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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY J. HATTON, et al., :

Plaintiffs, :

v. : Case No. 1:02CV01852

AMERICAN REGISTRY OF PATHOLOGY et al.,

Defendants :

Deposition of JAMES F. BARTER, M.D.
Bethesda, Maryland
Thursday, October 7, 2004
5:20 p.m.

Job No: 1-41243
Pages 1 - 70
Reported by: Peggy L. Dingle

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Deposition of JAMES F. BARTER, M.D., held at the location of:

SUBURBAN HOSPITAL
8600 Old Georgetown Road
Conference Room 1
Bethesda, Maryland 20814
(301) 896-3100

Pursuant to agreement, before Peggy L. Dingle, Notary Public of the State of Maryland.

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EXHIBITS

(Attached to the Transcript)



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PROCEEDINGS

JAMES F. BARTER, M.D.,

having been duly sworn, testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. HIRSHMAN:

Q Good evening. I am Toby Hirshman. We have been talking for a little while, but I am going to have you state your name for the record, if you would, even though you have just said it for the court reporter.

**A James Barter.**

Q And your middle initial?

**A F.**

Q And you are an M.D.?

**A Yes.**

Q And give me your home address, please.

**A 5968 Searl, S-E-A-R-L, Terrace, Bethesda, Maryland 20816.**

Q You have been asked to function as an expert witness in this case by the Defendant the United States; is that correct?

**A Yes.**

Q Can you tell me how you were contacted and

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when?

**A By phone.**

Q Do you know when it was and by whom?

**A It was Mr. Mitsch, I believe, but I don't have an exact date as to when.**

Q Can you give me an approximate date or is it in any of the documents you have in front of you. You have given me some letters and I will see what they say. Mr. Mitsch is the master of succinctness. It looks like the first of the letters that I have in front of me is dated September 29th of 2003. Does that seem to be about the time you were contacted in regard to this case?

**A That's the best I can do is the letter.**

MR. HIRSHMAN: Okay. Let's mark it as "Exhibit 1."

(Barter Deposition Exhibit 1 was marked for identification and was attached to the transcript.)

BY MR. HIRSHMAN:

Q Dr. Barter, I am showing you "Exhibit 1." This is the first letter that you received from Mr. Mitsch in regard to this case?

**A Yes.**

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Q Okay. Let's talk a little bit about the materials that -- well, before we do that, I have two other letters in front of me that are dated April 20th, 2004 and September 7th, 2004. Are these the only other letters that you received from Mr. Mitsch?

**A Yes.**

MR. HIRSHMAN: Okay. Let's mark those as "2" and "3" if we could.

(Barter Deposition Exhibits 2 and 3 were marked for identification and attached to the transcript.)

BY MR. HIRSHMAN:

Q So "Exhibits 2 and 3" reflect when it is that you received the depositions that you have reviewed in this case; is that a fair statement?

**A Yes.**

Q Okay. You have -- have you reviewed any other depositions, other than those of Arus, Arauco, Hussain, Method and Makii?

**A Yes.**

Q What else did you review? You have the deposition of Tammy Ascue that you have just handed me and that of Christie Lingard, both of which were taken

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September of 2004. So I take it you have gotten them sometime between the dates they were taken and the present?

**A Yes.**

Q Can you narrow it down any more for me?

**A This past week.**

Q Okay. Have you read all the depositions we have just --

**A Yes.**

Q -- talked about?

**A Yes.**

Q Okay. What else do you have besides those depositions? You have pushed a nine-inch file in front of me; is that about right? Is that right?

**A I don t have a ruler.**

Q What's your estimate? You make estimates all the time when you do surgery.

**A I think nine is fine.**

Q Nine? Okay. So you have reviewed the hospital record -- excuse me -- the Air Force record of Jill Miller?

**A Yes.**

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Q And do you know her name is Cindy and Jill? Can we refer to her by either?

**A Yes, sir.**

Q Okay. And you have reviewed subsequent records after her diagnosis, which is what I am looking at now, I take it?

**A Yes.**

Q All right. This whole pile constitutes subsequent records?

**A Yes.**

Q Dealing with her treatment for her cervical cancer?

**A Yes.**

Q Have you looked at any -- I thought I saw you looking at some medical literature a moment ago. Did I?

**A Yes.**

Q Is that in relation to this case?

**A No.**

Q Okay. Do you have any notes?

**A No.**

Q You have made no notes or you don't have any notes with you?

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**A I have no notes. I made no notes.**

Q Okay. Did you write a letter?

**A I -- I did write a letter. You want to scoot that over?**

Q Yes, sure. Do you have that letter here with you?

**A No.**

Q How many pages was your letter?

**A I believe just one.**

Q And what was that letter?

**A It was basically just summarizing my feelings about the case.**

Q And you provided a copy to Mr. Mitsch?

**A Yes.**

Q And he did not provide a copy to me. Where is that letter? In your office?

**A I don't have it. I mailed it to Mr. Mitsch.**

Q You don't have a copy?

**A No.**

MR. MITSCH: We decided we weren't going to do the letters. We weren't going to do reports. And, for the record, I will -- I will tell you that the information

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that he put in the letter is contained in the designation.

MR. HIRSHMAN: Well, it may be that information and it may be other information, as well.

MR. MITSCH: I don't have any trouble providing you with the letter.

MR. HIRSHMAN: Okay.

MR. MITSCH: I didn't bring it with me.

MR. HIRSHMAN: All right.

MR. MITSCH: For all practical purposes, it's -- it's what's in his designation.

BY MR. HIRSHMAN:

Q You have reviewed -- have you reviewed any literature?

**A No.**

Q In regard to this case, obviously?

**A (The witness shook his head.)**

Q No. Okay. Was there any other correspondence, other than that letter that you wrote to Mr. Mitsch that we just discussed and the three letters that Mr. Mitsch wrote to you that we have marked as "Exhibits 1, 2 and 3"?

