SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL TERM: PART 2

X

Plaintiffs,

INDEX NUMBER
010883

- against -

juerenaants

X

ninc0ia, 11501

June 21, 2007

EXAM KELVIN MOORE

BEFORE:

HONORABLE E.W. MCCARTY, III
Justice,
and a Jury.

APPEARANCES:

SILBERSTEIN AWAD MIKLOS, P.C.
Attorneys for Plaintiff
BY: JUDITH A. DONNEL, ESQ.

CHESNEY Sc MURPHY, LLP
Attorney for Defendants
BY: CHARLES C. NICHOLAS, ESQ

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CHERYL D. CHESTER, CSR RPR
MARGARET KOPACA, RPR
Official Court Reporter

Do you wish to call any witnesses, sir?

MR. NICHOLAS: Yes, your Honor. I guess we will reserve motions for another time.

THE COURT: Call your witness, please.

THE CLERK: In a nice clear voice give us your full name, spelling your last name, and your business address.

THE WITNESS:

THE CLERK: Business address?

THE WITNESS:

THE COURT: Thank you for coming today. Just relax.

Your witness, sir.

Good morning

Good morning.

Keep your voice up so that even the uror in the back can hear you. I would

- Direct

appreciate that. I am going to be asking you some questions about this case. If I ask you a question that is unclear or you don't understand it, would you tell me and I would be happy to rephrase it?

A Of course.

Q Doctor, what is your profession?

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Q Can you tell the jurors a little bit about your educational background?

A I graduated from Brooklyn Technical High School in 1971; went directly to St. John's University in New York and got a degree, a bachelor's of science, degree in biology. I graduated in 1974 and went to Loyola University, in Chicago, Medical School. I graduated in 1977 with a medical degree. From there I went directly into an internal medicine residency with a straight primary care residency training program. That is now Winthrop Hospital in Mineola.

I did that from 1977 to 1980. And then I became board certified in internal medicine in 1980. And then in 1987 I became a Fellow of

Defendant Direct

the America College Of Physicians. I have been in the private practice of internal medicine, primary care adult medicine, from 1980 to the present day.

Q Doctor, can you tell the jurors what internal medicine is?

A Internal medicine is the primary care

adult medical illnesses.

Q Are you board certified in that field?

A Yes.

Q Could you tell the jury what is board certification?

A Board certification is the passing of a rigorous examination in the field of internal medicine.

Q Do you have publications, sir?

A Yes. More than 20 years ago I had some cases studies and letters published in the Journal of the American Medical Society and Annals of Internal Medicine.

Q Where is your private practice?

A In Garden City.

Q How long have you been in private

Defendant - Direct

practice?

A Continuously since 1983. This is my 27th year.

Q Can you tell us about that private practice today? What type of private practice is it?

A Basically primary care, general

Q n r o- 1 m<r> ^ 1 T-l o

Q What is family practice medicine?

A Very similar to primary care, just a different path, slightly different pathway. They take a family practice training program instead of internal medicine training program.

Q They are similar fields?

A Both primary care and family care physicians are basic first-line doctors that you would be seeing.

Q Explain what that means.

A The doctor you would see for most of your problems, initial, simple problems. That could be colds and flu's to more serious problems like hypertension, diabetes, things like that.

Q Were you familiar with the standard of

Defendant - Direct

care in 2002 with respect to both internal medicine and family practice medicine?

A Absolutely. Primary care of adult patients mostly.

Q Did there come a time when I asked you to review some records in this case?

A Yes

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A Within the past year.

Q I sent you over some medical records, some hospital records, things of that nature?

A Yes, you did.

Q Some deposition transcripts?

A Yes.

Q Did you review those records?

A Yes, I did.

Q Did there come a time when I sent you the records did I ask you to review them and report back to me?

A That's correct.

Q Did you then contact me after you reviewed the records?

A I did.

Q Did we then have a discussion regarding

this case?

A We did.

Q Did you come to conclusions before we met on this case?

A After reading the records yes, I came to conclusions about the case.

Q Then did you report those conclusions

A Yes, I did.

Q Did you also review some of the trial transcript testimony in this case?

A Yes, I did.

Q Doctor, are you, have you been, or are you billing me for your time away from your patients and in review of these materials?

A Yes, I am.

Q Are you also billing me for your time here in court today?

A Yes, I am.

Q Doctor, have I ever sent you a case before to review?

A No.

Q Doctor, do you have some familiarity with the condition known as epilepsy?

Defendant - Direct

A Yes.

Q Do you have epileptic patients in your practice?

A Yes, I do.

Q Doctor, I want you to assume there has been some testimony by _ in this case, a family practitioner, that many family practitioners, in J_act most oi tneui uo not treat the condition known as epilepsy. That, in fact, there has been some testimony from that he doesn't treat that condition and referred the patient in this case, to a neurologist.

Do you have an opinion, to a reasonable degree of medical certainty, whether or not that is a prudent course, or that is an unusual course for the standard of care in that field?

A Yes, I do.

Q What is your opinion, sir?

A My opinion is that is a prudent course with most primary care doctors would be to refer out to a neurologist for care for a seizure disorder.

Q Why is that?

De fendant Direct

A The seizure disorder, there is an underlying neurological disease and the neurologist, it's in his purview to treat and monitor the seizure disorder.

Q Do you have an opinion whether or not that was a prudent course on s part?

A Yes, I do.

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A It's a prudent course to refer to a specialist.

Q Doctor, I am going to ask you to assume a set of facts. First, I want you to assume that there has been testimony in this case that saw : • . - that 'r. saw *I* on two occasions in April of 2001. The first occasion was on April 12th and the second occasion was on April 16, 2001.

I want you to further assume that Mr. had seen ' ho was covering for , in his office on April 4, 2001. And that staples were removed from the top of head during that visit. And that wrote in his records that the patient is on tegretol 100

Defendant - Direct

milligrams three times a day.

Doctor, if you have a need to see records we have them here for you. But I will put in up for you to see as well.

I want you to further assume that on 4-12-2001 saw for the first time, and that elicited from

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there to get a tegretol prescription. He wrote here grad mal seizure following -- he wrote grand mal seizure since birth.

I also want to you assume that -- I want you to see that in his testimony, I want you to see in the records that he wrote that he was on tegretol for many years.

Now, doctor, I want you to also assume that " indicated, and that it is in fact the case in this case, that the patient was seen four days earlier at Mercy Medical Center for a seizure, and wrote grand mal seizure followed.

I want you to also assume that had blood values faxed over to his office regarding the patient's tegretol level,

Defendant Direct
and that they were in the therapeutic range from that hospitalization.

I want you also to assume that there was some blood values, in terms of white blood count and things of that nature. I want you to assume that wrote the plaintiff a prescription for tegretol, 100 milligrams three

I want you to also assume that I testified that before he wrote that prescription he checked note and saw'' hadwrote tegretol 100 milligrams three times a day. He asked the patient what he was taking. He also checked the blood values from Mercy Hospital, specifically levels they were within normal 1imi ts.

I want you to also assume that he told the patient, I am going to give you this prescription, but that I don't treat this condition and I want you to see, to be monitored and treated by a neurologist. And I am also going to refer you to a hemotologist.

Doctor, do you have an opinion, to a

Defendant - •. . '-..,.- Direct reasonable degree of medical certainty, as to whether Dr. actions on April 12, 2001 were appropriate and within the standard of care of family practice medicine?

A Yes, I do.

Q Can you tell us what that opinion is?

A That they were within good and accepted

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that had given a history that he had been in the hospital for a seizure. He is a writing the prescription for him to continue him, to basically tied him over until he gets to the neurologist.

He goes the further step of checking the blood levels to see that the tegretol level was within the therapeutic range. And then makes an important note of low white count and low red count on the patient, which is one of the working diagnoses in patients being on medication for seizures. That affects the bone marrow. It lowers the red count and white count.

I see the combination of a man sitting before him, giving him a history of being on

De fendant Direct

tegretol, 100 milligrams three times a day, according his record, and according to the -- asking the patient and confirming what he believes the record indicates from the hospital. So he sees, there is a concern that perhaps the tegretol is lowering the bone marrow. He wants him to go see a hematologist because it is primary care, he wants to refer him to a neurologist. He says go to see the neurologist. He gives him a prescription for basically 90 pills to tide him over until he gets to see the neurologist. It's something that is done all time in medicine. It is well within the standard of care to treat the problem at hand, write an appropriate prescription, and refer the patient to the appropriate consulting doctors.

Q Doctor, what was the significance of the fact that this patient was on a long standing medication with a life long disease? Is there any significance to that?

A Yes, there is.

Q What is that?

Defendant-* -Direct

A When a patient comes to you, an adult male sits before you and he's young, coherent, he's oriented. He's telling you he's been taking a medication since childhood. First of all, you have no reason to doubt that he doesn't need the medication, since he's been having a disease since childhood.

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evaluated by a neurologist. He would refer him to a neurologist. You would, without a doubt in my opinion, take the dosage on strictly the word of the record. The fact that he didn't just go on the medication recently because of being at Mercy Hospital, he's been on this for his entire life, you are going to wrote the dosage down and give him a prescription for the exact same amount you believe the dosage he is on. Perfectly within the good and accepted medical care to do that.

Q Doctor, was he on the medication for his entire life? Did he report for many years?

A He reported for many years, that he had a seizure disorder for many years. He is on this medication for a long time.

Defendant - - Direct

Q The seizure disorder was for his whole life. The medication was a long standing medi cat ion?

A Correc t.

Q What is the significance of the fact that it was long-standing medication?

A Yes. Somebody who comes in, who is on j_ong™Suan^ij_ng uicuiCatiOu, c e .L x s you u ïi. e y are on a certain medication on a certain dosage, if they need a prescription for it you are going to write the prescription as they tell you, what the medication and dosage they are on.

Q Was there any significance to the fact that it was also written by another doctor in this case?

A Yes. As I said earlier, he confirmed in the record when he saw Stambler, had wrote that is 100 milligrams three times a day. And he did the additional step to check on the blood level, got back a therapeutic range in the blood level. He felt very comfortable in writing that prescription for tegretol.

Q Was it appropriate and proper for him to get that faxed laboratory data from the

Defendant - - Direct

Mercy Medical Center four days earlier?

A Yes, it was. It was an excellent thing to do under the circumstances, of getting that blood leve1.

Q What is the significance of him going that extra step in doing that?

