1

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

Case No. 04-16237 CA 42

JOSEPH MALLIA,

Plaintiff,

vs.

PNEUMO ABEX

Defendants.

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

- - - - -

The above-styled cause came on for

Jury Trial, held before the Honorable RICHARD YALE

FEDER, Presiding Judge, at the Dade County Courthouse, on the 9th day of December, 2005 at 9:00 o'clock a.m.

TESTIMON OF JOYCE GALE MALLIA,
DR. DAVID HAY GARABRANT & JOSEPH MALLIA (PART I)

APPEARANCES:

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

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

20

21

22

23

24

25

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

THE COURT: Are we ready?

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

THE COURT: Bring in the - sir?

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

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

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

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

Call your first witness.

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

THE COURT: Ma'am, come up here.

Thereupon:

JOYCE GALE MALLIA,

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

Q. (By Ms. Shull) Good morning.

A. Good morning.

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

A. Joyce Gale Mallia. I go by Gale.

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

A. No.

Q. Are you a little nervous?

A. Yes.

Q. We will just take it nice and slow.

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

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

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

Pizzeria Italian Restaurant. It was in the shopping center - next to the shopping center where my beauty salon was. You want more?

Q. Please. Please continue.

A. I was having lunch there one day, and my best friend at the time was the waitress, and I

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

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

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

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

Q. I guess it worked out well then?

A. Very much.

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

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

Q. That was a long time ago?

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

Q. Can you tell the jury about your relationship with your husband now?

A. It's changed.

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

A. Okay. I am sorry.

Q. Hold on a second, excuse me.

A. All right.

MS. SHULL: Your Honor, may I?

THE COURT: Yes.

THE WITNESS: I am sorry.

MS. SHULL: Take your time.

THE WITNESS: (Witness crying).

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

MR. POWERS: Your Honor, I didn't object to the last question, and I'm not going to, but it does raise a concern that Ms. Shull is going to ask Mrs. Mallia about how Mr. Mallia's illness affected her and her relationship with him. But if she is not doing that, it's not a problem.

MS. SHULL: I have no intention of doing that. I am very well aware Mrs. Mallia is not a party. I am laying a foundation for her to talk about her husband and what he is going to do.

THE COURT: Okay.

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

Q. (By Ms. Shull) Do you spend a lot of time with your husband now, Mrs. Mallia?

A. A lot.

Q. What kinds of things do you do together?

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

Q. Where do you go boating?

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

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

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

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

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

Q. Plans to go to college?

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

prepaid college scholarships, I think.

Q. Here in Florida?

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

They are really into school.

Q. Does that make him proud?

A. Oh, yeah.

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

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

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

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

Q. Are they into cars?

A. Oh, yes.

Q. Is that because of their dad?

A. Yes.

Q. Are you close with the boys?

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

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

A. Yes.

Q. The boys talk to Mr. Mallia to get advice from him?

A. Yes.

Q. What kinds of things do they talk about?

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

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

Do you remember about when that was?

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

Do you want to know about the hospital before?

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

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

So he didn't really think much of it.

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

Q. Had your husband ever been sick before?

A. Never.

Q. Ever been in a hospital before?

A. Not to my knowledge.

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

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

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

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

Q. What did they find?

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

Q. Take your time.

A. (Witness crying).

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

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

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

know anything. They thought he had pneumonia.

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

A. Yes.

Q. How did that happen?

A. They stuck a needle in his side and drained out fluid, and it came back highly suspicious.

Q. Were you there, Mrs. Mallia?

A. Oh, yes. I have been to every appointment, slept in the hospital, and I never left him. We've only been apart two nights in 14 years.

Q. Wow. Were you actually in the room when Mr. Mallia's fluid was drained?

A. Not in the hospital room because that was like a procedure done. Is that what you mean? They don't do it right in your room. They take him down to like the operating room.

Q. Was he scared before this happened?

A. He was very scared.

I believe they did that twice because the

fluid came back.

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

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

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

Q. Had you planned on getting married?

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

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

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

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

and they wanted him to make out a will, and he wanted to make sure that I would be okay if anything happened, and he wanted me to be in charge of his medical situation if need be.

Q. So at some point you found out that your husband was not having an infection, that it was

something else. Can you tell the jury about that, Mrs. Mallia?

A. How we found out?

Q. Please.

A. He was in the hospital three times, and I think it was January, and - then he was able to go home. And they had done - after they drew the fluid, took the fluid out twice, then I believe they did the biopsy where they actually take a piece of tissue from his lung. And we went home and they said wait for a phone call.

And we waited, and it was February 2nd. (Witness crying).

Q. Take your time.

A. Joe couldn't even answer the phone. And we knew, you know, what it was. It was the doctor calling.

And I took the phone. Joe was sitting out on the patio.

And the doctor told me who he was and said they got the results back because they actually send the biopsy, I guess, to another state or something. So it takes like a week. So we waited.

And when I answered the phone, he said that Joe has been diagnosed with malignant mesothelioma.

And I said, what's that?

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

And I said, what's that?

And he said, a cancer specialist.

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

A. Yes.

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

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

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

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

Q. Does she know - but she knows that her son has cancer, right?

A. She knows that he has cancer, but in her eyes that's her baby, and she - you know - she wants to believe it's a mistake and it's just going to go away.

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

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

Q. I understand.

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

A. Right.

Q. Can you tell the jury about that?

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

Q. Is it hard to keep these dates together?

A. So many doctors and hospitals.

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

Q. It's okay. The dates aren't important. I just want to talk about what you found out from the doctors at Sylvester.

A. When - first I believe we saw an oncologist. They confirmed that it was malignant mesothelioma, tumor of the pleura, which I had no idea what that

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

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

A. No.

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

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

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

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

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

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

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

A. Yes.

Q. And that's Moffitt?

A. H. Lee Moffitt in Tampa, Florida.

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

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

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

MR. POWERS: Excuse me, Your Honor, I have to object on the basis of hearsay.

THE COURT: Sustained.

Q. (By Ms. Shull) Let me rephrase, Mrs. Mallia. You go to Moffitt and get a second opinion. Did Moffitt suggest any type of treatment

for Mr. Mallia's condition?

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

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

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

And he said, you will either wake up a few

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

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

A. It was positive. (Witness crying).

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

about his emotional state.

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

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

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

And when he came to, he knew that they

hadn't removed his lung, and that it wasn't good because then that meant his only chance would be to have chemo. And with chemo, they told him he had 13 months, and without it, six to nine.

(Witness crying).

Q. Did your husband go through chemo?

A. Yes.

Q. Do you need a break?

A. No.

Q. When did he begin receiving chemotherapy treatments?

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

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

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

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

Q. Could he eat?

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

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

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

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

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

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

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

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

but it's so more involved than that.

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

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

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

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

Q. Why is that?

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

And when he was really bad, they never

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

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

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

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

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

Q. You go to Moffitt with him every time?

A. Oh, yes.

Q. Do you drive up there?

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

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

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

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

Q. (By Ms. Shull) Can you please describe your husband's mood when you are driving together to

Moffitt?

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

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

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

Q. Do you help him with that?

A. Oh, yes.

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

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

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

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

granted. Every day is a gift and, you know - like recently he had a little cold, and he said, oh, my God, the tumor is growing back.

You are constantly worried about it. You never, never forget about it. You never wake up in the morning and not think about it, you know. But Joe wants me to be strong for the boys. And like I said, we try not to talk about it a lot. We have a lot of family get-togethers. He doesn't want everyone to feel sorry for him and sit around and talk about it. It's not a talked-about discussion. I'm with him for every doctor's appointment.

If someone says to Joe, how are you doing, he will say, I can't complain, because he's not going to sit there and complain. But I see it and I live it, and it's hard.

MS. SHULL: Thank you, Mrs. Mallia. I have nothing further.

CROSS EXAMINATION

Q. (By Mr. Powers) I have a couple of questions, Mrs. Mallia. Good morning.

I know you heard me introduce myself, but I don't think I introduced myself to you. I really have just, I think, one question for you.

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

Mr. Mallia's tumor is not growing?

A. Correct.

Q. That's what the doctors told you?

A. It's not growing.

Q. I wanted to make sure that's what the doctor told you, as opposed to what you --

MS. SHULL: Objection, Your Honor, hearsay.

THE COURT: Grounds.

MS. SHULL: The attorney for Abex is asking Mrs. Mallia what the doctors told her.

THE COURT: I understand, but she testified to that on direct. Overruled.

Q. (By Mr. Powers) Miss Mallia, you believe that the tumor is not growing, and that's as of today, right?

A. Correct.

Q. That's based on what Mr. Mallia's doctors have told you and Mr. Mallia, right?

A. Correct.

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

A. Correct.

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

A. Right.

Q. Thank you, ma'am.

A. Uh-huh.

REDIRECT EXAMINATION

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

A. Most recently?

Q. Yes.

A. Yesterday.

MS. SHULL: Thank you.

