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1 CASE NUMBER: BC 367800

2 CASE NAME: WILLIAM MOLINA AND ANGELINA MOLINA

3 VS.

4 SHELL OIL COMPANY, ET AL.

5 LOS ANGELES, CA TUESDAY, OCTOBER 28, 2008

6 DEPT. NO. 323-CCW HON. CAROLYN B. KUHL, JUDGE

7 REPORTER: VIRGINIA R. ISHIDA, CSR 3784

8 TIME: 9:15 A.M.

9 APPEARANCES: (AS NOTED ON TITLE PAGE.)

10

11 (THE FOLLOWING PROCEEDINGS

12 WERE HAD IN OPEN COURT IN THE

13 PRESENCE OF THE JURORS:)

14

15 THE COURT: ALL JURORS AND ALTERNATES ARE HERE. GOOD

16 MORNING. COUNSEL ARE PRESENT. THE WITNESS IS AGAIN ON THE

17 WITNESS STAND.

18 MR. RIFF, YOU MAY INQUIRE.

19 MR. RIFF: THANK YOU, YOUR HONOR.

20

21 JOHN WHYSNER,

22 HAVING BEEN PREVIOUSLY SWORN BY THE CLERK, RESUMED THE STAND

23 AND TESTIFIED FURTHER:

24

25 REDIRECT EXAMINATION (RESUMED)

26 BY MR. RIFF:

27 Q DR. WHYSNER, AT 4:35 YESTERDAY WE WERE PUT TO A

28 DECISION WHETHER TO ASK YOU A FEW MORE QUESTIONS THEN OR THIS

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1 MORNING, AND WE'VE ELECTED TO DO SO THIS MORNING. WITH ANY
2 LUCK THIS WILL NOT TAKE ALL THAT LONG.

3 SO I WANT TO TAKE A GIANT STEP BACKWARDS FROM
4 THE DETAILS ON CROSS-EXAMINATION THAT OCCURRED YESTERDAY AND
5 ASK YOU THIS QUESTION: IN SELECTING THE ARTICLES THAT YOU
6 CONSIDERED FOR -- IN YOUR ANALYSIS, WHAT WERE THE KEY CRITERIA
7 OR FACTORS THAT YOU USED -- JUST LEAVE IT AT THAT.

8 A WELL, THERE WERE THREE FACTORS. ONE OF THEM WAS
9 THAT IF IT WAS A REPETITION OF AN ANALYSIS OF A PREVIOUS
10 PUBLICATION --

11 IN OTHER WORDS, IF IT WAS THE SAME GROUP OF
12 PEOPLE AND THEY WERE BEING ANALYZED A SECOND TIME, I TRIED TO
13 USE THE MOST RECENT STUDY OF THAT GROUP OF INDIVIDUALS.
14 THAT'S ONE THING.

15 BUT PROBABLY MOST IMPORTANTLY FOR WHAT WE WERE
16 TALKING ABOUT YESTERDAY, THE IMPORTANT THING IS WHEN YOU'RE
17 TRYING TO ANALYZE WHETHER OR NOT A PARTICULAR CHEMICAL MIXTURE
18 CAUSES A PARTICULAR DISEASE, THE STUDIES HAVE TO BE ABOUT,

19 NUMBER ONE, THE CORRECT DISEASE, AND NUMBER TWO, THE CHEMICAL
20 OR CHEMICAL MIXTURE THAT YOU'RE CONCERNED ABOUT.

21 THOSE ARE THE TWO MAIN CRITERIA BY WHICH I
22 SELECTED THE STUDIES THAT I DID AND THE RESULTS WITHIN CERTAIN
23 STUDIES THAT I SELECTED.

24 Q NOW, YOUR FILE IN THIS CASE THAT YOU PUT
25 TOGETHER INCLUDED MORE STUDIES THAN YOU INCLUDED ON THE ACTUAL
26 TABLES THAT WE SHOWED YESTERDAY; IS THAT TRUE?

27 A YES.

28 Q YOU BROUGHT ALL OF YOUR STUDIES AND ALL OF YOUR

1 FILES TO A DEPOSITION IN THIS CASE EARLIER THIS YEAR?

2 A YES.

3 Q AND COUNSEL'S PARTNER, MR. HANLEY, ASKED YOU
4 QUESTIONS FOR TEN HOURS ABOUT THOSE STUDIES?

5 A I BELIEVE THAT'S THE RIGHT AMOUNT OF TIME, YES.
6 UH-HUH.

7 Q YESTERDAY AT ONE POINT, AT LEAST BRIEFLY, WE
8 WERE TALKING ABOUT WHETHER -- ABOUT A STUDY THAT IDENTIFIED
9 HODGKIN'S DISEASE AS OPPOSED TO NON-HODGKIN'S LYMPHOMA. IS IT
10 APPROPRIATE TO -- FOR THE PURPOSES OF THIS CASE, FOR WHAT WE
11 ASKED YOU TO DO -- TO TALK ABOUT HODGKIN'S DISEASE?

12 A JUST LIKE ACUTE MYELOGENOUS LEUKEMIA IS A
13 DIFFERENT DISEASE FROM NON-HODGKIN'S LYMPHOMA, EVEN THOUGH
14 BOTH HODGKIN'S DISEASE AND NON-HODGKIN'S LYMPHOMA ARISE IN THE
15 LYMPH SYSTEM, THE LYMPH GLANDS, WE STILL HAVE TO LOOK AT THOSE
16 TWO DISEASES SEPARATELY. THEY HAVE TOTALLY DIFFERENT
17 CHARACTERISTICS, AND THE CLINICAL COURSE OF THE DISEASES ARE
18 DIFFERENT. THE TREATMENTS OF THE DISEASES ARE DIFFERENT. SO

19 WE, AGAIN, TRY TO FOCUS ON STUDIES OF NON-HODGKIN'S LYMPHOMA.

20 Q NOW, I THINK YESTERDAY --

21 A BY THE WAY, I'LL MENTION AS AN ASIDE. WE DO

22 HAVE A FAIR NUMBER OF STUDIES ON THE INTERSECTION BETWEEN

23 NON-HODGKIN'S LYMPHOMA AND THESE EXPOSURES. SO IT'S NOT AS IF

24 WE'RE -- WE DON'T HAVE STUDIES ENOUGH TO LOOK AT THESE

25 SPECIFICALLY.

26 Q LET ME ASK YOU ABOUT THAT.

27 WHEN YOU GO TO THE WORLD'S PUBLISHED

28 PEER-REVIEWED LITERATURE AND YOU SELECT OUT THOSE STUDIES THAT

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1 LOOK AT NON-HODGKIN'S LYMPHOMA AND REFINED -- ORGANIC REFINED
2 PETROLEUM SOLVENTS, YOU'RE LOOKING FOR THE INTERSECTION OF
3 THOSE TWO. WOULD YOU DESCRIBE THAT DATABASE, THAT COLLECTION
4 OF INFORMATION, AS --

5 WELL, HOW WOULD YOU DEFINE IT? A LOT? A
6 LITTLE? ROBUST? NOT ROBUST?

7 A I THINK IT'S REASONABLY ROBUST. I'VE CERTAINLY
8 BEEN INVOLVED IN ISSUES WITH OTHER CHEMICALS WHERE WE DON'T
9 HAVE ANYWHERE NEAR THE NUMBER OF STUDIES THAT WE HAVE HERE.
10 BUT THIS HAS BEEN STUDIED BY LOTS AND LOTS OF DIFFERENT
11 SCIENTISTS. AND WE NOT ONLY HAVE THE STUDIES THAT HAVE LOOKED
12 AT SOLVENT EXPOSURES IN BENZENE, BUT WE HAVE THE PETROLEUM
13 WORKERS STUDIES, SO THIS IS A FAIRLY HUGE DATABASE.

14 Q SO YESTERDAY YOU WERE ASKED LOTS OF QUESTIONS
15 ABOUT ORGANIC SOLVENTS, AND I WANT TO MAKE SURE THAT I
16 UNDERSTAND -- WE UNDERSTAND SOMETHING.

17 WITHIN THE WORLD OF, QUOTE, "ORGANIC SOLVENTS,"
18 IS THERE A FAMILY OF SOLVENTS THAT ARE CALLED "GLYCOL ETHER"?

19 A YES.

20 Q GIVE US AN EXAMPLE OF WHAT A GLYCOL ETHER IS.

21 A PROPYLENE GLYCOL ETHER IS ONE OF THEM. THESE

22 SOMETIMES ARE USED IN PAINTS IN TERMS OF -- BECAUSE THEY'RE

23 BETTER FOR LATEX PAINTS BECAUSE THEY NOT ONLY CAN DISSOLVE

24 THINGS THAT HAVE SOME ORGANIC PROPERTIES BUT ALSO NON-ORGANIC

25 PROPERTIES.

26 BUT THEY ARE TECHNICALLY ORGANIC SOLVENTS, BUT

27 THEY'RE ACTUALLY USED TO DISSOLVE DIFFERENT KINDS OF

28 COMPONENTS.

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1 Q WITHIN THE BASKET OF THINGS CALLED "ORGANIC
2 SOLVENTS," IS THERE A FAMILY OF SOLVENTS THAT HAVE ONE OR MORE
3 MOLECULES OF CHLORINE IN THEM?

4 A YES. FOR EXAMPLE, ONE OF THEM IS A SOLVENT THAT
5 WAS USED EXTENSIVELY IN THE DRY CLEANING INDUSTRY,
6 PERCHLOROETHYLENE, ALSO KNOWN AS TETRACHLOROETHYLENE.

7 ANOTHER ONE IS TRICHLOROETHYLENE, WHICH WAS USED
8 AS A DEGREASING SOLVENT. IT WAS USED IN MANUFACTURE AND
9 MAINTENANCE OF AIRPLANES TO A LARGE EXTENT. BUT IT WAS USED
10 FOR A LOT OF DIFFERENT PURPOSES AND SO THAT'S ANOTHER ONE.

11 DICHLOROETHANE, D.C.E., IS ANOTHER ONE. THEY'RE
12 JUST A --

13 OH, TETRACHLOROETHYLENE. THERE ARE A LARGE
14 NUMBER OF -- CHLOROFORM.

15 Q CHLOROFORM. IS THAT AN ORGANIC SOLVENT THAT HAS
16 ONE OR MORE CHLORINE MOLECULES IN IT?

17 A YES.

18 Q IS THAT COLLECTION OF SUBSTANTIVE ORGANIC

19 SOLVENTS WITH ONE OR MORE CHLORINE MOLECULES, ARE THOSE CALLED
20 "CHLORINATED SOLVENTS"?

21 A YES.

22 Q NONE OF THE SOLVENTS INVOLVED IN THIS CASE, AS
23 YOU APPRECIATE IT, INVOLVE CHLORINE SOLVENTS; IS THAT TRUE?

24 A I'VE LOOKED OVER THE M.S.D.S.'S THAT HAVE BEEN
25 USED AND ALL THE ISSUES THAT HAVE BEEN DISCUSSED IN THIS CASE
26 AND I DIDN'T SEE ANY INDICATION THAT THERE WERE EITHER GLYCOL
27 ETHERS OR CHLORINATED SOLVENTS INVOLVED.

28 Q AS A BROAD PROPOSITION, DR. WHYSNER, ARE THERE A

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1 SET OF TOXICOLOGICAL PROPERTIES OF GLYCOL ETHERS THAT ARE
2 DIFFERENT IN KIND THAN, SAY, FROM CHLORINATED ORGANIC
3 SOLVENTS?

4 A YEAH. YES, FOR EXAMPLE, ONE OF THE BIG ISSUES
5 OF GLYCOL ETHERS HAS TO DO WITH ACTUALLY EFFECTS ON THE
6 REPRODUCTIVE SYSTEM. SO A LOT OF THE REGULATIONS AND STUDIES
7 THAT HAVE BEEN AIMED AT GLYCOL ETHERS HAVE TO DO WITH THINGS
8 LIKE TOXICITY, ESPECIALLY TO THE -- WELL, THE MALE AND FEMALE
9 REPRODUCTIVE SYSTEM, WHICH HAS REALLY REQUIRED THEM TO BE
10 FAIRLY STRINGENTLY REGULATED.

11 Q THIS CASE INVOLVES THOSE ORGANIC SOLVENTS THAT
12 COULD BE CALLED "REFINED PETROLEUM SOLVENTS" OR "REFINED
13 PETROLEUM HYDROCARBONS," RIGHT?

14 A YES.

15 Q AND IS THE KEY CONCEPT THAT THEY ARE DERIVED
16 FROM PETROLEUM?

17 A YES.

18 Q IS TURPENTINE A REFINED PETROLEUM SOLVENT?

19 A NO.

20 Q WHY?

21 A IT COMES FROM, AS I MENTIONED, IT COMES FROM
22 PINE TREES.

23 Q NOW, IN DOING THE ANALYSIS YOU DID, DID YOU TRY
24 TO LIMIT YOUR WORK TO THOSE STUDIES THAT DEAL WITH REFINED
25 PETROLEUM SOLVENTS, THE SOLVENTS THAT ARE AT ISSUE IN THIS
26 CASE -- THE KIND OF SOLVENTS AT ISSUE IN THIS CASE?

27 A YES. WELL, SOME OF THE STUDIES MAY HAVE HAD
28 THESE OTHER SOLVENTS INVOLVED AS WELL. BUT IF THEY CONTAINED

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1 ACTUAL ANALYSES OF REFINED PETROLEUM SOLVENTS, I TRIED TO
2 INCLUDE THEM IN MY ANALYSIS.

3 Q NOW, NEXT TOPIC.

4 YOU WERE ASKED SEVERAL QUESTIONS ABOUT REVIEW
5 ARTICLES. DO YOU REMEMBER THAT?

6 A YES.

7 Q BY THE WAY, WITH THE EXCEPTION OF ONE ARTICLE,
8 THIS HAYES STUDY FROM CHINA, I AM NOT GOING TO ASK YOU ANY
9 QUESTIONS ABOUT ANY SPECIFIC ARTICLES, BUT I WANT TO
10 UNDERSTAND, WITHIN THE WORLD OF SCIENCE THAT YOU LIVE IN, I
11 WANT TO UNDERSTAND WHERE SOME OF THESE DIFFERENT CONCEPTS FIT
12 IN.

13 IS THERE A DISTINCTION, DR. WHYSNER, AS YOU
14 APPRECIATE IT, BETWEEN ORIGINAL RESEARCH AND A REVIEW ARTICLE?

15 A YES.

16 Q EXPLAIN THAT FOR THE JURY, PLEASE.

17 A WELL, THE DIFFERENCE IS IN AN ORIGINAL RESEARCH
18 THAT ACTUALLY CONTAINS THE DATA THAT WE RELY UPON IF WE'RE

19 LOOKING AT STUDIES OF INDIVIDUALS. THE DIFFERENCE IS THAT
20 REVIEW ARTICLES ARE SOMEBODY ELSE'S INTERPRETATION OF WHAT
21 THAT DATA MEANS OR A COLLECTION OF STUDIES MEANS.

22 Q NOW, WITHIN THE WORLD OF SCIENCE AND
23 PUBLICATIONS THAT PEOPLE LOOK AT, IS THERE THE CONCEPT OF AN
24 EDITORIAL?

25 A YES.

26 Q WHERE DOES THAT FIT INTO THE NOTION OF ORIGINAL
27 RESEARCH VERSUS REVIEW ARTICLES VERSUS EDITORIALS?

28 A WELL, EDITORIALS ARE SPECIFICALLY THERE TO

1 PROVIDE A COMMENTARY ON A PARTICULAR ISSUE. AND A LOT OF
2 TIMES EDITORIALS DON'T EVEN REQUIRE ONE TO EVEN REFERENCE WHAT
3 ONE IS TALKING ABOUT. IT'S A -- IT CAN BE A THINK-PIECE. IT
4 CAN BE PUTTING FORTH A HYPOTHESIS, A CRITIQUE. IT CAN BE
5 VARIOUS KINDS OF THINGS.

6 Q NOW, FOR AN AUTHOR TO WRITE A REVIEW ARTICLE ON
7 A TOPIC, AT LEAST IN SOME CASES, THAT AUTHOR IS HIMSELF OR
8 HERSELF SELECTING FROM AND AMONG THE WORLD OF ORIGINAL
9 RESEARCH. IS THAT YOUR EXPERIENCE?

10 A YES.

11 Q NOW, YOU WERE ASKED ABOUT THIS YESTERDAY. YOU
12 WERE ASKED: WELL, GEE WHIZ, WASN'T THAT STUDY FUNDED BY THE
13 AMERICAN PETROLEUM INSTITUTE? THAT KIND OF QUESTION.

14 WHAT IS THE ROLE, IN YOUR EXPERIENCE AND I GUESS
15 IN YOUR OPINION, TO A REASONABLE DEGREE OF SCIENTIFIC
16 PROBABILITY, WHAT IS THE ROLE OF A FUNDING SOURCE AS IT
17 RELATES TO ORIGINAL RESEARCH?

18 A WELL, AT LEAST IN OCCUPATIONAL MEDICINE, A LOT

19 OF THE ORIGINAL RESEARCH IS ACTUALLY DONE AND HAS TO BE DONE
20 APPROPRIATE BY THE COMPANIES THAT ARE EMPLOYING THE WORKERS.
21 SO IN, I WOULD SAY, MOST RESEARCH THAT HAS TO DO WITH CHEMICAL
22 EXPOSURES IN THE WORKPLACE IS ESSENTIALLY BEING FUNDED BY
23 COMPANIES, THEIR OWN COMPANIES.

24 IN THE CASE WE WERE TALKING ABOUT, A.P.I., THIS
25 IS THE ORGANIZATION OF PETROLEUM COMPANIES, AND I PRESUME THEY
26 WERE FUNDING THAT RESEARCH THAT WE WERE TALKING ABOUT BECAUSE
27 IT HAD TO DO WITH PUTTING TOGETHER THE DATA FROM A NUMBER OF
28 DIFFERENT COMPANIES.

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1 Q SO --

2 A THE BOTTOM LINE IS IT'S NOT REALLY UNUSUAL IN
3 THE OCCUPATIONAL HEALTH. IN FACT, THAT'S WHERE MOST OF OUR
4 INFORMATION COMES FROM.

5 Q NOW, HAVE YOU PERSONALLY BEEN INVOLVED IN
6 RESEARCH FUNDED BY INDUSTRY, LOOKING AT ADVERSE HEALTH EFFECTS
7 OF CHEMICALS IN WORKER POPULATIONS?

8 A WELL, YES, I HAVE BEEN.

9 Q WHY DON'T YOU GIVE US AN EXAMPLE OF THAT.

10 A WELL, FOR EXAMPLE, WHEN WE WERE FIRST DEALING
11 WITH THE ISSUE OF POLYCHLORINATED BIPHENYLS --

12 Q P.C.B.'S.

13 A -- P.C.B.'S -- I WAS INVOLVED IN DOING PERIODIC
14 EXAMINATIONS OF WORKERS THAT WORKED FOR AMTRAK TO LOOK AT
15 WHETHER OR NOT THEY HAD ANY HEALTH -- ADVERSE HEALTH OUTCOMES.
16 AND WE WERE ALSO TESTING THE AMOUNT OF --

17 WITH P.C.B.'S YOU CAN ACTUALLY TEST THE AMOUNT
18 OF P.C.B.'S IN A PERSON'S BLOOD BECAUSE IT'S A BIOPERSISTENT

19 COMPOUND. YOU CAN'T REALLY DO THAT WITH BENZENE BECAUSE IT
20 COMES AND GOES QUICKLY.

21 SO IN THOSE CASES WE WERE LOOKING AT P.C.B.
22 BLOOD LEVELS IN THE WORKERS AND LOOKING FOR VARIOUS KINDS OF
23 HEALTH OUTCOMES, CHANGES IN THINGS THAT A DOCTOR WOULD MEASURE
24 IN AN OFFICE LIKE YOUR LIVER ENZYMES OR GLUCOSE LEVELS OR
25 WHATEVER TO SEE IF WE COULD FIND ANYTHING. WE DID THAT ON A
26 PERIODIC BASIS. LIKE I SAID, THIS WAS DONE BY AMTRAK TO LOOK
27 AT THEIR OWN EMPLOYEES.

28 Q JUST BY WAY OF ANOTHER EXAMPLE, IS THERE A

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1 SUBSTANCE THAT IS A KNOWN HUMAN CARCINOGEN CALLED "VINYL
2 CHLORIDE"?

3 A YES.

4 Q WHAT PART OF THE BODY DOES VINYL CHLORIDE OR IS
5 VINYL CHLORIDE CAPABLE OF CAUSING CANCER IN?

6 A WELL, IT CAUSES ANGIOSARCOMA OF THE LIVER AND
7 ALSO HEPATIC CELLULAR CARCINOMA, REGULAR LIVER CANCER.

8 Q WERE THE STUDIES THAT DEMONSTRATED THAT VINYL
9 CHLORIDE CAN CAUSE THIS KIND OF LIVER CANCER AN
10 INDUSTRY-FUNDED STUDY?

