

1 course of disappearing when they were adolescent and young
2 adults but on the contrary, persisted into adult life and
3 that has resulted in some permanent alteration, mild, though
4 it is, in breathing capacity.

5 Q. So, this permanent alteration, mild though it is,
6 as you have said, in breathing capacity, is that the reason
7 that the bronchodilators in your opinion didn't help her?

8 A. I think that is quite clearly the case.

9 Q. The situation where you have this life-long allergy
10 and this mild asthma, can that result in a permanent -- Let
11 me rephrase that. Is the permanency in any way related to
12 severity in connection with this or to severity in connection
13 with with?

14 A. Well, we have the laboratory test results are the
15 best measure of severity and we can see that they are very
16 mild. The abnormalities are mild, but they are fixed. They
17 are irreversible. So there is a measurable alteration
18 reduction. There is a measurable reduction in breathing
19 capacity but it is rather limited in degree. That is why she
20 is able to function as a farmer, be an active farmer's wife,
21 work on the farm, but still she has symptoms particularly
22 when she is exposed to things that aggravate her allergy
23 problems which are in addition to this permanent impairment
24 that I think she has.

1 Q. Now, Doctor, would what you have seen in these test
2 results and described to us and the testimony that I have
3 read to you and the portions of Doctor Carnow's reports as to
4 her complaints, would that be compatible with a person that
5 has never really since the spill or before the spill been to
6 an allergist for treatment for these allergies or treatment
7 for any asthmatic symptoms or conditions?

8 A. Well, the fact that she has not needed medical care
9 or attention or hospitalizations or emergency room visits
10 merely means that the process is quite mild and by no means
11 eliminates or changes my views about the cause, the mechanism
12 and the natural history of her disease.

13 Q. Then in summary, with regard to these pulmonary
14 lung function dots, you would agree that some of those tests
15 do demonstrate, if I understand it, an abnormal pulmonary
16 lung function with regard to the FEV-1 over FVC?

17 A. Indeed.

18 Q. All right. Somewhat reliable, others are, as you
19 have told us?

20 A. Correct.

21 Q. But your opinion as to the cause of those based
22 upon your review of these medical reports, the testimony that
23 I have given you, is this long-standing history of allergies?

24 A. Correct.

1 Q. Doctor, there is in addition to the dots or the
2 pulmonary lung function test on Doctor Carnow's chart, there
3 is a symptom dot involving Carnow 1 for shortness of breath
4 and wheezing. Now, the Carnow 1 history that was given by
5 Joyce Kemner I think I have read to you, have I not? She
6 states that she has some shortness of breath and wheezing.
7 This is not present all the time but seems to relate just to
8 rain. Odors tend to intensify the problem also. That is
9 what I read to you before?

10 A. Yes.

11 Q. Is that compatible with the testimony that I read
12 to you, those complaints, the history of allergies that she
13 has, history of complaints that she has had before and after
14 the spill as a result of those allergies, that type of
15 complaint that she made to Doctor Carnow in Carnow 1?

16 A. Well, I think the pattern of intermittent symptoms
17 is quite consistent with mild allergies.

18 Q. And in August of '82, August, is that during
19 hayfever season, Doctor?

20 A. Indeed.

21 Q. And when there are trees and grass and molds and
22 dust that would be available to cause allergies to give her
23 problems, if in fact she is allergic to those things?

24 A. We know she has skin -- positive skin test

1 reactions to those substances so she certainly may respond
2 adversely when they are prominent in the environment.

3 Q. Now, there is also a symptom dot listed under the
4 first Carnow exam for coughing, and in connection with that,
5 what was reported by her at the time the Carnow 1 exam in
6 August of '82? Under pulmonary, it says negative except for
7 the sense of shortness of breath noted in the present
8 illness. That is what I read to you. She states with regard
9 to cough that this year she has developed very severe sinus
10 problems in addition to runny noses with discharge. There
11 also appears to be a constant cough and irritation of the
12 throat. Now, the complaints that she has there, are those
13 compatible with her allergies?

14 A. Yes, indeed.

15 Q. And there are no other dots for cough, for wheezing
16 or shortness of breath other than in connection with that one
17 exam, Doctor, so no need to go into any more of that. Let me
18 check my notes here. I think that is all the questions I may
19 have about Joyce Kemner, Doctor. Yes, I think that is it. I
20 would like to now move on to James Vaught.

21 Now, James Vaught is one of the plaintiffs that
22 you, in fact, did examine, I believe, is he not, Doctor
23 Cugell?

24 A. Yes, sir.

1 Q. Now, he has only with regard to the pulmonary lung
2 function test, he has a dot only for one test that was done
3 at the Boone Clinic in October of '84. And before we get to
4 that, I would like to first have you go over your examination
5 and findings with regard to Jim Vaught and do you have copies
6 of those? Handing you now what has been marked as
7 Defendant's 1727, is this your report of your examination of
8 James D. Vaught?

9 A. Yes, sir.

10 Q. And would you tell us when you performed this
11 examination, Doctor?

12 A. On November 10, 1983.

13 Q. All right. And if you could, tell us, well
14 generally, how do you perform your examinations, Doctor, when
15 you perform an examination that is directed toward pulmonary
16 problems or complaints? What is your regiment, if you will,
17 that you go through?

18 A. Well, the process is the same for almost any type
19 of medical assessment. It consists initially of a detailed
20 set of questions which in my case and in this examination was
21 focused primarily on respiratory complaints but includes
22 numerous other questions as well involving other organ
23 systems, that is organs other than the lungs. But my report
24 in general in this and in other people I examined is limited

1 to the respiratory problems that they may have had.

2 Q. All right.

3 A. Beyond that, at the conclusion of the interview or
4 the questioning, I do the physical examination which is a
5 general one starting at the head and going down to the feet,
6 although not all organ systems will be examined as completely
7 as others, and again my emphasis will be on the examination
8 of the lungs and the heart, examination of the chest in
9 general. There are laboratory results available, X rays,
10 lung function tests, blood tests or others, I will then
11 review those and on the basis of the information obtained
12 from the interview with the patient, from examination and
13 from the laboratory data, develop a report such as this.

14 Q. Tell us then, Doctor, what you first did in
15 connection with your examination of Jim Vaught and follow
16 through then, if you just would, with what you did thereafter
17 and what you found?

18 A. Well, the essential points are contained in the
19 reports and they deal primarily with the respiratory
20 complaints and as noted here, he denies any breathing
21 problems during exertion. He denied having any wheezing, any
22 cough, any shortness of breath, any chest pain. He did
23 respond positively with regard to a variety of other
24 symptoms, dizziness, headaches, noises and pains in his ears

1 and some complaints that I really couldn't fit into any well-
2 defined pattern such as jumping muscles. He also says that
3 he, to put it in his words, he says he runs out of air but
4 that was experienced at night in bed and I was unable to link
5 that with any significant related complaints. I might
6 interject at this point that in questioning people about
7 their respiratory or any other set of symptoms, it is
8 commonplace to ask a variety of questions all focused on the
9 same problem. In that way, you can sometimes determine
10 whether the complaint that the patient has is constant, that
11 he understands what you are asking, and that you should get
12 multiple responses that help you decide whether the complaint
13 is significant or not. And it is noted in my report here I
14 did, I was unable to get any constant or consistent
15 expression of symptoms.

16 Q. Is that inability, Doctor, expressed in the report
17 that you gave us here in any way?

18 A. Well, when I say he has bizarre replies, that means
19 that they are unexpected and inconsistent and don't match.

20 Q. Other things that he said?

21 A. Other things, exactly, but I think the relevant
22 statement here in this first paragraph in which my history is
23 detailed is no wheeze, no cough, no dyspnea, no chest pain
24 and these are the cardinal symptoms of significant lung

1 disease.