THE COURT: Thank you, ma'am.

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

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

(Thereupon, the jurors left the courtroom,

after which the following proceedings were had:)

THE COURT: What?

MR. RUCKDESCHEL: Your Honor, we would like to address initially a couple of issues about Dr. Garabrant, who is the next anticipated witness because we shuffled the schedule.

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

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

If I may approach, Your Honor.

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

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

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

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

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

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

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

together, you have amalgamated the hearsay.

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

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

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

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

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

Dr. Garabrant can say, I considered epidemiological studies, and I made my determination, and my opinion is X, but he cannot present this evidence to the jury because he says, and all these people agree with me.

When we combine what all these people said,

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

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

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

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

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

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

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

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

Starting with the fourth page, I do have a

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

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

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

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

THE COURT: Okay.

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

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

MR. RUCKDESCHEL: I understand.

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

THE COURT: Sure.

MR. RUCKDESCHEL: The next --

MR. BISHOP: Hold on a second.

MR. RUCKDESCHEL: We object.

MR. BISHOP: May I approach, Your Honor.

THE COURT: Sure.

MR. BISHOP: This, Your Honor, is a graph from his work, his study, his meta-analysis, where he has calculated the meta - the meta

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

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

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

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

That's exactly what he is doing.

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

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

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

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

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

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

any of those things.

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

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

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

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

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

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

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

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

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

And I said, yes.

He says, okay, here is what we do. We would have to identify a group of people like Mr. Mallia -- he didn't use the phrase like Mr. Mallia, but I am inserting that in there -- whose only known exposure to asbestos was to

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

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

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

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

The example we are all familiar with is

thalidomide. The women who took thalidomide while pregnant had a higher instance of birth defects. You either took thalidomide or you didn't, and your child either has a birth defect or it doesn't.

This type of epidemiology can't be used to

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

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

using the air, whether they cleaned up after themselves.

There is no information that allows us to do anything other than speculate as to whether those people are substantially similar to Mr. Mallia.

So it's really no different than any other

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

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

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

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

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

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

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

epidemiologists do every day.

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

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

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

THE COURT: I am not denying he can make that statement, as long as it's his opinion.

What we are talking about is this particular exhibit, which seems to indicate he was reviewing certain tests which are included in this list, McDonald, Teta, whatever, and giving them a

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

THE REPORTER: Now can we take a break?

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

MR. RUCKDESCHEL: Thank you, Your Honor.

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

THE COURT: All right, bring in the jury.

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

THE COURT: You may be seated.

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

come in orderly and logically.

The Plaintiff has not rested had, not finished their testimony. This is a witness for the Defendant, but unfortunately, he has flown in and we have to hear him when he is here. I wanted you to understand this is out of turn.

Mr. Bishop, you may proceed.

MR. BISHOP: Thank you, Your Honor.

Thereupon:

DR. DAVID HAY GARABRANT,

was called as a witness on behalf of the Defendant, and having been first duly sworn, testified upon his oath as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

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

A. Yes, I am David Hay Garabrant.

Q. And what is your profession?

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

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

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

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

Michigan?

A. Yes, it is.

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

A. I don't know about today. Yesterday when I got up, it was minus five.

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

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

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

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

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

After finishing public health school, I then

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

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

A. I am board certified in internal medicine

and also in occupational medicine.

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

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

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

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

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

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

A. Yeah. Occupational medicine is a discipline

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

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

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

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

MR. RUCKDESCHEL: Your Honor, may we approach briefly.

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

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

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

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

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

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

MR. RUCKDESCHEL: As long as that is what we are talking about. I am concerned that it fray.

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

Q. (By Mr. Bishop) Dr. Garabrant, in addition to your academic positions at the University of

Michigan, have you held other positions of leadership?

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

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

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

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

A. I am.

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

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

epidemiology and occupational medicine?

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

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

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

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

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

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

Cancer Institute.

Let's see, in addition to cancer, we have done - my colleagues and I have done studies of neurologic diseases in relation to chemicals, particularly pesticides. We have a big study right now looking at patterns of mortality, patterns of death in men and women who work in the automobile plants at the Ford Motor Company. That study is being done with funding from the United Auto Workers and Ford.

MR. RUCKDESCHEL: Object to the narrative.

THE COURT: I don't know how it could not be narrative. The question is what organizations or studies he has made. No. Overruled.

THE WITNESS: So that study looks mostly at the cancer risks amongst people who work in factories, making transmissions and doing metal stamping where there is a lot of exposures of mixes of oil, machine fluids, cutting oils, lots

of other chemicals, as well, welding fumes, et cetera.

Principally looking to see whether those exposures put people at increased risk of any particular types of cancer. That study involves almost 55,000 people.

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

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

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

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

Q. Dr. Garabrant, have you published in

peer-reviewed medical and scientific journals the results of your research on epidemiology?

A. Yes, many times.

Q. Have you published textbooks, as well?

A. I have published chapters in textbooks, yes.

Q. Now, in addition to your research

responsibilities, do you teach, as well?

A. In large part of my job is teaching. I teach a number of courses.

This semester I am teaching risk assessment. Next semester I will be teaching field methods in epidemiology.

Let's see, this semester I co-taught research methods in occupation environmental epidemiology. Next semester I co-teach environmental disease.

Q. Are you a member of a number of professional societies?

A. Yes, I am.

Q. Many of those deal with the issue of epidemiology?

A. They deal with both occupational medicine and epidemiology, yes.

MR. BISHOP: Your Honor, may I approach?

THE COURT: You may.

Q. (By Mr. Bishop) Doctor, let me hand you what appears to be a copy of your curriculum vitae.

Is that a current curriculum vitae that summarizes your qualifications and experience?

A. Yes. It's a few months out of date, but it's pretty much current.

MR. BISHOP: Your Honor, we ask that be marked for identification.

THE COURT: Let it be so marked.

THE CLERK: Thank you.

Q. (By Mr. Bishop) Among the research that you have conducted, have you looked at whether vehicle mechanics are at increased risk of mesothelioma?

A. Yes, I have.

Q. Have you published on that?

A. Yes, I have.

MR. BISHOP: Your Honor, at this time we would offer Dr. Garabrant as an expert in the fields of occupational and preventive medicine and epidemiology.

THE COURT: Mr. Ruckdeschel, do you wish to inquire?

MR. RUCKDESCHEL: No, Your Honor.

THE COURT: I will permit him to testify as

an expert in those areas.

MR. BISHOP: Thank you, Your Honor.

Q. (By Mr. Bishop) Doctor, how do folks like yourself go about determining what a cause of cancer is in humans?

A. There are a number of things that you have

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

Q. Both.

A. Okay. Well, most of what I do is research. So I design and conduct research studies to look at people who handle chemicals and other factors, but my work is focused on chemical exposures and cancer, to see whether there is increased risk of cancer.

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

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

In your opinion, can asbestos cause mesothelioma?

A. Some types of asbestos clearly cause mesothelioma.

Q. In your opinion, has epidemiology demonstrated that certain occupations are at increased risk of mesothelioma?

A. There is no question about it. And that

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

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

MR. RUCKDESCHEL: Objection.

THE WITNESS: It's very straightforward.

MR. RUCKDESCHEL: Objection. Can we approach?

THE COURT: Yes.

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

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

increased risk versus risk. Dr. Garabrant was asked the set-up question, increased risk. Mr. Bishop asked whether we need to study because of increased risk, not risk but increased risk.

And Your Honor made a ruling yesterday that the witness has to right to say he has an opinion

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

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

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

MR. BISHOP: Exactly.

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

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

MR. BISHOP: That's his argument.

THE COURT: Agree, that's your argument.

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

to talk about epidemiology. And that's precisely what the representations were to the Court.

Toxicology is bigger than epidemiology, and he was allowed to testify. That was their proffer.

So you can't now say this is different

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

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

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

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

It's fundamentally wrong.

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

MR. RUCKDESCHEL: If Mr. Mallia passed away tomorrow and there was an epidemiological study like the McDonald study, Mr. Mallia would be in the pavement striping study and never had the job title mechanic. That is what his occupation would be listed on his death certificate. If you look at his medical records, none of his medical records ever said he was a mechanic.

He wants to look at studies of mechanics or garage workers that say this. He's not one of them.

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

THE COURT: I think if you define what mechanics are, which includes filing, grinding, scraping, replacing brake lining, why wouldn't that be?

MR. RUCKDESCHEL: Because Dr. Garabrant has conceded it's speculation whether any of the people in any of those studies have done it.

I will show you the testimony. He said, we just presume that these job categories include a variety of different work practices. We presume.

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

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

MR. RUCKDESCHEL: Populations, not individuals.