11 A SOME WERE DONE BY THE COMPANIES WHERE THE
12 WORKERS WERE PRESENT, YES.

13 Q NOW, IF INDUSTRY FUNDS A STUDY OF ORIGINAL
14 RESEARCH AND SOME RESEARCHER LIKE YOU OR MR. WEISENBURGER OR
15 SOMEBODY GOES OUT AND DOES THE STUDY AND WRITES IT UP AND
16 WANTS TO GET IT PUBLISHED, THAT AUTHOR STILL HAS TO GET IT
17 PAST THE PEER-REVIEW PROCESS OF THE EDITORIAL BOARD OF A
18 PEER-REVIEW JOURNAL; IS THAT TRUE?

19 A YES.

20 Q WHY DID YOU -- WITHDRAWN.

21 DID YOU IN YOUR WORK FOR THIS CASE, IN FORMING
22 THE OPINIONS YOU TOLD THIS JURY YESTERDAY, WHAT ROLE, IF ANY,
23 DID REVIEW ARTICLES HAVE FOR YOU?

24 A WELL, I FOCUSED ON THE ORIGINAL RESEARCH THAT
25 HAD BEEN DONE. I MEAN, I'VE HAD --

26 I WAS ASKED TO COME UP WITH MY OWN OPINION. AND
27 SO WHAT OTHER PEOPLE HAD SAID IN THE LITERATURE AND REVIEWED
28 IN TERMS OF INDIVIDUAL AUTHORS WAS SOMETHING THAT I LOOKED AT

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1 BUT PRIMARILY TO FIND STUDIES. ACTUALLY, PUBMED IS A PRETTY
2 GOOD RESOURCE FOR TRYING TO FIND ALL THE --

3 THIS IS FROM THE NATIONAL LIBRARY OF MEDICINE.

4 IT'S A SEARCH SYSTEM TO FIND THINGS.

5 BUT MANY TIMES THE WAY YOU FIND THE ARTICLES IS
6 YOU CAN READ REVIEW ARTICLES OR OTHER PEOPLE'S ARTICLES AND
7 THEN THEY'RE REFERENCED IN THAT.

8 SO MY PRIMARY PURPOSE IN LOOKING AT REVIEW
9 ARTICLES WAS TRYING TO FIND THE UNIVERSE OF STUDIES.

10 Q I THINK THIS CAME UP IN YOUR CROSS-EXAMINATION
11 YESTERDAY -- WITHDRAWN.

12 NEXT TOPIC. THE ONLY ARTICLE I WANT TO TALK TO
13 YOU ABOUT IS THE HAYES AND YIN COLLECTION OF WORK COMING OUT
14 OF CHINA, COMMENCING IN ABOUT WHAT? '97? WITHDRAWN.

15 I WANT TO ASK YOU ABOUT THE HAYES 1997 ARTICLE
16 THAT MR. WAGNON ASKED YOU ABOUT. REMEMBER?

17 A YES.

18 Q DID YOU TELL US YESTERDAY IN RESPONSE TO

19 MR. WAGNON'S QUESTIONS THAT THERE WAS A SUBSEQUENT 2000 STUDY
20 OR PUBLICATION, I SHOULD SAY, THAT RELATES TO THAT HAYES '97
21 ARTICLE?

22 A YES.

23 Q REMIND US WHAT THE POINT WAS.

24 A WELL, THE POINT OF THAT WAS THAT THE AUTHOR WAS
25 REVIEWING OVER THAT PARTICULAR STUDY AGAIN, AND HE WAS
26 QUESTIONING WHETHER OR NOT THE FINDINGS THAT THEY HAD --
27 FIRST OF ALL, HE SAID CLEARLY THAT THE FINDINGS
28 FOR LEUKEMIA, ACUTE MYELOGENOUS LEUKEMIA, WERE SOUND FINDINGS,

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1 BUT HE QUESTIONED THE FINDINGS FOR NON-HODGKIN'S LYMPHOMA,
2 BECAUSE, AS I MENTIONED, THERE WERE DIFFERENT COHORTS,
3 ACTUALLY, THAT WERE BEING STUDIED AND THEY WERE COMBINED. BUT
4 THEY ALSO HAD INDIVIDUAL ANALYSES OF EACH ONE OF THOSE
5 COHORTS.

6 SO THERE WAS A GROUP OF CHEMICAL WORKERS. THERE
7 WAS A GROUP OF RUBBER WORKERS. THERE WAS A GROUP OF -- LET ME
8 JUST SEE, JUST SO I CAN MAKE SURE I GET THEM ALL -- COATINGS
9 WORKERS.

10 Q COATINGS?

11 A COATINGS.

12 Q SPELL IT.

13 A C-O-A-T-I-N-G-S.

14 Q GOT IT NOW. THANK YOU.

15 A A SHOE AND THEN OTHER MIXED IT HAD.

16 SO THERE WERE THESE DIFFERENT GROUPS OF PEOPLE.

17 WHAT THEY WERE COMMENTING ON WAS THAT THERE WERE BIG

18 DIFFERENCES BETWEEN THESE DIFFERENT GROUPS IN TERMS OF THE

19 S.M.R.'S, THE STANDARD MORTALITY RATES. AND IN THAT CASE,
20 ONLY ONE OF THEM THEY SAID HAD REACHED STATISTICAL
21 SIGNIFICANCE, AND THAT WAS THE GROUP OF CHEMICAL WORKERS.

22 AND I THINK I ALSO MENTIONED DURING THE
23 CROSS-EXAMINATION THAT THERE WAS ANOTHER -- THERE WERE OTHER
24 PAPERS IN THAT WHOLE GROUP THAT DESCRIBED THE METHODOLOGY.
25 WHEN YOU LOOK AT THAT PAPER TO SEE WHAT CHEMICAL WORKERS DID,
26 WAS THEY WERE MAKING PESTICIDES OR THEY WERE MAKING OTHER
27 KINDS OF ORGANIC CHEMICALS. NOW, THEY MAY HAVE BEEN USING
28 BENZENE AS PART OF THAT WORK, BUT THE FACT THAT THEY WERE

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1 EITHER USING BENZENE AS A SOLVENT OR USING IT AS A STARTING
2 COMPOUND FOR MAKING THESE OTHER CHEMICALS MEANS THAT ALL THE
3 OTHER CHEMICALS THAT THEY WERE PRODUCING, THEY WERE ALSO
4 EXPOSED TO.

5 SO WHAT THESE AUTHORS SAID WAS THAT PERHAPS THE
6 FINDING FOR NON-HODGKIN'S LYMPHOMA WAS DUE TO CO-EXPOSURE TO
7 THESE OTHER CHEMICALS, RATHER THAN TO BENZENE EXPOSURE.

8 Q NOW, I GUESS ONE WAY TO LOOK AT WHAT WE HAVE
9 BEEN TALKING ABOUT NOW FOR THE LAST DAY OR SO IS THE QUESTION
10 WHETHER OR NOT REFINED PETROLEUM SOLVENTS, THE KIND INVOLVED
11 IN THIS CASE, 2 PERCENT BENZENE OR LESS, ARE OR ARE NOT HUMAN
12 CARCINOGENS.

13 THAT WOULD BE A ONE-SENTENCE SUMMARY OF WHAT
14 WE'VE BEEN TALKING ABOUT FOR A LONG TIME NOW, CORRECT?

15 A YES.

16 Q HERE'S WHAT I WANT TO KNOW: DR. WHYSNER, HAVE
17 ANY OF THE FOLLOWING ENTITIES -- BODIES, HAVE ANY OF THESE
18 ENTITIES: THE NATIONAL TOXICOLOGY PROGRAM, THE UNITED STATES

19 ENVIRONMENTAL PROTECTION AGENCY, THE INTERNATIONAL AGENCY FOR
20 RESEARCH ON CANCER, THE AGENCY FOR TOXIC SUBSTANCES AND
21 DISEASE REGISTRY, THE AMERICAN CONFERENCE OF GOVERNMENTAL
22 INDUSTRIAL HYGIENISTS -- HAVE ANY OF THOSE BODIES, TO YOUR
23 KNOWLEDGE, CONCLUDED THAT, YES -- CONCLUDED AS OF 2008 THAT,
24 YES, REFINED PETROLEUM SOLVENTS ARE IN FACT A HUMAN
25 CARCINOGEN?

26 MR. WAGNON: OBJECTION; BEYOND THE SCOPE OF
27 CROSS-EXAMINATION. I DIDN'T GO INTO IN CROSS ANY OF THESE
28 ENTITIES AND ANY OF THEIR OPINIONS.

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1 THE COURT: OVERRULED.

2 YOU MAY RESPOND.

3 THE WITNESS: NO.

4 BY MR. RIFF:

5 Q LAST TOPIC.

6 YOU WERE SHOWN A DOCUMENT FROM 1948 ON WHICH I
7 REMAIN CONFUSED, YOUR HONOR, WHETHER IT'S 132 OR 133.

8 THE COURT: IT IS 133.

9 MR. RIFF: THANK YOU.

10 Q AND I JUST WANT TO SPEND A COUPLE OF MINUTES
11 GOING OVER THIS DOCUMENT WITH YOU AND ASKING YOU QUESTIONS
12 ABOUT IT SINCE IT WAS SHOWN TO YOU ON CROSS-EXAMINATION.

13 OKAY WITH YOU?

14 A YES.

15 Q LET'S TAKE A LOOK AT THIS. (READING)

16 A.P.I. TOXICOLOGY REVIEW, BENZENE, SEPTEMBER
17 1948. OFFICIAL PUBLICATION, THE A.P.I.

18 LET'S JUST SEE WHAT WE'RE TALKING ABOUT HERE.

19 I'LL READ IT FOR THE RECORD: (READING)

20 THIS REVIEW SUMMARIZES THE BEST AVAILABLE
21 INFORMATION ON THE PROPERTIES, CHARACTERISTICS, AND TOXICOLOGY
22 OF BENZENE. IT OFFERS SUGGESTIONS AND TENTATIVE
23 RECOMMENDATIONS PERTAINING TO MEDICAL TREATMENTS, MEDICAL
24 EXAMINATIONS AND PRECAUTIONARY MEASURES FOR WORKERS WHO ARE
25 EXPOSED TO BENZENE. IT WAS PREPARED AT THE HARVARD SCHOOL OF
26 PUBLIC HEALTH, BOSTON, MASS., UNDER THE DIRECTION OF
27 PROFESSIONAL PHILIP DRINKER. THE REVIEW HAS BEEN ADOPTED FOR
28 PUBLICATION BY THE MEDICAL ADVISORY COMMITTEE OF THE AMERICAN

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1 PETROLEUM INSTITUTE. ANYONE DESIRING TO SUBMIT ADDITIONAL
2 INFORMATION OR PROPOSED CHANGES FOR CONSIDERATION PRIOR TO
3 RE-ISSUANCE OF THIS REVIEW IS REQUESTED TO SEND THEM TO THE
4 AMERICAN PETROLEUM INSTITUTE. THIS REVIEW WAS PREPARED BY
5 MARSHALL CLINTON, M.D.

6 AND INDICATES AMERICAN PETROLEUM INSTITUTE,
7 DEPARTMENT OF SAFETY WITH A NEW YORK CITY ADDRESS.

8 NOW, IT STARTS "TOXICOLOGICAL REVIEW OF
9 BENZENE," WITH A VARIETY OF CHEMICAL AND PHYSICAL PROPERTIES.

10 LET'S SEE WHAT I WANT TO ASK YOU ABOUT.

11 (PAUSE.)

12 Q LET'S GO TO THE TOXICOLOGY SECTION, SINCE YOU
13 ARE A TOXICOLOGIST. THE JURY HAS ALREADY HEARD ABOUT THE
14 DIFFERENCE BETWEEN ACUTE EFFECTS AND CHRONIC EFFECTS.

15 YOU UNDERSTAND WHAT THOSE DIFFERENCES ARE?

16 A YES.

17 Q NOW, ACUTE BENZENE POISONING. LET ME JUST STOP.

18 IT'S 1948. WHAT IS YOUR UNDERSTANDING OF WHAT THE TERM "ACUTE

19 BENZENE POISONING" MEANT IN THE MEDICAL WORLD IN 1948?

20 A WELL, ACUTE BENZENE POISONING HAS TO DO REALLY

21 WITH PEOPLE BECOMING UNCONSCIOUS AND IT BECOMING A LIFE-

22 THREATENING CONDITION, WHEREBY WHAT'S CALLED "ACUTE SOLVENT

23 ENCEPHALOPATHY," WHICH MEANS EFFECTS ON THE BRAIN, WHEREBY ONE

24 CAN GO THROUGH VARIOUS STAGES, BUT ULTIMATELY --

25 IT'S JUST LIKE THE SLIDE THAT I SHOWED WITH

26 ALCOHOL, WHERE YOU GET TO THE HIGHER AND HIGHER LEVELS AND

27 EVENTUALLY YOU CAN GET TO COMA AND EVEN DEATH STRICTLY FROM

28 THE ACUTE EFFECT THAT IT HAS ON THE BRAIN.

1 Q SO IN THIS DOCUMENT THEY WRITE: (READING)
2 ACUTE BENZENE POISONING GENERALLY RESULTS FROM
3 THE INHALATION OF RELATIVELY HIGH CONCENTRATIONS OF THE VAPOR.
4 EXPOSURE TO AIR CONTAINING BENZENE IN CONCENTRATIONS OF 19,000
5 TO 20,000 PARTS PER MILLION, PAREN, (61 TO 65 MILLIGRAMS PER
6 LITER OF AIR) CLOSE PAREN, CAUSES DEATH WITHIN A FEW MINUTES,
7 WHEREAS CONCENTRATIONS OF 7,500 PARTS PER MILLION, PAREN, (25
8 MILLIGRAMS PER LITER), CLOSE PAREN, ARE DANGEROUS TO LIFE IN
9 ONE HALF TO ONE HOUR. THE MAXIMUM CONCENTRATION WHICH CAN BE
10 TOLERATED FOR ONE HOUR WITHOUT SERIOUS DISTURBANCES IS
11 ESTIMATED AT FROM 3,000 TO 4,700 P.P.M., PAREN, (10 TO 15
12 MILLIGRAMS PER LITER), CLOSE PAREN. MILD SYMPTOMS SUPERVENE
13 FOLLOWING EXPOSURE TO 1,500 TO 3,000 PARTS PER MILLION, PAREN,
14 (5 TO 10 MILLIGRAMS PER LITER), CLOSE PAREN, FOR A PERIOD OF
15 SEVERAL HOURS.

16 AND THEN THERE IS A DISCUSSION ABOUT THE
17 DRINKING OF BENZENE.

18 NOW, I WANT TO COMPARE AND CONTRAST THOSE

19 NUMBERS TO A DOCUMENT THAT IS IN EVIDENCE, WHICH IS EXHIBIT
20 110. AND THIS IS "SUMMARY OF BENZENE EXPOSURE ESTIMATES FOR
21 MR. MOLINA, BASED UPON HIS DEPOSITION TESTIMONY."

22 IN FACT, I DON'T WANT TO USE THAT ONE. I WANT
23 TO USE THE ONE BASED ON MR. NICAS' INTERVIEW WITH MR. MOLINA.
24 THIS IS EXHIBIT 111.

25 SO BASED UPON WHAT MR. MOLINA TOLD DR. NICAS IN
26 THIS CASE, THE CONCENTRATIONS IN HIS JOBS RANGED BETWEEN 1.0
27 PARTS PER MILLION IN THE AIR AND 6.7.

28 DO YOU SEE THAT?

4167

1 A YES.

2 Q AND THAT IS BEING COMPARED -- I AM COMPARING AT
3 LEAST -- TO THESE ACUTE EFFECT NUMBERS OF 19,000 TO 20,000,
4 3,000 TO 4,700, 1,500 TO 3,000.

5 GOING ON. FROM 1948, THE A.P.I. WRITES:

6 (READING)

7 ACUTE EXPOSURE TO BENZENE PRODUCES RAPIDLY
8 INCREASING SYMPTOMS OF TIGHTENING OF LEG MUSCLES, DIZZINESS,
9 EXCITATION AND PALLOR, FOLLOWED BY FLUSHING, WEAKNESS,
10 HEADACHE, BREATHLESSNESS, APPREHENSION OF DEATH AND
11 CONSTRICTION IN THE CHEST. THE PULSE BECOMES RAPID AND THE
12 COLOR BLUE. VISUAL DISTURBANCES, TREMORS AND MUSCLES WEAKNESS
13 ARE ENCOUNTERED. THE VICTIM MAY LOSE CONSCIOUSNESS AND PASS
14 INTO COMA OR MAY DEVELOP ACUTE MANIA AND DELIRIUM.
15 CONVULSIONS ARE FAIRLY FREQUENT. DEATH MAY OCCUR ALMOST AT
16 ONCE OR SEVERAL HOURS OR DAYS FOLLOWING EXPOSURE.

17 THE NEXT PARAGRAPH TALKS ABOUT RECOVERY FROM
18 ACUTE BENZENE POISONING. I WILL NOT READ ALL OF THAT.

19 I'M ON THE NEXT PAGE, AND THE A.P.I. WRITES
20 ABOUT SKIN CONTACT WITH BENZENE. IT WRITES: (READING)
21 SKIN CONTACT WITH BENZENE RESULTS IN DEFATTING
22 OF THE SKIN AND LEADS TO THE DEVELOPMENT OF ERYTHEMA.
23 `` WHAT IS ERYTHEMA?
24 A IT'S REDNESS BECAUSE OF THE INCREASED BLOOD
25 FLOW.
26 Q (READING)
27 DRY SCALING AND, IN SOME CASES, THE FORMATION OF
28 VESICULAR PAPULES.

4168

1 WHAT ARE THOSE?

2 A WELL, VESICULAR PAPULES ARE SORT OF -- SOMETHING
3 THAT MIGHT LOOK LIKE CHICKEN POX.

4 Q (READING)

5 PROLONGED EXPOSURE MAY PRODUCE LEGIONS
6 RESEMBLING FIRST- OR SECOND-DEGREE BURNS.

7 THEN THE A.P.I. TALKS ABOUT CHRONIC EFFECTS.

8 CHRONIC BENZENE POISONING -- LET'S STOP.

9 YOU TOLD US WHAT ACUTE BENZENE POISONING WAS A
10 MINUTE AGO.

11 WHAT IS CHRONIC BENZENE POISONING, AS YOU
12 APPRECIATE THAT TERM WAS BEING USED BY MEDICAL SCIENCE IN
13 ABOUT 1948?

14 A WELL, I THINK THAT, AGAIN, CHRONIC BENZENE
15 POISONING COULD BE ONE OF TWO THINGS. IT COULD BE A
16 REPEATED -- SOMETHING KNOWN AS "CHRONIC ENCEPHALOPATHY," BASED
17 UPON REPEATED EXPOSURES. AGAIN, EFFECTS ON THE BRAIN. BUT
18 THAT'S RELATIVELY UNCOMMON WITH BENZENE.

19 THE MOST IMPORTANT THING WITH BENZENE ARE
20 EFFECTS ON THE BONE MARROW. THINGS LIKE APLASTIC ANEMIA.
21 IN OTHER WORDS, THE BONE MARROW --
22 IT'S TOXIC TO THE BONE MARROW SO IT DOESN'T FORM
23 BLOOD-FORMING ELEMENTS, WHICH MEANS A DECREASE IN WHITE CELLS
24 AND RED BLOOD CELLS.

25 Q (READING)

26 CHRONIC BENZENE POISONING RESULTS FROM REPEATED
27 OR CONTINUOUS EXPOSURE TO -- NOW I PUT QUOTES -- "RELATIVELY
28 LOW," END QUOTE, THOSE ARE MY QUOTES -- CONCENTRATIONS

4169

1 OF BENZENE VAPOR. THE LEVEL AND DEGREE OF EXPOSURE NECESSARY
2 TO PRODUCE POISONING APPARENTLY VARY WIDELY. THERE ARE AT
3 LEAST TWO WELL-AUTHENTICATED CASES OF POISONING BY REPEATED
4 EXPOSURES OF ONLY 75 PARTS PER MILLION. YET MANY CHEMISTS
5 REPEATEDLY EXPOSE THEMSELVES TO FAR HIGHER CONCENTRATIONS OVER
6 PERIODS OF MANY YEARS WITH NO APPARENT ILL EFFECTS.

