

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

 JOAN SHIEL, as Personal : OCTOBER TERM, 2006
 Representative for the :
 Estate of RICHARD SHIEL :

vs

:
 :
 HONEYWELL INTERNATIONAL, :
 INC., successor in interest :
 to Bendix Corporation : NO. 2255

MARLENE REED, as Personal : NOVEMBER TERM, 2006
 Representative for the :
 Estate of FREDERICK LEWIS :

vs.

:
 :
 HONEYWELL INTERNATIONAL, :
 INC., successor in interest :
 to Bendix Corporation : NO. 1720

Room 253, City Hall

Philadelphia, Pennsylvania

 May 28, 2009

BEFORE: THE HONORABLE STEPHEN E. LEVIN, J.

 PHASE II
 EXCERPT
 CROSS-EXAMINATION
 OF
 RAYMOND D. HARBISON, M.D., Ph.D.

REPORTED BY: JANET M. MANSFIELD, RPR
 OFFICIAL COURT REPORTER

APPEARANCES:

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JOSEPH J. MCGILL, ESQUIRE
Counsel for the Plaintiffs

KEVIN E. HEXSTALL, ESQUIRE
SCOTT F. GRIFFITH, ESQUIRE
Counsel for the Defendant

CROSS-EXAMINATION

BY MR. WEINGARTEN:

Q. Dr. Harbison, just as defense counsel were brief in presenting your direct examination, I'll try to be equally as brief in cross-examining you, because I know you're anxious to get back to Tampa.

A. Thank you.

Q. How long have you been in Philadelphia?

A. I came Tuesday, Tuesday night.

Q. So you've been here since Tuesday evening.

Have you been spending time in the offices of defense counsel, Rawle & Henderson?

A. I have.

Q. And were you there this morning, Doctor?

A. I was.

Q. Doctor, while you were with the lawyers at Rawle & Henderson, whether it was this morning or Wednesday or even Tuesday evening, did they show you any other testimony from this case? It's all on video.

A. No, sir, I didn't see any.

Q. You have not seen the videotape testimony of Dr. Frank or Dr. Spector?

A. No, sir.

Q. Did they tell you that they took videotape testimony last night for about two and a half hours or so of an epidemiologist, a Dr. Jason Christie?

A. They told me they were going to before I left. I left around 5:00 or so.

Q. Have you ever seen the videotape of Dr. Christie's testimony?

A. I have not.

Q. Have you seen the written transcript of either Dr. Christie or Dr. Spector or Dr. Frank?

A. I have not.

Q. So when you've testified about the methodology utilized by Dr. Frank, for instance, you didn't have the benefit of seeing what Dr. Frank testified to this jury his methodology was, did you?

A. I did not.

Q. So then you don't know that Dr. Frank testified that his methodology in forming his opinions was based on a review of the medical records, a review of the latency period, a review

of the plaintiffs' depositions, a review of the epidemiological literature about chrysotile and disease and brakes and disease, a review of the medical literature about chrysotile and disease, Dr. Frank's own clinical investigations in the field, and his own personal research?

You didn't know that that was the methodology that he used?

A. Well, I didn't have any of that, so I wasn't aware that he used any methodology.

Q. I see. Okay. Well, now, Dr. Christie, who you were told gave videotape testimony last night for the defendant, is an epidemiologist; you're aware of that?

A. I am not.

Q. You're not aware that Dr. Christie is an epidemiologist?

A. I don't know Dr. Christie.

Q. I see. But you, Dr. Harbison, are not an epidemiologist?

A. I am not an epidemiologist. I use epidemiology to practice toxicology, but I am not.

Q. I'm going to represent to you, Dr. Harbison, that Dr. Christie last night gave testimony on at least a half a dozen of the

articles that you've relied upon in your report, and those were the ones by -- I'm trying to remember -- Teschke, Agudo. There were half a dozen that you relied upon?

A. Yes, sir.

Q. And rather than take your time and the jury's time in asking you questions about those six articles, I'll wait until tomorrow or whenever -- I think tomorrow when defense counsel plays the deposition testimony of Dr. Christie, so the jury can see the questions that I have about those articles.

I think that will speed things along, wouldn't you agree?

A. Well, I don't know. I'll certainly allow you to do that.

Q. I would hope so.

(Laughter.)