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

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

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

journals. If you want to look at the people doing vehicle work --

MR. RUCKDESCHEL: Not individuals, populations. And I can read you the deposition.

MR. BISHOP: He can draw the conclusions he draws from that, and it's perfectly appropriate

for an expert.

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

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

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

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

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

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

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

individuals.

THE COURT: I understand.

MR. RUCKDESCHEL: They want to say you can make generalizations about this group not substantially similar to Mr. Mallia.

THE COURT: That's cross-examination.

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

THE COURT: If they had a category mechanics that he feels covers what you claim Mallia did, why isn't that a category he can use?

MR. RUCKDESCHEL: Here is why, because it's misleading to the jury.

MR. LIPMAN: Don't use your finger.

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

Here is why, because Dr. Garabrant acknowledges, and Mr. Bishop will acknowledge, that none of these studies have any information

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

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

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

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

MR. RUCKDESCHEL: That's the problem.

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

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

doctors.

MR. RUCKDESCHEL: That's right.

THE COURT: Why can't he classify them as auto mechanics and presume they do all these things?

MR. RUCKDESCHEL: There is no factual basis

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

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

MR. BISHOP: That's his argument.

MR. RUCKDESCHEL: Dr. Garabrant will admit --

MR. BISHOP: They want --

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

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

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

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

MR. BISHOP: That was his decision.

THE COURT: That was yours, not mine.

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

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

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

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

MR. RUCKDESCHEL: He is admitting.

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

we have record evidence of what he knows and doesn't know.

MR. RUCKDESCHEL: He has admitted there is no factual basis for that presumption, that's the problem. You can say I presume, but really it's speculating, because there is no factual basis to

support the presumption.

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

THE COURT: Step out a second.

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

THE COURT: Doctor, step outside.

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

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

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

THE COURT: Go ahead.

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

brake work that they may have performed?

Answer, we know they were garage workers.

Question, and to the extent that they performed brake work, would you agree that we don't have a videotape or other record that shows how they did it?

Answer, that's correct.

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

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

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

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

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

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

Question, yeah. We don't know whether they

filed the edges of the brakes, whether they sanded the surface of the brakes, or whether they worked on cars or trucks, whether they did blow out compressed air, or whether they cleaned up after themselves, correct?

Answer, that is - that is not stated

explicitly in the McDonald study.

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

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

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

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

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

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

That must be a typo because there are not. That must be a typo.

Question, and we don't know how often the

mechanics in the McDonald study may have performed any brake work, correct?

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

We don't know how long the individuals in the McDonald study worked as garage workers?

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

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

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

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

publication. What we know is that these were people who were auto repair and related service workers, both cases and controls, and it is a reasonable assumption that they did what is typical in those occupations.

Now, the occupation that he has just

discussed is automobile repair and related services. Nobody knows what that means.

And I asked him, what is related services?

I would have to go back to the coding of the Teta study. I do not recall it from memory. I believe she used the Census Industry and Occupation Coding, and I don't have that with me.

I believe she - the term I believe she used was automobile mechanics and garage workers and gas station attendants.

So this includes the guy that pump gas, all right. And I would have to go back and review it, all right.

So - and do you believe it included individuals that were not performing mechanical work such as gas station attendants?

And then more of the speculation.

Answer, it included gas station attendants, but it is my understanding that in many instances

they do perform mechanical work.

Okay. But we don't know anything about how often they may have done that?

This study does not give those details in the publication.

And it's the same for all of the studies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I have heard enough.

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

admissibility. I am going to allow it.

Bring them back in.

THE REPORTER: Before we do that --

THE COURT: You want a break?

THE REPORTER: Yes.

(Thereupon, after a brief recess, the

following proceedings were had:)

(Thereupon, the witness entered the courtroom, after which the following proceedings were had:)

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

THE COURT: You may be seated.

You may proceed.

MR. BISHOP: Thank you, Your Honor.

Q. (By Mr. Bishop) Dr. Garabrant, when we took a recess I was asking you about the fact that you know there are elevated risks for mesothelioma in certain trades and occupations. If you know that, why would you need to study vehicle mechanics, for example?

A. Because we know the risks vary, we know the risks vary by type of asbestos. The evidence for some types of asbestos that it causes mesothelioma is

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

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

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

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

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

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

reliable thing to do.

Most scientists are reluctant to take results from mouse studies or rat studies and make conclusions about humans based on those studies, especially when there is evidence in humans to look at. Why would you rely on a mouse study if you have

human studies, and we do.

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

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

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

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

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

A. No.

Q. Is there a percentage of mesotheliomas that,

in your opinion, are unrelated to asbestos?

A. Yes, there is, and I think that is widely agreed upon, that there is a percentage of mesothelioma not due to asbestos and not due to any identified cause.

Q. Is there a background rate, therefore, for

mesothelioma unrelated to asbestos?

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

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

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

MR. BISHOP: All right.

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

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

of mesothelioma in the two groups.

There is a background rate for mesothelioma.

MR. RUCKDESCHEL: Objection, move to strike.

Again, this is beyond the scope of his opinions.

MR. BISHOP: It is not, Your Honor.

MR. RUCKDESCHEL: It's not fair.

THE COURT: Let me see his report.

Let me hear the question again.

(Thereupon, the court reporter read the previous question, after which the following proceedings were had:)

THE COURT: Your objection is it was not included in his report?

MR. RUCKDESCHEL: The objection is that the answer goes beyond the opinions that he has proffered in his report. And I would have asked him about these things in his deposition if I'd known he was going to talk about them.

THE COURT: Sustained.

Q. (By Mr. Bishop) Doctor, I want to explore with you epidemiology.

Have you brought some slides with you today that you believe will help illustrate how epidemiology goes about determining the cause of

disease in humans?

A. Yes.

MR. BISHOP: Your Honor, may he step down to show the slides?

THE COURT: Of course.

(Witness leaving the witness stand).

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

A. I'm ready.

Q. Doctor, what is epidemiology?

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

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

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

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

cholera.

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

A. Oh, sure. There are many.

The health effects of smoking, cancers from

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

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

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

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

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

THE WITNESS: I said it was reported at the

Rackham Graduate School at the University of Michigan showing that the vaccine worked.

Right now we are worried, deeply worried about avian flu. There are epidemiologists all over the world watching the pattern of disease. And we know that there are a few people who have

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

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

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

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

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

A. There are methods, yes.

Q. Do you have a slide that illustrates that?

A. Yeah. Epidemiology is a branch of science, like all science it has a standard set of methods. I get some pleasure in showing this. My youngest child is in tenth grade, and in ninth grade science she learned the scientific method. I worked with her on

it.

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

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

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

If it does, you find an association between

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

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

disease, my hypothesis was wrong.

You have to start over again, revise your hypothesis, design a new study, go through the process again. That's the scientific method.

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

A. Well, the trouble with case reports is that they don't have a control group. There is no comparison group, and they are not amendable to any formal analysis of the data. They are nothing more than a set of observations.

Gee, I've seen three cases of this disease and they had this exposure, this genetic factor, they eat this type of food, they all visited this area of the country, but there is no formal analysis of the data and they are not adequate to protest the hypothesis.

Q. What's the importance of the control population?

A. It allows you to measure whether there is an

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

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

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

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

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

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

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

We then follow both groups for years. Cohort studies we often follows groups for 10, 20, 30, 40 years. And as that time passes we would tally up how many of them got pancreas cancer. We would do that in the coffee drinkers and do that in the people who never drank coffee.

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

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

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

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

Theoretically you can get any of these three results.

Q. Do you compare the rates of cancer in the

exposed populations versus the unexposed in this example?

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

Now, that comparison is one of the key elements of good science.

If you don't have the comparison group all

you know is that among coffee drinkers, two out of 12 in this example, got the disease.

The question is, is that what you would expect to see in non-coffee drinkers? Is that too much, is that too little? We can't interpret it as showing that coffee does or doesn't do anything, you just have a rate among coffee drinkers. You need a rate among non-coffee drinkers.

Q. If you found no association, what would you expect to see?

A. Well, let's - so here is the calculation that we do, this is standard in epidemiology.

We take the rate among the exposed, which in this example is two out of 12, and divide that among the rate of the non-exposed, which in their example is 12 out of 12. If the time rates are equal then the ratio is one. So when the ratio is one we call that a rate ratio or a relative risk, the risk of one group relative to the other when the ratio or

relative risk is one. It means the rates are the same, there is no association.

No association at all, coffee drinking does not increase your risk of pancreas cancer, if that's what the data showed.

Q. If there were a positive association, what

would it show?

A. Here is a different example.

In this example let's say eight of the 12 coffee drinkers got the disease, and two of the 12 non-coffee drinkers got the disease. So eight over 12 divided by two over 12, that's a four-fold association. That's a positive association that says coffee drinkers are at four times the risk of pancreas cancer as non-coffee drinkers. That's a positive association.

