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1 IN THE CIRCUIT COURT OF MISSOURI
2 JACKSON COUNTY, DIVISION 5
3 HONORABLE W. STEPHEN NIXON, JUDGE

4 WILLIAM A. VANDENBURG,)
5 Plaintiff,)
6 vs.) No. 03CV237238
7 BROWN & WILLIAMSON)
8 TOBACCO CORP., et al.,)
9 Defendants.)

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11 TRANSCRIPT OF PROCEEDINGS

12 CONCLUSION OF SANFORD BARSKY, MD TESTIMONY

13 On Wednesday, February 1, 2006, the above
14 cause came on for hearing before the
15 HONORABLE W. STEPHEN NIXON, Judge of Division 5 of the
16 Jackson County Circuit Court at Independence, Missouri, and
17 a jury.
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23 Gayle M. Wambolt, Certified Court Reporter
24 Official Court Reporter, Division 5
25 Sixteenth Judicial Circuit at Independence

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1 AFTERNOON SESSION

2 THE COURT: All right.

3 Mr. McClain, you may resume for the afternoon.

4 MR. McCLAIN: Good afternoon,

5 Your Honor.

6 Thank you.

7 Good afternoon, ladies and gentlemen.

8 SANFORD BARSKY, M.D., previously being sworn, resumed the
9 stand and testified further:

10

CROSS-EXAMINATION BY MR. McCLAIN (continued):

11 Q Dr. Barsky, I want to get back into pathology
12 with you again. There was something I forgot
13 this morning that was on a subject you mentioned,
14 and that was this article that you wrote on
15 airway inflammation in young marijuana and
16 tobacco smokers.

17 You remember mentioning that to the jury?

18 A Yes.

19 Q Dr. Barsky, there's a -- just one piece of this
20 that I wanted to ask you a question about. It's
21 the highlighted section of your article that I
22 have. I'll let you look at that just for a
23 moment.

24 Dr. Barsky, I'd like to put that up, 2196,
25 your article on airway inflammation in young

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1 marijuana and tobacco smokers.

2 I just wanted to read this portion of it.

3 "Paralleling this rising trend in smoking among
4 young persons is the increasing perception that
5 smoking is not harmful."

6 Now, just clearly that was about the -- your
7 article talks about both daily tobacco smoking
8 and marijuana smoking; am I right?

9 A Yes.
10 Q "In 1993 fewer young people perceived regular
11 smoking of marijuana to be harmful than at any
12 time since 1987. Similarly, despite significant
13 adverse publicity, 30 percent of high school
14 seniors did not consider smoking as a serious
15 health risk. This later attitude may reflect a
16 perception that the consequences of smoking,
17 cardiovascular disease, emphysema, chronic
18 bronchitis, and cancer, only affect the elderly."
19 was that your finding?
20 A Well, these aren't findings of the article.
21 Findings of any article are always given in the
22 result section. This is part of the introduction
23 to the paper where we were citing the background
24 to the work.
25 Q All right. Fine.

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1 And you stated this in your introduction in
2 what year? what year was this written?
3 A This was written in 1998.
4 Q Thank you. Okay. Now, let's go back to
5 pathology. You talked with Ms. Henninger about
6 interobserver variability.
7 A Yes.
8 Q In many ways, particularly the type of pathology
9 we've talked about here, using an optical
10 microscope, is a visual discipline?
11 A Yes.
12 Q And I don't mean to denigrate this in any sense,
13 but I mean it's kind of like art appreciation in
14 some ways. Part of the training is to understand
15 what you're looking at and how to interpret
16 slides visibly; am I right?
17 A It's -- I would agree with the appreciation part,
18 but I would not agree with the art part. It's
19 medicine. It's disease, not art.
20 Q Scientific appreciation, then?
21 A Yes.
22 Q How's that?
23 A Yes.
24 Q Okay. Now, there have been editorials in
25 prominent journals in your field regarding this

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1 problem of interobserver variability; am I right?
2 A Yes.
3 Q You're familiar with the Journal of Pathology,
4 aren't you?
5 A Yes.
6 Q A subscriber to it?
7 A I don't remember if I'm a current -- it's a
8 British journal. I think at one time I
9 subscribed. I don't at the moment. But it's a
10 British journal.
11 Q All right. It's one you would rely on and find
12 reliable?
13 A Yes.
14 Q Okay. Let me show you what we marked as 2195.
15 Doctor, this is an article entitled -- it's
16 an editorial actually, editorial called
17 "Evidence-based pathology."
18 A Yes.
19 Q And, Doctor, in this article, "Evidence-based

20 pathology," they discuss the problem of
21 interreader or interobserver variability?
22 A Yes.
23 Q I want to read a quote from this, if I might, and
24 ask you whether you agree with it.

25 MR. MCCLAIN: Would you go to

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1 2195, Scott, second column.
2 Q (BY MR. MCCLAIN) It says, "Pathologists are
3 frequently not good at reproducibly identifying
4 specific morphological features. Indeed, apart
5 from grouping lesions into broad categories, for
6 example, benign versus malignant, poor agreement
7 is not infrequent."

8 I think that was a term you used yesterday,
9 that disagreements are not infrequent. Am I
10 right?

11 A Well, I think I may have used it today, but maybe
12 yesterday. I said that interobserver variability
13 occurred variably and it depended on the specific
14 type of lesion that one was looking at.

15 Q In other words, what we're saying is that it's
16 not infrequent for pathologists to disagree about
17 what they've seen; am I right?

18 A I would agree with that statement.

19 Q It says, "This implies that the observer" -- then
20 they talk about -- let's read this whole thing.

21 "In this context it should be noted that
22 most of the studies published involve very small
23 numbers of pathologists, often with specialist
24 knowledge and interest in the topic, often on a
25 restricted or selected samples and, of course,

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1 usually devoting unusual attention to the
2 material examined. This implies that the
3 observer variation in the general community is
4 likely to be significantly worse than that
5 documented."

6 Is that a true statement as far as you're
7 concerned?

8 A I would say if you take the entire pathology
9 community and look at everything across the
10 board, you're going to have more interobserver
11 variability across the board than you will
12 looking at just a specific disease process.

13 Q Now, there's another problem, not interobserver
14 variability, but intraobserver variability; am I
15 right?

16 A Yes.

17 Q And that means that the same pathologist looking
18 at the same slides can sometimes come to a
19 different conclusion looking at the same slide;
20 am I right?

21 A That's what that term means, yes.

22 Q And, Doctor, we had an example of that here in
23 the courtroom today, because you looked at the
24 slide on the screen and said you found emphysema;
25 am I right?

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1 A Yes.

2 Q But when we took your deposition, you said you
3 could find no evidence of emphysema
4 pathologically, true?

5 A I don't think that's accurate.
6 Q Well, let's look.
7 MR. McCLAIN: Page 281 of his
8 deposition.
9 MS. HENNINGER: Can we see it?
10 MR. McCLAIN: Sure.
11 Any objection?
12 Q (BY MR. McCLAIN) Doctor, the question was, "Does
13 VanDenBurg have emphysema?" On the page of 282.
14 Ms. Henninger raised an objection.
15 But the answer was, "Well, again, in my area
16 of expertise, I don't see that in the lung
17 pathologically," correct?
18 A Well, that's what that says in that particular
19 line.
20 Q Well, that was my only question.
21 Thank you.
22 A No --
23 THE COURT: Sir, counsel can ask
24 follow-up questions.
25 THE WITNESS: Okay.
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1 Q (BY MR. McCLAIN) Now, let's talk about the
2 symptoms of bronchiectasis. Are you familiar
3 with the symptoms of bronchiectasis, Doctor?
4 A Yes.
5 Q Okay. The Lung Association publishes those
6 symptoms as well. Would you like to see what the
7 symptoms that the Lung Association publishes
8 regarding bronchiectasis are?
9 A Well, I think I know what they are, but sure, I'd
10 like to see it.
11 MR. McCLAIN: Okay. Let's go to
12 that page, Scott.
13 MS. HENNINGER: Is it the same
14 thing you've shown?
15 MR. McCLAIN: Different portion on
16 symptoms.
17 MS. HENNINGER: Okay. Same
18 website?
19 MR. McCLAIN: Yeah. 2194.
20 Q (BY MR. McCLAIN) "Symptoms: The main symptoms of
21 patients with bronchiectasis is a cough. This
22 cough occurs with great regularity every day.
23 Generally, patients with bronchiectasis cough up
24 large quantities of phlegm, which resembles green
25 or yellow pus. It would not be uncommon for
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1 somebody to cough up more than a cup of this
2 phlegm per day. This phlegm may have an
3 objectionable odor and can be a source of great
4 embarrassment to the patient suffering from
5 bronchiectasis. This occurs because pus is
6 produced in the enlarged bronchial tubes which
7 are chronically infected and can only be removed
8 by coughing."
9 Doctor, do you agree with this description
10 of bronchiectasis?
11 A I do agree with this statement. I do agree with
12 that paragraph. When patients have symptoms, the
13 main symptom is cough.
14 Q And, Doctor, Mr. Vanamburg did not have --
15 Mr. VanDenBurg did not have this kind of symptom,
Page 4

