

1 IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

2 FLOYD D. KING,
3 WALLACE BENNETT,
4 ROBERT STALNAKER,

5 Plaintiffs,

6 vs. CIVIL ACTION NO. 98-C-70
7 CIVIL ACTION NO. 97-C-397
8 CIVIL ACTION NO. 97-C-333

9 OWENS-ILLINOIS, et al.,

10 Defendants.

COPY

11 TELEPHONIC DEPOSITION OF: DR. RAYMOND HARBISON

12 DATE: February 8, 1999

13 TIME: 1:04 p.m.

14
15 LOCATION: Law Offices of
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17 Poole
18 151 Meeting Street, Third Floor
19 Charleston, SC

20 TAKEN BY: Counsel for the Plaintiffs

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19 (INDEX AT REAR OF TRANSCRIPT)

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1 PROCEEDINGS

2 * * * * *

3 MR. RION: Before we begin, just for the
4 record, I'm James Rion representing the Plaintiffs,
5 and the other lawyer's Dave Hendrickson representing
6 Owens-Illinois. And I suppose, with that, we could
7 just swear Dr. Harbison and begin; is that all right,
8 Dave?

9 MR. HENDRICKSON: That's fine, James.

10 RAYMOND HARBISON

11 being first duly sworn, testified as follows:

12 EXAMINATION

13 BY MR. RION:

14 Q. Dr. Harbison, where are you currently
15 employed?

16 A. At the University of South Florida.

17 Q. And what's your position there?

18 A. I am professor of environmental and
19 occupational health and professor of pharmacology and
20 therapeutics and pathology in the College of Public
21 Health and in the College of Medicine.

22 Q. And you are a medical doctor?

23 A. No, sir, I am not.

24 Q. You don't have an MD degree, then?

25 A. I do not.

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1 Q. How much of your current income do you
2 derive from legal medical consulting work outside of
3 your academic practice?

4 A. I would estimate it's around 30 percent.
5 And that varies from year to year, but that's
6 probably a good estimate.

7 Q. How much of that is asbestos?

8 A. Oh, it would be a very small part. I
9 would say probably less than a couple percent.

10 Q. And what other type legal, medical
11 legal, consulting work do you do?

12 A. We have a clinic in which we see
13 patients, do independent medical exams. I do some
14 medical monitoring or surveillance for workers that
15 are on hazardous waste sites or respond to chemical
16 spills. I also review workmen's compensation claims
17 and also personal injury claims.

18 Q. All right, the medical monitoring work,
19 that's done by medical doctors who are part of the
20 same facility?

21 A. What -- what this would be is doing
22 pre-employment exams, for example, for people who
23 have to comply with OSHA regulations with regard to
24 wearing a respirator, looking at existing conditions
25 as to whether or not they can respond to field

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1 activities, it would be those sorts of -- of
2 activities.

3 Q. And do you do that personally, or do
4 you-all have a medical doctor who does that?

5 A. No, sir, I -- I am not a medical doctor,
6 we -- part of your clinic.

7 Q. And is that done at the request of
8 employers?

9 A. Yes, sir.

10 Q. And the workers' comp work that do you,
11 is that typically done at the request of employers or
12 workers or what?

13 A. It would be all; it would be individuals,
14 it would be insurance companies, it would be
15 employers. It would be all of those.

16 Q. What percentage of the workers' comp work
17 would you estimate is done either for insurance
18 companies or employers?

19 A. Oh, I would estimate that it's more than
20 50 percent. I -- I couldn't give you an exact
21 number, but it's -- it's certainly more than half.

22 Q. And is all the asbestos work you do at
23 the request of Owens-Illinois, or is there other
24 asbestos-related consulting work?

25 A. There would be others as well.

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1 Q. Could you describe that for me?

2 A. It would be a worker compensation claim,
3 it would be an evaluation of risk associated with
4 exposure to asbestos, for example, that might be
5 contained in a workplace or in the environment.
6 Those would be some of the other activities.