Doctor, you're not surprised, are you, that the expert witnesses who testify in this case for either side charge the lawyers for the time they take, are you?

A. No. I would expect to be paid for my time as well as others.

Q. Sure.

Just as Dr. Spector, Dr. Brody or even Dr. Frank would be paid for their time. It's not an offensive concept, is it?

A. It's not an offensive concept, and I would hope that we would all get paid for our work.

Q. Of course.

And, Doctor, without going into specifics, because I don't really want to pry into your financial relationship with defense counsel, I know that in the past, you've testified that you've made about 15 to 20 percent of your income from litigation; is that correct?

A. I think it's probably a little more than that now. It varies year to year. I would say it's probably 20, 30, somewhere around there, percent.

Q. Ball park, that's fine, Doctor.

Doctor, as far as I know, you've never testified in court on behalf of a plaintiff such as Mr. Lewis and Mr. Shiel. Am I still correct about that?

A. You are not.

Q. You have testified for plaintiff?

A. I have.

Q. In an asbestos case?

A. No, not in an asbestos case. No.

Q. And you have testified -- and I think this is in your curriculum vitae, Doctor -- at various times in the past on behalf of a number of different industries or companies, corporations, and let me see if I can tick off some of them. Shell, Texaco, Exxon, Dow Chemical, Monsanto, Occidental Oil, Hooker Chemical, Velsicol, companies like that, you've provided consultation for work for them in the past?

A. I thought the question was testifying or consultation.

Q. I'm sorry. I hope I said consultation.

A. Sure. I provided consultation on a whole variety of issues, developing new products, growth promoters, pesticides, yes.

Q. And always to industry?

A. I'm sorry?

Q. Always to industry, to companies, manufacturers, corporations?

A. I'm sorry. I didn't hear the question.

Q. You do consulting to corporations?

A. I consult to corporations. I consult to individuals. We have a clinic, probably see a couple of hundred individuals a year. So we do

both.

Q. Doctor, I noted that when Mr. Hexstall was asking you about some of your teaching experience, you named a number of courses and classes and groups that you teach.

I see there's one that kind of attracts my attention to your curriculum vitae. It looks like at one time, you participated in teaching a course for the American Bar Association concerning the role of expert testimony in environmental litigation.

Did you teach that course or help teach that course?

A. I did it, I believe, once or twice. But most of the courses that I teach are the primer for the technically challenged for lawyers.

Q. So when you go to teach these courses for the American Bar Association about how to be an expert witness, you don't tell them things like how to dress or where to stand in the courtroom, that kind of stuff? You don't do that?

A. Oh, I don't teach them how to be an expert witness.

My teachings are about the scientific method and about risk assessment, evaluating risks,

about the difference between public policy and toxicology and those sorts of things.

Q. Doctor, was there anything that you have reviewed either that you were given by any of the defense attorneys or that you found on your own to make you think that Mr. Lewis did not work with Bendix brake products for a considerable period of time?

A. Is there anything that I found that would lead me to believe that he did not?

Q. That he did not, that he was not exposed and did not work with Bendix brake products as he testified to in his deposition.

A. Well, I think that the deposition testimony was somewhat vague. So I don't -- I don't know how long or how many -- I don't know the duration and frequency.

Q. You don't think he testified that he worked with Bendix brakes over the course of 20 years at Dyke Motor Supply?

A. Working with them, meaning that he put the lining on or meaning that he sold them or ran the store?

Q. Well, when was the last time you reviewed his testimony?

A. A couple of days ago.

Q. So you don't recall the specifics of what he said?

A. I recall him talking about putting the linings on in the first year or so and then working in the shop, which I think he described as a machine shop-like operation. Yes, I recall that.

Q. Anything that you've been shown, Dr. Harbison, to cause you to doubt that Mr. Shiel, the other plaintiff in this combined lawsuit, worked with Bendix products for his backyard mechanic years of exposure the way he testified to, anything that would cause you to doubt that?

A. He testified about that. That's all the information I have.

Q. You used a phrase, Dr. Harbison. I wrote it down because I wanted to make sure I got it correct.

When you were talking about Mr. Shiel now, not Mr. Lewis, you said that his exposure because of his backyard mechanic work with the stock cars and what he did was -- and this is where I wrote quotations around it; you tell me if it was right or wrong -- you said it was orders of magnitude below background.