16 did he?
17 A well, I recall in reading the medical records he
18 did have episodes of coughing.
19 He did not have this specific symptom of
20 coughing up phlegm, et cetera.
21 Q well, let's look at -- let's look at the next
22 line from your deposition right below the one
23 about emphysema. You remember looking at his
24 medical records?
25 "would you look with me at the top of the
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1 page where it has at the top, 'Denies chronic
2 cough or phlegm production.'
3 You said, "Yes."
4 You remember that now, Doctor, from his
5 medical records?
6 A Yes, I do remember that.
7 Q Now, there's another thing. People with
8 bronchiectasis tend to be nonsmokers; isn't that
9 true?
10 A They're usually nonsmokers, yes.
11 Q And the medical literature says that "This is
12 presumedly because the symptoms of
13 bronchiectasis, such as production of copious
14 amounts of sputum daily, frequently severe chest
15 infections, and wheezing are not conducive to a
16 desire to smoke."
17 You would agree with that too, wouldn't you?
18 A I would agree that's one aspect of it.
19 Q Now, let's just back up now a bit and talk about
20 your role in tobacco litigation, if we can.
21 You mentioned the eight cases you have
22 actually testified in, but you have looked at
23 slides from a whole lot more cases than that;
24 isn't that right?
25 A Yes.
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1 Q Over a hundred cases have been brought to you by
2 cigarette companies; isn't that so?
3 A Yes.
4 Q And you told the jury that you made \$50,000 per
5 year for 20 years, right?
6 A Yes.
7 Q But I don't know -- I'm sure this was
8 inadvertent. You don't mean to say that you made
9 \$50,000 only in a year, did you?
10 A No, I don't think I said that.
11 Q Well, I just want to be clear. I don't -- I
12 thought that the way that you said it, you made
13 \$50,000 per year. But my point is that in 2005
14 you made \$150,000 from tobacco companies or their
15 lawyers, right?
16 A Yes.
17 Q And you made \$150,000 in 2004?
18 A Yes.
19 Q You made between 200- and 250,000 in 2003?
20 A Yes.
21 Q You made 250,000 in 2002?
22 A I was giving, I think, estimates of ranges.
23 Q Yeah. And in 2001, 200,000, right?
24 A I think I was giving ranges between a hundred and
25 two hundred thousand, ballpark figures basically.
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1 Q Yeah. But if the jury got the impression what
2 you were saying yesterday is you only made
3 \$50,000 a year, that wouldn't have been the
4 correct way to read your testimony; am I right?
5 A Well, I was asked the question how long had I
6 been doing this, I said approximately 20 years.
7 And I was also asked how much have I made in
8 total, and so in my mind I sort of added it all
9 up. I just divided it by the number of years.
10 But clearly -- and I also said when this all
11 started, many of these cases didn't go to
12 litigation. So obviously the time I would spend
13 on those earlier cases would be less.
14 So the total amount is definitely leaning
15 toward the more recent era of that 20-year
16 period.
17 Q Thank you, Doctor.
18 Now, in addition to the work that you do on
19 these cases, these hundred cases you've seen and
20 the trial testimony you've given and the
21 depositions, you were quoted last week in the
22 newspaper as a spokesman for RJR; isn't that
23 true?
24 A I had heard about this. It was kind of news to
25 me. I had heard about it, yes.

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1 Q Yeah. So you were quoted as their spokesman?
2 A Well, that was based on a -- something that I was
3 asked to do to review the effects of secondhand
4 smoke on breast cancer.
5 Q Yeah.
6 A And I was asked to review the literature
7 examining the evidence pro and con with respect
8 to that.
9 Q But it's true, isn't it, you've appeared now in
10 Missouri courts on more than one occasion in
11 cases brought against RJR on behalf of the RJR
12 lawyers, true?
13 A This is the second time I've appeared in a
14 Missouri courtroom.
15 Q This very courtroom?
16 A Yes.
17 Q And you appeared in the Linda Welch case and
18 claimed she didn't have a lung cancer caused by
19 smoking; am I right?
20 A Yeah. She had a BAC.
21 Q And you said that she was going to live for
22 years. You remember that?

23 MS. HENNINGER: Objection;
24 relevance.
25 THE COURT: Come forward.

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1 (Counsel approached the bench and the
2 following proceedings were had:)
3 THE COURT: All right. The
4 objection is relevance?
5 MS. HENNINGER: (Nodded head.)
6 THE COURT: Why is it relevant?
7 MR. McCLAIN: He came before the
8 Welch jury and said -- sorry. I don't mean to
9 knock you out of the way.
10 He came in front of the Welch jury and said
11 she was going to live for many years, that her

12 cancer was cured because it was a BAC. She died.

13 So it's relevant to that issue because one
14 of the hallmarks of BAC is they do get cured and
15 they live forever. That's what he said. He told
16 the jury she was going to live forever.

17 The reality is she died in October of last
18 year. She didn't have BAC, but he said she did.

19 It goes to his credibility that he was
20 willing to come and say to the jury she was going
21 to live for a full lifetime because she had BAC.
22 And she died.

23 MS. HENNINGER: If I can respond
24 briefly on two points.

25 Number one, I was here for that trial

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1 testimony. I don't have a transcript, but I
2 never recall him saying, number one, that she
3 would live forever. He did diagnose her as
4 having BAC.

5 Important to point out, which I will be very
6 happy to do if this goes much further, is that
7 her treaters diagnosed her with BAC. They sent
8 it off to the Mayo Clinic for a second opinion.

9 They diagnosed it as BAC. So there's more
10 than just Dr. Barsky coming in in the Welch case
11 saying it's BAC. This is going to be a complete
12 and utter side issue.

13 Luckily for me I have the Welch deposition
14 here. I have the pathology reports for Welch.
15 I'm going to have to use them if we go much
16 further.

17 THE COURT: Do you have something
18 to add, Mr. Geary?

19 MR. GEARY: Judge, I don't think
20 we should be trying other cases in this case. I
21 think we're busy enough as it is.

22 Do we need to bring in a forensic expert to
23 talk about why she died? Who knows why she died.
24 People die every day, and certainly whatever this
25 witness says is not a guarantee of everlasting

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1 life. That's the claim here. That's ridiculous.

2 MS. HENNINGER: She could get hit
3 by a bus.

4 MR. GEARY: Let's try this case
5 and not everybody else's case.

6 THE COURT: Mr. Durbin, looks like
7 you want to jump in.

8 MR. DURBIN: You're right. I
9 would say since we were not a party in the Welch
10 case and I was not present, I would think the use
11 of that sample would be unduly prejudicial to
12 Liggett's interest. It clearly exceeds his
13 probative value.

14 THE COURT: Did you retain him?
15 Are you retaining him?

16 MR. DURBIN: I did not retain him.

17 MR. McCLAIN: How is it prejudice
18 to your interest?

19 MR. DURBIN: You seem to keep me
20 in the case.

21 THE COURT: Here's my ruling: I'm
22 not going to let it go any further. We're not

23 going to talk about her death. We've established
24 that he gave an opinion that she didn't have
25 cancer caused by smoking. I think that makes the

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1 point that's necessary.

2 So sustained.

3 MR. McCLAIN: Right.

4 (The proceedings returned to open court.)

5 Q (BY MR. McCLAIN) Now, Doctor, back to Welch.
6 You did testify in that case that her cancer
7 wasn't caused by smoking; am I right?

8 A Yes, that's correct.

9 Q And you also were retained as an expert in the
10 Beckman case; am I right?

11 A Yes.

12 Q That was a doctor who was alleged to have cancer
13 caused by smoking?

14 A Yes.

15 Q And you, again, testified that his cancer was not
16 caused by smoking; am I right?

17 A Well, that case was much more complicated than
18 that.

19 Q Wasn't it your conclusion that his cancer was not
20 caused by smoking?

21 A I said it could not be determined with a
22 reasonable certainty given all the other
23 pulmonary diseases he had, including interstitial
24 pulmonary fibrosis, which he eventually died of.

25 Q And now you're here about Mr. VanDenBurg, true?

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1 A Yes.

2 Q Now, Doctor, this -- because we've discussed
3 Dr. Millett, it should be clear that there are
4 qualified pathologists in the state of Missouri;
5 am I right?

6 A Well, I'm sure there are many qualified
7 pathologists in every state, including Missouri.

8 Q In fact, don't you know Dr. Ritter over in
9 St. Louis?

10 A I really don't know him, no.

11 Q You've met him, haven't you?

12 A I can't say that I have.

13 Q Wasn't he one of the doctors that Shook Hardy &
14 Bacon asked about the Beckman case?

15 MR. GEARY: Excuse me, Your Honor.
16 I object to this. This is completely irrelevant.

17 THE COURT: Sustained.

18 Q (BY MR. McCLAIN) Suffice it to say, there are
19 certified, board certified anatomical and
20 clinical pathologists in this state; am I right?

21 A Of course.

22 Q Now, let's talk about squamous cell carcinoma for
23 a minute.

24 You agree Mr. VanDenBurg has that disease?

25 A Yes.

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1 Q And smoking does cause squamous cell carcinoma,
2 does it not?

3 A Yes. It's one cause and it's actually the
4 leading cause.

5 Q In fact, you've issued -- you've submitted some
6 of these grant applications in which you've
7 stated affirmatively that squamous cell carcinoma

8 is linked to smoking; am I right?
9 A Yes.
10 Q Let's look at one of them that you've submitted.
11 MS. HENNINGER: Can I see it
12 first?
13 MR. MCCLAIN: Sure.
14 Q (BY MR. MCCLAIN) Is this a document that you're
15 familiar with?
16 A Yes.
17 Q This is a grant application of yours?
18 A It's the abstract of the application.
19 Q All right.
20 THE COURT: What number is it,
21 Mr. McClain?
22 MR. MCCLAIN: It's 2187,
23 Your Honor.
24 THE COURT: Thank you.
25 MR. MCCLAIN: And I move it into

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1 evidence.
2 MS. HENNINGER: No objection.
3 THE COURT: All right. Exhibit
4 2187 is admitted.
5 MR. MCCLAIN: Let's bring that up,
6 Scott. Would you go to the highlighting, please.
7 Q (BY MR. MCCLAIN) This is TRDRP, Tobacco-Related
8 Disease Research Program, a Retroviral Link to
9 Human Tobacco-Related Lung Cancer?" was the
10 question. That was the grant application title,
11 right?
12 A Yes.
13 Q "While certain types of lung cancer, which are
14 strongly linked to smoking, like squamous cell
15 carcinoma and small cell cancer, have shown an
16 overall decrease in incidence during the past
17 decade due in part to smoking cessation,
18 peripheral adenocarcinomas and bronchioloalveolar
19 lung cancer have shown exponential increases."
20 This is something you talked to the jury
21 about; am I right?
22 A Yes.
23 Q You were contrasting squamous cell and small cell
24 cancer that are strongly linked to smoking with
25 other types of cancer, which you contended were

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1 not; am I right?
2 A You're correct.
3 Q Now, in fact, Doctor, it's your opinion that
4 95 percent of squamous cell carcinomas are caused
5 by smoking; am I right?
6 A Yes.
7 Q Now, the risk of lung cancer in smokers depends
8 on the duration of smoking and number of
9 cigarettes smoked.
10 You would agree with that?
11 A Yes.
12 Q Bill had a 75-pack-year history; am I right?
13 A Yes.
14 Q And tell the jury how you calculate pack years so
15 they understand what that calculation is all
16 about, would you?
17 A Pack years is simply a multiplier.
18 You take the number of packs that a person

19 smokes and multiply it by the number of years.
20 So someone that's smoked one pack a day for ten
21 years, that would be ten pack years.