7 Q. Have you ever testified at a jury trial
8 in a matter involving asbestos?

9 A. Yes.

10 Q. How many times?

11 A. I would estimate it's probably been about
12 four.

13 Q. And who was that at the request of?

14 A. One would be for Hendrickson & Long,
15 another would have been the Baltimore cases, and I
16 believe there was one occasion in Louisville.

17 Q. Were all of those Owens-Illinois cases?

18 A. Yes, sir, I believe so.

19 Q. Doctor, you were not involved in the
20 Kaylo studies, were you?

21 MR. RION: K-A-Y-L-O.

22 THE COURT REPORTER: Thanks.

23 THE WITNESS: Kaylo studies where?

24 BY MR. RION:

25 Q. Anywhere.

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1 A. No, sir.

2 Q. My question was probably a bad question.
3 Just so the record's clear, when you said, no, sir,
4 you're agreeing that, no, sir, I was not involved; is
5 that what you're saying?

6 A. No, I have not done any studies or been
7 involved with studies of Kaylo.

8 Q. Thank you. So your only involvement with
9 Owens-Illinois or Kaylo has been for the purposes of
10 reviewing materials for possible expert witness work?

11 A. Oh, I -- I have reviewed the Cerenak Lake
12 documents for Owens-Illinois and that's all I've
13 done.

14 Q. And you did that for the purposes of
15 evaluating the materials for expert witness work?

16 A. Well, that's certainly not what I
17 initially did it for, but I have certainly testified
18 about it.

19 Q. Well, what did you initially do it for?

20 A. They asked me to look at those documents
21 and to advise them of what was done and my
22 perspective of what was done.

23 Q. When was this?

24 A. Oh, that would have been probably about,
25 I'll say, 19 -- late nineteen-eighties.

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1 Q. All right. So they didn't seek your
2 advice when Owens-Illinois was manufacturing Kaylo?

3 A. No, sir.

4 Q. It was after litigation about the Kaylo
5 product developed?

6 A. Yes, sir.

7 Q. And who was it who came to you to ask for
8 your opinion?

9 A. I believe that I was first contacted by a
10 fellow by the name of Gardner Duval.

11 Q. And what was his position?

12 A. He was, I believe an -- I'm sure he was
13 an attorney with some group, I believe in Baltimore.

14 Q. And what did he tell you?

15 A. He asked me to look at the Cerenak Lake
16 documents.

17 Q. Did he indicate that Owens-Illinois was
18 involved in litigation concerning the documents?

19 A. I'm sure he probably did. I -- I don't
20 actually recall.

21 Q. After you met with him, did you have any
22 other meetings with Owens-Illinois lawyers -- first
23 of all, who was at this first meeting?

24 A. Just Gardner Duval and myself.

25 Q. Did he come to see you?

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1 A. Yes, sir, he did.

2 Q. And how long did you spend with him?

3 A. I would estimate probably a day.

4 Q. And what did you do?

5 A. He described the Cerenak Lake documents,
6 gave them to me. We talked about the testing, and he
7 left behind the Cerenak Lake documents and the
8 deposition, I believe, of Mr. Hazard.

9 Q. Did he describe for you Owens-Illinois'
10 strategy in defending the cases?

11 A. No, sir.

12 Q. Did you have any subsequent meetings with
13 Owens-Illinois lawyers?

14 A. Yes.

15 Q. When was the next meeting?

16 A. I -- I could not tell you that. I -- I
17 met with lawyers before testifying in Baltimore, and
18 I met with lawyers before testifying in Louisville.

19 Q. All right. Other than that, how many
20 other meetings have you had with Owens-Illinois
21 lawyers?

22 A. I -- I don't -- I don't recall others.

23 Q. Are those the only ones?

24 A. Well, those are the only ones I can
25 recall. I -- I don't -- I mean, that's about ten

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1 years ago, so I -- I frankly don't remember.

2 Q. Yes, sir. And you've been furnished the
3 documents from Cerenak Laboratory concerning the
4 experiments Owens-Illinois had Cerenak run on Kaylo,
5 correct?

