IN THE COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY, OHIO

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JANIE COUSINS,
Plaintiff,
vs
Case No. 460155
Judge Mary Boyle
JOHN T. JACOBUS,
Defendant.

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DEPOSITION OF SETH J. SILBERMAN, M.D.
MONDAY, DECEMBER 2, 2002

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Deposition of SETH J. SILBERMAN, M.D., a Witness herein, called by counsel on behalf of the Plaintiff for examination under the statute, taken before me, Vivian L. Gordon, a Registered Diplomate Reporter and Notary Public in and for the State of Ohio, pursuant to agreement of counsel, at the offices of Seth J. Silberman, M.D., 34055 Solon Road, Solon, Ohio, commencing at 5:00 o'clock p.m. on the day and date above set forth.

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APPEARANCES:

On behalf of the Plaintiff

Becker & Mishkind Co., LPA
HOWARD D. MISHKIND, ESQ.
Skylight Office Tower Suite 660
Cleveland, Ohio 44113
216-241-2600

On behalf of the Defendant

Rawlin, Gravens & Franey Co., LPA
RONALD V. RAWLIN, ESQ.
1240 Standard Building
Cleveland, Ohio 44113
216-579-1602

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SETH J. SILBERMAN, M.D., a witness herein, called for examination, as provided by the Ohio Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION OF SETH J. SILBERMAN, M.D.

BY MR. MISHKIND:

Q. Would you state your name for the record, please.

A. Seth Silberman, M.D.

Q. Dr. Silberman, we met a few moments ago. My name is Howard Mishkind, and as you know, I represent Janie Cousins in relation to the lawsuit going to trial next week.

I'm here to ask you questions concerning the report that you have prepared on behalf of the defense and try to find out the opinions that you hold and the bases for those opinions.

A. Sure.

Q. This afternoon I received a copy of your CV. And I'm not going to mark it as an exhibit, but let me just ask you whether you have ever written anything that would relate to the topic of causation of tinnitus?

A. No.
Q. Have you ever lectured on any topics that relate to issues of causation or the cause of tinnitus?
A. No.
Q. You have in your file some articles that you've brought up from a Medline search; is that true?
A. Correct.
Q. And before we finish the deposition, what I'm going to want to do is probably have you identify them and we'll mark them as exhibits.
A. Sure.
Q. But for housekeeping purposes, Vivian will remind me in case I forget.
A. Okay.
Q. In the information that you have reviewed, I see that you have the deposition transcript of Janie Cousins; is that true?
A. Yes.
Q. You have not received the deposition transcript of John Jacobus; correct?
A. No.
Q. Have you ever met John Jacobus?

A. Never.
Q. Tell me a little bit about your practice.
A. I practice general otolaryngology, ear, nose and throat. I see a wide variety of disease states in all of those, all the facets of practicing ear, nose and throat. Specifically, these relate to ear problems, such as infection, hearing loss, dizziness, tinnitus, or ringing in the ears, and related problems.
Also throat problems, commonly known as tonsillitis, and also nasal problems, such as stuffy noses and sinus disorders.
Q. You are not a primary care physician; correct?
A. I am not.
Q. So you don't treat on a day-to-day basis cervical or lumbar hyperextension or hyperflexion injuries; true?
A. Correct.
Q. You would defer to either an orthopedist or a primary care physician with regard to the treatment of those type of injuries; true?
A. Correct.

Q. Do you have any specialized training in the area of tinnitus as it relates to the issue of causation or treatment of tinnitus?

A. Well, as a board certified otolaryngologist, I'm required to know the causes of tinnitus, the treatments for tinnitus, how to diagnose it.

Q. Aside from those aspects that are part of your board certification, do you have any subspecialty or additional training that would relate to the understanding of tinnitus and the treatment of tinnitus?

A. No.

Q. The file that you have in front of you --

A. I would add one thing. I'm not sure that that is offered as part of additional training, but there is subspecialist training known as otology. I'm not sure how much time is actually devoted in otologist training towards tinnitus.

Q. The file that I have had a chance to look through, which has copies of Janie Cousins' medical records, itemization of her medical treatment, and reports from Dr. Fine and

Dr. Knapp, as well as the St. John records and your literature, does that constitute the entirety of the information that you have been provided --

A. Yes.

Q. -- in connection with this case?

A. Yes.

Q. And if I am remembering correctly, it appears that you were first consulted by Mr. Christie; is that correct?

A. Correct.

Q. And don't rely on my memory, because it was two or three minutes ago when I looked at your file, but it looks like his cover letter confirming that you and he spoke and you agree to review the case, that would have been the beginning of October of this year?

A. May I look at the record?

Q. Absolutely.

A. Okay. The letter is dated October 2nd, 2002, and it states, it was a pleasure finally speaking with you the other afternoon, so I'm assuming it was late September, early October.

Q. So prior to that time period, late

September, early October, is it fair to say that you had no knowledge of this case?

A. That would be correct.

Q. Let me ask you a little bit about some of the physicians that are involved in this case. Dr. Fine.

A. Yes.

Q. Do you know Dr. Fine?

A. Yes.

Q. And how do you know Dr. Fine?

A. I first met Dr. Fine briefly when I was interviewing in 1994 for a position at St. Luke's and we were both residents. And now casually the last time I saw him was in Chagrin Falls. I was bike riding one Sunday and I stopped in to get some coffee and met him and we had a few words and that's about it. We don't generally talk about professional things when we see each other.