22 Two packs a day for ten years would be 20.
23 One pack a day for 20 years would be 20 pack
24 years.

25 Q You would agree a 75-year-pack history would be
0023 sufficient dose to cause squamous cell cancer?

1 A I would agree that's a very significant pack-year
2 history that would increase the risk of squamous
3 cell cancers developing in the group of
4 individuals who have that exposure.

5 Q Now, in regard to the Surgeon General's Reports,
6 you are familiar with those, are you not?

7 A Yes.

8 Q As Mrs. Henninger pointed out, although the
9 Surgeon General, this is one we've shown the
10 jury. There are many.

11 The Surgeon General's Reports are compiled
12 by groups of experts, are they not?

13 A well, I think they emanate from the Surgeon
14 General's office, who has a lot of people working
15 for him who quote the literature and formulate
16 their report.

17 Q Then it's reviewed by panels of experts; am I
18 right?

19 A Yes.

20 Q Including pathologists?

21 A Yes.

22 Q You've never been asked by the Surgeon General at
23 all to even be a reviewer of one of these
24 reports, have you?

25 A That's correct.
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1 Q Now, but you would agree with the expert panels
2 from the Surgeon General that "cigarette smoking
3 is by far the largest cause of lung cancer and
4 worldwide epidemic of lung cancer is attributable
5 largely to smoking"?

6 Isn't that true?

7 A I would agree with that, yes.

8 Q Would you agree that "Lung cancer is the leading
9 cause of cigarette deaths in the United States
10 and cigarette smoking causes most cases"?

11 A I would agree with that, yes.

12 Q And in your opinion, cigarette smoking is the
13 number one cause of squamous cell lung cancer; am
14 I right?

15 A Yes, I would agree with that.

16 Q Now, let's talk about your specific work on this
17 case.

18 The first work you did on the case was
19 September 29th of 2005, right?

20 A Yes.

21 Q And that's when a lawyer by the name of
22 Susan Easter from Womble Carlyle brought you some
23 slides; am I right?

24 A I think her name is pronounced Susan Easter.

0025 1 Q well, of course. Thank you for correcting me.
2 You know her quite well; am I right?

3 A I wouldn't say I know her well. I know who she

4 is. I recognize her.
5 Q She's seen you several times?
6 A Yes.
7 Q She's brought you slides to your apartment
8 several times; am I right?
9 A Yes. Yes. Correct.
10 Q So when you said you recognized one of the
11 lawyers that came, it was this Susan Easter from
12 the Womble Carlyle firm, right?
13 A Absolutely correct.
14 Q And what she did, as I understand your testimony,
15 Doctor, is she walked in with -- I don't know
16 whether it was this group of slides, but it was a
17 group of slides like this. Am I right?
18 A Absolutely right.
19 Q And she came in with this group of slides to you
20 with a lawyer from Shook Hardy & Bacon and you
21 had a four-hour meeting with them; isn't that
22 true?
23 A Yes.
24 Q And the lawyers sat there while you read these
25 slides; am I right?
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1 A Totally correct.
2 Q Now, did you need the lawyers to interpret these
3 slides?
4 A No.
5 MR. GEARY: Your Honor, I object
6 to that. That's argumentative, mischaracterizes
7 what was taking place.
8 THE COURT: Overruled. It's
9 cross-examination. You can ask questions again
10 later if you wish.
11 Q (BY MR. McCLAIN) I mean, Doctor, I've dealt with
12 pathologists before.
13 Do you know of any other pathologist who
14 makes it their regular practice to let lawyers
15 sit next to them while they're reading pathologic
16 slides?
17 A Well, you know, in my practice of pathology,
18 people bring me slides all the time. Doctors
19 bring me slides. Residents bring me slides.
20 Even patients bring me slides. And it's not
21 uncommon for them to sit there while I look at
22 them.
23 So I really -- in my own mind, it makes no
24 difference who is sitting beside me when I'm
25 looking at the case.
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1 Q See, Doctor, I don't know. I don't know what
2 it's like in Ohio or any -- but we have lots of
3 means of delivering slides to people.
4 We have the Federal Express. We have
5 overnight mail. You know, you can even have
6 delivery services take them to people if you want
7 to do that.
8 MR. GEARY: Excuse me. I don't
9 want to interrupt. Are you done with your
10 question?
11 If that's a question, I object to it as
12 argumentative.
13 MR. McCLAIN: It was in the middle
14 of it.

15 MR. GEARY: I'll wait till you
16 finish.
17 Q (BY MR. McCLAIN) Is there any reason in the world
18 why they could not have sent these slides to you
19 by a common carrier?
20 MR. GEARY: Excuse me, Your Honor.
21 If that completes the question, my objection is
22 it's argumentative.
23 THE COURT: Overruled.
24 A well, most of the slides that I get in my
25 practice don't come by personal courier. They do
0028 come through the mail. They do come through the
1 routes you've raised.
2 But I have to say that, and I'm not an
3 expert in this, I understand there's something
4 called chain of custody, that you're not allowed
5 in a legal case to get slides out of your hand.
6 So it's always been my assumption that's why
7 they bring them to me personally because of
8 chain-of-custody issues.
9 Q (BY MR. McCLAIN) I see. So -- maybe -- and
10 maybe we'll have a discussion about that later.
11 Maybe the Court will tell us about
12 chain-of-custody problems.
13 But you thought there was some legal
14 requirement which requires the lawyers to bring
15 you these slides and sit there with you and get
16 your opinion from you? Was that what you were
17 thinking?
18 A Yeah. I really thought there was -- because this
19 was raised on another case about chain of
20 custody.
21 Q All right. well, Doctor, we'll see, if we get a
22 chance to talk to some other pathologists, what
23 their practice is. Maybe we'll be enlightened
24 about it.
25
0029 But you thought there was some legal
1 requirement which required the lawyers to bring
2 them over to you?
3 MR. GEARY: Excuse me, Your Honor.
4 I object to the colloquy that preceded the
5 question. I move to strike it. This is about
6 questions and answers.
7 THE COURT: Sustained. The
8 question is stricken.
9 Q (BY MR. McCLAIN) You thought it was some legal
10 requirement; am I right?
11 A Yes.
12 Q Now, you formed your opinion in this case based
13 upon your view of the slides alone; am I right?
14 A Yes.
15 Q You were certain of your opinion on September 29,
16 even before you had seen medical records or
17 learned anything about his smoking history; am I
18 right?
19 A I was certain about what the slides showed.
20 Q And you hadn't read any depositions, depositions,
21 right?
22 A Correct.
23 Q And later when you got the medical records, you
24 were looking for anything that would be a link to
25

0030

1 bronchiectasis; am I right?
2 A I wouldn't say that was accurate.
3 Q You looked for tuberculosis, right?
4 A When I reviewed the medical -- when I review the
5 medical records and when I do review medical
6 records, I look for anything that's either
7 related or not related. I use that to formulate
8 questions in my mind.
9 Maybe he had another tumor. Maybe it was
10 biopsied. Where are those slides?
11 There are numerous questions that goes
12 through one's mind when one reviews medical
13 records.
14 Q You looked for tuberculosis, true?
15 A Yes.
16 Q You didn't find it?
17 A Well, I found the mention of granulomas in the
18 lung.
19 Q You didn't find tuberculosis, did you?
20 A Well, granulomas is one possible form of
21 tuberculosis.
22 Q Doctor, listen to my question carefully.
23 Did you find mention of tuberculosis?
24 A I didn't find that word mentioned, but as a
25 trained pathologist, when I read the term

0031

1 "granulomas," that's one disease process that
2 could include tuberculosis.
3 Q Doctor, you know very well that granulomas could
4 include a whole lot of disease processes; am I
5 right?
6 A Yes.
7 Q Every one of these jurors has granulomas in their
8 lungs, don't they?
9 MR. GEARY: Excuse me, Your Honor.
10 I object to that. That's clearly calling for
11 speculation and it's not right to invoke the jury
12 in a question.
13 THE COURT: Sustained.
14 Q (BY MR. MCCLAIN) It's true everyone in this
15 region has granuloma in their lungs from
16 histoplasmosis; isn't that true, Doctor?
17 A This is definitely a region where histoplasmosis
18 is called endemic, and probably all people who
19 live here have been exposed to it. But whether
20 you have granulomas or not, I couldn't say for
21 sure.
22 Q It's very common to find granulomas in people
23 that have had histoplasmosis, right?
24 A It's common, but it doesn't mean everyone has it.
25 Q And endemic means that it's so common that most

0032

1 people have it; am I right?
2 A It means that most people are exposed to it.
3 Q Okay. So finding granulomas does not mean
4 tuberculosis; nothing in the medical records says
5 anything about tuberculosis, does it?
6 A Not tuberculosis, just granulomas. It doesn't
7 say histoplasmosis either, though.
8 Q He didn't have cystic fibrosis either, did he,
9 from the medical records?
10 A That's correct.