**A No.**

Q Okay. And the file that you have provided me

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with to look at is the complete file?
A **Yes.**
Q Okay. Have you been involved in any cases as an expert before, any medical malpractice cases?
A **Yes.**
Q About how often does that happen?
A **I would say I probably -- the things I remember being in court, and that happens about every year and a half, two years. It seems like I get deposed once or twice a year.**
Q Uh-huh. And how often do you look at cases for attorneys?
A **I don't know. That's harder for me to say. Sometimes people will call me and I will talk to them over the phone and never hear anything back from them. Sometimes I will get records, talk to them on the phone and never hear back from them. So that's hard for me to -- to guesstimate.**
Q Have you ever rendered opinions in a case dealing with cervical cancer before as an expert?
A **I -- I have, yes.**
Q Can you recall for me what those cases were or

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what they -- and who the attorneys were?
A **I don't recall.**
Q Does the name Sellers versus Sorreano ring a bell?
A **(The witness shook his head.)**
Q A deposition you gave --
A **No.**
Q -- regarding cervical cancer in 1988?
A **(The witness shook his head.)**
Q No?
MR. MITSCH: '98 or '88.
THE WITNESS: No, I don't think that's true. '88? 1988? You must mean '98.
BY MR. HIRSHMAN:
Q I think I mean '88.
A **Uhn-uhn.**
Q Uhn-uhn, you didn't or uhn-uhn --
A **No, I don't -- I don't think I started doing this until about ten years ago or so.**
Q Might be '98. I -- I wrote down '88.
A **I don't remember anyway, but --**
Q Okay How about Hodack versus -- the Hodack

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case? Does that ring a bell?
A **Name is familiar. I don't remember.**
Q A case with a recurrence?
A **No, it's familiar because I have a patient by that last name.**
Q This was a recurrence of a cervical cancer.
A **I don't recall.**
Q You don't remember who the attorneys were?
A **No.**
Q How about Keller?
A **I don't recall.**
Q Okay. Take a look at your expert designation for a moment. Have you had a chance to look at the designation that was prepared --
A **Yes.**
Q -- setting forth what your testimony would be?
A **Yes.**
MR. HIRSHMAN: Let's mark this as "Exhibit" -- what is it? -- "4."
(Barter Deposition Exhibit 4 was marked for identification and was attached to the transcript.)
BY MR. HIRSHMAN:

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Q I didn't bring the whole designation. I brought the part of the designation that deals with your anticipated testimony. Here. I will place the one that's marked as "Exhibit 4" in front of you and why don't you give me back the other one. Why don't you take a moment to look at it, if you would. Have you finished looking at it?
A **Yes.**
Q Have you seen it before this moment?
A **Yes.**
Q Does it properly reflect the substance and scope of the testimony you are going to give in this case?
A **Yes.**
Q All right. All right. After -- so you have reviewed all these records and you have reviewed the depositions. I am going to ask you for some opinions and then I will probably follow up with some questions about those opinions. I guess my first question is whether you have an opinion as to what the condition of Jill's cervix was in June and July of 1998?
A **Knowing the natural history of ovarian -- of cervical cancer, it would be reasonable that she had**

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**dysplasia present at that time.**
Q And you hold that opinion to a reasonable medical probability?
**A That's -- yes, yes.**
MR. KLORES: I just want to make sure you said -- you said 1998?
BY MR. HIRSHMAN:
Q I said 1998, didn't I?
**A Yes, June, July.**
Q And you hold that opinion to a reasonable probability?
**A Yes.**
Q Okay. What kind of dysplasia, in your opinion, did she have as of June, July 1998?
**A I -- I can't be certain of that.**
Q Well, I -- I guess I am not asking you for a CIN number, but I -- I am asking for some sort of a -- you believe it was a precancerous dysplasia, correct?
**A I am sorry?**
Q A precancerous dysplasia as opposed to an atypia?
**A Yes.**

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Q Okay. So somewhere between an LSIL and an HSIL is what you think she had at that time, to a reasonable probability?
**A I suspect.**
Q Do you think it was cancer in situ yet?
**A Maybe.**
Q So it's your opinion that in that time period she had something between an LSIL to a cancer in situ?
**A Sure.**
Q Okay. Let's talk about a different point in time. It will be the same question. Did you have an opinion as to what the condition of Jill's cervix was in late December 1998, early January 1998? So we are talking about six months later what the condition of her cervix was in that period of time.
MR. KLORES: Early January 1999?
MR. HIRSHMAN: No, '98. December '98 to January 1999, correct.
THE WITNESS: I suspect it was probably still dysplastic.
BY MR. HIRSHMAN:
Q And you hold that opinion to a reasonable

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probability, medical probability?
**A Yes.**
Q Same question subsequent point in time. I am going to move up two to four months to February 1999 to April '99. Do you have an opinion as to what the condition of Jill's cervix was then?
**A It's awfully hard to extrapolate through these times. I know that you would like a definitive answer and that would make it -- make my daily job a lot easier if I knew all of those questions. I think the -- or knew all those answers, rather. I think the key time that catches my eye is --**
Q Can I help you find something?
**A The reference in her Cleveland notes where she began having sustained uncontrolled bleeding.**
Q Well, she could --
**A And that to me denotes a malignancy.**
Q In her Cleveland notes? I will tell you what I -- what I believe to be the first Cleveland notes are September 2000. Does anybody have any different view on that?
MR. MITSCH: No, I think that's Dr. Chaho.

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MR. HIRSHMAN: Correct.
BY MR. HIRSHMAN:
Q The first visit to a doctor in Cleveland is September 18th, 2000 with a chief complaint of bleeding, history of irregular bleeding Q one to three months since birth of baby in 1994. The history goes on to say regulated with birth control pills Ovral 21 which she used until July 2000, stopped birth control pills and there is a question mark as to reason, I think. And there is something in reference to financial changes and it says "Began new job this month." The physical exam of the pelvis includes a reference to the vagina having moderate blood flow involved. Is that what you are referring to? And a biopsy was done that day of five places from the cervix.
**A It's in the -- Dr. Makii's note about regulated -- her bleeding was regulated with birth control pills until 3 of 2000. So I would think certainly by 3 of 2000 when her bleeding became unregulated, to me that's when she manifested first having malignancy. And any -- anything prior to that it's -- especially when you go back through the time periods that you have asked, it's a**

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**little more difficult, and the only reason I can state that is just through what we know about the -- generally what we know about the natural history of cervical dysplasia and cervical cancer.**

Q Now, what you referred to as 3 of 2000 I think I am referring as 7 of 2000. Do you have it in front of you?