Q. When you ran into him in Chagrin Falls, I take it you didn't talk about Janie Cousins?

A. I didn't know who she was at the time.

Q. This would have been before the end

of September, the beginning of October?
A. I believe it was. The weather was quite warm, so I think so.
Q. Dr. Fine is an otolaryngologist like you?
A. Yes.
Q. And Dr. Fine is affiliated with The Cleveland Clinic; correct?
A. Correct.
Q. And does Dr. Fine, in your opinion, hold a strong reputation in the area of otolaryngology?
A. Yes.
Q. You have seen information from Dr. Newman --
A. Yes.
Q. -- the audiologist?
A. Yes.
Q. Dr. Newman has a national reputation in the area of tinnitus, does he not?
A. I will go along with that.
Q. You recognize him as --
A. Yes.
Q. -- certainly a well-respected audiologist?

A. Yes. People around here do know him and speak highly of him.
Q. He has the tinnitus clinic or co-directs it, I believe?
A. Yes.
Q. Have you had occasion to refer patients to Dr. Newman for management of tinnitus?
A. No.
Q. Do you have an audiologist that you work with?
A. Yes.
Q. Who is that?
A. Karen Kline.
Q. She is in the office here?
A. Yes.
Q. Have you ever read any of the articles that Dr. Newman has written on the area of tinnitus management or the tinnitus clinic?
A. I may have read them when I was a resident, but nothing recently.
Q. What about Dr. Knapp, a primary care physician also at The Cleveland Clinic, do you know him?
A. I do not know Dr. Knapp.

Q. Have you worked with Mr. Christie or anyone from Mr. Rawlin's office in the past?
A. No.
Q. How is it that you were contacted in this case?
A. I believe it was through a mutual acquaintance, Lawrence Powers, who is an attorney, who referred Mr. Christie to me.
Q. Have you done work for Mr. Powers?
A. Mr. Powers has done work for me.
Q. Fair enough. You have not consulted as an expert for him in the past?
A. No.
Q. Have you ever served as an expert in any, we will call it, medical/legal cases, sort of in general?
A. As a resident, I had, but on the periphery, not as the main expert.
Q. Your residency was finished when?
A. 1994.
Q. So since 1994, you have not served as an expert?
A. To the best of my knowledge, no.
Q. Have you ever had your deposition taken before?

A. Yes.
Q. On how many occasions?
A. Oh, at least six.
Q. Would those be prior to 1994 or since?
A. Since.
Q. Are they on behalf of your patients or are you serving in the same capacity that you are serving in this case?
A. I can't comment on that.
Q. Well, why is that?
A. I can't comment on that. You can speak with Mr. Powers.
Q. All right. Well --
A. You could ask me in a different way. If you would like to know if I have been an expert witness in this capacity before, my answer again would be no. But commenting beyond that about any other details, I am prohibited by the court to comment on that.
Q. Is there some type of an order that --
A. Yes.
Q. There is an order?
A. Yes.

Q. And Mr. Powers, I take it, is the attorney that's involved?
A. Yes.
Q. All right, You have been asked to review medical records at the request of the defendant in this case and to provide opinions which we are going to talk about in a moment.
Have you served in that capacity, without going into any specifics, where you have been provided with records on someone that wasn't your patient and was asked to comment on issues of causation?
A. Yes.
Q. And on how many occasions has that been?
A. Six.
Q. Are you currently serving in that capacity on any of those six cases?
A. Yes.
Q. And your deposition has been taken?
A. No.
Q. Your deposition --
A. Not for the one that I'm currently -- in that capacity, it has not been taken.
Q. Is that the one that you are refusing

to talk about?

MR. RAWLIN: Prohibited from talking about. Object to the form.

MR. MISHKIND: That's okay.

Q. Is that the case that you won't tell me about; the one that you are currently serving in?

A. Can we go off the record for a moment?

Q. No, we have to be on the record.

A. I refuse to answer any further questions along that line.

Q. Can you explain to me?

A. No.

Q. Doctor, you are refusing to explain to me why you won't answer the question?

A. Yes.

Q. Okay,

A. You are getting me a little upset now.

Q. Well, I am not intending to.

A. Well, do you want me to get Mr. Powers on the phone for you? There is a court order that I'm not to talk about any of this.

Q. About the case that you are involved in with Mr. Powers?
A. Yes, that's correct.
Q. Let's put that case aside for a moment. Doctor, understand my intent is to take a discovery deposition of you.
A. I understand, but we are not doing that now.
Q. Well, we are. We are. And I get an opportunity to ask you questions --
A. Fine.
Q. -- do you understand?
A. I understand.
Q. Well, let me finish the question.
I'm going to be asking you a series of questions. Some of it has to do with your prior experience and I'm entitled to --
A. Fine.
Q. -- I'm entitled to finish my question before you answer it.
A. *Go* ahead.
Q. I'm also entitled --
A. Okay.
Q. Let's do each other a service. Let me finish my question first and then I'll let

you answer, and then when you are talking, I won't talk, okay?

A Uh-huh.

Q I'm not going to ask you any further questions about the situation with Mr. Powers. The record is very clear that you are restrained or otherwise not inclined to provide me with any information on that. Let's put that matter aside.

You have reviewed in the past records where you were asked to provide opinions on someone that was not your patient?

A Correct.

Q And would that be the other five situations?

THE WITNESS: Help me here.

Q Doctor, Mr. Rawlin is not your attorney, so he really can't help you.

Q I know he is not, but we are reaching a stumbling block here.