A It shows he is concerned about the

[illegible]

seizure four days earlier he wants, in his mind, to verify the drug and the dosage. Then when he gets back the blood work he sees the concern about the fact that the white count and red counts are low. He's now get additional concern, from a medical standpoint, of

-- he says, you've got to go see a hematologist to test your blood. Your counts are low. It may be due to the medications that you are on.

Q Tell us, was it prudent and appropriate for him to refer this gentleman to a neurologist and a hematologist?

A Yes. As I said, that almost all primary care doctors do not treat seizure disorders directly. They refer them to a

Defendant - Direct

consulting neurologist.

Q When you have a patient before you that is an adult patient, and you give that patient instructions, does the doctor expect that patient to follow his instructions?

A Absolutely.

Q Doctor, I want you to assume that Dr.

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testified there is little to no art in medicine; when it comes to treatment of epilepsy that it's strictly science.

I want you to assume that he said that? Would you agree or disagree with that?

A I would strongly disagree with that.

Q Tell the jurors why.

A We're taught from medical school on there is most certainly an art of medicine. The reason why there is an art of medicine is because yes, there are many diseases that people have. In this case has a seizure disorder. . has a seizure disorder. You have to be aware that there are intangible things that you can't quantify and understand. What is going to be a seizure

Defendant - Direct

disorder in Mr. , per se, if he's being given a seizure medication like tegretol you don't know how it is going to react in this particular patient in this case.

Plus the art of medicine comes in recognizing every patient is an individual. No one wants to be treated like just a disease.

your disease. Here is your treatment. There is an art in medicine. That patient never had that disease before. He first gets it. He never is given a certain medication until he first starts in. He wants to understand the nuances.

The second thing is, you are dealing in part with the patient. That is an art. That is not a science. In your rapport, you sit in there and say, you are on the drug. You have this disease. If there is no interaction, there is no rapport with the patient, you're not practicing the art of medicine, you are practicing some kind of rote prescription or guidelines without recognizing the human element involved.

Defendant - Direct

Q Is there any indication, from either Dr. ~ testimony or from the note that he wrote, his notes, that he properly and appropriately practices the art of medicine when it comes to this gentleman?

A Yes, I believe there is.

Q Can you tell us?

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note is the fact that he makes note of the history and the fact that he gets the prescription, the dosage and the drug; that he writes the notation that he is concerned with the interaction of that medication in Mr. Robinson, that it might be affecting his blood levels. Even though he's been on this medicine for some time, he has a seizure disorder since childhood. He's concerned that although that has happened, he's has a concern that maybe now in his body something is happening and it's lowering his blood count. That is why he referred him to the neurologist.

Even though he has a seizure disorder since childhood, he's saying go to the neurologist. You need to get followed up.

Defendant - \ . Direct

Because he wants to make sure that basically all avenues of diagnosis and evaluation and treatment are done in this man. So he did practice the art of medicine, in my opinion, based upon that note and the answers that he took in that day.

Q With respect to the lowered white blood

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Mercy Hospital, was that a significant finding?

A Yes, it was.

Q Tell us why.

A Well, we know for a fact that medicine, that virtually all the seizure medications, including tegretol, interfere with the bone marrow, for some reason, in some patients. Now it varies whether it will interfere with some patients the first time they go on the medication, within a month or two their bone marrow is depressed, they get anemic, their white counts change. In other patients it may take months or years for it to develop. You don't know how it's going to react in a specific patient.

The fact that he notes it now, and he

Defendant - ..^.i-Direct

is on this medication, he wants to do further evaluation by sending him, referring him to the hematologist.

Q I want you to assume z took the stand the other day and said that tegretol levels, or that tegretol would only affect the white blood count and blood values within the

[illegible]

Would you agree or disagree with that?

A I would strongly disagree with that.

Q Tell us why.

A Well, first of all, we know that a medication can affect a patient not just in the first six months. Patients may develop antibodies to a medication, or it can trigger some kind of a reaction in the patient's bone marrow, or affecting the making of the red cells, or the making of the white cells. To put it on a six-month time frame, that if doesn't occur within six months it's not going to happen, no.

The second reason I give, I have seen in patients on Dilantin and tegretol that they will get lowered blood counts months and years,

Defendant - . .. . - Direct

well after that six months, two, three, four years later. The third thing I would say, you never want to, in medicine, put yourself in a range, a category. To say if it doesn't happen in six months it can't be possibly the medication, that is putting yourself in a corner. That is forgetting the art of

Q You said you have experiences in your practice where patients will have been on tegretol for many years, it is your opinion that that can affect their white blood counts?

A Yes.

Q What is the danger in tegretol affecting the white blood count?

A Obviously when the white blood count is lowered your chances of getting infections are higher. So that is the main concern, that the white cells fight infection. And the second concern I would have, in affecting the bone marrow to lower the white count, in that case it possibly affects the making of red cells. You would be concerned about, there might be something triggering in the bone marrow that

De fendant Direct

could affect their entire well being and put their life in jeopardy if their bone marrow is starting to shut down over time.

Q I want you to assume that testified the other day that " _ - c should have increased the tegretol of this patient knowing that he had a grand mal seizure four uay ^ cai ixcx . i^w yuu ay.

that?

A I strongly disagree.

Q Tell us why.

A Number one, is the fact that now he would be taking over the management of a patient that he feels should be managed by a neurologist. I agree with that management. He is suddenly now managing the patient for seizure disorder, which wouldn't be the appropriate thing to do.

The second reason is, if you're concerned that the tegretol is affecting the bone marrow, then why would you want to raise it? You could make the affect of the bone marrow much worse. It would be something that you say, go to the hematologist and

Defendant Direct

neurologist. I would strongly disagree with him wanting to raise the tegretol because he had a seizure four days earlier.

Q I want you to also assume testified the other day, and he said should have added another medication at this April 12th visit. Do you agree or disagree

A Strongly disagree with that also.

Q Tell us why.

A Number one, as I said earlier, he would be managing the patient. Number two is, now you are adding a drug, drug interaction. You are already concerned about the possibility of the tegretol that could be affecting your bone marrow. Now you are going to add another drug. For the same reason that I said previously, you don't want to do anything that is going to start adding to the management of the patient. I don't want to add a second drug. It could further depress his own marrow or interact with the other drug.

Q I want you to assume that testified that it would be his custom and

Defendant - . - Direct practice to ask a new patient, such as , about his previous doctor so that he could obtain records.

I want you to further assume that if a patient came to him for prescription medication it would be his custom and practice to ask that patient if he brought with him a bottle or vial

I want you to further assume that he testified if there was no notation in his record, that he would conclude that that information was not forthcoming. Notwithstanding that, I want you to assume •"••• took the stand the other day and indicated that it was substandard practice, that it fell below the standard of care for " ' .lot to call the previous doctor, request to see a bottle or vial of medication before prescribing the tegretol, 100 milligrams three times a day.

Would you agree or disagree?

A Strongly disagree with that assessment.

Q Tell us why.

A Doctors who are dealing with coherent,

alert patient coming in, who have a history and know that he has a seizure disorder, you are definitely going to take what he says about the medicine he is on, and the dosage he is on at his word. You would be trying to develop a rapport with a patient, and not have to check and call to see if you are doing the right

It's perfectly reasonable. It's never done, to be calling the other doctor, checking on what medicine he was on. Calling a pharmacist or calling asking him to show you a bottle of the medicine. Oftentimes they won't have it. If he's taking his medication, he is not going to be walking around with the medication in his pocket. It's not a good thing to put the medication in this pocket. It heats up the medicine. You wouldn't expect to get a bottle of medication from him.

None of those things are reasonable that he said, Dr. saying that he should do that. He should be doubting the patient's dosage; doubting the drug he is taking; asking do see a bottle; trying to

Defendant Direct

confirm or suggest or verify what he says, is he telling him the truth, or getting accurate information. You are -- unless there is something that shows in your clinical evaluation that he doesn't have -- his mental status is incoherent, or there is something that you suspect that he is not telling you the

converse with you in a normal manner.

Q What do you mean by that?

A Well, you are sitting there evaluating the patient. You are trying to develop a rapport. You want to see if he is talking to you and making sense. As he is talking, if he starts to go off and brings up things that don't make any sense, you are going to understand maybe I should check to see if this man is telling me the true information.

There is nothing in that office visit, and nothing in the interaction between that suggested that he wasn't dealing with anybody who was perfectly coherent and giving him the proper information.

Q Doctor, how many years have you been in

Defendant - - • _ Direct practice?

A 27 years.

Q What is the standard of care on that issue?

A The standard of care is to interview the patient, take a history, do an examination. And you take patient's history at face value

examination or in your interaction that makes you suspect that he is not coherent in giving you the proper information.

Q Doctor, I want you to assume testified the other day that there was no contraindication to a patient who has epilepsy to having a glass of beer once in a while, a glass of wine once in a while. In fact, he even tells his patients, you can have a glass of wine. Would you agree or disagree with that?

A I would strongly disagree with that.

Q Tell us why.

A There are two reasons. Number one, alcohol is a depressant. It's a depressant to your central nervous system and brain function.

Defendant - Direct

What happens when you take alcohol, you cause a depression of your brain function. Then as you get out of that depression the function, as the alcohol wears off your body, in many patients but particularly in those who have seizure disorders, you can get an over stimulating of the brain, causing a seizure. You don't want

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the brain function, where you get a rebound which could precipitate a seizure in a susceptible individual likes a seizure-type patient.

The second thing is a little more technical. When you take alcohol your body has to metabolize that alcohol in the liver. The way it does it, it produces enzymes which breaks the alcohol down. It's a normal thing. The body recognizes that the alcohol has to be broken down, metabolized, and excreted out. When you are taking alcohol you stimulate those enzymes. Then the liver has got a higher level of medication breakdown, the enzymes which break down all the chemicals in your body to try to clean up the body.

Defendant Direct

What it can do, by taking alcohol, you can induce these enzymes to be over stimulating. Also that will break down not just the alcohol, but tegretol or any other drugs that has to pass through the liver and be broken down and metabolized. You could with the alcohol not just precipitate a seizure, but you can ai oO r i ± G. u ^ e i^±e _L r v e r uO m£ LauC±izc ^nC drugs in your system a lot quicker, and lower those levels, and precipitate a seizure in that manner.

Q Doctor, you saw the April 18th record regarding his tegretol levels; is that correct, when he went to the hospital on April 18th?

A Yes, I did.

Q 3.6; is that correct?

A That is correct.

Q How would you clarify 3.6?

A I would classify it as being borderline level.

Q Borderline normal? How?

A Borderline low.

Q Sir, alcohol affects tegretol levels; would they not?

