

1 sir?

2 A I am a neurologist.

3 Q What is your educational background?

4 A I attended John Hopkins University School of Medicine,  
5 graduated Hopkins in 1977. After graduation I did a one year  
6 internship at the University of Maryland Hospital in Baltimore  
7 and in 1978 moved back to New York where I started and completed  
8 a residency in the field of neurology at New York Hospital  
9 Cornell.

10 I finished Cornell in 1981, took a position here in the  
11 Bronx at St. Barnabas Hospital in 1981 and continued at Barnabas  
12 until 2005. In 1982 I became board certified in my field and  
13 again in 2005 I left the Bronx and took a position in Manhattan  
14 at NYU Medical School and Medical Center where I have an academic  
15 position there. I have a position at Metropolitan Hospital in  
16 Manhattan and keep an office in Manhattan as well.

17 I am board certified in my field and that was done in  
18 1982. I am a member of the American Academy of Neurology, I am  
19 considered a diplomat in the field of neurology. Neurology is  
20 the field of medicine that has to do with the muscles and the  
21 nerves and the conditions that affect them, primarily involving  
22 the head, neck and back.

23 Q What is board certification?

24 A In my field having successfully completed the residency  
25 in neurology at Cornell you are recommended to take a series of

1 examinations. There was an oral examination in Chicago and a  
2 written national examination that I completed successfully, both  
3 parts so I was admitted to the Academy of Neurology in November  
4 of 1982.

5 THE COURT: Doctor, you are keeping your voice up,  
6 the only thing I have is slow down. There is a reporter  
7 here, she has to take everything down and she is very, very  
8 good but not that fast.

9 THE WITNESS: Noted.

10 Q You talked about neurology. Can you expand a little  
11 bit about what you told us what neurology is and what it is the  
12 study of?

13 A It is the field of medicine involving the muscles and  
14 the nerves and it tends indicate to be involved with conditions  
15 of the head, neck and back. So conditions involving the brain,  
16 stroke, injuries, trauma, things we are going to talk about  
17 today, things involving the spine, neck pain, back pain, various  
18 kinds of medical and traumatic and non-traumatic conditions of  
19 the brain and the spine.

20 Q Presently, what does your practice consist of?

21 A Three parts. One part in NYU I see people primarily  
22 with multiple sclerosis. The second part primarily at  
23 Metropolitan Hospital which is a city hospital. I see people  
24 with general neurological conditions and in my office one day a  
25 week where I see patients with general conditions and some

1 patients with medical/legal issues.

2 Q Have you testified in court previously?

3 A I have.

4 Q Has it been for both plaintiffs and defendants?

5 A It has.

6 Q Have you testified on occasion for the New York City  
7 Transit Authority?

8 A Yes, I have.

9 Q How many occasions was that?

10 A Twice.

11 Q Are you being compensated for your time here in court  
12 today?

13 A I have been paid already.

14 Q If you were not here, where would you be?

15 A Probably at Metropolitan.

16 Q How much is your compensation for your time in court?

17 A I have been paid 5,000 dollars.

18 Q Doctor, with respect to that 5,000 dollars that  
19 includes talking to me, reviewing the documents and basically  
20 preparing yourself for your testimony today; correct?

21 A Correct.

22 Q Doctor, at some point at my request, did you examine a  
23 woman by the name of Dorothy Dunnigan?

24 A I did.

25 Q Do you know the date that you examined her, just the

1 date at this point?

2 MS. MOORE: If the Doctor is going indicate to be  
3 referring some documents, I would ask that the Court grant  
4 the witness permission if he has an independent recollection  
5 he can do so, but if he is referring to a document I would  
6 object.

7 THE COURT: No speeches, just objection.

8 MS. MOORE: Objection.

9 THE COURT: Overruled.

10 Go ahead.

11 Q Just the date, Doctor.

12 A 2011, April 15th.

13 Q Now I want you to assume as I told you this obviously  
14 that unfortunately Miss Dunnigan passed away on July 26, 2011 so  
15 it was a few months after you saw her; correct?

16 A Correct.

17 Q Doctor, at some point when we retained you did you get  
18 an opportunity to review certain hospital records relating to an  
19 incident involving Miss Dunnigan?

20 A I did.

21 MR. POLLACK: Judge, at this time I have the  
22 certified records from Jacobi Home Center. I would like  
23 them offered into evidence as Plaintiff's Exhibit 1 subject  
24 to redaction and they are certified as they came in through  
25 the Court.

1 THE COURT: Any objections?

2 MS. MOORE: No objection.

3 MR. CHURBUCK: No objection, your Honor.

4 MR. SESKIN: I don't know if I can object.

5 THE COURT: I still need something on the  
6 record.

7 THE COURT: No objection.

8 MR. SESKIN: No objection.

9 THE COURT: Entered into evidence without  
10 objection.

11 (Whereupon, Plaintiff Dunnigan Exhibit 1, Jacobi  
12 Medical Records, marked in evidence as of this date)

13 MR. POLLACK: Subject to redaction.

14 THE COURT OFFICER: So marked. Plaintiff  
15 Dunnigan Exhibit 1 in evidence.

16 Q Doctor, I want you to assume that on August 19, 2008  
17 Miss Dunnigan was a driver of a vehicle and there was a collision  
18 between a New York City Transit Authority bus and Miss Dunnigan's  
19 vehicle. I want you to assume that she was taken by ambulance to  
20 Jacobi Hospital. You have had an opportunity to review the  
21 records that are in evidence; correct?

22 A Correct.

23 Q Now, how did she present to Jacobi Hospital when she  
24 got there?

25 A By ambulance, she was brought by emergency service

1 personnel to the hospital after having been in the collision. At  
2 the hospital she made complaints involving a headache and other  
3 parts of her body. She vomited one time. Her blood pressure was  
4 significantly elevated and appropriately so, they did a brain CAT  
5 scan at that time which was abnormal.

6 Q When you say abnormal, what is abnormal and what is a  
7 CAT scan?

8 A A CAT scan stands for computerized axial tomography  
9 which is a computerized x-ray of a part of the body. In this  
10 case it was the head. Unlike an x-ray where you see the bones,  
11 the CAT scan shows not only the bones but the soft tissue which  
12 is the brain and that was done and she was found to have a  
13 subdural hematoma on the right side of her brain. What that  
14 is -- you want me to explain that?

15 Q Yes, please.

16 A Obviously the skull, right, obviously the brain is  
17 inside the skull. Between the brain and the skull is like a  
18 leather like envelope a lining called the dura. Between the dura  
19 and the brain is the small space, it has fluid and some blood  
20 vessels that circulate. A subdural hematoma occurs where there  
21 is damage to these blood vessels, in this case due to trauma and  
22 the blood vessels leak and blood leaks out of the vessels and  
23 goes in the space between the leather like envelope and the brain  
24 substance itself and depending on where it is and depending on  
25 how much it is determines what the eventual outcome will be.

1 She had a subdural hematoma found on the CAT scan that  
2 correlated with her headache. She had a bruise on her head as  
3 well. They also noted a slowing of the pulse rate which is  
4 something that one sees when there is extra pressure inside the  
5 head as occurs when there is extra blood inside the head such as  
6 with a subdural hematoma.

7 Q What is the concern of a subdural hematoma if it is not  
8 taken care of?

9 A The skull obviously is a rigid box and there is  
10 something in medicine that says within this box there is just so  
11 much you can put in it. There is brain fluid and blood and if  
12 you put extra blood in there like leaking out of a blood vessel  
13 and the subdural, there is pressure on the adjacent structure,  
14 the skull does not expand. Because it is rigid and there is  
15 extra pressure by the blood clot it causes pressure on the  
16 surrounding tissue which is in this case the brain and that can  
17 cause neurologic impairment, anything from headache to weakness  
18 to loss of consciousness to coma to death.

19 Q I want you to assume that according to the hospital  
20 recordings, Miss Dunnigan's course in the hospital was from the  
21 day of the accident to October 3 of 2008. You are aware of that;  
22 correct?

23 A I am.

24 Q Doctor, initially did they perform surgery or talk  
25 about performing surgery?

1 A Initially they talked about performing surgery, they  
2 did not do surgery initially.

3 Q Part of it was the client didn't want surgery, Miss  
4 Dunnigan didn't want surgery, I should say?

5 A There were a number of factors what she said and some  
6 of the co-existing medical issues that had to be dealt with in  
7 order to do surgery safely on this woman.

8 Q When she presented to the hospital she was 79 years  
9 old; correct?

10 A Correct.

11 Q Generally from the hospital records what do the  
12 hospital records indicate to be her pre-existing condition before  
13 the accident?

14 A Well she had cardiac disease, she was on medication for  
15 heart condition, she had some arthritis which is not surprising  
16 of her age so she had some co-existing medical conditions for  
17 sure which influenced the nature and the type of surgery she  
18 eventually had.

19 Q During the period of time when she was in the hospital,  
20 before the surgery, what type of treatment did they do, just  
21 generally?

22 A Before she had the surgery they gave her some physical  
23 therapy rehabilitation, she had underlying cardiac issues that  
24 needed to be addressed, she had a slow heart rate and that slow  
25 heart rate was a problem both to her general health and also to



1 the fact that if she needed surgery on her brain, it had to be  
2 done with the heart protected so that she could tolerate the  
3 surgery. So she underwent a series of both medical and  
4 rehabilitation treatments up to her surgery and in fact  
5 afterwards as well.