2 Q. Are those compatible, that is his not having those,
3 with symptoms that he runs out of air and he has to have a
4 fan going at night?

5 A. No. There is complete incompatibility there and
6 this is why I was unable to ascribe any specific significance
7 to his positive complaints.

8 Q. I added as you might note to what you hadn't said
9 but in the report there is some reference here to this
10 running out of air, that he has to have a fan going at night
11 because of that complaint?

12 A. Yes.

13 Q. Have you ever had that complaint made to you before
14 in your history of examining people, Doctor?

15 A. Oh, yes, but only in people that have very severe
16 and obviously bad lung disease.

17 Q. Now then, after talking with him and asking
18 questions and reviewing the systems that I take it were
19 related to pulmonary lung function or pulmonary examination,
20 what did you do next, Doctor?

21 A. Well, the next paragraph indicates the results of
22 the physical examination. The relevant comments are that the
23 lungs were clear to percussion and to auscultation during
24 both normal and exaggerated breathing.

1 Q. What does may mean, Doctor?

2 A. That is what you hear with a stethoscope and what
3 you detect by thumping the chest and it was done during
4 ordinary breathing and when the breathing efforts were
5 greatly exaggerated which sometimes brings out things which
6 would not be heard if the examination was conducted only
7 during normal breathing. And the point is is that with all
8 of these things, no abnormalities whatsoever were detected.
9 The laboratory data which is included in this --

10 Q. Doctor, before we go to the laboratory --

11 MR. CARR: May we approach the bench?

12 THE COURT: Yes, you may.

13 (Bench conference had out of the hearing of the
14 jury.)

15 MR. CARR: Your Honor, I didn't object earlier
16 because I thought he was doing this inadvertently but there
17 is a pattern. He is constantly referring to this report
18 which is not an exhibit in evidence and which is not
19 admissible into evidence. I don't mind counsel using the
20 report with the witness to refresh his memory so that he can
21 testify as to what he, in fact, found or what the man told
22 him at the time of the examination for that purpose. That is
23 perfectly proper to do so but he is referring to something
24 that is not an exhibit and cannot be an exhibit and I object

1 to any further questioning in that fashion.

2 MR. MUSGRAVE: Well, fine. I will not refer to
3 it. I think the record should reflect that every day that
4 Doctor Carnow sat in this box and testified, he had in front
5 of him, Mr. Carr knew it and I knew it and the Court knew it,
6 his reports and the man couldn't have testified in this
7 courtroom.

8 MR. CARR: I didn't say that. It is clearly clear.
9 I am not objecting to him using it at all, all right.

10 MR. MUSGRAVE: All right.

11 (The following proceedings were had in the hearing
12 and presence of the jury).

13 Q. Doctor, before we go on, you were mentioning lab.
14 Did you make any examination of his extremities?

15 A. Yes.

16 Q. And why would you examine a man's extremities,
17 Doctor, in connection with a test to determine any problems
18 with pulmonary function?

19 A. Well, a general response to that question would be
20 that part of the physical examination includes examining
21 everything and people may have respiratory complaints but
22 they can be related to systemic or general diseases other
23 than involving the lungs but the more specific response would
24 be that lung diseases of various kinds produce changes in the

1 tips of the fingers and changes in the color of the nailbeds
2 and have other effects on the appearance of the extremities.

3 Q. Did you find any of those in James Vaught?

4 A. None, whatsoever.

5 Q. Now, if you would then, Doctor, did you perform a
6 pulmonary lung function test or had performed a pulmonary
7 lung function test?

8 A. Yes, I did.

9 Q. And which one was that?

10 A. Well, the chest -- the report is listed here, the
11 chest X ray film was perfectly normal. And our routine lung
12 function tests were all normal with the exception of the
13 maximum voluntary ventilation which was slightly reduced and
14 my comments about that are similar to those.

15 MR. CARR: Your Honor, may I approach the bench?

16 THE COURT: Yes, you may.

17 (Bench conference had out of the hearing of the
18 jury.)

19 MR. CARR: Now I know this is not counsel's fault
20 but the witness is referring to the exhibit. The question
21 is --

22 MR. MUSGRAVE: I will talk with him.

23 THE COURT: Why don't we take a break now and do it
24 and also, we are going to break at 4:30 for the next few

1 days. One of the jurors has a babysitting problem so we will
2 probably be cutting back to one hour lunch periods and break
3 at 4:30. We will take a break now and why don't you talk to
4 him.

5 (The following proceedings were had in the hearing
6 and presence of the jury).

7 THE COURT: Ladies and gentlemen, we will take a
8 short break at this point in time and then resume testimony.
9 The admonishments that I gave you earlier will apply during
10 this break also. Court is in a short recess.

11 COURT RECESSED:

12 (The following proceedings were had in the hearing
13 and presence of the jury)

14 DAVID SUSKIND

15 having resumed the witness stand, being previously sworn,
16 testified further as follows:

17 DIRECT EXAMINATION

18 By

19 MR. JOHN R. MUSGRAVE.

20 Q. Doctor Cugell, we were talking about your
21 examination of James Vaught and the pulmonary lung function
22 tests that were done in connection with that. Handing you
23 now what has been marked as Defendant's Exhibit 1728. Is
24 that the pulmonary lung function test done in connection with

1 the Northwestern exam and your exam of James Vaught?

2 A. Yes, sir.

3 Q. And handing you what has been marked as Defendant's
4 1729. Did you review that at the time of your examination of
5 James Vaught or in connection with the examination of the
6 pulmonary lung function test that was done at the Carnow
7 exam of James Vaught?

8 A. Yes, sir.

9 Q. And that is 1729?

10 A. Yes, sir.

11 MR. MUSGRAVE: I would offer both of these into
12 evidence and request permission to pass both of those to the
13 jury.

14 MR. CARR: No objection, Your Honor.

15 THE COURT: Both admitted.

16 (Defendant's Exhibits 1728 and 1729 are passed to
17 the jury).

18 Q. Doctor Cugell, first of all, with regard to the test
19 performed in connection with your examination, Defendant's
20 1728, would you review that for us and tell us the results of
21 that examination, that pulmonary lung function test?

22 A. Well, without repeating every value on the page,
23 suffice it to point out that the forced vital capacity, that
24 is the value referred to on numerous occasions today, was 85

1 percent of the listed predicted value. That is well within
2 the normal range. The FEV-1 which is an even more important
3 measure sometimes, that is 4.11 or 93 percent of the
4 predicted value. The ratio of those two numbers was also
5 normal. So that all of these measures of volume and flow
6 were within normal limits.

7 Q. All right. I have started a little chart here. I
8 would like to try and keep track of these as we go along
9 which I have had the Court Reporter mark as Defendant's
10 Exhibit 1730 which has James Vaught's name at the top of it
11 and columns indicating date and columns for the FVC, the
12 FEV-1 and the ratio and I would like to start filling that in
13 with these two reports. The earliest one by date would have
14 been the Carnow 1 report, Defendant's 1729?

15 A. Yes.

16 Q. Let's start with that one if we can in filling this
17 in. That was done on the 21st of August, is that not
18 correct?

19 A. 8-21-82.

20 Q. And what was the FVC?

21 A. 4.81.

22 Q. All right. And the percent predicted would have
23 been 115 percent, is that right?

24 A. Correct.

1 Q. The FEV-1?
2 A. 3.67.
3 Q. And the percent predicted?
4 A. 100.
5 Q. And the ratio?
6 A. 76 percent.
7 Q. And the predicted was?
8 A. 87 percent.
9 Q. All right. And how does that stack up as far as
10 being normal, abnormal, what have you?
11 A. Those are all completely normal values.
12 Q. And you have just told us about the next one which
13 would have been the Northwestern, that was done 10-27-83, and
14 the FVC was --
15 A. 4.54.
16 Q. Which was 85 percent?
17 A. Yes.
18 Q. And the FEV-1 was?
19 A. 4.11.
20 Q. Which was 90 percent?
21 A. 93 percent.
22 Q. Pardon me? 93. And the ratio?
23 A. 91.
24 Q. It should be .91?