A Absolutely.

Q Doctor, I want to show you another chart of this gentleman's urinalysis, his urine results. Did they, at the hospital, ever check for aicohoi?

THE COURT: When? When?

MR. NICHOLAS: April 18th when he

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Q talked about this chart a lot, about the things they collected for. Do you know if they ever checked for alcohol leveIs?

A They did not, because in the way that record is presented, they check off a little plus mark when it was checked. If you notice ethenyl is not checked. They did not check for alcohol, which would have been something that would have been important to check for.

Q Why would that have been important?

A For the very reason I testified a few minutes ago. The alcohol can lower your tegretol levels. It can also precipitate a seizure in and of itself.

Q Doctor, I want you to assume Dr.

Defendant - - Direct

z took the stand the other day and said that this patient, , was having mild seizures prior to April 18 of 2001.

First of all, I would like to ask you, is there anything in the record that demonstrates that he was having mild seizures?

A No. In my opinion there is nothing in

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seizure.

Q The classification of mild seizure, is that the classification that doctors use?

A No. No doctors use that.

Q No doctor that you know of would use the word mild seizure?

A No. I can explain.

Q Please explain.

A There are two basic types seizures. One is called petit mal. And that is what the little children get. All of a sudden they start to stare into space for a few seconds. That is a fairly common seizure disorder in children.

Then the other kind is grand mal, which is where you have the tonic clonic seizure

Defendant - ∴ : .i - Direct

where you collapse and have all the spastic movements and jerking movements. It's discharge coming from the brain. A seizure is an uncontrolled discharge emanating from the brain. I have never heard the term mild seizure.

Q Is it true that you can have a seizure,

A Yes. You say this patient is going into status epileptus. They are having multiple seizures.

The differentiation into types, petit mal which is called absent seizure, and grand mal, that is something you are taught from medical school. That is a basic understanding of medicine. A patient might use the term mild seizure, but that is not a medical, scientific term. It is not a term a doctor would be using.

Q Can an epileptics experience a grand mal seizure? First of all, tell us what tonic clonic means?

A Tonic clonic means as you are having the discharge first, when the brain is going to

be in a shut down mode, everything shuts down. And that causes you to collapse to the ground. The second thing that occurs, after you have that collapse to the ground, then you have the clonic phase, which is all the discharge, the firing of the nerves in your body that cause all of the jerking motions and the flailing

only respond in a limited way. It's going to start in that fashion. Sometimes both the tonic part of the seizure and the clonic part are not as prominent. They can vary from seizure to seizure.

In no way would you clarify it as a mild seizure. In my definition it is a major thing that occurs in the brain.

Q Can someone have a grand mad seizure and not be injured seriously?

A Absolutely. That happens all the time. Patients have grand mal seizures everyday, and many patients are not injured at all. They don't bite their tongue. They don't have any major injuries to their extremities. Even times they will not urinate on themselves.

Defendant - " - Direct
That alone -- those three issues, those three things that occur, if they don't happen it doesn't mean you didn't have a grand raal seizure.

Q Would it also depend upon their environment, whether they had it on the bed or rug or a chair or bed?

concrete surface or around unshielded objects and you are hitting those -- if you are in the middle of your bed there is nothing to hit. Then you are going to have certainly worse damage in the one, and a lot less damage in the other.

Q Doctor, the doctors that saw him at the .s.-_ . . „ -y____, notes all of doctors that saw him, all the records that have been presented, has any one historian, any doctor, ever said he had patet mal seizures and now he is having grand mal?

A My recollection is there is only a mention of grand mal seizure.

Q I want to read you something that had testified to the other day. It's on

Defendant Direct

page 260 of the transcript.

"QUESTION: Did he ever tell you that he had a seizure during the entire time you were living with him?

"ANSWER: Yes.

"When did he tell you that?

"ANSWER: They would bring him home.

and a cousin would bring him home and they would tell me he had a seizure. They come in the house. They would walk him in the house. And he would sleep after that, after the seizure. He would sleep just about for hours, just half of the day after the seizure."

Doctor, do you have an opinion, to a reasonable degree of medical certainty, what the significance is of that, of her reporting that with respect to this gentleman?

A Yes, I do.

Q What is the significance of that?

A The significance is, she is reporting what is pretty classically called postictal state after you have the seizure. Because your body has discharged so many neurons and nerves

Defendant Direct

simultaneously. Your body is exhausted not just from the muscle activity but the brain itself is exhausted. You have a tendency, strong tendency to be very weak, and you don't really want to do anything. You are tired. You feel like sleeping. Very very typical. That kind of confirms that he's having grand

O C W J- 4- U -, 4-

out in the record.

Q What about the fact that he's being carried in and he's wiped out for half a day, tells you that he is having a grand trial?

A That fact that the legs are weak. Because they have been used up. The muscle is -- everything. You have what is called lactic acid builds up in your body. Whenever you have serious muscle activity you can get this acid buildup in your body. The muscles are contracting so vigorously. You are weak and tired, and you are -- you just can't walk or stand. And carried in is very typical in a serious grand mal seizure.

Q Would someone have that kind of post-seizure effect if they are having a petit

Defendant - Direct

mal seizure?

A Absolutely not.

Q You heard the testimony that he was, during this time, having that effect on tegretol 100 milligrams three times a day?

A That is correct.

Q I want you to further assume that

April 16th, 2001.

I just have a very few more questions. I am almost done.

That he returned on April 16, 2001 and that he had no complaints of seizure activity. That he had a complaint of a lump on his wrist. That : impression was a ganglion cyst. That • reassured him. And that I want you to assume : testified that it was his custom and practice to ask the patient if he went to the neurologist. If he had any follow-up it would customarily come by way of a letter from the neurologist in the office stating the treatment plan.

Do you have an opinion, to a reasonable

Defendant - - Direct degree of medical certainty, as to whether or not what _ c did on that day was appropriate and within the standard of care?

A Yes, I do.

Q What is your opinion?

A It's perfectly appropriate. He now has a patient that appears to be stable. He has uccuL|iviiiyii_Liiaprescription J_romtnsearxier visits. He has a new complaint then. He just reaffirms his recommendations from the previous visit. All is within good and accepted medical practice.

MR. NICHOLAS: I have no further questions. Thank you, doctor.

THE COURT: We will take a short break. See you back here in ten minutes.

(The jury left the courtroom.)

(A recess was taken.)

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom.)

THE COURT: Thank you all very much. The doctor is reminded he is testifying under oath.

CROSS-EXAMINATION

BY MS. DONNEL:

Q Good afternoon doctor.

A Good afternoon.

Q You've never testified for me, have you?

A No, I have not.

3 V J.NCVCJ. L-C^L-XJ-J-CLJ x w x illy JLXJ.UI, iidvc j u u ;

A I don't believe so.

Q Have you testified for M:. .

in the past, maybe not just for i^v

? but for the firm?

A It's possible but I don't recall specifically.

Q More than once?

A I don't recall testifying more than once for his firm. I don't recall but it could be.

Q How much time are you getting paid for? How much money are you getting paid for your testimony today?

A I will not really be getting paid for my testimony but for my time away from the office.

Defendant Cross

Q How much are you getting paid?

A $3500 for the day in court.

Q Your attorney said that he met with you right after you reviewed the records. You charge for reviewing records, right?

A That's correct.

Q How much do you charge for that?

[illegible]

Q How many hours did you spend? You've got a lot of records.

A I am sure it was at least ten hours.

Q You looked at the records really carefully, right?

A Yes, I did.

Q So ten hours times, what is it, $300 an hour?

A $350.

Q That could come out to $3500 to review the records?

A That would be about right.

Q Maybe more?

A I don't recall the exact number.

Q You went through them page-by-page, right?

A Always go through every page, yes.

Q Did you look at the transcripts in this case as well?

A Yes.

Q The deposition transcripts?

A Yes.

Q Was there a separate charge for

A That is all part of the whole record.

Q With respect to the meeting with Mr. , after you reviewed the records you charged for that, right?

A Yes.

Q How much did you charge for that?

A It's the same thing, $350.

Q How many hours did you spend with him?

A That I haven't calculated. I'm sure it was a couple of hours. We spent something like that.

Q That would be at lease $7000, right? That is after your initial review of the records, correct?

A That's correct.

Q And then prior to coming to court to

Defendant - . - Cross
give your opinions you met with
again, right?
A Yes.
Q How many times?
A A couple of times I would think.
Q Was ; "there with the two of
you as well?

Q Did you ever discuss the case with
oefore you got up on the stand today?
A No, never.
Q At any rate, when you were with Mr.
Nicholas, this is the first time before your
testimony in court, about how long did you
spend?
A I don't recall. Maybe an hour.
Q Maybe two?
A I don't -- could be but I think about
more like an hour.
Q Then after that, and again before
coming to court did you spend more time with

A Yes, because coming to court -- yes,
this past week or two, sure.

Q You discussed the testimony that had already been elicited in this case at that time, right?

A Yes. You mean the trial transcripts?

Q Correct.

A Yes, that's correct

Q Approximately how long did you spend

A Again maybe an hour, hour-and-a-half.

Q To discuss all the trial testimony you got it all done in an hour-and-a-half?

A To discuss specific aspects of the case.

Q An hour-and-a-half, so that would be $475?

A As I said I didn't calculate out a bill for this since I reviewed the case.

Q Did you read the trial transcripts?

A Yes, I did.

Q You charged for that, didn't you?

A Yes, but I haven't, as I said I haven't billed for that yet.

Q About how many hours did you spend reading the trial transcript?

Defendant - . _;._ - Cross

A I would say a couple of hours at least. Again, I haven't added it all up yet.

Q You went through all the trial transcripts in a couple of hours?

A I don't know the hours. I can't give you an exact number right now.

Q Without billing for the trial

[illegible]

that be fair?

MR. NICHOLAS: That is counsel's calculations.

THE COURT: You can say yes or no.

THE WITNESS: I don't know, exactly know what the final number is going to come out to.

Q Well, from what you told me so far that is about right, right?

THE COURT: Ball-park figure.

A Somewhere in the neighborhood of 7,000 or 8,000 total amount of compensation of my time, for reading the case and coming to court.

Q Without the bill for the trial transcripts?

A If that is the numbers. I haven't

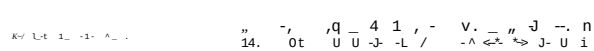
De fendant Cross

looked at your numbers. If you say those are the numbers that I gave you then somewhere in that neighborhood, yes.

Q You are board certified in internal medicine, right?