11 Q And almost 50 percent of the people with
12 bronchiectasis have cystic fibrosis, true?
13 A I would say that's true for clinically apparent
14 bronchiectasis.
15 Q And there was no evidence in his medical records
16 of pneumonia either; isn't that true?
17 A That's not true.
18 Q Well, Doctor, you remember your deposition, 105.
19 THE COURT: Is there any objection
20 to showing this?
21 MR. DURBIN: What are you planning
22 to read, Mr. McClain?
23 MS. HENNINGER: I didn't know we
24 were --
25 THE COURT: Obviously, he's
0033
1 preparing for something.
2 MR. McCLAIN: 105.
3 Q (BY MR. McCLAIN) Doctor, let's look at your
4 answer. You said, "I know there's
5 bronchiectasis, so every possible thing that
6 could be linked to bronchiectasis I'm looking
7 for, I'm questioning when I review the medical
8 records.
9 "Fine. And I'm just trying to trace your
10 analytic process here, Dr. Barsky. And so we're
11 looking in the medical records for evidence of,
12 you know, tuberculosis and pneumonia and cystic
13 fibrosis, among other things. Is that a fair
14 statement?
15 "I think 'among other things' is a fairer
16 statement."
17 Then your answer here --
18 "And for example, you know, were there
19 symptoms of coughing in the medical records?
20 "I can't remember if there were. I know in
21 depositions there were references made that he
22 coughed for a certain number of months per year,
23 but I didn't come away with the medical records
24 thinking it was a very significant problem or
25 that he had a lot of sputum production. I didn't
0034
1 get that impression, not to say there couldn't be
2 an isolated --
3 MR. McCLAIN: Can you find that,
4 Scott?
5 Q (BY MR. McCLAIN) To speed this along, the rest
6 of your answer is statement here and there. The
7 records are pretty voluminous.
8 Do you remember giving that answer?
9 A Yes.
10 Q Thank you.
11 Now, let's talk -- let's go then to the
12 second meeting with the lawyers at your apartment
13 in Columbus, if we can.
14 At that meeting you made photomicrographs of
15 the slides?
16 A Yes.
17 Q The lawyers that were there were Susan Easter; am
18 I right?
19 A Yes.
20 Q And a Matthew Lung?
21 A Yes.

22 Q Am I right?
23 A Yes.
24 Q And kind of an ironic name, isn't it,
25 Matthew Lung, from Womble Carlyle?
0035
1 A Well, his last name is lung.
2 Q And Tom Duncan from Shook Hardy & Bacon was there
3 too?
4 A Yes.
5 Q And they were all there at your apartment; am I
6 right?
7 A Yes.
8 Q Now, Doctor, let's talk then -- and then after
9 that point in time, you gave testimony in this
10 case by deposition; am I right?
11 A Well, there's a few steps you've left out.
12 Q Well, in terms of my exam, the important point is
13 you had two separate meetings with the lawyers at
14 your house before you offered opinions by
15 deposition in this case. That's all true, is it
16 not?
17 A Yes.
18 Q Now, let's go on to some other issues then, if we
19 can.
20 "Epidemiologic evidence is usually given
21 substantial weight when identifying the cause of
22 disease."
23 You agree with that?
24 A Yes.
25 Q There has been no epidemiologic study that
0036
1 bronchiectasis causes squamous cell carcinoma; am
2 I right?
3 A That is correct.
4 Q Bronchiectasis, in your view, is a disease that
5 has not been well studied or targeted; am I
6 right?
7 A Yes.
8 Q It's possible that bronchiectasis may not have a
9 relation to cancer, in your view?
10 A Well, I'm convinced, as I've stated before, that
11 based on what I've seen in this case and based
12 upon my review of the literature, that this
13 association has been documented and observed
14 previously.
15 Q But, Doctor, let's talk about case reports just
16 for a moment.
17 Case reports are much different than
18 epidemiologic studies; am I right?
19 A Yes.
20 Q I mean, a doctor can be convinced of something
21 from one case, and he could write about it to a
22 medical journal as something interesting, to kind
23 of alert other doctors that "This is something
24 I've seen. I want to alert you to something I
25 saw and thought about, so that if you see
0037
1 something similar, we might be able to get a
2 pattern going"; am I right?
3 A Yes.
4 Q And if you get enough of those cases, they can be
5 grouped into epidemiologic study, and we can run
6 tests to see whether or not what we're seeing

7 actually was caused by what we thought it was
8 caused by; am I right?
9 A I would say that's not correct.
10 Q Okay. Well, that is in fact what happened in
11 regard to cigarette smoking; am I right? They
12 had enough case reports and ultimately they
13 studied a population of smokers and tied their
14 cancer rates to their smoking history; am I
15 right?
16 A Well, I think the history of the epidemiology of
17 lung cancer and cigarette smoking first started
18 with anecdotal observations that lung cancer was
19 being observed among patients who died and a
20 large number of those patients were cigarette
21 smokers.
22 So from these observations, they were what's
23 called case-controlled studies. The scientists
24 involved looked at patients who had lung cancer,
25 compared them to patients who did not, and then
0038 asked, what percentage of each group were
1 smokers.
2 Q And that hasn't -- that step even hasn't been
3 done with bronchiectasis; am I right?
4 A That's correct.
5 Q So bronchiectasis has had no epidemiologic
6 studies. They haven't had any case-controlled
7 studies. You have observed a case report that
8 you showed us in your deposition; am I right?
9 A That's not totally accurate.
10 Q Okay. Well, you gave us a case report from 1952
11 in the deposition; isn't that correct?
12 A I did give you that case report, but I also cited
13 a textbook in pulmonary pathology, which in turn
14 cited three separate cases of that association.
15 Q But they were all case reports; am I right?
16 A No. The third one was a series of patients. I
17 think there were four or six patients in that
18 grouping.
19 Q Well, let's look at the one that you gave us,
20 Doctor, and we'll try to get some sense of the
21 literature that you're relying upon. All right?
22 It's 2185.
23 MR. McCLAIN: I don't seem to have
24 that folder here. Is that back there? 2185?
25 0039 Q (BY MR. McCLAIN) I was incorrect. I do have it.
1 2185 was the only case report in terms of a
2 case that you had found that -- I was going to
3 pass them out to the jury.
4 2185 was the only case report that you
5 provided us as a case report; am I right?
6 A That's not accurate.
7 Q Well, it is the only one that you gave to
8 Ms. Easter; isn't that right?
9 A That's also not accurate.
10 Q Well, let's show the jury 2197.
11 MS. HENNINGER: Wait, wait, before
12 you show.
13 Oh, go ahead.
14 Q (BY MR. McCLAIN) It says, "Here's another key
15 article" -- can you read your writing?
16 A It says, "Dear Susan: Here's another key

18 article. I'm looking forward to working with you
19 on this case."
20 Q "Sanford"?
21 A Right.
22 Q You sent her this article; am I right?
23 A That's correct.
24 Q You provided it to us in the deposition; am I
25 right?
0040
1 A That's totally correct. It's not the only
2 article.
3 Q We're going to look at the articles you did
4 provide. You provided a textbook which cited
5 three case reports; am I right?
6 A Not correct.
7 Q It cited three studies. We'll talk about those
8 in just a second. Okay?
9 A Okay.
10 Q But it was a small number of patients; am I
11 right? Total.
12 A Small number total.
13 Q Less than ten people total?
14 A In those three studies.
15 Q In the Surgeon General's Reports, we're talking
16 about thousands of people that have been studied,
17 not only in case-controlled studies, but
18 epidemiologic studies as well; am I right?
19 A For smoking and lung cancer, yes.
20 Q Right. I mean, as an example, Doctor, if we
21 piled up those three studies that you're talking
22 about and compared them with the studies that the
23 Surgeon General relies on or that have been done
24 on smoking and cancer, we would fill this room
25 with the studies on smoking and cancer, wouldn't
0041
1 we?
2 A Yes.
3 Q Now, let's take a look at this case report
4 regarding bronchiectasis and cancer.
5 MR. McCLAIN: Now, first of all,
6 let's go to 2185, if we can.
7 I've got a mess going here. I need my
8 highlighted copies of the articles. They've
9 gotten mixed in with all this stuff.
10 Q (BY MR. McCLAIN) Doctor --
11 MR. McCLAIN: Would you bring that
12 up, Scott, first? The date of this thing, 2185.
13 Q (BY MR. McCLAIN) Doctor, this is a case report
14 from 1951 that you identified as key, am I right,
15 to your opinions?
16 A It's one of the key articles, yes.
17 Q Well, you identified it as key to Susan; am I
18 right?
19 A Yes.
20 Q Okay. Let's read the highlighting here for a
21 minute.
22 "Clinics with extensive experience in
23 pulmonary disease have recorded very few
24 instances in which carcinoma developed in a
25 previously present bronchiectatic cavity."
0042
1 Am I right?
2 A Yes.

3 Q Now, so even this article that you rely on said
4 that this has only been reported a few times; am
5 I right?
6 A Yes.
7 MR. McCLAIN: Would you bring up
8 the first paragraph.
9 Q (BY MR. McCLAIN) "It is, of course, not uncommon
10 to find chronic bronchiectasis in association
11 with primary bronchiogenic carcinoma."
12 Right? That's not uncommon?
13 A That's correct, that's not uncommon.
14 Q It says the bronchiectasis in these cases was
15 obviously the result of the bronchiogenic
16 carcinoma and not the cause of it.
17 Am I right?
18 A You're totally correct.
19 Q What that's referring to, Doctor? Is that a
20 cancer can cause bronchiectasis? Am I right?
21 A Yes, definitely.
22 Q Let's go over to the -- now, it says the patient
23 in this case was a 65-year-old white man who had
24 a chronic cough dating back to 1924.
25 MR. McCLAIN: Now go to the date
0043
1 again of this thing.
2 Q (BY MR. McCLAIN) It's 1951. They're saying this
3 guy had been coughing since 1924. So how many
4 years is that, Doctor? Let's see, 37 years; is
5 that right? 27 years?
6 A 27.
7 Q 27 years. So this guy had been coughing for
8 27 years. This had been associated with episodes
9 of wheezing and exertional dyspnea. That means,
10 what, shortness of breath?
11 A Yes.
12 Q For the ten months following January 1, 1949, the
13 patient had noted an increase in his dyspnea and
14 cough and was expectorating one-half cupful of
15 foul and blood-tinged sputum.
16 So he was spitting up a one-half cupful of
17 phlegm essentially, right, a day?
18 A Yes.
19 Q Just like the Lung Association told us was common
20 with bronchiectasis; am I right?
21 A Yeah. But these symptoms can also be seen in
22 lung cancer.
23 Q I'm just saying that -- sure they can. But the
24 question is, Mr. VanDenBurg didn't have that
25 symptom with lung cancer at all, did he?
0044
1 A That's exactly my point. He didn't have these
2 symptoms with his lung cancer and he didn't have
3 these symptoms with his bronchiectasis, but that
4 doesn't change the fact that he had lung cancer
5 and he had bronchiectasis.
6 Q Doctor, I didn't bring this case report. You
7 did. You said it was key. I didn't.
8 Let's just read it. All right.
9 A Well, let's read the title.
10 Q Can we go ahead with this and then I'm happy to
11 read the title.
12 A Okay.
13 Q "During the period from 1940 to 1949, he had

14 noted a loss in weight of approximately 30
15 pounds."
16 Mr. VanDenBurg never experienced a
17 significant weight drop, did he?
18 A From reading the records, I think he lost some
19 weight, but not that much.
20 Q Have you talked to Ms. Henninger about that?
21 They've contended he's done nothing but gain
22 weight.
23 MS. HENNINGER: Objection. I
24 haven't --
25 THE COURT: That's sustained.