Let me make it very clear. The issues that I had with Mr. Powers and with the other parties that were involved have nothing to do with providing expert medical testimony *or* opinions. That's not the capacity that I served

in. We will talk about that no further.

We can talk about the other issues, but put Mr. Powers and that whole thing out of all of this. It has nothing to do with anything like that.

Q. Understand, doctor, I have never met you before. I have no knowledge of this. My obligation is to explore what is discoverable in the course of the deposition and I have no basis as I'm sitting here to understand why I wouldn't be able to ask you those questions nor why you wouldn't be obligated to answer them.

A. Maybe we should ask Judge Suster, I don't know, but you are really starting to bother me about it.

MR. RAWLIN: For the record, I think he has indicated that those issues --

A. I won't go on with this if this is how it's going to be.

Q. Doctor, if you are going to terminate the deposition, you have every right to do that. I'm here to ask you questions.

A. That may not be in your best interest, though.

MR. RAWLIN: Let me, for the record,

Howard, indicate to you that I think you are going far afield beyond the opinions he has rendered in this case. If you want to ask him about opinions he holds in this case or cases that aren't covered under a court order, that's one thing, but he has already told you he is under court order on these various cases and you know that you have no ability to question about those, the aspects of those cases.

THE WITNESS: And you continue to do that,

MR. RAWLIN: It's inappropriate for you to push him into the corner.

A. I will not go in a corner about this and you are pushing me to do that because you are testing my inner strength, so let's go on to something else.

Q. You can perceive what I'm doing and whatever way I am doing it, but I'm not testing your inner strength.

Are there any cases that you have been involved in as an expert where someone has asked you to provide opinions other than those which are governed by a court order?

A. Yes.

Q. How many?
A. Six -- five, six.
Q. Okay.
A I mean, we are going back a number of years. I don't keep a number, a count of the exact number.
Q Are you currently involved in any other cases, other than for Mr. Rawlin's office, that aren't otherwise protected by this court order?
A. Yes.
Q How many currently?
A. One.
Q And who is the attorney that you are working with in that case?
A He is in Colorado. I do not recall his name.
Q Is that a tinnitus case?
A. No.
Q What's the nature of that injury?
A That is due to a spinal fluid fistula secondary to endoscopic sinus surgery.
Q Sounds like you may be an expert in a medical malpractice case in that matter?
A. Yes.

Q. Are you the expert for the plaintiff or expert for the defendant in that case?

A. For the plaintiff.

Q. The other cases where you are serving as an expert that aren't governed by the court order, are those personal injury cases or are those medical malpractice cases?

A. Medical malpractice.

Q. And just to try to simplify things and move along, tell me what percentage of those cases that you are serving as an expert right now are that you are serving for the plaintiff versus for the doctor, the defendant?

A. Well, the one that I'm doing right now is for the plaintiff. That's why it's stated. The ones in the recent past have all been for the plaintiff.

Q. Have you worked on any cases in Cleveland -- Mr. Powers' situation aside -- where you have given deposition testimony in a matter that's not protected in some manner?

A. No.

Q. So this is the first time --

A. Yes.

Q. -- in a nonprotected situation --

A. Correct.
Q. -- in the City of Cleveland --
A. Yes.
Q. -- that you have testified?
A. Correct.
Q. Have you ever testified at trial in any matters?
A. No.
Q. What do you charge for -- what have you charged thus far for your review of the information that was provided to you by Mr. Christie?
A. Well, for a written report and for review of the information, $1,200.
Q. And how much do you charge for deposition testimony?
A. For deposition testimony, $500 per hour.
Q. And for trial testimony, how much do you charge?
A. I have not done trial testimony, so I don't have a charge for that.
Q. Are you going to charge more or less than $500?
A. More.

Q. Thus far, you billed Mr. Rawlin's office $1,200 for the work?
A. We haven't sent them a bill yet. We are still pending the bill.
Q. So the clock is still ticking, so to speak?
A. Uh-huh.
Q. That's a yes?
A. Correct, yes.
Q. The $1,200 was for the initial review and the preparation of the report?
A. That's correct.
Q. I take it the time is in excess of $1,200 at this juncture?
A. That's correct.
Q. Do you have any ideas how many hours you put in on this case?
A. Approximately eight.
Q. At $1,200, is it billed based on hourly rate?
A. No, it's based upon preparing the report.
Q. How many hours did it take for you to review the material and prepare the report?
A. Approximately four hours.

Q. So there has been an additional four hours on top of that?
A. Correct.
Q. And you will be billing at what rate per hour for those additional hours?
A. As I said, $500 per hour.
Q. So $500 for the additional time, $500?
A. For this.
Q. For the deposition?
A. Correct.
Q. And $500 or more for trial?
A. Yes.
Q. You have written one report in this case; true?
A. Correct.
Q. It looks like you generated this yourself on the computer?
A. Correct.
Q. It's a three-page report?
A. Almost. Two and a half pages.
Q. It covers three pieces of paper?
A. Correct.
Q. It appears that the report was sent to Mr. Christie on October 22nd at about 11:50

p.m.?

A. Correct.

Q. Have you made any revisions to the report since it was sent to Mr. Christie on October 22nd, 2002?

A. No

Q You have never met Janie Cousins; true?

A Correct.

Q You never examined Janie Cousins?

A Correct.

Q And as far as I know, you have never requested an opportunity to conduct an examination of her; true?

A That's correct.

Q You have not talked to Dr. Fine or Dr. Knapp --

A. No

Q. - or Dr. Newman concerning Janie; correct?

A. No

Q So all of the information that you have is based upon what's been provided to you?

A Correct.

