MOORE: Sorry, sorry.

[5]A No, I did not recall that part of his testimony.

[6]Q A direct contradiction to what you have said, and

[7]you didn't notice it; is that correct?

[8]MR. CITRIN: Objection.

[9]MR. MOORE: Withdrawn.

[10](The following is transcribed by Angela

[11]Spinelli.)

[12](Continued on next page.)

[13]\*\*\*

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1194

[1] [\*55] CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q Now, that you know that Dr. Block gave such

[4]testimony, I ask you, sir, would you please tell these jurors

[5]and this judge if you agree with that testimony or disagree

[6]with it? Agree or disagree, please pick one?

[7]A The specific statement --

[8]Q Did you hear my question?

[9]A That's why I'm asking you, sir, the specific

[10]statement that you want me to agree or disagree with is what

[11]Dr. Block said? I want to be certain I'm answering the right

[12]question, sir.

[13]Q What Dr. Block said from what I read to you just

[14]now, do you agree or disagree, please pick one?

[15]A I believe I can agree with that statement.

[16]Q Do you know -- withdrawn.

[17]You are now agreeing, before this jury and

[18]Judge, that a left-sided acoustic neuroma can cause

[19]right-sided head pain in a patient, true?

[20]A If it's of such a size that would cause that, it's

[21]possible, yes. But the pathology that would cause it is not

[22]the acoustic --

[23]Q Can you try and answer my questions?

[24]A I will try to, sir, and I am trying, sir, as hard

[25]as I can.

1195

[1] [\*56] Q You are?

[2]A Yes, I am.

[3]Q Can you answer this question yes or no:

[4]As you sit here now, this very moment, you

[5]agree that a left-sided acoustic neuroma can cause

[6]right-sided head pain in a patient?

[7]A I can't really answer that yes or no.

[8]Q Do you realize that you have answered yes or no

[9]earlier?

[10]MR. CITRIN: Objection.

[11]THE COURT: I'll sustain the objection.

[12]Q Do you realize that if not in words you have

[13]answered affirmatively that question when you agreed with

[14]what I read from Dr. Block; are you aware of that?

[15]MR. CITRIN: Objection.

[16]Q Just asking if you're aware or not aware?

[17]MR. CITRIN: Aware of what? Objection.

[18]MR. MOORE: Is this proper?

[19]THE COURT: Given what the question was, I will

[20]overrule.

[21]A I am aware of that.

[22]Q Thank you, Doctor, that's the answer.

[23]A Thank you, sir.

[24]Q You're welcome.

[25]Now, sir, did you read my cross-examination,  
1196

[1]and you know it's called cross-examination of what I did with

[2]Dr. Block, right?

[3]A In a cursory fashion, yes.

[4]Q From your experience **[\*57]** in court, you know that when

[5]Dr. Block came in for the defense, and then I got up to

[6]question him, you knew absolutely that that was

[7]cross-examination, didn't you?

[8]MR. CITRIN: Objection.

[9]THE COURT: Sustained.

[10]MR. MOORE: I don't -- I'm at a loss, Judge.

[11]THE COURT: There's nothing to be at a loss at,

[12]that's not a specific question that he answered before.

[13]Q Based on your -- withdrawn.

[14]In any event, did you know that on

[15]cross-examination of Dr. Block I asked him about Dr.

[16]Golfinos' records?

[17]A I believe you did, yes.

[18]Q Doctor, even a cursory reading would so indicate,

[19]true?

[20]MR. CITRIN: Objection. Objection.

[21]THE COURT: I'll sustain.

[22]Q You said you believe I did, I'm not picky, but you

[23]know I did, correct?

[24]MR. CITRIN: Judge, I object.

[25]MR. MOORE: Withdrawn.

1197

[1]Q Did you read that testimony, yes or no?

[2]A I read Dr. Block's testimony.

[3]Q No, no, no, Doctor --

[4]MR. CITRIN: -- Judge, can I ask the Court to  
[5]please prevent him from continuing to do what he's doing  
[6]before this Court and this jury. **[\*58]**

[7]THE COURT: I'm going to preside over a trial  
[8]where a question is asked, if there's an objection, an  
[9]objection will be interposed, and I will rule on it, and  
[10]the witness may or may not answer the question. That's  
[11]how the trial hopefully will be conducted from this  
[12]point on.

[13]MR. MOORE: May I, Judge?

[14]THE COURT: Yes.

[15]MR. MOORE: Thank you.

[16]Q Doctor, I asked you quite a while ago, and Mr.

[17]Citrin asked you if you read Dr. Block's testimony. Correct?

[18]A Yes.

[19]Q But just a while ago I asked you specifically did  
[20]you read it in reference to Dr. Golfinos and my questioning  
[21]on Dr. Golfinos, that's what I asked you, did you read that  
[22]specifically, yes or no?

[23]A I believe I did, but I don't have a specific  
[24]recollection of exactly what it said and would require a  
[25]chance to look at it if you're going to ask me specific  
1198

[1]questions because I don't have an encyclopedic memory of all  
[2]these things.

[3]MR. MOORE: Move to strike as non-responsive.

[4]THE COURT: I will strike the last part  
[5]encyclopedic memory.

[6]MR. MOORE: I asked for a yes or no, Judge. **[\*59]**

[7]THE COURT: Striking the last portion of the

[8]answer.

[9]MR. MOORE: I'll move on, Judge, all right.

[10]Q Doctor, if you were objective in this case and if

[11]you had -- withdrawn.

[12]Is it your sworn testimony that before you gave

[13]your testimony here today, you had read Dr. Golfinos' 2 page

[14]report?

[15]A Yes.

[16]Q Doctor, if you had done that, and if you were

[17]objective in this case, you would know that Dr. Golfinos'

[18]report contradicted a basic tenant of the defense in this

[19]case, true?

[20]MR. CITRIN: Judge, I object.

[21]MR. MOORE: What?

[22]MR. CITRIN: I'm going to object.

[23]THE COURT: You don't have to state the basis.

[24]I'm going to sustain a particular portion of that

[25]question.

1199

[1]Q Doctor, do you remember after I sat down Mr.

[2]Citrin got up and questioned Dr. Block again. You remember

[3]that?

[4]A I do recall there was, I think, it's called

[5]redirect, yes.

[6]Q And completely misstated the point being made

[7]relative to Dr. Golfinos when I was questioning Dr. Block?

[8]MR. CITRIN: Judge.

[9]MR. MOORE: Let me finish.

[10]Q Did you **[\*60]** notice that in reading the testimony?

[11]MR. CITRIN: Judge, I object, and I have an

[12]application to make outside of the presence of the jury.

[13]THE COURT: Ladies and gentlemen, we have to take

[14]care of something outside of your presence. If you

[15]could go back in the jury room.

[16]We'll see you back here shortly.

[17]THE OFFICER: All rise, jury exiting.

[18](Whereupon, the jury exited the courtroom.)

[19]THE COURT: Everybody can be seated. Doctor. If

[20]you need to use the facilities, you may do so.

[21]THE WITNESS: Should I remain outside.

[22]MR. MOORE: I don't care whether he remains or not

[23]to be quite frank.

[24]THE COURT: Why don't you stay outside. Everybody

[25]can be seated.

1200

[1](Whereupon, the witness exits the courtroom.)

[2]THE COURT: Mr. Citrin.

[3]MR. CITRIN: I move for a mistrial. Mr. Moore has

[4]continued to do what you absolutely cannot do which is

[5]to interject his own view of the objectivity of the

[6]witness and his ad hominum personal attacks on my

[7]misrepresentations now make it impossible for my client

[8]in my view to get a fair trial before this jury.

[9] **[\*61]** He's done this in my view intentionally because he

[10]doesn't like the direction in which the trial is going,

[11]and what he's doing is even a lawyer without his

[12]experience would know he cannot do, he cannot continue

[13]to lace his questions with his own view that this

[14]witness is not being objective.

[15]He continues to make statements about my

[16]misrepresentations and my dishonesty and my  
[17]misconstructions. And you can't -- that's well beyond  
[18]the comment on the evidence. It's his own personal view  
[19]of the integrity of the witness and the other attorney,  
[20]and for those reasons I don't believe my client can get  
[21]a fair trial before this jury.

[22]MR. MOORE: I am about to prove --

[23]THE COURT: Hold it. I'm speaking now.

[24]MR. MOORE: Sorry, Judge.

[25]THE COURT: I speak.

1201

[1]MR. MOORE: Ask I reply.

[2]THE COURT: I control this trial, and now I'm

[3]going to speak whether you like it or not, I am going to

[4]speak.

[5]My recollection is that last question that had

[6]that tenor to it, I sustained the objection. If there

[7]were other questions that had that tenor to it, I

[8]believe I sustained [**\*62**] objections.

[9]This last, I believe it was a question, yes, it

[10]was a question, that had that indication I forget the

[11]exact word that you were untruthful or --

[12]MR. MOORE: No, no, I didn't say that.

[13]THE COURT: I don't remember the exact words.

[14]MR. MOORE: Misrepresented -- I'll refresh your

[15]recollection, if I may.

[16]THE COURT: He's got the transcript right in front

[17]of him.

[18]MR. CITRIN: Yes.

[19]"QUESTION: Doctor do you remember after I sat

[20]down Mr. Citrin got up and questioned Dr. Block again,

[21]remember that?

[22]"ANSWER: I do recall, I think it's called

[23]redirect, yes.

[24]"QUESTION: And completely misstated the point."

[25]MR. MOORE: Yeah.

1202

[1]MR. CITRIN: Yeah.

[2]MR. MOORE: I'm going to prove that, Judge, on

[3]reading the transcript.

[4]MR. CITRIN: What?

[5]THE COURT: How is that a proper basis of a

[6]question which is -- essentially impugns his integrity.

[7]MR. MOORE: Judge, has nothing to do with his

[8]integrity. It has to do with the defense of this case.

[9]I say as an officer of this court in reading what

[10]I'm about to read **["\*63]** from the transcripts this witness if

[11]he knew Dr. Golfinos' testimony which he said he did

[12]would have known there was a total misstatement

[13]inadvertent or deliberate, and I won't comment on that,

[14]to try and take completely the meaning of the

[15]cross-examination by me of Dr. Block on the very same

[16]Dr. Golfinos. I'm --

[17]THE COURT: Why can't you do that without the

[18]reference made to defense counsel?

[19]MR. MOORE: Because -- it's not -- I never --

[20]Judge, I'm at a loss on many of your rulings, but I have

[21]to abide by them.

[22]THE COURT: You want to know something, I don't

[23]really care if you're at a loss regarding many of my

[24]rulings. I didn't ask for a criticism of your

[25]conducting my trial.

1203

[1]I now resent your critique of me throughout the

[2]trial. Don't let it happen again whatever you think of

[3]me and my ability, keep it to yourself because I have my

[4]opinions too.

[5]MR. MOORE: Your Honor, respectfully, I have said

[6]the exact opposite.

[7]THE COURT: You didn't just say it now.

[8]MR. MOORE: I absolutely was about to say whether

[9]I am mystified or not, is tough luck on me. [\*64] And I was

[10]about to say that I'm absolutely as convinced this very

[11]moment as I've been throughout this trial that you are

[12]absolutely objective in deciding this case -- forgive

[13]me, making your rulings totally impartially.

[14]I said that several times on this record, and I

[15]say it now. And the Court's ire at me is totally my mis

[16]phrasing of the situation, not the Court's fault, and I

[17]apologize.

[18]THE COURT: All right.

[19]MR. MOORE: What I was trying --

[20]THE COURT: Let's get back to the issue that Mr.

[21]Citrin raised.

[22]MR. MOORE: Okay.

[23]THE COURT: Why can't you accomplish what you want

[24]to accomplish without asking the question that -- the

[25]way I heard it, and obviously the way he heard it.

1204

[1]MR. MOORE: Okay.

[2]THE COURT: Has a certain -- I don't know what the

[3]right word is.

[4]MR. CITRIN: Impugns my integrity.

[5]THE COURT: I said that before.

[6]MR. MOORE: I will gladly try again, but can I

[7]please make one final effort to explain myself.

[8]I never meant that this lawyer deliberately did

[9]something. What I meant to convey was that the defense

[10] [\*65] in this case did not in, in setting forth Dr. Block's

[11]testimony on redirect, did not properly represent what

[12]had happened --

[13]MR. CITRIN: What?

[14]MR. MOORE: -- up to that in reference to Dr.

[15]Golfinos record, that's all. I probably phrased it

[16]badly.

[17]THE COURT: Try to make that point without

[18]saying --

[19]MR. MOORE: I apologize for that, and I would like

[20]to try and correct it and continue. But I'm about to

[21]show something very, very telling.

[22]THE COURT: That's fine, but you can do it without

[23]the reference.

[24]MR. MOORE: Judge, then I just said twice or three

[25]times that I apologize. I don't have any pride -- I've  
1205

[1]told you, Judge, at the bench not on the record that I

[2]don't have any pride of alter ship.

[3]What I mean by that whether I submit a

[4]questionnaire to you, whether I suggest a question in a

[5]certain form, Judge, you'd probably do it totally

[6]differently than I would.

[7]But I'm one person, and I'm trying to do the  
[8]cross-examination my way. If you think the form or  
[9]substance are wrong, you haven't been reluctant to  
[10]sustain the objections, nor should [\*66] you be. If you  
[11]sustain that question, I will ask it in another form.  
[12]THE COURT: I'm certainly prepared to sustain it  
[13]before Mr. Citrin asked for the ability to make a record  
[14]outside the presence of the trial. Now he moved for a  
[15]mistrial based on that, I believe what you believe to be  
[16]other things that have taken place.

[17]MR. CITRIN: Unquestionably the other things  
[18]particularly this witness today, truly objective witness  
[19]wouldn't say this.

[20]MR. MOORE: I'm going to back it all up.

[21]MR. CITRIN: Excuse me. You have no self-control.

[22]THE COURT: All right, can we get back --

[23]MR. CITRIN: I'm directing my comments --

[24]THE COURT: From now on, in this trial I want  
[25]neither one of you address each other. Anything  
1206

[1]that's going to be said by either one of you has to be  
[2]addressed to the Court.

[3]Maybe we have to start from that most basic  
[4]premise on how each of you will go forward in  
[5]representing your clients in this trial.

[6]MR. CITRIN: Yes, sir.

[7]I believe, Judge, that the pejorative terms he's  
[8]used throughout the morning with my last witness, again  
[9] [\*67] your Honor sustained the objection. The problem is he  
[10]continues to say them.

[11]And your Honor makes the rulings, and -- but the  
[12]fact of the matter is he keeps saying the same thing  
[13]over and over again. Doesn't stop. He apologizes,  
[14]withdraws the comment, but again it is out there.  
[15]So the problem with that is once you do that, 5 or  
[16]6 times, to one particular witness, I don't believe the  
[17]jury can look at that witness, or I believe the jury's  
[18]view of that witness is tainted, not by the substance of  
[19]the cross-examination which dealt with the hearing  
[20]impairment, age of my other witness, but rather the  
[21]pejorative comments of plaintiff's counsel questioning  
[22]the integrity of the witness and to a lesser extent of  
[23]me.

[24]That's why I move for a mistrial. I don't think  
[25]this jury can listen to the witness anymore because the  
1207

[1]comments he's making.

[2]THE COURT: I'm sure we could have done without  
[3]certainly that last comment. I'm not willing to grant a  
[4]mistrial. First of all. And always have at least in  
[5]the trials I preside over -- the utmost faith in the  
[6]jury that they will be able -- **[\*68]** clearly, I sustained  
[7]objections to questions, you know, that were phrased in  
[8]such a manner as to indicate the witness might have been  
[9]lying or whatever.

[10]So, notwithstanding that, questions of that type  
[11]may have been asked in some fashion a couple of times,  
[12]and notwithstanding the last question that raised the  
[13]specter of your conduct, if you will, I'm not willing to  
[14]grant a mistrial, and I certainly presume Mr. Moore

[15]would oppose that.

[16]I'm not willing to grant it. Just based on my

[17]presiding over this trial and my view of this jury, I

[18]will put my faith in the jury to know that. And I'm not

[19]even sure -- going to say at this point -- to know to do

[20]the right thing and to realize that what may have been

[21]said is not germane and is not any part of what they

[22]will have to decide when they sort out the issues in

[23]this case.

[24]I believe that my instinct is right. I don't

[25]believe that the trial has been so tainted, obviously,  
1208

[1]we all agree to grant a mistrial is so substantial in

[2]any case, that you do whatever you can to avoid granting

[3]it.

[4]And I don't think that we have come **[\*69]** close to the

[5]need to grant your application. We could with the

[6]remaining time that we have with this witness, and I

[7]presume he is the last witness, get back to the issues

[8]in this case. And if his opinion needs to be critiqued

[9]by way of cross-examination, you obviously know how to

[10]do that far better than me.

[11]And to do it in such a way that none of this side

[12]nonsense needs to arise. And to, you know, potentially

[13]taint the trial, even though I don't think it's tainted,

[14]given my feeling. So let's get back to what we need to

[15]do without the side nonsense.

[16]MR. MOORE: Can I say, Judge, that I heartily

[17]agree with the last statements of the Court, heartily.

[18]THE COURT: Okay, and my last statement will be

[19]let's --

[20]MR. MOORE: Act accordingly.

[21]THE COURT: Exactly.

[22]MR. CITRIN: Judge, before we bring them down, I

[23]want to use the rest room.

[24]THE COURT: Okay, if anybody needs to take a

[25]break, do so now.

1209

[1](Whereupon, a brief recess was taken.)

[2]THE COURT: I will sustain.

[3]THE OFFICER: All rise, jury entering.

[4](Whereupon, the jury entered **[\*70]** the courtroom.)

[5]THE COURT: You may all be seated, ladies and

[6]gentlemen. We are resuming with the cross-examination

[7]of Dr. DiGiacinto by Mr. Moore.

[8]THE CLERK: Doctor, I remind you you're still

[9]under oath.

[10]THE WITNESS: Thank you.

[11]MR. CITRIN: Judge.

[12]THE COURT: Technically there was an objection

[13]made to the last question I didn't rule on it before I

[14]sent the jury out for a break, I am sustaining the

[15]objection to the last question.

[16](Whereupon, Official Court Reporter Linda Calderon

[17]relieved Official Court Reporter Angela Spinelli.)

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1210

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q Doctor, I'm going to come back to Dr. Golfinos and

[4]the subject I was asking you about but before I do, I would

[5]like to ask some questions as follows beginning with this:

[6]You, sir, in a hypothetical question, meaning --

[7]withdrawn.

[8]You know what a hypothetical question is, don't

[9]you?

[10]A I believe so, yes.

[11]Q It can begin if, it can begin assume, it can begin

[12]it's conditional, and based on the information we give the

[13] **[\*71]** answer, correct?

[14]A Yes, I believe that's correct.

[15]Q Now, based on assumptions that Mr. Citrin asked you

[16]to make, you said, in essence, that Dr. Gordon acted

[17]appropriately in never ordering an MRI on this patient;

[18]correct?

[19]A Yes.

[20]Q Doctor, would you be open to other information on

[21]that subject?

[22]A I would be glad to listen, sir, yes.

[23]Q Should you have been open to other information --

[24]withdrawn.

[25]I would assume you didn't just agree with Mr.

1211

[1]Citrin just to agree with him; I would assume that, correct?

[2]A Correct.

[3]Q And I would assume, Doctor, that you would give

[4]objective analysis and thought before you would agree with

[5]Mr. Citrin or any lawyer in a court of law under oath,

[6]correct?

[7]A Correct.

[8]Q Would you agree, sir, that a physician is required

[9]to practice in accord with appropriate standards; would you

[10]agree with that?

[11]A Yes, sir.

[12]Q And, therefore, the other side of that, he can

[13]depart from good care or good standards, correct?

[14]A I don't understand the question as you asked it,

[15]sir, I'm sorry. **[\*72]**

[16]Q You never heard a departure from accepted care?

[17]A Yes, I have.

[18]Q That's the opposite to giving good care, correct?

[19]A In general, yes.

[20]Q And specifically; yes?

[21]A I suppose I could agree with that, yes, without

[22]further definition.

[23]Q Haven't you been asked many times in a court of law

[24]whether X, Y, Z is a departure -- meaning A, B, C, certain

[25]issues or specific issue and care either complied with

1212

[1]appropriate care or departed from it?

[2]A Yes, I have.

[3]Q And in this case you've said in response to Mr.

[4]Citrin's questions that Dr. Gordon did not depart from

[5]accepted care, correct?

[6]A That is correct.

[7]Q Now, before you would say that, you would want to

[8]know what you're talking about, correct?

[9]A Yes, sir.

[10]Q And is it your testimony to the judge and jury that

[11]you did know what you were talking about?

[12]A Yes, sir.

[13]Q Doctor, it goes without saying, doesn't it, that if

[14]a physician is not supposed to depart from accepted generally

[15]accepted care, he certainly is not supposed to depart from

[16]what is basic care; **[\*73]** true?

[17]A I would say yes.

[18]Q Are you aware that Dr. Gordon, and you know I have

[19]never, ever nor will question his background, his knowledge

[20]and his ability, nonetheless, are you aware he violated a

[21]fundamental and basic concept of neurology?

[22]MR. CITRIN: Objection.

[23]THE COURT: I'll overrule.

[24]You can answer that.

[25]A I'm not aware of that, sir.

1213

[1]Q Doctor, you don't have to be a board certified

[2]neurologist to know the following:

[3]A migraine headache sufferer may, subject to the

[4]vagaries of life, possibly get a headache with another cause;

[5]you don't have to be a board certified neurologist to know

[6]that, correct?

[7]A Correct.

[8]Q And, Doctor, a neurologist treating a woman with

[9]migraine headaches must always and constantly keep that basic

[10]principle in mind; true?

[11]A I would agree, yes.

[12]Q And, Doctor, surety of diagnosis should never, ever

[13]lead to ignoring a change --

[14]MR. CITRIN: Objection.

[15]Q -- true?

[16]MR. CITRIN: Objection to form.

[17]THE COURT: I'll allow it.

[18]You can answer.

[19]Overruled.

[20] **[\*74]** A I agree.

[21]Q Are you aware that one of the reasons that I

[22]questioned Dr. Block on Dr. Golfinos' record is precisely on

[23]the issue, not judging -- forgive me -- not having Dr. Gordon

[24]be responsible by hindsight or retrospect, but that

[25]prospectively he should have known with the right-sided

1214

[1]headaches that this woman was having something more might be

[2]going on; you are aware of that, aren't you?

[3]MR. CITRIN: Objection.

[4]MR. MOORE: If he is aware.

[5]THE COURT: Overruled.

[6]A I really didn't understand the question. I'm not

[7]sure why you questioned Dr. Block in any fashion. I think

[8]that was the question?

[9]Q Doctor, you know, don't you, that right-sided

[10]headaches -- withdrawn.

[11]There is no question, there is no question that

[12]Lauren Morris when she was seeing Dr. Gordon had migraine

[13]headaches, correct?

[14]A From my understanding of the record, correct.

[15]Q And, therefore, they caused pain? Kind of

[16]redundant. She suffered from migraines and they were off and

[17]on throughout the 25 months, correct?

[18]A Yes, sir.

[19]Q No question about that, correct? **[\*75]**

[20]A Correct.

[21]Q The salient point is we now know something else was

[22]going on, correct?

[23]MR. CITRIN: Objection to the salient --

[24]MR. MOORE: Now I'm talking about.

[25]MR. CITRIN: Objection to form.

1215

[1]THE COURT: Sustained.

[2]Q You now know, and I'm not now asking you to judge

[3]Dr. Gordon retrospectively or by hindsight, but as you sit

[4]here right now you now know something else was going on

[5]relative to headache, correct?

[6]MR. CITRIN: Objection.

[7]THE COURT: Overruled.

[8]You can answer that question.

[9]A I don't know that something else was going on

[10]relative to headache, no.

[11]Q And you have, Doctor, gone through these records as

[12]thoroughly as would be required to give that answer under

[13]oath to this Court and jury?

[14]A Yes, sir.

[15]Q Is that your testimony?

[16]A Yes, sir.

[17]Q Are you saying that -- withdrawn.

[18]I used a phrase earlier, in fact in opening

[19]statement in this case and I'm going to refer to it now:

[20]Headache and headache. Headaches and headaches.

[21]You knew what I meant, right?

[22]A Yes.

[23] **[\*76]** Q Let's take after the surgery. There were headaches

[24]and headaches, correct?

[25]A Yes, sir.

1216

[1]Q Nature didn't decide to go easy on her when --

[2]withdrawn. As to form.

[3]Doctor, despite horrendous postoperative pain that

[4]continued for a long time, this woman nonetheless had

[5]migraine headaches along with that pain, correct?

[6]A My understanding is yes.

[7]Q And that would be literally applicable to my

[8]statement: Headache and headache; correct?

[9]A If you are defining the pain she had relative to

[10]the surgery as a headache, yes.

[11]Q Are you saying, Doctor, fierce pain on the left

[12]side of the head wouldn't be termed a headache?

[13]A I suppose generically it could be, yes. It could

[14]be given other names as people have attempted to.

[15]Q Doctor, it was diagnosed as occipital neuralgia,

[16]but that's fierce pain on the left side of the head in this

[17]case -- withdrawn.

[18]Occipital neuralgia refers to fierce pain, but it

[19]could be on the left side or the right side, correct?

[20]A Correct.

[21]Q But in this case we know it was fierce pain on the

[22]left side, correct? [\*77]

[23]A Yes.

[24]Q And all along -- withdrawn.

[25]And you know from reading the testimony in this  
1217

[1]case that that pain -- withdrawn.

[2]You know that while she was in the hospital for

[3]about 20 days, it was in a word unbearable pain; you know

[4]that, don't you?

[5]A Yes, I do.

[6]Q And then it got more bearable but nonetheless

[7]fierce for a considerable period of time; you know that,

[8]don't you?

[9]A That is my recollection, yes.

[10]Q You think that had anything to do with the extent

[11]of the surgery required to remove the tumor when it was as

[12]big as it was at the time of surgery; yes or no, please?

[13]A I can't answer that yes or no.

[14]Q That's squarely within your field; is it not?

[15]A You would have to define what you mean by extent of

[16]the surgery, sir. That's the only question I have. If you

[17]mean the type of surgery, then I can answer the question.

[18]Q I meant the extent, Doctor; can you answer it?

[19]A She had an operation --

[20]Q Can you answer it?

[21]A I'm thinking the question through. I will do it

[22]quietly.

[23]Q I will move on. Do you [\*78] mind if I move on?

[24]A No, not at all.

[25]Q And when Dr. Jamieson said that she suffered from  
1218

[1]left-sided head pain and called it occipital neuralgia, that  
[2]was head pain that was as a result of the surgery, correct?

[3]A I believe so, yes.

[4]Q And, Dr. Jamieson made it perfectly clear that at  
[5]the same time this woman was having migraine headaches,  
[6]correct?

[7]A Yes.

[8]Q Does it refresh your recollection that when Mr.  
[9]Citrin questioned Dr. Block after I sat down, he questioned  
[10]whether there was exclusive left-sided pain or headache; do  
[11]you remember that?

[12]MR. CITRIN: Objection. Objection.

[13]THE COURT: I'm reading my notes.

[14]MR. MOORE: I will rephrase it, Judge.

[15]THE COURT: Okay.

[16]Q Doctor, Dr. Jamieson diagnosed left-sided occipital  
[17]neuralgia, correct?

[18]A Yes.

[19]Q But she also diagnosed migraines, correct?

[20]A Yes.

[21]Q The fact that this woman was suffering fierce pain  
[22]only on the left side is not contradicted by Dr. Jamieson's  
[23]reference to periorbital pain, correct?

[24]MR. CITRIN: Objection, that's not the entire

[25] **[\*79]** -- objection.

1219

[1]MR. MOORE: Objection, Judge, just objection.

[2]THE COURT: Lodge an objection. If I don't  
[3]understand why --

[4]MR. CITRIN: Yes, sir.

[5]THE COURT: -- then I will ask you.

[6]MR. CITRIN: Yes.

[7]THE COURT: Linda, read the question back,

[8]please.

[9]And this will be the last question and then we

[10]will break for lunch.

[11](Whereupon, the requested portion was read

[12]back.)

[13]THE COURT: And there was an objection. I'm

[14]going to overrule the objection.

[15]You can answer that question.

[16]A The periorbital pain was bilateral, so I'm not sure

[17]how to answer it. The left-sided pain appeared to be from

[18]the occipital neuralgia, yes.

[19]Q Doctor --

[20]A You said bilateral periorbital pain.

[21]Q Yes.

[22]A So the 2 aren't usually exclusive.

[23]Q What?

[24]A They are not usually exclusive.

[25]Q Of course not.

1220

[1]A I agree.

[2]Q Because you know that she clearly from her record

[3]knew the source of the bilateral periorbital pain as opposed

[4]to the left-sided pain; correct?

[5]MR. CITRIN: Objection.

[6] **[\*80]** Q If you know?

[7]THE COURT: Overruled.

[8]You can answer.

[9]A I believe that --

[10]Q Do you know?

[11]A Yes.

[12]Q And, Doctor, they are not contradictory because the

[13]periorbital bilateral pain was caused by migraines and the

[14]left-sided pain, quote-unquote, "was occipital neuralgia

[15]postsurgery;" true?

[16]MR. CITRIN: I will stipulate to that.

[17]MR. MOORE: That's not right, Judge.

[18]THE COURT: I'm going to -- you want me to

[19]strike that comment?

[20]MR. MOORE: Please do, Judge.

[21]THE COURT: I will strike that comment from

[22]the record.

[23]The jury is directed to disregard it.

[24]A True.

[25]THE COURT: That is the last question and  
1221

[1]answer as we will now break for lunch.

[2]If you could all report back, ladies and

[3]gentlemen for 2:00, at which time we will resume our

[4]trial.

[5]Have a good lunch. And don't discuss the case

[6]among yourselves or with anyone else. And don't form

[7]any opinions about the case at this time.

[8]We will see you at 2:00.

[9]THE OFFICER: All rise. Jury exiting.

[10](Whereupon, the jury then left the courtroom. **[\*81]** )

[11]THE COURT: Doctor, you can step down from the

[12]witness stand.

[13]THE WITNESS: Thank you.

[14]THE COURT: See you at 2:00.

[15]MR. CITRIN: See you at 2.

[16]MR. MOORE: See you at 2.

[17](Whereupon, the witness, Dr. George

[18]DiGiacinto, was then excused from the witness stand.)

[19](Whereupon, the trial was adjourned for the

[20]luncheon recess.)

[21]\*\*\*

[22](The following is transcribed by Angela Spinelli.)

[23](Continued on next page.)

[24]\*\*\*

[25]

1222

[1]A F T E R N O O N S E S S I O N

[2]THE CLERK: Remain seated and come to order

[3]please.

[4]THE COURT: Doctor, you want to retake the stand.

[5](Whereupon, the witness, DR. GEORGE DiGIACINTO,

[6]resumed the witness stand and testified follows:)

[7]THE CLERK: Ready for the jury, Judge?

[8]THE COURT: Yes.

[9]THE OFFICER: All rise, jury entering.

[10](Whereupon, the jury entered the courtroom.)

[11]THE COURT: Good afternoon, ladies and gentlemen.

[12]You may all be seated.

[13]We are now resuming our trial, resuming

[14]cross-examination of Dr. DiGiacinto by Mr. Moore on

[15]behalf of the plaintiff.

[16] [\*82] THE CLERK: Doctor, you're still under oath.

[17]THE WITNESS: Thank you.

[18]CROSS-EXAMINATION (CONTINUED)

[19]BY MR. MOORE:

[20]Q Good afternoon, Doctor.

[21]MR. MOORE: Good afternoon, ladies and gentlemen.

[22]Q Before lunch, we were asking in essence about

[23]headache and headache. And just before we broke the

[24]reference to the bilateral periorbital pain postsurgery, that

[25]was migraines, correct?

1223

[1]A I believe so, yes.

[2]Q And the left-sided -- we went through in detail

[3]how terrible it was initially, it gradually got better -- and

[4]by the way, you're aware they fortunately disappeared about

[5]2 years and some months after the surgery. Remember

[6]testimony to that effect?

[7]A I don't recall the exact time, but, yes, I do

[8]understand that to be true.

[9]Q And now Lauren Morris is left with migraines; you

[10]know that, right?

[11]A Yes, sir.

[12]Q Now, before the surgery, when I say left-sided

[13]pain, will you assume I mean the postsurgery occipital

[14]neuralgia?

[15]A Yes, sir.

[16]Q Okay. Even though, periorbital would -- bilateral

[17]periorbital would mean both left and right, **[\*83]** and that

[18]literally is left-sided pain and right-sided pain and

[19]left-sided headache and right-sided headache, but will you

[20]now understand it in the way I've asked you?

[21]A Yes.