7 SO THE A.P.I. IN 1948 IS WRITING ABOUT EXPOSURE
8 OF ONLY 75 PARTS PER MILLION BENZENE IN AIR.

9 IN 2008, WHAT IS THE P.E.L. FOR BENZENE IN
10 AMERICAN WORKPLACES ON AN 8-HOUR TIME-WEIGHTED AVERAGE?

11 A IT'S ONE.

12 Q IF YOU DON'T KNOW, JUST TELL ME, BUT IN THE
13 PERIOD 1963 TO 1980, WHAT WAS THE -- WHAT WERE THE A.C.G.I.H.
14 T.L.V.'S FOR BENZENE IN AMERICAN WORKPLACES ON AN 8-HOUR
15 TIME-WEIGHTED AVERAGE?

16 A I BELIEVE THEY WERE --

17 I BELIEVE THE P.E.L. WAS 25. I THINK THE T.L.V.
18 WAS ABOUT THE SAME.

19 Q SO THESE DOCTORS ARE WRITING THAT THERE ARE TWO
20 WELL-AUTHENTICATED CASES OF POISONING BY REPEATED EXPOSURE OF
21 ONLY 75 PARTS PER MILLION.

22 THEY GO ON TO WRITE: (READING)

23 BENZENE IS RELATIVELY INSOLUABLE IN BODY FLUIDS
24 AND TISSUES, THEREFORE, ONLY SMALL AMOUNTS ARE ABSORBED BY THE
25 BODY.

26 THERE IS FURTHER DISCUSSION ABOUT THE TOXICOLOGY
27 AND MEDICAL EFFECTS. THEN WE GET TO WHAT YOU WERE ASKED ABOUT
28 YESTERDAY -- SAFE LIMITS.

4170

1 BY THE WAY, IN DOING YOUR WORK FOR THIS CASE,
2 DID YOU ACTUALLY GO AND LOOK AT THE REFERENCES THAT ARE CITED
3 BY THESE DOCTORS IN THE BIBLIOGRAPHY SECTION OF EXHIBIT 133?

4 A WELL, I LOOKED AT SOME OF THEM.

5 Q WHEN DID YOU LOOK AT THEM AND WHY DID YOU LOOK
6 AT THEM?

7 A WELL, FOR THE SAME REASON THAT I WAS ASKED THE
8 QUESTION YESTERDAY ABOUT THE REFERENCE TO THE -- WHAT IS THE
9 SAFE LEVEL FOR BENZENE. IT'S BASED UPON A COUPLE OF PAPERS
10 THAT WERE WRITTEN IN 1939. ONE OF WHICH IS BY BOWDITCH AND
11 ONE OF WHICH IS BY HUNTER.

12 THEY DID A CASE SERIES OF PEOPLE WHO HAD BEEN
13 EXPOSED TO -- WHAT I WOULD CONSIDER TO BE A VERY HIGH LEVELS
14 OF BENZENE. SO MOST OF THESE PEOPLE WERE EXPOSED TO 200, 400,
15 800, AND I'M NOT TALKING ABOUT PARTS PER MILLION YEARS. I'M
16 TALKING ABOUT AIR LEVELS OF THOSE. AND I'M SURE THAT YOU
17 HEARD PLENTY ABOUT WHAT THE DISTINCTION IS BETWEEN THOSE.

18 IN OTHER WORDS, IF YOU HAD AN AIR LEVEL EXPOSURE

19 TO 400 PARTS PER MILLION OVER 20 YEARS, THAT WOULD BE -- I
20 THINK IT WOULD BE 8,000 PARTS PER MILLION YEARS.

21 THESE WERE HIGH LEVELS OF EXPOSURE THAT THEY
22 WERE TALKING ABOUT IN THESE PAPERS.

23 THERE WERE TWO INDIVIDUALS THAT HAD WHAT THEY
24 CONSIDERED TO BE RELATIVELY LOW LEVELS OF EXPOSURE.

25 Q "THEY," MEANING THE AUTHORS IN 1939?

26 A YES.

27 Q PLEASE CONTINUE.

28 A AND THESE PEOPLE WERE EXPOSED TO LESS -- WHAT

4171

1 THEY CONSIDERED TO BE LOW, WHICH THEY TERMED LESS THAN 25 OR
2 LESS THAN 10 PARTS PER MILLION. AND, ACTUALLY, THE TWO
3 INDIVIDUALS INVOLVED, ONE OF THEM HAD SOME KIND OF BLOOD
4 DISORDER THAT COULD HAVE BEEN LIKE WHAT WE CALL "MILD
5 DYSPLASTIC SYNDROME" OR "PRELEUKEMIA."

6 THE OTHER ONE LOOKED LIKE THEY HAD SOMETHING
7 CALLED "PERNICIOUS ANEMIA," WHICH ACTUALLY ISN'T KNOWN TO BE
8 RELATED TO BENZENE.

9 BUT, AT ANY RATE, THEY FOUND TWO INDIVIDUALS.
10 AND SO THE QUESTION THAT I HAD BEEN ASKED ABOUT THIS AND THEY
11 SAID "NO SAFE LEVEL," THEY WERE REALLY BASING THIS UPON WHAT I
12 WOULD CONSIDER TO BE VERY HIGH LEVELS OF EXPOSURE, GIVEN OUR
13 TIME FRAME TODAY. SO THEY WERE LOOKING --

14 LIKE I SAID, THEY WERE LOOKING AT PEOPLE WHO HAD
15 THESE VERY HIGH LEVELS OF EXPOSURE, AND THEY WERE MAKING THESE
16 STATEMENTS BASED ON WHAT THEY CONSIDERED TO BE VERY LOW LEVELS
17 OF EXPOSURE, WHICH WE WOULD TODAY CONSIDER TO BE VERY HIGH
18 LEVELS OF EXPOSURE.

19 Q SO LET'S SEE WHAT THEY ACTUALLY WRITE.

20 NOW READING FROM THIS 1948 DOCUMENT: (READING)

21 THE AMERICAN STANDARDS ASSOCIATION AND MOST

22 STATES HAVE SET AN ARBITRARY LIMIT OF 100 P.P.M. AS THE

23 MAXIMUM PERMISSIBLE BENZENE CONCENTRATION FOR WORKERS EXPOSED

24 TO THIS SUBSTANCE DURING AN 8-HOUR DAY. MASSACHUSETTS AND

25 OREGON HAVE SET LIMITS OF -- AND THEN YOU CAN'T READ IT

26 BECAUSE SOMEBODY THREE-HOLE PUNCHED THE ORIGINAL OF THAT --

27 WHEREAS, NEW YORK CONSIDERS 50 PARTS PER MILLION AS THE

28 HIGHEST PERMISSIBLE LEVEL. INASMUCH AS THE BODY DEVELOPS NO

4172

1 TOLERANCE TO BENZENE, AND AS THERE IS A WIDE VARIATION IN
2 INDIVIDUAL SUSCEPTIBILITY, IT IS GENERALLY CONSIDERED THAT THE
3 ONLY ABSOLUTELY SAFE CONCENTRATION FOR BENZENE IS ZERO. THE
4 INADEQUACY OF A LIMIT OF 100 P.P.M. IS INDICATED BY
5 WELL-AUTHENTICATED REPORTS OF AT LEAST TWO CASES OF BENZENE
6 POISONING FOLLOWING EXPOSURE TO ONLY 75 P.P.M. A LIMIT OF 50
7 P.P.M. OR LESS IS STRONGLY RECOMMENDED, PARTICULARLY WHERE
8 EXPOSURES ARE RECURRENT. SKIN CONTACT SHOULD BE AVOIDED.

9 SO, DR. WHYSNER, IN THIS A.P.I. DOCUMENT,
10 DR. DRINKER AT HARVARD AND DR. CLINTON, THE AUTHOR OF THIS,
11 ARE ACTUALLY URGING A 50 PARTS PER MILLION 8-HOUR
12 TIME-WEIGHTED AVERAGE EXPOSURE LIMIT. IS THAT HOW YOU
13 INTERPRET THIS?

14 A YES.

15 Q COMPARED WITH 25 -- AND MR. MOLINA WAS AT
16 FIRESTONE COMPARED WITH ONE TODAY; IS THAT RIGHT?

17 A YES. FOR THE P.E.L.

18 Q AND THEN THIS ARTICLE GOES ON TO TALK ABOUT

19 TREATMENT OF BENZENE POISONING: (READING)

20 ACUTE POISONING BY BENZENE SHOULD BE CONSIDERED
21 AS AN ACUTE EMERGENCY.

22 IT GOES ON AND ON ABOUT THAT.

23 IT TALKS ABOUT TREATMENT OF CHRONIC BENZENE
24 POISONING.

25 THERE'S A SECTION ABOUT EXAMINATIONS: (READING)

26 THE PRE-EMPLOYMENT EXAMINATION SHOULD INCLUDE A
27 DETAILED HISTORY, PHYSICAL EXAMINATION, CHEST X-RAY AND
28 COMPLETE BLOOD COUNT. GOES ON.

4173

1 IT TALKS ABOUT PERIODIC RE-EXAMINATIONS:

2 (READING)

3 THEIR FREQUENCY BEING DETERMINED BY THE SEVERITY
4 OF THE EXPOSURE.

5 THE A.P.I. HAS A SECTION 7 ON PRECAUTIONARY
6 MEASURES. IN PART THEY WRITE: (READING)

7 THE SAFETY MEASURES NECESSARY FOR THE PREVENTION
8 OF BENZENE POISONING ARE PRIMARILY THOSE DESIGNED TO PREVENT
9 INHALATION OF BENZENE VAPORS. VENTILATION, EITHER BY DILUTION
10 OR LOCAL EXHAUST, SHOULD BE SO DESIGNED AS TO PREVENT TOXIC
11 CONCENTRATIONS OF THE VAPORS FROM REACHING THE BREATHING ZONE
12 OF THE WORKERS.

13 AND THEN AS WE INDICATED, THESE PHYSICIANS LIST
14 25 REFERENCES FROM THE LITERATURE TO SUPPORT THE SCIENTIFIC
15 STATEMENTS THEY MAKE.

16 IS THAT HOW YOU INTERPRET THIS?

17 A YES.

18 MR. RIFF: THAT'S ALL THE QUESTIONS I HAVE. THANK YOU

19 VERY MUCH.

20 THE COURT: MR. WAGNON, WHENEVER YOU'RE READY.

21 MR. WAGNON: THANK YOU, YOUR HONOR.

22 I'LL MOVE EXHIBIT 133 INTO EVIDENCE. THIS IS

23 THE A.P.I. TOXICOLOGICAL REVIEW OF BENZENE THAT HAS BEEN

24 DISPLAYED EXTENSIVELY HERE.

25 THE COURT: ANY OBJECTION?

26 MR. RIFF: IT'S HEARSAY WITHIN HEARSAY HERE. CAN WE

27 RESERVE ON THAT AND DISCUSS IT LATER?

28 THE COURT: YES.

4174

1 MR. RIFF: THANK YOU, YOUR HONOR.

2 THE COURT: YOU CAN CERTAINLY USE THIS WITH THIS

3 WITNESS AS IT HAS BEEN USED EXTENSIVELY ON CROSS-EXAMINATION.

4 MR. WAGNON: THANK YOU. ALTHOUGH THAT WAS REDIRECT.

5 THE COURT: IT WAS, WASN'T IT? IT WAS REDIRECT

6 EXAMINATION. APPARENTLY, I CAN'T EVEN THINK THIS MORNING.

7 GO AHEAD, MR. WAGNON.

8

9 RECROSS-EXAMINATION

10 BY MR. WAGNON:

11 Q SIR, THE A.P.I. DOCUMENT ALSO HAS A SECTION IN

12 IT THAT TALKS ABOUT SKIN ABSORPTION, AND MR. RIFF SKIPPED OVER

13 THIS PART SO I WANTED TO COVER IT.

14 IT TALKS ABOUT: (READING)

15 THE PRODUCTION OF SYSTEMIC BENZENE POISONING BY

16 SKIN ABSORPTION HAS RECEIVED SCANT ATTENTION IN THE LITERATURE

17 AND DEFINITIVE INFORMATION ON THE SUBJECT IS NOT AVAILABLE.

18 THEN IT GOES ON TO SAY: (READING)

19 SKIN ABSORPTION IS DIFFICULT TO DISTINGUISH AS
20 INHALATION OF BENZENE VAPOR WOULD ACCOMPANY IT AND CONFUSE THE
21 PICTURE UNLESS A MASK WAS WORN. HOWEVER, REPUTABLE
22 AUTHORITIES HAVE STATED VERBALLY THAT SKIN ABSORPTION IS
23 EXTENSIVE AND SHOULD BE AVOIDED.

24 NOW, THE CONFUSION OF THE PICTURE THERE, THEY'RE
25 MAKING REFERENCE TO THE FACT THAT IF SOMEONE IS, SAY, WASHING
26 THEIR HANDS WITH BENZENE, THAT THEY'RE ALSO INHALING THE
27 VAPORS THAT WOULD HAVE BENZENE IN IT AS WELL.

28 IS THAT THE CONFUSION THEY'RE TALKING ABOUT?

4175

1 A WELL, I DON'T KNOW EXACTLY WHAT IT'S REFERRING
2 TO IN TERMS OF WASHING ONE'S HANDS. I THINK WHAT THEY'RE
3 TALKING ABOUT IS, FOR EXAMPLE, PEOPLE IN THE PLIOFILM COHORT
4 WOULD HAVE OBVIOUSLY HAVE BEEN EXPOSED NOT ONLY TO BENZENE
5 THROUGH INHALATION BUT ALSO TO DERMAL ABSORPTION FROM BENZENE.
6 AND IN THOSE STUDIES THE METRIC THAT WE TALKED ABOUT WHERE
7 THEY'RE ACTUALLY COMPARING PART PER MILLION YEARS TO OUTCOMES,
8 IN TERMS OF ACUTE MYELOGENOUS LEUKEMIA, WOULD ALSO HAVE
9 INCLUDED SOME DERMAL EXPOSURE. BUT THEY DIDN'T INCLUDE THAT
10 BECAUSE IT'S DIFFICULT TO ANALYZE THAT SPECIFICALLY.

11 SO I THINK IN ANY OF THESE STUDIES THAT WE'VE
12 BEEN TALKING ABOUT, IT'S IMPORTANT TO NOTE THAT THERE WILL BE
13 DERMAL ABSORPTION OF BENZENE THAT GOES ALONG WITH THE BENZENE
14 THAT IS BEING TALKED ABOUT IN TERMS OF THE AMOUNT IN THE AIR.

15 Q DO YOU AGREE WITH THE STATEMENT THAT SKIN
16 ABSORPTION IS EXTENSIVE AND SHOULD BE AVOIDED?

17 A WELL, IT CAN BE EXTENSIVE. I KNOW THAT SINCE
18 THAT TIME THERE HAVE BEEN A NUMBER OF STUDIES THAT HAVE BEEN

19 DONE ON ACTUALLY THE QUESTION OF SKIN ABSORPTION OF BENZENE,
20 AND IT'S SOMEWHAT ABSORBED FROM THE SKIN, BUT THERE ARE OTHER
21 CHEMICALS THAT HAVE A LOT MORE SKIN ABSORPTION. THEY'VE DONE
22 STUDIES IN MONKEYS. THEY'VE USED HUMAN SKIN IN A CHAMBER IN
23 ORDER TO STUDY THESE KINDS OF EFFECTS.

24 SO I WOULD SAY THAT IT COULD BE EXTENSIVE IF THE
25 WHOLE BODY WAS EXPOSED. BUT IN TERMS OF IT BEING ABSORBED
26 THROUGH THE SKIN, I WOULD SAY THAT IT RANKS IN THE GROUPING OF
27 CHEMICALS SOMEWHERE IN THE MIDDLE.

28 Q WELL, YOU DO AGREE THAT THE A.P.I. CONCLUDED IN

4176

1 1948 THAT SKIN ABSORPTION IS EXTENSIVE AND SHOULD BE AVOIDED.

2 YOU DO AGREE WITH THAT, SIR?

3 A WELL, AS I SAID AGAIN, THE REPUTABLE AUTHORITIES
4 HAVE STATED VERBALLY THAT SKIN ABSORPTION IS EXTENSIVE, BUT I
5 KNOW THERE HAVE BEEN EXPERIMENTAL STUDIES SINCE THEN.

6 I GUESS IT DEPENDS WHAT YOU MEAN BY "EXTENSIVE."
7 CERTAINLY, I DON'T BELIEVE IT'S ANYWHERE NEAR AS MUCH AS THE
8 AMOUNT THAT PEOPLE GET EXPOSED TO THROUGH INHALATION IN THE
9 WORKPLACE.

10 Q SIR, MY QUESTION WAS A SIMPLE ONE.

11 DIDN'T THE A.P.I. SAY IN 1948 THAT SKIN
12 ABSORPTION IS EXTENSIVE AND SHOULD BE AVOIDED?

13 A YES.

14 Q THANK YOU.

15 AND IN FACT, AGAIN, LATER IN THE SAME DOCUMENT
16 THEY REPEAT THE STATEMENT IN TERMS OF PRECAUTIONS THAT SKIN
17 CONTACT SHOULD BE AVOIDED, DON'T THEY?

18 A YES.

19 Q AND, AGAIN, A THIRD TIME, THEY SAY: (READING)

20 SKIN CONTACT AND POSSIBLE DERMATITIS FROM

21 BENZENE SHOULD BE AVOIDED ENTIRELY IF POSSIBLE, BUT IF THE

22 HANDS MUST CONTACT THE SOLVENT, THEN NEOPRENE GLOVES OR

23 PROTECTIVE CREAMS SHOULD BE USED.

24 THE A.P.I. SAID THAT IN 1948, DIDN'T THEY?

25 A YES, FOR EXPOSURES TO PURE BENZENE.

26 Q NOW, YOU WERE ASKED ON REDIRECT ABOUT LOOKING AT

27 THE VARIOUS REVIEW ARTICLES. AND I WAS -- I JUST WANTED TO

28 CLEAR UP A FEW THINGS.

4177

1 YOU DIDN'T CITE ANY OF THE REVIEW ARTICLES IN
2 ANY OF YOUR CHARTS, DID YOU?

3 A NO.

4 Q BUT YOU DID SEE THE REVIEW ARTICLES, DIDN'T YOU?

5 A WELL, AS I MENTIONED TO YOU BEFORE, I LOOK AT
6 THE REVIEW ARTICLES PRIMARILY TO TRY TO FIND ALL OF THE
7 LITERATURE THAT THEY'RE BASED UPON.

8 Q WELL, BUT THAT WOULD MEAN THAT YOU NEEDED TO
9 LOOK AT AND CONSIDER THE REVIEW ARTICLES. SO YOU DID DO THAT,
10 DIDN'T YOU?

11 A WELL, FOR SOME OF THE REVIEW ARTICLES, YES, I
12 DID.

13 Q WELL, DID YOU NOTICE THAT THE REVIEW ARTICLES
14 CONTAINED OPINIONS ABOUT THE RELATIONSHIP BETWEEN
15 NON-HODGKIN'S LYMPHOMA AND EXPOSURE TO PETROCHEMICAL SOLVENTS?

16 A YES. BUT I WAS ASKED TO FORM MY OWN OPINION IN
17 THIS CASE.

18 Q RIGHT. BUT DID YOU NOTICE ALONG THE WAY THAT

19 OTHERS HAD DONE SIMILAR THINGS? THAT THEY HAD REVIEWED THE
20 LITERATURE? THAT THEY HAD FORMED OPINIONS? AND THAT THEY HAD
21 PUBLISHED THEIR OPINIONS IN THE PEER-REVIEWED LITERATURE?

22 A WELL, ACTUALLY, I TRIED TO --

23 I WOULDN'T SAY TRY TO AVOID THAT, BUT I TRIED
24 NOT TO BE SWAYED SO I CAN DO MY OWN INDEPENDENT REVIEW OF THE
25 LITERATURE.

26 Q WELL, DID YOU NOTICE THAT THERE WERE A NUMBER OF
27 THESE REVIEW ARTICLES THAT DISAGREED WITH YOUR OPINION WITH
28 RESPECT TO WHETHER OR NOT PETROCHEMICAL SOLVENTS CAN INDUCE

4178

1 NON-HODGKIN'S LYMPHOMA?

2 A WELL, THERE ARE REVIEW ARTICLES THAT SAY BOTH
3 SIDES OF THIS ISSUE AND --

4 AS I SAID, I DIDN'T GO THROUGH A CATALOGUING OF
5 REVIEWING ARTICLES. AND, AGAIN, THE REVIEW ARTICLES THAT WE
6 WERE DISCUSSING THE OTHER DAY REALLY DIDN'T FOCUS NECESSARILY
7 ON PETROCHEMICAL SOLVENTS. THEY WERE FOCUSING ON SOLVENTS.

