

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK : PART 17

X

Plaintiff,  
-against-

INDEX #

STUART SEIDEN, M.D., PLASTARAS and  
SEIDEN,

TRIAL

Defendants.

March 7, 2006  
Riverhead, New York

x

B E F O R E :

H o n . PETER H. MAYER

A P P E A R A N C E S :

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**TESTIMONY OF  
DR. MARK CITRON**

BY: Karen Sparling  
Official Court Reporter

## DR. M. CITRON/CROSS/DONNEL

## CROSS-EXAMINATION

BY MS. DONNEL:

Q. Good afternoon, Doctor.

A. Hi.

Q. Doctor, you've never met me, right?

A. Just earlier in the day when you walked in.

Q. But I mean I've never consulted you on a case before?

A. Not to my knowledge. I don't recall.

Q. Not many plaintiffs do, do they?

MR. KAPNER: Objection.

THE WITNESS: I'm sorry?

THE COURT: Sustained.

Q. Doctor, you know what a plaintiff is, right?

A. Yes.

Q. In a lawsuit?

A. Yes.

Q. And that's a person who's bringing the lawsuit because they believe they've been in a malpractice case, malpractice? Is that correct?

MR. KAPNER: Judge, objection.

THE COURT: Overruled.

A. Yes.

Q. Somebody like \_\_\_\_\_ in this case?

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A. Yes. Can you just speak up just a bit please?

Q. Sure. Somebody like \_\_\_\_\_ in this case?

A. Yes.

Q. In your career you've testified in cases many times. Correct?

A. I don't know the exact number. I think in my career I'd say approximately about 20 times but I don't have an exact number.

Q. And have you testified in any of those 20 times for the plaintiff?

A. I just once I believe.

Q. You testified for a plaintiff once?

A. Yes.

Q. And out of the hundreds of cases that you have reviewed over the years which --

MR. KAPNER: Objection.

MS. DONNEL: Strike that.

THE COURT: The question is withdrawn?

MS. DONNEL: Yes.

THE COURT: Next question.

Q. Doctor, when did you first start reviewing

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cases for litigation purposes?

A. Well, I'm sure over a 20 year period at least.

Q. So that brings us back to the mid-80s or so?

A. Approximately. I'm not sure.

Q. When were you licensed to practice medicine?

A. '79.

Q. So --

A. Medicine, '74; oncology '79.

Q. And when were you board certified in oncology?

A. '79.

Q. So approximately five years, six years out you started reviewing cases for litigation?

A. I would say approximately.

Q. And approximately how many cases do you review a year?

A. Well, this varies of course but I would say generally I would say a few a month.

Q. So that would be about 50 a year?

A. Could be less or it could be more but --

Q. On the average?

A. Well, if you're talking about a few a month I'd say that'd be about 12 times 2; 25, 30, maybe

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more, maybe less.

Q. Three times 12 is 36?

A. Right.

Q. Okay. So somewhere around 36 on the average a year?

A. Or less.

Q. And over the years, in the past 20 years, you've -- you've looked at hundreds of cases.

Correct?

A. Correct.

Q. And in all of those years how many cases have you supported or reviewed for the plaintiff?

A. Very few.

Q. Doctor, since 1998 have you reviewed any cases for the plaintiff?

A. Yes.

Q. Approximately how many?

A. I would say I don't know how many. I probably -- I can only think of one.

Q. And do you recall testifying in a case Joseph Carbona and Karen Carbona against Marie Jonas et al, that was on February 6th of 1998 and that was in the County of Kings? Do you recall that?

A. No, I don't.

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Q. Did you at that time give this testimony on recross-examination by Mr. Cannavo:

(As read) Question: It's true, Doctor, that in the years you have been doing this you have only testified for one plaintiff. Correct?

Answer: Yes.

MR. KAPNER: Judge, objection.

THE COURT: It's sustained.

Ms. Donnel, he's acknowledged that in present testimony so --

MS. DONNEL: No, Judge. What I'm asking him, he said from '98 to present he's -- he's testified for one. I'm going before '98 now in his career.

MR. KAPNER: He wasn't asked that.

THE COURT: But did you ask that substantive question?

MS. DONNEL: Yes, your Honor. I thought I did.

THE COURT: Ask him the substantive question again.

MS. DONNEL: Sure.

Q. Doctor --

THE COURT: No. Not from the

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transcript --

M S . DONNEL: Right .

THE COURT: -- ask him the  
foundation question.

M S . DONNEL: Yes . your Honor .

Q. Doctor, 1998 back to when you first began reviewing cases, between that period of time how many cases did you review for the plaintiff?

A. I would say very few but I can't remember.

Q. Okay.

A. Sure.

Q Did --

A. I would acknowledge very few but I don't recall.

Q. Okay. Doctor, the testimony I read to you, does that refresh your recollection?

A. No. Not really.

Q. Now, when were you asked to review this case for Mr. Kapner?

A. Several years ago.

Q. And at that time what did you review?

A. I reviewed the records, you know, of the treating doctors and the depositions.

Q. Would you have reviewed D r . Shobin's

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records?

A . I remember here reviewing his records , yes .

Q . Dr . Lerner's records?

A . No , I don't believe I saw Lerner's records other than the -- the clearance I think that he gave for the patient .

Q . For the surgery --

A . Right .

Q . --on August 27th --

THE COURT: M s . Donnel and Doctor ,  
you both can't talk at the same time so try  
to coordinate the question and answer .

Q . And Doctor , did you review D r . Seiden's records?

A . Yes .

Q . North Shore Surgicenter?

A . Yes .

Q . Did you review D r . Barenbaum's records [sic]?

A . I don't recall .

Q . He's the obstetrician she went to --

A . Right .

Q . -- in 1997?

A . Right .

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Q. And did you ask whether you reviewed Dr. Caruso's records?

A. Yes.

Q. Dr. Martinez?

A. Martinez hospitalization, surgery; yes.

Q. That would have been the January '98 surgery?

A. Correct.

Q. And did you review Dr. Caruso's oncological records?

A. Yes.

Q. And as well, did you review the stem cell therapy records from Columbia Presbyterian?

A. Yes.

Q. And --

A. Not then. I can't recall when I reviewed those but I have reviewed them, yes.

Q. And when you reviewed this case several years ago you came to a conclusion, did you not, and formed an opinion?

A. Yes.

Q. And the opinion that you formed, that was based on the knowledge that you had at that time. Correct?

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A. Correct.

Q. Now, prior to your trial testimony today did you review additional records?

A. Yes.

Q. And would that be the records from the trial transcripts?

A. Yes.

Q. That would be the testimony given here at the trial?

A. Yes.

Q. And with respect to that testimony there was -- did your opinion -- well, withdrawn. Strike that.

With respect to the testimony that you did review that was in addition to the testimony -- to the records that you reviewed way back, some years back, some of those facts were different. Right?

MR. KAPNER: Judge, objection.

THE COURT: Yes; as to form,

Ms. Donnel.

MS. DONNEL: Okay.

Q. With respect to the records -- the trial transcripts that you did review, some of the testimony was different, wasn't it?

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A. Um, you have to ask me specifically what you're referring to.

THE COURT: Yes. That's sustained.

Q. Well, with respect to whether or not Dr. Seiden excised the mass, wasn't there a difference in testimony between the deposition and the trial transcript?

MR. KAPNER: Objection.

THE COURT: Sustained.

Ms. Donnel, would you maybe establish what specific trial transcripts he reviewed?

MS. DONNEL: Sure.

THE COURT: And then maybe pose your questions from there?

Q. Doctor, with respect to the trial transcripts that you reviewed, did you review the trial transcript of \_\_\_\_\_?

A. Yes.

Q. And did you review the trial transcript of Dr. Seiden?

A. Yes.

Q. Did you review the trial transcript of Dr. Zinberg?

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A. Yes.

Q. And did you review the trial transcript of Dr. Hirschman?

A. Yes.

Q. And did you review the transcript of Dr. Partridge?

A. Yes.

Q. You must have been busy this past week.

MR. KAPNER: Judge, objection.

THE COURT: Well, that's sustained, Ms. Donnel.

Q. Doctor, with respect to your charges your counsel asked you if you were compensated, what you're being paid to be here in court and he didn't ask you how much so I'm gonna.

How much are you being paid to give testimony here today in court?

A. Well, I'm not being paid for testimony today. I'm being paid for the time away from my practice.

Q. However you may phrase it, what are you being paid?

A. For today?

Q. Yes.

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A . Approximately \$3500 .

Q . And when you initially reviewed the case what were you paid then?

A . I don't recall .

Q . Do you recall what your hourly -- did you have hourly charges back then?

A . Probably .

Q . And can you recall what they were?

A . U r n , I could . I don't recall specifically . They're probably about \$300 an hour .

Q . You have somebody in your office that takes care of all that for you?

A . No . Not necessarily .

Q . Do you have a sheet on which all of your charges are on and give to defense attorneys?

A . An invoice .

Q . Do you have any thing that when you're first consulted you fax them a s t o , you know , how you're going to be paid?

A . Ah , no .

Q . With respect to your initial review of this case did you -- how many hours did you spend on it?

A . I don't recall .

Q . At that time -- well , would it have been at

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least five hours?

A. Probably. Around five hours.

Q. And Doctor, with respect to the trial testimony that you reviewed in this case approximately how many hours did that take you?

A. I would say approximately four hours.

Q. And with respect to that how much did you charge?

A. Well, I haven't charged.

Q. What do you anticipate the charges to be?

A. Well, I hadn't thought about it yet but say if we did four hours it would be approximately \$350 per hour for four hours.

