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Last Name	Levitan
First Name	Nathan
Specialty	Medical oncologist
Party	Plaintiff <input checked="" type="checkbox"/> D
Date (format =99/99/9999)	8/22/03
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Type of Injury	lung cancer
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<p>Page 1</p> <p>1 IN THE COURT OF COMMON PLEAS 2 OF CUYAHOGA COUNTY, OHIO 3 ----- 4 WILLIAM J. GILL, III, Executor of the Estate of 5 DANIEL P. GILL, deceased, 6 Plaintiff, 7 vs Case No. 457639 Judge Russo 8 9 ROGER A. MANSNERUS, M.D., et al., 10 Defendants. 11 12 ----- 13 DEPOSITION OF NATHAN LEVITAN, M.D. 14 FRIDAY, AUGUST 22, 2003 15 ----- 16 Deposition of NATHAN LEVITAN, M.D., a 17 Witness herein, called by counsel on behalf of 18 the Plaintiff for examination under the statute, 19 taken before me, Vivian L. Gordon, a Registered 20 Diplomate Reporter and Notary Public in and for 21 the State of Ohio, pursuant to agreement of 22 counsel, at the Glidden House, 1901 Ford, 23 Cleveland, Ohio, commencing at 7:00 o'clock a.m. 24 on the day and date above set forth. 25 -----</p>	<p>Page 3</p> <p>1 ----- 2 (Thereupon, LEVITAN Deposition 3 Exhibits 1 and 2 were marked for 4 purposes of identification.) 5 ----- 6 7 NATHAN LEVITAN, M.D., a witness herein, 8 called for examination, as provided by the Ohio 9 Rules of Civil Procedure, being by me first duly 10 sworn, as hereinafter certified, was deposed and 11 said as follows: 12 EXAMINATION OF NATHAN LEVITAN, M.D. 13 BY MR. MISHKIND: 14 Q. Would you state your name for the 15 record, please. 16 A. Dr. Nathan Levitan. 17 Q. Doctor, my name is Howard Mishkind, 18 and as you know, I represent the estate of Dan 19 Gill in connection with this lawsuit. Correct? 20 A. Correct. 21 Q. You and I have never met before, have 22 we? 23 A. I don't believe so. 24 Q. I understand you have a time 25 constraint this morning. We are starting at</p>
<p>Page 2</p> <p>1 APPEARANCES: 2 On behalf of the Plaintiff 3 Becker & Mishkind 4 HOWARD D. MISHKIND, ESQ. 5 Skylight Office Tower Suite 660 6 1220 W. 2nd Street 7 Cleveland, Ohio 44113 8 241-2600 9 10 On behalf of the Defendant 11 Reminger & Reminger 12 ROBERT D. WARNER, ESQ. 13 1400 Midland Building 14 Cleveland, Ohio 44115 15 687-1311 16 17 18 ----- 19 20 21 22 23 24 25</p>	<p>Page 4</p> <p>1 about 7:15 and you need to be out preferably at 2 or before 9:30 this morning; is that correct? 3 A. That's right. 4 Q. I will do what I can to finish, but I 5 will just on the record indicate that to the 6 extent that I am unable to finish my questioning 7 this morning, I will reserve the right to 8 complete the deposition at some time that's 9 convenient for everyone. Is that fair, as well? 10 A. Absolutely. 11 Q. Thank you. To try to speed things up 12 a bit, at least with regard to background, I was 13 hoping that you had a current CV with you, but 14 apparently you don't. 15 I grabbed from my file an old CV that 16 I have. I may have a more recent one in my 17 material here, but this one happens to be dated 18 May of '99. It happened to have been provided 19 to an attorney from the Reminger firm. There is 20 a fax across the top. 21 What I'm going to ask you to do is to 22 glance at the CV and if it is so terribly 23 outdated, then we will try to come at it at a 24 different way. If it's relatively accurate and 25 you can update on the record some of the things,</p>

