

## Deposition of James Bass, Jr., M.D. - October 27, 2003

<p>Page 1</p> <p>1 IN THE CIRCUIT COURT OF COMMON PLEAS 2 OF CUYAHOGA COUNTY, OHIO</p> <p>3 WILLIAM J. GILL, III 4 Executor of the Estate 5 of DANIEL P. GILL, 6 deceased, 7 Plaintiff, 8 vs. Case No. 9 457639 10 11 ROGER A. MANSNERUS, M.D. 12 et al., 13 Defendants.</p> <p>14 15 TELEPHONIC DEPOSITION OF 16 JAMES BASS, JR., M.D. 17 18 October 27, 2003 19 3:01 p.m. 20 4045 Newman Road 21 Racine, Wisconsin 22 23 CORINNE M. DAVIS 24 a Notary Public 25 in and for the State of Wisconsin</p>	<p>Page 3</p> <p>1 Telephonic Deposition of James Bass, Jr., M.D. 2 October 27, 2003 3 JAMES BASS, JR., M.D., called as a 4 witness herein by the Defendants, after having 5 first been duly sworn, was examined and 6 testified as follows: 7 EXAMINATION 8 BY-MR. WARNER: 9 Q. Doctor, for the record will you 10 state your name? 11 A. James Bass, Junior, M.D. 12 Q. My name is Robert Warner, I'm an 13 attorney representing Dr. Mansnerus. I take 14 it you've been to a deposition before? 15 A. Yes, I have. 16 Q. Okay. You've been identified as 17 an expert on behalf of the plaintiff in this 18 case. Do you have your file in front of 19 you? 20 A. Yes, I do. 21 Q. All right. Can you identify for 22 the record what you have in front of you? 23 A. I sure can. I've got my letter 24 that I sent to Mr. Mishkind September 22nd -- 25 6, 2002, relative to my review of the medical</p>
<p>Page 2</p> <p>1 APPEARANCES 2 APPEARED TELEPHONICALLY ON BEHALF OF THE 3 PLAINTIFF 4 BECKER &amp; MISHKIND 5 BY MR. HOWARD D. MISHKIND 6 The Skylight Office 7 Tower, Suite 660 8 Cleveland, Ohio 44113 9 10 APPEARED TELEPHONICALLY ON BEHALF OF THE 11 DEFENDANTS 12 REMINGER &amp; REMINGER 13 BY MR. ROBERT WARNER 14 1400 Midland 15 Building, 101 Prospect Avenue 16 West, Cleveland, Ohio 44115-1093 17 18 19 20 21 22 23 24 25</p>	<p>Page 4</p> <p>1 records of Daniel Gill. I also have several 2 sheets of paper here which are dated that 3 they're originally addressed to Attorney Howard 4 Mishkind. They're from different doctors. 5 There's reports on them. 6 Q. Okay. You identified what you 7 have? 8 A. I've got one that says -- Let's 9 see. It's from Robert J. Steel, M.D., 10 F.A.C.P. I have one from -- it's from -- 11 let's see -- 12 Q. Doctor, did you have these last 13 reports before you wrote your report? 14 A. No, I did not. John E. Sullivan, 15 M.D., is the next one. I have one from -- 16 wait a minute -- from Mark J. Bachman, M.D. 17 Q. Okay. 18 A. Those are the records I have in 19 front of me. I also had some deposition of 20 Norman -- Nathan Levitan, M.D. 21 Q. Okay. 22 A. And I also have a deposition of 23 Roger Mansnerus, M.D., and a deposition of 24 Raymond L. Rossman, M.D. 25 Q. Okay.</p>



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1 A. That's it.  
 2 Q. Do you have the medical records?  
 3 A. Oh, yes, I do have those.  
 4 Q. Anything else besides that?  
 5 A. No.  
 6 Q. What about any letters from  
 7 plaintiff's counsel?  
 8 A. No, I don't have anything from him  
 9 except I've got that one letter I mentioned  
 10 before.  
 11 Q. Okay. Can you go off the record.  
 12 If you hand that letter to the court  
 13 reporter?  
 14 A. Okay.  
 15 MR. MISHKIND: For the record,  
 16 which letter is that the doctor is handing to  
 17 the court reporter?  
 18 MR. WARNER: I think he indicated  
 19 the letter that he received from you.  
 20 MR. MISHKIND: Okay. I'm not sure  
 21 he identified that.  
 22 MR. WARNER: I'm going to have it  
 23 marked then he can identify it. Let me know  
 24 when we're ready to go, Ms. Reporter.  
 25 THE WITNESS: I'm afraid I can't

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1 find it.  
 2 (Discussion held off the record.)  
 3 (Exhibit-1 was marked for  
 4 identification.)  
 5 BY MR. WARNER:  
 6 Q. Doctor, is that the only letter  
 7 you had from plaintiff's counsel?  
 8 A. I had from his -- from a --  
 9 Q. Was that a yes?  
 10 A. No.  
 11 Q. Do you have other letters from  
 12 plaintiff's counsel?  
 13 A. I have one from Mary Ellen  
 14 Sansbury, RN, LNC.  
 15 Q. And all -- Have those letters  
 16 given to the court reporter and she'll mark  
 17 them as exhibits.  
 18 (Exhibit-2 was marked for  
 19 identification.)  
 20 THE WITNESS: Okay. Okay. We're  
 21 all set.  
 22 BY MR. WARNER:  
 23 Q. Doctor, go through the records and  
 24 just identify what Exhibit 2 is?  
 25 A. Exhibit 2 is a letter from Mr.

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1 Mishkind in which he faxed me for a Grand  
 2 Jury -- Wait a minute. That's not the right  
 3 one.  
 4 Q. As a suggestion, can we have the  
 5 speakerphone literally very close to you?  
 6 A. Good enough. How's that?  
 7 Q. Much better.  
 8 A. Okay. Good enough.  
 9 Q. And what again was Exhibit 2?  
 10 A. Exhibit 2 is a letter from Mary  
 11 Ellen Sansbury.  
 12 Q. Do you know who that is?  
 13 A. She's a nurse that works with the  
 14 -- this group of lawyers.  
 15 Q. What group of lawyers?  
 16 A. She's a nurse/legal assistant with  
 17 the group of Becker, Mishkind.  
 18 Q. With Mr. Mishkind's firm. I  
 19 understand. All right. Any others letters,  
 20 any other exhibits?  
 21 A. Exhibit 1 is from Mr. Mishkind  
 22 himself.  
 23 Q. All right. Is there an Exhibit 3  
 24 yet?  
 25 A. No, Exhibit 1 and 2.

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1 Q. Okay. So we've identified all the  
 2 letters you have in your file?  
 3 A. That's correct.  
 4 Q. Have you pulled any articles or  
 5 any journals or medical articles on this  
 6 subject?  
 7 A. No, I haven't.  
 8 Q. Do you consider any journals or  
 9 articles authoritative in this specific --  
 10 related to this case?  
 11 A. Well, I'll tell you, I can't think  
 12 of any one specific article that's really  
 13 specific on this sort of case. However, I  
 14 have seen articles that talked about it in  
 15 the past.  
 16 Q. This is my only chance to talk to  
 17 you before the trial. Are you going to  
 18 identify any articles as being authoritative  
 19 in this case?  
 20 A. No, I'm not.  
 21 Q. Okay. If you do so, will you  
 22 please notify Mr. Mishkind so I'm aware of  
 23 that?  
 24 A. Sure.  
 25 Q. How old are you, Doctor?