Q. Could you also find a negative association?

A. Sure. Let's say the data showed two out of 12 coffee drinkers got it, eight out of 12 non-coffee drinkers got it.

Now the ratio is flipped. So instead of four, it's .25 or one-quarter, that's a negative association.

Q. And could you further test a hypothesis that coffee drinking was protective?

A. Well, if this is what the data showed it would suggest it was protective. I would go and try to figure out why it was protective. Try to design another study to say how could this be true, how could it protect you against cancer?

Some things do protect against cancer, like

exercise actually does, so you would have to do further research to figure that out.

Q. Now, you talked about cohort studies.

You mentioned there was a second kind of epidemiological study you and epidemiologists use, and I think you said it was the case control study?

A. Yes.

Q. Can you tell the jury what a case control study is?

A. A case control study has a different design. What you do is go out and locate a group of people who have the disease, like pancreas cancer. So you would have to work with the hospitals and work with the physicians who diagnose and are treating pancreas cancer. You might have to work with the tumor registry to find cases of the disease, and you put together maybe 100 or 200 cases of pancreas cancer.

Again, you have to have a comparison group, and the comparison group are - in this instance are

people who don't have pancreas cancer. We call them controls, that's why it's is a case control study. So we have pancreas cancer and people who don't have pancreas cancer.

And then we ask both groups, did you - have you been a coffee drinker. And let's say, for

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

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

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

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

Q. And what do we call that comparison?

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

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

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

drunk coffee as people without pancreas cancer. That's a positive association.

And you can see you can end up with no association if the two groups had equal habits, and then the odds radio would be one, no association. Or if the people who were healthy drank more coffee than the people with pancreas cancer, you could have an odds ratio of less than one, which would suggest maybe coffee protects against pancreas cancer.

Q. You used the term "relative risk" a moment ago, can you describe what that is?

A. What the term relative risk is, it's sort of the umbrella term for rate ratios and odds ratios. It basically says compare the risk in two groups.

So in a cohort study we compare the rates in the two groups, in a case control study we compare the odds in the two groups. So you're measuring the risk in one group compared to the risk in the other group.

Q. How do we know whether it's a negative or positive association looking at relative risk?

A. The good thing is that the - the calculations are done in a manner such that when the answer is 1.0, there is no association. So it doesn't matter whether it's case control study or

cohort study, if the answer is one, there is no association at all.

If it's above one, it's a positive association, meaning the exposed people have a higher rate of disease than the unexposed. If it's below one, it's a negative association, meaning exposed people have a lower rate of disease than the unexposed people.

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

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

A. No. You can't say that.

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

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

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

there was some subtle error.

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

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

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

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

with is, gee, the pancreas cancer cases weigh less than the controls. It looks like being thin is associated with pancreas cancer.

That's a bias, that's a systematic error that results in a wrong answer. So we always evaluate epidemiology studies for systematic errors.

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

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

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

Q. And do epidemiologists use statistical

methods to evaluate the role of chance?

A. Yes, those are the fundamental methods for measuring the role of chance.

Q. Do you have a slide that illustrates that?

A. Yeah. There are two things that can be done. One is to calculate -- the first one is

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

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

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

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

and unlikely to be -- it gets less and less and less likely that the truth is out here or that the truth is out here, and showing an example of confidence interval.

Q. Do you as an epidemiologist, Dr. Garabrant, like to see more than one study that shows a positive

association before you draw conclusions regarding causal associations?

A. Absolutely.

Q. And why is that?

A. One of the fundamental issues in science is whether your findings can be replicated by other scientists, all right.

If I do a study and I find a positive association and I write it up and publish it in the peer reviewed literature, what I'm doing is I'm telling people here is how I did the work. Here are my methods, here is how I got my answer.

The idea is that other people can go out and repeat that study and see if they can get my answer. That's really important.

The pancreas cancer and coffee issue is actually a good example. There was a very famous study published in the 1980s, a case control study of pancreas cancer that reported that coffee drinking

was pretty strongly associated with pancreas cancer.

And it was published by the chairman of the department of epidemiology at Harvard, a very talented scientist. And got a lot of press coverage because coffee drinking is pretty common, pancreas cancer a bad disease. Epidemiologists all over the

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

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

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

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

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

and type in the keywords and find the studies.

You read them, look at the bibliography. You get the studies they rely on and read them. You try to assemble all the literature, all the scientific literature that addresses that hypothesis or that question.

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

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

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

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

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

The little box represents the odds ratio. In other words, the relative risk, and the bar around it represents the confidence interval.

So in this analysis these scientists looked at studies done in Europe. They have looked at studies done in the United States. And what you see,

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

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

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

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

Q. Do you have an example where the same method

was followed but a different conclusion is reached?

A. Yeah, this is a very important study, does smoking cause breast cancer. Well, this is an analysis of 53 --

MR. RUCKDESCHEL: Your Honor, may we approach?

THE COURT: Yes.

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

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

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

THE COURT: One at a time.

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

THE COURT: How many more have we got?

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

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

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

MR. LIPMAN: Can we come back a second? I heard Your Honor say that's fine, I didn't hear the resolution, I'm not sure.

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

MR. LIPMAN: That's the resolution.

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

THE COURT: I just want to make sure you understand this is not a case about smoking. The doctor is simply using that as an example of how epidemiology reaches a result and a conclusion, okay.

Proceed.

MR. BISHOP: Thank you, Your Honor.

Q. (By Mr. Bishop) I think the question was, do you have an example of how using this same method of reviewing all the studies, an epidemiologist drew the conclusion there was no association or causal association?

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

So this is a study of 53 epidemiologic studies that look at breast cancer and smoking. This has been studied a lot of times. And it includes over 58,000 women with breast cancer, 95,000 women

without breast cancer.

Here is what it found. Same style of graph.

Now you have a box that represents the relative risk, and the bar around it is the confidence interval.

Now in this graph big boxes represent bigger studies, so you also have some information - that's a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

allowable under the Court's rulings.

He's going to bootstrap these people in. And it's okay for him to say we have considered studies, but it's not okay for him to say we considered this study and this study and that study, because that is exactly what Your Honor has prevented everybody else in this case from doing.

Dr. Brody was not allowed to talk about the particular studies he relied upon, Dr. Egilman wasn't, Dr. Mark wasn't.

THE COURT: Why isn't that true?

MR. BISHOP: Your Honor, I think he identified the - a witness can identify the studies.

THE COURT: I prevented the other witnesses from doing just that. I ought to be consistent. I think he can testify that he did this empirical study of 42 or whatever the number is, without

naming McDonald or Teta or whatever the others are.

MR. RUCKDESCHEL: He's not going to talk about the numerical result of his meta-analysis.

THE COURT: In other words, what his results are.

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

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

MR. RUCKDESCHEL: No.

THE COURT: He can't give his opinion.

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

THE COURT: That's what I said.

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

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

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

people that agreed with me or 11 people that agreed with me.

THE COURT: That he is not going to do.

MR. BISHOP: Say how many studies he reviewed and what his conclusions were after reviewing them, that's absolutely appropriate.

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

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

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

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

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

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

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

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

1:30.

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

MR. LIPMAN: Your Honor, before the jury leaves. It's too late.

THE COURT: What?

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

THE COURT: No problem.

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

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

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

MR. BISHOP: 15, 20 minutes.

THE COURT: Which means a half an hour.

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

THE COURT: Okay.

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

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

them. They are busy, we accommodated them.

Your Honor accommodated them. I don't want to be in a situation where my client testifies on direct, and cross-examination is on the longer side and spills into Monday. That would be really unfair.

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

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

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

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

THE COURT: See you at 1:30.

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

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

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

were had:)

THE COURT: You may be seated.

You may proceed, Mr. Bishop.

MR. BISHOP: Thank you, Your Honor.

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

A. Good afternoon.

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

A. Yes.

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

A. Yes, I have.

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

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

population, but they are like big cohort studies.

Q. If we could turn to the next-to-the-last slide we are going to display for the jury.

Is this a paper that you coauthored, published in the peer-reviewed medical and scientific literature of your review of these case-control

studies, cohort studies, and registry studies?

A. Yes, it is.

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

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

MR. RUCKDESCHEL: Objection.

THE COURT: Overruled.

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

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

MR. RUCKDESCHEL: Objection.

THE COURT: No, listen to the question.

THE WITNESS: I am sorry?

THE COURT: Repeat your question.

Q. (By Mr. Bishop) Without reference to any of the studies, I need to ask you what your

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

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

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

A. Yes.

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

MR. RUCKDESCHEL: Objection.

THE COURT: Basis.

MR. RUCKDESCHEL: This is the issue we discussed with Dr. Weir yesterday.

May we approach?

THE COURT: I am sorry?

MR. RUCKDESCHEL: May we approach?