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1 we will do that and then I will ask you to
2 provide me with a current CV at a later point.
3 A. I can actually be very quick and
4 efficient time-wise. Since '99, the last four
5 years I'm still at University Hospitals. I have
6 published several articles since that time. The
7 topics -- I'm not sure I can recite the topics
8 to you.
9 I think they have been largely
10 pertaining to lung cancer and involving perhaps
11 some additional clinical trials, but basically
12 those are the important changes since that time.
13 Q. Do this for me, if you would. Take
14 Exhibit 1, recognizing what I just said a moment
15 ago, and glance through it. For example,
16 doctor, there may be some things on that
17 particular CV that are no longer applicable or
18 relevant to you. But we will start with having
19 you tell me whether there are things that should
20 be deleted or eliminated from the CV.
21 A. Well, I am no longer married. Not
22 that's that pertinent to this discussion. And I
23 published some additional articles, and those
24 are really the only changes.
25 Q. In terms of your affiliations, they

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1 the treatment or both of nonsmall cell lung
2 cancer?
3 A. I have written quite a number of
4 articles pertaining to largely the treatment and
5 natural history of lung cancer, and I would say,
6 I don't know what percentage, but a good number
7 of those have been pertaining to nonsmall cell
8 and some others to small cell.
9 Q. What I would like you to do, since
10 you know your publications far better than
11 anybody else, if you would just look at the
12 numbers and tell me which articles would have
13 information that would at least touch on the
14 topic of nonsmall cell lung cancer, the
15 evolution, and things of that nature. In fact,
16 as you are reading it through, if you could just
17 take this yellow hi-liter and perhaps just
18 highlight the number for me, that would be
19 great.
20 A. As I look here, it is my newer
21 papers, which, of course, I would be happy to
22 provide to you in CV form, that pertain to
23 nonsmall cell lung cancer. So these pertain to
24 general oncology, colorectal cancer, small cell
25 lung cancer and esophageal cancer, and it is my

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1 are all the same as reflected?
2 A. Yes. I am just looking very quickly,
3 but my place of employment has not changed.
4 That's right.
5 Q. Hold on to that for just one second.
6 Exhibit 1 has how many publications
7 on that CV?
8 A. There are 19.
9 Q. As best as you can recall, how many
10 publications do you have on your most recent CV?
11 A. You know, I don't know. It's not a
12 number that is important to me, so I don't
13 really have that. I have published several
14 since then, but I can't tell you. You know, you
15 can say is it three, five, I don't remember.
16 Q. Are there any publications on the CV
17 that you have in front of you that you believe
18 to be relevant to the topic in Mr. Gill's case?
19 A. Well, that's a broad question.
20 Q. Let me rephrase it then. Mr. Gill
21 had nonsmall cell cancer; correct?
22 A. Correct.
23 Q. Are there any publications that you
24 have written on that relate to the topic of the
25 diagnosis and treatment, either the diagnosis or

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1 newer articles since the date of this CV which
2 are several which pertain to nonsmall cell lung
3 cancer.
4 Q. The prognosis for nonsmall cell lung
5 cancer is different than small cell lung cancer;
6 true?
7 A. Well, it depends on the stage. But
8 one can't broadly say that the prognosis is
9 better or worse. You really have to look stage
10 for stage to determine the comparative.
11 Q. Stage 1 nonsmall cell lung cancer
12 doesn't have the same prognosis five year
13 survival as a small cell lung cancer same stage;
14 true?
15 A. Well, we stage -- again, I am not
16 trying to obfuscate nonsmall as limited versus
17 extensive rather than one, two, three, four.
18 To answer your question, if you are
19 asking me whether a nonsmall cell has a better
20 prognosis than limited stage small cell, the
21 answer is yes.
22 Q. So that if you had your druthers --
23 and I know this is somewhat of a silly
24 question -- but if you had your druthers in
25 terms of having lung cancer and having to

2 (Pages 5 to 8)

