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In The
Supreme Court of Virginia

RECORD NO. 001712

SOTIRI PONIRAKIS,

Appellant,

v.

DAVID CHOI, M.D.,

Appellee.

APPENDIX
Volume II of II

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COPY

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - x

4 SOTIRI PONIRAKIS,

5 Plaintiff,

6 vs.

At Law No. 174553

7 DAVID K. CHOI, M.D., et al.,

8 Defendants.

9 - - - - - x

10 Fairfax, Virginia

11 Wednesday, April 12, 2000

12 The trial commenced at 9:05 a.m.

13 BEFORE:

14 THE HONORABLE STANLEY P. KLEIN and jury.

15 APPEARANCES:

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1 schedule by counsel who are attempting to cooperate with
2 each other procedurally when they can.

3 You are to consider this testimony to be
4 defense evidence in the case, not plaintiff's evidence,
5 even though it's being presented at this stage.

6 MR. ALTMAN: Dr. Hubach.

7 THE COURT: Good morning, Dr. Hubach.

8 DR. HUBACH: Good morning.

9 THE COURT: Make yourself comfortable. Please
10 move a little bit closer to the microphone. Keep your
11 voice up so we can all hear you and please listen to and
12 answer only the specific questions that the attorneys
13 may ask you. Mr. Altman.

14 MR. ALTMAN: May I proceed? Thank you, sir.

15 Whereupon,

16 FREDERICK W. HUBACH, M.D.,
17 was called as a witness on behalf of the defendant Choi,
18 and after having been first duly sworn, was examined and
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. ALTMAN:

22 Q. Doctor, would you please give the ladies and

1 gentlemen of the jury your full name, your address and
2 your occupation, sir.

3 A. I'm Frederick W. Hubach. And I'm in private
4 practice, medical practice. 6715 Whittier Avenue in
5 McLean, Virginia.

6 Q. Okay. Now, Doctor, if you would briefly take
7 the ladies and gentlemen through your medical education
8 and experience before you went into the private practice
9 of medicine.

10 A. Okay. I attended George Washington University
11 School of Medicine from 1954 through 1958. I did then a
12 one-year rotating internship at D.C. General Hospital;
13 rotating internship meaning going through all the
14 various phases of medicine, pediatric to obstetrics,
15 surgery, et cetera.

16 Then I spent two years in the US Army as a
17 medical officer working in clinics both seeing military
18 personnel as well as their families. Following my
19 two-year stint in the Army I entered private practice in
20 Herndon, Virginia, in 1961.

21 I practiced family medicine, although it wasn't
22 called that then, until 1964 when I moved and joined a

1 classmate of mine from medical school in McLean in 1964.
2 And I've been in private practice there ever since.

3 Q. Okay. If you would, you've told the ladies and
4 gentlemen that you went into private practice, I think,
5 in 1961 in Herndon. And then in 1964 you moved to --

6 A. McLean.

7 Q. -- the McLean area.

8 Tell the ladies and gentlemen, if you would,
9 the types of patients and the types of problems that
10 you've had occasion to see over that 36-year period of
11 time.

12 A. Well, being in general -- general practice as
13 it was called then and now in family medicine initially
14 we took care of -- did OB and GYN. So we did deliveries
15 as well as taking care of the children, obviously
16 babies, children and adults. So we kind of took care of
17 people from cradle to grave.

18 Q. Now, is that also true at this time?

19 A. At this time we don't do OB any longer, but we
20 do take care of newborns on up. So --.

21 Q. Are there any medical conditions that you will
22 not take care of?

1 A. Well, yeah. Medical conditions -- there are
2 some things that are very complicated in today's world
3 with high tech that really are not in the scope of -- of
4 family medicine to actually manage those cases.

5 But we usually will manage cases along with
6 specialists who may be actually following the more
7 complicated illnesses, pulmonary illnesses, for example,
8 with ventilators and all these things. Today with the
9 sophistication of medicine there's -- general
10 practitioners can't keep up with all of that.

11 Q. Okay. Now, let me ask you some specific
12 questions about conditions. Do you continue to take
13 care of patients or do you take care of patients who
14 have renal disease or are on dialysis?

15 A. Yes; not that we manage the dialysis, because
16 we do not. But certainly people -- patients on dialysis
17 have other medical problems which we certainly do
18 handle. So we work together with the specialists.

19 Q. Similarly, do you take care of patients who
20 have lupus?

21 A. We have some patients who have lupus but don't
22 really manage their care particularly.

1 Q. Okay. When you say don't manage their care,
2 you mean don't manage their lupus care?

3 A. That's correct.

4 Q. Okay. Have you had occasion, sir, to
5 participate in or actually be the one to diagnose renal
6 disease?

7 A. Quite often. Renal disease is a complication
8 of many things. High blood pressure, for example,
9 frequently will cause renal problems. Diabetes is
10 another big one that will frequently cause renal
11 disease.

12 And so this is something that we monitor
13 patients who have the underlying problems. And we
14 monitor their renal function quite regularly.

15 Q. Have you had occasion to participate or
16 actually be the individual, the health care provider, to
17 diagnose a patient or suspect a patient of having lupus?

18 A. Sometimes suspected. I can't really recall
19 that I've ever actually made the primary diagnosis of
20 lupus.

21 Q. Have you had occasion during your years in
22 practice, I think 36 years at this -- in McLean and 39

1 years altogether -- have you had occasion to decide when
2 it was appropriate to order laboratory studies for
3 patients including urinalysis and blood studies?

4 A. Yes.

5 Q. Can you give the ladies and gentlemen an idea
6 of the frequency with which a decision has to be made on
7 ordering laboratory studies like urinalysis and blood
8 studies?

9 A. Well, obviously when a person has symptoms
10 suggestive of a problem in that area then appropriate
11 laboratory tests would be run such as a urinalysis.

12 There are occasions when we do it routinely.
13 Hypertensive patients, for example, we usually do one
14 routinely on an annual basis; diabetics on an annual
15 basis routinely. We sometimes will do screening
16 urinalysis in just complete physical examinations.

17 Q. Doctor, do you have occasion in the nature of
18 your practice that you've described to the ladies and
19 gentlemen -- do you have occasion to refer patients to
20 specialists?

21 A. Quite often.

22 Q. Do you have occasion when you refer patients to

1 specialists to communicate with them about their
2 findings and when they communicate with you about their
3 findings?

4 A. Yes.

5 Q. Now, have you had occasion during your 39 years
6 of private practice to take care of patients who present
7 with a variety of symptoms and complaints over a period
8 of time?

9 A. Yes.

10 Q. Now, are you currently licensed, sir?

11 A. I am.

12 Q. And where are you licensed?

13 A. In Virginia.

14 Q. And how long have you been licensed in
15 Virginia?

16 A. Since 1961.

17 Q. All right. Are you board certified in any
18 specialty?

19 A. I'm board certified in family medicine.

20 Q. Does one need to be board certified in family
21 practice in order to engage in the practice of family
22 practice?

1 A. No.

2 Q. Do you have any hospital privileges?

3 A. I do.

4 Q. And where is that, sir?

5 A. At Fairfax Hospital.

6 Q. And do you hold any teaching positions?

7 A. Yes, assistant clinical professor at the
8 Medical College of Virginia.

9 Q. Can you tell the ladies and gentlemen what it
10 means to be an assistant clinical professor at any
11 institution?

12 A. Well, it means then that students from that
13 particular institution come -- I don't go to the -- down
14 to Richmond; but the patients -- or the students come to
15 our office and rotate through our office, see patients
16 with us.

17 And we kind of guide their examination, their
18 diagnosis. It's a teaching, on-hands type of teaching
19 situation, not a -- like a lecture.

20 Q. And can you give the ladies and gentlemen an
21 idea of the frequency with which you have students from
22 the Medical College of Virginia rotating through your

1 office?

2 A. It does vary. And we also have them from GW,
3 although I'm not -- I never applied to be, quote,
4 officially a clinical instructor; but we do see students
5 from GW as well. But we usually have one -- one or two
6 a year.

7 Q. Now, do you attend continuing medical education
8 seminars, sir?

9 A. Yes.

10 Q. Can you give the ladies and gentlemen an idea
11 of what continuing medical education seminars are and
12 where you have attended these?

13 A. Well, in order to maintain certification in
14 family practice one has to have at least 50 hours per
15 year of continuing medical education in order to even
16 qualify to sit for re-certification boards.

17 So I have at least 50 hours per year of
18 continuing medical education. This is sometimes done
19 through the hospital, through individual study. I
20 usually try to attend one major conference a year.

21 The one I've attended the last several years
22 has been put on by Temple University in Lancaster which

1 is a full week, 55 hours of continuing medical
2 education.

3 And it includes the whole scope of primary care
4 which, again, is from taking care of newborns in our
5 case and for some family physicians where they do OB
6 right on through geriatrics. So we get a pretty broad
7 scope.

8 Q. In some of these seminars like the one that you
9 mentioned in Lancaster sponsored by Temple University --
10 are there some of your Virginia colleagues, Virginia
11 general practitioners and family practitioners, at these
12 seminars?

13 A. Yes.

14 Q. You've also told the ladies and gentlemen that
15 you have privileges at Fairfax Hospital. Do you serve
16 on any committees at Fairfax Hospital?

17 A. Yes. I'm on the Medical Record Committee there
18 at Fairfax.

19 Q. Okay. Do you have occasion whether it's on the
20 committee, the Medical Records Committee, or in just
21 being at the hospital -- do you have occasion to discuss
22 with your family practice colleagues how they are

1 handling individual problems?

2 A. Yes, we do. Even at Fairfax we have bi-monthly
3 meetings of the Family Practice Department. And
4 every -- usually every other meeting we have continuing
5 medical education lectures. So we do -- we get an
6 opportunity to discuss medical problems with colleagues.

7 Q. All right. Doctor, based upon your licensure
8 in the State of Virginia, your practice of almost 39
9 years now in the State of Virginia, your education, your
10 training, your experience as well as your interaction
11 with your family practice, general practice colleagues
12 here in Virginia do you believe, sir, that you're
13 familiar with the standard of care for family
14 practitioners in the State of Virginia?

15 A. I believe that I am.

16 MR. ALTMAN: Your Honor, at this time I would
17 proffer Dr. Hubach as an expert in family practice and
18 competent to give testimony on the standard of care.

19 THE COURT: Any objection?

20 MR. MALONE: No, sir.

21 THE COURT: Dr. Hubach will be received as an
22 expert in the field of family medicine. And the

1 credibility of his testimony will, again, be determined
2 by the eight of you. You may proceed, Mr. Altman.

3 MR. ALTMAN: May I approach the witness for one
4 moment, Your Honor?

5 THE COURT: Yes, sir.

6 BY MR. ALTMAN:

7 Q. Doctor, let me start by showing you what has
8 been previously marked as Defendant's Exhibit No. 2.
9 Would you simply identify that for the ladies and
10 gentlemen of the jury?

11 A. Yes. This is my curriculum vitae.

12 MR. ALTMAN: Your Honor, I would move the
13 admission of Defendant's Exhibit No. 2.

14 THE COURT: Any objection?

15 MR. MALONE: No, sir.

16 THE COURT: It's received in evidence.

17 (The Hubach curriculum vitae previously marked
18 Defendant's Exhibit No. 2 for
19 identification was received in evidence.)

20 BY MR. ALTMAN:

21 Q. Doctor, did there come a time when I asked you
22 to review some medical records and some other documents

1 regarding the medical care that a Mr. Sotiri Ponirakis
2 received from Dr. David Choi?

3 A. I -- what was that question? Have I -- how
4 many hours, did you ask?

5 Q. No. No. No. Did there come a time when I
6 asked you to review some records?

7 A. Yes, definitely.

8 Q. Okay. Could you tell the ladies and
9 gentlemen -- could you give them a brief summary of the
10 types of documents you reviewed?

11 A. Well, I reviewed the medical records. I -- of
12 Dr. Choi, the medical records or the reports from the
13 specialists that the patient had been seen by as well as
14 depositions that had been taken from other experts.
15 Basically I reviewed all the material that were
16 furnished to me pertaining to this case.

17 Q. Okay. Well, let me ask you some specific
18 questions and see if you reviewed this documentation.
19 Did you review records from health care providers who
20 took care of Mr. Ponirakis in 1994, 1995 specifically
21 regarding some urine studies?

22 A. I did.

1 Q. Did you review the Emergency Department records
2 from, I believe, December 13th, 1996?

3 A. I did.

4 Q. As far as depositions go, do you remember which
5 depositions you did review, sir?

6 A. When it comes to these doctors' names, I don't
7 really remember them, no; but they were the ones that --
8 all those that you furnished me.

9 Q. Okay. Well, again, let's make sure that the
10 ladies and gentlemen know exactly which ones that was.
11 Did you read Dr. Choi's deposition?

12 A. I did.

13 Q. How about a Dr. Jack Horton? Did you read his
14 deposition?

15 A. I did.

16 Q. Did you read a deposition of Mr. Ponirakis --

17 A. I did.

18 Q. -- the plaintiff?

19 A. I did.

20 Q. Did you read the deposition of a Mr. Ponirakis
21 who was the plaintiff's father?

22 A. I did.

1 Q. Did you read the depositions of some Emergency
2 Department personnel who cared for Mr. Ponirakis, the
3 plaintiff, at the Emergency Department on December 13th,
4 1996, specifically a Dr. Case and a Dr. Ware?

5 A. I don't believe I read those. I did not have
6 those depositions.

7 Q. Okay. Now, based upon everything you reviewed
8 let me ask you right now a very general question. Based
9 upon the entirety of the information you've reviewed do
10 you have an opinion, sir, to a reasonable degree of
11 medical probability whether or not Dr. David Choi
12 complied with the standard of care in his overall
13 management of the medical conditions of Mr. Sotiri
14 Ponirakis during his presentation to him?

15 A. I do.

16 Q. And what is that opinion, sir?

17 A. That he did comply with the standard of care in
18 the State of Virginia.

19 MR. ALTMAN: Okay. Now, Your Honor, at this
20 time I would like to move into evidence Defendant's
21 Exhibit No. 4 which is Dr. Choi's medical records.

22 THE COURT: Any objection?

1 MR. MALONE: It's already in evidence. I
2 admitted it in evidence.

3 THE COURT: As?

4 MR. MALONE: Plaintiff's --

5 MR. ALTMAN: His exhibit --

6 MR. MALONE: I believe it's Plaintiff's 7, the
7 same thing.

8 MR. ALTMAN: It is, Your Honor, but simply
9 because -- to give the doctor a copy. I don't have a
10 second copy of his Exhibit No. 7 is what I'm saying.

11 THE COURT: Can we then give that to the
12 witness? And if everyone agrees that it's part of
13 Plaintiff's 7, then the doctor can testify in response
14 to your questions but not have additional documentation
15 go back to the jury room that the jury would then have
16 to figure out is duplication.

17 MR. ALTMAN: That's fine, Your Honor. I wanted
18 to offer Dr. Choi's records. And this is fine for this
19 purpose.

20 THE COURT: I would like to avoid duplication
21 so the jurors don't have documentation back with them in
22 the jury room that they feel compelled to look at which,

1 in fact, is the duplication of other documentation
2 that's already in evidence.

3 MR. ALTMAN: I will refer to this as Exhibit 7
4 then, Your Honor.

5 THE COURT: Please. Please do. If it turns
6 out that it is not exactly the same thing, Mr. Altman,
7 and you discover that, you let me know. And whatever is
8 not in evidence will be put into evidence by the time
9 the case is submitted to the jury.

10 MR. MALONE: I was trying to ask him if it was
11 the same pagination so I can follow.

12 MR. ALTMAN: That's my only concern, Your
13 Honor. We've reviewed the documents. The documents are
14 the same. I'm just curious, as Mr. Malone is, whether
15 or not our pagination is the same; but we'll resolve
16 that problem.

17 THE COURT: If need be, you can take a look at
18 the exhibits. And if both of you -- if there's a
19 dispute, let me know. If both of you agree that certain
20 of the documentation should go back, let me know that;
21 but I want to avoid documentation that's duplicative
22 going back to the jury room.

1 MR. ALTMAN: That's fine, sir. And I'll just
2 be real careful with my page number references.

3 THE COURT: Okay, sir.

4 BY MR. ALTMAN:

5 Q. Doctor, if you would, would you look at that
6 exhibit that I've given you which we're going to call
7 Plaintiff's Exhibit No. 7, page 100001.

8 Is that the first encounter that Dr. Choi had
9 with Mr. Ponirakis? Up in the right-hand corner it
10 should be dated November 14th, 1996.

11 A. That's correct.

12 Q. Okay. Now, let's start with this. When a
13 patient comes to see you for the first time does the
14 standard of care require regardless of what his
15 complaints that a full review of systems be performed?

16 A. No.

17 Q. Could you tell the ladies and gentlemen why
18 not?

19 A. Well, this is kind of the new -- the new
20 medical management, I guess. Physicians are required to
21 see many more patients with the managed care programs.
22 And it's impossible to take a complete review of

1 systems, a complete history, a complete physical on the
2 first visit of every patient.

3 So basically what is taken is an appropriate
4 history and an appropriate physical is done for that
5 patient's complaints at the time.

6 Q. Let me ask you to assume that we have a
7 patient -- and confirm this with the records -- who
8 comes in with his present ailment being left anterior
9 low chest pain for four days and that he was in an
10 urgent care center the day before and that there was no
11 injury or similar pain.

12 Did the standard of care in 1996 require
13 Dr. Choi to do a complete review of systems on that
14 visit?

15 A. No.

16 Q. And for the reasons that you've already told
17 the ladies and gentlemen?

18 A. Correct.

19 Q. Let me ask you about specific questions. The
20 ladies and gentlemen have heard review of systems. What
21 does a review of systems involve actually?

22 A. Well, it involves asking questions that would

1 be pertinent to reveal any abnormalities with given
2 systems whether it be the nervous system or the
3 digestive system, the cardiovascular system, renal
4 system or whatever. And we call that the review of
5 systems.

6 Q. Okay. Now, let's turn our attention, if we
7 could, to the standard of care as it relates to a doctor
8 asking his patient questions about prior history.

9 Let me ask you to assume that Dr. Choi asked
10 Mr. Ponirakis on this November 14th, 1996, visit that
11 there were no serious -- or if there were any serious or
12 significant illnesses or operations.

13 Do you have an opinion, sir, to a reasonable
14 degree of medical probability whether or not that
15 question to elicit past history was in compliance with
16 the standard of care in 1996?

17 A. Well, I definitely believe that it was. And
18 because of the record we know that he did ask -- ask
19 that question, because it is written no serious diseases
20 or operations were -- were reported by the patient to
21 Dr. Choi.

22 Q. Now, you will notice at the top of that form it

1 says past history. And it lists 20, 30 things that
2 could be checked off.

3 Did the standard of care in this presentation
4 with Mr. Ponirakis on November 14th, 1996, require
5 Dr. Choi to go through each one of those things in light
6 of this complaint and this presentation?

7 A. No.

8 Q. Can you tell the ladies and gentlemen why not?

9 A: Well, this is kind of a complete, comprehensive
10 past history. And his complaint was referable to chest
11 pain. And so, you know, the other things that are
12 listed here, whether he had measles, mumps or chicken
13 pox or whether he had rheumatic fever and things, you
14 know, were not really pertinent to his present
15 complaint.

16 So, therefore, it was not within the standard
17 of care for him to ask all the questions that are
18 usually asked in a comprehensive, complete past history.

19 Q. Let me ask you to assume that, in fact, the
20 patient did have a two-year history -- I don't want to
21 mischaracterize it.

22 Two years before seeing Dr. Choi he had gone

1 through a period of time where he had some increased
2 blood and increased protein in his urine. Are you
3 familiar with that from the medical records?

4 A. I am.

5 Q. Let me specifically ask you to assume that the
6 patient had four plus blood and four plus protein in his
7 urine on two tests. Let me ask you to assume that the
8 patient had been referred to a urologist. And let me
9 ask you to assume that the patient really never got an
10 answer as to what the cause was for the blood in the
11 urine.

12 Do you have an opinion, sir, to a reasonable
13 degree of medical probability whether or not you would
14 have expected the patient to relate that information in
15 response to a question about significant or serious
16 illnesses or operations?

17 MR. MALONE: Excuse me. I object. It's
18 incomplete, for one thing, in terms of the hypothetical.
19 And I would ask to approach the bench --

20 THE COURT: Come on up.

21 MR. MALONE: -- for further conversation.

22

1 (Counsel approached the bench and the following
2 proceedings were held:)

3 THE COURT: Mr. Malone.

4 MR. MALONE: Number one, it's a pure jury
5 question, not a question of what a doctor with his
6 education would expect a patient to reveal.

7 In fact, he hasn't laid a foundation of being
8 familiar with the patient's intelligence and that kind
9 of thing. And there was nothing in this man's
10 deposition that he was going to testify about
11 contributory negligence.

12 THE COURT: Let's take -- go ahead.

13 MR. MALONE: And then the point I was starting
14 to raise from counsel table is that he hasn't given the
15 complete hypothetical.

16 If you're going to be fair to the patient,
17 you've got to say that the patient saw blood in his
18 urine in July '94 and the patient never saw the blood
19 again until July '97. That's one relevant factor from
20 the patient's point of view.

21 Another relevant factor is that the patient
22 never had any treatment for this condition; that it went

1 away as far as the patient knew. And all of these play
2 into the alleged reasonableness of the plaintiff's
3 conduct which is really not in his purview anyway.

4 THE COURT: Okay. Let's start off with whether
5 or not this is properly the subject of expert testimony.

6 MR. ALTMAN: Number one, Dr. Mackintosh
7 testified to the exact same point.

8 THE COURT: Without any objection.

9 MR. ALTMAN: Right.

10 THE COURT: And actually probably gave
11 testimony that may have helped you more than it hurt
12 you.

13 MR. ALTMAN: It clearly did, I think.

14 THE COURT: Does that mean that if you try to
15 put on the same testimony, because you didn't object if
16 it was objectionable that that means I have to let it in
17 over objection from the other side?

18 MR. ALTMAN: Well, it's already before the
19 jury. And I think that does go to the issue of whether
20 or not it is proper testimony. It's the -- sort of the
21 horse is already out of the barn.

22 THE COURT: Aren't you asking an expert to

1 opine based upon his medical background about what a lay
2 person would be expected to tell a doctor? Can't the
3 jury make that determination as well as an expert?

4 MR. ALTMAN: Well, I don't think so. I think
5 part of the information is that this doctor can say
6 based on my experience patients would respond about a
7 problem with blood in the urine for which they never got
8 an answer.

9 And I think just like we've had some testimony
10 that the Court has allowed about a doctor's experience,
11 for instance, we did do some of this with Dr. Kashgarian
12 yesterday where we objected to some similar issues. And
13 the doctor was able to testify as to what his experience
14 is along these lines.

15 And I think all -- the only thing that I'm
16 asking him is what would be his expectation based upon
17 his experience.

18 THE COURT: I think your question was whether
19 he has an opinion based upon his experience. And I
20 sustain the objection to that question. I don't believe
21 that that's an appropriate area for expert testimony.

22 I think a reasonable juror is just as able as a

1 reasonable doctor to determine what a lay person would
2 be expected to tell a doctor or not tell a doctor in
3 response to a specific question. So I sustain the
4 objection to eliciting an opinion from him.

5 MR. ALTMAN: All right, sir.

6 (The bench conference was concluded.)

7 BY MR. ALTMAN:

8 Q. Doctor, let me ask you to assume that a patient
9 reported to a doctor that he had had blood in his urine,
10 protein in his urine, had received some treatment and
11 never really got an answer to the question of what had
12 happened to cause the blood and protein in the urine.

13 Assume that a doctor received that information.
14 What would a reasonably prudent doctor do if he received
15 that information?

16 MR. MALONE: Excuse me. I have to object
17 again, because that's not the facts of our case. Even
18 the assumption states that he received some treatment.
19 He never received treatment. That's not in our case.
20 And I object for that reason.

21 THE COURT: Mr. Altman --

22 MR. ALTMAN: Your Honor --

1 THE COURT: -- is there evidence to support
2 that hypothetical in this case?

3 MR. ALTMAN: Well, I may have misspoken using
4 the word treatment. He certainly -- there's evidence in
5 this case that he went to a doctor.

6 THE COURT: I sustain the objection to the
7 question as phrased. You can rephrase it; but come up
8 to the bench for a moment, please, Counsel.

9 (Counsel approached the bench and the following
10 proceedings were held:)

11 THE COURT: Before I forget, my last ruling is
12 based upon 8.01-401.3 of the code. I don't believe that
13 it is the proper subject of expert testimony nor do I
14 believe it would assist the trier of fact in deciding
15 the issue in this case.

16 But, Mr. Altman, with this last question the
17 uncontroverted evidence is that that information was
18 never related to Dr. Choi. Am I right about that?

19 MR. ALTMAN: That's correct.

20 THE COURT: Then isn't your hypothetical based
21 upon things that are not in evidence in this case and
22 will never be in evidence?

1 MR. ALTMAN: Part of the contributory
2 negligence case is what would a doctor have done. Their
3 theory is we asked the wrong question. Our argument is
4 that had Mr. Ponirakis told him that information,
5 Dr. Choi would have taken some action and the reasonably
6 prudent doctor would have taken some action. This goes
7 to our contributory negligence.

8 THE COURT: Well, I don't want to -- Dr. Choi
9 has already testified what he would have done if he
10 received that information. Does it matter what a
11 reasonably prudent doctor would have done if he received
12 that information if what you're talking about is
13 establishing the causation link in the event that
14 contrib goes to the jury?

15 MR. ALTMAN: Right.

16 THE COURT: I think that's what you're saying,
17 what you're attempting to do. Dr. Choi has already
18 testified what he would have done. Does it matter what
19 a reasonably prudent doctor would have done?

20 MR. ALTMAN: Well, once again, Your Honor, we
21 went through this yesterday, what a reasonably prudent
22 doctor should have done by Dr. Mackintosh. It's a

1 standard of care opinion. And I think it's relevant.

2 THE COURT: Okay. It's a standard of care
3 opinion; but if I'm hearing you, you're not introducing
4 it for purposes of the standard of care. And if it's --
5 if it's a hypothetical, it's supposed to be based upon
6 evidence.

7 MR. ALTMAN: Right.

8 THE COURT: Your hypothetical is based upon
9 things that are contrary to the evidence.

10 MR. ALTMAN: But the Court sustained the
11 objection to the last question. So I was not allowed to
12 ask this witness would you have expected that
13 information to come to the doctor if the doctor asked a
14 certain question.

15 And then the follow-up question has to be if
16 you receive certain information, what would you have
17 expected a reasonably prudent doctor to do.

18 THE COURT: Okay. Mr. Malone.

19 MR. MALONE: But the linkup that fails here is
20 that what a reasonably prudent doctor would have done on
21 November 14th with information that Dr. Choi didn't have
22 is not the issue. The issue is what Choi would have

1 done. We have that evidence from Dr. Choi. He says I
2 would have --

3 THE COURT: I agree. I sustain the objection.
4 And your exception is noted.

5 MR. ALTMAN: Thank you, sir.

6 (The bench conference was concluded.)

7 THE COURT: The objection is sustained.

8 MR. ALTMAN: Thank you, sir.

9 BY MR. ALTMAN:

10 Q. Doctor, did the standard of care require
11 Dr. Choi on November 14th, 1996, to do either a
12 urinalysis or blood studies?

13 A. No.

14 Q. Can you tell the ladies and gentlemen why not?

15 A. Well, he came in with a history or complaining
16 of chest pain having just been seen the day before in an
17 urgent care center with the same complaint.

18 And chest pain is usually not -- does not
19 manifest any problems with the urine or with -- doing a
20 blood test when there's soreness in the chest as he
21 described.

22 So these -- these tests were -- I mean, you do

1 those tests which would be appropriate in helping you to
2 get to the basis, cause of his symptoms. And my -- my
3 opinion is that a urinalysis and a blood count would not
4 have aided him in any way in making a diagnosis.

5 Q. Again, looking at the presentation of November
6 14th, 1996, do you have an opinion, sir, to a reasonable
7 degree of medical probability whether or not the
8 standard of care required Dr. Choi to get prior medical
9 records from Mr. Ponirakis?

10 A. No, it doesn't. The standard of care doesn't
11 require to get -- to get prior medical records. It's
12 often done when there are medical problems that have
13 been evaluated and would be helpful for the physician
14 who is assuming the responsibility of his care to have.

15 But in many, many cases such -- especially in a
16 young individual, when he had his baby shots and things
17 are really not that pertinent to -- you know, to obtain
18 those records.

19 So when there is pertinent information or
20 pertinent past history, then it would be important to
21 have; but that history was really not given to Dr. Choi.

22 Q. Now, let's look at what was actually done for

1 Mr. Ponirakis on that November 14th visit. Based upon
2 your review of what is Exhibit 7, page 1, the visit of
3 November 14th, 1996, the patient came in complaining of
4 left anterior low chest pain.

5 And Dr. Choi found tenderness when he palpated
6 the left parasternal region near the sixth through the
7 eighth rib level. His diagnosis according to this
8 document was a left anterior low chest pain, possible
9 thoracic cage origin. He recommended an x-ray. He told
10 him to return in one week. And he gave him a
11 prescription for Motrin.

12 Based upon this presentation do you have an
13 opinion, sir, to a reasonable degree of medical
14 probability whether or not Dr. Choi's handling of the
15 complaints on this date, November 14th, 1996, complied
16 with the standard of care?

17 A. Yes, they most certainly did.

18 Q. Now, Doctor, I'm going to ask you to assume
19 that Dr. Choi has testified that there are three
20 circumstances during which he orders either urinalysis
21 or blood studies.

22 One is at the time of a routine physical

1 examination. One is where the patient comes in with a
2 history of a problem like diabetes or hypertension. And
3 a third time is when the patient relates a problem for
4 which blood studies or urinalysis might be helpful in
5 diagnosing the problem.

6 Assuming that that is the policy that Dr. Choi
7 has, do you have an opinion, sir, to a reasonable degree
8 of medical probability whether or not that's an
9 appropriate policy for deciding when to do urinalysis
10 and blood studies?

11 A. It is an appropriate policy.

12 Q. Okay. Let's turn our attention, if we could,
13 to the visit of November 23rd, 1996, which would be the
14 second page you've got there. And that's Exhibit 7,
15 page 2.

16 Based upon that note it appears as if the
17 patient came back and there was no chest pain and the
18 left chest pain was improved. Do you see that note on
19 the top line?

20 A. I do.

21 Q. Let's start with just that information. Based
22 upon that information alone in conjunction with what we

1 had from the prior visit do you have an opinion, sir, to
2 a reasonable degree of medical probability whether or
3 not Dr. Choi should have been thinking of some type of
4 systemic process?

5 A. No, there's -- there's no medical reason to
6 think of a systemic process. One would think that
7 because the symptoms had resolved with the treatment
8 that had been given that the treatment was appropriate
9 and, you know, it has resolved.

10 Q. Okay. Let's go on. Dr. Choi also notes in
11 there that the chest x-ray and left rib x-ray were
12 negative. The patient comes in now complaining of
13 chills, fever, vomiting two times bloody, numbness in
14 the forearm and hands, coughing for two days.

15 Dr. Choi does an examination which includes
16 looking into the throat and finds that the throat is
17 slightly infected and that his diagnosis at that time
18 was an upper respiratory infection.

19 Looking at the totality of the circumstances on
20 the November 23rd, 1996, presentation do you have an
21 opinion, sir, to a reasonable degree of medical
22 probability whether or not Dr. Choi complied with the

1 standard of care on this visit?

2 A. He did.

3 Q. Okay. Now, were urinalysis and/or blood work
4 needed on that visit?

5 A. No.

6 Q. Can you tell the ladies and gentlemen why not
7 on this visit?

8 A. Well, again, a urinalysis -- there are no
9 symptoms here referable to the urinary tract. And a
10 blood test like a CBC certainly could have been done,
11 but it was not necessary.

12 This time of year in -- in November, obviously
13 most people realize it's the cold and flu season. He
14 had symptoms suggestive of that. The most probable
15 cause then was a viral illness.

16 The other thing that I think is kind of
17 important to note is that in his prior visit he treated
18 him with a medication to relieve inflammation of
19 muscles, because he thought he had a chest wall type of
20 syndrome.

21 And so he did -- and knowing also from his
22 initial history that he had had a history of ulcers.

1 And he did appropriately give a low dose of Motrin,
2 ibuprofen, Advil, whatever you want to call it -- it's
3 all the same -- because -- and perhaps because of that
4 history of having had an ulcer.

5 So the fact that he did have some vomiting with
6 some blood-tinged tissue or evidence of blood tinged
7 was -- was reasonable to assume that given his weakness
8 for stomach problems that this may have been related to
9 his treatment. So to do other testing other than not
10 give him more Motrin would certainly be appropriate.

11 Q. Now, once again let's direct our attention to
12 not only this visit but the first visit. We have
13 Mr. Ponirakis coming back two times in a nine-day period
14 of time on November 14th for the chest complaints and
15 here on November 23rd for the upper respiratory
16 infection.

17 Did the standard of care require Dr. Choi to
18 think there was some type of systemic process going on
19 in light of these two presentations?

20 A. No.

21 Q. Again, could you tell the ladies and gentlemen
22 why not?

1 A. Well, these -- these symptoms are very local.
2 And the -- the cause for these symptoms was explainable.
3 And, therefore, you wouldn't look for some other
4 underlying problem when the symptoms were resolving or
5 can be explained by, you know, some other diagnosis.

6 Q. All right. Let me ask you to assume now,
7 Dr. Hubach, that in early December Dr. Choi received a
8 telephone call from his patient, Mr. Ponirakis, and was
9 told that he was having additional chest complaints and
10 that Dr. Choi referred him to Northern Virginia
11 Cardiologists, specifically Dr. Jack Horton.

12 First of all, taking that action in and of
13 itself did Dr. Choi comply with the standard of care?

14 A. Yes, he did.

15 Q. Okay. Can you tell the ladies and gentlemen
16 why this was in compliance with the standard of care
17 whereas the first chest pain was also in compliance with
18 the standard of care when the treatment was different?

19 A. Well, the symptoms were ongoing and recurrent.
20 So one always wonders is there some other underlying
21 problem regarding his heart that might be causing him to
22 have chest pain.

1 And, you know, today we're called gate keepers.
2 So we -- we do a lot of referrals to other specialists
3 when there are symptoms that are recurrent.

4 And so he did an appropriate thing to refer him
5 to a cardiologist who obviously specializes in chest
6 pains relating to the heart. And so the -- the referral
7 was appropriate.

8 Q. Doctor, let me ask you to assume that shortly
9 after Dr. Choi made the referral that he received some
10 correspondence from Dr. Horton in which Dr. Horton
11 suggested that he thought the problem was either related
12 to a pericarditis or a myocarditis.

13 First of all, in reading Dr. Choi's records did
14 you read those letters from Dr. Horton?

15 A. Yes, I did.

16 Q. Okay. And again let me ask you to assume that
17 in one of those letters -- I think it's the letter of
18 December 6th -- Dr. Horton says that he believes that
19 the problem is either a pericarditis or a myocarditis
20 and that he thought it would be atypical for a
21 myocardial infarction.

22 Let me also ask you to assume that in that same

1 correspondence Dr. Horton indicated that in doing some
2 laboratory studies he received a sedimentation rate
3 value of 51.

4 First of all, is 51 elevated?

5 A. Yes, it is.

6 Q. To a reasonable degree of medical probability
7 would you expect a patient to have an elevated
8 sedimentation rate even to the extent of 51 in the
9 presence of pericarditis or myocarditis?

10 A. One would expect that elevation.

11 Q. Can you tell the ladies and gentlemen a little
12 bit about the sedimentation rate and how it is affected
13 by various conditions in the body?

14 A. The sedimentation rate is a test that is done
15 to see how fast blood cells will settle in a tube where
16 blood is fixed so it won't clot -- in a tube, how much
17 it will settle in one hour.

18 The normal sedimentation rate for men is up to
19 20 millimeters in one hour. This rate of settling is
20 increased with many different disease states or medical
21 problems. And basically it is an indication of tissue
22 inflammation.

1 It's very non-specific. It doesn't tell you
2 where the inflammation is, but it tells you that -- the
3 likelihood that something is going on. So when one has
4 an abnormal sedimentation rate you try to find an
5 explanation for it.

6 In this particular case at the time that this
7 sedimentation rate was done he was -- the diagnosis was
8 made of either pericarditis or myocarditis. Those are
9 both inflammatory problems, one involving the covering
10 over the heart, the other actually involving heart
11 tissue.

12 So you have a diagnosis which is consistent
13 with explaining an elevated sed rate. So it -- you
14 know, usually, you know, that -- you don't look for
15 another cause.

16 Q. Would it have been appropriate, Dr. Hubach, and
17 within the standard of care for Dr. Choi to have felt
18 that he now had an explanation for the chest complaints,
19 that is, either the pericarditis or the myocarditis?

20 A. Definitely.

21 Q. Okay. And would it have been appropriate and
22 within the standard of care for Dr. Choi to have assumed

1 that the elevated sedimentation rate was related to one
2 of those two conditions?

3 A. It would.

4 Q. Let's turn our attention, if we could, to the
5 visit of January 2nd, 1997. And you will still find
6 that on page 2 of Exhibit 7.

7 Did you see mentioned in those notes that the
8 patient had a similar vomiting spell about two weeks ago
9 and fainted and was taken or took to the Emergency
10 Department and was told he was dehydrated?

11 Do you see that note?

12 A. Yes, I do.

13 Q. Now, do you have occasion, sir, to receive
14 telephone calls from the Emergency Department at Fairfax
15 Hospital when one of your patients presents to that
16 facility?

17 A. Occasionally.

18 Q. Okay. Do you always write down when the
19 hospital calls about your patient?

20 A. Not usually. There are times we do. For an
21 office they call the -- the receptionist. And they pull
22 the chart. And we're talking to the doctor. We may

1 make some notes, but more often than not we do not.

2 Q. Did the standard of care require -- assuming
3 the communications took place between Dr. Choi and an
4 Emergency Department physician at Fairfax Hospital, did
5 the standard of care require Dr. Choi to make notes of
6 the conversation?

7 A. No.

8 Q. Okay. Now, again let me ask you to assume that
9 there was a conversation between an Emergency Department
10 physician and Dr. Choi on December 13th, 1996, and that
11 Dr. Choi was told that the patient was dehydrated and
12 was there.