A Correct

Q With respect to your practice, you see



A Yes.

Q About how many patients or about how much time do you spend in your office seeing patients on a given day, practicing medicine?

A Various times. I have 25 patients in a day. Sometimes I will have 10. It's variable.

Q Are there some days, doctor, that you don't see patients, like today when you're testifying in court?

A If it's something where I'm going to be in court or have a meeting, then I may not see patients that day, sure.

Q Do you have an office, correct, examining rooms?

A Yes.

Q Do you also have a room where you

Defendant - \.' - Cross review medical/legal stuff?

A No, I don't have a special room for that.

Q Where do you do that?

A Sometimes it will be in the office at the end of the day. Sometimes it will be at my home. It's wherever I can read the records,

Q In the past you have testified in cases, correct?

A That's correct.

Q You know what a jury verdict search is, right?

A I have heard of the term, but I wouldn't be able to define it for you.

Q Do you know if there is some way that you can look into the Internet and find out how many times a doctor has testified?

A I guess if you tell me that. I don't know. I have no personal knowledge of that.

Q With respect to you, have you ever looked on the Internet to see if it's recorded as to how many times you've testified?

THE COURT: Do you every Google

yourseIf?

THE WITNESS: No. To Google myself, to look for things like that, no.

Q You have testified for both plaintiff and defendant, correct?

A That's correct.

area of the Internet it would say both plaintiff and defendant, correct?

A I don't know. Again, I told you I have no knowledge of that, description of that thing you're doing, so I can't answer what would be found on that.

Q What percentage do you testify for the plaintiff versus testifying for the defense? The plaintiff being the injured party and the defense being the doctor or the hospital.

A Percentage I couldn't give you. I could give you an estimate.

Q Sure, go ahead.

A Five percent.

Q Five percent for the plaintiff?

A Yes, I have, that I have testified for.

Defendant - - Cross

THE COURT: 95 percent for hospitals?

THE WITNESS: Right, for doctors.

Q Doctor, you also have a web page, don't you?

A No, I do not.

Q You don't have a web page?

Q Doctor, if I told you that Expert Pages has you on their website, would that refresh your recollection?

A No that -- that is not my website. And I tried to get that removed and I cannot get it removed. I did not create that website. They created it about six or seven years. If I can explain.

THE COURT: Somebody made a website to advertise him.

THE WITNESS: I didn't make the website. I tried to get it off.

THE COURT: Very clear. You did not make that website.

THE WITNESS: I did not make that website.

Defendant - - Cross

Q You did not pay for it?

A Absolutely not.

Q Do you know how it got there?

A Yes.

MS. DONNEL: I have it blown up May I put it up for the jury?

THE COURT: There is nothing in

Q Did you know that it has your education on it?

A Yes, I did know that.

Q Did you know how that information was obtained?

A Yes, I do know.

Q How was that?

A What happened about six or seven years ago I got called in the middle of a busy day saying, , we understand you have done expert testimony. We'd like to ask you some questions. I gave information to them, not understanding what the Internet was all about, and how it was going to be used six or seven years ago.

And then I when -- I saw what they were

doing. After going to court about maybe a year or so ago somebody brought it up, an attorney brought it up and said you are on the Internet. I said I didn't put myself on the Internet. The whole thing was a surprise to me. A couple of years ago I tried to get it off the internet. Once you're on the Internet it's

Q Who did you call?

THE COURT: Let him finish.

A Somebody at Expert Pages, I spoke to two people at Expert Pages. I said I didn't want to be on the Internet. They said you gave us the information? I said yes. That was a few years ago. I did not know what it entailed.

I don't want to be on the Internet. I did not understand what the Internet was all about. Unfortunately it's stuck on there. As I said, maybe last year or the year before when I was giving testimony in court an attorney brought it up and said, you're on the Internet. I was like, that is news to me. I should have been off.

Defendant - ' ". •• - Cross

Q Doctor, you gave him some information, right, when they did call you the first time, right? So you wouldn't want to be on the Internet? why? Does it hurt your business testifying?

MR. NICHOLAS: Objection Judge.

THE COURT: Sustained. Is your

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on the Internet. Is that your question?

MS. DONNEL: Yes, your Honor.

THE COURT: Why wouldn't you want to be on Internet?

THE WITNESS: I don't trust the Internet. It's something that I don't understand. I don't want to be on the Internet. Unfortunately I'm on there.

Q Why don't you --

MR. NICHOLAS We ware going far afield here.

THE COURT: Why don't you trust the Internet, doctor?

THE WITNESS: I don't trust the Internet. Apparently everything that

Defendant - … - Cross

goes on the Internet is transmitted worldwide. I feel there is no security or privacy.

Q Now you're worldwide. Isn't that great?

MR. NICHOLAS: Judge.

THE COURT: Move on.

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called, that you usually give expert medical reviews to defendant attorneys in medical malpractice cases?

A Not in that manner. They asked me questions. I answered that then.

Q Are you telling me that you didn't tell them that you usually give medical reviews to defendant attorneys in medical malpractice cases?

A They asked me something.

THE COURT: Did you say that?

THE WITNESS: I did not say that to them.

Q Do you know how they got that information?

MR. NICHOLAS: Judge, she is

Defendant - . . .. _^i - Cross talking about things that she has here that are not in evidence.

THE COURT: Overruled. You may have told them that. Did you say that to them?

THE WITNESS: They asked me questions about how many defendant

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could affirmatively -- I did more defendant's work than plaintiff's work, something like that. It was in that kind of a manner.

Q 95 percent more, right?

A No. That was -- that question was, as far as testimony, they wanted to know about reviewing cases. They were asking me about reviewing cases not going to court.

Q Also, doctor, you told them, did you, that in addition to 20 years of experience and 13 years as a medical/legal expert, you have testified in court over a dozen times?

THE COURT: Did you tell them that?

THE WITNESS: Yes.

Defendant Cross

Q When did they take this information, about six or seven years ago?

A By the fact it says 20 years in private practice, I am 27-and-a-half years in private practice. It was about seven years ago.

Q After the seven years -- withdrawn.

They took this information from you

in court, correct?

A That's correct

Q Approximately how many times each year do you testify?

A It may average out to once or twice maybe, depending. The total amount of times, it would make more sense if I give you that number.

Q Once or twice?

A I will give you total number if you want to clarify it. It's about 28 times I have been to court in 20 years.

Q 28 times in 20 years?

A About that. That is my recollection.

Q Did you also tell them, when they called, that you have also acted a consultant

Defendant - - Cross

to businesses in the general community and social and medical groups where environmental issues are involved?

A I have never used that word consultant. I don't recall what they asked me. I didn't use those words.

Q You also told them you are were

country if necessary; correct?

A Again, they asked me questions and I answered them. And I didn't know this was being created in this manner. I was basically naive in answering these questions on the phone to them. So that is how that came up. I never said that I will travel all over the country. I don't remember saying that.

Q Have you traveled to different parts of the country for depositions and for testifying?

A Never.

Q You have never travelled to another state to give testimony?

A Never.

Q Never flown anywhere?

A Never.

Q To give testimony?

A Never

Q Was it your inclination that you would, if someone would pay you to do it?

MR. NICHOLAS: Asked and answered.

THE COURT: Overruled. She's pressing.

Q Now, this initially -- did this website initially bring in business?

A Never brought me any business.

Q It never bought you any business?

A Never.

Q Your business is generally your reputation?

A I would say so.

Q Your reputation mostly among defense counsel, correct?

A I would say so.

Q Doctor, you didn't think that injuries were the result of an assault; did you?

A I don't understand the question. Which injuries are we taking about?

Defendant - " . ' Cross

Q Maybe his brain hemorrhage and the necessity for the issues in this case. You didn't think it was from an assault, did you?

A I think it's a possibility definitely

Q You think it's a possibility definitely?

MR. NICHOLAS: Can counsel stop

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THE COURT: This is a cross examination technique. Go ahead.

Q You looked at the records carefully so you know that there was, at least there was a blood level of tegretol drawn when the patient had a seizure 4-8-01 by Mercy Medical Center; correct?

A Correct.

Q You also know that there was at least one blood level drawn on 4-18-01, after he was admitted into the hospital seizing; correct?

THE COURT: Admitted into the hospital in whatever condition he may have been in.

A Yes, I'm aware of that.

Q Now, the level on 4-8-01, according to

Defendant - T _j_ - Cross

Mercy Medical Center, ranges 8.7. That was within what is known as a therapeutic range; correct?

THE COURT: The level of what, ma'am?

MS. DONNEL: The level of tegretol. I'm sorry, your Honor.

THE COURT: What was considered to be the therapeutic range? What was that?

MS. DONNEL: 8.7.

Q Doctor, what does therapeutic range mean?

A Therapeutic range is, a laboratory comes up with what they consider to be the normal range for a level of a drug in your blood. And based on their techniques that they use in the lab, they will printout a range, going from the low of what they consider to be therapeutic, to a high of what they consider to be therapeutic. It's not based on the clinical information. It is purely based on laboratory methods.

THE COURT: In other words, a lab was looking actually for tegretol in his blood; is that right?

THE WITNESS: That's correct.

THE COURT: They came up with this particular percentage. I know it's not percentage.

Q It's reflective of a patient taking his medication; correct? It's one way of looking to see whether the patient is taking his medication?

A It can be.

Q We know at least one level, on 4-18 at 2010, that is military time doctor, 8:10 p.m. it was 3:6; is that correct?

A That's correct.

Q According to South Nassau Communities Hospital's technique in analyzing the form there to see whether the drug is in the therapeutic range. That goes between four and ten; correct?

A According to that lab, yes.

Q 3.6, you consider that sub therapeutic,

right?

A No. I can't accept that characterization.

Q You can't. At any rate, assault, if the patient was assaulted wouldn't make those blood levels go down; would it?

A No. Not assault per se, no.

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what you just said. You were saying the lab values to be therapeutic would be between 4 and 10. When you saw it it was 3.6 you said, I wouldn't guess it to be below therapeutic level.

THE WITNESS: I will clarify that, if you want.

Q Why wouldn't it be below therapeutic level?

A As I said, you always have to take the clinical condition into account. Some patients when they get back a level, whether it's tegretol or digitalis or whatever the drug is, it comes in below what is called the therapeutic level. It always has to be clinically correlated. It's up to the doctor

to determine whether the patient is at the therapeutic level or not, not the lab.

THE COURT: That is what she was asking.

THE WITNESS: I misunderstood her. Yes.

THE COURT: Based on the pure level?