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1 choose, God gave you the power to do so, to have
2 either small cell or non-small cell and have it
3 diagnosed at an early stage, Stage 1 in the
4 spectrum of non-small cell or early stage in the
5 spectrum of small cell, you would much prefer to
6 have non-small cell lung cancer; true?
7 A. Except that a small peripheral nodule
8 from a small cell lung cancer is also very
9 highly curable. But the garden variety limited
10 stage small cell has a worse prognosis than most
11 Stage 1 non-small cell lung cancers.
12 Q. Thank you. So to complete the
13 circuit with regard to your CV, there would not
14 be anything that one would find in the articles
15 that you have written in this older version of
16 your CV that would relate to the staging or
17 prognostic factors as it relates to non-small
18 cell lung cancer; true?
19 A. As I glance over these, I think
20 that's right.
21 Q. Thank you. And if you would make a
22 mental note for yourself to get a current CV,
23 I'll try to follow up with Rob, as well, but I'm
24 not the best note taker in terms of following up
25 on things, but I would appreciate if you would

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1 the computer. So if I said to you, go to your
2 office and get me the Gill report, you would be
3 able to print it out?
4 A. Yes.
5 Q. The one that I have is signed and
6 it's dated October 22nd, 2002. Is that the same
7 date of your report?
8 A. Yes.
9 Q. Is this the only report that you have
10 written in this case?
11 A. Yes.
12 Q. Have you sent any other letters to
13 Mr. Warner with regard to any additional
14 opinions since October 22nd, 2002?
15 A. Not that I recall, because they
16 presumably would be in my computer file and
17 there is nothing there of that sort.
18 Q. You checked that?
19 A. Yes.
20 Q. Just for housekeeping matters, I'm
21 going to identify the information you have, both
22 with regard to that which you had at the time of
23 your report and that which you have reviewed
24 since, but in looking through your file, I don't
25 see any letters from Mr. Warner or from

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1 do that.
2 A. I would be glad to do that.
3 Q. Thank you. You mentioned that you
4 are not married any longer. You were at one
5 time married to Laura Rocker, M.D?
6 A. Correct.
7 Q. How long have you been divorced from
8 Dr. Rocker?
9 A. Officially, within the last year.
10 Q. That would have been here in Cuyahoga
11 County; true?
12 A. Correct.
13 Q. Somewhere in your stack I think is a
14 copy of your report that I had marked as an
15 exhibit.
16 A. Yes.
17 Q. And you have your computer printout.
18 I presume you just printed another copy of the
19 CV to have it available for today's deposition;
20 is that correct?
21 A. That's correct.
22 Q. You prepare your own reports;
23 correct?
24 A. Correct.
25 Q. And then you maintain the original on

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1 Reminger & Reminger. Is that true?
2 A. That's correct. I did not bring
3 those with me.
4 Q. Where are those?
5 A. Those are on my desk at home.
6 Q. Is there a reason you didn't bring
7 them with you today?
8 A. Mr. Warner suggested that I should
9 not bring those with me.
10 MR. WARNER: I'll be happy to get
11 them for you, counsel.
12 Q. I understand that. But do you know
13 why you were told not to bring them?
14 A. No. I simply follow the
15 recommendation of the attorney with whom I'm
16 working.
17 Q. How many letters are there?
18 A. They are merely cover letters.
19 Q. Doctor, that wasn't my question. How
20 many letters are there? I didn't want you to
21 tell me the substance of them.
22 A. A couple pages. I don't remember
23 whether there are two, three, one, I'm not sure.
24 Q. And when did you look at those
25 letters last?

3 (Pages 9 to 12)