13 Did the standard of care require Dr. Choi to
14 ask about other laboratory studies that had been done?

15 A. No.

16 Q. Can you tell the ladies and gentlemen of the
17 jury why not?

18 A. Well, one of the -- part of the medical
19 training is -- is relating to other physicians pertinent
20 information. And we usually do it in a very systematic
21 way; the nature of the complaint, the symptoms that he
22 had, the -- the physical findings, the laboratory

1 findings which are pertinent and then our impression and
2 what we've done for management.

3 And it's kind of a scenario that we all go
4 through. It's an organized way of relating a patient's
5 problems to another physician. And so physician to
6 physician one has to assume that this was done.

7 And so, you know, that information is conveyed
8 to Dr. Choi; but not every detail needs to be related to
9 a physician to make an appropriate assessment of the
10 problem.

11 Q. Well, going again to the -- what we read here
12 in the visit of January 2nd, it says he had a similar
13 vomiting spell about two weeks ago and fainted and was
14 taken to the ER and was told he was dehydrated.

15 Let me ask you to assume that Mr. Ponirakis
16 also reported that he got IV fluids and was rehydrated.
17 Did the standard of care require Dr. Choi just in light
18 of that historical information to do further testing as
19 to the dehydration or whether the dehydration still
20 existed?

21 A. No. If -- if the symptoms had persisted and he
22 had continued to have vomiting or losing extra fluid,

1 then that would be a different issue; but that's not the
2 case here.

3 The treatment was to give fluids which were
4 given in the emergency room. And when the vomiting has
5 subsided then one's normal intake of food and fluid
6 corrects the problem.

7 Q. You mentioned if he had continued to have
8 vomiting. Let me direct your attention to the second
9 line of the 1-2-97 note that we're referencing.

10 Does it indicate in there how much vomiting
11 Mr. Ponirakis relayed to Dr. Choi he was having?

12 A. Yes, it does.

13 Q. What does it say?

14 A. It said he had vomiting once.

15 Q. Okay. Now, in light of that report of one time
16 vomiting did the standard of care require that Dr. Choi
17 do any follow-up to the dehydration that occurred
18 earlier or to whether or not he was still dehydrated?

19 A. No.

20 Q. Now, let's look at that visit in its entirety
21 where the patient comes in complaining of vomiting,
22 headache, mid substernal pain and mid epigastric pain

1 for three days.

2 Dr. Choi did his examination which found no
3 chest wall tenderness. The head, ears, eyes, nose and
4 throat and lungs were clear. Abdomen was soft and not
5 distended. There was no -- and I have trouble reading
6 that. It's hepatosplen -- help me out here, Doctor.

7 A. Whereabout?

8 Q. All right. It's the -- about the fifth or
9 sixth line from the bottom. That's no
10 hepatosplenomegaly.

11 A. Yeah. That -- what you're saying is --
12 hepatosplenomegaly is the correct term. I don't --

13 Q. Okay.

14 A. There it is. Yes.

15 Q. Do you see it now?

16 A. Yes, I do.

17 Q. Okay. That he had tenderness in the epigastric
18 region without rebound tenderness. The bowel sounds
19 were normal. And that as a result Dr. Choi thought he
20 had possibly peptic ulcer disease. And he wanted to
21 rule out cholelithiasis.

22 First of all, for the ladies and gentlemen

1 understanding what is chololithiasis?

2 A. They're basically gallstones.

3 Q. Okay. Let me ask you to assume that Dr. Choi
4 recommended a gallbladder sonogram, an upper GI series
5 and a soft diet.

6 Do you have an opinion to a reasonable degree
7 of medical probability whether or not Dr. Choi's
8 management of the conditions and the issues presented on
9 January 2nd, 1997, complied with the standard of care?

10 A. It complies with the standard of care.

11 Q. Okay. Let me again ask you some questions that
12 I've asked you previously, but we've now added another
13 visit. Did the standard of care require that a
14 urinalysis or blood studies be done on this date?

15 A. No.

16 Q. Okay. And can you tell the ladies and
17 gentlemen again the reasons why?

18 A. Again, these are not symptoms that would
19 suggest a problem with a urinary tract problem. And
20 the -- the routine blood count would not really explain,
21 you know, any of the symptoms as well.

22 Q. If a patient has -- so the ladies and gentlemen

1 can maybe have a different slant on this, if a patient
2 has gallbladder disease, is that going to be reflected
3 in laboratory studies?

4 A. Rarely.

5 Q. Now, we now have a third presentation to
6 Dr. Choi in approximately a six-week period of time;
7 November 14th, November 23rd and January 2nd. Let's
8 throw into the mix the fact that there were the
9 telephone calls to Dr. Choi in which Dr. Choi referred
10 the patient to Dr. Horton.

11 Did the standard of care in light of all these
12 presentations and contact require Dr. Choi to be
13 thinking of some type of systemic process, that is, that
14 all of these problems were somehow connected?

15 A. No.

16 MR. MALONE: Excuse me. He's left out of the
17 hypothetical not just the telephone conversations but
18 the written reports and then the -- some of the other
19 communications. So I object, because the hypothetical
20 is incomplete.

21 THE COURT: Do you want to respond?

22 MR. ALTMAN: I think that's subject to cross,

1 but I'll throw it all in.

2 THE COURT: If you agree to put it in, you can
3 put it in.

4 MR. ALTMAN: I'll put it all in, Your Honor.

5 THE COURT: Okay.

6 BY MR. ALTMAN:

7 Q. Doctor, let's go back, because I don't want you
8 to leave anything out of your consideration here. The
9 first contact was on November 14th. The second contact
10 was on November 23rd.

11 There was the telephone call with Dr. Choi in
12 which there was additional chest complaints which
13 generated the referral to Dr. Horton. There were two
14 different letters from Dr. Horton, a December 4th letter
15 and a December 6th letter.

16 Let's assume that there was a telephone call on
17 December 13th from the Emergency Department to Dr. Choi.
18 Dr. Choi doesn't remember the call, but let's assume for
19 purposes of this question to you that there was that
20 contact. And then let's add in the January 2nd, 1997.

21 Considering all that did the standard of care
22 require Dr. Choi to begin thinking of one systemic

1 process that might explain the whole realm of contacts
2 that this patient had had?

3 A. No.

4 Q. Can you tell the ladies and gentlemen why not?

5 A. Because his complaints were explained by
6 findings. He had chest pain. He had soreness which
7 resolved with treatment. He had saw Dr. Horton.
8 Dr. Horton made a diagnosis of a problem that would
9 explain his elevated sed rate, would also explain chest
10 discomfort.

11 He had a gastrointestinal upset where he had
12 vomiting. And the diagnosis of a gastritis or peptic
13 ulcer disease, because that's been known that he had
14 that, was appropriate and explained the symptoms that he
15 was having. So, again, you don't go looking for a
16 problem when the symptoms that he's having are already
17 explainable.

18 Q. Now, Doctor, let's turn our attention, if we
19 could, to the visit of January 15th, 1997. And that's
20 on the bottom of page 2 of Exhibit 7.

21 Doctor, first of all, looking at the visit in
22 its entirety do you have an opinion, sir, to a

1 reasonable degree of medical probability whether or not
2 the care that Dr. Choi rendered to Mr. Ponirakis on that
3 visit complied with the standard of care?

4 A. Yes, it does.

5 Q. Okay. Did Mr. Ponirakis require the urinalysis
6 or blood studies be done on this day?

7 A. No.

8 Q. Did you note in the chart that on that date
9 about the fourth line down it reads he had cardiac
10 catheterization right inguinal region one day before
11 this began? And he's referring to the pain and swelling
12 localized in the knee for four days.

13 Did you read that in the note?

14 A. I see that. I do.

15 Q. Let me ask you to assume, Doctor, further that
16 Mr. Ponirakis told Dr. Choi that the results of the
17 cardiac catheterization were normal. Did the standard
18 of care require Dr. Choi to seek out a copy of the
19 cardiac catheterization report?

20 A. No.

21 Q. Can you tell the ladies and gentlemen why not?

22 A. Well, with somebody at that -- at that age one

1 would almost expect the test to be normal. And, you
2 know, the -- the standard of care would -- would require
3 the cardiologist to tell the patient if there was
4 something abnormal. And obviously if something had been
5 abnormal, then he would have related that to Dr. Choi.

6 Q. Doctor, let's talk a little bit about cardiac
7 catheterization. Do you refer patients for them?

8 A. Often.

9 Q. Do you have occasion to understand what they --
10 the purpose of a cardiac catheterization?

11 A. Yes.

12 Q. Okay. Dye is injected. We've heard this
13 already. And you're able to see the coronary arteries.
14 Is that your understanding?

15 A. That's correct.

16 Q. If, in fact, the patient has some clogging or
17 narrowing of the coronary arteries, does that usually
18 generate some treatment or some recommendations?

19 A. Absolutely.

20 Q. Okay. Can you give the ladies and gentlemen --
21 first of all, if there's good blood flow, is there any
22 recommendations usually made by the cardiologists?

1 A. No.

2 Q. If there is insufficient or inadequate or
3 diminished blood flow, are there usually recommendations
4 made by the cardiologist?

5 A. Yes.

6 Q. Can you give the ladies and gentlemen sort of
7 the variety of recommendations that one would expect to
8 see if there had been inadequate blood flow at the time
9 of the cardiac catheterization?

10 A. Well, you're referring now to the coronary
11 arteries. And you hear people having coronaries when
12 they have heart attacks. They are the blood vessels
13 which supply the heart muscle with blood flow and,
14 therefore, oxygen.

15 Obviously the heart muscle needs oxygen to
16 function properly. And if these coronary arteries are
17 narrowed or partially blocked, then the blood supply to
18 the heart muscle is diminished.

19 When the heart works it requires oxygen. And
20 it works harder with exercise. Anything that will make
21 the heart rate faster requires more oxygen. And if the
22 heart is unable to get the oxygen it demands, then one

1 has symptoms of chest discomfort or chest pain or chest
2 pressure. People describe it in different ways, but it
3 is related to a diminished supply of oxygen to the heart
4 muscle.

5 So obviously if one finds that coronary
6 arteries are narrowed, then we do several things. We
7 would restrict his exercise in a cautious way, give
8 medications which would either cause the blood vessels
9 to dilate and open up and improve blood flow or do a
10 technique at the time of catheterization to open those
11 blood -- those blood vessels.

12 And we do that with balloon angioplasty today
13 and stints and other techniques; but when the coronary
14 blood flow is normal then obviously no treatment, no
15 restrictions would be advised for that particular
16 patient.

17 Q. Let me ask you for a moment to forget that
18 Mr. Ponirakis had told Dr. Choi that the result was
19 normal, but let me ask you to assume that he did not
20 relay that he had been given medications, had been
21 given -- told that he needed further testing for his
22 cardiac condition; that he was not told in any way to

1 limit his activity.

2 Do you have an opinion, sir, to a reasonable
3 degree of medical probability whether it would have been
4 appropriate for Dr. Choi based upon that information to
5 assume that it was a normal study?

6 A. It would be appropriate to assume it was.

7 MR. MALONE: Excuse me, Your Honor. I don't
8 understand the question.

9 THE COURT: Do you understand the question?

10 THE WITNESS: I do.

11 THE COURT: Then I overrule the objection.

12 MR. MALONE: Okay.

13 MR. ALTMAN: I'm sorry. I don't know if the
14 ladies and gentlemen heard your answer because of
15 Mr. Malone's interjection.

16 THE WITNESS: Well, you asked the question was
17 it appropriate for him to assume that everything was
18 okay since he did not give him medication, did not
19 restrict his activity.

20 And certainly with a cardiac catheterization
21 which proved to be normal and found no problems with the
22 coronary arteries it would be appropriate not to give

1 him any restrictions or medications.

2 BY MR. ALTMAN:

3 Q. Doctor, we know at this time and I think we can
4 tell from Dr. Choi's record that the cardiac
5 catheterization was done on January 10th, 1997. And
6 this visit that we're referencing now is January 15th,
7 1997.

8 Would you have expected, sir, in your
9 experience to have received a copy of the
10 catheterization report within five days?

11 A. Not within five days.

12 MR. MALONE: Excuse me. I object to that
13 unless he knows the specific practices of Arlington
14 Hospital and the transcriptionists and that kind of
15 thing. We have some of that evidence in the record.

16 THE COURT: Mr. Altman.

17 MR. ALTMAN: I don't know that we do have any
18 of that.

19 BY MR. ALTMAN:

20 Q. Let me ask you to assume that it was dictated
21 on January 10th and typed on January 11th, but we don't
22 know when it was mailed out. Do you have an opinion

1 whether or not you would have expected it to be received
2 by January 15th?

3 A. I would probably not expect to receive it that
4 soon.

5 Q. Okay. Doctor, let's stay with that same
6 thought, that is, the cardiac catheterization report.
7 Let me ask you to assume that Dr. Choi received the
8 information that he did from this patient as reflected
9 in the note of January 15th.

10 I've already asked you the question whether or
11 not you would have expected Dr. Choi to go out and seek
12 the report. And I don't want to ask you that question
13 again.

14 My question to you is this: Does the standard
15 of care require a general practitioner, family
16 practitioner, internist to have some type of tracking
17 system so that he knows when referral documents come in
18 and when laboratory documents come in?

19 A. No.

20 Q. Can you tell the ladies and gentlemen why not?
21 And you can elaborate by telling them any information
22 that you need to that would respond to this question.

1 A. Well, the volume of paper that's being pushed
2 today in medical care makes it almost impossible to keep
3 track of every -- you know, every referral. It's kept
4 track of but not in a way that it's easy to retrieve.

5 We keep track when we make a referral. And
6 it's in these records that the referral was made, but to
7 follow up on every referral is not really -- really
8 possible.

9 Even in this day of computerization it's --
10 it's really a tremendous problem for primary care
11 physicians today to try to keep up with -- with this
12 gate keeper philosophy that we have to put up with.

13 Q. Now, Doctor, let's again direct your attention
14 to January 15th, 1997. And we again have a new visit.
15 And I would like to ask you this question.

16 Based upon all the information available to
17 Dr. Choi did the standard of care require him even once
18 he knew from his patient that the cardiac
19 catheterization was normal -- did the standard of care
20 require Dr. Choi to be thinking of some type of systemic
21 process?

22 A. No.

1 Q. And, again, could you tell the ladies and
2 gentlemen why not now that we've added this January 15th
3 visit?

4 A. Well, he -- every problem that he's had has
5 been evaluated, number one. And an explanation for the
6 symptoms has been found. So there's no real reason to
7 consider and think for other medical problems.

8 Q. Doctor, again checking your -- or looking at
9 the January 15th, 1997, note you'll notice that Dr. Choi
10 wrote down there arthritis of the right knee. And I'm
11 going to ask you to assume that he's told the ladies and
12 gentlemen that based upon the symptoms on that date that
13 was his preliminary diagnosis.

14 First of all, question number one: Did his
15 preliminary diagnosis based upon the presentation comply
16 with the standard of care?

17 A. Yes.

18 Q. Now, let me ask you to assume that on that date
19 Dr. Choi referred the patient to a Dr. Mark Theiss, an
20 orthopedic surgeon.

21 My question to you is: Do you have an opinion,
22 sir, to a reasonable degree of medical probability

1 whether or not a referral to an orthopedic surgeon in
2 light of this information and in light of the fact that
3 Dr. Choi's preliminary diagnosis was arthritis of the
4 right knee was appropriate and complied with the
5 standard of care?

6 A. I believe it was appropriate.

7 Q. Does arthritis sometimes manifest itself in the
8 joints of the knees?

9 A. Often.

10 Q. Okay. Who would be in the best position in
11 your experience, sir, to take care of a joint problem in
12 the knee?

13 A. Of this type where he had pain, swelling, we
14 call effusion or water on the knee would be an
15 orthopedist. Yes.

16 Q. Now, let me ask you to assume that the patient
17 came back on July 1, 1997. Do you see that on page 3 of
18 what's Exhibit 7, sir?

19 A. Yes, I do.

20 Q. And that the patient came in complaining of
21 loss of weight, pain in the right mid abdomen and right
22 flank for two weeks; that an examination was done and

1 that Dr. Choi ordered a urinalysis, an SMA 24 and CBC
2 and a CT scan of the kidneys.

3 Based upon that presentation, sir, do you have
4 an opinion to a reasonable degree of medical probability
5 whether or not Dr. Choi complied with the standard of
6 care in his management of the patient on that date?

7 A. I believe that he did.

8 Q. Now, was it appropriate -- let me ask you to
9 assume that Dr. Choi sent the patient to a urologist
10 following that visit. First of all, blood in the urine.
11 The urinary system is composed of how many parts?

12 A. Well, you have the kidney. You have the
13 ureter. You have the bladder. You have the urethra.
14 So basically four parts.

15 Q. Okay. So there are four parts starting with
16 the kidneys coming then out of the person?

17 A. Correct.

18 Q. Okay. What kind of doctor would take care of
19 the kidneys?

20 A. A nephrologist would take care of just the
21 kidneys.

22 Q. Okay. And what type of doctor would take care

1 of the ureters?

2 A. A urologist would take care of ureters and also
3 the kidneys sometimes, too. It depends upon what the
4 problem is with the kidneys.

5 Q. Okay. So the ladies and gentlemen sort of have
6 a brief understanding of the medicine, we've got the
7 kidneys. Then as urine would leave the body it goes
8 from the kidneys to where?

9 A. Goes to the collecting tube, the collecting
10 portions of the kidney into the ureter. It's the tube
11 from the kidney to the bladder.

12 Q. All right. And who takes care of the ureter?

13 A. Usually the urologist.

14 Q. Okay. And then it goes from the ureter to what
15 next structure?

16 A. To the bladder.

17 Q. Okay. And what type of doctor would take care
18 of the bladder?

19 A. Urologist.

20 Q. Okay. And then it goes from the bladder into
21 what structure?

22 A. Called the urethra which is the tube from the

1 bladder to the external.

2 Q. Okay.

3 A. Outside.

4 Q. In other words, the urine leaves the body
5 through the urethra.

6 A. Correct.

7 Q. Okay. And what doctor would be in charge of
8 taking care of the urethra?

9 A. Usually it's a urologist.

10 Q. Okay. Now, based upon that information was it
11 appropriate and within the standard of care
12 understanding that anatomy for Dr. Choi to first send
13 the patient to a urologist?

14 A. Yes, it was appropriate.

15 MR. ALTMAN: Court's indulgence for one minute.

16 THE COURT: Yes, sir.

17 BY MR. ALTMAN:

18 Q. Doctor, I'm going to ask you to assume that
19 following the cardiac catheterization of January 10th,
20 1997, that the patient received some information about
21 elevated laboratory studies and the fact that they may
22 be suggestive of a kidney problem.

1 Assume, if you would, that that information was
2 conveyed to Dr. Choi. What would the standard of care
3 require a reasonably prudent doctor to do if that
4 information had been supplied to Dr. Choi?

5 MR. MALONE: Excuse me. The same objection
6 that I made before.

7 THE COURT: Come up to the bench for a moment,
8 please, Counsel.

9 (Counsel approached the bench and the following
10 proceedings were held:)

11 THE COURT: Mr. Altman, it is a different
12 context, but isn't the issue basically the same? That
13 you're posing a hypothetical question that's
14 inconsistent, if I understood the question correctly,
15 with the uncontroverted testimony in this case that
16 Dr. Choi did not receive the information and then asking
17 him what the standard of care would require if he did.

18 MR. ALTMAN: I think His Honor is right. It is
19 a different context. It is the same type of question.
20 I'll withdraw it.

21 THE COURT: While you're here, both for this
22 objection and the last objection one of the points that

1 was raised by Mr. Malone that I would like to be clear
2 on the record is that you both have been referring to
3 the deposition of the doctors, not the designation of
4 the doctors.

5 I assumed that the parties had agreed to expand
6 the designations by what was included in the
7 depositions.

8 MR. ALTMAN: I'm not sure I understand what His
9 Honor is doing.

10 MR. MALONE: In terms of the scope of it.

11 THE COURT: The last time you were up here part
12 of the basis for the objection that was raised by
13 Mr. Malone -- and I didn't address it on the record --
14 was that he didn't expect this doctor to be a so-called
15 contributory negligence doctor; that he had not been put
16 on adequate notice of the fact that that was going to be
17 coming from this doctor either in response to the status
18 conference order or in interrogatory.

19 Both sides during the course of the trial have
20 referred to not being put on notice by the deposition
21 testimony. And I don't know if there was an agreement
22 between counsel to allow the deposition testimony to

1 supplement any interrogatory answers or the required
2 designation. I would like --

3 MR. MALONE: I'm sorry.

4 THE COURT: What I would like to have done --
5 and I don't want to do it right now. Maybe during the
6 course of the morning recess you can both take a look,
7 because I would like there to be -- I would like to be
8 able to make a finding on the record one way or the
9 other on that issue either as an additional basis for
10 sustaining the objection or if Mr. Malone is incorrect,
11 then I would like that to be on the record that that is
12 not a legitimate basis for my having sustained the
13 objection so that the record will be clear in the event
14 of an appeal.

15 So I just ask both sides to look into that,
16 discuss it. And if there is a disagreement, I do want
17 to make a finding one way or the other for this record.
18 Okay. I sustained the objection to the last question.
19 And then the same thing applies to this issue, also.

20 MR. ALTMAN: Yes, sir.

21 (The bench conference was concluded.)
22

1 BY MR. ALTMAN:

2 Q. Doctor, directing your attention to the July
3 1st, 1997, visit, the patient came in complaining of
4 right flank pain for two weeks.

5 Did you see that in the record?

6 A. Yes.

7 Q. On this visit Dr. Choi performed a urinalysis.
8 Do you see that in this record?

9 A. I do.

10 Q. Do you have an opinion, sir, to a reasonable
11 degree of medical probability whether or not it was
12 appropriate on this date to do a urinalysis in light of
13 the flank pain?

14 A. Absolutely.

15 Q. Can you tell the ladies and gentlemen what
16 flank pain is, where it is and what it might indicate?

17 A. Flank pain is referable to the area in the
18 lower part of the chest and the upper part of the back
19 under the rib cage which is where the area of the
20 kidneys are.

21 So if one has pain in the area of the kidneys,
22 it's appropriate to do a test that would check to see,

1 you know, what -- what is the status of the kidneys,
2 is there an infection, is there a normal urinalysis;
3 whatever. So it was definitely appropriate given the
4 presenting symptoms at that time to look at a
5 urinalysis.

6 Q. I want to make sure that I accurately state
7 what's in here. It says right back pain for two
8 weeks --

9 A. Right.

10 Q. -- as opposed to right flank pain.

11 A. But it also says, I believe, CDA tenderness.

12 Q. Right.

13 A. And that refers to that area anatomically.

14 MR. ALTMAN: Okay. I have nothing further,
15 Your Honor.

16 THE COURT: Okay. Mr. Malone, you may
17 cross-examine.

18 MR. MALONE: Thank you.

19 CROSS-EXAMINATION

20 BY MR. MALONE:

21 Q. Dr. Hubach, you remember just as a starting
22 point that we asked you in your deposition in this case

1 the medical negligence cases that you testified about in
2 the last four years or so.

3 A. Yes.

4 Q. And every case you identified was a case on
5 behalf of the defendant doctor; is that right?

6 A. That's correct.

7 Q. Did you ever testify on behalf of a plaintiff
8 during the last four or five years?

9 A. I have not.

10 Q. Okay. Now, let's go back to the beginning.
11 You talked about -- oh, on the aspect about your being
12 board certified in family medicine, I think your resume
13 reflects that you've been recertified several times.

14 A. I have.

15 Q. Is that routine for family practitioners to
16 do --

17 MR. ALTMAN: Objection.

18 BY MR. MALONE:

19 Q. -- in your experience?

20 MR. ALTMAN: Objection.

21 THE COURT: Do you want to respond to the
22 objection, a legal basis for the objection, please?

1 MR. ALTMAN: Relevance, sir.

2 MR. MALONE: He brought it up. And it's in --
3 it's in evidence in his -- in his resume.

4 THE COURT: I sustain the objection.

5 MR. ALTMAN: Thank you, sir.

6 MR. MALONE: Well, may I ask why he has been
7 recertified?

8 MR. ALTMAN: Same objection, sir.

9 THE COURT: Come on up to the bench.

10 (Counsel approached the bench and the following
11 proceedings were held:)

12 THE COURT: What does the re-certification have
13 to do with this case other than trying to raise in the
14 eyes of the jury a requirement for re-certification or
15 that Dr. Choi, because he hadn't been recertified, was
16 more likely to be negligent, none of which is
17 appropriate for the jury's consideration in this case?

18 MR. MALONE: Well, he's been talking about --
19 and Dr. Choi got in the fact that he goes to continuing
20 medical education. This guy got into the fact that he
21 goes to continuing medical education, too.

22 And he says he's required to get a certain

1 number of hours in order to get his re-certification
2 done. I think it's totally appropriate to ask him why
3 do you do that. You know, it's in order to maintain
4 competence.

5 MR. ALTMAN: It has --

6 THE COURT: What was the last question to which
7 the objection was sustained?

8 (The last question was read as follows:

9 Q. "Is that routine for family practitioners to
10 do --.")

11 THE COURT: I stand by that ruling. And then
12 you wanted to ask what? And I asked you to approach the
13 bench.

14 MR. MALONE: I wanted to ask him why do you get
15 recertified, how is it helpful to you.

16 MR. ALTMAN: But that's irrelevant. We've
17 already established through this witness and other
18 witnesses that certification doesn't mean you can
19 practice medicine. It doesn't limit your practice in
20 any way.

21 Why he may do it -- he may do it because he
22 wants to add things to his curriculum vitae. He may do

1 it just because it's simple to do. The fact of the
2 matter is why he does it is irrelevant. Why is --

3 THE COURT: Why did you ask him then on direct
4 examination whether he gets recertified?

5 MR. ALTMAN: I didn't. I didn't on direct
6 examination. I just asked him are you board certified.
7 He brought it up independently, not through any question
8 on my part. My question was a simple one, are you board
9 certified.

10 MR. MALONE: It's right on the CV that you
11 offered into evidence.

12 THE COURT: Let's do this. I'm going to ask
13 the witness to come here outside of the hearing of the
14 jury. I want to hear what his answer is to the question
15 if I allow it. Then I'm going to determine whether I'm
16 going to allow it or not. Is that acceptable to
17 everyone?

18 MR. MALONE: Yes.

19 THE COURT: Doctor, can you come up here for a
20 moment, please? You can stand on that side, please.

21 Mr. Malone, this is outside the hearing of the
22 jury. Ask your question.

1 MR. MALONE: My question is: Why have you
2 found it helpful to get recertified periodically?

3 THE WITNESS: Well, just to maintain your --
4 your accreditation in the family practice -- board of
5 family medicine. It's a requirement. It's the -- it
6 was the first medical specialty to require
7 re-certification.

8 In other words, ongoing it requires you to have
9 enough extended medical education in order to even
10 qualify to take the re-certification boards. And
11 it's --

12 MR. MALONE: All right.

13 THE WITNESS: And now the state requires you to
14 have certain amounts of hours as well. It's an easy way
15 to do it. It's a way to keep abreast of modern changes
16 in medicine.

17 MR. MALONE: Okay. That goes to my next
18 question which is: Is it useful for more than just a
19 piece of paper that says you're accredited -- is it
20 useful for your medical practice to go through the
21 process of getting re-accredited every X number of
22 years?

1 THE WITNESS: Just from the education
2 standpoint, yes. I don't even have my diploma hanging
3 in my office. So that's not something I flaunt; but it
4 is important to -- to -- you know, just to do it to keep
5 up.

6 THE COURT: All right. Thank you, Doctor. You
7 may return to the witness stand.

8 I sustain the objection. The Court believes
9 it's irrelevant. If he does it for purposes of
10 maintaining his board certification, Dr. Choi is not
11 board certified. So that has nothing to do with the
12 case.

13 And the other explanation which was just given
14 in response to your follow-up question is also
15 irrelevant to the issues involved in this case. And I'm
16 not going to let us start drifting towards the fact that
17 if Dr. Choi doesn't do what other people do as far as
18 continuing education or certifications or being board
19 certified that that is a reason from which the jury may
20 conclude that he is more likely to be negligent in this
21 case, because that is not consistent with Virginia law.
22 And I am not going to start us down that path. I

1 sustain the objection. And your exception is noted.

2 MR. MALONE: Thank you.

3 (The bench conference was concluded.)

4 MR. MALONE: Thank you, Your Honor.

5 BY MR. MALONE:

6 Q. Dr. Hubach, do you know Dr. Choi?

7 A. No, I do not.

8 Q. Have you ever met Dr. Choi at any of the
9 various medical meetings that you have gone to?

10 A. I have seen him, but I have never really met
11 him; had no contact, personal contact.

12 Q. Okay. Now, you talked at the first visit about
13 the fact -- and we're talking about 11-14-96 now -- that
14 no full review of systems was required at that time on
15 the very first visit of this patient.

16 Do you remember that?

17 A. I did.

18 Q. And I believe you said that under the new
19 medical management regime there's really no time to do
20 that.

21 A. On a -- on a single visit, yes. When they come
22 in with a specific complaint you really only have the

1 time allotted to take care of that problem. And in many
2 circumstances then one will reschedule them for a
3 complete physical or evaluation in appropriate
4 circumstances.

5 Q. Okay. Who is it that prevents the doctor from
6 taking the time on the first visit? Who is it that
7 allots this time?

8 A. Well, you know, usually your receptionist makes
9 the appointments. And you have a block of time that's
10 allotted. And so you -- you do what's appropriate.

11 Obviously if the person came in with an
12 emergency and it took an hour, you would do it; but
13 ordinarily you don't do a complete evaluation on
14 somebody that might be just kind of routine. You take
15 care of the urgent problem and then go on.

16 Q. Okay. I was under the impression -- and you
17 correct me if I'm wrong -- that doctors nowadays are
18 required to see many more patients than they were before
19 mainly because of managed care type of issues, HMOs,
20 and things like that. Is that what you're saying?

21 A. It's true.

22 Q. Okay. Now, is there sort of an allocation of

1 time or allotment that managed care companies give you
2 as a ballpark for how quickly you're expected to turn
3 the patients over?

4 A. No, not in my case at any rate.

5 Q. Okay. So you can spend as long as you want
6 with a patient that you think is prudent.

7 A. You can spend as much time as is prudent for a
8 given circumstance. That's true.

9 Q. Okay. How busy is your own practice, by the
10 way, in terms of the number of patients you see per day?

11 A. Obviously it does vary, but we see up to 25
12 patients per day.

13 Q. Okay. Now, if you saw 15 or 20 patients per
14 day in an eight-hour day, that would give you 20 to 30
15 minutes per patient.

16 MR. ALTMAN: Objection; calls for speculation.
17 We don't know what the visits are for.

18 BY MR. MALONE:

19 Q. Assuming that these are run-of-the-mill family
20 practice patients, if you saw 15 to 20 patients per day,
21 just on average you would have roughly 20 to 30 minutes
22 per patient; true?

1 MR. ALTMAN: Same objection, sir.

2 THE COURT: I think your question assumes that
3 there is nothing -- no complications in any of them;
4 that they're all the same amount of time and they're all
5 routine.

6 MR. MALONE: Well, I guess I should --

7 THE COURT: That's not part of the question. I
8 sustain the objection to the way the question is
9 phrased.

10 BY MR. MALONE:

11 Q. I guess I should ask you. Let's say you see 25
12 patients per day. How much time roughly does that give
13 you for an individual patient? And tell me how it
14 varies from the short end to the long end.

15 MR. ALTMAN: Same objection, Your Honor.

16 THE COURT: I sustain the objection.

17 BY MR. MALONE:

18 Q. Do you feel, though, that seeing 25 patients
19 per day you have adequate time to spend enough time with
20 that patient to do whatever is necessary, that you
21 wouldn't be turning away patients at that point?

22 A. That's very variable. I mean, if you're just

1 seeing, you know, runny noses because it's an allergy
2 season, yes, it is. If you're seeing congestive heart
3 failure patients, it's not.

4 Q. Okay.

5 A. And in primary care, you know, we get the
6 gambit.

7 Q. All right. Now, you agree that it's important
8 to have effective communications between the primary
9 care doctor and the consultants that he or she sends the
10 patient to.

11 A. Yes.

12 Q. And you agree, don't you, that in this case --
13 and let's just talk about the catheterization report for
14 a few minutes. Have you seen actually the report done
15 by Dr. Horton?

16 A. I did see that, yes.

17 Q. Okay. You agree that would have been useful
18 information for Dr. Choi to have.

19 A. At the time of the visit?

20 Q. Yes.

21 A. No.

22 Q. Well, I'm sorry. At the time of -- let's get

1 it out and talk about it. It's Plaintiff's Exhibit 8-A.

2 Do you have a copy of it?

3 A. No. This is -- 8-A?

4 Q. Let me --

5 A. No. I just have the --

6 MR. MALONE: I'll get a copy from the clerk, if
7 I might. I need the original.

8 THE CLERK: It's in your book.

9 MR. MALONE: Okay.

10 BY MR. MALONE:

11 Q. Now, let's see if this works. This exhibit,
12 8-A, is Dr. Horton's cardiac catheterization report
13 dated January 10th, 1997.

14 A. That's correct.

15 Q. Yes. Are you aware of the various steps that
16 Dr. Horton took to communicate the information in this
17 report to Dr. Choi?

18 A. Outside of the letters, no.

19 Q. Were you aware that Dr. Horton called
20 Dr. Choi's office on the same day as the catheterization
21 to report to him that the patient still had an elevated
22 creatinine, that that's Dr. Horton's testimony?

1 Were you aware of that?

2 A. No.

3 Q. If Dr. Horton did what he says he did, he
4 called Dr. Choi's office on January 10th, 1997, and tell
5 him that this patient still had an elevated creatinine
6 that might need follow-up, what was Dr. Choi obligated
7 to do in response to that?

8 A. He would be obligated to follow it up.

9 Q. And it would be obligated for Dr. Choi to bring
10 the patient in and perhaps at least repeat the
11 creatinine; true?

12 A. That's true.

13 Q. Okay. You don't have any doubt that -- any
14 reason to doubt that Dr. Horton called Dr. Choi's office
15 on January 10th, 1997, and reported this information, do
16 you?

17 A. It's not in Dr. Choi's record. That's all I
18 can say.

19 Q. Okay. Well, did you read Dr. Horton's
20 deposition where he described this?

21 A. Yes, I did.

22 Q. You just don't remember seeing it in there.

1 A. I don't -- I'm talking about Dr. Choi. He has
2 no recollection of receiving that information from
3 Dr. Horton.

4 Q. Okay. But isn't -- the issue is whether or not
5 it was communicated to Dr. Choi, isn't it? If the
6 information was communicated to Dr. Choi, you agree he
7 needed to follow up.

8 A. If it was communicated, it would be reasonable
9 to follow up, yes.

10 Q. Not just reasonable, but important for this
11 patient.

12 A. It would be important to follow up, yes.

13 Q. Okay. Now, do you have any reason to doubt
14 that Dr. Horton when he dictated a copy of the -- I'm
15 sorry. When he dictated the cath report into the
16 dictating machine at the hospital that a copy of that
17 report -- that he told them to send it to Dr. Choi, the
18 Arlington Hospital people? Do you have any reason to
19 doubt that that occurred?

20 MR. ALTMAN: Objection. Mr. Malone is asking
21 this witness to comment on the credibility of another
22 witness. I think it's improper.

1 THE COURT: Mr. Malone.

2 MR. MALONE: I'm asking him for his knowledge
3 based -- about this case and whether or not it's
4 reasonable for -- whether he has any reasonable
5 explanation for this cath report not being in Dr. Choi's
6 file.

7 THE COURT: I sustain the objection to the
8 question the way it was phrased.

9 MR. MALONE: All right.

10 BY MR. MALONE:

11 Q. Do you have any -- well, let me --.

12 A cardiac catheterization on a 20-year-old man
13 is a rather extraordinary event, isn't it?

14 A. It's unusual, but I've had some.

15 Q. Okay. And the reason it was done in this case
16 was a continuing search for the cause of this young
17 man's chest pain; right?

18 A. Partially.

19 Q. It was looking for a cardiac cause for the
20 young man's chest pain; right?

21 A. He had in some of the preliminary cardiac
22 evaluations some abnormalities. And those abnormalities

1 then, therefore, required him to proceed with the next
2 step in evaluating cardiac function which was the
3 cardiac catheterization.

4 He had an abnormal echocardiogram. And he had
5 some EKG changes. These could have been meaningless or
6 they could have been suggestive of underlying
7 cardiovascular diseases, the coronary artery disease
8 that we discussed earlier.

9 Q. And it turned out they were meaningless in
10 terms of whether or not the young man had heart disease;
11 right?

12 A. It turned out to show that he had normal
13 coronary arteries.

14 Q. Okay. And that leaves unexplained the young
15 man's repeated bouts of chest pain.

16 A. I don't think it does.

17 Q. You're going back to the pericarditis then;
18 right?

19 A. Exactly.

20 Q. And the pericarditis had the elevated
21 sedimentation rate; right?

22 A. Correct.

1 Q. All right. Well, if he is still having chest
2 pain in -- and, by the way, you saw in Dr. Horton's
3 report, didn't you, that the chest discomfort -- the
4 chest -- Mr. Ponirakis's chest discomfort most likely is
5 secondary to inflammation, although it is difficult to
6 explain pericarditis lasting more than two months.

7 You agree that that would be extremely unusual
8 for him to be having pericarditis for such a long period
9 of time.

10 A. That would be unusual for pericarditis. The
11 other explanation, though, was a myocarditis. And that
12 is not unusual for that.

13 Q. But myocarditis is heart disease. And that is
14 what Dr. Horton was checking out.

15 A. True, but you don't check out myocarditis with
16 a cardiac catheterization.

17 Q. But he had done these other studies. And he
18 never found any reason to believe that this man had any
19 inflammation of the heart tissue itself. He would have
20 treated him, because he's a cardiologist; right?

21 A. That's partially right, yes. I mean, you can
22 have normal studies and still have inflammation of the

1 heart muscle.

2 Q. Okay. If he had inflammation of the heart
3 muscle, Dr. Horton would still have the young gentleman
4 under his care; right?

5 A. Probably, but I can't answer that.

6 Q. Well, so -- and you had assumed earlier that
7 since Dr. Horton discharged the young man that that
8 meant he didn't have inflammation of the heart muscle
9 itself; right?