**A It's in Makii's note.**

Q Makii?

**A Yes.**

Q Let me take a look at it. Maybe --

**A Regulated with birth control pills until 3 of 2000.**

Q Oh, that's a three. Okay. And it says started birth control pills again 7/2000?

**A Yes.**

Q So the date of 3/2000 is of some significance to you.

**A Well, it's --**

Q What is the significance of that date?

**A It's significant to Dr. Makii in that it seems like that's the date that he feels that her bleeding**

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**became unregulated and there is a reference to her last -- last normal menstrual period being 8/28/2000 and then there is constantly bleeding.**

**So I think that when you -- when you try to go back and extrapolate. It's tough to -- to know, you know, these dysplasias and the rate of progression, and those kinds of things, I think, are always -- can be difficult. But I think certainly once somebody starts with unregulated bleeding, to me that indicates a malignancy.**

Q So you take this reference to regulated with birth control pills until 3/2000 to mean that at the -- at 3/2000, although still taking birth control pills, it no longer regulated her bleeding?

**A Yes.**

Q And you interpret it to mean that, rather than to mean that she stopped taking birth control pills on March -- in March of 2000?

**A That's the way it reads to me, yes.**

Q Okay. Well, I guess -- I think it's maybe both readings. At any rate, you have concluded that as of 3/2000 she had bleeding that was not due to dysfunctional uterine bleeding but, rather, due to a cervical lesion?

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**A As best I can piece together through the -- through the medical records.**

Q And it's your opinion that as of 3/2000 she had a -- a cancer or could that also have been a precancerous lesion that was bleeding?

**A If she -- if she has unregulated bleeding, to me that would indicate and in this clinical course that's a cancer.**

Q Okay. So to reasonable medical probability, as of 3/2000 her precancerous condition had turned into cancer?

**A Yes.**

Q And you hold that opinion to a reasonable medical probability?

**A Yes.**

Q And let's go back to my question, which was what was the condition of her cervix in February to April of 1999?

**A If I -- it would be somewhere between dysplasia and cancer. That's the best I can do.**

Q In other words, you can't say whether it was dysplasia or cancer at that time?

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**A I -- I can't be certain.**

Q And you can't say, if cancer, whether it was invasive or noninvasive at that time?

**A You talking about February '99?**

Q February to April '99.

**A No, I -- I think you are talking about -- we have talked about January '99. No, I expect she was probably dysplastic.**

Q In February to April of '99?

**A Yes, right.**

Q Okay. How about October to December of 1999? That's -- this one is putting you in the hot seat.

**A Again, she has not got uncontrolled bleeding, as best we can put together, and she would be somewhere in that transition.**

Q So if she has cancer at that time, it is still an early stage cancer, in your opinion?

**A Presumably.**

Q And by early stage we are talking about a stage 1A type situation?

**A I -- I really -- I am not sure I have a -- an exact opinion about breaking this down into various**

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**months. We just don't know in every case the transit time.**

Q You seem to be placing a lot of stock in the fact that there is or is not controlled -- uncontrolled bleeding and we know that -- or it's your impression that there was not uncontrolled bleeding yet as of October or December 1999. So if I understand your -- your reasoning then, it's your opinion that as of that point in time she had not reached the stage where the cancer had invaded the lower -- the layers of the cervix which would cause bleeding?

**A Yes, I -- reading through these records, March of 2000, if indeed that is the time when she begins unregulated bleeding, to me that indicates malignancy.**

Q And deeply invasive malignancy, correct?

**A Sufficient enough to have enough angiogenesis to allow spontaneous bleeding.**

Q And does angiogenesis develop in accordance with depth of invasion?

**A Yes, that indicates significant cancer volumes such that there would be uncontrolled bleeding.**

Q And invasion into the deeper depths of the

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cervix?

**A Unless it were a polyp that -- unless it were a polyp that were exophytic that had a lot of neoangiogenesis, that could bleed as well and not be deeply invasive.**

Q Do you have an opinion as to whether she had an exophytic polyp in --

**A Hers seems to be an endocervical lesion. So that would indicate substantial invasion when she begins unregulated bleeding.**

Q Rather than exophytic spread?

**A Yes.**

Q Okay. I am going to ask you your opinion about when a diagnosis could have been made here had certain things been done. If a pap had been performed on Jill between July and December of 1998 would a precancerous condition have been diagnosed, in your opinion?

**A If we assume that she had dysplasia at that time, it is possible that a pap smear could have picked that up.**

Q What is the likelihood that a pap smear would have picked it up if she indeed had a dysplasia at that

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point in time?

**A I would say fairly high.**

Q And are you familiar with Dr. Krebs?

**A Yes.**

Q You know he is a witness who testified in this case recently?

**A Yes.**

Q And are you aware of the fact that it was his opinion that there was a 60 percent likelihood that it would have been caught and diagnosed if a repeat pap had been done between July and December?

**A I think that that's fairly reasonable and we know pap smears have an inherent false negative rate. I would probably put it a little higher than 60 percent.**

Q Where would you put it?

**A Oh, probably 70.**

Q And I presume that it is your opinion that if a pap had been performed sometime between February and April 1999 a diagnosis would have been made with at least a 70 percent likelihood of a dysplasia, given your prior testimony?

MR. MITSCH: You are assuming an adequate pap.

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right?

MR. HIRSHMAN: I am assuming that a pap was done with -- in accordance with acceptable standards of care.

THE WITNESS: I think that's reasonable.

BY MR. HIRSHMAN:

Q And if a pap had been done from October to December 1999, I presume it's also your opinion that a dysplasia would have been picked up then with at least a 70 percent likelihood?

**A Well, I think we are mixing two things. We are mixing the sensitivity of a pap smear and her progression. And I have said I am not -- I can't be certain of her progression through this.**

Q Are you suggesting that this cancer regressed?

**A No, but we don't --**

Q Or that this dysplasia regressed?

**A No, but we don't know the exact progression of this.**

Q Uh-huh.