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<p>1 A. 63.</p> <p>2 Q. All right. And have you ever</p> <p>3 served as an expert before in medical/legal</p> <p>4 cases?</p> <p>5 A. Yes, I have.</p> <p>6 Q. All right. What year did you</p> <p>7 first start?</p> <p>8 A. 1992.</p> <p>9 Q. That was 1992?</p> <p>10 A. That's correct.</p> <p>11 Q. Okay. How many cases have you</p> <p>12 done since 1992, how many cases have you</p> <p>13 reviewed?</p> <p>14 A. I don't know. Maybe 100 or so.</p> <p>15 Q. Do you keep a list of them</p> <p>16 anywhere?</p> <p>17 A. No, I don't.</p> <p>18 Q. And how do you break that down</p> <p>19 plaintiff versus defense?</p> <p>20 A. 99 plaintiffs and one percent is</p> <p>21 -- one case has been for a defendant.</p> <p>22 Q. Okay. Do you have your name with</p> <p>23 any medical/legal organization that purports to</p> <p>24 indicate you're willing to review medical/legal</p> <p>25 cases?</p>	<p>1 A. How many cases?</p> <p>2 Q. Yes.</p> <p>3 A. Do I have?</p> <p>4 Q. Yes.</p> <p>5 A. I'm retired.</p> <p>6 Q. Okay. You're retired. When did</p> <p>7 you retire?</p> <p>8 A. July of -- July of 2002.</p> <p>9 Q. So you're no longer practicing</p> <p>10 medicine?</p> <p>11 A. No.</p> <p>12 MR. MISHKIND: Doctor, I think</p> <p>13 when he asked you how many cases you have in</p> <p>14 house, he wanted to know how many cases</p> <p>15 you're reviewing currently.</p> <p>16 BY MR. WARNER:</p> <p>17 Q. We'll go back to that. I'm going</p> <p>18 to go in this area. What do you currently</p> <p>19 -- Doctor, was there a specific reason that</p> <p>20 you retired at age 63?</p> <p>21 A. Yes. I developed Parkinson's</p> <p>22 disease.</p> <p>23 Q. Are you being treated for that?</p> <p>24 A. Oh, yes.</p> <p>25 Q. When was that diagnosis made?</p>
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<p>1 A. No, I don't.</p> <p>2 Q. All right. How do most of the</p> <p>3 cases come to you?</p> <p>4 A. I used to put ads in the Trial</p> <p>5 Magazine.</p> <p>6 Q. Which trial magazine?</p> <p>7 A. The name of it is Trial Magazine.</p> <p>8 Q. Very good. And has Mr. Mishkind</p> <p>9 or his firm worked with you before?</p> <p>10 A. Yes, he has.</p> <p>11 Q. On how many occasions?</p> <p>12 A. Once before.</p> <p>13 Q. And what was that case about?</p> <p>14 A. It was about a thoracic surgical</p> <p>15 case also. I don't recall really that much</p> <p>16 about it except it was about a guy who was</p> <p>17 in the hospital and developed atelectasis and</p> <p>18 did not check -- did not get a follow-up</p> <p>19 x-ray and he had lung cancer.</p> <p>20 Q. Do you know what happened to that</p> <p>21 case?</p> <p>22 A. Yes, they settled that case. It</p> <p>23 did not go to trial.</p> <p>24 Q. Okay. How many cases do you</p> <p>25 currently have in house?</p>	<p>1 A. I think it was January of 19 --</p> <p>2 2002.</p> <p>3 Q. So currently you're spending zero</p> <p>4 time in the active practice of clinical</p> <p>5 medicine?</p> <p>6 A. That's true.</p> <p>7 Q. Okay. And then how many -- To go</p> <p>8 back to this, how many cases do you currently</p> <p>9 have in house in reference to medical/legal</p> <p>10 files?</p> <p>11 A. Just this one.</p> <p>12 Q. Just this one.</p> <p>13 A. That's correct.</p> <p>14 Q. You're not taking on any new ones?</p> <p>15 A. I would if I could get them. At</p> <p>16 this time I'm not advertising so I'm not</p> <p>17 getting anything.</p> <p>18 Q. Okay. Is that a multiple reason,</p> <p>19 that is, you retired and your health</p> <p>20 problems?</p> <p>21 A. Nope, just that I retired.</p> <p>22 Q. Okay.</p> <p>23 A. I'm thinking of starting up again</p> <p>24 starting in the beginning of the year.</p> <p>25 Q. Okay. Beginning starting up what</p>



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<p style="text-align: right;">Page 13</p> <p>1 again?</p> <p>2 A. Medical/legal.</p> <p>3 Q. Medical/legal cases?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. All right. Doctor, have</p> <p>6 you ever been sued for medical malpractice?</p> <p>7 A. Yes, I have.</p> <p>8 Q. On how many occasions?</p> <p>9 MR. MISHKIND: Objection and</p> <p>10 continuing line objection to any questions of</p> <p>11 the doctor being sued but you can go ahead</p> <p>12 and answer the question, Doctor.</p> <p>13 THE WITNESS: Four times.</p> <p>14 BY MR. WARNER:</p> <p>15 Q. Will you briefly go through --</p> <p>16 Were all of them in -- What city are you in,</p> <p>17 Milwaukee?</p> <p>18 A. Yes.</p> <p>19 Q. Were all in the Milwaukee area?</p> <p>20 A. Yes.</p> <p>21 Q. What county is that?</p> <p>22 A. It's Milwaukee County.</p> <p>23 Q. Okay. Tell me briefly what each</p> <p>24 of the four cases was about and what happened</p> <p>25 to it?</p>	<p style="text-align: right;">Page 15</p> <p>1 Q. So what happened to the patient?</p> <p>2 A. The patient died about two days</p> <p>3 later. It turns out that the autopsy</p> <p>4 revealed that his bowel had indeed died.</p> <p>5 Q. Okay.</p> <p>6 A. But the only one who was sued was</p> <p>7 me, not my partner who talked me into this</p> <p>8 sort of business.</p> <p>9 Q. So that case was settled?</p> <p>10 A. Yes, \$170,000.</p> <p>11 Q. Okay. Then the next file?</p> <p>12 A. Next case was in 1987 which time I</p> <p>13 saw a patient who had been seen in the ER on</p> <p>14 the Saturday before having a cold, pulseless</p> <p>15 left leg that was -- that was quite painful.</p> <p>16 Patient had a white count of 26,000, however,</p> <p>17 the diagnosis of the emergency room physician</p> <p>18 was that she had some sort of respiratory</p> <p>19 problem so she told him to go home. When she</p> <p>20 saw her doctor on Monday, it had been 72</p> <p>21 hours so there was nothing to do on the case</p> <p>22 but kind of let her go. What I did is I</p> <p>23 told them exactly what had happened, what was</p> <p>24 going on. They decided they wanted to have</p> <p>25 someone else do the surgery so they took her</p>
<p style="text-align: right;">Page 14</p> <p>1 A. Okay. The first case was three</p> <p>2 months after I got in the practice which was</p> <p>3 back in November of 1981 and that case</p> <p>4 involved a patient who came to me with a</p> <p>5 Bochdalek hernia that was incarcerated. I had</p> <p>6 known about the patient before because of the</p> <p>7 fact that he had been seeing a doctor friend</p> <p>8 of mine, however, the guy did not want to</p> <p>9 come in because he was trying to make more</p> <p>10 money. So when he came in, his Bochdalek</p> <p>11 hernia was incarcerated, therefore, there was</p> <p>12 no question we had to do something about it</p> <p>13 so such that my senior partner and I took</p> <p>14 him in to surgery. And what I did is opened</p> <p>15 the guy up and sure enough, there was a</p> <p>16 Bochdalek hernia. It appeared the small bowel</p> <p>17 was dead so what I was going to do is take</p> <p>18 it all out but he said that if we took it</p> <p>19 out the patient would be a GI cripple and he</p> <p>20 said why don't we watch him and see if he</p> <p>21 gets better. He did appear to get a little</p> <p>22 better over the next 15, 20 minutes,</p> <p>23 therefore, I listened to him and closed the</p> <p>24 patient up and left the Bochdalek hernia</p> <p>25 repaired but the bowel was not removed.</p>	<p style="text-align: right;">Page 16</p> <p>1 to another hospital where they took off her</p> <p>2 leg that afternoon. She sued everyone</p> <p>3 involved. I was let off and her doctor was</p> <p>4 let off after a -- after a judge looked at</p> <p>5 it and said there was nothing there against</p> <p>6 us. So -- Let me think now. What happened</p> <p>7 is that we were let off with prejudice.</p> <p>8 With prejudice.</p> <p>9 MR. MISHKIND: Do you want the</p> <p>10 doctor to go into as much detail?</p> <p>11 MR. WARNER: I think he's doing</p> <p>12 fine.</p> <p>13 BY MR. WARNER:</p> <p>14 Q. Let's go on to the third thing.</p> <p>15 Just a couple sentences about what happened?</p> <p>16 A. Third case was a --</p> <p>17 MR. MISHKIND: Excuse me for one</p> <p>18 second. Let me reiterate my continuing line</p> <p>19 objection to any questions concerning the</p> <p>20 doctor's medical malpractice but go ahead,</p> <p>21 Doctor, answer the question.</p> <p>22 THE WITNESS: Okay. The third one</p> <p>23 was a patient who underwent -- Let's see now</p> <p>24 what happened. It was a patient who had a</p> <p>25 -- her toenail removed about two weeks before</p>