6 Q I want you to assume that there's been testimony by  
7 Miss Dunnigan in her deposition that prior to the date of the  
8 accident she never used a cane or a walker or any device to help  
9 her walk or ambulate. What's reflected in the hospital records  
10 with respect to her ability to ambulate?

11 A She deteriorated post trauma as a result of the  
12 subdural and the deconditioning. Obviously, when a person that  
13 age breaks their routine per se, they are more likely to undergo  
14 deconditioning, loss of activities of daily living which happened  
15 to this woman. In addition to the fact that she had the subdural  
16 which is obviously not good for brain function, so the  
17 combination of things made it more difficult for her to perform  
18 her activities of daily living.

19 Q In the hospital records of rehab they reflected that  
20 they were using a walker when she was doing rehabilitation?

21 A Correct she needed assistance with ambulatory aids for  
22 balance, strength and safety.

23 Q At some point Miss Dunnigan underwent surgery according  
24 to the Jacobi records; correct?

25 A Correct.

1 Q That was on October 1, 2008; correct?

2 A Correct.

3 Q Why did they have to do the surgery and what did the  
4 surgery involve?

5 A Well, they were monitoring her condition over time.  
6 Sometimes subdurals get better, the body resorbs the blood and  
7 sometimes they don't. In this case it did not. In fact, the  
8 condition got worse, the blood clot expanded and just prior to  
9 surgery she was found to be lethargic and sleepier and less  
10 responsive to the people around her, so they did a follow up CAT  
11 scan.

12 Q What did the CAT scan provide and that's in the  
13 hospital records as well?

14 A The CAT scan showed the fact that the blood clot  
15 expanded and caused additional pressure on the brain which  
16 accounted for her sleepiness or lethargy and decreased  
17 functioning and as a result they appropriately determined that  
18 the blood clot had to come out before more pressure and more  
19 brain injury occurs.

20 Q Doctor, you had an opportunity to review the operative  
21 report; correct?

22 A I did.

23 Q Generally, could you tell the jury what the procedure  
24 involved with respect to the subdural hematoma and removing it?

25 A In order to do it safely in this case they put a pace

1 maker to make sure the heart was able to tolerate the surgery and  
2 they did a burr hole, meaning that part of the skull that  
3 overlies the blood clot was entered by a drill, so a drill is  
4 used to take out a piece of the skull. When that happened, the  
5 operative report indicated a jetstream of blood burst out because  
6 the blood was under pressure. So the blood burst out of the hole  
7 and then the surgeon went in there, took out the remaining blood  
8 clot which was pressing on the brain and after having done that  
9 successfully, closed her up and put her in the intensive care  
10 unit to monitor her and then she survived the surgery.

11 Q I want you to assume that she was discharged from  
12 Jacobi Hospital on October 3 and went to a rehabilitation  
13 facility from October 3 until October 30 of 2008. I want you to  
14 assume further, Doctor, that there's been testimony that after  
15 she left the rehabilitation facility that compared to before the  
16 accident she used a walker and that with respect to the certain  
17 parts of her body, the shoulder, her leg and her back that it was  
18 different, she had more problems with it than before the  
19 accident.

20 I want you to assume further that then she came to see  
21 you on the date we mentioned which was April 15, 2011.

22 A Yes.

23 Q When she presented to you, did you examine her?

24 A I did.

25 Q And what did your exam consist of when you see a

1 patient?

2 A The exam consists of a neurological examination which  
3 has several parts. One is to examine the mental status of the  
4 patient; awake, alert and to evaluate memory, intellect,  
5 behavior, things of that nature which are important in this  
6 particular case. The cranial nerves which are the nerves of the  
7 head and face. Motor exam, sensory exam, reflex exam, gait and a  
8 brief general examination.

9 Q Generally with respect to her prior history, what type  
10 of history did she give you relating to your exam and what you  
11 were concerned with?

12 A Can I refer to my report?

13 THE COURT: You need to refresh your memory?

14 THE WITNESS: I do.

15 THE COURT: Go ahead.

16 A Again she told me that prior to the accident she was  
17 ambulatory, walking around, walking about without any ambulatory  
18 aids of any type. As I said she did have a history of coronary  
19 artery disease and arthritis and she was able to get around and  
20 go about her business. She told me that subsequent to the  
21 accident she required a rolling walker, she did not have as much  
22 energy as she used to have. She complained of headaches although  
23 not as bad as right after the accident, she still complained of  
24 headaches, dizziness, difficulty with her memory and  
25 concentration and she said to me "I am not the same person I used

1 to be."

2 She had pain in her shoulder, her neck, her left knee,  
3 poor balance and forgetfulness were among the complaints that she  
4 related to me on that day.

5 Q She certainly had the arthritis from before; correct?

6 A Right. She had some definite pre-existing conditions  
7 but despite that she was able to get around fairly independently  
8 prior to the subdural hematoma.

9 Q In your exam of her what did you do with her and what  
10 were your findings with respect to the tests?

11 A Well, there are certain parts of the mental status exam  
12 that are pretty standard in my field, you ask the patient to  
13 spell certain words front and back remember a few things, what's  
14 called serial sevens, you ask the person to count backward from  
15 100 by seven, if they cannot do that then you ask them to count  
16 backward from 21 by three and those are fairly normal ways to  
17 evaluate the mental status. What I found was her speech was  
18 clear, her language was fluent, which means something but not  
19 relative to this particular case --

20 MS. MOORE: I am sorry --

21 THE COURT: What did you say, not relevant to  
22 this particular case?

23 Is that what you missed?

24 MS. MOORE: I did not hear.

25 A Her speech was fluent.

1 MR. POLLACK: We are not claiming anything with  
2 regard to her speech.

3 THE COURT: Stop, stop. She did not ask you to  
4 repeat it. She asked what was said.

5 MR. POLLACK: Okay, Judge.

6 THE COURT: Reporter, read it back, please.

7 (Whereupon, the requested testimony was read back)

8 THE COURT: Are you finished with your answer?

9 THE WITNESS: No.

10 THE COURT: Continue.

11 A She was able to follow one step commands but not two or  
12 three step commands which means if you ask someone to stick your  
13 tongue out, touch your left ear, stick tongue out, touch left ear  
14 with right hand and right knee with your left hand, those are  
15 more complicated commands. She was able to do one step but  
16 missed on two and three steps. She could not spell the word  
17 world forward or backward.

18 THE COURT: Speak up, please.

19 A She could not do serial threes or serial sevens and  
20 remembered one of three objects at three minutes. Fairly  
21 typical. You ask someone to remember three things make sure they  
22 get it and ask them to repeat it in three minutes and she was  
23 able to repeat one of the three objects. There was impairment of  
24 her mental status. She had weakness of the left arm and the left  
25 leg, mild but notable and then she had hyperreflexia on the left

1 side and the significance of the weakness and the hyperreflexia  
2 has to do with the fact that the right side of the brain controls  
3 the left side of the body. She had a right sided brain injury  
4 and there was some residual on examination involving the left  
5 side of the body with the mild weakness and the change in  
6 reflexes which is an exam, part of the examination which looks at  
7 muscle tone. So there were abnormalities consistent with a right  
8 sided brain injury.

9 Continuing, of course, she needed a rolling walker to  
10 move about in my office. She did have the arthritis of some of  
11 her joints which she told me and I saw, so, those were the main  
12 findings on examination.

13 Q Doctor, at that point, did you make a diagnosis with  
14 respect to what injuries Miss Dunnigan sustained as a result of  
15 the accident in August of 2008?

16 A I did.

17 Q What was that?

18 A I concluded that she had a traumatic brain injury with  
19 a right frontal parietal subdural hematoma requiring burr hole  
20 evacuation surgery, extended stay rehabilitation and I thought  
21 she had an aggravation of some of her pre-existing arthritic  
22 conditions.

23 Q Doctor, I want you to assume after she finished with  
24 the rehab she testified at her deposition that she continued with  
25 physical therapy. Is that consistent with the type of injury

1 that she sustained that she be required to continue physical  
2 therapy?

3 A Correct.

4 Q why is that?

5 A Because these, the kinds of injuries she had is very  
6 debilitating even under the best of circumstances. If you have a  
7 79 year old lady or a woman with these other conditions it is  
8 going to further worsen them and make it of more difficult for  
9 her to get back to her normal state or baseline state so she  
10 needed rather prolonged and intensive therapy, post trauma.

11 Q We are talking about three months from when you  
12 examined her from April 15, 2011 until she passed on July 26,  
13 2011, but during that period of time do you have an opinion as to  
14 whether her condition would have gotten better OR gone away just  
15 that three month period?

16 A I have an opinion, of course.

17 Q what is that opinion?

18 A My opinion is it would not have gone away and would not  
19 have gotten better.

20 THE COURT: Did you say from July 15, I mean April  
21 15, 2011 until July 26, 2011?

22 MR. POLLACK: Yes, your Honor. That's when she  
23 passed.

24 THE COURT: That's the time period that you saw  
25 her, Doctor?



1 THE WITNESS: I saw her on April 15.

2 THE COURT: Just once?

3 THE WITNESS: Correct.

4 Q Now, Doctor, do you have an opinion to a reasonable  
5 degree of medical certainty as to whether the deficits, the  
6 problems that you just discussed as well as the surgery were  
7 caused from the accident that occurred on August 18, 2008?