**A So, yes, let's -- let's assume she had a dysplastic lesion. Then I would -- pap smears are**

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**generally fairly good at picking up dysplasia. And I think that's a reasonable number.**

Q So 70 percent would be reasonable for October to December 1999, as well?

**A If she had dysplasia. If we take that as an assumption, yes.**

Q Okay. And if she had cancer, it would have picked that up with at least as high a likelihood?

**A It depends. Sometimes cancers are harder to pick up because there is a lot more reaction around the cancer.**

Q So if it was cancer, what likelihood of having picked it up would you apply?

**A For cancers I am not sure I know that number, the sensitivity and specificity for pap smears.**

Q So as it relates to Jill Miller, those numbers that you gave are applicable to her?

**A I -- I think in general with dysplasia these are general terms.**

Q And -- and applicable to Jill?

**A If we assume she is in the general pool of people getting screened, yes.**

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Q Is there anything about her that would allow you to conclude that she isn't within the general pool of people getting screened?

**A I just said if we make that assumption.**

Q And I am asking whether you know of anything about her that would allow you to place her outside that general pool because of anything about her, about her history?

**A Nothing specifically.**

Q Okay. And the fact that this was an endocervical lesion doesn't change those numbers in any fashion or do you believe it was an endocervical lesion?

**A I believe it is endocervical and that that can -- that that is harder to pick up on pap smears.**

Q All right. And when Dr. Krebs gave his number of 60 percent, he was fully aware of the fact that we were talking about an endocervical lesion. Do you have any reason to dispute that number when talking about an endocervical lesion?

**A I just don't know any literature that can give you that number for endocervical lesions.**

Q Am I telling you something new when I tell you

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right now that this was an endocervical lesion? It seems to be in your designation you knew that as we discussed this case, correct?

**A Yes.**

Q Okay. So the numbers that you gave me were given to me with the understanding that Jill had an endocervical lesion?

**A I am -- the only number I can tell you is just generic pap smear numbers. I can't give you numbers on sensitivity specificity for dysplastic pap smears and endocervical lesions. That data doesn't exist, to the best of my knowledge.**

Q Okay

**A So what we talk about is generic numbers.**

Q All right. Do you disagree with Dr. Krebs's number of 60 percent as it relates to a patient with a barrel-shaped lesion which he hypothesizes was prior to becoming cancer and endocervical precancerous lesion?

**A I don't necessarily disagree with that. I am just not sure that I can tell you literature that substantiates that exact number.**

Q All right. So you have no -- in other words,

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you have no -- you have no basis upon which to disagree?

**A Correct.**

Q All right. You make some reference in your -- in your designation or in Mr. Mitsch's designation for you about the speed with which this cancer grew. Do you recall that?

**A Where did my designation go?**

Q That's it right there

**A Yes.**

Q And the basis of your opinion that it grew quickly is the fact that you believe it became -- she developed uncontrolled bleeding in March of 2000 and then she was diagnosed with cancer six months later, correct?

**A With a large lesion, be it a 1B or a 2, depending on who you are reading the notes, and the fact that she recurred within three months and was dead within a year.**

Q Okay.

**A Sounds pretty aggressive.**

Q So you see a -- you hypothesize -- what you are hypothesizing here is a patient who began to have a -- a cancer sufficiently invasive to cause bleeding in March

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2000, who by September 2000 had a lesion which, by some measurements, was ten centimeters in diameter?

**A Well, that's certainly the outlier for the measurement, the ten centimeters.**

Q So it was measured as being palpated in the pelvis by Dr. Kranyak, I believe? Is that your recollection?

**A Yes.**

Q Okay. How long do -- how often do you do pap screens on women of -- sexually active women of Jill's age in your practice?

**A Yearly**

Q Yearly. And if you do three in a row and they all come back negative, there is a school of thought, and I don't know if you adhere to it or not, which suggests that you can do them less frequently. Do you adhere to that school of thought?

**A I think you have to be very careful with that because I think you have to take in mind the risk factors for cervical cancer and I think you have to be certain to get a very good sexual history, number of partners, age of first intercourse, HPV status for the years.**

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Q But there -- and that's a school of thought that's being utilized by folks in the practice of gynecology these days, correct?

**A Correct.**

Q And the reason that they feel comfortable doing that is because of the long period of time that -- that precancerous conditions are understood to exist before they become actual cancers? Is that the --

**A Correct.**

Q Is that the premise for -- for waiting that long between -- between paps?

**A Correct.**

Q Do you agree with that understanding of the natural history of cancer or of precancerous conditions?

**A That's the basis for that recommendation.**

Q And do you agree with the -- even if you don't agree with the decision to do paps on a three-year basis in some women, do you agree that precancerous conditions are thought to harbor themselves in a woman's cervix for many years before they become cancer?

**A That's the general school of thought, yes.**

Q Do you agree with that school of thought?

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**A Yes.**

Q Okay.

**A In general.**

Q Okay. Is there any reason why you wouldn't agree with it in this case as it relates to Cindy?

**A There is really not enough data. I mean, those are, you know, studies with lots and lots of patients in them. Those studies don't always pertain to each one individual person. But, again, if we take her from the general pool, then, yes, that's what the -- that data is from.**

Q So to a reasonable probability this cancer was -- or this precancerous condition was residing in her cervix for five, ten years?

**A Well, yes, a period of time of which we are not a hundred percent sure and we don't know in her particular case.**

Q Does five to ten years sound outrageous to you?

**A That's generally the way we feel about it, yes.**

Q Okay. And that's true -- well, leave it at that. So you think there were two reasons for Jill's bleeding. If I understand without having really asked you

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these questions, you believe that she bled from March 2000 on due to her cervical cancer and that she bled prior to that from dysfunctional uterine bleeding? Is that your opinion?

**A Yes.**

Q And this dysfunctional uterine bleeding -- I might be repetitive by feeling I need to define it further -- but you consider it to have been a result of an anovulatory status?