<p>Page 13</p> <p>1 A. Well, I certainly didn't reread them 2 in preparation for today. And so I'm going to 3 guess that I probably read them when I received 4 them, and to tell you when that is, we have to 5 get them and look at the dates. 6 Q. So you have several letters from 7 Mr. Warner that you didn't bring with you today 8 because he suggested that you not bring them; 9 true? 10 A. One or more. 11 Q. One or more. And is there anything 12 else relative to this case that you did not 13 bring with you today, either because you chose 14 to or you were told not to? 15 A. No. 16 Q. Have you been provided with any 17 summaries, any deposition summaries relative to 18 any testimony in this case? 19 A. No summary information, no. Just 20 primary source documents. 21 Q. Now, I notice -- and I presume when 22 you received the information from Mr. Warner, it 23 came on Reminger & Reminger stationery? 24 A. I assume so, but I didn't 25 specifically look at that.</p>	<p>Page 15</p> <p>1 you prepared your October 22nd, 2002 letter? 2 A. You mean did we discuss the case in 3 any way by phone? 4 Q. By phone, in person. 5 A. What I assume is, though I don't have 6 a specific memory of this, is that after I 7 reviewed the records that were initially sent to 8 me, that we had a discussion by phone, but I 9 don't know the date nor do I have specific notes 10 of that discussion. 11 Q. And it's after having that discussion 12 with Mr. Warner that you then prepared this 13 report; correct? 14 A. Well, again, I don't have specific 15 recollection, but I can tell you in terms of 16 general patterns of my behavior, in general, I 17 would review records, have some discussions with 18 the attorney. We would have to have a 19 discussion for me to be asked to write a report. 20 Q. Well, doctor, you have been doing 21 this a long time. You have done this on more 22 than several occasions, so you know that a lot 23 of the questions that I'm going to be asking you 24 today are not going to be necessarily unique in 25 their format or their content. So if we can</p>
<p>Page 14</p> <p>1 Q. Obviously you recognize 2 Reminger & Reminger stationery, because as we 3 well know, you have worked for a number of 4 attorneys in that firm besides Mr. Warner; true? 5 A. Well, is that a question or a 6 statement? 7 Q. Well, it's a question because I ended 8 it with true, but I'll rephrase it if you are 9 uncomfortable with it. In fact, served as an 10 expert defending doctors represented by other 11 Reminger & Reminger attorneys; correct? 12 A. Yes, sir. 13 Q. And at least when you see a 14 Reminger & Reminger letterhead, you are familiar 15 with what the Reminger & Reminger letterhead 16 looks like, are you not? 17 A. Well, I don't think that I could 18 recreate it for you today, but I -- I don't 19 really understand the question. If a letter has 20 Reminger & Reminger on top of it, then I'll 21 understand that that's their letterhead, but I 22 really don't think I have memorized their 23 graphic design. 24 Q. All right. Can you tell me whether 25 you had any communication with Mr. Warner before</p>	<p>Page 16</p> <p>1 sort of just stay with answering my questions, I 2 can give you a greater guarantee or greater 3 likelihood that I will be able to finish within 4 the confines of the time constraints that you 5 have today. 6 In this case, the estate of Daniel 7 Gill, is it likely that you had a telephone 8 conversation with Mr. Warner after receiving the 9 material and reviewing it and prior to preparing 10 your report that is set forth in your opinions? 11 A. Yes. 12 Q. As you sit here right now, can you 13 tell me how long before October 22nd your 14 recollection is that you were consulted by 15 Mr. Warner on this case? 16 A. No. 17 Q. Now, did you have any e-mail 18 communication with Mr. Warner at all relative to 19 this case? 20 A. I don't remember. 21 Q. The reason I ask you that, doctor, is 22 because Mr. Warner's AOL e-mail is on the 23 letter, not his office e-mail. His office 24 e-mail is rwarner@reminger.com, although you 25 have an e-mail for his AOL account, which is not</p>

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1 his office account.
2 Having told you that, do you have a
3 recollection of having any communication with
4 Mr. Warner in this case at any time by way of
5 Internet? Even if it's just to set up times for
6 depositions.
7 MR. WARNER: Let me interject for the
8 record.
9 MR. MISHKIND: I don't need you to
10 interject.
11 MR. WARNER: I am unaware of AOL. I
12 have never used it. The only e-mail I ever had
13 was rwarner@reminger.com and I have never in my
14 life ever told anybody to communicate with me at
15 rwarner@aol.com. I will put that on the record.
16 That's all. I wanted to clarify that. That's
17 not recognizable to me.
18 MR. MISHKIND: Well, hopefully you
19 are not going to continue to jump in and make
20 these statements.
21 MR. WARNER: I apologize.
22 MR. MISHKIND: An error was made by
23 Dr. Levitan?
24 MR. WARNER: I don't know. That
25 doesn't belong to me.

