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1 IN THE CIRCUIT COURT OF THE
2 ELEVENTH JUDICIAL CIRCUIT
3 IN AND FOR DADE COUNTY, FLORIDA

3 Case No. 04-16237 CA 42

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5 JOSEPH MALLIA,

6 Plaintiff,

vs.

7

PNEUMO ABEX

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Defendants.

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 Miami, Florida
 December 9, 2005
 9:00 o'clock a.m.

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18 The above-styled cause came on for

19 Jury Trial, held before the Honorable RICHARD YALE

20 FEDER, Presiding Judge, at the Dade County

21 Courthouse, on the 9th day of December, 2005 at 9:00

22 o'clock a.m.

23

24 TESTIMON OF JOYCE GALE MALLIA,

25 DR. DAVID HAY GARABRANT & JOSEPH MALLIA (PART I)

1 APPEARANCES:

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DAVID M. LIPMAN, P.A.
By DAVID M. LIPMAN, ESQUIRE
REBECCA SHULL, ESQUIRE
THE RUCKDESCHEL LAW FIRM, LLC
By JONATHAN RUCKDESCHEL, ESQUIRE
appearing on behalf of the Plaintiff

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POWERS & FROST, LLP
By JAMES H. POWERS, ESQUIRE
WILCOX & SAVAGE, ESQUIRE
By BRUCE T. BISHOP, ESQ, ESQUIRE
HAWKINS & PARNELL, LLP
By EVELYN M. FLETCHER, ESQUIRE
appearing on behalf of the Defendant
Pneumo Abex

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1 (Thereupon, after the evening recess, the
2 following proceedings were had:)

3 THE COURT: Are we ready?

4 MR. LIPMAN: I am waiting on a phone call.
5 It's important, related to this case.

6 THE COURT: Bring in the - sir?

7 MR. LIPMAN: Your Honor, we are ready to
8 proceed. We are going to call Mrs. Mallia as our
9 first witness.

10 THE COURT: All right. We are waiting for
11 the jury.

12 (Thereupon, the jurors entered the
13 courtroom, after which the following proceedings
14 were had:)

15 THE COURT: You may be seated, good morning.
16 I hope you had a pleasant vacation.

17 Call your first witness.

18 MR. LIPMAN: Our first witness this morning
19 is Mrs. Gale Mallia.

20 THE COURT: Ma'am, come up here.

21 Thereupon:

22 JOYCE GALE MALLIA,

23 was called as a witness on behalf of the Plaintiff,

24 and having been first duly sworn, testified upon her

25 oath as follows:

1 DIRECT EXAMINATION

2 Q. (By Ms. Shull) Good morning.

3 A. Good morning.

4 Q. You have been briefly introduced to the
5 jury, but I would like you to introduce yourself,
6 please.

7 A. Joyce Gale Mallia. I go by Gale.

8 Q. Have you ever testified in court before,
9 Mrs. Mallia?

10 A. No.

11 Q. Are you a little nervous?

12 A. Yes.

13 Q. We will just take it nice and slow.

14 Somebody told me it's best just to pretend
15 we are talking in your living room.

16 We are going to start off with something
17 easy. I would like you to tell the jury how you met
18 your husband, Mr. Mallia.

19 A. I met him at a restaurant called Joe's

20 Pizzeria Italian Restaurant. It was in the shopping
21 center - next to the shopping center where my beauty
22 salon was. You want more?
23 Q. Please. Please continue.
24 A. I was having lunch there one day, and my
25 best friend at the time was the waitress, and I

1 spotted him at a table and told her that he was cute.

2 And after I left, she was waiting on their
3 table, him and I believe he was with his cousin and
4 another co-worker. They asked who I was, and she
5 told him I was her best friend. And they said, tell
6 her to come back and we will buy her lunch.

7 And she said, the guy you thought was cute
8 wanted to buy you lunch.

9 And of course I came back and ate again, and
10 we have been together ever since.

11 Q. I guess it worked out well then?

12 A. Very much.

13 Q. What was it about your husband that first
14 drew you to him?

15 A. I thought he was adorable, and I still do,
16 and a great guy.

17 Q. That was a long time ago?

18 A. 14 years, October. This October was 14
19 years.

20 Q. Can you tell the jury about your

21 relationship with your husband now?

22 A. It's changed.

23 Q. Well, first let's talk about some easy

24 stuff.

25 A. Okay. I am sorry.

1 Q. Hold on a second, excuse me.

2 A. All right.

3 MS. SHULL: Your Honor, may I?

4 THE COURT: Yes.

5 THE WITNESS: I am sorry.

6 MS. SHULL: Take your time.

7 THE WITNESS: (Witness crying).

8 (Thereupon, the following proceedings were

9 had out of the hearing of the jury:)

10 MR. POWERS: Your Honor, I didn't object to

11 the last question, and I'm not going to, but it

12 does raise a concern that Ms. Shull is going to

13 ask Mrs. Mallia about how Mr. Mallia's illness

14 affected her and her relationship with him. But

15 if she is not doing that, it's not a problem.

16 MS. SHULL: I have no intention of doing

17 that. I am very well aware Mrs. Mallia is not a

18 party. I am laying a foundation for her to talk

19 about her husband and what he is going to do.

20 THE COURT: Okay.

21 (Thereupon, the following proceedings were

22 had within the hearing of the jury:)

23 Q. (By Ms. Shull) Do you spend a lot of time

24 with your husband now, Mrs. Mallia?

25 A. A lot.

1 Q. What kinds of things do you do together?

2 A. We love boating. He has two children from
3 his first marriage, Joseph and Sean, and we spend a
4 lot of time with them.

5 Q. Where do you go boating?

6 A. In the Keys, in the Florida Keys. We love
7 to go boating. The boys are into anything that has
8 to do with water, whether it's snorkeling, scuba
9 diving, swimming, lobster diving, wave boarding.

10 Q. The jury had an opportunity to meet the boys
11 briefly. Can you tell them their names?

12 A. Joseph Junior is - he just turned 17 on the
13 21st, and Sean will be 16 this month.

14 Q. What grades are Joseph and Sean in high
15 school?

16 A. Joseph's in eleventh, he will graduate next
17 year, and I think Sean's in tenth.

18 Q. Plans to go to college?

19 A. Oh, yes, absolutely. Joe paid for the

20 prepaid college scholarships, I think.

21 Q. Here in Florida?

22 A. Yes. So definitely they will go to college.

23 They are really into school.

24 Q. Does that make him proud?

25 A. Oh, yeah.

1 Q. Do you like to spend time at home as a
2 family?

3 A. Yes, very much. During the week that's
4 pretty much what we do, you know. Joe loves a good
5 home-cooked meal and loves to barbeque and watch
6 movies. We don't really go out.

7 Q. Can you tell me a bit about the boys'
8 relationship with Mr. Mallia?

9 A. They are very close to their dad, very
10 close. There is not a day that goes by they don't
11 talk to him. And now Joseph drives, so they can come
12 over whenever they want, which is frequent.

13 Q. Are they into cars?

14 A. Oh, yes.

15 Q. Is that because of their dad?

16 A. Yes.

17 Q. Are you close with the boys?

18 A. Very much. I have known them since they
19 were two and three, so they are like my own.

20 Q. Did you say you consider them like your own?

21 A. Yes.

22 Q. The boys talk to Mr. Mallia to get advice

23 from him?

24 A. Yes.

25 Q. What kinds of things do they talk about?

1 A. Everything. School, girls, cars, sports,
2 everything. They are very close to their dad.

3 Q. I'd like to shift gears and talk to you a
4 little bit about when you first realized that
5 something was wrong with Mr. Mallia.

6 Do you remember about when that was?

7 A. I believe it was February 2nd of last year,
8 which would have been 2004. That's when we received
9 the phone call of what he had.

10 Do you want to know about the hospital
11 before?

12 Q. I want to hear about a lot of it, but first
13 let's talk about how you first knew something was
14 wrong with Mr. Mallia.

15 A. Prior to that, it was before Christmas, I
16 would say between Thanksgiving and Christmas, he was
17 coughing a lot. And I suggested that he go to a
18 doctor, which Joe's never gone to doctors except like
19 once a year for a physical, never been sick before.

20 So he didn't really think much of it.

21 He was coughing, and I told him to call the
22 doctors. But when he called, it was like six weeks
23 before they could give him an appointment. So he
24 didn't take the appointment because he said by then
25 he would be better.

1 Q. Had your husband ever been sick before?

2 A. Never.

3 Q. Ever been in a hospital before?

4 A. Not to my knowledge.

5 Q. So what happened? Did you wait the six
6 weeks?

7 A. Well, after Christmas he continued to have
8 this really dry cough, and he became very pale, and
9 he was weak and he was tired, and he said he was
10 having like shortness of breath.

11 I told him, after Christmas, I said, you are
12 going to the doctor's. I don't care if you have to
13 go sit there like an emergency and wait for them to
14 see you. Don't make an appointment, just go.

15 So after Christmas he went and they took a
16 chest film.

17 Q. What did they find?

18 A. His lungs - his lung was full of fluid.

19 Q. Take your time.

20 A. (Witness crying).

21 Actually, he went to his doctor. They sent
22 him downstairs for a chest film, and that's when they
23 admitted him to the hospital.

24 Q. At that point, did the boys know anything?

25 A. No, because at that point we didn't really

1 know anything. They thought he had pneumonia.

2 Q. Did they find out it wasn't pneumonia?

3 A. Yes.

4 Q. How did that happen?

5 A. They stuck a needle in his side and drained

6 out fluid, and it came back highly suspicious.

7 Q. Were you there, Mrs. Mallia?

8 A. Oh, yes. I have been to every appointment,

9 slept in the hospital, and I never left him. We've

10 only been apart two nights in 14 years.

11 Q. Wow. Were you actually in the room when

12 Mr. Mallia's fluid was drained?

13 A. Not in the hospital room because that was

14 like a procedure done. Is that what you mean? They

15 don't do it right in your room. They take him down

16 to like the operating room.

17 Q. Was he scared before this happened?

18 A. He was very scared.

19 I believe they did that twice because the

20 fluid came back.

21 Q. Now, at some point during when all this was
22 going on, did you have difficulty getting information
23 about Mr. Mallia?

24 A. Yes, because at the time we weren't actually
25 married, so I wasn't considered immediate family, and

1 they needed him to put down next of kin in case of an
2 emergency or, you know, something happened. And he
3 really didn't want his mom, you know, to know how bad
4 things were or if they were going to get bad. We
5 went to the courthouse and got married.

6 Q. Had you planned on getting married?

7 A. Oh, yes. This kind of just speeded it up a
8 little.

9 Q. You have told the jury you and Mr. Mallia
10 have been together for a long time. Why hadn't you
11 been married yet?

12 A. Well, when the boys were young, I really
13 didn't want to be like a stepmom, I wanted to be
14 their friend. And the years just flew by, and we got
15 engaged when I was 30, so I always joked around and
16 said I got engaged when I was 30 and would get
17 married when I was 40.

18 And it really wasn't an issue until Joe got
19 sick, and then we had to because of medical records,

20 and they wanted him to make out a will, and he wanted

21 to make sure that I would be okay if anything

22 happened, and he wanted me to be in charge of his

23 medical situation if need be.

24 Q. So at some point you found out that your

25 husband was not having an infection, that it was

1 something else. Can you tell the jury about that,

2 Mrs. Mallia?

3 A. How we found out?

4 Q. Please.

5 A. He was in the hospital three times, and I

6 think it was January, and - then he was able to go

7 home. And they had done - after they drew the fluid,

8 took the fluid out twice, then I believe they did the

9 biopsy where they actually take a piece of tissue

10 from his lung. And we went home and they said wait

11 for a phone call.

12 And we waited, and it was February 2nd.

13 (Witness crying).

14 Q. Take your time.

15 A. Joe couldn't even answer the phone. And we

16 knew, you know, what it was. It was the doctor

17 calling.

18 And I took the phone. Joe was sitting out

19 on the patio.

20 And the doctor told me who he was and said

21 they got the results back because they actually send

22 the biopsy, I guess, to another state or something.

23 So it takes like a week. So we waited.

24 And when I answered the phone, he said that

25 Joe has been diagnosed with malignant mesothelioma.

1 And I said, what's that?

2 And he said, you need to make an appointment
3 with an oncologist.

4 And I said, what's that?

5 And he said, a cancer specialist.

6 Q. So at this point, was that all you and your
7 husband knew about this disease?

8 A. Yes.

9 So I had to - I called I believe his primary
10 doctor to get a referral to an oncologist.

11 Q. At this point what do the boys know about
12 what's going on with their dad?

13 A. Not too much because, you know, Joe protects
14 them. He doesn't want them to know, and he doesn't
15 want it to interfere with their school. You know, he
16 would never tell them how bad it was.

17 And even his own mother to this day, you
18 don't even say the C word around her. We don't
19 discuss it. She is very much in denial.

20 Q. Does she know - but she knows that her son

21 has cancer, right?

22 A. She knows that he has cancer, but in her

23 eyes that's her baby, and she - you know - she wants

24 to believe it's a mistake and it's just going to go

25 away.

1 Q. Do the boys know what's going on with their
2 dad?

3 A. Pretty much. I mean, we don't sit around
4 and talk about it. Joe wants to try to live a normal
5 life as much as possible, you know. He tries to do
6 as much as he can with the boys. Sometimes he can't
7 do stuff that he would like to do, but for the most
8 part, you know, we try to live a normal life.

9 Q. I understand.

10 But part - what you just told me was your
11 husband had to go see an oncologist?

12 A. Right.

13 Q. Can you tell the jury about that?

14 A. I'm trying to think of - the first time was
15 at Sylvester.

16 Q. Is it hard to keep these dates together?

17 A. So many doctors and hospitals.

18 I believe the first one was at Sylvester. I
19 could be wrong. I am a little --

20 Q. It's okay. The dates aren't important. I

21 just want to talk about what you found out from the

22 doctors at Sylvester.

23 A. When - first I believe we saw an oncologist.

24 They confirmed that it was malignant mesothelioma,

25 tumor of the pleura, which I had no idea what that

1 was. And they recommended that we see a lung
2 specialist, which I believe is the thoracic surgeon.
3 And they wanted to remove Joe's lung.

4 Q. Was it your understanding that this would
5 cure his cancer?

6 A. No.

7 Q. Do you know why they wanted to remove his
8 lung?

9 A. Because of the tumor aligned his whole lung,
10 and that it was restricting his breathing.

11 But we wanted to get a second opinion, and
12 at that time we went to - after several visits to
13 Sylvester and different doctors and multiple tests
14 and everything else, we decided to get a second
15 opinion. And we went to Moffitt. We started going
16 to Moffitt, H. Lee Moffitt in Tampa, Florida.

17 Q. Before you go to Moffitt, can you tell the
18 jury about how your husband was feeling? And I don't
19 mean physically, I am talking about emotionally.

20 A. It was terrible. I mean, just the
21 anticipation and wondering and worrying and all these
22 big words and these specialists and hospitals. You
23 know, it just - I can't even explain to you what it's
24 like. It's very scary. He was terrified. You know,
25 it went from pneumonia to terminal cancer. We were

1 confused. He was freaking out. He didn't know - we
2 didn't know what to do, and everyone is telling us
3 different things.

4 Q. Did you finally find a treatment facility
5 you were comfortable with?

6 A. Yes.

7 Q. And that's Moffitt?

8 A. H. Lee Moffitt in Tampa, Florida.

9 Also, I forgot, the one doctor at Sylvester
10 said we could wait three months and see what happens.
11 And another doctor said, let's just take your lung
12 out. And we weren't comfortable with that, and it
13 was very scary. So we were - recommended to get a
14 second opinion, and that's what we did. We started
15 at another hospital.

16 Q. What did you learn at Moffitt about
17 Mr. Mallia's condition?

18 A. That there is no cure for it, and their lung
19 doctor there said that there was --

20 MR. POWERS: Excuse me, Your Honor, I have

21 to object on the basis of hearsay.

22 THE COURT: Sustained.

23 Q. (By Ms. Shull) Let me rephrase,

24 Mrs. Mallia. You go to Moffitt and get a second

25 opinion. Did Moffitt suggest any type of treatment

1 for Mr. Mallia's condition?

2 A. The lung specialist, Dr. Robinson, he had
3 seen Joe's records from the previous hospital. He
4 said the only way he would take out Joe's lung was if
5 he could - if he was guaranteed he could get all the
6 cancer 100 percent.

7 So we made - and this isn't on the first
8 appointment, it's a few appointments later. We made
9 arrangements to go there for eight days and prepare
10 to take his lung out if the cancer had not spread to
11 his lymph nodes. And the only way he would do that
12 to prepare Joe for the surgery.

13 And right before the surgery, while he was
14 under, they cut him open and take a piece of his
15 lymph nodes - or nymph node, and immediately have it
16 biopsied at the hospital while - and while they were
17 doing the test, if it was positive, they would not
18 continue with the surgery to remove his lung.

19 And he said, you will either wake up a few

20 hours later with one lung or wake up an hour later.

21 Q. Mrs. Mallia, what happened with the biopsy
22 results?

23 A. It was positive. (Witness crying).

24 Q. When your husband found out that the biopsy
25 results were positive, I want you to tell the jury

1 about his emotional state.

2 A. Well, when they found out - well, when he
3 woke up -- first of all, the preparation for the
4 surgery was unbelievable because they had to prep him
5 as if they were going to remove his lung, so they had
6 to completely shave him, give him an epidural in his
7 spine.

8 And, you know, I can't imagine because it's
9 not me, but from what he - from what I gathered from
10 the experience was the worst thing in the world was
11 being put under not knowing if you are going to wake
12 up in an hour or four hours.

13 And like I said, we were prepared to stay
14 there for eight days because the doctor said it was a
15 major surgery, and for him to get his life in order
16 prior to the surgery because you never know what the
17 outcome was going to be if he did perform the
18 surgery. And it was very emotional.

19 And when he came to, he knew that they

20 hadn't removed his lung, and that it wasn't good

21 because then that meant his only chance would be to

22 have chemo. And with chemo, they told him he had 13

23 months, and without it, six to nine.

24 (Witness crying).

25 Q. Did your husband go through chemo?

1 A. Yes.

2 Q. Do you need a break?

3 A. No.

4 Q. When did he begin receiving chemotherapy
5 treatments?

6 A. Shortly after that. I think we went home
7 once. And he may have gotten it before we even left
8 because we had prepared to stay there for eight days.

9 They started him on a real aggressive chemo
10 because the tumor was so big, you know, it was like
11 the whole lining of his lung. And they started him
12 on a real aggressive chemo called cisplatin and
13 Alimta. And he received that, I think four
14 treatments of that, every three weeks.

15 Q. How did he feel while he was receiving the
16 cisplatin treatments?

17 A. He felt like he was sitting around waiting
18 to die.

19 Q. Could he eat?

20 A. Oh, no. He had lost a lot of weight. He
21 was down to like 140 pounds. He would vomit all the
22 time. He couldn't stand noise. His ears would ring.
23 His feet went numb. He would have hiccups for days,
24 everything, constipation, diarrhea - not diarrhea, I
25 am sorry, constipation, vomiting. It was awful.