THE WITNESS: According to that lab I agree.

Q There are two kinds of therapeutic. We can agree on that, right? There is clinical therapeutic and lab therapeutic, right?

A Yes. The lab put in a range. They call it therapeutic range. There is an important difference.

Q Yes, there is. Because there -- if a patient is having seizures but he is still within the therapeutic range, you have to do something about that, don't you?

A I would agree. If you are having seizures and you are so called in the therapeutic range, then you must come up with a

diagnosis of why those seizures are occurring. Does it have anything to do with the medicine, the level of the medicine. It may not have anything to do with either of those two things

Q Somebody seizing, and they're on medication sometimes, doctor, isn't it a good thing to try to adjust the dose so that you

A I have got to disagree with that.

Q Is there something funny? What is funny? You are saying you have to agree?

THE COURT: He doesn't have to agree with anything. He is a witness on the stand.

Would you agree with that?

THE WITNESS: I would say that characterization, that's incorrect.

Q If somebody is seizing and is within the therapeutic range, you would just let him seize?

A No, of course not.

Q What would you do?

A The most important thing in medicine, which is why I disagree with you, you have to

Defendant - D ; i. - Cross

come up with a diagnosis. If you think medicine is that simple, if you think your question implies such a simplicity. Because a person is seizing, they have a level that is not in the therapeutic range, you've got your answer, you're not practicing complete medicine. You are not understanding the

[illegible]

other reasons why they're seizing than that drug or the level of that drug. That is a critical element of --

THE COURT: Your problem with her is that you are making assumptions. The patient may be seizing because of a brain tumor.

THE WITNESS: That is my point.

THE COURT: What she is saying, based upon no other symptomology except these blood levels, if the patient was seizing -- dot dot dot, ma'am.

Q If the patient was seizing and was within the therapeutic range you would -- could you attempt to adjust the medication to stop the seizures?

Defendant - _ . i - Cross

A If you use the term ever, that is a possibility. That precludes making a diagnosis, which is the most important thing, is to make the diagnosis of why the patient is having seizures and has the blood in the level that is therapeutic. That is what is so critical. That is the crux of the issue in

The patient had a seizure, had the tegretol level that was within the therapeutic range and had a seizure. Which tells you something very important. It tells you that that seizure is probably very like, more likely than not, certainly within a reasonable medical certainty, there is some other reason why the patient is having a seizure. It's not related to the tegretol. It's not related to the level of the tegretol. Something else must be causing that patient's seizure, since that patient is apparently in therapeutic range. There is some other explanation as to why that patient is having a seizure. That is why I can't agree, when you go into the low levels, let me raise the level. That is not thinking.

That is not making a diagnosis. That is not using the art of medicine.

Q Doctor, you looked at the South Nassau records real carefully, right?

A I looked at them, yes, ma'am.

Q You saw that on one of the consultations that they said that the tegretol that, right?

A I believe there was some type of evidence of lower levels or non-compliance, yes.

MR. NICHOLAS: Which admission?

MS. DONNEL: South Nassau.

THE COURT: Date?

MS. DONNEL: 4-18-01.

Q Date of consultation 4-18-01. He was getting tegretol. He got to the hospital. So this, more likely than not this is probably the first level drawn; correct?

A Yes. If that is the first level, I believe if you say that.

Q 2.3 is lower than 3.6, right?

A Correct.

Defendant - . - Cross

Q In fact, 2.3 is sub therapeutic, wouldn't you say?

A It's low, yes. Sub therapeutic, sure. In that lab value, yes.

Q Assault would not cause the tegretoi level on 4-18-01 to decrease to 2.3; would it?

A No. I would agree with that.

[illegible]

tegretoi level falls below the therapeutic range, especially when it falls below the therapeutic range, you are inviting a seizure;

cori3a8cLKr

A Increasing the risk of seizure. I would agree with that.

Q With respect to the Mercy Hospital emergency room of April 8, 2001, you knew that record said that the patient missed a pill; correct?

A Yes, I believe that.

Q Not always. Would you agree, not always but sometimes, when a patient misses a dose of their anti seizure medication this could result in a seizure?

A It's in the realm of possibility, yes.

Defendant Cross

Q But in this case it's not possible because it would support the plaintiff's position; correct?

MR. NICHOLAS: Objection.

THE COURT: Overruled. Pressing on cross.

A No. I would say that based upon my

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presentation of this patient, who had a seizure with the tegretol level in a therapeutic range, that something else is causing those seizures. And it's not related to the tegretol or the level of the tegretol, which is the critical, one of the critical elements of this case.

Q On 4-8-01, doctor, is it your testimony that the patient probably had a beer?

A I think you have to consider that that's it's a possibility that there are other medications, or ingestion of substances which could be interacting with the tegretol or affecting the patient's brain function, or there could be something else going on. It's just one of the diagnostic possibilities, which tells you, based upon what you said about the

Defendant - . ,. - Cross testing level being in therapeutic range, he had a seizure anyway.

Q Do you see anywhere in the record that he had alcohol on his breath?

THE CODRT: Was there anything?

A Nothing that said that. That doesn't mean you don't have alcohol if you don't have

Q Isn't it a fact that when a nurse triages a patient, and when a doctor examines a patient when they smell alcohol on their breath that is put into the medical record, especially when a patient has a seizure?

A That I would definitely agree with, that if they smell it.

Q There is nothing in the Mercy medical record on April 8, 2001 regarding alcohol on his breath, is there?

A I agree with that.

Q You still think that the patient might have had a beer on that day?

MR. NICHOLAS: He never testified to that.

THE COURT: She is pressing on

Defendant - '" '…. - Cross cross.

A Is the fact that he had a seizure and the fact that the level was therapeutic, would you have to consider that? That is an important possibility in this patient.

Q Doctor on 4-8-01 there was no toxicology screen, there was no drug screen on Q A-Q-C\^ On 4-S-O2 W-'S hVioro ^> hnvirn^rru drawn?

A No.

Q You would have to consider maybe -- let's see what time of day. He was there on 4-8-01. By this laboratory result of 8.7 -- excuse me a minute. The record indicates blood was dawn at 11:26 a.m; correct?

A Correct.

Q You think he was drinking that morning?

A All I said, it was a possibility to consider in a patient who has seizures. There is nothing unusual about my stating that. That is the good practice of medicine to consider that possibility in somebody who has seizures, whether they have alcohol on their breath or not.

Defendant - - Cross

Q Is that the art of medicine?

A Good practice of medicine, art and medicine both. There is a scientific basis for why you are concerned about the alcohol, as I testified earlier.

Q What is your scientific basis for being concerned about the alcohol?

O 7\ 7\o T S a i d in rn^r 1-oo1~-imr^r-i-<r ?l r^r^^^r^l In 3 o two significant effects. One it's --

Q That is not my question.

MR. NICHOLAS: She asked him a question.

THE COURT: He is answering the question.

A Alcohol has a depressant effect. You have a rebound hyperexcitabi1ity. Alcohol causes the liver to work harder and to metabolize any drug or drugs that are in your system. It can lower the level of drugs in the blood because it goes through the liver to be metabolized, and the enzymes break down the products and medicines that go through your body.

Q On 4-8 there is no evidence of

Defendant - Cross

hyperexcitabi1ity in ^ demeanor?

A I am talking about in the brain. If you take alcohol, you have a rebound, you can have a rebound seizure in a seizure-susceptible individual like . You have to consider that not just that day but any day you come in and the patient has a seizure.

foot one, weighing about 150, 160 pounds, would one beer cause that hyperexcitabi1ity state in the brain?

A It's possible. That is why I testified earlier that you should always tell your patient never to have a beer. It's not likely for one beer in a large man. But what I have seen in patients is that they will never tell you exactly that they are taking one beer. They can take two beers. It's not a good habit.

To tell a patient to take any alcohol, with a seizure disorder, that is not a good thing to do because of the reasons I stated.

Q You say one beer is not likely in a large man. You would suspect that a

Defendant - Cross

neurologist would agree with that statement; correct?

A Which statement, the statement not likely?

Q Not likely.

A I don't know Probably they would. I don't know.

4- 1^ ,' ,-, V 1 A

one sip could cause a seizure?

MR. NICHOLAS: Whether what neurologist would?

THE COURT: Sustained.

Q Have you conferred with neurologists with respect to your epileptic patients at any time?

A Yes, of course.

Q Have you ever talked about a sip of beer causing hyperexcitability in a patient's brain resulting in a seizure?

A Not a sip, but not drinking alcohol, yes, definitely.

Q Have you ever talked about drinking one beer, with a neurologist, causing a seizure in an epileptic patient?

Defendant - ' - Cross

MR. NICHOLAS: Objection.

THE COURT: Overruled.

Q Have you ever talked to a neurologist?

A Sure. The neurologist agrees. We're in agreement that you shouldn't take alcohol when you have a seizure disorder.

MS. DONNEL: That is not my

Q Have you specifically spoken with a neurologist regarding an epileptic patient having one beer resulting in a seizure?

A I would say yes, that has been discussed in the past over the years.

THE COURT: Be that as it may, how long do you think your cross is going to be?

MS. DONNEL: Very long, Judge.

THE COURT: See you back here at 2:15. Don't discuss this case among yourselves or with anyone.

(The jury left the courtroom.)

(Whereupon, a luncheon recess was taken.)

* * *

AFTERNOON SESSION

* * *

(The following testimony was recorded in open court by Official Court Reporter Margaret Kopacz:)

THE COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: You may continue your cross-examination. The witness is reminded he is testifying under oath.

MS. DONNEL: Thank you, your Honor.

(BY MS. DONNEL:)

Q Good afternoon, Doctor.

A Good afternoon.

Q Now, Doctor, we were talking about assault as one of your theories of what happened in this case causing Mr.

THE COURT: He doesn't have to propose any theories. That was not one of his theories,, just something to be considered, he said.

MS. DONNEL: Well, can I probe?

THE COURT: Yes, but do it by asking

questions -- he's a defense witness, he's not obligated to put forth any burden or to put forth any theories.

Q Doctor, with respect to your testimony previously about considering assault as a potential cause for Mr. Robinson's seizure and subsequent brain damage, Doctor, is there anything, any evidence --

THE COURT: No, no, no, ma'am. He never said there was a potential assault which led to a seizure which led his brain damage. I believe what he was potentially considering was an assault and fall to the ground and hitting his head causing brain damage; is that right, sir?

THE WITNESS: That's correct, your Honor.

THE COURT: Listen closely to what he is saying. Go ahead.