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1 Q. Doctor, you want to make your reports
2 as accurate as possible; correct?
3 A. Correct.
4 Q. Even the salutations, the greetings,
5 you want to make as accurate as possible;
6 correct?
7 A. I'm not a great typist, so I can't
8 verify where I got that. Frankly, I don't know.
9 Q. In any event, you have an e-mail for
10 Mr. Warner which does not say Reminger &
11 Reminger on it. Are you able to say to a
12 certainty that you did not have any
13 communication with Mr. Warner by way of e-mail?
14 A. I remember this week Mr. Warner's
15 secretary sent me a couple of e-mails regarding
16 setting up today. And I think what actually
17 happened, though, is my e-mail was down and went
18 back and forth and I'm not sure it even reached
19 anybody, but I do remember attempting some
20 e-mail correspondence with Mr. Warner's
21 secretary regarding this week.
22 Q. Now, having refreshed your memory at
23 least with regard to receiving a couple e-mails
24 from his secretary, can you state to a certainty
25 that other than those couple e-mails from

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1 Mr. Warner's secretary that you have not had any
2 communication with Mr. Warner about this case by
3 way of e-mail?
4 A. I have no recollection either way.
5 Q. When you have e-mail communication on
6 a case, you retain that e-mail on your computer;
7 true?
8 A. No, I don't save e-mails.
9 Q. You delete the e-mails?
10 A. Yes. I don't tend to save e-mails.
11 Q. What else on the computer do you have
12 on the Daniel Gill case other than your report?
13 A. The other page that I provided to you
14 here.
15 Q. And that's Exhibit 2; true?
16 A. Correct.
17 Q. In summary form, what is Exhibit 2?
18 We will talk about it in greater detail.
19 A. Exhibit 2 is the running list of
20 records that I have reviewed on this case and
21 various notes that I might have made as I was
22 reading those records.
23 Q. When was Exhibit 2 prepared?
24 A. I don't remember. At some point when
25 I was reading the records, and probably it was a

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1 work over time as I made notes reading the
2 records. But I can't tell you, I don't have it
3 dated.
4 Q. When was the last time that you made
5 an entry on Exhibit 2?
6 A. Well, we can deduce that because the
7 report that you have was dated October 22nd,
8 because there are a couple of additional entries
9 of things that I have read, they have been
10 entered since October 22nd, 2002. But I can't
11 say. The last ten months, but I can't tell you
12 when.
13 Q. Looking at your report, there are a
14 number of items that you have identified that
15 you reviewed at the time that you wrote your
16 report; true?
17 A. True.
18 Q. And does that constitute all of the
19 information that you reviewed at the time that
20 you had prepared your report?
21 A. Yes. Barring any oversight on my
22 part, it was an attempt to list everything that
23 I had reviewed in preparing that report.
24 Q. So the only error that we have been
25 able to identify thus far on your report is

5 (Pages 17 to 20)

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1 putting rwarner@aol.com?
2 A. Correct.
3 Q. Is it your testimony that you did not
4 e-mail Rob Warner, Mr. Warner, with regard to
5 any substantive discussion about opinions on
6 this case at any time?
7 A. I don't believe that was my testimony
8 from five or six minutes ago.
9 Q. So it's possible that you did, you
10 just don't have any recollection one way or
11 another?
12 A. I have no recollection either way
13 about any e-mail communication.
14 Q. So you can't say, Mr. Mishkind, I can
15 state to a certainty that I never communicated
16 anything substantive to Mr. Warner, nor can I
17 state to a certainty that I did?
18 A. I can tell you, when you are asking
19 me about substantive, I can tell you that in
20 general I wouldn't have a complicated
21 interaction by e-mail. I don't do that in
22 general, it's too time consuming, so I have no
23 recollection either way. But in terms of my
24 general habits, I doubt that there was some
25 substantive discussion, lengthy discussion by

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1 Q. Do you know whether Dan was married
2 or single?
3 A. I don't remember.
4 Q. Do you know whether Dan's parents
5 were living?
6 A. I don't remember.
7 Q. Do you know what the medical history
8 was with regard to Dan's parents?
9 A. No.
10 Q. Have you made any notes -- did you
11 actually read the depositions of Dr. Steele and
12 Dr. Sutherland?
13 A. Yes. Anything that I have listed
14 here I have read. I haven't admitted it to
15 memory, but I have read them.
16 Q. How long ago did you read either or
17 both of those?
18 A. I don't recall the dates. I did not
19 reread those depositions in preparation for
20 today.
21 Q. How much time have you spent on this
22 case hour-wise?
23 A. I don't have a record of that.
24 Q. You certainly bill by the hour;
25 correct?