Q. So about 1400.

THE COURT: Ms. Donnel, was it a question?

MS. DONNEL: Yes.

THE COURT: You may answer that.

Q. Is it about \$1400?

A. Is that what it computes to?

THE COURT: Three-fifty times four. Yes?

THE WITNESS: Okay.

Q. Is the answer "yes"?

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A . If you say s o .

Q . Well , Doctor , 350 and 350 is 7 0 0 , right ?  
And then 700 times 2 is 1400?

A . Okay .

Q . Now , you met with Mr . Kapner before this  
trial . Correct?

A . Correct .

Q . And when you met with him -- well , you must  
have charged for your time then , right?

A . Most likely .

Q . And for how long did you meet with him?

A . Oh , I don't recall the specifics . Generally  
the meetings would be about an hour .

Q . Do you recall -- do you recall how many  
times you met with him?

A . Ah , two or three .

Q . And you charged separate for that too ,  
didn't you?

A . Yes .

Q . What do you charge for each pretrial  
meeting?

A . What pretrial meeting?

Q . With Mr . Kapner .

A . There is none .

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Q. No, no. I asked you if you met with Mr. Kapner before this trial.

A. Right. I told you two to three times.

Q. Correct.

A. Yeah.

Q. So I'm asking you, at each of those times what would -- what was your charge?

A. Well, again it would be approximately. I don't recall specifics but generally those meetings would be about an hour and it would be 300 to 350 an hour approximately, in that range.

Q. So an additional thousand fifty. So were there any other charges in this case to Mr. Kapner's law firm for review of this matter?

A. Not that I recall.

Q. So it would have been about \$7,450 in total?

A. Is it? Is that the total?

Q. That's what I added it up today.

A. Okay.

THE COURT: Well, you're posing a question?

Q. You wouldn't argue with me if I told you that's what it added up to, would you?

A. No. I think you've so far been good with

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the mathematics.

Q. Doctor, when you were first consulted on this case --

A. Uh-hum.

Q. -- did you speak to M r . Kapner?

A. I don't recall.

Q. Did you speak with someone from Martin Clearwater & Bell?

A. Yes. Yes.

Q. And you've reviewed many cases for that firm. Correct?

A. I wouldn't say many but I have reviewed cases.

THE COURT: Overruled. You may answer.

Q. Approximately how many cases have you reviewed?

A. I have no idea.

Q. You've worked with M r . Kapner before t o o . Correct?

A. Correct.

Q. About how many times?

A. I can't. I don't know exactly. I recall at least once.

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Q. And with respect to Martin Clearwater & Bell, do you recall if you've reviewed cases for them in excess of 20 times?

A. I really don't know.

Q. Used to make a list, didn't you, as to what cases you reviewed and --

A. Yes.

Q. -- and who you reviewed them for?

A. Yes.

Q. Do you still make a list?

A. No.

Q. Why not?

A. I stopped doing it years ago.

Q. Did it happen to be a problem at trial?

MR. KAPNER: Judge, objection.

THE COURT: Well, as to the form of it, Ms. Donnel --

MS. DONNEL: Okay.

THE COURT: -- ask it in a different way.

Q. Doctor, were you asked for a copy of this list at a trial in the past?

A. I don't recall.

Q. When was the last time you maintained such a

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list?

A. Oh, I don't know. I -- I can't recall.  
It's been a while.

Q. Would it have been -- would you have  
maintained it at least in 1997?

A. '97? I don't recall.

Q. Do you recall testifying at a case Rhonda  
Zalayet, Z-A-L-A-Y-E-T, Demestrio (phonetic) against  
Nassau Radiology Group et al? That would have been  
December 14, 2001?

A. No, I don't.

Q. At that time you testified for another  
defense firm -- well, actually at that time you  
testified for Martin Clearwater & Bell again, right?

A. Ah, actually I don't know.

Q. Before Judge Dana Winslow in Nassau?

A. I don't recall.

Q. And Mr. Kapner was on that case  
coincidentally too, right?

A. Oh, was he?

Q. According to the transcript.

Doctor, did you -- were you asked this  
question at that time and did you give this answer?

(As read) Question -- page 28 -- do you --

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well, do you remember testifying in a case called Keller vs. White-Ready in the United States District Court in the Eastern District of New York?

MR. KAPNER: Objection.

THE COURT: Let her finish the question.

Q. (As read) Answer: Yes.

And in that case were you asked the following question and did you give the following answer?

(As read) Quote, Doctor, do you maintain a list of the cases that you have testified in this the last five years, and that was in 1997?

Answer: Yes.

Question: Would you provide us with that list please?

Answer: Yes.

Q. Do you recall that?

A. Ah, no.

Q. Do you make notes --

A. No, I don't.

Q. -- when you review cases?

A. No. Generally not.

Q. And is there a reason that you have that

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practice of not making notes --

MR. KAPNER: Objection.

Q. -- and putting them in a report and taking anything to court with you ; is there a reason for that?

MR. KAPNER: Objection.

THE COURT: Are you reading from something?

MS. DONNEL: I'm just asking a question, Judge.

THE COURT: It's overruled.

THE WITNESS: I'm sorry?

Q. Is there a reason that you don't make notes or bring anything to court with you?

A. It's just I can do it just as well without notes.

Q. Doctor, by the time you reviewed this several years ago until the trial came up this stayed fresh in your mind?

A. I don't know. I mean when I meet, I look at the records then tells me what the case is. It's all I can say.

Q. So would my understanding be correct that you reviewed the case years ago, came to an opinion

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and then you had a rereview all the records again before the trial?

A. I may sometimes. You mean this trial?

Q. Yes.

A. I assume that I reviewed the records again.

Q. What I'm asking you is though, did you remember this case or did you have to start afresh when the trial came up, this trial?

A. I remembered the case.

Q. Now --

A. You know. I just met with Erik a few weeks ago I think it was or a month ago.

Q. So what you're telling me is you review 36 cases or so a year, you were consulted several years ago, you -- so that's probably around 200, 250 cases at least that you saw in between this one, right?

A. Possibly.

Q. And you telling this jury that you remembered this case without notes?

MR. KAPNER: Objection.

A. I don't --

THE COURT: Overruled.

A. -- use notes.

Q. Did you --

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A. I review the case and I -- and I remembered the case at that time.

Q. Did you send an opinion letter to the firm of Martin Clearwater & Bell outlining what you felt to be the deviations?

A. Ah, first of all --

MR. KAPNER: Objection.

A. --no letter was sent here.

MS. DONNEL: Withdrawn. Strike that.

THE COURT: It's sustained. It's sustained. Go ahead.

Q. Did you, at the time you first reviewed the case, did you send any kind of a letter on your letterhead or any kind of a statement as to what you felt the case to be, what your opinion was?

A. No.

Q. You sent him a bill, right?

A. I sent an invoice, yes.

Q. And do you, with respect to your invoices, keep them in a separate file so you know which is legal and which is medical?

A. No.

Q. They're kept with your patient's files?

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A. I really don't keep the invoices.

Q. Where -- where do they go?

A. They just -- they are mailed out.

Q. Nobody follows up on it to make sure you're paid?

A. Generally not, no.

Q. You don't have any kind of record keeping as to how you're paid?

A. No, I don't.

Q. Do you get a W-2 form?

A. Yes. Yeah, sure.

Q. With respect to the cases that you've reviewed do you -- do you have an independent contractor form that you send to your accountant yearly to tell him how much you've earned doing cases for litigation?

A. I beg your pardon?

Q. This is tax season, right?

A. Right.

Q. Do you supply your accountant with, you know

A. On my W-2s. Right.

Q. And do you supply him with your income amount for the cases that you've reviewed that year

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on some sort of a form?

A. N o . I just send him my W-2s .

Q. And your W-2s -- well , that wouldn't reflect litigation cases , would it? Wouldn't that reflect what you get paid by Pro-Health?

MR. KAPNER: Objection.

THE COURT: No . Overruled.

A. Well , my W-2 includes all sources of earnings .

Q. So when you get paid by the law firms they take taxes out for y o u ; is that correct?

A. Urn , they take taxes out? I don't believe so . The taxes are paid after the gross .

Q. So don't you have to submit a different kind of form? I don't know what it's called, not a W-2 but a different kind of form to the IRS?

THE COURT: If you know .

A. I don't know .

Q. Do you do your own taxes?

A. I don't .

Q. When you first reviewed this case for Martin Clearwater & Bell did you discuss with whoever sent you the case any soft issues that might readily present a problem?

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MR. KAPNER: Objection.

THE COURT: I missed the words. Any

MS. DONNEL: Soft issues that might  
present a problem.

MR. KAPNER: Objection.

THE COURT: Soft issues?

MS. DONNEL: Uh-hum.

THE COURT: Not soft tissues?

MS. DONNEL: No. Soft issues.

THE COURT: Well, that's sustained.

MS. DONNEL: May we approach?

THE COURT: Well, it's sustained as  
to form.

MS. DONNEL: Okay.

THE COURT: Nobody knows.

Q. Doctor, when you first reviewed the case for  
Martin Clearwater & Bell did you discuss with  
whoever sent the case to you that there may be  
potential problems, one or two, with the defense in  
the case?

MR. KAPNER: Objection.

THE COURT: No. It's overruled.

Did you discuss the potential

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problems with the defense of the case is the question.

THE WITNESS: That's the question?

THE COURT: Yes.

A. No. I didn't see problems.

Q. You didn't see one problem with the case?

A. No. I didn't.

Q. How about just the fact that at that time Dr. Seiden only excised samples of the mass rather than the whole mass?

MR. KAPNER: Objection.