**A Yes.**

Q And after March of 2000 did her -- well, strike that. Let's talk about staging a little bit because we have talked about what you thought was going on at various points in time. So I want -- I want to try to talk a little bit about how you would stage her at various points in time starting with --

**A That's going to be hard to do because I don't have enough data, but --**

Q Okay. Let's attempt it and you will tell me what I am -- whether we can do it or not. I mean, people made attempts to do it at the time of her diagnosis. We know that. She was --

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A **I am sorry. Excuse me. I apologize. I thought you meant the progression of staging. But her -- her staging when she came in at Cleveland and Dr. Makii, sure, let's -- we can talk about that. Great.**

Q Okay. Let's -- let's start with that. She was staged by Dr. -- well, she wasn't staged by Dr. Chaho, but Dr. Chaho examined her and thought she had a two to three centimeter lesion, which he biopsied, correct?

A **Yes.**

Q And then Dr. Makii -- and I only say it differently than you because I have met him and I have heard him say his name -- he saw her on September 27th about nine days later and describes her as being a stage 2B based on a T2B tumor no node -- no information regarding nodes and M0. Do you agree with that stage?

A **I -- I would have to examine her myself.**

Q Well, let's assume that -- that he, in fact, found a four-by-five centimeter intravaginal mass with a ten centimeter ballottable -- is that how you say it or is it ballottable? --

A **Ballottable.**

Q -- ballottable mass in the pelvis and that he

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concluded that it extended into the endometrium -- into the perimetrium but did not attach itself to the pelvic wall. What would her stage be?

A **That would be a 2B.**

Q Okay. And then Dr. Fleming not too much later calls her a 1B2. Were you aware of that?

A **Yes.**

Q Are you in a position to explain what the disparity is between those or why the disparity exists between those two stagings?

A **No.**

Q 1B2 the 2 in -- in 1B2 is the reference to the barrel-shaped mass?

A **The size of it.**

Q The size of it or the fact that it's barrel-shaped?

A **No, the size of it. It's greater than four centimeters.**

Q Okay. And it doesn't become a 2B until it is extended to the perimetrium?

A **Correct.**

Q And do you have any criticism of the care that

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was -- you read -- you read all the records from the subsequent care. Do you have any criticism of the subsequent care that was rendered to Cindy by the various health care professionals who saw her subsequent to her diagnosis?

A **No.**

Q So it's fair to say that when Cindy was diagnosed in 2000 she had a lethal cervical cancer which, in fact, went on to kill her?

A **Yes. In her situation, yes.**

Q Okay. If Cindy was, in fact, or Jill was, in fact, suffering from a dysplastic cervix at earlier points in time, that means she didn't yet have cancer, correct?

A **Correct.**

Q And if diagnosed and properly treated, she never would have developed cancer, correct?

A **She would have a very high cure rate from dysplasia. She is awfully young. She could certainly be exposed later in life and could get cancer later in life, but in general the cure rate with dysplasia and irradication of that is -- is very high.**

Q Hovers right around a hundred percent, doesn't

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it?

A **I wouldn't say a hundred, but I would say 90, 95.**

Q So, to a reasonable probability, she not only would have been cured, she never would have developed cancer if she had been diagnosed while still having dysplasia?

A **And, again, she was very young. If she had gone in and gotten screened and gotten pap smears, yes.**

Q In other words, you are saying based on her young age this -- she may have had other dysplastic incidents in the future?

A **Yes.**

Q But this particular disease at this particular time would have been cured, if diagnosed and properly treated, with a 90 to 95 percent probability?

A **Yes.**

Q Do you think she had lymph node involvement at the time of her diagnosis?

A **The CAT scan indicates that she didn't.**

Q That she did not?

A **Correct.**

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Q Okay. Let me talk a little bit about standard of care with you for a moment moving on pretty quickly here. I would like to go back to your designation there, which is "Exhibit 4," and it represents somewhere in there that it's your opinion that Mrs. Miller was apprised, with a Z, that she needed to return to get her pap repeated. Do you see that?

**A Yes.**

Q Okay. Are you truly taking a stand on that issue in this case?

**A I am sorry? Excuse me?**

Q Are you truly taking a stand on this issue in this case that she was apprised?

**A Yes.**

Q You are?

**A Yes.**

Q Let's hear it then. What's the basis of your opinion that allows you to conclude that Jill was apprised of the need to return to have her pap repeated?

**A I think that the physicians and the system that I have read in the depositions indicate that she would have been apprised of that and that she should get pap**

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**smears every year.**

Q Let's talk about it more specifically, if we can. You have read the various depositions of Dr. Method, Dr. Arauco, Dr. Arus. Anybody else that gives you information in that -- let's talk specifically about their recollections. You -- you read that they recall talking to Jill and telling her to return?

**A Yes.**

Q And do you have -- that doesn't stretch your -- you believe them? You believe that they remember something that happened in a conversation with this woman five-and-a-half years ago?

**A And I think it makes sense that they would tell her that.**

Q Well, let's talk about their recollections first. Do you really think that they recalled that conversation when you can't recall the depositions you have testified in a few years ago?

**A It's -- it's not just an exact recollection. It's how we would manage something at a certain point in time.**

Q Okay. So you -- you would agree with me that

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to -- for them to simply recall this with their raw powers of recollection would indicate a most remarkable memory?

MR. MITSCH: Objection: Ambiguous as to most remarkable.

MR. HIRSHMAN: Well, I -- I don't think it's ambiguous.

THE WITNESS: Well, I think it -- it -- it fits a pattern of what we tell patients when they call about lab tests, what we advise patients that they should come in every year to get a pap smear. It fits a very conducive -- a very -- a pattern and it's very standard.

BY MR. HIRSHMAN:

Q So you choose to base your belief that Jill was apprised --

**A Yes.**

Q -- on the protocol that was set up there rather than on their recollection? Is that what I am hearing?

**A I believe that she was told that she should come in every year for a pap smear and that she should come in to repeat the unsatisfactory one when she was not bleeding.**

Q Yes, I know you believe that. I am trying to

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understand how it is that -- what information you have that allows you to believe that.