8 MR. CHURBUCK: 19th.

9 MR. POLLACK: August 19, 2008?

10 A I do.

11 Q What is your opinion?

12 A They were.

13 Q Why is that?

14 A Well, she was in the trauma, she hit her head and  
15 contemporaneously with that trauma an accident she developed a  
16 subdural hematoma which eventually required surgery so it is  
17 pretty clear that the accident was the proximate cause of those  
18 conditions.

19 Q Doctor, the fact that prior to the date of the accident  
20 Miss Dunnigan was not using any type of a device for ambulation  
21 and ambulation means walking; correct?

22 A Correct.

23 Q And since the date of the accident up until her death  
24 she continued using a device, what does that mean to you from a  
25 medical prospective?

1           A       It means to me she never recovered from the traumatic  
2 injuries that she had as a result of the accident. The surgery  
3 saved her life, obviously, but it did not reverse the underlying  
4 trauma to the brain which occurred as a result of this accident  
5 and, in fact, again when I saw her on April 15, 2011 she had some  
6 of the residual involving left side weakness and hyperreflexia  
7 which reflected right sided brain injury.

8                   MR. POLLACK:   Nothing further, thank you,  
9           Doctor.

10                   THE COURT:   Mr. Seskin, do you have any questions?

11                   MR. SESKIN:   No, your Honor.

12                   THE COURT:   Defendant Transit?

13                   MS. MOORE:   May I your Honor?

14                   THE COURT:   Yes.

15       CROSS EXAMINATION

16       BY MS. MOORE:

17           Q       Good morning, Doctor.

18           A       Good morning.

19           Q       Prior to coming here to testify you had an opportunity  
20 to review Miss Dunnigan's records; correct?

21           A       I did.

22           Q       You reviewed Miss Dunnigan's records before you  
23 examined her back on April 15, 2011; correct?

24           A       Correct.

25           Q       The records that you reviewed were her hospital records

1 Jacobi Hospital records; correct?

2 A Correct.

3 Q And it was important for to you review those records in  
4 order to come to some conclusion about her diagnosis and  
5 prognosis on that one time that you examined her; correct?

6 A Certainly --

7 Q Yes or no?

8 A Certainly her diagnosis, that's correct.

9 Q But you came to a prognosis after examining her;  
10 correct?

11 A Correct.

12 Q And also examining her records?

13 A Correct.

14 Q And during your examination -- well at some time either  
15 before or during your examination you had an opportunity to  
16 review her hospital records?

17 A I did.

18 Q When a person presents to a hospital there is something  
19 that they go through which is called an initial assessment;  
20 correct?

21 A Correct.

22 Q With an initial assessment the doctors and the nurses  
23 examine physically examine the person as well as other  
24 examinations that they perform to determine the person's status;  
25 correct?

1 A That's a very complicated question but in general the  
2 answer is yes.

3 Q It was determined that this plaintiff, Miss Dunnigan  
4 was involved in a motor vehicle accident; correct?

5 A Yes.

6 Q Now, did you review in the hospital records that there  
7 was an assessment made as to whether or not Miss Dunnigan was  
8 wearing a seat belt at the time?

9 MR. POLLACK: Objection. Objection.

10 THE COURT: I heard you, I heard you.

11 MR. POLLACK: May we approach please?

12 THE COURT: Yes.

13 (Whereupon, the following takes place in the  
14 robing room among counsel and the Court out of the presence  
15 of the jury)

16 THE COURT: You made an objection. State your  
17 basis.

18 MR. POLLACK: Your Honor, she has no expert on  
19 seat belt defense. You cannot rely on a hospital record  
20 where it says unrestrained driver. The police report says  
21 she had her seat belt on, she testified she had her seat  
22 belt on. She should be sanctioned and I have to request a  
23 mistrial. She cannot present an affirmative defense without  
24 a doctor to say that it has to be that the failure to wear a  
25 seat belt caused these injuries, that the failure if she did

1 have it on she would have had it or if she did not have it  
2 on she would not have had these injuries. You cannot make  
3 that argument. You have to have an expert.

4 I have to ask for a mistrial and counsel should  
5 know it, Judge. So I spent 5,000 dollars on a doctor for no  
6 reason whatsoever because she asked a question that she  
7 knows and your Honor told her she does not have a seat belt  
8 defense.

9 MS. MOORE: Your Honor, counsel admitted these  
10 hospital records into evidence, they indicated in the  
11 hospital records that she was an unrestrained driver. I  
12 have an affirmative defense that she was unseatbelted. The  
13 doctor testified as to what her injuries were immediately  
14 following the accident based upon the history she gave him  
15 and the hospital records that he examined which are in  
16 evidence. I am entitled to inquire of the doctor about the  
17 seat belt because it is in evidence.

18 MR. POLLACK: She is not and it was subject to  
19 redaction and that's exactly what gets redacted from the  
20 hospital records. I want them sanctioned 5,000 dollars to  
21 pay for my doctor. I want a mistrial.

22 MS. MOORE: It is not your determination, it is in  
23 the hospital records.

24 MR. POLLACK: What is coming out of her mouth  
25 shows me an incredible lack of legal knowledge. I am

1 telling you something I have been doing this a long time,  
2 even the most basic of legal tenets on a seat belt defense  
3 you don't play games like this and do this. I tried cases  
4 like this on a number of occasions. Counsel knows and I  
5 want them sanctioned 5,000 dollars and I want a mistrial.

6 THE COURT: Anybody else join in?

7 MR. CHURBUCK: No.

8 MR. SESKIN: Judge, as this may affect Dorothy  
9 Lemon's case also, I would have to join with counsel's  
10 request because this is going to come up and the question  
11 then was raised with regard to as was read by Miss Moore, as  
12 to Miss Dunnigan's testimony did she know whether or not  
13 Miss Lemon was seat belted. Miss Dunnigan testified, the  
14 testimony was read to the jury that she does not know  
15 anything about that and this may, in fact prejudice my  
16 client as well.

17 THE COURT: That was read to the jury yesterday?

18 MR. SESKIN: Yes and it completely correct as  
19 Miss Dunnigan's prior testimony.

20 THE COURT: I am listening to him right now.

21 There was no objection to that portion being read?

22 MS. MOORE: No, there was not.

23 MR. SESKIN: That was on counsel's case that had  
24 to do with the 50-h.

25 MS. MOORE: I read that portion.

1 THE COURT: That portion was read to the jury  
2 yesterday and there was no objection?

3 MR. SESKIN: Yes.

4 THE COURT: Regarding the seat belt?

5 MR. SESKIN: It was asking Miss Dunnigan she said  
6 she did not know, she did not say that she was not -- that's  
7 not objectionable testimony then I would have jumped up,  
8 that's not objectionable testimony. I am saying given the  
9 taint now and the prejudice to counselor that the seat belt  
10 defense has been raised without any proof to go and back it  
11 up improperly, that taint is going to go ahead and also  
12 cover and paint my client's testimony.

13 THE COURT: How so?

14 MR. SESKIN: If one was going to ask whether she  
15 was or was not wearing a seat belt and the jury could  
16 conclude that Miss Dunnigan was not and Miss Lemon wasn't, I  
17 am concerned about that. In fact, Judge, when we went down  
18 yesterday counsel wanted to make a --

19 THE COURT: When I say one at a time. I am not  
20 going to be able to hear both of you and the reporter will  
21 not be able to take it down. He has the floor. Let him  
22 speak.

23 MR. SESKIN: I have that sitting on my table.

24 THE COURT: Have what.

25 MR. POLLACK: It is the note that counsel took

1 from my client's record. It is a social worker note  
2 contained within my client's Jacobi Hospital record. It was  
3 entered about three weeks after my client was admitted to  
4 the hospital talking about speaking about a conversation the  
5 social worker had with my client about nine or ten days  
6 after she was admitted to the hospital and it said that my  
7 client, the social worker interpreted my client as saying  
8 that she was a passenger in a vehicle that made an illegal  
9 left turn and counsel intends to somehow introduce that into  
10 evidence.

11 It is the same kind of a story that we have here  
12 going on with the seat belt. Counsel somehow believes that  
13 simply because it was stated inside a hospital record means  
14 it was admissible because it was part of the client's  
15 treatment and the medical record. That's not how it  
16 works.

17 MS. MOORE: It is an admission against interest.  
18 I am entitled to ask her whether or not she made the  
19 statement to anyone, she can say either affirm or deny and  
20 if she denies I can bring that witness in to testify as to  
21 what it is the information that they obtained from this  
22 person. It is an admission against interest.

23 MR. CHURBUCK: Why is that an admission against  
24 interest?

25 MR. POLLACK: It is not related to anybody.



1 MS. MOORE: It is.

2 MR. POLLACK: She stated it.

3 MS. MOORE: She indicated that she told the social  
4 worker that Miss Dunnigan -- Miss Dunnigan made a left turn  
5 an illegal left turn on to ongoing traffic and that was part  
6 of the social worker's records and it took place seven days  
7 after the accident happened.

8 MR. CHURBUCK: Why is that an admission against  
9 her interest?

10 MS. MOORE: Because she is claiming the bus driver  
11 is at fault.

12 MR. CHURBUCK: She is claiming that the car is at  
13 fault.

14 MR. POLLACK: The statement does not say patient  
15 stated or she stated.

16 MS. MOORE: It does say patient states.

17 MR. POLLACK: We are getting far afield from what  
18 we are talking about.

19 MS. MOORE: It is a separate issue. We are here  
20 to talk about what happened with the doctor so that's a  
21 totally separate issue.