10 A. One might assume that.

11 Q. Okay. And then the only other explanation is
12 does he still have this very unusual pericarditis;
13 right?

14 A. Okay.

15 Q. And then the next step, as Dr. Horton suggests,
16 is that you want to know, well, is the sedimentation
17 rate still elevated. Wouldn't you want to know that?

18 A. That would be important to know.

19 Q. Okay. And he is sending the patient back to
20 Dr. Choi for Dr. Choi to answer that question; right?

21 MR. ALTMAN: Objection; assumes facts not in
22 evidence.

1 MR. MALONE: That's definitely in evidence.

2 BY MR. MALONE:

3 Q. Didn't you --

4 THE COURT: Why do you contend that it assumes
5 facts not in evidence?

6 MR. ALTMAN: Because it's not specifically
7 stated in the report. We went through that with
8 Dr. Horton.

9 MR. MALONE: Dr. Horton testified about this
10 the other day, Your Honor, just yesterday.

11 THE COURT: I overrule the objection.

12 BY MR. MALONE:

13 Q. I want you to assume that Dr. Horton testified
14 that he sent this patient back to Dr. Choi and that one
15 of the reasons he sent him the report was for Dr. Choi
16 to look for whether or not the sedimentation rate was
17 still elevated. That was a reasonable thing for
18 Dr. Horton to do. Do you agree?

19 A. I would.

20 Q. Wouldn't it have been important for Dr. Choi to
21 check to see if the sed rate was still elevated?

22 A. It would.

1 Q. And you wouldn't necessarily expect that when a
2 patient says to Dr. Choi, well, as far as I know the
3 heart is normal, the patient wouldn't necessarily know a
4 technical detail like a sedimentation rate. You
5 wouldn't expect that, would you?

6 A. No, I would not.

7 Q. Okay. And Dr. Choi had another reason to check
8 out the sedimentation rate on January 15th, 1997,
9 because he had a diagnosis potentially of arthritis;
10 right?

11 A. That's not usually a reason for doing a
12 sedimentation rate with -- with a joint like this, but
13 certain -- certain types of arthritis are evaluated by
14 sed rates. That is true.

15 Q. Okay. Now, let's talk about this January 2nd
16 visit about a week before the cardiac catheterization
17 was done. You mentioned that Dr. Choi's thought at that
18 time was that the young gentleman might be having a
19 peptic ulcer disease. He wrote that in his note.

20 A. Correct.

21 Q. Okay. Now, in his first visit, very first
22 visit back on November 14th, 1994, he had written

1 that --

2 THE COURT: Mr. Malone, if you're going to go
3 back to the first visit at this point, let's go ahead
4 and take the morning recess right now. And then --

5 MR. MALONE: Can I just tie in this one point?

6 THE COURT: Yes, sir, you can.

7 MR. MALONE: Okay.

8 BY MR. MALONE:

9 Q. The first visit Dr. Choi already knew that he
10 had a history of gastric ulcer disease in 1994; right?

11 A. Correct.

12 Q. Ulcer didn't seem to be doing anything in
13 November or December, but now here in January ulcer
14 seems to be rearing its ugly head; right?

15 A. Ulcer symptoms, yes.

16 Q. Okay. Good reason to get the prior records at
17 that point, January 1997.

18 A. No.

19 Q. I thought you said in your earlier testimony
20 that if a patient comes to you and has had prior
21 symptoms, been treated by another doctor that is
22 relevant to what he's now being seen by you for that you

1 might want look at those prior records.

2 A. That's true in general, but ulcer disease is
3 ulcer disease. And, you know, the history is adequate
4 in this case.

5 Q. If this patient had a -- Dr. Choi was sending
6 him out on January 2nd for an upper GI series. Where is
7 that? Upper GI series. Wouldn't it be relevant to
8 compare the new upper GI series to the old upper GI
9 series?

10 A. Not necessarily.

11 Q. Well, don't doctors always try to compare old
12 anatomy to new anatomy to see what changes there have
13 been?

14 A. It might be important if he found on doing
15 another test that he had a gastric ulcer, for example.
16 Then it might be important to know where a prior gastric
17 ulcer had been.

18 But, otherwise, if he did another upper GI
19 series or endoscopy and found everything to be normal,
20 then it's of no medical importance. So every case is
21 different; but, no, it's not necessary to get all the
22 information on the prior studies.

1 MR. MALONE: Okay. We can quit now if you
2 would like.

3 THE COURT: Ladies and gentlemen, we'll take
4 the morning recess for 15 minutes. Please don't discuss
5 anything about the case.

6 (The jury left the courtroom, after which the
7 following proceedings were held:)

8 THE COURT: Counsel, 15 minutes.

9 MR. GLASS: Yes, sir.

10 (A short recess was taken.)

11 THE COURT: Ready for the jury, Counsel?

12 MR. MALONE: Yes, sir.

13 THE COURT: Bring the jury in, please.

14 (The jury returned to the courtroom, after
15 which the following proceedings were held:)

16 THE COURT: Okay. Mr. Malone, you may continue
17 with your cross-examination.

18 MR. MALONE: Thank you. And I'll finish
19 hopefully fairly soon.

20 BY MR. MALONE:

21 Q. Just to finish a few questions on the cardiac
22 cath report of January 10th, Dr. Hubach --

1 A. Um-hum.

2 Q. Now, in your own practice you certainly have
3 sent patients out for cardiac catheterization.

4 A. I have.

5 Q. And you've talked to the cardiologist ahead of
6 time as Dr. Choi did with Dr. Horton to get an idea of
7 why it is the cardiologist wants to do it.

8 A. Yes.

9 Q. And then on some occasions at least with some
10 of these plans you've actually signed a written
11 authorization as Dr. Choi did in this case.

12 A. Right.

13 Q. Okay.

14 A. Yes.

15 Q. And then the normal routine is that you get the
16 report back from the cardiologist at some point in time;
17 right?

18 A. The usual routine; but, unfortunately, with
19 managed care that doesn't always happen, I'm sorry to
20 say.

21 Q. Well, it should happen.

22 A. It should happen. I agree.

1 Q. Okay. And when you get back those cardiac cath
2 reports you find them not always but sometimes helpful
3 in your further evaluation of the patient; true?

4 A. That's true.

5 Q. Sometimes the cardiac cath report will have
6 technical information in there that the patient was not
7 aware of after the catheterization procedure; true?

8 A. That may be.

9 Q. So when is it that you would expect Dr. Choi to
10 comply with the standard of care to have obtained this
11 cardiac cath report on this catheterization that he knew
12 was done on his 20-year-old patient?

13 MR. ALTMAN: Objection as to the form. It
14 assumes facts not in evidence, Your Honor.

15 MR. MALONE: I wasn't aware of any fact not in
16 evidence.

17 THE COURT: Mr. Altman.

18 MR. ALTMAN: The question assumed that Dr. Choi
19 had to get the information in order to comply with the
20 standard of care. That's what the question assumed.

21 BY MR. MALONE:

22 Q. Well, are you saying --

1 THE COURT: Why don't you rephrase the
2 question.

3 BY MR. MALONE:

4 Q. Are you saying that Dr. Choi was never required
5 to get this catheterization report, just let it
6 completely go off the radar screen forever, until the
7 end of time?

8 A. I didn't say that. I don't -- I don't know
9 that it's Dr. Choi's responsibility to get in contact
10 with the cardiologist to obtain those records.

11 I think it's -- the standard of care would
12 require that the cardiologist see that the -- the report
13 got to the primary care physician.

14 Q. And if the cardiologist does what the
15 cardiologist routinely does to get the report to the
16 doctor, but then it somehow by US mail or whatever
17 doesn't get there, is there any point in time at which
18 the internist is required to pick up the phone and say,
19 hey, you know, that cardiac catheterization we had, it
20 was kind of unusual, it involved a 20-year-old man, I
21 never got the report on that, could you send it over?

22 Any requirement at any point in time for him to

1 do that?

2 A. I don't know that there's a requirement to do
3 that, but as a -- as a physician communicates with his
4 patients and sees patients for other things it would
5 be -- you know, say, hey, I never got a report on that.

6 I just had that happen the other day from a
7 report that I have never gotten, but the -- the problem
8 is one that was -- was cardiac. And so I -- I didn't
9 obtain that report.

10 In this particular instance the problem was
11 really not cardiac. And, therefore, it was less
12 important for Dr. Choi to pick up the phone and talk to
13 Dr. Horton and say, hey, I never got a report.

14 Q. You say it was less important; but at some
15 point you would agree he should have tried to get the
16 report if, in fact, he never got it.

17 A. It -- for record completeness, yes; but in this
18 particular case this cardiac catheterization, per se,
19 did not contribute to the patient's --

20 Q. This cath report had vital information that
21 said the young man had a connective tissue disease.

22 A. I'm talking -- I'm talking strictly about the

1 heart now. Now, it did have other information; but --
2 and it is important. Right. You just showed me that.

3 And it does show other information that
4 would -- in this case would have been important to know.
5 And, therefore, Dr. Horton should have seen that he got
6 a report.

7 Q. He was handing the diagnosis to Dr. Choi on a
8 silver platter in this report, connective tissue
9 disorder.

10 MR. ALTMAN: Objection. Objection as to the
11 form of the question, Your Honor.

12 THE COURT: I sustain the objection.

13 BY MR. MALONE:

14 Q. He spelled out -- connective tissue disorder
15 includes lupus; right?

16 A. It does.

17 Q. And that's not within Dr. Horton's realm, is
18 it?

19 A. That's correct.

20 Q. But you can tell from this report that he was
21 just trying to be helpful to the internist, to give a
22 little special boost to his patient; right?

1 A. That's correct.

2 Q. Okay. And at some point even if Dr. Horton
3 telephoned and sent two mail copies of this report and
4 Dr. Choi never got it, you do say, don't you, that
5 Dr. Choi should have tried to learn the results of this
6 cath report?

7 A. At some point in time it would be important to
8 know that result, no question about it; but the onus has
9 been put on primary care physicians now to get all those
10 reports. It's impossible. We don't -- we are not set
11 up and geared to do that.

12 Q. Have you ever heard of a tickler system?

13 A. No.

14 Q. You've never heard of a system where you can
15 create a little flow chart that says like on the left
16 side referral sent out and then on the right side
17 there's a blank that's -- that says report received and
18 then you check it if you've received it. You've never
19 heard of a tickler system like that?

20 A. Not for that. We have one for laboratory tests
21 that we do in our office that's somewhat similar to that
22 but not for referrals.

1 Q. Well, a cardiac catheterization is just a much
2 more elaborate laboratory test, isn't it?

3 A. That's true.

4 Q. Okay. So you could have a tickler system.

5 A. One could have a tickler system, yes.

6 Q. Okay. Now, I want to talk about the December
7 '96 emergency room visit. You agree that the
8 information on page 4 of Exhibit -- I forgot the exhibit
9 number of the emergency room on 12-13-96.

10 You agree that that would have been very useful
11 information for Dr. Choi to have; true?

12 A. It would have.

13 Q. And you have no doubt that some conversation
14 occurred between Dr. Choi and the emergency room doctor
15 that day, don't you?

16 A. The record states that he did talk with
17 Dr. Choi.

18 Q. And, therefore, you assume that it happened.

19 A. I have to assume that.

20 Q. Now -- and you're aware that Dr. Choi doesn't
21 say it didn't happen. He just says he doesn't remember
22 the conversation.

1 A. That's correct.

2 Q. Okay. Now -- by the way, that's Exhibit 13.

3 If Dr. Choi had received this information
4 either orally or in writing from the emergency room
5 doctor, it would have been important for him to follow
6 up on. You would agree with that.

7 A. It would have been important.

8 Q. It signaled a potential kidney abnormality.

9 A. It could have been related to a kidney
10 abnormality. That's correct.

11 Q. Okay. Now, in your direct examination on this
12 very topic you said that he was not required -- that
13 there's an organized way of relating problems from the
14 emergency room doctor to the primary care doctor. And
15 there's kind of a standard way of people talking to each
16 other.

17 A. That's correct.

18 Q. Okay. What is that?

19 A. Well, I -- just to reiterate, when a physician
20 is talking with a physician they usually give the reason
21 that they're there -- we call it the chief complaint --
22 the symptoms that he had, the findings that they would

1 have during an examination and then an impression and
2 what the treatment was, the treatment that was given.

3 Q. And wouldn't they -- wouldn't you typically
4 learn at some point -- wouldn't the family practice
5 doctor typically learn at some point in the conversation
6 whether he asked or whether it was volunteered by the
7 emergency room doctor, by the way, we've got some
8 abnormal lab findings here?

9 MR. ALTMAN: Objection; calls for speculation.

10 MR. MALONE: It goes -- it goes to what he's
11 saying about the way the conversation routinely is
12 handled.

13 A. Right. And I also said that --

14 THE COURT: No. No. No. You don't say
15 anything yet until I've ruled. Anything further?

16 MR. ALTMAN: No, sir. It calls -- as it's
17 formed it's speculative.

18 THE COURT: I agree. And I think you need to
19 rephrase the question.

20 BY MR. MALONE:

21 Q. Well, let me try to put it in a more simple
22 way. The patient was vomiting so bad that he faints.

1 And he's dehydrated. We can assume that much is
2 related; right?

3 A. Correct.

4 Q. What should Dr. Choi have tried to get out of
5 the conversation with the doctor beyond that?

6 MR. ALTMAN: Objection. The way it's formed it
7 implies that something needed to be. That's contrary to
8 the doctor's testimony already.

9 MR. MALONE: I'm cross-examining him.

10 THE COURT: I overrule that objection.

11 THE WITNESS: Would you state the question
12 again, please?

13 BY MR. MALONE:

14 Q. What should Dr. Choi have tried to get out of
15 the conversation where the doctor is running down what
16 has happened with his patient?

17 A. Okay. Yeah. I think the bottom line is what
18 he really needs to get, what treatment was given, did
19 the treatment -- did the patient respond, was the
20 patient sent home, was the patient still having enough
21 problems that he should have been considered to be
22 admitted to the emergency room, should he be seen the

1 next day.

2 This is the type of thing that the emergency
3 room physicians convey to, you know, the primary care
4 physician or the gate keeper, if you will.

5 Q. And were there any abnormal lab findings that
6 needed to be followed up on. That's another thing;
7 right?

8 MR. ALTMAN: Objection, Your Honor. He's asked
9 the doctor the question. The doctor just answered it.

10 MR. MALONE: Excuse me. Now, this is
11 speaking --

12 THE COURT: Okay. Come on up here.

13 (Counsel approached the bench and the following
14 proceedings were held:)

15 THE COURT: Go ahead, Mr. Altman.

16 MR. ALTMAN: I object to the form of the
17 question, Your Honor, in that the doctor just said -- he
18 was asked what information is communicated. The doctor
19 answered it.

20 Now Mr. Malone is trying to say and this also
21 would have been communicated. What it does is it's
22 mischaracterizing his testimony. The doctor has said

1 what was communicated.

2 THE COURT: I'm going to grant him leeway.
3 This is cross-examination. If the doctor disagrees with
4 the predicate, the doctor can tell him that. The
5 objection is overruled.

6 MR. MALONE: Okay.

7 (The bench conference was concluded.)

8 THE COURT: The objection is overruled.

9 MR. MALONE: Go ahead, if you remember it.

10 THE WITNESS: Repeat it, please.

11 MR. MALONE: I will. I'll give you a little
12 more follow-up or background, if I might.

13 BY MR. MALONE:

14 Q. You agree Dr. Choi was obligated to find out
15 that the patient had been there, that he needed
16 intravenous resuscitation and that he was sent home. At
17 least that much; right?

18 A. I think that would have been conveyed in the
19 telephone conversation, yes.

20 Q. Okay. And in addition to that if he had any
21 abnormal laboratory findings, you would expect that that
22 would have been conveyed to Dr. Choi, something he

1 should have figured out by the end of the conversation;
2 true?

3 MR. ALTMAN: Objection as to the speculative
4 nature of you would have expected.

5 THE COURT: On cross-examination the objection
6 is overruled.

7 A. It has been my experience that patients are
8 usually given a copy of their lab results. They're
9 usually given a copy of the emergency room report saying
10 that the diagnosis -- what the diagnosis was, what the
11 treatment was given and what they -- if they asked the
12 patient to follow up, go see your doctor the next day,
13 two days, one week, whatever. And I don't believe there
14 is any documentation like that in this case. So I --

15 BY MR. MALONE:

16 Q. There is a discharge sheet that says -- tells
17 him to go to Dr. Choi. You saw that.

18 A. I did not see that. And I did not -- I did not
19 hear from Dr. Choi that he received a copy of this lab
20 from the patient. Now, again, there's an obligation of
21 patients --

22 Q. Excuse me. If you don't mind, my -- I don't

1 think you're quite answering my question.

2 A. Okay. I'm sorry.

3 Q. We're talking about this conversation where now
4 we've got doctor to doctor communicating to each other
5 on the telephone. Hi, Dr. Choi. I'm Dr. X at Fairfax
6 emergency room. I'm treating your patient here. He's
7 still here. We're going to send him home, but we want
8 him to have follow-up with you.

9 You agree that that much Dr. Choi should have
10 learned about, whether or not there should have been
11 follow-up; right?

12 A. If that was the recommendation, then yes.

13 Q. Okay. And did you look in the record that says
14 they did recommend that he follow up with Dr. Choi?

15 A. I -- I did look at all the records. I don't
16 recall that at the moment.

17 MR. MALONE: Well, let's just take a look then.
18 I think the court reporter has my copy. I mean the
19 clerk has my copy. If I may.

20 THE COURT: Take a look in the notebook.

21 THE CLERK: It's on the witness stand.

22 THE COURT: It's on the witness stand,

1 Mr. Malone.

2 MR. MALONE: I'm sorry. May I look at that for
3 a second?

4 BY MR. MALONE:

5 Q. Now, the patient received some discharge
6 instructions. This is page 9 of this exhibit, 13. And
7 it included drinking plenty of fluids, bland diet. And
8 then it says refer to personal physician, Dr. Choi, call
9 for appointment.

10 Do you see that?

11 A. I do.

12 Q. Had you not been aware of that before now?

13 A. Yes, I had. I just had forgotten the format.

14 Q. In any event, you can glean from that, can't
15 you, that as part of the call from the emergency room
16 doctor to Dr. Choi one of the reasons they're calling
17 him is the idea that you can probably expect to receive
18 a call from your patient for an appointment; right?

19 MR. ALTMAN: Objection; calls for speculation.

20 BY MR. MALONE:

21 Q. Or is that not right?

22 A. No. I don't think that's right. This is --

1 THE COURT: Hold on one second. Counsel,
2 Doctor, if there's an objection, I have to rule before
3 we go on with the question or we have an answer to the
4 question. The legal basis.

5 MR. ALTMAN: The objection was speculation.

6 MR. MALONE: I'm asking him what -- I don't
7 think it's speculative, because it goes to the patient
8 being instructed to follow up with Dr. Choi and whether
9 or not he would expect that that would be part of the
10 oral communication between the two.

11 MR. ALTMAN: That's the basis for the
12 speculation.

13 THE COURT: Rephrase your question. I sustain
14 the objection as phrased.

15 MR. MALONE: Okay.

16 BY MR. MALONE:

17 Q. Well, where I'm getting at is this: At some
18 point in this conversation between the emergency room
19 doctor and Dr. Choi wouldn't you expect that Dr. Choi
20 would have learned of the only abnormal lab finding that
21 was found at that hospital on that day?

22 A. That's a difficult question to answer with any

1 certainty, because they were abnormal lab tests. True.
2 He had nothing to eat for three days. He had been
3 vomiting to the point where he had collapsed and
4 syncope. That means low blood pressure.

5 When you have low blood pressure you have
6 decreased volume of blood. You have decreased blood
7 flow to your kidneys. Decreased blood flow to your
8 kidneys, you get changes in kidney function.

9 All of these things -- and this is -- it's
10 kidney abnormality. And it's significant if there was
11 not those other extenuating circumstances, but given
12 those circumstances it may not have been that
13 significant.

14 The -- they didn't say on this discharge sheet
15 follow up with your kidney function test, follow up
16 because you have abnormal creatinine. It says, yeah, we
17 treated him for what you should do and just check up
18 with your -- your regular doctor.

19 Q. Isn't precisely the reason that you follow up
20 with your primary doctor is to make sure that your --
21 the only abnormal labs you've had have returned to
22 normal? Isn't that the only reason to do that?

1 MR. ALTMAN: Objection to the form and to the
2 speculative nature of the question. The doctor has just
3 answered that question.

4 THE COURT: I overrule the objection.

5 A. Yeah. In many cases, yes, it should be. And
6 if he had that information conveyed to him, then it
7 would have been important to do that.

8 I'm not -- there's no -- I have no evidence
9 that that information or that creatinine and that BUN
10 were -- were conveyed to Dr. Choi. It doesn't say so on
11 the discharge instructions.

12 And -- and we don't know what the conversation
13 was from the emergency room physician. The discharge
14 diagnosis when he left the emergency room was
15 dehydration. And he treated the dehydration. It didn't
16 say anything else about anything else.

17 BY MR. MALONE:

18 Q. The reason to follow up, though, is to make
19 sure -- the reason to follow up with the primary care
20 doctor I thought you just admitted is to make sure that
21 the labs had returned to normal; right?

22 A. To -- to make sure that the patient is doing

1 okay. Sure. But the -- the labs to my knowledge never
2 entered into this. There's no -- I don't see any
3 evidence that Dr. Choi got that value of that lab.

4 Q. He could have gotten it just by asking for it,
5 couldn't he?

6 A. He could have.

7 Q. And if he had gotten that abnormal lab finding,
8 it was something that he was obligated to follow up on;
9 true?

10 A. If he had received it, then he would have been
11 obligated to follow up. I have no evidence that he did
12 receive it.

13 MR. MALONE: That's all I have.

14 THE COURT: Any redirect?

15 MR. ALTMAN: Very briefly.

16 REDIRECT EXAMINATION

17 BY MR. ALTMAN:

18 Q. Doctor, you indicated in response to a question
19 from Mr. Malone that it is possible to have a tickler or
20 a diary type system; is that correct?

21 Can you tell the ladies and gentlemen the
22 number of patients that you have actively under

1 treatment at any one time?

2 MR. MALONE: Excuse me. That's not relevant
3 unless it relates to Dr. Choi's panel of patients.

4 MR. ALTMAN: It goes to the questions about the
5 tickler system, sir.

6 THE COURT: Well, I thought the question was
7 whether he knew what a tickler system was. And he said
8 that he did not.

9 MR. ALTMAN: Then Mr. Malone went on and asked
10 questions about is it possible to have some type of
11 system to remind you about studies.

12 THE COURT: All right. That's true. I
13 overrule the objection.

14 MR. ALTMAN: And that's where I'm headed.

15 THE COURT: Okay.

16 BY MR. ALTMAN:

17 Q. Doctor, you told the ladies and gentlemen you
18 see about 25 patients a day. Number of patients that
19 you have actively under treatment.

20 A. I wouldn't even venture a guess. I mean, there
21 are three people in our office that are seeing patients.
22 And it's many.

1 Q. Okay. And do many of those patients -- are
2 many of those patients sent out for consultations
3 whether it's radiology, cardiology, rheumatology,
4 laboratory studies and the like?

5 A. Many are, yes.

6 Q. Is there any way, Doctor, considering the
7 nature, let's say, of your practice or considering the
8 practice where someone only sees 20 patients a day
9 instead of 25 patients a day to be kept abreast of when
10 reports should be coming back, when you might expect
11 them to come back, laboratory studies?

12 Is there any way to do that?

13 A. Not really. I'm on the Medical Records
14 Committee at Fairfax Hospital. And there's always a
15 delay even in the hospital situation of getting records
16 back in a timely fashion. It's been a problem. And
17 I've been on that committee for many years. And it's an
18 ongoing problem.

19 MR. ALTMAN: Nothing further.

20 MR. MALONE: I have one question.

21

22

1 cracks if you can avoid it.

2 MR. ALTMAN: Objection; relevance; to the form
3 of the question.

4 THE COURT: Do you agree?

5 MR. MALONE: I'll withdraw it.

6 THE COURT: The question is withdrawn.

7 MR. MALONE: Sorry, Your Honor.

8 THE COURT: Okay.

9 MR. ALTMAN: Nothing further, sir.

10 THE COURT: Okay. Is this witness free to go
11 or subject to recall?

12 MR. ALTMAN: He's free to go.

13 THE COURT: Mr. Malone.

14 MR. MALONE: Yes, sir.

15 THE COURT: Okay. Doctor, thank you very much.
16 You're free to go, sir.

17 (Witness excused.)

18 THE COURT: All right. Counsel, are we now
19 going back to the presentation of the plaintiff's
20 evidence?

21 MR. MALONE: Yes, sir.

22 MR. ALTMAN: I believe so, sir.

1 DIRECT EXAMINATION

2 BY MR. MALONE:

3 Q. Good afternoon, sir.

4 A. Good afternoon.

5 Q. You're Sotiri's dad?

6 A. Yes, sir.

7 Q. Tell us about your own family background.

8 Where are you from?

9 A. I came back from Athens, Greece.

10 Q. When were you born in Greece?

11 A. Athens.

12 Q. When?

13 A. When? 1994. '90 -- '44. I'm sorry. 1944.

14 September.

15 Q. September of 1944?

16 A. Yes, sir.

17 Q. How old are you now?

18 A. I'm 55.

19 Q. Are you a little bit nervous?

20 A. Yeah, a little bit.

21 Q. Have you ever testified in court before?

22 A. No.

1 Q. Ever been involved in any kind of legal
2 proceeding at all?

3 A. No.

4 Q. When did you come to the United States?

5 A. 1971.

6 Q. Are you married, sir?

7 A. Yes, sir.

8 Q. Is this your wife here?

9 A. Yes, sir.

10 Q. What is her name?

11 A. Mina Ponirakis, M-I-N-A.

12 Q. And what is your occupation?

13 A. Home improvement.

14 Q. Home improvement?

15 A. Yes, sir.

16 Q. What is your wife's occupation?

17 A. She work in a restaurant.

18 Q. What does she do in the restaurant?

19 A. Waitress. Waitress.

20 Q. Which one?

21 A. In Springfield. Saratoga restaurant. Saratoga
22 Pizzeria.

1 Q. Saratoga Pizzeria?

2 A. Yes, sir.

3 Q. Okay. Be sure to talk directly into the
4 microphone.

5 A. Okay.

6 Q. Okay. Now, tell us a little bit about your own
7 educational level.

8 A. I have high school education, three years of
9 college.

10 Q. Okay. And in the home improvement business
11 what kind of work do you do?

12 A. I do additions, kitchens, floors, decks, roofs.

13 Q. Who are your children?

14 A. 29-year-old Angelo Ponirakis and 23-year-old
15 Sotiri Ponirakis.

16 Q. Those are your two children? Those are your
17 only two children?

18 A. Yes.

19 Q. Do both of them live at home?

20 A. Yes.

21 Q. Does Angelo live with you with his wife?

22 A. Yeah, right now.

1 MR. ALTMAN: Excuse me, Your Honor. May we
2 approach, sir?

3 MR. MALONE: That's the last question on that.

4 MR. ALTMAN: All right.

5 THE COURT: Okay. Let's go forward, please.

6 MR. MALONE: Right.

7 BY MR. MALONE:

8 Q. What was -- did you take your son to see
9 various doctors starting after his high school
10 graduation in 1994?

11 A. Yes, sir.

12 Q. Did you routinely, always go with him to the
13 doctor's office?

14 A. Yeah, 99 percent.

15 Q. Okay. Now -- one second.

16 Sotiri has -- the jury hasn't seen it yet, but
17 Sotiri has covered in his video deposition some of the
18 questions I was going to ask you about going to
19 different doctors.

20 So I'm going to skip ahead a little bit so I
21 don't repeat what the jury is eventually going to see
22 here, Your Honor. That's what I was just talking about

1 with co-counsel.

2 Let's just jump to November 1996 when you took
3 Sotiri to the doctor. Did you take your son to the
4 urgent care center on November 13th, 1996?

5 A. Yes, sir.

6 Q. Why did you go to that particular outfit?

7 A. Because he have some chest pain.

8 Q. But, I mean, why did you pick that particular
9 one as opposed to some other place?

10 A. Yeah. Because I -- I call Dr. Choi office.
11 And Dr. Choi was not in his office that time. And his
12 secretary told me to go to this place, because it was
13 very close to his office.

14 Q. Okay. And so you took your son to the urgent
15 care center on November 13th, 1996.

16 A. Yes, sir.

17 MR. MALONE: Okay. I want to trace out some of
18 the follow-up you did and use this chart to help us.
19 Let me use the easel. And I'm going to ask you to stand
20 on one side of the chart. And I'll stand on the other;
21 okay?

22

1 (The witness left the stand and went in front
2 of the jury box.)

3 MR. MALONE: Let's switch places, if you don't
4 mind.

5 THE COURT: Let's get the logistics set up.
6 Mr. Ponirakis appears to be soft spoken. I need you to
7 keep your voice up so that the court reporter can hear
8 you.

9 THE WITNESS: Yes, sir.

10 THE COURT: And, Mr. Altman, can you see?

11 MR. ALTMAN: Yes, sir.

12 THE COURT: Okay. You may proceed.

13 BY MR. MALONE:

14 Q. At the urgent care clinic on November 13th,
15 1996, did your son see a doctor?

16 A. Yes, sir.

17 Q. Were you with him at the time?

18 A. Yes, sir.

19 Q. And who was the doctor?

20 A. Dr. Pickens.

21 Q. Dr. Pickens?

22 A. Yeah.

1 Q. And the recommendation according to their
2 records was that you follow up with Dr. Choi.

3 A. That's correct.

4 Q. Did you do that the next day?

5 A. Yes, sir.

6 Q. Okay. Now, Dr. Choi's records reflect that you
7 were in -- that your son was in his office with chest
8 pain on November 14th, 1996. Dr. Choi examined your son
9 on that day.

10 A. Yes, sir.

11 Q. And were you with him then?

12 A. Yes.

13 Q. And according to his records he gave you a
14 prescription for Motrin or ibuprofen; asked your son to
15 have a rib x-ray and to return in one week. Let me ask
16 you about each item.

17 Did you get that prescription filled for your
18 son?

19 A. I -- I remember I get the prescription, but I
20 don't remember what kind of prescription it were. Yes,
21 I remember it.

22 Q. You remember filling the prescription. You

1 don't remember the name on it.

2 A. Yes. I don't remember the name.

3 Q. But it was a prescription that Dr. Choi give
4 you.

5 A. Yes, sir.

6 MR. ALTMAN: Objection to the leading nature of
7 these questions, sir.

8 THE COURT: Sustained. Please don't lead the
9 witness.

10 MR. MALONE: Okay.

11 BY MR. MALONE:

12 Q. I can show you -- you were going at that time
13 to -- Plaintiff's Exhibit 12. Let me show you an
14 excerpt from that. Is this a Safeway pharmacy --

15 A. Yes.

16 Q. -- for November 14th, 1996?

17 A. Yes. I remember it.

18 THE COURT: This is -- does it have an exhibit
19 number?

20 MR. MALONE: This is part of Exhibit 12, Your
21 Honor.

22 THE COURT: Okay.

1 THE WITNESS: Yes.

2 BY MR. MALONE:

3 Q. And does it say ibuprofen on there, 600
4 milligrams?

5 A. 600 milligrams.

6 Q. And does it have Dr. Choi's name on there?

7 A. Yes, sir.

8 Q. And you got this prescription filled the same
9 day.

10 A. Yes, sir.

11 Q. Okay. On the rib x-ray, did you have that done
12 that Dr. Choi recommended?

13 A. Yes. Yes.

14 Q. Was that done the next -- when was it done?

15 A. A few days after.

16 Q. Okay. And he said to return to the office.
17 Did you return with your son to the office on November
18 3rd, 1996?

19 A. On December 3rd?

20 Q. I'm sorry. November 23rd, 1996.

21 A. Yes, sir. Yes.

22 Q. Okay. Now, did Dr. Choi give your son

1 prescriptions on that day?

2 A. Yes. Every time -- every time I was going to
3 his office it was given to us. I mean to my son. A
4 prescription, yeah.

5 Q. Okay. And did you take responsibility for
6 getting those prescriptions filled?

7 A. Yes, sir. Always.

8 Q. And you had those prescriptions filled.

9 A. Yes, sir.

10 Q. Okay. Now, what led up to this visit with
11 Dr. Horton on December the 4th, 1996?

12 A. I went to Dr. Choi office and with chest pain.
13 And --

14 Q. I'm sorry. You're saying "I". Do you mean
15 your son?

16 A. I mean with my son, yeah. We -- we went to
17 Dr. Choi office with chest pain and complain about it.
18 And he sent us to Dr. Horton, to the cardiologist.

19 Q. Okay. And did you go see Dr. Horton with your
20 son on December the 4th, 1996?

21 A. Yes, sir.

22 Q. Dr. Horton gave you a prescription on that day

1 for Indocin. I think I have that record here somewhere.
2 One second.

3 I don't have it right now, but did you get that
4 prescription filled?

5 A. Yes.

6 Q. Okay. And did your son take the medicine that
7 was --

8 A. Yes, sir.

9 Q. Okay. Dr. Horton ordered some laboratory
10 tests; sedimentation rate, CPK and hematocrit. Did you
11 get those tests done?

12 A. Yeah. I don't know what that means, but he
13 make some tests for my son. I don't know what.

14 Q. Okay. Did you take your son to this American
15 Medical Labs to get the blood drawn?

16 A. Yes. Yes. Across the street. Across the
17 street from his building.

18 Q. It was across the street from Dr. Horton's
19 office?

20 A. Yes.

21 Q. And did you have that done the same day?

22 A. The same day.

1 Q. Okay.

2 MR. ALTMAN: Objection to the leading nature of
3 this series of questions, sir.

4 MR. MALONE: This is all in the records, Your
5 Honor, but --

6 THE COURT: That may be, but please don't lead
7 the witness.

8 MR. MALONE: Okay. It just goes back to --

9 THE COURT: I'll let the last answer stand.
10 That's not in -- that specific fact is not in contest,
11 is it?

12 MR. ALTMAN: No, sir, it is not.

13 MR. MALONE: I don't think any of this is.

14 THE COURT: I understand that your objection is
15 that you want the nature of the examination to change.
16 I'm going to allow the last answer to stand, but please
17 do not lead the witness.

18 MR. MALONE: Okay.

19 BY MR. MALONE:

20 Q. Now, why did you take your son to see
21 Dr. Horton the next day?

22 A. We have some echo test -- echo test. The same

1 kind of symptoms.

2 THE COURT: I can't hear you. So I assume some
3 of the jurors can't hear you.

4 BY MR. MALONE:

5 Q. What kind of symptoms was your son having the
6 next day, December the 5th?

7 MR. ALTMAN: I couldn't hear, Your Honor.

8 THE COURT: Mr. Altman, can you see from there?

9 MR. ALTMAN: I can see fine. Because
10 Mr. Ponirakis is facing this way I couldn't hear him
11 where I was standing.

12 THE COURT: I'm sorry, Mr. Malone. Would you
13 repeat the question, please?

14 MR. MALONE: Okay.

15 BY MR. MALONE:

16 Q. Your son went back to -- the records reflect
17 your son went back to see Dr. Horton --

18 A. Yes.

19 Q. -- the very next day.

20 And my question is: What was wrong with him
21 that you saw as a lay person?

22 A. Yeah, for the chest pain.

1 Q. Okay. And Dr. Horton, according to his record,
2 his letter to Dr. Choi, said that he recommended you get
3 an echo stress test in the near future.

4 Was this set up at some point for your son?

5 A. Yes, sir.

6 Q. Okay. And was that the echo stress test that
7 was done down here on January the 8th?

8 A. On the 8th, yes, sir.

9 Q. Okay. What took your son to the emergency room
10 on December 13th, 1996? What did you see?

11 A. Yeah. On December 13 he wake up in the morning
12 and -- to go to school. And he faint. And I was --

13 Q. You say he fainted?

14 A. He fainted, yes. I'm sorry. And I grab him.
15 And I put him on the -- on the bed, his bed. And I call
16 right away the ambulance.

17 Q. 911?

18 A. 911. And they came over there. And they took
19 him to the emergency room at Fairfax Hospital.

20 Q. Okay. And your son got treated at Fairfax
21 Hospital.

22 A. Yes, sir.

1 Q. Were you with him?

2 A. Yes, all the times.

3 Q. Okay. And then there's a discharge instruction
4 sheet with your son's signature on it. Have you seen
5 that?

6 A. Yes.

7 Q. Okay. Did you make a follow-up appointment
8 with Dr. Choi after that?

9 A. Yes, sir.

10 Q. Okay. And that was on January the 2nd.

11 A. Yes, sir.

12 Q. Now, Dr. Choi's records reflect on January 2nd
13 that the first thing he asked you to get was a
14 gallbladder sonogram and an upper GI series. Did you
15 take your son to get these x-rays done a few days later?

16 A. Yes, sir.

17 Q. Let me see if I can find the prescriptions.

18 Now, Dr. Choi -- let me show you another page
19 from Exhibit 12. Dr. Choi gave you some prescriptions
20 on January the 2nd.

21 A. Yes.

22 Q. Did you get them filled on the same day?

1 A. Yes.

2 Q. And did your son take the medicine?

3 A. Yes, sir.

4 Q. What happened the next day?

5 A. The next day I took him out to go to the
6 grocery store. And I go to 95. And next to me he -- he
7 have something just like this. And I was scared to
8 death. And I don't know what to do.

9 And I was at Duke and 95. And the next exit
10 was the Alexandria Hospital. And I was going straight
11 to the emergency room. And the doctors over there, they
12 told us, you know, he's --

13 MR. ALTMAN: Objection to the hearsay, Your
14 Honor.

15 THE COURT: I sustain the objection to what the
16 doctors told him. And the record should reflect the
17 fact that the witness was shaking when he was describing
18 what he saw his son doing.

19 BY MR. MALONE:

20 Q. Okay. Was it your -- what was your
21 understanding? Don't say what the doctors said, but
22 what was your understanding was the problem with your

1 son on January the 3rd?