[22]Q So we had after the surgery, we had migraines both

[23]sides at times, and we had left-sided headache, correct?

[24]A Left-sided pain -- sorry, I'm just --

[25]Q When I say left-sided pain or left-sided headache,  
1224

[1]that -- I'm referring to the postsurgical occipital

[2]neuralgia, okay?

[3]A If we adopt that, my understanding now in the

[4]question, the answer is yes.

[5]Q Headache and headache. Correct?

[6]A Yes.

[7]Q Before the surgery, there was headache and

[8]headache, and I'll say it advisedly beyond a shadow of a

[9]medical doubt, true?

[10]MR. CITRIN: Objection.

[11]THE COURT: I'll sustain.

[12]Q Doctor, reasonable probability is not beyond a

[13]shadow of a doubt, correct?

[14]A I don't know the legal definition, so I'm hesitant

[15]to say yes or no, sir.

[16]Q I'm talking about English, Doctor --

[17]MR. CITRIN: Objection, objection.

[18]THE COURT: I'll sustain.

[19]MR. MOORE: **[\*84]** I'm sorry?

[20]THE COURT: I'll sustain.

[21]Q To you, Doctor, you know the difference between

[22]reasonable probability and beyond a shadow of a doubt,

[23]correct?

[24]A Reasonable probability versus absolute certainty,

[25]is that another way of putting it?

1225

[1]Q You don't know --

[2]A I want to be careful I understand the question.

[3]Q Beyond a shadow of a doubt would be absolute

[4]certainty, everybody knows that?

[5]MR. CITRIN: Objection.

[6]Q Do you know that?

[7]A I don't know what your definition is, sir.

[8]Q Your definition would be, Doctor, that beyond a

[9]shadow of a doubt and absolute certainty are the same thing,

[10]correct?

[11]A I understand absolute certainty.

[12]Q No. You don't know what beyond a shadow of a

[13]doubt means, is that your testimony to this Judge and this

[14]jury?

[15]A I don't know if that means a hundred percent, sir.

[16]If you define it as that, I will adopt either one or the

[17]other.

[18]Q Have you spoken English your whole life?

[19]MR. CITRIN: Objection.

[20]THE COURT: Sustained.

[21]MR. CITRIN: Move to strike his comment.

[22] **[\*85]** MR. MOORE: I said.

[23]Q Have you spoken --

[24]MR. MOORE: Withdrawn.

[25]THE COURT: Strike the comment.

1226

[1]Q Has English always been your major mode of

[2]communication?

[3]MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]Q One more time and I'll move on.

[6]Are you saying you never heard the phrase

[7]beyond a shadow of a doubt before I used it in this courtroom

[8]today, yes or no?

[9]A No.

[10]Q Many times you heard it, and you knew exactly what

[11]it meant when you heard it, true or false?

[12]A I need to know exactly what you mean to answer the

[13]question.

[14]Q Can you answer my question:

[15]In all the times you heard it, did you know

[16]exactly what it meant, yes or no and I'll move on?

[17]A No.

[18]Q Doctor, in any event, before the surgery, as I was

[19]saying -- withdrawn.

[20]Absolute certainty and reasonable probability

[21]are quite different, correct?

[22]A Yes.

[23]Q To state a truism, there's no absolute certainties

[24]generally in medicine, correct?

[25]A Correct -- actually I take that back, there are

1227

[1]absolute certainties, so I **[\*86]** can't say yes to that.

[2]Q Doctor, you give opinions commonly with absolute

[3]certainty in your practice, do you?

[4]A When it's possible to give them with absolute

[5]certainty, yes.

[6]MR. CITRIN: Judge --

[7]Q My question is do you do it commonly?

[8]MR. CITRIN: -- can he finish the answer?

[9]THE COURT: I think he did.

[10]Q Do you do it commonly?

[11]A When it's appropriate to say with absolute

[12]certainty, I do. When I say --

[13]Q That's not answering my question, Doctor.

[14]MR. CITRIN: Objection, Judge, this is not a

[15]question by Mr. Moore.

[16]MR. MOORE: I withdraw it. I withdraw it, Judge.

[17]Q Doctor, surely you agree that medicine is part art

[18]and part science, correct?

[19]A Yes, sir.

[20]Q And in the vast majority of the time, physicians

[21]give diagnosis, give treatment, give direction, give

[22]referral, based on reasonable probabilities, correct?

[23]A I think that's reasonable, yes.

[24]Q It's not only reasonable, it's true, correct?

[25]A For the most part, yes.

1228

[1]Q Now, Doctor, I assume the testimony you gave this

[2]Court and jury on [\*87] questions by Mr. Citrin were based on

[3]reasonable probabilities, correct?

[4]A More likely than not is the standard I'm going

[5]for. So I think reasonable probability and more likely than

[6]not are pretty close.

[7]Q Actually, Doctor, probability means literally more

[8]often than not, because the other word would be possibility

[9]and that is less often than not?

[10]MR. CITRIN: Objection. Is that a question?

[11]Q Do you understand that to be true, Doctor?

[12]A As you defined it, I now understand it, sir.

[13]Q Doctor, I assume when you gave testimony based on

[14]Dr. Gordon's care you said that at least in your opinion --

[15]forgive me, sorry.

[16]At least you stated what you believed true in

[17]terms of more likely than not, you at least said that, I

[18]assume; is that correct?

[19]A Yes.

[20]Q Doctor, if, if, if there was headache pain in this

[21]woman throughout, throughout the 25 months that she was being

[22]seen by Dr. Gordon, if that's true, right there he departed

[23]from accepted medical practice, reasonably probable or not?

[24]MR. CITRIN: Objection.

[25]THE COURT: Overruled.

1229

[1] [**\*88**] You can answer.

[2]A No, he did not.

[3]Q What ?

[4]A He did not depart from.

[5]Q Even, even if there was headache pain --

[6]withdrawn.

[7]MR. MOORE: May I indulge?

[8]THE COURT: The last question and answer.

[9](Whereupon, the requested portion was read back.)

[10]MR. MOORE: I misstated, Judge, I apologize.

[11]Q What I meant to say, and I now say, Doctor, if

[12]there was headache pain not related to migraine over those

[13]25 months, then he departed from accepted practice,

[14]reasonably probable?

[15]MR. CITRIN: Objection.

[16]THE COURT: Overruled.

[17]You can answer.

[18]A In the hypothetical.

[19]Q Doctor, did I say last time if, if, if?

[20]A Does that mean hypothetical, sir? I need to

[21]understand. I don't understand the question, sir.

[22]Q Didn't I, Doctor, before the break talk about

[23]hypothetical briefly, assume if the idea of conditional;

[24]remember that?

[25]A Yes, I do.

1230

[1]Q And you asked me what I mean by if?

[2]MR. CITRIN: Objection, objection.

[3]THE COURT: I'll sustain.

[4]Q You say you didn't know a question beginning with

[5] **[\*89]**

[6]MR. CITRIN: Objection.

[7]THE COURT: Overruled.

[8]You can answer that question.

[9]A I just need to adopt your language, and I need to

[10]be certain so I'm answering the question properly. If if

[11]means hypothetical, then I can answer the questions.

[12]Q Doctor, isn't "if" an article of speech?

[13]A It is an article of speech.

[14]Q Called conditional, correct, Doctor?

[15]A I don't really know.

[16]Q By the way, if it's called a conditional, the very

[17]nature of what it is called indicates that if a question

[18]begins with if, it's conditional or hypothetical?

[19]MR. CITRIN: Objection.

[20]Q Is that correct, Doctor?

[21]THE COURT: Overruled.

[22]You can answer that.

[23]A If hypotheticals are interchangeable, then I

[24]agree, yes.

[25]Q Know them to be as long as you've been going to  
1231

[1]school -- forgive me -- you know them to be since you've been

[2]in school, correct?

[3]MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]Q Doctor, if there was headache pain in this woman

[6]other than migraine during the 25 months she was being

[7] [\*90] treated by Dr. Gordon, he would have departed from accepted

[8]practice, true?

[9]MR. CITRIN: Objection.

[10]MR. MOORE: Same question as you overruled the

[11]last time, Judge.

[12]MR. CITRIN: I'd be more than happy to tell you

[13]privately.

[14]THE COURT: If I don't make a ruling -- can I

[15]think about it for a couple of seconds before somebody

[16]comments and tries to guide me?

[17]MR. MOORE: Sorry, Judge.

[18](Pause in the proceedings.)

[19]THE COURT: I'm going to sustain. And if you

[20]wonder why, I'll tell you why at side-bar.

[21]MR. MOORE: That's okay. Thank you.

[22]Q Doctor, you realize that it's an essential claim

[23]of the plaintiff that there was such headache over the

[24]25 months, other than migraine, you knew that, correct?

[25]MR. CITRIN: Objection.

1232

[1]THE COURT: Overruled.

[2]A I don't specifically recall that claim, sir, but I

[3]could have absolutely missed it.

[4]Q Doctor, if you knew the first -- Doctor, if -- did

[5]you discuss this case with Mr. Citrin before you took the

[6]witness stand?

[7]A I had meetings with him, yes.

[8]Q Sorry?

[9]A I have **[\*91]** had meetings with him, yes.

[10]Q Did you discuss the case, is what I said?

[11]A Yes.

[12]Q Remember when I said that I said in my opening

[13]statement headache and headache?

[14]A Yes, sir.

[15]Q I wasn't talking about postsurgery then, even

[16]though it's applicable, I was talking presurgery; did you

[17]know that?

[18]MR. CITRIN: Objection to the form of the

[19]question.

[20]THE COURT: I'll sustain.

[21]Q Doctor, did anybody tell you, anyone, that a basic

[22]premise of the plaintiff in this case is that this woman had

[23]not only headache and headache after the surgery, she had

[24]headache and headache before the surgery, based on the way

[25]we've been talking about it before lunch?

1233

[1]MR. CITRIN: Objection. And I'll be more than

[2]happy to share with you --

[3]THE COURT: Overruled.

[4]MR. CITRIN: Okay.

[5]A I don't recall reading records indicating other

[6]headaches beside the migraines.

[7]Q Is that your answer to my question?

[8]A I don't recall it. If you could cite something to

[9]me, I'd be glad to hear it --

[10]Q Doctor --

[11]A -- it might change my memory, [\*92] sir.

[12]Q Didn't you read Dr. Block's questioning by me when

[13]I talked about -- and we've gone through it with you --

[14]acoustic neuroma on the left causing pain on the right?

[15]MR. CITRIN: Objection, that --

[16]THE COURT: Overruled.

[17]MR. CITRIN: What is that?

[18]A I recall.

[19]Q No, no, no, Doctor.

[20]MR. MOORE: Can I start again, Judge, please?

[21]Q Please listen to me, Doctor?

[22]A I am trying, sir.

[23]Q I asked you about reading Dr. Block's testimony,

[24]remember, when you said that headache -- forgive me --

[25]acoustic neuroma on the left wouldn't cause pain on the  
1234

[1]right; remember that?

[2]A Yes.

[3]Q What?

[4]A Yes.

[5]Q And I showed you that Dr. Block said the opposite;

[6]remember that?

- [7]A I don't recall reading that specifically, sir, I'd
- [8]be glad to have you read it to me, and I could react to it.
- [9]Q I read it to you before lunch, Doctor.
- [10]A I do recall, I apologize, it is my error, I do
- [11]recall.
- [12]Q And I asked you if you agreed with it, remember?
- [13]A Yes, sir, I do remember.
- [14]Q Doctor, if there was acoustic [\*93] -- forgive me.
- [15]If there was pain on the right side as a result
- [16]of an acoustic neuroma you know that would not be migraine,
- [17]correct?
- [18]MR. CITRIN: Objection.
- [19]MR. MOORE: I don't understand this, Judge.
- [20]THE COURT: In this case?
- [21]MR. MOORE: Of course.
- [22]THE COURT: Overruled.
- [23]MR. MOORE: Sorry, of course, Judge.
- [24]THE COURT: Overruled.
- [25]A Could you read it back so I'm sure I hear the  
1235
- [1]question properly?
- [2]THE COURT: Angela, read it back.
- [3]MR. MOORE: I'll rephrase it. I'll repeat it.
- [4]May I repeat it rather than --
- [5]THE COURT: Sure.
- [6]Q If there was pain on the right side as a result of
- [7]an acoustic neuroma on the left in this patient, that would
- [8]not be migraine, true?
- [9]A If that statement is true --
- [10]Q Doctor, you're not --

[11]A -- that would be true.

[12]Q Did I begin with if, Doctor?

[13]A Yes, you did.

[14]Q So the answer was a resounding yes, true?

[15]MR. CITRIN: Objection. What is a resounding yes?

[16]MR. MOORE: The answer was a yes.

[17]Q Correct, Doctor?

[18]A In that hypothetical, yes. **[\*94]** In that if, yes.

[19]Q Do you realize that's an issue the jury's going to

[20]have to decide?

[21]A I suppose so. I don't have the legal expertise to

[22]know that.

[23]Q I assume you're in here as an expert to help them

[24]decide it fairly; is that correct?

[25]A Yes.

1236

[1]Q You'd have to know what the issue is before you

[2]could help people decide it fairly?

[3]MR. CITRIN: Objection.

[4]Q Is that basically true, Doctor?

[5]MR. CITRIN: Objection.

[6]THE COURT: Overruled.

[7]You can answer that.

[8]A I try to answer the questions as best I can.

[9]Q No, no. Is that true?

[10]A Yes.

[11]Q The yes is that you'd have to know the issue

[12]before you could help people decide it fairly, true?

[13]A Correct.

[14]Q So you know that was a central issue in the case

[15]before you took the witness stand, correct?

[16]A Can't answer that yes or no.

[17]Q Can you suggest somebody that could?

[18]MR. CITRIN: Objection.

[19]MR. MOORE: Withdrawn.

[20]THE COURT: Sustained. Strike that comment from

[21]the record. Jury is directed to disregard that comment.

[22]Q Doctor, [\*95] you would know whether you knew that,

[23]wouldn't you?

[24]MR. CITRIN: Judge, I object to this, the form of

[25]the question.

1237

[1]THE COURT: I'll allow it, if you understand the

[2]question, you can understand the question.

[3]THE WITNESS: I have to have it repeated.

[4]Q Do you mind if I move on, Doctor?

[5]A Go right ahead.

[6]Q You know, don't you, that --

[7]MR. MOORE: -- my recollection fails me, Judge, I

[8]know I asked the question. I don't remember the

[9]question, so if you could indulge me.

[10]Q Doctor, if there was pain other than migraine,

[11]head pain I'm talking about in this patient, Dr. Gordon

[12]should certainly have at least considered that, true?

[13]MR. CITRIN: Objection.

[14]THE COURT: Overruled.

[15]You can answer that.

[16]A Considered what, sir? That there was other pain

[17]or that there was a cause for it?

[18]Q Doctor --

[19]A Your question was if there was other pain, he

[20]should have considered there was other pain.

[21]Q Let me ask you this --

[22]A Yes, sir.

[23]Q -- you read Dr. Block's testimony, correct?

[24]A Yes, I did.

[25] **[\*96]** Q And you heard, you heard -- forgive me -- you read  
1238

[1]that he said singularly as opposed to everything else that at

[2]least the American Academy of Neurology Guidelines were

[3]authoritative; you read that, didn't you?

[4]A Sir, I really would have to -- not questioning

[5]your representation.

[6]Q You know what, Doctor?

[7]A I just don't specifically remember. And that's

[8]why I'll trust your representation, if it's true. I don't

[9]specifically remember.

[10]Q You didn't see I got to read them?

[11]A Yes.

[12]Q You know, therefore, he had to find that

[13]authoritative before I read them, you know that from your

[14]experience in court, don't you?

[15]A About guidelines, no, I don't know that.

[16]Q Haven't you testified under oath that you know if

[17]you don't recognize an article or book or piece of document

[18]as authoritative, the lawyer questioning you can't read from

[19]it; you have testified to that under oath, true?

[20]A Yes.

[21](Whereupon, Official Court Reporter Linda Calderon

[22]relieved Official Court Reporter Angela Spinelli.)

[23]

[24]

[25]

1239

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY [\*97] MR. MOORE:

[3]Q So therefore, you knew that if I read from that

[4]document when I was questioning Dr. Block, he had to say it

[5]was authoritative; you knew that, didn't you?

[6]A Sir, I don't know that guidelines fall under the

[7]same category. If they do, then I fully adopt what you say.

[8]I'm just --

[9]Q Don't you remember I asked him?

[10]A I don't recall the specific answer is what I said.

[11]Q And you don't remember all the other things I asked

[12]him if they were authoritative; you don't remember that

[13]either?

[14]A Not specifically.

[15]You can read them to me and I'm sure you would

[16]refresh my memory.

[17]Q Doctor, when did you read his testimony?

[18]A The evening it was given. Late at night.

[19]Q That's yesterday, right?

[20]A Was it yesterday or the day before?

[21]I have been very busy, sir, trying to get it done.

[22]MR. MOORE: I move to strike that as not

[23]responsive.

[24]THE COURT: I'm going to strike I have been

[25]very busy, I tried to get it done.

1240

[1]The jury is directed to disregard it.

[2]Q If you were going to answer -- withdrawn.

[3]Did you think [\*98] if you were furnished that testimony

[4]it was important to read it?

[5]MR. CITRIN: I object to this --

[6]MR. MOORE: What?

[7]MR. CITRIN: -- this entire line of

[8]questioning.

[9]THE COURT: Overruled.

[10]But I will sustain the objection to this last

[11]question.

[12]MR. MOORE: I don't -- whether he considered

[13]it important to read it? I would be guided, Judge.

[14]THE COURT: He said he read it.

[15]MR. MOORE: But I'm --

[16]Q Doctor, you don't remember the first thing about

[17]it; isn't that true?

[18]MR. CITRIN: Objection, objection.

[19]THE COURT: I'll sustain.

[20]But you can rephrase on that.

[21]MR. MOORE: Okay.

[22]Q Doctor, you remember very, very little about it,

[23]correct?

[24]A I recall reading it. I recall the essence of it

[25]without the details.

1241

[1]Q Doctor --

[2]MR. MOORE: I want to keep going.

[3]MR. CITRIN: I object to Mr. Moore pointing to

[4]his wristwatch. I object to his histrionics.

[5]MR. MOORE: Is this fair? May I, Judge?

[6]THE COURT: Members of the jury, if anybody  
[7]saw the reference to the watch, ignore it, I'm -- [\*99] the  
[8]rest of it, within reason, I'll allow.  
[9]Q True, right?  
[10]A I lost the question, sir.  
[11]Q You remember very --  
[12]A Okay, I remember the question. I don't remember  
[13]every single detail about it.  
[14]Q Did I ask you?  
[15]Doctor, you know what, you are not answering my  
[16]question; isn't that true?  
[17]MR. CITRIN: I object to Mr. Moore's comment.  
[18]Strike it --  
[19]THE COURT: It's not really a question, so  
[20]strike it.  
[21]MR. MOORE: Okay.  
[22]Q Doctor, are you saying you don't remember any  
[23]question by me of Dr. Block where I prefaced it whether an  
[24]article or a book or a document was authoritative; is that  
[25]your sworn testimony to this Court and jury having read his  
1242  
[1]testimony as you have sworn?  
[2]A I don't remember the specifics, sir. We can --  
[3]Q That's not my question.  
[4]My question is: Are you saying you don't remember  
[5]anything about that; yes or no?  
[6]A I do remember, yes, but not the specifics of which  
[7]and which.  
[8]Q Sir --  
[9]A Yes, sir.

[10]Q -- do you recognize the American Academy of

[11]Neurology guidelines as authoritative? **[\*100]**

[12]A No, because I don't know what they are other than

[13]what I have read in testimony.

[14]Q The exact guidelines that I read from you have said

[15]previously are not authoritative; correct?

[16]A I don't know them, sir, I couldn't make a judgment

[17]one way or the other. I haven't read it, I don't know it, I

[18]have only heard about it through testimony here that I have

[19]read.

[20]Q You have never heard of the American Academy of

[21]Neurology: The Utility Of Neuroimaging In The Evaluation of

[22]Headache In Patients With Normal Neurological Examinations;

[23]is that your testimony to this Court and jury?

[24]A I have heard --

[25]Q Yes or no, is it?

1243

[1]A I can't answer it yes or no -- actually I can.

[2]I have heard about it in the testimony, yes. I

[3]have not heard about it before the testimony. So I did

[4]elaborate --

[5]Q So that is false, isn't that true, Doctor?

[6]MR. CITRIN: I object to that statement.

[7]MR. MOORE: That's a foundation question --

[8]MR. CITRIN: No. Again, Judge --

[9]THE COURT: Sustained.

[10]I will strike his comment.

[11]The jury is directed to **[\*101]** disregard it.

[12]Q Doctor, haven't you sworn under oath that you are a

[13]member of the American Academy of Neurology; yes or no?

[14]A Not that I recall, no.

[15]Q If you so swore, it wasn't true; is that correct?

[16]A If I -- I lost the question, sir.

[17]MR. CITRIN: As a matter of curiosity, what is

[18]he doing sitting down and putting his head down?

[19]THE COURT: I presume he is getting ready to

[20]ask the next question.

[21]MR. MOORE: That's what I was doing, Judge, I

[22]was composing myself, Judge.

[23]MR. CITRIN: Right.

[24]Q Doctor, if I say to you, and I will produce it

[25]after the break of the afternoon, if I say to you that you  
1244

[1]swore under oath that you were a member of the American

[2]Academy of Neurology, are you saying such testimony was not

[3>true?

[4]MR. CITRIN: I object to this.

[5]This -- if he has something he wants to --

[6]MR. MOORE: Judge, this is not --

[7]THE COURT: Don't make a speech.

[8]Read the question back to make sure I have

[9]every word.

[10]MR. MOORE: Withdrawn.

[11]Q Are you saying to this jury that you have never

[12]been a member [**\*102**] of the American Academy of Neurology?

[13]A Correct, I have never been a member of the American

[14]Academy of Neurology.

[15]Q Doctor, surely, surely before you comment about the

[16]standard of care of Dr. Gordon as a neurologist in this case,

[17]you would want to know what the American Academy of Neurology

[18]says on the subject of the utility of neuroimaging in the  
[19]evaluation of headache in patients with normal neurological  
[20]examinations; am I right or am I wrong?

[21]A You're wrong.

[22]Q Doctor, would you agree that you must have the  
[23]requisite expertise to give an opinion before a Court and  
[24]jury?

[25]A Yes, sir.  
1245

[1]Q You just said he didn't depart because you have an  
[2]agenda here; true?

[3]MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]MR. CITRIN: Judge, I need -- I need to make  
[6]another application.

[7]MR. MOORE: Then I --

[8]MR. CITRIN: No, I need to make another  
[9]application.

[10]MR. MOORE: May I ask the next question?

[11]THE COURT: I will send the jury out.

[12]MR. MOORE: Can we hold it, Judge?

[13]MR. CITRIN: No, we took this up earlier.

[14] **[\*103]** THE COURT: Don't say anything.

[15]MR. MOORE: Please.

[16]THE COURT: No.

[17]Ladies and gentlemen, take a few minutes.

[18]Kindly go upstairs and we will see you shortly.

[19]THE OFFICER: All rise. Jury exiting.

[20](Whereupon, the jury then left the courtroom.)

[21]THE WITNESS: Should I leave, your Honor?

[22]THE COURT: Wait for the jury.

[23]THE WITNESS: Yes, your Honor.

[24]THE COURT: Why don't you step outside.

[25]THE WITNESS: Yes.

1139

[1]SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS : CIVIL TERM : PART 10

[2]-----X

LAUREN MORRIS,

[3]PLAINTIFF,

[4]-against- Index No. 8752/06

[5]MARC L. GORDON, M.D. and  
LONG ISLAND JEWISH MEDICAL CENTER,

[6]  
DEFENDANTS.

[7]-----X

[8]  
Supreme Courthouse

[9]88-11 Sutphin Boulevard  
Jamaica, New York 11435

[10]November 19, 2009

[11]  
B E F O R E:

[12]  
THE HONORABLE KEVIN J. KERRIGAN,

[13]J U S T I C E, and a jury

[14]A P P E A R A N C E S:

[15]KRAMER, DILLOF, LIVINGSTON & MOORE, ESQS.  
Attorneys for the Plaintiff

[16]217 Broadway  
New York, New York 10007

[17] **[\*104]** BY: THOMAS A. MOORE, ESQ.

[18]

[19]SHAUB, AHMUTY, CITRIN & SPRATT, LLP  
Attorneys for the Defendants

[20]1983 Marcus Avenue  
Lake Success, New York 11042-1038

[21]BY: MARC CITRIN, ESQ.

[22]

[23]  
ANGELA SPINELLI, CSR, RPR

[24]LINDA CALDERON  
Senior Court Reporters

[25]  
1140

[1]MORNING SESSION

[2]THE CLERK: All rise, Supreme Court Part 10 is now

[3]in session. The Honorable Kevin J. Kerrigan is

[4]presiding. Everybody come to order.

[5]MR. MOORE: Good morning, your Honor.

[6]THE COURT: Good morning, everybody.

[7]MR. CITRIN: In order to expedite things when the

[8]witness takes the stand, we've gone through the x-rays,

[9]they aren't in there, I have copies of them, I ask they

[10]be marked Defendant's Exhibit B and C in evidence.

[11]MR. MOORE: No objection, your Honor.

[12]THE COURT: Okay.

[13](Whereupon, the referred to items were marked as

[14]Defendant's Exhibits B and C in evidence by the

[15]Reporter.)

[16]THE CLERK: Ready for the jury, Judge?

[17]THE COURT: Yeah, those are marked?

[18]MR. MOORE: Yes.

[19]THE COURT: Bring the jury out, John.

[20]THE CLERK: All rise. Jury entering.

[21](Whereupon, [\*105] the jury entered the courtroom.)

[22]THE COURT: Ladies and gentlemen, good morning.

[23]All of you may be seated. Hope you all had a good day

[24]yesterday. We are now ready to resume our trial. We

[25]will continue on the defendant's case.

1141

[1]For the defendant, Mr. Citrin.

[2]MR. CITRIN: Yes. I call Dr. DiGiacinto.

[3]THE COURT: Okay.

[4]THE CLERK: Step right up, sir, remain standing

[5]for a moment. Raise your right hand.

[6]DR. GEORGE DiGIACINTO, called as a witness by and on

[7]behalf of the Defendant, after having been

[8]first duly sworn, was examined and testified as

[9]follows:

[10]THE COURT: Be seated. Please state your name for

[11]the record.

[12]THE WITNESS: George DiGiacinto.

[13]THE CLERK: Thank you, and your address please.

[14]THE WITNESS: 425 West 59 Street, New York, New

[15]York 10019.

[16]THE CLERK: Thank you, sir.

[17]THE COURT: Mr. Citrin.

[18]MR. CITRIN: May I inquire, Judge?

[19]THE COURT: Yes.

[20]THE CLERK: Can you guys hear?

[21](Whereupon, the jury answered in the affirmative.)

[22]MR. CITRIN: Want to try it?

[23]THE WITNESS: Good morning.

[24] **[\*106]** THE OFFICER: In order for it to work you have to

[25]talk directly straight into it. Position it that way.

1142

[1]THE WITNESS: Can we try without it?

[2]THE COURT: Try without it, just try to speak as

[3]loud as you can.

[4]THE WITNESS: I will.

[5]THE OFFICER: Or put it this way.

[6]THE CLERK: It's off.

[7]THE WITNESS: I'll speak up.

[8]THE OFFICER: Try it that way.

[9]THE WITNESS: Thank you very much.

[10]MR. CITRIN: The hardest part of the day is

[11]getting the microphone to work.

[12]Good morning Judge. Good morning, ladies and

[13]gentlemen of the jury, and good morning, Doctor.

[14]DIRECT EXAMINATION

[15]BY MR. CITRIN:

[16]Q Doctor, what is your medical speciality?

[17]A Neurosurgery.

[18]Q Where did you come from this morning?

[19]A The operating room at Roosevelt Hospital.

[20]Q Doctor, would you tell his Honor and the jury

[21]please about your background and training?

[22]A I graduated from Columbia College in 1966.

[23]Q You have to speak up because Juror Number 6 is

[24]leaning over.

[25]A With a BA degree. In 1970, I graduated from

1143

[1]Harvard Medical School **[\*107]** with an MD degree. From 1970 to 1972

[2]I was a surgical house officer at the Roosevelt Hospital in

[3]New York City.

[4]From 1972 to 1974 I was a medical officer in

[5]the United States Navy. From 1974 to 1978 I was a

[6]neurosurgical resident at the Neurological Institute at

[7]Columbia Presbyterian Medical Center in New York.

[8]Q And after completing the period of time you spent

[9]at the Neurological Institute in New York, Doctor, what did

[10]you do next?

[11]A I went into the private practice of neurological

[12]surgery in 1978. I was also on staff at Harlem Hospital and

[13]an in instructor in neurological surgery at Columbia.

[14]At that time I was on staff at Harlem Hospital,

[15]St. Luke's and Roosevelt Hospital, which later combined as

[16]well as Columbia Presbyterian.

[17]Q Did there come a time, Doctor, that you became

[18]board certified in the specialty of neurological surgery?

[19]A Yes.

[20]Q And when was that approximately?

[21]A 1981.

[22]Q And what did you have to do to become board

[23]certified in neurological surgery?

[24]A To become board certified in neurological surgery

[25]one most complete **[\*108]** an accredited residency in neurosurgery.

1144

[1]During that --

[2]Q Excuse me, Doctor, when Mr. Moore is done, we'll

[3]continue.

[4]MR. MOORE: I apologize, Judge, I mislaid

[5]something.

[6]THE COURT: Okay.

[7]Q Please continue, Doctor.

[8]A During your residency, you are allowed to sit for

[9]part 1 of the written boards. When you successfully complete

[10]your residency and the written boards, and after you've been

[11]in practice for 3 years, you're then allowed to sit for the

[12]oral boards. When you pass those, you become board

[13]certified.

[14]Q Doctor, after becoming board certified --

[15]withdrawn.

[16]Aside from your board certification, have you

[17]contributed to a body of writing known as the medical

[18]literature?

[19]A Yes.

[20]Q Approximately how many articles have you

[21]contributed to over the course of your career?

[22]A I think 15 or 20.

[23]Q In addition to board certification and

[24]contributing to the medical literature, Doctor, have you held

[25]any academic appointments?

1145

[1]A I am instructor of neurological surgery at

[2]Columbia Presbyterian.

[3]Q In your **[\*109]** capacity as instructor do you have

[4]occasion to teach your specialty?

[5]A Yes.

[6]Q Now, Doctor, aside from all of that, have you over

[7]the years have patient care responsibility?

[8]A Yes, I have.

[9]Q And do you continue to have patient care

[10]responsibilities as we speak?

[11]A Yes, I do.

[12]Q Okay. And in case I forgot to ask this earlier,

[13]what does the field of neurosurgery deal with?

[14]A Neurological surgery deals with the diagnosis of

[15]problems involving the nervous system, the brain, the spinal

[16]cord, nerves that leave the spinal cord, treatment of the

[17]structures supporting the nervous system such as the skull,

[18]the meninges.

[19]The spine, for example, with herniated discs or

[20]spine fractures as well as treatment of any problem that

[21]might involve peripheral nerves leaving the spinal cord or

[22]brain.

[23]Our charge is to evaluate a patient, to

[24]evaluate studies, including radiographic. And when

[25]appropriate, to treat such patients with problems surgically.

1146

[1]Q Have you over the course of your career treated

[2]patients who have developed acoustic neuromas?

[3] **[\*110]** A Yes, I have.

[4]Q To your knowledge and understanding what are

[5]acoustic neuromas?

[6]A An acoustic neuroma is a tumor, the nerve sheath,

[7]something called a Schwann growing off the vestibular portion

[8]of the 8th cranial nerve.

[9]Q Does it grow from within or out, if I understand?

[10]A I don't understand.

[11]Q Where does the tumor originate?

[12]A In one of the cells, the supporting cells called

[13]the Schwann cells.

[14]Q Have you had occasion over the course of your

[15]career to operate on patients who have developed acoustic

[16]neuromas?

[17]A Yes, I have.

[18]Q Approximately how many patients with acoustic

[19]neuroma have you operated on?

[20]A On the order of 25 to 30.

[21]Q And do you still care for patients today who

[22]suffer from this condition?

[23]A Yes, I do.

[24](Whereupon, Official Court Reporter Linda Calderon

[25]relieved Official Court Reporter Angela Spinelli.)

1147

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q And just as a small aside, Doctor, I want you to

[4]assume that last Friday there was a neurologist here,

[5]Lawrence Shields, and at page [\*111] 774 to 775 of the trial

[6]testimony he told this Court and jury that as a practicing

[7]neurologist, he tells the neurologist what he wants, and if

[8]they don't what he wants, he doesn't use them.