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<p style="text-align: right;">Page 17</p> <p>1 by a podiatrist who hadn't checked her 2 pulses. When she came in she had pus coming 3 out of her toe. When I seen her I could tell 4 she didn't have any pulses by looking at her, 5 and, indeed, she did not have pulses. We did 6 an arteriogram and she had no blood flow to 7 her leg which was the reason why she had 8 gotten in trouble. I told the family this 9 but they said well, we want you to try to 10 get blood flow to her leg so we did a bypass 11 on it but it didn't work. And so she too 12 underwent a leg amputation. And what they did 13 is they then sued the whole group. I was 14 again let off because they said hey, the guy 15 did whatever he could for the lady. And so 16 that took care of that problem. I was let 17 off with prejudice again. 18 BY MR. WARNER: 19 Q. And the last suit? 20 A. The last case was one of a patient 21 who I had done surgery on before who was a 22 heavy smoker. I told her I would not do 23 surgery any further unless she quit smoking, 24 she told me she had, however, she really 25 hadn't. I didn't find out until after we</p>	<p style="text-align: right;">Page 19</p> <p>1 Q. This is the only report you wrote, 2 the September 26, 2002? 3 A. Yes. 4 Q. All right. Doctor, among items 5 you were sent, weren't you sent x-rays? 6 A. Yes. 7 Q. And what were the dates on the 8 x-rays? 9 A. Oh, I think that was -- I think 10 that was December 30th or something like 11 that. Wait a minute. It was one -- It was 12 December 30th, 1999. 13 Q. What happened to the x-rays? 14 A. X-rays were lost. 15 Q. How did that happen? 16 A. Well, when I retired my wife had 17 me get rid of all the x-rays laying around 18 so I just took them and threw them all out. 19 Q. Okay. 20 A. Then I didn't discover until later 21 I accidentally thrown out the one I wanted to 22 keep of this patient. 23 Q. Okay. But like you said, this is 24 the only case you have going on now anyway? 25 A. That's correct.</p>
<p style="text-align: right;">Page 18</p> <p>1 had done her surgery which was fairly major 2 and involved an aortofemoral bypass. And so 3 she ended up dying of a problem with her 4 lungs and so I was sued then. I lost that 5 case. 6 Q. Did you go to trial on that one? 7 A. No, we did not go to trial. We 8 settled for 340,000. 9 Q. 340,000? 10 A. That's correct. 11 Q. Okay. Doctor, what do you charge 12 for writing -- for reviewing a file? 13 A. Reviewing a file is 400 an hour. 14 Q. All right. For deposition what do 15 you charge? 16 A. 2,500. 17 Q. How much? 18 A. 2,500. 19 Q. \$2,500 you're charging me for a 20 discovery deposition? 21 A. That's correct. 22 Q. What do you charge for trial? 23 A. 5,000. 24 Q. 5,000? 25 A. That's correct.</p>	<p style="text-align: right;">Page 20</p> <p>1 Q. Okay. Doctor, on December 30th, 2 1999, Mr. Gill came in to Dr. Mansnerus's 3 office, how long had he been having problems? 4 A. Six weeks prior to being seen. 5 Q. Did you look at the history as 6 reported in the chart? 7 A. Yes. 8 Q. You don't recall a forwarding 9 history? 10 A. Well, it says chest pain started 11 six weeks prior to being seen. 12 Q. How about the history of cough and 13 yellow sputum? 14 A. That was -- that was December 15 30th. Okay. That was four days prior. 16 Q. Okay. 17 MR. MISHKIND: I think we may be 18 talking about two different visits, Rob. 19 MR. WARNER: I was talking about 20 the December 30th. 21 THE WITNESS: I was talking about 22 December 9th. Sorry. 23 MR. MISHKIND: As long as we're on 24 the same page now. 25 BY MR. WARNER:</p>



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<p>1 Q. On that visit what else did Dr. 2 Mansnerus do, December 30th, 1999? 3 A. Yeah. Plaintiff would get a chest 4 x-ray and perform follow-up thereafter. 5 Q. Are you aware that he prescribed 6 antibiotics? 7 A. Yes, he prescribed zithromax as I 8 recall. 9 Q. And also Robitussin? 10 A. He might have done that too. 11 Q. Were those things within the 12 standard of care? 13 A. Sure. 14 Q. What -- The chest x-ray indicated 15 that there was -- gave a diagnosis of 16 pneumonia? 17 A. The chest x-ray said that the 18 patient had an infiltrate in the upper lobe. 19 Q. Did they give a diagnosis? 20 A. I don't know. I don't remember. 21 Q. Would that be important? 22 A. I suppose so. Except for the fact 23 that you can't get pneumonia from just a 24 plain old pneumonitis. Pneumonitis is not 25 the same as pneumonia. Pneumonia is where</p>	<p>1 A. I'd say probably half and half. 2 Q. Half and half. Okay. Doctor, can 3 you outline what you feel -- Your opinion is 4 Dr. Mansnerus deviated from the standard of 5 care? 6 A. Yes, I do. 7 Q. Will you outline for me what your 8 criticisms are of the doctor? 9 A. I think given Mr. Gill's history 10 of being an ex-smoker and the findings on 11 chest x-ray, there is no question he should 12 have been referred for a chest x-ray followed 13 by a CT scan, and in spite of the 14 recommendation of the radiologist he did not 15 do what was clearly indicated when he saw the 16 patient in January of 2000. It's my opinion 17 that had Dr. Mansnerus followed the 18 appropriate standards of care with the 19 follow-up chest and further diagnostic studies 20 Mr. Gill's nonsmall cell lung cancer would 21 have been diagnosed in late February -- late 22 January or early February. With a much 23 earlier diagnosis, he would have had a 24 substantially increased likelihood of 25 successful resection with an increased</p>
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<p>1 the entire lobe is taken up with bacteria and 2 all that sort of business. 3 Q. The -- If the chest x-ray gave a 4 diagnosis or impression of pneumonia, you 5 wouldn't disagree with it? 6 A. No, I wouldn't. 7 Q. Doctor, you're a vascular surgeon? 8 A. I do vascular and thoracic. 9 Q. Are you board certified in both 10 areas? 11 A. Board certified in thoracic 12 surgery. 13 Q. Not vascular surgery? 14 A. No. 15 Q. When you were practicing and I 16 think you last retired was January of 2002, 17 was I correct that you retired January 2002? 18 A. That's correct. 19 Q. What was your breakdown of patients 20 as far as vascular versus thoracic surgery? 21 A. I had a couple of thoracic and 22 about four or five vascular cases. 23 Q. Can you give me the percentage-wise 24 was most your work done in vascular surgeries 25 or how would you break it down for me?</p>	<p>1 likelihood of favorable prognosis. It's my 2 opinion that with a timely and appropriate 3 diagnosis in early 2000, Mr. Gill would 4 probably have survived. Without any question, 5 the delay caused by not performing any repeat 6 chest x-ray followed by a CT scan destroyed 7 any chance for Mr. Gill to survive lung 8 cancer and caused him to undergo extensive 9 treatment for metastatic disease caused by the 10 delayed diagnosis. 11 Q. Doctor, can I stop you. I notice 12 you're reading from your report, right? 13 A. No. 14 Q. You're reading word for word from 15 your report? 16 A. Really? 17 Q. Yeah. I can read myself. 18 A. Um-hum. 19 Q. I appreciate that. 20 A. Um-hum. 21 Q. All right. Ex-smoker, how long 22 was he a smoker? 23 A. Smoker about 20, 25 years. 24 Q. And how many cigarettes a day did 25 he smoke or packs a day?</p>



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<p>1 A. Pack and a half.</p> <p>2 Q. Doctor, is this patient's lung</p> <p>3 cancer related to the patient's history of</p> <p>4 smoking?</p> <p>5 A. In all likelihood it is.</p> <p>6 Q. Would the pack and a half or as</p> <p>7 you indicated 20 years or so, 20, 25 five</p> <p>8 years, is that a significant amount of</p> <p>9 cigarette smoking?</p> <p>10 A. It is a significant amount of</p> <p>11 cigarette smoking, yes.</p> <p>12 Q. Doctor, this patient stopped</p> <p>13 smoking sometime before this, correct?</p> <p>14 A. 1987, yes.</p> <p>15 Q. Why is it that -- Did the patient</p> <p>16 still remain a risk for lung cancer?</p> <p>17 A. Oh sure he did.</p> <p>18 Q. Even though he stopped smoking?</p> <p>19 A. That's correct.</p> <p>20 Q. Why is that?</p> <p>21 A. Because of the fact that what</p> <p>22 happens when you injure the lung by smoke is</p> <p>23 that it remains at risk to develop lung</p> <p>24 cancer for a number of years after you quit</p> <p>25 you see. And if the cells begin to change</p>	<p>1 indicate that you don't want to do a</p> <p>2 follow-up too quickly with pneumonia, you want</p> <p>3 to give it time to see what's happening and</p> <p>4 I've heard two to three months is an</p> <p>5 appropriate time frame to wait to do repeat</p> <p>6 chest x-ray?</p> <p>7 A. Four to six weeks.</p> <p>8 Q. Four to six weeks?</p> <p>9 A. That's correct.</p> <p>10 Q. So if the chest x-ray was taken --</p> <p>11 the first one December 30th, that would put</p> <p>12 us in the range using your outline anywhere</p> <p>13 from January 30th until approximately February</p> <p>14 15th?</p> <p>15 A. That's correct.</p> <p>16 Q. And you're thinking at that time</p> <p>17 is that -- why don't you want to do a repeat</p> <p>18 chest x-ray earlier than that?</p> <p>19 A. Well, some people would think well</p> <p>20 if you're going to let this thing -- if</p> <p>21 you're going to let the disease cure itself,</p> <p>22 let it do that and let the x-ray return to</p> <p>23 normal and that's when you take a review</p> <p>24 x-ray because if it's still something on the</p> <p>25 x-ray you'll see it again then you'll know</p>
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<p>1 which is what happened to him, then the thing</p> <p>2 is still there, they can get lung cancer you</p> <p>3 see. Because what happens -- I can tell you</p> <p>4 if you had been diagnosed with lung cancer in</p> <p>5 the year 1899, you would have been sent</p> <p>6 directly out to the university because reason</p> <p>7 is it was such a rare disease at that time.</p> <p>8 So few people smoked. And yet nowadays it's</p> <p>9 so common, everyone sees the disease. And</p> <p>10 it's all correlated to cigarette smoking. As</p> <p>11 a matter of fact, in women it's been shown</p> <p>12 that they -- they started -- when they</p> <p>13 started smoking heavily around World War II,</p> <p>14 men all went to war, left women here and</p> <p>15 started smoking, what happened in that</p> <p>16 situation is that the incidents of lung</p> <p>17 cancer started going up until today it's the</p> <p>18 most common thing in women where before it</p> <p>19 was breast cancer.</p> <p>20 Q. Doctor, in the chest -- Initial</p> <p>21 chest x-ray was taken December 30th, 1999?</p> <p>22 A. Um-hum.</p> <p>23 Q. And the impression I think</p> <p>24 indicated was pneumonia. What -- For</p> <p>25 recommended follow-up do some physicians</p>	<p>1 it's not pneumonia that you're looking at,</p> <p>2 it's something else.</p> <p>3 Q. I think you told me on the</p> <p>4 December 30th, 1999, visit you had no</p> <p>5 criticisms of the medical care of Dr.</p> <p>6 Mansnerus?</p> <p>7 A. No.</p> <p>8 Q. Okay. And it's on -- in and</p> <p>9 around the time frame of January 30th to</p> <p>10 February 15th that's when your criticisms</p> <p>11 started to come in?</p> <p>12 MR. MISHKIND: Objection.</p> <p>13 Objection. Go ahead, Doctor, if you understand</p> <p>14 the question. I don't think that's the</p> <p>15 testimony.</p> <p>16 THE WITNESS: What I really think</p> <p>17 is this, that what he should have done is</p> <p>18 the first time he saw this guy he should</p> <p>19 have gotten a chest x-ray.</p> <p>20 BY MR. WARNER:</p> <p>21 Q. I thought we got a chest x-ray on</p> <p>22 December 30th?</p> <p>23 A. That wasn't the first time he saw</p> <p>24 him. The first time he saw him was December</p> <p>25 the 9th.</p>