2 A. I thought -- I thought some -- something
3 terrible happen to my son.

4 Q. No. I mean once you had gone through all the
5 testing and your son was ultimately sent home.

6 A. Yeah. After maybe six, seven hours.

7 Q. Okay.

8 A. Yeah.

9 Q. What was your understanding of what the problem
10 was?

11 A. He was allergic to the medicine.

12 Q. Allergic to the medicine?

13 A. Yes.

14 Q. And was that fact reported to Dr. Choi?

15 A. Immediately, yeah.

16 Q. And I think we've already shown that in
17 Dr. Choi's records. That was the allergic to Compazine.

18 A. Yes.

19 Q. Okay. And, by the way, back on the January 2nd
20 visit, did you return to Dr. Choi's office --

21 A. Yes.

22 Q. -- after January 2nd?

1 A. Yeah.

2 Q. And that was on January 15.

3 A. Um-hum.

4 MR. ALTMAN: Objection to the leading nature of
5 the questions.

6 THE COURT: Can I see counsel at the bench for
7 a moment?

8 (Counsel approached the bench and the following
9 proceedings were held:)

10 THE COURT: Mr. Malone, you're testifying with
11 the father standing there. I'm not going to let you do
12 it. And it's unfair to opposing counsel for him to have
13 to continue to interpose objections.

14 I realize that much of this is uncontested.
15 And the things that are really uncontested I would
16 appreciate there not being objections, but you're
17 basically just testifying with the witness standing
18 there. And I am ordering you to stop doing it. You
19 need to ask nonleading questions.

20 MR. MALONE: And I intend to. My only -- and I
21 don't mean any disrespect whatsoever. My only point is
22 I have never gotten yet to a point where there was any

1 controversy about any of these matters.

2 And I thought under the rule to move things
3 along, especially with a witness where English is not
4 his native language much as Dr. Choi had -- was given
5 leeway with his counsel.

6 THE COURT: You can phrase questions what, if
7 anything, you did in response to that or --

8 MR. MALONE: All right.

9 THE COURT: -- whatever you can do.

10 MR. MALONE: Thank you.

11 THE COURT: I realize that some of this is
12 preliminary, but it is basically the heart of what I
13 understood you were going to have this witness testify
14 to. So no more leading.

15 (The bench conference was concluded.)

16 THE COURT: Okay.

17 BY MR. MALONE:

18 Q. We had talked earlier about your son being set
19 up for this echo stress test. Did you take -- what did
20 you do to get that echo test done, if anything, on
21 January the 8th?

22 A. What -- what --

1 Q. What was your involvement in it?

2 A. I got the referral from Dr. Choi. We got the
3 referral from Dr. Choi. And we went to Dr. Horton
4 office. And he have the test.

5 Q. Okay. After that what did -- what was
6 communicated to you about further follow-up testing that
7 was needed?

8 A. He told us -- Dr. Horton says maybe he needs --
9 he's going to have catheterization, cardiac -- cardiac
10 catheterization.

11 Q. Okay. And how soon was that done?

12 A. Probably a few days, couple days after that.

13 Q. Okay. Did you take your son to the hospital
14 for that?

15 A. Yes, sir.

16 Q. Which one was it?

17 A. Arlington Hospital.

18 Q. Okay. Tell us a little bit about the -- from a
19 lay standpoint -- I take it you weren't in the room when
20 the --

21 A. No, I was not there.

22 Q. Okay. Where did you --

1 A. But I took him. I took him there with the
2 doctor together. And then I came out.

3 Q. Okay. So you're saying you took him into the
4 room where the procedure was going to be done.

5 A. Yes. Yes.

6 Q. And then where did you go?

7 A. I went to the -- outside in the waiting room.

8 Q. Okay. Did you take off and leave or did you
9 stay?

10 A. I was staying over there.

11 Q. Okay. What happened afterwards?

12 A. I was waiting. And maybe -- I don't know -- a
13 couple hours after that he -- the -- Dr. Horton came
14 out. And he says, Mr. Ponirakis, you know, he's got
15 this very normal. And he make me to jump, you know. I
16 was very happy.

17 Q. I'm sorry. Are you talking about the heart
18 now?

19 A. Yeah. The heart catheterization. Right.

20 Q. You say you -- I'm not hearing you quite right.

21 A. He told me his heart is okay, he not having any
22 problem, his heart is very normal.

1 Q. Do you remember him telling you anything --
2 well, what did he tell you about following up with
3 Dr. Choi, if anything?

4 A. Yes. He told me to follow up with Dr. Choi.

5 Q. And you did do that.

6 A. Yes, sir.

7 Q. Okay. What, if anything, else do you remember
8 about the conversation with Dr. Horton, any other
9 specifics that you remember?

10 A. I was very happy that moment, you know, when he
11 told me, you know, everything was normal with his heart.
12 And I don't remember. I don't remember anything else.

13 Q. You don't remember anything about the kidneys
14 being mentioned.

15 A. No.

16 Q. Did Dr. Horton show you the pictures of the
17 heart blood -- heart vessels?

18 A. Yes. He show me -- not the pictures. Yeah, he
19 show me on the little screen on the -- they have little
20 screens over there. I don't remember how many screens
21 they have. And he tried to explain to me about my son
22 heart.

1 Q. Okay.

2 A. Yeah.

3 Q. So you followed up with Dr. Choi on -- what day
4 was that?

5 A. I don't remember. 15. January 15.

6 Q. Okay. What was your son's problem on January
7 15th?

8 A. The same chest pain again.

9 Q. On January 15th, though, we're focusing --

10 A. January 15. No, he was with -- with the right
11 knee. He was -- pain very much on the right knee.

12 Q. And what did you see? Limping or anything like
13 that or what?

14 A. Nothing. Just his knee was very normal. I
15 think a little bit swollen, a little bit, you know --

16 Q. Okay. Did you take him to Dr. Choi's office
17 personally on that day?

18 A. Yes, I took him over there.

19 Q. Okay.

20 A. And he --

21 Q. And did Dr. Choi refer you to an orthopedist?

22 A. No. The orthopedic was my doctor for many

1 years. And I talked to Dr. Choi to give me referral for
2 this doctor. And I went to his -- I went to the
3 orthopedic office. And his secretary call Dr. Choi.
4 And he FAXed the referral to him.

5 Q. You're talking about Dr. Theiss now.

6 A. Theiss. Yes, sir.

7 Q. Okay. Now, Dr. Choi on this visit said to
8 return in two weeks. And according to the records you
9 did not bring your son back in two weeks.

10 A. No, sir.

11 Q. Why was that?

12 A. Because everything was okay. He wasn't having
13 any complaint.

14 THE COURT: Mr. Ponirakis, I'm having
15 difficulty hearing you. You need to speak louder,
16 please.

17 THE WITNESS: He wasn't having any complaint.
18 That's why we went --.

19 BY MR. MALONE:

20 Q. Did you go back to see the orthopedist a second
21 time? According to the records January 20th you saw the
22 orthopedist.

1 A. Yes. One more time, I believe. Yes.

2 Q. How did the knee problem resolve?

3 A. It was okay. He give it to him, some kind of
4 medicine. I don't remember what -- what kind it was.
5 He was okay the next day.

6 Q. Okay. Now, what led your son to wind up seeing
7 a gastroenterologist? We know he saw a Dr. Peters
8 towards the end of January 1997. What led up to that?

9 A. For the chest pain and --

10 Q. I'm talking about the stomach doctor.

11 A. The stomach doctor. Yeah, he have some stomach
12 problems and vomiting.

13 Q. And was this something he had had before?

14 A. Yes. Yes, sir.

15 Q. Okay. What did you do about it when your son
16 started having the stomach pains?

17 A. I took him to the doctor.

18 Q. Okay. Well, how did you get to Dr. Peters,
19 though, is the question.

20 A. From doctor office. Dr. Choi office.

21 Q. Okay. Did you call Dr. Choi or -- did you do
22 all this on the telephone or did you do it in person or

1 do you recall?

2 A. I think that time -- I think that time we went
3 to doctor office, Dr. Choi office. And I got -- we got
4 the referral from -- from his office.

5 Q. Okay. And then how soon after that did you
6 take your son to see the gastroenterologist doctor?

7 A. I think the same day. I think, if I remember
8 correctly.

9 MR. MALONE: All right. You can sit back down.
10 I've got a few more questions for you.

11 THE COURT: Are you going to be using the chart
12 any further?

13 MR. MALONE: I might ask a couple questions
14 about it.

15 THE COURT: Turn it the other way then, please.

16 MR. MALONE: Okay.

17 (The witness resumed the stand.)

18 BY MR. MALONE:

19 Q. According to Dr. Peters's records your son had
20 a biopsy and endoscopy on January the 30th, 1997. Did
21 you take him in for that?

22 A. Yes, sir.

1 Q. And did your -- was your son prescribed some
2 medication after that?

3 A. Yes, sir.

4 Q. Did that as far as you could tell from a lay
5 point of view -- did that seem to calm down his stomach
6 situation?

7 A. Yes.

8 Q. When did you next notice health problems with
9 your son?

10 A. When?

11 Q. When did you next notice health problems with
12 your son after this interval that we've just been
13 talking about? We've talked about November, December,
14 January. When was the next time you noticed any health
15 problems?

16 A. The next time -- the next time was in June of
17 '97.

18 Q. And what did you notice at the time?

19 A. He have some vomiting and fevers.

20 Q. And did he go to the emergency room for that?

21 A. Yes.

22 Q. And then according to the records you took your

1 son or your son went to Dr. Choi on July the 1st, '97.

2 Were you involved in that visit as well?

3 A. Yes.

4 Q. What was his problem at that time?

5 A. His problem was vomiting and chills.

6 Q. Okay. And were there any complaints that you
7 recall which have been mentioned in the records about
8 your son having pain in the sides?

9 A. Yeah, I think so, too. Yeah, I think so.

10 Q. All right. Now, in December 1996 when your son
11 was at Fairfax Hospital, were you ever aware at that
12 time that he had an abnormal kidney test?

13 A. No.

14 Q. When did you first become aware that your son
15 had abnormal kidney lab reports?

16 A. In the summer of '97, July. July of '97.

17 Q. And how did you learn it? Who from?

18 A. We learn it from Dr. Mahoney.

19 Q. Okay. And that was the Dr. Mahoney who
20 testified here yesterday?

21 A. Yes, sir.

22 Q. Okay. The nephrologist.

1 A. Yes, sir.

2 Q. Okay. You gave your son a kidney.

3 A. Yes, sir.

4 Q. Which one?

5 A. My left.

6 Q. Okay. And did you have to go to the hospital
7 to get that done?

8 A. Of course.

9 Q. Which hospital was it?

10 A. Georgetown.

11 MR. MALONE: Okay. I gave you a notebook of
12 medical bills. May I approach the witness, Your Honor?

13 THE COURT: Yes. Can I see counsel for a
14 moment, please?

15 (Counsel approached the bench and the following
16 proceedings were held:)

17 THE COURT: Is there a question about the
18 admissibility of the bills?

19 MR. ALTMAN: Well, I think on the record I need
20 to object. I think His Honor is going to allow -- rule
21 that there was sufficient testimony as to --

22 THE COURT: How many different sets of bills

1 are we going to be going through?

2 MR. ALTMAN: We've got a fairly significant
3 number.

4 MR. MALONE: There is a summary.

5 MR. ALTMAN: I'm going to object to the
6 summary. I think it's unnecessary. It's a hearsay
7 document. They created it.

8 THE COURT: Okay. I'm going to sustain the
9 objection with the present status of Virginia law to
10 40A. Some day the General Assembly may pass a --

11 MR. MALONE: It's a 10:06 issue. We don't have
12 10:06 here.

13 THE COURT: We don't have 10:06. I was about
14 to say hopefully the Virginia General Assembly will
15 eventually agree with the federal rules, because I
16 believe it is helpful for a jury.

17 MR. MALONE: Right.

18 THE COURT: But it is -- it does not qualify
19 under any of the exceptions to the hearsay rule under
20 Virginia law as it presently stands. And I, therefore,
21 sustain the objection to it.

22 You can use it in your closing argument for

1 demonstrative purposes if you wish, but I sustain the
2 objection under 40A.

3 MR. MALONE: May I -- in the examination may I
4 ask him what each bill was and may I write it down on a
5 flip chart and ask him the total?

6 THE COURT: Any objection to that?

7 MR. ALTMAN: Well --

8 THE COURT: Can't you put that as a
9 demonstrative aid when you're going through this in
10 your --

11 MR. MALONE: Okay. I'll do that.

12 MR. ALTMAN: I thought what His Honor called us
13 up here for --

14 THE COURT: To find out if we could obviate
15 going through the litany of questions for each of the
16 bills.

17 MR. ALTMAN: Some of them I do have some
18 objections based upon it looks like the exhibit -- for
19 instance, some of the medical bills predate Dr. Choi.

20 MR. MALONE: Steve, I'm not sure that you've
21 seen all of this.

22 MR. ALTMAN: At least the original exhibits --

1 THE COURT: Why don't you take a look for a
2 moment. And, Mr. Altman, I'm not -- there are many
3 cases in which the defendant doesn't agree in the event
4 of a plaintiff's verdict that this all should be
5 recovered.

6 But I think you know under McMunn versus Tatum
7 unless you can proffer to me that there is a dispute as
8 to the causation of the medical necessity and the
9 defense evidence is going to establish a real dispute
10 that they're admissible into evidence.

11 MR. MALONE: May I? I think I can help you.
12 We culled out all of the bills except the only ones
13 we're offering. And I think you'll find there is
14 transplant and dialysis, period.

15 MR. ALTMAN: Well, then based upon the
16 representation here I don't think I have a basis for
17 objecting in light of the testimony and even in light of
18 what I anticipate the defense testimony will be on these
19 bills, 41-B, W, X, Z, AA, BB, CC, DD, EE.

20 THE COURT: Okay. Then all of those bills will
21 be received into evidence without objection. And do you
22 need to go through --

1 MR. MALONE: Just quickly I'll ask him --

2 THE COURT: All right. Well, let's do it --

3 MR. MALONE: -- a few things.

4 THE COURT: Let's run through it quickly then.

5 And we may have saved a little bit of time. Okay.

6 Thank you.

7 (The bench conference was concluded.)

8 BY MR. MALONE:

9 Q. We put together a set of Sotiri's medical bills
10 related to dialysis and transplant.

11 A. Yes, sir.

12 Q. Okay. And I would like you to identify, if you
13 would -- let me just -- actually, let me start at the
14 bottom. Where does your son regularly get dialysis?

15 A. Where?

16 Q. Where.

17 A. Springfield, Virginia.

18 Q. And is it at this place called Springfield
19 Dialysis?

20 A. No. They call it Continental. Continental
21 Dialysis.

22 MR. ALTMAN: Your Honor --

1 MR. MALONE: I think it's the same.

2 MR. ALTMAN: -- in light of my agreement I
3 would not have any objection if Mr. Malone wanted to
4 show that directly. Maybe he wants to do it
5 demonstratively this way.

6 I didn't know -- but I thought to speed things
7 along I didn't know if Mr. Malone wanted to show it to
8 Mr. Ponirakis, do it that way; but whatever way he wants
9 to do it.

10 BY MR. MALONE:

11 Q. Well, it's Continental Dialysis of Springfield.

12 A. Yes.

13 Q. Okay. And how far away is that from your
14 house?

15 A. It's about maybe three miles.

16 Q. Do you take him there each time?

17 A. Every time.

18 Q. Do you drop him off and then come pick him up?

19 A. No. I -- I wait over there, because maybe --
20 many times he -- he want to use the -- to go to the
21 bathroom. And he have three nurse in there. And they
22 are very busy. And every time he needs to go to the

1 bathroom I take him by myself.

2 Q. You're talking about bed pan type --

3 A. No. No. Take him to the bathroom, the
4 restroom.

5 Q. But are you talking about bowel movements -- is
6 what I'm asking.

7 A. Yes. Yes. Or any kind. I mean -- yeah.
8 Right. Right. Because he cannot -- he don't have any
9 urine. That's right. Yeah.

10 Q. Okay. So the only thing he goes to the
11 bathroom for is the other.

12 A. Yes.

13 Q. All right. Now, just quickly, the bill from
14 Springfield Dialysis totals \$133,000 for the last couple
15 of years; is that right?

16 A. Looks like it, yeah.

17 Q. Okay. And then we have some bills from
18 Georgetown University Hospital for various dates between
19 July of '98 and October 1998.

20 Did you go to Georgetown Hospital solely for
21 purposes of your son's transplant and then eventually
22 the transplant removal?

1 A. Yes.

2 Q. Okay. And are all those bills reflected on
3 that little summary you've got there?

4 A. Yes.

5 Q. Okay. And your son has also had some dialysis
6 at Fairfax Hospital itself.

7 A. Yes, sir.

8 Q. Okay. And those are about \$89,000.

9 A. Yeah.

10 Q. Okay. The admission when he actually had the
11 transplant to Georgetown, 41-Z, was that about \$150,000?

12 A. Yes, sir.

13 MR. MALONE: Okay. And then the total -- and
14 I'm offering into evidence 41-B, 41-W, 41-X, Z, AA, BB,
15 CC, DD and EE.

16 BY MR. MALONE:

17 Q. The total of all of these bills only for
18 dialysis --

19 THE COURT: Hold on for one second, please. Go
20 ahead, sir.

21 BY MR. MALONE:

22 Q. The total of all of those bills that I just

1 mentioned only for dialysis and transplant treatment, is
2 that that figure at the bottom of the page?

3 A. Yes, sir.

4 Q. 424,000 and change.

5 A. Yes.

6 MR. MALONE: Okay. One second.

7 That's all I have.

8 THE COURT: Can you hand up the notebook? Do
9 you intend to cross-examine on any of those exhibits?

10 MR. ALTMAN: No, sir.

11 THE COURT: The exhibits are received in
12 evidence. Can I have that top piece of paper?

13 MR. MALONE: The summary sheet?

14 THE COURT: Yes.

15 MR. MALONE: Yeah.

16 THE COURT: All of the items listed on 40-A are
17 in evidence at this point. That's what -- you've
18 offered all of them; is that right?

19 MR. MALONE: Yes, sir.

20 THE COURT: There's no objection to any of
21 this?

22 MR. ALTMAN: No objection, sir.

1 THE COURT: Received in evidence.

2 (The medical bills previously marked

3 Plaintiff's Exhibit Nos. 41-B, W, X, Z, AA,

4 BB, CC, DD, EE for identification were

5 received in evidence.)

6 THE COURT: You may cross-examine, Mr. Altman.

7 CROSS-EXAMINATION

8 BY MR. ALTMAN:

9 Q. Are you okay? Are you still nervous?

10 A. I'm okay.

11 Q. Getting into the swing of things a little bit?

12 A. Yeah.

13 Q. Okay. All right. Mr. Ponirakis, I'm going to

14 ask you a few questions to follow up on some of the

15 things that Mr. Malone asked you; okay?

16 A. Okay.

17 Q. Okay. If you don't understand me, please let

18 me know. And I'll try to rephrase the question.

19 A. Thank you.

20 Q. Okay. Now, your son -- and I'll refer to him

21 if it's okay with you as Sotiri. Is that okay?

22 A. Yes, sir.

1 Q. Okay. He first started noticing blood in his
2 urine in 1994; is that correct?

3 A. Yes. Yes, sir.

4 Q. Okay. And when he did he went to a doctor
5 called Dr. Salbert; is that also correct?

6 A. That's correct.

7 Q. Okay. Now, Dr. Salbert did a test and found
8 blood and protein in the urine; is that correct?

9 A. That's correct.

10 Q. By the way, will you do me a favor? Each time
11 I ask you about a doctor, I'm assuming that you were
12 present when the doctor spoke with Sotiri. Am I
13 correct?

14 A. Yes, sir.

15 Q. All right. You told the ladies and gentlemen
16 earlier you were there 99 percent of the time --

17 A. Right.

18 Q. -- right?

19 Okay. So I'm going to assume that you were
20 there. And that's the reason --

21 A. Yes.

22 Q. -- you know what Sotiri was told; okay?

1 A. Yes.

2 Q. Okay. Now, Dr. Salbert recommended that Sotiri
3 have a test called an IVP; isn't that also correct?

4 A. A kidney x-ray.

5 Q. I'm sorry.

6 A. Yes. Kidney x-ray you're talking about; right?

7 Q. I apologize, sir. I didn't understand the word
8 you said.

9 A. IVP. You said IVP.

10 Q. Right. An IVP. And did you say a kidney exam?

11 MR. MALONE: X-ray, he said.

12 MR. ALTMAN: I just -- I'm just asking him what
13 he said.

14 THE COURT: I think he said -- I think he said
15 kidney x-ray -- is what I understood.

16 MR. ALTMAN: I thought he said kidney x-ray as
17 well.

18 BY MR. ALTMAN:

19 Q. What did you say, sir? I don't want to try and
20 put words in your mouth.

21 A. No. The IVP means kidney x-ray; right?

22 Q. Kidney x-ray. That was your understanding.

1 A. Yes.

2 Q. Okay. All right. Now, the kidney -- the IVP
3 also found blood in the urine; right?

4 A. On the IVP x-rays?

5 Q. Yes, sir.

6 A. No.

7 Q. It didn't find anything?

8 A. No. It was normal.

9 Q. It was normal.

10 All right. Now, you came back to Dr. Salbert
11 after the IVP. And he did another urine test. And this
12 also found blood and protein in the urine; right?

13 A. You mean not -- not Dr. Salbert. Another
14 doctor; right?

15 Q. No. I meant that you came back to Dr. Salbert
16 in October of 1994. And he did a second urine study.

17 A. Yes. Yes. You're right.

18 Q. Right?

19 A. Yes, sir. Yes, sir.

20 Q. And this also found blood and protein --

21 A. Protein.

22 Q. -- in --

1 A. Yes, sir.

2 Q. -- Sotiri's urine; right?

3 A. That's correct.

4 Q. Okay. Now, after that occurred, after the
5 second time, Sotiri was referred to a urologist; am I
6 correct?

7 A. Yes.

8 Q. And Sotiri went to that urologist; right?

9 A. Yes.

10 Q. All right. What's your understanding of the
11 name of that doctor?

12 A. Dr. Rhame.

13 Q. Okay. And do you know that we've sort of found
14 out that it's a Dr. Abramson?

15 A. Yes.

16 Q. Same office.

17 A. Same group, yeah.

18 Q. Okay. Now, he also did some studies on Sotiri,
19 didn't he?

20 A. That's correct.

21 Q. And, in fact, this was in 1995 when he saw the
22 urologist; right?

1 A. That's correct.

2 Q. Okay. And that doctor also found blood and
3 protein in Sotiri's urine.

4 A. Yes, sir.

5 Q. All right. It wasn't just in the middle of
6 1994. This was in 1995.

7 A. Yes, sir.

8 Q. Okay. Now, that urologist referred you back to
9 Dr. Salbert, didn't he?

10 A. That's correct.

11 Q. Okay. And I take it as you sit here right now
12 you don't know one way or another what that urologist
13 recommended.

14 A. No.

15 Q. Okay. And, in fact, you called the urologist.
16 And you got the results.

17 A. A urologist?

18 Q. I'm sorry. You called the urologist,
19 Dr. Abramson, and got the results of the urine studies
20 that had been done on the day that Sotiri went to see
21 him.

22 A. I don't remember that.

1 Q. Okay. Now, there came a point in time when
2 Sotiri left Dr. Salbert; am I correct?

3 A. Yes.

4 Q. And he left Dr. Salbert, because you were
5 dissatisfied with Dr. Salbert; right?

6 A. Yes.

7 Q. And you were dissatisfied with Dr. Salbert,
8 because you had never been given an answer to the
9 question why did he have blood and protein in his urine;
10 isn't that correct?

11 A. No. At that time I don't know what that means,
12 blood and protein in urine.

13 Q. I understand that.

14 A. Yeah.

15 Q. So you and Sotiri didn't know what this meant.

16 A. No. Exactly. Right.

17 Q. You knew that he had had at least three urine
18 tests; two with Dr. Salbert, one with Dr. Abramson. He
19 underwent a study, an IVP. He had a visit with
20 Dr. Abramson. And --

21 A. With Dr. Rhame, you mean.

22 Q. No, actually it was Dr. Abramson. They're in

1 the same office.

2 A. Okay.

3 Q. And I think you thought it was Dr. Rhame.

4 A. Yeah.

5 Q. But I think we can agree it was Dr. Abramson.

6 A. Okay. Okay.

7 Q. And you and Sotiri did not have an answer --

8 A. No.

9 Q. -- to the question of why he was bleeding. It

10 just got better. And you forgot about it; right?

11 A. No. He -- he told us to go to follow up.

12 Q. Who told you to follow up?

13 A. The doctor.

14 Q. What doctor?

15 A. The doctor in Dr. Rhame office.

16 Q. Okay. And he told you to follow up with who?

17 A. With Dr. Salbert.

18 Q. Okay. And did you follow up with Dr. Salbert?

19 A. No, because I went -- Dr. -- I don't remember.

20 MR. MALONE: Can he use the records on this?

21 It would show --

22

1 BY MR. ALTMAN:

2 Q. Would you like some medical records? Would
3 that assist you?

4 A. Yeah, if you don't mind.

5 Q. Sure. Sure. Which ones would you like?

6 A. The follow-up with -- after the -- Dr. Rhame.

7 Q. Do you want Dr. Salbert's records?

8 MR. BROWN: 3, I believe.

9 MR. MALONE: 3.

10 MR. ALTMAN: Okay. Let me show you. These are
11 the records from --

12 THE COURT: Show them to plaintiff's counsel.

13 MR. ALTMAN: These are plaintiff's records.

14 THE COURT: I understand. Show him so that
15 you're both on the same wavelength. And then you can
16 approach the witness.

17 BY MR. ALTMAN:

18 Q. Do you want Dr. Salbert's records?

19 A. Yeah.

20 MR. ALTMAN: Okay. Let me give you -- may I
21 approach, Your Honor?

22 THE COURT: Yes, sir.

1 MR. ALTMAN: This is Exhibit 3, Plaintiff's
2 Exhibit No. 3. These are the records of Dr. Salbert.
3 While you're looking through those, Mr. Ponirakis, may I
4 ask you a question first?

5 THE WITNESS: Yes, sir.

6 BY MR. ALTMAN:

7 Q. Am I to understand that you need to refer to
8 the records to remember what occurred with Sotiri in the
9 progression of his medical treatment?

10 A. No, sir; but I don't remember the -- the dates.

11 Q. I'm not asking you a date. I'm sorry. Let me
12 try and make my question clearer. You're welcome to
13 look at those, please.

14 A. Okay.

15 MR. MALONE: May we approach the bench for a
16 second?

17 THE COURT: Yes.

18 (Counsel approached the bench and the following
19 proceedings were held:)

20 MR. MALONE: My point is this: It's misleading
21 to the jury where this is going, because we know from
22 the records that he saw this urologist on March 17th.

1 The records from Dr. Salbert reflect that the
2 patient was back in Dr. Salbert's office on April 5th.
3 This gentleman may or may not remember that, but whether
4 or not he remembers that specific visit it is in the
5 records. And he did get -- he did follow up with
6 Dr. Salbert.

7 So the suggestion that maybe he just never went
8 back to Dr. Salbert is misleading, because we have the
9 best evidence to contradict that.

10 THE COURT: Well, is there a question that's
11 pending to which you have an objection?

12 MR. MALONE: Well, my --

13 THE COURT: I don't believe that there's a
14 pending question to which there's an objection. This is
15 cross-examination. If you believe that the jury is
16 being given the wrong impression, you can ask what you
17 deem appropriate on redirect.

18 MR. MALONE: All right.

19 THE COURT: The objection is overruled.

20 (The bench conference was concluded.)

21 THE COURT: Mr. Altman, you may proceed.

22 MR. ALTMAN: Thank you.

1 BY MR. ALTMAN:

2 Q. Mr. Ponirakis, I do want you to take your time.
3 I'm not trying to put words in your mouth. Look at
4 whatever you feel you need to look at; okay?

5 My question is a simple one. After
6 Dr. Abramson sent you back to Dr. Salbert, sent you --
7 sent Sotiri back to Dr. Salbert did Sotiri go back to
8 Dr. Salbert?

9 A. I don't remember, no.

10 Q. Okay. All right. Now, by the time you left --
11 and, again, when I say you I mean Sotiri. By the time
12 Sotiri left Dr. Salbert you never had an answer to why
13 he had gone almost six, seven months having blood in his
14 urine; is that correct?

15 A. No.

16 MR. MALONE: Wait a minute. That misstates the
17 record. We're talking about three distinct episodes,
18 not some continuous course here.

19 THE COURT: I sustain the objection to the
20 question. Rephrase.

21 BY MR. ALTMAN:

22 Q. You didn't have information why between July

1 1994 and about March of '95 -- so that would be about an
2 eight-month period of time -- there were three separate
3 episodes where Sotiri had a lot of blood in his urine;
4 right?

5 A. I don't know if it was a lot or a little, you
6 know. Blood in the urine, yeah, we don't know.

7 Q. You never -- you never followed up with anyone
8 as to why he had three episodes of blood in his urine;
9 right?

10 MR. MALONE: Object to the relevance of that
11 about the follow-up.

12 MR. ALTMAN: Well, I meant -- again, when I say
13 you I mean Sotiri. I'm sorry.

14 THE WITNESS: Yes. I understand.

15 BY MR. ALTMAN:

16 Q. Okay. Sotiri never followed up, did he?

17 THE COURT: Do you object to that question?

18 MR. MALONE: No.

19 THE COURT: Okay. You can answer that
20 question, sir.

21 MR. MALONE: Well, actually -- actually I do
22 object to that question. Can we approach the bench?

1 THE COURT: Yes.

2 (Counsel approached the bench and the following
3 proceedings were held:)

4 MR. MALONE: I thought we had a ruling on the
5 motion in limine from last Friday that any alleged
6 failure to follow up by the patient in 1994, 1995 was
7 irrelevant.

8 THE COURT: What's the relevancy whether Sotiri
9 followed up?

10 MR. ALTMAN: Well, the relevancy is simply
11 this, Your Honor. They have made a big deal out of
12 trying to say that the plaintiff did everything he was
13 told.

14 And even though I'm not arguing that it's
15 contributory negligence to the jury, I can show there
16 have been times where he has not followed up either on
17 what he was told to do or followed up on medical
18 conditions that a reasonably prudent person might follow
19 up on.

20 THE COURT: Okay. I sustain the objection,
21 because although there may be some probative value to
22 what you have just said, the prejudice of injecting

1 contributory negligence or a thought process of
2 contributory negligence for the failure to follow up in
3 the earlier period of time in the Court's view outweighs
4 the slight probative value that there might be. And I,
5 therefore, sustain the objection. Your exception is
6 noted.

7 MR. ALTMAN: Thank you, sir.

8 (The bench conference was concluded.)

9 THE COURT: The objection is sustained to the
10 last question.

11 MR. ALTMAN: Thank you, sir.

12 BY MR. ALTMAN:

13 Q. Now, Doctor -- sorry. Doctor. Mr. Ponirakis.
14 We've had so many doctors on the stand it's just natural
15 for me to use that terminology. I hope you weren't
16 offended by that.

17 Mr. Ponirakis, let me ask you this question.
18 You will agree with me that in 1996 when Sotiri came to
19 Dr. Choi Sotiri did not tell him about these previous
20 episodes of blood in the urine; is that correct?

21 A. Yes, that's correct.

22 Q. Okay. Now, when Dr. Horton asked Sotiri to

1 come back for the stress echocardiogram Dr. Horton
2 wanted it done sooner than January 8th; is that correct?

3 A. Yes.

4 Q. And Sotiri did not come back till after
5 January -- or until January 8th; isn't that correct?

6 A. Yes, that's correct.

7 Q. Now --

8 MR. MALONE: What's the relevance of that?
9 There's no -- I object to that. It doesn't tie into
10 anything.

11 THE COURT: In light of the direct testimony I
12 overrule the objection.

13 MR. MALONE: All right.

14 MR. ALTMAN: Thank you, sir.

15 BY MR. ALTMAN:

16 Q. Now, when you -- when Sotiri went to
17 Dr. Papas -- and Dr. Papas was the doctor following
18 Dr. Salbert.

19 A. Yes.

20 Q. Okay. There was no discussion there regarding
21 the urine studies, was there?

22 A. No. No.

1 Q. And you saw Dr. Papas in 1995 in like the May
2 to December period of time.

3 A. About, yeah.

4 Q. And that would have been just two months
5 following your visit to Dr. Abramson; isn't that
6 correct?

7 A. Yes.

8 Q. Now, you will agree with me that Dr. Choi asked
9 Sotiri if he had any serious or significant illnesses or
10 operations.

11 A. That's correct.

12 Q. Okay. And you've already told me that Sotiri
13 did not tell Dr. Choi about the history of the urine
14 problems; right?

15 A. No. No.

16 Q. Now, let's turn our attention to the Emergency
17 Department. Okay. On December 13th, 1996, did the
18 emergency room doctor -- you were there, weren't you?

19 A. Yes.

20 Q. Okay. And were you back in the examination
21 area with Sotiri the entire time he was back there?

22 A. Next to him all the times.

1 Q. I'm sorry. I just didn't hear.

2 A. Yes. Yes.

3 Q. You were with him.

4 A. All the times.

5 Q. I mean, you went with him in the ambulance;
6 right?

7 A. No. No. I drove. I drove my car. I followed
8 the ambulance.

9 Q. Okay. And as soon as you got there you went
10 back to the area where they were taking care of Sotiri.

11 A. That's correct.

12 Q. Okay. And the doctor -- it's your
13 understanding that Sotiri had become dehydrated.

14 A. That's what he told us, yes.

15 Q. That the dehydration came from the vomiting;
16 right?

17 A. Yes.

18 Q. And Sotiri had gone through a lot of vomiting
19 then -- before then, hadn't he?

20 A. Yes. Yes.

21 Q. Okay. And he hadn't eaten very much, because
22 he was nauseous.

1 A. That's correct.

2 Q. Okay. And they gave Sotiri fluids through an
3 intravenous line; is that correct?

4 A. Yes. IV. Yes.

5 Q. And, unfortunately, you now know what that is;
6 right?

7 A. Yes. Yeah. Okay.

8 Q. The doctors didn't tell you anything about
9 abnormal laboratory values, did they?

10 A. No, sir.

11 Q. And the instruction sheet that Mr. Malone has
12 shown us earlier that we went through with Dr. Hubach,
13 it didn't say anything about abnormal laboratory values,
14 did it?

15 A. No.

16 Q. And Sotiri didn't bring that sheet to Dr. Choi,
17 did he?

18 A. No.

19 Q. Now, when you were at the Emergency Department
20 the doctor didn't say anything about blood studies, did
21 he?

22 A. Nothing.

1 Q. And when Sotiri went back to Dr. Choi --

2 A. Yes.

3 Q. -- you didn't discuss laboratory values,
4 because you didn't know that there were any abnormal
5 values.

6 A. Exactly.

7 Q. Now, let's turn our attention to your visit
8 with Dr. Horton at the time of the cardiac
9 catheterization.

10 A. Okay.

11 THE COURT: We're a couple minutes to 1:00.
12 How long do you expect to be on this subject?

13 MR. ALTMAN: Two minutes. And I'm almost done,
14 sir.

15 THE COURT: All right, sir. I'll let you
16 finish then.

17 BY MR. ALTMAN:

18 Q. When you went to see Dr. Horton for the cardiac
19 catheterization --

20 A. Yes, sir.

21 Q. -- did he talk with Sotiri before the
22 catheterization?

1 A. You mean in the hospital?

2 Q. Yes, sir. I'm sorry. In the hospital did he
3 speak with Sotiri?

4 A. Not in front of me. Maybe after I left the
5 room, the procedure room.

6 Q. Okay. But so the ladies and gentlemen are
7 clear, from the time Sotiri got into the hospital at
8 Arlington Hospital -- you drove him there; right?

9 A. Yes, sir.

10 Q. You helped him change clothes; right?

11 A. Yes. Yes.

12 Q. You helped him get in the bed.

13 A. On the bed.

14 Q. And you were with him the entire time.

15 A. Yes, sir.

16 Q. And literally you walked with the bed or the
17 gurney into the room.

18 A. With? Excuse me. With?

19 Q. The bed.

20 A. Yes.

21 Q. The gurney.

22 A. Yeah.

1 Q. Okay?

2 A. Okay.

3 Q. Into the room where they were actually going to
4 do the procedure. And then you had to leave.

5 A. Yes.

6 Q. Okay.

7 A. That's correct.

8 Q. And shortly after that, after the procedure was
9 over -- I know it took a couple hours -- you had some
10 conversations with Dr. Horton.

11 A. Yes, sir.

12 Q. Was Sotiri there?

13 A. No.

14 Q. Sotiri wasn't there?

15 A. He was on the bed.

16 Q. He was on the bed. Was he there with you and
17 Dr. Horton?

18 A. No.

19 Q. He was in a different room?

20 A. Yes. He was in the -- in the -- I don't know
21 how they call it, operation room, on the same -- in the
22 same room. The time when Dr. Horton -- he was talking

1 to me in the waiting room.

2 Q. Okay. Well --

3 A. He was not with us.

4 Q. He was not with you when you spoke to
5 Dr. Horton.

6 A. No.

7 Q. Did Sotiri ever speak with Dr. Horton?

8 A. Like I said, from after he finish the
9 procedure, no.

10 Q. He never spoke --

11 A. No. I don't --

12 Q. So you would disagree with Dr. Horton where he
13 said that he spoke to Sotiri.

14 A. From the time where he finish the procedure I
15 don't think he talk to him, because I was with him all
16 times. And then they move him from this point to the
17 regular room. And we left the hospital, I don't know,
18 seven, eight o'clock at night.

19 Q. So it's your testimony that Dr. Horton never
20 spoke to Sotiri after the test.

21 A. After the -- no, I don't think so.

22 Q. All right. And Dr. Horton never told you about

1 elevated blood values or abnormal laboratory studies,
2 did he?

3 A. Like I said before, he was talking to me -- to
4 me about the -- his heart. He was normal. And I was --
5 I was so happy. And I said everything is okay with my
6 son. And I hope, you know, we don't have any more
7 problems. And I -- I don't remember, you know, to --

8 Q. In fact, you told me at the time of your
9 deposition that Dr. Horton did not tell you about any
10 blood tests or kidney tests.

11 A. Yeah. I don't remember.

12 Q. Well, do you remember when you had your
13 deposition taken?

14 A. Yeah. I don't remember what I said, you know.

15 Q. You do remember what you said?

16 A. I don't remember.

17 Q. Okay. Let me see if I can refresh your
18 recollection; okay? Your deposition was taken on March
19 10th, just about a month ago.