Q Mr. Rawlin's office; Mr. Christie,

Mr. Rawlin --
A. Correct.
Q. -- or Mr. Franey?
A. Uh-huh, yes.
Q. And just so that I'm clear, the purpose of your retention was to write a report concerning your findings, and as necessary, testify at the trial of this matter; is that true?
A. Initially I was contacted to review the case and write a report. That's as far as I know.
Q. And you realize that we are going to be meeting again next week when you are going to be videotaped for trial?
A. Yes. But when I wrote the report, I was providing just a written report.
Q. I understand that. You have learned since preparing the report that there was more involved potentially as a requirement of your involvement to testify?
A. Yes.
Q. And the report that you have contains all of the opinions, I take it, that you intend to offer at the trial of this matter?

A. Not all of them, because there is other information that I received from Dr. Newman through a cover letter from Mr. Christie.

Q. Concerning the tinnitus matching?

A. Correct.

Q. Have you received any additional information other than the tinnitus matching from Mr. Christie that would constitute a basis for any additional opinions?

A. Yes. I received an inventory profile of the patient's tinnitus symptoms, her rank of her tinnitus symptoms.

Q. Anything else besides the ranking of her tinnitus symptoms and the tinnitus matching that you have received?

A. Not that I see.

Q. And those then constitute additional facts that you have relied upon to arrive at additional opinions; true?

A. Correct.

Q. You have never written any additional reports to Mr. Christie or Mr. Franey or Mr. Rawlin setting forth those additional opinions; true?

A. Correct.
Q. Have you been requested by counsel to provide a written report setting forth the additional opinions?
A. No.
Q. Have you shared those additional opinions with Mr. Christie, Mr. Rawlin -- rather than repeating their names, defense counsel?
A. We met for about 15 minutes, Mr. Rawlin and I met for about 15 minutes today. We discussed things and then I gave him a little demonstration of the test that Ms. Christie underwent with Mr. Newman.
Q. You mean Ms. Cousins?
A. Ms. Cousins, excuse me.
Q. But in terms of providing a supplemental report setting forth what those opinions are --
A. I had one discussion with Mr. Christie on the telephone after I sent him this report and I cannot recall -- I know I didn't have Mr. Newman's --
I do recall. now. I did not have Dr. Newman's report of the tinnitus matching profile, but I had called Mr. Christie because I

received the tinnitus inventory questionnaire and there was a letter dated October 3rd about additional documentation, and then I went ahead and called him about that.

Q. Okay.

A. And I had a brief discussion on the telephone, but nothing in writing, as you questioned me.

Q. Sure. In fairness, Mr. Christie or defense counsel did not say to you, doctor, I need a supplemental report from you setting forth these additional opinions; true?

A. No. Correct, true.

Q. So as I'm sitting here about to venture in your report, what I have is the report that you prepared close to midnight on October 22nd, 2002 is the only written report expressing opinions?

A. That's correct.

Q. Fair enough.

MR. RAWLIN: Just so you know, he indicated there are other opinions which he may hold.

MR. MISHKIND: I understand that and I'm also going to, as I feel appropriate, go

into it, but I'm asking whether or not he has provided any supplemental reports, which he hasn't, and obviously there is the local rule with regard to supplemental reports.

MR. RAWLIN: Well, I wouldn't go there if I were you, Howard, since you are beyond all your deadlines on local reports.

MR. MISHKIND: I don't think so.

Q. According to your review, doctor, how many times did Janie Cousins go to the emergency room in December after the collision of December 6th?

A. As best I can recall, she was there once for her initial evaluation following the accident.

Q. The tinnitus matching profile, I think you indicated in your report, provides objective information?

A. Uh-huh.

Q. And have you obtained that objective information?

A. Yes.

Q. Based upon that objective information, do you have an opinion as to whether the tinnitus is causally related to the

motor vehicle collision?
A. No.
Q. No, you don't have an opinion?
A. No, I don't know if it's causally related.
Q. So you don't have an opinion one way or another?
A. It could be.
Q. Again, I just want to understand. You can't rule out the tinnitus being caused by the auto collision?
A. That's absolutely correct, cannot rule out.
Q. But you don't have an opinion to a probability whether it is or it isn't?
A. Correct.
Q. So you can't say?
A. It could be zero percent or it could be 100 percent, that's what you could say.
Q. But can you state to a reasonable degree of certainty, or at least to a degree of probability, that the tinnitus is not causally related to the auto collision?
A. Well, the patient states initially that she did have tinnitus, and we know back in

1997 that there was a report that she had some other complaints related to this realm of symptoms and that she stated specifically at that time that she did not have tinnitus, so from a temporal standpoint, from a time line standpoint, you could say that they are causally related.

Q. That the auto collision --

A. The auto collision caused the tinnitus, correct.

Q. And I just want to understand. There is nothing that you have that you can take the stand and say based upon the evidence before you that the tinnitus that she has developed is not causally related to the auto collision of December 6th, 2000; true?

A. Correct.

Q. In fact, that incident back in 1997, there was no history of tinnitus before January of 1997; true?

A. Correct.

Q. In fact, there is no evidence at that time that she had tinnitus in January of '97; true?

A. Correct.

Q. And based upon a review of the records in '97, '98, '99, and leading up to this collision in 2000, there is no evidence suggesting any history or predisposition to the development of tinnitus; true?

A. Absolutely correct.

Q. Now, of what significance as it relates to this auto collision is the tinnitus matching profile that you have obtained from Dr. Newman as it relates to the opinions that you hold in this case?