8 AND SO, AGAIN, IT WAS THE SAME PROBLEM THAT I
9 HAD WITH MANY OF THE STUDIES WHERE THEY WERE PUTTING ALL
10 SOLVENTS TOGETHER, AND I WAS TRYING TO LOOK FOR INFORMATION
11 SPECIFICALLY ON PETROCHEMICAL SOLVENTS.

12 Q SIR, YOU MENTIONED I.A.R.C. --

13 A YES.

14 Q -- A FEW MOMENTS AGO?

15 I.A.R.C. AT ONE TIME DID ADDRESS PETROCHEMICAL
16 SOLVENTS?

17 A YES.

18 Q WHAT YEAR DID THEY DO THAT?

19 A WELL, THEY --

20 I CAN'T REMEMBER THE EXACT YEAR THAT THEY DID

21 OVERALL BUT, FOR EXAMPLE, IN 1999 THEY DID TOLUENE, AND THEY

22 DID XYLENES AND WHICH I CONSIDER TO BE PETROCHEMICAL SOLVENTS

23 AND THE MAJOR --

24 WELL, CERTAINLY PROMINENT CONSTITUENTS IN THE

25 KIND OF MIXTURES WE'RE TALKING ABOUT. EARLIER THEY HAD LOOKED

26 AT GASOLINE SOLVENT; SOME SOLVENT MIXTURES LIKE STODDARD

27 SOLVENT; AND SO THEY HAVE BEEN REVIEWING SOME OF THESE, BUT

28 MOST RECENTLY IS 1999.

4179

1 Q WHEN WAS THE ONE WHEN THEY REVIEWED GASOLINE?

2 A I THINK IT WAS 1989, BUT I'M NOT 100 PERCENT

3 SURE. I BELIEVE THAT'S THE DATE ON THAT.

4 Q SINCE 1989 THERE HAVE BEEN A NUMBER OF ARTICLES
5 THAT HAVE LOOKED AT NON-HODGKIN'S LYMPHOMA AND ITS
6 RELATIONSHIP TO PETROCHEMICAL SOLVENTS, HAVEN'T THERE?

7 A YES.

8 Q IN FACT, IN TERMS OF THE ARTICLES THAT CONCLUDE
9 THAT THERE IS A RELATIONSHIP, NEARLY ALL OF THOSE HAVE BEEN
10 PUBLISHED SINCE 1989, HAVEN'T THEY?

11 A I DON'T KNOW WHAT YOU MEAN BY "RELATIONSHIP."

12 Q HOW ABOUT FOR A LARGER -- A SIGNIFICANT
13 ASSOCIATION IN TERMS OF THE STANDARD INCIDENCE RATIO OR
14 STANDARD MORTALITY RATIO BEING HIGHER THAN ONE AND THE RESULT
15 BEING SIGNIFICANT?

16 A WELL, AS I MENTIONED BEFORE, THERE HAVE BEEN
17 STUDIES THAT HAVE DONE BOTH.

18 LET ME MAYBE EXPLAIN SOMETHING ABOUT HOW

19 I.A.R.C. WORKS BECAUSE I KNOW A LITTLE BIT ABOUT IT --

20 Q SIR, I'M JUST ASKING ABOUT THE STUDIES THAT WERE
21 PUBLISHED SINCE 1989. THAT MOST OF THE STUDIES OUT THERE THAT
22 HAVE FOUND A RELATIONSHIP, A STATISTICAL RELATIONSHIP TO
23 EXIST, MOST OF THEM HAVE BEEN PUBLISHED SINCE 1989; ISN'T THAT
24 TRUE?

25 A YES, THAT'S CORRECT.

26 MR. WAGNON: THAT'S ALL I HAVE. THANK YOU.

27 THE COURT: ANYTHING FURTHER, MR. RIFF?

28 ///

4180

1 FURTHER REDIRECT EXAMINATION

2 BY MR. RIFF:

3 Q DR. WHYSNER, IN ORDER TO COMPLETE AN ANSWER
4 ABOUT I.A.R.C., IS THERE SOMETHING THAT YOU WANTED TO TELL US
5 ABOUT HOW I.A.R.C. WORKS?

6 A YES. THAT WAS THAT WHAT I.A.R.C. DOES IS THAT
7 IT PERIODICALLY REVIEWS THE DATA THAT IS AVAILABLE. AND THEN
8 IF THEY BELIEVE THAT A RE-REVIEW OF THAT INFORMATION MIGHT
9 PRODUCE A SIGNIFICANT CHANGE IN THEIR CLASSIFICATION SYSTEM,
10 THEN THEY MAKE IT PART OF A WORKING GROUP. AND I'VE BEEN
11 INVOLVED IN WORKING GROUPS THAT HAVE RE-REVIEWED CHEMICALS
12 THAT HAD PREVIOUSLY BEEN REVIEWED BECAUSE NOW THERE HAD BEEN
13 WHAT THEY CONSIDERED TO BE SIGNIFICANT NEW INFORMATION.

14 MR. RIFF: NO OTHER QUESTIONS.

15 MR. WAGNON: NOTHING FURTHER.

16 THE COURT: YOU MAY STEP DOWN, SIR, OR WHY DON'T YOU
17 JUST STAY THERE. YOU'RE EXCUSED.

18 ANY FURTHER WITNESSES FOR THE DEFENSE?

19 MR. RIFF: NO. HOWEVER, I THINK WE HAVE A STIPULATED
20 EXHIBIT THAT WE ARE HOPING TO PUT IN BEFORE THE CLOSE OF ALL
21 OF THE EVIDENCE, IF I'M NOT MISTAKEN. NOW WOULD BE A GOOD
22 TIME FOR THAT.

23 THE COURT: YES. NOW IS A GOOD TIME. WE MAY HAVE SOME
24 OTHER EXHIBIT ISSUES AS WELL.

25 MR. WAGNON: YOUR HONOR, THIS IS A STIPULATED EXHIBIT.
26 IT CONSISTS OF A SERIES OF CHARTS. IT'S MULTIPLE PAGES, BUT I
27 THINK IT COULD BE JUST MARKED AS ONE EXHIBIT.

28 THE COURT: THAT WOULD BE FINE. I THINK THE NEXT WOULD

4181

1 BE 134.

2 (MARKED FOR IDENTIFICATION

3 EXHIBIT 134, 14 PAGES, CHARTS.)

4 THE COURT: DO YOU WANT TO DESCRIBE IT FOR THE RECORD?

5 MR. WAGNON: YES, YOUR HONOR.

6 THIS IS A SERIES OF CHARTS; PROVIDES DATA

7 REGARDING THE YEARLY SUPPLY OF SOLVENTS THAT WERE USED IN

8 VARIOUS FIRESTONE PRODUCTS, AND IT IDENTIFIES THE RELATIVE

9 QUANTITIES OF SUCH SOLVENTS THAT WERE SUPPLIED BY CHEVRON,

10 UNION OIL AND SHELL, BASED UPON AVAILABLE DATA THAT WE HAVE

11 THAT WAS PRODUCED IN DISCOVERY.

12 THE COURT: LOOKS LIKE 14 PAGES; IS THAT RIGHT? IT'S

13 ONLY PAPER CLIPPED HERE. SO I WANT TO MAKE SURE WE'VE GOT

14 CLOSURE ON WHAT WE HAVE.

15 MS. KAHN: I HAVE 14 PAGES, YOUR HONOR.

16 THE COURT: 134 THEN IS RECEIVED.

17 (RECEIVED IN EVIDENCE

18 EXHIBIT 134.)

19 THE COURT: WITH THAT, DEFENSE RESTS?

20 MR. RIFF: YES, WE DO, YOUR HONOR.

21 THE COURT: ANY REBUTTAL OTHER THAN THE DOCUMENTS THAT
22 REMAIN TO BE DISCUSSED IN TERMS OF MOVING THEM INTO EVIDENCE?

23 MR. WAGNON: NO, YOUR HONOR.

24 WE DO HAVE SOME DOCUMENTS TO MOVE INTO EVIDENCE,
25 BUT WE HAVE NO WITNESSES IN REBUTTAL AT THIS TIME.

26 THE COURT: SO MY SUGGESTION WOULD BE THAT WE DEAL WITH
27 THOSE EXHIBITS AND ANY OBJECTIONS THAT THERE MIGHT BE OUT OF
28 THE PRESENCE OF THE JURY AND THEN INFORM THE JURY TOMORROW,

1 WHICH EXHIBITS HAVE BEEN RECEIVED, IF THAT'S ALL RIGHT.

2 MR. WAGNON: YES.

3 MR. RIFF: YES, YOUR HONOR.

4 THE COURT: VERY GOOD.

5 THEN, LADIES AND GENTLEMEN, WE BROUGHT YOU IN
6 HERE ALL THE WAY TODAY, BUT WE'RE GOING TO EXCUSE YOU FOR THE
7 REST OF THE DAY, BUT IT WAS IMPORTANT, OBVIOUSLY, THAT WE
8 FINISH THIS WITNESS. SO COUNSEL AND I WILL BE BUSY THE
9 REMAINDER OF THE DAY FINALIZING JURY INSTRUCTIONS, MAKING SURE
10 THAT ALL DOCUMENTS THAT NEED TO BE IN EVIDENCE ARE IN
11 EVIDENCE, AND TOMORROW MORNING WHEN YOU COME WE WILL READ -- I
12 WILL PROVIDE YOU WITH JURY INSTRUCTIONS, AND I WILL READ THEM
13 TO YOU AND YOU CAN FOLLOW ALONG AND THEN WE WILL HAVE CLOSING
14 ARGUMENTS AND THEN A FEW JURY INSTRUCTIONS AFTER THAT. AND
15 THEN JUST DEPENDING ON THE TIMING, YOU'LL EITHER START TO
16 DELIBERATE TOMORROW OR THE FOLLOWING DAY.

17 SO WE WILL SEE YOU TOMORROW AT 9 O'CLOCK.

18 REMEMBER, AGAIN, COMING CLOSE TO THE END NOW, DON'T DISCUSS

19 THE CASE WITH ANYONE. DON'T FORM ANY OPINIONS ON IT UNTIL WE
20 HAVE THE INSTRUCTIONS, THE ARGUMENTS AND THE MATTER IS
21 SUBMITTED TO YOU, AND WE'LL SEE YOU TOMORROW MORNING AT 9:00.
22 THANK YOU VERY MUCH.

23

24 (THE FOLLOWING PROCEEDINGS WERE HELD
25 OUTSIDE THE PRESENCE OF THE JURY:)

26

27 THE COURT: JURORS AND ALTERNATES HAVE LEFT THE
28 COURTROOM.

1 BEFORE I TURN OFF THE CLOCK, IF YOU'RE
2 INTERESTED, PLAINTIFFS HAVE 12 HOURS AND 5 MINUTES.
3 DEFENDANTS HAVE 8 HOURS AND 32 MINUTES. THOSE ARE SOME VERY
4 LONG CLOSINGS, IF YOU TAKE ALL THAT TIME, AND I'LL BRING MY
5 NO-DOZ.

6 WHAT I PROPOSE THAT WE DO IS I THINK I'M GOING
7 TO -- IF MS. NAVARRO IS WILLING -- I THINK I'M GOING TO GIVE
8 HER MY EXHIBITS LIST SO SHE CAN CHECK THAT OVER. I THOUGHT WE
9 WOULD GO AHEAD AND DISCUSS JURY INSTRUCTIONS FIRST.

10 THEN I'LL LET YOU WORK WITH EACH OTHER AND THE
11 CLERK, IF NECESSARY, ON EXHIBITS. IF WE NEED ANY ARGUMENT ON
12 ANY EXHIBITS, I'LL HEAR THAT. AND THEN HOPEFULLY WE'LL BE
13 DONE.

14 I ANTICIPATE THAT THERE MAY BE A COUPLE OF
15 INSTRUCTIONS THAT I ASKED YOU TO WORK ON TOGETHER. SO
16 HOPEFULLY WE CAN GET ALL THAT DONE THIS MORNING OR INTO THE
17 NOON HOUR AND GET DONE.

18 DOES THAT SOUND ALL RIGHT?

19 MR. RIFF: WITH ONE CAVEAT: THE DEFENSE HAS A SERIES
20 OF MOTIONS FOR DIRECTED VERDICT.

21 THE COURT: OH, THE MOTIONS. WHEN DO YOU WANT TO DO
22 THOSE?

23 MR. RIFF: WELL, WE PROBABLY SHOULD DO THEM PRIOR TO
24 JURY INSTRUCTIONS SINCE THEY WILL BE THEORETICALLY FOR EFFECT
25 FOR WHAT INSTRUCTIONS ARE GIVEN.

26 THE COURT: LET ME TAKE A MOMENT AND GIVE SOME THINGS
27 TO MS. NAVARRO, AND SO WE'LL BE IN RECESS A FEW MINUTES AND
28 THEN I WILL BE BACK.

1 (RECESS.)

2 (THE FOLLOWING PROCEEDINGS WERE

3 HAD IN OPEN COURT OUT OF THE

4 PRESENCE OF THE JURORS:)

5

6 THE COURT: COUNSEL ARE PRESENT. JURORS AND ALTERNATES
7 ARE NOT PRESENT.

8 MR. RIFF HAS ONE OR MORE MOTIONS ON BEHALF OF
9 DEFENSE.

10 MR. RIFF: WE DO, YOUR HONOR. GOOD MORNING AGAIN.

11 WE HAVE A SERIES OF MOTIONS FOR DIRECTED VERDICT
12 OR PARTIAL DIRECTED VERDICT.

13 AND WOULD THE COURT PREFER TO DO THESE SERIATIM,
14 OR WOULD THE COURT PREFER THAT I MAKE ALL THE MOTIONS AT ONCE
15 TO WHICH COUNSEL CAN THEN RESPOND? OR WOULD THE COURT PREFER
16 TO KNOW WHAT THEY ARE FIRST?

17 THE COURT: WELL, WHY DON'T YOU ORGANIZE THEM AS YOU
18 WISH, AND THEN I THINK IT'S PROBABLY BETTER IF YOU SET

19 EVERYTHING FORTH AND THEN LET MR. WAGNON SPEAK. IS THAT ALL
20 RIGHT?

21 IT'S REALLY UP TO COUNSEL, BUT IS THAT ALL
22 RIGHT, MR. WAGNON?

23 MR. WAGNON: SURE, THAT'S FINE.

24 THE COURT: FINE. WHY DON'T WE DO THAT.

25 MR. RIFF: WELL, THE FIRST MOTION WE HAVE, YOUR HONOR,
26 IS A MOTION FOR DIRECTED VERDICT AS TO THE FIRST CAUSE OF
27 ACTION ON THE FIRST AMENDED COMPLAINT, WHICH I BELIEVE IS THE
28 OPERATIVE PLEADING.

1 THIS IS A -- THE FIRST CAUSE OF ACTION PURPORTS
2 TO BE COMMON LAW NEGLIGENCE. AND THE OPERATIVE WORDING -- I
3 SHOULD SAY THE SPECIFICATIONS OF NEGLIGENCE ASSERTED ARE FOUND
4 IN PARAGRAPH 22. I WILL NOT BURDEN THE RECORD WITH ALL OF
5 THOSE VERBS.

6 THE MOTION, HOWEVER, IS FOR A DIRECTED VERDICT
7 ON THAT COMMON LAW NEGLIGENCE GROUND, UNDERSTANDING THAT BY
8 MAKING THIS MOTION WE ARE NOT BY THIS MOTION SEEKING A
9 DIRECTED VERDICT ON ANY SPECIES OF FAILURE TO WARN, WHETHER
10 NEGLIGENT FAILURE TO WARN OR STRICT LIABILITY FAILURE TO WARN.
11 IN OUR VIEW THAT IS A DIFFERENT COLLECTION OF ISSUES.

12 BUT THERE IS NO EVIDENCE, IN OUR JUDGMENT, FROM
13 WHICH A REASONABLE JURY CAN CONCLUDE THAT OUR CLIENTS WERE
14 OTHERWISE NEGLIGENT IN THE VARIOUS SPECIFICATIONS INDICATED IN
15 PARAGRAPH 22.

16 WE'VE HAD SOME OFF-THE-RECORD CONVERSATIONS
17 ABOUT THIS, AND I'M NOT GOING TO SEEK TO PARAPHRASE
18 PLAINTIFFS' VIEW ON THIS. I'LL JUST SAY IN OUR VIEW IT IS NOT

19 ENOUGH SIMPLY TO SAY THAT THE DEFENDANTS WERE NEGLIGENT IN ALL
20 WAYS OR WORDS TO THAT EFFECT, AND LET THE JURY SORT OUT
21 WHETHER THAT'S TRUE OR NOT TRUE.

22 SO THAT IS OUR FIRST MOTION. WITH THAT SAID,
23 SHALL I THEN CONTINUE?

24 THE COURT: WELL, KNOWING WHAT THIS IS THEN, MR.
25 WAGNON, WHAT WOULD BE YOUR PREFERENCE IN TERMS OF RESPONDING?
26 WOULD YOU RATHER HEAR EVERYTHING AND GO BACK, OR WOULD YOU
27 RATHER HEAR ONE AT A TIME?

28 WHAT ELSE DO YOU HAVE CATEGORY-WISE?

1 MR. RIFF: WELL, I HAVE A MOTION FOR DIRECTED VERDICT
2 ON THE STRICT LIABILITY AND NEGLIGENT FAILURE TO WARN AS TO
3 ALL CLIENTS, ALL DEFENDANTS UNDER THE JOHNSON LINE. THAT IS
4 TO SAY, THAT THE SOPHISTICATION AND KNOWLEDGE -- RELEVANT
5 SOPHISTICATION AND KNOWLEDGE OF FIRESTONE ELIMINATED THE DUTY
6 TO WARN EITHER UNDER NEGLIGENCE OR STRICT LIABILITY. IT'S THE
7 SAME DUTY. SO WE HAVE THAT.

8 DEPENDING UPON YOUR RULING OF THAT, I MAY HAVE A
9 VARIANT OF THAT THAT PERTAINS TO TWO OF THE THREE DEFENDANTS.

10 WE WILL HAVE A MOTION FOR DIRECTED VERDICT BASED
11 ON STRICT LIABILITY, DESIGN DEFECT ON THE RISK BENEFIT PRONG,
12 ON THE GROUNDS THAT -- WELL, THAT THERE'S NO --

13 THERE'S UNCONTROVERTED EVIDENCE THAT THESE
14 SOLVENTS AND THESE DESIGNS ARE NECESSARY TO BUILD TIRES.
15 THERE IS NO EVIDENCE TO THE CONTRARY.

16 AND IT WILL BE OUR POSITION THAT THE RISK, AS
17 ASSERTED BY THE PLAINTIFFS, WAS UNKNOWABLE BY RESORT TO THE
18 WORLD'S AVAILABLE MEDICAL AND SCIENTIFIC KNOWLEDGE UNTIL A

19 TIME AFTER MR. MOLINA WAS NO LONGER WORKING AT FIRESTONE.

20 SO EVEN IF THERE WAS A RISK THAT ONE COULD SAY

21 EXISTED IN THE 2008, THE EVIDENCE WILL SHOW OR HAS KNOWN THAT

22 THAT RISK WAS UNKNOWN AND UNKNOWABLE FOR PURPOSES OF THIS TORT

23 THEORY AT THE RELEVANT TIMES.

24 SO WITH THAT AND THEN WE WILL MOVE FOR A

25 DIRECTED VERDICT ON THE PUNITIVE DAMAGES CLAIM. AND THE SHORT

26 HEADNOTE OF THAT IS THAT NO REASONABLE JURY COULD FIND UNDER

27 THE CLEAR AND CONVINCING STANDARD THE TYPE OF CONSCIOUS

28 DISREGARD IN VIOLENT, CONTEMPTIBLE CONDUCT -- THAT IN FACT THE

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1 ONLY EVIDENCE BEFORE THE COURT FROM THE DEFENDANTS --

2 THE COURT: OKAY. ALL RIGHT. DON'T ARGUE IT.

3 I'M JUST ASKING, MR. WAGNON, WHAT DO YOU WANT TO

4 DO? DO YOU WANT TO RESPOND TO THESE ONE AT A TIME OR ALL

5 TOGETHER? YOUR CHOICE.

6 MR. WAGNON: I CAN DO IT EITHER WAY, YOUR HONOR.

7 REALLY IT'S FOR THE BENEFIT OF THE COURT, SO IT'S WHATEVER IS

8 GOING TO WORK THE BEST FOR THE COURT IN TERMS OF RULING ON

9 THEM.

10 THE COURT: OKAY. WELL, WHY DON'T WE HEAR THEM ALL,

11 AND THEN I'LL LET MR. WAGNON SPEAK.

12 MR. RIFF: OKAY.

13 WELL, I HAVE NOTHING FURTHER TO SAY ABOUT THE

14 MOTION FOR DIRECTED VERDICT ON THE -- WHAT I'M CALLING

15 "GENERAL COMMON LAW NEGLIGENCE."