20 A. Yeah.

21 Q. Okay. And -- let me see. I'll read you
22 something. And I'll ask you if you remember it; okay?

1 A. Okay.

2 Q. Page 46 of your deposition, starting on line
3 18. The question that was asked of you was this; okay?
4 And I'll read question and answer, Mr. Ponirakis.

5 A. Yes, sir.

6 Q. Do you remember Dr. Horton talking about any
7 tests, blood tests or kidney tests? Your answer, no.
8 No. The next question, you don't remember that. Your
9 answer was, no, he don't tell us anything.

10 Do you remember saying that?

11 A. I don't remember; but if it's there, yes.

12 Q. Now, if Dr. Horton had told you anything about
13 the tests, you would have communicated that to Sotiri,
14 wouldn't you, sir?

15 A. You mean about the heart?

16 Q. Heart or abnormal kidney test or blood test.

17 A. I don't remember about the kidney.

18 Q. No. No. I'm sorry. Let me -- let me ask my
19 question again. I know you don't remember; but if
20 Dr. Horton had said, well, the heart's normal, but he's
21 got some abnormal laboratory studies that may mean
22 something about the kidneys, you would have definitely

1 told Sotiri about that.

2 A. Of course. Definitely. Of course. Not only
3 Sotiri, I take my son to -- to the doctor right away.

4 MR. ALTMAN: I think that's -- Court's
5 indulgence for one minute.

6 BY MR. ALTMAN:

7 Q. By the way, Mr. Ponirakis, you've already
8 answered my question about whether you told Dr. Choi
9 about the urine test the first time you went to see him;
10 right?

11 A. Yeah.

12 Q. Okay. Now, on November 23rd, 1996, when Sotiri
13 came back -- this is when he had flu-like symptoms and
14 upper respiratory -- did Sotiri tell Dr. Choi about the
15 abnormal urine studies on that date?

16 A. No.

17 Q. The next time that Sotiri came back was on
18 January 2nd, 1997. This is when he was having the
19 stomach pains.

20 A. Yes.

21 Q. Did Sotiri tell Dr. Choi about the abnormal
22 urine studies on that visit?

1 A. No, sir.

2 Q. On January 15th -- this is when he came in for
3 the knee problem --

4 A. Yes.

5 Q. -- did he tell Dr. Choi about the abnormal
6 urine studies on that visit, sir?

7 A. No.

8 Q. When Sotiri came back to Dr. Choi on July 1st,
9 1997, and Dr. Choi -- Sotiri said he was having some
10 pain or discomfort in his side, do you remember that?

11 A. I remember, yeah.

12 Q. And Dr. Choi did a urinalysis and some blood
13 studies. Sotiri didn't tell Dr. Choi even then about
14 the previous abnormal studies, did he?

15 A. No.

16 MR. ALTMAN: Nothing further, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. MALONE:

19 Q. But did Dr. Choi ever ask your son
20 specifically --

21 A. No.

22 Q. Let me finish the question.

1 Did Dr. Choi ever specifically ask your son in
2 your presence, young man, have you ever had any episodes
3 of blood in the urine?

4 A. Absolutely not.

5 MR. ALTMAN: Objection as to leading. It's
6 beyond the scope, Your Honor.

7 MR. MALONE: That is exactly following --

8 THE COURT: I overrule the objection in light
9 of the cross.

10 A. He never ask us. He never ask my son if you
11 have any -- and I don't know what that means. Like I
12 said before, you know, what means urine or protein or
13 creatinine. I don't know anything. We don't know
14 anything that time.

15 BY MR. MALONE:

16 Q. If he had asked you on November 14th, 1996, has
17 your son ever had any episodes of blood in the urine,
18 what would you have told Dr. Choi?

19 A. Of course, I would tell him.

20 MR. ALTMAN: Objection; calls for speculation.
21 And he's beyond the scope.

22 MR. MALONE: He asked the questions. This is

1 not beyond the scope. I'm almost finished, too.

2 THE COURT: Well, that may be; but I sustain
3 the objection to the question as to what he would have
4 told Dr. Choi.

5 BY MR. MALONE:

6 Q. Well, were you there with your son and
7 Dr. Choi?

8 A. Yes, sir.

9 Q. Did he -- do you recall him asking about any
10 prior serious medical diseases? Dr. Choi, did he ask
11 your son about that?

12 A. If he --

13 Q. Did Dr. Choi ask your son about prior medical
14 diseases?

15 A. Yes.

16 Q. Did he ask him anything specific beyond that?

17 A. The only thing I remember he asked for if he
18 smoke, drink or he have any major operations and major
19 illness.

20 Q. Okay. And just going back a little bit on one
21 small point, you saw this urologist on March 17th, 1995,
22 according to the records. You took your son there.

1 A. Yes.

2 Q. Would it refresh your recollection about going
3 back to Dr. Salbert after that if I showed you a page of
4 Dr. Salbert's records that shows that your son was back
5 there on April the 5th, 1995?

6 MR. ALTMAN: Objection; form, relevance.

7 THE COURT: Sustained; not for the relevance,
8 but for form I sustain the objection.

9 BY MR. MALONE:

10 Q. Do you recall whether or not your son did go
11 back to Dr. Salbert after that time?

12 A. Yes.

13 Q. Okay. Now, after that you switched internists
14 to Dr. Papas.

15 A. Yes.

16 Q. Okay. And what was the reason for that?

17 A. Because the insurance.

18 Q. Okay. I thought you said something with
19 Mr. Altman's questions about dissatisfaction. Did you
20 understand that word, dissatisfaction?

21 A. No. He asked me about Dr. Salbert, why I
22 switch --

1 Q. Okay.

2 A. -- from Dr. Salbert after Dr. Papas.

3 Q. That's what I'm asking. Why did you switch
4 from Dr. Salbert to Dr. Papas? Were you dissatisfied?
5 Do you understand what dissatisfied means?

6 A. Yes.

7 Q. Okay.

8 A. I -- he -- he -- I mean, we went to the
9 Dr. Papas, because my son get insurance from his job.
10 And Dr. Salbert doesn't accept this -- this insurance.
11 That's why we went to Dr. Papas.

12 Q. Is that what you meant by dissatisfied?

13 A. Yes. Yes.

14 MR. MALONE: All right. I just wanted to clear
15 that up. That's all. Thank you.

16 MR. ALTMAN: Your Honor, in light of the
17 dissatisfied question may I clarify?

18 THE COURT: Yes.

19 RECCROSS-EXAMINATION

20 BY MR. ALTMAN:

21 Q. Mr. Ponirakis, again I'm going to refer you to
22 your deposition, sir. Okay. I'll read you a section of

1 it; okay? This is on page 23 starting at line 10. I'll
2 read the question and then your answer.

3 Were you dissatisfied with Dr. Salbert? Yes.
4 I was trying to find something -- you know, something
5 better, you know, to find out what is going on with my
6 son as soon as possible.

7 A. Yes.

8 Q. Do you remember saying that?

9 A. Yes.

10 MR. ALTMAN: Nothing further, Your Honor.

11 THE COURT: Anything further of the witness?

12 MR. MALONE: No. Thank you.

13 THE COURT: Mr. Ponirakis, you may step down.

14 (The witness left the stand.)

15 THE COURT: Ladies and gentlemen, we'll take a
16 luncheon recess at this time. It's a couple of
17 minutes -- about eight minutes after 1:00 according to
18 that clock. I would ask that you meet Deputy Royal
19 about eight minutes after 2:00. Please leave your pads
20 and don't discuss anything about the case. Enjoy your
21 lunch.

22

* * *

1 plaintiff's case in chief.

2 MR. ALTMAN: Dr. Neal Roberts.

3 THE COURT: Okay. Good afternoon, Dr. Roberts.

4 DR. ROBERTS: Good afternoon, sir.

5 THE COURT: If you would keep your voice up so
6 everyone can hear you.

7 DR. ROBERTS: Yes, sir.

8 THE COURT: Please listen to and answer only
9 the specific questions that the attorneys may ask you.
10 Mr. Altman.

11 MR. ALTMAN: Thank you, Your Honor.

12 Whereupon,

13 W. NEAL ROBERTS, JR., M.D.,
14 was called as a witness on behalf of the defendant Choi,
15 and after having been first duly sworn, was examined and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. ALTMAN:

19 Q. Doctor, would you please give the ladies and
20 gentlemen your full name, your office address and your
21 occupation, sir?

22 A. W. Neal Roberts, Jr. Clay and 11th Streets,

1 Richmond, Virginia. I'm a Charles W. Thomas associate
2 professor of medicine in the Division of Rheumatology,
3 Allergy and Immunology at the Medical College of
4 Virginia

5 Q. Okay. Let's start with this. What is a
6 rheumatologist?

7 A. A rheumatologist is an internal medicine that
8 is an adult, non-surgical doctor with two to three years
9 of subspecialty training in care of diseases that have
10 one or two common threads running through them.

11 One is they either have a lot of arthritis.
12 And second is the need for use of relatively toxic
13 immunosuppressive medications.

14 Q. We have heard from the previous witnesses in
15 this case that rheumatologists take care of connective
16 tissue diseases. Is that an accurate statement?

17 A. That's an accurate statement. Connective
18 tissue disease is kind of an umbrella term that was
19 invented by a laboratory scientist, Dr. Kempler, in the
20 '40s which unified a group of these diseases that have a
21 lot to do with bones and joints but also includes some
22 extra-articular features such as kidney disease in this

1 case.

2 Q. In the diagnosis and treatment of lupus, what
3 medical specialty is primarily involved in the diagnosis
4 and treatment of that condition?

5 A. It's basically rheumatologists. If -- if the
6 person who has lupus has a narrow range of features that
7 would be just -- just kidney disease, for example, they
8 may be taken care of by a specialist in that organ
9 system, a nephrologist in this case.

10 However, most of the .1 percent of the
11 population in the United States who has lupus probably
12 has a rheumatologist as their main physician. There are
13 about 3,000 practicing ones in the United States.

14 Q. Okay. Let's go back and pick up on some of
15 your medical education and training. Could you tell the
16 ladies and gentlemen where you did your medical school
17 training?

18 A. Charlottesville, University of Virginia.

19 Q. Okay. And can you give them the year of that?

20 A. It's '73 to '77.

21 Q. Okay. And following your medical school
22 training at UVA what did you do next?

1 A. I was a house officer at Duke in general
2 internal medicine for three years.

3 Q. All right. Was that an internal medicine
4 residency program?

5 A. Yes, sir.

6 Q. Okay. The ladies and gentlemen have heard a
7 lot about residency programs. And they know -- did you
8 say it was a rotating internship?

9 A. That was a -- what they call a categorical
10 internal medicine. So it's all internal medicine but
11 not rotating which generally means there's some
12 pediatrics or gynecology or something else.

13 Q. Okay. What did you do upon completion of that
14 internal medicine residency program that you just
15 described?

16 A. I went from there to a rheumatology fellowship
17 and laboratory experience at the Harvard Medical School,
18 Brigham and Women's Hospital and general medicine
19 fellowship at the Massachusetts General Hospital and
20 then a clinical rheumatology fellowship. And I was an
21 instructor there at Harvard for three years. So that
22 covers a six-year span.

1 Q. Okay. Let's go back, because I think you're
2 mentioning some new terms the ladies and gentlemen have
3 not heard about.

4 A. Sorry.

5 Q. After your internal medicine residency program
6 at Duke you said you went on -- is the next thing you
7 did a fellowship?

8 A. Yes, sir.

9 Q. Okay. The ladies and gentlemen have heard
10 about a residency. What's a fellowship?

11 A. A fellowship is a prolonged period of training
12 which can be as little as two and can be as many as six
13 years which probably includes some laboratory or
14 epidemiology math type of research.

15 Q. Okay. What is epidemiology?

16 A. Who gets what diseases and -- and where and
17 what the time course of those or the natural -- what
18 they call the natural history of those might be.

19 And I did that and in addition to some
20 laboratory work with immune complexes. And -- and then
21 in the epidemiology portion my area was lupus. And I
22 stayed with that when I left there and moved to

1 Richmond.

2 Q. All right. Prior to the time -- we're still
3 talking about this six years of fellowship programs.

4 A. Three -- three years of fellowship and three
5 years as an instructor.

6 Q. Okay. And during this period of time is this
7 when you got your initial training in the diagnosis and
8 treatment of lupus?

9 A. Predominantly. Everybody who goes through a
10 residency sees some patients with lupus. So that would
11 be for me the -- the Duke experience, but it was where I
12 got my first intense exposure.

13 Q. Okay. Can you give the ladies and gentlemen an
14 idea of the number of lupus patients you would have seen
15 during your fellowship?

16 A. Maybe a hundred.

17 Q. Okay. Now, that's just during the fellowship
18 period of time. Of this approximately hundred that
19 you've just mentioned for the ladies and gentlemen of
20 the jury, did these people have generalized lupus?

21 A. The variability of the disease is sort of a
22 famous feature of it. And that's what makes it so

1 difficult. So some would have many organ systems
2 involved; say, heart, brain, kidney. And others would
3 have only one or two. Probably the extreme example of
4 that is many people who have skin involvement may have
5 skin involvement only.

6 Q. All right. Now, you told the ladies and
7 gentlemen you did the three-year fellowship. And then
8 you stayed on at Harvard for three years as an
9 instructor; is that correct?

10 A. Yes.

11 Q. I'm sorry.

12 A. Correct.

13 Q. When you were an instructor were you actually
14 teaching other fellows and residents?

15 A. Yes. And that's when I had -- my interest in
16 lupus probably developed the most.

17 Q. Okay. Can you give the ladies and gentlemen --
18 let me start with this question. Were you actually
19 instructing other residents in rheumatology and other
20 fellows in rheumatology on the diagnosis and treatment
21 of lupus and lupus conditions?

22 A. Yes.

1 Q. Okay. Can you give the ladies and gentlemen --
2 now we're talking about that three-year period of
3 time -- the number of lupus patients that you took care
4 of during that period when you were an instructor?

5 A. It's probably equal; probably another hundred.

6 Q. All right. Now, you said that after you left
7 Harvard -- is that when you went to the Medical College
8 of Virginia?

9 A. Yes, sir.

10 Q. And what year was that?

11 A. '86.

12 Q. All right. What position do you hold at the
13 Medical College of Virginia at this time?

14 A. I'm, as I said, a Thomas associate professor of
15 medicine and director of the training program in
16 rheumatology.

17 Q. Do you actually treat patients as the -- as
18 a --

19 A. Some -- some oversight and some direct
20 treatment. So we probably have 400 patients with lupus
21 in the data base of which maybe 200 have severe enough
22 disease to be seen by a doctor often. And probably 50

1 of those I take care of directly and supervise about
2 half of the others.

3 Q. Okay. Let's go back and see if we can't get a
4 little bit more specific on the number. Can you give
5 the ladies and gentlemen -- by the way, what year was it
6 when you went to the Medical College of Virginia?

7 A. '86.

8 Q. Okay. From 1986 to the present time can you
9 give the ladies and gentlemen an idea of the number of
10 lupus patients who you have either treated or studied or
11 had some contact with since going to the Medical College
12 of Virginia?

13 A. Generally about -- we're carrying, as I said,
14 about 200 in the group that I have some input on
15 probably. Probably about 10 percent of them are new
16 every year. So that's times 15, 16 years.

17 Q. Okay. Do you at any one time or since going to
18 the Medical College of Virginia have you continued to
19 have 50 patients or so whom you have been actively
20 treating?

21 A. There's a -- a gradation. I probably treated
22 fewer directly during the first 10 years. I had some

1 research grants that did have to do with lupus
2 epidemiology primarily.

3 And the last two or three years I've been
4 mostly doing the administrative job which is the
5 fellowship teaching job which is around 15 percent and
6 the rest pure clinical.

7 Q. The teaching position that you hold -- I'm
8 sorry. You said you're director of the residency
9 program.

10 A. The fellowship program.

11 Q. What does it mean to be a director of a
12 fellowship program at the Medical College of Virginia?

13 A. That's some direct teaching and some arranging
14 teaching for trainees who are at the 30-year-old level
15 and above more or less. There is usually only one or
16 two of those per medical school at a time.

17 Q. Do you actually teach when -- when you do that
18 portion of the directorship which is teaching do you
19 actually do teaching about lupus?

20 A. Right. Right. Not exclusively; but, yes,
21 that's probably -- lupus is probably the -- the third or
22 fourth most taught or talked about illness in -- in this

1 subspecialty.

2 Q. Okay. Within the general area of rheumatology
3 do you specialize in any area?

4 A. To a degree I specialize in lupus and vascular
5 inflammation or vasculitis which is a -- sort of an
6 allied condition and sometimes occurs within lupus.

7 Q. Doctor, have you received any awards or honors
8 in your field?

9 A. 1988 I got the American College of Rheumatology
10 Dubois award for research in lupus.

11 Q. Have you ever received any grants?

12 A. About 10 years of NIH support primarily for
13 epidemiology and lupus.

14 Q. Okay. Can you briefly tell the ladies and
15 gentlemen what it means to receive a grant regardless of
16 the source? You said this was from -- the last 10 years
17 has been from the National Institutes of Health?

18 A. Yes, sir.

19 Q. Regardless of the source what does it mean when
20 you get a grant?

21 A. It means you isolate a question about which not
22 enough is known. You write a proposal to receive salary

1 and technical support to study that question, submit it
2 in some sort of competitive, what they call, peer review
3 process which is really a blinded thing where they take
4 your name off. And you don't know who's reviewing it.
5 A panel at the granting agency reviews that and picks a
6 percentage of those to be funded.

7 Q. And have these grants been in the field of
8 lupus?

9 A. Yes.

10 Q. Doctor, have you ever been published before?

11 A. Yes.

12 Q. Can you give the ladies and gentlemen an idea
13 of the number of times you've been published?

14 A. 45.

15 Q. Okay. Have any of those publications been
16 about lupus?

17 A. Yes.

18 Q. Okay. Let me show you, if I could, what has
19 been previously marked -- may I approach the witness,
20 Your Honor?

21 THE COURT: You may, sir.

22

1 BY MR. ALTMAN:

2 Q. As Defendant's Exhibit No. 3. Could you just
3 identify that for the ladies and gentlemen of the jury?

4 A. All right. That's the copy that I gave you of
5 my curriculum vitae which is sort of an academic life
6 history.

7 MR. ALTMAN: Your Honor, at this time we would
8 move the admission of Defendant's Exhibit No. 3.

9 THE COURT: Any objection?

10 MR. MALONE: No, sir.

11 THE COURT: It's received in evidence.

12 (The Roberts curriculum vitae previously marked
13 Defendant's Exhibit No. 3 for identification
14 was received in evidence.)

15 MR. ALTMAN: And I would proffer Dr. Roberts as
16 an expert in the field of rheumatology and the disease
17 of lupus.

18 THE COURT: Any objection?

19 MR. MALONE: No, sir.

20 THE COURT: He will be received as an expert in
21 those fields. And, again, the credibility of his
22 testimony will be determined by the eight members of the

1 jury. You may proceed, Mr. Altman.

2 MR. ALTMAN: Thank you.

3 BY MR. ALTMAN:

4 Q. Doctor, if you would, we've heard a great deal
5 about the condition of lupus; but I would like for you
6 to enlighten us a little further, if you could. Could
7 you tell us what lupus is?

8 A. It's very complex, hard to explain in English
9 without sounding condescending; but it's basically
10 misdirected inflammation or infection fighting and
11 misdirected clotting.

12 So that in a sense if you want to -- the body
13 thinks that there's infection where there's not
14 infection and starts the process of inflammation to
15 defend against that in an inappropriate time and place
16 in the body and the same for clotting to a lesser
17 degree, blood clotting.

18 Q. All right. Let's try and break that down. Can
19 you give the ladies and gentlemen a concrete example of
20 what you mean where the body mistakes that it sees an
21 infection?

22 A. Okay. Probably the classic teaching example

1 which is actually quite relevant to Mr. Ponirakis's
2 clinical situation is that the kidney which is filtering
3 the blood and, therefore, exposed to blood a great deal
4 filters out immune complexes which is antibodies that
5 the body is making which it shouldn't be making in this
6 case.

7 They actually cross react with parts of -- of
8 one's cells. And those filter out or precipitate out in
9 the glomerulus or filter part of the kidney.

10 And they attract inflammatory cells trying to
11 clean up those immune complexes. And a lot of mediators
12 are released, some of which cause scarring and permanent
13 damage to the kidney.

14 Q. You've used a lot of medical terms.

15 A. Sorry.

16 Q. And I'm going to ask you to try to explain this
17 in as simple English --

18 A. Yes, sir.

19 Q. -- even if it sounds like you're talking
20 condescending. You used terms like mediators and
21 complexes and things like that.

22 A. Right.

1 Q. Simple English. Tell the ladies and gentlemen,
2 if you would, or give them an example of how the body
3 thinks it's fighting an infection when there's really
4 not an infection there.

5 A. Well, normally if you had a blood stream
6 infection with a bacterium like a staph that you might
7 get from your skin, something in it -- let's say it was
8 an abscess or something like that that stayed there for
9 awhile.

10 The body would make antibodies which are
11 proteins which stick to the staph. And on the other end
12 of the antibody is a portion which hooks to cells that
13 then eat the staph. Okay. That would be the normal
14 infection fighting mechanism.

15 In the case of lupus some of these antibodies
16 seem to stick to DNA, for example, from the body's own
17 cells. That combination of the target and the antibody
18 is an immune complex. Those drift through the blood and
19 land in certain places, kidney being a prime one since
20 it's filtering the whole pool of blood.

21 Q. Am I correct, sir, that what you're saying is
22 that these antibodies end up fighting healthy tissue

1 instead of fighting infected tissue?

2 A. Right. Yeah.

3 Q. Okay. Now, you also mentioned that lupus has
4 another way that it attacks. And that's through blood
5 clots.

6 A. Right.

7 Q. Could you explain to the ladies and
8 gentlemen --

9 A. A couple of others, but that's the prominent
10 one.

11 Q. Okay. Can you explain to the ladies and
12 gentlemen the way that works and in as simple English as
13 you can; okay?

14 A. The -- an example of the way that works is that
15 the previously discussed immune complexes seem to affect
16 the health of blood vessel lining in an adverse way.
17 And that lining then is less slick or less able to
18 counteract inappropriate clotting.

19 And so those blood vessels will be more
20 inclined to develop a small clot or plug, fibrin plug,
21 in an inappropriate spot. And, in fact, that often is
22 the final point even in the kidney inflammation that

1 the -- the filter, the glomerulus, which is filtering
2 the blood clots off. So it's the clotting rather than
3 the actual inflammation which does the final damage.

4 Q. All right. Let's break this down. Now that
5 you've described it let me ask you to tell the ladies
6 and gentlemen first dealing with the false infection
7 fighting aspect of it, what happens when the body
8 falsely attacks an area that it thinks is infected but,
9 in fact, has healthy tissue?

10 A. Ultimately some chemicals are produced by the
11 immune competent cells, the white blood cells, that are
12 there that promote scarring. So you get a scar where
13 you actually had no original damage. That scarring
14 replaces some of the normal tissue and may even destroy
15 a kidney glomerulus or filter.

16 Q. And what happens to the body when it goes
17 through this blood clotting phenomenon that you
18 discussed?

19 A. Well, in the end it -- it's analogous to what
20 happens in a heart attack. Blood that should go through
21 that spot is blocked from going through it. And the
22 tissue that's downstream from that can't get any

1 nourishment and infarcts or dies from lack of oxygen.

2 Q. Is there any cure for lupus?

3 A. There's no practical cure.

4 Q. What do you mean by that?

5 A. Probably -- worldwide there are probably 50
6 million people who have lupus. There are probably about
7 50 who have been cured all in the last five or six
8 years.

9 And that's through experimental protocols which
10 turned out to be a very high morbidity and mortality.
11 That's taking the current medications, particularly the
12 cyclophosphamide which is used frequently in renal
13 disease, and upping the dose to doses that are used for
14 wiping out the bone marrow preparatory to bone marrow
15 transplantation in some cancers. That would be 10 times
16 the usual dose used in lupus.

17 And if the person survives that, it seems
18 that -- that they might be cured. On the other hand,
19 the programs in the United States have been stopped
20 because of the high mortality. It seems to kill 20
21 percent of the patients who --

22 Q. Once again I want to make sure the ladies and

1 gentlemen understand this. If I understand what you
2 just said, there may be out of the -- how many million
3 people who have lupus?

4 A. 50.

5 Q. 50 million people.

6 A. Worldwide.

7 Q. There are maybe 50 people who have been cured.

8 A. Right.

9 Q. And these 50 people have received exceptionally
10 high doses of what type of drugs?

11 A. Cyclophosphamide primarily.

12 Q. Is that the same thing as Cytosan?

13 A. Yes, sir.

14 Q. Is Cytosan a different name?

15 A. Cytosan is the proprietary Bristol-Myers name.
16 So cyclophosphamide is the chemical name.

17 Q. Have any of these programs where you said that
18 they have been given exceptionally high doses of the
19 Cytosan -- have any of these programs ever been in the
20 United States?

21 A. There was one at Northwestern. The person -- I
22 heard the person in charge speak in November. They said

1 they were kind of holding off, looking at it more
2 carefully because of the number of deaths they had.

3 That was my point. It's not really curable
4 from the practical standpoint in the year 2000. We have
5 a theoretical way of curing. We understand a mechanism
6 by which it could be cured. It's not currently used
7 even in Kehl, Germany, where it was first used.

8 Q. And the reason it's not currently used is
9 because the risk of death --

10 A. Yeah.

11 Q. -- is so significant?

12 A. Patient sacrifice; too much mortality. So
13 the -- the practical answer is, no, there's not a cure.

14 Q. Okay. Now, Doctor, did there come a time when
15 I asked you to review some medical records regarding a
16 patient by the name of Sotiri Ponirakis?

17 A. Yes, sir.

18 Q. Okay. Did you review medical records regarding
19 the problems he has encountered since July of 1997 when
20 he was diagnosed with lupus nephritis?

21 A. Yes. Yes.

22 Q. Okay. Now, let me start with this question.

1 To a reasonable degree of medical probability do you
2 believe that Mr. Ponirakis has systemic lupus?

3 A. Yes.

4 Q. Okay. Can you tell the ladies and gentlemen
5 what evidence there is that he has systemic lupus?

6 A. Well, there are three or four categories of
7 evidence. All of them are important. The history of
8 what happened with the kidney disease, the lung disease
9 and the gut disease, that -- that natural history of
10 those events coming together is one line of evidence
11 that he had lupus.

12 Of course, the one that's relied on to a great
13 deal clinically is the blood testing evidence. So he
14 had the so-called antinuclear antibody that you might
15 have heard about and anti-DNA and low complement; all
16 blood tests which have to do with inappropriate
17 activation of the immune system. He had all of those.

18 Q. Okay. Let me stop you for a minute; okay? We
19 have not talked, I don't believe, about any of those
20 blood studies. One was an antinuclear antibody. That's
21 the ANA?

22 A. Yes, sir.

1 Q. It's also referred to as an ANA test?

2 A. Yes, sir.

3 Q. Am I correct that he had that test done
4 sometime after July of 1997, after the lupus nephritis
5 was actually diagnosed?

6 A. Maybe right before that.

7 Q. Okay. All right. What other types of tests
8 were you referring to?

9 A. One of them is a low serum complement -- it's
10 called. Complement is a set of serum proteins that are
11 important in fighting infection. They're like
12 ammunition for the immune system.

13 They were depleted in him which often happens
14 in lupus because of the inappropriate activation of the
15 infection fighting system.

16 Q. All right. Now, you've said that there were
17 three things that went into your decision that he had
18 systemic lupus, one of which was the history.

19 A. History, lab. And he does have a catalog of
20 biopsies now that suggest that looking in retrospect.

21 Q. So the pathology.

22 A. Correct.

1 Q. Okay. Now, the ladies and gentlemen have heard
2 a great deal about a condition called TTP.

3 A. Yes.

4 Q. Okay. I think this is going to be a difficult
5 question for you. Within a reasonable degree of medical
6 probability can you tell the ladies and gentlemen what
7 thrombotic thrombocytopenic purpura is?

8 MR. MALONE: Excuse me. Can we approach the
9 bench for a second, Your Honor?

10 THE COURT: Yes.

11 (Counsel approached the bench and the following
12 proceedings were held:)

13 THE COURT: Mr. Altman, before we do this,
14 approximately how long would you expect to be with him?

15 MR. ALTMAN: Probably just another 15, maybe 20
16 minutes. We're in the meat of his testimony now.

17 THE COURT: I'm going to send them out for the
18 afternoon recess right now. Is it a logical time to
19 stop for you?

20 MR. ALTMAN: Sure.

21 (The bench conference was concluded.)

22 THE COURT: Okay. Ladies and gentlemen, it's

* * *

1 And I don't think that that's been discussed,
2 but that should be part of the record as further
3 information of what the plaintiff was aware of.

4 THE COURT: I want the designation to be part
5 of the record. I want the deposition transcript to be
6 part of the record so that in the event that there's an
7 appeal and that's an issue, I want the record to be
8 there. And both sides can argue what they deem
9 appropriate to the Supreme Court if you disagree with
10 the Court's ruling.

11 MR. ALTMAN: Thank you, sir.

12 (The jury returned to the courtroom, after
13 which the following proceedings were held:)

14 THE COURT: Thank you for your patience.

15 Mr. Altman.

16 DIRECT EXAMINATION (resumed)

17 BY MR. ALTMAN:

18 Q. All right. Doctor, when we took our break we
19 were starting to talk about TTP. Doctor, can you tell
20 the ladies and gentlemen what the relationship is of TTP
21 to the overall disease of lupus?

22 A. In lupus of the more severe variety probably

1 about five percent of patients encounter some severe low
2 platelet counts. Platelets are blood cells that
3 contribute to clotting. And in lupus sometimes there's
4 inappropriate clotting.

5 And just like the immune complex components are
6 consumed -- what I mean is complexes are formed,
7 platelets are consumed when clotting is taking place
8 especially inappropriately all over the body.

9 Q. Go ahead, sir. I'm sorry. Finish your answer.

10 A. So the two platelet disorders that lupus
11 patients get other than just low platelets are immune
12 thrombocytopenic purpura which is antibodies to
13 platelets which take them out of circulation and TTP or
14 thrombotic thrombocytopenic purpura which is fibrin
15 strands.

16 Those are clotting proteins stuck together
17 making a clot across the vessel opening and platelets
18 sticking to that and blood cells, red blood cells,
19 hitting it and breaking apart.

20 So TTP is an illness which most often occurs by
21 itself, that is, we don't understand the triggers or
22 causes in the year 2000; but it sometimes occurs in

1 lupus in a small number of patients which is less than
2 five percent even in the severe group.

3 Q. Now, did there come a time when you reviewed
4 the medical records and learned that Mr. Ponirakis had
5 developed TTP?

6 A. Right. Right. I -- or could have been ITP.
7 It was not entirely clear.

8 Q. Okay. Do you have an opinion -- first of all,
9 is the TTP treated and, if so, how is it treated?

10 A. Yes, it is treated. It has to be treated
11 relatively promptly by plasma pheresis. That's taking
12 blood out and taking away some of the soluble elements
13 and putting the cells back in salt water, in saline, and
14 getting rid of some of the ammunition for clotting that
15 is part of the natural clotting system and also by high
16 dose corticosteroids or Prednisone.

17 Q. Do you have an opinion, sir, to a reasonable
18 degree of medical probability assuming that
19 Mr. Ponirakis had received treatment for his lupus
20 nephritis in like December '96, January '97 -- do you
21 have an opinion, sir, to a reasonable degree of medical
22 probability whether he would have developed TTP

1 regardless?

2 A. Yes.

3 Q. And what is that opinion, sir?

4 A. He would have developed it, because it appears
5 that the time of the renal disease was very separate in
6 time from the TTP which appears to be, I think, mostly a
7 1999 event.

8 So it was '96 to '99. The treatment -- the
9 efficacy of the treatment that we would use for the
10 renal disease is not long enough to cover that 1999
11 period.

12 Q. If I understand what you're saying then, had
13 treatment been instituted in December '96, early '97, he
14 would have gone through a period of treatment; is that
15 correct?

16 A. Right.

17 Q. And that that period of time --

18 THE COURT: Hold on for one second.

19 MR. MALONE: The testimony by counsel is what I
20 wanted to object to.

21 THE COURT: Is your objection that he's
22 leading? I sustain the objection.

1 BY MR. ALTMAN:

2 Q. Doctor, would the treatment, assuming it had
3 been instituted in December '96, '97, have covered and
4 prevented the TTP?

5 A. I don't think so.

6 Q. Now, let's turn our attention, if we could, to
7 the intestinal bleeding that Mr. Ponirakis has
8 undergone. Did there come a time, sir, where he began
9 to experience some intestinal bleeding?

10 A. Yes.

11 Q. Okay. Did there come a time when he, in fact,
12 had portions of his colon and small intestine removed?

13 A. Yes.

14 Q. Did you read the medical records of September
15 1999 in which they made a diagnosis of vasculitis?

16 A. Yes.

17 Q. What is the significance of vasculitis -- well,
18 let me -- before you answer that question let me ask a
19 different question.

20 Do you have an opinion, sir, to a reasonable
21 degree of medical probability whether or not had
22 treatment been instituted in December '96, early 1997 --

1 whether or not Mr. Ponirakis would have -- regardless
2 have suffered the bleeding episodes in his colon and
3 ended up with the colon resection that he did?

4 A. I think the earlier renal treatment would have
5 been effective at that time period, but its effect would
6 not have lasted until 1999. So the answer is I think it
7 would have happened anyway.

8 Q. Okay. Now, the pathology report indicates
9 vasculitis.

10 A. Yes.

11 Q. Okay. Doctor, do you have an opinion, sir, to
12 a reasonable degree of medical probability whether or
13 not treatment with cyclosporines was the cause of
14 Mr. Ponirakis developing the gut bleeding, the bleeding
15 in his colon?

16 A. Well, I have an opinion, yes.

17 Q. What is that opinion, sir?

18 A. No.

19 Q. Okay. Now, the cyclosporines, are those
20 medications that are sometimes given to patients who
21 receive transplants?

22 A. To -- every patient who receives a transplant

1 gets cyclosporine or a decedent drug that's similar
2 called FK506 or tacrolimus. So speaking of classes of
3 drugs, every transplant patient gets it.

4 Q. Did Mr. Ponirakis, in fact, get those after he
5 received his transplant?

6 A. I believe so, yes.

7 Q. Okay. And do you have an opinion whether or
8 not those drugs caused him to suffer the intestinal
9 bleeding that he underwent?

10 A. I don't think they did. I think vasculitis
11 from the lupus caused some tissue to die. And that
12 bled.

13 Q. Now, Doctor, let me ask you to assume that --
14 strike that. Let me ask you one other question about
15 the intestinal bleeding.

16 Do you have an opinion, sir, to a reasonable
17 degree of medical probability whether or not the
18 bleeding in the colon was caused by the renal disease?

19 A. I think both the renal disease and the
20 vasculitis which I think caused the bleeding in the
21 colon are caused by the lupus, but the vasculitis is not
22 causing the renal disease. And the renal disease is not

1 causing the vasculitis.

2 Q. Okay. Now, let's talk about Mr. Ponirakis's
3 lung problems. Did you read during the materials that
4 you received that he has been admitted on occasion for
5 lung infections and lung problems?

6 A. Most significantly the November -- I think it's
7 November '98 episode that was described by the treating
8 physicians as being due to lupus pneumonitis.

9 Q. Specifically let me direct your attention --
10 are you referring to the Dr. Musio discharge note of
11 November 29th where he reported that there was
12 interstitial pneumonitis with intra-alveolar hemorrhage
13 consistent with lupus pneumonitis?

14 A. Yes. That's a biopsy report. That's a complex
15 area, but that seems to be; that that's related to the
16 lupus directly.

17 Q. Okay. Let me direct your attention now just to
18 the lung problems. Do you have an opinion, sir, to a
19 reasonable degree of medical probability whether had
20 treatment been instituted in December '96, January '97
21 Mr. Ponirakis would have, nevertheless, undergone those
22 problems?

1 A. I think it's less clear than for the gut
2 infarction, because that period of time abuts on the end
3 of the maintenance period of the hypothetical renal
4 disease treatment he would have gotten; but if you pin
5 me down to what I think, I think it would have occurred
6 anyway.

7 MR. MALONE: Well, I'm not sure that that's --

8 THE COURT: Doctor, you can opine if you hold
9 your opinion to a reasonable degree of medical
10 probability. If it's just a gut reaction, you cannot
11 give us your opinion.

12 THE WITNESS: I think it's 51 -- at least 51
13 percent likely that he would have had the lung episode
14 anyway; but if we were to find the opposite was true in
15 reality, I wouldn't be shocked. I would be shocked,
16 amazed and --

17 THE COURT: Do you want to be heard any
18 further, Mr. Malone?

19 MR. MALONE: No. I think he's clarified it.

20 THE WITNESS: If the gut --

21 THE COURT: The objection is overruled.

22

1 BY MR. ALTMAN:

2 Q. Doctor, what are lupus flares?

3 A. They're periodic exacerbations of lupus
4 manifestations. And really the word flare is the
5 common-sensical meaning that you would -- has the
6 common-sensical meaning that you would think, you know.

7 It applies to any feature that that individual
8 person might have as part of their lupus which would
9 include their renal disease, would include the lupus
10 lung disease that you just described, would include the
11 vasculitis even.

12 Q. Doctor, do you have an opinion within a
13 reasonable degree of medical probability whether the
14 lupus flares -- I better ask that question. Has
15 Mr. Ponirakis undergone lupus flares?

16 A. Well, yes. And almost all patients have flares
17 in the sense that they don't have the same degree of
18 intensity of disease all the time. It has sort of a
19 sine wave, roller coaster, up and down quality to it.
20 And that's one of the most deceptive things. That's why
21 it's a difficult clinical area.

22 Q. Do you have an opinion to a reasonable degree

1 of medical probability had treatment been instituted for
2 the lupus nephritis in December '96, January '97 -- do
3 you have an opinion, sir, whether or not he would have,
4 nevertheless, undergone lupus flares?

5 A. Well, I think he would have undergone some
6 lupus flares. And the further away you get in time from
7 the intense treatment, hypothetical treatment period
8 from December '96 to June '97 the more likely it is that
9 that flare would have happened in any case.

10 Q. I just have one little area of questioning to
11 go through. You've mentioned on several occasions the
12 intense therapy, the lupus therapy.

13 Would you tell the ladies and gentlemen what
14 the intense lupus therapy consists of and then any other
15 therapy that might go along with that?