Did I write that down right?

A. You did.

Q. Are you saying that Mr. Shiel, who did I think you said 30 brake changes -- I think my note says about 50 or 55, and the jury will remember whatever it is that they recall -- but somewhere between 30 and 55, perhaps, brake changes, are you saying he did not have any more exposure than someone who never did a brake change?

A. No. I'm saying that if you put that into the context of the range of background exposures, he's orders of magnitude below the average.

So I took the average of background exposures and compared his to the background, and he'd be well, well below that, orders of magnitude below that.

Q. So when you say "the average," what do you mean by "the average"?

A. The average background exposure that individuals have who live in the United States.

Q. All right. So now you take that person with the average background exposure. Mr. Shiel, if he did not do one brake change in his entire life, would be in that background exposure, would

he not?

A. Well, yes, he would have been.

Q. So then you take an individual who is in the background, and then you add to that some number of brake changes, whether it's your number 30 or my number 55 or whatever number it is, and you say that he's now below the background?

A. Yes, sir.

Q. Okay. Well, then --

A. It's de minimis. The exposure is so small that it wouldn't add to the background level. If you looked at the average and you take the range, the level of exposure is so small, it's de minimis. It would make no significant contribution.

Q. Doctor, I know that you testified earlier that you've written, I think, four articles that had to do with asbestos out of the 160 or so articles that you've written.

I have to apologize to you. I only have two of them, and I quite frankly could only find three on your CV. But assume there's four. I mean I'm assuming. I just couldn't find the other one.

But it seems to me that of the two or three articles that I'm aware of, one of them has

to do with asbestos brakes, correct?

A. Correct.

Q. And one of them has to do with asbestos gaskets, correct?

A. Correct.

Q. And one of them I think has to do with asbestos brakes on airplanes?

A. That's correct.

Q. And I think the fourth one, is that asbestos in car clutches?

A. Clutches in seam sealant, that is, the undercoating.

Q. Now, in the two or three articles I was able to get my hands on, it appears that you have another coauthor who you wrote with on at least three of these articles, and that's Charles Blake; is that correct?

A. That's correct.

Q. And do you ever talk with Dr. Blake outside the writing of the articles context? Do you ever socialize with him or anything?

A. No, I don't.

Q. And do you know anything about him?

A. I know -- it's not Dr. Blake. He's Charlie Blake. But I know Charlie Blake. I don't

really have frequent contact with him, but I've certainly met Charlie.

Q. I've met him, too, Dr. Harbison.

Are you aware that Charlie Blake testifies fairly frequently for various defendants in asbestos litigation?

A. I knew he testified. I don't know about its frequency.

Q. Doctor, I want to talk to you -- I've already promised you I'm not going to ask you about the six articles that I asked Dr. Christie about last night until 9:30, because we're not going to do that today.

But I do want to ask you about one or two of the articles that you did mention that I didn't talk to Dr. Christie about, and the first one you talk about was the article by Goodman.

A. Yes.

Q. That was one of the articles that you based your opinion on, and, Doctor, this is what they call meta-analysis, and a meta-analysis, as I understand it, is where a researcher, an epidemiologist takes a number of papers that were previously out there in the literature, and he kind of or she kind of combines the results to get an

overall picture. Is that a good lay man's definition?

A. Well, I think it's not quite complete. It's more than just combining them. It's using the Hill criteria to sort out the various articles and the various data sets, relying upon some, not relying upon some, not relying upon some because the exposure information isn't complete or there may not have been a confirmation of morphology of mesothelioma.

So it's more than just putting them all together. It's looking at the quality and whether or not they're suitable for meta-analysis.

Q. I think Dr. Goodman and his colleagues reviewed a number of articles, and I think they ultimately decided there were seven of them that were, in your words, suitable for the meta-analysis; is that correct?

A. That's correct.

Q. As I add up the numbers, Dr. Harbison, it seems to me that there were only, in all the seven different studies, a total of 200 motor vehicle mechanics that was the subject of this report; am I correct?