1 Q. At some point did he change the course - was
2 he able to change the course of his chemotherapy?

3 A. Well, they could only do I believe four
4 treatments of that because it is so aggressive.

5 They took him off of it and they put him on
6 just the Alimta, and that's kind of like a
7 maintenance compared to the real aggressive stuff,
8 just to keep the tumor from growing back.

9 And then eventually they had to take him off
10 that because they have to give your body a break.
11 The chemo not only kills the cancer cells, it kills
12 all your cells.

13 Q. Were the boys aware that their father was
14 getting chemotherapy?

15 A. Yes, but if you have never been through it,
16 you can't even imagine what it is like.

17 You know, I have heard people say so and so
18 got chemo and they say that's great, you go to the
19 doctor's, you get a treatment and you are all better,

20 but it's so more involved than that.

21 It's so hard to watch someone you love go
22 through it. You don't just get a little shot. You
23 sit there for hours in a recliner with, you know,
24 these IVs, and it takes like five hours because it
25 just drips and drips.

1 And also he had to have a port put in his
2 chest because the chemo will collapse your veins
3 after a while. So they can't just keep giving it to
4 you in your arm. So they also did a procedure and
5 put a port in his chest, and then the chemo goes
6 directly into, like, the main artery, I believe. But
7 it still takes hours. It's not a little procedure.

8 And prior to that they have to do CAT scans
9 and blood work and - it's a lot more involved than
10 what people think.

11 So we would never tell the boys how bad it
12 actually was. And he always, you know, put on a
13 strong front for them.

14 Q. Why is that?

15 A. Because he loves them and he doesn't want
16 them to, you know, be sad. And, you know, he is
17 their father. He is their hero. He doesn't want to
18 look weak.

19 And when he was really bad, they never

20 really saw him when he was really sick because we
21 kind of hid it, and they would go to their uncle's
22 house on the weekends because he wouldn't let them
23 see him, plus, he was advised not to be around people
24 because he could be exposed to germs, so he couldn't
25 be around a lot of people. He couldn't really go out

1 in public or the restaurants, not that he would have.

2 But when you are undergoing chemo, you are
3 very susceptible to germs. And they said that if he
4 was to get sick, his body couldn't fight it off, and
5 he would probably get pneumonia and die.

6 Q. Is your husband receiving chemotherapy right
7 now, Mrs. Mallia?

8 A. No, right now he doesn't get chemo, but we
9 still have to go to the hospital to have his port
10 flushed and for CAT scans and blood work because the
11 tumor is not growing at this time, but if they do see
12 the slightest growth, then he will have to go back on
13 the chemo. So it's a constant thing.

14 Q. You go to Moffitt with him every time?

15 A. Oh, yes.

16 Q. Do you drive up there?

17 A. Yes. It's like four hours each way.

18 Q. Can you describe your husband's mood while
19 you are in the car driving to Moffitt?

20 MR. POWERS: Excuse me, I am sorry, I didn't

21 hear you.

22 MS. SHULL: I asked Mrs. Mallia - I will

23 repeat.

24 Q. (By Ms. Shull) Can you please describe

25 your husband's mood when you are driving together to

1 Moffitt?

2 A. Well, his mood - the anticipation of finding
3 out that the tumor is growing back or his blood work
4 is not good, it's hard. The four hours seems like an
5 eternity when you are driving to the hospital.

6 Right now he is actually doing pretty good,
7 but the doctor said it will - he will always have the
8 disease, the tumor always grows back, there is no
9 cure for it, and the only thing they can offer is to
10 give him the best quality of life that they can.
11 They will try to keep him comfortable, and hopefully
12 he won't have to go on the real aggressive chemo, but
13 eventually he will have to probably go on the Alimta.

14 We try to eat real healthy, and he takes
15 vitamins from a nutritionist, and I think that helps.

16 Q. Do you help him with that?

17 A. Oh, yes.

18 Q. When your husband gets in the car and drives
19 to Moffitt with you, does he think this is it?

20 A. I don't understand, this is it.

21 Q. When your husband gets in the car and drives
22 to Moffitt for his checkups, is he concerned that
23 this is it?

24 A. Well, you know, when you are faced with
25 something like this, you learn not to take life for

1 granted. Every day is a gift and, you know - like

2 recently he had a little cold, and he said, oh, my

3 God, the tumor is growing back.

4 You are constantly worried about it. You

5 never, never forget about it. You never wake up in

6 the morning and not think about it, you know. But

7 Joe wants me to be strong for the boys. And like I

8 said, we try not to talk about it a lot. We have a

9 lot of family get-togethers. He doesn't want

10 everyone to feel sorry for him and sit around and

11 talk about it. It's not a talked-about discussion.

12 I'm with him for every doctor's appointment.

13 If someone says to Joe, how are you doing,

14 he will say, I can't complain, because he's not going

15 to sit there and complain. But I see it and I live

16 it, and it's hard.

17 MS. SHULL: Thank you, Mrs. Mallia. I have

18 nothing further.

19 CROSS EXAMINATION

20 Q. (By Mr. Powers) I have a couple of

21 questions, Mrs. Mallia. Good morning.

22 I know you heard me introduce myself, but I

23 don't think I introduced myself to you. I really

24 have just, I think, one question for you.

25 Did you tell us that as of today, as of now,

1 Mr. Mallia's tumor is not growing?

2 A. Correct.

3 Q. That's what the doctors told you?

4 A. It's not growing.

5 Q. I wanted to make sure that's what the doctor

6 told you, as opposed to what you --

7 MS. SHULL: Objection, Your Honor, hearsay.

8 THE COURT: Grounds.

9 MS. SHULL: The attorney for Abex is asking

10 Mrs. Mallia what the doctors told her.

11 THE COURT: I understand, but she testified

12 to that on direct. Overruled.

13 Q. (By Mr. Powers) Miss Mallia, you believe

14 that the tumor is not growing, and that's as of

15 today, right?

16 A. Correct.

17 Q. That's based on what Mr. Mallia's doctors

18 have told you and Mr. Mallia, right?

19 A. Correct.

20 Q. And that's a very, very recent bit of
21 information that you and Mr. Mallia got, isn't it?

22 A. Correct.

23 Q. So as of today, the medical information that
24 your doctors are giving you is that his tumor has not
25 grown since the chemotherapy?

1 A. Right.

2 Q. Thank you, ma'am.

3 A. Uh-huh.

4 REDIRECT EXAMINATION

5 Q. (By Ms. Shull) When did you learn the
6 tumor is not growing?

7 A. Most recently?

8 Q. Yes.

9 A. Yesterday.

10 MS. SHULL: Thank you.

11 THE COURT: Thank you, ma'am.

12 MS. SHULL: We are all through. You can
13 come down, Mrs. Mallia.

14 MR. RUCKDESCHEL: Your Honor, the next thing
15 that we would like to do, I think we can take
16 perhaps a five-minute break and discuss some
17 issues with the Court. Perhaps it would be time
18 for an early morning break.

19 (Thereupon, the jurors left the courtroom,

20 after which the following proceedings were had:)

21 THE COURT: What?

22 MR. RUCKDESCHEL: Your Honor, we would like

23 to address initially a couple of issues about

24 Dr. Garabrant, who is the next anticipated

25 witness because we shuffled the schedule.

1 Counsel has been kind enough to provide me
2 with a copy of a PowerPoint presentation that
3 Dr. Garabrant apparently is going to give to the
4 jury.

5 The PowerPoint at the end - I have basically
6 no objection to Dr. Garabrant giving the
7 beginning of the PowerPoint presentation, which
8 talks about how epidemiology works as a science.
9 There are a couple of examples of studies that
10 aren't pertinent to this case, and as long as
11 it's made clear those aren't pertinent to the
12 case, I have no problem with counsel using them
13 as an example.

14 If I may approach, Your Honor.

15 At the end of the presentation, there begins
16 to be discussion of studies that are allegedly
17 pertinent to this case, including a slide that
18 has the title to an article on which
19 Mr. Garabrant was listed as one of the authors.

20 That's the meta-analysis Your Honor has heard
21 about.

22 And the following page lists studies by
23 others that were considered in the meta-analysis
24 and combined, and then some charts that talk
25 about what the results of those studies were.

1 We object to the presentation of this
2 evidence as hearsay and as improper bolstering,
3 as the Court has articulated throughout this
4 case.

5 Dr. Garabrant's study, if I can refer to it
6 that way, it's commonly referred to as the
7 Goodman study or the meta-analysis.
8 Dr. Garabrant's study is hearsay. It's an
9 out-of-court statement they want to introduce for
10 the truth of the matter asserted.

11 More importantly, what a meta-analysis does
12 by definition is combine other studies in an
13 attempt to increase the power of them.

14 The underlying studies were not performed by
15 Dr. Garabrant, studies published like McDonald
16 and Teta and Agudo and, for example, the McDonald
17 study got information off of death certificates.
18 That's all hearsay, and the McDonald study is
19 hearsay. And when you combine all these studies

20 together, you have amalgamated the hearsay.

21 And the example that occurred to me in the
22 morning in the shower, where all the best
23 thinking takes place, was it's hearsay for me to
24 come in and put somebody on the stand in an
25 automobile case to say, I heard Jimmy say the

1 light was green. And it's hearsay for me to put
2 somebody on the stand to say, I heard Jimmy and
3 Steve and Betty and Timmy and five other people
4 say the light was green. And it's hearsay for
5 them to say, I interviewed all the witnesses, and
6 they all said the light was green, even though
7 they don't identify the witnesses.

8 And that's exactly what the meta-analysis
9 does. It takes all inadmissible studies and
10 lumps them together and says, okay, okay, we
11 think that these studies, when you combine them,
12 all say the same thing.

13 Under Your Honor's rulings in this case and
14 under Florida law, that's improper and bolstering
15 of Dr. Garabrant's opinion.

16 I think clearly that the pages after where
17 there are charts of the different individual
18 studies listed by name and the results of those
19 studies are hearsay.

20 Dr. Garabrant can say, I considered
21 epidemiological studies, and I made my
22 determination, and my opinion is X, but he cannot
23 present this evidence to the jury because he
24 says, and all these people agree with me.
25 When we combine what all these people said,

1 they still agree with me, which is not all that
2 shocking.

3 There are other objections to the
4 presentation of this evidence that deal with the
5 substance of those studies if Your Honor is not
6 inclined to grant our motion to exclude it on
7 those grounds. And so I think it would be an
8 appropriate time for me to stop talking, see
9 where the Court will go. And if the Court will
10 keep the studies out, we need nothing further.
11 If you are going to let them in, we need to talk
12 about them individually.

13 MR. BISHOP: Dr. Garabrant is an
14 epidemiologist, board-certified in occupational
15 and preventative medicine, as well as he teaches
16 epidemiology at the University of Michigan.

17 He will tell the Court and jury that the
18 essence of epidemiology, you conduct a study, and
19 then you do additional studies. And the job of

20 the epidemiologist is to look at the entire
21 landscape to see whether the data is supportive
22 of a causal association or a positive association
23 between an occupation and disease or exposure and
24 disease or a negative association or no
25 association.

1 And he gives the example in the earlier
2 slides of breast cancer and smoking, which
3 obviously has nothing to do with this, as a
4 teaching example where you take the data from all
5 of the 20 studies, and there is a relative risk
6 calculated for each, and you see where it lines
7 up, and you make and draw conclusions about what
8 all the data shows.

9 What he has done, Your Honor, is
10 published - in the first slide, there is an
11 objection to simply the title of his article,
12 which is no more than what Plaintiff's counsel
13 did with one of their witnesses where he was
14 entitled to not show anything.

15 THE COURT: I don't have a problem with the
16 first page, I don't have a problem with the
17 second page, I don't have a problem with the
18 third page.

19 Starting with the fourth page, I do have a

20 problem, because he is now listing what the
21 results of all those tests were, and that's
22 hearsay.

23 He can give his opinion and say he checked
24 all these studies on the first whatever, three
25 pages or four pages, whatever, three pages, but

1 not the 95 percent confidence ratio and the odds
2 ratio and number of controls, no, I will not
3 allow it.

4 MR. BISHOP: Your Honor, if I could show you
5 one additional slide.

6 THE COURT: Okay.

7 MR. RUCKDESCHEL: Your Honor, regarding the
8 charts, I believe that if Dr. Garabrant shows the
9 jury these charts, he is going to be saying all
10 these people agree with me.

11 THE COURT: No, he will not. He can say his
12 opinion. He has reviewed all these - his opinion
13 is as follows.

14 MR. RUCKDESCHEL: I understand.

15 MR. BISHOP: If I can have just a moment,
16 Your Honor.

17 THE COURT: Sure.

18 MR. RUCKDESCHEL: The next --

19 MR. BISHOP: Hold on a second.

20 MR. RUCKDESCHEL: We object.

21 MR. BISHOP: May I approach, Your Honor.

22 THE COURT: Sure.

23 MR. BISHOP: This, Your Honor, is a graph

24 from his work, his study, his meta-analysis,

25 where he has calculated the meta - the meta

1 relative risk of vehicle mechanics and whether
2 there is a positive, negative, or no association
3 with mesothelioma.

4 That's his calculation. He's not reporting
5 on what somebody else interpreted, what somebody
6 else's opinion is. That's his calculation.

7 And he will tell the jury and the Court that
8 this is a well-accepted technique that
9 epidemiologists use, that he has used in this
10 case, and that's the subject of the paper he
11 wrote with these other gentlemen, and that's the
12 independent conclusion he drew.

13 MR. RUCKDESCHEL: The point Mr. Bishop has
14 just made is exactly the point I'm trying to
15 make. It's not his calculation. What he has
16 done is taken studies that other people did, and
17 he says, when I lump up all these studies
18 together and take all their conclusions that the
19 light was green, I concluded the light was green.

20 That's exactly what he is doing.

21 When I talked with Dr. Garabrant in his
22 deposition about how he selected the control
23 populations and this type of thing for the
24 underlying studies, he said, we didn't have any
25 involvement in that. They didn't.

1 The McDonald study, again, it's based on
2 death. There is no evidence that these people
3 ever did a brake job. Their death certificate
4 said garage.

5 The Teta study is based on similar
6 information. These studies are based on hearsay.
7 They are lumping together lots of hearsay
8 statements, and then those authors conclude
9 something.

10 What Dr. Garabrant does and his co-authors
11 do in the meta-analysis, they take all that stuff
12 and lump it together and say, now, we have all
13 these statements we can't talk about
14 substantively. We want to say we can lump them
15 all together and come up with a number.

16 The number includes all these individually
17 inadmissible things, and they don't become
18 magically admissible if you lump them together,
19 and it's grossly misleading to the jury.

20 What it does, it leaves me with no choice
21 but to cross-examine him about the specific
22 studies, and then it opens it all up. And that's
23 not proper because he's not allowed to talk about
24 the McDonald study or the Agudo study and can't
25 talk about the Teta study and can't talk about

1 any of those things.

2 And they can't wash it and say here is the
3 number I got when I added up all these other
4 numbers that I can't tell you about because it
5 leaves me in a position where I have no choice
6 but to go back and do it.

7 What's equally important, Your Honor, is
8 Mr. Bishop I think will not argue with me that
9 the testimony Dr. Garabrant is going to give is
10 that it is my conclusion that individuals who
11 fall within the job title vehicle mechanic are
12 not at a statistically increased risk for
13 developing mesothelioma.

14 Mr. Mallia doesn't have the job title
15 vehicle mechanic, a point that has been made
16 abundantly clear by the Defendants in this case.

17 None of these studies have any information
18 about the work practices of the individuals in
19 the study.

20 And I asked Dr. Garabrant about that in his
21 deposition. I said, do we know anything about
22 what these people did with brakes so that we
23 would know that their work practices were similar
24 to Mr. Mallia's, and thus, their exposure was
25 similar to Mr. Mallia's?

1 And he said, no. We just presume that these
2 studies are big enough that they include people
3 like Mr. Mallia.

4 It's speculation. This may be a useful
5 study for public health purposes to look and try
6 to determine what groups of people are getting a
7 lot of mesothelioma, but it's not relevant and
8 it's misleading to the question of whether
9 Joe Mallia got mesothelioma from exposure to
10 asbestos or from working with brakes.

11 I asked Dr. Garabrant in deposition, I said,
12 Dr. Garabrant, if the question that we are trying
13 to answer is whether you can get mesothelioma
14 from exposure to asbestos that occurs when you
15 manipulate new friction materials by sanding,
16 grinding, filing, what's the study that we would
17 have to do?

18 And he says, you want me to design that
19 study?

20 And I said, yes.

21 He says, okay, here is what we do. We would

22 have to identify a group of people like

23 Mr. Mallia -- he didn't use the phrase like

24 Mr. Mallia, but I am inserting that in there --

25 whose only known exposure to asbestos was to

1 sanding, grinding, or filing brakes. Then you
2 would have to identify a group of people that
3 were exactly like Mr. Mallia but didn't have that
4 exposure, they didn't have any other exposure and
5 didn't sand and grind and file brakes, and follow
6 those groups for 40 years. And then you compare
7 how much mesothelioma in group one versus how
8 much mesothelioma in group two. Then we have
9 exposed in a substantially similar way to
10 unexposed.

11 And I said, well, Dr. Garabrant, has that
12 study been done?

13 And he says, I don't know of any.

14 And that's the point. You can use
15 epidemiology to point at individuals and make
16 determinations about specifically individuals if
17 you know you've got exposed and you know you have
18 unexposed.

19 The example we are all familiar with is

20 thalidomide. The women who took thalidomide
21 while pregnant had a higher instance of birth
22 defects. You either took thalidomide or you
23 didn't, and your child either has a birth defect
24 or it doesn't.
25 This type of epidemiology can't be used to

1 draw meaningful conclusions about Mr. Mallia, and
2 he is the perfect example because he is over here
3 in the construction stuff on Mr. Bishop's board.
4 That's where Joe Mallia shows up in an
5 epidemiological study because his job title in
6 many of his medical records is construction. And
7 that's why it doesn't work, and that's why it's
8 fundamentally misleading.

9 None of the data that Dr. Garabrant combined
10 has any basis in fact for application to
11 Mr. Mallia other than pure speculation. There is
12 no information in any these studies about how
13 much these individuals were exposed to,
14 how - about how long they did brake jobs, for the
15 number of brake jobs they did, for whether they
16 sanded it, whether they filed, whether they
17 ground. There is none of that. Whether they
18 blew out, whether they used respirators, whether
19 they used dust control like vacuums instead of

20 using the air, whether they cleaned up after

21 themselves.

22 There is no information that allows us to do

23 anything other than speculate as to whether those

24 people are substantially similar to Mr. Mallia.

25 So it's really no different than any other

1 time where we come in and try to use something as
2 an example in court.

3 Dr. Longo can't come in and talk about the
4 numbers in his studies because they don't measure
5 Joe Mallia's exposure, same with Dr. Weir, and
6 the same with an epidemiologist.