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<p style="text-align: right;">Page 29</p> <p>1 Q. You want to go back to December 2 the 9th now? 3 A. Oh, sure I do. 4 Q. All right. Because before I asked 5 you about your criticisms and I didn't hear 6 you talk about that date, maybe I 7 misunderstood you when I asked you what the 8 criticisms were? 9 A. You said you wanted to know 10 criticisms of treatment on the 30th which I 11 didn't have any problem with. 12 Q. I don't want to limit you in any 13 way and I apologize if I somehow left you 14 with that impression. I'll repeat the 15 question again. This my only chance to get to 16 talk to you. Your criticisms of Dr. 17 Mansnerus? 18 A. Okay. I think he should have 19 gotten an x-ray on him on the 9th of 20 December when he first saw the patient. 21 Q. Okay. You agree that the 22 follow-up chest x-ray of December 30, 1999, 23 the impression of pneumonia was correct so if 24 a chest x-ray had been taken 21 days earlier 25 more likely than not that would have showed a</p>	<p style="text-align: right;">Page 31</p> <p>1 Q. Okay. I'll accept that and move 2 on. And what would that chest x-ray that 3 you talked about in that time frame of 4 January 30th and February 15th what would 5 that have shown? 6 A. Probably would have shown no 7 change. 8 Q. No change? 9 A. That's correct. 10 Q. Did the patient's symptoms improve 11 according to the records of Dr. Mansnerus? 12 A. I'll check and tell you. 13 Q. And specific to the January 6th, 14 2000, note? 15 A. He was complaining of lingering 16 cough. 17 Q. Isn't there some wording before 18 that, Doctor? 19 A. Let's see. 20 Q. He's improved? 21 A. I'm trying to find it here in the 22 notes. Okay. Let's see here. Seen one week 23 ago. This is December 6th. 24 MR. MISHKIND: Doctor, you mean 25 January 6?</p>
<p style="text-align: right;">Page 30</p> <p>1 diagnosis of pneumonia or maybe it wouldn't 2 or you don't know? 3 A. I feel it probably would have 4 shown the infiltrate in the upper lobe you 5 see. 6 Q. Doctor, how sure are you of that? 7 MR. MISHKIND: Objection to the 8 form of the question but go ahead, Doctor. 9 THE WITNESS: I'm fairly certain 10 that's what it would have shown you see 11 because that's when he first had a problem. 12 BY MR. WARNER: 13 Q. Okay. The patient never had 14 pneumonia before? 15 A. I know. 16 Q. And he had stopped smoking some 17 years before? 18 A. Yes, that's correct. 19 Q. All right. I guess I'm still 20 looking at when the follow-up chest x-ray 21 then should have been done? 22 A. Follow-up chest x-ray should have 23 been done four to six weeks after the first 24 one which would have been anywhere from 25 January the 30th through February the 15th.</p>	<p style="text-align: right;">Page 32</p> <p>1 THE WITNESS: That's correct. 2 Seen one week ago with pneumonitis. Let's 3 see. And mostly bland to normal except for 4 lingering cough. 5 BY MR. WARNER: 6 Q. What did you say before the 7 lingering cough? 8 A. Something to normal except for -- 9 mostly something to normal. 10 Q. Back to normal? 11 A. Mostly back to normal except for 12 lingering cough. 13 Q. And I think on December 30th did 14 the patient have a temperature, I had it at 15 101.4? 16 A. I think you're right. 17 Q. So is it not only did the chest 18 x-ray, the symptoms of December 30th were 19 indicative of pneumonia? 20 A. Yes, they were. 21 Q. All right. It's your opinion that 22 on or about December 30th, 1999, Mr. Gill did 23 have pneumonia? 24 A. Yes, I guess he did, didn't he? 25 Q. Okay. Going back to when the</p>



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<p style="text-align: right;">Page 33</p> <p>1 second chest x-ray that you suggested be done</p> <p>2 that they would -- it would have still showed</p> <p>3 -- what again would it have showed?</p> <p>4 A. Well, I'll tell you what it would</p> <p>5 have shown is some sort of patchy infiltrate</p> <p>6 in the left upper lobe.</p> <p>7 Q. What would that prompt to be done?</p> <p>8 A. That would have prompted a call to</p> <p>9 the surgeon to come -- or the pulmonologist</p> <p>10 to come and do a bronchoscopy on the patient.</p> <p>11 Q. To do exactly what?</p> <p>12 A. A bronchoscopy.</p> <p>13 Q. A bronchoscopy --</p> <p>14 A. Um-hum.</p> <p>15 Q. -- would that take a couple days</p> <p>16 to a week to get scheduled or maybe longer?</p> <p>17 MR. MISHKIND: Objection. Go</p> <p>18 ahead, Doctor.</p> <p>19 THE WITNESS: Couple days I would</p> <p>20 guess.</p> <p>21 BY MR. WARNER:</p> <p>22 Q. Okay. This would not be done on</p> <p>23 a stat basis, this would be done --</p> <p>24 A. Urgently.</p> <p>25 Q. That would be what?</p>	<p style="text-align: right;">Page 35</p> <p>1 Q. Doctor, we're already past that.</p> <p>2 What you told me was the time frame of</p> <p>3 January 30 to February 15th and then you're</p> <p>4 tacking -- I want to know from that second</p> <p>5 chest x-ray how much time would have to go</p> <p>6 by until in your opinion the diagnosis would</p> <p>7 have been, one to two weeks or shorter?</p> <p>8 A. One week. One week would be good.</p> <p>9 Q. What would be the max number?</p> <p>10 A. Two to three week.</p> <p>11 Q. Two to three weeks?</p> <p>12 A. Um-hum.</p> <p>13 Q. Anywhere from one to two to three</p> <p>14 weeks?</p> <p>15 A. That's correct.</p> <p>16 Q. So that could bring us up to</p> <p>17 February 15th or even in beginning of March</p> <p>18 when the diagnosis would be made?</p> <p>19 A. That's correct.</p> <p>20 Q. If the diagnosis were made during</p> <p>21 that time frame, that still would have been</p> <p>22 within the standard of care?</p> <p>23 A. That's true.</p> <p>24 Q. Okay. When was the diagnosis</p> <p>25 made?</p>
<p style="text-align: right;">Page 34</p> <p>1 A. Done on an urgent basis.</p> <p>2 Q. Okay. Then what would that show?</p> <p>3 A. Probably show the tumor in the</p> <p>4 left upper lobe bronchus that's causing the</p> <p>5 problem you see. And once it was biopsied,</p> <p>6 then you would know what the hell was going</p> <p>7 on.</p> <p>8 Q. They'd have to do a biopsy then?</p> <p>9 A. Sure.</p> <p>10 Q. When would the biopsy be scheduled?</p> <p>11 A. Biopsy would be scheduled the same</p> <p>12 time the bronchoscopy is done.</p> <p>13 Q. All right. So what time frame</p> <p>14 would the diagnosis of cancer be made then?</p> <p>15 A. Oh, anywhere from -- If he had</p> <p>16 done it when it should have been done, it</p> <p>17 would have already been made.</p> <p>18 Q. I'm trying to get a time frame.</p> <p>19 You have second chest x-ray from January 30th</p> <p>20 to February 15th so we're talking about one</p> <p>21 to two weeks after that? I'm trying to have</p> <p>22 you tell me what the time frame for the</p> <p>23 diagnosis would be.</p> <p>24 A. Anywhere from January 6th through</p> <p>25 February 15th.</p>	<p style="text-align: right;">Page 36</p> <p>1 A. Made in July of 2000 I believe.</p> <p>2 Q. So if we're talking middle of</p> <p>3 February to early part of March -- March,</p> <p>4 April, May, June -- diagnosis made in July,</p> <p>5 we're talking about four to five months in</p> <p>6 the delay of diagnosis of cancer?</p> <p>7 A. That's correct.</p> <p>8 Q. Doctor, at the time of the</p> <p>9 diagnosis have you looked at the staging of</p> <p>10 what -- do you know what the staging of the</p> <p>11 cancer was?</p> <p>12 A. It was a stage three, wasn't it?</p> <p>13 Q. You're of the opinion it was a</p> <p>14 stage three?</p> <p>15 A. Stage three or four I think. I'm</p> <p>16 not sure.</p> <p>17 Q. You're not sure. Okay. Doctor,</p> <p>18 how much time have you spent reviewing these</p> <p>19 medical records?</p> <p>20 A. Six hours.</p> <p>21 Q. How many hours?</p> <p>22 A. Six.</p> <p>23 Q. I couldn't hear you, Doctor.</p> <p>24 A. Six hours.</p> <p>25 Q. I'm sorry. There's a delay here</p>