1 A. Yes.

2 Q. Actual, and the predicted was?

3 A. .82.

4 Q. .82. And so the record understands this, I am

5 putting the predicted be they percent or I just the numerals

6 in parenthesis. All right, Doctor. Then, upon review of

7 these two spirometries and your physical examination of

8 Vaught, did you have an opinion at that time based upon that

9 information as to the condition of his pulmonary system?

10 A. Yes, I did.

11 Q. And what was it, sir?

12 A. That this man had absolutely no evidence of any

13 lung problem of any kind and he was perfectly healthy.

14 Q. All right. How did he describe himself when you

15 talked with him?

16 A. Well, as was my custom when I examined these

17 people, I asked them how they were, how they felt in a

18 general sense and they said fine and he as I recall responded

19 that he had no health problems.

20 Q. Doctor, handing you now what now has been marked

21 Defendant's Defendant 1731, the spirometry for James Vaught

22 done in connection with the Carnow 2 exam on November 12,

23 1983. It would be shortly after the one you just told us

24 about?

1 A. Yes.

2 Q. I am going to put the date up here on Defendant's
3 1730. What was the FVC?

4 A. 4.72.

5 MR. MUSGRAVE: Incidentally, I have copies of this,
6 Your Honor. I would offer 1731 and request permission to
7 pass copies to the jury.

8 MR. CARR: No objection, Your Honor.

9 THE COURT: It is admitted without objection.

10 (Defendant's Exhibit 1731 is passed to the jury).

11 Q. Then the FVC was 4.72 I think you told us?

12 A. Yes. 106 percent.

13 Q. And the FEV-1?

14 A. Looks like 4.09. 105 percent.

15 Q. And the ratio?

16 A. .87.

17 Q. And the predicted?

18 A. .86.

19 Q. And how does that stack up then, Doctor? How do
20 those test results --

21 A. Absolutely everything on there is quite normal.

22 Q. Now, Doctor, the next test coming forward would be
23 the one that Doctor Carnow put a dot on his chart for and let
24 me get that for you. Handing you now what has been marked as

1 Defendant's 1732, this is the pulmonary lung function test of
2 James Vaught done on October 19, 1984, at the Boone Clinic.
3 I would offer that into evidence and request permission to
4 pass copies to the jury.

5 MR. CARR: No objection.

6 THE COURT: Admitted without objection.

7 (Defendant's Exhibit 1732 is passed to the jury).

8 Q. Now, Doctor, we see here again, do we not, the test
9 being done both before bronchodilators and after
10 bronchodilators?

11 A. That is correct.

12 Q. I am going to put this date up here. Let's get it
13 up here first. This would be October 19, 1984, okay. Now,
14 is there any difference, first of all, between the before
15 bronchodilators and the after bronchodilators as far as the
16 results of this test?

17 A. Yes, sir.

18 Q. And where do you see that, Doctor?

19 A. Well, that is mostly, most obvious in the change in
20 the FEV-1 that is reported here.

21 Q. Uh-huh.

22 A. Which goes from 2.78 to 3.59.

23 Q. All right.

24 A. And there is a corresponding difference in the

1 ratio of FEV-1 to FVC from 65, this is the next to the last
2 number, to 81.

3 Q. All right. I am going to put up here on
4 Defendant's 1730 so we have consistency with what we are
5 doing, the test done before bronchodilators. The FVC would
6 be 4.25?

7 A. That is correct.

8 Q. And the percent of predicted?

9 A. 79.

10 Q. And the FEV-1?

11 A. 2.78 which was 63 percent of predicted.

12 Q. And the ratio?

13 A. .65.

14 Q. Okay. With the predicted being?

15 A. .82.

16 Q. All right. Now, just looking at those numbers then
17 before bronchodilitation, how do they appear?

18 A. Well, there is an obvious difference in the FEV-1
19 in comparison with the previous measurements.

20 Q. Now, Doctor, attached to this exhibit, Defendant's
21 1732, are the tracings, are they not?

22 A. Yes.

23 Q. And Doctor, I have the blowups here of the tracings
24 that are attached to the exhibit. Can you tell me which one

1 of these two starts the pulmonary lung function test?

2 A. This one (indicating).

3 Q. That is the one that I have had the Court Reporter
4 mark as Defendant's 1733?

5 A. Yes.

6 Q. And what I have now had the Court Reporter mark as
7 Defendant's 1734 would be the rest of that tracing, is that
8 correct?

9 A. Yes.

10 Q. And these are blowups that are just blowups of what
11 is attached to 1732 being the tracings of that Boone Clinic
12 spirometry done in October of '74, correct?

13 A. Correct.

14 Q. Now, these go together, do they not?

15 A. Yes.

16 Q. We are going to try and find some way to get these
17 together. Now, Doctor, we have these side by side here. Do
18 you have the Exhibit 1732? Now, could you tell us what these
19 tracings look like, Doctor, and what the significance is of
20 the tracings related to the numbers that we have on
21 Defendant's 1732?

22 A. Well, this is a blowup of the actual tracing from
23 the spirogram from that drum of the illustration that we saw
24 earlier today, but because the tracing was relatively long

1 and it had to be reproduced in two sections, if we cut this
2 off and moved it over, you would see that these lines
3 represent continuations of those lines and if you take the
4 second page of Exhibit 1732 and separate them and fold them
5 over and piece them together as I have done here, it is
6 immediately apparent that the lines on the left-hand panel
7 are merely extensions of the lines on the right-hand panel.

8 Q. Now, have you done that, Doctor, with the exhibits
9 that I had you identify, 1732?

10 A. That is what I am holding up now.

11 Q. Let me get a piece of tape and we will tape those
12 two pages together and reattach it so that will be done on
13 the Court's exhibit. All right, sir. Do you want to display
14 that then to the jury and I will get an idea of what we are
15 talking about. Now, Doctor, do each one of these lines again
16 represent an independent effort, an independent blow through
17 the spirometer?

18 A. Yes. There are on this one graph evidence of four
19 separate forced expiratory efforts.

20 Q. Now, could you comment, Doctor, then with regard to
21 what the tracings show relative to the results and if there
22 are any problems of any kind associated with what the
23 tracings show?

24 A. The effort begins here and continues until

1 breathing in again as shown here. What is apparent from just
2 a casual inspection is that this specific effort was
3 terminated prematurely because he started breathing in within
4 a second or two seconds after the expiration began so that
5 breath was not sustained long enough to give a valid number.

6 Q. Now, Doctor, before we go on, the line that you
7 have just testified to, I am going to draw an arrow to it and
8 put a one behind it to identify it in red ink and have I not
9 done that?

10 A. Yes, and it is so indicated on here, if you wish.

11 Q. Where does that match up over here?

12 A. Right there.

13 Q. It is this one right here. This is number, this is
14 the one right here?

15 A. It is that one.

16 Q. And I am putting another arrow on the Exhibit 1733
17 with a number one behind it which matches the two up then
18 between 1733 and 1734, is that correct?

19 A. Correct.

20 Q. Okay. There is another bump over here in 1733,
21 that number 11 line. Is that of any significance?

22 A. Well, that represents a failure to continue
23 sustained and continual expiratory effort and further
24 indicates that this was indeed inadequate, improper and not a

1 valid, forced expiratory maneuver.

2 Q. All right. Now, if you could, comment on any of
3 the other lines there that have similar problems?

4 A. Well, of the three remaining -- well, let's look at
5 this lowest most line here which continues over like this.

6 Q. Let me put an arrow and a number two to that. I
7 have done that now on 1733 and I will do it on 1734, a red
8 arrow and a number two behind it. Comment on that, if you
9 would?