7 If you don't have studies that tell us about
8 Joe, you can't use studies where you are
9 speculating and say, well, this allows me to draw
10 conclusions about Mr. Mallia.

11 And this is - this is more than just a
12 cross-examination issue, Your Honor. This is
13 fundamentally misleading to the jury, it's
14 fundamentally misleading. If it comes in, it's
15 going to create this thing, this high drama, as
16 all of these heads when there is no factual basis
17 for the application.

18 And Dr. Garabrant was very candid in his
19 deposition. He said, we just presume that the

20 groups are big enough that they include a variety
21 of work practices. That doesn't help us in this
22 case.

23 MR. BISHOP: Your Honor, that's
24 cross-examination. He is going to tell Your
25 Honor and the jury that this is what

1 epidemiologists do every day.

2 If they had to do the kind of study that he
3 mentioned, they do studies every day of
4 occupations to draw reasonable inferences about
5 whether people that do certain kinds of work are
6 at increased risk of disease. That's all for
7 cross-examination.

8 I know he is not going to quote from these
9 studies, but to use those as examples, Your
10 Honor. There are 20 studies, and most of those
11 studies - and they are in peer-reviewed medical
12 and scientific journals, they have been subject
13 to peer review, and the epidemiologists drew
14 conclusions, and many of them they said
15 specifically there is no evidence of increased
16 risk for auto mechanics.

17 And he certainly is entitled, Your Honor, to
18 do that in this courtroom. He, in fact, did a
19 meta-analysis.

20 THE COURT: I am not denying he can make

21 that statement, as long as it's his opinion.

22 What we are talking about is this particular

23 exhibit, which seems to indicate he was reviewing

24 certain tests which are included in this list,

25 McDonald, Teta, whatever, and giving them a

1 percentage rating, which is in effect telling
2 this jury what that study said. And that I won't
3 allow, so I won't allow this exhibit. The
4 others, yes, as I have indicated, okay.

5 THE REPORTER: Now can we take a break?

6 THE COURT: As long as the jury is out, we
7 will take a break.

8 MR. RUCKDESCHEL: Thank you, Your Honor.

9 (Thereupon, after a brief recess, the
10 following proceedings were had:)

11 THE COURT: All right, bring in the jury.

12 (Thereupon, the jurors entered the
13 courtroom, after which the following proceedings
14 were had:)

15 THE COURT: You may be seated.

16 Ladies and gentlemen of the jury, a little
17 explanation is necessary. I think I told you
18 before opening statement that one of the reasons
19 for an opening is things get jumbled, they don't

20 come in orderly and logically.

21 The Plaintiff has not rested had, not

22 finished their testimony. This is a witness for

23 the Defendant, but unfortunately, he has flown in

24 and we have to hear him when he is here. I

25 wanted you to understand this is out of turn.

1 Mr. Bishop, you may proceed.

2 MR. BISHOP: Thank you, Your Honor.

3 Thereupon:

4 DR. DAVID HAY GARABRANT,

5 was called as a witness on behalf of the Defendant,

6 and having been first duly sworn, testified upon his

7 oath as follows:

8 THE COURT: You may proceed.

9 DIRECT EXAMINATION

10 Q. (By Mr. Bishop) Can you introduce yourself
11 to the Court and jury?

12 A. Yes, I am David Hay Garabrant.

13 Q. And what is your profession?

14 A. I am a physician, a medical doctor, and I am
15 a professor at the University of Michigan.

16 THE REPORTER: Can I ask to you spell your
17 name?

18 THE WITNESS: G-a-r-a-b-r-a-n-t.

19 Q. (By Mr. Bishop) And that's in Ann Arbor,

20 Michigan?

21 A. Yes, it is.

22 Q. A little warmer here than it is in Ann Arbor

23 today?

24 A. I don't know about today. Yesterday when I

25 got up, it was minus five.

1 Q. Doctor, can you tell the jury or summarize
2 for the jury your educational background?

3 A. Yes. I did my college studies in chemical
4 engineering. I got a degree in chemical engineering,
5 and then I went to medical school.

6 I should say where I went. I went to Tufts
7 University, outside of Boston. Then I went to
8 medical school, also at Tufts University, got my
9 medical degree in 1976.

10 Then I trained in internal medicine for two
11 years in Washington, D.C. at Georgetown University
12 Hospital.

13 Then I went to public health school for two
14 years at Harvard in Boston, and while I was in public
15 health school, I completed a residency in
16 occupational medicine, and I received a master of
17 public health degree and a master of science in
18 physiology.

19 After finishing public health school, I then

20 did my final year of training in internal medicine at
21 Boston University Medical Center in Boston, and I
22 completed that in 1981.

23 Q. And what board certifications do you hold,
24 Doctor?

25 A. I am board certified in internal medicine

1 and also in occupational medicine.

2 Q. After your post graduate training, can you
3 give the jury some idea of what you have done up
4 until the present date?

5 A. Yeah. When I finished my training in 1981,
6 I was invited to join the faculty of the medical
7 school at the University of Southern California in
8 Los Angeles, and the department I was in was the
9 department of preventive medicine.

10 The research in that department was focused
11 on cancer epidemiology, in other words, looking at
12 patterns of cancer in the populations and trying to
13 identify risk factors. My work while I was at USC
14 was looking at occupational causes of cancer.

15 I was at USC from 1981 to '88. I was given
16 tenure there, and in 1988 I was offered the position
17 as head of occupational medicine at the University of
18 Michigan. So I moved with my wife and children to
19 Ann Arbor, that was 17 years ago, and I am now

20 professor of occupational medicine, professor of
21 epidemiology, and associate professor of emergency
22 medicine at the University of Michigan.

23 Q. Doctor, can you tell the jury what
24 occupational medicine is?

25 A. Yeah. Occupational medicine is a discipline

1 within the broader field of preventive medicine, and
2 the goals in occupational medicine are to prevent
3 occupational diseases and occupational injuries. And
4 we do that by trying to identify the things that
5 cause people to be made ill, by identifying those
6 risk factors, by measuring those risk factors, and by
7 trying to prevent people from being exposed or from
8 being made ill.

9 We also treat people, I treat people who
10 have occupational illnesses, so I have clinic, I see
11 patients in clinic who have been exposed to chemicals
12 and have been made ill or have been exposed to
13 chemicals and are concerned whether they are made ill
14 or will get ill in the future.

15 I do return-to-work evaluations. So if
16 someone, for example, has asthma and needs to know
17 whether it's safe to go back to a dusty environment,
18 someone has to say, no, that's not a safe
19 environment, or yes, that is a safe environment that

20 you can go back to work. That's the sort of thing I

21 do.

22 MR. RUCKDESCHEL: Your Honor, may we

23 approach briefly.

24 (Thereupon, the following proceedings were

25 had out of the hearing of the jury:)

1 MR. RUCKDESCHEL: I have a concern about
2 where we are going, and I want to raise it now so
3 I'm not overly disruptive to Mr. Bishop.

4 Dr. Garabrant's report lists he has three
5 opinions, all of those opinions are specifically
6 regarding the epidemiology.

7 Now, Dr. Garabrant is also an occupational
8 medicine doctor as part of his qualifications. I
9 don't have an objection to Mr. Bishop inquiring
10 what he is qualified as, but I feel we are
11 starting to fray on how occupational medicine and
12 public health relate to this case, and that is
13 not what Dr. Garabrant was offered as an expert
14 to do, he was offered to talk about the increased
15 risk about the epidemiological studies.

16 So I object to that to the extent that
17 that's where we are headed.

18 MR. BISHOP: That's his background and
19 training. That's all I am going over.

20 MR. RUCKDESCHEL: As long as that is what we

21 are talking about. I am concerned that it fray.

22 (Thereupon, the following proceedings were

23 had within the hearing of the jury:)

24 Q. (By Mr. Bishop) Dr. Garabrant, in addition

25 to your academic positions at the University of

1 Michigan, have you held other positions of
2 leadership?

3 A. I guess so. I have served on study sections
4 for the National Institutes of Health. The study
5 sections are the groups of scientists who review
6 grant proposals and score them for funding.

7 I am currently on the scientific advisory
8 panel for a nonprofit research foundation, the Mickey
9 Leland National Urban Air Toxics Research Center in
10 Houston. That's a congressionally mandated research
11 group that funds research into air pollution.

12 I have been on the editorial board of the
13 Journal of Occupational Medicine, and I have held a
14 number of positions, administrative positions at the
15 University of Michigan in addition. Those would be
16 examples.

17 Q. All right. In some of those administrative
18 positions, are you currently the director for the
19 Center for Risk Science and Communication?

20 A. I am.

21 Q. Now, you mentioned journals, and you
22 mentioned you served on an editorial board of a
23 peer-reviewed medical journal.

24 Have you also served as a reviewer for a
25 number of journals that relate to the field of

1 epidemiology and occupational medicine?

2 A. Yes. I continue to do that. I have done
3 that for years.

4 Q. What have been your research interests at
5 the University of Michigan?

6 A. They have been principally occupational
7 cancer epidemiology, looking at patterns of cancer in
8 populations and trying to identify why people are at
9 increased risk for cancer, or in some instances, why
10 some people are at low risk for cancer.

11 For example, I worked on colon cancer for
12 20-some years. My colleagues and I identified that
13 exercise, physical activity puts people at reduced
14 risk of colon cancer, protects against colon cancer.
15 That observation we made 21 years ago has been
16 replicated over 50 times. It's widely accepted as
17 true.

18 I worked on pancreas cancer, trying to find
19 risk factors for pancreas cancer. We looked at a

20 study looking at pesticides, actually looking at
21 chemicals in pancreas cancer, we did that for a
22 chemical manufacturing company, and found a strong
23 association between DDT and risk of pancreas cancer.
24 And also two DDT-related pesticides and risk of
25 cancer. We recorded that in the Journal of National

1 Cancer Institute.

2 Let's see, in addition to cancer, we have

3 done - my colleagues and I have done studies of

4 neurologic diseases in relation to chemicals,

5 particularly pesticides. We have a big study right

6 now looking at patterns of mortality, patterns of

7 death in men and women who work in the automobile

8 plants at the Ford Motor Company. That study is

9 being done with funding from the United Auto Workers

10 and Ford.

11 MR. RUCKDESCHEL: Object to the narrative.

12 THE COURT: I don't know how it could not be

13 narrative. The question is what organizations or

14 studies he has made. No. Overruled.

15 THE WITNESS: So that study looks mostly at

16 the cancer risks amongst people who work in

17 factories, making transmissions and doing metal

18 stamping where there is a lot of exposures of

19 mixes of oil, machine fluids, cutting oils, lots

20 of other chemicals, as well, welding fumes, et

21 cetera.

22 Principally looking to see whether those

23 exposures put people at increased risk of any

24 particular types of cancer. That study involves

25 almost 55,000 people.

1 Q. (By Mr. Bishop) Dr. Garabrant, the
2 research you have told the jury about, have you
3 received funding from a variety of governmental
4 agencies, as well?

5 A. Yes, I received funding from the National
6 Cancer Institute, the National Institute for
7 Occupational Health - Safety and Health, NIOSH is the
8 acronym, the National Institute for Environmental
9 Health Sciences, private foundations, such as the
10 American Cancer Society, state agencies, state health
11 departments, et cetera.

12 Q. Where are you licensed to practice medicine,
13 Doctor?

14 A. I have an active license in Michigan right
15 now. I also hold licenses that are inactive in
16 Washington, D.C., Maryland, Massachusetts and
17 California, which are all the places that I have
18 lived while I was in earlier parts of my career.

19 Q. Dr. Garabrant, have you published in

20 peer-reviewed medical and scientific journals the

21 results of your research on epidemiology?

22 A. Yes, many times.

23 Q. Have you published textbooks, as well?

24 A. I have published chapters in textbooks, yes.

25 Q. Now, in addition to your research

1 responsibilities, do you teach, as well?

2 A. In large part of my job is teaching. I

3 teach a number of courses.

4 This semester I am teaching risk assessment.

5 Next semester I will be teaching field methods in

6 epidemiology.

7 Let's see, this semester I co-taught

8 research methods in occupation environmental

9 epidemiology. Next semester I co-teach environmental

10 disease.

11 Q. Are you a member of a number of professional

12 societies?

13 A. Yes, I am.

14 Q. Many of those deal with the issue of

15 epidemiology?

16 A. They deal with both occupational medicine

17 and epidemiology, yes.

18 MR. BISHOP: Your Honor, may I approach?

19 THE COURT: You may.

20 Q. (By Mr. Bishop) Doctor, let me hand you
21 what appears to be a copy of your curriculum vitae.
22 Is that a current curriculum vitae that
23 summarizes your qualifications and experience?
24 A. Yes. It's a few months out of date, but
25 it's pretty much current.

1 MR. BISHOP: Your Honor, we ask that be

2 marked for identification.

3 THE COURT: Let it be so marked.

4 THE CLERK: Thank you.

5 Q. (By Mr. Bishop) Among the research that

6 you have conducted, have you looked at whether

7 vehicle mechanics are at increased risk of

8 mesothelioma?

9 A. Yes, I have.

10 Q. Have you published on that?

11 A. Yes, I have.

12 MR. BISHOP: Your Honor, at this time we

13 would offer Dr. Garabrant as an expert in the

14 fields of occupational and preventive medicine

15 and epidemiology.

16 THE COURT: Mr. Ruckdeschel, do you wish to

17 inquire?

18 MR. RUCKDESCHEL: No, Your Honor.

19 THE COURT: I will permit him to testify as

20 an expert in those areas.

21 MR. BISHOP: Thank you, Your Honor.

22 Q. (By Mr. Bishop) Doctor, how do folks like

23 yourself go about determining what a cause of cancer

24 is in humans?

25 A. There are a number of things that you have

1 to do. Are you talking about doing research or
2 reviewing the literature and trying to reach
3 conclusions or both?

4 Q. Both.

5 A. Okay. Well, most of what I do is research.

6 So I design and conduct research studies to look at
7 people who handle chemicals and other factors, but my
8 work is focused on chemical exposures and cancer, to
9 see whether there is increased risk of cancer.

10 And so I look principally at what I will
11 call epidemiologic science, to try and identify risk
12 factors for cancer. And that's the focal point of
13 trying to figure out what causes cancer in humans.
14 It's the most important discipline.

15 Q. Now, let me give you an example,
16 Dr. Garabrant, and let's talk specifically about
17 asbestos and mesothelioma.

18 In your opinion, can asbestos cause
19 mesothelioma?

20 A. Some types of asbestos clearly cause

21 mesothelioma.

22 Q. In your opinion, has epidemiology

23 demonstrated that certain occupations are at

24 increased risk of mesothelioma?

25 A. There is no question about it. And that

1 knowledge that some types of asbestos cause
2 mesothelioma and that some occupations put people at
3 increased risk for mesothelioma has come from
4 epidemiology, that's where it comes from.

5 Q. If we know that something is a carcinogen
6 and it increases the risk of cancer in certain
7 occupations, why do we have to go and bother and
8 study another occupations to see whether work in that
9 occupation carries a risk of developing disease as a
10 result of that exposure?

11 MR. RUCKDESCHEL: Objection.

12 THE WITNESS: It's very straightforward.

13 MR. RUCKDESCHEL: Objection. Can we
14 approach?

15 THE COURT: Yes.

16 (Thereupon, the following proceedings were
17 had out of the hearing of the jury:)

18 MR. RUCKDESCHEL: This is exactly what we
19 got into yesterday with Dr. Weir, this concept of

20 increased risk versus risk. Dr. Garabrant was
21 asked the set-up question, increased risk.
22 Mr. Bishop asked whether we need to study because
23 of increased risk, not risk but increased risk.
24 And Your Honor made a ruling yesterday that
25 the witness has to right to say he has an opinion

1 based on his study, what he has read, as to
2 whether there is a risk but not an increased
3 risk.

4 What Dr. Garabrant is going to talk about
5 now is mechanics are not, in his opinion, at an
6 increased risk for disease.

7 THE COURT: The only problem I have is Weir
8 was not an epidemiologist.

9 MR. BISHOP: Exactly.

10 THE COURT: This man is. Epidemiology deals
11 with whether or not there is an increased risk.

12 MR. RUCKDESCHEL: I understand, but
13 increased risk of a job category that Mr. Mallia
14 is not in is not what this case is about.

15 MR. BISHOP: That's his argument.

16 THE COURT: Agree, that's your argument.

17 MR. RUCKDESCHEL: Mr. Bishop argued
18 yesterday that epidemiology is a subset of
19 toxicology, and Your Honor then allowed Dr. Weir

20 to talk about epidemiology. And that's precisely

21 what the representations were to the Court.

22 Toxicology is bigger than epidemiology, and

23 he was allowed to testify. That was their

24 proffer.

25 So you can't now say this is different

1 because he was a toxicologist and this guy's an
2 epidemiologist. They can't have their cake and
3 eat it, too, and that's what they did. Now they
4 want to have the same testimony from somebody
5 that they said is in the same field. And that's
6 different, and I object for the same reasons that
7 we did with Dr. Weir.

8 The question here isn't whether mechanics in
9 general are at increased risk, it's whether
10 people that do what Joe Mallia did can get this
11 disease, it's whether they can get this disease.

12 Joe Mallia has a zero or 100 percent chance
13 of getting mesothelioma. There is no comparison
14 group for him. The study has never been done,
15 and you can't talk about it. It's confusing to
16 the jury, and it doesn't lend any reasonable
17 inference to the jury. They are going to misuse
18 it because mechanics as a group haven't been
19 measured to have an increased risk against a

20 non - non-controlled population. They don't have
21 a controlled population that is not exposed.
22 Then the rate of the disease in the exposed but
23 unknown category is higher than or equal to the
24 rate of disease that Mr. Mallia isn't in. It's
25 nonsensical and it's going to confuse the jury.

1 It's fundamentally wrong.

2 THE COURT: What is Mr. Mallia's --

3 MR. RUCKDESCHEL: If Mr. Mallia passed away

4 tomorrow and there was an epidemiological study

5 like the McDonald study, Mr. Mallia would be in

6 the pavement striping study and never had the job

7 title mechanic. That is what his occupation

8 would be listed on his death certificate. If you

9 look at his medical records, none of his medical

10 records ever said he was a mechanic.

11 He wants to look at studies of mechanics or

12 garage workers that say this. He's not one of

13 them.

14 MR. BISHOP: Your Honor, that's his

15 argument.

16 THE COURT: I think if you define what

17 mechanics are, which includes filing, grinding,

18 scraping, replacing brake lining, why wouldn't

19 that be?

20 MR. RUCKDESCHEL: Because Dr. Garabrant has

21 conceded it's speculation whether any of the

22 people in any of those studies have done it.

23 I will show you the testimony. He said, we

24 just presume that these job categories include a

25 variety of different work practices. We presume.

1 That's it. There is no facts to support it, just
2 a leap of faith. And it's useful for public
3 health, but not useful for this case.

4 MR. BISHOP: He is trying to hijack science,
5 that's what they are doing. He will testify
6 epidemiology is how they go about determining
7 cause of disease in human populations.