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1 with the telephone and I apologize if you  
 2 think I'm -- I'm having difficulty hearing  
 3 you.  
 4 A. No problem. Okay. No problem.  
 5 Q. You read the deposition of Dr.  
 6 Levitan?  
 7 A. Yes, I did.  
 8 Q. Dr. Levitan is of the opinion that  
 9 this was -- the medical records show this was  
 10 a stage four. Do you agree or disagree with  
 11 that that when the patient when diagnosed in  
 12 July was stage four?  
 13 A. Well, I tell you I'm not sure if  
 14 that's true.  
 15 Q. Well, Doctor, this is the only  
 16 time I get to talk to you. When are you  
 17 going to have an opinion whether this patient  
 18 had a three or a four stage?  
 19 A. Okay. I can tell you right now.  
 20 Q. Okay.  
 21 A. Give me a couple minutes. Okay.  
 22 Q. Dr. Levitan said this was a T4 N3  
 23 M1?  
 24 A. N3 M1. Okay.  
 25 Q. And I want to know whether you

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1 agree or disagree with that or have no  
 2 opinion.  
 3 MR. MISHKIND: I think his  
 4 question before what his opinion is to  
 5 whether it's a stage three or four. I  
 6 believe the doctor is looking at this record  
 7 to determine that.  
 8 THE WITNESS: That's correct. Let  
 9 me check here. It is a stage four, you're  
 10 right.  
 11 BY MR. WARNER:  
 12 Q. Okay. Doctor, in read -- at the  
 13 deposition of Dr. Levitan he was of the  
 14 opinion that this patient retrospectively  
 15 probably had this lung cancer from about six  
 16 to seven years before diagnosis?  
 17 A. I don't think that's true.  
 18 Q. All right. How far back do you  
 19 feel this cancer -- from the time of  
 20 diagnosis, how far back did it exist?  
 21 A. Three to five.  
 22 Q. Three to five?  
 23 A. Um-hum.  
 24 Q. That's three to five years?  
 25 A. That's correct.

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1 Q. Is it fair to say that as of  
 2 December the 30th of '99 that this patient in  
 3 all probability had a stage four lung cancer?  
 4 MR. MISHKIND: Objection.  
 5 THE WITNESS: I don't think so.  
 6 BY MR. WARNER:  
 7 Q. Okay. What do you think it was  
 8 staged at at that time?  
 9 A. Probably a stage two.  
 10 Q. A stage two?  
 11 A. Yes.  
 12 Q. What basis are you relating that  
 13 on, how do you come to that conclusion?  
 14 A. The CT of the bones had not been  
 15 done at the time so we don't see T3 N0. We  
 16 don't see anything but an N0 and we don't  
 17 even see a T0 and N0.  
 18 Q. Like you said, no CT scan had been  
 19 done so how are you getting to a stage two?  
 20 A. Um-hum.  
 21 Q. How are you classifying this  
 22 patient on stage two on December 30th, 1999?  
 23 A. Because he had no problems to  
 24 relate to cause symptoms at that time.  
 25 Q. He had no problems that were

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1 related to having cancer at that time?  
 2 A. No.  
 3 Q. Completely explain, I didn't  
 4 understand your comment. He had no problems  
 5 that what?  
 6 A. He had no problems in his femur at  
 7 that time you see.  
 8 Q. No problems in the femur. All  
 9 right.  
 10 A. So that means he's an N0 and you  
 11 really couldn't see any nodes so it's N0 so  
 12 it's stage one actually.  
 13 Q. So he's a stage one?  
 14 A. That's correct.  
 15 Q. And yet this cancer had been --  
 16 What's your basis for saying stage one?  
 17 A. Because it was T1 N0 M0 or T2 N0  
 18 M0.  
 19 Q. You said no CT scan had been done  
 20 so you're saying since it wasn't done you're  
 21 making assumptions then. I'm lost on how you  
 22 get to that.  
 23 A. I'll tell you, because what  
 24 happens, you see, when these things come out  
 25 it appears they're growing fast but they're



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<p>1 growing at the same rate they're always 2 growing but now you can actually see the 3 growth. 4 Q. Is this a slow growing or fast 5 growing cancer? 6 A. This is probably a fast growing. 7 Q. This is a fast growing cancer? 8 A. Yes. 9 Q. What type of cancer did he have? 10 A. He had a fast growing. 11 Q. Pardon? 12 A. He had a relatively fast growing 13 one. 14 Q. I mean was it small cell or 15 nonsmall cell? 16 A. Nonsmall cell. 17 Q. And you're of the opinion that 18 nonsmall cell is fast growing? 19 A. Some of them are, yes. 20 Q. Well, now you sort of modified. 21 You said some of them are. Was this cancer 22 that Mr. Gill had was this a fast growing 23 cancer as you previously stated? 24 A. Yes, it was. 25 Q. Doctor, you're not an oncologist,</p>	<p>1 said before latter part of February to March? 2 A. Yes, he was. 3 Q. What type of surgery would you do? 4 A. Thoracotomy. 5 Q. Can you be more specific exactly 6 what you would do? 7 A. Thoracotomy with left upper 8 lobectomy. 9 Q. When was the last time you did a 10 thoracotomy, Doctor? 11 A. Oh, about a year ago. 12 Q. Was there any other reason that 13 you retired, Doctor, or why did you 14 specifically retire? 15 MR. MISHKIND: Objection, asked and 16 answered. Go ahead again, Doctor. 17 THE WITNESS: Because I developed 18 Parkinson's disease. 19 BY MR. WARNER: 20 Q. Okay. Is this high grade or low 21 grade carcinoma? 22 A. It's high grade. 23 Q. Is that a good or bad sign for 24 the patient? 25 MR. MISHKIND: Objection. Go</p>
Page 42	Page 44
<p>1 correct? 2 A. No. 3 Q. Would you defer -- Would you feel 4 more comfortable to deferring to a board 5 certified oncologist as to the opinion of the 6 staging on this patient? 7 MR. MISHKIND: Objection. 8 THE WITNESS: No. 9 BY MR. WARNER: 10 Q. You would not? 11 A. No. 12 Q. You typically stage patients for 13 cancer? 14 A. That's correct. 15 Q. When do you get involved? 16 A. I get involved at the time when it 17 comes to take them out. 18 Q. When they do the surgery? 19 A. That's correct. Also the diagnosis 20 many times. 21 Q. When would you have done surgery 22 on this patient? 23 A. As soon as I saw it. 24 Q. When you saw him. I mean was the 25 patient a surgical candidate, say, as you</p>	<p>1 ahead, Doctor. 2 THE WITNESS: It's not good. 3 BY MR. WARNER: 4 Q. All right. Why not? 5 A. Because when they're high grade 6 they grow faster. 7 Q. This was -- Was this a D 8 differentiated type of cancer? 9 A. Yes, it was. 10 Q. And is that a good or bad sign 11 for the patient? 12 A. It's not good. 13 Q. Pardon? 14 A. Not good. 15 Q. Okay. Was this -- I saw the word 16 bulky, b-u-l-k-y. 17 A. Yes. 18 Q. What does that mean in reference 19 to the cancer? 20 A. Well, you see it. Where do you 21 see the word? 22 Q. Where do I see it? I heard it 23 described as a bulky type of cancer. 24 MR. MISHKIND: He's asking where 25 do you see the word bulky?</p>



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1 MR. WARNER: Where in the medical  
2 records. I don't have it in front of me.  
3 BY MR. WARNER:  
4 Q. What does bulky means?  
5 A. Bulky means it's large.  
6 Q. I'm looking through my records,  
7 Doctor. At the time of diagnosis, what areas  
8 of the body did the patient have cancer?  
9 A. At the time of diagnosis, he had  
10 it in his lungs.  
11 Q. Lungs.  
12 A. And in the neck.  
13 Q. Neck.  
14 A. And in the periaortic node.  
15 Q. Where was that?  
16 A. Periaortic.  
17 Q. Where exactly is the periaortic?  
18 A. It's around the aorta which is the  
19 main blood vessel that comes out of the heart  
20 and gives blood to the rest of the body.  
21 Q. Anywhere else that you recall?  
22 A. No.  
23 Q. What about the femur?  
24 A. I don't think they did a CT scan  
25 at that time, had they?