0045

1 Q (BY MR. MCCLAIN) Have you talked to her about the
2 subject?
3 A No.
4 Q You want to look at the title? I'm happy to.
5 Bring that up for the doctor.
6 It says, "Carcinoma arising in
7 bronchiectatic cavities." There's no question
8 about that. It's a one-case report. I'm talking
9 about the one guy they found it in. Okay.
10 Let's look at what else they say about him.
11 "In November he again entered the hospital.
12 He was coughing considerably and expectorating a
13 half cupful of yellowish-brown sputum. Since his
14 last admission, he had lost approximately
15 6 pounds in weight and had noted a moderate
16 increase in shortness of breath."
17 These symptoms have never been reported in
18 Mr. VanDenBurg, have they?
19 A They have not.
20 Q "The pathological report was as follows: Gross
21 description: The specimen consists of a right
22 lower lobe which has been removed in toto."
23 So they had a lobectomy; am I right?
24 A Yes.
25 Q And Mr. VanDenBurg had a lobectomy; am I right?

0046

1 A Yes.
2 Q Okay. It says, "Situated in the basal segment is
3 a 4 by 4 centimeter abscess cavity, which is
4 filled with necrotic, yellowish-tan material."
5 Now, Mr. VanDenBurg's lobectomy was not
6 described this way, was it?
7 A No.
8 Q He didn't have an abscess cavity with
9 yellowish-tan material, did he?
10 A No.
11 Q On the removal of this material, the wall of the
12 cavity consisted of a thickened, wrinkled,
13 pearly-gray lining.
14 He didn't have that description of his
15 tissue, did he?
16 A No.
17 Q "Bronchiectasis, chronic, with abscess formation
18 and chronic pneumonitis, organizing" was the
19 diagnosis of the doctors who looked at this; am I
20 right?
21 A There's the first diagnosis.
22 Q Sure. Squamous cell carcinoma, well
23 differentiated. His was moderately
24 differentiated, right?

25 A (Witness nodded head.)
0047 1 Q Of right lower lobe arising in a bronchiectatic
2 cavity. Then they had bronchiectasis chronic
3 with abscess formation and, chronic, pneumonitis,
4 organizing.
5 He didn't have a diagnosis of bronchiectasis
6 by his doctors, did he?
7 A I believe this is the pathological diagnosis.
8 Q This is the doctors who operated on him?
9 A It says on the surgical specimen so it was made
10 by pathologists.
11 Q Right. Just like Dr. Millett. The surgical
12 pathologist in this case did not say he had
13 bronchiectasis chronic with abscess formation,
14 did she?
15 A No. She didn't.
16 Q No one did, none of his treating doctors, right?
17 A Correct.
18 Q Chronic pneumonitis, organizing. She didn't say
19 that either, did she?
20 A Not in the diagnosis. But in the description,
21 there was a statement to that effect.
22 Q Well, Doctor, the fact is she didn't say that in
23 the diagnosis, did she?
24 A She just said squamous cell cancer.
25 Q Right. So she didn't say it in the diagnosis,
0048 1 did she?
2 A Correct.
3 Q All right. Now, there was another -- one of the
4 articles that was cited, I believe --
5 Doctor, are you familiar with another
6 article from that era --
7 MR. McCLAIN: Where's 2180 --
8 yeah.
9 Q (BY MR. McCLAIN) 2188.
10 Doctor, since you were looking at articles
11 from the 1950s -- by the way, 1951, just to do
12 our math is, what, 54 years ago, 55 years ago
13 now, right?
14 A 54 years ago.
15 Q Well, it's 2006, it's --
16 A Well, I'm 55 and I was born in 1950.
17 Q Depends on what time of year it came out, I
18 guess, right?
19 A Yes.
20 Q Okay. So that was 55 years ago and the Surgeon
21 General's never reported as an alternate cause to
22 squamous cell carcinoma bronchiectasis, have
23 they?
24 A No. But I wouldn't expect him to. Or her to.
25 Q You know Dr. Burns?
0049 1 I don't know him personally.
2 Q You think he did a slipshod job in drafting the
3 Surgeon General's Reports?
4 MR. GEARY: Excuse me, Your Honor.
5 I object to that. That's argument.
6 THE COURT: Sustained.
7 Q (BY MR. McCLAIN) A whole panel of experts, who
8 know all about bronchiectasis, commented on it
9 for the surgeon General, didn't they?

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MR. GEARY: I object. That calls for speculation. There's no foundation for that question.

MR. MCCLAIN: I'll try it a different way. It was a bad question, Doctor. I recognize that.

Q (BY MR. MCCLAIN) Here's the question, Do you think the authors of the Surgeon General's Reports aren't aware of the disease process bronchiectasis, Doctor?

A I'm sure they are, but the Surgeon General is charged with protecting the public health. Therefore, the duty is to warn the public of things they can avoid, more healthier habits, not for things they really can't do much about. And bronchiectasis is one of those things.

Q Let's look at 2188, Doctor.

MS. HENNINGER: Hold on before you show it. Is there a foundation for this?

MR. MCCLAIN: I haven't shown anything. I've given it to you.

Q (BY MR. MCCLAIN) Doctor, are you familiar with this article?

A No, I'm not.

Q You didn't look at this one?

A I don't have a recollection at the moment. I'd have to restudy it.

Q It's --

MR. GEARY: Your Honor, cross-examination of this article lacks foundation.

MR. MCCLAIN: Judge, if Mr. Geary could sit down until I got my questions out, we might get a foundation.

THE COURT: All right. We need to change the tone back.

Now, the objection is sustained. There's no foundation now, but we'll let Mr. McClain establish his foundation.

MR. MCCLAIN: Thank you.

Q (BY MR. MCCLAIN) Thorax is a well-respected

0051

journal in the area of lung diseases; am I right?

A Yes.

Q And the Royal College of Surgeons of England are a well-respected society regarding lung disease; am I right?

A Yes.

Q And an article in Thorax in 1958 regarding the frequency of tumor-like formations in bronchiectatic lungs is something -- that is something that you would review and consider in forming your opinions; am I right?

A Yes.

Q Let me show you -- I'll give you as much time as you'd like to look at it, if you need time, but I only have a short passage.

A All right.

Q Doctor, this is a series -- you talked about a case series. And this is a case series on bronchiectatic lungs; am I correct?

MR. GEARY: Excuse me, Your Honor.

20

21 I still have an objection as to lack of
22 foundation.

23 THE COURT: Overruled. That's a
24 foundation question.

25 Q (BY MR. MCCLAIN) Doctor, you're prepared to talk
0052 about this article, aren't you?

1 A Yes.

2 Q This is a series of 102 surgically resected
3 specimens of bronchiectatic lungs; am I right?

4 A Yes.

5 Q And they describe a lesion in these lungs. Would
6 you go to the top of it.

7 They say that --

8 MR. MCCLAIN: Scott, would you
9 show 2188, the front page.

10 MR. GEARY: Your Honor, I do
11 object. There's a lack of foundation.

12 THE COURT: Come up.

13 (Counsel approached the bench and the
14 following proceedings were had:)

15 THE COURT: Let me see it first.
16 what's your objection?

17 MR. GEARY: Your Honor, when the
18 examination began, this witness had not seen this
19 article. He has yet to say it's authoritative.
20 I don't think it's appropriate to show a witness
21 an article on first impression and to
22 cross-examine on it.

23 He was not familiar with it. He is familiar
24 with it only because it was given to him by

0053 counsel. That's not the appropriate way to
1 cross-examine a witness.

2 It shouldn't be examined. It's not the
3 basis for his opinions in this case. He hadn't
4 seen it before. It shouldn't be the topic of
5 cross-examination.

6 There's a lack of foundation for it.

7 MR. MCCLAIN: The only foundation
8 I must show is from an authoritative source in
9 this state that the witness is familiar with it.
10 He took time and read it. Said, "I'm ready to
11 answer any questions" and that he would consider
12 the information in regard to his opinions from
13 this article.

14 That's the only foundation I need. The fact
15 whether he saw it before or not goes to his
16 credibility.

17 You can show an expert witness things at
18 trial to see if it changes their opinion. So
19 I've laid all the foundation I need to show him
20 this document.

21 MR. GEARY: well, he hasn't said
22 it's authoritative --

23 MR. MCCLAIN: He doesn't have to.

24 THE COURT: Let him finish his
0054 objection.

1 MR. GEARY: As I recall with
2 Dr. Burns when I tried to show him a newspaper
3 article, when he said he was not familiar with
4 it, that ended it.
5

6 It's the same thing here. When he was not
7 familiar with this article on cross, that ends
8 it.

9 MR. MCCLAIN: No. This is an
10 article. It's an authoritative article. He
11 doesn't have to acknowledge it is by words
12 indicating that it's an authoritative journal and
13 that he would review it and consider the
14 information in it and that he has reviewed it and
15 he's prepared to talk about it is sufficient
16 foundation to ask him questions.

17 THE COURT: Are you trying to
18 speak on this one, Mr. Durbin?

19 MR. DURBIN: No, sir.

20 THE COURT: Mrs. Henninger, are
21 you stepping in here?

22 MS. HENNINGER: You know, I
23 question whether it's even worth, it because I'm
24 sure he can handle it.

25 The fact of the matter is that, you know,

0055
1 this article -- he's never said that he agrees
2 with it, disagrees with it. He just said it's
3 the kind of thing he wouldn't have minded looking
4 at in forming his opinions.

5 I think there's probably a little bit more
6 that needs to be done in order to show it to the
7 jury. But then again, I don't really care.

8 THE COURT: The objection is
9 overruled. I'm going to permit it.

10 MR. MCCLAIN: Thank you,
11 Your Honor.

12 (The proceedings returned to open court.)