A. It's our objective data that we can look at to see what level of tinnitus this woman has. And by level, I mean, how loud is it.

Q. Okay.

A. We can't tell from the outside. We can't hold up our ear to her ear and say I can hear this. This is a noise that's generated from within the workings of the ear, the ear anatomy itself. So it's the only objective way that I know.

And I would assume Dr. Newman knows, since he performed the test and he is the expert also, that you can actually gain some objective information about how loud the level the

tinnitus is to the patient.

Q. So can we agree that the tinnitus matching profile in the information provided by Dr. Newman lends objective support to the fact that the patient has tinnitus?

A. Correct.

Q. And that the tinnitus -- or tinnitus, depending on whose vernacular you are following.

A. Where you are from.

Q. -- is a fairly severe form of tinnitus?

A. Incorrect.

Q. Why do you say that?

A. Because the level is 21 decibels above her threshold, and if you are familiar with decibel levels, about 20 to 30 decibels is the sound you would hear from a ticking watch. 30 decibels is a whisper. 50 decibels is conversational speech.

Q. So your interpretation of what Dr. Newman has to say concerning the level of her tinnitus, how would you classify it?

A. Hardly audible.

Q. Now, there are a number of sounds

that are available on the Internet with regard to tinnitus. I'm sure you probably have seen some of the audio files that describe the different --

A. No, I don't look at the Internet for my information.

Q. Do you know what the tinnitus sounds like to Janie Cousins?

A. No one knows except Janie Cousins.

Q. Do you know how disabling it is to Janie Cousins?

A. Well, I can see from her report that it is 100 percent disabling in all of its aspects.

Q. Do you have any basis to dispute that?

A. Yes.

Q. On what?

A. Because I went in our audiology booth and I heard 21 decibels above the treshold of 600 Hz and I could barely hear it.

Q. Now, you referenced the use of Flexeril and you stated Flexeril may also cause tinnitus.

A. Uh-huh.

Q. Is it your intent to testify at trial that her tinnitus was caused by the Flexeril?

A. Let me tell you my intent to testify at trial and make all of this simple. She had a car accident. She has tinnitus. I agree 100 percent.

Her symptoms are far, far more severe subjectively stated on her questionnaire than her objective findings are from your expert at The Cleveland Clinic, Dr. Newman, whether it's from the Flexeril, whether it's from a rock concert when she was 15 years old or whether it's from her car accident. You have got objective evidence that states this woman has normal hearing. Her hearing is better than mine. She is normal hearing and she states that she has tinnitus that is the worst that I have seen in a long time based on her questionnaire form that she filled out on September 24th, 2002.

Q. Okay.

A. And Dr. Newman, who you state has written articles and is the expert, says that her tinnitus is 21 decibels above her treshold at 600 Hz as of May. As of June 20th, 2002 at

600 Hz, her treshold is 15 decibels, which is excellent hearing for a 49-year-old. So she can hear her tinnitus at about -- 15 plus 21 is about 35, 36 decibels. So that's about the sound of a wristwatch.

Q Again, let me go back to my question.

A Go ahead.

Q Because I want to understand matters that you have expressed in your report.

A Yes.

Q Because we deal in medicine and in law, we deal with probabilities, I want to make sure that I understand your opinion.

Are you able to state to a probability that some rock concert years ago is the cause of her tinnitus today?

A No.

Q Are you able to state to a probability that the Flexeril that she took at or around the time of the collision is the cause of her tinnitus?

A Very unlikely.

Q Certainly less than a probability; correct?

A. Correct.

Q. Do you have any evidence to suggest that her tinnitus is secondary to hydrops?
A. No.
Q. You are not going to suggest that she has Meniere's disease; true?
A. Correct.
Q. You would agree that lightheadedness can be caused by a flexion/extension injury?
A. Correct.
Q. And her lightheadedness seemed to start shortly after the motor vehicle collision; true?
MR. RAWLIN: Objection.
A. Correct.
Q. And do you have any basis to dispute that there is a causal relationship between the lightheadedness and the flexion/extension injury that occurred at the time of the auto collision?
A. I believe at some point this lady had a prior history of lightheadedness related to anxiety.
Q. We know we have this lightheadedness back in January of '97; true?
A. Correct.
Q. But besides that -- I think it was

January 21, 1997 -- can you cite me to anything else in all of her visits to all of her doctors after January of '97 where she complained of any lightheadedness or vertigo or dizziness prior to the motor vehicle collision?

A. No.

Q. Do you know the circumstances that led her to see a doctor on January 13 and January 21, 1997 at The Cleveland Clinic for this feeling of lightheadedness at that time?

A. Well, she was diagnosed with a dizziness anxiety reaction. We do know that some people in certain situations, either as a result of their anxiety or as a cause of their anxiety can have motion sickness problems, feel like they are having motion and have dizziness, so there is some information known about that type of a situation.

Q. Do you know whether she had any type of a flu-like syndrome going on at that time?

A. I don't recall from the record.

Q. And certainly a flu-like syndrome can cause lightheadedness, vertigo and symptoms of that nature?

A. Correct.

Q. And can resolve as the flu-like phenomenon resolves; correct?
A. The patient gets a viral inflammation in their vestibulocochlear nerve and it can take up to six months to resolve, but typically resolves spontaneously.
Q. And recognizing that Janie Cousins had a history of some anxiety, and then as we get closer to the time of the collision, she had a divorce action that she was going through, but going back in 1997, and continuing '97, '98, '99, do you see any evidence that would permit you to say that she was continuing to suffer with any type of ongoing or chronic vestibular type of symptoms?
A. No.
Q. So is it fair to say that while you indicate that she may have a preexisting condition, that preexisting condition is supported in the medical records from a symptom standpoint by the January 1997 description; true?
A. Yes.
Q. And by nothing else; true?
A. Correct.