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1 e-mail. I don't generally do that.
2 Q. I'm not suggesting that it
3 necessarily has to be lengthy, but just
4 discussing any substance of the case, you don't
5 remember one way or another, true, in this case?
6 A. What does substantive mean? It's a
7 vague term. To be very clear, I have no
8 recollection either way.
9 Q. Got it. What have you reviewed in
10 addition to the material identified in your
11 report since your report?
12 A. I have listed two additional items.
13 One is the deposition of Dr. Sutherland and one
14 is the deposition of Dr. Steele.
15 Q. You have not read the deposition of
16 any family members, have you?
17 A. Not that I recall. And if I had read
18 them, I think that I would have listed them
19 here.
20 Q. Do you know the names of any of the
21 family members?
22 A. Not offhand, no.
23 Q. Do you know how many brothers and
24 sisters Dan Gill had?
25 A. No.

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1 A. I do.
2 Q. So that at some point in time, the
3 number of hours that you have put in on this
4 case become relevant; correct?
5 A. What do you mean by become relevant?
6 Q. If you are going to submit a bill to
7 Reminger & Reminger for your time, you need to
8 have some record as to how many hours you put in
9 that you need to be paid for; correct?
10 A. Correct.
11 Q. You do your own billing?
12 A. Correct.
13 Q. And you generate your own bills?
14 A. I do.
15 Q. Have you submitted any bills on this
16 case?
17 A. Probably, but my pattern is that once
18 I receive payment for the bill, I will simply
19 file that bill in documents that go to my
20 accountant for use at the end of the year.
21 Q. At the end of the year when you start
22 getting into 1099's from all the various
23 companies that you are providing medical/legal
24 work, you can verify that against the bills that
25 you submitted or your accountant can do that for

6 (Pages 21 to 24)

<p style="text-align: right;">Page 25</p> <p>1 you? 2 A. Yes. 3 Q. You practice medicine and you leave 4 the accounting to him? 5 A. Her. 6 Q. Who is your accountant, by the way? 7 THE WITNESS: Do I really have to 8 divulge that kind of information? 9 MR. WARNER: Note my objection. I 10 don't see what the relevancy of that is. 11 MR. MISHKIND: Well, it may not 12 ultimately lead to discovery of admissible 13 evidence, but as it relates to payments that the 14 doctor has received, I'm entitled to ask him who 15 his accountant is. 16 A. Her name is Joyce Gray. 17 Q. How long has Joyce Gray been your 18 accountant? 19 A. A few years. I don't recall exactly. 20 Q. Is she on her own or with a firm? 21 A. She has been all of the above. I 22 think this past year she left some firm and 23 moved on her own. 24 Q. What firm was she with? 25 A. I don't remember the name of the</p>	<p style="text-align: right;">Page 27</p> <p>1 MR. MISHKIND: Your objection is 2 noted. Please don't make speeches. 3 MR. WARNER: Counsel, don't start 4 waving your hand in front of me. 5 MR. MISHKIND: I am not waving my 6 hand in front of you. I said don't make 7 speeches. 8 MR. WARNER: Doctor, you already 9 answered the question. 10 A. If I go to a party and I meet 11 somebody and I can't remember their name and you 12 repeatedly ask why do you not remember their 13 name, it's an absurd question. 14 Q. As absurd as it is, I'm going to ask 15 one more time. Your accountant who has been 16 your accountant for a number of years, is there 17 a reason why you don't remember the name of the 18 firm that she was with until this past year? 19 MR. WARNER: Objection. 20 A. I'm afraid I don't understand the 21 question. 22 Q. She was with an accounting firm? 23 A. I believe so, but I don't recall the 24 details. 25 Q. Where was the accounting firm</p>
<p style="text-align: right;">Page 26</p> <p>1 firm. 2 Q. It's been within the last year? 3 A. Correct. 4 Q. And you don't remember the name of 5 the firm? 6 A. Correct. 7 Q. Is there a reason you don't remember 8 the name of the firm? 9 A. I'm sorry, I don't remember the name 10 of the firm. 11 Q. Is there a reason that you don't 12 remember? 13 MR. WARNER: Asked and answered. 14 Q. I appreciate that you said you are 15 sorry you don't remember. I am curious as to 16 why you don't remember the name of the firm that 17 your accountant was with. 18 A. I don't understand the question. 19 Q. I am curious. Do you just have a 20 mental block on remembering the name of the firm 21 or is there a reason, another reason that you 22 don't remember? 23 MR. WARNER: Note my objection. I 24 think he is starting to harass the doctor. He 25 is giving you a response.</p>	<p style="text-align: right;">Page 28</p> <p>1 located? 2 A. Somewhere in Woodmere or Beachwood. 3 Q. Was she a named partner; in other 4 words, was it Gray something or something Gray? 5 A. All my correspondence with her has 6 always been simply by her name and her address. 7 Q. Can you give me an idea in terms of 8 how many hours you put in in terms of reviewing 9 the initial material before you prepared your 10 report? 11 A. I don't have that record and I don't 12 want to guess. 13 Q. Where would that record be? 14 A. Well, if I went through the 15 information that is designated to go to my 16 accountant, I could pull out copies of records, 17 of bills that I have sent to Mr. Warner 18 pertaining to this case, bill or bills. I don't 19 recall. So that information is retrievable, but 20 I don't have it committed to memory. 21 Q. You don't have it with you today? 22 A. Correct. 23 Q. Have you billed Mr. Warner since, for 24 this additional information that you have 25 received, Dr. Steele's and Dr. Sutherland's</p>