Q With respect to your consideration that the patient may have been assaulted, fell, hit his head which caused a seizure and subsequent the brain damage

THE COURT: No, ma'am. There's nothing about the seizure. He fell, hit his head causing brain damage; is that right, sir?

THE WITNESS: That's correct, your Honor.

Q Doctor, with respect to your prior testimony

regarding the possibility of an assault, do you have an opinion within a reasonable degree of medical certainty that the assault resulted in a fall and that caused a seizure?

A No, I never said that. I said that the -- since we don't know what happened, and ~ 1 was found basically unconscious, stuporous, however you want to say it, on the ground, you don't really know what happened, and that's a consideration of an assault that could have caused hemorrhaging or bleeding in the brain. That has to be considered in this patient.

Q Would it be also your opinion then that the hemorrhaging or bleeding in the brain caused the seizure?

A Oh, well, first of all, any kind of hemorrhaging, anything that's irritating in the brain can trigger off a seizure because a seizure originates in what's called an irritative focus in the brain. So absolutely way beyond a reasonable medical diagnosis,: you would have to consider that bleeding, blood in the brain, can precipitate a seizure because it's an irritative focus. The blood does not belong in the brain tissue like that. Just in the blood vessels of the brain tissue, not directly irritating the brain. And if it does directly irritate the brain, it can

trigger off a seizure. This is a known medical fact, this is not speculation on my part. This is just something that doctors know. We have seen that in the past.

Q And, Doctor, is there any evidence anywhere in the hospital records that you reviewed or the medical records that you reviewed that supports this position?

A Yes, there is.

Q What is that?

THE COURT: Ma'am, what position? He was just talking about a physiological process.

MS. DONNEL: That supports the position that the patient may have been assaulted.

THE COURT: Okay. Is there anything you saw that --

A Yes. When the patient had CAT scans done, MRIs and when he had surgery, there was hemorrhage, there was a blood clot deep in the brain tissue. There was -- in order to get hemorrhage, you must have some kind of trauma. Now, is the trauma because there's damage coming from the outside causing damage to the brain -- the cells, did a blood vessel just hemorrhage and leak, which can happen? And so you have deep in -- what's called the intracerebral area, not in the top of brain portion where it sits on the brain and pushes into

the brain, it's not just below the surface of the brain, this was something that was deep in the brain. So you really don't -- you cannot determine just on the basis of that where indeed the initial hemorrhaging started or how it started or why it started. So it has to be a consideration in the -- basically in the differential diagnosis of this patient because he had blood deep within the brain tissue.

Q That could also be caused by a fall and striking your head as well, correct?

A Less likely than something happening from inside the brain, and I will tell you why if you want to hear it .

Q I don't want to hear it

Now, Doctor, in fact, isn't there a pre-hospital care report in the South Nassau Communities' records?

A I believe so, yes.

Q You reviewed that, right?

A Yes.

Q And isn't there a box on that for unarmed assault that's not checked?

A I believe -- if you say it, I believe it.

Q Other than -- well, on the CAT scans, there's no evidence of a fractured skull, is there?

A Correct.

Q Do you have a subspecialty in neurology?

A No.

Q Other than the CAT scans that you have referred to, is there any evidence whatsoever in any of the records that supports the position or that supports your consideration that the patient was assaulted?

A No, other than what I said, it's a possibility that has to be considered.

Q And with respect to that the patient may have had a beer and that caused the seizure, is there anything -- any evidence anywhere in the medical records that supports that?

MR. NICHOLAS: Judge, objection. Where did counsel get had a beer? I don't know where she's getting that from.

THE COURT: Overruled.

Phrased correctly, is there anything in this medical record to show he imbibed alcohol prior to the event?

THE WITNESS: In the medical records for this event, no nothing that proves that he had it in this event, no.

Q Now, in fact, with respect to this seizure that he suffered four days before seeing - for

the first time on April 8, 2001, is there anything in the record of Mercy Medical Center April 8, 2001 which supports any position or consideration that the patient had a beer before that seizure? Any evidence whatsoever?

A Evidence, no.

THE COURT: Next question.

Q Now, with respect to lack of sleep, did you discuss the potential of the patient having a lack or loss of sleep prior to the seizure suffered April 18, 2001 as he did on 12/2, 2000 complaining of that in the emergency room? Did you discuss that as a potential cause for this man's seizure?

MR. NICHOLAS: Judge, objection as improper.

THE COURT: It's improper, but she's probing now.

A I don't understand the question. Discuss,: consider or --

THE COURT: She will rephrase her question.

MR. NICHOLAS: Judge, can we approach for one moment?

THE COURT: There•s no need to.

MR. NICHOLAS: I just need to ask one

question.

THE COURT: Let's go ahead.

Q Doctor, did you review the Mercy Medical Center records for the emergency room visit, not any admission but the emergency room visit of 12/2, 2000?

A Yes.

Q And in that emergency room record it indicates that the patient was complaining of lightheadness because he hadn't slept for more than two hours in the past five days; is that correct?

A Yes, I recollect that.

Q Did you consider in forming your opinions in this case the fact that the patient may have suffered a seizure due to the fact that maybe he didn't get sleep?

A Oh, yes, that's one of the factors that you consider in anybody who has a seizure.

Q Is there anything, any evidence whatsoever in the record of 4/18, 2001 that supports that?

THE COURT: That supports he didn't have a lack of sleep.

A No. Not in the 4/18, no.

Q Is there anything in " s records for 4/12/01 and 4/16/01 that supports that?

A Nothing in the records.

Q Now, you were talking about decreased white

blood count, decreased hemoglobin and hematocrit, correct, anemia?

A Correct.

Q Caused by Tegretol in this case, correct?

A I didn't say caused, but it's a strong consideration, it's in your differential diagnosis.

Q You came to that strong conclusion?

A Based upon my medical knowledge and expertise that that's one of the things that causes a low hemoglobin and low white count. When you see the two in conjunction, that means you are having suppression of the bone marrow that's affecting both the white cells and the red cells which you say, well, it's less likely to be a bleeding issue; it could be something to do with the medication or some other toxic effect, so it's a serious consideration in this patient.

Q You wouldn't want to increase Tegretol because that could cause an infection, and the patient could die, right?

A No, I didn't say that. I said that it could worsen the hematological abnormalities.

THE COURT: She was saying if you continue to throw down his WBC, he was going to .be subject to infection and can die?

A Yes. If you extend it out, extrapolate it

out, yes, it's a possibility, that's correct.

Q You never treated this patient, right?

A No, of course not.

MR. NICHOLAS: Objection.

THE COURT: Overruled.

0 What records did you review in this case?

A All the patient records from -- that were given to me which includes the hospital records, the clinic records that he had prior to seeing Dr. Halper, all the Examination Before Trials of all the parties involved.

Q Can you list me the records that you reviewed?

A Other than what I told you, you know, and I seen the post-hospital -- I saw through the whole hospital stay after he had his event.

Q You can't list me any of the medical records?

A Just what I said.

Q By name.

A No, I can't. They're all in there. .I have reviewed all the records both prior to the event and after the event.

Q Well, surely you looked at the Huntington Hospital record, correct?

A If it's in there with the rest of the

records, I saw all the records involved with this patient.

Q Did you note that on the transfer summary from Huntington Hospital, it says, "It was also noted during this hospital course that he had anemia, and based on the old records, the anemia was worked up before and did not show any obvious cause;" were you aware of that?

A Yeah. Anemia --

Q So you, Doctor, who've never seen this patient, never treated this patient, based on your review of records is going to come into this courthouse and tell this jury that he has anemia because of the Tegretol; is that correct?

A I didn't say that. I said that that was a serious consideration because he's on Tegretol. And just because you had anemia prior --

THE COURT: Serious consideration because he was on Tegretol. That's all, that's the response to the question.

Q Doctor, even in the Huntington Hospital transfer summary, it even indicates that the patient had some tests done as well, and there was no conclusion; is that correct?

A Yeah. That doesn't affect my opinion on the

matter.

Q That he had a hemoglobin electrophoresis • which was normal?

THE COURT: Are you aware of that?

Q Did that affect your opinion at all?

A Yeah, that actually rules out one of the considerations. Whoever ordered that was looking for abnormalities of the hemoglobin such as sickle cell anemia, sickle cell trait. That was a good test to have done. It just makes it -- you know, one of the considerations has been ruled out.

Q But that wasn't the only test that's been done in the past, right, from your review of the records?

A That's correct.

Q Now, Doctor, April 8, 2001 patient suffered a seizure. You had talked about on Direct Examination different types of seizures. And grand mal seizures are always big ones, right?

A No, I didn't say that. I said that there's only two distinctions of seizures, petit mal and grand mal. And grand mal means you have to have a discharge coming from the brain itself, and it's always a significant discharge because the brain is the center of all the nerve function, so when you have a seizure, you

are going to have a grand mal seizure if you have that tonic-clonic-type seizure, and that there's no such thing as what is called a mild seizure even though the patient may refer to it. You're either having a grand mal seizure or petit mal. That distinction I felt had to be made because there's somehow the notion came up that there's such a thing as mild seizure. There isn't. That's not a medical terminology.

Q Let me ask you this, a patient usually -- that's an epileptic usually knows the type of seizure he has, correct?

A Historically or when they actually are having a seizure?

Q Well, when he has a seizure, he knows what he is experiencing, correct?

A No. By definition, you lose consciousness, and it's only after the fact that you can intimate or imply if you find yourself, you know, groggy and sleepy and lethargic, you realize, oh, I had another seizure. You don't know what is going on when it's happening. You don't say I'm having a seizure right now, it's not possible.

Q Surely you are aware of the April 8, 2001 emergency room record and what it says, correct?

A Oh, yes.

Q And it also says in there in quotes that the patient usually has light ones, doesn't it?

A That was a history of -- yes, it says that.

Q And a patient usually, when it comes to seizures, tries to adequately describe them because he doesn't like having them; isn't that correct?

MR. NICHOLAS: Objection to the form.

THE COURT: Sustained. I think what she is saying is, if you say there are only two types l of seizures, petit mal and grand mal seizures, if the patient could describe to his physician maybe or nurse and he writes in his own record that he had a light seizure, would that be a grand mal or petit mal seizure?

THE WITNESS: Well, the nurse is only describing what was reported to her, so she's taking a subjective history from the patient. The patient cannot recall exactly what he had, which is my point is that because you lose consciousness,; you don't know, you are not able to visualize yourself or be aware cognitively of what is going on in the middle of the seizure. It's only after the effect. So some patients will say, well, because I didn't have a major injury, I must have not had a bad seizure. But I'm telling you from a

medical standpoint, there's only those two basic types, petit mal and grand mal seizures, and ' has had grand mal seizures for many years.