THE COURT: Yes. We're in this area now, Ms. Donnel, of phrasing what's previously been testified to so I'm going to sustain. I'm straining it as to form but change the format of the question.

MS. DONNEL: Yes, your Honor.

Q. With respect to your review and any discussions that you had after that review, did you identify any areas of concern with defense counsel that they would have to address at the time of trial?

MR. KAPNER: Objection.

THE COURT: Overruled. You may

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answer.

THE WITNESS: I can answer?

THE COURT: Yes.

A. No.

Q. Did you discuss with defense counsel any areas of the case that the plaintiff may try to adduce at the time of trial that could be detrimental to the defense?

A. I'm not sure what you're referring to. What do you mean specifically?

Q. Did you identify with the defendants any issues that the plaintiff might raise that would be detrimental to the defense?

A. No.

Q. Now, when you talk about the case then with defense counsel what do you talk about?

A. I talk about the standard of care which I thought was well maintained here by Dr. Seiden so I didn't see any -- any problems with that that you're referring to. In fact I thought the care was excellent.

Q. He heard you on direct.

MR. KAPNER: Judge, objection; move to strike.

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THE COURT: That's not appropriate,  
Ms. Donnel.

MS. DONNEL: I'm sorry, your Honor.

THE COURT: The comment is stricken  
but the jury knows comments by counsel are  
not evidence. Proceed.

Q. Doctor, would you agree that the quality of  
your opinion depends on the quality of the facts you  
assume on a case. Correct?

A. No. The quality of my -- the quality of my  
opinion or --

Q. The quality of your opinion.

A. Well, first of all my opinion rests on the  
facts of the case. Essentially I'm here to explain  
the case to the jury from the record.

Q. And if the facts change over the years the  
basis of your opinion changes as well; is that a  
fact?

MR. KAPNER: Objection.

A. I don't know what you're referring to.

THE COURT: Hold it.

MR. KAPNER: I withdraw the  
objection.

THE COURT: Well, it's withdrawn?

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MR. KAPNER: Well, can we approach, your Honor?

THE COURT: No.

MR. KAPNER: I hate to say this.

THE COURT: Is it withdrawn?

MR. KAPNER: I'm objecting to this line of questioning on this matter.

THE COURT: Well, the objection is sustained as to form.

Ms. Donnel, if you want to ask him about --

THE WITNESS: Can I have some more water?

THE COURT: -- about if he's mistaken on any of the facts he assumed, would it affect his opinion, those are appropriate areas for the cross-examiner but you have to do it in the right form so I'm going to sustain it as to form.

Q. Doctor, if you were mistaken on the facts of this case as originally reviewed would that change your opinion?

MR. KAPNER: Again, objection.

THE COURT: Overruled.

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A. Well, I'm not -- I don't know what fact you're referring to. The facts I'm talking about are the facts in the record that I reviewed.

Q. Okay. Now, you said you published a lot of stuff, right?

A. I didn't use those words, no.

THE COURT: Stuff?

MS. DONNEL: Studies.

A. I published studies, yes.

Q. And articles too?

A. Yes.

Q. Were all the studies that you did published?

A. I'm sorry?

Q. All the studies that you indicated that you did and research, were all of those published?

A. All my studies published? Probably not.

Q. What percentage would have been published if you know?

A. My studies?

Q. Uh-hum.

A. A majority but I don't -- I don't really know.

Q. You don't remember?

A. I wouldn't know. I've done too many

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studies.

Q. Do you --

A. I wouldn't know.

Q. -- keep a list of those?

A. Of my studies? No.

Q. With respect to the papers that you have published, do you yourself consider those papers authoritative?

A. Well, they are of course my opinion at the time that I -- that I write them.

Q. I mean authoritative as a generally accepted authoritative source in the medical and oncological community.

A. Well, it's an authoritative source which is my opinion at the time that I write it.

Q. Doctor, you've testified many times.

A. Right.

Q. Okay? When somebody asks you, they show you a book --

MR. KAPNER: Objection, Judge.

Q. -- and they say --

THE COURT: I'll let her finish.

Q. Doctor, would you consider this source authoritative? That's what I'm talking about in

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reference to the studies and articles that you publish.

THE COURT: Ask your question.

Q. Do you consider in that context the studies that you've published and the articles you've written authoritative?

A. Yes. At the time that I write them for myself. For my opinion.

Q. So if you were handed one of your studies and asked if it was authoritative here today you would say it was?

A. Well, it may have been authoritative when I wrote it which may not apply to the facts 20 years later.

Q. Now, you reviewed Dr. Shobin's records, his deposition testimony too?

A. Yes.

Q. And do you know that first presented to Dr. Shobin in June of '96. Correct?

A. With the -- with the breast --

Q. With the breast mass.

A. Let me think.

MR. KAPNER: Judge, objection.

A. With the lump. Yes.

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Q . You read Dr . Shobin's deposition, right?

A . Right .

Q . Okay . And when you read D r . Shobin's deposition do you remember reading this? And I'm talking about Dr . Shobin's deposition, December 11 , 2002 ; page 35 , line 15 .

( A s read ) Question : Did you have any clinically significant findings as a result of your bilateral breast exam?

Answer : Yes .

Question : What were those findings?

Answer : I found nothing suspicious on her left breast . On her right breast I found a 2 by 2 centimeter firm, mobile, painless lump at the junction of the right tail of Spence with the anterior axillary line . I found no lymph nodes , galactate -- galactorrhea or skin change .

Question -- this is over to page 36 , line 3

( A s read ) From your note of June 26 , 1996 , can you read what's written next to where it says anorectal cul-de-sac . That one line . Clinically suspicious . Closed quotes .

A . I'm sorry . I missed the --

Q . Answer --

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A. You dropped your voice. I'm sorry. I missed the sentence.

Q. (As read) Answer: Clinically suspicious.

A. Before that. Is it cul-de-sac?

Q. It s a y s , (as read) Question: From your note of June 26 , 1996 , can you read what 's written next to where it says anorectal cul-de-sac , comma , end quote . That one line .

Answer: Clinically suspicious.

Question: Would it be fair to say that you were referring, that the lump discovered in her right breast was clinically suspicious for breast cancer?

Answer: Yes .

Q. Do you recall reading that?

A. Ah , no .

Q. Do you recall ever learning that Dr . Shobin felt that it was a breast mass?

MR. KAPNER: Objection .

A. No , 'cause I --

THE COURT: Sustained. Hold o n .

THE WITNESS: Yeah .

Q. I'm sorry. Do you recall ever reading that Doctor -- in D r . Shobin's testimony that he found a

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2 by 2 centimeter mass on her right breast? Do you recall that?

A. I would --

MR. KAPNER: Objection. Can we approach, your Honor?

THE COURT: No. It's sustained. You read what you read. Ask the next question.

Now he's heard it so you can ask.

Q. Doctor, did Dr. Shobin, according to his deposition, find no lymph nodes on examination?

A. Well, I can't recall the deposition, I just recall the office record.

Q. I just read it to you, Doctor. In his --

THE COURT: You can see it if you want to look at it.

THE WITNESS: I mean she's -- I mean she maybe referring to other parts --

THE COURT: No. Stop. Question and answer only.

THE WITNESS: Yeah.

MS. DONNEL: Doctor, may I give this to the witness? I mean Judge, may I give it to the doctor?

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THE COURT: He's the doctor. Yes, you may, Ms. Donnel.

MS. DONNEL: Thank you.

THE COURT OFFICER: (Hands.)

THE COURT: You can ask him to read it silently to himself.

THE WITNESS: Yes. Thank you.

Okay.

Q. You found no lymph node involvement?

A. Well, he initially says he found a 2 by 2 centimeter firm, mobile painless lump at the junction of the -- this is his quote -- at the right tail of Spence with the anterior axillary line which is right at the area of the axilla and he said I found no lymph nodes. Right.

Q. Thank you. And the right tail of Spence, that's part of the breast, isn't it?

A. Well, it's the lateral part of the breast.

THE COURT OFFICER: (Hands document back to Ms. Donnel.)

MS. DONNEL: Thank you.

Q. Now, from your review of the records, the patient next went for a mammogram?

A. Correct.

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Q. Is that a comparison mammogram?

A. She had the mammogram then they got the films eventually and they compared them, yes.

Q. Then she went for a sonogram?

A. Then a sono. Right.

Q. And the sonogram, that showed a cyst at the 11 o'clock on her breast?

A. There was a cyst, yes.

Q. With respect to Dr. Seiden's first visit --

A. Yes.

Q. -- you remember his note, right?

A. Yes.

Q. Yeah.

MS. DONNEL: Judge, I'm going to put up Plaintiff's I E. It's Dr. Seiden's officenotes, one page.

THE COURT: Yes.

MS. DONNEL: Three visits.

Q. I'm going to ask you, Doctor, with respect to Dr. Seiden's description of the mass does he describe the mass as far as consistency in his record?

A. No. I think he just says it's a 2 centimeter right axillary. Yes.

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Q. Did he describe whether it's mobile or immobile?

A. I don't believe so.

Q. Does he describe -- well, withdrawn. Strike that.

You'd agree that it would be good medical practice to describe a mass that you find on a patient. Correct?

MR. KAPNER: Objection.

THE COURT: Overruled.

A. It depends on the situation. Now, I actually would find this note to be the standard of care. I -- I feel masses all the time and I would rarely put mobile or fixed. I would just describe a 2 centimeter mass in the axilla in a situation like this.

Q. When you're trying to rule in or rule out breast cancer?

A. Yes.

Q. That's not important?

A. It depends on the clinical situation but he was --

Q. Depends on the case, right?

MR. KAPNER: Judge --

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A. In a clinical situation.