22 MR. POLLACK: Obviously and this is, I have  
23 tremendous respect for Miss Moore and the thing I have to  
24 say is if this is how this case is going to be tried we are  
25 going to have six or seven applications for a mistrial

1 because there are tons of things that people can play games  
2 with and this is a game and if she does not know that she  
3 needs to go back to her office and be retrained by the  
4 Transit Authority on what to say, what goes in or what does  
5 not go in.

6 MS. MOORE: You are not in a position to speak  
7 about my training as a lawyer with the New York City Transit  
8 Authority and I do not believe that you are in a position to  
9 talk about any of my training as a lawyer.

10 MR. POLLACK: I am because you know what because  
11 the Judge told you --

12 MS. MOORE: I take offense to it and you should  
13 stop.

14 THE COURT: Wait, wait you are not going to talk  
15 over me. When I say stop I mean stop, that means everybody.  
16 I made a ruling as to the expert and I am very troubled by  
17 the fact that you asked this doctor that question when I  
18 don't have the information before me, but I need to see what  
19 the police report says and the records say.

20 MR. POLLACK: I could tell you what the police  
21 report says, is both drivers both Miss Lemon and Dunnigan  
22 were restrained drivers.

23 THE COURT: Who wrote that the police officer?

24 MR. POLLACK: Yes.

25 THE COURT: Is that so, Miss Moore? Is that what

1 the police report says?

2 MS. MOORE: I believe so. I don't have it.

3 THE COURT: You seem to know what the medical  
4 records say.

5 MS. MOORE: We do because it is a medical  
6 doctor.

7 THE COURT: Somebody get the police report and  
8 tell me what it says.

9 MR. POLLACK: Here is the police report and here  
10 is the key and if you look here it talks about safety  
11 equipment used. Number four is lap belt harness with  
12 respect to Miss Dunnigan and Miss Lemon the last two things  
13 there is a number four there which means lap belt harness  
14 which means they were using their seat belts. The police  
15 wrote --

16 THE COURT: Including the bus driver.

17 MR. POLLACK: The bus driver had a lap belt and  
18 obviously these are the other people that were on the bus.

19 MS. MOORE: Show the Court the hospital  
20 records.

21 MR. POLLACK: I am going to show her that. Here  
22 is the hospital records and it says throughout the hospital  
23 records, unrestrained driver, but never attributable to any  
24 of the plaintiffs and if it says unrestrained driver  
25 attributable to the plaintiff --

1 THE COURT: Number one who wrote that?

2 MR. POLLACK: Someone from the hospital.

3 THE COURT: How is that germane to treatment?

4 MS. MOORE: The one issue it goes to causation  
5 and also it goes to comparative negligence.

6 THE COURT: This is the hospital records, how is  
7 that germane to treatment?

8 MS. MOORE: It is germane to treatment as to how  
9 she sustained the injury. If she sustained a subdural  
10 hematoma because her head came into contact with the  
11 windshield, because she was unseatbelted, I am entitled to  
12 put forward that defense of her comparative negligence. We  
13 have indicated that as an affirmative defense in our answer  
14 and all of the parties are aware of that.

15 THE COURT: That does not answer how it is  
16 germane to treatment.

17 MS. MOORE: Because it goes to the history.

18 THE COURT: The fact that she was involved in a  
19 car accident how she obtained the injury is germane to  
20 treatment, whether she fell from a building or got hit by a  
21 car, but whether she had a seat belt on or made a wrong turn  
22 on ran a light that is not germane to treatment. The fact  
23 that she got the injury because of a fall or a car accident  
24 or a contact, car to car or head to something that is  
25 germane to treatment. That is the first thing.

1 MS. MOORE: But her head hit the windshield.

2 THE COURT: What does the seat belt have to do  
3 with her treatment? Absolutely nothing. Not only that when  
4 this went into evidence the first thing he said and the  
5 second thing and I corrected him, I said, I heard him, is  
6 that it is subject to redaction, he said that more than  
7 once. I turned to everyone, first of all they are certified  
8 records but yet I still turned to everyone and said any  
9 objections, although they are certified and everyone said no  
10 objection which meant no objections because they are subject  
11 to redaction.

12 MS. MOORE: We did not discuss what would be  
13 redacted.

14 THE COURT: Therefore you had a responsibility to  
15 ascertain what would or would not be redacted coupled with  
16 my ruling already about the expert.

17 MS. MOORE: But we have a medical doctor here on  
18 the stand who reviewed these medical records who can testify  
19 about this seat belt defense.

20 MR. POLLACK: If I may first of all counsel is  
21 confusing two things, it is not comparative negligence what  
22 it is with a seat belt defense is a mitigation of damages  
23 where in a jury looks at the case if you have a seat belt  
24 expert they award a sum of money and how much of that amount  
25 should be reduced in numbers if you prove those injuries or

1 some injuries were caused as a result of not wearing a seat  
2 belt. You need an expert to come in and testify as to that.  
3 It is not comparative without an expert. You cannot do  
4 that, period.

5 THE COURT: That is why the biomechanical engineer  
6 was an expert, if he had a medical background would have  
7 been able to come in and testify regarding your defense but  
8 because of the issues that was raised in the motion in  
9 limine, he was precluded. Not only that, he did not even  
10 have the medical background assuming that I would have  
11 allowed him to testify.

12 MS. MOORE: But you are saying that I cannot ask  
13 this doctor who reviewed the medical records about what the  
14 medical records say?

15 THE COURT: That questions was inappropriate. You  
16 should have known that. That question was prejudicial, you  
17 should have known that. That question goes totally against  
18 my motion in limine ruling, you should have known that.

19 MS. MOORE: Your Honor, your ruling was regarding  
20 the experts that I exchanged, not regarding the plaintiff's  
21 experts.

22 THE COURT: The expert that you felt you needed to  
23 assert a defense, you did not have the expert and in order  
24 to assert that defense you needed an expert. You cannot go  
25 through the back door and use an expert that is here to talk

1 about damages, her damages.

2 MS. MOORE: But her injuries as they were  
3 reflected in her hospital records are a part of her damages.

4 THE COURT: He is not the witness to use for that  
5 and you have already been precluded. So I have to make a  
6 decision now, do I A grant a mistrial and who am I granting  
7 a mistrial to? If I grant a mistrial to him what about the  
8 rest of them. I have to grant a mistrial to the rest of the  
9 case. If I do, do I sanction you because he just spent what  
10 he spent to put the doctor on the stand and if not the first  
11 or the second question out of your mouth was about  
12 mitigation, that really goes to whether or not her injuries  
13 would have been less or more or severe or whatever had she  
14 been restrained. It has nothing to do with comparative  
15 negligence, comparative negligence would have been how she  
16 made the turn into the intersection and what her  
17 responsibility was as far as the roadway and what she did or  
18 didn't do.

19 So he is correct as far as you are confusing or  
20 mixing up the comparative negligence with the seat belt  
21 defense and how you prove that.

22 MS. MOORE: Okay. How do you want to proceed,  
23 your Honor?

24 THE COURT: I only have a couple of options.

25 MS. MOORE: You can give the jury a curative

1 instruction.

2 THE COURT: Not with something like that.

3 MS. MOORE: The other thing is counsel's  
4 objection was so loud it is not even clear whether or not  
5 they heard my question.

6 THE COURT: Oh, they heard it.

7 Let me think about it. I am going to take a break  
8 and I might be inclined to grant the mistrial and sanctions.  
9 Let me think about it.

10 MS. MOORE: Okay.

11 MR. SESKIN: Thank you.

12 MR. POLLACK: Thank you.

13 THE COURT: You can make whatever phone call you  
14 want to make and I have not made a ruling yet. If there is  
15 anything before I make a ruling that you want to bring to my  
16 attention --

17 MS. MOORE: Such as?

18 THE COURT: My attention is always some kind of an  
19 authority to stop me or make me do something. That's what  
20 leads me one way or the other.

21 MS. MOORE: Your Honor, I would just ask that the  
22 Court not grant a mistrial because there is not any  
23 indication that the jury even heard my question and secondly  
24 there is no correlation between my question and there was no  
25 answer. Your Honor already instructed the jury just because



1 a question is asked does not mean and there is no answer  
2 does not mean they should be considering that as evidence.

3 THE COURT: Do me a favor please, Madam Reporter,  
4 right before the objection get me the question she asked so  
5 we are clear of what the jury heard. You may think they  
6 have not heard it, the jurors listen to everything.

7 THE COURT: Read that back, please.

8 (Whereupon, the requested testimony was read back)

9 (Whereupon, an off the record discussion was held)

10 THE COURT: Let get on the record. The Court had  
11 the question read back as far as defense was asked -- the  
12 defense asked the doctor regarding the hospital records  
13 which I believe in essence said, the question was whether  
14 there was an assessment made as to whether or not Miss  
15 Dunnigan was wearing a seat belt at the time so in that  
16 question the defense counsel Moore did not indicate an  
17 answer. She asked if he reviewed the assessment regarding  
18 the seat belt and the objection was made. There was no  
19 answer given because the Court took everyone back into the  
20 robing room.