A. That's probably about right, yes.

Q. A pretty small number?

A. It is a small number. But in those kinds of analyses, the statistical strength of those numbers is tested, and in their analysis, the power of that calculation was sufficient to rely upon that data.

Q. What they did in getting down to the seven studies that they ultimately considered is they reviewed some other studies, and they decided they were not worthy of consideration or inclusion, correct?

A. Well, they decided there were deficiencies that wouldn't allow them to meet the methodological standards that they had for evaluating the data.

Q. Well, one of the ones that they decided wasn't sufficient to include was a study by an author named Malker. Do you recall that?

A. Yes.

Q. And Malker came up with -- what's RR in epidemiological lingo? Do you know what RR is?

A. Relative risk.

Q. Well, I guess the higher -- again, I'm a layman and you tell me if I'm wrong. But the higher the relative risk, the more harm or hazard

or danger there is in a certain matter; is that correct?

A. It means that there is a greater likelihood that, in fact, that exposure could result in some -- in whatever the condition is you're looking at, in this case, mesothelioma.

Q. Okay. I think we're on the same wavelength, Doctor. So if the relative risk is 1.0, then there's no risk from it?

A. They're the same.

Q. If the relative risk is 27, then it's enormous compared to what you're looking at, correct?

A. Well, it's not just the relative risk, but it's the confidence interval around that relative risk. So it depends on whether or not the confidence interval gets below 1 or not, and, frankly, I don't remember the confidence interval for the 2.4.

Q. I didn't say it was 2.4.

A. I'm sorry?

Q. Did I say it was 2.4?

A. Yes.

Q. I said it was 27. I was giving you an example.

A. It's 27?

Q. No, it's not. I was giving you an example of 27.

A. I thought you were referring to Malker.

Q. Oh, but you're absolutely right. Your memory is terrific. Malker's relative risk, in fact, was 2.4?

A. Correct.

Q. And the authors decided that that article shouldn't be the subject of their analysis?

A. No. What they decided is that the dispersion of the variance around that data made it such that it was not statistically reliable because the confidence interval around that was too great.

Q. The bottom line was it had a relative risk of 2.4, as you had correctly stated, and they did not include it in the meta-analysis for whatever reason?

A. It's not whatever reason. It's because of the uncertainty in that number. It meant that number is not reliable. It may be 2.4, may be .9, it might be 5, but the confidence interval around that number made it such that the number has great uncertainty in it and, therefore, it's not reliable.

Q. And that's why it wasn't included?

A. That's correct.

Q. They also didn't include the report by Dr. Gustavsson, correct?

A. I don't remember the table, but yes, I'll agree with you.

Q. And he found two mesotheliomas in his study of brake mechanics?

A. I don't remember.

Q. Now, Doctor, this report from Dr. Goodman that you and I have been discussing and that you told us on direct examination that you relied on in forming your opinions and writing your report and giving your testimony -- I wanted to take a look -- according to the very end of the article, they have conclusions, and at the end of the Conclusion paragraph, they have about four lines of what they call acknowledgements.

Let me just read to you Dr. Goodman and his colleagues' acknowledgments of how this article came about -- and I'll just quote this -- "This research was funded primarily by Ford Motor Company, Daimler-Chrysler Corporation and General Motors Corporation. Some of the authors have testified as expert witnesses in litigation

regarding the potential health effects associated with brake repair."

Do you recall those acknowledgements appeared at the back of Dr. Goodman's article?

A. I do recall that. But that doesn't mean in any way that that data is not reliable. And it has been subjected to peer review. So people who have nothing to do with any of those entities or with the authors have peer reviewed it and determined that it was good or scientifically meritorious for publication.

MR. WEINGARTEN: Your Honor, I would ask to move to strike the latter part of the doctor's answer as being nonresponsive.

THE COURT: Overruled.

BY MR. WEINGARTEN:

Q. Doctor, irrespective of what you just volunteered for us when you answered my question, when it says that these authors have testified as expert witnesses in litigation, given the fact that they were funded by Ford, Chrysler and General Motors, do you think they testified on behalf of plaintiffs such as the late Mr. Shiel and the late Mr. Lewis, or do you think they testified on behalf

of defendants?

A. I think they testified about their data, as most of the testifiers that I know of would.

I don't testify on behalf of anybody. I testify about my results, about my investigation and the results of my investigation.