Q. Is a patient's description of chirping, like crickets, is that a common way that patients describe their tinnitus?
A. Yes.
Q. I know there are a number of other ways, but that's one of a number; true?
A. Correct.
Q. And is habituation in an effort to treat the tinnitus a recognized course of treatment in the area of audiology and otolaryngology?
A. Habituation or masking, yes.
Q. There is no cure for tinnitus; true?
A. Correct.
Q. If a patient has tinnitus, what you try to do is to minimize the effects of the symptoms on the patient's day-to-day activities?
A. Well, there are -- depending on the disorder that's causing the tinnitus, if a patient has N stage Meniere's disease, surgery can be offered in that particular setting.
Q. But we don't have that in this case?
A. Correct.
Q. We have an injury to her neck at the time of a motor vehicle collision and the

development of her tinnitus?

A. Correct.

Q. And then we have a patient who is continuing two years afterwards to have symptoms of tinnitus and is being treated at The Cleveland Clinic for that now; true?

A. Correct.

Q. And do you feel that the treatment that she is receiving by Dr. Newman and initially by Dr. Fine, do you feel that that treatment was reasonable and appropriate for the patient's symptoms?

A. I don't recall Dr. Fine offered her treatment; only to refer her on to the tinnitus clinic at The Cleveland Clinic. As far as the treatment that Dr. Newman has offered, I think what he has offered for her is to purchase some hearing aid type devices which are more like tinnitus maskers that she can wear, but really as far as offering her any further treatment, I don't recall that that was an option for her.

Q. I'm sorry, I didn't mean to cut you off. Were you done?

A. Yes.

Q. The ear pieces, the hearing aids, for

lack of better terminology, that he has recommended, is that a reasonable modality to use in an effort to aid a patient that has tinnitus?

A. Well, according to my training, it's not very successful.

Q. Do you then dispute Dr. Newman's treatment or would you defer to him as it relates to this particular patient?

A. I would, number one, tell you that my opinion is based upon the people who trained me, Dr. Buckingham and Dr. Leonetti at Loyola University; that they both felt that these were not viable options for patients with tinnitus. And I would in doing so defer back to him since I would not offer that to her.

Q. You would defer back to Dr. Newman?

A. Yes.

Q. And these other two doctors are not going to be testifying at the trial of this matter?

A. That's correct. I'm giving you my experience and background.

Q. Not a problem. But you are not disputing the appropriateness or the

reasonableness of Dr. Newman's treatment, are you?

A. This is what I don't understand; that her tinnitus is at 21 decibels, the level of her tinnitus. I'm not so certain why he is masking her tinnitus if it's only at that level, if it's barely audible, unless that's the last effort on his behalf to try to see if that might work for her.

Q. So as it relates to the appropriateness of Dr. Newman's --

A. Well, here's --

Q. Let me finish and then perhaps -- as it relates to the appropriateness of Dr. Newman's treatment, you would need to have a better understanding as to why Dr. Newman is using the devices or recommending the devices?

A. I would enter into discussion about behavior modification first before I recommended the devices.

Q. Well, again, I want to understand under oath, are you suggesting that what Dr. Newman is doing is unnecessary for Janie Cousins?

A. It's worth a try.

Q. So you are not going to say it's unnecessary?
A. No, it's worth a try. If she is that bothered, it's worth a try.
Q. Okay.
A. But once again, I'm not certain why he didn't recommend behavior modification first.
Q. When I use the term vertigo, and I then use in the same context dizziness, are they interchangeable terms?
A. Yes. Vertigo would be a more medically appropriate term.
Q. For dizziness?
A. Correct.
Q. And in looking at your report under the current problem list, you acknowledge that her vertigo is posttraumatic dizziness; true?
A. Correct.
Q. So you would agree then that the auto collision is the cause of the patient's dizziness?
A. Correct.
Q. And I think you went on further to say it's due to abnormal sensory input from the nerves in the neck to the cervical center --

A. Correct.
Q. -- as a result of a neck injury; true?
A. Yes.
Q. And this can happen even without the classic hitting of the head against a fixed object; correct?
A. Yes.
Q. So the movement of the neck, whether it be to the side, or the classic hyperextension, hyperflexion type of injuries is well recognized in the literature to cause posttraumatic dizziness?
A. Vertigo, yes.
Q. And it's also recognized in the literature to be a cause of tinnitus, as well; true?
A. What is recognized to be a cause of tinnitus; a whiplash injury?
Q. Yes.
A. It can be --
Q. Okay.
A. -- 50 percent of the time or so.
Q. Okay.
A. Yeah.

Q. And you recognize there are a number of studies that indicate that certain clinical symptoms associated with hyperextension, hyperflexion injuries, or the vernacular of whiplash, result in patients developing tinnitus?

A. Yes.

Q. And again, I know I may be beating a dead horse with a stick, and I will stop doing it just so long as I make sure I'm clear. There is no question in this case that the most likely explanation for her tinnitus is the whiplash injury, the hyperextension injury that she obtained?

A. Most likely.

Q. You can't come up with any explanation that would be of equal or greater explanation than the auto collision?

A. As long as we are sure that the air bag did not deploy, which would be another cause for hearing loss or tinnitus, that would be correct.