13 MR. MCCLAIN: Okay. Scott, would
14 you bring it up, please, 2188.

15 Q (BY MR. MCCLAIN) Now, this article is the
16 frequency --

17 THE COURT: Did you turn your mike
18 off, Mr. McClain?

19 MR. MCCLAIN: Did I?

20 THE COURT: I think.

21 MR. MCCLAIN: I must have. Is it
22 on?

23 THE COURT: Now it is.

24 Q (BY MR. MCCLAIN) Doctor, this is from Thorax in
25 1958. The title of it is "The Frequency of

0056
1 Tumor-like Formations in Bronchiectatic Lungs";
2 am I right?

3 A It's bronchiectatic.

4 Q Bronchiectatic lungs, correct?

5 A Correct.

6 Q And it was published by Drs. G. J. Cunningham,
7 E. Nassau and J. B. Walter from the Royal
8 College of Surgeons of England and Harrowfield
9 Hospital in Middlesex, correct?

10 A Correct.

11 Q Would you go down to this. It says the material
12 consisted of 102 surgically resected specimens of
13 bronchiectatic lungs, correct?

14 A Correct.

15 Q And this is a case series like you talked to us
16 about; am I right?

17 A Correct.
18 Q It says, "The type of lesion to which we refer as
19 a tumorlet have been well described previously by
20 Whitwell."
21 Do you see that?
22 A Yes.
23 Q They have some pictures of these lesions as you
24 showed us. These are in black and white, but
25 same kind of pictures; am I right?

0057

1 A No, they're not at all the same kind of pictures.
2 These are tumorlets. They're baby neuroendocrine
3 tumors of the lung. I showed you pictures of
4 squamous cell cancers. That's a total horse of a
5 different color.
6 Q Well, of course. And because they conclude that
7 cancer is not associated with bronchiectasis, you
8 wouldn't expect them to show cancers. But my
9 question really is, this is a pathologic slide,
10 isn't it?

11 MR. GEARY: Excuse me, Your Honor.
12 I hate to interrupt, but move to strike the
13 colloquy before the question.

14 THE COURT: Sustained. That
15 wasn't a question. It is stricken.
16 Q (BY MR. McCLAIN) This is a pathologic slide; am I
17 right?

18 A You're not accurate. It's a photomicrograph.
19 Actually, it's a print of a photomicrograph of a
20 pathological slide.

21 Q Okay. Like you showed us?

22 A Well, mine was in color.

23 Q I think that we all observed that. Okay.

24 Now, do you have enough distinctions?
25 It is a black and white photograph of a

0058

1 photomicrograph like the one you showed us in
2 color, true?
3 A It's a different disease, though. I want to make
4 that point.
5 It's a tumorlet. That's a different kind of
6 tumor than what we discussed today.

7 Q It says here, Doctor -- let's cut to the chase.

8 MR. McCLAIN: Go to the last page,
9 would you, Scott, page 68.

10 Q (BY MR. McCLAIN) It says, "The authors support
11 the view that these lesions are not related to
12 carcinoma, though they are liable to cause
13 difficulty in pathological diagnosis," true,
14 Doctor?

15 A I would agree with that. They're definitely not
16 related to carcinoma. That's what I said before.
17 It's a totally different kind of tumor.

18 Q Now, you even believe, Doctor, that the risk that
19 someone with bronchiectasis will get squamous
20 cell cancer is very small; am I right?

21 A That's correct.

22 Q So on the one hand, we have 95 percent of
23 squamous cell cancer being caused by smoking.
24 You've given us that previously; am I right? To
25 compare what you're telling us about

0059

1 bronchiectasis, a fraction of 1 percent of

2 persons who get bronchiectasis would get squamous
3 cell lung cancer; am I right?
4 A You're correct.
5 Q So something under 1 percent risk; am I right?
6 A Yes.
7 Q It's a very unusual occurrence?
8 A Correct.
9 Q And only a handful of case reports have ever been
10 given in the literature; am I right?
11 A Correct.
12 Q Now, Doctor, the last issue that I want to talk
13 to you about is that in this case you've told us
14 that in general you didn't believe that there was
15 any lung damage visible in his tissue; am I
16 right?
17 A No. There's lung damage, but it's in the form of
18 bronchiectasis. It's in the form of asthma.
19 I said there was not tobacco or
20 cigarette-smoking-related damage in his tissue.
21 Q Didn't you show us a slide and said his lung
22 tissue looks pretty good?
23 A I showed one slide of the central airway. I said
24 that looked essentially normal except for the
25 presence of asthma.

0060

1 Q Have you ever seen him walk?
2 A Well, I saw -- I think I saw the plaintiff or
3 your client walk in today.
4 Q Did you see his difficulty in breathing?
5 A I really didn't appreciate that.
6 Q His doctors have diagnosed him with emphysema and
7 COPD. You know that?
8 A I did see mention of that in the medical history,
9 but not consistently.
10 Q Well, you do recognize that his doctors have
11 diagnosed emphysema and COPD; am I right?
12 A Well, I remember seeing that in the medical
13 history.

MR. MCCLAIN: Thank you, Doctor.
I have no further questions.

THE COURT: All right. Let's see,
Mr. Geary, do you have questions?
You would be next.

MR. GEARY: Your Honor, I'm going
to pass to Mrs. Henninger.

THE COURT: Mr. Durbin?
MR. DURBIN: No questions,
Your Honor.

THE COURT: Ms. Henninger, do you
have redirect?

0061

1 MS. HENNINGER: (Indicated.)
2 THE COURT: All right.
3 MS. HENNINGER: Good afternoon.
4 THE COURT: Is your mike on?
5 MS. HENNINGER: Probably not. It
6 is.
7 THE COURT: Why don't you switch
8 collars.

MS. HENNINGER: Yesterday it was
best on this collar.

THE COURT: I know you had it
facing the other way yesterday. Face it in and

13 it will work better.
14 MR. McCLAIN: I'm sorry. I took
15 these off up here.
16 MS. HENNINGER: Okay. I'll try to
17 be loud.
18 MR. McCLAIN: You won't have much
19 trouble.
20 MS. HENNINGER: You're right.
21 REDIRECT EXAMINATION BY MS. HENNINGER:
22 Q Never been accused of being soft spoken,
23 Dr. Barsky.
24 Do you feel like answering a little bit more
25 for me?

0062

1 A Sure.
2 Q Do you need any more -- you've got water.
3 Mr. McClain asked you some questions about
4 the Nobel Prize.
5 Do you recall those?
6 A Yes.
7 Q And the committees that he asked you whether or
8 not you were members of or whether or not you
9 were a member of, can you explain to us what
10 those committees are.
11 A Well, he got those committees from the website,
12 and those are the committees at the Nobel Prize
13 headquarters in Stockholm. Those committees are
14 involved in picking the Nobel Prize winner, in
15 selecting the winner.
16 I'm not at all involved in that. I simply
17 am a person who throws in nominations. There are
18 many people like myself at different universities
19 in this country who are solicited for
20 nominations. So that's why my name doesn't
21 appear on those committee lists.
22 Q When you told the jury, yesterday perhaps, that
23 you were one of the people that helped nominate
24 people for a Nobel Prize, that was accurate,
25 correct?

0063

1 A Yes.
2 Q Okay. Now, Dr. Barsky, does the fact that the
3 medical records in Mr. VanDenBurg's case -- does
4 the fact that they do not contain any reference
5 to bronchiectasis, does that change your opinions
6 at all?
7 A No.
8 Q Why not?
9 A Well, as I said before, you know, a pathologist
10 applies what I call the gold standard, which is
11 the tissue pattern under the microscope. There
12 are many diseases that are not detected
13 clinically.
14 They're called subclinical or asymptomatic.
15 There are many processes ranging from
16 bronchiectasis to cancer that the first diagnosis
17 that's made is one under the microscope. That's
18 why we're called to look at tissue under the
19 microscope.
20 That's why we're called to evaluate
21 biopsies. If everything could be diagnosed in
22 the patient, there would be no need -- I wouldn't
23 be in business because there would be no need to

24 examine this kind of material.
25 Q And, for example, as you said, someone can have

0064

1 cancer and not know it, correct?

2 A Well, that happens all the time in males in the
3 setting of prostate cancer.

4 Somebody will come in with a test called
5 PSA. It might be a little elevated. The
6 prostate exam will show nothing. The radiology
7 exam, which is an ultrasound exam, will be
8 normal.

9 And yet the urologist will do a number of
10 what's called blind biopsies and, lo and behold,
11 they'll reveal cancer under the microscope.

12 It happens all the time that way.

13 Q As a pathologist, while the clinical records, the
14 medical records, and other findings are important
15 to you, do you always need to have clinical
16 findings to make a pathological diagnosis?

17 A Absolutely not. I mean, I view the clinical
18 records as important. I use them to formulate
19 questions in my mind. But I have to be an
20 independent observer, as I said before, an
21 eyewitness to the disease process. The process
22 is under the microscope. And although the
23 clinical records and history are important, they
24 subserve the information that is present -- the
25 definitive information that's present under the

0065

1 microscope.

2 Q And let's take a hypothetical, for example.

3 with lung cancer, what are some of the
4 clinical symptoms that a patient has lung cancer?

5 A Well, it depends where the cancer is located, but
6 if it's central cancer, they can have shortness
7 of breath which is called dyspnea.

8 They can have cough. They can have sputum
9 production. They can cough up blood. That's
10 called hematemesis. They can have chest pain.
11 They can have a number of symptoms.

12 Q And in your review of Mr. VanDenBurg's records,
13 did he have any of those symptoms prior to his
14 fall at Ponderosa?

15 A Well, there was a -- somewhat of a history of
16 cough. But it wasn't consistent. He certainly
17 didn't have hematemesis. He didn't have chest
18 pain.

19 He did not have the symptoms that I would
20 associate with lung cancer.

21 Q And do you remember why he had a chest X-ray
22 which led to the finding of something suspicious
23 in his lung?

24 A It would be called a serendipitous event.
25 Apparently, he fell accidentally and he

0066

1 injured his ribs. And in the process of
2 evaluating whether his ribs were broken, a chest
3 X-ray was taken, and lo and behold, the chest
4 X-ray showed this mass in the left upper lobe.
5 So it was an accidental finding.