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1 Q. More likely than not did he have  
2 it in the femur at that time?  
3 A. I don't think so.  
4 Q. You don't think so. Ultimately he  
5 did have a diagnosis of cancer spread to the  
6 femur?  
7 A. Yes, he did.  
8 Q. He also had it in the mediastinum?  
9 A. Mediastinum adjacent to the lung,  
10 yes.  
11 Q. Okay. Then he had it in the  
12 bone?  
13 A. Yes.  
14 Q. At the time of diagnosis, would  
15 you agree that it was widely metastatic?  
16 A. No, I don't.  
17 Q. The primary source of the cancer  
18 was in the lungs?  
19 A. Yes.  
20 Q. Where else had it spread to as of  
21 the time of the diagnosis in July?  
22 A. It spread to the neck and to the  
23 mediastinum and the periaortic nodes.  
24 Q. When -- You said this cancer in  
25 your opinion was three to five years of age

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1 at the time of diagnosis?  
2 A. That's correct.  
3 Q. Had it in -- Say December the 30th  
4 of '99 had it already -- it was already in  
5 the lungs obviously, correct?  
6 A. That's where it started, yes.  
7 Q. Because you said it was three to  
8 five years old. Was it in the neck at the  
9 time, had it already spread to the neck?  
10 MR. MISHKIND: Objection. Go  
11 ahead, Doctor.  
12 THE WITNESS: No.  
13 BY MR. WARNER:  
14 Q. It had not?  
15 A. No.  
16 Q. Had it already spread in the  
17 mediastinum?  
18 A. No, it had not.  
19 Q. Had it already spread to the  
20 periaortic?  
21 A. No, it had not.  
22 Q. Had it already spread to the  
23 femur?  
24 A. No, it had not.  
25 Q. And, Doctor, how do you know that

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1 no CT scan was done, how do you know that?  
2 A. Because you would be able to see  
3 it on examination of the patient and/or chest  
4 x-ray.  
5 Q. You would be able to see the  
6 metastatic spread on the chest x-ray?  
7 A. Sure could.  
8 Q. You have a chest x-ray from  
9 December 30, 1999, and you already told me  
10 you agree with the diagnosis of pneumonia?  
11 A. That's right.  
12 Q. All right. So based on the chest  
13 x-ray itself of December 30th, 1999, the  
14 diagnosis of lung cancer was not made?  
15 A. That's correct.  
16 Q. Doctor, what is microscopic?  
17 A. That means you can only see it  
18 through a microscope.  
19 Q. Did the patient in all probability  
20 that is more likely than not have microscopic  
21 spread of the cancer on December 30th, 1999?  
22 MR. MISHKIND: Objection. Go  
23 ahead, Doctor.  
24 THE WITNESS: I don't know.  
25 BY MR. WARNER:



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1 Q. You don't know that. More likely  
2 than not did the patient have microscopic  
3 spread of the cancer in the neck on December  
4 30, 1999?  
5 A. No, he probably did not.  
6 Q. Well, I thought you first told me  
7 you didn't know and now you're telling me he  
8 did not, how do you distinguish those two  
9 statements for me?  
10 A. I think you asked two different  
11 questions, didn't you?  
12 MR. MISHKIND: You did ask two  
13 different questions, Rob. One he didn't know  
14 and one his answer was no.  
15 BY MR. WARNER:  
16 Q. All right. Doctor, why is it that  
17 you told me you can't tell me if the patient  
18 had microscopic spread of cancer on December  
19 30th, 1999?  
20 A. Well, because I did not get a  
21 sample to look at.  
22 Q. Okay. So I guess the reverse is  
23 that it is possible that the patient had  
24 microscopic spread of cancer on December 30th,  
25 1999, or metastasis?

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1 MR. MISHKIND: Objection to the  
2 form of the question, possibility, speculative.  
3 Go ahead, Doctor.  
4 THE WITNESS: I suppose you could  
5 say that he did have a chance of having it.  
6 BY MR. WARNER:  
7 Q. And what if it was microscopic  
8 spread, more likely than not then the fate of  
9 Mr. Gill unfortunately couldn't be reversed?  
10 MR. MISHKIND: Objection. Go  
11 ahead, Doctor.  
12 THE WITNESS: Well, I tell you,  
13 what that depends on is the amount of spread  
14 to the microscopic area that you're talking  
15 about. And the other thing is whether or not  
16 he -- whether or not he was continuing to do  
17 things that would cause the problems such as  
18 some people will continue to smoke even in  
19 the face of cancer.  
20 BY MR. WARNER:  
21 Q. What was that about continuing  
22 smoke?  
23 A. He doesn't smoke so it doesn't  
24 really matter now.  
25 Q. Okay. One second here. Of the

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1 deaths in America where does lung cancer  
2 range?  
3 A. I think it's about number four or  
4 five, isn't it?  
5 Q. What's the one-year survival rate  
6 for lung cancer?  
7 MR. MISHKIND: Objection. For the  
8 record, I'm not sure he's required to state  
9 the type of lung cancer but in general note  
10 my objection to the broad nature of the  
11 question but go ahead and answer the  
12 question, Doctor.  
13 MR. WARNER: Tomorrow when we do  
14 the depositions hopefully you will be as  
15 generous as I am to make suggestions, Howard.  
16 MR. MISHKIND: I'm not making any  
17 suggestions.  
18 MR. WARNER: I said I hope  
19 tomorrow you're as generous with me. I've  
20 not stopped you or done anything.  
21 BY MR. WARNER:  
22 Q. Go ahead, Doctor. Do you need the  
23 question repeated, the court reporter can read  
24 it back to you?  
25 A. Yes.

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1 (Question read.)  
2 THE WITNESS: If you look at all  
3 lung cancer, it's about 25 or 30 percent I  
4 think.  
5 BY MR. WARNER:  
6 Q. All right. What's the five-year  
7 survival rate for lung cancer?  
8 MR. MISHKIND: Objection to the  
9 form of the question but go ahead.  
10 THE WITNESS: I don't know.  
11 BY MR. WARNER:  
12 Q. Would you agree or disagree with  
13 that the five-year survival rate is about  
14 around 15 percent?  
15 MR. MISHKIND: Objection.  
16 THE WITNESS: Sounds pretty good.  
17 BY MR. WARNER:  
18 Q. What are signs and symptoms of  
19 lung cancer?  
20 A. Oh, coughing up bloody sputum main  
21 one. Weight loss, if you got spread then  
22 you have situations which are secondary to  
23 wherever the spread is. If it's in the  
24 liver, for example, you have a liver  
25 problems. If you have brain, you have brain



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1 problems. If you have a bony metastasis,  
2 then you have problems with breaking of legs  
3 and that sort of business.

4 Q. This patient wasn't coughing up any  
5 bloody sputum, correct?

6 A. Nope.

7 Q. He didn't have weight loss, right?

8 A. Nope.

9 Q. He didn't have -- When you talked  
10 spread, he didn't have any signs of symptoms  
11 with his liver?

12 A. No.

13 Q. Or his brain?

14 A. Nope.

15 Q. No fractures?

16 A. No.

17 Q. You agree cigarette smoking is the  
18 most important risk factor?

19 MR. MISHKIND: Objection.

20 THE WITNESS: Yes.

21 BY MR. WARNER:

22 Q. I'm sorry, was that a yes or no,  
23 Doctor?

24 A. Yes.

25 Q. I'm looking through my notes,

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1 Q. For example, the pneumonia that Mr.  
2 Gill had that you said he had?

3 A. Um-hum. I would say in that sort  
4 of situation that I would say what he needs  
5 is another chest x-ray to make sure that  
6 things aren't still going on.

7 Q. The medical records in this case  
8 though do substantiate that Mr. Gill did  
9 respond to the antibiotic treatment, he got  
10 better?

11 A. Yes, but he still had lingering  
12 cough you see.

13 Q. Maybe you didn't understand my  
14 question. If you could answer it yes or no  
15 or I don't know would be fine. Did, in  
16 fact, Mr. Gill respond to the antibiotic  
17 treatment?

18 MR. MISHKIND: Objection. The  
19 doctor can answer whatever way he feels  
20 necessary but go ahead, Doctor.

21 THE WITNESS: My situation is that  
22 the patient did -- his fever did go down.  
23 However, he continued with the lingering cough  
24 and that to me means that he still has a  
25 problem.

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1 Doctor.

2 A. Um-hum.

3 Q. Doctor, tell me whether you  
4 disagree or agree with the statement  
5 establishing the diagnosis of pneumonia for  
6 low-risk stable patients treated on an  
7 outpatient basis, repeated chest radiography is  
8 generally not indicated for patients who  
9 respond to antibiotic treatment?