16 TURNING TO THE STRICT LIABILITY, FAILURE TO

17 WARN, AND NEGLIGENT FAILURE TO WARN CLAIM, IT IS OUR POSITION

18 UNDER THE JOHNSON CASE AND THE AUTHORITIES CITED THEREIN THAT

19 THE UNCONTROVERTED EVIDENCE IN THIS CASE IS THAT ALL RELEVANT
20 TIMES FROM 1963 TO 1980, FIRESTONE WAS A KNOWLEDGEABLE AND
21 SOPHISTICATED INTERMEDIARY BETWEEN THE DEFENDANTS AND THE
22 PLAINTIFF.

23 THE UNCONTROVERTED EVIDENCE THAT CAME IN THROUGH
24 DR. CORN IS THAT ON THE KEY ISSUE, I THINK, IS THAT IF
25 FIRESTONE HAD RESORTED TO THE WORLD'S SCIENTIFIC AND MEDICAL
26 LITERATURE WITHOUT LIMITATIONS, AND HE MADE CLEAR THAT THAT
27 WAS COMING FROM THE TESTIMONY OF DR. HUSSER AND MR. BALLOU,
28 AND OF COURSE THE COURT HAS HEARD IN EXTENSIVE DETAIL

1 GENERALLY ABOUT THE SOPHISTICATION AND KNOWLEDGE AND SIZE OF
2 FIRESTONE WITH RESPECT TO ITS INDUSTRIAL HYGIENE SAFETY AND
3 MEDICAL OPERATION.

4 THE COURT ALSO KNOWS THAT AT THE TIME, AT ALL
5 TIMES RELEVANT, THERE WAS A LEGAL OBLIGATION IN THE STATE OF
6 CALIFORNIA UNDER LABOR CODE SECTION 6400 AND 6401 AND 6402
7 THAT -- I PARAPHRASE -- THE EMPLOYER IS OBLIGATED TO PROVIDE A
8 SAFE PLACE FOR THE EMPLOYEE TO WORK AND TO DO ALL THINGS TO
9 REMOVE ANY RISK OF HARM.

10 SO IF THERE EVER WAS A CASE OF SOPHISTICATED
11 INTERMEDIARY OF A SOPHISTICATED EMPLOYER, THIS IS IT.

12 I REMIND THE COURT THAT THE UNCONTROVERTED
13 EVIDENCE IS THAT IT WAS FIRESTONE WHO WOULD REVIEW WHATEVER
14 INFORMATION WAS COMING IN FROM SUPPLIERS, TOGETHER WITH
15 RESORTS TO ALL THE OTHER INFORMATION IT HAD AVAILABLE TO IT,
16 AND IT WAS FIRESTONE THAT THEN CAME UP WITH WARNINGS AND SAFE
17 HANDLING INSTRUCTIONS FOR ITS EMPLOYEES.

18 SO I'LL JUST LEAVE IT WITH THAT TO SAY THAT IF

19 THIS IS NOT A CASE OF A JOHNSON VERSUS AMERICAN STANDARD
20 SOPHISTICATED EMPLOYER, THEN I DON'T THINK CALIFORNIA LAW WILL
21 EVER HAVE SUCH A CASE. THE EVIDENCE IS OVERWHELMING AND
22 UNCONTROVERTED ON THAT POINT.

23 IT DID DAWN ON ME, YOUR HONOR, THAT THE COURT
24 MIGHT BE OF THE VIEW THAT THERE IS MORE EVIDENCE ON THAT POINT
25 IN THE 1970 TO '80 PERIOD THAN IN THE 1963 TO '70 PERIOD.

26 I WOULD DISAGREE WITH THAT. I THINK THAT THE
27 KEY EVIDENCE OF THE EXISTENCE OF THESE VARIOUS OFFICES WITHIN
28 FIRESTONE FROM '63 -- AT LEAST FROM '63 ON -- BOTH AT THE

1 CORPORATE AND LOCAL LEVEL, ELIMINATES THAT DISTINCTION.

2 BUT, YOUR HONOR, IF YOU THINK THAT'S AN

3 IMPORTANT DISTINCTION OR WERE TO ARGUE THAT WERE AN IMPORTANT

4 DISTINCTION, I WOULD LIKE TO SPECIFICALLY DRAW THE COURT'S

5 ATTENTION TO EXHIBIT 121 IN EVIDENCE, WHICH IS FIRESTONE'S

6 SAFETY MANUAL DISCUSSION OF THE SUBSTANCE BENZENE, DATED APRIL

7 1, 1971, WHERE IT EXPLICITLY STATES IN PART THAT, QUOTE:

8 (READING)

9 EFFECTS ON THE BLOOD-FORMING SYSTEMS

10 PREDOMINATE. CHANGES IN BLOOD CELLS ARE COMMON. ANEMIA AND

11 LEUKEMIA MAY OCCUR.

12 AS OF APRIL 1, 1971, WERE THERE ANY DOUBT, THIS

13 DOCUMENT LAYS TO REST THE DOUBT THAT FIRESTONE KNEW THAT

14 BENZENE WAS A HUMAN CARCINOGEN, OR WAS AT LEAST POTENTIALLY A

15 HUMAN CARCINOGEN AND NEEDED NO INFORMATION FROM ANY SUPPLIERS

16 ON THAT POINT BECAUSE IT KNEW IT AS OF THAT DAY.

17 NOW, I WOULD REMIND THE COURT THAT PLAINTIFFS'

18 EXPERT, DR. INFANTE, CONCEDED THAT IT IS HIS OPINION THAT

19 WHATEVER THE SUPPLIERS KNEW, FIRESTONE ALSO KNEW. AND I HAVE
20 A DIRECT QUOTE FROM HIM THAT I THINK IS WORTH MY DIGGING OUT.

21 (PAUSE.)

22 MR. RIFF: OR AT LEAST GIVING YOU A REFERENCE IN THE
23 TRANSCRIPT ON THE POINT.

24 IT'S AT PAGE 1830 OF THE TRANSCRIPT. THIS IS
25 FROM MY NOTES. I HOPE THAT THIS -- IT HAS QUOTES AROUND MY
26 NOTES. I HOPE THIS IS AN ACCURATE STATEMENT OF WHAT HE SAID.
27 QUOTE: (READING)

28 IN MY OPINION THE INFORMATION WAS AVAILABLE IN

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1 THE LITERATURE, AND IF THEY HAD INDUSTRIAL HYGIENISTS
2 REVIEWING THE LITERATURE, THEN THEY SHOULD HAVE BEEN AWARE OF
3 WHAT'S IN THE LITERATURE.

4 AT 1831: (READING)

5 IF FIRESTONE KNEW OF THE HEALTH HAZARDS RELATED
6 TO EXPOSURE TO SOME SOLVENTS, FIRESTONE SHOULD HAVE CONVEYED
7 THAT INFORMATION TO ITS EMPLOYEES.

8 QUOTE: (READING)

9 YES, IF THEY KNEW, THEY SHOULD HAVE CONVEYED IT,
10 AND I AM SAYING YES.

11 NOW, THE REASON I FOCUSED ON 71 AND EXHIBIT 121,
12 IS I WOULD POINT OUT FROM EXHIBIT 134, WHICH WAS THE LAST
13 THING TO COME INTO EVIDENCE, YOU CAN SEE, YOUR HONOR, THAT
14 DEFENDANTS SHELL AND UNION OIL SOLD NO PRODUCT, NO RELEVANT
15 PRODUCT IN THIS CASE TO THIS FACILITY UNTIL 1973.

16 SO, LEST THIS NOT BE OBVIOUS, WHILE I AM MOVING
17 ON BEHALF OF ALL DEFENDANTS FOR THE ENTIRE PERIOD, I AM
18 CERTAINLY MOVING ON BEHALF OF SHELL AND UNOCAL ON THIS GROUND,

19 BECAUSE NOW THE UNCONTROVERTED EVIDENCE THERE IS THAT THEY
20 SOLD ONLY AFTER FIRESTONE'S OWN SAFETY MANUAL EXPLICITLY SHOWS
21 US WHAT THEY KNEW ABOUT THE RISK OF HARM FROM BENZENE.

22 THE COURT: OKAY. I DO HAVE THAT CALL I HAVE TO TAKE
23 FROM THE ASSISTANT PRESIDING JUDGE. I HAVE TO DO THAT NOW.
24 MAYBE YOU SHOULD TALK ABOUT ANYTHING YOU THINK YOU CAN MAKE
25 PROGRESS ON, BUT ONE THING I MIGHT SUGGEST IS YOU CAN WORK ON
26 THE SOPHISTICATED INTERMEDIARY INSTRUCTION, OR --

27 ONE THING I THINK WE DO NEED TO GIVE THE JURY
28 GUIDANCE ON IS WHAT THEY SHOULD MAKE OF THE FEDERAL STANDARDS,

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1 AND PLAINTIFF HAS A PROPOSED INSTRUCTION ON THAT.

2 I'M NOT QUITE SURE THAT THAT CAPTURED -- THAT

3 YOUR VERSION OF IT CAPTURED WHAT WE NEED TO TELL THEM, BUT WE

4 NEED TO SAY --

5 I THINK WE NEED TO SAY IT'S NOT CONCLUSIVE TO

6 APPLY CALIFORNIA LAW. BUT I ALSO THINK WE SHOULD ALSO SAY

7 IT'S SOMETHING YOU CAN CONSIDER IN APPLYING CALIFORNIA LAW.

8 SO MAYBE IT'S SOMETHING YOU CAN AGREE ON. JUST TRYING TO MOVE

9 THINGS FORWARD HERE.

10

11 (RECESS.)

12

13 (WHEREUPON AT 11:02 A.M. THE FOLLOWING

14 PROCEEDINGS RESUMED IN OPEN COURT

15 OUT OF THE PRESENCE OF THE JURORS:)

16

17 THE COURT: WE ARE BACK ON THE RECORD WITHOUT THE JURY.

18 GO AHEAD, MR. RIFF.

19 MR. RIFF: THANK YOU, YOUR HONOR.

20 I BELIEVE I HAD CONCLUDED MY COMMENTS ON THE
21 DIRECTED VERDICT ON THE FAILURE TO WARN THEORY UNDER THE
22 JOHNSON AUTHORITY.

23 MS. KAHN URGES ME TO ACKNOWLEDGE THAT I
24 UNDERSTAND -- AND I KNOW THE COURT UNDERSTANDS WELL -- THAT
25 THE JOHNSON CASE IS A SOPHISTICATED EMPLOYEE AS OPPOSED TO A
26 SOPHISTICATED EMPLOYER CASE. I KNOW THE COURT HAS DEALT WITH
27 THAT ANALYSIS AT SOME LENGTH IN OUR SUMMARY JUDGMENT, SO I
28 ACKNOWLEDGE FOR THE RECORD THAT POINT.

1 BUT OUR VIEW IS THAT THE COURT'S ANALYSIS ON OUR
2 SUMMARY JUDGMENT IS CORRECT AND CERTAINLY THAT DOCTRINE WOULD
3 APPLY TO A SOPHISTICATED INTERMEDIARY/EMPLOYER AS FIRESTONE IS
4 IN THIS CASE.

5 I GUESS A VARIANT OF THIS MOTION FOR DIRECTED
6 VERDICT WOULD BE A MOTION FOR PARTIAL DIRECTED VERDICT ON THE
7 PROPOSITION THAT IN FACT FIRESTONE IS SO SOPHISTICATED AND
8 KNOWLEDGEABLE. THERE IS NO EVIDENCE TO THE CONTRARY.
9 PLAINTIFFS HAVE NOT ATTEMPTED TO REFUTE OR CONTROVERT THAT
10 FACT. NO JURY, NO REASONABLE JURY COULD FIND FROM THIS
11 EVIDENCE OTHER THAN THAT.

12 SO WE WOULD URGE IF THE COURT IS NOT GOING TO
13 GRANT THE DIRECTED VERDICT ON THE ISSUE OF DUTY, THUS
14 ELIMINATING THOSE LEGAL THEORIES, AT A MINIMUM THE COURT
15 SHOULD GRANT A PARTIAL DIRECTED VERDICT ON THE FACT QUESTION
16 OF ITS SOPHISTICATION, SO THAT THE JURY WOULD NOT HAVE TO SO
17 DECIDE IN ITS DELIBERATIONS.

18 MOVING ON TO THE STRICT LIABILITY DESIGN DEFECT

19 UNDER THE RISK BENEFIT CAUSE OF ACTION, WE, THE DEFENDANTS,
20 MOVE FOR A DIRECTED VERDICT ON THAT GROUND ON THESE
21 PROPOSITIONS.

22 LET ME JUST FIRST ACKNOWLEDGE THAT I UNDERSTAND
23 I THINK THE WAY CALIFORNIA LAW WORKS HERE, WHICH IS THAT ONCE
24 A PLAINTIFF HAS MADE A PRIMA FACIE SHOWING THAT THE QUOTE,
25 "DESIGN," END QUOTE, OF THE PRODUCT WAS THE CAUSE OF HIS OR
26 HER HARM, THE BURDEN THEN SHIFTS TO THE DEFENDANTS TO SHOW
27 THAT THE BENEFITS OF THAT DESIGN OUTWEIGH THE RISKS.

28 SO I BELIEVE I UNDERSTAND THAT ON THIS RECORD,

1 AT LEAST ARGUABLY -- AND I WANT TO COME BACK TO THIS POINT --
2 AT LEAST ARGUABLY THIS BURDEN NOW RESIDES ON THE DEFENDANTS ON
3 THE RISK BENEFIT QUESTION.

4 TO REPEAT WHAT I SAID EARLIER, THE BENEFIT OF
5 THE DESIGN OF THESE PRODUCTS HAS NOT BEEN CHALLENGED BY THE
6 PLAINTIFFS, AND THE DEFENDANTS HAVE SHOWN THAT THESE ARE
7 BENEFICIAL DESIGNS; THAT TIRES CANNOT BE BUILT WITHOUT THEM.
8 WE HEARD THAT FROM DR. INFANTE. HE TOLD US THAT. WE HEARD
9 THAT FROM ART WESP, THE SHELL SOLVENT SALESMAN WHO SERVICED
10 THE TIRE INDUSTRY FOR SOME DECADES. WE HEARD IT FROM DR.
11 CORN, AND WE HAVE NOT HEARD FROM THE CONTRARY. WE HAVE NOT
12 HEARD FROM ANYBODY THAT YOU COULD BUILD THESE TIRES IN THOSE
13 DAYS WITHOUT PRODUCTS OF THIS DESIGN.

14 SO THAT IS THE BENEFIT PRONG, AND THE LEGAL
15 QUESTION, IT SEEMS TO ME, IS: WELL, IS THERE NOW ON THIS
16 EVIDENCE A TRIABLE ISSUE OF FACT ON THE RISK SIDE?

17 AND WE URGE NOT BECAUSE WE TOOK SOME PAINS TO
18 SHOW THAT THE SCIENTIFIC AND MEDICAL KNOWLEDGE THAT CAME TO

19 LIGHT RELATIVE TO SUCH A CLAIMED RISK DID NOT EXIST AT THE --
20 WELL, AT THE EARLIEST WAS 1979. THERE IS A SINGLE ARTICLE BY
21 VIANNA -- V-I-A-N-N-A -- IN HOLLAND THAT DR. INFANTE MADE
22 REFERENCE TO, BUT EVERY OTHER ARTICLE THAT WOULD SUGGEST SUCH
23 A RISK EXISTED IS FROM 1980 AND THEREAFTER. AND AS RECENTLY
24 AS THIS MORNING, YOUR HONOR, YOU HEARD US ARGUING ABOUT PAPERS
25 FROM 2004 AND 2006.

26 SO, IN LIGHT OF WHAT WAS KNOWN OR KNOWABLE, WE,
27 THE DEFENDANTS, COULD NOT HAVE APPRECIATED THAT RISK. THE
28 TORT OF STRICT LIABILITY IS NOT YET IN THIS STATE AN INSURANCE

1 THEORY. WE ARE NOT INSURERS FOR UNFORESEEABLE, UNKNOWABLE
2 CONSEQUENCES OF THE DESIGN OF OUR PRODUCTS.

3 A PREMISE OF PRODUCT LIABILITY IS THAT THE
4 SUPPLIER VOLITIONALLY SUPPLIES PRODUCT, PUTS IT OUT INTO THE
5 MARKETPLACE FOR SALE OR FOR DISTRIBUTION, AND OUR VOLITION IN
6 DOING SO IS INFORMED BY WHAT IS KNOWN OR KNOWABLE.

7 SO I WILL LEAVE IT AT THAT. THAT'S OUR POINT.

8 NOW, YOUR HONOR, IN MY EARLIER LISTING OF
9 MOTIONS, I NEGLECTED TO IDENTIFY A MOTION THAT IS CRITICAL,
10 AND I WILL TELL YOU WHAT IT IS NOW.

11 WE MOVE FOR A DIRECTED VERDICT ON ALL CAUSES OF
12 ACTION ON THE GROUND THAT THERE HAS NOT BEEN ADEQUATE
13 IDENTIFICATION BY THE PLAINTIFFS ON THE EVIDENCE OF THIS CASE
14 THAT THE SOLVENTS THAT ARE THE SUBJECT OF OUR PRODUCTS,
15 INDIVIDUALLY OR IN COMBINATION, ARE THE SOLVENTS THAT ARE
16 CAPABLE UNDER THE PLAINTIFFS' THEORY OF THE CASE OF CAUSING OR
17 INCREASING THE RISK OF NON-HODGKIN'S LYMPHOMA.

18 ON THIS POINT I REMIND THE COURT OF THE CANDID

19 CONCESSION BY DR. WEISENBURGER, WHO TOLD US THAT THERE ARE
20 THOUSANDS OF ORGANIC SOLVENTS; THAT HE DID NOT KNOW WHETHER
21 THE SOLVENTS COMPRISING THESE PRODUCTS, THE DEFENDANTS'
22 SUBJECT PRODUCTS, ARE OR ARE NOT WITHIN THOSE THAT IN HIS
23 OPINION THE LITERATURE SHOWS ARE CAPABLE OF CAUSING OR
24 INCREASING THE RISK OF NON-HODGKIN'S LYMPHOMA.

25 I ASKED HIM IF HE COULD DO SO WITHOUT GUESSING
26 OR SPECULATING, AND HE SAID, NO, HE COULD NOT. DR. INFANTE
27 DID NO BETTER. HE SPOKE QUITE BROADLY ABOUT SOLVENTS. AT
28 PAGE 1761 OF THE TRANSCRIPT HE SPOKE ABOUT THE MIXTURES OF

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1 ALL -- THAT'S AS SPECIFIC AS HE GOT. THE MIXTURES OF ALL OF
2 THEM.

3 NOW, THIS IS NOT A SMALL PROBLEM, NOR IS IT
4 UNPRECEDENTED IN CALIFORNIA LAW. THIS IS THE LOCKHEED CASE,
5 AND I REMIND THE COURT, AND I WISH I HAD THAT CITE HANDY. I
6 WILL GET IT FOR YOU BEFORE WE COME BACK THIS AFTERNOON.

7 I KNOW SOMETHING ABOUT THE LOCKHEED CASE. IT IS
8 MY CASE. IT IS MY MS. KAHN'S CASE. WE HAVE BEEN REPRESENTING
9 THOSE DEFENDANTS SINCE 1989 IN SUPERIOR COURT. THE CASE HAS
10 BEEN TRIED SIX TIMES TO THE COURT OF APPEALS. AND THERE IS
11 ONE PUBLISHED OPINION IN THE LOCKHEED SERIES OF CASES IN THE
12 COURT OF APPEAL THAT REMAINS THE LAW OF THE STATE OF
13 CALIFORNIA.

14 I JUST DIGRESS TO TELL YOU THERE WAS GOING TO BE
15 ANOTHER OPINION IN THE LOCKHEED COLLECTION OF CASES IN THE
16 CALIFORNIA SUPREME COURT, BUT POST-BRIEFING --

17 THE COURT: I KNOW IT WELL.

18 MR. RIFF: YOU'RE AWARE OF THAT CIRCUMSTANCE. FINE.

19 WELL, THE CASE THAT IS THE LAW OF THE STATE OF
20 CALIFORNIA DEALT WITH THIS ISSUE. THE PLAINTIFF'S EVIDENCE
21 WAS THAT A COLLECTION OF CHEMICALS FOUND IN THE PAINTING
22 INDUSTRY WERE CAPABLE OF CAUSING CANCER, BUT THE PLAINTIFF'S
23 EXPERTS COULD NOT LINK -- COULD NOT IDENTIFY AND LINK WHICH
24 CHEMICALS SPECIFICALLY WITHIN THE LITERATURE ON WHICH THEY
25 RELIED TO THE SPECIFIC CHEMICALS THAT WERE SUBJECT OF THE
26 LAWSUIT.