Q. But when you go back to Tampa, Doctor, you're going to send a bill to somebody, and it's pretty safe to say you're not going to send the bill to me, right?

A. Well, that's because you didn't ask me to testify or to investigate Mr. Lewis' or Mr. Shiel's claims. If I had, you probably wouldn't want my testimony.

Q. Now, Doctor, you gave us opinions earlier on that chrysotile doesn't cause disease, doesn't cause mesothelioma, correct?

A. It doesn't -- it's not associated with an increased risk for cause of mesothelioma.

Q. Now, Doctor, are you aware that there are other entities, whether they be agencies, organizations, governments, what have you, that disagree with your opinion about that?

A. Well, my opinion is based on science and based upon the scientific method. It's not based

on government proclamations or other entities' proclamations.

Q. Well, then let's go through some of that, Doctor, and see how they shape up.

You're familiar with the National Cancer Institute as part of the United States National Institute of Health?

A. I am.

Q. And are you aware, Doctor, that they recently came out with a statement that -- again, I'll quote this, Doctor -- "Studies evaluating the cancer risk experienced by automobile mechanics exposed to asbestos through brake repair are limited, but the overall evidence suggests there is no safe level of asbestos exposure"?

A. Well, that's what they say. But you have to remember that regulations protect; they do not predict. You can't use government statements or quotes or proclamations as reliable science for determining cause.

And those statements are made for public health purposes, and that is the precautionary principle is used so that people will safely use those products or take precautions when they're using those products.

So that's not a scientific basis, and the government doesn't have to have a scientific basis because it's regulatory and, again, regulations protect; they do not predict.

Q. And that's probably then why they go on to say "Although all forms of asbestos are considered hazardous, different types of asbestos fibers may be associated with different hazard risk"?

A. Sure.

Q. Doctor, you're also familiar with an organization called -- I call it NIOSH. But you're familiar with NIOSH?

A. I'm familiar with NIOSH. And as I stated earlier, I was the chairperson of the NIOSH study review commission or committee for about four years and served on it as an advisor for about eight.

Q. NIOSH stands for National Institute of Occupational Safety and Health?

A. It does.

Q. And it's something that is out there to help try to assure workplace safety for workers in the United States?

A. NIOSH is the research arm or does

evaluations of various data and does health -- I think they're called health hazard evaluations.

Q. And you're aware then, Doctor, that in 1975, NIOSH passed a regulation that recommended having warning signs in all brake repair areas?

A. I don't recall the date, but sure.

Q. Now, you're also familiar, Doctor, are you not, with the American Thoracic Society?

A. I am.

Q. That's not a government; that's a group of doctors and professors?

A. Well, it's a society or it's an organization. So it has various committees that come to various conclusions.

Q. And you're not a member of the American Thoracic Society, or are you, Doctor?

A. I am not. I've made presentations, but I'm not a member.

Q. Doctor, I know you were here in the afternoon and you heard some of Dr. Arnold Brody's cross-examination.

Were you here when he testified that the reason why he's not in court is because he was speaking for two days at the annual meeting of the American Thoracic Society in San Diego?

I just want to know if you heard that part or not.

A. I did not. I've never spoken for two days, but I have spoken for a half a day.

Q. Well, you're familiar then with the American Thoracic Society's document from December of 2003 called Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos?

A. Yes, I am.

Q. And then, Doctor, you are probably aware or you recall that the following statement is contained in that document -- and, again, I'll quote this for you, Doctor -- "Just as all forms of asbestos by the definition and classification above appear to cause malignancy, all may cause the nonmalignant diseases described."

So the American Thoracic Society came out with this document that says that all forms of asbestos cause malignant disease, correct?

A. Well, I'd have to read the whole thing, but, sure, all forms of asbestos do cause or can increase the risk of malignant disease, not mesothelioma, but other kinds of cancer.

Q. Okay. Doctor, I can't remember if you mentioned this. I know it's mentioned at some

point in your report, the International Agency for Research on Cancer.

That's a portion of the World Health Organization, the WHO, is it not?

A. It is.

Q. And, Doctor, they issued a document that looks like it's from 1998 -- and, again, I'll quote this to you -- that says "Many pleural and peritoneal mesotheliomas have been observed after occupational exposure to crocidolite, amosite and chrysotile."