6 A. That is correct.

7 Q. And you've been furnished Mr. Hazard's
8 deposition?

9 A. That is correct.

10 Q. Any other materials Owens-Illinois has
11 furnished you?

12 A. No.

13 Q. Did any of the documents generated by the
14 Cerenak Laboratories state that Kaylo was a hazardous
15 material?

16 A. I don't recall any documents that
17 specifically stated it was a hazardous material, I --
18 I don't recall that.

19 Q. Do you recall any documents generated
20 from Cerenak Laboratories saying that precautions or
21 preventive measures need to be taken with the Kaylo
22 product?

23 A. I don't recall any precautions or
24 preventive measures other than adequate ventilation
25 and dust control, which was ongoing in -- in the

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1 facilities. I don't recall anything other than that.

2 Q. Do you recall, then, that Cerenak advised
3 that industrial hygiene dust control precautions
4 needed to be taken with the Kaylo product?

5 A. Not specifically with the Kaylo product.
6 I believe that it was an advice to control dust as
7 they had been doing and that they should continue
8 doing that.

9 Q. But, as I understand what you're saying,
10 they were advised that dust generally needed to be
11 controlled, but there was nothing about Kaylo dust
12 specifically being needed to be controlled?

13 A. I don't recall any specific reference to
14 Kaylo, other than Kaylo, of course, there was a dust
15 produced; and it advised about dust control, which
16 would have included Kaylo.

17 Q. From looking at the Kaylo box during the
18 time that Owens-Illinois manufactured the product,
19 would there have been any way of telling by looking
20 at the box or product that the product contained
21 asbestos?

22 MR. HENDRICKSON: I don't know if he's
23 ever seen a box.

24 THE WITNESS: Yeah, I -- I have never
25 seen a box.

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1 BY MR. RION:

2 Q. All right.

3 MR. HENDRICKSON: I think I ought to
4 object. I mean, maybe you should ask him if he's
5 ever seen one before.

6 BY MR. RION:

7 Q. Well, as far as you know, from any of the
8 materials that you reviewed, did you see any
9 indication that Owens-Illinois ever advised its
10 customers that the Kaylo product contained asbestos?

11 A. From the Cerenak Lake documents, the --
12 there -- there -- I have seen nothing that would
13 indicate that, but I haven't seen any boxes or -- or
14 other descriptive materials.

15 Q. Did any of the documents you were
16 furnished from Cerenak Laboratories state that the
17 Kaylo product is toxic, in those words?

18 A. I don't recall that specific statement.

19 Q. Did any of the documents you were
20 furnished from Cerenak Laboratories state or address
21 whether asbestos is a carcinogen?

22 A. The only reference to cancer is in the
23 publication, the 1955 publication, which states that
24 there was no finding of neoplasia from the studies.
25 Other than that, I don't recall any statements.

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1 Q. So you don't recall anything from Cerenak
2 specifically stating whether asbestos is or was a
3 carcinogen?

4 A. Well, other than, in the findings, there
5 wasn't any finding of neoplasia.

6 Q. Right.

7 A. Other than that, I -- I don't recall any
8 statements.

9 Q. In your opinion, what was the purpose of
10 the Kaylo studies?

11 A. The purpose of the studies was to
12 determine that, at the highest achievable levels of
13 exposure, if there was any adverse effects that would
14 be seen in laboratory animals as a result of exposure
15 to the Kaylo dust.

16 MR. HENDRICKSON: James, can I clarify
17 one thing?

18 MR. RION: Yes, sir.

19 MR. HENDRICKSON: I don't mean to
20 interrupt you. The question, the one before the last
21 one, when you're talking about from Cerenak, are you
22 talking about just -- you're talking about the Kaylo
23 studies now, right, you're not talking about any
24 other Cerenak studies?

25 MR. RION: I'm talking about anything

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1 Owens-Illinois gave him --

2 MR. HENDRICKSON: Oh, okay.

3 MR. RION: -- that came from Cerenak --

4 MR. HENDRICKSON: Okay.

5 MR. RION: -- so I think his answer
6 probably would be the same.

7 MR. HENDRICKSON: Okay.

8 BY MR. RION:

9 Q. Now, understanding that the immediate
10 purpose was to see what happened in animals, Doctor,
11 was there any larger objective concerning humans, or
12 was the purpose limited to simply wanting to know
13 whether animals could get asbestosis?