21 For all the reasons that I stated before on the  
22 record that it was improper, it is prejudicial and it may  
23 warrant a mistrial, it goes against my ruling as far as your  
24 expert and it has to do with the seat belt defense which is  
25 an affirmative defense, the issue of the seat belt has to do

1 with damages, whether or not the damages could have been  
2 mitigated by wearing a seat belt. The way to cure that  
3 absent a mistrial and/or sanctions is since the police  
4 report indicated that both plaintiffs, Dunnigan and Lemon  
5 were --

6 MR. POLLACK: They were wearing their lap  
7 belt/harness.

8 THE COURT: Wearing their lap belt/harness, I  
9 think it would be more appropriate, the parties suggested a  
10 stipulation before the jury that is what the police report  
11 indicated and then you move on with the doctor, leaving the  
12 doctor out of correcting anything, then you move on with the  
13 doctor as far as the cross examination you want to conduct  
14 with him.

15 with that in mind, is that amenable to everyone as  
16 far as a cure for what has occurred earlier?

17 MR. SESKIN: For Dorothy Lemon it is.

18 MR. POLLACK: Yes, your Honor, absolutely, the  
19 last thing I want is a mistrial.

20 MR. CHURBUCK: Yes, your Honor.

21 THE COURT: The defense as to Transit and Canty?

22 MS. MOORE: Yes, your Honor, I want to be clear as  
23 to the language. It has been stipulated among the parties  
24 that the police report taken contemporaneous to the accident  
25 reflects that both plaintiff Dunnigan and plaintiff Lemon

1 were wearing seat belts, were wearing lap and shoulder  
2 harnesses?

3 THE COURT: Perfect.

4 MR. POLLACK: That's fine.

5 MR. SESKIN: That's fine.

6 (Whereupon, the following takes place back in open  
7 court in the presence of the jury)

8 (Continued on following page..)  
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1 THE COURT: Ladies and gentlemen of the jury, one  
2 of the things -- if I didn't indicate it, I will now. There  
3 are times during the trial that there will be delays. And  
4 during a delay sometimes I have you go back to the jury room  
5 and you wait. Sometimes it's more prudent for me to have  
6 you seated in the jury box and deal with certain legal  
7 issues in the robing room next door.

8 So, unfortunately, this is a part and parcel part  
9 of the trial. Sometimes there are delays. Rest assured,  
10 the delay is so that when we come back to you, we could  
11 expeditiously continue with the trial. I thank you now and  
12 I will thank you many times throughout the trial for your  
13 patience.

14 Objection that was made is sustained.

15 Counsel?

16 MS. MOORE: Yes, your Honor. Just for the record,  
17 the --

18 THE COURT: Actually, it's not only sustained, but  
19 the question is stricken from the record.

20 MR. SESKIN: Thank you, your Honor.

21 MS. MOORE: Okay. Shall I --

22 THE COURT: Yes, now.

23 MS. MOORE: Thank you, your Honor.

24 Q. Now, Doctor, in reviewing the hospital record --

25 MR. POLLACK: The stipulation?

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 MS. MOORE: Now?

2 THE COURT: Yes.

3 MS. MOORE: It's stipulated among the parties that  
4 the police report reflects that both --

5 THE COURT: The police report taken.

6 MS. MOORE: The police report taken  
7 contemporaneous to the accident reflects that both the  
8 plaintiff Dunnigan and the plaintiff Lemon were wearing lap  
9 harnesses, and shoulder harnesses.

10 MR. SESKIN: Seat belts.

11 MS. MOORE: No, that is not what we said.

12 THE COURT: A lap harness and shoulder harness.

13 MR. SESKIN: Seat belt.

14 THE COURT: Which means a seat belt.

15 MS. MOORE: Okay.

16 MR. POLLACK: Lap belt and harness.

17 MS. MOORE: Lap belt and harness.

18 THE COURT: So stipulated, correct?

19 MR. CHURBUCK: Yes, your Honor.

20 THE COURT: You may proceed.

21 MS. MOORE: Thank you, your Honor.

22 THE COURT: Thank you for your patience, Doctor.

23 THE WITNESS: You're welcome.

24 Q. Now, Doctor, in reviewing Ms. Dunnigan's hospital  
25 records, did you also review the different medications that she

1 was taking at the time the accident occurred?

2 A. I did.

3 Q. And out of those medications, did you also review what  
4 type of side effects were associated with those medications?

5 A. No.

6 Q. Okay. Do you feel that that would have been  
7 appropriate in order to complete an assessment and history of  
8 evaluating Ms. Dunnigan on April 15th, 2011?

9 A. I am familiar with the medications in general. And I  
10 am very comfortable to come to the conclusions I did without  
11 further research.

12 Q. Okay. Well, one of those medications Ms. Dunnigan was  
13 taking was Toprol, correct?

14 A. Sorry?

15 Q. Toprol, T-O-P-R-O-L?

16 A. Yes, correct.

17 Q. And that was for her hypertension condition, correct?

18 A. Yes.

19 Q. And it's fair to say that one of those side effects  
20 that is associated with Toprol is dizziness, correct?

21 A. On occasion.

22 Q. Okay. But did you ask Ms. Dunnigan whether she had  
23 experienced any dizziness at any time prior to the date of the  
24 accident?

25 A. No.

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 Q. Okay. That wasn't important.

2 THE COURT: Is that a question or a statement?

3 MS. MOORE: Oh --

4 THE COURT: You said that was not important.

5 Q. Was that important for your diagnosis?

6 A. No.

7 Q. Or examination?

8 A. Well, she -- when I saw her she was complaining of  
9 dizziness post-accident. I didn't see anything about dizziness  
10 pre-accident.

11 Q. But you didn't ask that question, correct? Yes or no.

12 A. Correct.

13 Q. All right. And the other thing she was taking for the  
14 congestive heart failure was the Lasix, L-A-S-I-X, correct?

15 A. I am familiar with that.

16 Q. Okay. And you're also familiar with the side effects  
17 that could be associated with that medication, correct?

18 A. I am.

19 Q. Okay. And, in fact, Doctor, one or two of the side  
20 effects that are associated with that medication is dizziness and  
21 lightheadedness, correct?

22 A. On occasion, that's correct.

23 Q. Okay. But you didn't inquire as to whether Ms.  
24 Dunnigan had experienced any dizziness or lightheadedness prior  
25 to the accident or even at the time of the accident, correct?

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1           A.    I didn't see anything of that -- in the medical record  
2 prior to the accident.

3           Q.    But my question is, Doctor, when you examined her on  
4 April 15th, 2011, you -- you, yourself, did not inquire as to  
5 whether or not Ms. Dunnigan experienced any of those symptoms,  
6 correct?

7           A.    Well, again --

8           Q.    Yes or no.

9           A.    I am trying to answer the question. The only dizzy --

10          Q.    Can you answer yes or no?

11          A.    No, I can't.

12          Q.    Okay. Thank you.

13                Now, the other medication that she was taking was  
14 Diovan, D-I-O-V-A-N, which was also for the hypertension  
15 condition, correct?

16          A.    Yes, correct.

17          Q.    And you are familiar with the side effects that are  
18 associated with that medication as well, correct?

19          A.    On occasion. There are side effects, yes.

20          Q.    And, in fact, three side effects that are associated  
21 with that condition are headache, dizziness, yes?

22          A.    Are you saying from this case?

23          Q.    I am asking you in your knowledge of the medication  
24 that Ms. Dunnigan was taking, that you obtained a history from  
25 her to obtain which medications she was taking, correct?



1 A. That's correct.

2 Q. Okay. And two of the side effects associated with that  
3 medication are headache and dizziness, yes or no?

4 A. Again, you are talking in general or in this particular  
5 case?

6 Q. I am saying, in general, you indicated you are familiar  
7 with the side effects associated with that particular medication?

8 A. Correct.

9 Q. And two of the side effects are headache and dizziness,  
10 yes or no?

11 A. On occasion that is true.

12 (Brief pause.)

13 Q. Okay. The other medication that she was taking was  
14 Amlodipine for her hypertension and chest pain. And are you  
15 familiar with the side effects that are associated with that  
16 medication?

17 A. When they occur, yes.

18 Q. And it's fair to say that the side effects associated  
19 with that medication are headache, dizziness, lightheadedness,  
20 drowsiness, and excessive tiredness?

21 A. On occasion, that's correct.

22 Q. But you didn't inquire as to whether or not Ms.  
23 Dunnigan had experienced any of those side effects at any time  
24 either during the accident or before the accident, correct?

25 A. Again, I didn't see anything of that in the medical

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 record.

2 Q. Okay. But my question is, did you inquire as to Ms.  
3 Dunnigan as to whether or not she experienced any of these side  
4 effects either before the accident or during the accident?

5 A. No.

6 (Brief pause.)

7 Q. Now, did you also have an opportunity to review in the  
8 medical records whether Ms. Dunnigan made any complaints or any  
9 admission of any prior memory loss?

10 A. I saw something in the medical record about that.

11 Q. Okay. And so when you saw that information that was  
12 taken in her medical records on a particular day, did that have  
13 any assessment in your -- did you take that into assessment in  
14 your diagnosis that her memory loss was associated with this  
15 accident?

16 A. I took that into account as well.

17 Q. But you didn't mention that in your report that Ms.  
18 Dunnigan had experienced prior memory loss before the accident  
19 occurred, correct?

20 A. That's correct.

21 Q. Okay. So that also wasn't important enough for you to  
22 document in your report to Mr. Pollack, correct?

23 A. Well, it was documented prior to the accident she was  
24 able to carry out her activities of daily living, largely  
25 independently given the fact that she was seventy-nine years old.

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 It would not be surprising that she had some degree of changes  
2 due to aging in the number of different areas, including memory.