10 A. Well,, this is also an inadequate expiratory
11 maneuver in part for the same reason. It sort of bounces
12 around here, then he suddenly breathes in. Then he breathes
13 out and then he quits.

14 Q. He took a breath in the course of that one?

15 A. Well a small one but he reversed his process
16 instead of continuing to blow out which is what one is
17 supposed to do, he decided to breathe in a little bit. So,
18 number two is an inadequate effort that we cannot really rely
19 upon as providing any good results.

20 Q. Let's try to put these together.

21 A. There are only two efforts remaining on the graph,
22 there are only four all together. They are reasonably
23 similar. The performance was apparently adequate but since
24 we don't know which was before bronchodilator or which was

1 after or if indeed they both represent a before or an after
2 and since we don't have more than two efforts, we really have
3 no way of ascertaining from these limited results whether
4 they do in fact represent the true lung function in this man
5 or what, if any, drug effects may have occurred or what. So
6 we can really make no judgments on the basis of this limited
7 valid, apparently valid test results that are apparent here.

8 Q. All right. But at least two of these four were not
9 performed properly by Mr. Vaught in your opinion?

10 A. Absolutely.

11 Q. Now, let me put these down. The results reported
12 here show a decrease in the FEV-1, in the ratio and in the
13 FVC from essentially all three prior tests, do they not?

14 A. Yes.

15 Q. Would you expect then in this year period of time
16 if this decrease occurred that there would be symptoms of
17 some kind that would be associated with that change in
18 function?

19 A. I certainly would.

20 Q. And would you expect there to be physical findings
21 in connection with an examination of the lungs in October of
22 '84 that would account for such a significant change?

23 A. Well, if he was symptomatic at that time as I would
24 have expected him to be if there was a significant and real

1 impairment, he might very well have some symptoms, some
2 abnormal physical findings on examination.

3 Q. All right. Let me get the records, Doctor, that
4 contain the symptoms, the physical findings, otherwise, that
5 were done at this time. I have now marked as Defendant's
6 1735 the record of James Vaught and would refer you first of
7 all, Doctor, to a chest X ray that was done on October 19,
8 1984, and does that result in any findings of any physical
9 objective findings?

10 MR. CARR: Those are the Boone Clinic records,
11 counsel?

12 MR. MUSGRAVE: They are.

13 A. This is reported as a completely negative chest X
14 ray film.

15 Q. And we then have a questionnaire dated October 10,
16 1984, which I believe was done in conjunction with this
17 examination and would you go through that and see if there
18 was any complaints?

19 A. Well, his specific comments about the respiratory
20 system say he has a cough with occasional yellow sputum and
21 no shortness of breath.

22 Q. All right. Would those type of complaints account
23 for such a dramatic change, Doctor, in your opinion?

24 A. Absolutely not.

1 Q. And I know -- well, let's come back to it, Doctor.
2 I know we have got it somewhere and let's see if we can find
3 it before we finish our examination. In any event, what you
4 have reviewed here so far has no symptoms that would account
5 for this?

6 A. Correct.

7 Q. With regard to the exam, Doctor, then the pulmonary
8 lung function test, the before and the after bronchodilator,
9 there was an indication, I believe you told us that, that the
10 bronchodilator -- that the performance on the pulmonary lung
11 function test after bronchodilators was with some
12 improvement?

13 A. The report indicates there was.

14 Q. Uh-huh. Based upon the records that you have seen
15 to date so far in your physical exam, do you have an opinion
16 as to why that performance was better after bronchodilators?

17 A. Well, in view of my uncertainty about the value of
18 the tests that were done or their significance or how
19 reliable they are, I really would not make any such
20 conclusion or interpretation. We don't know from the records
21 that we have been able to review whether the
22 pre-bronchodilator tests were truly his maximal efforts and
23 maybe all we are seeing is an improved performance the second
24 time around and not a pharmacologic effect of the drug that

1 he took.

2 Q. Then the improvement after using the
3 bronchodilators, if I understand what you are saying, and
4 correct me if I am wrong, could have been just as easily from
5 improved performance as opposed to any real effect of the
6 bronchodilator?

7 A. That is a very distinct possibility in view of the
8 appearance of the tracings that we have just finished
9 reviewing.

10 Q. Doctor, a person that doesn't have an asthmatic
11 condition and has a bronchodilator administered to them, will
12 they have improved performance after bronchodilator, assuming
13 the same efforts are given on both, before and after tests?

14 A. They may but it will seldom exceed five or 10
15 percent at the most.

16 Q. Doctor, there is one other spirometry that I want
17 you to look at that you will want to chart up there. That is
18 one done again in March of '85. Handing you now what has
19 been marked as Defendant's 1736 which is a spirometry of
20 James Vaught done March of '85 by Doctor Carnow and could you
21 tell us what the FVC was at that time and I will put that up
22 here on our chart?

23 A. 4.62. 101 percent.

24 Q. All right, sir.

1 A. And the FEV-1 was 4.00 or 102 percent and the ratio
2 was .87 as against an expected ratio of .86. 86 percent.

3 Q. And how does that compare, then, with the '84 and
4 those before, Doctor?

5 A. Well, these are excellent values, completely
6 normal. Just as all the prior tests were except for the one
7 immediately before it.

8 Q. Now, Doctor, with regard to Defendant's 1730 here,
9 the chart that we have been repairing as we go along, the one
10 spirometry that appears on here that Doctor Carnow and the
11 only one that Doctor Carnow says is abnormal is as you might
12 expect the 10/1984 which I will circle in red. Now, Doctor,
13 based upon your review of all of these records, can you or
14 would you utilize this 10/84 spirometry in trying to assess
15 the pulmonary lung function ability of James Dean Vaught?

16 A. Well, I have the advantage of examining the man, of
17 questioning him myself. I have the benefit of all this other
18 lung function data and that collective information makes it
19 quite clear that no particular significance can be ascribed
20 to the data that you have circled there.

21 Q. Well, do you know whether or not Doctor Carnow had
22 his own reports, Carnow 1 and Carnow 2, as well as the
23 Northwestern?

24 A. Well, he obviously had his own data.

1 Q. Do you know whether he had -- he must have had this
2 report because he called it abnormal, didn't he?

3 A. That is where the dot originated from.

4 Q. And the tracings would have been available for him
5 to review to the best of your knowledge?

6 A. If he had the Boone Clinic data, he must have had
7 the tracings.

8 Q. Do you have an opinion as to whether James Vaught
9 has on any occasion on any of these tests up here, in fact,
10 had an abnormal finding with regard to his FVC, his FEV-1 or
11 ratio thereof?

12 A. Well, he did have those abnormal numbers. They
13 speak for themselves but I don't believe they represent any
14 real abnormality in his lung function.

15 Q. All right, Doctor. Now, Doctor, moving on to
16 symptoms that appeared on Doctor Carnow's dot charts, there
17 is a symptom of a complaint of shortness of breath that was
18 made or appeared on Doctor Carnow's charts with regard to a
19 complaint made at the Boone Clinic. In fact, it is the very
20 one we referred to, the October 19, 1984, Boone Clinic test
21 right here. Now, I think we found what we were looking for
22 earlier here. Again referring you to the Boone Clinic
23 records and the entry made with regard to the October 19,
24 1984, exam. Would you read that to us, Doctor?

1 A. The entry of October 19, 1984, says, "Mr. Vaught's
2 X rays show possible heart shadow." That must be a typo. It
3 doesn't make much sense. "Passible, perhaps." I don't know
4 what that implies.

5 Q. This is Referring to the one above there?

6 A. I am sorry. Two entries of that date the one you
7 asked me about is just above the one I just read. The other
8 October 19, 1984, entry says, "James Vaught is complaining of
9 shortness of breath. Also says his chest on examination
10 reveals no rawls, squeezing or bronchi. There is no
11 dullness." And then he comments that they will obtain the X
12 ray and his next entry relates to the X ray.