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

MR. BISHOP: May I proceed, Your Honor?

THE COURT: Yes.

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

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

medical records, I apologize.

I reviewed Defendant's Request for Production and Plaintiff's Answers to Defendant's Set of Interrogatories, Social Security Administration earning records, union records from the International Union of Operating Engineers, some exposure sheets.

That was basically it.

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

A. I did reach an opinion.

Q. And what is that opinion?

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

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

THE COURT: Yes.

MR. BISHOP: Thank you.

THE COURT: You may inquire.

CROSS EXAMINATION

Q. (By Mr. Ruckdeschel) Good afternoon, Dr. Garabrant.

A. Good afternoon, Mr. Ruckdeschel.

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

A. That's correct.

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

A. I do.

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

A. No.

Q. How much are you being paid?

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

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

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

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

A. An hour, not per day.

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

Now, this paper, Mesothelioma and Lung Cancer Among Motor Vehicle Mechanics, a Meta-analysis, that was paid for by Ford, Chrysler and General Motors, correct?

A. It is my understanding that Ford, Chrysler and General Motors paid the authors who were an

exponent. They did not pay me. I did not receive any compensation for that.

Q. The paper states it was financed by Ford, Chrysler and General Motors, correct?

A. I believe that's true.

Q. Now, you have worked for companies or have testified for companies that manufactured brakes other than Abex, correct?

A. Yes, I have.

Q. For Abex. For General Motors?

A. I don't know whether General Motors manufactures brakes or not.

Q. You have testified for General Motors in brake cases?

A. Yes, I have.

Q. And for Ford and Chrysler?

A. Yes, I have.

Q. And you have worked for NAPA and Mack Trucks and Bendix in brake cases, too?

A. I'm not - I don't know whether I worked for all of them. I may have.

Q. You worked for NAPA and Mack Trucks and Bendix in this case, didn't you, before working for Abex?

A. I know I was retained on behalf of Mack

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

Q. They also go by Genuine Parts.

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

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

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

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

A. To the best of my knowledge, once.

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

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

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

A. Then that would be correct.

Q. All right. Now, epidemiology studies groups, correct?

A. Studies populations, yes.

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

A. Yes.

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

A. Yes.

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

A. That's correct.

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

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

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

A. I believe that is highly likely.

Q. And Mr. Mallia has mesothelioma, correct?

A. I believe so.

Q. Now, you talked with Mr. Bishop about various studies of different types of people, and I'd like to ask you whether you are aware of studies that

show, for example, that electricians are at an increased risk of mesothelioma?

A. I would have to look. I don't recall offhand without looking. I believe there are some studies that have shown that. I don't know whether there is a replicated pattern for that just from memory.

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

If that is the case, for any particular electrician, is it the job title electrician or is it the asbestos that gives them the mesothelioma?

A. Well, it would be the exposures. In that instance, one would think about amphibole asbestos. So it's typically not the job title, it's typically the chemical, if that chemical causes that cancer.

Q. Asbestos acts the same on a plumber or an electrician or a mechanic or anybody else, having a different job title doesn't change how asbestos works in the body, does it?

A. Well, when you state it that way, it mixes some different issues together, one of which is that there are different types of asbestos --

Q. Doctor --

A. Some carry risk and some don't for mesothelioma.

Q. Doctor, the question is does a particular fiber of asbestos act differently in a person's body if that person is an electrician or a plumber or a mechanic? I don't care what kind of fiber it is, you pick whatever kind you want.

Does it make any difference what their job title is how that asbestos works in your body?

A. The fiber doesn't know what the job title is.

Q. All right, thank you.

In Mr. Mallia's deposition, I asked you a hypothetical question. Do you recall that question?

A. I don't offhand, I am sorry.

Q. Okay. You talked with Mr. Bishop about the scientific method and testing hypotheses earlier today, do you recall that?

A. Yes.

Q. In your deposition, I asked you if you were going to design an epidemiological study to test the

hypothesis whether individuals like Mr. Mallia who ground brakes, who filed brakes, who sanded brakes were at risk for mesothelioma, how would you design that study? And you responded to that question.

Do you remember my asking that question?

MR. BISHOP: I apologize. This is improper

impeachment. He can ask a question. Now, if there is a basis, he can go back to the deposition, but I don't believe this is proper.

MR. RUCKDESCHEL: I am just asking if he remembers the question.

THE COURT: That's not the appropriate question. If you are going to ask a witness whether he remembers something in the deposition, refer him to page and line and read the question and the answer.

Q. (By Mr. Ruckdeschel) Doctor, let me read you your question and answer and see if you recall giving this answer.

MR. BISHOP: Can you give me the page and line?

MR. RUCKDESCHEL: Absolutely. It's on page 69, and starts at Line 8, I am sorry.

THE WITNESS: May I get my copy?

MR. RUCKDESCHEL: Of course. I have a copy

of it here for you, Doctor.

THE WITNESS: Thank you.

Q. (By Mr. Ruckdeschel) If you look at page 69, beginning at Line 10, Doctor.

And this is your response: Are you asking me to design an epidemiologic study that would test

the hypothesis that sanding, filing and/or grinding new friction materials causes mesothelioma?

Question, yes.

Answer, well, I could do that for you. That would take some thought.

Question, okay. How would you do it?

Answer, I'm not sure it's feasible to do so.

I would want to identify a cohort of people whose only exposure to asbestos was from sanding, filing or grinding new friction materials; I would want to follow that cohort over a sufficient period of time, probably a minimum of 40 years; and I would want to calculate the incidence rate of mesothelioma in that group; and then I would want to compare it to a referent population that did not sand, grind - I am sorry, sand, file or grind friction products but who were otherwise just like the exposed population.

Do you remember giving that answer?

A. I do.

Q. So let me ask you, Doctor, is the study to test that hypothesis, does it involve those four steps, the study you designed in your deposition?

A. I am sorry, I'm - would you ask me again?

Q. Sure. The study you designed in your deposition had four steps, correct?

A. Okay, yes.

Q. And the first step is identify a group that has its only exposure to asbestos from grinding, filing or sanding brakes, right?

A. Yes.

Q. Okay. And the second question, the second step is to follow that cohort for at least 40 years, right?

A. Well, I said for a sufficient period of time.

Q. Okay.

A. Probably a minimum of 40 years.

Q. All right. So I will put sufficient time, and then I will do a little wiggle here because it's approximate.

40 years, is that fair?

A. Yes.

Q. And then you want to calculate the rate of mesothelioma in that group, right?

A. Yes.

Q. All right. And then the final step is to compare that group and the rate of mesothelioma to the rate of mesothelioma in an identical population that didn't sand, grind or file brakes; is that correct?

A. Pretty close. The way I said it, would compare it to a referent population that did not sand, file or grind friction products who were otherwise just like the exposed population.

Q. Okay. So you want them to be the same except for they didn't sand, grind or file?

A. Except for sanding, grinding, filing brakes, that's correct.

Q. I will put same but no sand, grind or file.

Those are the four steps, right?

A. Yes.

Q. You would agree that study has never been done, correct?

A. Mr. Ruckdeschel, that exact study, which is an ideal --

Q. Doctor --

A. Can I finish?

Q. The study has never been done, correct?

A. That exact study has never been done.

MR. RUCKDESCHEL: Thank you. Nothing further.

THE COURT: Redirect.

MR. BISHOP: Thank you, Your Honor.

REDIRECT EXAMINATION

Q. (By Mr. Bishop) Two items, Dr. Garabrant.

The study that you published, your participation in that study, was that funded by General Motors, Ford or Chrysler?

A. I was not paid by anyone for my work on that study. I did it because I thought it was good science to participate in that.

Q. Do we have to do this cohort study and follow them for 40 years in order to determine in your opinion, with a reasonable degree of medical certainty, whether Mr. Mallia had any measurable risk of mesothelioma from working with brakes as a vehicle mechanic over and above what he would have had in the absence of any such work?

MR. RUCKDESCHEL: Objection.

THE COURT: Overruled.

THE WITNESS: No, you don't have to do that exact study. That's an ideal study that I said in my answer may not even be feasible to do.

May I continue with my answer?

THE COURT: I don't know. It's up to the lawyers.

MR. RUCKDESCHEL: I object to a volunteered narrative, Your Honor.

THE COURT: Ask your next question.

Q. (By Mr. Bishop) Dr. Garabrant, as an

epidemiologist practicing for over 20 years, can you tell the jury whether you believe you had sufficient information, based upon your training, experience and your review of the epidemiological literature, to reach a conclusion whether Mr. Mallia's mesothelioma was caused or contributed by his work as a vehicle mechanic working with brakes?

A. Yes, I do have a very good basis for that conclusion. The studies that have been done are well-done studies.

MR. RUCKDESCHEL: Objection.

THE COURT: Overruled.

MR. BISHOP: Thank you, Doctor.