10 MR. MISHKIND: Objection. Go  
11 ahead, Doctor.

12 THE WITNESS: What do you want me  
13 to say on that one?

14 BY MR. WARNER:

15 Q. Whether you agree or disagree that  
16 patients who respond to antibiotic treatment  
17 who had the diagnosis of pneumonia that  
18 repeated chest radiography is not indicated  
19 for patients who responded to antibiotic  
20 treatment?

21 MR. MISHKIND: Objection. Go  
22 ahead.

23 THE WITNESS: I think that it  
24 depends on where the pneumonia is.

25 BY MR. WARNER:

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1 BY MR. WARNER:

2 Q. He still had a pneumonia problem?

3 A. That's correct.

4 Q. What type of problem did he still  
5 have?

6 A. Still had problem with his lung  
7 that's why the cough was bothering them.

8 Q. Somebody smokes as long as you've  
9 indicated are they going to have a  
10 compromised lung?

11 A. Oh, I think so. It depends on  
12 how much they smoked.

13 Q. Well, the history that you gave,  
14 I'm not going to suggest anything, but you  
15 reviewed, Doctor?

16 A. Um-hum. I think that he would  
17 have a little bit of a problem, yes.

18 Q. All right. He's going to have  
19 that problem for the rest of his life?

20 A. Oh, I'm not sure if he'd have it  
21 for the rest of his life but he would have  
22 it for about five years after he quit.

23 Q. This was longer than five years  
24 after he quit?

25 A. He quit in 1987. Oh yeah, you're



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## Deposition of James Bass, Jr., M.D. - October 27, 2003

<p style="text-align: right;">Page 57</p> <p>1 right. So he should be okay from that 2 standpoint. That makes you think though what 3 he's got is something -- it's not normal you 4 see. That's the problem that you see that. 5 Q. Okay. When did the -- I asked 6 you in December of 1999 if the patient had 7 had metastasis and you said no, so when did 8 this patient have metastasis, what month did 9 that occur realizing the diagnosis is made in 10 July and you're saying in end of February, 11 March is when you would have made the 12 diagnosis of cancer. 13 A. I think probably May or June. 14 Q. May or June? 15 A. Yes. 16 Q. So in May or June we had a 17 metastasis of the cancer in Mr. Gill? 18 A. That's correct. 19 Q. Could it even have occurred in 20 July? 21 A. Sure it could have. 22 Q. And could it -- Going the other 23 wave of the spectrum, could it have occurred 24 even into April? 25 MR. MISHKIND: Objection. Go</p>	<p style="text-align: right;">Page 59</p> <p>1 opinion occurred in May or in June, once the 2 metastasis has occurred in this particular 3 patient more likely than not his chance of 4 long-term survival is unlikely? 5 A. That's correct. 6 Q. So you're indicating that the 7 diagnosis for Mr. Gill would have to be made 8 before more likely than not there was a 9 metastasis or spread of the cancer? 10 A. That's correct, unless it only 11 spread to a small part. Say, for example, 12 it spread to the hila nodes, then you would 13 still have a chance to save him. 14 Q. Why does lung cancer have such a 15 poor survival rate? 16 MR. MISHKIND: Objection. Go 17 ahead doctor. 18 THE WITNESS: Because when it's 19 seen so -- when you see it, it's usually too 20 late to do anything you see. So because 21 what happens is that you don't see anything 22 until you start getting symptoms and symptoms 23 don't start showing up until very late in the 24 disease. 25 BY MR. WARNER:</p>
<p style="text-align: right;">Page 58</p> <p>1 ahead, Doctor. 2 THE WITNESS: I'm not sure. 3 BY MR. WARNER: 4 Q. So it's possible I guess in April? 5 MR. MISHKIND: Objection, 6 speculation. Go ahead, Doctor. 7 THE WITNESS: Yes, it is. 8 BY MR. WARNER: 9 Q. Okay. What about even going into 10 the next month in March? 11 A. I don't think so. 12 MR. MISHKIND: Objection. 13 BY MR. WARNER: 14 Q. I'm sorry, Doctor, did you answer? 15 A. Yes, I did. 16 Q. I'm sorry, I didn't hear your 17 answer. What was your answer? 18 A. I don't think so. 19 Q. But apparently it's possible? 20 MR. MISHKIND: Objection. 21 THE WITNESS: Anything is possible. 22 BY MR. WARNER: 23 Q. Okay. Doctor, if realizing the 24 diagnosis is in July and you said that the 25 metastasis more likely than not in your</p>	<p style="text-align: right;">Page 60</p> <p>1 Q. What was your -- You've treated 2 many patients with lung cancer? 3 A. That's correct. 4 Q. You've done thoracotomies on them? 5 A. That's correct. 6 Q. And I assume that some of your 7 patients in all probability despite your good 8 medical care still died from lung cancer? 9 A. Sure they do. 10 Q. What percentage of your patients 11 who you performed thoracotomies on survived, 12 were they in line with the national 13 statistics or did you have better results or 14 worse? 15 A. About the same results. 16 Q. You had about the same results? 17 A. Yes, I think so. 18 Q. So in terms of one-year survival 19 rate, you had approximately, what, 40 percent 20 survive? 21 A. About 52 percent. 22 Q. 52 percent? 23 A. Yes. 24 Q. And in a five-year survival rate 25 was it consistent with national standards of</p>



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## Deposition of James Bass, Jr., M.D. - October 27, 2003

<p style="text-align: right;">Page 61</p> <p>1 approximately 15 percent?</p> <p>2 A. No, it was higher than that.</p> <p>3 Q. Higher than that. What percentage</p> <p>4 of your patient --</p> <p>5 A. I'd say 35.</p> <p>6 MR. MISHKIND: Objection. Same</p> <p>7 basis I stated before.</p> <p>8 THE WITNESS: 35 to 40 I guess.</p> <p>9 BY MR. WARNER:</p> <p>10 Q. All right. Would you track them</p> <p>11 longer than five years -- Strike that. Is</p> <p>12 lung cancer -- a patient considered cured</p> <p>13 after five years or with lung cancer you</p> <p>14 can't say that?</p> <p>15 A. If they don't have any evidence of</p> <p>16 spread after five years, you can say they're</p> <p>17 cured.</p> <p>18 Q. Okay. So you said you had a</p> <p>19 better result than the national standards of</p> <p>20 your doing -- you had a 35 to 40 percent</p> <p>21 survival rate after five years?</p> <p>22 A. Yes.</p> <p>23 Q. All right. So if this patient had</p> <p>24 come to you and just doing with your own</p> <p>25 statistics, more likely than not Mr. Gill</p>	<p style="text-align: right;">Page 63</p> <p>1 question?</p> <p>2 MR. WARNER: Could we have the</p> <p>3 court reporter read it back?</p> <p>4 (Question read.)</p> <p>5 THE WITNESS: That's correct.</p> <p>6 BY MR. WARNER:</p> <p>7 Q. Okay.</p> <p>8 MR. MISHKIND: Again, show an</p> <p>9 objection. That includes all comers not just</p> <p>10 the staging.</p> <p>11 THE WITNESS: That's true.</p> <p>12 BY MR. WARNER:</p> <p>13 Q. Doctor, when did you -- when were</p> <p>14 these x-rays thrown out?</p> <p>15 A. I think they were thrown out last</p> <p>16 year.</p> <p>17 Q. Can you give me a month or time</p> <p>18 frame?</p> <p>19 A. Oh, right after I quit practice.</p> <p>20 Q. So that was in January of 2002?</p> <p>21 A. I meant June of 2002.</p> <p>22 Q. I'm sorry, I misunderstood you.</p> <p>23 MR. MISHKIND: Rob, for the record</p> <p>24 his report was written September 2002 and I</p> <p>25 don't know whether that helps in terms of</p>
<p style="text-align: right;">Page 62</p> <p>1 would not have survived five years?</p> <p>2 MR. MISHKIND: Objection. You're</p> <p>3 misstating the facts. It depends upon the</p> <p>4 stage it's in. The 35 to 40 percentage it</p> <p>5 all covers. Rob, you're misstating the facts</p> <p>6 intentionally and the record should reflect</p> <p>7 that, but you can answer the question.</p> <p>8 MR. WARNER: I hope you're just as</p> <p>9 generous as I am in allowing you to have a</p> <p>10 speaking objection and I hope you don't</p> <p>11 interfere tomorrow and you give me the same</p> <p>12 courtesy.</p> <p>13 BY MR. WARNER:</p> <p>14 Q. Go head, Doctor, answer the</p> <p>15 question.</p> <p>16 MR. MISHKIND: Let me state for</p> <p>17 the record I sat through Levitan's and</p> <p>18 Rossman's deposition and the same courtesies</p> <p>19 applied during my deposition so don't --</p> <p>20 people in glass houses shouldn't throw stones.</p> <p>21 You're misstating the facts of the record in</p> <p>22 terms of statistics and I want the record to</p> <p>23 reflect that. Doctor, go ahead and answer</p> <p>24 the question.</p> <p>25 THE WITNESS: Okay. What was the</p>	<p style="text-align: right;">Page 64</p> <p>1 when the x-rays were thrown out because</p> <p>2 timing of his report indicate he reviewed</p> <p>3 them.</p> <p>4 MR. WARNER: Right. He said he</p> <p>5 got them, reviewed them, and threw them out.</p> <p>6 I understand.</p> <p>7 BY MR. WARNER:</p> <p>8 Q. Doctor, I've heard Mr. Mishkind and</p> <p>9 appreciate it but you stand by your testimony</p> <p>10 that when you threw them out you said it was</p> <p>11 June of 2002?</p> <p>12 A. Well, wouldn't have been that time.</p> <p>13 It was after I quit.</p> <p>14 Q. After you quit?</p> <p>15 A. Yes, practice.</p> <p>16 Q. Maybe I -- When did you quit</p> <p>17 again? I keep saying January 2002.</p> <p>18 A. July of 2002.</p> <p>19 Q. Now you're telling me it's July of</p> <p>20 2002 you think you quit?</p> <p>21 A. Yes, it was June or July.</p> <p>22 Q. Those other comments then are</p> <p>23 mistaken, so it's July of 2002?</p> <p>24 MR. MISHKIND: Objection, move to</p> <p>25 strike the comment.</p>