16 A. Okay. Well, the therapies are somewhat toxic.
17 And so the universal approach is to try to find the
18 times when the disease is really flaring up and treat
19 intensely during those periods and then decrease the
20 treatment when the disease has quieted down. All right.

21 So the usual protocol for treatment of lupus
22 nephritis which Mr. Ponirakis had in December of '96

1 would be six months of monthly Cytoxan plus Prednisone
2 followed by somewhere between six and 18 further months
3 of quarterly -- quarterly cyclophosphamide, every 12
4 weeks.

5 So the intense period of treatment on average
6 is able to control more than half of lupus
7 manifestations including some of the things that
8 happened to him.

9 But I think the maintenance therapy, the
10 quarterly therapy, especially as you get out toward the
11 end of the maintenance therapy, is weak enough so that
12 the strong lupus manifestations usually come through
13 that in some way.

14 Q. One final question, Doctor. How bad is
15 Mr. Ponirakis's lupus, the disease itself?

16 A. It's severe. It's severe. He has -- of the
17 major features that are really threatening which
18 includes the renal disease and the gut infarction and
19 even the lung disease he's only missing one which is the
20 brain disease or strokes. So it's severe.

21 MR. ALTMAN: Thank you, sir. I have nothing
22 further, Your Honor.

1 THE COURT: Mr. Malone, you may cross-examine.

2 MR. MALONE: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. MALONE:

5 Q. Good afternoon, Dr. Roberts. December 1996,
6 creatinine of 1.9. Lupus treatment at that point would
7 have been appropriate; true?

8 A. I believe so.

9 Q. And you believe if he had gotten that treatment
10 in December 1996, then he would have kidney function
11 today without dialysis and without having had to undergo
12 a transplant; true?

13 MR. ALTMAN: Objection. Beyond the scope, Your
14 Honor.

15 THE COURT: Overruled.

16 MR. MALONE: You may answer the question.

17 A. Yes. You're right. He -- he would have had --
18 the likelihood at the 51 percent level is that he would
19 not be on dialysis and would not need a transplant at
20 this moment.

21 BY MR. MALONE:

22 Q. And what the Cytosan does is to calm down the

1 autoimmune responses that are creating these immune
2 complexes; right?

3 A. Right. Which is the -- probably the most
4 important mechanism of several in the kidney disease.

5 Q. Okay. Now, we can't say for sure, can we, that
6 his subsequent course, the timing of his subsequent
7 courses of events -- and I'm talking about this TTP
8 developed in 1998.

9 We can't be sure that that timing would have
10 been the same if he had had the right kind of treatment
11 for the lupus back in December '96 through the early
12 part of '97; true?

13 A. What does sure mean in that context? Is it 51
14 percent or --

15 Q. Well, we know -- let me just back up a little
16 bit. We know that this man developed the TTP condition
17 sometime late in 1998; correct?

18 A. Right, although --

19 Q. And -- or 1999.

20 A. -- the -- the vasculitis part that really
21 resulted in the gut infarction might be later. I think
22 the operation was September '99 or something like that.

1 Q. What I'm -- what I thought I heard you saying
2 earlier was that the treatment of the Cytosan that helps
3 the kidneys also can help prevent these other things if
4 it's given at the right time.

5 A. Correct.

6 MR. ALTMAN: Objection as to form, Your Honor.

7 THE COURT: I'm not sure I understand what you
8 mean by the form, sir.

9 MR. ALTMAN: It can help. And my objection is
10 to form. I think the question has got to be asked to a
11 reasonable degree of medical probability.

12 THE COURT: It's cross-examination. The Court
13 disagrees. And I overrule the objection.

14 BY MR. MALONE:

15 Q. Let me try it again so we're all on the same
16 wavelength. The Cytosan treatment that's given to calm
17 down the lupus and clean up the kidneys along with the
18 help of the Prednisone, that can help other aspects of
19 the lupus as well; right?

20 A. It's best at helping the kidney disease, but it
21 can help other aspects as well. You're correct.

22 Q. It can help to prevent the onset of the TTP

1 disease if it's given at the right time.

2 A. And probably in the right quantity, too. Yeah.

3 Q. Okay. So what your opinion is here, if I
4 understand you right, is that looking back, crystal ball
5 gazing if he had had six months worth of lupus
6 treatment, of the Cytoxan treatment clear through the
7 first half of 1997, yes, it would have cleaned up his
8 kidneys; but since he didn't get the TTP until later on
9 in late '98 or '99 there wouldn't have been a lingering
10 effect of the Cytoxan.

11 A. Yes, sir.

12 Q. Okay. Now, of course, if he had had some kind
13 of lupus flare, that would have been appropriate to give
14 him some Cytoxan at that point; right?

15 A. Depending on the severity. For renal disease,
16 definitely, yes. And for other features perhaps not.
17 It's a risk, benefit calculation we do every time,
18 because the cyclophosphamide has some serious side
19 effects. It can cause some cancers.

20 Q. But my point is that if he had gotten the
21 Cytoxan at the right time in fairly close proximity to
22 the TTP, it could have prevented the TTP.

1 A. Correct. Correct, although I would point out
2 there's -- once the lupus diagnosis is made for certain
3 by the kidney biopsy in 1997 then there's nothing to
4 prevent us from treating with cyclophosphamide for
5 another feature of the lupus.

6 Q. All right. Now, you're the same W. Neal
7 Roberts who's written various articles in rheumatology.
8 And you've written about lupus in general.

9 A. Yes, sir.

10 Q. May I show you one thing you've written and ask
11 if you agree with this statement just as a general
12 statement? This is from Rheumatology, Problems in
13 Primary Care, 1990 copyright.

14 Do you remember writing that?

15 A. Yes, sir.

16 Q. Okay. I've just got the one copy, but maybe
17 you can read with me on the monitor. You said in
18 Chapter 13 on page 205, systemic lupus erythematosus can
19 be fulminating and rapidly fatal or a chronic and mild
20 disease. With the advent of sensitive serologic
21 tests -- and those are blood tests; right?

22 A. Yes, sir.

1 Q. Okay. Many cases are diagnosed that are mild
2 with an irregular course over many years with periods of
3 complete or nearly complete remission.

4 In contrast to the early periods of complete or
5 nearly complete -- I'm sorry. I need to put my glasses
6 on.

7 In contrast to the early understanding of the
8 disease, it is no longer thought of as a uniformly fatal
9 disease. In fact, most individuals live fairly normal
10 lives despite their symptoms.

11 Did you write that in your --

12 A. Yes, sir.

13 Q. -- textbook in 19 --

14 A. That's true still, I think, yes.

15 Q. Okay. And you agree that early detection
16 particularly with the kidney aspects of lupus is very
17 important.

18 A. Yes.

19 Q. Having dialysis can make an enormous impact on
20 someone's quality of life. Do you agree with that?

21 A. Yes. It basically -- it takes three days a
22 week to do it. And then you don't feel well afterwards

1 usually. So it's sort of like a half-time job.

2 MR. MALONE: Thank you. That's all I have.

3 REDIRECT EXAMINATION

4 BY MR. ALTMAN:

5 Q. Mr. Malone just asked you --

6 THE COURT: Redirect.

7 BY MR. ALTMAN:

8 Q. -- about quality of life, Doctor. When a
9 person has the type of gut problems that Mr. Ponirakis
10 has had -- has undergone, how does that affect his
11 quality of life?

12 A. Well, my understanding is that he's on total
13 parenteral nutrition which you all have probably gone
14 over; but it means --

15 Q. Actually we haven't. Will you tell the ladies
16 and gentlemen what TPN or total parenteral nutrition is?

17 A. That means that after the operation there was
18 not enough length of working gut left to absorb enough
19 food to keep the person healthy. And so, therefore,
20 they have to have an intravenous line usually put in
21 under the clavicle in all the time.

22 And they get soluble nutrition, everything that

1 they need through that. So it's no eating. And it has
2 a serious side effect. There's something about that
3 that we don't understand that winds up hurting the liver
4 after a long period of time of getting all these
5 concentrated nutrients and not eating. And there's
6 quite a large, like 50 percent in 10 years, prevalence
7 of serious liver damage from it.

8 Q. Mr. Ponirakis told us in his deposition that he
9 has three ostomy bags on his stomach.

10 MR. MALONE: This is beyond the scope of my
11 cross, Your Honor.

12 MR. ALTMAN: Quality of life.

13 THE COURT: Do you want to say anything
14 further, Mr. Malone?

15 MR. MALONE: No.

16 THE COURT: I overrule the objection.

17 BY MR. ALTMAN:

18 Q. Tell the ladies and gentlemen very briefly what
19 an ostomy bag is.

20 A. That would be a heavy duty plastic baggy with
21 an adhesive surface that's put over a hole in the
22 person's side where the -- what's left of the bowel

1 might hook up so that even if the person is not eating,
2 any secretions and in some cases fecal material that
3 might come out there doesn't get on your clothes.

4 Q. Are those ostomy bags related to the problems
5 and the surgeries he's had to his bowel?

6 A. I would think so, yes.

7 Q. How do they affect someone's quality of life,
8 sir?

9 A. Well, that's terrible, I guess. Yeah. I
10 mean --

11 MR. ALTMAN: I have no other questions.

12 THE COURT: Is this witness free to go or
13 subject to recall?

14 MR. ALTMAN: Free to go.

15 THE COURT: Is he free to go as far as you're
16 concerned, Mr. Malone?

17 MR. MALONE: Yes, sir.

18 THE COURT: All right. Doctor, thank you very
19 much. You're free to go.

20 (Witness excused.)

21 THE COURT: Mr. Altman.

22 MR. ALTMAN: No further evidence on behalf of

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1 your deliberations as the members of the jury deem
2 appropriate and arrive at your verdict.

3 And after that's done you will be free to
4 discuss it with anyone that you may want to discuss the
5 case with, but at this point please don't do anything
6 relating to the case or do any independent examination
7 or anything else.

8 Go home; enjoy yourselves tonight; meet Deputy
9 Royal outside Courtroom 4-A about 25 minutes after 9:00.
10 And I'll get you back to the courtroom as quickly as we
11 can tomorrow. Have a nice evening, folks.

12 (The jury left the courtroom, after which the
13 following proceedings were held:)

14 THE COURT: Mr. Altman, you said you wanted to
15 make a motion to strike.

16 MR. ALTMAN: Oh, the Court wants me to do that
17 now? Yeah. Two bases, Your Honor. At this time on
18 behalf of Dr. Choi I would move to strike the
19 plaintiff's evidence --

20 THE COURT: Hold on for one second.
21 Mr. Malone, please. He's making a motion to strike.
22 You might want to listen to this.

1 MR. ALTMAN: I'm insulted that he wouldn't want
2 to listen.

3 MR. MALONE: No. I was letting my client go.
4 That's all.

5 THE COURT: Okay.

6 MR. ALTMAN: At this time on behalf of Dr. Choi
7 I would move to strike the plaintiff's evidence and for
8 entry of summary judgment on his behalf for two bases.

9 Number one, in light of the evidence that was
10 adduced at trial I don't believe that the plaintiff has
11 established a prima facie case. I'm not going to
12 belabor that point any further.

13 I also think that there is another basis upon
14 which the Court should strike the plaintiff's evidence.
15 And I think that the plaintiff's evidence itself proves
16 that there's contributory negligence as a matter of law.

17 If, in fact, we have the testimony -- we've got
18 the testimony, some of this from plaintiff's own case --
19 we've got the testimony that in response to the question
20 that Dr. Choi did ask from Dr. Mackintosh that he would
21 have expected Mr. Ponirakis to answer that question, to
22 answer that question by saying that he has the history

1 of the urine problems.

2 On top of which we have Dr. Choi's testimony,
3 Dr. Hubach's testimony as well as Dr. Mackintosh's
4 testimony that had that information been provided that
5 it would have resulted in some additional testing. We
6 wouldn't be here today had the plaintiff provided that
7 information.

8 I don't think there's any way in light of the
9 testimony that has been adduced at trial that this jury
10 could find that even in light of the plaintiff's
11 testimony -- the plaintiff now -- I mean, under Massie
12 versus Firmstone I think the plaintiff really has to --
13 is sort of stuck living with Dr. Mackintosh's testimony.

14 THE COURT: I think Massie versus Firmstone
15 just applies to the plaintiff's own testimony.

16 MR. ALTMAN: And I must admit I'm not a hundred
17 percent sure that that's --

18 THE COURT: I think a lot of people, judges
19 included, get confused. The plaintiff is bound by
20 things that he himself puts on that are not at all in
21 conflict with the other evidence in the case.

22 The plaintiff is bound by his own statements of

1 fact whether he puts on conflicting evidence or not.
2 And I think the latter is what Massie versus Firmstone
3 is about.

4 MR. ALTMAN: Well, I may have misstated my
5 understanding of Massie; but I think this jury on the
6 plaintiff's evidence hears the testimony from
7 Dr. Mackintosh. Even if Dr. Choi should have asked more
8 questions, that's really irrelevant to the contributory
9 negligence argument.

10 THE COURT: Is the jury bound to accept the
11 testimony of an expert witness?

12 MR. ALTMAN: Well, I think that where there is
13 nothing in contrast to it I think they are. There is
14 nothing in contrast to the testimony from Dr. Mackintosh
15 that they would have expected -- he would have expected
16 this information to be given in response to the question
17 that Dr. Choi did ask.

18 THE COURT: So in a typical personal injury
19 case if the defense has no doctor and the plaintiff's
20 expert testifies that the injuries were proximately
21 caused by the accident in question, the judge should
22 instruct the jury that that's the only testimony and you

1 need to necessarily decide that proximate causation
2 should be ruled in favor of the plaintiff?

3 MR. ALTMAN: The example, if I may, sir, is a
4 little too simplistic. Is the attorney for the
5 defendant attacking the doctor's opinion or is he
6 leaving that opinion alone?

7 If he leaves that opinion alone, I think the
8 judge in that circumstance could instruct it; but if the
9 attorney attacks it and calls into question the
10 credibility on that point of the doctor, then I think
11 it's a different scenario. And I don't think so.

12 In this particular case we have not attacked
13 Dr. Mackintosh's opinion that a reasonably prudent
14 patient in response to the question that Dr. Choi did
15 ask would have given the information about the history
16 of the blood in the urine.

17 THE COURT: Okay, sir.

18 MR. ALTMAN: So it's on the basis that I think
19 the plaintiff has failed to establish a prima facie
20 case -- and, again, I don't want to belabor that
21 point -- and the contributory negligence as a matter of
22 law, sir.

1 THE COURT: The motion to strike is denied.
2 And your exception is noted. I'm going to hear argument
3 on whether there's sufficient evidence for contributory
4 negligence to go to the jury and for how I'm going to
5 instruct the jury, but I will not nor do I believe it
6 would be appropriate for me to rule as a matter of law
7 in this case that there was contributory negligence.

8 If there is sufficient evidence to go to the
9 jury, that is generally a jury issue. And I do not
10 believe that reasonable minds could come to only one
11 conclusion as to contributory negligence in this case,
12 that the plaintiff was contributorily negligent.

13 And unless I could reach that -- unless that's
14 the only reasonable conclusion that could be reached,
15 it's a jury issue of contrib. It should go to the jury.

16 That having been said, Counsel, that's where I
17 would like to start our discussion of the jury
18 instructions instead of dealing with the others. Let's
19 get to the heart of the dispute in the case. And then
20 we'll see where things go from there.

21 Mr. Altman, you've just explained to me -- is
22 there anything else you want to add as to why you

1 contend that contributory negligence should go to the
2 jury other than what you've just articulated for me?

3 MR. ALTMAN: Well, I think there's the second
4 issue, sir. And that is the issue -- and this is where
5 I've been telling the Court that I can argue
6 alternatively.

7 If Dr. Horton conveyed that information to
8 Sotiri as he says he did, then that information should
9 have been communicated to Dr. Choi on the January 15th
10 visit.

11 I also asked Dr. Hubach -- actually I asked
12 Mr. Ponirakis, the father, did Sotiri communicate this
13 information on November 23rd, did he communicate the
14 information on January 2nd.

15 THE COURT: You went through every one of the
16 dates.

17 MR. ALTMAN: Including -- including, I might
18 add, July 1, 1997, when there, in fact, was this
19 complaints or problems. And Dr. Choi did a urinalysis.

20 So it's our position that, in fact, this
21 information could have been conveyed at any one of those
22 visits and that the failure to do so was contributory

1 negligence on the part of the plaintiff.

2 I don't know if His Honor wants us to argue law
3 at this point.

4 THE COURT: Well, you're relying principally as
5 far as the law is concerned on Gravitt versus Ward. And
6 the plaintiff is relying on Eiss versus Lillis and
7 Lawrence versus Wirth. Are there any other cases that
8 you're relying on, Mr. Altman?

9 MR. ALTMAN: Well, Your Honor, you started
10 asking me this question. And I was really going to have
11 Mr. Brown argue the contributory negligence instruction,
12 because he argued it to Judge Alden. And he was
13 prepared to argue it. So I --

14 THE COURT: I read his memo that he provided to
15 Judge Alden. That's why I was saying that he's
16 principally relying on Gravitt versus Ward.

17 And I think Judge Alden's ruling was absolutely
18 correct; that although we like to rule in limine when we
19 can, this is simply one where the trial judge had to
20 hear the evidence and then determine whether it was
21 sufficient or not.

22 Why don't you save it for rebuttal, Mr. Brown,

1 unless there is something else specifically legally that
2 you want to bring to my attention before I hear
3 argument.

4 MR. BROWN: I was only going to point out to
5 Your Honor that actually we were basically
6 distinguishing these three cases. These were the three
7 cases, my understanding at least preliminarily, that the
8 plaintiffs were relying on. We don't believe any of
9 them specifically address this issue, but I'll
10 reserve --

11 THE COURT: I understand that; but you're
12 saying if any of the three cases are applicable, the
13 closest one is Gravitt.

14 MR. BROWN: That's correct.

15 THE COURT: Okay. Let me hear from the
16 plaintiff. Mr. Glass.

17 MR. GLASS: Finally.

18 THE COURT: I was wondering when we were going
19 to get you to stand up.

20 MR. GLASS: I know. I go home every night
21 wondering how come I haven't been in the battle.

22 Let me say first Gravitt doesn't have anything

1 to do with this case, because there really is no factual
2 dispute as to what Sotiri said on each of the two
3 occasions which I think are the only two occasions where
4 an argument can be made. Gravitt was was there
5 sufficient evidence from the defense standpoint that the
6 woman didn't complain about a breast lump.

7 Here, I mean, Judge, the undisputed evidence is
8 that Sotiri Ponirakis did not tell Dr. Choi in the first
9 visit about the history. And the undisputed evidence as
10 to what Sotiri did or didn't do in this come back from
11 the catheterization is that he didn't say anything
12 about, I mean, nobody mentioned abnormal lab values to
13 me.

14 So I don't think there's a factual dispute at
15 all here. The only issue is whether Sotiri's conduct
16 meets the definition and the legal requirements for a
17 contributory negligence defense or instruction in this
18 case. And that would be the first part of my argument.

19 The second part is because we have multiple
20 acts over a period of time of alleged negligence if you
21 are to instruct on contributory negligence, you have to
22 be very careful to not give the standard automobile one

1 that says, you know, if I rip off this little piece of
2 paper, that's the case.

3 THE COURT: I understand why your proposed
4 instruction -- if I give -- allow contrib to go to the
5 jury, you want me to instruct the jury on the concurring
6 nature of negligence in a medical malpractice case.

7 MR. GLASS: Number one. And, number two, it's
8 almost a last clear chance type of instruction, because
9 there are -- there's alleged negligence after Sotiri's
10 last alleged contributory negligence, duties that
11 Dr. Choi had to get this report afterwards.

12 And so you can't say that because Sotiri may
13 have been negligent, if you believe, at visit one that
14 that prevents him as a legal matter from recovering in
15 this case when Dr. Choi had many opportunities
16 afterwards to get the information that would have saved
17 this young man's health.

18 Let's talk just for a few minutes about the
19 first visit. And the -- first of all, Sotiri's conduct
20 is going to be judged not by what any expert witness
21 said. There is no instruction, there is no law in
22 Virginia --

1 THE COURT: I agree with you. And that's why I
2 wouldn't let Mr. Altman get into it with his expert, but
3 there is evidence from Dr. Mackintosh that he would have
4 expected a patient in light of the questioning by
5 Dr. Choi to have given that information. Do you agree
6 that that's what his testimony was?

7 MR. GLASS: I agree that that is what his
8 testimony is, but it's --

9 THE COURT: Isn't that more than a scintilla of
10 evidence then to support contributory negligence going
11 to the jury?

12 MR. GLASS: See, the scintilla goes to whether
13 there is evidence -- listen for a moment to my
14 argument --

15 THE COURT: All right, sir.

16 MR. GLASS: -- is that you have to have -- in
17 order to have contributory negligence you have to have
18 negligence meeting negligence. All right.

19 And the jury is either going to believe that
20 Dr. Choi complied with the standard of care in history
21 taking and if he did and Sotiri gave bad information,
22 that's maybe a hundred other things; but it's not

1 contrib, because it's not negligence meeting negligence.

2 You have -- appropriate standard of care and an
3 uncareful act by the plaintiff can never be contributory
4 negligence. All right.

5 THE COURT: Well, isn't there at least dicta in
6 Gravitt to the contrary?

7 MR. GLASS: If you would read it to me and
8 direct my attention, I'll look. And if it's dicta, I
9 would argue it's dicta; but --

10 THE COURT: Give me one moment.

11 If I accepted your basic premise, Mr. Glass,
12 how could there ever be contributory negligence in a
13 medical malpractice case?

14 MR. GLASS: You and I have had this discussion
15 before. And it's my position that there cannot be and
16 there has not been a factual scenario under any of the
17 cases that have gone to the Supreme Court of Virginia.

18 While they have talked about contrib in a
19 malpractice case in a vacuum, there's been no factual
20 situation which has met the legal definition as they
21 point out in Gravitt.

22 They say -- I don't know if -- it looks like

1 page 3 -- let's see. 330. It's hard to tell what
2 version you're reading there; but when they talk about
3 with respect to the requirements for a contrib
4 instruction and they cite to Eiss they say in order for
5 a plaintiff's negligence to bar recovery it must concur
6 without defendant -- that means in a malpractice context
7 the patient's alleged negligence must be contemporaneous
8 with the main fact asserted as negligence on the
9 doctor's part.

10 THE COURT: Isn't the Court then saying that
11 if -- and in Gravitt the situation was similar to the
12 situation here in the sense of an allegation of the
13 patient not giving information to the treating
14 physician, doesn't it?

15 MR. GLASS: In that sense it is, but --

16 THE COURT: The language that you just gave me
17 would, therefore, support the fact that at least at the
18 present state of the Virginia law contributory
19 negligence can arise in that context, wouldn't it?

20 MR. GLASS: Not in a history taking context,
21 because -- and I don't want to interrupt you; but let me
22 just put it this way.

1 THE COURT: Go ahead.

2 MR. GLASS: Because, again, if there is no
3 breach of the standard of care in history taking, then
4 there can be no contributory negligence as to that
5 allegation, because you don't have negligence matching
6 negligence.

7 If the history taking was improper or
8 substandard, then I'd argue to you that no reasonable
9 juror could say that based upon the questions Dr. Choi
10 asked that this young man should have reported, oh,
11 yeah, I had blood in the urine, protein in the urine two
12 years ago.

13 In other words, there's no situation where you
14 have negligent history taking on Dr. Choi's part and
15 that -- and a situation where a reasonable juror could
16 find that this young man failed to answer the question
17 that wasn't asked and that that was a breach of his
18 duty, so to speak.

19 THE COURT: So as a matter of law
20 Dr. Mackintosh is wrong.

21 MR. GLASS: As a matter of fact
22 Dr. Mackintosh's testimony makes no difference. And so,

1 yes, as a matter of law Sotiri's conduct -- if the
2 history taking is wrong, Sotiri's conduct as a matter of
3 law does not rise to the level of, you know, an
4 unreasonable man.

5 THE COURT: Okay. Give me one moment, please.
6 Okay. Anything else, sir?

7 MR. GLASS: The other thing to remember still
8 just in regard to the first visit is what Dr. Mackintosh
9 said is that I, as a doctor, would expect that a patient
10 would respond affirmatively to the question of serious
11 illnesses or diseases if he had blood and -- protein in
12 the urine and blood in the urine; but that's not enough.

13 And that's why you have to go and do a review
14 of systems. And that's why you have to ask more
15 questions, all right; but my main point there is that
16 you sitting as a trial judge, all right, have to make a
17 decision as a matter of law as to whether any eight
18 reasonable jurors or seven reasonable jurors if you
19 believe the history taking was improper -- whether they
20 really can come to a conclusion that Sotiri should have
21 volunteered this information in any event.

22 Because that's the only situation where you'll

1 have contrib, if the history taking is proper. It might
2 be a hundred other things, but it's not contributory
3 negligence under Virginia law.

4 THE COURT: Okay. I understand your position.

5 MR. GLASS: All right. And the only other
6 scenario that I think is a true argument to be made here
7 involves the return from Dr. Horton's cardiac
8 catheterization.

9 I would make much the same argument. On his
10 return he's asked essentially, you know, how was the
11 test. Well, everything is normal. There is no evidence
12 in the case that he was asked about any abnormal lab
13 values.

14 So, number one, no reasonable juror should be
15 able to come to the conclusion that Sotiri had to
16 volunteer if you believe the evidence about what
17 Dr. Horton allegedly told him -- that Sotiri had to
18 volunteer this information when not asked by Dr. Choi.
19 That is our argument number one.

20 Argument number two, though, what is there that
21 Dr. Choi was supposed to do that day? Again, there is
22 no allegation of negligence as to that day. The

1 evidence is that as of that day this report wasn't
2 available.

3 Dr. Choi then had an obligation to go look for
4 it; but in order to have contributory negligence we have
5 to have misconduct, so to speak, by the plaintiff
6 matching up to some misconduct or negligence on behalf
7 of the defendant.

8 THE COURT: And it's your position that no duty
9 exists for a patient to volunteer information to a
10 doctor who hasn't requested it.

11 MR. GLASS: That's number one; but, number two,
12 even if there is a duty in this case it doesn't match to
13 any specific allegation of negligence against Dr. Choi
14 for that day. In other words, this was collateral
15 information he was coming back with allegedly.

16 THE COURT: You contend, do you not, that
17 Dr. Choi was negligent on the next visit after the
18 cardiac catheterization for not ordering a blood or
19 urine test?

20 MR. GLASS: Yes.

21 MR. MALONE: Yes.

22 THE COURT: Then why wouldn't any negligence --

1 if I find that there is a legal duty for a patient under
2 the circumstances where he's not asked, why wouldn't
3 that negligence be concurring as to your claim of
4 negligence by the doctor on that particular day?

5 MR. GLASS: Because Sotiri's failure that day
6 has nothing to do with Dr. Choi's decision to order or
7 to not order blood tests that day.

8 THE COURT: Didn't Dr. Choi testify that if he
9 had learned of that aspect of the report from the
10 cardiologist that he would have ordered a follow-up
11 test?

12 MR. GLASS: He probably did. So let's think
13 about that for a moment. All right. Okay. I would
14 concede that. On that second visit --

15 THE COURT: Your argument is that at the second
16 visit there's no legal duty nor should this Court
17 establish a legal duty for a patient who isn't asked,
18 who's relying on the expertise of his doctor to have to
19 start giving information to a doctor that may be
20 important.

21 MR. GLASS: Right. Yes, sir.

22 THE COURT: Okay. I understand your position

1 in regard to that.

2 MR. GLASS: Do you want me to address the other
3 issues that -- I hear an argument now that each time
4 Sotiri came back he was supposed to have volunteered
5 that, oh, yeah, two years ago I had blood in the urine,
6 protein in the urine.

7 THE COURT: Go ahead and address that, because
8 obviously that's coming. I'm sure that's why Mr. Altman
9 asked the series of questions that he did.

10 MR. GLASS: Right. And do you want me to -- I
11 would just suggest to the Court that, again, there are
12 questions that are not being asked of the patient.

13 And no reasonable jury could find as each of
14 these visits went by -- and he's entrusting his health
15 to this doctor -- that the patient now is supposed to
16 think of I'm not getting fixed, I'm not getting fixed,
17 I've got different problems, oh, yeah, I had these
18 problems two years ago.

19 THE COURT: Basically the same argument again.
20 There is no legal duty for a patient to give information
21 when he's relying on the expertise of a doctor unless
22 the patient is asked by the doctor and fails to give

1 what a reasonable patient would have given in response
2 to the doctor's question.

3 MR. GLASS: Right. When the doctor doesn't
4 think it's important enough to ask again for a complete
5 history having not done so.

6 THE COURT: Okay. I understand your position.
7 Mr. Brown.

8 MR. BROWN: Yes, Your Honor.

9 THE COURT: Mr. Brown, I'm going to make part
10 of it easy for you.

11 MR. BROWN: Certainly.

12 THE COURT: Contributory negligence will go to
13 the jury on the first visit; that if the Supreme -- if
14 there's going to be a decision made that there cannot be
15 contributory negligence in a medical malpractice case --
16 and I comment not on whether I think there should or
17 shouldn't be.

18 That's for the Virginia General Assembly to
19 decide or for the Virginia Supreme Court to decide in
20 light of the language and decisions in Gravitt versus
21 Ward, Eiss versus Lillis and Lawrence versus Wirth.

22 In all of those cases the Supreme Court said

1 that the issue should not have gone to the jury, but
2 Mr. Glass is asking me to make what he believes to be a
3 logical extension and said that there can't be such a
4 scenario.

5 And that may or may not be, but I don't believe
6 that that's an appropriate thing for a trial court to do
7 when the Virginia Supreme Court has written three
8 opinions saying that it appears that the court believes
9 that there can be. It's just the factual scenarios
10 involved in those cases didn't reach that level.

11 There is also some evidence to support it from
12 Dr. Mackintosh's testimony and the testimony from the
13 plaintiff and the plaintiff's father. And there is
14 evidence to support an instruction on contributory
15 negligence.

16 And the Court believes that reasonable minds
17 may be able to differ on that issue for the first visit
18 when the question was asked and Dr. Mackintosh said that
19 he would have expected a patient to have given the
20 information that was not given by this plaintiff under
21 those circumstances.

22 I do not believe that under Virginia law the

1 jury is at all bound by Dr. Mackintosh's statement, but
2 there is evidence from which the jury can reach that
3 conclusion if they deem it appropriate. And, therefore,
4 contrib is going to the jury on the first visit.

5 I also find that it is sufficiently concurring
6 under those circumstances for the first visit for it to
7 be distinguishable from Gravitt versus Ward, Eiss versus
8 Lillis and Lawrence versus Wirth.

9 So let's turn to the second scenario, namely,
10 not relating the information that you contend,
11 Mr. Brown, may have been related by the cardiologist and
12 whether there is a legal duty when not asked and whether
13 there would be a legal duty relating to the information
14 from 1994 when no such information is asked for by the
15 expert during those visits.

16 MR. BROWN: Well, let me start by simply
17 addressing Gravitt for one, because I believe -- and I
18 don't want to put words in anybody's mouth; but I
19 believe that Gravitt doesn't necessarily apply to any of
20 the instances that we're alleging that there was
21 contributory negligence involved here.

22 The reason being there is evidence upon

1 which -- I mean, direct evidence, direct testimony as to
2 every instance in which we allege there's contributory
3 negligence.

4 And if the plaintiff is taking the position --
5 and perhaps I'm getting a little bit far afield from the
6 cardiac catheterization questioning.

7 But if I understand Mr. Glass correctly, he is
8 alleging that there was negligence beyond just the first
9 visit. It just superseded -- it didn't supersede. It
10 continued from the first visit to the last visit.

11 THE COURT: Well, the plaintiff -- part of the
12 plaintiff's theory in this case is that as each piece of
13 the puzzle came on your client with one additional piece
14 had even more of an obligation to do the blood or urine
15 tests so that he could see if these pieces, in fact, fit
16 together to a systemic problem.

17 That's part of the plaintiff's theory. And the
18 jury can accept that or not accept that, but there's
19 clearly evidence to support that.

20 MR. BROWN: I absolutely agree with you on that
21 point; but with regard to whether or not they concur,
22 whether or not as we allege at any time he was

1 presenting with these problems subsequently he could
2 have told Dr. Choi, oh, by the way, I had problems with
3 blood and protein in my urine, we would argue that there
4 is a concurring contributory negligence that is
5 simultaneous with any alleged negligence with each one
6 of those visits.

7 THE COURT: So then it is your position that
8 there is a legal duty for a patient who goes to see a
9 doctor to tell the doctor what the patient as a lay
10 person believes may be relevant for purposes of the
11 expert's diagnosis and treatment even when the expert
12 doesn't ask for the information.

13 MR. BROWN: Well, let me back up just for a
14 minute. I believe the answer to your question is yes
15 with a caveat.

16 And that caveat being we believe Dr. Choi asked
17 the appropriate question in that first visit. And we
18 were not given the answer that we would expect to be
19 given.

20 And at any time after that he could have given
21 us that information. And he would have acted upon it.
22 He's testified as to what he would have done. He would

1 have done the blood test. He would have done the
2 urinalysis. He would have referred him to a
3 nephrologist.

4 I believe the jury is entitled to consider that
5 information. And if they're going to be -- obviously
6 they have taken the position that we're negligent
7 throughout. I understand that.

8 Well, we're taking the position that they're
9 contributorily negligent throughout, because at that
10 very first visit if he had told Dr. Choi as
11 Dr. Mackintosh has even told us he would expect that he
12 had blood in the urine, he had protein in the urine,
13 we've got the causal connection, so to speak, that's
14 required under Gravitt, because he's told us what he
15 would have done.

16 THE COURT: Excuse me for one moment.

17 Go ahead, sir.

18 MR. BROWN: Now, with regard to the factual
19 scenario with the cardiac catheterization report and the
20 information contained in that report being relayed to
21 Dr. Choi, obviously Sotiri did come back to Dr. Choi
22 after that. And at that point in time he was asked what

1 happened with the cardiac catheterization. And he was
2 told it was fine, nothing unusual to report.

3 Now, we understand that they contend that we
4 still should have gotten a copy of that; but, again,
5 without expert testimony I don't think we need to.

6 I think the only thing that is different
7 between the very first visit and the cardiac cath visit
8 on the facts is that we happen to have, although it's
9 not necessary, opinion testimony from an expert saying I
10 would expect for him to say that.

11 I think and I believe under Gravitt -- again, I
12 don't believe Gravitt applies, because there is direct
13 testimony that he was asked that question and the answer
14 that he gave.

15 I believe from those facts we can argue to the
16 jury -- we should be entitled to argue to the jury
17 because it's a factual question that there's
18 contributory negligence involved; that he should have
19 volunteered the information that Dr. Horton says he
20 conveyed to him.

21 Now, they can argue as to Horton's credibility
22 and as to whether or not that should have been conveyed

1 to Dr. Choi; but we should be able to argue the other
2 side of that. And that's what we would ask the Court to
3 do.

4 With all of these questions we believe that
5 there is a factual argument to be made both ways. And
6 we would simply ask the Court to grant us the
7 instruction as we don't believe Gravitt prevents that.

8 THE COURT: Okay. Give me a moment, please.

9 Okay. Anything else, Mr. Brown?

10 MR. BROWN: No, sir.

11 THE COURT: Mr. Glass, let me address one final
12 question to you.

13 MR. GLASS: Yes, sir.

14 THE COURT: I would like you to respond to
15 Mr. Brown's argument that if I have found that there is
16 a basis for which a jury can conclude that your client
17 was negligent in visit number one by failing to respond
18 to the question and the question had been posed, why
19 wouldn't your client have a duty to give the information
20 as time went on even if he was not specifically re-asked
21 the question that he was asked at the initial visit with
22 the doctor?

1 MR. GLASS: Because of the disparate nature of
2 the relationship between a doctor who I'm putting my
3 faith and trust in and the patient.

4 And here's a doctor who has made -- fails to
5 ask the question the first time, makes no effort to get
6 the records the next time who says all of these things
7 on different visits. And here's a 20-year-old kid who
8 keeps showing up sick as a puppy.

9 I just do not believe that -- and I think the
10 Supreme Court has recognized the difference between the
11 doctor and the patient in these doctor, patient
12 colloquies about history.

13 And so even if -- and Your Honor has ruled that
14 there was this duty on behalf of the plaintiff to do it
15 the first time. I think as time goes on and the doctor
16 doesn't ask any question now that's getting -- I mean,
17 we at least have a question on the first visit, have you
18 had any serious illnesses.

19 And now, Judge, they're coming in. And it's
20 like you and I sitting down and having a discussion
21 about -- it's a different topic. And the issue of
22 history never comes up again.

1 I think his duty -- I don't think he has a duty
2 in the first place, but I think the duty has got to be
3 even less as we go along primarily because of the
4 difference in the relationship between the two. And the
5 kid is not having to himself any urinary symptoms.

6 THE COURT: Okay. I agree. I decline, reading
7 the Virginia Supreme Court's decisions in Lawrence
8 versus Wirth and Eiss versus Lillis and Gravitt versus
9 Ward and the language and the rationale utilized by the
10 Virginia Supreme Court in those cases -- I decline to
11 establish a duty on behalf of a patient who goes to see
12 a doctor, an expert, for the patient then to have to be
13 volunteering information to the doctor in order for the
14 doctor to reach what would be an appropriate diagnosis,
15 an appropriate regimen of treatment.

16 And the Virginia Supreme Court kind of touched
17 on the issues in all of these cases. In Lawrence versus
18 Wirth the Supreme Court specifically said the physician,
19 patient relationship differs substantially from that of
20 the ordinary plaintiff and defendant.

21 Due to the great disparity in medical knowledge
22 between doctor and patient the patient is entitled to

1 rely upon assurances made by the doctor and generally
2 need not seek the opinions and services of others which
3 would include the patient's own opinions as to what may
4 be important or not.

5 In Eiss versus Lillis the court in part stated
6 were we to accept Dr. Lillis's argument in any case
7 where the plaintiff was responsible for events that led
8 to his hospitalization, the treating physician would not
9 be liable for negligent treatment. And we reject that
10 argument.

11 What the Supreme Court appears to be saying in
12 these cases is we're not going to allow a doctor who is
13 negligent to rely upon negligence of a plaintiff in
14 deciding what the doctor deems to be appropriate unless
15 it is linked in time -- the negligence of the parties
16 are sufficiently linked in time that one necessarily
17 would have to flow from the other.