3 Q. But you failed to document that in your report, yes or  
4 no?

5 A. Correct.

6 Q. Now, regarding her activities of daily living, you were  
7 aware that Ms. Dunnigan was utilizing the services of a home  
8 health aide at the time that the accident occurred, correct?

9 A. A few hours a day, that's correct.

10 Q. And did you inquire of Ms. Dunnigan why she needed the  
11 assistance of a home health aide, what her ailments were?

12 A. Her ailments were the cardiac condition and her  
13 arthritis.

14 Q. And did you also review in the hospital records  
15 regarding any assessment of Ms. Dunnigan as to whether or not she  
16 used a walker prior to the accident?

17 A. I didn't see anything.

18 Q. Okay. Did you review the social work records that were  
19 indicated in the hospital records on August 21st, 2008, where Ms.  
20 Dunnigan indicated that she used a walker prior to the accident?

21 A. I don't recall seeing that.

22 Q. But that information wouldn't have been important for  
23 you to document it in your report to Mr. Pollack, correct?

24 A. That is also contrary to what I was told.

25 Q. Contrary to what you were told?

1 A. By the patient, that's correct.

2 Q. Okay.

3 (Brief pause.)

4 Q. Now, in your examination of Ms. Dunnigan you asked her  
5 to spell certain words backwards and forwards, correct?

6 A. Yes.

7 Q. And, now, did you ask Ms. Dunnigan about her prior  
8 education before you examined her?

9 A. No.

10 Q. No?

11 A. No.

12 Q. So if I were to tell you that Ms. Dunnigan testified or  
13 gave testimony that she has a 6th grade education, would that  
14 have been important for your assessment as to whether or not she  
15 could spell words backwards and forwards, yes or no?

16 A. I don't believe so, no.

17 Q. And did you also obtain any information from Ms.  
18 Dunnigan during the course of your examination on April 15th,  
19 2011, as to whether or not she was a smoker?

20 A. I did not.

21 Q. Okay. And you didn't feel that that information was  
22 important as to her prior medical conditions, and how they  
23 related to the conditions that she suffered from the accident?

24 A. Well, smoking obviously is not good for your health and  
25 obviously not good for your heart health. That would be outside

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 my area of expertise and outside the reason I was seeing her as  
2 well. And clearly the fact that she smoking was irrelevant to  
3 the fact --

4 Q. Okay, but you indicated that you reviewed all the  
5 hospital records, correct?

6 A. Yes.

7 Q. All the Jacobi Hospital records?

8 A. Yes.

9 (Brief pause.)

10 Q. And in determining a person's activities or what their  
11 health conditions were, it would be important to make an  
12 assessment as to how the person was when they actually saw you?

13 A. Okay.

14 Q. But you didn't feel that information was important?

15 A. Whether she smoked or not relative to the subdural, the  
16 answer is no.

17 Q. Okay. What about whether or not Ms. Dunnigan drank or  
18 not, did you inquire as to whether Ms. Dunnigan drank or not?

19 A. No.

20 Q. And you found that that information was also not  
21 important in your assessment as to her health condition at the  
22 time of the accident or either at any time that you saw her?

23 A. I didn't see anything in the medical records to  
24 indicate that that was relevant to any of the issues we are  
25 talking about today.

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 Q. And did you see anything in the medical records as to  
2 Ms. Dunnigan's drinking habits?

3 A. Not anything in the medical files relevant to the  
4 issues we are talking about today.

5 Q. My question is did you see anything --

6 A. I don't recall.

7 Q. But you weren't looking for that information, correct?

8 A. I have --

9 Q. Yes or no.

10 A. I have an open mind as to what is in the records. But  
11 there was nothing in the records that indicated to me that  
12 drinking was at all involved in any of the issues we are talking  
13 about here.

14 Q. Okay. I will show you what is indicated in the  
15 hospital records that you indicate that you had reviewed. I will  
16 show you two documents.

17 MR. POLLACK: Can I see them first please?

18 MS. MOORE: Sure. I will.

19 (Brief pause.)

20 MS. MOORE: I will show them to the attorney  
21 first.

22 (Documents submitted.)

23 MR. POLLACK: Judge, we will need to approach on  
24 one of those notes.

25 THE COURT: Okay. Yes.

Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 (Whereupon, an off-the-record side-bar conference  
2 was held.)

3 THE COURT: Officer?

4 COURT OFFICER: Yes, Judge.

5 Q. I will show you a document that was -- a four-page  
6 document that was contained within the -- Ms. Dunnigan's hospital  
7 records.

8 I will ask you to look at the document and when you  
9 finish, just let me know.

10 (Documents submitted.)

11 A. Okay.

12 Q. Now, does that refresh your recollection as to whether  
13 or not you reviewed that document in your assessment of Ms.  
14 Dunnigan?

15 A. Yes and no.

16 Q. So regarding your portion of yes, you reviewed the  
17 initial assessment of Ms. Dunnigan -- of that -- that was taken  
18 of Ms. Dunnigan on the date the accident happened, when she was  
19 admitted into Jacobi Hospital, correct?

20 A. Yes, correct.

21 Q. And did you review the information that was contained  
22 in the initial assessment that was taken of Ms. Dunnigan on the  
23 date that she entered into the hospital?

24 A. I did.

25 Q. Did you review all of the information regarding whether

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 or not there was any alcohol involved?

2 MR. POLLACK: Objection, your Honor.

3 THE COURT: Overruled.

4 A. I didn't see it.

5 Q. Okay. So that information wasn't important to you to  
6 make an assessment as to her condition on the date of the  
7 accident?

8 MR. CHURBUCK: Objection, your Honor.

9 MR. SESKIN: Objection.

10 THE COURT: Sustained.

11 Q. Well, I will show you the second document.

12 MR. SESKIN: Judge, we object. And may I have a  
13 sidebar --

14 THE COURT: No. The question is -- that -- the  
15 question, was that information important to you, you need to  
16 clarify your question.

17 What do you mean that information part of  
18 assessment wasn't important?

19 MS. MOORE: Well, your Honor, you indicated --

20 THE COURT: I made a ruling. Don't go against my  
21 ruling.

22 MS. MOORE: I am not.

23 THE COURT: Are you referring to the -- Doctor,  
24 did you review the entire assessment?

25 THE WITNESS: I reviewed a lot of records.



Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 THE COURT: Yes or no?

2 THE WITNESS: The answer is yes.

3 THE COURT: Do you recall the portion of the  
4 assessment that she just showed you, you recall reviewing  
5 that?

6 THE WITNESS: No.

7 THE COURT: So that is what you meant by yes and  
8 no?

9 THE WITNESS: Correct.

10 THE COURT: Move on.

11 Q. Okay. Well, I will show you a different document.

12 (Document submitted.)

13 Q. When you finish, just let me know.

14 A. I am done.

15 Q. And the document that you are looking at, do you recall  
16 looking at that document regarding this -- Ms. Dunnigan's social  
17 history?

18 A. Again, I don't -- I don't recall this specific  
19 document. I looked at a lot of documents.

20 Q. And you don't recall reviewing any documents regarding  
21 whether or not Ms. Dunnigan drank socially?

22 A. Um, again, I reviewed a lot of documents. I can't say  
23 as I sit here this particular document. But I am sure I looked  
24 at it.

25 Q. You didn't feel it was important to mention it to your

1 report for -- in your report for Mr. Pollack?

2 A. That's correct. Relative to the injuries she  
3 sustained, correct, it wasn't important.

4 Q. Okay. But it was important enough for the doctors who  
5 initially --

6 MR. POLLACK: Objection.

7 MR. SESKIN: Objection.

8 THE COURT: Sustained. Don't go there.

9 MS. MOORE: Your Honor, may I have the documents  
10 back from the -- I will get them.

11 THE COURT: No, you won't get them. That is why I  
12 have an officer.

13 (Documents submitted.)

14 Q. So there was information that was contained in Ms.  
15 Dunnigan's records that you reviewed but failed to mention in  
16 your report because you felt that that information wasn't  
17 relevant, correct?

18 MR. CHURBUCK: Objection.

19 MR. SESKIN: Objection.

20 MR. POLLACK: Objection.

21 THE COURT: Sustained.

22 Q. And also you felt it was not relevant as to whether or  
23 not Ms. Dunnigan utilized a walker before the accident, correct?

24 A. The information I got from the patient was that she did  
25 not rely on a walker prior to the accident.

## Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 Q. But there was some information that was contradictory  
2 to what Ms. Dunnigan told you in the hospital, correct?

3 MR. POLLACK: Objection.

4 THE COURT: You could answer.

5 A. Not that I saw on any consistent basis, no.

6 Q. Okay. I will show you another document.

7 MR. POLLACK: Counsel -- your Honor, I don't know  
8 what records counsel is using. I have the subpoenaed  
9 records here.

10 MS. MOORE: These are from the subpoenaed records.

11 MR. POLLACK: You need to show me so I could see  
12 what you are working from.

13 (Brief pause.)

14 MS. MOORE: Social worker records.

15 MR. POLLACK: Can you show me please?

16 MS. MOORE: I don't have it right now.

17 (Brief pause.)

18 MS. MOORE: Here, I have it.

19 (Document submitted.)