8 MR. RUCKDESCHEL: Populations, not
9 individuals.

10 MR. BISHOP: That's how he as an
11 occupational medical specialist in epidemiology
12 draws conclusions in individual cases. They can
13 argue about whether it's the right category or
14 not.

15 A vehicle mechanic will be doing that work
16 more often than someone who does that as well as
17 construction work.

18 He has published on the subject and has been
19 accepted in peer-reviewed and scientific

20 journals. If you want to look at the people

21 doing vehicle work --

22 MR. RUCKDESCHEL: Not individuals,

23 populations. And I can read you the deposition.

24 MR. BISHOP: He can draw the conclusions he

25 draws from that, and it's perfectly appropriate

1 for an expert.

2 MR. RUCKDESCHEL: Generically he can say, I
3 reviewed the epidemiology, and it's my opinion,
4 but he can't say the epidemiology has an
5 increased risk, because it's not relevant.

6 And I can hand the deposition to Your Honor,
7 and we can go through. Don't know whether they
8 filed, don't know whether they sanded, don't know
9 whether they did any of the things. So we just
10 presumed that they did.

11 MR. BISHOP: If we accepted his definition,
12 we would never have any epidemiological studies.

13 They do this every day. They look for
14 occupations and trades to see if they are at
15 increased risk.

16 He can argue on cross-examination whether
17 that category covers everything Mr. Mallia did or
18 not, that's cross-examination. He will say
19 whether this establishes an increased risk and

20 whether someone has an increased risk and whether
21 you can say that exposure was a cause or
22 contributing factor.

23 MR. RUCKDESCHEL: The work Dr. Garabrant
24 does is extremely valuable in our society. The
25 work they do is about populations, groups, not

1 individuals.

2 THE COURT: I understand.

3 MR. RUCKDESCHEL: They want to say you can

4 make generalizations about this group not

5 substantially similar to Mr. Mallia.

6 THE COURT: That's cross-examination.

7 MR. BISHOP: That's cross-examination, Your

8 Honor.

9 THE COURT: If they had a category mechanics

10 that he feels covers what you claim Mallia did,

11 why isn't that a category he can use?

12 MR. RUCKDESCHEL: Here is why, because it's

13 misleading to the jury.

14 MR. LIPMAN: Don't use your finger.

15 MR. RUCKDESCHEL: I'm not pointing at you, I

16 am pointing up.

17 Here is why, because Dr. Garabrant

18 acknowledges, and Mr. Bishop will acknowledge,

19 that none of these studies have any information

20 about what the individuals did and whether they
21 did the kinds of things that Mr. Mallia did, and
22 because there is no factual basis for it to say,
23 well, he can say, well, it's my opinion that this
24 is just misleading. It's misleading to the jury
25 because there is no measurement of exposure.

1 THE COURT: Why would an epidemiologist ever
2 be able to determine a risk for a group if they
3 don't know what each individual in that group did
4 in that profession?

5 MR. RUCKDESCHEL: That's exactly what they
6 do. They just generalize for public health
7 purposes.

8 THE COURT: I understand, but that's within
9 their expertise. You have a right to point out
10 he doesn't know whether the people in this study
11 blew air into the tires or not, he doesn't know
12 whether they drilled a hole or not, but that's
13 cross.

14 MR. RUCKDESCHEL: That's the problem.

15 MR. BISHOP: That's cross. He wants to shut
16 off --

17 THE COURT: If we take a group of doctors,
18 does he know what every one of those doctors did,
19 of course not. He is classifying them as

20 doctors.

21 MR. RUCKDESCHEL: That's right.

22 THE COURT: Why can't he classify them as

23 auto mechanics and presume they do all these

24 things?

25 MR. RUCKDESCHEL: There is no factual basis

1 for generalizing about that group, and
2 Mr. Mallia - there is no factual basis. It's no
3 different than a recreation. There is a
4 difference between what's useful in the courtroom
5 and what's useful in public health.

6 If we want to know, do we need to be
7 concerned as mechanics as a group getting a ton
8 of meso, then epidemiology is useful. If we want
9 to know about whether Joe Mallia got
10 mesothelioma --

11 MR. BISHOP: That's his argument.

12 MR. RUCKDESCHEL: Dr. Garabrant will
13 admit --

14 MR. BISHOP: They want --

15 THE COURT: The jury will determine that
16 Joseph Mallia got ill from what he did with that
17 brake.

18 MR. RUCKDESCHEL: It's no different than my
19 saying Dr. Longo did 15 studies and found there

20 were 18 million fibers per cc in the samples of
21 my studies, because Dr. Longo's studies are not
22 numerically - you won't allow us to do that.

23 THE COURT: I said you weren't going to go
24 into that. I didn't deny it.

25 MR. BISHOP: That was his decision.

1 THE COURT: That was yours, not mine.

2 MR. RUCKDESCHEL: The same decision was made
3 with Dr. Weir. And the law is clearly there has
4 to be substantial similarity. That's the
5 problem, there is no substantial similarity.

6 THE COURT: He will testify his opinion. As
7 I understand what his deposition said, he
8 presumed auto mechanics includes all these things
9 that Joe Mallia did. It may not be a fair
10 presumption, but it's his presumption.

11 MR. RUCKDESCHEL: No, it's his speculation,
12 and that's what - you have no factual basis.

13 THE COURT: This jury can say if he is
14 speculating that, quote, auto mechanics includes
15 replacing brakes, working on clutches, drilling
16 into the wheel.

17 MR. RUCKDESCHEL: He is admitting.

18 MR. LIPMAN: Can we send the jury out?
19 Could you do that so we can discuss it, because

20 we have record evidence of what he knows and

21 doesn't know.

22 MR. RUCKDESCHEL: He has admitted there is

23 no factual basis for that presumption, that's the

24 problem. You can say I presume, but really it's

25 speculating, because there is no factual basis to

1 support the presumption.

2 (Thereupon, the following proceedings were
3 had within the hearing of the jury:)

4 THE COURT: Step out a second.

5 (Thereupon, the jurors left the courtroom,
6 after which the following proceedings were had:)

7 THE COURT: Doctor, step outside.

8 (Thereupon, the witness left the courtroom,
9 after which the following proceedings were had:)

10 THE COURT: As I understand it, your
11 position, Mr. Ruckdeschel, is that this witness
12 has no idea, has no basis in fact for determining
13 what the class of auto mechanic, quote/unquote
14 does.

15 MR. RUCKDESCHEL: Precisely. And I can read
16 you his testimony.

17 THE COURT: Go ahead.

18 MR. RUCKDESCHEL: Doctor, do we know how the
19 mechanics in the McDonald study performed any

20 brake work that they may have performed?

21 Answer, we know they were garage workers.

22 Question, and to the extent that they

23 performed brake work, would you agree that we

24 don't have a videotape or other record that shows

25 how they did it?

1 Answer, that's correct.

2 Question, and there is no information in the
3 McDonald study about how they did it?

4 Answer, the McDonald study does not describe
5 how brake repair work was done. It simply
6 includes garage workers who were believed to do
7 brake work.

8 Question, and we don't know whether the
9 garage workers in the McDonald study opened the
10 boxes of brakes themselves?

11 Answer, the McDonald study does not say
12 anything in response to that issue.

13 Question, and we don't know whether the
14 mechanics in the McDonald study ground the
15 brakes, correct?

16 Answer, all we know is that they were garage
17 workers and that they were either cases or
18 controls.

19 Question, yeah. We don't know whether they

20 filed the edges of the brakes, whether they
21 sanded the surface of the brakes, or whether they
22 worked on cars or trucks, whether they did blow
23 out compressed air, or whether they cleaned up
24 after themselves, correct?
25 Answer, that is - that is not stated

1 explicitly in the McDonald study.

2 Question, okay. We don't know whether they
3 used any dust control methods or wore a
4 respirator in the McDonald study, correct?

5 Answer, the McDonald study does not provide
6 information on that issue.

7 Question, and it provides no information
8 regarding the level of dust in the garages --

9 And then I have to repeat the question
10 because they didn't get it.

11 Question, it doesn't provide any information
12 regarding the level of dust in the garages, where
13 these mechanics worked, correct?

14 Answer, there are no measurements of
15 exposure in the McDonald's study. There are
16 measurements of airborne exposures.

17 That must be a typo because there are not.

18 That must be a typo.

19 Question, and we don't know how often the

20 mechanics in the McDonald study may have

21 performed any brake work, correct?

22 Answer, the McDonald study does not provide

23 any information on that point.

24 We don't know how long the individuals in

25 the McDonald study worked as garage workers?

1 Answer, the McDonald study does not provide
2 information on that point.

3 It goes on. And then I said the Teta study.

4 And we don't know whether any of those
5 individuals performed brake work, they opened
6 boxes themselves, whether they ground the brakes,
7 whether they filed the edge or sanded the
8 surface, whether they were working on cars or
9 trucks, whether they swept up after themselves,
10 whether they used dust controls or wore a
11 respirator, what the dust level was, what the
12 frequency of any brake work was, what the
13 duration of their employment was, or whether they
14 did any other work potentially - that potentially
15 involved an exposure to asbestos, correct? We
16 don't know any of that information in the Teta
17 study?

18 And the answer from Dr. Garabrant: None of
19 that information is reported explicitly in the

20 publication. What we know is that these were
21 people who were auto repair and related service
22 workers, both cases and controls, and it is a
23 reasonable assumption that they did what is
24 typical in those occupations.
25 Now, the occupation that he has just

1 discussed is automobile repair and related

2 services. Nobody knows what that means.

3 And I asked him, what is related services?

4 I would have to go back to the coding of the

5 Teta study. I do not recall it from memory. I

6 believe she used the Census Industry and

7 Occupation Coding, and I don't have that with me.

8 I believe she - the term I believe she used

9 was automobile mechanics and garage workers and

10 gas station attendants.

11 So this includes the guy that pump gas, all

12 right. And I would have to go back and review

13 it, all right.

14 So - and do you believe it included

15 individuals that were not performing mechanical

16 work such as gas station attendants?

17 And then more of the speculation.

18 Answer, it included gas station attendants,

19 but it is my understanding that in many instances

20 they do perform mechanical work.

21 Okay. But we don't know anything about how

22 often they may have done that?

23 This study does not give those details in

24 the publication.

25 And it's the same for all of the studies

1 that he is going to talk about. The information
2 isn't reported, it's an assumption that has no
3 basis in fact. It has no basis in fact, and so
4 we don't know whether they were exposed or not.

5 And so while in Dr. Garabrant's professional
6 life in public health, it may be useful
7 information, but in the courtroom, in the
8 courtroom it doesn't tell us anything about
9 Joe Mallia that's admissible in this case because
10 it's all based on the supposition that has no
11 fact behind it that the people in these groups
12 did the kinds of things that Joe Mallia did.

13 And that's the real danger of this. We
14 start talking about this with the jury, it's
15 going to get confusing, the issues are going to
16 get confused. It's misleading and it has no
17 basis in facts. It's no different than a work
18 practice simulation.

19 MR. BISHOP: Your Honor, I find it hard to

20 believe that he can argue that epidemiology,
21 which their own witness, Arnold Brody, said was
22 the way you determine the cause of disease in
23 human populations, is immaterial, when --

24 MR. RUCKDESCHEL: That's not what he said.

25 MR. BISHOP: -- when a petri dish, growing

1 cells in a petri dish was the basis for allowing
2 their experts to conclude Mr. Mallia's
3 mesothelioma was asbestos-related.

4 This is the study of disease in human
5 populations. That's what allows people to
6 determine whether people are at increased risk
7 for cancer, and that allows them to determine if
8 they do develop cancer, the fact they develop
9 cancer was related to their working in that
10 occupation as opposed to the risk that all of us
11 have outside of working in that population.

12 This is the way epidemiologists go about
13 doing it. If we went to the extreme he contends,
14 which he can argue on cross examination, we would
15 never have epidemiological studies. It would be
16 impossible to put them together.

17 Here is a chart from Dr. Garabrant's
18 meta-analysis which was accepted obviously for
19 publication in a peer-reviewed scientific

20 journal, and you will see some of the studies he
21 has reviewed, you will see the exposure
22 information is not going to be the same for every
23 study. Sometimes they are characterized as
24 garage workers, other times they are specifically
25 characterized as brake wear, brake repair.

1 He can go over that on cross-examination,
2 Your Honor, but it's clear what they do is they
3 classify people by an occupation that's close to
4 what those kinds of people do, and that's how
5 they classify people who make brake repair, they
6 classify them as motor vehicle mechanics.

7 In some of these studies, they went further
8 and classified them as the very people who do
9 brake repair. It's cross-examination, Your
10 Honor.

11 He is trying to cut off epidemiology, which
12 his own experts have said is the most important
13 thing in terms of determining the cause of
14 disease in human populations.

15 MR. RUCKDESCHEL: The Plaintiff's experts
16 absolutely have not.

17 THE COURT: I have heard enough.

18 What you are saying, in my opinion, goes to
19 the weight of his testimony, not his

20 admissibility. I am going to allow it.

21 Bring them back in.

22 THE REPORTER: Before we do that --

23 THE COURT: You want a break?

24 THE REPORTER: Yes.

25 (Thereupon, after a brief recess, the

1 following proceedings were had:)

2 (Thereupon, the witness entered the

3 courtroom, after which the following proceedings

4 were had:)

5 (Thereupon, the jurors entered the

6 courtroom, after which the following proceedings

7 were had:)

8 THE COURT: You may be seated.

9 You may proceed.

10 MR. BISHOP: Thank you, Your Honor.

11 Q. (By Mr. Bishop) Dr. Garabrant, when we

12 took a recess I was asking you about the fact that

13 you know there are elevated risks for mesothelioma in

14 certain trades and occupations. If you know that,

15 why would you need to study vehicle mechanics, for

16 example?

17 A. Because we know the risks vary, we know the

18 risks vary by type of asbestos. The evidence for

19 some types of asbestos that it causes mesothelioma is

20 very strong. And for chrysotile asbestos the
21 evidence is very controversial, not clear that it
22 causes it at all.

23 So the fact you see a risk in one occupation
24 doesn't mean you're going to see the risk in every
25 other occupation. Every chemical has some health

1 risk associated with it, but the risk is related to
2 the dose, like - like pharmaceuticals, if you take
3 too much, adverse health effects occur. If you take
4 the right amount, for pharmaceuticals you get a
5 benefit, for chemicals we don't usually believe that.

6 The point is if you want to know whether
7 there is increased risk of disease from asbestos in a
8 certain occupation, you have to study that
9 occupation. You cannot assume that there is
10 increased risk without actually studying it. That's
11 not a fair assumption.

12 Q. Will animal studies, animal inhalation or
13 injection studies tell us whether vehicle mechanics
14 have an increased risk of mesothelioma from their
15 work?

16 A. No, animal studies tell you whether you can
17 cause cancer in animals with asbestos by some mode of
18 exposure. You can't extrapolate from rats or mice
19 and say that has to be true in humans. That's not a

20 reliable thing to do.

21 Most scientists are reluctant to take

22 results from mouse studies or rat studies and make

23 conclusions about humans based on those studies,

24 especially when there is evidence in humans to look

25 at. Why would you rely on a mouse study if you have

1 human studies, and we do.

2 Q. What about in vitro research where they put
3 cells in a petri dish?

4 A. Similar answer, you can do experiments in
5 laboratories with cells or with parts of cells and
6 look for mechanisms. In other words, look for ways
7 in which chemicals affect the cells.

8 But that doesn't tell you what happens to
9 living human beings. You have to study living human
10 beings and the exposures that they have to know what
11 happens to living human beings.

12 Things you can see in a cell don't
13 necessarily translate to what happens to a person as
14 they go about their business in society.

15 Q. Let me focus for a moment specifically on
16 mesothelioma. Are all mesotheliomas related to
17 asbestos?

18 A. No.

19 Q. Is there a percentage of mesotheliomas that,

20 in your opinion, are unrelated to asbestos?

21 A. Yes, there is, and I think that is widely

22 agreed upon, that there is a percentage of

23 mesothelioma not due to asbestos and not due to any

24 identified cause.

25 Q. Is there a background rate, therefore, for

1 mesothelioma unrelated to asbestos?

2 MR. RUCKDESCHEL: Objection. It's beyond
3 every scope of what was offered in his report and
4 in his deposition. It's not within the purview
5 of the opinions Dr. Garabrant has stated - going
6 to opine on at trial.

7 MR. BISHOP: It will exactly explain why you
8 have to look for increased risk.

9 THE COURT: Rephrase your question. I think
10 we're going a little far afield.

11 MR. BISHOP: All right.

12 Q. (By Mr. Bishop) If as you told the jury
13 there is a percentage of mesotheliomas unrelated to
14 asbestos, then how do you, there in your field of
15 epidemiology, determine whether mesothelioma is
16 related to asbestos?

17 A. The principle way we do that is to identify
18 people who have asbestos exposure and people who do
19 not have asbestos exposure, and to compare the rates

20 of mesothelioma in the two groups.

21 There is a background rate for mesothelioma.

22 MR. RUCKDESCHEL: Objection, move to strike.

23 Again, this is beyond the scope of his

24 opinions.

25 MR. BISHOP: It is not, Your Honor.

1 MR. RUCKDESCHEL: It's not fair.

2 THE COURT: Let me see his report.

3 Let me hear the question again.

4 (Thereupon, the court reporter read the

5 previous question, after which the following

6 proceedings were had:)

7 THE COURT: Your objection is it was not

8 included in his report?

9 MR. RUCKDESCHEL: The objection is that the

10 answer goes beyond the opinions that he has

11 proffered in his report. And I would have asked

12 him about these things in his deposition if I'd

13 known he was going to talk about them.

14 THE COURT: Sustained.

15 Q. (By Mr. Bishop) Doctor, I want to explore

16 with you epidemiology.

17 Have you brought some slides with you today

18 that you believe will help illustrate how

19 epidemiology goes about determining the cause of

20 disease in humans?

21 A. Yes.

22 MR. BISHOP: Your Honor, may he step down to

23 show the slides?

24 THE COURT: Of course.

25 (Witness leaving the witness stand).

1 Q. (By Mr. Bishop) Doctor, let me know when
2 you're ready.

3 A. I'm ready.

4 Q. Doctor, what is epidemiology?

5 A. Okay, it's the study of the distribution of
6 disease and the causes of disease in human
7 populations. And the word epidemiology comes from
8 the word epidemic, so it's the study of epidemics,
9 the pattern of disease in populations of people.

10 Q. Does it go back a couple of hundred years?

11 A. Yeah, that's about right. Its earliest
12 roots were in dealing with the epidemics of cholera
13 that used to sweep through London, and were
14 recognized by a very astute physician as being due to
15 contaminated water.

16 So he looked at the patterns of disease in
17 London and realized it correlated well with one of
18 the water supplies and not with the other water
19 supply, and he was able to stop an epidemic of

20 cholera.

21 Q. Dr. Garabrant, can you give the jury some
22 more recent examples of how epidemiology helped us
23 understand the cause of disease in humans?