13 Q. And it says probably get pulmonary function
14 studies?

15 A. That is also included in the entry.

16 Q. And we have been through those pulmonary lung
17 function studies, have we not?

18 A. Yes.

19 Q. Coming back again to the physical exam. Upon
20 physical exam on that day they found no rawls, those other
21 things?

22 A. Absolutely nothing.

23 Q. And would you expect again, Doctor, if there was in
24 fact this significant drop in the FVC and the FEV-1 in this

1 short period of time, to have such symptoms at least of that
2 nature?

3 A. Well, I would certainly expect some abnormalities
4 on the physical examination and none were found.

5 Q. Then this is the coming back again, this is the
6 shortness of breath complaint that resulted in the dot on
7 Carnow, Doctor Carnow's charts under symptoms. Is that much
8 of a symptom, Doctor, to ascribe a condition of some type of
9 abnormality in the lungs by simply getting that type of a
10 report?

11 A. Well, breathing difficulty, shortness of breath is
12 an extremely common complaint. The doctor has to sort it out
13 and decide what the significance of that complaint is. What,
14 if any, organ malfunction it represents. In this case it is
15 quite clear that there is no basis for an organic disease
16 basis for this complaint. His lung function has been and was
17 subsequently excellent. His X ray film was normal. There is
18 no abnormalities on physical examination and one would -- I
19 would certainly conclude from the information, extensive
20 information available, there is no disease present in this
21 man.

22 Q. Can there be shortness of breath complaints that
23 aren't associated with actual lung problems?

24 A. Oh, yes. It is a very common sign of any manner of

1 emotional problems, anxiety. I think we have all had the
2 experience of having a gasp occurring when we see something
3 frightening or unusual. So that respiratory responses to any
4 type of insult are unexpected events. It is very
5 commonplace. We can also have a respiratory sensation in
6 response to strong odors or unexpected events and interpret
7 them as being signs of shortness of breath. It by no means
8 need occur only when there is serious illness.

9 Q. With regard to Mr. Vaught's shortness of breath,
10 Doctor, I would like to refer you to Defendant's Exhibit 760.
11 These are records from the University of Missouri, Columbia,
12 regarding some treatment that James Vaught had. Let me see
13 if I can find my reference first here. These records cover
14 quite a period of time but referring you first of all to a
15 record in January of '78, is there any reference in there,
16 this would have been before the spill, any reference in there
17 to whether Mr. Vaught has any anxiety problems or nervousness
18 or anything of that nature?

19 A. Well, this refers to a visit and the mother told
20 the doctor that he had a deep cough and that it had been
21 present for two months and that it followed a viral upper
22 respiratory infection. There is a note at the bottom of this
23 page that the mother is quite concerned about worrying about
24 the son's worrying. Some cough medicine was prescribed.

1 Q. And, of course, that was prior to the spill, I
2 understand, by a year or so. I want to now refer you to a
3 record in there of October 30th of '83 which would have been
4 before, of course, this pulmonary lung function test was done
5 and let me see if I can't get you a specific reference. I
6 thought I had it here in my notes and I don't see it. It
7 should be page A8 of those records, I believe?

8 A. I have it.

9 Q. Do you have it?

10 A. Yes, sir.

11 Q. Let me move this back so I can get that out of the
12 way for a moment. Would you read that record, not read it
13 but read it to yourself, Doctor, would you please? I believe
14 there is a record that follows of November 2, 1983, that
15 deals with that also. If you would take a look at that also,
16 please?

17 A. Yes.

18 Q. Now, in those records is there a reference to Mr.
19 Vaught being put on a Holter monitor?

20 A. Yes, there is.

21 Q. And what is that, sir?

22 A. That is a device that records the electrocardiogram
23 over a prolonged period of time, 12 or 24 hours, and it is
24 used to determine if there are any irregularities in the

1 heart rhythm.

2 Q. And while he was on that Holter monitor, did he
3 have complaints of shortness of breath as reflected by that
4 record?

5 A. Well, I don't see the Holter monitor results but
6 his only complaints I note in these few pages are these
7 fainting spells for which the Holter monitor was applied and
8 there is a notation on page A11 about abdominal cramps.

9 Q. Do you have page A18 or A20 there? I believe that
10 has the results of the Holter monitor.

11 A. Yes. I have A18 and the interpretation is on page
12 A20.

13 Q. Yes.

14 A. In which the narrative summary states there was no
15 correlation between the electrocardiographic findings and the
16 symptoms of which he complained nor was there any
17 irregularity in heart rhythm.

18 Q. And were there complaints of shortness of breath
19 while he was being monitored?

20 A. Yes. There is a notation on page A11 of the last
21 entry says one episode of shortness of breath during the
22 monitoring.

23 Q. Uh-huh. And if you would turn to page A25 of those
24 records again dealing with the impressions as a result of the

1 Holter monitor and complaints that he had during that period
2 of time?

3 A. Yes. I have that.

4 Q. And if you would review that for us please,
5 Doctor. Just read it to yourself, please?

6 A. Well, the conclusion of the physician preparing
7 this evaluation is that there was no objective evidence of
8 any abnormality based on the Holter monitor results or any of
9 the other records they reviewed and for completeness sake,
10 suggest an electroencephalogram. That is part of the routine
11 procedure in working up or evaluating people that complain of
12 fainting spells. But the doctors here in this report comment
13 that they don't expect that that would be particularly
14 informative.

15 Q. Is there any reference to hyperventilation in the
16 findings there, Doctor?

17 A. Well, one of the explanations that is offered for
18 the fainting episodes is episodes -- possibly episodes of
19 hyperventilation.

20 Q. All right. But there was no actual finding that he
21 hyperventilated at that time while being examined with the
22 Holter monitor?

23 A. Well, the monitor -- that would not be identifiable
24 on the Holter monitor and particularly if the patient

1 interprets those episodes of periods of breathing difficulty,
2 then perhaps it did occur and that might have been the event
3 corresponding with the episode of breathing difficulty that
4 did occur when he was being monitored.

5 Q. Of course, if someone observed him hyperventilating
6 while he was on the machine, that could be recorded, could it
7 not?

8 A. That would be noted, yes. The symptoms that
9 occurred while he was under the monitor are those that he,
10 the patient, actually reports, not that someone happens to
11 observe.

12 Q. Can hyperventilation, Doctor, result in a feeling
13 of shortness of breath?

14 A. Yes, indeed. And it can make you dizzy and make
15 you feel like you are passing out.

16 Q. Doctor, I want to show you yet another record
17 dealing with this same topic that that one dealt with except
18 at a different hospital, Defendant's 765. These are records
19 again of James Dean Vaught from the Audrain Medical Center
20 and let me find a reference here for you. Page U95, Doctor.

21 A. My records only go as far as U59.

22 Q. Do you have U54 there? Well, let me see.

23 A. Yes.

24 Q. You are looking at page what of those records,

1 Doctor?

2 A. U4.

3 Q. All right. And do these records reflect another
4 Holter monitor evaluation in 1983, the latter part of 1983,
5 for James Vaught?

6 A. Yes. This is a very detailed summary of a
7 hospitalization and includes -- or a visit and includes
8 reference to prior medical workups.

9 Q. All right. And was another Holter monitor done at
10 this time?

11 A. Yes.

12 Q. And was there any experience noted in the Holter
13 monitor that was done at this time of hyperventilating in the
14 course of that?

15 A. There is reference to an episode of light
16 headedness but he does not specifically state in the summary
17 about hyperventilation.

18 Q. As a result of this examination, though, and the
19 complaints that he had that it occurred during the Holter
20 monitor, was there any tie-in between the complaints and the
21 findings on the Holter monitor again?