[9]Do you have an opinion with a reasonable degree of

[10]medical probability as to whether or not this is the way

[11]surgical interaction takes place between a neurosurgeon and

[12]neurologist?

[13]A I do have an opinion.

[14]Q And what is it?

[15]A It's an exchange between the neurosurgeon and the

[16]neurologist, but I never had a neurologist come to me and say

[17]this is what you have to do.

[18]I will have him come and present a problem and

[19]discuss it, but I thought about after reading that I don't  
[20]think I ever had a neurologist come to me and say this is  
[21]what you have to do.

[22]Q Now, Doctor, did there come a time that we asked to  
[23]you review this case in order to determine not only the  
[24]quality of the care provided by Dr. Gordon to Dr. Morris but  
[25]also whether or not, regardless of when between February 10,  
1148

[1]2003 and March of 2005, the acoustic neuroma was diagnosed,  
[2]whether the treatment options would have **[\*112]** been different and  
[3]whether with reasonable medical probability the outcome for  
[4]Dr. Morris would have been different?

[5]A You did ask me to evaluate records in that fashion,  
[6]yes.

[7]Q All right. In order to allow you to conduct this  
[8]analysis, did we provide you with certain materials?  
[9]A Yes, you did.

[10]Q Did we provide you with the records of Dr. Gordon?

[11]A Yes, you did.

[12]Q Did we provide you actually with the MRI films  
[13]which are now evidence that came to Dr. Morris?

[14]A Yes.

[15]Q Did we provide you with the inpatient record of Dr.  
[16]Morris of April 27, 2005 to Columbia?

[17]A Yes.

[18]Q Did we provide you --

[19]MR. MOORE: Why doesn't he tell us --

[20]objection. Objection, I'm sorry.

[21]THE COURT: I'll sustain.

[22]Q Doctor, aside from what we have already talked

[23]about, what else did we provide you with?

[24]A You provided me with a number of radiographic

[25]studies, MRI scans, et cetera. You provided me with the  
1149

[1]deposition testimony of Dr. Gordon, of Dr. Morris. I

[2]received multiple reports from many other doctors, and it

[3]would be hard for [\*113] me to enumerate them, neurologists --

[4]Q Let me ask you --

[5]A -- internists.

[6]Q I tell you we provided with you a copy of --

[7]MR. MOORE: Objection.

[8]MR. CITRIN: Judge, I'm allowed to refresh his

[9]recollection.

[10]THE COURT: I will overrule.

[11]MR. MOORE: That's leading.

[12]Q Doctor, would it refresh your recollection if I

[13]asked you whether we provided you with the records of Dr.

[14]Stubjen?

[15]A I saw Dr. Stubjen's, yes.

[16]Q And the records of Dr. Samton?

[17]A Yes.

[18]Q And the records more recently of Dr. Golfinos?

[19]A Yes.

[20]Q And the records of Dr. -- hold on a second -- the

[21]records of Dr. Jamieson?

[22]A Yes.

[23]Q Have we also sent you the trial testimony that was

[24]available to the time it was available?

[25]A Yes.

1150

[1]Q And have you read the trial testimony of the

[2]plaintiff's expert, Dr. Lawrence Shields?

[3]A Yes, I have.

[4]Q And the testimony of Dr. Gordon?

[5]A Yes, I have.

[6]Q And the testimony of Dr. Block?

[7]A Yes, I have.

[8]Q And the testimony of the plaintiff?

[9]A Yes, [\*114] I have.

[10]Q Now, I'm going to ask you for the purposes of the

[11]next series of questions to assume certain facts; and,

[12]Doctor, as I said before, if any fact that I ask you to

[13]assume is not in accordance with your understanding of the

[14]facts as you found them to be, please let me know and I will

[15]adopt your understanding of the facts, okay?

[16]A Should I do it ongoing or wait until the end?

[17]Q Stop me as soon as there is a problem, okay?

[18]A Yes.

[19]Q I want you to assume, Doctor, that Lauren Morris

[20]was first diagnosed with migraine headaches at 5 years of

[21]age.

[22]I want you to further assume she continued to

[23]suffer from migraines till her early teens.

[24]I want you to assume the migraines remitted or

[25]stopped and then returned when she was in her late teens

1151

[1]towards the beginning of college.

[2]That during her early years she was treated for

[3]these migraine headaches by a Dr. Donat who never ordered an

[4]imaging study of her brain.

[5]I want you to assume that while in college, at SUNY

[6]Binghamton, Lauren Morris suffered a migraine that was so  
[7]severe that she needed **[\*115]** to go to Binghamton emergency.  
[8]Assume, please, that she was seen and evaluated by  
[9]an emergency room doctor in that ER and was treated with  
[10]medication for the migraine, but this doctor ordered no  
[11]imaging studies of her brain.  
[12]Assume that just before medical school, while  
[13]working as a research assistant at Mount Sinai, she had  
[14]another migraine which was so severe migraine that she had to  
[15]go to the Mount Sinai Hospital ER.  
[16]Assume that in the ER was seen and evaluated by a  
[17]Mount Sinai physician who treated her migraine, but who also  
[18]did not order any imaging studies of her brain.  
[19]Assume that after this she came under the care of a  
[20]Dr. Patrick Stubjen, a neurologist at New York Cornell, and  
[21]remained under his care for migraines between 1998 and 2002.  
[22]Assume that during this period of time, although  
[23]her migraines were coming with increasing frequency, Dr.  
[24]Stubjen never ordered imaging studies of Dr. Morris' skull at  
[25]any time over those 4 years.

1152

[1]Assume also during this period of time that Dr.  
[2]Morris, who was by now in medical school at the New York  
[3]College of Osteopathic **[\*116]** Medicine, began attending the clinic  
[4]at her school for treatment by pain management doctors at  
[5]that clinic. And assume this happened at about 2000.  
[6]Assume that during that period of time, Dr. Morris  
[7]came under the care of an osteopathic pain management  
[8]specialist, Dr. Dennis Dowling -- let me stop for a second,  
[9]Doctor.

[10]Do you recall being provided with the 2005 office

[11]records of Dr. Dowling as part of what we submitted to you

[12]for your review?

[13]A Yes.

[14]Q During that period of time, this is now in or

[15]around 2000, Dr. Morris' migraines were so severe she was

[16]taking 20 to 30 antimigraine pills a month.

[17]Assume further that as a result of Dr. Dowling's

[18]manipulative therapy, Dr. Morris was able to reduce her

[19]headache medications from 20 to 30 pills to 2 to 3 pills.

[20]But assume during that period of time, while

[21]treating her for migraine, neither Dr. Dowling nor any of the

[22]other doctors at the New York College of Osteopathic Medicine

[23]ever ordered any imaging studies of Dr. Morris' brain.

[24]Assume that by December of 2002, Dr. Morris asked

[25]Dr. Gordon to become her neurologist **[\*117]** to treat her for  
1153

[1]migraine headaches, and he agreed.

[2]And assume that he remained Dr. Morris' treating

[3]neurologist from February 10th of '03 to March 30th of 2005.

[4]And assume that prior to the first examination that

[5]Dr. Gordon performed on Dr. Morris, he had her fill out a

[6]lengthy patient questionnaire.

[7]Have you seen that questionnaire, Doctor?

[8]A Yes, I have.

[9]Q All right. And assume further that in addition to

[10]the written questionnaire, Dr. Gordon supplemented the

[11]information on this questionnaire with a verbal interview at

[12]the time of the first visit, and Dr. Gordon learned that one

[13]of the things that would trigger Dr. Morris' migraines were

[14]stress.

[15]And assume that during that period of time, Dr.

[16]Gordon performed multiple neurological evaluations on Dr.

[17]Morris, and all of those neurological evaluations were

[18]absolutely normal.

[19]Assume that while under his care, there were times

[20]with the various medications which Dr. Gordon prescribed

[21]would work to help treat Dr. Morris' migraines and other

[22]times he needed to change the medications and/or the dosages. [**\*118**]

[23]And assume, sir, that as late as January 3, 2005,

[24]Dr. Morris reported that Dr. Gordon's treatment was working

[25]and her headaches were improving.

1154

[1]Assume that according to Dr. Gordon's records, at

[2]one time in mid to late 2004, specifically October 18, 2004,

[3]Dr. Morris reported that while on a migraine controlled

[4]medication, Topamax, she experienced mood swings.

[5]So at that point, Dr. Gordon contacted Dr. Wilkes,

[6]the plaintiff's treating psychiatrist, to coordinate their

[7]treatment in order to try and treat both the mood swings and

[8]the migraines.

[9]And assume that a decision was made to hold the

[10]dosage of Topamax and ultimately to reduce it. And on this

[11]treatment, the reduced Topamax dosage, the mood swings

[12]stopped.

[13]Now, further assume that although there is nothing

[14]in Dr. Gordon's records to indicate that Dr. Morris ever

[15]complained to him about gait disturbance or ataxia, Dr.

[16]Morris testified that she complained of ataxia and mood

[17]swings on one occasion.

[18]But assume that once the Topamax dosage was held  
[19]and then reduced, the ataxia and mood swings went away. **[\*119]**

[20]Now assume from the middle to the end of 2004, Dr.

[21]Morris was experiencing very specific types of stress.

[22]By the way, Doctor, did we also provide you with a

[23]copy of the office records of Dr. Morris's treating

[24]psychiatrist, Dr. Wilkes?

[25]A Yes, you did.

1155

[1]Q Assume she was under stress with her residency

[2]program; that she was experiencing sleep deprivation from

[3]having to be on call to the ER for 24 hours at a time.

[4]Assume that she had been in an auto accident where

[5]she rear-ended another car and didn't report it to the other

[6]driver or the police, and she has told the Court and jury she

[7]felt very guilty about that.

[8]She was also having a tremendous amount of

[9]difficulty trying to establish a relationship with a man that

[10]would last.

[11]And she was under stress, as she has told us and

[12]the records reflect, in anticipating the medical boards that

[13]she had to take.

[14]And she was under further stress in February

[15]of 2005 when she learned she actually failed those boards.

[16]And she shared these stressors with both Dr. Gordon

[17]and Dr. Wilkes, her psychiatrist, **[\*120]** as her migraine headache

[18]increased in frequency.

[19]And assume further that although the migraines were

[20]coming with greater frequency, Dr. Gordon documented that

[21]they were the same types of pain that Dr. Morris had always

[22]suffered from.

[23]You recall seeing that entry in Dr. Gordon's

[24]records?

[25]A Yes, I do.

1156

[1]Q And assume that while she was under Dr. Gordon's

[2]care, Dr. Morris was also under the care of this board

[3]certified psychiatrist, Dr. Wilkes.

[4]And assume that at various times, in 77 visits

[5]between 2002 to 2005, Dr. Morris would complain to Dr. Wilkes

[6]about her migraines.

[7]And assume at no point did Dr. Wilkes ever order

[8]any sort of imaging study of Dr. Morris' brain.

[9]Assume that in September of 2004, Dr. Morris went

[10]to her internist, a Dr. Marcus, for treatment of a cold.

[11]And assume that although during the course of that

[12]visit Dr. Morris told Dr. Marcus that she was concerned she

[13]had a brain tumor, Dr. Marcus performed no neurological

[14]evaluation and ordered no imaging studies of her brain.

[15]By the way, did we send you a copy of Dr. Marcus'

[16] **[\*121]** records as well?

[17]A Yes, you did.

[18]Q Assume that on March 22, 2005, in an effort to get

[19]better relief from her migraines, Dr. Morris returned to her

[20]pain management specialist, Dr. Dowling.

[21]At the time of that visit, Dr. Dowling performed a

[22]complete neurological evaluation on Dr. Morris and found that

[23]the neurological examination was completely normal.

[24]He took a history of migraine headaches, which is

[25]essentially the same history she had given the other doctors

1157

[1]she had seen for treatment of this condition over the years.  
[2]Assume that after the normal neurological  
[3]examination, Dr. Dowling performed manipulative therapy which  
[4]was designed to try and give Dr. Morris migraine relief, and  
[5]at the end of that visit Dr. Dowling gave Dr. Morris a copy  
[6]of an article which he had written.  
[7]He recommended that she change the pillow she slept  
[8]on and scheduled her for another treatment one week later.  
[9]He did not order any imaging studies of her brain.  
[10]And assume on March 25, 2005, Dr. Morris saw Dr.  
[11]Samton, a neurologist at New York Cornell.  
[12]Dr. Morris gave her essentially **[\*122]** the same history of  
[13]migraines she gave all of her other doctors except she told  
[14]Dr. Samton that she had no relief from migraines at any time  
[15]over 11 years. And in this courtroom before this Court and  
[16]jury indicated that that was not entirely accurate, as she  
[17]had believed been relieved at different times from her  
[18]migraines.  
[19]Assume that Dr. Samton performed a full  
[20]neurological evaluation of Dr. Morris, which was completely  
[21]normal.  
[22]And assume at the time of that visit, Dr. Samton  
[23]diagnosed the plaintiff as suffering from migraine headache  
[24]and prescribed all new antimigraine medications for the  
[25]plaintiff.

1158

[1]And assume that she told Dr. Morris to stop taking  
[2]over-the-counter medications. And she ordered an MRI.  
[3]By the way, Doctor, is that MRI ultimately the  
[4]films that you've had an opportunity to review?

[5]A Among others, yes.

[6]Q After ordering the MRI, Dr. Samton gave Dr. Morris

[7]an appointment for 2 weeks later.

[8]And assume that on March 28, 2005, the MRI was done

[9]showing what you have now had a chance to see what it shows.

[10]And, Doctor, by the way, [\*123] we have marked those into

[11]evidence. Do you feel, sir, it would be helpful to the Court

[12]and jury and your understanding of some of the things you

[13]will talk about today to actually see those MRI films?

[14]A I think it would be a good starting point, yes.

[15](The following is transcribed by Angela Spinelli.)

[16](Continued on next page.)

[17]\*\*\*

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1159

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q Okay.

[4]THE COURT: Let me indicate to the members of the

[5]jury that the parties have stipulated and agreed that

[6]Defendant's Exhibit B and Defendant's Exhibit C are in

[7]evidence, they are the MRI films.

[8]MR. CITRIN: Okay, thank you, Judge.

[9]Q Now, I'm going to ask you. Doctor, to assume a  
[10]couple of other things, and then I'll shut up, okay.  
[11]I want you to assume that from the records of  
[12]Dr. Golfinos, we have heard that in a letter that Dr.  
[13]Golfinos wrote to a Dr. Mogliner, he says that Lauren Morris  
[14]is a 31-year old right handed woman who came to see me  
[15]because of complaints of headache on the right side of her  
[16]head following resection of [\*124] an acoustic neuroma.  
[17]She worked as Long Island Jewish as a  
[18]psychiatry resident. She went to medical school at the New  
[19]York College of Osteopathic Medicine. She had life long  
[20]headaches beginning in childhood, migraines as well,  
[21]headaches in the past are always quite severe, however,  
[22]always affected the right side of her head.  
[23]Now, do you -- are you familiar with that --  
[24]A Yes.

[25]Q -- portion of that record?  
1160

[1]I want you to assume further that Dr. Golfinos  
[2]in the impression section says, quote:  
[3]"I think that Lauren Morris has a new headache  
[4]and pain syndrome following successful suboccipital resection  
[5]of a large left-sided acoustic neuroma with facial nerve  
[6]preservation.  
[7]"What is unusual in this case is that her  
[8]right-sided headaches have completely gone, in a sense they  
[9]are cured, however, they have been replaced by left-sided  
[10]pain syndrome.  
[11]"I accept this to be occipital neuralgia, it  
[12]could be related to trauma or damage to the occipital nerve,

[13]it's hard to explain how she felt it immediately

[14]postoperative, generally one would expect formation [\*125] of a

[15]neuroma on left -- on left occipital neuralgia, following

[16]surgery.

[17]"After reviewing current MRI scans, I do not

[18]see any other indications or anything else wrong."

[19]Have you seen that letter, by the way, Doctor?

[20]A Yes, I have.

[21]Q Going back to the latter of part or the earlier

[22]part of Dr. Golfinos' records, assume that he says she has

[23]never had pain on the left side of her. And you are familiar

[24]with Dr. Golfinos' having taken that history?

[25]A Yes.

1161

[1]Q All right. Now, re you also familiar with the

[2]records of Dr. Jamieson?

[3]A Yes.

[4]Q Okay. And are you familiar with this entry in her

[5]records, quote:

[6]"Lauren Morris is a 32-year old female comma

[7]headaches due to left acoustic and now neuralgic post-op

[8]pain, her examination is remarkable for deafness."

[9]You remember reading that?

[10]A Yes, I do.

[11]Q Doctor, do you also remember reading from Dr.

[12]Jamieson's record, quote:

[13]"Now has bilateral periorbital headache

[14]triggered by stress and fatigue."

[15]And I want you to assume further that after the

[16]surgery, in addition [\*126] to having bilateral headaches -- by the

[17]way, what are bilateral headaches?

[18]A It means on both sides of the cranium, both sides

[19]of the head.

[20]Q Assume even after the surgery and after the

[21]removal of the acoustic neuroma Dr. Morris was having

[22]headaches on both sides of her head and was still being

[23]treated with a drug called Maxalt; are you familiar with that

[24]drug?

[25]A Yes.

1162

[1]Q What type of drug is that?

[2]A It is used for treatment of migraine headaches.

[3]Q Doctor, you're familiar with the fact --

[4]withdrawn.

[5]From what you reviewed, from all the records

[6]you reviewed, did Dr. Morris continue to receive --

[7]THE WITNESS: Oh, I'm very sorry, your Honor, I

[8]really thought I didn't do that.

[9]MR. CITRIN: Reminds me to turn mine off.

[10]THE WITNESS: I don't know how to do it. I really

[11]thought it was on silent.

[12]It's off. I really apologize, your Honor.

[13]THE COURT: Okay.

[14]Q Okay?

[15]A Yes.

[16]Q All right. Doctor, after the surgery of April 27,

[17]2005, and up to and including the time Dr. Morris was being

[18]seen by Dr. Golfinos **[\*127]** and Dr. Jamieson, did she continue to

[19]require the use of antimigraine medication?

[20]A The records I reviewed indicated that she did,

[21]yes.

[22]Q Okay. Now, and this is just briefly on this first

[23]question, Doctor, assuming all of the facts as I've asked you

[24]to assume them to be, assuming the facts that you know from

[25]the records that you've reviewed, do you have an opinion with  
1163

[1]a reasonable degree of medical certainty from a neurosurgical

[2]standpoint as to whether or not it represented reasonable

[3]medical judgment on the part of Dr. Gordon not to order an

[4]MRI while he was caring for Dr. Morris?

[5]A I do have an opinion.

[6]Q And what is it, sir?

[7]A That was an appropriate judgment.

[8]Q An appropriate judgment?

[9]A It was appropriate not to order an MRI scan based

[10]on the information available.

[11]Q Can you explain to the Court and jury briefly on

[12]this point why?

[13]A The presence of migraine headaches in a patient

[14]with a normal neurological examination does not require that

[15]any kind of imaging study of the brain, be it MRI or anything

[16]else be done. It is not the **[\*128]** standard of care to have that

[17]done in such a patient.

[18]Q Let's talk about the subject of acoustic neuromas

[19]or schwannomas. First of all, do you have an opinion with a

[20]reasonable degree of medical probability as to the normal

[21]growth rate or pattern of these particular types of tumors?

[22]A I do.

[23]Q What is it and explain why?

[24]A The acoustic neuroma or schwannoma is historically

[25]very, very slow growing tumors. Over years it may not grow  
1164

[1]at all. Over years it may grow at an infinitesimal rate.

[2]It may grow on the order of 1 millimeter a

[3]year. It is known to be extremely slow growing -- found in

[4]multiple reviews of patients in my own 25 years, with totally

[5]static acoustic neuromas.

[6]Q Have there been patients in your experience,

[7]Doctor, you have followed who have had acoustic neuromas that

[8]you haven't operated on?

[9]A Yes, many times.

[10]Q Now, Doctor, I want you to assume there's been

[11]testimony in this courtroom by Dr. Shields that acoustic

[12]neuromas grow more rapidly in women; did you read that?

[13]A Yes, I did.

[14]Q Well, do you have an opinion with **[\*129]** a reasonable

[15]degree of medical probability as to whether or not that

[16]particular piece of information is accurate?

[17]A I do have an opinion.

[18]Q And what it is?

[19]A My opinion is it is not accurate.

[20]Q Why is that? Explain that?

[21]A In my knowledge of the literature having been

[22]involved with patients for 36 years really since starting my

[23]residency, I've never been exposed to any literature that

[24]indicates it's more rapidly growing in women. I've never

[25]seen any study that showed that. So I believe that's not a

1165

[1]true statement.

[2]Q Now, you've told us that these tumors sometimes

[3]don't grow; is that correct?

[4]A That's correct.

[5]Q And sometimes they grow slowly?

[6]A That's correct.

[7]Q Do they sometimes grow rapidly?

[8]A Rarely they can, yes.

[9]Q And is there with reasonable medical probability

[10]any rule of thumb that you doctors use to determine

[11]approximately how quickly if an acoustic neuroma is growing

[12]it is expected to grow each year?

[13]A I think I mentioned the number, around

[14]1 millimeter a year. Some people think perhaps up to 1.5,

[15] **[\*130]** but generally accepted studies following this is around

[16]1 millimeter a year, if at all.

[17]Q Now, Doctor, do you have an opinion with a

[18]reasonable degree of medical probability as to whether or not

[19]from everything you learned this acoustic neuroma was present

[20]in Dr. Morris long before she became a patient of Dr.

[21]Gordon's ?

[22]A I do have an opinion.

[23]Q What is your?

[24]A That it was present.

[25]Q Without having anyone prior to Dr. Gordon having

1166

[1]ordered an imaging study, is there any way one can estimate

[2]how large the acoustic neuroma was in terms of its actual

[3]dimensions at the time that Dr. Morris first saw Dr. Gordon?

[4]A It is essentially impossible.

[5]Q Okay. And so in order to try and make that

[6]judgment, how in this case did you do that?

[7]A Well, I used several factors. Number 1, I

[8]mentioned it may be exactly the same, so I could see a scan  
[9]in 2003 that looked the same, it may be 1, 1 and a half or  
[10]2 millimeters smaller, which in essence would not be a  
[11]significant difference whatsoever.  
[12]The one piece of information that we can  
[13]extrapolate from the [\*131] MRI scan done was there was no  
[14]surrounding edema, evidence of swelling. That would be the  
[15]only way we could say this was not growing rapidly.  
[16]If the size of a growth changes rapidly, it  
[17]will cause reaction around itself. And that is manifested on  
[18]the surface of the brain by something called brain edema,  
[19]which would be shown on an MRI scan which was not at all  
[20]present on the MRI scan.

[21]MR. CITRIN: Your Honor, with the Court's  
[22]permission, I think at this point it would be helpful  
[23]for the doctor to come down from the witness stand, set  
[24]up the view box and look at a couple of these MRI films.

[25]THE COURT: Okay.

1167

[1]Q Previously marked Defendant's Exhibit B and C, if  
[2]you would go through the films with our jury and the Court  
[3]and tell us what there is to be seen.

[4]MR. CITRIN: Judge, any way everybody can kind of  
[5]gather around a little to see what there is to be seen?

[6]THE COURT: Can all the jurors see the shadow box  
[7]from where you're seated?

[8]A This is an MRI scan of Lauren Morris performed on  
[9]the date we discussed -- not sure if you heard about MRI  
[10]scans.

[11] [\*132] Q Tell us about that, we haven't?

[12]A Basically, this particular view gives us  
[13]cross-sections.  
[14]THE COURT: We'll move some jurors to the second  
[15]row to see better.  
[16]A So we're basically going to look at slices or  
[17]cross-sections. If you visualize the section going through  
[18]the head and then moving up, I think 5 millimeters or  
[19]7 millimeters basically, we're going to have a stack of  
[20]slices, a little like chopping off, I guess, bologna and  
[21]putting it back together.  
[22]So we're going to see images that are literally  
[23]just a cross-section through. That's one of the good things  
[24]that the MRI scan does. When we look at these images, it's  
[25]as if I am looking at you.

1168

[1]So, I'm going to get confused now. This is the  
[2]right and this is the left. So I'm not confused when --  
[3]there is a little marker that says left there. We're  
[4]starting down. These are the teeth. And as we're coming up  
[5]we're going to get closer and closer to a section that will  
[6]go right through the ear and ear canal.  
[7]That's our area of interest because we're  
[8]looking for growth on the 8th cranial nerve. If you look  
[9] [\*133] closely here you can see a density that is a little darker  
[10]than the rest of the brain. And it is not in the brain, it  
[11]is on the surface of the brain, and that is in the region of  
[12]the 8th cranial nerve or the region where an acoustic neuroma  
[13]would sit.  
[14]There's another term cerebellopontine angle.  
[15]This is the cerebellum. That is the component that's another

[16]way of knowing where it is. It is on the left side.

[17]Now we'll go to exhibit -- cranial nerve equals

[18]8 nerves -- C. I was looking at Exhibit B. And you'll have

[19]a little easier time seeing it now because now the patient

[20]has been given contrast. There is a substance called

[21]gadolinium that makes certain types of tissue light up more.

[22]You can see on this study in the area in the

[23]cerebellopontine angle on the surface of the brain not within

[24]the brain that this thing is lit up, and you can see it's

[25]very bright, and it is relatively homogenous, meaning it

1169

[1]looks all the same.

[2]This again is the left cerebellopontine angle

[3]mass that we described as an acoustic neuroma. The finding

[4]on MRI scan is almost diagnostic. By that I mean there **[\*134]** are

[5]possibilities of other tumors, of tumors. But by far the

[6]leading candidate would be an acoustic neuroma.

[7]Q Now, Doctor, you mentioned earlier before we put

[8]the MRIs up on the view box that one of the things that told

[9]you in your review that this was a slow growing tumor was a

[10]lack of edema or swelling; is that right?

[11]A That is correct.

[12]Q Could you show the Court and jury please, what you

[13]would be looking for and where in particular you'd be looking

[14]for it?

[15]A It is easier to see without the contrast so let me

[16]put Exhibit B up again. So we'll go back to the interface,

[17]the area where the tumor is touching the brain. And if there

[18]were edema, this area would look very white.

[19]It would look much whiter. These areas of

[20]edema are normal, but there is specifically no edema in the  
[21]brainstem where we anticipate seeing it. Again, that lack of  
[22]edema tells me it is not a rapidly growing tumor.

[23]Q Anything else you need to point out before we move  
[24]on?

[25]A I think that's basically what we need to see.  
1170

[1]Q Okay. Thank you. Can you resume the witness  
[2]stand. All [\*135] right, now, Doctor, 8th cranial nerve controls  
[3]what?

[4]A Primarily hearing and balance.

[5]Q And, Doctor, you've told us earlier how the  
[6]acoustic neuromas grow out of a cell from the 8th cranial  
[7]nerve; is that correct?

[8]A Yes.

[9]Q Doctor, what, if anything, does the way these  
[10]tumors grow, what does it mean in terms of a surgeon's  
[11]ability to remove them without causing damage to the 8th  
[12]cranial nerve?

[13]A The tumor is very intimately involved with the 8th  
[14]cranial nerve, and it is basically part of the nerve. As the  
[15]tumor grows, it tends to envelope the nerve, and it's  
[16]surgically impossible to distinguish tumor from nerve.

[17]As I say, it is -- just wraps around it in  
[18]contradistinction to one of the other nerves, the nerves  
[19]which always lies on top of it or use the term draped over  
[20]it. So this tumor and nerve basically become one. As the  
[21]tumor grows.

[22]Q Doctor, in terms of the removal of these tumors,  
[23]broadly, what are the 2 general areas of treatment options

[24]open to the patient, in general?

[25]A Well, I'm going to make it 3. One is to observe  
1171

[1]the tumor [**\*136**] and not do anything. The second is to have

[2]microsurgery for removal of the tumor. And third is treat it

[3]with radiosurgery.

[4]Q Tell the Court and jury in a tumor that is timely

[5]diagnosed and appropriately treated, are there risks to the

[6]patient in the performance of stereotactic radiosurgery?

[7]A Yes.

[8]Q Explain to the jury what those are?

[9]A Let's talk specifically about what we're talking

[10]about, the acoustic neuroma. The goal of the radiation is to

[11]arrest the growth of the tumor. It is not designed to take

[12]the tumor out, it is not designed to make the tumor

[13]disappear.

[14]The goal, as I stated, is to stop it from

[15]growing any further. It may shrink, it may continue to grow.

[16]Radiation may not control the growth of the tumor.

[17]In addition, you're exposing the brain to

[18]radiation, so the -- out of necessity because the location of

[19]the tumor, the 8th cranial nerve is going to receive the same

[20]radiation that the tumor does, moreover, the surrounding

[21]brain unavoidably will be exposed to radiation.

[22]There are several potential problems from that.

[23]We'll talk about. Damage [**\*137**] to the hearing. Which occurs in a

[24]very measurable number of patients. But aside from the

[25]tumor, there are 2 entities called radiation necrosis, where  
1172

[1]some of the surrounding brain can be destroyed. Fairly

[2]shortly after or a year later or 2 years later. Or even

[3]longer than that.

[4]There's also the risk although very unusual of

[5]inducing malignancy from the radiation itself. So that the

[6]stereotactic radiosurgery is not totally without risk both in

[7]terms of tumor persistence and growth as well as other types

[8]of damage.

[9](Whereupon, Official Court Reporter Linda Calderon

[10]relieved Official Court Reporter Angela Spinelli.)

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1173

[1]DIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q And, Doctor, in terms of microsurgery, are there

[4]risks to the patient in the performance of that sort of

[5]treatment even with at the time of diagnosis or an early

[6]diagnosis of the tumor?

[7]A Yes, there are.

[8]Q And could you explain to his Honor and the jury

[9]what those risks are?

[10]A Well, you are going through surgery under general

[11] **[\*138]** anesthesia, you are having an opening into the surface of the

[12]brain and to the spinal fluid space.

[13]In performing the surgery, you're near the

[14]structures of the brain stem, you're near several of the

[15]cranial nerves, most specifically the 8th and 7th nerve.

[16]Possibility of damaging those during surgery certainly

[17]exists.

[18]The possibility of developing infection, failure of

[19]wound healing, leakage of spinal fluid, pain postsurgery are

[20]among some of the problems that we tend to deal with in this

[21]type of surgery.

[22]Q And, Doctor, is that true with reasonable medical

[23]probability, are all of those risks of both stereotactic

[24]surgery and open microsurgery, are all of those risks with

[25]reasonable medical probability risks that the patient is

1174

[1]exposed to no matter when the tumor is diagnosed?

[2]A Yes.

[3]Q Now, Doctor, I will read to you something that was

[4]said here last Friday, it's from page 911 of the official

[5]trial transcript, and it pertains to Dr. Morris in this case,

[6]and this is the testimony of Dr. Shields:

[7]"QUESTION: And the two options were, as you

[8]told us Friday, either **[\*139]** microsurgery or stereotactic

[9]radiosurgery; true?

[10]"ANSWER: Yes.

[11]"QUESTION: And those were the two options

[12]that were available throughout the period of time that

[13]the patient was under Dr. Gordon's care; true?

[14]"ANSWER: Yes."

[15]One other quote and then I want to ask you

[16]some questions:

[17]"QUESTION: You would agree with me -- this is

[18]page 913 of the official trial transcript.

[19]"QUESTION: You would agree with me there is a

[20]substantial body of information from doctors who deal

[21]with acoustic neuromas, neurosurgeons or radiologists or

[22]radiation oncologists, there are a substantial number of

[23]those that would say up to 3 centimeters and greater

[24]diameter, an acoustic neuroma can be -- and Dr. Shields

[25]interjects:

1175

[1]"ANSWER: In its greatest diameter.

[2]"QUESTION: In its greatest diameter, an

[3]acoustic neuroma can be radiated; true?

[4]"ANSWER: Yes.

[5]"QUESTION: And we can agree in terms of its

[6]greatest diameter here, this acoustic neuroma was at the

[7]time of diagnosis 3 centimeters, correct?

[8]"ANSWER: Yes."

[9]First, Doctor, did you have **[\*140]** occasion in

[10]preparing for today to actually measure the acoustic

[11]neuroma in this case.

[12]A Yes, I did.

[13]Q And can you tell the Court and jury the results of

[14]your measurements?

[15]A In the precontrast study it appeared to be about  
[16]2.8 or 2.9 centimeters. On the contrast study, which always  
[17]lights it up, it is somewhere around 2.9. So it was right on  
[18]that variation.  
[19]I could not find any diameter in any films that I  
[20]could in any way call greater than 3 centimeters even on the  
[21]contrast study.

[22]Q Do you have an opinion with a reasonable degree of  
[23]medical probability -- first of all, do you agree with what  
[24]Dr. Shields said about stereotactic surgery being available  
[25]to this patient given the fact that the greatest diameter of  
1176

[1]this tumor never exceeded 3 centimeters while under Dr.  
[2]Gordon's care?