**A Two main things. One, that's just standard preaching and she delivered a baby, she had had two pap smears early on. She had seen a number of health care providers and it's very standard dogma that I think everybody would understand that they need to come in for a pap smear every year.**

Q So the standard dogma is --

**A Can we go off the record?**

**(Thereupon, a brief break was taken, and then the deposition continued as follows:)**

**BY MR. HIRSHMAN:**

Q So it's standard dogma to preach to patients just generically that they should get a pap every year?

**A Correct.**

Q Well, that -- that's one issue and maybe that happened, maybe it didn't in this case. Do you have any reason to know that they -- that Jill's health providers did preach that to her at the time of her delivery and thereafter?

In fact, do you know whether Jill was seen --

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how many times was Jill actually seen by a doctor in between the pap she had at her delivery and 19 -- and 1998? Do you know how many times she was seen and can you tell me that during those visits she would have been given the dogma?

**A I -- I can't count to you -- I could count you the times as we went through here. It's a number of times --**

Q Uh-huh.

**A -- that she was seen and certainly through pregnancy. I -- I have rarely met somebody through pregnancy that doesn't understand you need to come in and get a pap smear every year. That would be way, way out there.**

Q Now, let -- let's assume -- there is two different issues here. One is whether she was told whether she needs a pap smear as a general principle every year. That's a little bit different issue than the issue of whether she was told she had a pap smear and the results came back and the results were unsatisfactory and you should get one again. That's a different issue, isn't it?

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**A Yes, there are two issues.**

Q Okay. Let's talk about that second issue.

**A Okay.**

Q Now, what is the basis of your opinion -- I will call it an opinion -- that she was told that she needed to return because the pap that she had gotten in June was unsatisfactory?

**A The health care providers have testified to that and the -- and the depositions of Miss Lingard.**

Q What did Miss Lingard remember?

**A And the other technician testified that there is a computer system whereby when Dr. Method writes repeats on it that there would have been a letter that had -- that was sent to her that it was unsatisfactory.**

Q So that's -- so your opinion is based, number one, on the recollection of Drs. Arus and Arauco and, number two, on the procedure that was described by -- by Lingard and Sweeney?

MR. MITSCH: Ascue.

BY MR. HIRSHMAN:

Q Ascue, correct?

**A Correct.**

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Q Anything else?

**A No.**

Q How did you understand that -- understand that system to work that was described by Lingard and Ascue?

**A Just that when somebody comes in they write out their own card with their address on it. When the results come back, the doctor puts down one of a number of different things to do and then it gets mailed out.**

Q So if -- if that didn't happen, if I could prove to you that that didn't happen, you would have to reconsider your opinion, wouldn't you?

**A Yes, if you would have proof that that did not happen.**

Q Okay. In other words, if I could prove to you that no letter was filled out by her and as a result the mechanism which was in place to send that letter with the results to her was, in fact, not sent, you would have to reconsider?

**A Yes, except that would not have been their standard operating procedure.**

Q It was their standard operating procedure to utilize that letter which she filled out her address on

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and which Dr. Method was required to fill out a part of indicating what the results of the tests were and what his recommendations were, correct?

**A Yes.**

Q Okay. Is there any other information that you are relying on besides the method or the procedure set up in the office as described by Lingard and -- and Ascue, number one, and, number two, the recollections of Drs. Arauco and Arus? Do you have any other basis for concluding that Jill was told to come back for a repeat pap smear because the first one was unsatisfactory?

**A Yes, it's intuitive. Why would a health care provider tell her otherwise or not tell her.**

Q Okay. So it's intuitive. Okay.

**A It makes sense.**

Q You would agree with this? Your opinions on whether or not these doctors in the Air Force comported with acceptable standards of care hinges on whether or not Jill was told to come back for a repeat pap?

**A Could you repeat that?**

MR. HIRSHMAN: Let's try the court reporter.

THE REPORTER: "You would agree with this?

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Your opinions on whether or not these doctors in the Air Force comported with acceptable standards of care hinges on whether or not Jill was told to come back for a repeat pap?"

THE WITNESS: I think it is within the standard of care to tell somebody that their pap smear is unsatisfactory.

BY MR. HIRSHMAN:

Q And to not tell them that their pap smear is unsatisfactory is a departure from acceptable standards of care, correct?

**A With the proviso that a patient also has an obligation to follow up on tests that she is getting.**

Q And, in fact, Jill seems to have followed up. She called on the 15th in the regard to she asked about some labs, correct?

**A Correct.**

Q Do you know what labs she was talking about?

**A She was talking about the bloods that Dr. Method had drawn and her pap smear.**

Q That was a TSH, a T4 and a prolactin?

**A Yes.**

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Q Okay.

(Thereupon, a brief break was taken, and then the deposition continued as follows:)

BY MR. HIRSHMAN:

Q I would like to talk a little bit about refills of birth control pills. You got -- your practice is mostly gynecologic oncology?

**A Yes.**

Q But within the course of your practice do you do any straight gynecology?

**A Yes.**

Q Do you prescribe birth control pills for women?

**A Yes.**

Q You have women calling you up wanting refills?

**A Yes.**

Q You have women coming to your office and wanting refills?

**A Yes.**

Q And you have situations where you give them those refills, correct?

**A Yes.**

Q Do you -- what do you do before you refill a

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woman's -- give your -- what do you do, give them usually a set of refills spanning a period of months?

**A Yes.**

Q How many months, usually?

**A It -- it varies on the situation. It could be anywhere from 3 to 12 months.**

Q Okay. But do you see this as an opportunity to get women back to your office when need be?

**A Yes, it can be.**

Q Okay. In other words, when women have not seen you in a while and they want their birth control pills renewed, those -- that prescription is a pretty good lever to get them in for an examination and a pap --

**A Yes.**

Q -- correct? And you do that?

**A Yes.**

Q And you consider that good practice to do that?

**A Yes.**

Q So before prescribing that you need to look at the patient's chart to see when they were last in to see you before you decide whether you are going to give them another prescription or not?

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**A Yes.**

Q And if they haven't been in to see you or you can discern from their chart that they haven't had a pap for many years that's been a successful pap that shows -- they haven't had a pap that's a satisfactory pap, you tell them they have to come in before you will represcribe, correct?

**A Yes. That's why we generally don't give it for more than a year.**

Q Okay. And you consider that appropriate care to do that?