24 A. Oh, sure. There are many.

25 The health effects of smoking, cancers from

1 smoking, chronic obstructive pulmonary disease, much
2 of that evidence has come from epidemiologic studies.

3 The ability of ionizing radiation causing
4 cancer to humans comes from epidemiology, comes from
5 ongoing studies going back to 1945 that followed the
6 survivors of the atomic bomb blasts in Japan. They
7 have been followed since 1945 and clearly show an
8 excess of cancer.

9 The Polio vaccine was demonstrated to be
10 effective and safe in a huge epidemiology study. It
11 was reported in 1955, actually at the University of
12 Michigan, one of the things my school was most proud
13 of, the field trial showed that the Polio vaccine
14 worked.

15 It was an epidemiology study involving
16 millions of chickens, and it was reported out --

17 THE REPORTER: I'm sorry I'm having trouble
18 hearing you.

19 THE WITNESS: I said it was reported at the

20 Rackham Graduate School at the University of
21 Michigan showing that the vaccine worked.
22 Right now we are worried, deeply worried
23 about avian flu. There are epidemiologists all
24 over the world watching the pattern of disease.
25 And we know that there are a few people who have

1 been infected with the avian flu in China and
2 other parts of Asia.

3 What we are watching for is the day that
4 that flu can jump from person to person. Right
5 now it's capable of going from birds to people.
6 It's capable of spreading among the bird
7 population, but it has not yet spread in person
8 to person.

9 When we see evidence that it can spread from
10 person to person, then it has completed the
11 crucial step that might allow it to become an
12 epidemic. And epidemiologists are watching that
13 all over China and Asia at the Centers for
14 Disease Control in Atlanta.

15 That's what they do. We are trying to gear
16 up to be ready with vaccine if that occurs.

17 Q. (By Mr. Bishop) Doctor, is there a method
18 for doing this as an epidemiologist?

19 A. There are methods, yes.

20 Q. Do you have a slide that illustrates that?

21 A. Yeah. Epidemiology is a branch of science,

22 like all science it has a standard set of methods. I

23 get some pleasure in showing this. My youngest child

24 is in tenth grade, and in ninth grade science she

25 learned the scientific method. I worked with her on

1 it.

2 So epidemiology follows this like all
3 branches of science. Typically something gives a
4 scientist an idea, hey, I think that such and such
5 might be true. I think that this chemical might
6 cause this disease, okay.

7 That allows you to form a hypothesis.
8 That's just a statement of your idea. Once you have
9 a hypothesis you design a scientific study. How can
10 I evaluate whether that hypothesis is right or wrong?
11 So you design a study, you write a study protocol and
12 you collect data.

13 It's always important to have a control
14 group, particularly in epidemiology you always have a
15 study group and a control group. You collect your
16 data, you analyze your data. And then you interpret
17 what the analysis say and try to answer the question,
18 whether the data supports your hypothesis.

19 If it does, you find an association between

20 exposure and the disease. In other words, hey, the
21 chemical is associated with the disease. Then you
22 say, okay, my hypothesis was right.

23 If the data does not support the hypothesis,
24 you don't find any association. Then you say, gee,
25 it doesn't look like that chemical causes that

1 disease, my hypothesis was wrong.

2 You have to start over again, revise your

3 hypothesis, design a new study, go through the

4 process again. That's the scientific method.

5 Q. Why aren't case reports enough to do that?

6 A. Well, the trouble with case reports is that

7 they don't have a control group. There is no

8 comparison group, and they are not amendable to any

9 formal analysis of the data. They are nothing more

10 than a set of observations.

11 Gee, I've seen three cases of this disease

12 and they had this exposure, this genetic factor, they

13 eat this type of food, they all visited this area of

14 the country, but there is no formal analysis of the

15 data and they are not adequate to protest the

16 hypothesis.

17 Q. What's the importance of the control

18 population?

19 A. It allows you to measure whether there is an

20 association between exposure and disease. It is
21 different than what you would expect in the absence
22 of exposure.

23 Q. Now that we talked about the scientific
24 method, are there particular kinds of studies that
25 epidemiologists can do to get at these answers?

1 A. Yes. Epidemiologists do two basic types of
2 studies. There are other variations but most
3 epidemiology is based on either cohort studies or
4 case control studies.

5 A cohort study is - follows this design.
6 You take a group of people who have some exposure in
7 common, and that group might include thousands of
8 people.

9 I mentioned my study in the auto industry,
10 55,000 people who worked in transmission plants.

11 And so you have a group of people who all
12 have some exposure, and then you can choose a
13 comparison group that doesn't have the exposure. Let
14 me do this with an example.

15 Suppose we wanted to know whether drinking
16 coffee causes pancreas cancer, that's a famous
17 example. The way we would do it is pick a group of
18 coffee drinkers and a group of people who never drank
19 coffee.

20 We then follow both groups for years.

21 Cohort studies we often follows groups for 10, 20,

22 30, 40 years. And as that time passes we would tally

23 up how many of them got pancreas cancer. We would do

24 that in the coffee drinkers and do that in the people

25 who never drank coffee.

1 And what we want to do is compare the two
2 groups, which group has the higher rate of disease.
3 If the rates are the same you say, hey, coffee
4 drinkers don't get more pancreas cancer than
5 non-coffee drinkers, there is no association.

6 Q. You might find the rates are greater or
7 lower or the same?

8 A. Right. And that's what this slide shows.
9 If the two groups have equal rates of disease, you
10 say coffee isn't associated with pancreas cancer. If
11 you have more rate of disease, you say the coffee
12 drinkers have more risk than the non-coffee drinkers.

13 If you saw that the coffee drinkers had less
14 disease than the non-coffee drinkers, you would say,
15 gee, they have a lower rate. That might suggest that
16 coffee protects against pancreas cancer.

17 Theoretically you can get any of these three
18 results.

19 Q. Do you compare the rates of cancer in the

20 exposed populations versus the unexposed in this

21 example?

22 A. That's exactly right. That's exactly right.

23 Now, that comparison is one of the key

24 elements of good science.

25 If you don't have the comparison group all

1 you know is that among coffee drinkers, two out of 12

2 in this example, got the disease.

3 The question is, is that what you would

4 expect to see in non-coffee drinkers? Is that too

5 much, is that too little? We can't interpret it as

6 showing that coffee does or doesn't do anything, you

7 just have a rate among coffee drinkers. You need a

8 rate among non-coffee drinkers.

9 Q. If you found no association, what would you

10 expect to see?

11 A. Well, let's - so here is the calculation

12 that we do, this is standard in epidemiology.

13 We take the rate among the exposed, which in

14 this example is two out of 12, and divide that among

15 the rate of the non-exposed, which in their example

16 is 12 out of 12. If the time rates are equal then

17 the ratio is one. So when the ratio is one we call

18 that a rate ratio or a relative risk, the risk of one

19 group relative to the other when the ratio or

20 relative risk is one. It means the rates are the

21 same, there is no association.

22 No association at all, coffee drinking does

23 not increase your risk of pancreas cancer, if that's

24 what the data showed.

25 Q. If there were a positive association, what

1 would it show?

2 A. Here is a different example.

3 In this example let's say eight of the 12

4 coffee drinkers got the disease, and two of the 12

5 non-coffee drinkers got the disease. So eight over

6 12 divided by two over 12, that's a four-fold

7 association. That's a positive association that says

8 coffee drinkers are at four times the risk of

9 pancreas cancer as non-coffee drinkers. That's a

10 positive association.

11 Q. Could you also find a negative association?

12 A. Sure. Let's say the data showed two out of

13 12 coffee drinkers got it, eight out of 12 non-coffee

14 drinkers got it.

15 Now the ratio is flipped. So instead of

16 four, it's .25 or one-quarter, that's a negative

17 association.

18 Q. And could you further test a hypothesis that

19 coffee drinking was protective?

20 A. Well, if this is what the data showed it
21 would suggest it was protective. I would go and try
22 to figure out why it was protective. Try to design
23 another study to say how could this be true, how
24 could it protect you against cancer?
25 Some things do protect against cancer, like

1 exercise actually does, so you would have to do

2 further research to figure that out.

3 Q. Now, you talked about cohort studies.

4 You mentioned there was a second kind of

5 epidemiological study you and epidemiologists use,

6 and I think you said it was the case control study?

7 A. Yes.

8 Q. Can you tell the jury what a case control

9 study is?

10 A. A case control study has a different design.

11 What you do is go out and locate a group of people

12 who have the disease, like pancreas cancer. So you

13 would have to work with the hospitals and work with

14 the physicians who diagnose and are treating pancreas

15 cancer. You might have to work with the tumor

16 registry to find cases of the disease, and you put

17 together maybe 100 or 200 cases of pancreas cancer.

18 Again, you have to have a comparison group,

19 and the comparison group are - in this instance are

20 people who don't have pancreas cancer. We call them

21 controls, that's why it's is a case control study.

22 So we have pancreas cancer and people who don't have

23 pancreas cancer.

24 And then we ask both groups, did you - have

25 you been a coffee drinker. And let's say, for

1 example, among the people with pancreas cancer, four
2 of them said, yeah, I've been a coffee drinker. And
3 among the people who don't have pancreas cancer, two
4 of them said, yeah, I've been a coffee drinker.

5 Okay. What we do then is calculate the odds
6 of exposure in both groups. And if anybody - anybody
7 who has ever bet on a horse race or dog race knows
8 what odds are, it's the probability of winning over
9 the probability of losing, those are odds.

10 In this instance we say the number of people
11 who have the exposure divided by the number of people
12 who don't have the exposure among the cases, so four
13 over eight.

14 We do the same thing in the people who don't
15 have the disease, the controls. In this instance two
16 of them were coffee drinkers, ten were not. And then
17 we compare those odds in the two groups given this
18 comparison.

19 Q. And what do we call that comparison?

20 A. That's called an odds ratio, the ratio of
21 the odds.

22 So in this example we take the .5 over the
23 .2, and that gives us a two-and-a-half-fold risk.

24 What that says is that people with pancreas
25 cancer are two and a half times as likely to have

1 drunk coffee as people without pancreas cancer.

2 That's a positive association.

3 And you can see you can end up with no

4 association if the two groups had equal habits, and

5 then the odds ratio would be one, no association. Or

6 if the people who were healthy drank more coffee than

7 the people with pancreas cancer, you could have an

8 odds ratio of less than one, which would suggest

9 maybe coffee protects against pancreas cancer.

10 Q. You used the term "relative risk" a moment

11 ago, can you describe what that is?

12 A. What the term relative risk is, it's sort of

13 the umbrella term for rate ratios and odds ratios.

14 It basically says compare the risk in two groups.

15 So in a cohort study we compare the rates in

16 the two groups, in a case control study we compare

17 the odds in the two groups. So you're measuring the

18 risk in one group compared to the risk in the other

19 group.

20 Q. How do we know whether it's a negative or

21 positive association looking at relative risk?

22 A. The good thing is that the - the

23 calculations are done in a manner such that when the

24 answer is 1.0, there is no association. So it

25 doesn't matter whether it's case control study or

1 cohort study, if the answer is one, there is no
2 association at all.
3 If it's above one, it's a positive
4 association, meaning the exposed people have a higher
5 rate of disease than the unexposed. If it's below
6 one, it's a negative association, meaning exposed
7 people have a lower rate of disease than the
8 unexposed people.

9 So 1.0 is the critical number for an
10 association versus a negative association, or I
11 should say a positive association versus a negative
12 or no association at all.

13 Q. Now, are all the positive associations
14 necessarily causal?

15 A. No. You can't say that.

16 Q. What are some of the things that you, as an
17 epidemiologist, have to look out for to determine
18 whether or not a positive association is a causal
19 association?

20 A. Well, there are a number of things to
21 evaluate, okay, and epidemiologists always worry
22 about bias, confounding and chance.

23 Okay, bias means that there has been some
24 systematic error in the study. It doesn't mean that
25 the investigator intentionally did it wrong, it means

1 there was some subtle error.

2 I could give you an example of a subtle bias
3 that would give you a wrong answer. For example,
4 let's suppose that you - we're doing your case
5 control study of pancreas cancer and wanted to find
6 out if drinking coffee was a cause of pancreas
7 cancer.

8 You design a control cancer, and let's say
9 you're interested in whether obesity causes this
10 cancer. So you go for the cases for people who are
11 hospitalized, because pancreas cancer is a serious
12 disease, and you get their weight, and for the
13 controls that are healthy people.

14 And you say it sounds evenhanded on the
15 surface of it, but it's not because pancreas cancer
16 causes people to lose weight. So if you take their
17 weight out of the hospital charts, they're falsely
18 low. That's a bias, that's a systematic error.

19 If you don't realize that, what you end up

20 with is, gee, the pancreas cancer cases weigh less

21 than the controls. It looks like being thin is

22 associated with pancreas cancer.

23 That's a bias, that's a systematic error

24 that results in a wrong answer. So we always

25 evaluate epidemiology studies for systematic errors.

1 Confounding is another type of systematic
2 error, when there is some other factor that you
3 didn't control for.

4 So if you're looking at coffee drinking and
5 pancreas cancer, and let's say you find an
6 association but you don't deal with smoking. Well,
7 actually smoking and coffee drinking do correlate.
8 People who drink coffee tend to smoke more than
9 people who don't drink coffee, and causes pancreas
10 cancer. If you do not do that, you come up with the
11 wrong answer.

12 And the last one, in every study you have to
13 evaluate the role of chances. In other words, could
14 these findings have come about by chance alone when
15 there is really no association at all. And so we
16 always look to see whether the epidemiologist or
17 whether the scientist has evaluated the role of
18 chance.

19 Q. And do epidemiologists use statistical

20 methods to evaluate the role of chance?

21 A. Yes, those are the fundamental methods for

22 measuring the role of chance.

23 Q. Do you have a slide that illustrates that?

24 A. Yeah. There are two things that can be

25 done. One is to calculate -- the first one is

1 values. We have all heard about confidence interval.
2 When you listen to the news and hear a story that a
3 Gallup Poll has evaluated how people think
4 President Bush is doing and 28 percent of them
5 approve of his handling of some issue, plus or minus
6 two percent, that's a confidence interval.

7 What they are saying, the data said 28
8 percent approve but the range, because of random
9 error, the range could be between 26 and 30, that's a
10 confidence error.

11 Epidemiologist calculate these. The
12 range - let's say you get a relative risk of 2.0.
13 You calculate a confidence level around it. And
14 that's the range of which the element of risk would
15 fall 95 percent of the time if you do the same study
16 over and over and over again, because it evaluates
17 the random error in doing a statistical sample.

18 What it means is the true relative risk.
19 The truth is likely to be close to what you measured

20 and unlikely to be -- it gets less and less and less

21 likely that the truth is out here or that the truth

22 is out here, and showing an example of confidence

23 interval.

24 Q. Do you as an epidemiologist, Dr. Garabrant,

25 like to see more than one study that shows a positive

1 association before you draw conclusions regarding

2 causal associations?

3 A. Absolutely.

4 Q. And why is that?

5 A. One of the fundamental issues in science is

6 whether your findings can be replicated by other

7 scientists, all right.

8 If I do a study and I find a positive

9 association and I write it up and publish it in the

10 peer reviewed literature, what I'm doing is I'm

11 telling people here is how I did the work. Here are

12 my methods, here is how I got my answer.

13 The idea is that other people can go out and

14 repeat that study and see if they can get my answer.

15 That's really important.

16 The pancreas cancer and coffee issue is

17 actually a good example. There was a very famous

18 study published in the 1980s, a case control study of

19 pancreas cancer that reported that coffee drinking

20 was pretty strongly associated with pancreas cancer.

21 And it was published by the chairman of the

22 department of epidemiology at Harvard, a very

23 talented scientist. And got a lot of press coverage

24 because coffee drinking is pretty common, pancreas

25 cancer a bad disease. Epidemiologists all over the

1 world set out to replicate that finding, with few
2 exceptions they couldn't.

3 Now there wasn't anything wrong with the
4 study that reported it, that's just the way the data
5 came out. Nobody criticized, gee, the data was
6 wrong, the data was phony, but other scientists
7 didn't find the same answer.

8 I still drink coffee. I don't believe
9 coffee causes pancreas cancer because the evidence
10 doesn't support it. Even though there is a positive
11 study, there is a lot of studies that say there is no
12 association there. So replication really matters.

13 Q. So how do you, you as an epidemiologist, go
14 about reviewing a series of studies to ultimately
15 determine whether there is, in fact, a causal
16 association?

17 A. Well, the first thing you do is you search
18 the scientific literature. And we can do that now on
19 line. You can do it on line. You can type in PubMed

20 and type in the keywords and find the studies.

21 You read them, look at the bibliography.

22 You get the studies they rely on and read them. You

23 try to assemble all the literature, all the

24 scientific literature that addresses that hypothesis

25 or that question.

1 And then you abstract from those studies
2 what the relative risks and the confidence intervals
3 were. And you try to categorize case control studies
4 versus cohort studies, recent studies versus studies
5 done a long time ago, all sorts of ways of looking at
6 them.

7 And you try to sum them up. And the way you
8 sum them up is to try to take an average of what
9 those relative risks are. But it's a weighted
10 average because bigger studies get more weight,
11 little studies get less weight, and you try to do
12 that.

13 Q. Do you have a couple of examples of that?

14 A. Yeah, yeah. This is a study that looks at
15 whether cigarette smoking is associated with cancer
16 of the urinary tract. Urinary tract is the kidneys
17 and the bladder, okay.

18 So this is in the published literature. And
19 here is - here is what we typically do.

20 The little box represents the odds ratio.

21 In other words, the relative risk, and the bar around

22 it represents the confidence interval.

23 So in this analysis these scientists looked

24 at studies done in Europe. They have looked at

25 studies done in the United States. And what you see,

1 they vary, they give different answers. They looked
2 at studies done back before 1980, studies done in the
3 '80s, studies done in the '90s, follow-up studies,
4 cohort studies, a synonym.

5 And as you look down the chart you see the
6 answers vary, but they are really centered pretty
7 nicely on one value, and that looks to me to be maybe
8 2.7. So what they say when you add them up is there
9 is about a 2.7-fold association between cigarette
10 smoking and cancer of the urinary tract.

11 Okay. And this vary - and this study is
12 very different. This one is significantly different
13 than all the others. But if you add them up using
14 any fair measure, you come up with about a 2.7-fold
15 association.

16 From that we conclude there is a positive
17 association, cigarette smoking is associated with
18 increased risk of urinary tract cancer.

19 Q. Do you have an example where the same method

20 was followed but a different conclusion is reached?

21 A. Yeah, this is a very important study, does

22 smoking cause breast cancer. Well, this is an

23 analysis of 53 --

24 MR. RUCKDESCHEL: Your Honor, may we

25 approach?

1 THE COURT: Yes.

2 (Thereupon, the following proceedings were
3 had out of the hearing of the jury:)

4 MR. RUCKDESCHEL: Your Honor, I am concerned
5 that this is now the third smoking-related
6 example Dr. Garabrant is using. This is not a
7 case about smoking.