22 A. Well, the doctor who prepared this detailed summary
23 stated in his description of the course of events that
24 occurred in the hospital that the workup was essentially

1 negative and he ascribed the complaints and the symptoms to a
2 chronic anxiety syndrome.

3 Q. The reference to dizzy spells in here, did the
4 doctor express an opinion with regard to what they would be
5 suggestive of?

6 A. Well, I think he was unable to identify any
7 specific cause which is why he arrived at the impression that
8 anxiety was a major factor.

9 Q. And is hyperventilation associated with anxiety or
10 can it be, Doctor?

11 A. Intimately.

12 Q. And this hyperventilation, I think you told us, can
13 be the cause of a feeling of sensation of shortness of
14 breath?

15 A. Yes.

16 Q. Now, Doctor, you still have Defendant's 760 there,
17 do you not?

18 A. Yes.

19 Q. Those are the University, or, I believe, yes, the
20 University of Missouri records. Would you turn to page All
21 of those records?

22 A. Yes, sir.

23 Q. Does that involve a November 2, 1983, visit?

24 A. Yes.

1 Q. And at that time, this is now November of '83, it
2 would be a few days before the Carnow 2 spirometry --

3 A. Yes.

4 Q. -- was done, is that correct?

5 A. Yes, sir.

6 Q. At the University of Missouri at that time, in that
7 record, is there any complaint of shortness of breath?

8 A. Well, not in the initial information on page All,
9 no. No mention of it.

10 Q. Let me see if I can find my reference in my note
11 that says that. Let me see if I can find -- Let me see if I
12 can find what I have reference to, Doctor. I am sorry, I
13 seem to have jumbled my notes with the records here. Does
14 that deal with the November 2 of '83 -- Yes, here is what I
15 had reference to on All. Notes taken at the time of that
16 examination. Is there a reference to complaints of shortness
17 of breath at any time?

18 A. There is a handwritten comment in the middle of the
19 page that says hit with a baseball bat years ago. SOB for
20 five years off and on.

21 Q. Shortness of breath?

22 A. For five years off and on.

23 Q. That is the second page of what would be the first
24 page of that record from November of 1983?

1 A. Yes, sir.

2 Q. Now at trial -- November of '83 then five years off
3 and on would take you back to when?

4 A. Well, 1978.

5 Q. 1978. And Mr. James Dean Vaught testified at trial
6 that his, he first got shortness of breath in 1984. Does
7 that correspond with that note there, Doctor, what he told
8 the doctors on that occasion in 1983?

9 A. The on and off five year period would take him back
10 obviously much further.

11 Q. All right. And if Mr. Vaught had anxiety syndrome
12 and occasions of hyperventilation, was worrying as indicated
13 by his mother back in '78, do all of those result in
14 complaints of shortness of breath and be in accord with your
15 inability to find any physical evidence to account for the
16 shortness of breath from the lung function test, the physical
17 exams and what have you?

18 A. It more than supports the view that there is no
19 organic basis for the breathing complaints that this man
20 has. Obviously not only was he tested for lung conditions
21 but for lots of others and no abnormalities of any organ
22 systems were identified. So someone with multiple complaints
23 involving many organ systems and all of them turn out to be
24 normal leads one to the inevitable conclusion that these are

1 related to anxiety or worry or nervousness but not to
2 significant disease.

3 Q. Now, Doctor Cugell, there is also on the symptom
4 dot charts of Doctor Carnow in addition to this shortness of
5 breath complaints -- and, incidentally, there is only one dot
6 on there. It is not for anything before that 1984 exam. It
7 is just that one time. There is also a dot for chest pain
8 associated with the Carnow 1 exam and, first of all, I would
9 like to report to you what was said by James Vaught in the
10 Carnow 1 exam about chest pain. Let me find my record here.
11 With regard to the pulmonary review of systems, Mr. Vaught
12 denied cough and said he was able to exercise without
13 limitation. By shortness of breath he denies wheezing.
14 Under cardiac, though, there, however, appeared he has
15 occasional sharp chest pain with exercise and as I indicated,
16 there is a dot under the symptoms of pulmonary,
17 cardiovascular pulmonary. Doctor, is that description enough
18 to, in your opinion, make any type of a diagnosis of any type
19 of an abnormal condition from any source?

20 A. Well, at the most it might prompt you to
21 investigate whether there was any organ abnormalities to
22 account for it and that has been done. So I think the
23 combination of multiple negative laboratory tests and the
24 vague complaints on one occasion as you have described it

1 hardly justifies any kind of a diagnosis and I don't think
2 that that represents disease in any way, shape or form.

3 Q. Would you inquire as to the frequency of this if
4 you were trying to get more information about it to determine
5 if there was anything to it? The frequency, when it started,
6 how long it lasts, those types of things?

7 A. Well, those are the standard qualifications that
8 have to be investigated with respect to any complaints that a
9 patient makes so those would be essential.

10 Q. And without doing that, is there any way you can
11 make anything out of such a complaint and put it in any
12 category as to what it represents or doesn't represent or
13 what caused it or didn't cause it?

14 A. Well, especially in an active 18 or 19 year old
15 person, I think I would be reluctant to encourage his
16 dependency and anxieties by concentrating on a vague and
17 uncertain complaint of that sort.

18 Q. Now, Doctor, you again have those University of
19 Missouri records in front of you. Would you turn to page 34,
20 that is Defendant's 760?

21 A. Yes.

22 Q. If I am correct this time in my notes, is that a
23 record of July 8, 1982, when he was in for a right patella
24 complaint, that is a kneecap, problem with the kneecap?

1 A. These are some nurse's notes of a hospitalization
2 where an orthopedic procedure was done.

3 Q. And was a review of systems done at that time?

4 A. Well, on page 35 there is a review of the
5 respiratory complaints.

6 Q. All right. And this was July of '82 which would
7 have been --

8 A. July 8th of '82.

9 Q. Right. A month and a half maybe, five weeks before
10 this Carnow 2 or Carnow 1 exam?

11 A. Correct.

12 Q. And was there any complaints then about this chest
13 pain?

14 A. There is absolutely nothing mentioned about chest
15 pain.

16 Q. Well,, is there a review of the pulmonary system?

17 A. It specifically states that he denied all the
18 respiratory symptoms that he asked him about.

19 Q. Which included what?

20 A. Shortness of breath, cough, cold, spit, infections,
21 smoking and then cardiovascular just above he denied any
22 problems there as well.

23 Q. So, this is then a month or so before seeing Doctor
24 Carnow. Would you look at page, I believe it is, 38 of those

1 same records he was back and you see the University of
2 Missouri again in connection with this same kneecap
3 complaint. I believe the date is September 14, 1982, less
4 than a month after he saw Doctor Carnow when he complained
5 about those chest pains. Do you have that record there?

6 A. Well, this is a hospital registration form dated
7 September 17th of '82.

8 Q. All right. Let me check my notes here again. Page
9 72 of those records. Do you have those, Doctor?

10 A. Page 72 is nurse's notes again, information form.

11 Q. And do they refer to respiratory or cardiovascular
12 questions that were asked?

13 A. Page 73 does.

14 Q. All right. And what do those say, Doctor, with
15 regard to any --

16 A. Well, again under the cardiovascular, there is no
17 history of heart problems, no shortness of breath, no chest
18 pain. No chest pain. Under respiratory, it says doesn't
19 smoke. No history of infections, cough, no sore throat. So,
20 there is a large number of negatives here.

21 Q. The isolated complaints, Doctor, in view of -- and
22 I would like you also to assume upon physical examination
23 both Carnow 1 and Carnow 2 and I think you have seen the
24 Northwestern exam, that the physical examination of the lungs

1 were normal and there was no findings of any abnormal breath
2 sounds, no findings of anything, any objective findings at
3 all. Assuming all of that and the records that you have
4 seen, do you have an opinion as to whether this complaint of
5 chest pain related by Mr. Vaught, Doctor Carnow on this
6 occasion in August of 1982 is of any medical significance
7 with regard to his pulmonary lung functions and pulmonary
8 system?