[3]A I do have an opinion.

[4]Q And what is that?

[5]A I do agree with that statement.

[6]Q And why is that?

[7]A In my experience, radiation oncologists are very  
[8]willing to treat tumors up to and even a little bit more than  
[9]3 centimeters at this time and throughout **[\*141]** the past, and at  
[10]the time that was diagnosed in Dr. Morris.

[11]Q And, Doctor, do you have an opinion with a  
[12]reasonable degree of medical probability for Dr. Morris in  
[13]this case, as between stereotactic radiosurgery and open  
[14]microsurgery, which would have been the more definitive  
[15]surgery?

[16]A Well, certainly the open microsurgery is more  
[17]definitive because you are actually removing the tumor.

[18]Q And, Doctor, you indicated that you had reviewed

[19]other MRI films over the years after '05; is that correct?

[20]A Yes.

[21]Q And for Dr. Morris?

[22]A Yes.

[23]Q And, Doctor, do you have an opinion with a

[24]reasonable degree of medical probability as to whether or not

[25]on any of those films there is any evidence at all of tumor

1177

[1]regrowth?

[2]A I saw no evidence at all.

[3]Q And that's a good thing for her?

[4]A Yes.

[5]Q Throughout the course of Dr. Gordon's care of this

[6]patient, do you have an opinion with a reasonable degree of

[7]medical probability as to whether or not both stereotactic

[8]surgery and/or open microsurgery were available to the

[9]doctors who ultimately [\*142] were treating her?

[10]A I do have an opinion.

[11]Q And what is that?

[12]A That either was available to the patient throughout

[13]the time that Dr. Gordon was seeing the patient.

[14]Q Doctor, do you have an opinion, from everything you

[15]have read, with reasonable -- with a reasonable degree of

[16]medical probability for Dr. Morris in this case, given her

[17]history, given the findings on the MRI, her outcome would

[18]have been any different had surgery been done at any time

[19]between February 10, 2003, and I will open it up as far as

[20]the date of the surgery, April 25, 2007, do you have an

[21]opinion?

[22]A I do have an opinion.

[23]Q And what is your opinion, sir?

[24]A That there would be no difference in outcome had

[25]surgery been done in 2003 and any time through the date of  
1178

[1]the surgery.

[2]Q Could you explain to his Honor and the jury,

[3]please, why it is you say that?

[4]A We have discussed the issue of tumor growth. And

[5]we have agreed or I have stated that you cannot say that the

[6]tumor was any smaller in 2003 than it was when it was

[7]operated on.

[8]If it was smaller, it was [\*143] minutely smaller, 1 or

[9]2 millimeters or 3 millimeters. And even if the tumor was

[10]2.5, 2.6, 2.7, 2.8 centimeters at the time of surgery, the

[11]surgical approach, the surgical technique, the risk of

[12]surgical complications would have been exactly the same. The

[13]surgery would have been the same, the risk of the facial

[14]nerve would have been the same, the risk to hearing would

[15]have been exactly the same given that spread of tumor sizes,

[16]if there was any difference at all.

[17]Q Let's take it separately one nerve at a time.

[18]Doctor, with reasonable medical probability, why

[19]would the outcome have been the same with regard to the 8th

[20]cranial nerve; can you focus on that?

[21]A The anatomical difference between the distribution

[22]of tumor and nerve in 2005, 4 or 3 and the relationship of

[23]the tumor to the nerve would have been exactly the same. We

[24]mentioned several times the possibility of it being a couple

[25]of millimeters smaller.

1179

[1]Again, through my surgical experience and through

[2]the literature, there is essentially no difference in  
[3]operating on tumors in the spectrum that we might allow if  
[4]there [\*144] was any difference in size.

[5]Q And the same question with reasonable medical  
[6]probability as to the facial nerve, separate --

[7]A Exactly the same statement.

[8]The facial nerve is stretched over a 2.7 centimeter  
[9]tumor, like it's stretched over a 2.9 centimeter tumor, and  
[10]the difference in that size, which is really minute, would  
[11]not change the surgical approach. The likelihood of  
[12]preserving the facial nerve or not preserving the facial  
[13]nerve.

[14]MR. CITRIN: Thank you.

[15]I have no further questions.

[16]THE COURT: Thank you, Mr. Citrin.

[17]Cross-examination, Mr. Moore.

[18]MR. MOORE: Thank you, Judge.

[19]CROSS-EXAMINATION

[20]BY MR. MOORE:

[21]Q Good morning, Doctor.

[22]A Good morning.

[23]MR. MOORE: Good morning, ladies and  
[24]gentlemen.

[25]Q What you just said to this jury is that with  
1180

[1]reasonable medical probability no matter when in the  
[2]25 months that this woman was seeing Dr. Gordon, no matter  
[3]when the tumor would have been discovered and properly  
[4]treated either by radiotherapy or microneurological surgery,  
[5]the outcome would have been the same; you [\*145] have said that

[6]under oath to this jury, correct?

[7]A Yes.

[8]Q When did you, with all your qualifications, and I

[9]don't question them for a moment, and all your education, and

[10]I don't question it for a moment, and all of your schooling,

[11]which I don't question for a moment, and all your

[12]certifications, which I don't question for a moment, when did

[13]you decide to make that statement under oath to this jury and

[14]Court?

[15]A As I reviewed the records available.

[16]Q You, Doctor, mentioned the literature, correct?

[17]A Yes.

[18]Q Peer reviewed articles and recognized textbooks in

[19]particular specialties are the hallmark of that concept, the

[20]literature; correct?

[21]A Yes.

[22]Q The literature -- withdrawn.

[23]Isn't it a fact, sir, that the literature in

[24]neurological surgery and applicable related fields says that

[25]your statement is blatantly false; isn't that true?

1181

[1]A No, sir.

[2]Q I'm going to have a lot of questions about that

[3]last answer, Doctor, but let me for now go to something else.

[4]You said to this jury that you read Dr. Block's

[5]testimony?

[6] [\*146] A Yes.

[7]Q Correct?

[8]A Yes, sir.

[9]Q And you know Dr. Block to be a lovely gentleman,

[10]don't you?

[11]A Yes.

[12]Q A doctor, considerate, but quite old and hard of

[13]hearing, right?

[14]MR. CITRIN: Objection.

[15]MR. MOORE: If he knows.

[16]MR. CITRIN: Quite old and hard of hearing?

[17]THE COURT: I will sustain.

[18]Q Did you know he was 80 years old and has great

[19]difficulty hearing?

[20]MR. CITRIN: What does that have to do with

[21]anything?

[22]MR. MOORE: I'm just asking if he knows.

[23]MR. CITRIN: Objection.

[24]THE COURT: That question I will allow.

[25]A I did not know the doctor's age and I'm -- I  
1182

[1]thought he was around that age, but I'm not aware of his

[2]hearing problem.

[3]Q And you swore under oath you read his testimony

[4]here in this courtroom; is that your testimony to this jury?

[5]Did you swear before this jury that you read his testimony

[6]and did you say that on questioning by Mr. Citrin?

[7]A Yes, I did.

[8]Q From that testimony as to when he graduated from

[9]medical school, you would know that if he wasn't 80, he was

[10]around **[\*147]**

[11]right, Doctor?

[12]A I think I misunderstood your question. I thought

[13]you meant as a personal matter I knew that.

[14]I read his testimony and I could extrapolate that

[15]testimony --

[16]Q That answer is false, but -- because you know I

[17]caught you?

[18]MR. CITRIN: Objection.

[19]THE COURT: Sustained.

[20]I will strike that remark from the record.

[21]MR. MOORE: Thank you, Judge. It was a bit of

[22]a temper.

[23]THE COURT: Mr. Moore, when I'm talking, you

[24]can't talk.

[25]The jury is directed to disregard that

1183

[1]statement.

[2]Q Doctor, the fact is that when I brought that up,

[3]you said you read Dr. Block's testimony, you realized that

[4]you would have been able to tell from that testimony his

[5]approximate age; isn't that true?

[6]A I don't really recall that part of the testimony,

[7]sir.

[8]Q Would you answer my question?

[9]A If I had read it and taken notes, which I didn't,

[10]and was looking for that, I gather I would have been able to

[11]extrapolate it from that.

[12]I don't recall that part of the testimony. **[\*148]** I

[13]wasn't trying to pay attention to that part of the testimony.

[14]MR. MOORE: Can we strike that answer, Judge,

[15]please?

[16]MR. CITRIN: Objection.

[17]MR. MOORE: I move to strike that answer as

[18]not responsive.

[19]MR. CITRIN: I object.

[20]MR. MOORE: The same rule for Dr. Shields,

[21]Judge, can we strike that, please?

[22]THE COURT: I will strike that comment about

[23]the same -- I think he said the same rule as Dr.

[24]Shields.

[25]MR. MOORE: Yes, like striking Dr. Shields,

1184

[1]can we strike that last statement?

[2]THE COURT: I'm striking that comment about

[3]Dr. Shields.

[4]MR. MOORE: Can we strike the answer is my

[5]humble --

[6]THE COURT: That's what we should get back to,

[7]your request that the answer be stricken.

[8]I'll strike the answer.

[9]The jury is directed to disregard the answer

[10]as not being responsive to the particular question.

[11]Q Now, Doctor, can you answer this question possibly,

[12]possibly yes or no? And if you can't, would you tell us?

[13]Even a cursory reading of Dr. Block's testimony

[14]would allow you to tell his approximate age --

[15]MR. [\*149] CITRIN: Objection.

[16]Q true?

[17]MR. CITRIN: I object to the line of

[18]questioning. What does Dr. Block's --

[19]THE COURT: Overruled.

[20]You can answer that question.

[21]A I would say a cursory reading --

[22]Q Is the answer a resounding yes?

[23]A Probably a no.

[24]Q Is the answer a resounding yes to this question?

[25]Even a cursory reading of Dr. Block's testimony  
1185

[1]would allow you to tell that he was hard of hearing?

[2]A I have to say no, sir, because of the way I do a

[3]cursory reading.

[4]Q That statement you just made is false; true?

[5]A No, sir.

[6]Q In any event, I assume -- withdrawn.

[7]You were asked a long assumption question by Mr.

[8]Citrin, correct?

[9]A Yes, sir.

[10]Q I assume he went over it with you prior to you

[11]getting on the witness stand, did he?

[12]A He did not.

[13]Q You wouldn't just say yes or agree with the tenor

[14]of a long assumption question unless you knew all the

[15]assumptions were valid, or would you?

[16]A I would not.

[17]I can't answer that yes or no, but I would be glad

[18]to explain, if I may? I didn't **[\*150]** understand the question which

[19]is why I'm afraid to say yes or no, I might get it backwards.

[20]I would be glad --

[21]Q Are you afraid to say yes or no lest you not tell

[22]the truth, or are you afraid to say yes or no because of the

[23]implication of the yes or no?

[24]Which is it?

[25]MR. CITRIN: Objection to the form of the  
1186

[1]question.

[2]THE COURT: I will sustain.

[3]THE WITNESS: I'm sorry?

[4]THE COURT: Doctor, you don't have to answer

[5]it.

[6]Q Doctor, you said you were afraid to say yes or no,

[7]right?

[8]A Because I'm not sure of the question.

[9]Q Excuse me, did I ask you because?

[10]MR. CITRIN: Objection.

[11]A Okay --

[12]THE COURT: I'm not sure he was even finished

[13]with the question.

[14]THE WITNESS: I apologize.

[15]THE COURT: Doctor, don't begin answering

[16]until the question is completed.

[17]Q You have heard that one before, haven't you, what

[18]the judge just said?

[19]A Yes, I have.

[20]Q And you have -- I will ask very few questions in

[21]this area, but you have a lot of experience in court, right?

[22]A Yes, I do.

[23]Q In any **[\*151]** event, Doctor, you agree that -- and forgive

[24]me -- an opinion --

[25]MR. MOORE: Sorry, Judge.

1187

[1]Q -- an opinion is only as good as the assumptions

[2]upon which that opinion or opinions is or are based; would

[3]you give me a yes to that, please?

[4]A Yes.

[5]Q Thank you.

[6]And you realize that Dr. Block gave a no to that?

[7]MR. CITRIN: Objection.

[8]MR. MOORE: Judge --

[9]THE COURT: I'm going to sustain.

[10]MR. MOORE: Respectfully except and say it's

[11]in the record.

[12]MR. CITRIN: Objection.

[13]MR. MOORE: But I will move on. Judge, I will

[14]move on.

[15]MR. CITRIN: Excuse me, I move to strike Mr.

[16]Moore's comment.

[17]THE COURT: I will strike the comment.

[18]MR. MOORE: Fine, fine.

[19]Q Did you see that I asked Dr. Block that question?

[20]Not -- I don't pretend that I asked it in the very

[21]same words -- but in substance?

[22]A I don't recall seeing it, which is not to say it's

[23]not there, sir, I don't recall it.

[24]Q In any event, sir, are you aware that the

[25]assumptions by Mr. Citrin left out cardinal information that

1188

[1]any objective **[\*152]** person would need to know before they gave an

[2]objective opinion; are you aware of that?

[3]MR. CITRIN: Objection to the form of the

[4]question.

[5]THE COURT: Overruled.

[6]You can answer.

[7]A I'm aware that Mr. Citrin did not --

[8]Q Are you aware of that, Doctor?

[9]You want me to repeat the question?

[10]A I'm aware he didn't read the entire record into

[11]that question. And I'm sure there are multiple pieces of

[12]information that were not included.

[13]Q Did I ask you that, Doctor?

[14]A I'm not sure, sir.

[15]Q So why did you answer?

[16]A I thought that was responsive to your question.

[17]Q Let me ask you again, sir:

[18]Were you aware in that long assumption question

[19]that Mr. Citrin, on behalf of Long Island Jewish Medical

[20]Center and its director of neurology, the defendants in this

[21]case, left out very important information that would be

[22]necessary for an objective answer on the subject?

[23]Are you aware of that? That's all I'm asking you.

[24]MR. CITRIN: Judge, I object to Mr. Moore's

[25]characterization, very important.

1189

[1]THE COURT: I'll sustain.

[2] [\*153] MR. MOORE: No, I -- is that why you are

[3]sustaining it, Judge?

[4]THE COURT: Sustained.

[5]Q Doctor, would you say objectivity requires

[6]knowledge of all important and pertinent information?

[7]A I would agree with that, yes.

[8]Q Therefore, if you give an opinion based on

[9]insufficient information, that opinion may not be correct;

[10]true?

[11]A As a generalization, it may or not be true.

[12]Q Well, Doctor, it's true unless there is an amazing

[13]coincidence as follows:

[14]Without the requisite information you made the

[15]right decision anyway, otherwise it's true; correct?

[16]A I did not understand that question, sir.

[17]Q Without appropriate information, a correct opinion

[18]could be given but that would be just a coincidence, the

[19]person happened to give the right opinion but didn't have the

[20]requisite information; true?

[21]A True.

[22]Q But, Doctor, the time-honored concept is that we

[23]don't rely on coincidences, correct?

[24]A I guess not, correct.

[25]Q So, therefore, Doctor, it's true, isn't it, that if

1190

[1]you don't have the requisite information, barring

[2]coincidence, **[\*154]** you are not going to give the correct opinion.

[3]That follows, Doctor, literally as night follows day; true?

[4]A I think you have to be more specific about what

[5]you're talking about before I can answer that question, sir.

[6]Q Doctor, that was a general question and as a

[7]general principle it is, Doctor, universally true; correct?

[8]A As a generalization, yes.

[9]Q Do you realize, Doctor, you have just contradicted

[10]yourself?

[11]MR. CITRIN: Objection.

[12]THE COURT: I'll sustain.

[13]Q In any event, sir, Dr. Block -- withdrawn.

[14]Did anybody ask you before you got on the witness

[15]stand whether a left acoustic neuroma could cause right-sided

[16]head pain in a patient?

[17]A Yes.

[18]Q And I assume you had an answer?

[19]A Yes.

[20]Q Was it yes, no or maybe?

[21]A No, and incredibly rare, if at all.

[22]Q No, incredibly rare, if at all.

[23]Doctor, is it no, or incredibly rare? Those are

[24]absolutely different; yes or no?

[25]A I would say no in my own experience and in the  
1191

[1]literature that I am aware of.

[2]Q We are going to get to the literature, Doctor, [\*155] we

[3]are going to get to the literature.

[4]Your answer is no; is that correct?

[5]A Correct.

[6]Q Well, that was the answer -- does this refresh your  
[7]recollection?

[8]That was the answer that Dr. Block gave when Mr.

[9]Citrin questioned him; correct?

[10]A I believe that is true, yes.

[11]Q And he gave the opposite answer when I questioned

[12]him; isn't that also true?

[13]MR. CITRIN: Objection.

[14]MR. MOORE: If he knows?

[15]THE COURT: I'll overrule.

[16]A I don't recall that testimony, sir. But I would be

[17]glad to show -- I wouldn't argue with it if it is there. I

[18]would be glad to look at it, I just don't recall.

[19]Q Doctor, would you do me a favor --

[20]MR. CITRIN: Objection.

[21]THE COURT: Sustained.

[22]Q You are aware surely, and just to highlight it in

[23]your mind, just before I went to Dr. Jamieson's records, I --

[24]in fact, let's get it.

[25](Whereupon, there was a pause in the proceedings.)

1192

[1]MR. MOORE: Give me a moment, your Honor, I'm

[2]sorry.

[3]THE COURT: Okay.

[4](Whereupon, there was a pause in the

[5]proceedings.)

[6] [\*156] Q "QUESTION: --

[7]MR. CITRIN: Page and line?

[8]MR. MOORE: I'm just about to give it.

[9]Q Question on page 1052, line 15. Me of Dr. Block:

[10]"QUESTION: If, if you said that right-sided

[11]headache could not be caused by a left acoustic neuroma,

[12]that would not be true.

[13]Can you answer that question as posed; yes or

[14]no?

[15]"ANSWER: A right-sided headache can be caused

[16]by an acoustic neuroma, not a right-sided migraine

[17]headache, sir."

[18]Are you saying that you, giving the opinion

[19]that you a little while ago gave on this subject to this

[20]jury, did not know that sworn testimony by Dr. Block on

[21]the exact same issue; Doctor, yes, no or maybe?

[22]Is that your testimony?

[23]MR. CITRIN: Objection.

[24]What's the question?

[25]Objection.

1193

[1]THE COURT: Overruled.

[2]MR. MOORE: What?

[3]THE COURT: I overruled the objection.

[4]MR. MOORE: Sorry, sorry.

[5]A No, I did not recall that part of his testimony.

[6]Q A direct contradiction to what you have said, and

[7]you didn't notice it; is that correct?

[8]MR. CITRIN: Objection.

[9]MR. MOORE: [\*157] Withdrawn.

[10](The following is transcribed by Angela

[11]Spinelli.)

[12](Continued on next page.)

[13]\*\*\*

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1194

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q Now, that you know that Dr. Block gave such

[4]testimony, I ask you, sir, would you please tell these jurors

[5]and this judge if you agree with that testimony or disagree

[6]with it? Agree or disagree, please pick one?

[7]A The specific statement --

[8]Q Did you hear my question?

[9]A That's why I'm asking you, sir, the specific

[10]statement that you want me to agree or disagree with is what

[11]Dr. Block said? I want to be certain I'm answering the right

[12]question, sir.

[13]Q What Dr. Block said from what I read to you just

[14]now, do you agree or disagree, please pick one?

[15]A I believe I can agree with that statement.

[16]Q Do you know -- withdrawn.

[17]You are now agreeing, before this jury and

[18]Judge, that a left-sided acoustic neuroma can cause

[19]right-sided head pain in a patient, true?

[20]A If it's of such a size that would cause that, it's

[21]possible, yes. But the pathology [**\*158**] that would cause it is not

[22]the acoustic --

[23]Q Can you try and answer my questions?

[24]A I will try to, sir, and I am trying, sir, as hard

[25]as I can.

1195

[1]Q You are?

[2]A Yes, I am.

[3]Q Can you answer this question yes or no:

[4]As you sit here now, this very moment, you

[5]agree that a left-sided acoustic neuroma can cause

[6]right-sided head pain in a patient?

[7]A I can't really answer that yes or no.

[8]Q Do you realize that you have answered yes or no

[9]earlier?

[10]MR. CITRIN: Objection.

[11]THE COURT: I'll sustain the objection.

[12]Q Do you realize that if not in words you have

[13]answered affirmatively that question when you agreed with

[14]what I read from Dr. Block; are you aware of that?

[15]MR. CITRIN: Objection.

[16]Q Just asking if you're aware or not aware?

[17]MR. CITRIN: Aware of what? Objection.

[18]MR. MOORE: Is this proper?

[19]THE COURT: Given what the question was, I will

[20]overrule.

[21]A I am aware of that.

[22]Q Thank you, Doctor, that's the answer.

[23]A Thank you, sir.

[24]Q You're welcome.

[25]Now, sir, did you read [**\*159**] my cross-examination,  
1196

[1]and you know it's called cross-examination of what I did with

[2]Dr. Block, right?

[3]A In a cursory fashion, yes.

[4]Q From your experience in court, you know that when

[5]Dr. Block came in for the defense, and then I got up to

[6]question him, you knew absolutely that that was

[7]cross-examination, didn't you?

[8]MR. CITRIN: Objection.

[9]THE COURT: Sustained.

[10]MR. MOORE: I don't -- I'm at a loss, Judge.

[11]THE COURT: There's nothing to be at a loss at,

[12]that's not a specific question that he answered before.

[13]Q Based on your -- withdrawn.

[14]In any event, did you know that on

[15]cross-examination of Dr. Block I asked him about Dr.

[16]Golfinos' records?

[17]A I believe you did, yes.

[18]Q Doctor, even a cursory reading would so indicate,

[19]true?

[20]MR. CITRIN: Objection. Objection.

[21]THE COURT: I'll sustain.

[22]Q You said you believe I did, I'm not picky, but you

[23]know I did, correct?

[24]MR. CITRIN: Judge, I object.

[25]MR. MOORE: Withdrawn.

1197

[1]Q Did you read that testimony, yes or no?

[2]A I read Dr. Block's testimony. **[\*160]**

[3]Q No, no, no, Doctor --

[4]MR. CITRIN: -- Judge, can I ask the Court to

[5]please prevent him from continuing to do what he's doing

[6]before this Court and this jury.

[7]THE COURT: I'm going to preside over a trial

[8]where a question is asked, if there's an objection, an

[9]objection will be interposed, and I will rule on it, and

[10]the witness may or may not answer the question. That's

[11]how the trial hopefully will be conducted from this

[12]point on.

[13]MR. MOORE: May I, Judge?

[14]THE COURT: Yes.

[15]MR. MOORE: Thank you.

[16]Q Doctor, I asked you quite a while ago, and Mr.

[17]Citrin asked you if you read Dr. Block's testimony. Correct?

[18]A Yes.

[19]Q But just a while ago I asked you specifically did

[20]you read it in reference to Dr. Golfinos and my questioning

[21]on Dr. Golfinos, that's what I asked you, did you read that

[22]specifically, yes or no?

[23]A I believe I did, but I don't have a specific

[24]recollection of exactly what it said and would require a

[25]chance to look at it if you're going to ask me specific

1198

[1]questions because I don't have an encyclopedic memory of all

[2]these **[\*161]** things.

[3]MR. MOORE: Move to strike as non-responsive.

[4]THE COURT: I will strike the last part

[5]encyclopedic memory.

[6]MR. MOORE: I asked for a yes or no, Judge.

[7]THE COURT: Striking the last portion of the

[8]answer.

[9]MR. MOORE: I'll move on, Judge, all right.

[10]Q Doctor, if you were objective in this case and if

[11]you had -- withdrawn.

[12]Is it your sworn testimony that before you gave

[13]your testimony here today, you had read Dr. Golfinos' 2 page

[14]report?

[15]A Yes.

[16]Q Doctor, if you had done that, and if you were

[17]objective in this case, you would know that Dr. Golfinos<sup>1</sup>

[18]report contradicted a basic tenant of the defense in this

[19]case, true?

[20]MR. CITRIN: Judge, I object.

[21]MR. MOORE: What?

[22]MR. CITRIN: I'm going to object.

[23]THE COURT: You don't have to state the basis.

[24]I'm going to sustain a particular portion of that

[25]question.

1199

[1]Q Doctor, do you remember after I sat down Mr.

[2]Citrin got up and questioned Dr. Block again. You remember

[3]that?

[4]A I do recall there was, I think, it's called

[5]redirect, yes.

[6]Q **[\*162]** And completely misstated the point being made

[7]relative to Dr. Golfinos when I was questioning Dr. Block?

[8]MR. CITRIN: Judge.

[9]MR. MOORE: Let me finish.

[10]Q Did you notice that in reading the testimony?

[11]MR. CITRIN: Judge, I object, and I have an

[12]application to make outside of the presence of the jury.

[13]THE COURT: Ladies and gentlemen, we have to take

[14]care of something outside of your presence. If you

[15]could go back in the jury room.

[16]We'll see you back here shortly.

[17]THE OFFICER: All rise, jury exiting.

[18](Whereupon, the jury exited the courtroom.)

[19]THE COURT: Everybody can be seated. Doctor. If

[20]you need to use the facilities, you may do so.

[21]THE WITNESS: Should I remain outside.

[22]MR. MOORE: I don't care whether he remains or not

[23]to be quite frank.

[24]THE COURT: Why don't you stay outside. Everybody

[25]can be seated.

1200

[1](Whereupon, the witness exits the courtroom.)

[2]THE COURT: Mr. Citrin.

[3]MR. CITRIN: I move for a mistrial. Mr. Moore has

[4]continued to do what you absolutely cannot do which is

[5]to interject his own view of the **[\*163]** objectivity of the

[6]witness and his ad hominum personal attacks on my

[7]misrepresentations now make it impossible for my client

[8]in my view to get a fair trial before this jury.

[9]He's done this in my view intentionally because he

[10]doesn't like the direction in which the trial is going,

[11]and what he's doing is even a lawyer without his

[12]experience would know he cannot do, he cannot continue

[13]to lace his questions with his own view that this

[14]witness is not being objective.

[15]He continues to make statements about my

[16]misrepresentations and my dishonesty and my

[17]misconstructions. And you can't -- that's well beyond

[18]the comment on the evidence. It's his own personal view

[19]of the integrity of the witness and the other attorney,

[20]and for those reasons I don't believe my client can get

[21]a fair trial before this jury.

[22]MR. MOORE: I am about to prove --

[23]THE COURT: Hold it. I'm speaking now.

[24]MR. MOORE: Sorry, Judge.

[25]THE COURT: I speak.

1201

[1]MR. MOORE: Ask I reply.

[2]THE COURT: I control this trial, and now I'm

[3]going to speak whether you like it or not, I am going to

[4]speak. **[\*164]**

[5]My recollection is that last question that had

[6]that tenor to it, I sustained the objection. If there

[7]were other questions that had that tenor to it, I

[8]believe I sustained objections.

[9]This last, I believe it was a question, yes, it

[10]was a question, that had that indication I forget the

[11]exact word that you were untruthful or --

[12]MR. MOORE: No, no, I didn't say that.

[13]THE COURT: I don't remember the exact words.

[14]MR. MOORE: Misrepresented -- I'll refresh your

[15]recollection, if I may.

[16]THE COURT: He's got the transcript right in front

[17]of him.

[18]MR. CITRIN: Yes.

[19]"QUESTION: Doctor do you remember after I sat

[20]down Mr. Citrin got up and questioned Dr. Block again,

[21]remember that?

[22]"ANSWER: I do recall, I think it's called

[23]redirect, yes.

[24]"QUESTION: And completely misstated the point."

[25]MR. MOORE: Yeah.

1202

[1]MR. CITRIN: Yeah.

[2]MR. MOORE: I'm going to prove that, Judge, on

[3]reading the transcript.

[4]MR. CITRIN: What?

[5]THE COURT: How is that a proper basis of a

[6]question which is -- essentially impugns his integrity.

[7] **[\*165]** MR. MOORE: Judge, has nothing to do with his  
[8]integrity. It has to do with the defense of this case.  
[9]I say as an officer of this court in reading what  
[10]I'm about to read from the transcripts this witness if  
[11]he knew Dr. Golfinos' testimony which he said he did  
[12]would have known there was a total misstatement  
[13]inadvertent or deliberate, and I won't comment on that,  
[14]to try and take completely the meaning of the  
[15]cross-examination by me of Dr. Block on the very same  
[16]Dr. Golfinos. I'm --

[17]THE COURT: Why can't you do that without the  
[18]reference made to defense counsel?  
[19]MR. MOORE: Because -- it's not -- I never --  
[20]Judge, I'm at a loss on many of your rulings, but I have  
[21]to abide by them.

[22]THE COURT: You want to know something, I don't  
[23]really care if you're at a loss regarding many of my  
[24]rulings. I didn't ask for a criticism of your  
[25]conducting my trial.

1203

[1]I now resent your critique of me throughout the  
[2]trial. Don't let it happen again whatever you think of  
[3]me and my ability, keep it to yourself because I have my  
[4]opinions too.

[5]MR. MOORE: Your Honor, respectfully, I have **[\*166]** said  
[6]the exact opposite.

[7]THE COURT: You didn't just say it now.

[8]MR. MOORE: I absolutely was about to say whether  
[9]I am mystified or not, is tough luck on me. And I was  
[10]about to say that I'm absolutely as convinced this very

[11]moment as I've been throughout this trial that you are  
[12]absolutely objective in deciding this case -- forgive  
[13]me, making your rulings totally impartially.  
[14]I said that several times on this record, and I  
[15]say it now. And the Court's ire at me is totally my mis  
[16]phrasing of the situation, not the Court's fault, and I  
[17]apologize.

[18]THE COURT: All right.

[19]MR. MOORE: What I was trying --

[20]THE COURT: Let's get back to the issue that Mr.

[21]Citrin raised.

[22]MR. MOORE: Okay.

[23]THE COURT: Why can't you accomplish what you want

[24]to accomplish without asking the question that -- the

[25]way I heard it, and obviously the way he heard it.  
1204

[1]MR. MOORE: Okay.

[2]THE COURT: Has a certain -- I don't know what the

[3]right word is.

[4]MR. CITRIN: Impugns my integrity.

[5]THE COURT: I said that before.

[6]MR. MOORE: I will gladly try again, [\*167] but can I

[7]please make one final effort to explain myself.

[8]I never meant that this lawyer deliberately did

[9]something. What I meant to convey was that the defense

[10]in this case did not in, in setting forth Dr. Block's

[11]testimony on redirect, did not properly represent what

[12]had happened --

[13]MR. CITRIN: What?

[14]MR. MOORE: -- up to that in reference to Dr.

[15]Golfinos record, that's all. I probably phrased it

[16]badly.

[17]THE COURT: Try to make that point without

[18]saying --

[19]MR. MOORE: I apologize for that, and I would like

[20]to try and correct it and continue. But I'm about to

[21]show something very, very telling.

[22]THE COURT: That's fine, but you can do it without

[23]the reference.

[24]MR. MOORE: Judge, then I just said twice or three

[25]times that I apologize. I don't have any pride -- I've

1205

[1]told you, Judge, at the bench not on the record that I

[2]don't have any pride of alter ship.

[3]What I mean by that whether I submit a

[4]questionnaire to you, whether I suggest a question in a

[5]certain form, Judge, you'd probably do it totally

[6]differently than I would.

[7]But I'm **[\*168]** one person, and I'm trying to do the

[8]cross-examination my way. If you think the form or

[9]substance are wrong, you haven't been reluctant to

[10]sustain the objections, nor should you be. If you

[11]sustain that question, I will ask it in another form.

[12]THE COURT: I'm certainly prepared to sustain it

[13]before Mr. Citrin asked for the ability to make a record

[14]outside the presence of the trial. Now he moved for a

[15]mistrial based on that, I believe what you believe to be

[16]other things that have taken place.

[17]MR. CITRIN: Unquestionably the other things

[18]particularly this witness today, truly objective witness

[19]wouldn't say this.

[20]MR. MOORE: I'm going to back it all up.

[21]MR. CITRIN: Excuse me. You have no self-control.

[22]THE COURT: All right, can we get back --

[23]MR. CITRIN: I'm directing my comments --

[24]THE COURT: From now on, in this trial I want

[25]neither one of you address each other. Anything  
1206

[1]that's going to be said by either one of you has to be

[2]addressed to the Court.

[3]Maybe we have to start from that most basic

[4]premise on how each of you will go forward in

[5]representing [\*169] your clients in this trial.

[6]MR. CITRIN: Yes, sir.

[7]I believe, Judge, that the pejorative terms he's

[8]used throughout the morning with my last witness, again

[9]your Honor sustained the objection. The problem is he

[10]continues to say them.