MR. KAPNER: -- she cut him off.

Objection.

THE COURT: Overruled.

Q. On a --

THE COURT: Did you finish your answer?

THE WITNESS: Yes.

THE COURT: Next question.

Q. So you're staying id depends on the case?

A. Yes.

Q. And in this case it wasn't important but in other cases it might be. Correct?

MR. KAPNER: Objection.

A. Yeah --

THE COURT: Overruled.

A. -- I don't think it was important here.

Q. Do you think it was important as to what his plan was?

A. Yes.

Q. And his plan was to schedule an excision. Correct?

A. To remove it. Yes.

Q. In its entirety.

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A . Yes .

Q . And there's a difference between an excision and incision; isn't that a fact?

A . Yes .

Q . Incisional biopsy versus excisional biopsy?

A . Incisional versus excisional, yes .

Q . And the difference is with incisional you don't remove the entire mass ; is that correct?

A . You may not . Yes .

Q . Well , excisional ; you want to remove the mass and you want to make sure you get clear margins , don't you , so that you know that there's nothing there ; is that correct?

A . Yes . But that depends on the clinical setting .

Q . Right . And it's better practice when you suspect a mass suspicious for breast cancer to excise it ; isn't it correct?

MR . KAPNER : Objection .

THE COURT : Well , sustained . Just link it to this case .

MS . DONNEL : Okay .

Q . With respect to breast cancer and a suspicious mass noted , is the treatment of

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preference excisional biopsy?

MR. KAPNER: Judge, objection.

A. It depends.

THE COURT: Sustained. You didn't link it. Link it to situation.

Q. Well, in this particular case when Dr. Seiden decided that he was going to excise the mass on August 1st, 1996, that was a proper decision at that time, was it not?

A. To remove the mass, yes.

Q. Now, he had her to the North Shore Surgicenter August 27th --

A. Yes.

Q. --of 1996, right? And at that time he didn't remove the mass in entirety, did he?

MR. KAPNER: Objection.

A. Yes, it was removed.

THE COURT: Well, you withdraw the objection?

MR. KAPNER: Yes.

A. The mass was removed.

Q. And he removed it in one piece, right?

A. In five pieces.

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Q. And when you say it was removed how do you know it was removed?

A. For several reasons that I talked about earlier. He went into the axilla which is the proper surgical technique. He palpated the areas of the lymph nodes. Anything that felt suspicious was removed, sent to the pathologist, it was cut .

The size -- the total volume of tissue that was removed was in far excess of the 2 centimeters that was felt . The reason is , is that when he went into the axilla underneath the arm, those nodes were stuck together so he took those nodes out . They were suspicious, removed nine and they were sent to pathology.

MS . DONNEL: Judge , I ' m going to put up in a minute this path report . It's Plaintiff's ID and that's dated, date collective 8/27/96.

MR. KAPNER: Your Honor , may the doctor be given a copy of that?

THE COURT: Do you need --

THE WITNESS: No . It's okay.

THE COURT: --a copy or you're all right?

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THE WITNESS: I mean if there's a question I can look up there, right?

THE COURT: If you have a problem relating to you can't see it let us know --

THE WITNESS: Okay.

THE COURT: -- and we'll fix it.

MR. KAPNER: I can't.

THE COURT: Well, we'll let the witness tell us if he's not comfortable with looking at it.

THE WITNESS: Let me hear the question then so I can answer.

THE COURT: At this point, Ms. Donnel, you can ask your question.

Q. Doctor, just because an amount of tissue in excess of what originally was thought to be 2 centimeters, the mass 2 centimeters, just because you send more tissue than that how do you know you've removed the whole mass?

A. Well again, he uses clinical judgment. He went in, incised, felt the areas that felt suspicious, removed them, they went to pathology and we can see on the pathology report that these -- some of these lymph nodes were substantially

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enlarged but they were enlarged not due to cancer but it says reactive or some type of other provoking proceed stimulus.

Q. Well, you've said something interesting. You said he palpated i t . Was that in D r . Seiden's deposition testimony when you initially reviewed the case?

MR. KAPNER: Objection.

M R . KAPNER: Can we approach, your Honor?

THE COURT: Yeah. Come on up .

THE COURT OFFICER: Can you step down?

(Whereupon witness stepped down and a side-bar conference was held off the record the record.)

THE COURT: The objection is sustained.

THE COURT OFFICER: You can g o .

(Whereupon witness resumed the stand.)

THE COURT: Or M s . Donnel, if you can find the specific portion you can focus on i t .

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Q. Doctor, when you say the defendant palpated the mass prior to taking it out or prior to removing it at the surgery, whatever tissue he did remove, is that in the operative report that you reviewed?

A. I -- I don't believe so.

Q. What are you basing that statement on?

A. Well, I believe it was in the testimony but also that is a standard procedure for going to the axilla.

Q. Testimony at trial?

A. I believe so. Yes.

Q. Now, if indeed Dr. Seiden did not palpate the lump at the time of the surgery that would be a deviation from the standard of care, would it not?

MR. KAPNER: Objection.

THE COURT: Overruled.

A. Well, the facts are that he did palpate the lump so there's no --

Q. The testimony at trial is that he did palpate the lump.

A. Yeah. And that's the -- that is the standard care that's why he's in the axilla.

Q. That's not my question, Doctor. If indeed Dr. Seiden did not palpate the lump at the surgery

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on August 21 of '96 that indeed would be a standard --a deviation from the standard of care as you've just proffered. Correct?

MR. KAPNER: Objection.

THE COURT: Overruled.

A. The --

Q. Can you answer yes or no, Doctor?

A. Ah --

THE COURT: If you can.

A. Let me rephrase this.

The standard for surgeons is they will go in and they will feel if there is anything abnormal and biopsy it. That's done routinely. So the fact in the testimony just is consistent with it.

Q. I didn't ask you that. Doctor --

A. So I'm saying there's no evidence --

THE COURT: Doctor.

THE WITNESS: Yeah.

THE COURT: --Ms. Donnel's question is different than that.

THE WITNESS: Okay.

Q. If Dr. Seiden --

THE COURT: Listen to the question.

Q. -- did not palpate for the mass prior to

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excising the pieces of tissue at the surgery, August 27th, 1996, that indeed would constitute a deviation from the standard of care then and there existing, would it not?

MR. KAPNER: Objection.

THE COURT: Overruled.

A. There is no evidence that he didn't palpate --

Q. Doctor, that's not my question.

A. -- and that's the extent --

Q. Can you answer yes or no?

A. I can't answer yes or no because there's --

Q. We'll leave it at that then?

THE COURT: Doctor, once again you can't talk over each other.

THE WITNESS: Okay. I'm sorry.

THE COURT: Next question.

Q. Now Doctor, again just because there's more tissue removed than what you think the size of the mass you're contemplating is, that doesn't mean that you actually got the mass, does it? Just because there's more tissue?

A. Oh. I think in this case clearly it has because what we see are the pieces of tissue

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reflecting the enlarged nodes . Those have been removed . This is essentially what happens when a surgeon is operating on the axilla with breast cancer . They are going into the axilla , they are removing a clump of tissue , they are palpating , feeling for anything abnormal , doing frozen sections , that's why he did the frozen section on the node that he handed to the pathologist which was implicit that it was palpated --

Q . Doctor --

A . -- and that is --

M S . DONNEL : Judge --

A . -- negative pathologically so it was removed .

THE COURT : You've answered the question . Let's move o n .

Q . Doctor , this mass was 2 centimeters on palpation , right?

A . Approximately , yes .

Q . Okay . Dr . Shobin thought that?

A . Yes .

Q . And Dr . Seiden thought t h a t . And i n d e e d that's what you're basing everything on that they actually got this mass out , right?

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MR. KAPNER: Objection.

THE COURT: Sustained as to the  
form.

Q. Doctor, Dr. Shobin felt the mass to be 2 centimeters and so did Dr. Seiden. Correct?

A. Correct.

Q. And indeed because the amount of tissue taken out is greater than 2 centimeters it's your belief on that basis that they got the entire -- the mass or whatever it was. Correct?

A. Yes.

Q. But there wasn't an MR performed in this case, was there?

MR. KAPNER: Objection.

THE COURT: Well, as to form.

MS. DONNEL: At the time.

THE COURT: Put it in the proper  
time frame.

Q. Prior to the surgery of August 26th, 1997 there wasn't an MR performed. Correct?

A. Correct.

Q. And you indicated I think that an MR was much more specific than clinical palpation of the mass to determine its size.

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Correct.

Didn't you say that this morning?

I believe so, yes.

And indeed this mass would have been --

THE COURT: Hold it. Hold it.

MR. KAPNER: Objection.

THE COURT: Mr. Kapner, when you stand I have to wait to hear you verbally.

MR. KAPNER: I'm objecting, Judge.

THE COURT: All right. I've lost the last question so you're going to have to read it back.

(Whereupon Reporter read back as requested.)

THE COURT: I'm going to sustain it but the question, you know, "you indicated that," that prefaced --

MS. DONNEL: He agreed he did it.

THE COURT: Well, Ms. Donnel --

MS. DONNEL: I'm sorry.

THE COURT: -- don't characterize the testimony. That's the problem here. If you want to ask him his opinion on that whether it is or not you may do so.

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Q. Doctor, is it your opinion that an MR study is much more specific as to the size of the mass than mere palpation?