27 AND I BELIEVE THAT OPINION IS BY JUSTICE TURNER,
28 IF I'M NOT MISTAKEN, AND THAT CASE STANDS FOR THE PROPOSITION

1 THAT THAT ISN'T GOOD ENOUGH. IT IS NOT GOOD ENOUGH TO SAY
2 THAT A CHEMICAL WAS IN THE NEIGHBORHOOD WHEN THE OFFENSE
3 OCCURRED, IF I CAN SPEAK FIGURATIVELY.

4 IF A COLLECTION OF CHEMICALS, A THROUGH K, IN
5 COMBINATION APPARENTLY ARE ASSOCIATED WITH AN INCREASED RISK
6 OF AN ADVERSE OUTCOME, IT IS NOT ENOUGH TO SAY THAT CHEMICAL D
7 WAS PRESENT. THERE HAS TO BE SPECIFIC EXPERT TESTIMONY THAT
8 CHEMICAL D WAS A CAUSE, AND THAT IS MISSING IN THIS CASE.

9 SO THE RULE OF LOCKHEED PERTAINS AND WOULD
10 RESULT IN A -- OR OUGHT TO RESULT IN A DIRECTED VERDICT AS TO
11 THE ENTIRE CASE.

12 LAST, WE ARE MOVING FOR A PARTIAL DIRECTED
13 VERDICT ON PUNITIVE DAMAGES. THIS COURT NEEDS NO GREAT
14 ORATORY FROM ME ABOUT PUNITIVE DAMAGES. I KNOW THE COURT IS
15 QUITE EXPERT IN THE AREA.

16 LET ME JUST COMMENT TO SAY THAT -- AT LEAST THE
17 ONLY EVIDENCE ADDUCED FROM THE DEFENDANTS, THAT IS TO SAY, THE
18 DEFENDANTS' WITNESSES, WHETHER CALLED UNDER 776 OR OTHERWISE,

19 IS THAT THEY TRIED TO PROVIDE ADEQUATE WARNINGS AND WERE
20 CONCERNED WITH THE HEALTH AND SAFETY OF USERS OF THEIR
21 PRODUCTS.

22 NOW, OUR VIEW IS THAT GIVING THE PLAINTIFFS THE
23 BENEFIT OF EVERY INFERENCE, AS I THINK YOU MUST ON A MOTION
24 LIKE THIS, THE MOST ONE CAN SAY IS THAT THE DEFENDANTS MADE A
25 MISTAKE AND THEY WERE NEGLIGENT; THAT THEY DIDN'T APPRECIATE
26 SOMETHING THAT THEY SHOULD HAVE APPRECIATED. AND THE WORST
27 ONE COULD SAY IS THAT THEY UNREASONABLY FAILED TO PROVIDE A
28 WARNING OR SAFE-USE INSTRUCTION.

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1 BUT THERE IS NO EVIDENCE HERE OF CONSCIOUS
2 DISREGARD OF ANYBODY'S INTERESTS. THERE IS NO EVIDENCE OF
3 PUTTING PROFIT BEFORE SAFETY. THERE IS NO --

4 THERE'S JUST NONE OF THAT, YOUR HONOR. AND I
5 KNOW YOU KNOW A PUNITIVE DAMAGE CASE WHEN YOU HEAR IT, AND
6 THIS IS NOT ONE. IT IS APPROPRIATE FOR THE YOU NOW TO DIRECT
7 A VERDICT ON PUNITIVE DAMAGES.

8 THAT IS OUR SUBMISSION. THANK YOU.

9 THE COURT: VERY GOOD.

10 MR. WAGNON, WHENEVER YOU'RE READY.

11 MR. WAGNON: I'M READY.

12 THE COURT: ALL RIGHT.

13 MR. WAGNON: AND I'LL JUST GO DOWN THE LIST IN THE SAME
14 ORDER SINCE IT SEEMS THE LOGICAL WAY TO DO IT.

15 NUMBER ONE, THE MOTION FOR A DIRECTED VERDICT ON
16 THE COMMON LAW THEORY OF NEGLIGENCE. WE HAVE ESSENTIALLY
17 THREE LEGAL THEORIES UNDER WHICH WE'RE PROCEEDING AT THIS
18 POINT, AND NEGLIGENCE IS ONE OF THEM.

19 NEGLIGENCE IN THIS CASE KIND OF FILLS IN THE
20 GAPS, IF YOU WILL, THAT ARE LEFT UNCOVERED PERHAPS BY THE
21 THEORY THAT THIS COMPANY SHOULD -- OR THESE COMPANIES SHOULD
22 BE LIABLE FOR THEIR FAILURE TO WARN.

23 AND THE WAY IN WHICH IT FILLS IN THE GAPS IS
24 THIS: THAT IF A RESTRICTED VIEW OF FAILURE TO WARN IS
25 APPLIED, WHERE FAILURE TO WARN APPLIES ONLY TO CONDUCT WITH
26 RESPECT TO WHAT WAS ON LABELING OR THE -- I SHOULD USE MY
27 TERMS MORE CORRECTLY.

28 THE LABEL THAT WAS ON THE PRODUCT AND THE

1 LABELING THAT ACCOMPANIED THE PRODUCT -- WHICH IN THIS CASE I
2 THINK WOULD TRANSLATE INTO THE M.S.D.S. OR THE EQUIVALENT OF
3 THAT -- IF THAT IS THE TOTAL SCOPE OF WHAT THE FAILURE TO WARN
4 THEORY MUST BE CONFINED TO, THEN IT'S OUR CONTENTION THAT
5 THERE ARE ACTIONS THAT WENT BEYOND THOSE THAT WERE DESCRIBED
6 BY WITNESSES, THAT DEALT WITH OTHER CONDUCT THAT ALSO WAS
7 RELEVANT HERE THAT SUPPORTS A THEORY THAT THESE DEFENDANTS
8 WERE NEGLIGENT IN THEIR FAILURE TO PROVIDE INFORMATION THAT
9 THEY SHOULD HAVE BEEN PROVIDING.

10 THE OTHER PART OF THE NEGLIGENCE IS THE
11 NEGLIGENCE IN THE FORMULATION OF THE PRODUCT. AND I'M GOING
12 TO GET MORE INTO DETAIL ABOUT THIS IN THE RISK VERSUS BENEFITS
13 ARGUMENT, BUT I'LL GIVE YOU A SHORT PREVIEW OF IT. AND THAT
14 IS, IS THAT MR. RIFF TALKED ABOUT SOLVENTS BEING NECESSARY TO
15 MAKE TIRES. AND WE CONCEDE THAT. THERE'S NO DISPUTE THAT
16 SOLVENTS WERE NECESSARY TO MAKE TIRES.

17 THE PROBLEM IS, IS THAT WHAT SOLVENTS WERE
18 NECESSARY TO MAKE TIRES WAS NOT A SINGLE FORMULA. IN FACT,

19 THE EVIDENCE WAS THAT IT WAS POSSIBLE TO MANIPULATE THAT
20 FORMULA IN DIFFERENT WAYS. THAT THE PRODUCT WAS A MIXTURE OF
21 VARIOUS THINGS. AND WHEN A REQUEST WAS MADE TO CHANGE THAT
22 MIXTURE, THAT REQUEST WAS COMPLIED WITH. IN FACT, I BELIEVE
23 THE EVIDENCE WAS THAT SEVERAL DIFFERENT COMPILATIONS WERE
24 PROVIDED.

25 THE POINT IS, IS THAT TIRES CAN BE MADE WITH
26 SOLVENTS, BUT WHAT SOLVENT IS PROVIDED IS A VARIABLE. AND
27 THAT VARIABLE WAS IN THE CONTROL OF THESE MANUFACTURERS. AND
28 THE MANUFACTURERS WERE PROVIDING DIFFERENT VERSIONS AS

1 REQUESTED, AS NEEDED, AND PART OF WHAT THEY SHOULD HAVE BEEN
2 TAKING INTO ACCOUNT WHEN PROVIDING THOSE DIFFERENT MIXTURES IS
3 THE HAZARDS INHERENT IN THOSE PRODUCTS, ESPECIALLY WITH
4 RESPECT TO BENZENE CONTENTS, BECAUSE OF THE KNOWLEDGE AT THAT
5 TIME THAT BENZENE WAS A CARCINOGEN.

6 SO GETTING BACK TO THE NEGLIGENCE ISSUE, THERE
7 ARE TWO ASPECTS OF THEIR CONDUCT WHICH I THINK COMES UNDER
8 NEGLIGENCE. ONE IS THE FAILURE TO COMMUNICATE HAZARDS ABOUT
9 THE PRODUCTS, AND THE OTHER IS THE FAILURE TO PROVIDE A
10 HAZARD-FREE PRODUCT OR A PRODUCT THAT HAD SHARPLY REDUCED THE
11 LEVEL OF HAZARD.

12 BOTH ACTIONS ARE ACTIONS THAT THESE DEFENDANTS
13 CONTROLLED IN TERMS OF THEIR ACTIVITIES, AND WE HAVE EVIDENCE
14 IN THE RECORD THAT THERE ARE CHOICES THAT THEY MADE THAT
15 CONTRIBUTED TO THE INJURY IN THIS CASE IN TERMS OF FAILING TO
16 WARN ABOUT A CANCER POTENTIAL AND PROVIDING A PRODUCT THAT HAD
17 A HIGHER DEGREE OF BENZENE CONTENT THAN EVIDENTLY WAS
18 NECESSARY AND NEEDED IN ORDER TO DO THE JOB IN TERMS OF MAKING

19 THE TIRES.

20 SO, BOTTOM LINE IS OUR EVIDENCE OF NEGLIGENCE

21 IS, IN ADDITION TO THE FAILURE TO PROVIDE SPECIFIC WARNING

22 INFORMATION IN THE WARNING DOCUMENTS, THAT IS THE M.S.D.S.'S,

23 THEY ALSO FAILED TO PROVIDE IN OTHER FORMS, SUCH AS ADDITIONAL

24 WRITTEN COMMUNICATIONS THEY COULD HAVE PROVIDED. ORAL

25 COMMUNICATIONS THEY COULD HAVE PROVIDED.

26 SECONDLY, THAT THEY WERE NEGLIGENT IN THEIR

27 FAILURE TO REFORMULATE THE PRODUCTS IN WAYS THAT AVOIDED THIS

28 HIGH LEVEL OF BENZENE WHICH COULD CAUSE CANCER AND THEREFORE

4200

1 WAS A PART OF THE HAZARD OF THE PRODUCT.

2 SO THAT IS OUR NEGLIGENCE THEORY. I THINK THAT
3 IT DEALS WITH FACTS THAT ARE SEPARATE FROM THE FAILURE TO WARN
4 THEORY, AND BECAUSE OF -- AND IT OVERLAPS A BIT, OF COURSE,
5 WITH THE DESIGN DEFECT THEORY, BUT NEGLIGENCE AND DESIGN
6 DEFECTS HAVE ALWAYS OVERLAPPED. I MEAN, THAT'S THE NATURE OF
7 THOSE THEORIES.

8 SO BASED ON THAT I WOULD ARGUE THAT BECAUSE
9 THERE IS SUFFICIENT EVIDENCE IN THE RECORD FROM WHICH THE JURY
10 COULD CONCLUDE THAT THESE DEFENDANTS ARE NEGLIGENT, THAT YOU
11 MUST DENY THAT MOTION FOR DIRECTED VERDICT ON THAT ISSUE.

12 LET'S MOVE ON THEN TO THE FAILURE TO WARN ISSUE.
13 AND THIS ONE IS REALLY BASED ON JOHNSON, AND IT REQUIRES THAT
14 I DEAL WITH THE JOHNSON CASE IN THE CONTEXT OF THIS AS BEING A
15 COMPLETE DEFENSE IN TERMS OF WHAT FIRESTONE KNEW OR SUPPOSEDLY
16 SHOULD HAVE KNOWN.

17 FIRST OF ALL, I HOPE IT IS CLEAR FROM THE
18 RECORD, AND I'D LIKE TO RESTATE IT AT THIS TIME IN TERMS OF

19 OUR POSITION. OUR POSITION IS, IS JOHNSON APPLIES TO THE
20 INDIVIDUAL PLAINTIFF USER OF THE PRODUCT WHO BECOMES HARMED,
21 AND THE KNOWLEDGE THAT THAT PERSON HAS OR THAT THAT PERSON
22 SHOULD HAVE BECAUSE THEY ARE A MEMBER OF A TRADE OR A
23 PROFESSION WHERE THE HAZARD IS COMMONLY KNOWN. THAT'S THE
24 LIMITS OF THE JOHNSON CASE.

25 WHAT IS BEING ARGUED IN THIS CASE IS THAT
26 JOHNSON CAN APPLY TO THE EMPLOYER OF THAT INDIVIDUAL, NAMELY,
27 FIRESTONE IN THIS CASE. I DID NOT PARTICIPATE IN THE
28 ARGUMENTS IN THE BRIEFING WITH RESPECT TO THAT ISSUE, BUT MY

4201

1 UNDERSTANDING IS, IS THAT THE COURT HAS ADOPTED THE
2 DEFENDANTS' VIEW THAT JOHNSON CAN APPLY BEYOND THE SITUATION
3 WITH THE INDIVIDUAL AND CAN APPLY TO THE EMPLOYER IF THE
4 EMPLOYER OCCUPIES AND HAS THE REQUISITE CHARACTERISTICS THAT
5 THE INDIVIDUAL PLAINTIFF HAD IN THE JOHNSON CASE.

6 SO WE OBVIOUSLY DISAGREE WITH THE COURT WITH
7 RESPECT TO THAT POSITION, AND WE DO WHATEVER WE NEED TO DO
8 HERE TO RESERVE OUR RIGHTS TO APPEAL ON THAT POINT.

9 SO LET ME THEN PROCEED ON WITH THE ARGUMENT.
10 GIVEN THAT JOHNSON THEN APPLIES, WHAT DO WE HAVE IN THE FACTS
11 OF THIS CASE? AND WHAT'S IMPORTANT ABOUT THE JOHNSON CASE
12 THAT I THINK IF YOU'RE GOING TO APPLY IT, THAT'S REALLY
13 IMPORTANT IS THE LANGUAGE FOUND ON PAGE -- LET'S SEE. IT
14 WOULD BE PAGE -- ON THE 43 CAL.4TH VERSION, PAGE -- LOOKS LIKE
15 67. IT'S THE LANGUAGE THAT APPEARS JUST ABOVE THE HEADING OF
16 FIERRO VERSUS INTERNATIONAL HARVESTER. AND I'LL READ THE
17 PARAGRAPH OR THE LAST SENTENCE FROM THE PARAGRAPH THAT I
18 WANTED TO DRAW THE COURT'S ATTENTION TO.

19 IT SAYS: (READING)

20 JUST AS A MANUFACTURER NEED NOT WARN ORDINARY

21 CONSUMERS ABOUT GENERALLY-KNOWN DANGERS, A MANUFACTURER NEED

22 NOT WARN MEMBERS OF A TRADE OR PROFESSION, PAREN,

23 (SOPHISTICATED USERS), CLOSE PAREN, ABOUT DANGERS GENERALLY

24 KNOWN TO THAT TRADE OR PROFESSION.

25 NOW, IN THE JOHNSON CASE, THE FACTS WERE THAT

26 YOU HAD A PLAINTIFF WHO WAS A MEMBER OF A TRADE OR PROFESSION,

27 BUT THAT PLAINTIFF EVIDENTLY PROFESSED OR THERE WAS SOME

28 QUESTION ABOUT THE ACTUAL KNOWLEDGE THAT THAT INDIVIDUAL HAD.

4202

1 BUT THE EVIDENCE WAS THAT MEMBERS OF THAT TRADE
2 OR PROFESSION HAD THAT KNOWLEDGE. THAT THIS WAS A PARTICULAR
3 TRADE THAT INVOLVED SOPHISTICATED PEOPLE WHO DID PARTICULAR
4 THINGS WITH THIS PIPING, AND THIS HAZARD NEED NOT HAVE BEEN
5 WARNED ABOUT BECAUSE MEMBERS OF THE TRADE WHOSE BUSINESS IT
6 WAS TO OPERATE ON THIS KIND OF PIPING KNEW ABOUT THIS HAZARD,
7 EVEN IF THIS PARTICULAR PLAINTIFF HAD BEEN SLEEPING THAT DAY
8 AND NOT PAYING ATTENTION TO THE INFORMATION WHEN IT WAS
9 DISTRIBUTED AMONG THAT PROFESSION.

10 OKAY. SO WHAT WE HAVE HERE IS NOT JUST ARE THEY
11 SOPHISTICATED, BUT DO THEY HAVE THE SPECIFIC KNOWLEDGE?
12 EITHER IN THIS CASE DOES FIRESTONE HAVE THE SPECIFIC KNOWLEDGE
13 ABOUT THE HAZARD, OR IS THIS PARTICULAR HAZARD KNOWN TO THE
14 TRADE OR PROFESSION THAT FIRESTONE IS PART OF SO THAT
15 EVERYBODY IN THAT TRADE OR PROFESSION KNOWS ABOUT THIS HAZARD?

16 AND IN THE JOHNSON CASE THERE WAS OVERWHELMING
17 EVIDENCE THAT EVERYBODY IN THE TRADE OR PROFESSION KNEW ABOUT
18 THIS HAZARD. IT WAS REGULARLY COVERED IN TRAINING SESSIONS.

19 IT WAS REPEATED AD NAUSEAM IN VARIOUS MANUALS AND STUFF.

20 THE COURT: IT WAS UNDISPUTED ON SUMMARY JUDGMENT IN
21 THAT POSTURE.

22 MR. WAGNON: I THINK IT WAS. I THINK IT WAS.

23 AND HERE WE DON'T HAVE THAT SAME SITUATION.

24 HERE WE HAVE IT HIGHLY DISPUTED. IN FACT, WE LACK SPECIFIC

25 EVIDENCE. REMEMBER IT'S DEFENDANTS' BURDEN ON THIS, OF

26 COURSE. WE LACK SPECIFIC EVIDENCE OF WHAT THE TRADE OR

27 PROFESSION OF TIRE MANUFACTURERS SPECIFICALLY KNEW ABOUT THE

28 CANCER POTENTIAL OF BENZENE.

1 THEY WERE SOPHISTICATED AS TIRE MANUFACTURERS?

2 YES, THEY WERE. DID THEY HAVE DOCTORS IN THEIR EMPLOY? YES,

3 THEY DID. WERE THERE MEDICAL LIBRARIES FROM WHICH THEY COULD

4 HAVE GOTTEN THE INFORMATION? WELL, YES, BUT THAT'S NOT THE

5 STANDARD. THAT'S NOT THE STANDARD IN TERMS OF THE FACT THAT

6 THE INFORMATION IS OUT THERE IN SOME MEDICAL LIBRARY, AND IF

7 YOU'RE SMART ENOUGH AND YOU KNOW WHICH LIBRARIES HAVE THIS

8 STUFF, AND YOU KNOW HOW TO USE THE THINGS AND YOU CAN READ THE

9 MEDICAL INFORMATION YOU FIND, AND YOU CAN CORRECTLY INTERPRET

10 IT -- THE FACT THAT IT'S OUT THERE AND SOMEBODY WHO IS A

11 RESEARCHER CAN UNCOVER IT ISN'T THE STANDARD HERE.

12 THE STANDARD HERE IS GENERALLY KNOWN TO THE

13 TRADE OR PROFESSION. AND THAT STANDARD THEY HAVEN'T MET UNDER

14 THE EVIDENCE.

15 WHAT EVIDENCE ARE THEY POINTING TO? WELL,

16 THEY'RE POINTING TO THE FACT THAT THERE WAS A RELIANCE WITHIN

17 THE FIRESTONE ORGANIZATION UPON INFORMATION PROVIDED BY THE

18 MANUFACTURER. AND THE TESTIMONY WAS FROM EXPERTS, INCLUDING

19 DR. CORN, WAS THAT THAT RELIANCE WAS REASONABLE. THERE WAS
20 TESTIMONY ABOUT THAT THERE'S A WHOLE EXPECTATION IN O.S.H.A.
21 THAT THERE WOULD BE WARNINGS THAT OBTAIN FROM THE MANUFACTURER
22 OF THE PRODUCTS THAT ARE THEN PASSED ALONG.

23 AND THE EVIDENCE THAT WE HAD IN THE EARLY 1960'S
24 DOCUMENT, IT TURNED OUT THAT THE SOURCE WAS CLEARLY INDICATED
25 ON THE DOCUMENT, THAT INDICATED THAT IT WAS FROM THE
26 PARTICULAR CHEMICAL COMPANY THAT THEY HAD OBTAINED THE
27 INFORMATION USED TO FILL OUT THIS INTERNAL WARNING FORM THAT
28 THEY USED.