9 A. Yes, and that complaint that you described has no
10 medical significance whatsoever.

11 Q. Doctor Cugell, that is all the questions I have
12 about Jim Vaught at this time. And I am going to talk about
13 some more plaintiffs here but all of the plaintiffs that I
14 have had you testify about today are the only ones that have
15 dots on any of Doctor Carnow's charts where he found an
16 abnormality in a pulmonary lung function test and I have
17 prepared a chart here, I think, with your assistance which I
18 would like to show you and have marked here first.

19 This has now been marked as Defendant's 1737 and
20 can you identify this for us, Doctor?

21 A. Yeah. This is a summary of the patients in whom
22 one or another of the multiple lung function tests that were
23 performed had one or another abnormality and in the final
24 column is my comments about the results of the abnormality or

1 the significance of the data.

2 Q. And of the 65 plaintiffs in this case, these are
3 the only ones with pulmonary lung function dots on Doctor
4 Carnow's charts anyway, is that correct?

5 A. That is so I understand.

6 MR. MUSGRAVE: I would like to offer this into
7 evidence, Your Honor.

8 MR. CARR: Approach the bench, Your Honor?

9 THE COURT: Sure.

10 (Bench conference had out of the hearing of the
11 jury.)

12 MR. CARR: Your Honor, this is an argument of the
13 witness's findings. It is a summary of his testimony and I
14 object to it.

15 MR. MUSGRAVE: Well, if he identifies it as
16 accurately, does it accurately reflect, do you have any
17 problem with the fact, Mr. Carr, that it reflects the dots
18 that Doctor Carnow put up there?

19 MR. CARR: I haven't checked it but if it does, I am
20 quarreling with the argument that he is making on here. The
21 summary of testimony that you have on here. That is what my
22 objection is to.

23 MR. MUSGRAVE: It is not argument. It either is in
24 fact a brief summary of his testimony or it is not.

1 MR. CARR: Well, it is a brief summary of his
2 testimony which is, in fact, argument. He says poor effort.
3 That is an argument of his. That is a description of his.
4 He says low because FVC much better than predicted. That is
5 an argument of his. It is a summary of his. All normal
6 proper. That is an argument of his. That is a summary of
7 his. Non obstruction due to 30 years of smoking. It is an
8 argument of his. What you have done here is written a
9 summary chart form.

10 MR. MUSGRAVE: May I respond, Your Honor? It is
11 not argument. This is his opinion that he has already
12 expressed. If Mr. Carr chooses to challenge his opinion,
13 obviously that is what cross examination is for. If Doctor
14 Cugell says that this is a brief summary of the opinions that
15 he has testified to, Mr. Carr may argue with it but it is not
16 argument as put on this exhibit. This trial is going to go
17 on for some time with trying to review this medical
18 evidence. The only way that we can get back into this type
19 of evidence with any hope of bringing back to the jury to
20 some extent what has happened six or seven months ago or a
21 year ago is to have exhibits like this where they have pulled
22 together in this instance a situation where these are the
23 only people with pulmonary lung function dots. To pull this
24 together in a brief exhibit so we can use them, of course, in

1 argument. It is not argument. This is testimony. If he so
2 identifies this as testimony, it is relevant. It is
3 material. It would be aiding the jury and unless Mr. Carr
4 can tell me that Doctor Cugell hasn't testified to any of
5 these things that are briefly summarized in this column, I
6 can't understand what the basis for his objection is.

7 MR. CARR: I will say it again. It is a summary of
8 his testimony and it is argument.

9 THE COURT: I don't think that part of it should be
10 on. The rest of it, assuming that it corresponds with the
11 dots and everything would be proper, so I think you are going
12 to have to change it before you give it to the jury so white
13 it out or cut it out.

14 MR. MUSGRAVE: It is of no significance really. I
15 will just have him testify in summary fashion, Your Honor.

16 MR. CARR: That would be repetition, Your Honor. He
17 has already summarized for each of these persons. He has
18 already given his opinion as to each of these persons. It is
19 repetition and it is on something that he has already
20 testified to at great length. He has already stated all of
21 these things in essence already. It is repetition.

22 MR. MUSGRAVE: Well, Your Honor, I think that
23 counsel is entitled to summarize appropriately and briefly at
24 an appropriate break in the course of testimony and we are

1 moving from the pulmonary lung function test abnormality into
2 areas where there are none to the extent that it is
3 repetitious. It is going to be very minimally repetitious.
4 Only pulling together things. It helps clarify certain facts
5 with regard to how many of these people have been alleged to
6 have abnormal lung function tests. What families they come
7 from. To categorize generally his findings and I think it is
8 totally proper and it is not repetitious in view of the fact
9 that it is more or less a brief summary where he has an
10 overview of these seven people that were claimed to have how
11 much. In fact, he agrees or disagrees and briefly again he
12 is stating briefly what accounted for those things.

13 THE COURT: I think it is repetitious. I think his
14 testimony has been pretty clear. I really don't think that
15 there is a need for any complication or any need for a
16 summary as you are saying. I think his testimony has been
17 pretty clear up to this point. Both before the break that he
18 took and after. I would sustain the objection.

19 MR. MUSGRAVE: It has been two months since he
20 testified, Your Honor.

21 THE COURT: I know that. If and when you cut off
22 this last column, I will admit this. I don't see any problem
23 with it except for that, so if you wish to use an excised
24 copy, I will admit that.

1 MR. MUSGRAVE: I intend --

2 MR. MUSGRAVE: That doesn't do me any good,
3 Judge. So I will let the exhibit stand and just stand as
4 part of the record as being overruled but just so I can
5 clarify the Doctor for the time here, I wouldn't want to go
6 forward asking of these seven people how many he felt had in
7 fact a true abnormality in their pulmonary lung function.
8 Without going into it but just of the seven, how many does he
9 agree with. Just to summarize in that fashion without going
10 into it in detail.

11 THE COURT: I will allow you to do that.

12 (The following proceedings were had in the hearing
13 and presence of the jury).

14 Q. Doctor Cugell, of these seven people that had
15 pulmonary lung function dots on Doctor Carnow's charts that
16 we have now talked about, how many of them in your opinion in
17 fact had some type of pulmonary lung function test
18 abnormality?

19 A. If I understand the question correctly, you are
20 referring to abnormalities of significance that indicate some
21 site of lung disease?

22 Q. Yes.

23 A. Well, I haven't reviewed all of these recently. I
24 think Dorothy Jennings has a repetitive reduction that is --

1 Q. Doctor, if you can without going into each
2 individual. You can review what you have in front of you if
3 that is of assistance to you. I know it has been some time
4 since you testified but if you just give us the number of the
5 -- as I say seven, Doctor Carnow says have pulmonary lung
6 function test abnormalities?

7 A. One.

8 Q. One?

9 A. Yes.

10 Q. And would that be Dorothy Jennings?

11 A. Yes. Excuse me. I will add a second. Linda Kemner
12 has an abnormality, too.

13 Q. All right. And in a population of 65 people taken
14 from any source, would you expect to find something like
15 that?

16 A. Well, depends on the age and smoking habits and
17 other things, that is very likely.

18 Q. Okay. Then moving on, Doctor, to the next
19 plaintiff and hereinafter we will not be dealing with
20 pulmonary lung function tests that were found abnormal and I
21 will try and speed up the process of going through those to
22 the extent that they are necessary to play a role in your
23 opinions. I would like to talk about Greg Ballard first of
24 all. Now, Greg Ballard, was not one of the people you

1 examined, is that right, Doctor?