A. It's more sensitive. Yeah. Yeah.

Q. But isn't it true too that --

A. It's less specific sometimes but it's more sensitive.

Q. And less specific you mean you might not see what's behind the area reflected on the MR imaging?

A. No. No. That was my point before. In other words, since the MR can be more sensitive for cancer the 6 centimeter cyst that was suspicious for cancer that would have shown up as malignant on the MR but it's less specific because you can have false positives with the MR. See the difference?

Q. Are you insinuating that there was a false positive in this case?

MR. KAPNER: On what? Objection.

Q. No. I'm explaining --

THE COURT: We're apples and oranges here.

THE WITNESS: Yeah.

THE COURT: That's sustained. You just explained --

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THE WITNESS: Yeah.

THE COURT: -- what you meant.

THE WITNESS: Between sensitive and specific.

THE COURT: All right. Next question.

THE WITNESS: Yeah.

Q. So Doctor, what I'm asking you is the mass that they felt on palpation may have even been greater than 2 centimeters, right?

A. Yes.

Q. And may have been even greater than the amount of tissue removed. Correct?

A. I don't know.

MR. KAPNER: Objection.

THE COURT: I'll overrule it.

A. No. Because again you have to look at technique that was done here. He went into the axilla, he felt the abnormalities with his hand, that is again implicit that he's palpating it because he's actually handing the tissue to the pathologist so his hand is on the tissue. After he's evaluated the axilla and biopsied those specimens they are sectioned by the pathologist and

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negative the job is done.

Q. Well Doctor, certainly you would agree with me on this, that --

A. Can you speak up just a bit?

Q. Certainly you'd agree with me --

THE COURT: Sustained.

MS. DONNEL: Oh. Sorry, Judge.

I'll rephrase.

Q. Doctor, if indeed he was removing the wrong tissue then he wouldn't be palpating the mass, right?

MR. KAPNER: Objection.

THE COURT: If he --

A. I don't understand the question.

THE COURT: Yeah. Sustained.

Change the form.

Q. If Dr. Seiden on August 27th, 1996 when he removed this tissue, if indeed he was removing the wrong tissue he wouldn't have been palpating the mass. Correct?

MR. KAPNER: Same objection.

THE COURT: Yeah. It's sustained as to form.

A. There's two negatives in that.

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THE COURT: No, no, Doctor.

THE WITNESS: Okay. I'm sorry.

THE COURT: It's sustained. When you hear sustained don't answer.

THE WITNESS: Sorry.

Doctor, Dr. Shobin felt that this was a mass breast tissue. If Doctor --

MR. KAPNER: Objection.

THE COURT: Sustained. This is what the problem is, Ms. Donnel. You can't just generally refer to what Dr. Shobin felt. There's a record. It says what it says --

MS. DONNEL: I'll rephrase it, Judge. I'm sorry.

THE COURT: -- you're going to have to use the specifics plus we are getting repetitive here. You've been through Dr. Shobin and you've been through his record so we're repeating.

MS. DONNEL: My question --

THE COURT: I think, Ms. Donnel, it's probably good to take our afternoon break at this time which we will do and then we'll come back in ten minutes and

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recommence.

Ladies and gentlemen, we're going to break for ten minutes so you can stretch and use the facilities.

Remember you must not speak about the case amongst yourselves or with anyone else.

You must report to the Court anybody who attempts to improperly influence any member of the jury.

Thank you very much. We'll see you in about ten minutes.

THE COURT OFFICER: All rise while the jury exits.

(Whereupon jury exited.)

THE COURT: We're off the record.

(Whereupon a conference was held off the record.)

(Whereupon a recess was taken.)

THE COURT OFFICER: Remain seated, come to order.

THE CLERK: Come to order please?

All parties are present, your Honor. Counsels, are you ready?

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MS . DONNEL: Yes .

MR. KAPNER: Judge , before that can I just note something on the record?

Counsel has been repeatedly asking this witness and it's not in the EBT. I object to that. The deposition, for instance Dr . Seiden didn't say this , Dr . Seiden didn't say that . She's not reading specific testimony and besides which Dr . Seiden at the deposition was being questioned by the plaintiff's lawyer . This was not an expose on what happened . Plaintiff's lawyer asked question , he gave answers so she's trying to draw an implication that without reading the entire deposition that certain things weren't mentioned in a situation where the doctor is answering specific --

THE COURT: Give me a specific example of where she did that .

MR. KAPNER: She did it by saying: And Dr . Seiden didn't testify in his deposition that he palpated the mass or something along that line . If he wasn't

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asked that did you -- did you palpate the mass -- I can't go through this entire deposition and see if he used that word but if he wasn't asked the question --

THE COURT: I believe Ms. Donnel asked the question predicated on the fact that he testified to palpating the mass in the trial testimony.

MS. DONNEL: Yes, your Honor. That was elicited.

MR. KAPNER: I think she --

MS. DONNEL: No. It was before that. The judge corrected me and --

THE COURT: Yes. We've been through that and I sustained your objection but I'm not -- but your point is well taken to the extent that you can't incorporate in your question Dr. Seiden didn't say "X" and so therefore I ask you, Doctor Expert, based upon that, because it's too ripe and I don't and I'm not suggesting intentional conduct on your part, it's just too ripe for inaccuracy (a), and (b), perhaps more importantly, what someone doesn't say in a

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EBT transcript can never be a fact incorporated in a question because it implies, it begs the question of was the proper question asked to get that piece of testimony; on the other hand, if an answer was given directly on point in a transcript that's relevant to what you want to ask the expert you may do that but I'm going to ask you to, you're going to have to go to the transcript.

M S . DONNEL: Judge --

THE COURT: You can't just say, well Dr. Seiden said "X." We've run into too many problems with that in this case --

M S . DONNEL: It was --

THE COURT: -- with a fight over the accuracy of what the lawyer is narrating as to what the witness actually said. There's only one way to correct that, that's for you to go to the transcript and the rule applies to everybody.

M S . DONNEL: Because I was going to say your Honor, this morning, Mr. Kapner repeatedly did that.

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MR. KAPNER: Did what?

MS. DONNEL: Referred to testimony and didn't -- and didn't quote it.

THE COURT: No. I listened, Ms. Donnel, and you know, Mr. Kapner's, when he elicited the opinion he asked that very lengthy question based upon a number of assumptions but the assumptions were clearly drawn from what has been placed in evidence. I was listening for that so I didn't see that this morning but, you know, that's another thing that's happened in this case. We've got a little too much of he did it so I can do it; she did it so I can do it. Let's stop that. All right? Let's just come to a conclusion and we'll move on. All right? Enough said so we'll proceed.

THE COURT OFFICER: Please remain standing while the jury enters.

(Whereupon jury entered.)

THE CLERK: All parties are present and the jurors are all present.

THE COURT: Okay.

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THE CLERK: Be seated please .

THE COURT: Okay . M s . Donnel , you  
may proceed .

M S . DONNEL: Thank y o u , your Honor .

CROSS-EXAMINATION

BY M S . DONNEL ( cont ' d ) :

Q. Doctor , I'm going to read you from the  
deposition of D r . Shobin taken December 1 1 , 2002  
from page 3 5 , line 15 to page 3 6 , line 1 .

MR . KAPNER: I'm going to obj ect .  
This has already been read to the doctor .

THE COURT: Has it been already  
read?

M S . DONNEL: Yes , your Honor , that's  
why I just referred to it . It's one  
question, Judge , and then I ' ll move on .

THE COURT: Come u p .

(Whereupon witness stepped down and  
a side-bar conference was held off the  
record .)

(Whereupon witness resumed the  
stand .)

THE COURT: Sustained .

Q. Doctor , with respect to the pathology report

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in this case, a radical axillary node dissection was not performed. Correct?

A. Correct.

Q. Five pieces of tissue were submitted to pathology?

A. Correct.

Q. Pathology is only as accurate as to what is -- it's given; isn't that a fact? What's submitted to the pathologist?

A. The pathologist is looking at the tissue submitted.

Q. And if certain tissue isn't submitted the pathologist can't comment on that tissue, can he?

MR. KAPNER: Objection.

THE COURT: I'll take it.

A. He can't comment on the tissue he hasn't received.

Q. And --

A. Or her.

Q. -- indeed, if he did comment on the tissue he received that would be inappropriate. Correct?

A. I don't think I understand that.

THE COURT: I'm sorry.

Q. Indeed --

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MS. DONNEL: I ' ll rephrase it ,  
Judge.

THE COURT: Yeah.

Q. If a pathologist comments on tissue in a pathology report that was not received, that's not good practice. Correct?

MR. KAPNER: Judge, objection.

THE COURT: Well, I ' ll take it .

A. I don't know what this is referring to .

THE COURT: Well --

MS. DONNEL: I'm just asking the question.

THE WITNESS: Well, I mean it's a --

THE COURT: It's a general question,

THE WITNESS: It's a nonsensical question.

THE COURT: Can you? Answer the question if you can .

THE WITNESS: I don't think I can answer that .

THE COURT: All right. Next question.

Q. A pathologist's opinion with respect to pathology submitted is based on the scientific

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evidence he's presented with. Correct?

A. With the tissue.

Q. Now, with respect to return to Dr. Seiden on September 3rd of 1996 -- and for the record I'm displaying again Dr. Seiden's note --

MR. KAPNER: Can we approach on this, Judge?

THE COURT: No.

Q. And that's Plaintiff's IE.

Now, with respect to his --

MR. KAPNER: Judge.

THE COURT: No. No. Finish the question.

Mr. Kapner, wait for the lawyer to finish the question then raise your objection.

Q. With respect to his note of 9/3/96, is it indicated in that note that he discussed with the patient the results of pathology?

MR. KAPNER: Objection.

THE COURT: Sustained.

A. Can I have the --

THE COURT: Doctor, when you hear "sustained" no answer.