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## Deposition of James Bass, Jr., M.D. - October 27, 2003

Page 65	Page 67
<p>1 BY MR. WARNER:</p> <p>2 Q. Doctor, I don't want to be</p> <p>3 misunderstood. When did you quit practicing</p> <p>4 medicine?</p> <p>5 A. July of 2002.</p> <p>6 Q. Okay. And, Doctor, throughout this</p> <p>7 deposition if you need to correct something,</p> <p>8 please do.</p> <p>9 A. Okay.</p> <p>10 Q. So at the time you wrote your</p> <p>11 report, you were already retired?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. I don't have any other</p> <p>14 questions at this time except I do have one</p> <p>15 more follow-up. Your license has never been</p> <p>16 suspended?</p> <p>17 A. No.</p> <p>18 Q. Never been revoked?</p> <p>19 A. No.</p> <p>20 Q. All right. Doctor, have you</p> <p>21 outlined all your criticisms of Dr. Mansnerus?</p> <p>22 MR. MISHKIND: Objection. Go</p> <p>23 ahead, Doctor.</p> <p>24 THE WITNESS: Yes, I have.</p> <p>25 MR. WARNER: All right. Doctor, I</p>	<p>1 DESCRIPTION OF EXHIBITS</p> <p>2 EXHIBIT DESCRIPTION</p> <p>3 1 10/15/02 Letter</p> <p>4 2 9/18/01 Letter</p> <p>5 .</p> <p>6 .</p> <p>7 .</p> <p>8 .</p> <p>9 .</p> <p>10 .</p> <p>11 .</p> <p>12 .</p> <p>13 .</p> <p>14 .</p> <p>15 .</p> <p>16 .</p> <p>17 .</p> <p>18 .</p> <p>19 .</p> <p>20 .</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p> <p>25 .</p>
Page 66	Page 68
<p>1 appreciate it. I think we're done.</p> <p>2 MR. MISHKIND: For the record</p> <p>3 just, Court Reporter, if you could reflect no</p> <p>4 waiver of signature so that when the</p> <p>5 deposition is transcribed, number one, just</p> <p>6 reflect that by agreement doctor could have</p> <p>7 28 days which Mr. Warner and I have agreed</p> <p>8 to with regard to all of our experts and</p> <p>9 that the doctor will read the deposition</p> <p>10 rather than waiving signature.</p> <p>11 MR. WARNER: Thank you.</p> <p>12 (At 4:15 p.m. the deposition</p> <p>13 ended.)</p> <p>14 .</p> <p>15 .</p> <p>16 .</p> <p>17 .</p> <p>18 .</p> <p>19 .</p> <p>20 .</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p> <p>25 .</p>	<p>1 STATE OF WISCONSIN )</p> <p>2 MILWAUKEE COUNTY ) SS:</p> <p>3 I, CORINNE M. DAVIS, Notary Public</p> <p>4 in and for the State of Wisconsin, do hereby</p> <p>5 certify that the deposition of JAMES BASS,</p> <p>6 JR., M.D. was taken before me at 4045 Newman</p> <p>7 Road, Racine, Wisconsin, on the 27th day of</p> <p>8 October, 2003, commencing at 3:01 o'clock in</p> <p>9 the afternoon.</p> <p>10 That it was taken at the instance</p> <p>11 of the Defendants, upon verbal interrogatories.</p> <p>12 That said deposition was taken to</p> <p>13 be used in an action now pending in the</p> <p>14 Circuit Court of Common Pleas of Cuyahoga</p> <p>15 County, Ohio, in which WILLIAM J. GILL, III,</p> <p>16 is the Plaintiff and ROGER A. MANSNERUS,</p> <p>17 M.D., et al., are the Defendants.</p> <p>18 APPEARANCES</p> <p>19 BECKER &amp; MISHKIND, The Skylight</p> <p>20 Office Tower, Suite 660, Cleveland, Ohio</p> <p>21 44113, by MR. HOWARD D. MISHKIND appeared</p> <p>22 telephonically on behalf of the Plaintiff.</p> <p>23 REMINGER &amp; REMINGER, 1400 Midland</p> <p>24 Building, 101 Prospect Avenue, West, Cleveland,</p> <p>25 Ohio 44115-1093, by MR. ROBERT WARNER appeared</p>



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## Deposition of James Bass, Jr., M.D. - October 27, 2003

<p style="text-align: right;">Page 69</p> <p>1 telephonically on behalf of the Defendants.</p> <p>2 That said deponent, before</p> <p>3 examination, was sworn to testify the truth,</p> <p>4 the whole truth, and nothing but the truth</p> <p>5 relative to said cause.</p> <p>6 That the foregoing is a full,</p> <p>7 true, and correct record of all the</p> <p>8 proceedings had in the matter of the taking</p> <p>9 of said deposition, as reflected by my</p> <p>10 original machine shorthand notes taken at said</p> <p>11 time and place.</p> <p>12</p> <p>13 Notary Public in and for</p> <p>14 the State of Wisconsin</p> <p>15 Dated this 3rd day of November,</p> <p>16 2003,</p> <p>17 Milwaukee, Wisconsin.</p> <p>18 My commission expires April 4,</p> <p>19 2004.</p> <p>20 .</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p> <p>25 .</p>	<p style="text-align: right;">Page 71</p> <p style="text-align: center;">CERTIFICATE</p> <p>1 STATE OF :</p> <p>2 COUNTY/CITY OF :</p> <p>3 Before me, this day, personally</p> <p>4 appeared, James Bass, Jr., M.D., who, being</p> <p>5 duly sworn, states that the foregoing</p> <p>6 transcript of his/her Deposition, taken in</p> <p>7 the matter, on the date, and at the time and</p> <p>8 place set out on the title page hereof,</p> <p>9 constitutes a true and accurate transcript of</p> <p>10 said deposition.</p> <p>11</p> <p>12 James Bass, Jr., M.D.</p> <p>13</p> <p>14 SUBSCRIBED and SWORN to before me this</p> <p>15 day of , 2003 in the</p> <p>16 jurisdiction aforesaid.</p> <p>17</p> <p>18 My Commission Expires Notary Public</p> <p>19</p> <p>20 .</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p> <p>25 .</p>
<p style="text-align: right;">Page 70</p> <p style="text-align: center;">CAPTION</p> <p>1 The Deposition of James Bass, Jr.,</p> <p>2 M.D., taken in the matter, on the date, and</p> <p>3 at the time and place set out on the title</p> <p>4 page hereof.</p> <p>5 It was requested that the deposition</p> <p>6 be taken by the reporter and that same be</p> <p>7 reduced to typewritten form.</p> <p>8 It was agreed by and between counsel</p> <p>9 and the parties that the Deponent will read</p> <p>10 and sign the transcript of said deposition.</p> <p>11</p> <p>12 .</p> <p>13 .</p> <p>14 .</p> <p>15 .</p> <p>16 .</p> <p>17 .</p> <p>18 .</p> <p>19 .</p> <p>20 .</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p> <p>25 .</p>	<p style="text-align: right;">Page 72</p> <p style="text-align: center;">DEPOSITION ERRATA SHEET</p> <p>1</p> <p>2</p> <p>3 RE: SetDepo, Inc.</p> <p>4 File No. 2242</p> <p>5 Case Caption: William J. Gill, III vs. Roger</p> <p>6 A. Mansnerus, M.D., et al.</p> <p>7</p> <p>8 Deponent: James Bass, Jr., M.D.</p> <p>9 Deposition Date: October 27, 2003</p> <p>10</p> <p>11 To the Reporter:</p> <p>12 I have read the entire transcript of my</p> <p>13 Deposition taken in the captioned matter or</p> <p>14 the same has been read to me. I request</p> <p>15 that the following changes be entered upon</p> <p>16 the record for the reasons indicated. I</p> <p>17 have signed my name to the Errata Sheet and</p> <p>18 the appropriate Certificate and authorize you</p> <p>19 to attach both to the original transcript.</p> <p>20</p> <p>21 Page No. Line No. Change to:</p> <p>22</p> <p>23 Reason for change:</p> <p>24 Page No. Line No. Change to:</p> <p>25</p>


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9	James Bass, Jr., M.D..	



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