8 MR. BISHOP: He is giving examples, Your
9 Honor.

10 THE COURT: One at a time.

11 MR. RUCKDESCHEL: I'm concerned smoking,
12 smoking, smoking.

13 THE COURT: How many more have we got?

14 MR. BISHOP: This is an example of a
15 negative, they didn't find an association between
16 smoking and breast cancer.

17 MR. RUCKDESCHEL: I'm going to ask the jury
18 be instructed this case has nothing to do with
19 smoking.

20 MR. BISHOP: That's fine, Your Honor.

21 MR. LIPMAN: Can we come back a second? I

22 heard Your Honor say that's fine, I didn't hear

23 the resolution, I'm not sure.

24 THE COURT: I'm going to tell the jury.

25 MR. LIPMAN: That's the resolution.

1 (Thereupon, the following proceedings were

2 had within the hearing of the jury:)

3 THE COURT: I just want to make sure you

4 understand this is not a case about smoking. The

5 doctor is simply using that as an example of how

6 epidemiology reaches a result and a conclusion,

7 okay.

8 Proceed.

9 MR. BISHOP: Thank you, Your Honor.

10 Q. (By Mr. Bishop) I think the question was,

11 do you have an example of how using this same method

12 of reviewing all the studies, an epidemiologist drew

13 the conclusion there was no association or causal

14 association?

15 A. Well, it was that there was no association.

16 So this is a study of 53 epidemiologic

17 studies that look at breast cancer and smoking. This

18 has been studied a lot of times. And it includes

19 over 58,000 women with breast cancer, 95,000 women

20 without breast cancer.

21 Here is what it found. Same style of graph.

22 Now you have a box that represents the relative risk,

23 and the bar around it is the confidence interval.

24 Now in this graph big boxes represent bigger

25 studies, so you also have some information - that's a

1 little teeny study, that's a real big study.

2 As you go down, these two things are pretty
3 clear. They vary, right, and there is a central
4 value, almost exactly on 1.0.

5 Okay, so what this says is that in this huge
6 amount of scientific evidence, there is really no
7 association between cigarette smoking and breast
8 cancer.

9 That's a really important finding. Smoking
10 causes a lot of types of cancer, doesn't appear to
11 cause breast cancer. That's important to know.

12 Now, it's important to recognize that out of
13 these 53 studies this one's a significantly positive
14 association. And I say that because the confidence
15 interval doesn't overlap 1.0, so this one's
16 different.

17 And that's actually the CASH study, that was
18 a very well-done study, but it gives a slightly
19 different answer than all the others.

20 What is not appropriate to do is rely on
21 that study and ignore the other 52. You can't do
22 that. You can't pick the one you like and say,
23 that's the truth and the other 52 are wrong. You
24 properly evaluate all the 53 and add them up in a
25 fair manner.

1 When you do, the conclusion is there is no
2 association between smoking and breast cancer.

3 Okay, so that's what epidemiologists pretty
4 routinely do to try to evaluate many studies that
5 have all looked at the same question. It comes to
6 this issue of replication, do these findings
7 replicate? And the answer for smoking and breast
8 cancer is, yes, they do.

9 And these studies give answers that wiggle
10 around, one by a little bit, but they are pretty
11 compatible answers.

12 MR. RUCKDESCHEL: Your Honor, may we
13 approach again, please.

14 (Thereupon, the following proceedings were
15 had out of the hearing of the jury:)

16 MR. RUCKDESCHEL: We are going next - and
17 what I'm concerned about --

18 THE COURT: We're probably going to lunch
19 next.

20 MR. RUCKDESCHEL: What Dr. Garabrant said,
21 you have to add them up and then you have to make
22 your evaluation.

23 Now, what Dr. Garabrant is going to do now,
24 in my study I looked at what all these other
25 people said and name them, and that's not

1 allowable under the Court's rulings.

2 He's going to bootstrap these people in.

3 And it's okay for him to say we have considered

4 studies, but it's not okay for him to say we

5 considered this study and this study and that

6 study, because that is exactly what Your Honor

7 has prevented everybody else in this case from

8 doing.

9 Dr. Brody was not allowed to talk about the

10 particular studies he relied upon, Dr. Egilman

11 wasn't, Dr. Mark wasn't.

12 THE COURT: Why isn't that true?

13 MR. BISHOP: Your Honor, I think he

14 identified the - a witness can identify the

15 studies.

16 THE COURT: I prevented the other witnesses

17 from doing just that. I ought to be consistent.

18 I think he can testify that he did this empirical

19 study of 42 or whatever the number is, without

20 naming McDonald or Teta or whatever the others

21 are.

22 MR. RUCKDESCHEL: He's not going to talk

23 about the numerical result of his meta-analysis.

24 THE COURT: In other words, what his results

25 are.

1 MR. RUCKDESCHEL: But he can't say my
2 meta-analysis showed no increased risk because
3 that's the number.

4 MR. BISHOP: He can certainly testify to his
5 opinion based on the review in the study is X.

6 MR. RUCKDESCHEL: No.

7 THE COURT: He can't give his opinion.

8 MR. RUCKDESCHEL: He can't say my opinion
9 based on all the things I reviewed is X?

10 THE COURT: That's what I said.

11 MR. RUCKDESCHEL: What they want to do is
12 say your opinion based on your study that X - and
13 that's not what everybody's been allowed to do.

14 You can only say it's my opinion, based on
15 all of the things I have reviewed, that there is
16 no increased risk. Otherwise he is bootstrapping
17 in all of the things he did.

18 And he said I combined seven studies here or
19 11 studies there, he's saying there are seven

20 people that agreed with me or 11 people that

21 agreed with me.

22 THE COURT: That he is not going to do.

23 MR. BISHOP: Say how many studies he

24 reviewed and what his conclusions were after

25 reviewing them, that's absolutely appropriate.

1 MR. RUCKDESCHEL: We were not allowed to, we
2 were not allowed to say I looked at 72 studies.

3 THE COURT: I don't recall somebody asking
4 me if you can do that. All I said was they
5 couldn't mention the names of the studies or what
6 they said. I never said you couldn't say they
7 looked at six-month's worth of studies.

8 MR. RUCKDESCHEL: As long as he's not
9 testifying about the result of the study.

10 THE COURT: No, he can say I looked at these
11 studies and my opinion is blank.

12 MR. RUCKDESCHEL: Not my study showed or my
13 study proved.

14 THE COURT: Okay, we're going to break for
15 lunch.

16 (Thereupon, the following proceedings were
17 had within the hearing of the jury:)

18 THE COURT: We are going is to take a break
19 for lunch.

20 1:30.

21 (Thereupon, the jurors left the courtroom,

22 after which the following proceedings were had:)

23 MR. LIPMAN: Your Honor, before the jury

24 leaves. It's too late.

25 THE COURT: What?

1 MR. LIPMAN: I would like to discuss
2 scheduling without the witness in the courtroom.

3 THE COURT: No problem.

4 MR. LIPMAN: In terms of scheduling, we have
5 a sense of how long --

6 THE COURT: How long is the doctor going to
7 be?

8 MR. LIPMAN: How much longer the direct will
9 be?

10 MR. BISHOP: 15, 20 minutes.

11 THE COURT: Which means a half an hour.

12 MR. LIPMAN: Right, 1:30, 2:00. I just want
13 to make something really - I don't think it will
14 occur.

15 THE COURT: Okay.

16 MR. LIPMAN: I don't think it will occur. I
17 want to put it up here to think about though.

18 We have accommodated scheduling of very
19 important, busy experts, two of them. Two of

20 them. They are busy, we accommodated them.

21 Your Honor accommodated them. I don't want

22 to be in a situation where my client testifies on

23 direct, and cross-examination is on the longer

24 side and spills into Monday. That would be

25 really unfair.

1 THE COURT: Well, then, two choices. Number
2 one, assuming he's through by 2:00, how long will
3 your cross be?

4 MR. LIPMAN: We will discuss it at lunch and
5 have an answer for you after lunch, so then we
6 will have a sense of that.

7 THE COURT: Because it would seem to me,
8 depending upon how long - one choice would be to
9 simply permit direct and do cross on Monday, or
10 go home even earlier and not have either direct
11 or cross today.

12 MR. LIPMAN: I'm raising it for discussion.

13 THE COURT: See you at 1:30.

14 (Thereupon, the Court adjourned for the
15 luncheon recess:)

16 (Thereupon, after the luncheon recess, the
17 following proceedings were had:)

18 (Thereupon, the jurors entered the
19 courtroom, after which the following proceedings

20 were had:)

21 THE COURT: You may be seated.

22 You may proceed, Mr. Bishop.

23 MR. BISHOP: Thank you, Your Honor.

24 Q. (By Mr. Bishop) Good afternoon, Doctor.

25 A. Good afternoon.

1 Q. Just prior to the break, I believe you were
2 giving the jury an example of reviewing published
3 epidemiological studies where the review indicated
4 there was not an association?

5 A. Yes.

6 Q. I want to turn to vehicle mechanics and
7 mesothelioma. Have you reviewed the peer-reviewed
8 scientific literature to be able to identify
9 epidemiological studies pertaining to motor vehicle
10 mechanics and mesothelioma?

11 A. Yes, I have.

12 Q. Without naming any kind of studies, what
13 kind of studies, whether they were case-control or
14 cohort?

15 A. Well, they were both, they were case-control
16 studies and cohort studies, and what are commonly
17 referred to as registry studies, which are like
18 cohort studies. They come from large cancer
19 registries that maintain surveillance over an entire

20 population, but they are like big cohort studies.

21 Q. If we could turn to the next-to-the-last

22 slide we are going to display for the jury.

23 Is this a paper that you coauthored,

24 published in the peer-reviewed medical and scientific

25 literature of your review of these case-control

1 studies, cohort studies, and registry studies?

2 A. Yes, it is.

3 Q. If you can resume the stand, that will be
4 the last slide that we show.

5 Doctor, upon reviewing all of the available
6 studies you reviewed in the world's scientific and
7 world's published literature on mechanics and
8 mesothelioma, can you arrive at any opinions that you
9 can express, within a reasonable degree of scientific
10 certainty and medical certainty, whether motor
11 vehicle mechanics are at any elevated risk as a
12 result of their work?

13 MR. RUCKDESCHEL: Objection.

14 THE COURT: Overruled.

15 Q. (By Mr. Bishop) Without referencing any
16 particular study, what was your bottom-line
17 conclusion?

18 A. The - my review indicated that there were 17
19 studies --

20 MR. RUCKDESCHEL: Objection.

21 THE COURT: No, listen to the question.

22 THE WITNESS: I am sorry?

23 THE COURT: Repeat your question.

24 Q. (By Mr. Bishop) Without reference to any

25 of the studies, I need to ask you what your

1 bottom-line conclusion was. After reviewing the
2 studies, what conclusion specifically did you reach
3 whether there was any increased risk in your
4 scientific judgment, among motor vehicle mechanics,
5 an increased risk of mesothelioma?

6 A. My conclusion was that there is no evidence
7 of an increased risk of mesothelioma among motor
8 vehicle mechanics and brake repair workers.

9 Q. Now, were you asked in this case to review
10 materials, depositions, discovery pertaining to
11 Mr. Mallia and his work?

12 A. Yes.

13 Q. And were you asked to arrive at a conclusion
14 which you can express with a reasonable degree of
15 medical certainty whether his work as a vehicle
16 mechanic placed him at any increased risk for
17 developing mesothelioma?

18 MR. RUCKDESCHEL: Objection.

19 THE COURT: Basis.

20 MR. RUCKDESCHEL: This is the issue we

21 discussed with Dr. Weir yesterday.

22 May we approach?

23 THE COURT: I am sorry?

24 MR. RUCKDESCHEL: May we approach?

25 THE COURT: Sure.

1 (Thereupon, the following proceedings were
2 had out of the hearing of the jury:)

3 MR. RUCKDESCHEL: Your Honor, this is the
4 increased compared to who question.

5 MR. BISHOP: You ruled on that. You said
6 that was the subject of cross. You specifically
7 ruled on that.

8 THE COURT: I don't think I did, but go
9 ahead.

10 MR. RUCKDESCHEL: Do you have an opinion
11 that you have a risk, that's one thing. An
12 increased risk necessarily is comparing him to
13 other people who Dr. Garabrant has no information
14 about, who there is no basis are different or
15 unexpressed. And, in fact, the testimony in this
16 case is uncontested that most of the people who
17 don't think they were exposed were. And so
18 comparing Mr. Mallia to other unspecified people
19 is not germane to the case.

20 THE COURT: I think he has a right to an
21 opinion that he had no risk, but increased risk,
22 from what I hear, that he didn't know what these
23 other people in the study did.

24 I think if you just take out the word
25 increased risk and ask him an opinion, was he at

1 any risk of mesothelioma from what he did as seen
2 in the deposition.

3 MR. BISHOP: I would state in the studies
4 that he reviewed, some of them were categorized
5 as garage mechanics and others specifically
6 categorized as brake workers, so it did include
7 that.

8 THE COURT: I understand, but that's not
9 what his answer in the deposition was. No.

10 (Thereupon, the following proceedings were
11 had within the hearing of the jury:)

12 MR. BISHOP: May I proceed, Your Honor?

13 THE COURT: Yes.

14 Q. (By Mr. Bishop) Dr. Garabrant, can you
15 tell the jury briefly what kind of material did you
16 review in connection with your review of Mr. Mallia's
17 case?

18 A. Yes, I can. I reviewed depositions, I
19 reviewed medical records - no, wait, I didn't review

20 medical records, I apologize.

21 I reviewed Defendant's Request for

22 Production and Plaintiff's Answers to Defendant's Set

23 of Interrogatories, Social Security Administration

24 earning records, union records from the International

25 Union of Operating Engineers, some exposure sheets.

1 That was basically it.

2 Q. Based upon your review of those materials
3 and your review of the literature, as well as your
4 training and experience as a cancer epidemiologist
5 for over 20 years, did you reach an opinion that you
6 can express, within a reasonable degree of medical
7 certainty, whether Mr. Mallia's work in repairing
8 brakes either caused or contributed to in any way the
9 development of his mesothelioma?

10 A. I did reach an opinion.

11 Q. And what is that opinion?

12 A. That his work doing brake repair and vehicle
13 repair did not cause or contribute to his
14 mesothelioma in any way.

15 MR. BISHOP: Your Honor, if I can just have
16 a second.

17 THE COURT: Yes.

18 MR. BISHOP: Thank you.

19 THE COURT: You may inquire.

20 CROSS EXAMINATION

21 Q. (By Mr. Ruckdeschel) Good afternoon,

22 Dr. Garabrant.

23 A. Good afternoon, Mr. Ruckdeschel.

24 Q. Prior to today, you and I had never met,

25 correct?

1 A. That's correct.

2 Q. We had spoken on the telephone in a
3 deposition in this case, do you recall that?

4 A. I do.

5 Q. Doctor, you are being paid \$625 an hour
6 right now, correct?

7 A. No.

8 Q. How much are you being paid?

9 A. For court testimony I charge by the half
10 day, and it is \$2250 for a half day or 4500 for a
11 full day.

12 Q. 4500 for a full day. What does that work
13 out to per hour if it's an eight-hour day?

14 A. Eight into 45 is about 500 - I'm not quick
15 enough. 560.

16 Q. Okay. And when you are not testifying, you
17 get \$525 a day?

18 A. An hour, not per day.

19 Q. I am sorry, an hour, thank you.

20 Now, this paper, Mesothelioma and Lung
21 Cancer Among Motor Vehicle Mechanics, a
22 Meta-analysis, that was paid for by Ford, Chrysler
23 and General Motors, correct?
24 A. It is my understanding that Ford, Chrysler
25 and General Motors paid the authors who were an

1 exponent. They did not pay me. I did not receive

2 any compensation for that.

3 Q. The paper states it was financed by Ford,

4 Chrysler and General Motors, correct?

5 A. I believe that's true.

6 Q. Now, you have worked for companies or have

7 testified for companies that manufactured brakes

8 other than Abex, correct?

9 A. Yes, I have.

10 Q. For Abex. For General Motors?

11 A. I don't know whether General Motors

12 manufactures brakes or not.

13 Q. You have testified for General Motors in

14 brake cases?

15 A. Yes, I have.

16 Q. And for Ford and Chrysler?

17 A. Yes, I have.

18 Q. And you have worked for NAPA and Mack Trucks

19 and Bendix in brake cases, too?

20 A. I'm not - I don't know whether I worked for

21 all of them. I may have.

22 Q. You worked for NAPA and Mack Trucks and

23 Bendix in this case, didn't you, before working for

24 Abex?

25 A. I know I was retained on behalf of Mack

1 Trucks. I don't remember NAPA. That could be my
2 lack of memory.

3 Q. They also go by Genuine Parts.

4 A. Oh, I didn't know that, yes.

5 Q. All right. And you have testified for
6 companies that manufactured and sold welding rods in
7 personal injury cases where individuals are claiming
8 welding rod disease from manganese and other things
9 in welding rods, correct?

10 A. In cases where people have claimed
11 Parkinson's disease, yes.

12 Q. And you have testified for pharmaceutical
13 companies in lawsuits?

14 A. To the best of my knowledge, once.

15 Q. In the past four years through at least the
16 time of your deposition in this case, you had
17 testified at least 43 times in depositions, correct?

18 A. I don't know exactly, but that would be
19 approximately right, I think.

20 Q. If that's the number you gave in your

21 deposition --

22 A. Then that would be correct.

23 Q. All right. Now, epidemiology studies

24 groups, correct?

25 A. Studies populations, yes.

1 Q. And did you compare populations, for
2 example, you talked with the jury about comparing
3 exposed versus unexposed earlier?

4 A. Yes.

5 Q. Now, when you do a study like that, it's
6 important that the exposed people actually be
7 exposed, would you agree?

8 A. Yes.

9 Q. And it's important that the unexposed people
10 actually be unexposed?

11 A. That's correct.

12 Q. Now, for an individual like Joe Mallia, am I
13 correct you either have a zero or a 100 percent
14 chance of getting mesothelioma?

15 A. Each of us will die of something, and our
16 chance of getting whatever it is we die of will be
17 100 percent when we die.

18 Q. And Mr. Mallia is going to die of
19 mesothelioma?

20 A. I believe that is highly likely.

21 Q. And Mr. Mallia has mesothelioma, correct?

22 A. I believe so.

23 Q. Now, you talked with Mr. Bishop about

24 various studies of different types of people, and I'd

25 like to ask you whether you are aware of studies that

1 show, for example, that electricians are at an

2 increased risk of mesothelioma?

3 A. I would have to look. I don't recall

4 offhand without looking. I believe there are some

5 studies that have shown that. I don't know whether

6 there is a replicated pattern for that just from

7 memory.

8 Q. Let's assume that that's the case, Doctor.

9 If that is the case, for any particular

10 electrician, is it the job title electrician or is it

11 the asbestos that gives them the mesothelioma?

12 A. Well, it would be the exposures. In that

13 instance, one would think about amphibole asbestos.