[11]And your Honor makes the rulings, and -- but the

[12]fact of the matter is he keeps saying the same thing

[13]over and over again. Doesn't stop. He apologizes,

[14]withdraws the comment, but again it is out there.

[15]So the problem with that is once you do that, 5 or

[16]6 times, to one particular witness, I don't believe the

[17]jury can look at that witness, or I believe the jury's

[18]view of that witness is tainted, not by the substance of

[19]the cross-examination which dealt with the hearing

[20]impairment, age of my other witness, but rather the

[21]pejorative comments of plaintiff's counsel questioning

[22]the integrity of the witness and to a lesser extent of

[23]me.

[24]That's why I move for a mistrial. I don't think

[25]this jury can listen to the witness anymore because the  
1207

[1]comments he's making.

[2]THE COURT: I'm sure we could have done without

[3]certainly that last comment. **[\*170]** I'm not willing to grant a

[4]mistrial. First of all. And always have at least in

[5]the trials I preside over -- the utmost faith in the

[6]jury that they will be able -- clearly, I sustained

[7]objections to questions, you know, that were phrased in

[8]such a manner as to indicate the witness might have been

[9]lying or whatever.

[10]So, notwithstanding that, questions of that type

[11]may have been asked in some fashion a couple of times,

[12]and notwithstanding the last question that raised the

[13]specter of your conduct, if you will, I'm not willing to

[14]grant a mistrial, and I certainly presume Mr. Moore

[15]would oppose that.

[16]I'm not willing to grant it. Just based on my

[17]presiding over this trial and my view of this jury, I

[18]will put my faith in the jury to know that. And I'm not

[19]even sure -- going to say at this point -- to know to do

[20]the right thing and to realize that what may have been

[21]said is not germane and is not any part of what they

[22]will have to decide when they sort out the issues in

[23]this case.

[24]I believe that my instinct is right. I don't

[25]believe that the trial has been so tainted, obviously,  
1208

[1] **[\*171]** we all agree to grant a mistrial is so substantial in

[2]any case, that you do whatever you can to avoid granting  
[3]it.

[4]And I don't think that we have come close to the  
[5]need to grant your application. We could with the  
[6]remaining time that we have with this witness, and I  
[7]presume he is the last witness, get back to the issues  
[8]in this case. And if his opinion needs to be critiqued  
[9]by way of cross-examination, you obviously know how to  
[10]do that far better than me.

[11]And to do it in such a way that none of this side  
[12]nonsense needs to arise. And to, you know, potentially  
[13]taint the trial, even though I don't think it's tainted,  
[14]given my feeling. So let's get back to what we need to  
[15]do without the side nonsense.

[16]MR. MOORE: Can I say, Judge, that I heartily  
[17]agree with the last statements of the Court, heartily.

[18]THE COURT: Okay, and my last statement will be  
[19]let's --

[20]MR. MOORE: Act accordingly.

[21]THE COURT: Exactly.

[22]MR. CITRIN: Judge, before we bring them down, I  
[23]want to use the rest room.

[24]THE COURT: Okay, if anybody needs to take a  
[25]break, do so now.

1209

[1] [**\*172**] (Whereupon, a brief recess was taken.)

[2]THE COURT: I will sustain.

[3]THE OFFICER: All rise, jury entering.

[4](Whereupon, the jury entered the courtroom.)

[5]THE COURT: You may all be seated, ladies and

[6]gentlemen. We are resuming with the cross-examination

[7]of Dr. DiGiacinto by Mr. Moore.

[8]THE CLERK: Doctor, I remind you you're still

[9]under oath.

[10]THE WITNESS: Thank you.

[11]MR. CITRIN: Judge.

[12]THE COURT: Technically there was an objection

[13]made to the last question I didn't rule on it before I

[14]sent the jury out for a break, I am sustaining the

[15]objection to the last question.

[16](Whereupon, Official Court Reporter Linda Calderon

[17]relieved Official Court Reporter Angela Spinelli.)

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1210

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q Doctor, I'm going to come back to Dr. Golfinos and

[4]the subject I was asking you about but before I do, I would

[5]like to ask some questions as follows beginning with, this:

[6]You, sir, in a hypothetical question, meaning --

[7]withdrawn.

[8]You know what a hypothetical question is, don't

[9] [\*173] you?

[10]A I believe so, yes.

[11]Q It can begin if, it can begin assume, it can begin

[12]it's conditional, and based on the information we give the

[13]answer, correct?

[14]A Yes, I believe that's correct.

[15]Q Now, based on assumptions that Mr. Citrin asked you

[16]to make, you said, in essence, that Dr. Gordon acted

[17]appropriately in never ordering an MRI on this patient;

[18]correct?

[19]A Yes.

[20]Q Doctor, would you be open to other information on

[21]that subject?

[22]A I would be glad to listen, sir, yes.

[23]Q Should you have been open to other information --

[24]withdrawn.

[25]I would assume you didn't just agree with Mr.

1211

[1]Citrin just to agree with him; I would assume that, correct?

[2]A Correct.

[3]Q And I would assume, Doctor, that you would give

[4]objective analysis and thought before you would agree with

[5]Mr. Citrin or any lawyer in a court of law under oath,

[6]correct?

[7]A Correct.

[8]Q Would you agree, sir, that a physician is required

[9]to practice in accord with appropriate standards; would you

[10]agree with that?

[11]A Yes, sir.

[12]Q And, therefore, the **[\*174]** other side of that, he can

[13]depart from good care or good standards, correct?

[14]A I don't understand the question as you asked it,

[15]sir, I'm sorry.

[16]Q You never heard a departure from accepted care?

[17]A Yes, I have.

[18]Q That's the opposite to giving good care, correct?

[19]A In general, yes.

[20]Q And specifically; yes?

[21]A I suppose I could agree with that, yes, without

[22]further definition.

[23]Q Haven't you been asked many times in a court of law

[24]whether X, Y, Z is a departure -- meaning A, B, C, certain

[25]issues or specific issue and care either complied with  
1212

[1]appropriate care or departed from it?

[2]A Yes, I have.

[3]Q And in this case you've said in response to Mr.

[4]Citrin's questions that Dr. Gordon did not depart from

[5]accepted care, correct?

[6]A That is correct.

[7]Q Now, before you would say that, you would want to

[8]know what you're talking about, correct?

[9]A Yes, sir.

[10]Q And is it your testimony to the judge and jury that

[11]you did know what you were talking about?

[12]A Yes, sir.

[13]Q Doctor, it goes without saying, doesn't it, **[\*175]** that if

[14]a physician is not supposed to depart from accepted generally

[15]accepted care, he certainly is not supposed to depart from

[16]what is basic care; true?

[17]A I would say yes.

[18]Q Are you aware that Dr. Gordon, and you know I have  
[19]never, ever nor will question his background, his knowledge  
[20]and his ability, nonetheless, are you aware he violated a  
[21]fundamental and basic concept of neurology?

[22]MR. CITRIN: Objection.

[23]THE COURT: I'll overrule.

[24]You can answer that.

[25]A I'm not aware of that, sir.

1213

[1]Q Doctor, you don't have to be a board certified

[2]neurologist to know the following:

[3]A migraine headache sufferer may, subject to the

[4]vagaries of life, possibly get a headache with another cause;

[5]you don't have to be a board certified neurologist to know

[6]that, correct?

[7]A Correct.

[8]Q And, Doctor, a neurologist treating a woman with

[9]migraine headaches must always and constantly keep that basic

[10]principle in mind; true?

[11]A I would agree, yes.

[12]Q And, Doctor, surety of diagnosis should never, ever

[13]lead to ignoring a change --

[14]MR. [\*176] CITRIN: Objection.

[15]Q true?

[16]MR. CITRIN: Objection to form.

[17]THE COURT: I'll allow it.

[18]You can answer.

[19]Overruled.

[20]A I agree.

[21]Q Are you aware that one of the reasons that I

[22]questioned Dr. Block on Dr. Golfinos' record is precisely on  
[23]the issue, not judging -- forgive me -- not having Dr. Gordon  
[24]be responsible by hindsight or retrospect, but that  
[25]prospectively he should have known with the right-sided  
1214

[1]headaches that this woman was having something more might be  
[2]going on; you are aware of that, aren't you?

[3]MR. CITRIN: Objection.

[4]MR. MOORE: If he is aware.

[5]THE COURT: Overruled.

[6]A I really didn't understand the question. I'm not  
[7]sure why you questioned Dr. Block in any fashion. I think  
[8]that was the question?

[9]Q Doctor, you know, don't you, that right-sided  
[10]headaches -- withdrawn.

[11]There is no question, there is no question that  
[12]Lauren Morris when she was seeing Dr. Gordon had migraine  
[13]headaches, correct?

[14]A From my understanding of the record, correct.

[15]Q And, therefore, they caused pain? Kind of  
[16]redundant. **[\*177]** She suffered from migraines and they were off and  
[17]on throughout the 25 months, correct?

[18]A Yes, sir.

[19]Q No question about that, correct?

[20]A Correct.

[21]Q The salient point is we now know something else was  
[22]going on, correct?

[23]MR. CITRIN: Objection to the salient --

[24]MR. MOORE: Now I'm talking about.

[25]MR. CITRIN: Objection to form.  
1215

[1]THE COURT: Sustained.

[2]Q You now know, and I'm not now asking you to judge

[3]Dr. Gordon retrospectively or by hindsight, but as you sit

[4]here right now you now know something else was going on

[5]relative to headache, correct?

[6]MR. CITRIN: Objection.

[7]THE COURT: Overruled.

[8]You can answer that question.

[9]A I don't know that something else was going on

[10]relative to headache, no.

[11]Q And you have, Doctor, gone through these records as

[12]thoroughly as would be required to give that answer under

[13]oath to this Court and jury?

[14]A Yes, sir.

[15]Q Is that your testimony?

[16]A Yes, sir.

[17]Q Are you saying that -- withdrawn.

[18]I used a phrase earlier, in fact in opening

[19]statement in this **[\*178]** case and I'm going to refer to it now:

[20]Headache and headache. Headaches and headaches.

[21]You knew what I meant, right?

[22]A Yes.

[23]Q Let's take after the surgery. There were headaches

[24]and headaches, correct?

[25]A Yes, sir.

1216

[1]Q Nature didn't decide to go easy on her when --

[2]withdrawn. As to form.

[3]Doctor, despite horrendous postoperative pain that

[4]continued for a long time, this woman nonetheless had

[5]migraine headaches along with that pain, correct?

[6]A My understanding is yes.

[7]Q And that would be literally applicable to my

[8]statement: Headache and headache; correct?

[9]A If you are defining the pain she had relative to

[10]the surgery as a headache, yes.

[11]Q Are you saying, Doctor, fierce pain on the left

[12]side of the head wouldn't be termed a headache?

[13]A I suppose generically it could be, yes. It could

[14]be given other names as people have attempted to.

[15]Q Doctor, it was diagnosed as occipital neuralgia,

[16]but that's fierce pain on the left side of the head in this

[17]case -- withdrawn.

[18]Occipital neuralgia refers to fierce pain, but it

[19]could **[\*179]** be on the left side or the right side, correct?

[20]A Correct.

[21]Q But in this case we know it was fierce pain on the

[22]left side, correct?

[23]A Yes.

[24]Q And all along -- withdrawn.

[25]And you know from reading the testimony in this

1217

[1]case that that pain -- withdrawn.

[2]You know that while she was in the hospital for

[3]about 20 days, it was in a word unbearable pain; you know

[4]that, don't you?

[5]A Yes, I do.

[6]Q And then it got more bearable but nonetheless

[7]fierce for a considerable period of time; you know that,

[8]don't you?

[9]A That is my recollection, yes.

[10]Q You think that had anything to do with the extent

[11]of the surgery required to remove the tumor when it was as

[12]big as it was at the time of surgery; yes or no, please?

[13]A I can't answer that yes or no.

[14]Q That's squarely within your field; is it not?

[15]A You would have to define what you mean by extent of

[16]the surgery, sir. That's the only question I have. If you

[17]mean the type of surgery, then I can answer the question.

[18]Q I meant the extent, Doctor; can you answer it?

[19]A She had **[\*180]** an operation --

[20]Q Can you answer it?

[21]A I'm thinking the question through. I will do it

[22]quietly.

[23]Q I will move on. Do you mind if I move on?

[24]A No, not at all.

[25]Q And when Dr. Jamieson said that she suffered from  
1218

[1]left-sided head pain and called it occipital neuralgia, that

[2]was head pain that was as a result of the surgery, correct?

[3]A I believe so, yes.

[4]Q And, Dr. Jamieson made it perfectly clear that at

[5]the same time this woman was having migraine headaches,

[6]correct?

[7]A Yes.

[8]Q Does it refresh your recollection that when Mr.

[9]Citrin questioned Dr. Block after I sat down, he questioned

[10]whether there was exclusive left-sided pain or headache; do

[11]you remember that?

[12]MR. CITRIN: Objection. Objection.

[13]THE COURT: I'm reading my notes.

[14]MR. MOORE: I will rephrase it, Judge.

[15]THE COURT: Okay.

[16]Q Doctor, Dr. Jamieson diagnosed left-sided occipital

[17]neuralgia, correct?

[18]A Yes.

[19]Q But she also diagnosed migraines, correct?

[20]A Yes.

[21]Q The fact that this woman was suffering fierce pain

[22]only on the **[\*181]** left side is not contradicted by Dr. Jamieson's

[23]reference to periorbital pain, correct?

[24]MR. CITRIN: Objection, that's not the entire

[25]-- objection.

1219

[1]MR. MOORE: Objection, Judge, just objection.

[2]THE COURT: Lodge an objection. If I don't

[3]understand why --

[4]MR. CITRIN: Yes, sir.

[5]THE COURT: -- then I will ask you.

[6]MR. CITRIN: Yes.

[7]THE COURT: Linda, read the question back,

[8]please.

[9]And this will be the last question and then we

[10]will break for lunch.

[11](Whereupon, the requested portion was read

[12]back.)

[13]THE COURT: And there was an objection. I'm

[14]going to overrule the objection.

[15]You can answer that question.

[16]A The periorbital pain was bilateral, so I'm not sure

[17]how to answer it. The left-sided pain appeared to be from

[18]the occipital neuralgia, yes.

[19]Q Doctor --

[20]A You said bilateral periorbital pain.

[21]Q Yes.

[22]A So the 2 aren't usually exclusive.

[23]Q What?

[24]A They are not usually exclusive.

[25]Q Of course not.

1220

[1]A I agree.

[2]Q Because you know that she clearly from her **[\*182]** record

[3]knew the source of the bilateral periorbital pain as opposed

[4]to the left-sided pain; correct?

[5]MR. CITRIN: Objection.

[6]Q If you know?

[7]THE COURT: Overruled.

[8]You can answer.

[9]A I believe that --

[10]Q Do you know?

[11]A Yes.

[12]Q And, Doctor, they are not contradictory because the

[13]periorbital bilateral pain was caused by migraines and the

[14]left-sided pain, quote-unquote, "was occipital neuralgia

[15]postsurgery;" true?

[16]MR. CITRIN: I will stipulate to that.

[17]MR. MOORE: That's not right, Judge.

[18]THE COURT: I'm going to -- you want me to

[19]strike that comment?

[20]MR. MOORE: Please do, Judge.

[21]THE COURT: I will strike that comment from  
[22]the record.

[23]The jury is directed to disregard it.

[24]A True.

[25]THE COURT: That is the last question and  
1221

[1]answer as we will now break for lunch.

[2]If you could all report back, ladies and

[3]gentlemen for 2:00, at which time we will resume our  
[4]trial.

[5]Have a good lunch. And don't discuss the case

[6]among yourselves or with anyone else. And don't form

[7]any opinions about [\*183] the case at this time.

[8]We will see you at 2:00.

[9]THE OFFICER: All rise. Jury exiting.

[10](Whereupon, the jury then left the courtroom.)

[11]THE COURT: Doctor, you can step down from the  
[12]witness stand.

[13]THE WITNESS: Thank you.

[14]THE COURT: See you at 2:00.

[15]MR. CITRIN: See you at 2.

[16]MR. MOORE: See you at 2.

[17](Whereupon, the witness, Dr. George

[18]DiGiacinto, was then excused from the witness stand.)

[19](Whereupon, the trial was adjourned for the  
[20]luncheon recess.)

[21]\*\*\*

[22](The following is transcribed by Angela Spinelli.)

[23](Continued on next page.)

[24]\*\*\*

[25]

1222

[1]AFTERNOONSESSION

[2]THE CLERK: Remain seated and come to order

[3]please.

[4]THE COURT: Doctor, you want to retake the stand.

[5](Whereupon, the witness, DR. GEORGE DiGIACINTO,

[6]resumed the witness stand and testified follows:)

[7]THE CLERK: Ready for the jury, Judge?

[8]THE COURT: Yes.

[9]THE OFFICER: All rise, jury entering.

[10](Whereupon, the jury entered the courtroom.)

[11]THE COURT: Good afternoon, ladies and gentlemen.

[12] **[\*184]** You may all be seated.

[13]We are now resuming our trial, resuming

[14]cross-examination of Dr. DiGiacinto by Mr. Moore on

[15]behalf of the plaintiff.

[16]THE CLERK: Doctor, you're still under oath.

[17]THE WITNESS: Thank you.

[18]CROSS-EXAMINATION (CONTINUED)

[19]BY MR. MOORE:

[20]Q Good afternoon, Doctor.

[21]MR. MOORE: Good afternoon, ladies and gentlemen.

[22]Q Before lunch, we were asking in essence about

[23]headache and headache. And just before we broke the

[24]reference to the bilateral periorbital pain postsurgery, that

[25]was migraines, correct?

1223

[1]A I believe so, yes.

[2]Q And the left-sided -- we went through in detail

[3]how terrible it was initially, it gradually got better -- and

[4]by the way, you're aware they fortunately disappeared about  
[5]2 years and some months after the surgery. Remember  
[6]testimony to that effect?

[7]A I don't recall the exact time, but, yes, I do  
[8]understand that to be true.

[9]Q And now Lauren Morris is left with migraines; you  
[10]know that, right?

[11]A Yes, sir.

[12]Q Now, before the surgery, when I say left-sided  
[13]pain, will you assume I mean the **[\*185]** postsurgery occipital  
[14]neuralgia?

[15]A Yes, sir.

[16]Q Okay. Even though, periorbital would -- bilateral  
[17]periorbital would mean both left and right, and that  
[18]literally is left-sided pain and right-sided pain and  
[19]left-sided headache and right-sided headache, but will you  
[20]now understand it in the way I've asked you?

[21]A Yes.

[22]Q So we had after the surgery, we had migraines both  
[23]sides at times, and we had left-sided headache, correct?

[24]A Left-sided pain -- sorry, I'm just --

[25]Q When I say left-sided pain or left-sided headache,  
1224

[1]that -- I'm referring to the postsurgical occipital  
[2]neuralgia, okay?

[3]A If we adopt that, my understanding now in the  
[4]question, the answer is yes.

[5]Q Headache and headache. Correct?

[6]A Yes.

[7]Q Before the surgery, there was headache and

[8]headache, and I'll say it advisedly beyond a shadow of a

[9]medical doubt, true?

[10]MR. CITRIN: Objection.

[11]THE COURT: I'll sustain.

[12]Q Doctor, reasonable probability is not beyond a

[13]shadow of a doubt, correct?

[14]A I don't know the legal definition, so I'm hesitant

[15]to **[\*186]** say yes or no, sir.

[16]Q I'm talking about English, Doctor --

[17]MR. CITRIN: Objection, objection.

[18]THE COURT: I'll sustain.

[19]MR. MOORE: I'm sorry?

[20]THE COURT: I'll sustain.

[21]Q To you, Doctor, you know the difference between

[22]reasonable probability and beyond a shadow of a doubt,

[23]correct?

[24]A Reasonable probability versus absolute certainty,

[25]is that another way of putting it?

1225

[1]Q You don't know --

[2]A I want to be careful I understand the question.

[3]Q Beyond a shadow of a doubt would be absolute

[4]certainty, everybody knows that?

[5]MR. CITRIN: Objection.

[6]Q Do you know that?

[7]A I don't know what your definition is, sir.

[8]Q Your definition would be, Doctor, that beyond a

[9]shadow of a doubt and absolute certainty are the same thing,

[10]correct?

[11]A I understand absolute certainty.

[12]Q No. You don't know what beyond a shadow of a  
[13]doubt means, is that your testimony to this Judge and this  
[14]jury?

[15]A I don't know if that means a hundred percent, sir.

[16]If you define it as that, I will adopt either one or the  
[17]other.

[18] **[\*187]** Q Have you spoken English your whole life?

[19]MR. CITRIN: Objection.

[20]THE COURT: Sustained.

[21]MR. CITRIN: Move to strike his comment.

[22]MR. MOORE: I said.

[23]Q Have you spoken --

[24]MR. MOORE: Withdrawn.

[25]THE COURT: Strike the comment.  
1226

[1]Q Has English always been your major mode of  
[2]communication?

[3]MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]Q One more time and I'll move on.

[6]Are you saying you never heard the phrase  
[7]beyond a shadow of a doubt before I used it in this courtroom  
[8]today, yes or no?

[9]A No.

[10]Q Many times you heard it, and you knew exactly what  
[11]it meant when you heard it, true or false?

[12]A I need to know exactly what you mean to answer the  
[13]question.

[14]Q Can you answer my question:

[15]In all the times you heard it, did you know

[16]exactly what it meant, yes or no and I'll move on?

[17]A No.

[18]Q Doctor, in any event, before the surgery, as I was

[19]saying -- withdrawn.

[20]Absolute certainty and reasonable probability

[21]are quite different, correct?

[22]A Yes.

[23]Q To state a truism, [\*188] there's no absolute certainties

[24]generally in medicine, correct?

[25]A Correct -- actually I take that back, there are  
1227

[1]absolute certainties, so I can't say yes to that.

[2]Q Doctor, you give opinions commonly with absolute

[3]certainty in your practice, do you?

[4]A When it's possible to give them with absolute

[5]certainty, yes.

[6]MR. CITRIN: Judge --

[7]Q My question is do you do it commonly?

[8]MR. CITRIN: -- can he finish the answer?

[9]THE COURT: I think he did.

[10]Q Do you do it commonly?

[11]A When it's appropriate to say with absolute

[12]certainty, I do. When I say --

[13]Q That's not answering my question, Doctor.

[14]MR. CITRIN: Objection, Judge, this is not a

[15]question by Mr. Moore.

[16]MR. MOORE: I withdraw it. I withdraw it, Judge.

[17]Q Doctor, surely you agree that medicine is part art

[18]and part science, correct?

[19]A Yes, sir.

[20]Q And in the vast majority of the time, physicians

[21]give diagnosis, give treatment, give direction, give

[22]referral, based on reasonable probabilities, correct?

[23]A I think that's reasonable, yes.

[24]Q It's not **[\*189]** only reasonable, it's true, correct?

[25]A For the most part, yes.

1228

[1]Q Now, Doctor, I assume the testimony you gave this

[2]Court and jury on questions by Mr. Citrin were based on

[3]reasonable probabilities, correct?

[4]A More likely than not is the standard I'm going

[5]for. So I think reasonable probability and more likely than

[6]not are pretty close.

[7]Q Actually, Doctor, probability means literally more

[8]often than not, because the other word would be possibility

[9]and that is less often than not?

[10]MR. CITRIN: Objection. Is that a question?

[11]Q Do you understand that to be true, Doctor?

[12]A As you defined it, I now understand it, sir.

[13]Q Doctor, I assume when you gave testimony based on

[14]Dr. Gordon's care you said that at least in your opinion --

[15]forgive me, sorry.

[16]At least you stated what you believed true in

[17]terms of more likely than not, you at least said that, I

[18]assume; is that correct?

[19]A Yes.

[20]Q Doctor, if, if, if there was headache pain in this

[21]woman throughout, throughout the 25 months that she was being

[22]seen by Dr. Gordon, if that's true, right **[\*190]** there he departed

[23]from accepted medical practice, reasonably probable or not?

[24]MR. CITRIN: Objection.

[25]THE COURT: Overruled.  
1229

[1]You can answer.

[2]A No, he did not.

[3]Q What?

[4]A He did not depart from.

[5]Q Even, even if there was headache pain --

[6]withdrawn.

[7]MR. MOORE: May I indulge?

[8]THE COURT: The last question and answer.

[9](Whereupon, the requested portion was read back.)

[10]MR. MOORE: I misstated, Judge, I apologize.

[11]Q What I meant to say, and I now say, Doctor, if

[12]there was headache pain not related to migraine over those

[13]25 months, then he departed from accepted practice,

[14]reasonably probable?

[15]MR. CITRIN: Objection.

[16]THE COURT: Overruled.

[17]You can answer.

[18]A In the hypothetical.

[19]Q Doctor, did I say last time if, if, if?

[20]A Does that mean hypothetical, sir? I need to

[21]understand. I don't understand the question, sir.

[22]Q Didn't I, Doctor, before the break talk about

[23]hypothetical briefly, assume if the idea of conditional;

[24]remember that?

[25]A Yes, I do.

1230

[1]Q And you asked **[\*191]** me what I mean by if?

[2]MR. CITRIN: Objection, objection.

[3]THE COURT: I'll sustain.

[4]Q You say you didn't know a question beginning with

[5]3 ifs was a hypothetical?

[6]MR. CITRIN: Objection.

[7]THE COURT: Overruled.

[8]You can answer that question.

[9]A I just need to adopt your language, and I need to

[10]be certain so I'm answering the question properly. If if

[11]means hypothetical, then I can answer the questions.

[12]Q Doctor, isn't "if" an article of speech?

[13]A It is an article of speech.

[14]Q Called conditional, correct, Doctor?

[15]A I don't really know.

[16]Q By the way, if it's called a conditional, the very

[17]nature of what it is called indicates that if a question

[18]begins with if, it's conditional or hypothetical?

[19]MR. CITRIN: Objection.

[20]Q Is that correct, Doctor?

[21]THE COURT: Overruled.

[22]You can answer that.

[23]A If hypotheticals are interchangeable, then I

[24]agree, yes.

[25]Q Know them to be as long as you've been going to

1231

[1]school -- forgive me -- you know them to be since you've been

[2]in school, correct?

[3] [\*192] MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]Q Doctor, if there was headache pain in this woman

[6]other than migraine during the 25 months she was being

[7]treated by Dr. Gordon, he would have departed from accepted

[8]practice, true?

[9]MR. CITRIN: Objection.

[10]MR. MOORE: Same question as you overruled the

[11]last time, Judge.

[12]MR. CITRIN: I'd be more than happy to tell you

[13]privately.

[14]THE COURT: If I don't make a ruling -- can I

[15]think about it for a couple of seconds before somebody

[16]comments and tries to guide me?

[17]MR. MOORE: Sorry, Judge.

[18](Pause in the proceedings.)

[19]THE COURT: I'm going to sustain. And if you

[20]wonder why, I'll tell you why at side-bar.

[21]MR. MOORE: That's okay. Thank you.

[22]Q Doctor, you realize that it's an essential claim

[23]of the plaintiff that there was such headache over the

[24]25 months, other than migraine, you knew that, correct?

[25]MR. CITRIN: Objection.

1232

[1]THE COURT: Overruled.

[2]A I don't specifically recall that claim, sir, but I

[3]could have absolutely missed it.

[4]Q Doctor, if you knew the first -- **[\*193]** Doctor, if -- did

[5]you discuss this case with Mr. Citrin before you took the

[6]witness stand?

[7]A I had meetings with him, yes.

[8]Q Sorry?

[9]A I have had meetings with him, yes.

[10]Q Did you discuss the case, is what I said?

[11]A Yes.

[12]Q Remember when I said that I said in my opening

[13]statement headache and headache?

[14]A Yes, sir.

[15]Q I wasn't talking about postsurgery then, even

[16]though it's applicable, I was talking presurgery; did you

[17]know that?

[18]MR. CITRIN: Objection to the form of the

[19]question.

[20]THE COURT: I'll sustain.

[21]Q Doctor, did anybody tell you, anyone, that a basic

[22]premise of the plaintiff in this case is that this woman had

[23]not only headache and headache after the surgery, she had

[24]headache and headache before the surgery, based on the way

[25]we've been talking about it before lunch?

1233

[1]MR. CITRIN: Objection. And I'll be more than

[2]happy to share with you --

[3]THE COURT: Overruled.

[4]MR. CITRIN: Okay.

[5]A I don't recall reading records indicating other

[6]headaches beside the migraines.

[7]Q Is that your answer **[\*194]** to my question?

[8]A I don't recall it. If you could cite something to

[9]me, I'd be glad to hear it --

[10]Q Doctor --

[11]A -- it might change my memory, sir.

[12]Q Didn't you read Dr. Block's questioning by me when

[13]I talked about -- and we've gone through it with you --

[14]acoustic neuroma on the left causing pain on the right?

[15]MR. CITRIN: Objection, that --

[16]THE COURT: Overruled.

[17]MR. CITRIN: What is that?

[18]A I recall.

[19]Q No, no, no, Doctor.

[20]MR. MOORE: Can I start again, Judge, please?

[21]Q Please listen to me, Doctor?

[22]A I am trying, sir.

[23]Q I asked you about reading Dr. Block's testimony,

[24]remember, when you said that headache -- forgive me --

[25]acoustic neuroma on the left wouldn't cause pain on the  
1234

[1]right; remember that?

[2]A Yes.

[3]Q What?

[4]A Yes.

[5]Q And I showed you that Dr. Block said the opposite;

[6]remember that?

[7]A I don't recall reading that specifically, sir, I'd

[8]be glad to have you read it to me, and I could react to it.

[9]Q I read it to you before lunch, Doctor.

[10]A I do recall, I apologize, **[\*195]** it is my error, I do

[11]recall.

[12]Q And I asked you if you agreed with it, remember?

[13]A Yes, sir, I do remember.

[14]Q Doctor, if there was acoustic -- forgive me.

[15]If there was pain on the right side as a result

[16]of an acoustic neuroma you know that would not be migraine,

[17]correct?

[18]MR. CITRIN: Objection.

[19]MR. MOORE: I don't understand this, Judge.

[20]THE COURT: In this case?

[21]MR. MOORE: Of course.

[22]THE COURT: Overruled.

[23]MR. MOORE: Sorry, of course, Judge.

[24]THE COURT: Overruled.

[25]A Could you read it back so I'm sure I hear the  
1235

[1]question properly?

[2]THE COURT: Angela, read it back.

[3]MR. MOORE: I'll rephrase it. I'll repeat it.

[4]May I repeat it rather than --

[5]THE COURT: Sure.

[6]Q If there was pain on the right side as a result of

[7]an acoustic neuroma on the left in this patient, that would

[8]not be migraine, true?

[9]A If that statement is true --

[10]Q Doctor, you're not --

[11]A that would be true.

[12]Q Did I begin with if, Doctor?

[13]A Yes, you did.

[14]Q So the answer was a resounding yes, true? **[\*196]**

[15]MR. CITRIN: Objection. What is a resounding yes?

[16]MR. MOORE: The answer was a yes.

[17]Q Correct, Doctor?

[18]A In that hypothetical, yes. In that if, yes.

[19]Q Do you realize that's an issue the jury's going to

[20]have to decide?

[21]A I suppose so. I don't have the legal expertise to

[22]know that.

[23]Q I assume you're in here as an expert to help them

[24]decide it fairly; is that correct?

[25]A Yes.

1236

[1]Q You'd have to know what the issue is before you

[2]could help people decide it fairly?

[3]MR. CITRIN: Objection.

[4]Q Is that basically true, Doctor?

[5]MR. CITRIN: Objection.

[6]THE COURT: Overruled.

[7]You can answer that.

[8]A I try to answer the questions as best I can.

[9]Q No, no. Is that true?

[10]A Yes.

[11]Q The yes is that you'd have to know the issue

[12]before you could help people decide it fairly, true?

[13]A Correct.

[14]Q So you know that was a central issue in the case

[15]before you took the witness stand, correct?

[16]A Can't answer that yes or no.

[17]Q Can you suggest somebody that could?

[18]MR. CITRIN: Objection. **[\*197]**

[19]MR. MOORE: Withdrawn.

[20]THE COURT: Sustained. Strike that comment from

[21]the record. Jury is directed to disregard that comment.

[22]Q Doctor, you would know whether you knew that,

[23]wouldn't you?

[24]MR. CITRIN: Judge, I object to this, the form of

[25]the question.

1237

[1]THE COURT: I'll allow it, if you understand the

[2]question, you can understand the question.

[3]THE WITNESS: I have to have it repeated.

[4]Q Do you mind if I move on, Doctor?

[5]A Go right ahead.

[6]Q You know, don't you, that --

[7]MR. MOORE: -- my recollection fails me, Judge, I

[8]know I asked the question. I don't remember the

[9]question, so if you could indulge me.

[10]Q Doctor, if there was pain other than migraine,

[11]head pain I'm talking about in this patient, Dr. Gordon

[12]should certainly have at least considered that, true?