4204

1 SO THE EVIDENCE IS, IS THAT THE SOURCE OF
2 INFORMATION THAT WAS BEING RELIED UPON BY FIRESTONE WAS THE
3 CHEMICAL COMPANIES, WHICH MAKES PERFECT SENSE. THE CHEMICAL
4 COMPANIES ARE THE EXPERTS ON THE HAZARDS OF THEIR PRODUCTS.
5 THEY ARE THE ULTIMATE WORD IN TERMS OF WHAT THE HAZARDS ARE.
6 IT IS REASONABLE FOR FIRESTONE TO RELY UPON THESE CHEMICAL
7 COMPANIES IN TERMS OF WHAT THE HAZARDS ARE.

8 THERE WAS THE ONE DOCUMENT THAT WAS FROM 1971
9 THAT TALKED ABOUT BENZENE AS A PARTICULAR CHEMICAL STANDALONE
10 BY ITSELF. THE PROBLEM WITH THAT DOCUMENT IS FOR ALL INTENTS
11 AND PURPOSES THAT DOCUMENT WAS BURIED SOMEWHERE IN A MANUAL
12 THAT IS APPROXIMATELY SIX-INCHES THICK, IF IN FACT IT WAS
13 REALLY AVAILABLE THERE.

14 SECONDLY, IT IDENTIFIED A PRODUCT THAT ALL THE
15 WITNESSES TESTIFIED ABOUT WAS NEVER ACTUALLY USED IN IT BY
16 ITSELF. THERE WAS NO USE OF BENZENE BY ITSELF AT THE COMPANY.
17 AND THEREFORE BECAUSE THEY WEREN'T GETTING DRUMS OF BENZENE,
18 THEY WEREN'T, YOU KNOW, USING BENZENE AS ONE -- AS THE

19 SOLVENT, FOR INSTANCE, IN MAKING TIRES OR ANY OTHER PRODUCT,
20 BENZENE AS A STANDALONE PRODUCT WASN'T THE PRODUCT AT ISSUE.

21 THE PRODUCT AT ISSUE WAS THE SOLVENTS THAT THEY
22 WERE BUYING. AND IT'S NOT EVEN CLEAR THAT FIRESTONE KNEW
23 UNTIL THE 1970'S THAT BENZENE WAS EVEN IN THOSE PRODUCTS. AND
24 IN THE 70'S EVIDENTLY WHEN THEY FOUND THAT BENZENE WAS IN THE
25 PRODUCTS, THEN THEY REQUESTED THAT THE LEVEL OF BENZENE BE
26 REDUCED, WHICH WAS THEN COMPLIED WITH EVIDENTLY.

27 BUT THERE WAS NO EVIDENCE THAT THEY WERE AWARE
28 THAT THE PRESENCE OF SOME PERCENTAGE OF BENZENE IN THE

4205

1 SOLVENTS THEY WERE PURCHASING REPRESENTED A HAZARD TO THEIR
2 USERS IN TERMS OF A CANCER RISK. THAT INFORMATIONAL PIECE IS
3 THERE'S NOWHERE IS THERE ANY EVIDENCE THAT DIRECTLY
4 DEMONSTRATES THAT FIRESTONE HAD THAT KNOWLEDGE, NONE AT ALL.
5 IT'S NOT IN ANY OF THE DOCUMENTS, AND THERE WAS NO WITNESS
6 THAT TESTIFIED TO THAT.

7 SO WE'RE LEFT WITH, WELL, COULD THEY HAVE HAD
8 IT? OR WHAT COULD HAVE BEEN THE SOURCES OF THIS INFORMATION?

9 WELL, ANY TIME WE'RE LEFT WITH SPECULATING ABOUT
10 WHAT THEY COULD HAVE HAD, THAT SORT OF THING, WE'VE GOT A
11 TRIABLE ISSUE OF FACT. AND I THINK IT MAKES YOUR JOB EASY.
12 YOU HAVE TO DENY THE MOTION FOR A DIRECTED VERDICT ON THIS,
13 BECAUSE WE'VE GOT --

14 I MEAN, THE JURY COULD WELL CONCLUDE UNDER THE
15 FACTS OF THIS CASE THAT FIRESTONE ACTUALLY DID NOT KNOW THAT
16 THIS WAS A HAZARD BECAUSE THERE IS NO DOCUMENT THAT MADE IT
17 CLEAR THAT IT WAS A HAZARD.

18 THERE WAS A DOCUMENT THAT WE SHOWED THAT SHELL

19 EVIDENTLY DISTRIBUTED IN '79, BUT THERE WAS NO -- THAT WOULD
20 HAVE PUT THEM ON NOTICE. I CONCEDE THAT. THAT WAS THAT
21 WARNING DOCUMENT THAT TALKED ABOUT SHELL SOL-B AND THE FACT
22 THAT IT CONTAINED BENZENE, WHICH WAS KNOWN TO CAUSE CANCER.

23 BUT THERE IS NO EVIDENCE THAT THAT DOCUMENT
24 ITSELF EVER GOT TO FIRESTONE BECAUSE SHELL WASN'T SELLING AT
25 THAT TIME. THEY'D STOPPED SELLING SEVERAL YEARS EARLIER.

26 BUT THAT'S THE KIND OF DOCUMENT THAT YOU NEED TO
27 FIND IN THE FIRESTONE FILES. THAT'S THE KIND OF DOCUMENT THAT
28 WOULD SHOW THAT FIRESTONE ACTUALLY HAD THIS KNOWLEDGE. BUT

4206

1 LACKING THAT, WE'RE LEFT WITH SPECULATION. WE'RE LEFT WITH
2 ASSUMPTIONS. WE'RE LEFT WITH, YOU KNOW, WITNESSES WHO THINK,
3 WELL, BECAUSE THEY WERE SOPHISTICATED, THEY SHOULD HAVE OR
4 COULD HAVE FOUND OUT THIS INFORMATION.

5 WELL, IF WE'RE LEFT WITH THOSE KINDS OF THINGS,
6 THOSE ARE INFERENCES, AND DIFFERENT INFERENCES COULD BE DRAWN
7 FROM THAT AND THEREFORE IT'S A TRIABLE ISSUE, AND THEREFORE I
8 THINK IT'S AN EASY CALL. YOU HAVE TO DENY THE MOTION FOR A
9 DIRECTED VERDICT ON THIS.

10 ANOTHER POINT ABOUT THIS -- AND MAYBE I SHOULD
11 JUST MOVE ON BECAUSE IT'S REALLY MORE IN THE RISK VERSUS
12 BENEFIT POINT. OR, NO, IT'S IN ONE OF THE OTHER ONES. BUT
13 LET ME MOVE ON TO NUMBER THREE, THE DIRECTED VERDICT REGARDING
14 RISK VERSUS BENEFITS.

15 AND HERE, AS I ALLUDED TO EARLIER, OUR POSITION
16 IS, IS THAT WHILE SOLVENTS WERE INDEED NECESSARY TO MAKE
17 TIRES, SOLVENTS WERE NOT A FIXED FORMULATION. THEY WERE A
18 VARIABLE FORMULATION. THERE WERE DIFFERENT FORMULAS THAT

19 COULD BE USED TO MAKE THE TIRES.

20 WHY DO WE KNOW THAT? WELL, BECAUSE WE HAD

21 WITNESSES THAT SAID THAT, AND BECAUSE WE KNOW THAT THERE WERE

22 REQUESTS TO REDUCE BENZENE CONTENT, IN OTHER WORDS, CHANGE THE

23 FORMULA IN THE 1970'S, AND THAT THOSE REQUESTS WERE COMPLIED

24 WITH. I BELIEVE THE EXPLANATION WAS THAT WE PROVIDED A

25 SEVERAL -- A COUPLE OF DIFFERENT FORMULATIONS. THEY DID TESTS

26 ON THOSE, AND THEY TOLD US WHICH ONES THEY LIKED THE BEST.

27 SO IF THEY CAN FORMULATE IT DIFFERENTLY, THEN I

28 THINK THAT THE BURDEN UNDER THE RISK VERSUS BENEFITS THEORY

4207

1 SHIFTS TO THEM TO SHOW THAT THE FORMULATION THAT THEY CHOSE IS
2 THE BEST ONE UNDER THE RISK VERSUS BENEFITS. NOT THE BEST ONE
3 FOR MAKING TIRES. PRESUMABLY IT WORKED OKAY FOR MAKING TIRES,
4 BUT THE BEST ONE IN VIEW OF THE FACT THAT THIS HAS GOT
5 CANCER-CAUSING ELEMENTS IN IT.

6 AND WHAT WAS THE RISK VERSUS BENEFITS OF, SAY,
7 LOWERING THE BENZENE CONTENT EVEN FURTHER OR PERHAPS EVEN
8 ELIMINATING IT ENTIRELY? WAS THERE ANY EVIDENCE THAT THEY
9 COULDN'T HAVE DONE THAT? WELL, THAT WAS THEIR JOB TO PUT IN
10 THAT EVIDENCE

11 WAS THERE ANY EVIDENCE THAT THERE WERE OTHER
12 PRODUCTS IN THERE THAT THEY ALSO COULD HAVE ADJUSTED THAT
13 WOULD HAVE DONE THE JOB JUST AS WELL, BUT REDUCE THE HAZARDOUS
14 NATURE OF THIS?

15 IN TERMS OF THE FORMULATION OF THE SOLVENTS,
16 THAT'S THEIR JOB TO PROVE THAT IT COULDN'T BE DONE A DIFFERENT
17 WAY OR THAT THE TRADEOFFS WERE REASONABLE TRADEOFFS. AND I
18 DON'T THINK THEY'VE DONE THAT, FRANKLY. I THINK, YOU KNOW,

19 THEY'VE JUST RELIED ON THE ASSUMPTION THAT THERE WAS ONLY ONE
20 FORMULATION OF THESE SOLVENTS AND THAT'S IT. AND THEY STOPPED
21 THERE.

22 SO THEY'VE UTTERLY FAILED WITH RESPECT TO THEIR
23 BURDEN OF PROOF ON THIS ISSUE, AND I THINK, YOU KNOW, THIS
24 SHOULD BE A SLAM DUNK FOR US, BUT NOT SO MUCH THAT I'M GOING
25 TO ASK FOR A DIRECTED VERDICT ON IT.

26 BUT I THINK THAT IN TERMS OF A MOTION FOR A
27 DIRECTED VERDICT, THEY HAVE NOT CARRIED THEIR BURDEN OF
28 PROVING THAT THERE WAS NO ALTERNATE FORMULATION OF THESE

1 PRODUCTS. THAT THERE WAS NO BETTER TRADEOFF. THAT THERE WAS
2 NO QUESTION THAT THEY HAD TO PROVIDE THE PRODUCT IN THIS FORM
3 THAT THEY PROVIDED IT IN.

4 IN FACT, THE EVIDENCE IS ABSOLUTELY TO THE
5 CONTRARY, AND THEREFORE I THINK YOU NEED TO DENY THAT MOTION.

6 THAT MOTION ALSO DEALT WITH THE QUESTION OF WHAT
7 THE RISK WAS. AND HERE WE GET INTO ONE OF THE CONFUSING
8 ASPECTS OF THIS CASE. IN THAT THE CANCER THAT MR. MOLINA HAS
9 IS ONE THAT I WILL CONCEDE WAS NOT KNOWN ABOUT IN TERMS OF
10 WHAT WAS PUBLISHED IN THE MEDICAL LITERATURE AS OF THE TIME
11 THAT HE WAS EXPOSED.

12 OUR POSITION IS, IS THAT THERE WAS ANOTHER
13 CANCER, A.M.L., THAT WAS KNOWN ABOUT, THAT WAS ASSOCIATED WITH
14 THESE PRODUCTS, AND THEREFORE THEY SHOULD HAVE BEEN WARNING
15 ABOUT A CANCER RISK.

16 AND THAT HAD THEY WARNED ABOUT A CANCER RISK,
17 THAT THE WARNING WOULD HAVE BEEN HEEDDED, THAT THERE WOULD HAVE
18 BEING STEPS TAKEN TO REDUCE OR ELIMINATE EXPOSURES. THEY

19 WOULD HAVE MADE THEM WEAR GLOVES, LIKE IT SAID TO DO ON THAT
20 SHELL WARNING DOCUMENT. THEY WOULD HAVE WARNED THEM ABOUT --
21 THEY WOULD HAVE --

22 YOU KNOW, THERE'S LOTS OF THINGS THAT COULD HAVE
23 BEEN DONE TO REDUCE EXPOSURES HAD THEY KNOWN ABOUT THE HAZARD.

24 AND I THINK THE INFERENCE CAN BE DRAWN THAT HAD
25 THERE BEEN A WARNING ABOUT THE HAZARDS, THAT IT WOULD HAVE
26 BEEN HEEDDED, AND THAT THINGS WOULD HAVE BEEN DONE TO REDUCE OR
27 ELIMINATE THE EXPOSURES SUCH THAT NO CANCER WOULD HAVE
28 RESULTED FROM THIS.

1 SO IT'S OUR POSITION THAT THE -- WE NEED NOT
2 PROVE THAT AS OF THE TIME THAT THIS PRODUCT WAS BEING SOLD
3 THAT THERE WAS KNOW -- IT WAS KNOWN OR KNOWABLE THAT THE RISK
4 OF THE PARTICULAR CANCER THAT MR. MOLINA DEVELOPED, THE
5 FOLLICULAR LYMPHOMA, THAT THAT PARTICULAR CANCER WAS KNOWN AT
6 THAT TIME. THAT'S NOT AN ELEMENT. I DON'T SEE THAT AS AN
7 ELEMENT OF WHAT OUR PROOF REQUIRES IN THIS.

8 FINALLY, THE LAST ASPECT OF THIS ISSUE IS
9 WHETHER OR NOT IT WAS KNOWABLE IS DIFFERENT THAN WHETHER OR
10 NOT IT WAS KNOWN. AND KNOWABILITY IN SCIENCE OFTEN HAS TO DO
11 WITH WHETHER OR NOT SOMEBODY IS DOING THE STUDIES.

12 IN OTHER WORDS, IF WE KNOW TODAY THAT A CERTAIN
13 PRODUCT CAUSES CANCER, BECAUSE A STUDY WAS DONE LAST YEAR THAT
14 SHOWS THAT THAT PRODUCT CAUSED CANCER, COULD WE HAVE DONE THAT
15 STUDY 40 YEARS AGO AND FOUND OUT THE SAME THING? OTHER THAN
16 THE WILL TO DO IT, OTHER THAN THE FUNDING FOR THE STUDY, WAS
17 THERE ANY TECHNICAL BARRIER TO BEING ABLE TO DO THE STUDY?

18 AND HERE, YOU KNOW, I MEAN, SCIENCE MOVES ALONG

19 AT ITS OWN PACE DEPENDING ON WHAT FUNDING AND WHO HAS INTEREST
20 AND ALL THAT SORT OF THING, BUT IT'S NOT AS IF THERE ARE
21 THINGS THAT JUST CANNOT BE KNOWN. OFTENTIMES IT'S A QUESTION,
22 OF, WELL, IS ANYBODY TRYING TO FIND OUT?

23 AND THE MANUFACTURER IS IN A POSITION TO FUND A
24 LOT OF STUDIES. IN FACT, THERE WAS EVIDENCE THAT THEY DID
25 FUND STUDIES. THEY FUND STUDIES. THEY CAN DO ANIMAL
26 EXPERIMENTATIONS. THEY CAN VARIOUS THINGS TO UNCOVER THE
27 RISKS AND HAZARDS IN THEIR PRODUCTS.

28 MANY DECIDE, AS A MATTER OF PRACTICALITY, NOT TO

4210

1 DO THOSE STUDIES. THEY DECIDE TO SIT BACK AND WAIT FOR OTHERS
2 TO DO THEM, AND THEN WHEN THOSE STUDIES ARE DONE AND THE PILE
3 OF STUDIES IS SO HIGH, THEN THEY ADMIT, THAT, OH, YES, THERE
4 IS A PROBLEM.

5 WELL, I SUBMIT THAT UNDER STRICT LIABILITY LAWS
6 THAT THEY BEAR THE RISK OF THAT CONDUCT. THEY BEAR THE RISK
7 OF IF THEY'RE GOING TO SIT BACK AND WAIT FOR SOMEBODY ELSE TO
8 DO THE STUDY RATHER THAN BEING PROACTIVE AND UNCOVERING THE
9 HAZARD THEMSELVES, THAT IF THE HAZARD DEVELOPS, THEY DON'T GET
10 TO SAY, "A-HAH, BUT NO ONE KNEW AT THE TIME."

11 THE ONLY EXCEPTION TO THAT MAY BE IF THEY CAN
12 PROVE THAT IT WAS IMPOSSIBLE TO HAVE FOUND OUT BECAUSE OF
13 SOME, YOU KNOW, LIMITATION IN TERMS OF, YOU KNOW, SOMEBODY
14 HADN'T INVENTED AN EPIDEMIOLOGY TECHNIQUE OR SOMETHING.
15 SOMEBODY DIDN'T KNOW HOW TO LOOK IN THE MICROSCOPE AND
16 DETERMINE WHAT THESE CANCERS WERE. OR SOMEBODY DIDN'T KNOW
17 HOW TO COUNT UP THE NUMBER OF PEOPLE THAT HAD DIED FROM THESE
18 CANCERS. YOU KNOW, SOMETHING ALONG THOSE LINES THAT WOULD

19 HAVE PREVENTED THE POSSIBILITIES.

20 SO MY POSITION IS, IS ESSENTIALLY THEY CAN'T

21 HAVE THEIR CAKE AND EAT IT, TOO, IN TERMS OF NOT FUNDING A

22 STUDY AND THEN SITTING BACK AND SAYING, "WELL, BECAUSE THERE

23 WAS NO STUDY, YOU CAN'T HOLD US RESPONSIBLE FOR WHAT THAT

24 STUDY WOULD HAVE REVEALED." WE CAN AND WE DO HOLD THEM

25 RESPONSIBLE.

26 THEY, YOU KNOW, IT'S OFTEN SAID THAT UNDER

27 PRODUCTS LIABILITY LAW, MANUFACTURERS ARE NOT INSURERS OF

28 THEIR PRODUCTS. AND WHILE THAT'S TRUE IN THE STRICT SENSE

4211

1 THAT IN TERMS OF THEY'RE NOT LIKE FULL COMPLETE INSURERS OF
2 EVERY ASPECT OF IT. THE FACT IS, IS THAT PRODUCTS LIABILITY,
3 STRICT LIABILITY LAW DOES RESEMBLE INSURANCE IN A CERTAIN WAY.
4 IT MAKES THEM RESPONSIBLE REGARDLESS OF THEIR
5 KNOWLEDGE ABOUT HAZARDS. IT MAKES THEM RESPONSIBLE REGARDLESS
6 OF THEIR GOOD FAITH OF THEIR ACTIONS. IT MAKES THEM
7 RESPONSIBLE, EVEN IF IT WASN'T NECESSARILY KNOWN THAT THAT
8 PARTICULAR GRIEF MIGHT HAPPEN AS A RESULT OF THEIR PRODUCT
9 BECAUSE THEY'RE IN THE BEST POSITION FROM A SOCIAL POLICY
10 STANDPOINT TO BE ABLE TO SPREAD THAT RISK IN AN INSURANCE-LIKE
11 MANNER, RATHER THAN HAVING THE INNOCENT PERSON WHO HAD BEEN
12 INJURED BY THE PRODUCT BEAR ALL OF THAT RISK.

13 THE BURDEN OF THAT RISK IS ASSIGNED TO THE
14 MANUFACTURER WHO'S IN THE BEST POSITION TO DISTRIBUTE IT TO
15 THE COST OF THEIR PRODUCTS, AND TO DO SOMETHING ABOUT THAT
16 RISK IN TERMS OF RESEARCH IN TERMS OF THEM COVERING THOSE
17 RISKS AND IN TERMS OF DOING SOMETHING ABOUT IT IN TERMS OF
18 WARNING OR CHANGING THE FORMULATIONS OF THEIR PRODUCTS.

19 BOTTOM LINE IS, YOU SHOULD DENY THE MOTION FOR A
20 DIRECTED VERDICT WITH RESPECT TO THE RISK VERSUS BENEFITS
21 THEORY.

22 NOW, THERE WAS ANOTHER MOTION FOR A DIRECTED
23 VERDICT. THIS IS NUMBER FOUR, ON THE GROUNDS OF INADEQUATE
24 IDENTIFICATION OF THE CHEMICALS.