14 So it's typically not the job title, it's typically

15 the chemical, if that chemical causes that cancer.

16 Q. Asbestos acts the same on a plumber or an

17 electrician or a mechanic or anybody else, having a

18 different job title doesn't change how asbestos works

19 in the body, does it?

20 A. Well, when you state it that way, it mixes
21 some different issues together, one of which is that
22 there are different types of asbestos --
23 Q. Doctor --
24 A. Some carry risk and some don't for
25 mesothelioma.

1 Q. Doctor, the question is does a particular
2 fiber of asbestos act differently in a person's body
3 if that person is an electrician or a plumber or a
4 mechanic? I don't care what kind of fiber it is, you
5 pick whatever kind you want.

6 Does it make any difference what their job
7 title is how that asbestos works in your body?

8 A. The fiber doesn't know what the job title
9 is.

10 Q. All right, thank you.

11 In Mr. Mallia's deposition, I asked you a
12 hypothetical question. Do you recall that question?

13 A. I don't offhand, I am sorry.

14 Q. Okay. You talked with Mr. Bishop about the
15 scientific method and testing hypotheses earlier
16 today, do you recall that?

17 A. Yes.

18 Q. In your deposition, I asked you if you were
19 going to design an epidemiological study to test the

20 hypothesis whether individuals like Mr. Mallia who
21 ground brakes, who filed brakes, who sanded brakes
22 were at risk for mesothelioma, how would you design
23 that study? And you responded to that question.

24 Do you remember my asking that question?

25 MR. BISHOP: I apologize. This is improper

1 impeachment. He can ask a question. Now, if
2 there is a basis, he can go back to the
3 deposition, but I don't believe this is proper.

4 MR. RUCKDESCHEL: I am just asking if he
5 remembers the question.

6 THE COURT: That's not the appropriate
7 question. If you are going to ask a witness
8 whether he remembers something in the deposition,
9 refer him to page and line and read the question
10 and the answer.

11 Q. (By Mr. Ruckdeschel) Doctor, let me read
12 you your question and answer and see if you recall
13 giving this answer.

14 MR. BISHOP: Can you give me the page and
15 line?

16 MR. RUCKDESCHEL: Absolutely. It's on page
17 69, and starts at Line 8, I am sorry.

18 THE WITNESS: May I get my copy?

19 MR. RUCKDESCHEL: Of course. I have a copy

20 of it here for you, Doctor.

21 THE WITNESS: Thank you.

22 Q. (By Mr. Ruckdeschel) If you look at page

23 69, beginning at Line 10, Doctor.

24 And this is your response: Are you asking

25 me to design an epidemiologic study that would test

1 the hypothesis that sanding, filing and/or grinding

2 new friction materials causes mesothelioma?

3 Question, yes.

4 Answer, well, I could do that for you. That

5 would take some thought.

6 Question, okay. How would you do it?

7 Answer, I'm not sure it's feasible to do so.

8 I would want to identify a cohort of people

9 whose only exposure to asbestos was from sanding,

10 filing or grinding new friction materials; I would

11 want to follow that cohort over a sufficient period

12 of time, probably a minimum of 40 years; and I would

13 want to calculate the incidence rate of mesothelioma

14 in that group; and then I would want to compare it to

15 a referent population that did not sand, grind - I am

16 sorry, sand, file or grind friction products but who

17 were otherwise just like the exposed population.

18 Do you remember giving that answer?

19 A. I do.

20 Q. So let me ask you, Doctor, is the study to
21 test that hypothesis, does it involve those four
22 steps, the study you designed in your deposition?

23 A. I am sorry, I'm - would you ask me again?

24 Q. Sure. The study you designed in your
25 deposition had four steps, correct?

1 A. Okay, yes.

2 Q. And the first step is identify a group that
3 has its only exposure to asbestos from grinding,
4 filing or sanding brakes, right?

5 A. Yes.

6 Q. Okay. And the second question, the second
7 step is to follow that cohort for at least 40 years,
8 right?

9 A. Well, I said for a sufficient period of
10 time.

11 Q. Okay.

12 A. Probably a minimum of 40 years.

13 Q. All right. So I will put sufficient time,
14 and then I will do a little wiggle here because it's
15 approximate.

16 40 years, is that fair?

17 A. Yes.

18 Q. And then you want to calculate the rate of
19 mesothelioma in that group, right?

20 A. Yes.

21 Q. All right. And then the final step is to

22 compare that group and the rate of mesothelioma to

23 the rate of mesothelioma in an identical population

24 that didn't sand, grind or file brakes; is that

25 correct?

1 A. Pretty close. The way I said it, would
2 compare it to a referent population that did not
3 sand, file or grind friction products who were
4 otherwise just like the exposed population.

5 Q. Okay. So you want them to be the same
6 except for they didn't sand, grind or file?

7 A. Except for sanding, grinding, filing brakes,
8 that's correct.

9 Q. I will put same but no sand, grind or file.
10 Those are the four steps, right?

11 A. Yes.

12 Q. You would agree that study has never been
13 done, correct?

14 A. Mr. Ruckdeschel, that exact study, which is
15 an ideal --

16 Q. Doctor --

17 A. Can I finish?

18 Q. The study has never been done, correct?

19 A. That exact study has never been done.

20 MR. RUCKDESCHEL: Thank you. Nothing

21 further.

22 THE COURT: Redirect.

23 MR. BISHOP: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 Q. (By Mr. Bishop) Two items, Dr. Garabrant.

1 The study that you published, your
2 participation in that study, was that funded by
3 General Motors, Ford or Chrysler?

4 A. I was not paid by anyone for my work on that
5 study. I did it because I thought it was good
6 science to participate in that.

7 Q. Do we have to do this cohort study and
8 follow them for 40 years in order to determine in
9 your opinion, with a reasonable degree of medical
10 certainty, whether Mr. Mallia had any measurable risk
11 of mesothelioma from working with brakes as a vehicle
12 mechanic over and above what he would have had in the
13 absence of any such work?

14 MR. RUCKDESCHEL: Objection.

15 THE COURT: Overruled.

16 THE WITNESS: No, you don't have to do that
17 exact study. That's an ideal study that I said
18 in my answer may not even be feasible to do.

19 May I continue with my answer?

20 THE COURT: I don't know. It's up to the

21 lawyers.

22 MR. RUCKDESCHEL: I object to a volunteered

23 narrative, Your Honor.

24 THE COURT: Ask your next question.

25 Q. (By Mr. Bishop) Dr. Garabrant, as an

1 epidemiologist practicing for over 20 years, can you
2 tell the jury whether you believe you had sufficient
3 information, based upon your training, experience and
4 your review of the epidemiological literature, to
5 reach a conclusion whether Mr. Mallia's mesothelioma
6 was caused or contributed by his work as a vehicle
7 mechanic working with brakes?

8 A. Yes, I do have a very good basis for that
9 conclusion. The studies that have been done are
10 well-done studies.

11 MR. RUCKDESCHEL: Objection.

12 THE COURT: Overruled.

13 MR. BISHOP: Thank you, Doctor.

14 THE COURT: Thank you, sir, you are excused.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Let's take a five-minute break
17 while we get all of this out of here.

18 (Thereupon, the jurors left the courtroom,
19 after which the following proceedings were had:)

20 (Thereupon, after an off-the-record

21 discussion, the following proceedings were had:)

22 THE COURT: I want charges Monday morning.

23 MR. LIPMAN: Would the Court reconsider,

24 then, the idea, just an idea, I'm not rearguing,

25 an idea, would the Court consider allowing

1 direct, allowing that portion of cross to 5:00,

2 and then resuming?

3 THE COURT: That was the one thing you

4 didn't want. You didn't want to break it up.

5 MR. LIPMAN: I said that, but --

6 THE COURT: That's not fair to the defense.

7 They will have all of the direct to take home and

8 sleep on over the weekend and only a portion of

9 the cross. No, I don't like severing that.

10 I will do this, I will let you have a half

11 hour of direct just to get the jury to see

12 Mr. Mallia and get his name and a couple of live

13 interesting things out, and then we will break.

14 I'll do that.

15 MR. LIPMAN: Okay.

16 THE COURT: Is that not too objectionable to

17 the defense?

18 MR. POWERS: I was going to say I'm not

19 crazy about it, but I won't object to it, Your

20 Honor.

21 MR. LIPMAN: Okay.

22 THE COURT: We are going to take a recess

23 for ten minutes.

24 MR. BISHOP: I wanted the Court's

25 permission, before I do it, I would like to mark

1 for identification the --

2 THE COURT: The exhibits I didn't allow.

3 MR. BISHOP: Right, and I will just proffer.

4 THE COURT: Are we ready?

5 MR. RUCKDESCHEL: No, I'm not. I need the

6 tech guy here.

7 MR. LIPMAN: Let's just start, and the tech

8 guy will sneak up here, I will bet. Let's just

9 start.

10 THE COURT: Gus, get me the jury.

11 MR. POWERS: I gathered from our schedule we

12 are going to just stop at 3:00.

13 THE COURT: So you can make your flight.

14 MR. POWERS: Thank you.

15 (Thereupon, the jurors entered the

16 courtroom, after which the following proceedings

17 were had:)

18 THE COURT: Mr. Ruckdeschel, that's not in

19 evidence, turn it around.

20 MR. RUCKDESCHEL: Oh.

21 THE COURT: You may be seated.

22 You may proceed.

23 MR. LIPMAN: Yes, Your Honor.

24 Your Honor, with the Court's permission, we

25 call our final witness for today, my client,

1 Mr. Joseph Mallia.

2 THE COURT: Come up here, sir.

3 Thereupon:

4 JOSEPH MALLIA,

5 was called as a witness on his own behalf, and having

6 been first duly sworn, testified upon his oath as

7 follows:

8 THE COURT: I want you to understand that

9 you are going to have an abbreviated session

10 today, so you are not going to hear all of his

11 testimony, you are only going to hear a

12 beginning, and then we will break for the day.

13 You may proceed.

14 DIRECT EXAMINATION

15 Q. (By Mr. Lipman) Only in the formality of a

16 court, I suppose, in room 6-2, where we all know each

17 other, would I ask you to state your name and spell

18 your last name.

19 A. Joseph Mallia, M-a-l-l-i-a.

- 20 Q. And Mr. Mallia, I have a half an hour. I'd
- 21 like to start with you've been here during the
- 22 opening, during the whole session, other than when
- 23 Mrs. Mallia testified?
- 24 A. Correct.
- 25 Q. I want to show you some graphics that were

1 shown in the opening session and shown by Abex's

2 counsel to several or at least one expert.

3 Mr. Mallia, do you recall during the opening

4 session that this graphic was displayed to the jury,

5 and then during one of the witness examinations, and

6 the matter of a medical record indicating exposure to

7 asbestos 20 years while doing demolition of buildings

8 was read to the jury and was discussed?

9 A. Yes.

10 Q. All right. Starting - this is Doctor - the

11 physician from Sylvester Cancer Clinic. You heard

12 him testify, Dr. Tang?

13 A. Yes.

14 Q. Do you know anything about any discussion

15 that you recall with Dr. Tang about as - exposure to

16 asbestos 20 years while doing demolition of

17 buildings?

18 A. Yes.

19 Q. Tell us what you recall.

20 A. I got asked - well first, can I go back a
21 little bit and talk about the emergency room?
22 I was asked, when they told me about there
23 is something going on, everything looks suspicious
24 with the fluid and all of that, they asked me if I
25 was exposed to asbestos.

1 My first answer was no because I didn't know
2 anything about working with asbestos. My type of
3 work, I worked on brakes, I worked on trucks, I
4 worked on cars. I was a supervisor for a while and
5 ran some equipment, and I didn't know anything about
6 asbestos.

7 That was brought up because when you think
8 about construction, you think about buildings. So we
9 worked at - one of the main jobs was the mall we
10 talked about, and the other one was the school.

11 Q. Now, when you say we, the jury has met your
12 brother.

13 A. Yeah. And, I mean, the company, too,
14 basically the company.

15 Q. What's the name of the company?

16 A. Imburgia Construction.

17 Q. Tell the jury what you recall from the
18 demolition incident that you were referring to with
19 Dr. Tang.

20 A. Well, at first - the first thing I thought
21 of is that when you are going through all of this, I
22 was scared. I didn't know what was going on. I
23 heard I had this illness. The first thing that came
24 to my mind was asbestos in a building or in the
25 ceilings, because you hear of asbestos like in

1 ceilings or walls or something like that. So that
2 along with all my work, that's what I considered was,
3 you know, asbestos.

4 Q. And you heard your brother describe that
5 project. Do you have any memory of the demolition
6 project that happened 20 years earlier?

7 A. Now when I look back, we talked about it, we
8 started checking into everything. The mall, they
9 were doing demolition work inside. We were working
10 outside doing site work, site work, stuff like that.
11 So I was never really involved in the building.

12 The school, we did research on that and
13 found out the school had the abatement. My cousin
14 couldn't even get a permit to let us go in and start
15 doing the site work.

16 Both jobs, if I wasn't in the shop, I would
17 deliver equipment, drop equipment off, go back to the
18 shop. If they needed fuel, they would call me on the
19 radio, I would run out there. So it wasn't like I

20 was there continuously.

21 Q. Your brother explained about the business,
22 so we heard the testimony, but does that square with
23 how you understand the business in your experience?

24 A. Yeah, I mean.

25 Q. What was the work of Imburgia when you got

1 here to Florida?

2 A. When we first moved down in '78?

3 Q. Yes.

4 A. My father brought some dump trucks down and

5 went in partners with my cousin. We started out

6 asphalt paving and driveways. That was basically it.

7 We had some dump trucks. We bought a few more dump

8 trucks from Mack, we bought a lowboy and bought a

9 service truck.

10 At that time we didn't have a mechanic. I

11 was the only one that was really mechanically

12 inclined. And so I started - I volunteered, and we

13 had no choice and I started working on the equipment

14 because I had a lot of experience with vehicles since

15 I was really young, took shop mechanics in school,

16 hung out with a lot of guys that took cars apart and

17 put them back together. It was like a hobby with me.

18 Q. Did you ever get a license or certificate or

19 any training?

20 A. No. I took shop mechanics when I was in

21 high school.

22 Q. How old were you when you first started your

23 interest in cars and trucks or such?

24 A. 14.

25 Q. The jury heard a little bit about life in

1 New York. Did you do that - were you employed? Did
2 you do that as a hobby? What did you do before you
3 came to Florida?

4 A. Before I came to Florida, I worked at a Hess
5 gas station where I pumped gas. There was no
6 mechanics involved. And after that I worked for
7 Pizza Kitchen for a little while, but I really wasn't
8 into that.

9 Q. Do you know when, if you can, put a time
10 when you did your first mechanical brake work or
11 other kind of work?

12 A. 13, 14. I was working on cars before I
13 could even drive. We were on a couple of acres, so I
14 would actually work on the cars, and me and my
15 brother would drive them around the backyard. We
16 opened right into an apple orchard, so we could drive
17 all the way around but weren't on the road.

18 Q. All right.

19 Now, you are down here in Florida, we have

20 heard, about 1978. I think your brother came a year

21 after you?

22 A. Yeah, about a year after.

23 Q. And what kinds of equipment were you

24 personally working on with your family in the family

25 business in those early years?

1 A. We had a couple of Chevy dump trucks,
2 single-axle dump trucks, we had a couple of
3 single-axle Ford dump trucks, we had a lowboy
4 trailer, we had a Mack Truck, a fuel truck, we had a
5 couple of C-10 pickup trucks, which were a lighter
6 duty pickup, and a Ford F-150, Ford F-250.

7 Q. What kind of work did you do on those
8 vehicles for Imburgia?

9 A. Everything, from a radiator hose to radiator
10 to transmission, brakes, light engine work.

11 If something blew up or a piston went bad or
12 something like that, we would bring it to a machine
13 shop. Tune-ups, oil changes, stuff of that nature.

14 Q. Where did you buy the equipment when you did
15 the mechanical work at Imburgia?

16 A. Most of the time, NAPA.

17 Q. Why was that?

18 A. They were real close. You would walk almost
19 right across the street. So it would be real easy to

20 pick up the parts and have them delivered.

21 Q. Did you do that?

22 A. Did I pick the parts up?

23 Q. Yes.

24 A. Yeah, or we had them delivered.

25 Q. What kind of parts did you buy at NAPA?

1 A. Everything, hoses, spark plugs, oil,
2 brakes, hydraulic fluid. NAPA had a big line of
3 everything. Still does.

4 Q. In the early years, did anyone else do that
5 work other than Joseph Mallia?

6 A. No. I was the only one that did it.

7 Q. Did you work hard?

8 A. Real hard, sometimes seven days a week.

9 Q. Were you in the field, as well?

10 A. Very little. If I wasn't doing mechanical
11 work in the shop, the only time I would not be doing
12 mechanical work, if they called me and I had to move
13 a piece of equipment, or go service to fuel the
14 equipment, because I drove the fuel truck. If I was
15 in the shop and they needed fuel, I would jump in the
16 truck, fill up the fuel, and then come back to the
17 shop.

18 Q. Would there be times when NAPA didn't have
19 what you needed, and you went elsewhere?

20 A. Yeah. Sometimes we would go to either the
21 Chevy dealer or Ford dealer, which was right down the
22 street, too.

23 Q. Why would that be?

24 A. If NAPA didn't have it, or we had to get
25 something out right away or fixed the next day, say

1 something came in at that was broke, and we had to
2 get the part right away and couldn't wait to be
3 fixed, we would go to the dealer and try to get it if
4 they had it.

5 Q. Mr. Mallia, we have some brakes right here
6 that you recently purchased?

7 A. Yes.

8 Q. Non-asbestos?

9 A. Non-asbestos.

10 Q. No asbestos. Did you buy these?

11 A. Yes.

12 Q. Did you buy those to show the jury what a
13 brake is?

14 A. Yes.

15 Q. Where did you buy these materials?

16 A. Let's see which ones we have in here.

17 These ones are from - these ones are from

18 Mack.

19 Q. Okay.

20 A. And these ones are from the NAPA dealer.

21 Q. Is there a NAPA logo on the box, on my side
22 of the box?

23 A. Yeah.

24 Q. Show the jury, if you can, what those
25 different brakes are and how they relate, realizing

1 they are not asbestos, how do they compare? Are they
2 similar to the kinds of brakes you worked with on the
3 vehicles in the early years at Imburgia?

4 A. Yes. I purchased these from a NAPA dealer.
5 These are from a 1972 C-60 Chevy dump truck. That's
6 what we had, we had two of those, and we had a couple
7 of Ford F-700s. This is the size of the brake, one
8 of the brakes, I worked with on some of the trucks.

9 Q. How many of those size brakes would there be
10 on the trucks; the C-60?

11 A. C-60, yeah.

12 Q. How many brakes like that that you have in
13 your hands would there be in a truck?

14 A. This is one rear set, so you would have had
15 four in the back and two sets in the front.

16 Q. All right. Anything else in the box?

17 A. No, that's it.

18 Q. Could you show the jury, realizing again,
19 these are non-asbestos, what the brakes looked like

20 back when you worked at Imburgia? Same appearance?