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THE COURT: Oh , okay .

Q. Doctor , with respect to the note that is there does Dr . Seiden indicate in that note if he palpated the area where he excised the tissue?

MR . KAPNER: Objection . This is beyond direct , Judge . Objection .

THE COURT: Overruled . I'll take it .

THE WITNESS: Can I have the record that she's talking to? Then I can see it .

THE COURT: Yes . Yes .

THE WITNESS: Thank y o u .

THE COURT OFFICER: Plaintiff's Exhibit 1 in evidence (hands) .

THE WITNESS: Thank y o u .

THE COURT OFFICER: You have to look for that specific place in there .

THE WITNESS: Sure .

A. Okay . I'm sorry . I'm ready now .

M S . DONNEL: Judge , can I have the question read back?

THE COURT: Y e s , you may .

(Whereupon Reporter read back as requested .)

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A . No .

THE COURT: All right . Now come u p .  
Come u p .

(Whereupon witness stepped down and  
a side-bar conference was held off the  
record.)

(Whereupon witness resumed the  
stand.)

THE COURT: Okay . You may proceed .

MS . DONNEL: Thank you , your Honor .

Q . Now Doctor , from your review of the records  
the patient returned approximately a year later or  
in a couple of months in October of '97 where she  
was diagnosed with another lump . Correct?

A . Yes .

Q . And that lump was in the subareolar area of  
the breast?

A . Yes .

Q . Around the nipple?

A . Yes .

Q . And Doctor , at that time a decision from  
your review of the record was made to administer  
chemotherapy to the patient in an effort to shrink  
the mass prior to performing a mastectomy . Correct?

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A. Correct.

Q. Now, the MR noted the mass to be a 2 centimeter solid lesion. Correct?

A. That's correct.

Q. With a large cystic area behind it in the breast?

A. Correct.

Q. And there can be cystic lesions that are cancerous. Correct?

A. Correct. It's uncommon but it can happen.

Q. And Doctor, with respect to the 2 centimeter lesion, is it your opinion within a reasonable degree of medical certainty that that was the size of the lesion at that time?

A. Yes.

Q. And what Dr. Caruso, in his note of December 5th, 1997 --

MS. DONNEL: And Judge, that is Plaintiff's Exhibit 6A-1. I'm going to put it up on the board.

MR. KAPNER: Can I please see it?

THE COURT: Go ahead, Ms. Donnel.

Q. He indicates the patient is clinically a Stage III with a large mass in the right breast

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along with palpable lump -- lymph nodes in the right axillary. Correct?

A. Correct.

Q. And Dr. Caruso was her oncologist?

A. Correct.

Q. And Doctor, you're familiar with TNM classifications. Correct?

A. Yes.

Q. And with TNM classifications isn't it true that for Stage III you would have to have a mass greater than 5 centimeters; isn't that a fact?

A. Well, there's one -- one of the reasons. There are other ways to be Stage III without a mass more than 5 centimeters.

Q. Correct. But T2, according to the categorization of --

A. Are you saying T3 is greater than 5 centimeters.

Q. I'm sorry?

A. T3 greater than 5 centimeters.

Q. Yeah.

A. Yeah.

Q. In other words --

A. But the stage is different than the T. In

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2 other words --

3 Q. Okay but T2 tumors as far as definitions go  
4 as far as TNM classifications?

5 THE COURT: What is TNM?

6 MS. DONNEL: Tumor --

7 THE WITNESS: What it refers to is  
8 tumor T, N nodes, M metastases.

9 THE COURT: Thank you.

10 THE WITNESS: So it's a schema in  
11 terms of classifying the patient.

12 THE COURT: Thank you. Go ahead,  
13 Ms. Donnel.

14 Q. Now T2 tumors are defined as more than 2  
15 centimeters in size but not more than 5 centimeters  
16 in greatest dimension. Correct?

17 A. Yes.

18 Q. And T3 tumors are more than 5 centimeters in  
19 greatest dimension?

20 A. Yes.

21 Q. So it would have been Dr. Caruso's opinion,  
22 according to his note, that the mass was  
23 larger than 5 centimeters. Correct?

24 A. Correct.

25 Q. Do you still maintain that the mass was 2

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centimeters?

A. I think the mass and, like I said before, an MRI is more sensitive than physical exam and the sensitivity actually is that you will see benign areas pick up an MRI as being positive but when you operate they're actually less specific; in other words, it's not malignant. So if anything, what you'd expect here is an MRI showing a larger tumor consistent with the physical examination because of the high sensitivity of the MRI.

Q. Doctor, you've had patients where their tumor ultimately turned out to be bigger than what was reported on MR., right?

MR. KAPNER: Objection.

THE COURT: It's overruled.

A. Sometimes it happens. Yes.

Q. Sometimes --

A. Yeah.

Q. -- it does happen?

A. Yeah.

Q. But it didn't happen in this case?

A. Well, I'm just saying that if you ask me what I would go on in terms of looking at a case I would --

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Q. I didn't ask that you question, Doctor, I asked you --

MR. KAPNER: Judge, objection.

Objection.

THE COURT: All right.

MS. DONNEL: Move to strike?

THE COURT: It's stricken but the objection is sustained and ask another question.

Q. Doctor, you've reviewed the records from Columbia Presbyterian Hospital as well, right?

A. Yes.

Q. And this description, the T2 classification, T3 in this case, is given as to the size of the tumor when diagnosed. Correct?

A. Yes.

Q. And in the Columbia Presbyterian records do the oncologists at Columbia Presbyterian also stage this patient as Stage III? I mean as T3?

A. Well, there are notes also in the Columbia records which put her at Stage IV.

Q. Right.

A. So --

Q. But certainly not anything less. Correct?

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A. No --

MR. KAPNER: Objection.

THE COURT: Hold it .

MR. KAPNER: Can he be allowed to answer the question, Judge?

THE COURT: Overruled. Next question.

Q. Doctor, with respect to -- you were talking about doubling time this morning? You indicated I believe, and please correct me if I 'm wrong, that doubling times have been discredited?

A. I didn't say that, I said constant doubling times.

Q. I'm sorry?

A. Constant doubling times. In other words, the interval between the growth of the cancer varies throughout the life of the cancer.

Q. Doctor, would you agree that from when the first cancer cell begins until the point where it's a palpable nodule that it must double and grow time and time again. Would you agree with that?

A. Yes.

Q. And would you agree that it's approximately 30 times before it becomes a palpable tumor?

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A. Well, that's -- that's the old thinking.  
Years ago --

THE COURT: That's the answer. Next  
question.

Q. When you say the old thinking, would that  
thinking have been your opinion in 1998?

A. Well, I don't recall when that went out but  
that was my thinking at one point but that was the  
old way of looking at tumor growth.

Q. And now do you believe that tumors grow a  
little faster in the beginning and then slow down?

A. The theoretical model, one theoretical model  
for tumor growth is called Gompertzian and what that  
refers to is a theoretical model that tumors grow  
faster when they're smaller and then so as we have a  
very fast slow up initially and as they get larger  
they plateau but even the Gompertzian model does not  
take into account what we were talking about before  
which are the subtypes of breast cancer that we're  
dealing with and here we're dealing with a Her2  
positive subtype of which we know very little about  
doubling time.

Q. Well Doctor, with respect to Her2 --

A. Right.

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Q. -- isn't the most important consequence of that, doesn't it initially relate to the limited effectiveness of antihormonal therapy, chemotherapy and radiation therapy?

A. You're saying that's the most important?

Q. Aspect of when you see Her2 on a pathology report? The effectiveness of people --

A. I don't know. I don't know what the most. There are many attributes of Her2 so it's hard to prioritize them. I think --

MR. KAPNER: Your Honor, may he be allowed to answer the question?

THE COURT: He's answered it. Next question.

MS. DONNEL: Thank you, your Honor.

Q. Now, you spoke about measuring the mass. Is it, Doctor, your opinion that if you excise the mass completely it's easier in -- if you excise the mass completely in one piece it's easier to measure. Correct?

MR. KAPNER: Judge, objection.

THE COURT: Overruled.

THE WITNESS: I can answer or I can't?

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2 THE COURT: Yes .

3 THE WITNESS: I ' m sorry .

4 A . If you excise it in one piece it could be  
5 easier to measure . Yes .

6 Q . Now Doctor , with respect to staging ,  
7 at the time that she had this surgery in  
8 January of 1998 had 13 out of 18 lymph nodes  
9 involved . Correct ?

10 A . Correct .

11 Q . And how does -- you're familiar with the  
12 terminology "staging ." Correct ?

13 A . Yes .

14 Q . And how does that correlate to the ultimate  
15 stage that the patient or this patient was diagnosed  
16 with ?

17 A . Well , it ' s actually the presence of the  
18 lymph nodes that reflect the prognosis more so than  
19 the stage .

20 Q . With respect to a T3 patient with 13 out of  
21 18 lymph nodes involved at the time the mastectomy  
22 is performed , is there any kind of stage grouping in  
23 the oncological literature that you would recognize  
24 as authoritative that indicates that with this type  
25 of patient you have to be careful for ten years ?

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A. Yes. This type of cancer essentially is at risk for recurrence of disease and the risk of the recurrence is based initially on the lymph node status.

Q. You indicated that \_\_\_\_\_ was never -- according to your review of the records -- diagnosed with any kind of heart problems, right?

A. Yeah. I'm not aware of that. Right.

Q. But you reviewed the Columbia Presbyterian records. Correct?

A. Yeah. She has no heart damage on that.

MS. DONNEL: Can the doctor have Columbia Presbyterian records please?