14 A. Well, the -- the purpose wasn't to see if
15 animals could get asbestosis, the purpose was to see
16 whether or not, if, at the maximum level of exposure
17 that was achievable, there would be any adverse
18 effects produced in the animals, knowing that there
19 was silica, asbestos both being in the product.

20 And the objective was to determine
21 whether or not, in this new condition -- that is, the
22 formula in which these materials were contained --
23 whether they would still have their individual
24 properties of being able to produce pneumoconioses
25 and that was the purpose of the study.

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1 Q. Do you believe that, although animals
2 were used, one of the purposes of the study was to
3 evaluate, help evaluate, the product's possible
4 effects on humans?

5 A. Sure.

6 Q. Do you believe that, given the state of
7 the art existing at the time, the Kaylo study was
8 reasonably designed?

9 A. Yes, sir.

10 Q. Do you have any specific criticisms of
11 the study based on the state of the art that was in
12 existence when the study was done?

13 A. I do not.

14 Q. My next question, Doctor, is limited to,
15 remember, documents generated by Cerenak; okay?

16 A. Yes, sir.

17 Q. Did you see any of the ma -- and let me
18 back up: Did you see, in any of the reports or
19 correspondence from Cerenak after 1947, any
20 statements that the Kaylo product was not hazardous
21 to humans?

22 A. You mean that specific statement, not
23 interpreting --

24 Q. Yes, sir.

25 A. -- the narrative, but that statement

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1 specifically?

2 Q. Yes, sir.

3 A. I don't recall any statement that said
4 that it was not, and there was no statement that said
5 that it was.

6 Q. Now, in the initial study, the initial
7 results in 1947 showed no response, correct?

8 A. That is correct -- well, yes, that's
9 correct.

10 Q. No response to asbestos? And then, in
11 1948, the researchers found that all of the animals
12 exposed had developed fibrosis or asbestos-related
13 fibrosis, correct?

14 A. I -- I don't remember the total number,
15 but I think that's -- that's probably close.

16 Q. And Cerenak then wrote Owens-Illinois and
17 said the earlier findings from 1947 would have to be
18 reversed, correct?

19 A. That's correct.

20 Q. And do you agree that, as of 1948, the
21 documents and correspondence indicate that, insofar
22 as the experiments were studying the effects of
23 asbestos, the conclusions at that point were final
24 with regards to asbestos as of 1948, although further
25 work was to be done regarding tuberculosis and

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1 diatomaceous earth?

2 And when I say final, I mean final with
3 regards to the disease asbestosis, although further
4 work was to be done regarding tuberculosis and
5 diatomaceous earth.

6 A. I -- I'm not sure I understand that. Do
7 you -- do you mean, was the conclusion in 1948 that
8 the product, under these conditions of exposure,
9 could -- could produce asbestosis?

10 Q. Was that conclusion, at that point, a
11 final conclusion with regard to that specific point,
12 yes, sir?

13 A. I -- I believe so. And -- and actually,
14 when you asked me the question earlier about the 1947
15 data, the 1948 data didn't reverse the 1947
16 conclusions. I mean, the data up to 1947 is valid.

17 Q. Right.

18 A. But what it did do is show that an
19 additional length of exposure could result in the
20 fibrosis and asbestosis. So it didn't reverse it, it
21 demonstrated that additional exposure in fact could
22 lead to that condition.

23 Q. And so you would not use the word
24 reversed to describe the change from '48 to '47 -- or
25 '47 to '48?

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1 A. Well, no. I mean, it didn't -- it didn't
2 change the '47 data, it -- it -- it simply added to
3 it, showing that a longer period of exposure could
4 result in effects.

5 Q. Do you recall if, anywhere in the Cerenak
6 documents, just sitting here, Doctor, whether Cerenak
7 ever used the term reversed to describe the
8 relationship between the '48 results and the 1947
9 results?

10 A. I -- I do not recall whether that term is
11 used or not.

12 Q. Now, I think you and I are on the same
13 wavelength here. Do you agree that, in 1948, Cerenak
14 had completed its evaluation of whether the Kaylo
15 product can cause asbestosis in the animals, and the
16 subsequent work from '48 to '52 concerned other
17 issues?