Q. Now, I'm going to try to wrap things up in short order, but you have indicated to me that you had arrived at additional opinions

based upon the tinnitus questionnaire and Dr. Newman's information --

A. Yes.

Q. -- aside from what was in your report?

A. Correct.

Q. Have we covered those additional opinions that are not contained in your report?

A. Yes. Clearly stated, my opinion is that the objective information provided by Dr. Newman from the tinnitus matching profile and the information that was provided by the patient in her tinnitus questionnaire are out of proportion to one another.

Q. But stated in another way, you are not suggesting that she doesn't have tinnitus as a result of the collision; true?

A. Correct.

Q. You are not suggesting that she doesn't have symptoms associated with the tinnitus two years after the collision?

A. That's a subjective finding. I can't say that one way or another.

Q. Okay.

A. What type of symptoms are you talking

about specifically?

Q. Well, what you are saying to me is that you just have a difficult time understanding the description that the patient is giving to the level of the tinnitus based upon the objective evidence from Dr. Newman?

A. Correct.

Q. Dr. Newman has provided objective evidence that she has tinnitus, just, in your opinion, not to the extent that the patient complains of?

A. Specifically, the level of a wristwatch ticking.

Q. Okay.

A. And that's the facts.

Q. Her divorce and the anxiety and depression that she was going through with the divorce, that didn't cause the tinnitus, did it?

A. You can find various reports in the literature that state that tinnitus can be caused or exacerbated by stress or anxiety, certainly.

Having tight neck muscles can cause tinnitus. Having problems with your jaw muscle can cause tinnitus. Maybe she was under stress

and had a tight neck which exacerbated things. We don't know that.

Q. I want to understand. To the extent that you testify in this case, I want to understand whether or not you are going to provide opinions to a reasonable degree of probability that her tinnitus is caused by divorce-related issues associated with the depression at or around the time?

A. Her tinnitus clearly began after the car accident. So there is a relationship between the car accident and the tinnitus. I wouldn't deny that nor would any other expert, but the fact that she was under psychological and emotional stress may significantly exacerbate the tinnitus.

Tinnitus is a behavioral issue also. Some people learn to ignore it and deal with it and with other people it becomes much worse, because what we hear is a perception sometimes.

If you are in your car driving somewhere and you are listening to the radio, you get to your destination and you drove for three hours and somebody says, what did you do? Well, I listened to the radio. What did you

hear? Well, it was music. I don't know what it was.

But if there was an attack on the World Trade Center that came over the radio, you would perceive that as a much different noise or sound and would darn sure remember what you heard on that radio.

So that's a pretty good explanation of how we perceive noise and we perceive the same level of sounds. That radio is at the same volume level for the music as it was for that reporter that came through and said that the World Trade Center collapsed. That's a pretty far removed analogy, but that's the best I can give you about the perception. That's how we perceive noise.

9. And again, the perception is the perception that Janie Cousins has; true?

A. Correct.

Q. The fact that she may have had a history of depression or anxiety, if I understand what you are telling me, she may be more prone, because of her underlying emotional state, she may be more prone to perceiving the tinnitus as a greater disability than someone

that doesn't have underlying depression or anxiety?

A. Yes. She may actually be fixated on this symptom. And that's why I would say rather than put tinnitus masking devices on her to mask something that is the level of a wristwatch, why not get her behavior modification so she can deal with it better and cope with the other stressors and anxiety that may be magnifying this psychologically.

Q. And again, you have never interviewed her, so you don't know?

A. I don't know the lady.

Q. And from the standpoint of how she is handling the other anxieties in her life and how she has dealt with those, you don't know how she has put that component --

A. I would have no idea, correct.

Q. Certainly, the people that have seen her over a period of time, Dr. Knapp, and perhaps Dr. Fine, would have a better idea as to how she is handling these emotional stressors as it relates to the impact on her tinnitus; true?

A. Maybe a psychologist or a psychiatrist would, because they deal with

emotional issues and psychological issues. Dr. Fine is about as qualified as me to make that statement, and Dr. Knapp is a primary care physician. So maybe that's the type of specialist that's required. Maybe not a person at The Cleveland Clinic that's an audiologist.

Q. Based upon what you have reviewed --

A. Yes.

Q. -- are you able to state to a probability more likely than not that Janie had factors in her life such as noise levels, work issues, or other common factors that can cause tinnitus?

A. I see nothing in the record according to what was given to me that she had other risk factors for tinnitus.

Q. The MRI that was ordered early on to rule out any type of pathology, that was a reasonable and appropriate thing to do, was it not?

A. The patient had a normal audiogram. To look for intracranial pathology, yes, it was an appropriate thing to do for completeness. To shed light on why she has tinnitus, no.

Q. But again, to rule out perhaps a

life-threatening kind of situation or something that might be a surgical issue?

A. Typically you see asymmetrical hearing loss. In other words, one of the ears is not hearing as well as the other ear. And that's typically what you see in a pattern with noise induced tinnitus or with acoustic neuroma tumor, something that you are referring to.

Q. Again, going back to the bottom line, the prescription of an MRI as a diagnostic workup was an appropriate test to rule out tumors or other pathology of that nature?

A. Yes. Multiple sclerosis, things like this.

Q. I take it as to the issue of permanency in terms of her cervical vertigo, and her neck injuries, the spasms that she has in her neck, that would be an area that you would defer to the internist in terms of opinions on?