THE COURT OFFICER: Plaintiff's 7 in evidence before the witness (hands.)

THE COURT: Thank you.

Q. Doctor, I'd like you to turn to the EKG of 5/23/98? I think it's flagged there for you.

A. Yes.

Q. All right. Does that EKG indicate that it's an abnormal EKG?

A. Yes.

Q. And it's a possible inferior wall infarct to the heart?

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A. Well --

Q. Does that say that?

A. Yes, it's possible. It's not definite and this is a abnormality that's commonly seen on EKGs. It may or may not be significant and I don't recall seeing anything about a heart attack in the hospital.

Q. Are there other EKGs there after 5/23/98?

A. Yes.

Q. And the next one after 5/23/98, which one is that?

A. That says nonspecific --

THE COURT: What's the date of it?

THE WITNESS: Oh ; 5/24. It was the date of the first one.

THE COURT: And your question, Ms. Donnel?

Q. And what does that one say?

A. It shows nonspecific abnormalities in the anterior leads.

Q. Now Doctor, with respect to this patient in the Columbia Presbyterian records, she was experiencing nausea, vomiting, all of that with the stem cell. Right?

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A. That's right.

Q. And was she even being given a drug Zofran?

A. Yes.

Q. And that's a pretty heavy-duty drug to stop the nausea?

A. Well, it's a drug that's used to treat nausea and vomiting and from chemotherapy. It's a commonly used drug for all chemotherapy drugs --or any chemotherapy that can cause nausea.

Q. And Doctor, with respect to the Columbia Presbyterian records that you have before you, you indicated that this was a study that she was participating in. Is there a consent form to participate in the study in that --in that record?

A. Well, there was one in the records I reviewed. A seven page consent.

Q. Is there one in the records that were sent to this courthouse and certified as a complete and accurate copy?

A. Oh, I don't know.

THE COURT: It's a lot of records here, Ms. Donnel. You want him to look through all of these records?

MS. DONNEL: I think he's almost all

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the way through, Judge.

THE COURT: Okay.

THE WITNESS: I don't see it in this. I didn't look through every page but I didn't see it.

MR. KAPNER: Can we approach on this?

THE COURT: Yeah.

(Whereupon witness stepped down and a side-bar conference was held off the record.)

THE COURT: All right, folks. We have a slight impasse here. I'm going to send you out for five minutes. Keep in mind you must not discuss the case amongst yourselves or with anyone else and promptly report to the Court any person attempting to influence any member of the jury.

I'll get you back here as fast as we can. Thank you very much.

THE COURT OFFICER: All rise while the jury exits the courtroom.

(Whereupon jury exited and a conference was held off the record.)

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THE COURT: Let's go on the record.  
Off the record at side-bar  
conference Mr. Kapner has produced a seven  
page document which he alleges to be the  
consent form signed by the patient and  
plaintiff in this case, ,  
to enter Columbia Presbyterian Hospital's  
stem cell program which he explains was a  
research program. We are going to indulge  
to see if the set of original records that  
came to the Court via subpoena contains the  
seven page document but my suggestion to  
the parties would be to come to some  
stipulation as to the existence of this  
document but it strikes me that with my own  
 cursory look at the seven page document it  
does appear to be the patient consent form  
signed by the patient for Columbia  
Presbyterian so I'll be out in a few  
minutes and see if you can come to some  
stipulation on this particular document.

(Whereupon a recess was taken.)

THE CLERK: Doctor, will you please  
come back onto the stand?

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(Whereupon witness resumed the stand.)

THE COURT OFFICER: Your Honor, just to clarify the record that latest exhibit has been marked as Plaintiff's 7B in evidence.

(Whereupon exhibit was so marked.)

THE COURT: Okay. What do we call this? This is the consent.

MS. DONNEL: Consent for cell stem therapy, C-E-L-L S-T-E-M therapy.

THE CLERK: All right. Counsels, we're ready?

THE COURT: Plaintiff's what again?

THE COURT OFFICER: 7B.

THE COURT: Thank you.

MS. DONNEL: The date on that is 5/5/98.

THE COURT: Okay. We'll have the jury.

MR. KAPNER: Can the witness be provided with the document?

THE CLERK: He has it, Counsel.

THE COURT OFFICER: The actual

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exhibit will be placed before the witness.

THE WITNESS: Okay. Thank you.

THE COURT: Why don't I just tell them -- we're on the record -- why don't I just tell them we've located the exhibit and separately marked it --

MS. DONNEL: Okay. I think that would make me look awful that I didn't look which I did.

THE COURT: All right. I'll help you with that.

THE CLERK: Jury entering.

THE COURT OFFICER: All rise while the jury enters.

(Whereupon jury entered.)

THE CLERK: All parties are present, the jurors are present. Please be seated.

THE COURT: All right. Members of the jury, occasionally when documentary evidence comes to the Court via subpoena sometimes along the route something goes missing. In this particular case we have a duplicate original of the record in question that we have marked as Plaintiff's

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7B which is called "consent for cell stem therapy" which did not and was not with the originals that came here but it is in fact pursuant to stipulations of the party the appropriate document that should have been part of these records. So Plaintiff's 7B has been marked in evidence pursuant to stipulation between the parties, we're calling it "consent for cell stem therapy."

Ms. Donnel?

MS. DONNEL: Thank you, your Honor.

THE COURT: Any objection by anybody to the instruction?

MR. KAPNER: No.

MS. DONNEL: No, your Honor.

THE COURT: All right. You may continue.

**CROSS-EXAMINATION**

BY MS. DONNEL (cont'd):

Q. Doctor, with respect to participation in the study -- this is at Columbia Presbyterian -- she would have had to be referred by her doctor. Correct?

A. Patients can be self-referred.

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Q. Do you know in this case from your review of the records which happened here?

A. I believe Dr. Caruso referred her.

Q. Now, with respect to what's now been marked as Plaintiff's 7 B, you have that before you, Doctor?

A. Yes.

Q. I'd ask that you turn to the third page at the bottom where it says "study risks"?

A. Yes.

Q. Do you see that? All right. It says side effects of insertion of catheter?

A. Yes.

Q. Side effects of peripheral blood stem cell harvest?

And then it continues on the next page and there's some listings. It says under (1) for people with a history of migraines or asthma, pheresis could trigger a recurrence of symptoms. Is that correct?

A. Yes.

Q. And item (2) and pheresis, that's -- that's what's called when they take the stem cell -- stem cells out of the patient's blood, it goes through a machine?

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A. Yes.

Q. Okay. Two, tingling of the lips and fingers, sensation of feeling faint or mild chest tightness and cough related to a blood thinner in the red cells and plasma being returned. These sensations generally last about 15 to 20 minutes and improve when calcium is administered through the catheter? It says that, right?

A. Yes.

Q. And (3) bruising or infection may occur at the needle insertion site?

A. Yeah. You can keep reading.

Q. (4) Low blood pressure, high blood pressure or slow pulse can occur usually lasting 15 to 30 minutes and resolving when the procedure is interrupted. These reactions can be due to the blood thinner that keeps the blood from clotting.

(5) Serious although rare reactions are possible and include allergic reactions which could be life threatening. It says that, right?

A. Yes.

Q. And then I'm skipping a little bit --

THE COURT: Ms. Donnel, is there a question related to the subject matter that

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can be posed to the witness?

MS . DONNEL: Yes , your Honor .

THE COURT: Because I'm really not going to let you read the whole thing.

MS . DONNEL: No , I'mnot , your Honor. I'm just going to read a little bit more .

THE COURT: Okay .

Q. With respect to the symptoms that I've already read to you , did -- from your review of testimony did she sustain some of these side effects?

A. I don't recall which ones .

Q. With respect to side effects of chemotherapy section it says: These powerful drugs used to kill cancer cells also kill some normally rapidly growing cells , blood cells , hair and cells that line the mouth , stomach and intestines . Side effects severe enough to cause death may occur . Generally , however , these side effects are treatable and reversible . It would be highly unusual for all or even most of these side effects to occur in any one patient . Because these drugs are being used in high doses side effects not previously reported or more

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severe than previously reported may occur. Some of these side effects may decrease your tolerance to future chemotherapy.

And then it says: High dose chemotherapy with cyclophosphamide, thiotepa and carboplatin. Some of the following side effects can be expected with high dose cyclophosphamide, thiotepa and carboplatin.

THE COURT: Is there a question, Ms. Donnel?

M S . DONNEL: There will be right after this and I ' m done , Judge .

Q. It can cause bone marrow suppression. Correct? Heart failure, lung damage --

MR. KA. PNER: Judge, the whole reading; objection.

M S . DONNEL: No , I said I was only reading in a part .

MR. KA. PNER: It's not --

M S . DONNEL: It's an exhibit.

THE COURT: Please. It's overruled. Read it and then ask a question please.

Q. Liver damage, kidney damage, skin changes, hair loss, nausea, vomiting.

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And then there's a section neurotoxicity.

MS. DONNEL: And this is all I'm reading, Judge.

Q. Carboplatin may cause numbness and tingling of the hands or feet. This can rarely lead to difficulty in walking. Carboplatin may also cause hearing loss which is usually reversible and mild. Since many important antibiotics can also cause hearing loss the combination may lead to a more substantial hearing loss. Some patients treated with thiotepa have developed confusion and memory loss. This is usually mild and reversible and has occurred only at doses of thiotepa higher than planned in this study.

And then it goes on: Unanticipated side effects may occur which have not been reported.

Again Doctor, from your review of trial testimony did she indeed complain of confusion and memory loss?

A. I don't recall. During the transplant. You mean during the transplant?

Q. Up to the present day.

A. After the -- after.

Q. After?

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A. Yeah. Okay.