18 A. I don't --

19 Q. Or do you remember?

20 A. Yeah, I don't -- I don't recall the
21 asbestos exposure alone continuing beyond 1948; I
22 believe it was looking at the effect of asbestos on
23 tuberculosis. So, best I can recall, it was looking
24 at other issues.

25 Q. So best you can recall, my statement

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1 sounds correct?

2 A. Yes, sir.

3 Q. All right. Based on what you know about
4 the state of the art existing in 1955, including but
5 not limited to the finished -- excuse me -- including
6 but not limited to the Kaylo studies, do you believe
7 there was any reason to be concerned about the health
8 of a person who was working with the finished product
9 Kaylo?

10 MR. HENDRICKSON: Let me just interpose
11 just, I guess, an objection. He's not being offered
12 as a state of the art witness in the pure sense that
13 I think you and I refer to it as, James. I mean,
14 I --

15 MR. RION: Well, let me rephrase my
16 question, then.

17 MR. HENDRICKSON: Well, let me just
18 finish, and maybe you can, and I think we'll
19 understand where we're going. I think he can
20 comment -- certainly your question is a fair question
21 as far as state of the art of this type of testing
22 and that kind of stuff.

23 MR. RION: Right.

24 MR. HENDRICKSON: That's what he is being
25 offered about, but as far as coming in and testifying

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1 about what the medical literature was back then,
2 that's not what he's being offered about.

3 BY MR. RION:

4 Q. Okay, I've got a simpler way of doing it.
5 Doctor, based on what you know and what you've seen,
6 would there have been any reason in 1955 to be
7 concerned about the health of a person who was
8 working with the finished product Kaylo?

9 A. I don't know of any specific reason there
10 would have been for concern other than normal
11 industrial hygiene practices, work practices for dust
12 suppression and protection against dust. I don't
13 know of any other precautions that would have been
14 indicated based upon the information that was
15 available at that time.

16 Q. Doctor, based on what you've known and
17 seen, would you have recommended, based on 1955 state
18 of the art, for persons working with the finished
19 product Kaylo, that they be x-rayed to see if they
20 developed any sign of disease?

21 A. No.

22 Q. Based on what you know about the Kaylo
23 product in 1955 and based on 1955 state of the art,
24 would you have recommended that persons involved in
25 removing the finished Kaylo product from the box as

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1 part of their job, should those persons be x-rayed,
2 based on 1955 state of the art, to see if they
3 developed any disease?

4 A. I would not know of any reason to do
5 that.

6 Q. Doctor, I want to ask you if you agree or
7 if you know -- I'm going to ask you a question; if
8 you simply don't know, just tell me you don't know.
9 Do you agree that, by 1955, it was established with
10 reasonable probability that persons who had the
11 disease asbestosis suffered an increased incidence of
12 lung cancer?

13 A. I -- I don't know the answer to that.

14 Q. So would it be fair to say you don't hold
15 an opinion about when the relationship between
16 asbestos and cancer was established with reasonable
17 probability?

18 A. I -- I haven't looked at that, and I
19 don't have an opinion about that.

20 Q. Do you expect to offer an opinion at
21 trial about when it was known that the disease
22 mesothelioma or any other pleural tumor was linked to
23 asbestos exposure?

24 A. I do not intend to offer such an opinion.

25 Q. Do you agree, Doctor, that asbestosis,

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1 lung cancer and mesothelioma can all be fatal under
2 certain circumstances?

3 A. I suppose that's possible, yes.

4 Q. Do you also agree that, once a
5 manufacturer -- leaving aside what it takes to
6 provide notice to a manufacturer that his product
7 causes disease -- do you agree that, once a
8 manufacturer knows that his asbestos product causes
9 asbestosis, lung cancer or mesothelioma, any one of
10 those, that he should warn customers or users to take
11 precautions with the product?