18 Because otherwise as a matter of public policy
19 doctors would not have to be as careful as doctors are
20 held out to be required to be because of the important
21 role that doctors play in our society.

22 And that the Supreme Court appears to be

1 loathed to relieve a doctor from that responsibility and
2 the requirement to be appropriately careful when
3 doctors' decisions are probably as important if not more
4 important than any other decisions that are being made,
5 because doctors' decisions can often result in life and
6 death.

7 That being the situation, I decline to
8 establish a duty on behalf of the patient to volunteer
9 information when it has not been requested by the
10 doctor.

11 And that being the situation, although there
12 was a request made at the initial meeting and
13 Dr. Mackintosh's testimony presents a jury question as
14 far as the Court's concerned especially when combined
15 with the testimony of the plaintiff and the plaintiff's
16 father -- I am not going to allow that to stretch into
17 an obligation of the plaintiff to volunteer the
18 information when the doctor doesn't deem it to be
19 sufficiently important to request any follow-up
20 information in follow-up visits.

21 And, therefore, I am not going to let the issue
22 of contributory negligence go to the jury for any of the

1 visits other than the first visit. And we need to make
2 sure that the instructions are drafted in a way where
3 that's clear to the jury.

4 And the exception of the plaintiff is noted for
5 the reasons that the plaintiff has articulated. The
6 exception of the defendant is noted for the reasons that
7 the defendant has articulated.

8 MR. BROWN: Your Honor, does that also include
9 the cardiac catheterization as a separate issue or are
10 we still talking --

11 THE COURT: It does, because the same rationale
12 would apply. If a doctor asks how the cardiac
13 catheterization went, I am not going to impose a duty on
14 a patient to tell the doctor that although the cardiac
15 catheterization went fine, the doctor did mention
16 something else that may relate to something unrelated to
17 the catheterization.

18 And I'm not going to establish a duty for a
19 patient under those circumstances to give information
20 that may have been related that is unrelated to the
21 cardiac catheterization.

22 I don't believe that that will be consistent

1 with what the Virginia Supreme Court has attempted to do
2 in the lines that it's drawn in the three cases. And if
3 the Virginia Supreme Court believes that I'm in error,
4 when the case gets to them they can make that decision.

5 I try to do and I believe what the
6 responsibility of a trial court judge to do is to take
7 the precedent from the Supreme Court and try to take
8 that precedent and the rationale underlying that
9 precedent and to apply it to the factual circumstances
10 of the given case. And that's what I've attempted to
11 do.

12 MR. ALTMAN: Your Honor, you mentioned in
13 passing that you -- the record will note the exceptions
14 to the plaintiff. I just want to make sure --

15 THE COURT: I said both.

16 MR. ALTMAN: I'm sorry. I did not hear both.
17 I appreciate it.

18 THE COURT: I said both.

19 MR. ALTMAN: Thank you, sir.

20 THE COURT: Okay. That having been done, let's
21 turn to the contested instructions.

22 MR. ALTMAN: Excuse me, Your Honor. What time

1 do you want us here tomorrow morning?

2 THE COURT: Well, I want to do some of this
3 right now.

4 MR. ALTMAN: Well --

5 THE COURT: For Dr. Choi's purposes? If he
6 doesn't have to be here for finishing touches on
7 instructions, he can be here at 9:30, because the jurors
8 aren't required to be here until 9:30.

9 MR. ALTMAN: Thank you, sir.

10 THE COURT: Can we address one other question
11 right now? Are we going to have eight jurors decide
12 this case or seven? As I said to you before, if both
13 sides agree, it will be eight. If either side objects,
14 it will be seven.

15 (Discussion off the record.)

16 THE COURT: Eight or seven, Mr. Malone?

17 MR. MALONE: I was just trying to figure out
18 which one was the alternate.

19 MR. ALTMAN: It's the woman in the back row
20 sitting like --

21 THE COURT: Closest to me. Seat two is where
22 she's been sitting for most of the trial. Alice Jacobs.

1 She appears -- she appears to potentially be Hispanic or
2 partially.

3 If you want to think about that overnight, you
4 can think about it overnight; but let's find out if it's
5 an issue. As far as you're concerned, Mr. Altman, eight
6 or seven?

7 MR. ALTMAN: Eight. I'll be happy to go with
8 eight. The poor lady has sat here the whole time.

9 MR. MALONE: Yeah, I say eight.

10 THE COURT: All right. Well, then if both
11 sides agree, I'm going to allow all eight jurors to
12 deliberate.

13 MR. MALONE: Except -- well, off the record.

14 (Discussion off the record.)

15 THE COURT: Okay. Let's go to the remaining
16 instructions. Why do we need 10, Mr. Glass --

17 MR. GLASS: Let me look.

18 THE COURT: -- at this stage?

19 MR. GLASS: I will withdraw 10.

20 THE COURT: Okay.

21 MR. ALTMAN: All right. 10 out.

22 MR. GLASS: Steve didn't like that one.

1 MR. ALTMAN: Thank you.

2 THE COURT: I won't say what I thought,
3 Mr. Glass. 10 is withdrawn. Okay. Without waiving
4 your objection about contrib going to the jury --

5 MR. GLASS: Yes, sir.

6 THE COURT: -- is there a problem with nine?

7 Well, let's set aside nine for a moment,
8 because you want me to specifically instruct the jury
9 about the negligence having to be concurring in addition
10 to the plaintiff being negligent. So let's set that
11 aside for a moment.

12 He sat through the entire trial like a trooper
13 and let you be. Let him be.

14 MR. GLASS: With Your Honor's limitation about
15 the contributory negligence issue will only go to the
16 first visit, all right, it seems to me that
17 instruction -- that I no longer need the concurring
18 nature that I outline in instruction 13.

19 Do you have 13 in front of you?

20 THE COURT: Let's do this. Let's set 13 and 14
21 aside with nine for a moment and then combine it with
22 the defendant's proposed instruction on contrib. And

1 then I can draw the line taking a look at all of them at
2 the same time.

3 What is your objection to 11, Mr. Altman, which
4 appears to be the model instruction on general damages?

5 MR. ALTMAN: There's only one part to which I
6 object, Your Honor. I think that this jury cannot be
7 instructed on future medical expenses. We're totally
8 allowing them to speculate.

9 Even assuming that we have testimony that he's
10 going to need dialysis, we're not going to be able to
11 break that down. We don't know, for instance, from the
12 summary -- this jury is not going to be able to make a
13 decision, gee, the dialysis was inpatient. So now he's
14 going to need to be inpatient or the dialysis was
15 outpatient. We don't know how frequently he's going to
16 need dialysis.

17 We're totally allowing them to speculate on the
18 issue of damages. I readily admit that common sense
19 would tell one that he's going to need continuing future
20 medical treatment.

21 But there's been no testimony, there's been no
22 guidance on it. Are they to assume, gee, there's going

1 to be another 424,000 over the next -- or every three
2 years?

3 I don't know what they're going to assume, but
4 since they've been given no guidance I don't think they
5 can be instructed on future medical expenses.

6 THE COURT: Mr. Glass.

7 MR. GLASS: I mean, the evidence is the kid is
8 on dialysis.

9 THE COURT: I'm not -- my concern is not
10 whether or not a reasonable juror can conclude that
11 there will be future medical expenses, because based
12 upon the testimony I believe that a reasonable juror can
13 so conclude.

14 My concern is how do they determine how much
15 without any testimony about what it would cost for these
16 treatments in the future.

17 MR. GLASS: You have the evidence right in the
18 medical bills. You've got two-and-a-half years,
19 whatever it's been, of dialysis treatment, some of it
20 outpatient at Continental Dialysis in Springfield and
21 some of it inpatient at Fairfax Hospital. And it's our
22 job to provide reasonable evidence of the reasonable

1 nature of future damages.

2 THE COURT: Do you want to risk a plaintiff's
3 verdict in this case in the event that the Supreme
4 Court -- that issue has never been squarely addressed.

5 Do you want to potentially risk a plaintiff's
6 verdict in this case if the Supreme Court were to
7 determine that future meds should not have gone to the
8 jury in this case and have to retry the whole case?

9 MR. GLASS: The reality, Judge, is you've got
10 \$430,000 in medical bills.

11 THE COURT: That's why I'm asking you the
12 question.

13 MR. GLASS: Well, a plaintiff's verdict in my
14 view -- if it's a plaintiff's verdict in excess of the
15 cap, it's going to get reduced to the cap anyway. I
16 don't see --

17 THE COURT: Which is why I'm asking you the
18 question. If you believe that's true, why risk
19 potential error in the record by asking me to do
20 something that -- I may agree with you; but I think
21 Mr. Altman has a legitimate argument, also.

22 MR. GLASS: But I guess my point is -- let me

1 consult with Mr. Malone for a second to see how he wants
2 to argue.

3 The argument without putting a specific number
4 on future medical expenses in closing argument is that
5 he has this history. We know what the dollar amount is
6 for the history by year, by two years.

7 And the evidence is that he's going to need it
8 in the future. There is no evidence as to diminution of
9 life expectancy in this case. He's now 23 years old.

10 And I think that having heard what Your Honor
11 said that we want the instruction and are entitled to
12 the instruction. And we believe that we have proven,
13 reasonably proven, that this gentleman is going to have
14 future medical expenses. And the issue as to what that
15 is is up to the jury.

16 THE COURT: 11 is granted over the defendant's
17 objection.

18 MR. ALTMAN: May I just add one thing to the
19 record?

20 THE COURT: Yes, sir.

21 MR. ALTMAN: I think it's also important if
22 we're granting future medical bills, how long is this

1 gentleman going to live? We don't even have his life
2 expectancy anywhere in this chart. Are they to --

3 THE COURT: There's another model instruction,
4 Mr. Altman, that is not included in the set right now;
5 but if you tender it, I would consider giving it about
6 burdens of proof for reasonable estimates for items of
7 damages.

8 MR. ALTMAN: I did tender that, sir. That
9 should be included in the group.

10 THE COURT: Okay. If that's in, then my
11 reservations are gone. I think that would be an
12 appropriate instruction in light of the argument that
13 you're making.

14 But if the jury has the testimony that it has,
15 both the lay testimony and the expert testimony,
16 including the number of times that this particular
17 plaintiff has to have the dialysis and they have bills
18 showing how much it has cost him to have this type of
19 treatment done, then they have a basis from which they
20 can make a reasonable estimate of how much it's going to
21 cost for at least some period of time.

22 And then they have a basis to award the

1 plaintiff those damages if they deem it appropriate.

2 And so 11 is granted. And your exception is noted.

3 So what's left is nine, 13 and 14 from your
4 side. Let's take a look. Do you object -- Mr. Glass,
5 when I ask you these questions about the objections to a
6 finding instruction or an issues instruction I
7 understand that you are not waiving your objection to
8 letting contrib go to the jury at all.

9 The only thing I'm trying to find out now is if
10 there's any additional objection to the wording of these
11 proposed instructions.

12 MR. GLASS: Yes, sir. I understand.

13 THE COURT: Anything further with J?

14 MR. GLASS: With J, yes. I think that it
15 misstates and is confusing as to the issue of
16 contributory negligence as it is worded in that it would
17 permit the jury to find in favor of the defendant if
18 they believe Sotiri Ponirakis was negligent on the first
19 visit even though the defendant thereafter was negligent
20 and had an opportunity to save this young man's health.

21 THE COURT: Okay. Well, we need -- we will
22 need to do something to address that issue. Let's set J

1 aside for a moment.

2 Why do we need M if -- Mr. Altman, this is a
3 recurring issue. Maybe you can be the first one. Why
4 do we need M if I'm going to give them an issues
5 instruction telling them that the plaintiff has the
6 burden of proof?

7 I'm going to give them a finding instruction
8 telling them the plaintiff has the burden of proof both
9 on negligence and causation. Why do I need to tell them
10 that again in M?

11 MR. ALTMAN: Well, don't we need some
12 description like greater weight of the evidence?

13 THE COURT: I'm going to define for them
14 greater weight of the evidence. I think we have that
15 already. And I posed to counsel the other day if you
16 want to add to the issues instruction from the very
17 beginning that it's by the greater weight of the
18 evidence, I'll do that.

19 It has been my experience through the years
20 that I've been on this side that if I tell a jury
21 everything except one thing one time and I tell them the
22 other thing two or three times, a jury could reasonably

1 conclude the judge believes that this is particularly
2 important, because the judge is taking time to tell it
3 to me multiple times. So I try to avoid it.

4 MR. ALTMAN: I'll withdraw M. I'll withdraw M.

5 THE COURT: Okay. Thank you. Do you want me
6 in the issues instruction to say by the greater weight
7 of the evidence?

8 MR. ALTMAN: I would like to, sir.

9 THE COURT: Do you object to that?

10 MR. GLASS: No, sir.

11 THE COURT: Okay. Then when we redraft what
12 we're going to redraft with J, however it's going to
13 play out, I want that to be included so that's clear.

14 That's the first instruction I give. The next
15 one I give is the definition of greater weight of the
16 evidence. So it's clear from the beginning what the
17 situation is.

18 MR. ALTMAN: Thank you, sir.

19 THE COURT: Okay. Any objection -- any
20 additional objection to O?

21 MR. GLASS: No. I think O correctly states
22 what the law is.

1 THE COURT: Then O is granted over the
2 plaintiff's objection. Any additional objection to P?

3 MR. GLASS: No, I won't -- no objection to P.

4 THE COURT: Okay. P is granted over the
5 plaintiff's objection. Any additional objection to Q?

6 MR. GLASS: Yes. Q suffers from the same
7 infirmity.

8 THE COURT: I think we need to take a look at Q
9 as a result of my ruling. Does T fit under the
10 circumstances of this case, Mr. Altman?

11 MR. ALTMAN: Yeah. I don't want this jury
12 assuming -- there are clearly circumstances where
13 Dr. Choi -- indeed, Dr. Hubach testified to them; that
14 he -- efforts in diagnosing what was going on could have
15 complied with the standard of care, but he still
16 developed the disease process.

17 I don't want this jury thinking, well, we know
18 that he had it back in 1994, we know that he had it
19 while he was seeing Dr. Choi, Dr. Choi must have done
20 something wrong, because he didn't make the diagnosis.

21 THE COURT: If I'm giving them an issues
22 instruction and a finding instruction that's going to

1 tell them that the plaintiff has the burden of proof on
2 the issue, why do I need to tell them that again in T?

3 MR. ALTMAN: Well, that's not telling them that
4 again in T. That's making sure that they don't do
5 something that juries are prone to do. And that is jump
6 from one thing to another -- to a conclusion.

7 And the law in Virginia is you can't jump to
8 that conclusion. I think the issues instruction is
9 totally -- a totally different instruction. I think
10 they're designed for totally different issues.

11 I think this makes sure they know that there is
12 something they can't do. It's like the one that says
13 about sympathy, bias. You can't do that. You can't
14 necessarily think just because the doctor's efforts were
15 unsuccessful that that's negligence.

16 THE COURT: Okay. Mr. Glass.

17 MR. GLASS: Two points. Yes, sir. One,
18 there's an interesting comment on the back page in the
19 model book that says something to the effect of --

20 THE COURT: I no longer give this in a car
21 accident case. I simply don't.

22 MR. GLASS: That's what it says.

1 THE COURT: I don't think it's appropriate, but
2 I am not sure if the situation should be different in
3 the context of a medical malpractice case. And I'm
4 giving thought to it.

5 MR. GLASS: It's 35.040.

6 THE COURT: It appears that some of the people
7 who work on the model jury instruction committee share
8 my concern. I'm going to think about this one
9 overnight, Counsel. This isn't going to affect your
10 closing arguments. I want to give it some
11 consideration.

12 MR. ALTMAN: Actually it does affect my closing
13 argument in that I usually mention this one, sir.

14 THE COURT: Well, I'm not sure I'm going to
15 give it, Mr. Altman. I'm not sure you want me to rule
16 right now, because if I do, I'm not sure that you're
17 going to be pleased with my ruling.

18 But you've articulated something for me that I
19 want to ponder before I make a definitive ruling,
20 because you've articulated something that may have some
21 merit to it.

22 MR. ALTMAN: Is that on the record?

1 THE COURT: I said that may.

2 MR. ALTMAN: I'll even take a may at this time.

3 THE COURT: And then K we have the same issue.

4 All right. Let's put together J, K and Q and nine, 10
5 and -- nine, 13 and 14 and determine how this jury ought
6 to be instructed in light of my ruling.

7 And again so it's abundantly clear for the
8 record in asking counsel to propose language I am not
9 asking counsel nor do I believe that counsel is waiving
10 the objections that they articulated when I dealt with
11 the whole issue of contributory negligence. They're
12 simply trying to come up with an instruction that would
13 be consistent with the rulings of the Court.

14 Mr. Glass, you were saying something before
15 about viewing nine, 13 and 14 in light of my ruling.

16 MR. GLASS: Yes, sir. It seems to me that in
17 light of your ruling and limiting this to one incident
18 that instruction 13 I don't need, particularly if you
19 would agree with me to look at instruction 14 and let me
20 suggest this slight change to that instruction.

21 And what I would suggest is this: Contributory
22 negligence by the plaintiff will not bar his recovery if

1 you find by the greater weight of the evidence that,
2 one, the plaintiff was negligent on the first visit or
3 however we want to define it and thereafter Dr. Choi
4 could have avoided the injuries to the plaintiff by
5 adhering to the standard of care.

6 It's a little different than my concurring
7 issue which is a technical, legal argument which I don't
8 think -- when we narrow it down to one incident now I
9 think that instruction 14 or some instruction that tells
10 them that the only contributory negligence event is the
11 first visit to Dr. Choi, that instruction 14 would tell
12 them correctly that plaintiff's failure at that -- in
13 that meeting would not necessarily bar his recovery.

14 THE COURT: Okay. Mr. Altman.

15 MR. ALTMAN: Again, so the record is clear, I'm
16 arguing this point, because --

17 THE COURT: I don't know how many times I can
18 try to say it, Counsel.

19 MR. ALTMAN: And I appreciate that.

20 THE COURT: There is no question that this
21 trial judge understands that both sides continue to
22 assert their objections to my rulings on the contrib

1 issue and that it would be an injustice if the Supreme
2 Court were to find that that had not been sufficiently
3 protected.

4 And I trust that the seven justices of the
5 Supreme Court would not do that in light of my repeated
6 statements. So go ahead, sir.

7 MR. ALTMAN: The problem with number 14, sir,
8 is this: It essentially takes the decision of
9 contributory negligence away from this jury. This jury
10 could say, oh, what the heck, we don't even need to
11 think about that, let's just go see if Choi was
12 negligent down the line. And I don't think that's
13 proper. I don't think this is a proper instruction
14 considering this.

15 Now, if, in fact, that information misled
16 Dr. Choi, I don't think that the fact that he may have
17 been negligent on different things changes the outcome.
18 My point is this: I don't think this is a last clear
19 chance case.

20 THE COURT: Let me tell you what I propose,
21 Counsel. I propose to use 13 to say this: When the
22 defendant claims contributory negligence as a defense he

1 has the burden of proving by the greater weight of the
2 evidence, one, that the plaintiff was negligent during
3 the first visit on -- was it November 13th?

4 MR. MALONE: 14th.

5 THE COURT: November 14, 1996, semicolon, that
6 this negligence concurred with the negligence of the
7 defendant and that this negligence was a proximate cause
8 of the plaintiff's injuries.

9 Contributory negligence may be shown by the
10 defendant's evidence or by the plaintiff's evidence.
11 Take out that last sentence, because then it appears
12 that I'm unduly accenting that burden of proof on the
13 defendant and then maybe put in the last paragraph of
14 instruction nine.

15 MR. ALTMAN: The Court's indulgence for one
16 minute while I find nine, please.

17 THE COURT: Or maybe just -- instead of in
18 order for the plaintiff's negligence to bar him and just
19 say this: In a medical malpractice case concurring --
20 or even say -- do a separate instruction that says
21 concurred in instruction number 13 means that the
22 plaintiff -- that the patient's alleged contributory

1 negligence must be contemporaneous with the main fact
2 asserted as negligence on the doctor's part.

3 MR. GLASS: Do you want my comment?

4 THE COURT: Yes.

5 MR. GLASS: It doesn't do it, because it still
6 does not provide for the situation where there is
7 subsequent negligence which really -- I mean, it's
8 almost an intervening superseding cause. And this is
9 exactly what the cases that the Supreme Court has talked
10 about contrib in a malpractice case --

11 THE COURT: So what you're saying is the jury
12 in this case may determine that there was negligence at
13 the first meeting on both sides --

14 MR. GLASS: Yes, sir.

15 THE COURT: -- but there was negligence on the
16 other occasions from the doctor and that the jury can
17 base its verdict on negligence on those other days and
18 not bar the plaintiff's recovery even if they find that
19 the plaintiff was negligent on day one.

20 MR. GLASS: Yes. They have to understand that
21 negligence which pre-exists other negligence -- that's
22 what Eiss says -- does not bar recovery.

1 THE COURT: Okay. Conceptually do you agree or
2 disagree in light of my ruling?

3 MR. ALTMAN: I disagree.

4 THE COURT: Okay. So it's your opinion that if
5 the plaintiff and the doctor were negligent on November
6 14th and the doctor was negligent on all of the other
7 occasions and that the damages -- the plaintiff has
8 proven by the greater weight of the evidence that the
9 damages proximately flowed from negligence on the other
10 occasions, the plaintiff is still barred from
11 recovering.

12 MR. ALTMAN: Yes, sir. To make it any other
13 way actually goes to the point that I think Mr. Glass is
14 ultimately attempting to foster. And that's this: You
15 could never have contributory negligence in a medical
16 malpractice case unless there was only one visit. You
17 could never have contributory negligence raised against
18 a doctor who sees a patient many times.

19 And I don't think that's what the Court is
20 saying. Contributory negligence, you know, there's no
21 comparison of negligence.

22 The fact of the matter is His Honor has ruled

1 only contrib is going as to the first visit; but if this
2 jury finds that he was contributorily negligent and that
3 contributory negligence was a proximate cause of the
4 failure of Dr. Choi to discover this on the first visit,
5 that's it. He's contributorily negligent. That's my
6 perspective.

7 THE COURT: Okay. Mr. Altman, the Court
8 doesn't agree. I don't agree, because the rationale
9 underlying the necessity for the negligence to be
10 concurrent in my view would equally apply here and that
11 if the jury were to find that the doctor was negligent
12 on other occasions and that the plaintiff has proven by
13 the greater weight of the evidence that the injuries
14 flowed from negligence of the doctor that had nothing to
15 do with the negligence of the plaintiff on the first
16 occasion that the plaintiff would be entitled to
17 recover.

18 And I believe that that is consistent with what
19 the Supreme Court has stated in the three cases we've
20 been discussing. So I'm going to give an instruction --

21 MR. MALONE: You just dictated it, Judge,
22 didn't you?

1 THE COURT: Well, I'm not sure what I just
2 dictated; but --

3 MR. MALONE: Sorry.

4 THE COURT: -- you talk to your co-counsel.

5 MR. MALONE: Yeah. I didn't mean to do that.
6 I'm sorry.

7 THE COURT: I'm not going to say what I just
8 said to the jury, because that is argumentative. And
9 I'm not going to say something that is argumentative or
10 gives the jury any type of an inclination that that is
11 the way that I view the situation.

12 I'm going to tell the jury a neutral, objective
13 statement of the law that allows both sides to argue and
14 the jury to understand where the lines have been drawn.

15 MR. GLASS: Then I think instruction 14 is the
16 framework from which we all work.

17 THE COURT: Well, I don't like could have
18 avoided the injuries by adhering to the standard of
19 care. The way that it's phrased is my major problem
20 with it, because it appears to be -- reading it, it
21 appears to be a comment by me. And I don't believe that
22 that's the way it ought to be done. It needs to be put

1 in a neutral way.

2 MR. GLASS: And I think that you did just
3 dictate it. And it would be something like this: If
4 the plaintiff was negligent on the first visit in
5 November and thereafter, you know, the plaintiff has
6 proven that Dr. Choi was negligent and that injuries
7 flowed from negligence, you know, which occurred after
8 the first visit; something along those lines.

9 THE COURT: Could we incorporate this issue
10 into the finding instruction? And instead of saying in
11 the finding instruction you shall find for the defendant
12 if the defendant proves by the greater weight of the
13 evidence that the plaintiff was negligent, could we
14 incorporate it there and say you shall find for the
15 defendant if the defendant has established by the
16 greater weight of the evidence that the plaintiff was
17 contributorily negligent on the first visit and his
18 contributory negligence was a proximate cause of the
19 plaintiff's injuries and that the defendant -- and the
20 plaintiff has failed to prove that Dr. Choi was
21 negligent on any subsequent occasions?

22 MR. MALONE: Right. Yes.

1 MR. GLASS: We could do that.

2 THE COURT: Mr. Altman, again, I'm not looking
3 for you to agree with me. I know you disagree with me.
4 I'm trying to come up with language that will accomplish
5 what I have ruled and will not be seen as a comment on
6 the evidence.

7 MR. ALTMAN: I'm sort of at a loss. I don't
8 know how that can be done without essentially taking
9 contributory negligence away from the jury. And I know
10 His Honor has ruled. I'm at a loss to be of any help on
11 the drafting of what His Honor --

12 THE COURT: What it basically boils down to
13 based upon my rulings is that if the jury finds
14 negligence on day one and no negligence after that, then
15 you win if you've proven by the greater weight of the
16 evidence there was contributory negligence.

17 If the jury finds negligence of the doctor on
18 any of the other occasions, then according to my
19 instructions there should be a plaintiff's verdict in
20 the case.

21 MR. GLASS: And we believe that the instruction
22 that you're proposing and the language in the finding

1 instruction should have both sides of that equation.

2 THE COURT: Well, I'm not sure that that's not
3 going to overdo it; but, again, you can put together
4 some language overnight if you want to, because, to be
5 frank, I'm not going to sit here until seven o'clock
6 tonight trying to put this together.

7 I'm going to leave that up to counsel to try to
8 do. And we'll take a look at it again at nine o'clock
9 tomorrow morning; but it seems to me that if we do it
10 consistent with what I suggested in the finding
11 instruction, that may obviate the necessity for some of
12 the other things.

13 For instance, do we need concurrence? Do we
14 need to say anything about concurrence to the jury based
15 upon my ruling?

16 MR. GLASS: No. No. That's why I said in
17 light of your ruling I think we can take that
18 instruction out and just work on the shorter
19 instruction, Your Honor, or the finding instruction. So
20 based on your ruling it seems to me that we can withdraw
21 instruction 13.

22 THE COURT: Mr. Altman still is entitled to

1 have the first paragraph of nine. Well, he still is
2 entitled to have Q with the modifications necessitated
3 by my ruling which you had in your nine.

4 He's still entitled to have the jury told if
5 they find that there's concurring negligence with the
6 first visit and they don't find negligence after that,
7 then they're not supposed to start comparing 99 percent
8 versus one percent. So that needs to be incorporated
9 into something.

10 MR. GLASS: I agree with that.

11 THE COURT: Otherwise, it would appear to me
12 that the way to handle this would be to put the language
13 that I proposed into the finding instruction and not
14 overcomplicate it and let you argue from your respective
15 positions what the situation is.

16 And I'm not sure that we have to make J
17 complicated, because we're not talking about what they
18 need in order to find one way or the other. These are
19 just the issues that they have to concern themselves
20 with. They're going to have to concern themselves with
21 whether the plaintiff was negligent.

22 Now, you may be able to change J to say was the

1 plaintiff negligent on the first meeting with Dr. Choi
2 on November 14th, 1996. That may be appropriate.

3 And I'm not sure we want to say the injury. I
4 think we should say a proximate cause of the plaintiff's
5 injuries, plaintiff's claimed injuries or something to
6 that effect.

7 But I think otherwise we can leave J as is.
8 Something needs to be done to incorporate the language
9 from Q and then explain the situation to the jury about
10 their findings in the finding instruction by changing
11 paragraph two of the basis for them to find for the
12 defendant.

13 And I think that would be the simplest way to
14 do it in a way where I would not be overly commenting on
15 the issues or saying anything that the jury could
16 interpret as my opinion on the issues. Those are jury
17 issues. They're to decide that, not me.

18 In K again it says the injury. Is that the way
19 that the model reads? Because if both sides agree to
20 leave it the injury -- and I think both of you have it
21 that way --

22 MR. GLASS: The injury, accident or damage.

1 THE COURT: Okay. If everybody agrees to say
2 the injury, we can do that.

3 MR. GLASS: It should say plural.

4 THE COURT: Mr. Altman, do you want it to say
5 injury or injuries?

6 MR. ALTMAN: I don't have -- I take no position
7 on it, sir.

8 THE COURT: Okay. What do you want it to say,
9 Mr. Glass?

10 MR. GLASS: Injuries, please.

11 THE COURT: Okay. How about this, Counsel? In
12 K we'll leave one and two the same. Well, maybe we can
13 say injuries. We'll make it plural in K, also.

14 You shall find your verdict for the defendant
15 if, one, the plaintiff failed to prove either or both of
16 the elements above or if, two, you find by the greater
17 weight of the evidence that the plaintiff was
18 contributorily negligent on November 14, 1990 -- excuse
19 me.

20 That you find by the greater weight of the
21 evidence that, A, the plaintiff was contributorily
22 negligent on November 14, 1996, and that his negligence

1 was a proximate cause of the injuries and, B, that the
2 plaintiff has failed to prove by the greater weight of
3 the evidence that the defendant was negligent after
4 November 14, 1996, and that such negligence was a
5 proximate cause of the plaintiff's injuries.

6 MR. GLASS: That's acceptable to the plaintiff.

7 THE COURT: Without waiving your objections,
8 Mr. Altman, how about that for potential wording?

9 MR. ALTMAN: In light of His Honor's ruling the
10 wording sounds fine.

11 THE COURT: Okay. Who's going to type it
12 tonight?

13 MR. GLASS: Did you write it nice and neat?

14 THE COURT: If I wrote it, you can be sure that
15 it's not nice and neat.

16 MR. GLASS: Let me see if I can read it. And
17 I'll take care of it.

18 MR. ALTMAN: Will His Honor read the entirety
19 for us again just so that I have my own copy?

20 THE COURT: Okay. Everything -- change injury
21 to injuries in paragraph two, Mr. Glass.

22 MR. GLASS: Yes, sir.

1 THE COURT: Then finding for the defendant
2 if -- one stays the same.

3 MR. GLASS: Yes, sir.

4 THE COURT: Two will read, if you find by the
5 greater weight of the evidence that, A, the plaintiff
6 was contributorily negligent on November 14, 1996, and
7 that his negligence was a proximate cause of the
8 injuries.

9 MR. GLASS: Okay. Hold on, please. Okay.

10 THE COURT: And, B, that the plaintiff has
11 failed to prove by the greater weight of the evidence --

12 MR. GLASS: Yes, sir.

13 THE COURT: -- that the defendant was negligent
14 after November 14, 1996, and that such negligence was a
15 proximate cause of plaintiff's injuries.

16 If you didn't prove your case or -- for the
17 defendant to prevail, if you didn't prove your case or
18 by the greater weight of the evidence there was contrib
19 on November 14 and you failed to prove negligence and
20 proximate causation after November 14.

21 MR. GLASS: I got it. And that language is
22 acceptable to me.

1 THE COURT: Okay. K is denied. And the
2 defendant's exception is noted.

3 MR. ALTMAN: The way that the Court said that
4 it sounds funny. The K that I proffered is denied and
5 redrafted. My objection is noted.

6 THE COURT: Well, your K as drafted is denied.
7 I'm going to ask Mr. Glass to draft something overnight
8 and put a new letter on it, give it to you for you to
9 take a look at so you can see it in writing.

10 And then if there's something stylistic about
11 it, Mr. Altman, that you have a problem with, you can
12 let me know that tomorrow morning. And if I agree, I'll
13 change it.

14 MR. ALTMAN: Thank you, sir.

15 THE COURT: As a matter of fact, if you could
16 FAX it -- are you going to be at your office before you
17 come in?

18 MR. ALTMAN: No, sir. And I'm not nearly the
19 typist he is.

20 THE COURT: Okay.

21 MR. GLASS: I think this is W.

22 THE COURT: Whatever it may be. W.

1 MR. ALTMAN: You're going to give it a letter?

2 MR. GLASS: Do you want me to give it a star?

3 MR. ALTMAN: No. I didn't know if you were
4 going to give a number or a letter or --

5 THE COURT: Put a roman numeral on it so it's
6 clear it's not either of yours. It's mine. Okay.
7 Roman numeral one.

8 MR. GLASS: It's going to look the same on a
9 computer, Judge.

10 THE COURT: Well, then do whatever you want. I
11 think the record is abundantly clear --

12 MR. GLASS: I'll make it XX.

13 THE COURT: -- that both sides are objecting to
14 this. And it's the Court's instruction based upon the
15 Court's rulings.

16 MR. GLASS: XX. That's roman numeral 20.

17 THE COURT: J, was the plaintiff negligent on
18 November 14, 1996? And then when you have the burdens
19 of proof it should be by the greater weight of the
20 evidence in all three places.

21 MR. GLASS: So each time we say on these issues
22 the plaintiff has the burden of proof by the greater

1 weight of the evidence, the defendant has the burden of
2 proof by the greater weight of the evidence, plaintiff
3 has the burden of proof by the greater weight of the
4 evidence.

5 THE COURT: Yes.

6 MR. GLASS: Okay.

7 THE COURT: Okay. You're going to retype that.
8 And J is denied. In light of my rulings you're
9 withdrawing which of yours, Mr. Glass? And then we're
10 going to deal with Q. You wanted 14. And you were
11 withdrawing nine and 13. Did I understand you
12 correctly?

13 MR. GLASS: I wanted 14.

14 THE COURT: 14 is denied. And your exception
15 is noted.

16 MR. GLASS: Yes, sir. I withdraw nine.

17 THE COURT: Nine is withdrawn.

18 MR. GLASS: And --

19 THE COURT: Is there anything else about 14
20 that you want to articulate that you haven't already
21 articulated especially in light of what I'm including in
22 the finding instruction?

1 MR. GLASS: No, sir, I don't think so.

2 THE COURT: Okay. 13 is being withdrawn or did
3 I misunderstand you?

4 MR. GLASS: No, I think that you're right.

5 THE COURT: All right. 13 is withdrawn.

6 MR. GLASS: 13 is withdrawn. Yes, sir.

7 MR. ALTMAN: May I ask a question, sir?

8 THE COURT: You sure can.

9 MR. ALTMAN: Did you deny number 14? I thought
10 that's what I heard you say.

11 THE COURT: Yes, sir. Yes, sir, I did.

12 MR. ALTMAN: I'm just trying to write on my
13 copies as we put them back in some order.

14 THE COURT: Let me take a look at the agreed
15 upon instructions that were tendered this afternoon.

16 Okay. You do have R which was the one that I
17 was referring to before, Mr. Altman. And you're free to
18 argue that to the jury if you deem it appropriate.

19 Okay. All right. Counsel, what are we going
20 to do with Q? How about saying if you find from the
21 greater weight of the evidence that both the plaintiff
22 and the defendant were negligent on November 14th, 1996,

1 and that their negligence proximately contributed to the
2 plaintiff's injuries, you may not compare the negligence
3 of the parties and leaving it at that and then relying
4 on the finding instruction to tell them that they're
5 going to find for the defendant if they find that that
6 was the basis or do you feel that that doesn't give
7 sufficient importance to the concept that's set forth in
8 Q, Mr. Altman?

9 MR. ALTMAN: I'm sorry, Your Honor. I just
10 didn't hear the beginning part of your question to me.

11 THE COURT: Okay. Take -- do you have Q in
12 front of you, sir?

13 MR. ALTMAN: I do, sir.

14 THE COURT: What I'm saying is first sentence,
15 take out second sentence and -- put in that both the
16 plaintiff and the defendant were negligent on November
17 14th, 1996, and then leave the rest of the first
18 sentence and take out the second sentence.

19 MR. ALTMAN: I still think that we need to
20 state somehow as confusing as it might be --

21 THE COURT: That's what my concern is. Let me
22 leave that to you tonight. Take a look at Q; try to

1 draft it in a way that it would mirror the concept but
2 won't be overly confusing.

3 MR. ALTMAN: I'll try.

4 THE COURT: That's what my concern is. If you
5 can come up with language that is not overly confusing
6 but basically otherwise leaves Q intact, consistent with
7 my rulings I'll be glad to consider doing that. And
8 maybe -- you don't have access to a FAX machine.

9 MR. ALTMAN: I don't have access to a FAX
10 machine. I can hunt and peck on a PC. So I'll retype
11 it, but I'm not going to be able to get it to Mr. Glass
12 this evening.

13 MR. GLASS: You can't E mail it to me?

14 MR. ALTMAN: Don't even begin to go there.

15 THE COURT: Bring it, show it to him. And
16 Ms. Ralph has agreed that she'll type it for us tomorrow
17 morning. I don't want you hunting and pecking tonight.

18 MR. ALTMAN: No. No. That's not a problem,
19 sir. It won't take -- my hunting and pecking is a lot
20 faster than -- seriously, I don't have any problem. And
21 I don't want the clerk to have to --

22 THE COURT: Well, if we need to make changes

1 afterwards, Ms. Ralph has graciously agreed to take care
2 of that for us tomorrow morning if we need it.

3 Okay. Does that take care of the instructions?

4 MR. GLASS: Yes, sir, I think so.

5 THE COURT: How long do you need to argue your
6 case? Mr. Malone, are you going to argue?

7 MR. MALONE: Yes, sir.

8 THE COURT: How long do you need to argue your
9 case?

10 MR. MALONE: I would like to have 45 plus 15,
11 but I probably will take less than that; but I would
12 like to have that much leeway.

13 THE COURT: Mr. Altman.

14 MR. ALTMAN: Well, whatever the plaintiff asks
15 for, I would like an equal amount of time.

16 THE COURT: He's asking for an hour. Will an
17 hour be sufficient?

18 MR. ALTMAN: Absolutely, sir. I'm really
19 paring mine down to 30, 35 minutes; but thank you.

20 THE COURT: He's asking for an hour. In a
21 four-day case -- well, it's a three-day case of
22 evidence. With the medical testimony I'll give you an

1 hour. I'm not sure that it behooves you to argue for an
2 hour, but that's your case.