Q. And Dr. Caruso even says that in his records. Correct?

A. The -- she complained of those symptoms not -- not that I saw in the Columbia record if that's what you're asking.

Q. No. It's subsequent.

A. Okay. Yes.

Q. And she testified to that at her trial?

A. Yes. Yes.

Q. Now, you would agree with me, Doctor, that the earlier a patient with breast cancer is diagnosed the better the prognosis?

A. In general. Yes.

THE COURT: Overruled.

Q. And Doctor, you would agree that Stage II with one node is better than five nodes? Stage II

MR. KAPNER: Objection.

THE COURT: Sustained --

MS. DONNEL: Okay.

THE COURT: -- as to form.

Q. Doctor, would you agree that Stage II breast cancer is better -- has a better prognosis than

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Stage III breast cancer?

A. Like I --

MR. KAPNER: Objection.

THE COURT: Overruled. Overruled.

You can answer.

A. Like I said before, the number of nodes is more important than the stage.

Q. Okay.

A. In other words --

Q. Let me --

A. -- you can have it -- someone with Stage III who has a better prognosis than someone with Stage II.

Q. Let me rephrase the question, Doctor.

A patient with Stage II breast cancer with one or two nodes involved has a better prognosis than a patient diagnosed with Stage III breast cancer with 13 out of 18 lymph nodes involved. Correct?

A. Yes. The number of lymph nodes involved is related to the chance of recurrence. I said that.

Q. Now Doctor, with respect to recurrence of cancer, Doctor, with respect to a patient with Stage -- diagnosed with Stage III breast cancer as in this

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case with 13 of 18 lymph nodes affected, do you agree that the risk of recurrence associated with distant metastasis remains ten years and beyond?

A. Yes.

Q. Doctor, with respect to recurrence, if you put a hundred people in a room with the same type of cancer and treatment as in this case and similar staging, in your opinion how many of those women are at risk for reoccurrence?

MR. KAPNER: Objection.

THE COURT: I think you need a little more of a foundation, Ms. Donnel. I'll sustain.

Q. Doctor, are you aware of statistics on recurrence?

A. Yes.

Q. And in a case such as this with Stage III breast cancer and 13 out of 18 lymph nodes present do you know statistically what the chance of recurrence is at or about year ten?

A. Ballpark. Yes.

Q. And what is that?

A. Well, this is say at the day of surgery. In other words, when the patient -- after the patient's

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had their surgery looking forward respectively this patient has a very substantial chance of recurrence of breast cancer which is microscopic disease in an organ or elsewhere which then regrows. However, the situation is different as Dr. Hirschman pointed out for this particular patient because now that she has gone already approximately eight years postsurgery she has passed fortunately that very substantial risk which was in the -- initially so her chance of recurrence is she has a much, much better prognosis at this point. But going forward from the first day of surgery she has a substantial chance of recurrence.

Q. But I asked you Doctor, and I don't think you answered my question --

MR. KAPNER: Objection.

THE COURT: Sustained. Strike that from the record.

Ms. Donnel, ask a question.

MS. DONNEL: I'm sorry, your Honor.

Q. Doctor, do you have an opinion what this patient's risk of recurrence is at year ten?

MR. KAPNER: Objection.

THE COURT: you're

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talking about?

MS . DONNEL: Yes .

Q. A patient with Stage III cancer with 13 out of 18 lymph nodes when diagnosed.

MR . KAPNER: Objection .

THE COURT: Overruled .

THE WITNESS: So I can answer?

THE COURT: Yes . Overruled means you can answer .

THE WITNESS: Okay .

A. The -- you know these are still ballpark figures. It's hard to have a precise quantitation but for a patient who's now gone eight years disease free she's passed her significant hurdles in terms of recurrence. She has a very good chance now of being disease free going forward like Dr. Hirschman said but there still is a small risk now over the next several years.

Now, the problem is that we don't have a lot of good data on Her2 disease but it does appear with the Her2 patients, I think this is what Dr. Hirschman was alluding to in his testimony, that the Her2 patients, because the tumor is so aggressive they tend to recur earlier but once

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they've made it past that state and they haven't shown any evidence for disease they appear to be plateauing in terms of being disease free. So that's how I would answer it.

We still don't have a good data set on her particular problem. That's how I would look at it.

Q. Would you say the chance of reoccurrence in case would be at least one percent?

MR. KAPNER: Judge, objection.

A. Of -- of recurrence you said?

Q. Of reoccurrence.

THE COURT: Hold it. Hold it, doctor. Don't answer it.

THE WITNESS: Yeah.

THE COURT: I think you have to establish. In fact, I'm going to sustain it because of the last answer that the studies are not in yet. I mean the foundation isn't quite there.

MS. DONNEL: I'll ask a different question.

THE COURT: If you can establish a better foundation I'll let you ask it.

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MS. DONNEL: I'll ask a different question.

Q. Doctor, as we sit here today you cannot testify here can you, that there is absolutely no chance that cancer will not reoccur, can you?

MR. KAPNER: Objection.

THE COURT: Well, that's an "is it possible question" so that's sustained.

Q. Doctor, with respect to reoccurrence, is this patient or is there a chance of reoccurrence in this patient at ten years or longer?

MR. KAPNER: Objection.

THE COURT: Overruled. I'll take it.

A. Well, like I said, the --in this particular subtype of Her2 we don't have good natural history data because all the data before was every -- all the patients were grouped together. Now I would think that there still would be some residual risk now even beyond year eight. It would be small annually for this patient but I understand what Dr. Hirschman said when he said that he did not predict further recurrence because with the Her2

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positive patients, when they get beyond a certain point, when that disease has not manifested it does appear that they're plateauing without recurrence.

Q. And Doctor, if cancer does reoccur to a distant site you would agree, Doctor, that death is certain. Correct?

MR. KAPNER: Objection.

THE COURT: Sustained.

Q. Doctor, did you ever offer an opinion that the hazards of reoccurrence are important because if breast cancer recurs in a distant organ it's not considered curable by today's treatment standard, it's treatable but not curable. Did you ever testify to that?

MR. KAPNER: Objection.

THE COURT: Well, you're going to have to ask it. Sustained as to form.

You have to ask the foundation question, get the answer and then read from the transcript if it's inconsistent with the answer.

Q. Doctor, do you have an opinion that with respect to the hazard of reoccurrence of breast cancer that data is very important because if breast

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cancer recurs in a distant organ it's not considered curable by today's treatment standard; it's treatable but not curable?

MR. KAPNER: Can we --

Q. Is that your opinion?

MR. KAPNER: I'm going to object to this, Judge.

THE COURT: I'll hear you on this. Come on up.

(Whereupon witness stepped down and a side-bar conference was held off the record.)

(Whereupon witness resumed the stand.)

THE COURT: All right. It's sustained as to form.

Q. Doctor, with respect to a patient such as who was diagnosed with Stage III cancer with 13 out of 18 lymph nodes positive, in her case, Doctor, if her breast cancer recurs and metastasizes to a distant organ such as the brain, a distant organ, that is not curable by today's standards, is it, Doctor?

MR. KAPNER: Judge --

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THE COURT: No. Sustained. You can ask does he have an opinion within a reasonable degree.

Q. Doctor, with respect to a patient such as who's diagnosed with Stage III cancer with 13 out of 18 lymph nodes positive, if has recurrence of cancer and it metastasizes to a distant organ such as a brain, do you have an opinion within a reasonable degree of medical certainty that in that case death is certain?

MR. KAPNER: Objection, Judge.

THE COURT: Ms. Donnel, it's sustained.

MS. DONNEL: I'll rephrase it, Judge.

Q. Doctor, in a patient such as who was diagnosed with Stage III cancer with 13 out of 18 lymph nodes positive, if her cancer should reoccur in a distant organ such as the brain, do you have an opinion, Doctor, within a reasonable degree of medical certainty whether or not she could be cured?

MR. KAPNER: Judge, again objection.

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THE COURT: I'll allow it.

THE WITNESS: Okay.

THE COURT: You may answer it.

THE WITNESS: Okay.

A. The -- when breast cancer returns in a distant organ it's generally not considered curable but it's treatable and the paradox here is that Her2 disease which is so aggressive and it can recur responds very well to a drug called a monoclonal antibody that hits the Her2 directly. So what's happened with the Her2 patients is that they can recur in distant organs but they are highly treatable with this drug called Herceptin and other treatments.

In my own practice I have patients who are beyond five years with distant disease who are treated just with this infusion of Herceptin but in general we think of it as not as curable but is treatable for complete remission and some patients can live with complete remission.

THE COURT: Next question.

M S . DONNEL: I have no more questions. Thank you.

THE COURT: Redirect?

**DR. M. CITRON/REDIRECT/KAPNER**

THE COURT: Members of the jury, I stand up once in a while. You can draw no inference from that. I do that. I think you know why.

MR. KAPNER: Judge, I always get to do this at 5 o'clock.

THE COURT: Yes. I know, Mr. Kapner, but this jury knows that they will draw no adverse inference against you or any of the parties and hopefully me. So you may proceed with redirect.

MR. KAPNER: Thank you, Judge.

## REDIRECT EXAMINATION

BY MR. KAPNER:

Q. Let me start. Ms. Donnel was asking you about the testimony of Dr. Hirschman. You read that testimony?

A. Yes.

Q. And Dr. Hirschman was asked this question and gave this answer reading from page -- from the transcript of Dr. Hirschman.

Question by Ms. Spina: (As read) I'd like you to assume that \_\_\_\_\_ was diagnosed with breast cancer October of 1997. It is now March 2006