THE COURT: Thank you, sir, you are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: Let's take a five-minute break while we get all of this out of here.

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

(Thereupon, after an off-the-record discussion, the following proceedings were had:)

THE COURT: I want charges Monday morning.

MR. LIPMAN: Would the Court reconsider, then, the idea, just an idea, I'm not rearguing, an idea, would the Court consider allowing

direct, allowing that portion of cross to 5:00, and then resuming?

THE COURT: That was the one thing you didn't want. You didn't want to break it up.

MR. LIPMAN: I said that, but --

THE COURT: That's not fair to the defense. They will have all of the direct to take home and sleep on over the weekend and only a portion of the cross. No, I don't like severing that.

I will do this, I will let you have a half hour of direct just to get the jury to see Mr. Mallia and get his name and a couple of live interesting things out, and then we will break. I'll do that.

MR. LIPMAN: Okay.

THE COURT: Is that not too objectionable to the defense?

MR. POWERS: I was going to say I'm not crazy about it, but I won't object to it, Your

Honor.

MR. LIPMAN: Okay.

THE COURT: We are going to take a recess for ten minutes.

MR. BISHOP: I wanted the Court's permission, before I do it, I would like to mark

for identification the --

THE COURT: The exhibits I didn't allow.

MR. BISHOP: Right, and I will just proffer.

THE COURT: Are we ready?

MR. RUCKDESCHEL: No, I'm not. I need the tech guy here.

MR. LIPMAN: Let's just start, and the tech guy will sneak up here, I will bet. Let's just start.

THE COURT: Gus, get me the jury.

MR. POWERS: I gathered from our schedule we are going to just stop at 3:00.

THE COURT: So you can make your flight.

MR. POWERS: Thank you.

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

THE COURT: Mr. Ruckdeschel, that's not in evidence, turn it around.

MR. RUCKDESCHEL: Oh.

THE COURT: You may be seated.

You may proceed.

MR. LIPMAN: Yes, Your Honor.

Your Honor, with the Court's permission, we call our final witness for today, my client,

Mr. Joseph Mallia.

THE COURT: Come up here, sir.

Thereupon:

JOSEPH MALLIA,

was called as a witness on his own behalf, and having been first duly sworn, testified upon his oath as follows:

THE COURT: I want you to understand that you are going to have an abbreviated session today, so you are not going to hear all of his testimony, you are only going to hear a beginning, and then we will break for the day.

You may proceed.

DIRECT EXAMINATION

Q. (By Mr. Lipman) Only in the formality of a court, I suppose, in room 6-2, where we all know each other, would I ask you to state your name and spell your last name.

A. Joseph Mallia, M-a-l-l-i-a.

Q. And Mr. Mallia, I have a half an hour. I'd like to start with you've been here during the opening, during the whole session, other than when Mrs. Mallia testified?

A. Correct.

Q. I want to show you some graphics that were

shown in the opening session and shown by Abex's counsel to several or at least one expert.

Mr. Mallia, do you recall during the opening session that this graphic was displayed to the jury, and then during one of the witness examinations, and the matter of a medical record indicating exposure to asbestos 20 years while doing demolition of buildings was read to the jury and was discussed?

A. Yes.

Q. All right. Starting - this is Doctor - the physician from Sylvester Cancer Clinic. You heard him testify, Dr. Tang?

A. Yes.

Q. Do you know anything about any discussion that you recall with Dr. Tang about as - exposure to asbestos 20 years while doing demolition of buildings?

A. Yes.

Q. Tell us what you recall.

A. I got asked - well first, can I go back a little bit and talk about the emergency room?

I was asked, when they told me about there is something going on, everything looks suspicious with the fluid and all of that, they asked me if I was exposed to asbestos.

My first answer was no because I didn't know anything about working with asbestos. My type of work, I worked on brakes, I worked on trucks, I worked on cars. I was a supervisor for a while and ran some equipment, and I didn't know anything about asbestos.

That was brought up because when you think about construction, you think about buildings. So we worked at - one of the main jobs was the mall we talked about, and the other one was the school.

Q. Now, when you say we, the jury has met your brother.

A. Yeah. And, I mean, the company, too, basically the company.

Q. What's the name of the company?

A. Imburgia Construction.

Q. Tell the jury what you recall from the demolition incident that you were referring to with Dr. Tang.

A. Well, at first - the first thing I thought of is that when you are going through all of this, I was scared. I didn't know what was going on. I heard I had this illness. The first thing that came to my mind was asbestos in a building or in the ceilings, because you hear of asbestos like in

ceilings or walls or something like that. So that along with all my work, that's what I considered was, you know, asbestos.

Q. And you heard your brother describe that project. Do you have any memory of the demolition project that happened 20 years earlier?

A. Now when I look back, we talked about it, we started checking into everything. The mall, they were doing demolition work inside. We were working outside doing site work, site work, stuff like that. So I was never really involved in the building.

The school, we did research on that and found out the school had the abatement. My cousin couldn't even get a permit to let us go in and start doing the site work.

Both jobs, if I wasn't in the shop, I would deliver equipment, drop equipment off, go back to the shop. If they needed fuel, they would call me on the radio, I would run out there. So it wasn't like I

was there continuously.

Q. Your brother explained about the business, so we heard the testimony, but does that square with how you understand the business in your experience?

A. Yeah, I mean.

Q. What was the work of Imburgia when you got

here to Florida?

A. When we first moved down in '78?

Q. Yes.

A. My father brought some dump trucks down and went in partners with my cousin. We started out asphalt paving and driveways. That was basically it. We had some dump trucks. We bought a few more dump trucks from Mack, we bought a lowboy and bought a service truck.

At that time we didn't have a mechanic. I was the only one that was really mechanically inclined. And so I started - I volunteered, and we had no choice and I started working on the equipment because I had a lot of experience with vehicles since I was really young, took shop mechanics in school, hung out with a lot of guys that took cars apart and put them back together. It was like a hobby with me.

Q. Did you ever get a license or certificate or any training?

A. No. I took shop mechanics when I was in high school.

Q. How old were you when you first started your interest in cars and trucks or such?

A. 14.

Q. The jury heard a little bit about life in

New York. Did you do that - were you employed? Did you do that as a hobby? What did you do before you came to Florida?

A. Before I came to Florida, I worked at a Hess gas station where I pumped gas. There was no mechanics involved. And after that I worked for Pizza Kitchen for a little while, but I really wasn't into that.

Q. Do you know when, if you can, put a time when you did your first mechanical brake work or other kind of work?

A. 13, 14. I was working on cars before I could even drive. We were on a couple of acres, so I would actually work on the cars, and me and my brother would drive them around the backyard. We opened right into an apple orchard, so we could drive all the way around but weren't on the road.

Q. All right.

Now, you are down here in Florida, we have

heard, about 1978. I think your brother came a year after you?

A. Yeah, about a year after.

Q. And what kinds of equipment were you personally working on with your family in the family business in those early years?

A. We had a couple of Chevy dump trucks, single-axle dump trucks, we had a couple of single-axle Ford dump trucks, we had a lowboy trailer, we had a Mack Truck, a fuel truck, we had a couple of C-10 pickup trucks, which were a lighter duty pickup, and a Ford F-150, Ford F-250.

Q. What kind of work did you do on those vehicles for Imburgia?

A. Everything, from a radiator hose to radiator to transmission, brakes, light engine work.

If something blew up or a piston went bad or something like that, we would bring it to a machine shop. Tune-ups, oil changes, stuff of that nature.

Q. Where did you buy the equipment when you did the mechanical work at Imburgia?

A. Most of the time, NAPA.

Q. Why was that?

A. They were real close. You would walk almost right across the street. So it would be real easy to

pick up the parts and have them delivered.

Q. Did you do that?

A. Did I pick the parts up?

Q. Yes.

A. Yeah, or we had them delivered.

Q. What kind of parts did you buy at NAPA?

A. Everything, hoses, spark plugs, oil, brakes, hydraulic fluid. NAPA had a big line of everything. Still does.

Q. In the early years, did anyone else do that work other than Joseph Mallia?

A. No. I was the only one that did it.

Q. Did you work hard?

A. Real hard, sometimes seven days a week.

Q. Were you in the field, as well?

A. Very little. If I wasn't doing mechanical work in the shop, the only time I would not be doing mechanical work, if they called me and I had to move a piece of equipment, or go service to fuel the equipment, because I drove the fuel truck. If I was in the shop and they needed fuel, I would jump in the truck, fill up the fuel, and then come back to the shop.

Q. Would there be times when NAPA didn't have what you needed, and you went elsewhere?

A. Yeah. Sometimes we would go to either the Chevy dealer or Ford dealer, which was right down the street, too.

Q. Why would that be?

A. If NAPA didn't have it, or we had to get something out right away or fixed the next day, say

something came in at that was broke, and we had to get the part right away and couldn't wait to be fixed, we would go to the dealer and try to get it if they had it.