[13]MR. CITRIN: Objection.

[14]THE COURT: Overruled.

[15]You can answer that.

[16]A Considered what, sir? That there was other pain

[17]or that there was a cause for it?

[18]Q Doctor --

[19]A Your question was if there was other pain, he

[20]should have considered **[\*198]** there was other pain.

[21]Q Let me ask you this --

[22]A Yes, sir.

[23]Q you read Dr. Block's testimony, correct?

[24]A Yes, I did.

[25]Q And you heard, you heard -- forgive me -- you read  
1238

[1]that he said singularly as opposed to everything else that at

[2]least the American Academy of Neurology Guidelines were

[3]authoritative; you read that, didn't you?

[4]A Sir, I really would have to -- not questioning

[5]your representation.

[6]Q You know what, Doctor?

[7]A I just don't specifically remember. And that's

[8]why I'll trust your representation, if it's true. I don't

[9]specifically remember.

[10]Q You didn't see I got to read them?

[11]A Yes.

[12]Q You know, therefore, he had to find that

[13]authoritative before I read them, you know that from your

[14]experience in court, don't you?

[15]A About guidelines, no, I don't know that.

[16]Q Haven't you testified under oath that you know if

[17]you don't recognize an article or book or piece of document

[18]as authoritative, the lawyer questioning you can't read from

[19]it; you have testified to that under oath, true?

[20]A Yes.

[21](Whereupon, **[\*199]** Official Court Reporter Linda Calderon

[22]relieved Official Court Reporter Angela Spinelli.)

[23]

[24]

[25]

1239

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q So therefore, you knew that if I read from that

[4]document when I was questioning Dr. Block, he had to say it

[5]was authoritative; you knew that, didn't you?

[6]A Sir, I don't know that guidelines fall under the

[7]same category. If they do, then I fully adopt what you say.

[8]I'm just --

[9]Q Don't you remember I asked him?

[10]A I don't recall the specific answer is what I said.

[11]Q And you don't remember all the other things I asked

[12]him if they were authoritative; you don't remember that

[13]either?

[14]A Not specifically.

[15]You can read them to me and I'm sure you would

[16]refresh my memory.

[17]Q Doctor, when did you read his testimony?

[18]A The evening it was given. Late at night.

[19]Q That's yesterday, right?

[20]A Was it yesterday or the day before?

[21]I have been very busy, sir, trying to get it done.

[22]MR. MOORE: I move to strike that as not

[23]responsive.

[24]THE COURT: I'm going to strike I have been

[25] **[\*200]** very busy, I tried to get it done.

1240

[1]The jury is directed to disregard it.

[2]Q If you were going to answer -- withdrawn.

[3]Did you think if you were furnished that testimony

[4]it was important to read it?

[5]MR. CITRIN: I object to this --

[6]MR. MOORE: What?

[7]MR. CITRIN: -- this entire line of

[8]questioning.

[9]THE COURT: Overruled.

[10]But I will sustain the objection to this last

[11]question.

[12]MR. MOORE: I don't -- whether he considered

[13]it important to read it? I would be guided, Judge.

[14]THE COURT: He said he read it.

[15]MR. MOORE: But I'm --

[16]Q Doctor, you don't remember the first thing about

[17]it; isn't that true?

[18]MR. CITRIN: Objection, objection.

[19]THE COURT: I'll sustain.

[20]But you can rephrase on that.

[21]MR. MOORE: Okay.

[22]Q Doctor, you remember very, very little about it,

[23]correct?

[24]A I recall reading it. I recall the essence of it

[25]without the details.

1241

[1]Q Doctor --

[2]MR. MOORE: I want to keep going.

[3]MR. CITRIN: I object to Mr. Moore pointing to

[4]his wristwatch. I object to his histrionics. **[\*201]**

[5]MR. MOORE: Is this fair? May I, Judge?

[6]THE COURT: Members of the jury, if anybody

[7]saw the reference to the watch, ignore it, I'm -- the

[8]rest of it, within reason, I'll allow.

[9]Q True, right?

[10]A I lost the question, sir.

[11]Q You remember very --

[12]A Okay, I remember the question. I don't remember

[13]every single detail about it.

[14]Q Did I ask you?

[15]Doctor, you know what, you are not answering my

[16]question; isn't that true?

[17]MR. CITRIN: I object to Mr. Moore's comment.

[18]Strike it --

[19]THE COURT: It's not really a question, so

[20]strike it.

[21]MR. MOORE: Okay.

[22]Q Doctor, are you saying you don't remember any

[23]question by me of Dr. Block where I prefaced it whether an

[24]article or a book or a document was authoritative; is that

[25]your sworn testimony to this Court and jury having read his  
1242

[1]testimony as you have sworn?

[2]A I don't remember the specifics, sir. We can --

[3]Q That's not my question.

[4]My question is: Are you saying you don't remember

[5]anything about that; yes or no?

[6]A I do remember, yes, but not the specifics [**\*202**] of which

[7]and which.

[8]Q Sir --

[9]A Yes, sir.

[10]Q -- do you recognize the American Academy of

[11]Neurology guidelines as authoritative?

[12]A No, because I don't know what they are other than

[13]what I have read in testimony.

[14]Q The exact guidelines that I read from you have said

[15]previously are not authoritative; correct?

[16]A I don't know them, sir, I couldn't make a judgment

[17]one way or the other. I haven't read it, I don't know it, I

[18]have only heard about it through testimony here that I have

[19]read.

[20]Q You have never heard of the American Academy of

[21]Neurology: The Utility Of Neuroimaging In The Evaluation of

[22]Headache In Patients With Normal Neurological Examinations;

[23]is that your testimony to this Court and jury?

[24]A I have heard --

[25]Q Yes or no, is it?

1243

[1]A I can't answer it yes or no -- actually I can.

[2]I have heard about it in the testimony, yes. I

[3]have not heard about it before the testimony. So I did

[4]elaborate --

[5]Q So that is false, isn't that true, Doctor?

[6]MR. CITRIN: I object to that statement.

[7]MR. MOORE: That's a foundation [\*203] question --

[8]MR. CITRIN: No. Again, Judge --

[9]THE COURT: Sustained.

[10]I will strike his comment.

[11]The jury is directed to disregard it.

[12]Q Doctor, haven't you sworn under oath that you are a

[13]member of the American Academy of Neurology; yes or no?

[14]A Not that I recall, no.

[15]Q If you so swore, it wasn't true; is that correct?

[16]A If I -- I lost the question, sir.

[17]MR. CITRIN: As a matter of curiosity, what is

[18]he doing sitting down and putting his head down?

[19]THE COURT: I presume he is getting ready to

[20]ask the next question.

[21]MR. MOORE: That's what I was doing, Judge, I

[22]was composing myself. Judge.

[23]MR. CITRIN: Right.

[24]Q Doctor, if I say to you, and I will produce it

[25]after the break of the afternoon, if I say to you that you

1244

[1]swore under oath that you were a member of the American

[2]Academy of Neurology, are you saying such testimony was not

[3>true?

[4]MR. CITRIN: I object to this.

[5]This -- if he has something he wants to --

[6]MR. MOORE: Judge, this is not --

[7]THE COURT: Don't make a speech.

[8]Read the question **[\*204]** back to make sure I have

[9]every word.

[10]MR. MOORE: Withdrawn.

[11]Q Are you saying to this jury that you have never

[12]been a member of the American Academy of Neurology?

[13]A Correct, I have never been a member of the American

[14]Academy of Neurology.

[15]Q Doctor, surely, surely before you comment about the

[16]standard of care of Dr. Gordon as a neurologist in this case,

[17]you would want to know what the American Academy of Neurology

[18]says on the subject of the utility of neuroimaging in the

[19]evaluation of headache in patients with normal neurological

[20]examinations; am I right or am I wrong?

[21]A You're wrong.

[22]Q Doctor, would you agree that you must have the

[23]requisite expertise to give an opinion before a Court and

[24]jury?

[25]A Yes, sir.

1245

[1]Q You just said he didn't depart because you have an

[2]agenda here; true?

[3]MR. CITRIN: Objection.

[4]THE COURT: Sustained.

[5]MR. CITRIN: Judge, I need -- I need to make

[6]another application.

[7]MR. MOORE: Then I --

[8]MR. CITRIN: No, I need to make another

[9]application.

[10]MR. MOORE: May I ask the next question? **[\*205]**

[11]THE COURT: I will send the jury out.

[12]MR. MOORE: Can we hold it, Judge?

[13]MR. CITRIN: No, we took this up earlier.

[14]THE COURT: Don't say anything.

[15]MR. MOORE: Please.

[16]THE COURT: No.

[17]Ladies and gentlemen, take a few minutes.

[18]Kindly go upstairs and we will see you shortly.

[19]THE OFFICER: All rise. Jury exiting.

[20](Whereupon, the jury then left the courtroom.)

[21]THE WITNESS: Should I leave, your Honor?

[22]THE COURT: Wait for the jury.

[23]THE WITNESS: Yes, your Honor.

[24]THE COURT: Why don't you step outside.

[25]THE WITNESS: Yes.

1246

[1](Whereupon, the witness, Dr. George

[2]DiGiacinto, was then excused from the courtroom.)

[3]THE COURT: Everybody can be seated.

[4]MR. CITRIN: Would you tell him to sit down

[5]while we are in session?

[6]MR. MOORE: Sorry, forgive me.

[7]MR. CITRIN: Judge, I am going to at this time

[8]renew my motion for a mistrial.

[9]You cautioned Mr. Moore before the lunch break  
[10]about his interjecting his own personal -- I can't do  
[11]this while he is doing this. Can you ask the other two  
[12]people to step **[\*206]** out of the well area while we are in  
[13]session?

[14]MR. MOORE: Sorry.

[15]THE COURT: I'm not going to chastise them at  
[16]all.

[17]MR. MOORE: Me, yes it's my fault, Judge.

[18]It's my fault.

[19]THE COURT: I'm not going to chastise anybody  
[20]for that.

[21]MR. MOORE: Thank you.

[22]THE COURT: What I would like now is for  
[23]everybody to pay attention.

[24]You have something that you want to put on the  
[25]record and let's hear it.  
1247

[1]MR. CITRIN: Yes.

[2]I am again constrained to move for a mistrial.

[3]Mr. Moore, despite this Court's repeated admonitions,  
[4]continues to interject his own personal comments about  
[5]the integrity of the witness whom he is cross-examining.

[6]The most recent example of that, and I quote:

[7]"You just said he didn't depart because you have an  
[8]agenda here."

[9]That is an absolutely inappropriate comment.

[10]And that comment, if it were made on summation, could  
[11]serve as reversible error, and I ask him to stop acting  
[12]like a wild ape until I'm finished talking.

[13]THE COURT: Do me a favor, can we, as  
[14]apparently it's going to continue, stop with  
[15]inflammatory [**\*207**] language?  
[16]MR. CITRIN: Yes, sir. Yes, sir.  
[17]THE COURT: I'm trying to remain calm.  
[18]MR. CITRIN: Yes, sir.  
[19]Mr. Moore has through not substantive  
[20]cross-examination but his own pejorative comments  
[21]accused the witness of saying things that are patently  
[22>false without basis for doing that, he has thrown his  
[23]glasses on the table, he has shouted at the witness, but  
[24]more disturbingly, throughout the course of the day  
[25]carried over to the afternoon despite the admonition of  
1248  
[1]the Court, continues to interject his own personal view  
[2]of the voracity and integrity of this witness, which is  
[3]completely inappropriate.  
[4]MR. MOORE: Judge, can I be heard?  
[5]THE COURT: Up until the last question, I  
[6]don't recall, as before the lunch break, that I allowed  
[7]the answer to any question which would have essentially  
[8]reflected that the witness is lying under oath.  
[9]MR. CITRIN: The statement that he makes  
[10]without cross-examination to support it is, and this was  
[11]this afternoon, that statement is patently false.  
[12]Now, you can't ask that question and move on  
[13]to something else because [**\*208**] then, Judge, it becomes a  
[14]comment by the lawyer, not a cross-examination point --  
[15]THE COURT: Wouldn't that have been something  
[16]that I would have struck? I can't remember everything

[17]because there are so many things to remember here that  
[18]it's beyond my capacity, but wouldn't I have struck  
[19]that?

[20]MR. CITRIN: It's again, and again most  
[21]respectfully, Judge, there is only so much you can do,  
[22]you would have, and you did, so I'm not suggesting in  
[23]any fashion the Court is indulging it. What I'm saying  
[24]is --

[25]THE COURT: No, I understand that.  
1249

[1]MR. CITRIN: That despite the best efforts of  
[2]this Court, this jury has now been subjected to Mr.  
[3]Moore's view not only of me, which hasn't recurred this  
[4]afternoon, but more importantly the witness, falsehoods,  
[5]an agenda. And the problem is, and I share the Court's  
[6]view that jurors tend to be a lot smarter and more savvy  
[7]than we are, the problem is that we can't see into their  
[8]minds. And like the effects of rocks, water dripping on  
[9]rocks over a long period of time has an eroding effect.  
[10]I believe very little of substance has been  
[11] [\*209] gone into and more in terms of personal attacks on the  
[12]integrity of the witness that this conduct by Mr. Moore,  
[13]which he is apparently incapable of controlling, is  
[14]going to continue and continued, and for that reason I  
[15]again renew my motion for a mistrial.

[16]THE COURT: You want to be heard, Mr. Moore?

[17]MR. MOORE: I will not dignify that.

[18]One word, Judge. I don't think agenda as such is a  
[19]pejorative term. I don't --

[20]THE COURT: I have a problem with it.

[21]MR. MOORE: Well, if you have a problem then

[22]you would have sustained the objection. But did it

[23]require a comment --

[24]THE COURT: We didn't get to that point --

[25]MR. MOORE: But we didn't. Judge, how am I  
1250

[1]going to finish if we --

[2]THE COURT: I have an easy answer for that.

[3]Let's stop what I think I referred to before as the

[4]extraneous nonsense.

[5]MR. MOORE: I used -- sorry. I used a word

[6]that I thought was not pejorative but a foundation for

[7]the next thing I was going to do, and I don't think it

[8]warranted taking now almost 15 minutes of break. That's

[9]all I'm saying.

[10]THE COURT: Well, I have a **[\*210]** problem with the

[11]word "agenda".

[12]MR. MOORE: Okay.

[13]THE COURT: That means to me that he is going

[14]to intentionally lie because he has an agenda; that's

[15]what it means to me.

[16]MR. MOORE: Well --

[17]THE COURT: And I don't know that that should

[18]attempt to even be elicited.

[19]MR. MOORE: Well, you will see where I was

[20]going with it, you would have sustained the objection,

[21]Judge.

[22]THE COURT: Yes, certainly I would have

[23]sustained the objection.

[24]MR. MOORE: Okay.

[25]MR. CITRIN: The point is, as I said to the  
1251

[1]Court before, if your Honor sustains the objections, it  
[2]doesn't reverse the prejudicial effects of the comment,  
[3]and that is what the problem is and that is what the  
[4]problem has been, and despite the Court's sustaining  
[5]objections, the jury hears it.

[6]MR. MOORE: Okay, I do have something to say.  
[7]How about the prejudicial effect of a man  
[8]under oath that won't answer a question being asked on  
[9]cross-examination? How about the prejudicial effect of  
[10]that to the plaintiff?

[11]THE COURT: Well, if and when that happens,  
[12]you can ask the Court **[\*211]** for assistance in requiring the  
[13]answer, assuming it's a yes-or-no question, and I have  
[14]done it several times throughout the trial --

[15]MR. MOORE: I don't doubt that.  
[16]What I'm saying is I think this record is  
[17]clear that this witness is trying to obfuscate --

[18]MR. CITRIN: Now he is obfuscating --

[19]MR. MOORE: That's not before the jury.

[20]MR. CITRIN: Again, Judge, that's -- those  
[21]comments, even though this one was not made before the  
[22]jury, those are the comments that are inappropriate and  
[23]are prejudicial for which there is no cure.

[24]And so, Judge, if the question Mr. Moore says,  
[25]how are we going to finish? I would ask the Court if  
1252

[1]you are not going to declare a mistrial, the next time  
[2]he does it, sit him down, because he is apparently  
[3]incapable of controlling himself.

[4]And the more he does it, despite the Court's  
[5]best efforts, the more prejudicial this becomes.  
[6]MR. MOORE: A 10-year old would know reading  
[7]this transcript that this witness is not forthcoming. I  
[8]stand on it.  
[9]MR. CITRIN: And this is exactly the --  
[10]THE COURT: He may not be forthcoming. [**\*212**]  
[11]MR. MOORE: That's all I said.  
[12]THE COURT: I don't know that that leads to  
[13]asking a question using the word agenda, he has an  
[14]agenda.  
[15]MR. MOORE: One has nothing to do with the  
[16]other.  
[17]What I'm saying is this is not an easy  
[18]cross-examination.  
[19]MR. CITRIN: And nor has any of the other  
[20]cross-examinations --  
[21]MR. MOORE: Oh, come on, okay --  
[22]THE COURT: Listen, I really and truly still  
[23]don't believe that the record that's now been made this  
[24]afternoon, coupled with your request this morning, and  
[25]maybe even an earlier request a week or 2 ago, warrants  
1253  
[1]a mistrial.  
[2]But I would hope that, and I guess at times  
[3]whatever I said falls on deaf ears, but I don't know why  
[4]all of this gets mixed into a search for the truth and  
[5]what should be an easier way to get to the truth.  
[6]So I'll certainly note your exception. I  
[7]don't know if I noted it on the earlier motion today. I

[8]will note it now if I didn't note it before, but I'm not

[9]going to grant a mistrial.

[10]John.

[11]THE OFFICER: Yes.

[12]THE COURT: You might as well get the doctor.

[13] [\*213] MR. MOORE: Can we just -- now can I get what

[14]I was looking for, Judge, before the jury comes?

[15]THE COURT: Yes, sure.

[16](The following is transcribed by Angela

[17]Spinelli.)

[18](Continued on next page.)

[19]\*\*\*

[20]

[21]

[22]

[23]

[24]

[25]

1254

[1]THE CLERK: Remain seated and come to order

[2]please.

[3]THE OFFICER: All rise, jury entering.

[4](Whereupon, the jury entered the courtroom.)

[5]THE COURT: You may all be seated, ladies and

[6]gentlemen. We are resuming the cross-examination of Dr.

[7]DiGiacinto by the Mr. Moore.

[8]MR. MOORE: May I, your Honor?

[9]THE COURT: Yes.

[10]THE CLERK: Doctor, you're under oath sir.

[11]THE WITNESS: Yes.

[12]CROSS-EXAMINATION (CONTINUED)

[13]BY MR. MOORE:

[14]Q Doctor, tell the jury how many times in your

[15]medical/legal career have you come into a court of law in New

[16]York State and testified on behalf of a plaintiff -- forgive

[17]me, in a medical malpractice case against a hospital and/or

[18]doctor?

[19]A I don't believe I have.

[20]Q Never, right?

[21]A That's my recollection, sir.

[22]Q You say it's your recollection, if you had, **[\*214]** that's

[23]something you'd remember, right?

[24]A I could forget it, but I don't think I am. I

[25]believe you're correct.

1255

[1]Q Doctor -- by the way, let me cover it quickly --

[2]how much are you charging?

[3]A For today? \$ 5,000.

[4]Q Do your charges go down?

[5]MR. CITRIN: Objection.

[6]THE COURT: Sustained.

[7]Q Do you remember testifying under oath in July of

[8]this year, question in Figueroa versus Montefiore Medical

[9]Center, July 1, 2009, question at page 58 on

[10]cross-examination line 12:

[11]"QUESTION: I should have asked you how much are

[12]you getting paid to be here today?

[13]"ANSWER: \$ 6,000."

[14]Q Did you give that testimony?

[15]A Yes, I did.

[16]Q Doctor, getting back to substance, do you agree,

[17]sir -- withdrawn.

[18]Remember my questions about you being a member

[19]of the Academy of Neurology?

[20]A Yes, I do, sir.

[21]Q Caravalu says --

[22]MR. MOORE: I'm sorry, Judge, this is a transcript

[23]of another witness, I apologize. This is not the doctor

[24]dealing -- my reference.

[25]THE COURT: Talking about the Figueroa.

1256

[1]MR. MOORE: **[\*215]** No, no, Figueroa was Dr. DiGiacinto,

[2]Judge. I have another transcript here that I was led to

[3]believe was Dr. DiGiacinto that talks about the American

[4]Academy of Neurology.

[5]I apologize to you, Doctor. And I apologize to

[6]everybody. That is not a reference to you.

[7]Sorry, Judge.

[8]THE COURT: Okay.

[9]Q In any event, Doctor, I do though ask you isn't it

[10>true that to give testimony about the care of a neurologist

[11]you should know the basic standards of the American Academy

[12]of Neurology?

[13]A I don't think that's completely necessary, sir, I

[14]can offer my opinions.

[15]Q You say it's not completely necessary; isn't it

[16]reasonable, Doctor?

[17]A I don't think so. I'm here as a neurosurgeon, and

[18]I'm giving testimony as a neurosurgeon.

[19]Q But you gave testimony to this jury that Dr.

[20]Gordon did not depart as a neurologist, not as a

[21]neurosurgeon, correct?

[22]A That's correct.

[23]Q Doctor, do you agree that if, if there was a

[24]change in pattern of headaches in this woman, before she saw

[25]Dr. Gordon and he knew or should have known that, he would  
1257

[1]have been required [**\*216**] right there to order neuroimaging, true or

[2>false?

[3]MR. CITRIN: Objection.

[4]THE COURT: Overruled.

[5]You can answer.

[6]A I think stated hypothetical and then used names.

[7]You'd have to evaluate the entire picture before you can say

[8]that he should or shouldn't have.

[9]Q Doctor, is frequency, does frequency come under

[10]the heading of pattern?

[11]A I believe it would, yes.

[12]Q Does severity come under the heading of pattern?

[13]A I'm not sure about that.

[14]Q Didn't you see in Dr. Block that he said that?

[15]A I don't recall, sir.

[16]Q Does localization come under the heading of

[17]pattern?

[18]A I think it would.

[19]Q Did you see that in Dr. Block?

[20]A I don't recall, sir.

[21]Q Did you see my questioning of Dr. Block that if

[22]there's a change in pattern and these 3 things are the

[23]specific things mentioned, there would have to be

[24]neuroimaging done on the patient if it had not been done

[25]before?

1258

[1]A Again, I don't specifically recall that, sir. I

[2]trust your representation, and I don't argue with it. But I

[3]can't tell you that I recall [\*217] specifically reading that. I

[4]would welcome your taking the time to read it to me, and I

[5]will react to it.

[6]MR. CITRIN: Objection.

[7]Q Are you going to say that every time?

[8]THE COURT: Sustained.

[9]Q Doctor, you remember in Dr. Shields' testimony Mr.

[10]Citrin asked him about the statistical likelihood as follows

[11]-- of a patient with migraines and a normal neurological

[12]exam, the statistical likelihood of underlying brain

[13]pathology or sudden -- I say more appropriately --

[14]intracranial pathology; remember that?

[15]A I do recall testimony along that line.

[16]Q Doctor --

[17]A Not the specifics, sir.

[18]Q He actually gave a statistic; you don't remember?

[19]A I don't recall the statistic, sir.

[20]Q The statistic was .2 percent; you don't remember?

[21]A I'll adopt your number. I don't recall it.

[22]Q That's one in a thousand, correct?

[23]A .2 is --

[24]Q One in 500, sorry, my math apologize.

[25]One in 500, correct?

1259

[1]A I believe that's correct.

[2]Q Doctor, Dr. Shields agreed, correct?

[3]A What?

[4]Q He agreed with that; you don't [\*218] remember that

[5]either?

[6]A It wasn't a complete question.

[7]Q Do you agree with that?

[8]A I don't know the exact statistics. I'm sure it's

[9]on that order.

[10]Q If you don't know the exact statistic --

[11]A I would think it's ballpark, yes.

[12]Q That has nothing -- if a patient has migraine and

[13]a headache from another source that's getting more severe,

[14]more frequent and localized, what are the statistical chances

[15]that that patient on neuroimaging would show intracranial

[16]pathology?

[17]MR. CITRIN: Objection.

[18]Q Do you know the answer to that one?

[19]MR. CITRIN: Objection.

[20]THE COURT: I'll allow it.

[21]You can answer.

[22]Overruled.

[23]A I don't know the answer.

[24]Q What?

[25]A I don't know the answer.

1260

[1]Q 10 percent, Doctor, true?

[2]MR. CITRIN: Objection.

[3]A I don't know the answer.

[4]THE COURT: Overruled.

[5]Q On that issue, that's squarely within the field of

[6]neurology, isn't it?

[7]A I'm a neurosurgeon, sir.

[8]Q Do you think you had to say that in response to my

[9]question?

[10]MR. CITRIN: **[\*219]** Objection.

[11]THE COURT: Sustained.

[12]Q That's squarely within the field of neurology,

[13]correct?

[14]A I believe it would be, yes.

[15]Q Doctor, you've known since you rotated through

[16]neurology that a basic text in the field is Merritt's

[17]Neurology, and I have here the 10th Edition; you know that,

[18]don't you?

[19]A I know that Merritt's Neurology is a basic

[20]neurology text.

[21]Q You have known that years ago as long as you

[22]rotated through neurology?

[23]A Yes.

[24]Q Would you say that would be a reasonably

[25]authoritative work on this precise subject? You reserving  
1261

[1]the right to disagree with any particular portion that I

[2]might read?

[3]A I would not be able to say it was authoritative,

[4]sir.

[5]Q Doctor, you know from your time through neurology

[6]that it is a text that those teaching future neurologists

[7]refer them to, true?

[8]A I was the 2nd Edition, sir. I don't know the 10th

[9]Edition.

[10]Q But in your time it was true, correct?

[11]A True that?

[12]Q That neurologists, professors referred their

[13]students to Merritt's Neurology, correct?

[14] **[\*220]** A Yes.

[15]Q Do you think, Doctor, they did it so that they'd

[16]learn the right thing or the wrong thing?

[17]MR. CITRIN: Objection.

[18]MR. MOORE: Withdrawn as to form, Judge.

[19]Q Do you think, Doctor, they did it at that time so

[20]that the students would learn?

[21]A Yes.

[22]Q Do you think they did it so they'd learn the right

[23]way?

[24]A They learned Dr. Merritt's version of information.

[25]Q Doctor, you do agree that if an imaging study had  
1262

[1]been done in any month of the 25 months it would have shown

[2]the acoustic neuroma, correct?

[3]A Yes.

[4]Q And, Doctor, if an acoustic neuroma should be done

[5]when there is a significant change in pattern, under the

[6]circumstances of this case, you would agree with that, true?

[7]A Read that question back. I don't think it was a

[8]question.

[9]MR. MOORE: I might have misphrased it, Judge.

[10]I'll repeat it.

[11]Q Doctor, if it was required that neuroimaging be

[12]done, if that was a requirement neuroimaging be done if there

[13]was a significant change in pattern under the circumstances

[14]of this case, if that was a requirement, that **[\*221]** would be a

[15]requirement; you would agree with, true?

[16]MR. CITRIN: Objection.

[17]THE COURT: Overruled.

[18]A Depending on the pattern, it would have to be

[19]evaluated.

[20]Q I said under the circumstances of this case, I

[21]assume you're including proper evaluation?

[22]A And my answer stands.

[23]Q So are you agreeing or disagreeing?

[24]A I am saying it would depend on the change in the

[25]symptoms and pattern.

1263

[1]Q I still don't know what your answer is, Doctor?

[2]MR. CITRIN: Objection to Mr. Moore's comment.

[3]THE COURT: Overruled.

[4]Q Let me ask you again.

[5]A Yes, sir.

[6]Q Under -- you have a lot of knowledge about this

[7]case, I'm assuming?

[8]A Yes.

[9]Q Is my assumption correct or incorrect?

[10]A Correct.

[11]Q Under the circumstances of this case, all of them,

[12]would you agree that if there was a significant change in

[13]pattern in headache in this patient it would have required a

[14]neuroimaging study?

[15]A I cannot answer that question as stated without

[16]knowing what the change in pattern that you're referring to

[17]is.

[18]Q [**\*222**] You should know.

[19]MR. CITRIN: Objection. That assumes there was a  
[20]change.

[21]MR. MOORE: I said if, I don't understand, Judge.

[22]THE COURT: I agree. Continue.

[23]MR. MOORE: Thank you.

[24]Q I said if, Doctor, do you agree?

[25]A And I said it depends on what the change in  
1264

[1]pattern is.

[2]Q But that's --

[3]A I can't answer it better than that, sir.

[4]Q You're not saying to this jury that the only pain

[5]that's caused by an acoustic neuroma is what you described

[6]for the jury on questioning by Mr. Citrin, are you?

[7]A I don't recall describing.

[8]Q Doctor, are you saying you don't remember what you  
[9]said?

[10]A I don't recall describing the pain from the

[11]acoustic, which I think was what your question just was.

[12]Q You don't remember -- I don't say you use this

[13]phrase -- but you don't remember in essence testifying that

[14]an acoustic neuroma could cause -- and this is the phrase you

[15]may not have used, but it was the import, correct me if I'm

[16]wrong -- a mass effect pain; you don't remember that before

[17]lunch, is that your testimony?

[18]MR. CITRIN: Objection, **[\*223]** Judge.

[19]MR. MOORE: No, not saying he used that phrase.

[20]THE COURT: Overruled.

[21]MR. MOORE: Thank you, Judge.

[22]A I don't recall that general area of testimony

[23]period.

[24]Q Doctor, you know what mass effect pain is?

[25]A I know what mass effect is. I don't know what  
1265

[1]mass effect pain is. It's not a term I'm familiar with.

[2]Q You're a neurosurgeon?

[3]A Yes, I am, sir.

[4]Q Doctor, there was mass effect in this patient in

[5]March of 2005, correct?

[6]A Yes.

[7]Q And that could cause pain, correct?

[8]A Types of pain, yes.

[9]Q You just said you don't know what mass effect pain

[10]is, and now you just said that you do, correct?

[11]A I never used the term mass effect pain, sir. I

[12]said that mass effect could cause types of pain which is

[13]different than saying I understand the term mass effect pain,

[14]which I have never heard used, and which I have never used.

[15]Q You have just said under oath that mass effect can

[16]result in pain, and I assume you've known that as long as

[17]you've been a neurosurgeon, correct?

[18]A Correct, yes.

[19]Q Doctor, [**\*224**] acoustic neuroma can cause pain other than

[20]as a result of mass effect, any neurosurgeon practicing

[21]appropriately would have to know that, correct?

[22]A It would be mass effect --

[23]Q Excuse me?

[24]A that was causing pain, so the answer is no.

[25]I'm listening to the question myself. The answer is no.  
1266

[1]Q The answer is no, you say to these people under

[2]oath; is that correct? Doctor, don't worry what I'm doing.

[3]MR. MOORE: There's an outstanding question.

[4]MR. CITRIN: Objection.

[5]THE COURT: Strike the remark.

[6]THE WITNESS: Sorry, I thought I answered it.

[7]MR. MOORE: Could we have the question read back.

[8]THE WITNESS: I thought I said no. I didn't hear

[9]your next question.

[10](Whereupon, the requested portion was read back.)

[11]A I'd have to hear the question before, I'm sorry.

[12]There was a follow-up to the question. I don't know what the

[13]original question was.

[14]Q Doctor, the original question was: You know,

[15]don't you, that there can be pain as a result of an acoustic

[16]neuroma that's not a result of mass effect, you know that and

[17]have known it [**\*225**] since you've been first a neurosurgeon and even

[18]before, true?

[19]A I think I have to say no to that question.

[20]Q Okay, that's what you said before.

[21]Now, Doctor, on that basic issue, do you think

[22]that the literature might have something to say?

[23]MR. CITRIN: Objection to the form of the

[24]question.

[25]THE COURT: I'll sustain based on form.

1267

[1]Q Remember you said you referred to the literature

[2]on questioning by Mr. Citrin?

[3]A Yes.

[4]Q Doctor, in the field of neurosurgery, practically

[5]a tone is neurosurgery edited by Robert H. Wilkens and Setti

[6]S. Rengachary, true?

[7]A Yes.

[8]Q Do you recognize that text as reasonably

[9]authoritative reserving the right to disagree with any

[10]particular portion that I might read?

[11]MR. CITRIN: Objection to the form of the question

[12]reasonably.

[13]THE COURT: I'll sustain.

[14]MR. MOORE: I've been using that.

[15]MR. CITRIN: Reasonably.

[16]Q Doctor, you know what the phrase authoritative

[17]text means, Doctor, don't you?

[18]A Yes.

[19]Q This is beyond the shadow of a doubt an

[20]authoritative text in [**\*226**] your specialty, correct?

[21]A It is a prominent textbook. I don't consider it

[22]authoritative.