20 MS. MOORE: From August 21st.

21 THE COURT: Counsel --

22 MS. MOORE: May I show the records to the doctor?

23 MR. POLLACK: No, Judge. It's not in the  
24 subpoenaed records. And it doesn't mean what counsel is  
25 saying.

Dr. Gutstein - Plaintiff - Cross/Ms. Moore

1 THE COURT: Speaking --

2 MR. POLLACK: That is why --

3 THE COURT: So there is an objection?

4 MR. POLLACK: Yes, I apologize.

5 THE COURT: Come up and bring whatever it is that  
6 you have.

7 (Whereupon, an off-the-record side-bar conference  
8 was held.)

9 - Proceedings continue on next page -

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1 THE COURT: Go ahead.

2 MS. MOORE: Thank you, your Honor.

3 Q Doctor, I am going to show you a document and when you  
4 finish looking at that document let me know.

5 A Okay.

6 Q Now, did you have an opportunity to review that  
7 document prior to your assessment of Miss Dunnigan?

8 A I reviewed a lot of documents.

9 Q Do you recall?

10 A This was probably part of it.

11 Q Do you have any recollection?

12 A No.

13 Q Thank you. Now Doctor, when you examined Miss Dunnigan  
14 back on April 15, 2011, you received some compensation for that  
15 examination; correct?

16 A I did.

17 Q How much was your -- did you receive for compensation  
18 for that examination?

19 A In the neighborhood of 750.

20 Q So that was separate from the 5,000 dollars that you  
21 are getting for, that you are receiving for compensation for your  
22 testimony here today?

23 A Well it is not exactly for the testimony it is for the  
24 time involved but the answer is correct, separate.

25 Q So, there were two separate, there was a fee for the

1 examination that you saw Miss Dunnigan back on April 15, 2011?

2 A Yes.

3 Q And also a fee for your time here today?

4 A Correct.

5 Q You also testified that you see patients regarding  
6 medical/legal issues, what does that mean?

7 A People are referred to me by attorneys, by third party  
8 agencies for evaluation of their condition and narrative reports  
9 similar to what I did in this case.

10 Q So Miss Dunnigan came to you because an attorney  
11 referred her to you; correct?

12 A Correct.

13 Q Now, did you have occasion to speak to Miss Dunnigan's  
14 doctors, her primary care physicians, her cardiologists, any of  
15 the doctors who were treating her before you saw her?

16 A No.

17 Q And the information that they may have had would have  
18 been important in your assessment of Miss Dunnigan on April 15,  
19 2011; correct?

20 A I made an independent assessment.

21 Q But you knew that you were evaluating Miss Dunnigan for  
22 the purposes of testifying at trial; correct, yes or no.

23 A I would be happy to answer the question but I cannot  
24 answer it properly yes or no.

25 Q But you worked with Mr. Pollack's firm before?

1 A No.

2 Q This is your first time working with Mr. Pollack's  
3 firm?

4 A Yes, correct.

5 Q But this is not your first time testifying on behalf of  
6 people who were claiming injuries and were eventually going to  
7 come to court; correct?

8 A That's correct.

9 Q Now, did you inquire of Miss Dunnigan as to why it is  
10 that she needed a home health aid before the date of the  
11 accident?

12 A No, not specifically.

13 Q That information also wasn't important?

14 A Well, based on my knowledge and experience, I had an  
15 idea why she needed it because of her arthritis and her cardiac  
16 condition but I did not ask specifically.

17 Q I am just saying just for the purposes of your report,  
18 why she had a home health aid before the accident, that  
19 information was not important enough for you to put it in your  
20 report, yes or no?

21 A That's correct.

22 Q You made an assessment that based upon the time that  
23 you saw Miss Dunnigan approximately two years after the accident  
24 that all of the injuries that you found as a result of your  
25 assessment of Miss Dunnigan were related to the accident;

1 correct?

2 A No, not exactly.

3 Q Well you found that Miss Dunnigan had to utilize a  
4 walker as a result of the accident; correct?

5 A Right you are talking about injuries a few minutes ago  
6 this is a separate question now, the answer is correct she needed  
7 a walker on a regular basis post accident.

8 Q In the hospital records there was some evidence to the  
9 contrary?

10 MR. POLLACK: Objection.

11 MS. MOORE: I have not finished my question, your  
12 Honor.

13 THE COURT: You said in the hospital record there  
14 is evidence to the contrary.

15 MS. MOORE: If there was evidence to the  
16 contrary.

17 THE COURT: That's implying there was evidence to  
18 the contrary. Sustained.

19 Q Did you make a determination as to whether or not Miss  
20 Dunnigan utilized a walker before the accident occurred?

21 A Again from my review of the records and talking to Miss  
22 Dunnigan she did not.

23 Q Now you also made an assessment that Miss Dunnigan had  
24 experienced dizziness after the accident; correct?

25 A That's correct.



1 Q But you couldn't make a determination as to whether or  
2 not the dizziness that she experienced was as a result of  
3 something else other than the accident; correct?

4 A There was nothing that I saw that indicated that she  
5 had any pre-existing dizziness as you would suggest prior to the  
6 accident.

7 Q But we already talked about the medications that she  
8 was utilizing or that she was taking before the accident;  
9 correct?

10 MR. POLLACK: Objection, your Honor.

11 THE COURT: Overruled.

12 A We did. Correct.

13 Q We talked about some of the side effects that may be  
14 associated with those medications; correct?

15 A We did, but I did not see any of the side effects  
16 mentioned in the record indicating that she was having those side  
17 effects prior to the accident.

18 Q Did you inquire of Miss Dunnigan as to whether or not  
19 she experienced any side effects associated with her medications  
20 before the accident?

21 A I did not ask and she did not say that she had any side  
22 effects from her medication.

23 Q But you were making an assessment of Miss Dunnigan as  
24 you saw her on April 25, 2011; correct?

25 A Correct.

1 Q And you, based upon the records that you had from the  
2 hospital --

3 MS. MOORE: Is there an objection? I see counsel  
4 standing.

5 MR. POLLACK: The objection is asked and  
6 answered. Now it is three times.

7 THE COURT: You may ask again. Go right ahead.

8 MS. MOORE: Your Honor, I was just --

9 THE COURT: Go right ahead.

10 Continue.

11 MS. MOORE: Thank you.

12 Q After you reviewed the records, the hospital records  
13 you made an assessment as to what Miss Dunnigan's condition was  
14 at the time that you examined her?

15 A Correct.

16 Q But you did not inquire as to whether she experienced  
17 any side effects from her medications?

18 MR. POLLACK: Objection.

19 THE COURT: Overruled.

20 A As part of the history and the review of the record I  
21 did not see that she was experiencing any side effects from the  
22 medications.

23 Q But you were making an assessment as to how she was  
24 after the accident; correct?

25 A My interview with the patient was partly to determine

1 what her symptoms were since the accident and among her symptoms  
2 after the accident and not before were difficulty with balance,  
3 intermittent headaches, dizziness, difficulty concentrating and  
4 forgetfulness--

5 Q Doctor --

6 THE COURT: Don't cut him off.

7 A She told me and I quoted "I am not the same person that  
8 I used to be."

9 Q I indicated that Miss Dunnigan said she is not the same  
10 person that she used to be but did you inquire what her condition  
11 was prior to the accident?

12 A Insofar as I knew she was taking medications for the  
13 conditions that we talked about and absent anything I saw in the  
14 record and absent anything she told me she tolerated the  
15 medicines fine.

16 Q Doctor, yes or no, you are here to bring some  
17 information to the jury about Miss Dunnigan's condition when you  
18 saw her that one time; correct?

19 A Correct.

20 Q And it is important to provide, to obtain a history  
21 from whoever it is that you are examining, especially if you are  
22 going to provide information as to what their prior condition was  
23 before they saw you; correct?

24 A I believe I did that.

25 Q I showed you in the hospital records some information

1 about Miss Dunnigan's prior memory loss, do you recall that when  
2 I showed you that document?

3 A I don't think you showed it to me.

4 Q I will show it to you again.

5 MR. POLLACK: Can you show me in the medical  
6 records here where that says, please?

7 MS. MOORE: Okay.

8 MR. POLLACK: I don't know where you are getting  
9 the record from.

10 MS. MOORE: Your Honor, I object to counsel's  
11 colloquy.

12 THE COURT: Yes. Stop that. Take it off what you  
13 have it on, please.

14 MS. MOORE: This is in a binder, I would not mix  
15 it up, Judge.

16 THE COURT: Okay.

17 Q Do you recall seeing that document, Doctor?

18 A Not specifically.

19 Q What records did you review prior to coming here to  
20 court?

21 A Prior to coming to court?

22 Q Yes.

23 A I reviewed my report and an independent medical  
24 examination report.

25 Q What independent medical examination report did you

1 review?

2 A Doctor Bagley's.

3 Q Did you bring that with you to court to testify?

4 A I brought it with me to court, whether I testify on it  
5 or not depends on the questions.

6 Q Did you review Doctor Bagley's report prior to coming  
7 here to testify?

8 A I didn't.

9 Q What about when you examined Miss Dunnigan on April 15,  
10 2011 did you review Doctor Bagley's report at that time before  
11 you prepared your report?

12 A No.

13 Q When was the first time that you saw Doctor Bagley's  
14 report prior to coming here to testify?

15 A Probably Sunday night.

16 Q That's when you spoke to Mr. Pollack about your  
17 testimony here today?

18 A Well, I would not say about my testimony it had to do  
19 with reviewing the medical records of my report.

20 THE COURT: Don't drop your voice, you are  
21 dropping it.

22 MS. MOORE: I did not get that.

23 A It was going over my report and Doctor Bagley's report  
24 as well.

25 Q So, in preparation for your testimony here today you

1 reviewed Doctor Bagley's report which was an independent medical  
2 examination and you reviewed your own --

3 MR. POLLACK: Objection, your Honor.

4 MS. MOORE: Your Honor, may we approach?

5 THE COURT: No. Objection sustained.

6 Q In addition to Doctor Bagley's report, what other  
7 records did you review in preparation for your testimony here  
8 today?