6 MR. McCLAIN: Could we come up,
7 Judge.

8 (Counsel approached the bench and the

9 following proceedings were had:)

10 MR. McCLAIN: I didn't ask him
11 anything about this in cross. This is new
12 direct.

13 I don't -- this is not responding to my
14 cross.

15 MS. HENNINGER: what he asked him
16 in cross were all sorts of questions about how he
17 can say that he has bronchiectasis when he
18 doesn't have any of the clinical symptoms,
19 et cetera.

20 Here we have a man who had lung cancer
21 without having any of the clinical symptoms. It
22 is an analogous situation. I'm using my
23 redirect.

24 MR. McCLAIN: It's apples and
25 oranges.

0067
1 MS. HENNINGER: All I'm trying to
2 prove is there are things people can have that
3 don't necessarily present clinically, but then
4 can be diagnosed pathologically.

5 Mr. McClain made a point on cross that the
6 first time anyone is diagnosing this is
7 pathologically. My point is that's not so
8 uncommon. In fact, it happened.

9 THE COURT: Overruled. I'm going
10 to permit it.

11 (The proceedings returned to open court.)

12 Q (BY MS. HENNINGER) Dr. Barsky, back to where we
13 were. Was the finding -- let me ask it this way.

14 Mr. VanDenBurg, they had a finding of
15 something suspicious on his radiology, correct?

16 A Yes.

17 Q Then he went in and had surgery and pathological
18 diagnosis was made, correct?

19 A Yes.

20 Q And were there any clinical symptoms of lung
21 cancer before the pathologist diagnosed him with
22 cancer?

23 A No.

24 Q Okay. Now, there was -- Mr. McClain showed you
25 this American Lung Association website. Do you

0068
1 recall that?

2 A Yes.

3 MS. HENNINGER: Scott, would it be
4 possible to pull it up.

5 Q (BY MS. HENNINGER) You had said something to him
6 that you thought this actually supported your
7 view?

8 A Yeah. Supported my view that bronchiectasis is a
9 pathological diagnosis.

10 Q Was there something that you wanted to point out
11 with regard to that?

12 A Yes.

13 Q What is it?

14 A well, in the first paragraph it says that -- it
15 defines bronchiectasis. It's an abnormal
16 stretching and enlarging of the respiratory
17 passages caused by mucous blockage.

18 Then it says that the blockage and
19 accompanied infection causes inflammation,

20 leading to scarring and deformity.
21 There would be no way you would know this
22 unless you looked at it under the microscope.
23 You can't see inflammation and infection and
24 distortion of this nature unless you actually see
25 the process under the microscope.

0069

1 what it's describing here is a morphological
2 assessment of this process. It's defining it and
3 supporting what I said, that it's a pathological
4 diagnosis.

5 Q Okay. Was there anything else in this
6 bronchiectasis fact sheet from the internet that
7 you would like to talk about, Dr. Barsky?

8 A Yes.

9 Q What is that?

10 A Down below that's highlighted. Doctors evaluate.

11 Q Uh-huh.

12 A I was asked about this before, and I think it's
13 important to point out that this isn't -- it
14 doesn't say doctors diagnose bronchiectasis with
15 a chest X-ray, breathing tests, sputum culture.
16 It doesn't say that doctors diagnose
17 bronchiectasis; it says they evaluate it, which
18 means you already have a diagnosis of
19 bronchiectasis, and now you're evaluating its
20 severity, its extent, whether it's infected,
21 these kind of things.

22 Q Okay. Thank you, Dr. Barsky.

23 Now, you are not disputing that
24 bronchiectasis is a diagnosis that can be made
25 clinically, are you?

0070

1 A No.

2 Q But it is also a diagnosis that can be made
3 pathologically, correct?

4 A Correct.

5 Q And you are making the diagnosis of
6 bronchiectasis based on Mr. VanDenBurg's
7 pathology, correct?

8 A Correct.

9 Q But you have reviewed the whole gamut of
10 information available as far as the medical
11 records as well, correct?

12 A Yes.

13 Q Now, just so I'm clear, a person can have
14 bronchiectasis without necessarily having a cup
15 or half a cup of sputum production a day,
16 correct?

17 A Yes. Well, any disease process can be what we
18 call subclinical or asymptomatic. It depends on
19 how advanced it is. I mean cancers can be silent
20 without any symptoms. Same thing is true for
21 bronchiectasis.

22 Q Now, you were asked some questions briefly with
23 regard to your compensation in tobacco-related
24 matters, Dr. Barsky.

25 The questions that Mr. McClain asked you

0071

1 today do not change -- let me ask you this: Do
2 they change your opinion as to the total amount
3 of money you've made in the last 20 years?

4 A No.

5 Q When you said you made \$50,000 a year, were you
6 giving the jury an average?
7 A Yeah. I was just trying to give an average over
8 20 years, a ballpark figure.
9 Q Are there some years in the last 20 years where
10 you may not have made any money in the
11 tobacco-related pathological reviews?
12 A In the late '80s and early '90s, there were some
13 years there was no income from this sort of
14 activity.
15 Q And you were also asked a question about being a,
16 quote, spokesman for RJR regarding breast cancer;
17 is that correct?
18 A Yes.
19 Q Can you tell the jury the story behind that.
20 A Well, I was approached -- I have an interest in
21 breast cancer and in defining the cause and the
22 risk factors involved in breast cancer. And I
23 was asked what my opinion was on the relationship
24 of secondhand smoke and breast cancer, if I could
25 look into this.

0072

1 So I conducted a review of the literature, a
2 review of the epidemiological studies. Some
3 studies showed a very weak association. Some
4 studies showed no association.
5 And I felt imbalance, that the evidence was
6 not compelling enough to say that secondhand
7 smoke was a cause of breast cancer.
8 Q And were you asked to be on, what was it, CNN or
9 something like that?
10 A No.
11 Q Was there a national --
12 A I was just asked to write a report on this, and I
13 filed the report with -- it was a couple of years
14 back in the state of California to the
15 Air Resources Board.
16 Q Okay. Then I must be mistaken.
17 Was there something last week that you were
18 asked to be on CNN?
19 A Well, what happened last week was apparently a
20 news story broke in relationship to what was
21 going on in the state of California related to
22 this issue of secondhand smoke and breast cancer.
23 And apparently some news articles were
24 written in which what I had written a few years
25 back was quoted.

0073

1 Q Okay. Now, you were asked whether or not there
2 were qualified pathologists in the state of
3 Missouri.
4 Do you recall those questions?
5 A Yes.
6 Q And do you know whether or not there are
7 qualified pulmonologists in the state of
8 Missouri?
9 A I'm sure there are qualified, board certified
10 doctors of every specialty in the state of
11 Missouri.
12 Q And that would include radiology?
13 A Yes.
14 Q And that would include occupational medicine?
15 A Yes.

16 Q And that would include geriatricians?
17 A Yes.
18 Q And that would include internal medicine doctors?
19 A Yes.
20 Q Such as family practitioners?
21 A Well, family practitioners may not be board
22 certified in internal medicine. They may be
23 board certified in family medicine.
24 Q Okay.
25 Now, I thought that we were pretty clear

0074

1 when I was asking you some questions, but you
2 have no doubt that cigarette smoking can be a
3 cause of squamous cell carcinoma of the lung;
4 isn't that right?
5 A Well, I have no doubt. In fact, I think it's the
6 majority -- it's the major cause of squamous cell
7 cancer of the lung.
8 Q And you also have an opinion, do you not, that
9 smoking did not cause Mr. VanDenBurg's squamous
10 cell carcinoma of the lung, correct?
11 A Correct.
12 Q So when Mr. McClain asked you whether or not
13 95 percent of squamous cells were associated with
14 smoking, that is just in general, correct?
15 A Yes. In populations.
16 Q And what is some of the causes of the other
17 5 percent of lung cancer?
18 A Well, we know that radon, radiation can be a
19 cause. There's increasing evidence that there's
20 a virus called the human papilloma virus, which
21 causes warts and causes cervical cancer.
22 There's increasing evidence that that can be
23 a cause of lung cancer and other head and neck
24 cancers.

25 Then we have the situation where squamous
0075

1 cell cancers can arise in sinus tracts, in
2 abscess cavities, in the setting of tuberculosis
3 and histoplasmosis and in the setting of
4 bronchiectasis.
5 So that's why the finding of bronchiectasis
6 in this case is so important and so relevant.
7 Q All right. Now, briefly I want to turn to your
8 deposition in this case. I apologize. My only
9 extra copy is a marked-up copy.
10 But if you can turn to page 8, please,
11 Dr. Barsky.
12 MR. McCLAIN: Your Honor, might we
13 approach?
14 (Counsel approached the bench and the
15 following proceedings were had:)
16 MR. McCLAIN: Your Honor, what use
17 can be made of this? He's not a party. You
18 can't read the testimony of a witness like you
19 can a party.
20 So what would be the purpose of this offer?
21 MS. HENNINGER: That's fair.
22 Maybe I should go back and establish what the
23 purpose is so we have no question about it. But
24 Mr. McClain tried to impeach him and showed him
25 some kind of testimony about emphysema when this

0076

1 deposition is replete of times he told Mr. Leyh
2 there was emphysema changes in Mr. VanDenBurg's
3 lungs.

4 There was the one quote that Mr. McClain
5 showed. I'm entitled to show there were several
6 other quotes.

7 I'm going to start at page 8.

8 THE COURT: Just let me look real
9 quick.

10 MS. HENNINGER: Okay. Just so
11 we're clear, Mr. McClain specifically said that
12 he testified differently in his deposition than
13 he did in court. In his deposition he tells
14 Mr. Leyh that there's emphysema in
15 Mr. VanDenBurg's lungs in two different places.

16 THE COURT: All right.
17 Mr. McClain, you want to come up?

18 MR. McCLAIN: Yeah.

19 THE COURT: All right. There was
20 a question in cross about whether he had stated
21 there was emphysema found or not, and it was
22 meant to impeach him on statements that were made
23 earlier.

24 So I'm going to allow this.

25 MR. McCLAIN: Well, my question

0077
1 was a direct question to him that he said that it
2 was not found pathologically. We all know that
3 it's in the medical records. So what if he
4 acknowledges it was in the medical records.