[23]Q That's a deliberate --

[24]MR. MOORE: Withdrawn, withdrawn.

[25]THE COURT: And I will strike that remark even

1268

[1]though it's withdrawn. The jury is directed to

[2]disregard it.

[3]Q Well, Doctor, do you sometimes teach students?

[4]A Yes, I do.

[5]Q Are you saying to them -- forgive them -- are you

[6]saying to this jury that you've never referred students to

[7]that -- I only have one book, but it's actually a 3 volume

[8]work; are you saying you've never done that?

[9]A No.

[10]Q You've done that many times, correct?

[11]A More than likely, yes.

[12](Whereupon, Official Court Reporter Linda Calderon

[13]relieved Official Court Reporter Angela Spinelli.)

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1269

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q And you've done that so that they get the right

[4]answers, not the wrong answers; true?

[5]A I do it as a source of information that they can

[6]add to their general knowledge, sir. It may contain wrong

[7]answers at times. **[\*227]** They contain answers that evolved since

[8]publication.

[9]Q Is that your answer to my question?

[10]A Yes.

[11]Q Doctor, would you say you do it so that hopefully

[12]down the road they'll treat patients properly as

[13]neurosurgeons; would you say you do it for that reason?

[14]A I try to get them to gather all the information I

[15]can.

[16]Q Is the answer a resounding yes?

[17]A Partially, yes.

[18]Q Doctor, the fact is that why, why -- withdrawn.

[19]You know that acoustic neuroma can cause pain in

[20]the patient suffering from it in at least 50 percent of the

[21]cases; you know that, don't you?

[22]A I think that's a fair number, yes.

[23]Q And you know, Doctor, that in the overwhelming

[24]majority of those instances, the exact reason is unknown to

[25]neurology and neurosurgery, correct?

1270

[1]A I don't know that for a fact, sir.

[2]Q On that, isn't that the kind of fact that you

[3]should know before you come in here and say that Dr. Gordon

[4]did not depart from accepted practice?

[5]A I don't believe that what you said is a fact, sir,

[6]I think that the majority of pain is --

[7] **[\*228]** Q Okay. Would you say, Doctor, on that issue, on

[8]that precise issue, Merritt's is not authoritative on that,

[9]right?

[10]A No.

[11]Q Wilkinson's is not authoritative on that; right?

[12]A No.

[13]Q But Principles of Neurology by Raymond -- edited by

[14]Raymond D. Adams, Maurice Victor and Alan H. Ropper, would

[15]you say that that would be an authoritative text on that

[16]subject as to whether when there is pain as a result of

[17]acoustic neuroma, the exact reason is overwhelmingly not

[18]known even in the best of hands and the best of authorities

[19]and the best of medical science?

[20]A No, sir.

[21]Q Would that book be authoritative on that subject?

[22]A No, sir.

[23]Q That's a text that -- from your knowledge and your

[24]days in neurology rotation, at least and since, that's a text

[25]that you know professors of neurology refer their students to  
1271

[1]many, many, many times; true?

[2]A I suspect so, I don't know it for a fact, but I

[3]certainly would suspect so.

[4]Q Doctor, this is the 6th edition.

[5]There was an edition when you were rotating through

[6]neurology; you know that, don't you? **[\*229]**

[7]A Yes, I do.

[8]Q And you don't know whether your teachers referred

[9]you to that book?

[10]A I'm sure they did, but it was one that was

[11]available.

[12]Q You just said the exact opposite?

[13]MR. CITRIN: Objection.

[14]MR. MOORE: Withdrawn.

[15]THE COURT: Sustained.

[16]Q Doctor, I said I would come back to Dr. Golfinos

[17]and I'm going to do it now.

[18]You, sir, answered questions by Mr. Citrin that

[19]included a reading from page 1070 of the transcript; you

[20]remember that?

[21]A It might be the number. Probably.

[22]Q What?

[23]A Might be the number, I can't be sure.

[24]Q Forgive me, I don't mean do you remember the exact

[25]page, but you remember that question; right?

1272

[1]A He read something to me. I would have to --

[2]Q Well --

[3]A -- know which question it was.

[4]Q Doctor, yes, I assume you wouldn't answer yes

[5]without knowing what was read to you; is that true?

[6]A I asked you if the page was something that I had

[7]been read from. I don't recall the page number. I don't

[8]think I answered yes actually.

[9]Q Doctor, do you remember [\*230] about -- withdrawn.

[10]MR. MOORE: Can I have Dr. Golfinos' record,

[11]please?

[12]THE COURT: 8, I believe?

[13]MR. MOORE: I'm sorry, Judge?

[14]THE COURT: Is it 8?

[15]MR. MOORE: I have the list and I think I have

[16]mislaid it.

[17]THE OFFICER: (Hanging.)

[18]MR. MOORE: Sorry, Judge.

[19]Q Doctor, remember I was questioning you about the

[20]issue of right-sided pain -- forgive me, left-sided pain,

[21]meaning neuralgia and migraines after the surgery?

[22]A Yes, sir.

[23]Q Okay. And, Doctor, you reading Dr. Block saw that

[24]the questioning of Dr. Block by Mr. Citrin was precipitated

[25]by my asking Dr. Block to read along with me in reference to

1273

[1]the fact that the right-sided headaches are in a sense cured,  
[2]meaning that they have not reappeared after the tumor was  
[3]removed; you remember that?

[4]A Yes, sir.

[5]Q And Mr. Citrin got up and asked Dr. Block to read  
[6]the page before of the 2-page report; do you remember that?

[7]A I don't specifically, sir, I'm sorry. I don't  
[8]doubt it but I don't specifically remember.

[9]Q And he gave him the exhibit, Plaintiff's --

[10] [\*231] MR. MOORE: I think you gave the number,

[11]Judge? Could you indulge me?

[12]THE COURT: Golfinos?

[13]MR. MOORE: Yes.

[14]THE COURT: It's 8, I believe.

[15]MR. MOORE: Thank you.

[16]Q Doctor, don't say anything, just look at the first  
[17]2 lines and particularly the last 2 words in the second line.

[18](Handing.)

[19]A (Examining Plaintiff's Exhibit 8.)

[20]Last 2 words of the second line, yes, sir.

[21]Q Just look at it.

[22]A Yes.

[23]Q Thank you.

[24]A I didn't hear what you wanted me to look at, sir.

[25]Q You saw that according to what Dr. Block read from  
1274

[1]that document, if it was correct, the statement that  
[2]right-sided headaches have not reappeared would be false; you  
[3]saw that, correct?  
[4]MR. CITRIN: Judge, I object.

[5]Q Did you see that?

[6]MR. CITRIN: I object.

[7]THE COURT: I'll --

[8]MR. CITRIN: At least to the point --

[9]THE COURT: For that reason alone, sustained.

[10]Just rephrase it.

[11]Q Did you read Dr. Block's testimony -- you don't

[12]need to look at anything else but what I pointed out to you,

[13]okay?

[14]MR. CITRIN: **[\*232]** Judge, I object to the comments

[15]to the witness.

[16]THE COURT: That I will allow. The witness

[17]was still looking at the report.

[18]Q The second page.

[19]A You said the first page. I'm sorry, you handed me

[20]the first page.

[21]Q You said you didn't look beyond what I showed you.

[22]I just saw you do it.

[23]MR. CITRIN: Objection, Judge.

[24]THE COURT: Listen, I'm going to put a stop to

[25]it by indicating: Doctor, could you just put that down

1275

[1]and listen to the next question?

[2]THE WITNESS: Yes, that would be the --

[3]Q If when she presented to Dr. Golfinos she was

[4]complaining of right-sided pain, that would absolutely

[5]contradict his conclusion that right-sided headache has in a

[6]sense been cured; true?

[7]Did you hear me?

[8]A Yes, I'm just making sure I heard it. If she still

[9]had right-sided --

[10]Q Making sure you heard it?

[11]A Correctly.

[12]If she still had right-sided pain, she would still

[13]have right-sided pain.

[14]Q And, therefore, the statement that it didn't appear

[15]again and it's in a sense cured would be false, correct?

[16]A I believe **[\*233]** so.

[17]Q When Dr. Block read it and when Mr. Citrin referred

[18]you to it today, he started right at the first line: Lauren

[19]Morris is a 31-year old right-handed woman, correct?

[20]A Correct.

[21]Q Who came to see me because of complaints of

[22]headache -- just listen. I know you are reading, Doctor,

[23]listen: On the right side. That's what was read and that's

[24]what Mr. Citrin posed to you in a hypothetical this morning,

[25]correct?

1276

[1]I know you are looking -- Doctor, you are not --

[2]MR. CITRIN: Judge, objection.

[3]MR. MOORE: I'm not asking him to --

[4]THE COURT: Look, I need to be clear also

[5]whether the doctor is listening to the question --

[6]THE WITNESS: I am listening to the question.

[7]THE COURT: -- or reading and not getting the

[8]full question.

[9]Q What Dr. Block should have read but didn't --

[10]MR. CITRIN: I object to this. I object to

[11]this.

[12]MR. MOORE: Whatever phrase you --

[13]THE COURT: I'll sustain.

[14]Q Doctor, what the record reads and what Mr. Citrin

[15]asked you to assume today is: Lauren Morris is a 31-year old

[16]right-handed woman --

[17] [\*234] MR. CITRIN: Where is he reading from, Judge,

[18]can I have the page and line?

[19]MR. MOORE: Page 1070, I said it earlier,

[20]sorry, line 4.

[21]Q Lauren Morris is a 31-year-old right-handed woman

[22]who came to see me because of complaints of headaches on the

[23]right side of her head following resection of an acoustic

[24]neuroma.

[25]Dr. Golfinos' record indicates the opposite; true?

1277

[1]A Yes, sir.

[2]Q In other words, what he wrote at the time is

[3]totally consistent with his statement that the right-sided

[4]headaches were in a sense cured; true?

[5]A For the most part, yes.

[6]Q No, for the total part; true?

[7]A What he wrote, I'm sorry, yes.

[8]Q What he wrote was: Lauren Morris is a 31-year old

[9]right-handed woman who came to see me because of complaints

[10]of headache on the right -- forgive me, on the left side,

[11]correct?

[12]A That's what it says, yes.

[13]Q And that is totally consistent with right-sided

[14]headache in a sense cured; true?

[15]A By that statement, yes. If, if that is exclusive

[16]and that's all he is talking about, yes.

[17]Q Dr. Jamieson has the same information, [\*235] no  
[18]right-sided headaches in that sense, we are not talking about  
[19]migraines now -- let me go back -- periorbital on both sides,  
[20]we have covered that, please don't refer to that.  
[21]But headaches -- headache on right side has not  
[22]reappeared since the acoustic neuroma is gone. Dr. Jamieson  
[23]has the same information, correct?  
[24]A I would have to see it. I trust your  
[25]representation. I don't --  
1278

[1]Q Didn't you see my reference to it yesterday when I  
[2]was questioning Dr. Block?  
[3]A I believe it's correct. I don't trust my memory  
[4]well enough. I would accept your representation and say yes.

[5]Q Couldn't you just say yes then?

[6]A Because I have to predicate it by saying I don't  
[7]specifically recall --

[8]Q You want to be very careful that you are giving  
[9]precisely truthful information, correct?

[10]A That would be appropriate, yes.

[11]Q Therefore, Doctor, surely, surely on the issue of  
[12]acoustic neuroma causing on the left -- causing right-sided  
[13]head pain, you would have looked at what Dr. Jamieson opined  
[14]on that subject as records in this case in preparation for  
[15]your testimony; [\*236] true?

[16]A Correct.

[17]Q And she said the exact opposite of what you have  
[18]told the jury, correct?

[19]A I have no idea how to answer that because I'm not  
[20]sure what you are referring to, sir.

[21]Q Aren't you aware that Dr. Jamieson indicated that  
[22]it was her opinion that headache resulted from the left  
[23]acoustic neuroma and she didn't say left, she said acoustic  
[24]

[25]  
1279

[1]neuroma -- no, I'm sorry. She didn't say neuroma, she said  
[2]acoustic and didn't add the word neuroma; didn't you hear  
[3]that?

[4]A I would prefer to see her record. Not that I'm  
[5]questioning you, but I don't recall specifically.

[6]MR. MOORE: May I, Judge, use my copy to move  
[7]along, it's Plaintiff's Exhibit 9?

[8]THE COURT: Exhibit 9.

[9]MR. MOORE: Thank you.

[10]Q (Handing.)

[11]You see what's underlined there, Doctor, just read  
[12]it to yourself.

[13]A (Examining Plaintiff's Exhibit 9.)

[14]Q It's only 2 lines.

[15]A I read it.

[16]Q Doctor, on the issue at hand, doesn't it contradict  
[17]flatly what your opinion has been on the subject to this  
[18]jury?

[19]A Absolutely not.

[20]Q Are **[\*237]** you saying that that doesn't say that headache  
[21]was from the acoustic neuroma?

[22]Read it again, Doctor.

[23]A I have read it.

[24]Q Are you saying that?

[25]A I'm saying that it is not --  
1280

[1]Q No, Doctor, are you saying that?

[2]A I am saying it, yes.

[3](Hanging.)

[4]Q Lauren Morris is a 32-year old female with

[5]migraines comma headache due to left acoustic. Headache due

[6]to left acoustic. By the way, migraines comma and then

[7]headache.

[8]The comma means there are different references,

[9]correct?

[10]A Absolutely.

[11]Q Headache, therefore, if we go headache and

[12]headache, migraine is headache and now the use of headache is

[13]the other, correct?

[14]A I believe so.

[15]Q Headache due to acoustic neuroma -- not the word --

[16]neuroma left out -- left acoustic, L acoustic means that the

[17]L acoustic, left acoustic caused headache, correct?

[18]A No.

[19]Q What?

[20]A No.

[21]Q What does the phrase, due to, mean?

[22]A This is in the postoperative period where you have

[23]described the headaches that the patient has, and in my

[24]opinion in reading the entire **[\*238]** report she is referring to the

[25]headaches which is the occipital neuralgia, which you have

1281

[1]spoken of at length. That is my interpretation of that

[2]statement.

[3]Q Doctor, that's clearly not the situation in terms

[4]of the totality of a report, correct?

[5]A I disagree with you on that statement. I have

[6]given my interpretation of the report.

[7]Q Did you come up with that when they showed you --

[8]withdrawn.

[9]Didn't you go over this assessment and plan of Dr.

[10]Jamieson with Mr. Citrin since yesterday?

[11]A I discussed it with Mr. Citrin.

[12]Q Did you hear my question?

[13]A Yes. I'm not sure if it was yesterday or the day

[14]before, sir.

[15]Q You don't know?

[16]A I don't remember.

[17]Q I asked deliberately yesterday because the first

[18]time the jury heard about that assessment and plan was

[19]yesterday, so I'm asking --

[20]MR. CITRIN: We didn't sit yesterday, Judge,

[21]so I'm not sure what he is talking about.

[22]MR. MOORE: Am I on the wrong day?

[23]THE COURT: I will sustain the objection

[24]technically.

[25]Q Tuesday. Any time I said yesterday, I meant the  
1282

[1] [**\*239**] last trial day.

[2]A I'm a little unclear, too, whether it was yesterday

[3]or the day before.

[4]Q But it was certainly after the testimony by Dr.

[5]Block?

[6]A I believe it was.

[7]Q Correct?

[8]A I believe it was, yes.

[9]Q Do you think there is a difference between headache

[10]due to removal of an acoustic neuroma as opposed to the

[11]statement headache due to an acoustic neuroma; is there a

[12]difference between those in neurosurgery?

[13]A That's vague and impossible to answer that

[14]question, sir. It has to refer to a specific situation.

[15]Q Let me move on, Doctor.

[16]By the way -- sorry, before I do.

[17](The following is transcribed by Angela Spinelli.)

[18](Continued on next page.)

[19]\*\*\*

[20]

[21]

[22]

[23]

[24]

[25]

1283

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q By the way, sorry, before I do.

[4]You're disputing that these right-sided

[5]headaches disappeared, correct?

[6]A Not completely disappeared, she had bilateral

[7]headaches.

[8]Q Are we back to this, Doctor?

[9]MR. CITRIN: I object. Move to strike the

[10]comment.

[11]MR. [\*240] MOORE: We've covered this, Doctor.

[12]Q Bilateral meaning the migraines, correct?

[13]A Yes.

[14]Q Right-sided head pain, not migraine has

[15]disappeared, true, since, since the acoustic on the left was

[16]removed, true?

[17]A The problem I had was all the head pain on the

[18]right was characterized as migraine, and I believed that's

[19]what it was.

[20]Q You know what, Doctor?

[21]A What?

[22]Q Withdrawn.

[23]Are you objective in this case?

[24]MR. CITRIN: Objection.

[25]THE COURT: Sustained.

1284

[1]MR. CITRIN: Objection.

[2]MR. MOORE: I'm sorry.

[3]THE COURT: Sustained.

[4]Q You wouldn't just say something because it helps

[5]the defense, would you?

[6]MR. CITRIN: Objection.

[7]THE COURT: I'll sustain.

[8]Q That does help the defense, what you just said,

[9]you know that, don't you?

[10]MR. CITRIN: Objection.

[11]THE COURT: I'm going to sustain.

[12]Q The testimony you gave on direct, did you think

[13]that helped the defense?

[14]MR. CITRIN: Objection.

[15]THE COURT: Sustained.

[16]Q Did you consider the import of the testimony you

[17]were [\*241] going to give before you took the witness stand?

[18]A Yes.

[19]Q You didn't think it was helping the plaintiff, did

[20]you?

[21]MR. CITRIN: Objection.

[22]THE COURT: Sustained.

[23]Q You knew that if the jury believed you, there

[24]would be a finding for the defense; you knew that?

[25]MR. CITRIN: Objection.

1285

[1]THE COURT: Sustained.

[2]Q Did you know, Doctor?

[3]MR. MOORE: Sorry.

[4]Q That if the jury believed your testimony there

[5]would be a finding for the defense in this case?

[6]MR. CITRIN: I object to this.

[7]THE COURT: Sustained.

[8]MR. MOORE: I'm excepting to this, Judge.

[9]THE COURT: Okay.

[10]Q Did you consider the import of your testimony?

[11]MR. CITRIN: Objection, asked and answered.

[12]THE COURT: He did answer that.

[13]Q The answer was yes, right?

[14]A Correct.

[15]Q You knew it was the defense asking you to come and

[16]testify, didn't you?

[17]MR. CITRIN: Objection.

[18]THE COURT: Overruled.

[19]You can answer that.

[20]A Yes, I did.

[21]Q You knew it was the defense paying you --

[22]withdrawn.

[23]Doctor [\*242] --

[24]THE COURT: Mr. Citrin, you can sit down please.

[25]MR. MOORE: Could I have Dr. Steig's records  
1286

[1]please, S-T-E-I-G.

[2]THE OFFICER: 9?

[3]MR. MOORE: No, no, 9 is Jamieson.

[4](Whereupon, an off the record discussion was

[5]held.)

[6]Q I believe Dr. Steig was the neurosurgeon in this

[7]case, right?

[8]A That is correct.

[9]Q You knew he saw her in follow-up?

[10]A Yes.

[11]Q And you read those records, correct?

[12]A Yes, I did.

[13]MR. MOORE: May I use my copy for the moment,

[14]Judge?

[15]THE COURT: I believe this is Exhibit 17.

[16]MR. MOORE: Can I just approach because I'm trying

[17]to move on?

[18]THE COURT: Yes.

[19]Q Doctor, you see what I've underlined, just read it

[20]to yourself. Don't mix this.

[21]MR. MOORE: Can we just put this back, Judge, this

[22]is Dr. Golfinos' records.

[23]Q Would you read to the jury that -- by the way,

[24]that's September '07, correct?

[25]A No, it's September '05.

1287

[1]Q I meant -- I stand corrected. I meant '05.

[2]Correct?

[3]A Yes.

[4]Q Read it please to the jury?

[5]A She no longer [**\*243**] has right-sided headache which was

[6]one of her presenting symptoms.

[7]Q Did you know that was in there?

[8]A Yes, sir.

[9]Q Do you dispute it?

[10]A I don't think I can. Because it's written there.

[11]And he was seeing the patient.

[12]Q Doctor, you gave testimony on growth rates,

[13]correct?

[14]A Yes, sir.

[15]Q The literature has a lot to say about growth rates

[16]of acoustic neuromas, correct?

[17]A I'm sure it does.

[18]Q You said it's your -- withdrawn.

[19]By the way, Dr. Shields was asked for a number;

[20]remember those questions of Dr. Shields?

[21]A I do.

[22]Q In reference to what the size of the tumor would

[23]have been in February of '03 or a point subsequently, right?

[24]A Yes, sir.

[25]Q It would be impossible to give such testimony,

1288

[1]true?

[2]A Yes.

[3]Q Yet -- Doctor -- sorry.

[4]The reason it would be impossible and the only

[5]way it would have been possible is if there was an earlier

[6]diagnosis and a -- based on an imaging study, correct?

[7]A Yes.

[8]Q By the way, Doctor, you gave 2.8, right?

[9]A Yes, sir.

[10]Q [**\*244**] Are you aware that everybody, based on the MRI

[11]gave 3, and the only variation in largest diameter,

[12]2 centimeters, the only variation anywhere in the record is

[13]Dr. Steig talking about the actual tumor he removed, he gave

[14]it as 2.9, correct?

[15]A No, sir, he referred to it earlier as 2.5.

[16]Q Doctor, there's no question that this tumor was

[17]either 2.9 or 3, true?

[18]A Or very close to that, yes.

[19]Q But you came in and said 2.8, true?

[20]A True. When I tried to measure it on the MRI scan.

[21]Q And --

[22]A Without contrast it appeared to be 2.8 or 2.9.

[23]Q Even though it's only a millimeter or at most

[24]2 millimeters, it is somewhat important based on the growth

[25]rate that you testify to per year of the acoustic neuroma in  
1289

[1]this case, correct?

[2]A I don't think one relates to the other, sir.

[3]Q It doesn't? Well, didn't you say, first of all,

[4]that it's your opinion that this would have grown at

[5]one millimeter a year if it grew at all?

[6]A Possibly.

[7]Q Sorry?

[8]A I could not --

[9]Q That was your testimony?

[10]A Yes, I did not say it. I was **[\*245]** certain it may have

[11]grown at less.

[12]MR. CITRIN: Objection. Mr. Moore is now turning

[13]to the jury and asking questions.

[14]MR. MOORE: But he did give that testimony.

[15]THE COURT: Whatever he said when facing the jury,

[16]strike it from the record, the jury is directed to

[17]disregard.

[18]MR. MOORE: It was a question.

[19]Q Doctor, didn't you say that to this jury -- and I

[20]do admit I was facing the jury.

[21]A Yes, sir.

[22]Q And you said, Doctor, the literature supports you,

[23]correct?

[24]A My awareness of information that I've gleaned,

[25]including literature and personal experience, including  
1290

[1]conferences, including reviews of multiple cases supports

[2]that.

[3]Q Doctor, and you went on to say that at most it

[4]would grow 1.5 millimeters a year, correct?

[5]A That would be the highest possible number, yes.

[6]Q The highest possible.

[7]Are you, Doctor, familiar with -- withdrawn.

[8]Would you say that an authoritative work on

[9]this subject would be acoustic tumors in the young adult from

[10]the Archives of Otolaryngology Volume 110 back to June of

[11]1984?

[12] **[\*246]** A I have no idea, sir. I've never read the article.

[13]Q Doctor, would you question statistics of growth

[14]rates in such an article?

[15]A I'd read it and be aware of what it said. I don't

[16]know that I could call it authoritative.

[17]Q Are you aware that a growth rate in a young --

[18]withdrawn.

[19]Remember saying that sex is not a factor in

[20]whether the tumor might grow faster; remember saying that?

[21]A Yes, I do.

[22]Q That's not correct, true?

[23]A To my knowledge, it is.

[24]Q You certainly didn't say that youth is a factor,

[25]right?

1291

[1]A I don't recall if I used the term youth or not, I

[2]don't think I did.

[3]Q And you should, Doctor, minimally have told the

[4]jury that it grows faster in the young than in the middle age

[5]or the old; you should have told that to this jury, correct?

[6]MR. CITRIN: Objection.

[7]THE COURT: Sustained.

[8]Q Doctor, you know, don't you, and did when you

[9]testified about growth rates before this jury this morning,

[10]you know that acoustic neuromas are documented to grow faster

[11]in young people than in middle aged or old; you knew that, **[\*247]**

[12]correct?

[13]A No, sir.

[14]Q Are you saying that's not true?

[15]A I'm saying I do not know that, sir. I've never

[16]read that.

[17]Q Would you say the following would be authoritative

[18]in that it would be used as an informational and teaching

[19]tool:

[20]Acoustic tumor in a young adult documented

[21]growth rate in the American Journal of Otology Volume 8

[22]Number 2 going back to March of 1987?

[23]A I would not consider it authoritative. I don't

[24]know the article.

[25]Q Are you saying, Doctor, that it's not documented

1292

[1]in the literature that an acoustic neuroma can grow at the

[2]rate of 2 centimeters in 15 months?

[3]A I am not aware of that, and it certainly is

[4]outside any norm that anyone has ever stated.

[5]Q Than anyone has ever stated?

[6]MR. CITRIN: Objection, Judge.

[7]MR. MOORE: That's what he said.

[8]MR. CITRIN: Inappropriate use of whatever it is

[9]he's using.

[10]MR. MOORE: I'm showing him.

[11]MR. CITRIN: Judge, I object.

[12]THE COURT: I'll sustain.

[13]MR. CITRIN: Can we take that back please,

[14]whatever it is.

[15]MR. MOORE: It's not **[\*248]** contagious, Doctor.

[16]MR. CITRIN: Objection.

[17]MR. MOORE: That was a side light, Doctor.

[18]THE COURT: Strike that remark. The jury is

[19]directed to disregard it.

[20]Q On this precise subject, would you find

[21]authoritative the Natural History of Untreated Acoustic

[22]Neuromas by Barry Strasnick, Michael Glasscock, David Haynes,

[23]Sean McMenemy, Lloyd B. Minor in Laryngoscope that is a peer

[24]reviewed periodical, correct?

[25]A I'm not familiar.

1293

[1]Q You've never heard of Laryngoscope?

[2]A I would presume that's an ear, nose and throat

[3]journal. I don't review those.

[4]Q 104, September 1994, would you say that would be

[5]reasonably authoritative?

[6]A No, sir.

[7]Q Well, you have heard of the Journal of

[8]Neurosurgery, correct?

[9]A Yes, sir.

[10]Q Sir, you told this jury that the outcome would

[11]have been the same no matter when the tumor was diagnosed in

[12]those 25 plus months, correct?

[13]A Yes.

[14]Q That is, Doctor, neurosurgically and

[15]neurologically untrue, correct?

[16]MR. CITRIN: Objection.

[17]THE COURT: Overruled.

[18]A No, it's not incorrect. **[\*249]**

[19]Q Even if this tumor when diagnosed was

[20]4 millimeters smaller, it would have hugely enhanced her

[21]chance of no hearing deficit after removal, true?

[22]A No.

[23]Q Long-term Hearing Preservation After Surgery For

[24]Vestibular Schwannoma by Simone A. Betchen, Jane Walsh, and

[25]Kalmon D. Post, department of neurosurgery, Mount Sinai  
1294

[1]School of Medicine 2005, in the Journal of Neurosurgery

[2]Volume 102, would you say that that's an authoritative work

[3]on the subject?

[4]A No, sir.

[5]Q As to -- withdrawn.

[6]Remember taking issue with Dr. Shields'

[7]statement that he -- in the context that he tells the

[8]neurosurgeon what to do?

[9]A I do remember, yes.

[10]Q What?

[11]A I do recall, yes.

[12]Q You thought that was outrageous in a word, you

[13]didn't use that word, but you did, right?

[14]A Correct.

[15]Q Did you read the context?

[16]A I recall the statement, and I recall reading it in

[17]his testimony and having that reaction to it.

[18]Q Dr. Shields is clearly a patient advocate,

[19]whatever else you think of him, you could see that from his

[20]testimony, correct? **[\*250]**

[21]MR. CITRIN: Objection.

[22]THE COURT: Sustained.

[23]Q Doctor, Dr. Shields went on to say that the

[24]patient makes the choice, you don't disagree with that,

[25]correct?

1295

[1]A I need the context. The patient makes the choice.

[2]Q Oh, I'm sorry as to what to do?

[3]A Patient has to participate in the choice, but the

[4]choices have to be appropriate medically for he or she to

[5]have a choice.

[6]Q And if the doctor thinks it's not appropriate, the

[7]patient has the right to seek somebody else, correct?

[8]A Correct.

[9]Q And if Dr. Shields as a neurologist is speaking

[10]for his patient, as he said the patient decides, then it

[11]would be most appropriate for him to tell the neurosurgeon

[12]what to do, and if the neurosurgeon says no, to seek another

[13]neurosurgeon, true?

[14]MR. CITRIN: Objection, objection.

[15]THE COURT: Overruled.

[16]A No.

[17]Q No? Is that your testimony?

[18]A The statement that Dr. Shields made to me is

[19]totally inappropriate.

[20]Q And now in context, it was most appropriate, true?

[21]A I don't think that statement ever could be

[22]appropriate, [\*251] sir.

[23]Q Sir, you saw in Dr. Shields' testimony his

[24]statements before this jury about the choices that would have

[25]been available earlier, correct?

1296

[1]A I saw his testimony, yes.

[2]Q He talked about radiosurgery and what is literally

[3]microneurosurgery, what was done on this patient was

[4]microneurosurgery, correct?

[5]A Correct.

[6](Whereupon, Official Court Reporter Linda Calderon

[7]relieved Official Court Reporter Angela Spinelli.)

[8]

[9]

[10]

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1297

[1]CROSS-EXAMINATION (CONTINUED)

[2]BY MR. MOORE:

[3]Q On the issue of an outcome at an earlier time,

[4]would you find the following:

[5]Radiosurgery of vestibular Schwannomas: Summary of

[6]Experience in 829 cases -- withdrawn.

[7]Dr. Luntsford's study is the seminal study on this

[8]subject and you know it; true?

[9]A I have read it, yes.

[10]Q And you know it to be the seminal study on this

[11]subject, correct?

[12]A I have read it, sir, I don't know it to be the

[13]seminal study.

[14]Q Do you find authoritative on this subject:

[15]Radiosurgery of Vestibular [\*252] Schwannomas: Summary of

[16]Experience in 829 cases, by L Dade Lunsford, Ajay Niranjana,

[17]John C. Flickinger Ann Maitz and Douglas Kondziolka, from the

[18]Department of Neurological Surgery and Radiation Oncology,

[19]the University of Pittsburgh School of Medicine; and the

[20]University of Pittsburgh Medical Center, Pittsburgh,

[21]Pennsylvania contained in the Journal of Neurosurgery, Volume

[22]102, January of 2005.

[23]Do you find that work to be authoritative so that I

[24]could read from it in this case before this jury?

[25]A No, sir.

1298

[1]Q Lastly, Doctor, I'm sure you would like to hear

[2]that, right?

[3]A (No response.)

[4]Q If the tumor was even, was even 4 or 5 millimeters

[5]smaller, the outcome would have been hugely better in

[6]probability; true?

[7]A No.

[8]Q On that precise subject -- withdrawn.

[9]Doctor, the most recognized, disseminated, used

[10]treatise in the field of your specialty, is Youman's

[11]Neurological Surgery, correct?

[12]A It is one of them, but it is not --

[13]Q It is the most, Doctor; true?

[14]A I don't know that.

[15]If you know the statistics, you know more [**\*253**] than I

[16]do, sir.

[17]Q Doctor, if you -- withdrawn.

[18]You would know that more than I; true?

[19]A The complete statement I couldn't be able to agree

[20]with --

[21]MR. CITRIN: Judge, is he directing his

[22]question to the witness and not the jurors?

[23]THE COURT: Rephrase the question.

[24]Q I meant to say -- I should have said you would know

[25]that more than me, correct?

1299

[1]A If I knew statistically that was true, I would

[2]admit it. I don't know that that's the most frequently

[3]utilized textbook as opposed to several others.

[4]Q Doctor --

[5]A I just don't know, sir.

[6]Q -- Doctor, neurosurgery hasn't been around as long

[7]as neurology, right?

[8]Textbooks in neurosurgery haven't been around as

[9]long as textbooks in neurology, correct?

[10]A I really don't know that, sir, honestly. I have

[11]one from 1840 --

[12]Q Doctor, when you said "honestly," I hope that all

[13]the testimony you have given is honestly; is that correct?

[14]MR. CITRIN: Objection.

[15]MR. MOORE: Well --

[16]THE COURT: Sustained.

[17]MR. MOORE: All right.

[18]Q The 5th edition of [\*254] a neurosurgery book is a  
[19]significant edition in terms of it being around and being  
[20]used, correct?