2 A. That is correct.

3 Q. Now, Greg Ballard has a dot on Doctor Carnow's
4 charts only for X ray. An allegation that there is an
5 abnormal X ray. Nothing under pulmonary cardiovascular
6 system for symptoms and no cardiovascular system physical
7 examination dots for any of the spirometries that were ever
8 done, just X ray. And that X ray was the Northwestern X ray
9 and have you reviewed that X ray, Doctor?

10 A. Yes, I have.

11 Q. And let's take a look at that, if we could. We
12 have a shadow box here. Doctor, we now have had the Court
13 Reporter mark as Defendant's 1738 the X ray that was done in
14 connection with the Northwestern exam of Greg Ballard, is
15 that correct, in 1983?

16 A. Yes, sir.

17 Q. All right. Now, have you reviewed the radiology
18 report on this, on this X ray, the radiologist that read it?
19 Have you reviewed his report?

20 A. This was at the Moberly Medical Center?

21 Q. Yes.

22 A. I believe I did. I don't recall specific
23 findings.

24 Q. Handing you now what has been marked as -- what is

1 that, Doctor? Defendant's --

2 A. 1739.

3 Q. Is that the report of the radiologist at Moberly
4 Regional Medical Center where this X ray was taken and his
5 interpretation originally of this 1738 that is now up on the
6 shadow box, is that correct?

7 A. Correct.

8 Q. And would you review for us then, Doctor, your
9 findings with regard to the X ray?

10 A. Well, the chest X ray is film technically passable
11 but not much better than that. The heart shadow is ample but
12 probably normal. The skeletal structures, the ribs, the
13 shoulder blades and so forth are normal. The diaphragm which
14 separates the chest cavity from the abdominal cavity is
15 normal in location and in contour and everything about this
16 film is quite okay. However, at the bottom of the right lung
17 over here in an area that has been marked with a pencil,
18 someone has raised a question of there being some shadows
19 that are abnormal. There is also a rather bright little line
20 here and the radiologist or Doctor Kays who interpreted this
21 chest X ray film raised the question of pneumonitis at the
22 right base meaning that perhaps he is seeing some
23 inflammation of the lung tissue in this region. He is
24 unclear. He raises the question and because of the question

1 recommends that additional chest X ray films be taken.

2 Q. And to interpret the significance, if any, Doctor,
3 of this Northwestern X ray, would it be helpful to see X rays
4 that had been taken before and even after the X rays we have
5 here in question?

6 A. Well, quite so and he has included that in his
7 interpretation by recommending a followup film.

8 Q. What about an X ray taken before? Would that be of
9 any assistance?

10 A. That would be very useful. If it indeed was no
11 different than the current film, that would minimize the
12 significance of the questionable shadow.

13 Q. We have the X ray that was done in 1982 at the
14 Carnow 1 exam and let me now have that marked and we will
15 take a look at that. Handing you what has been marked as
16 Defendant's 1740. This is the X ray of Greg Ballard done for
17 Doctor Carnow on August 28, 1982, as indicated in the upper
18 right-hand corner, correct?

19 A. Yes, sir.

20 Q. And looking at that then, Doctor, tell us what you
21 see and what significance, if any, this X ray has when read
22 in comparison with the one that we just had up there, the
23 Northwestern X ray?

24 A. Well, the overall impression is that it differs

1 from the previous film a little bit in the technical
2 factors. That is, it is a little darker. It is taken with a
3 higher energy X ray beam or it was developed for a longer
4 time or for various technical reasons, it is a little darker
5 than the previous film. My impression of this chest X ray
6 film is that it is perfectly normal. That the shadow
7 previously noted at the bottom of the right lung is really
8 not visible but in order to make a better judgment, we should
9 look at the two of them simultaneously. We don't have two X
10 ray view boxes but I am going to turn this one around so we
11 are looking at the left side, so we are looking at the same
12 side of the chest on both of these X rays. So we are now
13 comparing the bottom of the right lung of the Moberly film
14 with the bottom of the right lung of the Carnow, excuse me,
15 the bottom of the right lung of the Moberly film which is
16 here and the bottom of the right lung of the Carnow film
17 which is there. The blacks and whites are stronger on this
18 film. There is a higher contrast. The higher contrast tends
19 to wash out this questionable shadowing that was noted by the
20 radiologist at Moberly. Given the difference in technical
21 factors, I think this infiltrative process that concerned him
22 is identical. That there really is no difference. The one
23 signal difference is this little sharp line here on these two
24 films.

1 Q. But with regard to what was, I guess, called in the
2 Northwestern X ray, questionable phenumonitis?

3 A. Yes.

4 Q. Which is why Doctor Carnow put a dot up here. Does
5 the Carnow 1 X ray help to clear up whether in fact it is or
6 isn't?

7 A. I think that the availability of the earlier film
8 and its comparison as we are doing now would clearly
9 eliminate pneumonitis as being present.

10 Q. Why is that?

11 A. Because this is given the difference in the
12 technical -- given the technical differences in the film,
13 they are otherwise identical.

14 Q. I see. Would it be helpful to even see a more
15 recent --

16 A. That would be further support or confirmation that
17 this is no difference. That it is unchanged, that it is not
18 an infection.

19 Q. What is pneumonitis, Doctor?

20 A. Well, that is a general term for inflammation of
21 the lung tissue.

22 Q. And if an X ray in fact showed pneumonitis, if in
23 fact that -- this X ray right here, the Northwestern X ray,
24 that was, in fact, pneumonitis, does the picture give you any

1 idea of the degree of it, if in fact it was pneumonitis?

2 A. Well, if it is visible at all on a chest X ray
3 film, that means that there is certainly enough of a region
4 of lung involved to create a shadow on the film so there
5 certainly must be a substantial amount of lung tissue
6 involved.

7 Q. And would you expect some type of clinical
8 objective symptoms to be found upon examination, if this were
9 the case?

10 A. I certainly would.

11 Q. And what type of symptoms would be expect to be
12 present with, if in fact this represented pneumonitis as
13 opposed to a difference in the technique of the X rays?

14 A. Well, I would expect considerable symptoms in the
15 way of cough and chills and fever and temperature elevation
16 and other signs of substantial lung infection.

17 Q. Now, you have reviewed the physical examination
18 that was done of Greg Ballard at the time this X ray was
19 taken by Doctor Webster, have you not?

20 A. Yes, I did.

21 Q. And were there any such findings made?

22 A. None at all.

23 THE COURT: Mr. Musgrave, is this a good point to
24 break?

1 MR. MUSGRAVE: I think it is, Your Honor, yes.

2 THE COURT: We will adjourn at this time. We will
3 resume again tomorrow morning at 9:30. I would like to
4 remind you as I do on any overnight break that you are not to
5 read, listen to or watch anything about this case in
6 particular or subject matter in general in any of the media,
7 print or electronic. Thank you for your attention and
8 cooperation. Court is adjourned.

9 COURT ADJOURNED:

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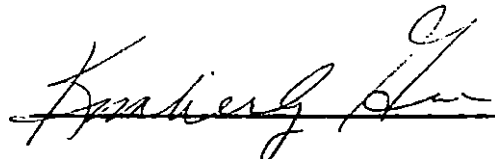
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT) SS
3 COUNTY OF ST. CLAIR)
4

5 I, Kimberly Ganz, one of the Official Court Reporters, do
6 hereby certify that the foregoing transcript is a true and
7 correct transcript of the proceedings had in the
8 above-entitled cause.

9 Dated this 15 day of April, 1986.

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13 KIMBERLY GANZ
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT) SS
3 COUNTY OF ST. CLAIR)
4

5 I, RICHARD P. GOLDENHERSH, one of the Judges in and for
6 the Twentieth Judicial Circuit, do hereby certify that the
7 foregoing transcript is a true and correct transcript of the
8 proceedings had in the above-entitled cause.

9 Dated this 15 day of April, 1986.

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HON. RICHARD P. GOLDENHERSH

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