5 That's not what he was telling the jury on
6 direct. He was telling them he found it
7 pathologically.

8 Then when he was asked the question
9 specifically whether he found it pathologically,
10 he said no.

11 THE COURT: Okay. That is true.
12 That was the question.

13 MS. HENNINGER: Well, I have a
14 response for it, because on page 215 he is
15 showing the very picture he showed this jury to
16 Mr. Leyh, and he says, "what's the significance
17 of this?"

18 They said, "It shows emphysema."

19 Let me find it. 215.

20 It says, "12J" -- it shows subpleural
21 emphysema emphysematous changes on the right.

22 MR. McCLAIN: I think that's fair.
23 She can show that part of the testimony.

24 I think that's fair. No objection.
25 (The proceedings returned to open court.)

0078
1 THE COURT: Proceed.

2 Q (BY MS. HENNINGER) Can you look at page 215,
3 Dr. Barsky.

4 MS. HENNINGER: They just turned
5 it on.

6 Thank you.

7 See, they think I'm soft spoken.

8 MR. McCLAIN: They don't know you
9 as well as I do.

10 MS. HENNINGER: Lucky for them,
11 I'm sure.

12 Q (BY MS. HENNINGER) Do you see on line 11, there's
13 a question: "All right. what is 12J?"

14 A Yes.

15 Q Can you briefly explain, if you recall, what we
16 were talking about during your deposition when we
17 referred to 12J?

18 A Well, I was being asked what the different
19 photomicrographs that I took showed. And I said
20 that 12J is another image of slide 6J that shows
21 the squamous cell cancer on the left and it
22 showed subpleural emphysema, emphysematous
23 changes on the right, the same thing I showed
24 today.

25 Q Okay. So you did in fact say in your deposition

0079

1 that you found emphysematous changes in the
2 pathology, correct?

3 A Yes. And I think the question that I was asked
4 before about -- that I said there was no acinar
5 emphysema, but what there was, was Emph
6 (phonetic), which is a type of subpleural
7 emphysema.

8 MS. HENNINGER: Okay. I
9 understand Mr. McClain needs a break.

10 Is this a good time? I can keep going and
11 we'll finish --

12 THE COURT: How much more do you
13 have?

14 MS. HENNINGER: Ten more minutes.

15 MR. MCCLAIN: I can wait.

16 THE COURT: Let's proceed.

17 MS. HENNINGER: All right.

18 Q (BY MS. HENNINGER) Now I feel time pressure.

19 Okay. Dr. Barsky, briefly, on Plaintiff's
20 Exhibit 2197.

21 MS. HENNINGER: Scott, is there a
22 way you can pull that up for me, please.

23 Q (BY MS. HENNINGER) When you showed -- when you
24 sent the article, "Carcinoma Arising in
25 Bronchiectatic Cavities" to Ms. Easter, to Susan,

0080

1 can you again say what you told her about this
2 article?

3 A Well, what I told her was what I wrote basically.
4 "Here is another key article."

5 I think if you look at that, you'll realize
6 it's not the first article. It's another
7 article.

8 This article I found after I had sent the
9 group of articles to Ms. Easter.

10 Q Okay.

11 A I wanted her to have this one as well.

12 Q Now, Dr. Barsky, if you can, explain for the jury
13 why this article, "Carcinoma Arising in
14 Bronchiectatic Cavities" was, quote, key in your
15 opinion. This is Plaintiff's Exhibit 2185.

16 A Well, to adequately explain that, I have to sort
17 of summarize the history that led to this
18 article.

19 When I first saw this case --

20 MR. MCCLAIN: Your Honor, I object
21 to this narrative.

22 THE COURT: Overruled. I'm going

23
24
25
0081

to allow it for a little bit.
But what I'm not going to allow you to do is
go more than an explanation of why you sent the

article.
So you can't go on beyond that in this
answer. Understood?

THE WITNESS: Yes, sir.

THE COURT: All right.

A When I looked at the slides and made the
observation, I looked in the literature to find
support for that observation. I first went into
a textbook called Spencer that described this
phenomenon.

It cited three articles. I went to the
library and I attempted to find these articles.

The first article I found and I sent
through. The second article is this article.
That's why it says, "another key article."

Then there's a third article that I
subsequently found.

Q (BY MR. MCCLAIN) Okay. Dr. Barsky, I want to
make something clear. Just because
bronchiectasis is an unusual event -- strike
that.

Just because carcinoma arising from
bronchiectasis is an unusual event or an uncommon
event doesn't mean it doesn't happen; is that
right?

0082

A That's correct.

Q And just because it is an unusual event, does
that place any doubt in your mind that you saw
cancer arising from bronchiectasis in
Mr. VanDenBurg's pathology?

A None whatsoever. I see unusual events all the
time.

Q Dr. Barsky --

MS. HENNINGER: If I can borrow
your Surgeon General's Reports.

MR. MCCLAIN: What's mine is
yours.

MS. HENNINGER: Thank you.

Q (BY MS. HENNINGER) This says "Surgeon General's
Reports," it says "The Health Consequences of
Smoking."

Does that title explain to you at all why
bronchiectasis may not be mentioned in this
Surgeon General's Report?

A Yes.

Q And why?

A well, as I said before, the Surgeon General is
the main public officer of the United States
whose job it is to warn the public of public
health dangers, things that can be avoided,

0083

lifestyle changes that are beneficial, things
that are, quote, bad for us. There are diseases
that we really can't do much about from the
public health point of view.

So bronchiectasis, which is something that
can be congenital, something that can be acquired
through pneumonia, something related to cystic

8 fibrosis, there's really no public health warning
9 that would benefit anyone.

10 So it's just something that I don't really
11 think is in the purview of the Surgeon General.

12 Q Okay. And is bronchiectasis associated with
13 smoking?

14 A It is not.

15 Q Okay. Now, briefly with regard to this article
16 that Mr. McClain showed you, which was
17 Plaintiff's Exhibit 2188, you were attempting to
18 explain why this article -- why these were two
19 different apples and oranges, for example.

20 Can you do that, please.

21 A May I see the article again?

22 Q Oh, sure.

23 A Yeah. Well, this paper I hadn't really read
24 before, but I read it during the bar conference
25 that we had in the courtroom.

0084

1 It describes another kind of tumor in
2 association with bronchiectasis, a tumor that's
3 called a tumorlet, which is a neuroendocrine
4 tumor. It has nothing to do with bronchial
5 cancer. The paper says that and I totally agree.

6 It's a different entity.

7 The fact that it occurs in bronchiectasis
8 doesn't change really anything about the fact
9 that squamous cell cancers can also occur in
10 bronchiectasis.

11 This article has nothing really to do
12 with -- in my opinion, with this case.

13 Q And Dr. Barsky, is there a reason why a lot of
14 the articles related to bronchiectasis are old
15 articles?

16 A Yes.

17 Q Why is it?

18 A Because in the 1930s and 1940s and 1950s,
19 bronchiectasis was a much more common disease in
20 terms of prevalence and incidence. And it was
21 during that era that this phenomenon, that
22 squamous cell cancers were seen to arise in these
23 foci. These foci are peripheral. They are
24 toward the pleural of the lung, away from the
25 main stem bronchus where smoking-related cancers

0085

1 of a squamous type arise.

2 So the first record of these events were
3 made in the '50s when they were first observed.

4 Q And have modern antibiotics cut down on the
5 number of cases of bronchiectasis?

6 A That's what the theory is, yes.

7 Q Now, Dr. Barsky, two brief questions or areas.

8 A review of the pathology, does it always
9 tell you what the cause of a person's cancer is?

10 A No.

11 Q Can it sometimes tell you what a cause of a
12 person's cancer is?

13 A Yes. As I said before, you can't make a global
14 sweep one way or another. It depends on the
15 specifics of the case.

16 Q And in this case, what we're here on, this case,
17 Mr. VanDenBurg's case, are you able to determine
18 a cause of his lung cancer from a review of the

19 pathology within a reasonable degree of medical
20 certainty?

21 A Yes.

22 Q And why can you do that in this case when you
23 can't do that in all cases?

24 A Well, because this case is different than most
25 cases in the sense that he has a peripheral

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1 squamous cell cancer arising next to this
2 diseased area of the lung called bronchiectasis.

3 And more importantly or along with that, I
4 can actually visually see under the microscope
5 where this cancer began and the steps that it has
6 undergone through, and I can trace its origin
7 from this focus to where it developed into a
8 tumor.

9 That, in my opinion, is a very important
10 finding.

11 Q Now, Dr. Barsky, as a pathologist are you often
12 confronted with requests from other doctors to
13 read pathological slides?

14 A Yes.

15 Q And does it occur frequently that your opinion
16 with regard to those pathological slides makes a
17 difference in how other doctors treat their
18 patients?

19 A Yes.

20 Q And do sometimes your diagnosis of pathological
21 slides involve or reach -- when they reach the
22 other doctors, they have to make decisions of
23 life and death?

24 A Yes.

25 Q And do sometimes the decision as to whether or

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1 not to do a surgery, such as remove a breast or
2 that kind of thing, happen only after you make a
3 pathological diagnosis?

4 A Yes.

5 Q And after you review pathological slides?

6 A Yes.

7 Q And you tell those doctors your opinions,
8 correct?

9 A Yes.

10 Q And they rely on your opinions based on your
11 training, expertise, and judgment in treating
12 their patients, do they not?

13 MR. McCLAIN: Your Honor, all
14 these are leading.

15 THE COURT: That's true. But
16 we're right about at the end.

17 Overruled.

18 A Yes.

19 MR. McCLAIN: Is that a promise?

20 MS. HENNINGER: Yes. Because I'm
21 done.

22 No further questions. Thank you very much.

23 MR. McCLAIN: Doctor, as tempting
24 as it is to wade back into all of this, thank you
25 very much for coming. I hope you have a safe

0088

1 flight back to Ohio.

2 THE WITNESS: Thank you.

3 THE COURT: I take it there's no

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other questions.
You may step down and you're excused.

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REPORTER'S CERTIFICATE

I, Gayle M. Wambolt, Certified Court Reporter, certify that I am the official court reporter for Division 5 of the Jackson County Circuit Court; that on February 1, 2006, I was present and reported all of the proceedings in William A. VanDenBurg, Plaintiff, vs. Brown & Williamson Tobacco Corp., et al, Defendants, Case No. 03CV237238.

I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings transcribed.

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