Q Well, you are not suggesting that a patient, after a seizure, wouldn't be able to know whether he had a huge seizure or a lighter seizure, are you?

A Well, as I said, part of a grand mal seizure is you lose consciousness. You are impaired mentally. You're only guessing and inferring from your post-seizure state what you thought you had but --

THE COURT: Let's not bicker over this. In that post-seizure state a person could say that was a mild one or that was a bad one; is that right?

THE WITNESS: He could say that, but it's not medically based.

THE COURT: We all know that, we all ; understand the concept. Let's go.

Q Surely you don't think was lying when he made that statement in the April 8, 2001 Mercy Medical Center records, do you? Do you have any reason to believe he was lying about that?

A No. Lying, no, of course not.

Q With respect to the sarcoidosis, when you

reviewed this case, did you have a consideration that sarcoidosis, the patient's history of this disease, may have played a part in causing this seizure?

A I don't understand the question. Which seizure are you referring to now?

Q I'm sorry, April 18, 2001.

A The April 18 admission. Yes, it's a consideration because sarcoid is a widespread systemic disease with what's called granulomas. You get scar tissue forming in various parts of your body, particularly the lungs it mostly affects, but it can affect the brain, it can affect other parts of the body, the kidneys. So it's a consideration in the differential.

Q But this patient's sarcoidosis, from your review of the records, was in his lungs, wasn't it?

A Yes. It mostly appeared to be confined to the lungs, which 90 percent of cases are, so he would just fit into that 90 percent.

Q So it wasn't in the brain?

A No. The only way you could really tell for sure if it's in the brain is if you actually take tissue biopsy, so --

Q And there's no evidence in this case, is there, that there was any sarcoidosis in "

brain, is there?

A That's correct.

Q And, in fact, sarcoidosis would not cause a decrease in the Tegretol level in the blood, would it?

A That's correct.

Q And truly, lack of sleep, if the patient suffered a lack of sleep, that would not cause a decrease in the Tegretol level in his blood either, would it?

A Not per se lack of sleep.

Q Lack of sleep causes a decrease in the Tegretol level?

A I said not per se lack of sleep.

Q Now, with respect to drugs, you considered drugs, Doctor, did you not as a potential cause of seizure he sustained on 4/18/01, right?

A Yes, that's a consideration.

Q And, Doctor, you reviewed the records, right, and you saw a toxicology, right, report for 4/18/01?

A That's correct.

Q When you first saw this toxicology report, did you read it right, or did you think that he was positive for amphetamines, barbiturates, benzodiazepines, cocaine metabolite, methadone, opiates, phenothiazines and tricyclic antidepressants; is that

what you first thought?

MR. NICHOLAS: Objection, your Honor.

THE COURT: It's quite -- technically, it's an improper question because you broke it into so many different areas. Rephrase.

Q Doctor, when you first looked at this toxicology report when you first reviewed these records, did you think that the toxicology report showed that the patient was positive for amphetamines?

A No, I did not think that.

Q Did you think that the toxicology report showed that the patient was positive for barbiturates?

A No, I did not think that.

Q Did you think, when you first reviewed this toxicology report, that the patient was positive for benzodiazepines?

A There's a positive on that one because it mentioned in the upper section there.

Q Right, because it says patient results are noted above, correct?

A Correct.

Q In fact, because the patient had another seizure in the emergency room after he arrived at the hospital, he was given Valium and Ativan, correct?

A Correct.

Q And that's why that level is positive; isn't that correct?

A Most likely, yes, that's correct.

Q Now, when you first looked at this toxicology report, did you think the patient was positive for cocaine metabolite?

A No, I did not.

Q Did you think he was positive for methadone?

A No.

Q Or opiates?

A No.

Q Phenothiazines?

A No.

Q Or tricyclic antidepressants?

A No.

Q So, Doctor, with respect to drugs, is there any evidence anywhere in the April 18, 2001 Mercy Hospital admission that indicates that the patient had been taking drugs which caused his seizure?

A There's no evidence, but certain things were not tested.

Q And, Doctor, when you say certain things were not tested, they didn't test for aspirin, did they?

A No.

Q They didn't test for acetone, did they?

THE COURT: What do you feel may not have been tested for which were relevant?

THE WITNESS: Marijuana, tetrahydrocannabinol THC, was not tested for, which should have been, and alcohol should be been tested for. Those are two things that can be contributory, and they should have been tested.

Q Well, Doctor, you weren't there that day, were you?

THE COURT: Where?

Q At Mercy Hospital an April 18, 2001?

A No, I wasn't there.

Q Doctor, there were doctors taking care of the patient, right?

A Yes.

Q And if the patient came in with alcohol on his breath, don't you think they would have tested for ethanol?

MR. NICHOLAS: Judge, didn't we go through this already?

THE COURT: Do you think they should have tested if there was alcohol on his breath?

THE WITNESS: If he had alcohol on his breath and if he didn't have alcohol on his breath because sometimes you won't smell alcohol on the

breath.

THE COURT: Or if he smelled marijuana, should he have been tested?

THE WITNESS: He should have been tested even if he wasn't because that's a consideration of somebody who has a sensorium deterioration, somebody who's in coma, somebody who has a seizure. Those are things that should be tested in my opinion. I stand on that.

Q So the doctors at committed malpractice in not testing for that?

MR. NICHOLAS: Objection. He didn't say that.

THE COURT: Did they?

A Not that it's malpractice. It's a judgment call. They should have used their judgment and exercised it and gotten those two drugs tested.

Q Do you have any reason to believe that they did not exercise their best judgment in testing and treating on April 18, 2001?

A In reference to not ordering an alcohol level and not getting a THC screening, they should have done, that's my opinion.

Q Are you saying they did not use their best judgment in treating when he came in with

the seizure on April 18?

THE COURT: He said they should have given it to him. Move on.

Q Now, is there any evidence anywhere in the April 18, 2001 records that would support the position that had taken marijuana?

A No evidence, I agree.

Q Is there any evidence in the Mercy Hospital Medical Center records of April 18, 2001 that had been drinking? Is there any evidence?

A There's no evidence.

Q And now let me ask you this: If had been drinking and that caused his -- would that have caused his decrease in the Tegretol level?

A Well, most definitely could have, as I explained several times before.

Q It could have caused a decrease from 8.7 on 4/8 to 3.6 or lower on 4/18?

A Yes, it could have.

Q He would have had to drink a lot, wouldn't he have?

A Not necessarily. Once the enzymes are inducted as we call them, once they're going and they're stimulated, they will metabolize everything that passes through the liver. This is not some theory that I am

coming up with. This is good practice of medicine. This is known medical facts, it happens all the.time.

Q What also is a known medical fact, Doctor, is it not, is if the patient's Tegretol dose is cut in half for six days and he misses 1800 milligrams of his dosing, that could also, and more likely than not, cause a drop in Tegretol level, correct?

A Well, you gave me two things there. You said also, I would agree with. More likely than not, I would disagree with.

Q You think it's alcohol that did it when there's no evidence in the chart whatsoever rather than the patient's Tegretol; is that your opinion?

A No, I didn't say that.

Q Okay. Well, let me ask you this: Did , when he saw the patient on April 12, 2001, prescribe a dose of Tegretol, 100 milligrams three times a day?

A Agreed.

Q And would you also agree that the South Nassau Family Clinic records, that's the clinic he went to, you must have reviewed that, he was on 200 milligrams three times a day prior to seeing t___, correct?

A I agree.

Q And, Doctor, if you cut a patient's Tegretol dosaging in half, 100 milligrams, and assuming the patient is taking the prescription three times a day from 4/12, 2001 to 4/18, 2001, would not you see a drop in the Tegretol level?

A Are you asking me in general or specifically with this patient, because there are two different answers?

Q Two different answers because it's a different answer in this case than it would be in general?

A In general --

Q Aside from alcohol, aside from anything, okay, if this patient was prescribed half of his dose and took it for six days, would you not expect to see a drop in the Tegretol level?

A You would expect to see it generally;

Q And a drop in Tegretol level invites seizures; isn't that a fact?

MR. NICHOLAS: In this case, Judge, or in general?

THE COURT: Overall, in general, does a drop in Tegretol levels invite seizures?

A In general, I would agree. Yes, I would agree in general.

Q Now, we know Dr. Halper prescribed the Tegretol 100 milligrams, as we just said, correct?

A Yes.

Q You reviewed the pharmacy records?

A Yes.

Q Now, there was a prescription for April 1, 2001 for Tegretol, it's listed here as Carbamazepine, I always pronounce it wrong. At any rate, that's Tegretol, correct?

A Generic version, yes.

Q For 200 milligrams, correct?

A Yes. I can't see it from here, but I accept what you are saying. That's very small.

Q I will hand it to up, Doctor. It's been previously marked here as Plaintiff's 4.

MS. DONNEL: Judge, may I hand it to the witness?

Q Can you see the prescription, Doctor, 4/1, 2001 for Tegretol, 200 milligram tablets?

A Yes, I do.

Q And that's for 30 tablets, correct?

A Yes, it is only for 30 tablets.

Q So that would last him 10 days, correct?

A That's correct.

Q And that was filled because there's something

under filled-sold date, correct?

A Where are you looking?

THE COURT: Look up, she can point to it.

Q This is the fill-sold date column, correct?

A Yeah, right.

Q When you first looked at this record, Doctor, you saw that there was an entry for 4/11, 2001, did you not?

A What are you talking about, on this page?

Q On this page.

A Yes, I see a notation there on the bottom left.

Q Did you read it right the first time? Did you see that it was not filled, or did you think that that was filled?

MR. NICHOLAS: I'm going to object to the form, did you read it right the first time.

THE COURT: Overruled, she's probing.

A Yeah, I read it right because it's in the fill and quantity. I thought it was strange because it was only for 30 pills, which even if he took it three times a day --

Q I'm not talking about 4/1, Doctor.

A What are you talking about?

Q I'm talking about 4/11. That's for 30 pills

too, so you thought that was --

A Well, if you let me speak, there's a prescription number. Usually the way it works, prescription number is written, the drug is mentioned, the dosage, the person who manufacturers it and then there's the amount. And in this prescription, it's just there, and there's no further entries on that line of 4/11, so it's irregular because the dosage and the amount alone -- I mean the number of pills you're getting is a very small amount, so it's some kind of tied-over prescription that was either called in or whatever, given in some way. It is an irregular amount for somebody who's on a seizure medicine to have only 30 pills given to them.