Q. Mr. Mallia, we have some brakes right here that you recently purchased?

A. Yes.

Q. Non-asbestos?

A. Non-asbestos.

Q. No asbestos. Did you buy these?

A. Yes.

Q. Did you buy those to show the jury what a brake is?

A. Yes.

Q. Where did you buy these materials?

A. Let's see which ones we have in here.

These ones are from - these ones are from Mack.

Q. Okay.

A. And these ones are from the NAPA dealer.

Q. Is there a NAPA logo on the box, on my side of the box?

A. Yeah.

Q. Show the jury, if you can, what those different brakes are and how they relate, realizing

they are not asbestos, how do they compare? Are they similar to the kinds of brakes you worked with on the vehicles in the early years at Imburgia?

A. Yes. I purchased these from a NAPA dealer. These are from a 1972 C-60 Chevy dump truck. That's what we had, we had two of those, and we had a couple of Ford F-700s. This is the size of the brake, one of the brakes, I worked with on some of the trucks.

Q. How many of those size brakes would there be on the trucks; the C-60?

A. C-60, yeah.

Q. How many brakes like that that you have in your hands would there be in a truck?

A. This is one rear set, so you would have had four in the back and two sets in the front.

Q. All right. Anything else in the box?

A. No, that's it.

Q. Could you show the jury, realizing again, these are non-asbestos, what the brakes looked like

back when you worked at Imburgia? Same appearance?

A. The color was different. The asbestos brakes, I mean, were a lot more tanner, more of a brown color. These are like a grayish black.

Q. And the metal backing to what you have in your hand --

A. Right.

Q. -- what is that called? What do you know about that?

A. This is the mounting bracket. This goes up against the wheel, the backing plate, and this mounts the brake to the inside of the housing.

Q. Monday I'm going to get into more of that with you. But the holes, if you can still show the jury, there are holes --

A. Yeah. What it is, there are pins that come through the backside of the - backside of the wheel housing, and they actually hold it in place. Sometimes the holes could be holes to the spring from one side to the other side, adjusters, wheel cylinders. If we had a little graph or something, I could --

Q. We will do that Monday. Kind of just do a big picture today.

A. I am doing a big picture, basically, with

the holes are for pins and springs, and hold different stuff in place.

Q. Show the jury how you do a brake job on Monday. I want to wait on that.

A. Yes.

Q. Are there any other brakes in this

particular box?

A. No.

Q. Now, there is another box here called Bendix.

A. Uh-huh.

Q. And it says relined brake shoes. I think the jury has been introduced to the idea some brakes are relined.

A. Right.

Q. What does that mean?

Q. Most of the time, if you go to the dealership, it's brand new manufactured brakes. Most of the brakes we got from NAPA and they sell are relined brakes.

They take this piece, take this off, the shoe off, okay, and you heard they went through the cleaning process and all that, and when you get it back, they either rivet it back on or adhere it back on or glue it back on. It's a relined brake. The

whole thing isn't new, just the shoe.

Q. They save the back end?

A. They save the back end, yeah.

Q. Can you show the jury the Bendix box and the brakes inside it?

A. Yeah.

Q. And could you show the jury those brakes?

A. (Indicating).

Q. What would those be used for?

A. I don't know, a go-cart. I don't know what they are used for.

Q. Did you see Abex's counsel during opening session show the jury a brake?

A. Yes.

Q. All right.

MR. LIPMAN: Counsel, do you have that in the courtroom, the brake you showed the jury?

MR. BISHOP: I am sure if you asked me earlier, I would have been able to look for it.

MR. LIPMAN: Could you?

Q. (By Mr. Lipman) You saw counsel show the jury a brake when we began in the opening session, I think that was Wednesday of last week.

A. You see these ones, you see how these are glued?

Q. Yes.

A. That's the difference.

Q. While he's finding his set, what do you mean, glued versus riveted?

A. There are two ways to mounting them. This one is riveted on to make it stay on there, and this

is glued on. They have some special glue that adheres.

Q. All right.

A. These are two different styles.

MR. LIPMAN: While counsel is finding the brake he showed the jury in opening, if you can, can you bring that Monday for us?

MR. BISHOP: We will look for it.

MR. LIPMAN: Thank you.

Q. (By Mr. Lipman) Was it similar to the size of the brake in the Bendix box that counsel for Abex showed the jury?

A. It was small. I know that. I don't know if it was the same one or not. I know it was small.

Q. Would you have an idea what a small brake like that would be used for?

A. I don't know.

Q. Would you use that on dump trucks, pickup trucks, some of the equipment you used at Imburgia?

A. No.

Q. Would you use that on cars?

A. Maybe some type of foreign car or a real small, small car.

Q. Let me ask you this, at NAPA, did you - when you went in to buy brakes, do you remember the brand

name of any of the brakes? I am at Imburgia at the same period of time, the early years, when you were doing the work?

A. Bendix, Abex and NAPA. Those are the three names of brakes that NAPA carried.

Q. How did you know those brands in relation to what you bought at NAPA?

A. Usually when I went to NAPA and ordered something, that is what I would get. That's what they would give me.

Q. NAPA said NAPA?

A. Yeah.

Q. And NAPA on the NAPA box?

A. Yes.

Q. And Bendix said Bendix?

A. Yes.

Q. Did you know that Abex manufactured the Bendix brake before this trial?

A. No.

MR. POWERS: Excuse me, Your Honor, I object, foundation, and I think it misstates what the evidence is.

THE COURT: Sustained.

Q. (By Mr. Lipman) Let me show you, do you have the - you have been sitting in trial,

Mr. Mallia. Let me ask you if you are familiar - they have something else on - ask you about this, and we will get back to Bendix in a minute. If you can come around with me.

A. (Witness leaving witness stand).

Q. Are you familiar with the photograph that's enlarged and on the screen?

A. Yes.

Q. And tell the jury what that is and where this fits in to what you just said.

A. Okay. So you see it's got a NAPA label with an American Brakeblok which is Abex in it. Now, they are the same team and they are with NAPA.

Q. Do you recall the NAPA logo when you bought your NAPA brand?

A. Yes.

Q. Do you recall American Brakeblok?

A. Yes.

Q. Do you recall Abex?

A. Yes.

Q. Do you recall Bendix?

A. Yes.

Q. Okay. And were these the types of containers that you saw that - the boxes of the brakes that you bought at NAPA?

A. Yeah. I remember seeing the names. I remember - the colors, you know, I mean, it was so far back. The names I remember. If you asked me the color of the box, I couldn't tell you. But yes.

MR. LIPMAN: All right. Do we have a photograph printed of this - of this - what we are seeing now, do we have a photograph here?

MR. RUCKDESCHEL: Not here.

Q. (By Mr. Lipman) I will do that Monday with you. I will mark it and we will do that Monday.

You personally went to NAPA and bought NAPA?

A. Yes.

Q. Abex?

A. Yes.

Q. Bendix?

A. Yes.

Q. Did you have them delivered?

A. Sometimes picked up, sometimes delivered. If a delivery was going to take a while, we would go

pick it up.

Q. Ever see any indication on the boxes that indicated that the materials contained, the materials in the boxes, the brakes contained asbestos?

A. No.

Q. Anything about cancer?

A. No.
Q. Anything about a respirator?
A. No.
Q. Anything about mesothelioma?
A. No.
Q. Anything about danger caused by breathing dust?
A. No.
Q. Any skull and crossbones?
A. No.
Q. I want to talk to you about some of the trucks.
MR. LIPMAN: Can we put the trucks from the question in 122.
Q. (By Mr. Lipman) You sat here and you saw the Bendix - excuse me, the Abex answers to some questions, we called them interrogatories?
A. Yes.
Q. And they referenced they were manufacturing

brakes for Chevy or Chevrolet Model 10 and Model 20 models?

A. C-10 and C-20s.

Q. What's a C-10 and what's a C-20?

A. A C-10 is a half-ton pickup truck. It just means the weight of it. A C-20 is 3/4-ton, and you

got the C-30 is a one-ton.

Q. Do you recall, I published this to the jury, and the gist of it was that Bendix manufactured for Chevrolet Motors Corporation, Chevy 1/2-ton trucks, the C-10 model, 100 percent from August '57 to July '70, 50 percent from August '70 to June '75?

A. Uh-huh.

Q. Now, did you know that those brakes that you used or bought for the Chevy 1/2-ton trucks were manufactured by Abex?

MR. POWERS: Excuse me, Your Honor, I object. That totally misstates what this evidence says.

MR. LIPMAN: Exactly what it says, Your Honor.

THE COURT: I don't know what it says. Can somebody show me?

MR. POWERS: May we have a side bar to take this up?

Can we take this off?