A. I would feel more comfortable with a spine specialist, an orthopedic surgeon or neurosurgeon.

Q. But is it fair to say that you're not going to provide opinions to a reasonable degree of probability as to whether these injuries are

or are not permanent; true?
A. Correct.
Q. Based upon the additional information that you received from The Cleveland Clinic after you wrote the report, in your original letter you had recommended that she undergo electrocochleography and electronystagmography.
A. ENG and ECoG.
Q. Are those tests, based upon the totality of what you know now, in your opinion necessary?
A. Electrocochleography is not necessary because it's unlikely that we are dealing with endolymphatic hydrops, as you stated before. Electronystagmography, if she is continuing change of symptoms, it may show us if she has problems with, still has problems with her neck and with vertigo.
Q. You haven't specifically recommended, though, that that is a necessary test at this particular point; true?
A. I haven't recommended anything medically for the patient.
Q. Okay.
A. I'm not her treating physician, in

other words.

Q. I understand that. But in terms of providing opinions that to a reasonable degree of probability this is the test that she needs to undergo, you are not going to take the stand and say that, are you?

A. If I were asked to testify about the patient's continuing cervical sprain and cervical vertigo problems, I would recommend an ENG.

Q. But again, that's something, in terms of her continuing cervical symptoms, that's something that is not an area that you commonly treat?

A. Correct.

Q. And that's something that you wouldn't provide expert opinion on?

A. We do treat vertigo. And just as Dr. Fine did an MRI to rule out other pathology, I think it would be interesting to see if there is other pathology going on. If you look for a lesion, why not do an ENG test to look for a component of her vertigo. There is an overlap between a neurologist, an audiologist, a spine specialist, et cetera, and an otolaryngologist.

Q. How much does that cost?
A. I don't know. We don't do those.
Q. Where would you refer the patient?
A. An ENG could be done with Dr. Hamid, H-A-M-I-D, M.D. He is in Solon.
Q. And that may or may not shed light on why she is continuing to be symptomatic with regard to the neck and the vertigo symptoms; true?
A. Correct. There is something similar that can be done for free. You can put her in a chair like this and hold her head still and turn her body and see if she gets dizzy and then you know it's due to her neck.
Q. And since you have never examined her, you are not able to tell us about that?
A. Correct.
Q. No one, to your knowledge, Dr. Fine, Dr. Newman, Dr. Knapp, none of them have recommended that she undergo the ENG?
A. Not to my recollection from reviewing the record.
Q. Doctor, I have gone through what I believe to be the areas concerning what you had indicated in your report might be causative of

her condition, and I think I have clarified that you have ruled out to a probability hydrops?

A. Correct.

Q. You have ruled out Flexeril to a probability as being the cause?

A. Correct.

Q. You have acknowledged the auto collision as being the most likely cause of the tinnitus?

A. Correct.

Q. You have acknowledged that her spasms and lightheadedness and vertigo to a probability are related to the auto collision?

A. I recall in the record though that she said that wasn't a problem anymore.

Q. I'm not suggesting necessarily --

A. That it's not ongoing.

Q. -- I'm not suggesting in my question that it is or isn't, but you have acknowledged that --

A. Yes, correct.

Q. And you have also considered the tinnitus matching profile in your opinion in terms of what she perceives versus what 21 decibels would suggest exists are different

perception versus reality from an objective standpoint; that her perception is greater than the actual objective evidence of her injury?

A. Correct.

Q. But yet, whether she is perceiving more than what the evidence shows, there is no question in your mind that she is still demonstrating objective evidence of some degree of ongoing tinnitus?

A. Correct.

Q. Are there any other opinions that you intend to offer, either additional ones that were not covered in the report or that we have not covered based upon your two and a half page letter to Mr. Christie?

A. No.

Q. I thank you for your time.

(Recess had.)

MR. MISHKIND: Let's go back on the record and reflect that we are leaving with the court reporter what you believe to be the pertinent articles that you had reviewed from a list of a Medline search that you had done and that the articles will be attached as an exhibit to the deposition.

Vivian Gordon is being entrusted with your copies to photocopy and return to your office tomorrow. Is that fair?

THE WITNESS: That's fair.

MR. MISHKIND: You are going to be deposed next Monday, videotaped. This deposition is going to be written up for my use. You have the right to read it over and sign it or you can waive that requirement of reading and signing.

THE WITNESS: I would like to read it to make sure it's accurate.

MR. MISHKIND: Understand, because of the short period of time, that when it comes to you, you will need to read and sign it before the videotaped deposition starts.

THE WITNESS: Yes, fine.

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(Thereupon, Silberman Deposition Exhibits 1 thru 3 were marked for purposes of identification.)

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(Deposition concluded at 6:15 p.m.)

(Signature not waived.)

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AFFIDAVIT

I have read the foregoing transcript from page 1 through 59 and note the following corrections:

PAGE	LINE	REQUESTED CHANGE

SETH J. SILBERMAN, M.D.

Subscribed and sworn to before me this day of , 2002.

Notary Public

My commission expires

CERTIFICATE

State of Ohio,

SS:

County of Cuyahoga.

I, Vivian L. Gordon, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named SETH J. SILBERMAN, M.D. was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony as above set forth was by me reduced to stenotypy, afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony.

I do further certify that this deposition was taken at the time and place specified and was completed without adjournment; that I am not a relative or attorney for either party or otherwise interested in the event of this action. I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28 (D).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 2nd day of December, 2002.

Vivian L. Gordon

Vivian L. Gordon, Notary Public
Within and for the State of Ohio

My commission expires June 8, 2004.

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DEPOSITION OF SETH J. SILBERMAN, M.D.