Q Doctor, when you first discussed this case or looked at the records and gave some opinions, did you give the opinion that this prescription had been filled and, therefore, i probably never even took r prescription? Did you give that opinion?

A That was not an opinion that I gave.

Q At any rate, there was a prescription by for 100 milligrams, chewable tablets, right, chewable tablets for 4/11, or April 11, 2001 which was filled, right?

A Agreed.

Q Now, : testified, I want you to assume, that he doesn't treat this type of patient, right?

A I agree.

Q Did you read that in his testimony?

A I agree he said that, yes.

Q But, Doctor, when you issue a prescription for somebody, that's treatment, is it not; yes or no? Is that considered treatment in the world of the art of medicine?

A Well, in the art of medicine, you always want to keep a patient --

Q Doctor, yes or no, is that treatment?

A In the art of medicine, yes.

THE COURT: That's the answer.

A Of course.

Q *r* had no business prescribing this prescription for did he, since he didn't treat these types of patients?

A Oh, I disagree with that strongly.

Q Now, Doctor, do you know if ' had a physical disability that day that he couldn't pick up a telephone and ascertain what the patient's dose had been? Do you know if he had a physical disability?

THE COURT: Do you know if he did or not?

A I don't know if he did or not.

Q And, Doctor, wouldn't it have been reasonable, wouldn't it have been reasonable for him or prudent for him --

THE COURT: Ma'am, now you are asking two questions, wouldn't it have been reasonable, wouldn't it have been prudent. If he says yes, we don't know if it's reasonable or prudent.

MS. DONNEL: I will rephrase it.

Q You said, Doctor, in your Direct Examination that it would have been a prudent course on part to refer this patient to a neurologist, you said that, correct?

A Correct.

Q Wouldn't it also have been a prudent course to check the prescription on Tegretol before prescribing it, seeing as he didn't treat these types of patients?

A He did check the prescription.

Q He checked the prescription via asking the patient?

A Yes.

Q And he also saw the other written entry by

A That's correct.

Q However, that wasn't the right dose, was it?

A That was the dose he was told by the patient.

Q That's not me question. Yes or no, was that the right dose?

MR. NICHOLAS: Objection to the word right.

THE COURT: Overruled.

A No. It was not the dose he was getting, that's correct.

Q Doctor, seeing as he had a seizure four days prior -- I mean this isn't just a patient coming in with, you know, just a history of epilepsy, he had a seizure four days prior, correct?

A Correct.

Q Under those circumstances, shouldn't have picked up the phone and either called a neurologist he usually refers patients to, _, or checked with one of the patient's previous doctors to see what he had been on prior to coming to Halper's office?

A As I testified earlier, that is not necessary. That is not within the standard. No doctor does that.

Q It's not within the standard to --

MR. NICHOLAS: Let him finish the answer.

THE COURT: Did you finish your answer?

A That is not what doctors do or have ever done in that situation. They do exactly what this doctor did.

Q Doctor, you also testified you wouldn't second-guess a patient, you wouldn't want to disturb that repertoire in the art of medicine, correct?

A I didn't say repertoire, I said rapport.

Q Rapport, correct?

A That's correct.

Q So rather -- and then the patient tells you he is on 100 milligrams three times a day, right, and you are not familiar with the medication -- testified, correct, he wasn't familiar with the medication? Isn't that what you read in his testimony?

A Familiar meaning that he is prescribing it as treating for seizures, but he knows what the medication is.

Q How do you know that?

A Because I know that he referred the patient to a hematologist, and he knows that the drug -- he is familiar with the drug enough that he knew it could lower the person's blood counts, white counts, so he is familiar, and I would not agree that he is not familiar with the medicine.

Q He did testify, did he not, that he wasn't

familiar with dosaging of it; did he testify to that?

MR. NICHOLAS: Judge, he never testified to that. Objection.

THE COURT: Overruled. It's his recollection.

A I don't recall that, and I would have to see the testimony to see what I can give you an opinion on.

Q I don't need your opinion right now.

MR. DONNEL: Objection, Judge.

THE COURT: Just get to the question.

Q Doctor, with respect to the PDR, did you know that testified that he was not aware that the dosage for children over 12 and adults, the dosage was -- the minimum dosage, 200 milligrams twice a day, so that would be 400 milligrams a day, did you read that testimony?

MR. NICHOLAS: Judge, objection. He never testified to that.

THE COURT: It will be the jury's recollection that controls. Go ahead.

A I don't recollect that testimony.

Q And, Doctor, certainly a prescription for 300 milligrams a day would be a child's dose; would you not agree with that?

A I would not agree with that as I talked about

individualizing, you would always keep it to an individual patient. That dosage may be the dosage for that patient.

THE COURT: That's not what her question was. Her question was, ordinarily, not whether a big husky old guy or husky old woman were taking a child's dose. She wants to know, did you recognize that as being a commonly known child's dose?

THE WITNESS: I don't recognize that. I would not use that term.

THE COURT: Don't quibble over terms. Do you recognize it as being a pediatric dose?

THE WITNESS: I'm sorry, your Honor, it's like somebody being on -- if they take another medication, to say, oh, you're on a minuscule dose, I would never minimize the dosage somebody is on.

THE COURT: The question we're askingiis, do you ever recognize or observe this type of dose at 100 milligrams to be pediatric, child, not related to ability of patient to tolerate or to take the dose, but did you recognize this as, generally speaking, a child's dose of this medication?

THE WITNESS: Well, if you say generally, then I would say yes, in a general phrase.

Generally, I would agree with that.

Q And, in fact, Doctor, you are familiar with the Physician's Desk Reference, right?

A Yes.

Q You use it all the time, or if you need to refer -- to get dosaging information or information about a drug, do you use it?

A I use it as a reference only.

Q And most doctors in this country use it, don't they?

A As a reference? What's the rest of the question? Use it as what?

Q Use it as -- to look up drugs, look up drug information?

MR. NICHOLAS: Judge, objection to the form in terms of just foundation of the question.

THE COURT: Rephrase.

Q Doctor, with respect to this particular book, is it not a fact that it's virtually in every doctor's office in this country?

A Oh, I would agree with that.

Q Now, Doctor, with respect to this children's dosage, and in fact, in fact, when the patient had it filled at the pharmacy, the hundred milligram dosage comes in chewable tabs, doesn't it?

A There's a reason for that, yes.

Q And, Doctor, shouldn't that have been a red flag if had been aware or had tried to ascertain in any manner what the proper dosaging was of Tegretol, shouldn't that have been a red flag that having epilepsy all his life, and having a seizure four days ago, couldn't have possibly been on 100 milligrams three times a day? Wouldn't that have been a red flag?

A Red flag to whom? I don't understand the question.

Q Shouldn't that have been a red flag to had he known this was a children's dose?

A No, but he --

MR. NICHOLAS: Objection to the form, Judge.

THE COURT: Can you answer the question?

THE WITNESS: Not the way it's phrased, I can't answer it.

THE COURT: He can't answer the question.

Q Doctor, certainly, you are aware that 100 milligrams three times a day is a children's dose, correct?

MR. NICHOLAS: Judge, he has not testified to that.

THE COURT: She's probing, sir.

A I didn't concede that.

THE COURT: She's not asking whether you concede. She said to you recognize that 100 milligrams three times a day to be a child's dosage for this medication?

THE WITNESS: I had said earlier that I did not recognize that, I don't use those terms.

Q Well, whatever terms you do use, Doctor, that particular dose is really generally a children's dose; is that not correct?

A I would agree with that, as I did already.

Q My question is, if - had been familiar with the proper dosaging of Tegretol, shouldn't that have been a red flag and alerted him to the possibility --

THE COURT: No, red flag and alerted, all this other business. Ask him this question, since you, as a practicing physician, recognized that as a children's dose, shouldn't ' have also recognized it in his state of practice?

THE WITNESS: My opinion is is that he believed that was the dosage he was on, and he prescribed that dosage.

THE COURT: That's not the question. The

question is, should he have also recognized that as a children's dose?

THE WITNESS: But I never even conceded that it was a children's dose. It's a lower does that's generally given to children.

THE COURT: Therefore, should he have recognized that as a lower does generally given to children is what she wants to know.

THE WITNESS: Is that critical in his decision-making practice?

THE COURT: She just wants to know whether he should have recognized that as a lower dose generally given to children?

THE WITNESS: I can't answer the question. I don't really understand what --

Q You don't want to answer the question, Doctor, do you?

MR. NICHOLAS: Objection, Judge.

THE COURT: She's probing.

Q You don't want to answer that question because then you would have to concede that Dr. Halper was negligent in this case, so you don't want to answer that question.

MR. NICHOLAS: Objection, Judge.

Q Is that a fair statement?

THE COURT: Sustained, sustained.

Q You have a definition of controlled seizures, right?

A I don't understand what you mean when you say "controlled seizures."

Q When you use the phrase controlled seizures, do you have an understanding -- well, withdrawn.

Let me ask you this, Doctor: You reviewed Dr. Halper's records, right?

A Yes, I did.

Q Let me refresh your recollection. I will hand them up to you. They have been previously marked as Plaintiff's number 1. You see the entry that ' wrote for April 12, 2001?

A Yes.

Q Do you see where he writes under impression, seizure disorder, then he's got a dash and controlled is stuck to the side; do you see that?

A Yes, that I see.

Q So is _ not using the proper terminology? You don't know what controlled seizures are?

A He's using the proper terminology. You used the wrong thing. You said controlled seizures. There's no such thing. He wrote it correctly, seizure disorder

dash controlled. That's why I didn't agree with you because you said it wrong. You're making a point of everything that I'm saying, and I'm telling you this is written correctly, seizure disorder controlled. You said controlled seizures.

Q Can you tell me the difference?

A Certainly. This is the correct medical term, you have a seizure disorder --

Q But, Doctor --

THE COURT: He's attempting to answer your question. Go ahead.

A This is the correct terminology. Impression, seizure disorder that he relayed to the doctor, he's controlled, he has no problems with seizures now, he's walking into the office. So he puts down seizure disorder controlled. He's not having seizure that day, the day before. Yes, he went to the hospital few days ago. He walks into his office, he is controlled on the medication that he is on. That's written in the correct term. The term controlled seizure that you mentioned, ma'am --

Q What does that mean?

A Doesn't mean anything in medicine. This is what it means correctly, seizure disorder controlled.

THE COURT: Next question, thank you.