21 A. The color was different. The asbestos

22 brakes, I mean, were a lot more tanner, more of a

23 brown color. These are like a grayish black.

24 Q. And the metal backing to what you have in

25 your hand --

1 A. Right.

2 Q. -- what is that called? What do you know

3 about that?

4 A. This is the mounting bracket. This goes up

5 against the wheel, the backing plate, and this mounts

6 the brake to the inside of the housing.

7 Q. Monday I'm going to get into more of that

8 with you. But the holes, if you can still show the

9 jury, there are holes --

10 A. Yeah. What it is, there are pins that come

11 through the backside of the - backside of the wheel

12 housing, and they actually hold it in place.

13 Sometimes the holes could be holes to the spring from

14 one side to the other side, adjusters, wheel

15 cylinders. If we had a little graph or something, I

16 could --

17 Q. We will do that Monday. Kind of just do a

18 big picture today.

19 A. I am doing a big picture, basically, with

20 the holes are for pins and springs, and hold

21 different stuff in place.

22 Q. Show the jury how you do a brake job on

23 Monday. I want to wait on that.

24 A. Yes.

25 Q. Are there any other brakes in this

1 particular box?

2 A. No.

3 Q. Now, there is another box here called

4 Bendix.

5 A. Uh-huh.

6 Q. And it says relined brake shoes. I think

7 the jury has been introduced to the idea some brakes

8 are relined.

9 A. Right.

10 Q. What does that mean?

11 Q. Most of the time, if you go to the

12 dealership, it's brand new manufactured brakes. Most

13 of the brakes we got from NAPA and they sell are

14 relined brakes.

15 They take this piece, take this off, the

16 shoe off, okay, and you heard they went through the

17 cleaning process and all that, and when you get it

18 back, they either rivet it back on or adhere it back

19 on or glue it back on. It's a relined brake. The

20 whole thing isn't new, just the shoe.

21 Q. They save the back end?

22 A. They save the back end, yeah.

23 Q. Can you show the jury the Bendix box and the

24 brakes inside it?

25 A. Yeah.

1 Q. And could you show the jury those brakes?

2 A. (Indicating).

3 Q. What would those be used for?

4 A. I don't know, a go-cart. I don't know what
5 they are used for.

6 Q. Did you see Abex's counsel during opening
7 session show the jury a brake?

8 A. Yes.

9 Q. All right.

10 MR. LIPMAN: Counsel, do you have that in
11 the courtroom, the brake you showed the jury?

12 MR. BISHOP: I am sure if you asked me
13 earlier, I would have been able to look for it.

14 MR. LIPMAN: Could you?

15 Q. (By Mr. Lipman) You saw counsel show the
16 jury a brake when we began in the opening session, I
17 think that was Wednesday of last week.

18 A. You see these ones, you see how these are
19 glued?

20 Q. Yes.

21 A. That's the difference.

22 Q. While he's finding his set, what do you

23 mean, glued versus riveted?

24 A. There are two ways to mounting them. This

25 one is riveted on to make it stay on there, and this

1 is glued on. They have some special glue that

2 adheres.

3 Q. All right.

4 A. These are two different styles.

5 MR. LIPMAN: While counsel is finding the

6 brake he showed the jury in opening, if you can,

7 can you bring that Monday for us?

8 MR. BISHOP: We will look for it.

9 MR. LIPMAN: Thank you.

10 Q. (By Mr. Lipman) Was it similar to the size

11 of the brake in the Bendix box that counsel for Abex

12 showed the jury?

13 A. It was small. I know that. I don't know if

14 it was the same one or not. I know it was small.

15 Q. Would you have an idea what a small brake

16 like that would be used for?

17 A. I don't know.

18 Q. Would you use that on dump trucks, pickup

19 trucks, some of the equipment you used at Imburgia?

20 A. No.

21 Q. Would you use that on cars?

22 A. Maybe some type of foreign car or a real

23 small, small car.

24 Q. Let me ask you this, at NAPA, did you - when

25 you went in to buy brakes, do you remember the brand

1 name of any of the brakes? I am at Imburgia at the

2 same period of time, the early years, when you were

3 doing the work?

4 A. Bendix, Abex and NAPA. Those are the three

5 names of brakes that NAPA carried.

6 Q. How did you know those brands in relation to

7 what you bought at NAPA?

8 A. Usually when I went to NAPA and ordered

9 something, that is what I would get. That's what

10 they would give me.

11 Q. NAPA said NAPA?

12 A. Yeah.

13 Q. And NAPA on the NAPA box?

14 A. Yes.

15 Q. And Bendix said Bendix?

16 A. Yes.

17 Q. Did you know that Abex manufactured the

18 Bendix brake before this trial?

19 A. No.

20 MR. POWERS: Excuse me, Your Honor, I
21 object, foundation, and I think it misstates what
22 the evidence is.

23 THE COURT: Sustained.

24 Q. (By Mr. Lipman) Let me show you, do you
25 have the - you have been sitting in trial,

1 Mr. Mallia. Let me ask you if you are
2 familiar - they have something else on - ask you
3 about this, and we will get back to Bendix in a
4 minute. If you can come around with me.

5 A. (Witness leaving witness stand).

6 Q. Are you familiar with the photograph that's
7 enlarged and on the screen?

8 A. Yes.

9 Q. And tell the jury what that is and where
10 this fits in to what you just said.

11 A. Okay. So you see it's got a NAPA label with
12 an American Brakeblok which is Abex in it. Now, they
13 are the same team and they are with NAPA.

14 Q. Do you recall the NAPA logo when you bought
15 your NAPA brand?

16 A. Yes.

17 Q. Do you recall American Brakeblok?

18 A. Yes.

19 Q. Do you recall Abex?

20 A. Yes.

21 Q. Do you recall Bendix?

22 A. Yes.

23 Q. Okay. And were these the types of

24 containers that you saw that - the boxes of the

25 brakes that you bought at NAPA?

1 A. Yeah. I remember seeing the names. I
2 remember - the colors, you know, I mean, it was so
3 far back. The names I remember. If you asked me the
4 color of the box, I couldn't tell you. But yes.

5 MR. LIPMAN: All right. Do we have a
6 photograph printed of this - of this - what we
7 are seeing now, do we have a photograph here?

8 MR. RUCKDESCHEL: Not here.

9 Q. (By Mr. Lipman) I will do that Monday with
10 you. I will mark it and we will do that Monday.

11 You personally went to NAPA and bought NAPA?

12 A. Yes.

13 Q. Abex?

14 A. Yes.

15 Q. Bendix?

16 A. Yes.

17 Q. Did you have them delivered?

18 A. Sometimes picked up, sometimes delivered.

19 If a delivery was going to take a while, we would go

20 pick it up.

21 Q. Ever see any indication on the boxes that

22 indicated that the materials contained, the materials

23 in the boxes, the brakes contained asbestos?

24 A. No.

25 Q. Anything about cancer?

1 A. No.

2 Q. Anything about a respirator?

3 A. No.

4 Q. Anything about mesothelioma?

5 A. No.

6 Q. Anything about danger caused by breathing
7 dust?

8 A. No.

9 Q. Any skull and crossbones?

10 A. No.

11 Q. I want to talk to you about some of the
12 trucks.

13 MR. LIPMAN: Can we put the trucks from the
14 question in 122.

15 Q. (By Mr. Lipman) You sat here and you saw
16 the Bendix - excuse me, the Abex answers to some
17 questions, we called them interrogatories?

18 A. Yes.

19 Q. And they referenced they were manufacturing

20 brakes for Chevy or Chevrolet Model 10 and Model 20

21 models?

22 A. C-10 and C-20s.

23 Q. What's a C-10 and what's a C-20?

24 A. A C-10 is a half-ton pickup truck. It just

25 means the weight of it. A C-20 is 3/4-ton, and you

1 got the C-30 is a one-ton.

2 Q. Do you recall, I published this to the jury,
3 and the gist of it was that Bendix manufactured for
4 Chevrolet Motors Corporation, Chevy 1/2-ton trucks,
5 the C-10 model, 100 percent from August '57 to July
6 '70, 50 percent from August '70 to June '75?

7 A. Uh-huh.

8 Q. Now, did you know that those brakes that you
9 used or bought for the Chevy 1/2-ton trucks were
10 manufactured by Abex?

11 MR. POWERS: Excuse me, Your Honor, I
12 object. That totally misstates what this
13 evidence says.

14 MR. LIPMAN: Exactly what it says, Your
15 Honor.

16 THE COURT: I don't know what it says. Can
17 somebody show me?

18 MR. POWERS: May we have a side bar to take
19 this up?

20 Can we take this off?

21 MR. LIPMAN: It's in evidence, Your Honor.

22 MR. POWERS: He read from our answers to

23 interrogatories. I have an objection to it.

24 (Thereupon, the following proceedings were

25 had out of the hearing of the jury:)

1 THE COURT: What's your objection?

2 MR. POWERS: The objection is if you look at
3 it, Judge, the Chevy C-10 which he just asked him
4 about, the dates that it says that we supplied
5 the brakes are not the dates that he worked down
6 in Florida for Imburgia Construction Company. So
7 the way he asked the question, it totally
8 misstates the evidence, which is what that is.

9 MR. LIPMAN: We have had evidence already
10 about the shelf-life of these brakes. Dr. Longo
11 testified to that, Dr. Weir testified to that.

12 MR. POWERS: That wasn't the question.

13 THE COURT: What was the question?

14 MR. LIPMAN: The question was, was he aware
15 of the fact that when he worked on Chevy 10 Model
16 half-ton trucks, that the brakes he was using for
17 those trucks were Chevy - the brakes he used for
18 those trucks were manufactured by Abex?

19 MR. POWERS: They were not manufactured by

20 Abex during the time he worked on Chevy trucks.

21 THE COURT: When did he work for Imburgia?

22 THE REPORTER: One at a time.

23 MR. LIPMAN: We had testimony about the

24 shelf-life of these materials from two experts,

25 and we also have a Chevy 20 model that's

1 exactly --

2 THE COURT: That's not your question.

3 MR. LIPMAN: I will rephrase.

4 THE COURT: Okay.

5 (Thereupon, the following proceedings were

6 had within the hearing of the jury:)

7 Q. (By Mr. Lipman) Mr. Mallia, do you know
8 from your work doing mechanical work back in 1978
9 that the material - that the brakes you were buying
10 from NAPA had a long shelf-life, that they were
11 stored, had been manufactured and stored at the
12 distribution place in NAPA for a period of time?

13 THE COURT: Lay a foundation how he would
14 know.

15 Q. (By Mr. Lipman) Do you have any knowledge
16 as to the shelf-life of the brakes you were
17 purchasing?

18 A. No.

19 Q. Let me ask you this, did you work on

20 Chevrolet 20 Models?

21 A. Yes.

22 Q. Did you work on Chevrolet 20 Models - what

23 is that?

24 A. The 20, it's a 3/4-ton pickup truck, your

25 average Chevy 3/4-ton pickup truck.

1 Q. Did you work on those kinds of pickup

2 trucks?

3 A. Yes.

4 Q. Did you work on those kinds of pickup trucks

5 between 1978 and 1980?

6 A. Yes.

7 Q. Did you go to the NAPA dealer to buy

8 brakes --

9 A. Yes.

10 Q. -- for those 20 ton - 20 model?

11 A. C-20 models, yes.

12 Q. What does that all mean?

13 A. That just different sizes. A C-10 is

14 lighter duty, 1/2 ton, a C-20 is a little heavier

15 duty, the springs.

16 Q. Did you buy it at NAPA?

17 A. Yes.

18 Q. Were you aware at the time that 100 percent

19 of those brakes at NAPA for that model is

20 manufactured by Abex?

21 A. No.

22 MR. POWERS: Excuse me, Your Honor, I have

23 to object. That's not what that evidence says.

24 I guess I can clear it up on cross, but I do want

25 to lodge an objection.

1 Q. (By Mr. Lipman) Now I am going to ask you

2 a couple of final questions before we --

3 A. Can I go back up?

4 Q. Yes, please.

5 A. (Witness regaining witness stand).

6 MR. POWERS: Are you finished with this

7 particular exhibit?

8 MR. LIPMAN: For this moment I am, sir.

9 MR. POWERS: Thank you, sir.

10 THE COURT: Take it off the display.

11 Q. (By Mr. Lipman) Just a couple of final

12 questions to get everybody out at 3:00.

13 Would there be - when you worked with a

14 brake like the truck brake that we are talking

15 about --

16 A. Uh-huh.

17 Q. -- that you purchased from NAPA --

18 A. Yes.

19 Q. -- back in '78, the early years --

20 A. Yes.

21 Q. -- would you file the edges of those brakes?

22 A. Yes.

23 Q. Why?

24 A. So the drum would slide over the shoes

25 easier.

1 Q. Okay.

2 A. And - and I wanted to make a point

3 about - we talked about the sanding. We could talk

4 about the sanding later, we can talk about it now,

5 because there is a reason why I wanted to talk about

6 the sanding, because I did a lot of sanding, and

7 there was a reason why I did it.

8 The video we looked at - remember the video

9 we seen here in the courtroom?

10 Q. Yes, sir.

11 A. Showed the guy messing around with his hands

12 dirty.

13 My hands. You have to imagine taking

14 something apart, holding these shoes, putting them

15 back together. Everything that's on here is on here

16 (indicating).

17 Q. Right.

18 A. I had a couple of experiences with the dirt,

19 grease, grime stuff coming back on these. Get a

20 glazing on, then when you use them, they get hot.

21 Get a glazing on them. And ever since I started

22 sanding the face of them to remove the stuff that

23 came off my hand back onto these, okay, I never had a

24 problem after that.

25 Q. All right.

1 A. But that's one of the reasons why I used to
2 sand them. It's more than filing, i did a lot of
3 sanding, too.

4 Q. What would you sand with?

5 A. Emory cloth, sandpaper.

6 Q. What would you file the edges with?

7 A. A metal file.

8 Q. Does that create dust?

9 A. Yes.

10 Q. Did you breathe the dust?

11 A. Yes, yes.

12 Q. Did the dust get over your work station?

13 A. Yes.

14 Q. Did you put the brakes in an vice when

15 you --

16 A. Yes, everyone - when I filed them, they were
17 in a vice. After I installed them back on the car is
18 when I sanded them. This way it was all assembled,
19 put back together, and that's when I cleaned them.

20 Q. Do you have any idea how many times you did

21 that, Mr. Mallia, since you have been a kid?

22 A. No idea.

23 Q. All right. Any idea at all?

24 A. A lot of times. It - to pinpoint it, no.

25 Q. When you did brake jobs, would you always

1 have to file and would you always have to sand?

2 A. Yes. It was rule of thumb, usually whenever

3 you put them on, especially with the bigger brakes,

4 you are talking about a big heavy drum. So to sit

5 there and fight with that thing and try to get it on,

6 it was a lot easier to spend a little time filing it,

7 sanding it. This way it would slide on easier.

8 Q. How would you clean up the dust after you

9 did a brake job after you filed or after you sanded?

10 A. Usually with an air hose or just a push

11 broom.

12 Q. Did you have that at Imburgia?

13 A. Yes.

14 Q. Did that create dust?

15 A. Yes.

16 Q. Did you breathe that dust?

17 A. Yes.

18 Q. Did you sweep up the - clean the area when

19 you were done after you used the air hose?

20 A. I used to sweep a lot because a lot of the
21 stuff I used to do, we talked about I used to buy my
22 own vehicles and refurbish them and stuff. I used to
23 do body work, and I used to do a lot of painting, and
24 I used Imburgia's equipment. I painted office
25 equipment and painted his dump trucks. So one of the

1 most important things when you are painting obviously
2 is not to have a lot of dust in the air because it
3 comes in and lands back on the paint. So when I
4 cleaned up, I used to clean it really good just
5 because of the case of spray painting.

6 MR. LIPMAN: Your Honor, this is 3:00.

7 THE COURT: Yes.

8 MR. LIPMAN: My commitment. Thank you.

9 THE COURT: Have a nice weekend. See you on
10 Monday at 9:00. Still don't talk about this.

11 (Thereupon, the jurors left the courtroom,
12 after which the following proceedings were had:)

13 JUROR NO. 7: Can I ask you a question?

14 THE COURT: Sure.

15 (Thereupon, after an off-the-record
16 discussion between the Court and juror number
17 seven, the following proceedings were had:)

18 THE COURT: The juror wanted to know whether
19 we would go through Friday, and I said no, I

20 don't think so.

21 MR. LIPMAN: You assured the juror we would

22 not go through Friday?

23 THE COURT: Yes.

24 MR. LIPMAN: I think that's fairly certain.

25 THE COURT: All right, Court's in recess.

1 MR. BISHOP: I am going to object on the
2 record to Mr. Lipman in the middle of his
3 examination directing a request to me to go look
4 for a demonstrative exhibit I used in the
5 opening.

6 I sat here and waited for ten minutes while
7 he got ready to do his direct examination. There
8 is no need to do that in front of the jury. I
9 consider that a cheap theatrical trick, and I
10 object.

11 MR. LIPMAN: If that were true, he would
12 have objected then, and he didn't. To show that
13 jury a go-cart brake, and now it disappeared.

14 If they demonstrate materials to the jury, I
15 have a right to take what they demonstrate and
16 ask my client what it is.

17 THE COURT: Was it marked in evidence or for
18 identification?

19 THE CLERK: No.

20 MR. LIPMAN: I have no idea what he did with
21 it. He certainly showed it to the jury for an
22 extended period of time, him suggesting that
23 was - in fact, stating that was the type of
24 material that Mr. Mallia worked with.

25 THE COURT: Are we now going to have this

1 witness identify something that was used by
2 counsel that hasn't been marked and we don't know
3 what it was?

4 MR. LIPMAN: I would like whatever the
5 demonstration was - I would like the brakes --

6 THE COURT: How do we know --

7 MR. LIPMAN: I would like to hand it to
8 Mr. Mallia and ask him what it was used for.

9 THE COURT: Somebody should have asked
10 counsel before we started.

11 MR. LIPMAN: I did not mean to be
12 inappropriate.

13 THE COURT: But you should have objected
14 then, not now. It's a little bit late.

15 We are in recess until Monday.

16 (Thereupon, the Court adjourned for the
17 weekend recess:)

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1 CERTIFICATE

2 STATE OF FLORIDA)

3) SS:

4 COUNTY OF DADE)

5

6 I, ROBERT S. KLUPT, Court Reporter, do hereby

7 certify that I was authorized to and did report in

8 shorthand the proceedings taken before the Honorable

9 Richard Yale Feder, Circuit Court Judge, at the time

10 and place aforesaid; and that the foregoing pages are

11 a true and correct transcription of my stenographic

12 notes of the proceedings taken at the Dade County

13 Courthouse, Miami, Florida, on the 9th day of

14 December, 2005, commencing at 9:00 a.m.

15 IN WITNESS WHEREOF I have hereunto

16 affixed my hand this 9th day of December, 2005

17

18

ROBERT S. KLUPT, RPR

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