3 MR. MALONE: And I don't think I will, but --

4 THE COURT: You can argue your case. We got
5 the case to the jury in the time frame that you all said
6 you'd get the case to the jury. If you want an hour to
7 argue your case, I'll give you an hour to argue your
8 case.

9 Come in tomorrow morning. We'll deal -- I'll
10 come on the bench at nine o'clock. I would like to see
11 where we stand with the ones that are being drafted. I
12 will have organized the other instructions. And I will
13 tell you what the situation is.

14 And we actually haven't put on the record the
15 lack of objection to the other ones. We'll take care of
16 that tomorrow morning, also.

17 MR. ALTMAN: There's one other, Your Honor,
18 that I just want to remind you you need to deal with,
19 that one about -- you said you'd think about it
20 overnight.

21 THE COURT: Thank you for reminding me. The
22 unsuccessful treatment.

1 MR. ALTMAN: Yes, sir.

2 THE COURT: I'm ready to rule on that right
3 now. In light of everything else and the nature of the
4 instructions that are going back to the jury I'm
5 granting that instruction --

6 MR. ALTMAN: Thank you, sir.

7 THE COURT: -- under the circumstances of this
8 case.

9 MR. GLASS: Let me just -- if I may just
10 articulate one reason I haven't already said, because I
11 don't think we said anything at all about that
12 instruction.

13 I think that instruction is more proper in a
14 case where a physician makes a diagnosis and is trying
15 to attack a particular problem or fix a leg or fix a
16 shoulder or cure a cold and he doesn't than when he's
17 not getting anywhere near the right diagnosis.

18 I also think that that -- as the comment points
19 out, there really is no basis in law for instructing the
20 jury on that issue. It's just something that we've used
21 forever in the Commonwealth. And that's not a good
22 reason to keep on using it.

1 THE COURT: And I don't disagree with your last
2 statement which is why I won't give it in a car
3 accident. And in a simple medical negligence case,
4 assuming that there is such a thing, I might not be
5 willing to give it.

6 But here we're talking about different times of
7 alleged negligence, a course of treatment over an
8 extended period of time. And I believe it's appropriate
9 to tell the jury that just because the doctor's efforts
10 were not successful doesn't mean the doctor was
11 negligent when we have differing theories of the times
12 of negligence.

13 And I believe under the circumstances of this
14 case that what historically has been done is appropriate
15 to do. And I'm going to do it. Your exception is
16 noted, Mr. Glass.

17 MR. ALTMAN: 10 seconds of the Court's further
18 time? You asked us to provide the Court with a copy of
19 the expert witness designation of Dr. Choi for the
20 record and as well as a copy of Dr. Roberts's
21 deposition. And you asked for a copy of the letter, the
22 opinion letter, that he wrote.

* * *

COPY

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - x

4 SOTIRI PONIRAKIS,

5 Plaintiff,

6 vs.

At Law No. 174553

7 DAVID K. CHOI, M.D., et al.,

8 Defendants.

9 - - - - - x

10 Fairfax, Virginia

11 Thursday, April 13, 2000

12 The trial commenced at 9:00 a.m.

13 BEFORE:

14 THE HONORABLE STANLEY P. KLEIN and jury.

15 APPEARANCES:

16 PATRICK A. MALONE, Esq., Stein, Mitchell &
17 Mezines, 1100 Connecticut Avenue, Northwest,
Suite 1100, Washington, D.C. 20036
and

18 BENJAMIN W. GLASS, III, Esq., 3915 Old Lee
19 Highway, Suite 22B, Fairfax, Virginia
22030, counsel for the plaintiff.

20 STEPHEN L. ALTMAN, Esq., and MARC A. BROWN,
21 Esq., Montedonico, Hamilton & Altman, 10306
Eaton Place, Suite 100, Fairfax, Virginia
22 22030, counsel for the defendant Choi.

1 P R O C E E D I N G S

2 THE COURT: How did our typists do last
3 evening? Mr. Glass. Mr. Altman.

4 MR. GLASS: Pretty good. I've checked his.
5 He's looked at mine.

6 MR. ALTMAN: I think the Court is going to be
7 more impressed with my typing skills than my drafting
8 skills. May I hand up what --

9 THE COURT: Yes.

10 MR. ALTMAN: -- the Court asked me to redraft
11 as Q?

12 THE COURT: Please do.

13 MR. GLASS: And also let me send up a whole set
14 of clean instructions. I think the ones I had given you
15 before had cites at the bottom. Did they?

16 THE COURT: No.

17 MR. GLASS: They didn't? They're clean?

18 THE COURT: They're all clean.

19 MR. GLASS: Okay.

20 MR. ALTMAN: And this has no cite at the
21 bottom, Your Honor. That's the one -- that's 6.050 that
22 you asked me to redraft or to try and redraft.

1 THE COURT: Okay. I'll take a look at that in
2 a moment. Before we get to that, Mr. Glass, you handed
3 up to me again your proposed instruction seven which was
4 the contrib that I had previously given back to you
5 saying it was a duplicate of O which had been granted.
6 That being the situation, do you withdraw seven?

7 MR. GLASS: Yes, sir. Yes, sir.

8 THE COURT: Seven is withdrawn. Okay.

9 MR. GLASS: Now I'm going to hand up to you the
10 issues and findings instruction marked XX and YY as we
11 discussed yesterday.

12 THE COURT: Okay. Thank you. These are the
13 three that I'm looking for this morning.

14 MR. GLASS: Pardon me?

15 THE COURT: Is there a dispute between counsel
16 as to the wording of these three instructions? Again,
17 I'm not asking either side to waive the positions you
18 took yesterday about granting or not granting
19 contributory negligence instructions at all.

20 MR. ALTMAN: I still need to read YY. Based
21 upon His Honor's ruling I have no problem with the
22 drafting of XX.

1 THE COURT: Okay. Why don't you take a look at
2 that. And you can take a look at Q if you haven't had a
3 chance to do it. And let me look at all of them.

4 MR. MALONE: Judge, would it distract you if I
5 fooled with my computer a little bit while you're doing
6 that?

7 THE COURT: I don't think so.

8 MR. MALONE: Okay. Thank you.

9 MR. ALTMAN: I have no -- I'm sorry, sir. May
10 I?

11 THE COURT: Give me one second, Mr. Altman,
12 please.

13 MR. ALTMAN: Sure.

14 THE COURT: Okay. Go ahead, Mr. Altman.

15 MR. ALTMAN: I have no problem with Mr. Glass's
16 drafting of YY. I think it's consistent with what His
17 Honor has ruled.

18 THE COURT: Okay. Then XX is granted over the
19 objection of both parties. YY is granted over the
20 objection of both parties.

21 And I'm saying over the objection -- the
22 objection for the reasons that were articulated by

1 counsel yesterday; but in light of the Court's rulings
2 there appears to be no objection to the wording of the
3 instructions, although the parties retain their
4 objections to the substance of the Court's prior contrib
5 rulings. Give me one more moment, please.

6 Is there any additional objection to Q?
7 Because Q appears to be redrafted consistent with my
8 prior rulings.

9 MR. GLASS: No, sir, no additional objection.

10 THE COURT: Okay. Q is granted over the
11 objection of both parties for the reasons articulated
12 yesterday. Mr. Altman --

13 MR. ALTMAN: Yes, sir.

14 THE COURT: -- I'm going to make your original
15 Q Q-1, the one that you tendered yesterday. In light of
16 my granting Q, the retyped one, over your objection do
17 you withdraw Q-1?

18 MR. ALTMAN: I will withdraw Q-1.

19 THE COURT: Okay. Q-1 is withdrawn.

20 MR. ALTMAN: I have one other request from the
21 Court very briefly, if you don't mind.

22 THE COURT: Before you do that let me say

1 something. After we left yesterday I gave some further
2 thought to all of the rulings that I made yesterday.

3 And the more that I thought about them the more
4 that I believe that my rulings yesterday were consistent
5 with the present status of Virginia law and what I
6 believe the Supreme Court would decide with the issues
7 that have not been explicitly decided by the court.

8 I continue to believe that reasonable minds
9 could differ on whether the plaintiff was contributorily
10 negligent on November 14, 1996, and that there's
11 evidence to support that.

12 And I continue to believe and I continue to
13 rule that there was no duty on behalf of a patient after
14 that date to provide any further information to Dr. Choi
15 in light of the requests or lack of requests of Dr. Choi
16 after that date.

17 So my rulings from yesterday stand over the
18 objections of the parties as they've articulated them.

19 Now, Mr. Altman.

20 MR. ALTMAN: Two things exceptionally brief.
21 First of all, I think procedurally at this point in time
22 I need to remake my motion to strike. And I won't take

1 any more of the Court's time.

2 THE COURT: That's fine, sir. You do what you
3 need to do to protect the record. The motion to strike
4 is again denied for the reasons I articulated yesterday.

5 MR. ALTMAN: I have a very short request of the
6 Court before it actually -- we bring the jury in and
7 instruct them.

8 THE COURT: Okay.

9 MR. ALTMAN: Could you go through and tell us
10 exactly which ones -- just read off the numbers? And
11 you don't even need to say over objection or anything.

12 THE COURT: I'm going to tell you exactly which
13 instructions I'm granting, the order in which I intend
14 to read them. So that if I've missed something or
15 something is in here that shouldn't be, you'll have the
16 opportunity to do that. And you also can plan your
17 closing arguments accordingly.

18 MR. ALTMAN: Thank you, sir.

19 THE COURT: Mr. Glass, anything else from you
20 before I do that?

21 MR. GLASS: Yes, sir. We will not be
22 mentioning the ad damnum in the closing.

1 THE COURT: Okay. That was going to be asked.
2 And I actually left something on that particular
3 instruction. Let's take care of that right now then.
4 So that H -- you are not going to mention the amount
5 sued for. Are you going to mention an amount sought?

6 MR. GLASS: No, sir.

7 MR. MALONE: Well, we're going to mention the
8 medical bills.

9 THE COURT: I'm not asking whether you're going
10 to mention the evidence. Are you going to ask the jury
11 to award the plaintiff a certain amount of money?

12 MR. MALONE: No.

13 THE COURT: And you're not going to mention the
14 amount sued for.

15 MR. MALONE: Correct.

16 MR. ALTMAN: I will withdraw that instruction.

17 THE COURT: H is then withdrawn.

18 All right. Counsel, I'm going to instruct the
19 jury as follows: YY, the issues instruction; six,
20 definition of preponderance; 12, standard of care; U,
21 consider only the expert testimony in determining the
22 standard of care; N, definition of proximate cause; O,

1 definition of contributory negligence; P, proving
2 contributory negligence; Q, don't compare the negligence
3 of the parties; G, don't consider anything that was
4 rejected or stricken, because I did strike some evidence
5 during the course of the trial; one, credibility of the
6 witnesses; two, credibility of an expert; E, prior
7 inconsistent statement by a witness.

8 Now, I don't have -- yesterday I thought -- or
9 before yesterday I thought I had a prior inconsistent
10 statement by a party. That wasn't back with the
11 instructions that you gave me yesterday, Counsel. Was
12 that intentionally or inadvertently?

13 MR. ALTMAN: Mr. Glass and I went through that.
14 And I don't think we at any time raised the issue of a
15 prior -- I don't think Mr. Malone did when he
16 cross-examined Dr. Choi.

17 THE COURT: That's fine. I just wanted to make
18 sure it wasn't inadvertent, because I knew that that
19 initially had been tendered to me. And I thought it was
20 not objected to. And if both sides agree, that's fine.

21 E is prior inconsistent statement of a witness;
22 B, plaintiff calling the defendant as an adverse

1 witness; T, fact of the doctor's efforts on behalf of
2 the patient are unsuccessful doesn't establish
3 negligence; V -- actually I'm going to do it this way.

4 I'm going to put three, circumstantial
5 evidence, after adverse witness. Then I'm going to give
6 T, unsuccessful treatment doesn't establish negligence;
7 V, the medical malpractice review panel is not binding,
8 you can consider it as evidence; XX, the finding
9 instruction; 11, general damages; R, plaintiff has to
10 provide sufficient evidence for a reasonable estimate or
11 can't recover for the item. And then -- is it S for
12 sympathy, bias, guesswork or speculation?

13 MR. ALTMAN: No, sir. Let me see which one
14 that is.

15 THE COURT: I can't read the letter.

16 MR. ALTMAN: I'm sorry, sir. That's I.

17 THE COURT: That's I?

18 MR. ALTMAN: That's the letter I. It's the
19 best I can do, Judge.

20 THE COURT: Okay. If you say it's I --

21 MR. ALTMAN: My copy is I.

22 THE COURT: Let's make sure.

1 MR. ALTMAN: Yes, sir. That is my letter I. I
2 apologize.

3 THE COURT: Sympathy, bias, guesswork and
4 speculation. Again, Counsel, without waiving your prior
5 objections is that what you've tendered to me and
6 consistent with my prior rulings?

7 MR. ALTMAN: To the best of -- I'm in agreement
8 that those are the ones based upon His Honor's rulings
9 that should be read to the jury.

10 MR. GLASS: Yes, sir.

11 THE COURT: Okay. Do we have our jurors?

12 THE DEPUTY SHERIFF: No, not yet.

13 THE COURT: And we've agreed that we're going
14 to let all eight deliberate.

15 MR. GLASS: Yes, sir.

16 MR. MALONE: May I look at my exhibits to make
17 sure I've got everything admitted?

18 THE COURT: Actually, you asked that yesterday.
19 Mr. Altman, you asked. And I said I'd let both of you
20 do it. Why don't you take care of that right now to
21 make sure there aren't any exhibits that either side
22 wants to have admitted that have not yet been admitted.

1 Mr. Malone, if you get to a point that you're
2 40 minutes into your closing argument, I'll let you know
3 that you are at 40 so that --

4 MR. MALONE: Right. And I don't think I'm
5 going to get there. We've worked it out.

6 THE COURT: Well, that's up to you. As I said
7 yesterday, I'm not somebody who is going to cut you off
8 in mid sentence if you get to your 45 minutes; but if
9 you tell me 45 and 15, I expect you to be right about 45
10 and 15. And I'll let you know when you're at 40 if you
11 get to that point --

12 MR. MALONE: Yes, sir.

13 THE COURT: -- so you can plan about another
14 five minutes worth. And, Mr. Altman, if you get to 50
15 minutes --

16 MR. ALTMAN: Cut me off.

17 THE COURT: I'm not going to cut you off, but
18 I'll let you know you're at 50 when you get there so you
19 can plan accordingly, also.

20 MR. ALTMAN: Thank you, sir.

21 (A short recess was taken.)

22 THE COURT: All right. Good morning again.

1 Counsel, can I see you at the bench for a quick moment,
2 please?

3 (Counsel approached the bench and the following
4 proceedings were held:)

5 THE COURT: These are the proposed verdict
6 forms. I just want to make sure that they're acceptable
7 to everyone.

8 MR. ALTMAN: You didn't have to put that big of
9 a blank for the damages. I have no objection to either
10 way, Your Honor. I don't know that that makes a
11 difference.

12 THE COURT: It's the same one that they get in
13 any case, Mr. Altman.

14 MR. ALTMAN: You know, some people do object
15 about that. I don't. Some people object to the
16 plaintiff being listed first. I don't. That's --

17 THE COURT: I've heard them all.

18 MR. ALTMAN: If that's going to be the basis
19 for a verdict, I haven't done a very good job. So I
20 don't mind.

21 THE COURT: The verdict forms are okay for the
22 plaintiff?

1 MR. GLASS: Yes, sir.

2 MR. MALONE: Okay.

3 THE COURT: All set?

4 MR. MALONE: Yes.

5 THE COURT: Okay. Renee, let's bring the
6 jurors in, please.

7 (The jury returned to the courtroom, after
8 which the following proceedings were held:)

9 THE COURT: Ladies and gentlemen, good morning.
10 This is a group -- it's always interesting, because
11 there are some groups of jurors that change seats every
12 day. There are other groups that like their own seats.
13 It looks like this is a group that has their own seats.

14 Before I instruct you let me give you something
15 that I hope all eight of you will consider to be good
16 news. The parties have agreed to allow all eight of you
17 to deliberate in this case. So the alternate is not
18 going to be an alternate.

19 The time that you've spent here won't be such
20 that one of you is going to be sent home. All eight of
21 you are going to be together to make the decision.

22 At this point I'm going to instruct you on the

1 law that's applicable to the case. And the attorneys
2 will then make their closing arguments to you.

3 It's obviously important for you to follow
4 along as I read the instructions to you; but if you
5 don't immediately understand the concept or you miss a
6 word or two, don't be overly concerned, because you will
7 have the actual typewritten instructions with you in the
8 jury room when you conduct your deliberations.

9 Your verdict must be based on the facts as you
10 find them and on the law contained in all of these
11 instructions.

12 The issues in this case are, one, was the
13 defendant negligent? Two, if he was negligent, was his
14 negligence a proximate cause of the claimed injuries?
15 The burden is on the plaintiff to prove these issues by
16 the greater weight of the evidence.

17 Three, was the plaintiff negligent on November
18 14, 1996? Four, if he was negligent, was his negligence
19 a proximate cause of the claimed injuries? The burden
20 is on the defendant to prove these issues by the greater
21 weight of the evidence.

22 Five, if the plaintiff is entitled to recover,

1 what is the amount of his damages? The burden is on the
2 plaintiff to prove this issue by the greater weight of
3 the evidence. Your decision on these issues must be
4 governed by the instructions that follow.

5 The greater weight of all the evidence is
6 sometimes called the preponderance of the evidence. It
7 is that evidence which you find more persuasive. The
8 testimony of one witness whom you believe can be the
9 greater weight of the evidence.

10 An internist or family practitioner has a duty
11 to use the degree of skill and diligence in the care and
12 treatment of his patient that a reasonably prudent
13 internist or family practitioner in the same field of
14 practice in this state would have used under the
15 circumstances of this case. If a doctor fails to
16 perform this duty, then he is negligent.

17 You must determine the degree of care that was
18 required of the defendant by considering only the expert
19 testimony on that subject.

20 A proximate cause of an accident, injury or
21 damage is a cause which in natural and continuous
22 sequence produces the accident, injury or damage. It is

1 a cause without which the accident, injury or damage
2 would not have occurred.

3 Contributory negligence is the failure to act
4 as a reasonable person would have acted for his own
5 safety under the circumstances of this case.

6 When the defendant claims contributory
7 negligence as a defense he has the burden of proving by
8 the greater weight of the evidence that the plaintiff
9 was negligent and that his negligence was a proximate
10 cause of the plaintiff's injuries. Contributory
11 negligence may be shown by the defendant's evidence or
12 by the plaintiff's evidence.

13 If you believe from the greater weight of the
14 evidence that both plaintiff and defendant were
15 negligent on November 14, 1996, and that their
16 negligence proximately contributed to the plaintiff's
17 injuries and if you further believe that at no other
18 time was Dr. Choi negligent, then you may not compare
19 the negligence of the parties.

20 Assuming you find that Dr. Choi was not
21 negligent on any date after November 14, 1996, then any
22 negligence of the plaintiff on November 14, 1996, which

1 was a proximate cause of his injuries will bar the
2 plaintiff from recovering.

3 You must not consider any matter that was
4 rejected or stricken by the Court. It is not evidence.
5 And it should be disregarded.

6 Ladies and gentlemen, you are the judges of the
7 facts, the credibility of the witnesses and the weight
8 of the evidence. You may consider the appearance and
9 manner of the witnesses on the stand, their
10 intelligence, their opportunity for knowing the truth
11 and for having observed the things about which they
12 testified, their interest in the outcome of this case,
13 their bias and, if any have been shown, their prior
14 inconsistent statements or whether they have knowingly
15 testified untruthfully as to any material fact in this
16 case.

17 You may not arbitrarily disregard believable
18 testimony of a witness. However, after you've
19 considered all the evidence in the case then you may
20 accept or discard all or part of the testimony of a
21 witness as you think proper. You're entitled to use
22 your common sense in judging any testimony.

1 From these things and all of the other
2 circumstances of the case you may determine which
3 witnesses are more believable and weigh their testimony
4 accordingly.

5 In considering the weight to be given to the
6 testimony of an expert witness you should consider the
7 basis for his opinion and the manner by which he arrived
8 at it and the underlying facts and data upon which he
9 relied.

10 If you believe from the evidence that a witness
11 previously made a statement inconsistent with his
12 testimony at this trial, the only purpose for which the
13 statement may be considered by you is its bearing on the
14 witness's credibility. It is not evidence that what the
15 witness previously said is true.

16 The plaintiff called the defendant as an
17 adverse witness. The plaintiff is bound by as much of
18 the defendant's testimony given as an adverse witness as
19 is clear, logical, reasonable and uncontradicted.

20 The plaintiff is not bound by any of the
21 defendant's testimony given as an adverse witness that
22 conflicts with any of the other evidence in this case.

1 Any fact that may be proved by direct evidence
2 may be proved by circumstantial evidence, that is, you
3 may draw all reasonable and legitimate inferences and
4 deductions from the evidence.

5 The fact that a doctor's efforts on behalf of
6 his patient were unsuccessful does not by itself
7 establish negligence.

8 The opinion of the medical review panel is not
9 binding upon you. You should consider it along with the
10 other evidence in this case.

11 You shall find your verdict for the plaintiff
12 if he has proved by the greater weight of the evidence
13 that, one, the defendant -- there was a typo in here,
14 folks. So I'm just going to change it to say if the
15 defendant was negligent and that, two, the defendant's
16 negligence was a proximate cause of the plaintiff's
17 injuries.

18 You shall find your verdict for the defendant
19 if, one, the plaintiff failed to prove either or both of
20 the two elements above or if, two, you find by the
21 greater weight of the evidence that the plaintiff was
22 contributorily negligent on November 14, 1996, and that

1 his negligence was a proximate cause of his injuries
2 and, B, the plaintiff has failed to prove by the greater
3 weight of the evidence that the defendant was negligent
4 after November 14, 1996, and that such negligence was a
5 proximate cause of the plaintiff's injuries.

6 If you find your verdict for the plaintiff,
7 Sotiri Ponirakis, then in determining the damages to
8 which he is entitled you shall consider any of the
9 following which you believe by the greater weight of the
10 evidence was caused by the negligence of the defendant,
11 Dr. David Choi.

12 One, any bodily injuries he sustained and their
13 effect on his health according to their degree and
14 probable duration; two, any physical pain and mental
15 anguish he suffered in the past and any that he may be
16 reasonably expected to suffer in the future; three, any
17 disfigurement or deformity and any associated
18 humiliation or embarrassment; four, any inconvenience
19 caused in the past and any that probably will be caused
20 in the future and, five, any medical expenses incurred
21 in the past and any that may be reasonably expected to
22 occur in the future.

1 Your verdict shall be for such sum as will
2 fully and fairly compensate the plaintiff for the
3 damages sustained as a result of the defendant's
4 negligence.

5 The burden is on the plaintiff to prove the --
6 to prove by the greater weight of the evidence each item
7 of damage he claims and to prove that each item was
8 caused by the defendant's negligence.

9 He is not required to prove the exact amount of
10 his damages, but he must show sufficient facts and
11 circumstances to permit you to make a reasonable
12 estimate of each item. If the plaintiff fails to do so,
13 then he cannot recover for that item.

14 Your verdict must -- you must not base your
15 verdict in any way upon sympathy, bias, guesswork or
16 speculation. Your verdict must be based solely upon the
17 evidence and the instructions of this Court.

18 Mr. Malone, do you wish to make a closing
19 argument?

20 MR. MALONE: I do, sir. And I thank you.

21 THE COURT: Proceed, sir.

22 (The closing arguments were made.)

1 THE COURT: Thank you, Mr. Malone.

2 Ladies and gentlemen, before I submit the case
3 to you let me give you some brief final instructions.
4 This is obviously a very important case both to the
5 plaintiff and to the defendant.

6 It is now your duty to deliberate and reach
7 your verdict. In order to reach a verdict all eight of
8 you will have to agree. Your verdict will have to be
9 unanimous.

10 In pursuing the goal of reaching a verdict you
11 should conduct your deliberations in a businesslike
12 manner. I will suggest to you that the first thing that
13 you probably ought to do when you retire is to elect one
14 of your number to be the foreperson.

15 And he or she should see to it that
16 deliberations, in fact, go forward, each of you has an
17 opportunity to express your views, consider the evidence
18 and consider the views of your fellow jurors.

19 When you retire to conduct your deliberations
20 you're going to have each of the exhibits which has been
21 introduced in evidence. You're going to have each of
22 the instructions which I've previously read to you.

1 And you're going to have two verdict forms;
2 obviously one verdict form if you find for the
3 plaintiff, one verdict form if you find for the
4 defendant.

5 If you find your verdict for the plaintiff in
6 the case, then you shall assess the plaintiff's damages
7 based upon the evidence that has been presented and the
8 instructions of law which I've given to you.

9 Your foreperson should fill out the amount of
10 the damages that you award, should sign that verdict
11 form and print his or her name on that particular
12 verdict form.

13 If you find your verdict for the defendant,
14 then your foreperson should sign that verdict form and
15 print his or her name on the verdict form finding for
16 the defendant.

17 Ladies and gentlemen, you have a duty to
18 consult with one another and to deliberate with a view
19 towards reaching an agreement if it can be done without
20 violence to your individual judgments.

21 Each of you must decide this case for yourself
22 but only after a fair and impartial consideration of the

1 evidence and the views of your fellow jurors.

2 During the course of your deliberations none of
3 you should hesitate to re-examine your position or even
4 potentially completely change your position if you
5 become convinced that your original position may have
6 been erroneous.

7 However, none of you should surrender your
8 honest conviction as to the weight or the effect of the
9 evidence solely because of the views of your fellow
10 jurors or solely for purposes of reaching a verdict.

11 With my thanks for the attention that I've seen
12 that all eight of you have given to this case during the
13 course of its presentation during the course of the last
14 four days and the attention that I trust you will give
15 to it during the course of your deliberations I now
16 submit the case to you. And we await your verdict.

17 You may now take your pads back with you into
18 the jury room. I will have the exhibits, the
19 instructions, the verdict forms back to you in the jury
20 room in a very few minutes. Thank you very much.

21 (The jury left the courtroom, after which the
22 following proceedings were held:)

1 THE COURT: Counsel, can you approach the
2 bench, please?

3 (Counsel approached the bench and the following
4 proceedings were held:)

5 THE COURT: Counsel, I'm going to want you to
6 go through the instructions, the verdict forms and the
7 exhibits, again, without waiving your prior objections;
8 just make sure that what I'm proposing to send back to
9 the jury room is consistent with my prior rulings.

10 If you find something that you believe is
11 wrong, bring it to my attention immediately. Otherwise,
12 I really don't want you to say anything until you've
13 reviewed all three.

14 And then I'm going to have both sides state for
15 the record that what I'm proposing to send back is
16 consistent with the prior rulings.

17 Mr. Altman, why don't you start with the
18 exhibits. The verdict forms are in the middle.
19 Mr. Glass, Mr. Malone, why don't you start with the
20 instructions, if you would, please.

21 And I'm not sending back the deposition
22 transcripts or the video tapes to the jury room. If

1 there's a request for them, we'll deal with that at the
2 appropriate time; but, otherwise, they're not going back
3 to the jury room at this point.

4 MR. ALTMAN: My question was just a little bit
5 different. Are they formal exhibits or are they just
6 being kept with the court file? That's my question. I
7 guess if they were exhibits, they'd have to go back as
8 an exhibit.

9 THE COURT: Well --

10 MR. ALTMAN: I'm not suggesting they should.

11 THE COURT: I understand that, Mr. Altman. I
12 think they are made a part of the record. The video
13 taped deposition, if they asked me to replay parts of
14 the video taped deposition, I would hear your arguments;
15 but I may not be favorably inclined to do that, because
16 we can't replay for them the other testimony that they
17 heard from the witness stand.

18 The reason that it's going to remain with us is
19 I want it to be part of the record in the event of an
20 appeal; that the Supreme Court would have the advantage
21 of that in deciding any issues where the video tape
22 might be relevant.

1 MR. ALTMAN: So it's part of the record, but
2 it's not an exhibit. That's my only question.

3 THE COURT: Yes, sir.

4 MR. ALTMAN: Okay. Thank you, sir.

5 MR. BROWN: By the way, Your Honor, the
6 instructions are correct.

7 THE COURT: Let's wait for all three,
8 Mr. Brown, if you would, please.

9 Counsel, I may have to ask you to clean up
10 counsel table.

11 (Discussion off the record.)

12 MR. ALTMAN: Your Honor, do you want to hear
13 from me about all three now?

14 THE COURT: If you've gone through all three,
15 are the exhibits, instructions and verdict forms in
16 proper form consistent with the Court's prior rulings as
17 far as the defense is concerned?

18 MR. ALTMAN: Absolutely. I just need to make
19 one comment. Your K is as hard to read as my I; but
20 they are all in proper form, sir.

21 THE COURT: I won't say what I'm thinking,
22 Mr. Altman.

1 MR. GLASS: On behalf of the plaintiff the
2 exhibits and the instructions are in proper form and so
3 is the verdict form.

4 THE COURT: Okay. Renee, you can take
5 everything back.

6 Is Mr. Ponirakis here? Ask him to step into
7 the courtroom for a moment, if you would, please.

8 I want this on the record. The Court very much
9 appreciates the very professional manner in which this
10 case was tried by all four of the attorneys involved in
11 the case..

12 Mr. Ponirakis, I want you to tell your son and,
13 Dr. Choi, I want to tell you that no matter what the
14 jury decides in this case, you have been extremely well
15 represented by your chosen attorneys.

16 The Court stands in recess until we hear from
17 the jury.

18 (At 11:30 a.m., a recess was taken while the
19 jury consider its verdict.)

20 THE COURT: I'm going to take my jury question
21 before I get to the Town of Herndon case.

22 Okay. Counsel, a note has come out from the

* * *

1 the jury room under Virginia law are those exhibits
2 which have been introduced into evidence, they are
3 exhibits that are in evidence.

4 There are other things you've seen during the
5 course of the trial that were used solely as
6 demonstrative aids to make it easier for you to
7 understand the evidence. Those exhibits don't go back
8 into the jury room, because they're not in evidence.

9 MR. GLASS: That's acceptable.

10 MR. ALTMAN: Fine.

11 THE COURT: All right. Bring them in.

12 (The jury returned to the courtroom, after
13 which the following proceedings were held:)

14 THE COURT: Ladies and gentlemen, I have your
15 note. Let me respond to your note in this way. Under
16 Virginia law the only documents that go back into the
17 jury room are exhibits which are received into evidence
18 during the course of the trial.

19 You have seen two things during the course of
20 this trial. You've seen documents that are in evidence.
21 They are all back with you in the jury room.

22 And the other things that you've seen are what

1 we call demonstrative aids which are not evidence and
2 which are not in evidence. They simply are presented to
3 you during the course of the trial to aid you in
4 understanding the oral testimony that is forthcoming.

5 You've seen that by way of certain charts. The
6 paper was used at different times by the attorneys.
7 Those exhibits, if I may so term them -- they're really
8 aids -- are not evidence. And under Virginia law they
9 are not to go back into the jury room.

10 So if that's what you were referring to,
11 Virginia law does not allow me to send those back to the
12 jury room. And I can't send them back at this time.

13 So if you will go on, continue on with your
14 deliberations. If you believe that there's a particular
15 document that was received into evidence, you heard me
16 say that this is received in evidence -- something may
17 have been marked for identification. There were things
18 that were marked for identification that were not
19 received in evidence. If they weren't received in
20 evidence, they're not back with you.

21 If there's something that you believe was
22 received in evidence that you don't have back with you,

1 you can send a note to the deputy about that.

2 But we've checked that. And the lawyers have
3 all agreed that all of the exhibits that were received
4 into evidence were in the book that was sent back to you
5 when Deputy Royal brought you the instructions, the
6 exhibits and the verdict forms.

7 If you would continue on with your
8 deliberations, please, and go back to the jury room.

9 (The jury left the courtroom, after which the
10 following proceedings were held:

11 THE COURT: Okay. Counsel, if you would step
12 back, please. We stand in recess in this case until we
13 hear from the jury.

14 (At 12:20 p.m., a recess was taken while the
15 jury consider its verdict.)

16 THE COURT: It's my understanding that the jury
17 has reached a verdict. Bring the jurors in, please.

18 (The jury returned to the courtroom, after
19 which the following proceedings were held:)

20 THE CLERK: Members of the jury, have you
21 reached your verdict?

22 JUROR PAXTON: Yes, we have.

1 THE CLERK: And is your verdict unanimous?

2 JUROR PAXTON: Yes, it is.

3 THE CLERK: We, the jury, on the issue joined
4 in the case of Sotiri Ponirakis, plaintiff, versus David
5 K. Choi, M.D., defendant, find our verdict in favor of
6 the defendant. Signed, David S. Paxton, foreperson.

7 THE COURT: Are there any motions or questions
8 for the members of the jury before they're released?

9 MR. MALONE: Yes, please.

10 MR. GLASS: Poll.

11 THE COURT: Poll the jurors, please, Ms. Ralph.

12 THE CLERK: When I call your name, will you
13 please answer yes if the verdict I read was the verdict
14 you rendered.

15 Brenda Griffin.

16 THE JUROR: Yes.

17 THE CLERK: Alice Jacobs.

18 THE JUROR: Yes.

19 THE CLERK: Billy Landreth.

20 THE JUROR: Yes.

21 THE CLERK: Marilyn Snow.

22 THE JUROR: Yes.

1 THE CLERK: Janice Cabral.

2 THE JUROR: Yes.

3 THE CLERK: David Paxton.

4 THE JUROR: Yes.

5 THE CLERK: Norma Lunasin.

6 THE JUROR: Yes.

7 THE CLERK: Joseph Kasell.

8 THE JUROR: Yes.

9 THE COURT: Anything further before the members
10 of the jury are discharged?

11 MR. MALONE: No, sir.

12 MR. ALTMAN: No, sir.

13 THE COURT: Ladies and gentlemen, thank you
14 very much for your service in this case. You're
15 discharged at this time. Have a good day.

16 (The jury left the courtroom, after which the
17 following proceedings were held:)

18 THE COURT: Consistent with the policy of the
19 Court, we have proposed orders ready. Would you
20 approach the bench, please?

21 (Counsel approached the bench and the following
22 proceedings were held:)

1 THE COURT: Review the order, please. And if
2 you would endorse it noting whatever exceptions the
3 plaintiff wishes to note or whatever exceptions you also
4 want to note, Mr. Altman, if any.

5 MR. ALTMAN: Thank you, sir.

6 THE COURT: All right. The final order is
7 entered.

8 (The bench conference was concluded.)

9 THE COURT: Mr. Ponirakis, I wish your son
10 well. And, Dr. Choi, I wish you well, also. Court
11 stands in recess. Thank you, Counsel.

12 MR. ALTMAN: Thank you, sir.

13 (At 3:35 p.m. the proceedings in the
14 above-entitled matter were concluded.)
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JURY INSTRUCTION NO. 10

Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of this case.

JURY INSTRUCTION NO. P

When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

JURY INSTRUCTION XX

You shall find your verdict for the Plaintiff if he has proved by the greater weight of the evidence that:

- ✕ (1) the Defendant ^{was} negligent; and that
- ✕ (2) the Defendant's negligence was a proximate cause of the Plaintiff's injuries.

You shall find your verdict for the Defendant if:

- ✕ (1) the Plaintiff failed to prove either or both of the two elements above; or if
- (2) you find by the greater weight of the evidence that
 - (a) the Plaintiff was contributorily negligent on November 14, 1996 and that his negligence was a proximate cause of his injuries; and
 - (b) the Plaintiff has failed to prove by the greater weight of the evidence that the Defendant was negligent after November 14, 1996 and that such negligence was a proximate cause of the Plaintiff's injuries.

JURY INSTRUCTION YY

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

- (1) Was the Defendant negligent?
- (2) If he was negligent, was his negligence a proximate cause of the claimed injuries?

The burden is on the Plaintiff to prove these issues by the greater weight of the evidence.

- (3) Was the Plaintiff negligent on November 14, 1996?
- (4) If he was negligent, was his negligence a proximate cause of the claimed injuries?

The burden is on the Defendant to prove these issues by the greater weight of the evidence.

- (5) If the Plaintiff is entitled to recover, what is the amount of his damages?

The burden is on the Plaintiff to prove this issue by the greater weight of the evidence.

Your decision on these issues must be governed by the instructions that follow.



IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SOTIRI PONIRAKIS,
Plaintiff,

LAW NO. 174553

VERSUS

DAVID K. CHOI, M.D.,
Defendant.

FINAL ORDER
JURY TRIAL


THIS CAUSE came on for trial upon the pleadings filed by the parties herein and
UPON CONSIDERATION of the evidence presented, the argument of counsel, the rulings of the Court
and the verdict of the jury, it is,

ADJUDGED, and **ORDERED** that judgment be and is hereby entered in favor of the Defendant.

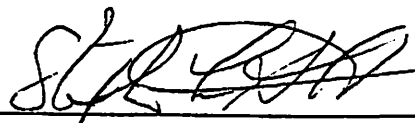
It is further **ADJUDGED**, and **ORDERED** that in the event no appeal is timely filed, the Clerk of the
Court be, and hereby is authorized to destroy or return to the parties, if requested, all exhibits in this case,
whether identified or admitted, forty-five (45) days after this Order becomes final.

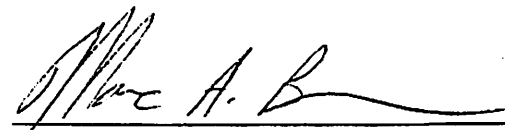
AND THIS CAUSE IS ENDED.

Entered on April 13, 2000.

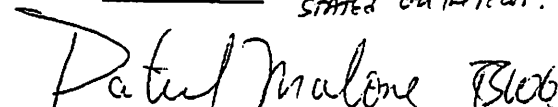

JUDGE STANLEY P. KLEIN


I ask for this:


Stephen L. Altman, Counsel for Defendant


Marc A. Brown, Counsel for the Defendant

Seen and Observed to be true REASONS
STATED ON THE RETURN!


Patrick A. Malone, Counsel for Plaintiff


Benjamin W. Glass, III, Counsel for Plaintiff

ASSIGNMENT OF ERROR

In this medical malpractice case involving a delayed diagnosis of kidney disease, the trial court erred in instructing the jury that they could find the plaintiff contributorily negligent when the doctor asked him whether he had had any “serious diseases or operations,” he failed to reveal prior episodes of blood and protein in his urine, which the patient thought had resolved without incident. The instructions at issue are O, P, XX and YY.