25 NOW, THIS IS AN INTERESTING ONE. HERE, WHAT OUR
26 EVIDENCE WAS WAS THAT THE DEFENDANTS SOLD MIXED SOLVENT
27 PRODUCTS. THEY HAD NAMES, LIKE CHEVRON THINNER 200. BUT
28 THESE PRODUCTS WERE THEMSELVES MIXTURES OF DIFFERENT COMPONENT

4212

1 CHEMICALS. THEY INCLUDED BENZENE. THEY INCLUDED TOLUENE.
2 THEY INCLUDED XYLENE AND A WHOLE BUNCH OF OTHER THINGS.

3 NOW WHAT THEY'RE SAYING -- AND WE HAVE PUT OUR
4 CASE ON BASED UPON PROOF THAT IT IS THAT MIXTURE OF PRODUCT
5 THAT THEY SOLD, THAT'S THE INJURY-CAUSING PRODUCT. THAT'S THE
6 ONE THAT THE PLAINTIFF WAS EXPOSED TO, AND THE EVIDENCE WAS
7 THAT EXPOSURE TO THAT MIXTURE PRODUCT WAS WHAT CAUSED THE
8 INJURY.

9 MR. RIFF'S MOTION IS SAYING IN EFFECT, EVEN
10 THOUGH THEY SOLD A MIXTURE, IT'S OUR JOB TO SAY, WELL, WHICH
11 SPECIFIC COMPONENT OF THAT MIXTURE WAS ACTUALLY THE CAUSE OF
12 THE INJURY? THIS IS DIRECTLY EQUIVALENT TO THE CIGARETTE
13 CAUSING LUNG CANCER SITUATION, WHICH SEVERAL EXPERTS TALKED
14 ABOUT ON THE WITNESS STAND. THAT CIGARETTES CONSTITUTE --
15 CIGARETTE SMOKE CONSTITUTES A MIXTURE OF A LARGE NUMBER OF
16 CHEMICALS, AND WHAT THE EPIDEMIOLOGY SHOWS IS THAT EXPOSURE TO
17 CIGARETTE SMOKE OR EXPOSURE TO THAT MIXTURE OF ALL OF THOSE
18 CHEMICALS, CAUSES PEOPLE TO GET LUNG CANCER.

19 WE DON'T KNOW THE PRECISE ROLE OF EACH OF THE
20 INDIVIDUAL CHEMICALS, AND WHETHER IT'S AN INTERACTIVE EFFECT
21 AMONG THEM, OR THAT IT'S A ONE, TWO PUNCH FROM A COMBINATION
22 OF CHEMICALS OR ONE PARTICULAR CHEMICAL. YOU KNOW, WE DON'T
23 KNOW THESE DETAILS.

24 WHAT WE DO KNOW IS FROM AN EPIDEMIOLOGICAL
25 STANDPOINT IS YOU SMOKE. YOU GET EXPOSED TO THIS MIXTURE. IT
26 CAUSES LUNG CANCER.

27 WELL, WE'RE DOING THE EXACT SAME THING HERE.
28 WE'VE GOT A MIXTURE OF CHEMICALS. WE'VE GOT EXPOSURE TO THAT

4213

1 MIXTURE OF CHEMICALS OF CHEMICALS, AND IT'S THAT MIXTURE OF
2 CHEMICALS THAT CAUSES THE CANCER.

3 SO DO WE HAVE TO DO WHAT YOU CAN'T DO ABOUT
4 CIGARETTES? DO WE HAVE TO PICK OUT THE INDIVIDUAL CHEMICALS
5 AND SHOW THE PRECISE MECHANISM? SPEND MILLIONS OF DOLLARS ON
6 TOXICOLOGY STUDIES TO FIGURE EXACTLY HOW -- WHICH PART OF
7 THEIR PRODUCT ACTUALLY CAUSED THIS CANCER?

8 NO. IT'S ENOUGH UNDER PRODUCT LIABILITY LAW TO
9 LOOK AT THEIR PRODUCT AS THEY SOLD IT, AND THAT'S WHAT WE'VE
10 DONE. THAT'S WHAT OUR EVIDENCE HAS BEEN. THAT THEY SOLD THIS
11 MIXTURE OF CHEMICALS, AND THE MIXTURE OF CHEMICALS IS WHAT
12 CAUSED THE CANCER. THAT WAS THE TESTIMONY. THAT WAS THE
13 EVIDENCE FROM MULTIPLE EXPERTS, AND, AS A RESULT, I THINK YOU
14 HAVE TO DENY THE MOTION FOR A DIRECTED VERDICT WITH RESPECT TO
15 THIS POINT.

16 FINALLY, WE HAVE PUNITIVE DAMAGES. AND OUR
17 THEORY OF PUNITIVE DAMAGES --

18 FIRST OF ALL, JUST TO BE CLEAR, I BELIEVE WE ARE

19 ENTITLED TO PUNITIVE DAMAGES AS TO ALL THREE OF THESE
20 DEFENDANTS, AND OUR POSITION IS THIS: THAT THE ELEMENT WHICH
21 NEEDS TO BE THERE IN ORDER TO SATISFY THE STATUTORY
22 REQUIREMENTS FOR PUNITIVE DAMAGES IS THE ELEMENT OF MALICE.

23 MALICE IS FOUND UNDER THE LAW IF THERE IS A
24 CONSCIOUS DISREGARD OF SAFETY, WITH A REQUISITE SORT OF MOTIVE
25 TO PROCEED ON DESPITE THE CLEAR NATURE OF THE HAZARD.

26 AND WHERE I THINK YOU FIND THIS ELEMENT IN TERMS
27 OF THE ACTIONS OF THESE DEFENDANTS, IS THEY'RE WAITING UNTIL
28 THE INFANTE STUDY WAS PUBLISHED BEFORE BEGINNING TO WARN ABOUT

4214

1 A CANCER RISK WITH RESPECT TO BENZENE. THAT'S THE SPECIFIC
2 CONDUCT.

3 AND WHY? IT'S BECAUSE WHAT THEY HAVE CHOSEN TO
4 DO -- AND I THINK SOME OF THE CORPORATE WITNESSES MADE IT REAL
5 CLEAR THAT THIS WAS APPROACH AS A CORPORATION -- WAS TO STAND
6 BACK. LET OTHERS DO THE SCIENTIFIC INQUIRIES AND WAIT UNTIL
7 THOSE -- UNTIL EFFECTIVELY THE BODIES HAD PILED UP HIGH ENOUGH
8 THAT THEY COULD BE COUNTED SO WELL THAT THERE WAS NO LONGER --
9 IT WAS NO LONGER POSSIBLE TO DENY IT.

10 THE FINAL BODY COUNT CAME THROUGH THE INFANTE
11 STUDY. THAT'S WHERE IT FINALLY HAPPENED. WERE THERE REPORTS
12 OUT THERE BEFORE THEN? YES, GOING BACK TO 1928 IN TERMS OF
13 THE CANCER.

14 THERE WERE CASE REPORTS, MULTIPLE CASE REPORTS,
15 CASE SERIES. THERE WERE STUDIES THAT WERE PUBLISHED IN THE
16 MEDICAL LITERATURE. THERE WERE WARNINGS. THERE WAS
17 DISCUSSION. THERE WAS LOTS OF TALK ABOUT THIS BEING CANCER
18 CAUSING. THAT THE BENZENE CONTENT OF A PRODUCT WAS SOMETHING

19 THAT WAS HAZARDOUS. IT WAS HAZARDOUS BECAUSE IT ATTACKED THE
20 BLOOD-FORMING ORGANS, SOMETHING THEY KNEW SINCE 1897.

21 THEY KNEW THAT THIS CAUSED SERIOUS DISEASES OF
22 THE BLOOD-FORMING ORGANS, BUT IT WAS IN THE LATE 1920'S, FROM
23 THEN ON IT WAS CLEAR THAT NOT ONLY WAS THERE A PROBLEM IN
24 TERMS OF ACUTE TOXIC EFFECTS THAT WERE VERY SERIOUS AND LIFE
25 THREATENING, BUT THAT WERE ALSO CHRONIC TOXIC EFFECTS IN TERMS
26 OF CANCER. THE PARTICULAR CANCER WAS LEUKEMIA, AND THAT
27 LEUKEMIA RISK WAS SOMETHING THAT WAS OUT THERE AND WAS KNOWN.

28 THE CORPORATE RESPONSE WAS TO SIT BACK AND DENY

4215

1 IT. TO SIT BACK AND SAY, "WELL, IT HASN'T BEEN PROVEN.
2 HASN'T BEEN PROVEN." AND THEY KEEP SAYING THAT UNTIL THE
3 INFANTE STUDY FINALLY MADE IT SO DIFFICULT FOR THEM TO
4 MAINTAIN THAT POSITION THAT THEY HAD TO ROLL OVER AND ADMIT,
5 "WELL, MAYBE, OKAY, WE'VE GOT A PROBLEM HERE."
6 THAT'S THE CONDUCT RIGHT THERE. THAT IS THE
7 HEART OF THIS CASE IN TERMS OF WHAT THE EVIDENCE HAS SHOWN
8 REGARDING WHAT WAS KNOWN ABOUT STATE OF THE ART AND WHERE THE
9 CONDUCT OF MALICE COMES FROM.
10 THE EVIDENCE WAS THAT THIS WAITING UNTIL A
11 DEFINITIVE STUDY WAS PUBLISHED, NAMELY, THE INFANTE STUDY, WAS
12 THE POLICY OF THE DEFENSE -- OF THE DEFENSE. THAT THEY WAITED
13 UNTIL THAT POINT TO PROVIDE ANY KIND OF INFORMATION ABOUT THIS
14 CANCER HAZARD IN THEIR WARNING DOCUMENTS.
15 THERE WAS EVIDENCE TO THE CONTRARY FROM OUR
16 WARNINGS EXPERTS, DR. VREDENBURGH, WHO SAID THAT IT WAS HER
17 VIEW THAT ANY TIME THERE WAS PUBLICATION IN A PEER-REVIEWED --
18 IN THE PEER-REVIEWED LITERATURE OF A CANCER HAZARD, THAT THEY

19 SHOULD START WARNING. THAT THAT'S THE TRIGGER RIGHT THERE.

20 AND WE CERTAINLY MET THAT IN TERMS OF THIS CASE.

21 NOW, HAVE WE PROVEN OUR CASE IN TERMS OF MALICE

22 THERE? I DON'T KNOW. IT DEPENDS ON, YOU KNOW, HOW ONE VIEWS

23 THAT. I MEAN, THERE'S AN OLD SAYING THAT A DOG KNOWS THE

24 DIFFERENCE BETWEEN BEING KICKED AND BEING STUMBLED OVER. THIS

25 IS AN ASSESSMENT THAT NEEDS TO BE MADE OF THIS CORPORATE

26 CONDUCT IN TERMS OF WHETHER OR NOT THIS REQUISITE STATE OF

27 MIND OF MALICE WAS REALLY THERE.

28 DID CHEVRON AND SHELL AND UNOCAL -- DID THEY

4216

1 SIMPLY STUMBLE ON THIS ISSUE? WAS THIS A SIMPLE -- WAS THIS A
2 MISTAKE ON THEIR PART? OR WAS IT A KICK ON THEIR PART IN
3 TERMS OF SAYING AND HAVING AN ATTITUDE OF, "WELL, WE DON'T
4 CARE. WE'RE GOING TO DENY THIS UNTIL IT'S ABSOLUTELY SO CLEAR
5 THAT WE CAN'T DENY IT ANYMORE, AND AT THAT POINT WE'LL CHANGE
6 OUR POSITION."

7 I SUBMIT THAT'S A JURY QUESTION. AND THAT
8 THEREFORE YOU HAVE TO DENY THE MOTION FOR A DIRECTED VERDICT
9 ON THIS WITH RESPECT TO PUNITIVES AS TO ALL THREE OF THESE
10 DEFENDANTS. I THINK THAT THERE'S FACTS THERE FROM WHICH I CAN
11 MAKE THE ARGUMENT THAT FROM WHICH JURORS COULD REASONABLY
12 CONCLUDE THAT THESE DEFENDANTS ACTED WITH THAT REQUISITE
13 MALICE. AND AS LONG AS I CAN BE MAKING THOSE KINDS OF
14 ARGUMENTS, THEN YOU MUST IN YOUR ROLE AS THE JUDGE IN THIS
15 INSTANCE DENY THE MOTION FOR A DIRECTED VERDICT.

16 UNLESS THE COURT HAS QUESTIONS, I'VE COVERED ALL
17 OF THE MOTIONS I THINK THEY'VE MADE AND I'M DONE.

18 THE COURT: OKAY. CAN WE FINISH UP BEFORE LUNCH?

19 MR. WAGNON: OH, YEAH.

20 MR. RIFF: YOUR HONOR, I JUST HAVE A FEW COMMENTS.

21 FIRST OF ALL, THE LOCKHEED CASE IS FOUND AT 15

22 CAL.APP.4TH 558. AND ON THAT POINT, I THINK HERE IS THE KEY

23 -- OR AT LEAST A KEY -- BECAUSE EVERYTHING I SAID BEFORE I

24 THINK STILL APPLIES.

25 IN THIS CASE, IT'S EVEN MORE AGGRAVATED THAN IN

26 THE LOCKHEED CASE. WE CAN'T SAY THAT THERE IS ANY

27 INTERSECTION WHATSOEVER OF EVENTS -- THE VENN DIAGRAM --

28 BETWEEN THE COLLECTION OF MIXED SOLVENTS THAT THESE EXPERTS

4217

1 FOR THE PLAINTIFFS ARE RELYING ON AS INCREASING THE RISK OF
2 CAUSING NON-HODGKIN'S LYMPHOMA AND THE ACTUAL CHEMICALS IN
3 THIS CASE.

4 AND, IF THE COURT WISHES, I'D SUGGEST THE COURT
5 TAKE A LOOK AT WHAT DR. WEISENBURGER SAYS ON THAT POINT AT
6 PAGES 479 THROUGH 481 OF THE TRANSCRIPT OF THE TRIAL. MY NOTE
7 SAYS HE DOES NOT KNOW WITHOUT GUESSING OR SPECULATING THAT THE
8 SPECIFIC COMPONENTS OF THE PRODUCTS ARE WITHIN THE GROUP THAT
9 CAUSES N.H.L. SO THERE IS A NON-INTERSECTION OF THOSE VENN
10 DIAGRAMS.

11 ON THE FAILURE TO WARN -- I'M SORRY -- ON WHAT
12 WE'RE NOW CALLING THE "GENERAL NEGLIGENCE CAUSE OF ACTIONS,"
13 TO MY EAR THE FIRST PRONG OF WHAT PLAINTIFFS ARE TALKING ABOUT
14 IS THE FAILURE TO WARN. I DON'T KNOW WHAT IS LEFT THAT ISN'T
15 WITHIN THE WORLD OF FAILURE TO WARN.

16 ON THE SECOND PRONG OF THEIR GENERAL NEGLIGENCE,
17 I WROTE DOWN FAILURE TO PROVIDE A LOWER BENZENE FORMULATION.
18 AND ON THIS POINT, YOUR HONOR, THERE IS A FAILURE OF PROOF ON

19 THE PLAINTIFFS THAT IT WOULD HAVE MADE A DIFFERENCE. THERE IS
20 NO EVIDENCE THAT IF THE DEFENDANTS HAD NOT BEEN NEGLIGENT IN
21 THAT PARTICULAR, THAT IT WOULD HAVE MADE ANY DIFFERENCE.
22 THERE IS NO MEDICAL CAUSATION TESTIMONY ON THAT POINT.
23 NOTHING THE JURY CAN INFER FROM WITHOUT THE RANKEST OF
24 SPECULATION.

25 SO EVEN IF COUNSEL IS CORRECT ON THAT POINT, I'D
26 SUGGEST THAT IT'S STILL A PROPER SUBJECT OF A DIRECTED
27 VERDICT.

28 TWO MORE THINGS AND THEN I WILL BE DONE.

4218

1 COUNSEL SAID THERE IS NO -- I'M SORRY.

2 REFERRING TO THE ISSUE OF FIRESTONE'S KNOWLEDGE

3 AND SOPHISTICATION, ONE OF COUNSEL'S POINTS THERE IS THAT

4 THERE IS NO EVIDENCE IN THE RECORD THAT FIRESTONE WOULD HAVE

5 KNOWN THAT THESE PRODUCTS EVEN CONTAINED BENZENE.

6 THAT'S ACTUALLY NOT TRUE. THE ONLY EVIDENCE ON

7 THE POINT CAME FROM WILLIAM ELLIS, THE CHEVRON CHEMIST WHO

8 SAID SPECIFICALLY THAT FIRESTONE'S CHEMISTS, KNOWING THE

9 DISTILLATION RANGE, THE INITIAL BOILING POINT AND THE DRY

10 POINT, THAT IF THAT PASSES THROUGH 176 DEGREES FAHRENHEIT,

11 THEY DEFINITELY WOULD HAVE KNOWN THERE WAS BENZENE IN THE

12 PRODUCT AND HOW MUCH OR HOW LITTLE DEPENDS ON THE WIDTH OF

13 THAT BOILING RANGE. IT ASSUMES WE HAVE A COUNTERPOINT.

14 BUT THE POINT IS THAT THEY DIDN'T; THAT

15 FIRESTONE WOULD HAVE KNOWN THAT THESE PRODUCTS CONTAINED

16 BENZENE IN SOME AMOUNT.

17 AND, LAST, ON THE PUNITIVE DAMAGES POINT, I, AT

18 LEAST, WAS NOT PERSUADED BY MR. WAGNON, BUT THAT'S NOT THE

19 TEST, I GUESS. I WOULD JUST POINT OUT THAT THERE IS JUST
20 PLAIN NO EVIDENCE WHATSOEVER WITH REGARD TO UNOCAL'S CONDUCT
21 IN THIS CASE, YOUR HONOR.

22 I THINK THE ONLY TIME UNOCAL'S NAME GOT
23 MENTIONED IN THIS CASE, OTHER THAN WITH RESPECT TO THIS
24 APPLIES TO THE CHEMICALS, WAS IN REFERENCE TO A STUDY DONE BY
25 UNOCAL IN 1992 BY ELIZABETH DEL SAL (PH.), AS I REMEMBER, 12
26 YEARS LATER; 12 YEARS AFTER THE LAST YEAR THAT MR. MOLINA
27 WORKED. SO I POINT THAT OUT FOR WHATEVER LEGAL SIGNIFICANCE
28 THAT HAS. THANK YOU.

1 THE COURT: ALL RIGHT. HERE'S WHAT I'M GOING TO DO.
2 THE DEFENSE MOTIONS ON ALL POINTS ARE DENIED. HOWEVER, WITH
3 RESPECT TO THE NEGLIGENCE CLAIM, I THINK THAT THE NEGLIGENCE
4 THEORIES AND EVIDENCE THAT HAVE BEEN PUT FORWARD BY THE
5 PLAINTIFF ARE ADEQUATELY REFLECTED IN THE JURY INSTRUCTIONS ON
6 FAILURE TO WARN, WHETHER THAT BE STRICT LIABILITY OR
7 NEGLIGENCE, AND IN THE DESIGN DEFECT, EVEN THOUGH THAT'S
8 TAGGED AS STRICT LIABILITY, I THINK IT ADEQUATELY REFLECTS THE
9 LAW WITH RESPECT TO WHAT MUST BE SHOWN TO ESTABLISH LIABILITY
10 ON THE PART OF A MANUFACTURER FOR NEGLIGENT DESIGN OF A
11 PRODUCT.

12 SO, THE MOTION WAS, ESSENTIALLY, FOR A DIRECTED
13 VERDICT ON THE FIRST CAUSE OF ACTION. THAT'S DENIED, BUT I'M
14 NOT GOING TO GIVE ANY NEGLIGENCE INSTRUCTIONS BECAUSE I
15 THINK -- AS SUCH, BECAUSE I THINK THAT THOSE WOULD ONLY INVITE
16 THE JURY TO IGNORE THE SPECIFIC REQUIREMENTS FOR PROOF OF
17 NEGLIGENCE IN THE CONTEXT OF THE EVIDENCE AND ARGUMENTS THAT
18 ARE SUPPORTED BY THE EVIDENCE.

19 SO THAT'S IT.

20 MR. RIFF: AND I THINK THIS GOES WITHOUT SAYING, BUT

21 MAY I SAY IT? YOUR RULINGS ARE, OF COURSE, WITHOUT PREJUDICE

22 TO ANY SUBSEQUENT MOTIONS AT A LATER PHASE OF THE PROCEEDINGS,

23 IF NECESSARY

24 THE COURT: THAT'S ALWAYS THE CASE.

25 MR. RIFF: I THINK SO, TOO. THANK YOU.

26 THE COURT: I GUESS WE NEED THE OTHER THINGS TO BE

27 DONE.

28 WELL, LET'S GO OFF THE RECORD.

4220

1 (A DISCUSSION WAS HAD OFF OF
2 THE RECORD.)

3
4 (AT 12:04 P.M. A RECESS WAS HAD
5 UNTIL 1:30 P.M. OF THE SAME DAY.)

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