12 A. I'm sorry.

13 Q. You want me to try that again?

14 A. Yes. I'm sorry, I can't remember it all,
15 it's too long.

16 Q. Would you agree that, once an asbestos
17 manufacturer knows that his product causes either
18 asbestosis, lung cancer or mesothelioma, any one of
19 those, that, at that point, that manufacturer should
20 begin advising users or consumers to take precautions
21 with the product?

22 MR. HENDRICKSON: Just note my objection
23 to the question; go ahead.

24 THE WITNESS: I -- I wouldn't -- I
25 wouldn't necessarily agree with that.

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1 BY MR. RION:

2 Q. Why not?

3 A. Well, because the use of the product may
4 not result in a risk of increasing any of those
5 conditions.

6 Q. All right, well, let me rephrase my
7 question; I think I understand your answer. How
8 about once a manufacturer knows that his product
9 causes an increased risk to humans, in its ordinary
10 and intended use, of either asbestosis, lung cancer
11 or mesothelioma, that he should, at that point, begin
12 advising customers to take precautions?

13 MR. HENDRICKSON: Same objection.

14 THE WITNESS: Well, my answer would be
15 the same as it was before. Just because it increases
16 the risk, that doesn't -- doesn't necessarily mean
17 that where this product is is going to result in an
18 exposure that's going to increase the risk, so it may
19 or may not be appropriate.

20 BY MR. RION:

21 Q. What would it take, Doctor, before you
22 would say a manufacturer should advise users to take
23 precautions with its products?

24 A. Well, if there was a significant increase
25 of risk based upon exposure, then there may be some

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1 reason to offer a statement about precautions, but --
2 but certainly, during that period of time, that
3 was -- was not -- not done.

4 Q. All right. Well, once you have a
5 sufficiently -- I guess what I'm asking, do you think
6 the manu -- once the manufacturer knows a product can
7 cause any one, knows with reasonable probability that
8 his product can and in fact will cause asbestosis or
9 lung cancer or mesothelioma, do you think it is
10 appropriate to begin advising that precautions be
11 taken?

12 MR. HENDRICKSON: I object to the
13 question again.

14 THE WITNESS: Again, not necessarily;
15 it depends on the exposure.

16 BY MR. RION:

17 Q. So you think there are certain
18 circumstances under which a manufacturer might know
19 that his product is in fact causing disease, but yet
20 you would think it would still be appropriate that he
21 fail to warn customers about the potential hazard,
22 depending on the exposure?

23 A. Well, I think if a manufacturer has
24 scientific data that indicates that his product is
25 causing disease, then he certainly has an obligation

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1 to provide some information to alter that exposure.
2 So I would think that, if that information existed,
3 then it might be appropriate.

4 MR. RION: Okay, I think that's all I
5 have.

6 MR. HENDRICKSON: That's it?

7 MR. RION: Let me look at my notes.

8 MR. HENDRICKSON: Okay.

9 MR. RION: That's all I have.

10 MR. HENDRICKSON: Doctor, do you want to
11 read this?

12 THE WITNESS: I don't think it's probably
13 necessary.

14 (The witness, after having been advised
15 of his right to read and sign this transcript, waives
16 that right.)

17 (The deposition concluded at 1:35 p.m.)

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1 CERTIFICATE OF REPORTER

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I, Lisa F. Walkabout, Court Reporter and
Notary Public for the State of South Carolina at
Large, do hereby certify:

That the foregoing deposition was taken before
me on the date and at the time and location stated on
page 1 of this transcript; that the witness was duly
sworn to testify to the truth, the whole truth, and
nothing but the truth; that the testimony of the
witness and all objections made at the time of the
examination were recorded stenographically by me and
were thereafter transcribed by computer-aided
transcription; that the foregoing deposition as typed
is a true, accurate, and complete record of the
testimony of the witness and of all objections made
at the time of the examination.

I further certify that I am neither related to
nor counsel for any party to the cause pending or
interested in the events thereof.

1 Witness my hand, I have hereunto affixed my
2 official seal this 10th day of February, 1999 at
3 Charleston, Charleston County, South Carolina.
4
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6

7 *Lisa F. Walkabout*

8 Lisa F. Walkabout
9 Court Reporter
10 My Commission Expires
11 November 14, 2004
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