[21]A Yes, sir.

[22]Q And, Doctor, 4 volumes, right, Youman's

[23]Neurological -- forgive me -- Neurological Surgery, correct?

[24]A I'm sorry, the question was?

[25]Q There is 4 volumes, right?  
1300

[1]A I'm not sure if there were 4 or 5.

[2]Q Are you saying, Doctor, that you don't refer to

[3]this textbook?

[4]A I haven't recently, but I have many times.

[5]Q Many, many times you personally have referred to

[6]it, correct?

[7]A Yes.

[8]Q You would never refer -- withdrawn.

[9]And you have done that because you want

[10]information, correct?

[11]A Yes, sir.

[12]Q And, therefore, Doctor, you want information you

[13]can rely on, correct?

[14]A I want information to add to my knowledge.

[15]Q Doctor, please, that's the question:

[16]You want information you can rely on, correct?

[17]A For the most part, yes.

[18]Q You want information you can't rely on?

[19]A I want information that I can compare with other

[20]information and reach a conclusion based on many forms of

[21] [\*255] information.

[22]Q I have a copy of what's here.

[23]Doctor, would you agree that the following is true

[24]in neurological surgery as in any field of medicine:

[25]As a general principle, the earlier the diagnosis,  
1301

[1]the better the outcome?

[2]A That's too general a principle, sir.

[3]Q That's not --

[4]A Sometimes it makes a difference, sometimes it

[5]doesn't.

[6]Q Of course.

[7]Did I -- Doctor, if it's a general principle, it

[8]may have exceptions, correct?

[9]A I suppose so, yes.

[10]Q But that doesn't invalidate it as a general

[11]principle; true?

[12]A I think I understand what you are saying, and I can

[13]agree with that.

[14]Q And that's true in this case, correct, Doctor?

[15]A It's not my --

[16]Q As a general principle -- forgive me.

[17]As to this case, as to acoustic neuromas, it is a

[18]general principle that the earlier the diagnosis, the better

[19]the outcome; true?

[20]A I could not answer --

[21]Q That's either a yes or no, Doctor?

[22]A I can't answer it yes or no.

[23]Q So you agreed it was a general principle but you

[24]are not sure if **[\*256]** that general principle applies to acoustic

[25]neuromas; is that your testimony to this jury?

1302

[1]A You would have to have a time factor on than that--

[2]Q Doctor, that's the point of a general principle.

[3]Maybe when you specify, there might be exceptions, but I'm

[4]asking you one more time and I'll move on.

[5]Have you said that the statement or the principle:

[6]Earlier diagnosed -- the earlier the diagnosis, the

[7]better the outcome, that that applies to medicine in general,

[8]are you saying it doesn't apply to neurosurgery -- forgive

[9]me -- to neurosurgery on the issue of acoustic neuroma?

[10]A My answer is it depends on the time frame that you

[11]are talking about.

[12]Q You are -- you haven't answered my question,

[13]Doctor.

[14]MR. CITRIN: Objection.

[15]THE COURT: Overruled.

[16]Q Doesn't the time frame in which you are talking

[17]lead to the specificity that may be an exception to the

[18]general principle?

[19]A I think it defines --

[20]Q I will ask you one more time, Doctor, and I'm going

[21]to move on.

[22]Would you tell this Court and this jury under oath,

[23]isn't it true **[\*257]** when it comes to acoustic neuromas, the general

[24]principle of the earlier the diagnosis, the better the

[25]outcome is absolutely true?

1303

[1]A I can only answer it the way I answered --

[2]Q You're not answering my question, but I'll move on.

[3]By the way, Doctor, Neurological Surgery by

[4]Youman's, that's the first guy who edited the first edition,

[5]and that often happens; right? You have no idea?

[6]A I have no idea for sure.

[7]Q You have no idea?

[8]A I presume he was totally involved in it.

[9]Q But he is dead now, right?

[10]A I don't know that.

[11]Q But in any event, the text goes on, Youman's,

[12]right?

[13]A I know Youman's still exists.

[14]Q Not uncommon.

[15]And Wolff on Headaches I referred to yesterday,

[16]Wolff's Headache, Wolff has been dead since 1948, correct?

[17]A I trust your statement.

[18]Q But it's still Wolff's Headache, right?

[19]A Yes.

[20]Q And then later people pick up the task and edit it,

[21]subsequent editions; that's common in your specialty and in

[22]other specialties of medicine, correct?

[23]A Correct.

[24]Q There is over 300 [\*258] contributors to Youman's; you are

[25]aware of that from referring to it, correct?

1304

[1]A I will trust that number, yes.

[2]Q That's a huge number of contributors to any text,

[3]isn't it?

[4]A Yes.

[5]Q Let me ask you this:

[6]The following chapter in Neurological Surgery, the

[7]5th edition, the edition applicable to the events in this

[8]case, entitled: Acoustic Neuroma by Professors Long,

[9]L-O-N-G, and Sampath, S-A-M-P-A-T-H, Professor Long being the

[10]distinguished service professor of neurosurgery, Johns

[11]Hopkins University School of Medicine, Johns Hopkins

[12]Hospital, Principal Staff, Applied Physics Laboratory, Johns

[13]Hopkins University, Baltimore, Maryland.

[14]Doctor, he is a well-known authority on acoustic

[15]neuroma, and you know it; true?

[16]A Yes, sir.

[17]Q Isn't the following true --

[18]MR. CITRIN: Judge, I object.

[19]MR. MOORE: He just said he is an authority.

[20]MR. CITRIN: No, he didn't ask him about that

[21]particular textbook.

[22]MR. MOORE: No, no, I'm --

[23]THE COURT: Let him ask the question and then

[24]I'll rule on the objection.

[25]Q Dr. Long's [**\*259**] chapter in -- on acoustic neuroma,  
1305

[1]chapter 65 of Youman's, says on page 1147 the following and I

[2]ask you if --

[3]MR. CITRIN: Judge --

[4]Q -- I ask you if you agree or disagree?

[5]MR. CITRIN: -- I object to this.

[6]THE COURT: Why don't you guys come up and

[7]talk about this.

[8](Whereupon, an off-the-record bench conference

[9]was then held.)

[10]Q Doctor, I assume when you say that Dr. Long is a --

[11]Professor Long and Dr. Long is an authority on acoustic

[12]neuroma, you would agree that acoustic neuroma, the chapter

[13]written with Dr. Sampath, by Dr. Long in Neurological  
[14]Surgery, would be an authoritative work; I assume you are  
[15]saying that, aren't you?

[16]A No, sir.

[17]MR. MOORE: I have no further questions of  
[18]this witness.

[19]THE COURT: Redirect examination, Mr. Citrin.

[20]MR. CITRIN: Yes, Judge.

[21]I don't have a lot. Could you make sure  
[22]everybody is still comfortable in terms of bathroom and  
[23]things like that?

[24]THE COURT: I assume everybody is. That's why  
[25]we are continuing.  
1306

[1]MR. CITRIN: All right, very good, thank you.

[2]Good [\*260] afternoon, Judge, good afternoon, Doctor.

[3]Good afternoon, ladies and gentlemen.

[4]REDIRECT EXAMINATION

[5]BY MR. CITRIN:

[6]Q Doctor, you were asked several hundred questions  
[7]today about the subject of authoritative works. Could you  
[8]explain to the Court and jury why in your view the various  
[9]documents Mr. Moore referred to are not authoritative or why  
[10]you don't accept these things as authoritative?

[11]MR. MOORE: Objection.

[12]THE COURT: I'm going to sustain.

[13]Q You told Mr. Moore that you didn't accept the  
[14]various documents as authoritative, correct?

[15]A Correct.

[16]Q Why?

[17]MR. MOORE: Objection.

[18]THE COURT: I'm still going to sustain.

[19]MR. CITRIN: I'm not quite sure, is it to  
[20]form?

[21]MR. MOORE: No.

[22]THE COURT: No.

[23]MR. CITRIN: Oh, really, you are making the  
[24]rules now too? Okay.

[25]Q In your view, what is an authoritative text?  
1307

[1]MR. MOORE: Objection.

[2]THE COURT: I'm going to continue to sustain.

[3]Q What does the term "authoritative text" mean to  
[4]you?

[5]MR. MOORE: Objection.

[6]THE COURT: I will continue **[\*261]** to sustain.

[7]MR. CITRIN: Can we approach?

[8]THE COURT: Yes.

[9](Whereupon, an off-the-record bench conference  
[10]was then held.)

[11]MR. MOORE: You know what, I withdraw the  
[12]objection. I withdraw the objection.

[13]THE COURT: You want to ask the next question  
[14]now.

[15]MR. CITRIN: I'm not sure what the next  
[16]question is.

[17]Q In response to Mr. Moore's questions, you indicated  
[18]many of these sources that you knew of were good but not  
[19]authoritative. Can you explain to the Court and jury why?

[20]A The practice of medicine, the art of medicine, the

[21]science of medicine is constantly evolving. To have an  
[22]article written, there is a lag period of a year. To have a  
[23]textbook written, there is a lag period of a year or two.  
[24]Things change.

[25]To recognize something as authoritative means to  
1308

[1]say that's absolutely the word, I'm 100 percent sure that's  
[2]the word, and that can't be the case.  
[3]The other issue is that you did read 3 chapters in  
[4]3 different well-circulated textbooks of medicine which have  
[5]very different opinions.  
[6]The point that I'm making in not considering  
[7] [**\*262**] something authoritative, you have to take it at face value,  
[8]read it, understand what it says, compare it to other pieces  
[9]of information that you have read and other textbooks and  
[10]other articles, get more updated information and conferences  
[11]and take all of that and put it together.  
[12]So when something is called authoritative, it means  
[13]that's it. I suppose what would be authoritative is 2 plus 2  
[14]is 4. But statistics, numbers are constantly changing.  
[15]There is a constant contribution in the literature  
[16]from one source to another, from one article to another, from  
[17]one chapter to another, which is why it's impossible to take  
[18]a single piece of information that certainly contains  
[19]important information and say it's authoritative.  
[20]Q Doctor, you were also asked questions by Mr. Moore  
[21]with regard to the timing of the diagnosis of the acoustic  
[22]neuroma; you remember being asked those questions?  
[23]A Yes.

[24]Q Now, you understand, Doctor, that we're talking in

[25]this case about the period of time that Dr. Morris was under  
1309

[1]Dr. Gordon's care, correct?

[2]A Correct.

[3]Q The question I have [**\*263**] for you is:

[4]Within that period of time, 25 months that Mr.

[5]Moore is referring to, the 25 months that Dr. Morris was

[6]under Dr. Gordon's care, within that fixed period of time, do

[7]you have an opinion with a reasonable degree of medical

[8]probability as to whether or not given everything you know,

[9]including the size of the acoustic neuroma at the time of

[10]diagnosis on March 28, 2005, would operating within that 25

[11]month period have changed the outcome?

[12]A I do have an opinion.

[13]Q And what is that?

[14]A That it would not have changed the outcome.

[15]Q Can you explain to us surgically why that is your

[16]belief?

[17]MR. MOORE: That was testified to on direct

[18]examination.

[19]MR. CITRIN: Now, Judge, the question was not

[20]from a surgical vantage point and that's the question

[21]I'm asking now.

[22]MR. MOORE: Objection.

[23]THE COURT: Overruled.

[24]I don't think that was elicited on direct.

[25]Q Do you understand the question?

1310

[1]A Yes, I do.

[2]Q Please explain.

[3]A The surgical approach is exactly the same if the

[4]tumor is 1, 2 or 3 millimeters smaller. **[\*264]** The difficulty with  
[5]the facial nerve is essentially exactly the same 1, 2, or 3,  
[6]4 millimeters smaller, the involvement. The 8th nerve is  
[7]essentially the same and the statistical outcome of hearing  
[8]preservation is the same in either of those circumstances.  
[9]Q Within that 25 month period, the microsurgical  
[10]approach, can you describe for the Court and jury what would  
[11]have been involved with regard to the contact of the surgeon  
[12]with the nerve relative to the tumor at any time in that 25  
[13]month period?

[14]A Which nerve?

[15](The following is transcribed by Angela Spinelli.)

[16](Continued on next page.)

[17]\*\*\*

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1311

[1]REDIRECT EXAMINATION (CONTINUED)

[2]BY MR. CITRIN:

[3]Q The 8th cranial nerve?

[4]A The 8th cranial nerve was completely enveloped by  
[5]the tumor in 2003, 2004, 2005. The 8th cranial nerve and the  
[6]tumor would be almost impossible to differentiate one from  
[7]the other.

[8]Your finding of the tact nerve would then blend  
[9]into totally a nerve tumor mixture without the ability to  
[10]separate one from the other, and that would have been true [\*265] in  
[11]2003, 2004 or 2005.

[12]Q And once that happened, Doctor, with reasonable  
[13]medical probability, what in that same time frame is the  
[14]likelihood of sparing the 8th cranial nerve, what is the  
[15]likelihood of sparing the 8th cranial nerve in that time  
[16]period?

[17]A The nerve we were talking about?

[18]Q Yes.

[19]A It is statistically on the order of 40 percent,  
[20]something like that.

[21]Q That would have been true in 2003, 2004, 2005?

[22]A Yes.

[23]Q Up to and including the time of the surgery?

[24]A Yes.

[25]Q All right. Now, you were also asked questions  
1312

[1]about an acoustic neuroma causing pain, if the pain is not

[2]from mass effect, you remember that?

[3]A Yes.

[4]Q Doctor, with reasonable medical probability, if  
[5]the tumor, the acoustic neuroma was the cause of pain not  
[6]from mass effect, what side would you expect the pain to be  
[7]on?

[8]A The same side as the tumor.

[9]Q Why is that?

[10]A The pain is being caused by irritation of

[11]something. It is not a remote effect. It is a local effect,

[12]and it would be on the same side as the tumor.

[13]Q Now, [\*266] you were asked a lot of questions about Dr.

[14]Block's testimony and about something he read from Doctor --

[15]the report of Dr. Jamieson and then the report of Dr.

[16]Golfinos, remember that?

[17]A Yes, sir.

[18]MR. CITRIN: Can I have Dr. Jamieson's records and

[19]Dr. Golfinos' records please.

[20]THE COURT: Exhibits 8 and 9.

[21]MR. CITRIN: And can I have the easel real quick.

[22]Q Doctor, I'm going to hand you Exhibits 8 and 9?

[23]A Thank you.

[24]Q Okay, now, you have, first, you have Dr. Golfinos'

[25]records?

1313

[1]A Yes.

[2]Q Those would be the ones by your right hand.

[3]Just so that there's no confusion about who

[4]said --

[5]MR. MOORE: Objection.

[6]Q what to whom?

[7]MR. MOORE: Objection.

[8]THE COURT: Sustained.

[9]Q Just so we're all on the same page --

[10]MR. MOORE: Objection.

[11]THE COURT: Overruled. I don't see a problem with

[12]that.

[13]MR. CITRIN: Thank you.

[14]Q Do you have the first page, Doctor?

[15]A Of Dr. Golfinos, yes.

[16]Q Yes. And he's writing to Dr. Mogilner?

[17]A Yes.

[18]Q And he says: I am writing to introduce [\*267] you to a

[19]patient of mine, I am hoping you will see in consultation.

[20]Did I read that right?

[21]A Yes.

[22]Q Lauren Morris is a 31-year old right-handed woman

[23]who came to see me because of complaints of headaches on the

[24]left side of her head following resection of an acoustic

[25]neuroma.

1314

[1]So, the first sentence tells Dr. Mogilner why

[2]the patient came to see him, and according to what Dr.

[3]Golfinos is saying why did Dr. Morris come to him in May of

[4]2007?

[5]A Correct.

[6]Q No, no, why what was the reason?

[7]A Because of the pain she was having after surgery

[8]which was localized to the left side of her head following

[9]surgery.

[10]Q Now, if we work our way down, he talks about Dr.

[11]Moore's professional attainments, correct?

[12]A Yes.

[13]Q And he says she has had life long headaches, the

[14]headaches began in childhood, she has had migraines as well,

[15]her headaches in the past were always quite severe. However,

[16]they always affected only the right side of her head.

[17]Did I read that right?

[18]A Yes, you did.

[19]Q That's what it says, right?

[20] [**\*268**] A Yes.

[21]Q It says she never had pain on the left side,

[22]correct?

[23]A Yes.

[24]Q Did I read that right?

[25]A Yes, you did.

1315

[1]Q Headaches would occur almost on a daily schedule,

[2]correct?

[3]A Yes.

[4]Q And then he talks about triggering factors. By

[5]the way, Doctor, from your review of the records that's not

[6]entirely an accurate statement, correct?

[7]A That is correct, it is not entirely accurate.

[8]Q From your review of the records, if you recall,

[9]what were some of Dr. Morris's triggering factors for her

[10]migraines?

[11]A I think stress was the main one, if I recall.

[12]Q Okay. Then they talk about the MRI. He talks

[13]about the MRI of March 28, 2005. And then he describes

[14]surgery of April 27, 2005?

[15]A Yes.

[16]Q And then she said -- he says that she had a stormy

[17]postoperative course. She was 22 days in the hospital

[18]following resection of the tumor. Most of this was because

[19]of the extreme pain that she experienced postoperatively.

[20]And she complains of the pain being unbelievable. It is

[21]interesting that her right-sided headaches were gone.

[22] [**\*269**] Correct?

[23]A Yes.

[24]Q However, she now had severe pain on the left side

[25]of her head going up from the occiput to the top of her head,  
1316

[1]correct?

[2]A Yes.

[3]Q All right, now, the rest of it is what she did or

[4]didn't complain of on the rest of that page, correct?

[5]A Yes.

[6]Q Now, we get to page 2, under impression:

[7]I think that Lauren Morris has a new headache

[8]and pain syndrome following successful suboccipital resection

[9]of a large left-sided acoustic neuroma with facial nerve

[10]preservation.

[11]Then Dr. Golfinos says what is unusual in this

[12]case is that her right-sided headaches have completely gone.

[13]In a sense they are cured.

[14]Doctor, neurosurgeon to neurosurgeon, why would

[15]that be unusual?

[16]A It would not be anticipated that the acoustic

[17]neuroma on the left side had anything do with her right-sided

[18]headaches, would not be anticipated that the presence of an

[19]acoustic neuroma on the left side would give her migraine

[20]headaches anywhere.

[21]Q And, again, this was -- then he describes the

[22]thought that he thinks maybe a neuroma formed, what is **[\*270]** that?

[23]A When you do any kind of operation cutting through

[24]the skin, even the most minor, you cut through some sensory

[25]nerves invariably. A neuroma is an attempt to regrow, tends

1317

[1]to be sensitive.

[2]Q So this is in May of 2007, right?

[3]A Yes.

[4]Q That's when this letter is written from Dr.

[5]Golfinos to Dr. Mogilner?

[6]A Correct.

[7]Q In this letter in May of 2007, he says that the

[8]right-sided headaches were gone, in a sense cured, right?

[9]A Yes.

[10]Q But now, all right, now 3 months later Dr. Morris

[11]is now back at Dr. Jamieson, okay, Dr. Dara G. Jamieson, see

[12]that?

[13]A Yes.

[14]Q This is August 7, 2007, literally 3 months later,

[15]correct?

[16]A Yes.

[17]Q And you have the record in front of you?

[18]A Yes, I do.

[19]Q Okay. So now she writes -- by the way, I keep

[20]saying she, is Dara Jamieson a he or she?

[21]MR. MOORE: Dara is a man's name.

[22]MR. CITRIN: I know Dara as a woman too.

[23]Q Lauren Morris is a 32-year old female with

[24]headaches since age 5 with migraines in college. She had a

[25]scan as part of an evaluation of headaches **[\*271]** which showed  
1318

[1]acoustic neuroma resected in 4 of '05. She had right-sided

[2]throbbing headaches with nausea. She tried beta blockers

[3]including Topamax which make her loopy; you see that?

[4]A Yes.

[5]Q She had 3 migraines a year with bilateral eye

[6]pain. From everything you read, is that an accurate piece of

[7]history?

[8]A No.

[9]Q Did she have less or more than 3 migraines a year?

[10]A Reading the record, it appeared she had many more.

[11]Q Dr. Jamieson writes triggers, menses, stress and

[12]fatigue. She says she has not had a severe migraine?

[13]A Yes.

[14]Q Paragraph 2, now she has a bilateral periorbital

[15]headache triggered by stress or fatigue, first of all, what

[16]does bilateral mean?

[17]A Both sides.

[18]Q And what does periorbital mean?

[19]A Around the eyes.

[20]Q She's having headaches now post the surgery

[21]2 years later on both sides of her head around the eyes,

[22]correct?

[23]A Yes.

[24]Q She can work through the headache. She has a

[25]daily chronic headache with left temporal pain and -- what is  
1319

[1]that?

[2]A The left side near the ear region. **[\*272]**

[3]Q Treated with Advil daily 3 down from 8. She went

[4]off trileptal with increase in headaches.

[5]Now, Doctor, trileptal, and she would take

[6]Maxalt 2 to 4 a month. What are trileptal and Maxalt used to

[7]treat?

[8]A Migraine headaches.

[9]Q Okay. Based upon the records, these 2 records,

[10]Dr. Golfinos and Dr. Jamieson, would it appear that at least

[11]by August of '07 the right-sided headaches had returned even

[12]though the tumor had been removed?

[13]A Yes.

[14]Q By the way, Mr. Moore asked you to read or read to

[15]you from or showed you Dr. Steig's note from '05?

[16]A Yes.

[17]Q And Dr. Steig noted that the right-sided headaches

[18]had gone?

[19]A Yes.

[20]Q Okay. That was in, I think, you still have it in

[21]front of you when in '05 was that?

[22]MR. MOORE: September.

[23]A September 26, 2005.

[24]Q Okay. And, Doctor, given what we've now seen

[25]between Dr. Golfinos' records and Jamieson's records, which  
1320

[1]are in August of '07, would it be fair to say that despite

[2]the fact the tumor was removed by August of '07, the

[3]right-sided headaches and left-sided headaches **[\*273]** bilaterally,

[4]the right-sided headaches had returned?

[5]A Yes.

[6]Q She was being treated for those headaches and the

[7]left-sided headaches with various types of antimigraine

[8]medication, true?

[9]A Yes.

[10]MR. CITRIN: Thank you. I have no further

[11]questions.

[12]RECROSS EXAMINATION

[13]BY MR. MOORE:

[14]Q Doctor, those records to the uninitiated are

[15]indeed confusing, correct?

[16]A I would say in general, yes.

[17]Q But to you, Doctor, they are clear, she never had

[18]right-sided headache, meaning other than migraine ever again,

[19>true?

[20]A I don't think that's what it says. It said she

[21]had bilateral periorbital.

[22]Q Which are migraine, didn't we go through that

[23]earlier?

[24]A I agree.

[25]Q Do you want to withdraw your testimony that that's

1321

[1]correct?

[2]MR. CITRIN: Objection.

[3]THE COURT: Sustained.

[4]Q Doctor, when you said, when you said earlier that

[5]bilateral periorbital pain, meaning on the left and the right

[6]referred to migraine, are you now saying you were incorrect,

[7]yes or no, please?

[8]A I think they're migraines.

[9] **[\*274]** Q Yes or no please?

[10]A Repeat the question then please, sir.

[11]Q Do you mind if I move on, Doctor?

[12]A Yes, go ahead.

[13]Q Doctor, even though it could lead to confusion, it

[14]is clear that Dr. Golfinos and Dr. Jamieson distinguish

[15]between migraine and headache, even though migraines are

[16]headaches; isn't that true?

[17]MR. CITRIN: Objection.

[18]THE COURT: Overruled.

[19]A I don't see that they do in terms --

[20]Q -- Doctor you're -- withdrawn.

[21]They don't?

[22]A I don't think they do.

[23]Q Okay. And if --

[24]MR. MOORE: That's enough.

[25]Q Doctor, and by the way, by the way, you went along  
1322

[1]with it, but you, Doctor, agreed -- open it up again, Doctor,

[2]forgive me, please open it up again?

[3]A To?

[4]Q Dr. Jamieson.

[5]A I think that's this.

[6]Q It was up on the board?

[7]A Yes, sir. I have it.

[8]Q Yeah. Remember she had 3 migraines a year,

[9]remember that?

[10]A Yes.

[11]Q That's clearly false it was suggested, right?

[12]A In the period that we're talking about it appeared

[13]she had more than that.

[14]Q Of course, **[\*275]** Doctor. She had many, many, many more

[15]than that, correct?

[16]A Yes.

[17]Q But if you finish the whole sentence, the woman is

[18]telling the whole truth, correct?

[19]MR. CITRIN: What? Objection.

[20]MR. MOORE: Withdrawn.

[21]THE COURT: Sustained.

[22]Q If you read, Doctor, the whole sentence it's true,

[23]correct, and I read: She had 3 migraines a year with  
[24]bilateral eye pain, nausea and vomiting, sensitivity to light  
[25]and sound, and smells.  
1323

[1]Doctor, that means that she's saying she had 3  
[2]migraines a year with all of those accompanying things,  
[3]correct?

[4]A That's how it reads, yes.

[5]Q And that's the exact opposite implication that you  
[6]just gave this jury, correct?

[7]MR. CITRIN: Objection.

[8]THE COURT: Overruled.

[9]A I don't think so.

[10]Q You don't?

[11]A No.

[12]Q Do you know -- withdrawn.

[13]MR. MOORE: I just have a couple of more  
[14]questions.

[15]Q Doctor, you know, don't you, that even if this  
[16]tumor was as big as 2.5 centimeters, when, when it was  
[17]diagnosed rather than 2.9 or 3, there would have been a  
[18]99 percent chance that **[\*276]** the facial nerve would have been  
[19]totally preserved, forgive me -- that there would be no  
[20]affect whatsoever on the facial nerve either in radiosurgery  
[21]or microsurgery, correct?

[22]A I don't know that, no.

[23]Q You don't know that?

[24]A No.

[25]Q You're supposed to know that, aren't you?  
1324

[1]MR. CITRIN: Objection.

[2]THE COURT: Sustained.

[3]Q Wouldn't your answer to that question affect the

[4]issue of whether the outcome might have been different on an

[5]earlier diagnosis?

[6]A Depending on the size, yes.

[7]Q Is the answer yes?

[8]A In my opinion, no, it would not have any impact.

[9]Q And there's nothing authoritative anywhere in the

[10]literature on that; is that your testimony?

[11]MR. CITRIN: Objection.

[12]THE COURT: Sustained.

[13]Q Last question, Doctor, you've heard of

[14]authoritative text, you've heard that phrase, right?

[15]A Yes, I have.

[16]Q But your testimony to Mr. Citrin just a minute ago

[17]is that in your opinion, nothing that's ever been written in

[18]the history of the literature could be authoritative,

[19]correct?

[20]A Correct.

[21] [\*277] MR. MOORE: No further questions.

[22]THE COURT: Thank you, Doctor, you may step down

[23]from the witness stand where.

[24](Whereupon, the witness was excused.)

[25]THE COURT: Mr. Citrin, on behalf of the defense

1325

[1]do you have anymore witnesses?

[2]MR. CITRIN: No your Honor on behalf of Dr. Gordon

[3]and Long Island Jewish, I rest.

[4]THE COURT: Thank you.

[5]So, ladies and gentlemen, we are now finished with

[6]the testimony in this case which leads, as I said the  
[7]other day, when I gave you a general idea of the rest of  
[8]the schedule of our trial. Remember we're not working  
[9]tomorrow because of prior scheduling.

[10](Whereupon, Official Court Reporter Linda Calderon  
[11]relieved Official Court Reporter Angela Spinelli.)

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

1326

[1]THE COURT: Tomorrow, being Friday, I ask all  
[2]of you to report Monday morning for 10:00. Monday we  
[3]will hear the summations of the parties, then I will  
[4]give you my instructions on the law and then you will  
[5]retire to your deliberations.  
[6]Now, I anticipate on Monday that we will be  
[7]ordering lunch for **[\*278]** all of you, so when you come in  
[8]Monday morning I will ask that John take your lunch  
[9]order, so don't make any lunch plans for Monday if you

[10]were thinking about it.

[11]So we'll have a break between now and Monday

[12]morning. During that break, once again, please don't

[13]discuss the case among yourselves or with anyone else.

[14]And please don't form any opinions about the case yet.

[15]So all of you have a good day tomorrow, a good weekend,

[16]and we will see you Monday morning for 10:00.

[17]Thank you.

[18]THE OFFICER: All rise. Jury exiting.

[19](Whereupon, the jury then left the courtroom.)

[20]THE COURT: Off the record.

[21](Whereupon, a discussion was held off the

[22]record.)

[23]THE COURT: On the record on an issue on the

[24]verdict sheet.

[25]MR. MOORE: Is Mr. Citrin saying on behalf of  
1327

[1]both defendants that he has no objection to the general

[2]question as framed by the Court on the verdict sheet?

[3]MR. CITRIN: The question, Judge --

[4]MR. MOORE: No objection to the Court's

[5]question.

[6]MR. CITRIN: Stop cutting me off. Stop

[7]cutting me off.

[8]THE COURT: All right, [\*279] it's been a long day,

[9]let's not ruin it.

[10]I will ask the question: Is question number

[11]1, as written, that being one general departure question

[12]as opposed to 3 separate and distinct departure

[13]questions, is question number 1 acceptable to both

[14]sides?

[15]MR. CITRIN: It is to me, Judge.

[16]MR. MOORE: Therefore it is to me, Judge.

[17]THE COURT: Now what was left open on the

[18]verdict sheet was on past and future pain and suffering,

[19]the issue that Mr. Moore raised, where -- and I don't

[20]have it in front of me, because I didn't know whether we

[21]would get to it or not, where each question starts out,

[22]if any, and then the instruction after the line for a

[23]number says something like: If.

[24]MR. MOORE: If you do not make an award, write

[25]the word none.

1328

[1]MR. CITRIN: Right.

[2]THE COURT: I reflected on that and I think

[3]based on this particular record, as opposed to virtually

[4]any other case that I have had, I think his observation

[5]is correct, so that -- and we have done it, I can give

[6]you copies now.

[7]If you want to except, I will note it.

[8]I think that if they answered **[\*280]** yes to the

[9]departure, yes to the substantial factor, in terms of

[10]the pain and suffering on this record, they have to make

[11]an award. Whatever the award is, it can't be zero.

[12]MR. CITRIN: Well, I disagree with the Court.

[13]I think the jury, since this is uniquely within the

[14]province of the jury to do, then they can award whatever

[15]it is they think is reasonable, and if they think that

[16]for whatever reason zero is reasonable, then that's

[17]within their province.

[18]I don't think it's fair for the Court to take  
[19]over and not draw -- but the Court to suggest that in  
[20]advance of a verdict if the jury gave nothing that the  
[21]Court would set that aside.

[22]THE COURT: The way I analyzed the record that  
[23]was made here --

[24]MR. MOORE: Sorry, Judge.

[25]THE COURT: -- the way I analyzed the record  
1329

[1]that was made here, obviously the dispute is whether or  
[2]not there was malpractice. And the dispute is also, as  
[3]part and parcel of that, whether the surgery at the time  
[4]it was done as a result of not having an MRI performed  
[5]earlier, resulted in more damage than could have been  
[6]the result if an earlier **[\*281]** diagnosis of the acoustic  
[7]neuroma was made based on the MRI study.

[8]That, to me, doesn't -- that last issue  
[9]doesn't go to the pain and suffering that happened to  
[10]the plaintiff.

[11]MR. CITRIN: Well --

[12]THE COURT: That goes -- because here, unlike  
[13]most any other trial, the pain and suffering that was  
[14]testified to wasn't contradicted at all. The pain and  
[15]suffering testimony wasn't contradicted at all like it  
[16]is in many, if not most other trials.

[17]MR. CITRIN: Can I just take an exception to  
[18]it?

[19]THE COURT: Okay.

[20]MR. CITRIN: Are you going to let --

[21]THE COURT: I will give you copies of the

[22]verdict sheet now.

[23]MR. CITRIN: I will take it.

[24]MR. MOORE: That would be great, Judge.

[25]THE COURT: We still have 4 other --  
1330

[1]MR. CITRIN: The issue.

[2]THE COURT: Error in judgment.

[3]MR. MOORE: Are you ready to rule on those,

[4]Judge?

[5]THE COURT: Kind of tired.

[6]MR. CITRIN: We can do it --

[7]MR. MOORE: You take your time.

[8]THE COURT: That's why I said 10:00 for them.

[9]MR. MOORE: Fine.

[10]THE COURT: You [**\*282**] come in at 9:30 on Monday.

[11]MR. CITRIN: I will grab the verdict sheet and

[12]be out of here.

[13]MR. MOORE: See you on Monday.

[14]THE COURT: Don't leave.

[15](Whereupon, the trial was then adjourned to

[16]Monday, November 23, 2009, at 10:00 AM.)

[17]\*\*\*

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

---

End of Document