**A Yes.**

Q And to just hand out birth control pills willy-nilly without consulting the chart would be unacceptable care, correct?

**A I think that would depend on the situation. If I have somebody in the Foreign Service that I have known for a while that's going away, I may give her birth control pills.**

Q What if it's a patient that you haven't seen before but you have her chart and you know that she hasn't had an interpretable pap in five years and you also know

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she is about to leave your practice and go somewhere else and she wants a represcription of her birth control pills? What would you do under those circumstances?

**A In generically speaking. I would like to make sure the patient has an exam and the patient is there in my office and that she gets a -- the appropriate evaluation.**

Q Which would include a pap under the circumstances I just described?

**A Yes, in general, somebody with birth control pills, if they have had a pap smear every year, we would like to continue that, yes.**

Q And if they haven't had one in five years that anyone could interpret you would certainly want them to come in and get a pap?

**A Yes, we would generally do that. There are exceptions.**

Q Does Jill fit into one of those exceptions in this case?

**A I am not really sure. I don't -- I don't -- I know she came in to get birth control pills and she left with Meridia.**

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Q Well, I will tell you that she also got -- I will show you this "Exhibit Number 5."

(Barter Deposition Exhibit 5 was marked for identification and was attached to the transcript.)

BY MR. HIRSHMAN:

Q I am showing you a document that is a medication profile which indicates that in October of '99 Jill was not only prescribed the Meridia but was also prescribed by Dr. Vargas at the Air Force base Ovral 21. It's the top entry there. Do you see that?

**A Yes, I see this.**

Q And it's for three refills of -- what? -- 68 each? That's the quantity there?

**A Maybe 63. 68, maybe.**

Q Yes, 63. Well, it's 21. So 21, 42, 63.

**A Uh-hun.**

Q Okay. 63 is what it is. So that's -- 63 is three -- that's nine months, isn't it?

**A Well, they are 21 in a package. So that's three months and it says "Left two out of three." So that would be six more months. It says, "Refills left two out of three." So presumably she --**

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Q Well, this is the first one right here, the first refill?

**A I see.**

Q Okay. And I suppose whether it's nine months or less than nine months depends on whether or not the way that it is written to be given is correct. It's being written to be given one tab PO TID for seven days, which is how you give it for DUB, right?

**A Correct.**

Q That may be what he wanted to do. It may be that that's what was already in the computer so it just spit it out the same way. Is that how you look at this and see it?

**A It is what it is. One tab PO TID for seven days then, rather than the, one tab PO every day as indicated.**

Q At any rate, she was given a lengthy prescription for this medication, correct?

**A Yes. According to this, yes.**

Q And given the history of her with which she -- which I indicated to you she came to Dr. Vargas requesting this prescription, you wouldn't have given it to her,

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would you?

**A Well, I don't know. I mean, I don't -- this -- this doesn't make any sense. I mean, all I see here is she comes in for birth control pills and leaves with Meridia.**

Q And I want you to assume that she also got the --

**A I -- I would have to --**

Q -- the Ovral.

**A I would have to hear what Dr. Vargas has to say. This -- I don't understand this.**

Q Let's do it as a hypothetical then. If we assume that Dr. Vargas, in fact, gave her Ovral under the circumstances which I described, not just Meridia but Meridia and Ovral, without seeing her and without getting a pap, that isn't the type of care you would want to have practiced in your practice, is it?

MR. MITSCH: Objection: Improper hypothetical.

THE WITNESS: It's too isolated. I can't -- I -- I don't have an opinion.

BY MR. HIRSHMAN:

Q You don't have an opinion?

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**A No. I would have to hear what Dr. Vargas has to say before I can form an opinion about that.**

Q And -- and -- and what if Dr. Vargas says it appears to me that I did indeed prescribe her those medications at that dosage and I did not see her?

**A Let's hypothesize if he said, okay, I will cut you a break, but you go and get your pap smear or find out what the situation is. Again, I don't want to speculate. I want to hear what Dr. Vargas has to say because that's -- you know, I think it's unfair for me to opine without knowing more of the information around that.**

Q So I assume if Dr. Vargas says I remember this patient, too, we all remember her and my memory is as good as Dr. Arauco's and my memory is as good as Dr. Arus's and we are all Mensa children, and then you would -- if he says I remember talking to her and telling her to come in and it's only with her coming in that I would prescribe this medication, then you would say he did fine, correct?

MR. MITSCH Objection: Again, same issue about the improper hypothetical.

THE WITNESS: I don't have an opinion until I see what Dr. Vargas says.

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BY MR. HIRSHMAN:

Q All right. You can -- we can -- we can avoid hypotheticals here. We can't avoid them in a courtroom. What did the standard of care require in 1998 as follow-up in a 25-year-old patient with a previous pap -- without a previous pap in four years when a pap is reported back unsatisfactory due to completely obscuring blood? What is required follow-up?

**A It is for the patient to come back to have the pap smear repeated when she is not bleeding.**

Q And how soon?

**A I don't think that there is any huge rush. I mean, I wouldn't say you have to come in tonight. I would probably say the next several weeks.**

Q Okay. And what is the standard of care that's required as of 1998 as follow-up of such a patient has a pap which is reported back as ASCUS, and that's A-S-C-U-S, cannot exclude HSIL? Are follow-ups required then?

**A That wouldn't have happened in '98.**

Q Well, let's -- well, it would have. It could have. It's not part of the Bethesda system, but you don't think people were reporting out?

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**A I don't think so.**

Q Well, you don't think there were reports of ASCUS, cannot exclude squamous intraepithelial lesion back in 1998?

**A That's different than high grade, though.**

Q Now let's use that one then squamous intraepithelial lesion?

**A To the follow-up for that?**

Q What was the follow-up for that in 1998, again?

**A A lot of people just have the patients come back in six months for another pap smear. Some people would recommend four months. Some people would recommend colposcopy. There is a lot of variation.**

Q What would you have done in 1998?

**A Depends on the patient.**

Q Well, if the patient who is 25 years old. hasn't had a pap that could be read --

**A Well, I would ask that patient to come back --**

Q -- in four years?