9 A Just my report.

10 Q You did not review Miss Dunnigan's hospital records at  
11 all?

12 A Correct.

13 Q When was the last time that you saw Miss Dunnigan's  
14 hospital records?

15 A Around the time of my report, 2011.

16 THE COURT: There are documents that you reviewed  
17 prior to your examination of her?

18 THE WITNESS: Correct.

19 THE COURT: There are documents that you reviewed  
20 subsequent to your examination of her like this doctor's  
21 report?

22 THE WITNESS: Right, that was way subsequent to  
23 my evaluation, it was a couple of days ago.

24 MS. MOORE: I did not hear what was said.

25 THE COURT: You have to listen.

1 MS. MOORE: I was listening but the Doctor's  
2 voice was trailing.

3 THE COURT: Did you hear what I said?

4 MS. MOORE: I did not hear the doctor's response  
5 to your Honor's question.

6 THE WITNESS: Do you want me to repeat it?

7 (Whereupon, the requested testimony was read back)

8 Q So, did you review the hospital records of Miss  
9 Dunnigan before you evaluated her?

10 A Of course in 2011.

11 Q Were there some separate documents that you reviewed  
12 after your evaluation of her other than Doctor Bagley's report?

13 A No.

14 Q So the last time that you saw any of Miss Dunnigan's  
15 hospital records would it be fair to say some time in 2011?

16 A Yes, except I flipped through them this morning prior  
17 to appearing on the stand.

18 Q Which records did you review? Did you review the  
19 records you had in your office or some separate ones?

20 A The subpoenaed records that were in court.

21 Q Did you have some records from Miss Dunnigan's hospital  
22 records that you reviewed before these records were sent to the  
23 subpoenaed records room?

24 A In 2011.

25 Q You did not bring those to court?

1 A Correct.

2 Q Do you know if the records that you reviewed are the  
3 same as the records that are here in the subpoenaed records?

4 A I would like to think so but I don't know absolutely  
5 100 percent every piece of paper.

6 Q I will take that document back. Do you have Doctor  
7 Bagley's report here with you?

8 A Yes, I do.

9 Q I will take a look at that.

10 MS. MOORE: If I may, your Honor?

11 THE COURT: Yes.

12 Q Do you know when Doctor Bagley evaluated Miss  
13 Dunnigan?

14 A It is on the report, I don't know.

15 Q You have no independent recollection?

16 A No.

17 Q Why was it important for you to review Doctor Bagley's  
18 report before coming here to testify?

19 A So I could see what the other side said.

20 Q Would reviewing what another doctor has to say about a  
21 patient have any affect on what your testimony would be?

22 A On that -- that report has no bearing on my testimony  
23 today although I found certain parts of his report very  
24 curious.

25 THE COURT: Very what?



1 THE WITNESS: Curious.

2 Q My question is upon review of Doctor Bagley's report,  
3 did that change your opinion at all as to Miss Dunnigan?

4 A No, of course not.

5 Q If I were to tell you that Doctor Bagley examined Miss  
6 Dunnigan before you did would that refresh your recollection  
7 regarding his report?

8 A No.

9 THE COURT: Would that refresh --

10 MS. MOORE: Yes.

11 THE COURT: Did you need your recollection  
12 refreshed?

13 MS. MOORE: If I may, your Honor, the witness  
14 testified that he did not recall when Doctor Bagley examined  
15 Miss Dunnigan.

16 THE COURT: Okay.

17 MS. MOORE: I did not give a specific date.

18 THE COURT: Repeat the question to him.

19 Q Would it refresh your recollection if I told you that  
20 Doctor Bagley examined Miss Dunnigan before you did?

21 A I don't know when he examined him.

22 Q But you felt that it was important for you to review  
23 Doctor Bagley's report before you came to provide any information  
24 to the jury here today; correct, yes or no?

25 A I would like to see what he said, correct.

1 Q You would like to see what the other doctor has to say  
2 so that you could tailor your testimony as to the information  
3 that you would provide to the jury; yes or no?

4 A No.

5 Q At any time after you were retained by Mr. Pollack did  
6 you make any appointments for Miss Dunnigan to see you again for  
7 any further evaluation or treatment?

8 A No.

9 Q At the time that you saw Miss Dunnigan you did not  
10 indicate that she required any additional treatment after you saw  
11 her, is that fair to say?

12 A I indicated that future treatments such as therapy,  
13 medications, follow up examination, restriction of activities and  
14 a home care --

15 MS. MOORE: I object to the witness reading from  
16 his report. What I asked him specifically was whether or  
17 not he indicated that there was any further treatment from  
18 Miss Dunnigan and that's a yes or no question.

19 THE COURT: You can answer a yes a question yes or  
20 no and if you cannot say you cannot. The answer yes or no  
21 or you cannot answer it yes or no.

22 THE WITNESS: I cannot answer it properly yes or  
23 no.

24 Q Yes or no, Doctor, did you refer Miss Dunnigan to any  
25 other specialties after you examined her on April 15, 2011?

1 A No.

2 Q Did you make any follow up appointments to see Miss  
3 Dunnigan after you saw her on April 15th, 2011?

4 A No.

5 MS. MOORE: Nothing further at this time.

6 MR. POLLACK: Judge, I have a couple of questions  
7 to follow up.

8 THE COURT: Yes, go ahead.

9 REDIRECT EXAMINATION

10 BY MR. POLLACK:

11 Q Doctor, have you seen anything in the hospital records  
12 or any document whatsoever that indicates that any of those  
13 medications affected Miss Dunnigan as far as side effects prior  
14 to the date of the accident?

15 MS. MOORE: Objection.

16 MR. POLLACK: I will rephrase the question.

17 I will ask it again.

18 Q Counsel asked you about medications that Miss Dunnigan  
19 was on after she got to the hospital; correct?

20 A Correct.

21 Q Did you see anything anywhere that indicated that she  
22 had any side effects from those medications?

23 A No.

24 MS. MOORE: Objection.

25 THE COURT: Overruled.

1 Q Did you see anything anywhere that indicated that any  
2 of those medications had anything to do with her having this  
3 accident?

4 MS. MOORE: Objection.

5 THE COURT: Overruled.

6 A No.

7 MS. MOORE: Your Honor, may we approach?

8 THE COURT: No.

9 Q Doctor, counsel asked you about testifying for --

10 A Testifying for?

11 Q Testifying in court sometimes on legal matters?

12 MS. MOORE: Objection, your Honor.

13 THE COURT: Sorry, counsel.

14 MR. POLLACK: It is okay.

15 Q Doctor, counsel asked you about testifying in court on  
16 legal matters; correct?

17 A Correct.

18 Q On those occasions, you testified for the Transit  
19 Authority --

20 MS. MOORE: Objection, your Honor. Beyond the  
21 scope.

22 MR. POLLACK: She asked about testifying in  
23 court.

24 MS. MOORE: Your Honor, objection.

25 THE COURT: What was your question?

1 MR. POLLACK: Excuse me?

2 THE COURT: What was your question?

3 MR. POLLACK: The question is, you were  
4 compensated for your time when you testified for the Transit  
5 Authority --

6 MS. MOORE: Objection.

7 THE COURT: Approach.

8 MR. POLLACK: I will skip it, Judge. I don't  
9 need it. I will skip the whole line. I don't need to do  
10 it.

11 Q Doctor, with respect to your opinions, were all of your  
12 opinions to a reasonable degree of medical certainty in the field  
13 of neurology?

14 A Yes.

15 MS. MOORE: Objection, your Honor. Beyond the  
16 scope.

17 MR. POLLACK: It is not beyond the scope.

18 MS. MOORE: Objection, beyond the scope.

19 THE COURT: No, approach.

20 (Whereupon, an off-the-record discussion was held  
21 at the bench among counsel and the Court out of the presence  
22 of the jury)

23 THE COURT: Objection sustained.

24 Q Doctor, counsel asked you certain questions with  
25 respect to history, certain other areas with respect to Miss

1 Dunnigan's treatment; correct?

2 A Correct.

3 Q Did anything that Miss Moore brought up to you, would  
4 change your opinions that you gave on direct testimony with  
5 respect to your feelings with respect to the causation of the  
6 injury and the injuries that Miss Dunnigan had to a reasonable  
7 degree of medical certainty?

8 MS. MOORE: Objection, your Honor.

9 THE COURT: Did you say anything changed?

10 MR. POLLACK: Yes, would it change his opinion.

11 THE COURT: Overruled.

12 A No.

13 MR. POLLACK: Nothing further, thank you.

14 THE COURT: Anything further?

15 MS. MOORE: Nothing further, your Honor.

16 THE COURT: Nobody has any questions?

17 MR. SESKIN: Nothing Judge.

18 MR. CHURBUCK: Nothing Judge.

19 THE COURT: Doctor, that's it. Enjoy the rest of  
20 the day.

21 THE COURT: Approach.

22 (Whereupon, the witness steps down from the  
23 witness stand)

24 THE COURT: Approach.

25 (Whereupon, an off-the-record discussion was held