MR. LIPMAN: It's in evidence, Your Honor.

MR. POWERS: He read from our answers to interrogatories. I have an objection to it.

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

THE COURT: What's your objection?

MR. POWERS: The objection is if you look at it, Judge, the Chevy C-10 which he just asked him about, the dates that it says that we supplied the brakes are not the dates that he worked down in Florida for Imburgia Construction Company. So the way he asked the question, it totally misstates the evidence, which is what that is.

MR. LIPMAN: We have had evidence already about the shelf-life of these brakes. Dr. Longo testified to that, Dr. Weir testified to that.

MR. POWERS: That wasn't the question.

THE COURT: What was the question?

MR. LIPMAN: The question was, was he aware of the fact that when he worked on Chevy 10 Model half-ton trucks, that the brakes he was using for those trucks were Chevy - the brakes he used for those trucks were manufactured by Abex?

MR. POWERS: They were not manufactured by

Abex during the time he worked on Chevy trucks.

THE COURT: When did he work for Imburgia?

THE REPORTER: One at a time.

MR. LIPMAN: We had testimony about the shelf-life of these materials from two experts, and we also have a Chevy 20 model that's

exactly --

THE COURT: That's not your question.

MR. LIPMAN: I will rephrase.

THE COURT: Okay.

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

Q. (By Mr. Lipman) Mr. Mallia, do you know from your work doing mechanical work back in 1978 that the material - that the brakes you were buying from NAPA had a long shelf-life, that they were stored, had been manufactured and stored at the distribution place in NAPA for a period of time?

THE COURT: Lay a foundation how he would know.

Q. (By Mr. Lipman) Do you have any knowledge as to the shelf-life of the brakes you were purchasing?

A. No.

Q. Let me ask you this, did you work on

Chevrolet 20 Models?

A. Yes.

Q. Did you work on Chevrolet 20 Models - what is that?

A. The 20, it's a 3/4-ton pickup truck, your average Chevy 3/4-ton pickup truck.

Q. Did you work on those kinds of pickup trucks?

A. Yes.

Q. Did you work on those kinds of pickup trucks between 1978 and 1980?

A. Yes.

Q. Did you go to the NAPA dealer to buy brakes --

A. Yes.

Q. -- for those 20 ton - 20 model?

A. C-20 models, yes.

Q. What does that all mean?

A. That just different sizes. A C-10 is lighter duty, 1/2 ton, a C-20 is a little heavier duty, the springs.

Q. Did you buy it at NAPA?

A. Yes.

Q. Were you aware at the time that 100 percent of those brakes at NAPA for that model is

manufactured by Abex?

A. No.

MR. POWERS: Excuse me, Your Honor, I have to object. That's not what that evidence says. I guess I can clear it up on cross, but I do want to lodge an objection.

Q. (By Mr. Lipman) Now I am going to ask you a couple of final questions before we --

A. Can I go back up?

Q. Yes, please.

A. (Witness regaining witness stand).

MR. POWERS: Are you finished with this particular exhibit?

MR. LIPMAN: For this moment I am, sir.

MR. POWERS: Thank you, sir.

THE COURT: Take it off the display.

Q. (By Mr. Lipman) Just a couple of final questions to get everybody out at 3:00.

Would there be - when you worked with a brake like the truck brake that we are talking about --

A. Uh-huh.

Q. -- that you purchased from NAPA --

A. Yes.

Q. -- back in '78, the early years --

A. Yes.

Q. -- would you file the edges of those brakes?

A. Yes.

Q. Why?

A. So the drum would slide over the shoes easier.

Q. Okay.

A. And - and I wanted to make a point about - we talked about the sanding. We could talk about the sanding later, we can talk about it now, because there is a reason why I wanted to talk about the sanding, because I did a lot of sanding, and there was a reason why I did it.

The video we looked at - remember the video we seen here in the courtroom?

Q. Yes, sir.

A. Showed the guy messing around with his hands dirty.

My hands. You have to imagine taking something apart, holding these shoes, putting them back together. Everything that's on here is on here (indicating).

Q. Right.

A. I had a couple of experiences with the dirt, grease, grime stuff coming back on these. Get a

glazing on, then when you use them, they get hot. Get a glazing on them. And ever since I started sanding the face of them to remove the stuff that came off my hand back onto these, okay, I never had a problem after that.

Q. All right.

A. But that's one of the reasons why I used to sand them. It's more than filing, i did a lot of sanding, too.

Q. What would you sand with?

A. Emory cloth, sandpaper.

Q. What would you file the edges with?

A. A metal file.

Q. Does that create dust?

A. Yes.

Q. Did you breathe the dust?

A. Yes, yes.

Q. Did the dust get over your work station?

A. Yes.

Q. Did you put the brakes in an vice when you --

A. Yes, everyone - when I filed them, they were in a vice. After I installed them back on the car is when I sanded them. This way it was all assembled, put back together, and that's when I cleaned them.

Q. Do you have any idea how many times you did that, Mr. Mallia, since you have been a kid?

A. No idea.

Q. All right. Any idea at all?

A. A lot of times. It - to pinpoint it, no.

Q. When you did brake jobs, would you always

have to file and would you always have to sand?

A. Yes. It was rule of thumb, usually whenever you put them on, especially with the bigger brakes, you are talking about a big heavy drum. So to sit there and fight with that thing and try to get it on, it was a lot easier to spend a little time filing it, sanding it. This way it would slide on easier.

Q. How would you clean up the dust after you did a brake job after you filed or after you sanded?

A. Usually with an air hose or just a push broom.

Q. Did you have that at Imburgia?

A. Yes.

Q. Did that create dust?

A. Yes.

Q. Did you breathe that dust?

A. Yes.

Q. Did you sweep up the - clean the area when you were done after you used the air hose?

A. I used to sweep a lot because a lot of the stuff I used to do, we talked about I used to buy my own vehicles and refurbish them and stuff. I used to do body work, and I used to do a lot of painting, and I used Imburgia's equipment. I painted office equipment and painted his dump trucks. So one of the

most important things when you are painting obviously is not to have a lot of dust in the air because it comes in and lands back on the paint. So when I cleaned up, I used to clean it really good just because of the case of spray painting.

MR. LIPMAN: Your Honor, this is 3:00.

THE COURT: Yes.

MR. LIPMAN: My commitment. Thank you.

THE COURT: Have a nice weekend. See you on Monday at 9:00. Still don't talk about this.

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

JUROR NO. 7: Can I ask you a question?

THE COURT: Sure.

(Thereupon, after an off-the-record discussion between the Court and juror number seven, the following proceedings were had:)

THE COURT: The juror wanted to know whether we would go through Friday, and I said no, I

don't think so.

MR. LIPMAN: You assured the juror we would not go through Friday?

THE COURT: Yes.

MR. LIPMAN: I think that's fairly certain.

THE COURT: All right, Court's in recess.

MR. BISHOP: I am going to object on the record to Mr. Lipman in the middle of his examination directing a request to me to go look for a demonstrative exhibit I used in the opening.

I sat here and waited for ten minutes while he got ready to do his direct examination. There is no need to do that in front of the jury. I consider that a cheap theatrical trick, and I object.

MR. LIPMAN: If that were true, he would have objected then, and he didn't. To show that jury a go-cart brake, and now it disappeared.

If they demonstrate materials to the jury, I have a right to take what they demonstrate and ask my client what it is.

THE COURT: Was it marked in evidence or for identification?

THE CLERK: No.

MR. LIPMAN: I have no idea what he did with it. He certainly showed it to the jury for an extended period of time, him suggesting that was - in fact, stating that was the type of material that Mr. Mallia worked with.

THE COURT: Are we now going to have this

witness identify something that was used by counsel that hasn't been marked and we don't know what it was?

MR. LIPMAN: I would like whatever the demonstration was - I would like the brakes --

THE COURT: How do we know --

MR. LIPMAN: I would like to hand it to Mr. Mallia and ask him what it was used for.

THE COURT: Somebody should have asked counsel before we started.

MR. LIPMAN: I did not mean to be inappropriate.

THE COURT: But you should have objected then, not now. It's a little bit late.

We are in recess until Monday.

(Thereupon, the Court adjourned for the weekend recess:)

20

21

22

23

24

25

CERTIFICATE

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, ROBERT S. KLUPT, Court Reporter, do hereby certify that I was authorized to and did report in shorthand the proceedings taken before the Honorable Richard Yale Feder, Circuit Court Judge, at the time and place aforesaid; and that the foregoing pages are a true and correct transcription of my stenographic notes of the proceedings taken at the Dade County Courthouse, Miami, Florida, on the 9th day of December, 2005, commencing at 9:00 a.m.

IN WITNESS WHEREOF I have hereunto affixed my hand this 9th day of December, 2005

_____
ROBERT S. KLUPT, RPR

20

21

22

23

24

25