A. That's an old document. Those are old fears that are not consistent with new facts. So if you look at the new epidemiologic studies and evaluations, 2001, 2004, that statement would not be consistent with that new data.

Q. Have they changed that opinion?

A. I don't know that the committee has ever met again.

Q. How about this one, Doctor, that's also from the World Health Organization -- that's the group we were just talking about -- dated September 2006, a little bit more recent, and this document says "All types of asbestos cause cancer in humans."

It goes on to say "Asbestos (actinolite, amosite, anthophyllite, chrysotile, crocidolite and tremolite) has been classified by the International Agency for Research on Cancer as being carcinogenic to humans."

That's what they said in September of 2006.

A. I think I just said I don't disagree with that. It's not mesothelioma. There are other kinds of cancer, and chrysotile in some occupations can increase the risk of other cancers --

Q. Lung cancer?

A. -- not mesothelioma.

Q. Let me read from the next page of the document, Doctor, because this is interesting. They then go on to say -- and I'll quote this again -- "Mesotheliomas have been observed after occupational exposure to crocidolite, amosite, tremolite and chrysotile, as well as among the general population living in the neighborhood of asbestos factories and mines and in people living with asbestos workers."

I haven't read that incorrectly, have I?

A. No. But you don't have a complete

understanding of it. There are some studies of chrysotile that is contaminated with amphiboles that have shown an increase. But those aren't chrysotile. And the chrysotile that's found in brakes and friction products is absent or mostly absent of amphiboles.

Q. That's the pure chrysotile?

A. That's correct, it would be pure chrysotile.

Q. There's nothing in this article, however, that says anything about contamination with tremolite?

A. No. But I'm familiar with the studies. You obviously aren't.

Q. Well, I'm here to be educated, Doctor.

It goes on to say that "No threshold has been identified for the carcinogenic risk of chrysotile." No safe limit?

A. There are thresholds for chrysotile mesothelioma. The exact number is not known, but certainly it's above background, and certainly it's above that level that mechanics are exposed to, because there's no increased risk of mesothelioma amongst them.

Q. Then I have just one more I want to take

a look at with you, Doctor. This is also from the IARC, the International Agency for Research in Cancer?

A. Yes.

Q. We've discussed that before. That's a branch or something to do with the World Health Organization, the WHO?

A. I think it is some sort of committee of the World Health Organization. I think it's in [sp]Lyon, France.

Q. That would be my understanding also, Doctor.

But they issued a report in March -- well, actually, the report was issued in May of 2009. That's right now. And I'll quote to you from the very first sentence. It says that in March 2009, 27 scientists from eight countries met at the International Agency for Research on Cancer to reassess the carcinogenicity of various substances.

It looks like this was a meeting a couple of months ago not of politicians or bureaucrats, but of 27 scientists from eight countries from around the world. So they got together in Lyon, France for this meeting.

A. Well, the first thing you have to remember is that science is not a consensus. So just because a committee got together doesn't mean they came to a reliable conclusion. It may or may not. Don't know.

Q. It all depends on who the scientists are and what the science is?

A. It's not published. So it's not been subjected to peer review.

Q. This is what they go on to say then, Doctor. This is called a special report, by the way.

They go on to say -- and I'll quote this -- "Epidemiological evidence has increasingly shown an association of all forms of asbestos (chrysotile, crocidolite, amosite, tremolite, actinolite and anthophyllite) with an increased risk of lung cancer and mesothelioma."

I guess you said that's not good science?

A. No, that's not what I said. I said you don't have an understanding of the data.

What you did is you concluded that all of that increased mesothelioma. There certainly is data to show amphiboles increase the risk of

mesothelioma, but in that sentence was mesothelioma and lung cancer and, again, not in mechanics.

MR. WEINGARTEN: Thanks, Doctor. I don't have anything else.

THE WITNESS: Thank you.

MR. HEXSTALL: I want to thank everybody for allowing me to take Dr. Harbison out of turn. I don't have any questions.

THE WITNESS: Thank you for your accommodation.

C E R T I F I C A T I O N

I HEREBY certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause, and this copy is a correct transcript of the same.

JANET M. MANSFIELD, RPR
Official Court Reporter

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