**A I would ask that patient to come back when she is not bleeding to repeat the pap smear.**

Q And --

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**A I am sorry. And then -- and then this pap smear I did repeat comes back ASCUS?**

Q No, no. This is the same -- I am giving you the same hypothetical with just two different scenarios. The first one is no pap has been done in four years, a pap is done and comes back unsatisfactory due to completely obscuring blood. And your response was under that circumstance management would require them to come back when not bleeding within the next several weeks, correct?

**A Yes.**

Q Is that what you told me?

**A Yes, yes.**

Q Okay. Now I am going to ask you a different hypothetical.

**A Okay.**

Q And this hypothetical is that we have a person same age in 1998 who is 25 years old, hasn't had a pap in four years and when she has the pap done it comes back reading ASCUS, cannot exclude SIL. What would you want them to do?

**A I would want that patient to come back in -- if it's can't exclude SIL, I would probably ask that patient**

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**to come back in a month or so to get a -- to repeat it and/or do a colposcopy.**

Q And what would dictate -- what would -- what would cause you to choose a pap as opposed to a colposcopy or a colposcopy as opposed to a pap when they come back?

**A I think her other risk factors, the reliability of the patient, sexual history, history of HPV.**

Q Okay. Let's -- I haven't gone through your qualifications and I would like to at this time. Let me start with where you went to college, medical school and we will go from there.

**A Washington and Lee University.**

Q College?

**A College.**

Q When did you graduate?

**A '73.**

Q Medical school?

**A University of Virginia '77.**

Q And you did a -- what did you do then, go straight to a residency or did an internship or --

**A Two years of internal medicine University of Kentucky '77 to '79, Duke for OB/GYN '79 to '83, '83 to '85 University of Alabama GYN oncology fellowship.**

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Q What were those years?

**A '83 to '86.**

Q Three years?

**A Two-and-a-half.**

Q Is that -- isn't that a long fellowship?

**A No, they are three now.**

Q They are three now?

**A Or four.**

Q And you are Board certified in OB/GYN, correct?

**A Yes.**

Q And you are Board certified in --

**A GYN oncology.**

Q -- GYN oncology?

**A Yes.**

Q And you took those and passed them on your first attempt?

**A Yes.**

Q And you are licensed where?

**A Maryland, Virginia and the District.**

Q Let's see. And your practice. Where do you practice out of, what hospitals?

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**A I was at Georgetown from '86 to two years ago, a year and a half ago and then I went into private practice in Washington and Bethesda. So now I practice out of Sibley, Suburban, and Holy Cross mostly.**

Q Sibley Suburban is one hospital or --

**A Sibley comma Suburban --**

Q Okay.

**A -- comma and Holy Cross.**

Q Okay. That's three hospitals.

**A (The witness nodded his head.)**

Q Okay. And do you hold any positions in any societies?

**A I am on the Finance Committee for the Society for GYN Oncology.**

Q Is that -- what is that, a national organization or --

**A Yes.**

Q And you -- you have published -- I have got your CV. You have published in -- how many articles have you published?

**A I don't know. I don't know. Forty.**

Q Okay. Let's see. Tell me a little bit about your practice, what it entails. If you can give me percentages, what -- what kind of patients do you see?

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**A Since I have been in private practice I -- I see -- it seems like I am -- I am -- and I am just adapting into this, but I am seeing more noncancer patients but GYN patients with problems, be it abnormal pap smears, abnormal bleeding, pelvic masses. My percentage was higher of seeing cancer when I was at Georgetown. I am doing much more of what we refer as benign, which it's really not because there is something abnormal.**

Q So you are seeing women with different sorts of dysplasias that have a possibility of ripening into a cancer and you are dealing with them in a preventive fashion, whereas before your practice was much more dealing with women whose disease had already progressed to the point of being a cancer; is that what I am hearing?

**A I think that's correct, yes.**

Q And that your -- do you have any responsibilities other than -- professionally, other than the clinical practice of medicine? Let me ask it a little differently. What percentage of your time is -- your

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professional time is engaged in the clinical practice of medicine?

**A I would say 90, 95 percent.**

Q Okay. So this type of activity that we are doing here today is a small part of that?

**A Yes.**

Q And you have certain administrative responsibilities that are rather small compared to your clinical practice?

**A Yes.**

Q Okay. Let me take a look at your CV a minute. I am just about done. You graduated Magna Cum Laude from medical school or was that --

**A From college.**

Q From college. You were Phi Beta Kappa?

**A Yes.**

Q You were worked at Lombardi Cancer Center?

**A Yes.**

Q That's in Georgetown?

**A Yes.**

Q Did you work with Mark Lippman at all?

**A Yes.**

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Q Good guy.

**A I know Mark very well.**

Q Yes. Do you teach at all?

**A Right now we have students at Holy Cross and other than that it's pretty much working with the physician assistants and teaching them. And I still lecture.**

Q Okay. I have a copy of your CV here and I -- unfortunately, only have one. Do you have one with you?

**A I don't.**

Q Well, let's mark it.

(Barter Deposition Exhibit 6 was marked for identification and was attached to the transcript.)

BY MR. HIRSHMAN:

Q Take a look at your CV there and tell me whether that is an accurate copy of your CV.

**A Yes.**

Q Did I highlight certain things on there?

**A Yes.**

Q It is an accurate copy of your CV?

**A Yes.**

MR. HIRSHMAN: All right. We will mark that --

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we will submit that as "Exhibit 6." That's all I have. Thanks.

THE WITNESS: Thank you.

MR. HIRSHMAN: Thanks very much. Any questions? All right. You have a right to read or waive the right to read.

MR. MITSCH: I suggest that you read it.

THE WITNESS: I would like to read it.

(Signature having not been waived, the deposition of JAMES BARTER, M.D. was concluded at 7:55 p.m.)

* * *

ACKNOWLEDGMENT OF DEPONENT

I, JAMES F. BARTER, M.D., do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me and any corrections appear on the attached Errata sheet signed by me.

_____ _____

(DATE) (SIGNATURE)

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CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

I, PEGGY L. DINGLE, a Notary Public, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 25th day of October 2004.

My commission expires:
August 1, 2006

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF MARYLAND

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