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1 deposition?
2 A. I don't recall, but I don't know why
3 I wouldn't have, since it looks like the last
4 work that I did on this was when I reviewed
5 those depositions.
6 Q. Why wouldn't you bill for the time
7 that you put in on reviewing those depositions?
8 A. I probably did.
9 Q. So there would be a bill that you
10 would have at your home for that time; correct?
11 A. Probably. But again, I don't
12 specifically recall. I'm guessing, but I think
13 that's a reasonable assumption.
14 Q. I'm going to request on the record
15 that you check your records and provide copies
16 of the bills that you have submitted in
17 connection with this case, both the most recent
18 billing, as well as any other billing that you
19 have submitted on this case thus far. Will you
20 check your records and attempt to provide that
21 information to Mr. Warner?
22 A. If Mr. Warner advises me to do so, I
23 will do so.
24 MR. WARNER: I don't have any problem
25 with copies of bill or bills related to this.

1 A. To be clear, I have reviewed cases
2 before for Mr. Warner, but I cannot tell you the
3 number.
4 Q. More than two?
5 A. Probably, yes.
6 Q. More than three?
7 A. Probably, yes.
8 Q. More than four?
9 A. I don't recall.
10 Q. So more than three, but you are not
11 certain how many more, if any; is that a fair
12 statement?
13 A. I think that's a fair statement,
14 though I don't recall, even regarding the three,
15 I don't recall the specificity. I'm guessing
16 here.
17 Q. You have served as an expert witness
18 on behalf of a number of attorneys from
19 Reminger & Reminger in the past; correct?
20 A. Correct.
21 Q. And in fact, you are serving as an
22 expert witness currently for other attorneys
23 from the Reminger & Reminger firm on current
24 cases; correct?
25 A. Correct.

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1 Q. Have you ever served as an expert at
2 the request of Mr. Warner before the Gill case?
3 A. I believe so.
4 Q. On how many occasions?
5 A. A few, but I don't have those. I
6 don't recall specifically.
7 Q. What is a few to you?
8 A. Again, I can't give you a number.
9 And you know, you can say is it more than two,
10 more than five, I can't tell you. I don't
11 recall.
12 Q. And the word you used was a few, so I
13 just want to find out from you when you say a
14 few how you define that term.
15 A. Again, you know, you can press me all
16 you want.
17 Q. I'm not pressing you. You used the
18 word few, and I'm just asking you -- when I
19 asked you how many cases, you said a few. And
20 I'm asking you to tell me what you meant by a
21 few. That's all I am trying to do.
22 MR. WARNER: Note my objection. He
23 answered the question. It could be two, five,
24 he doesn't know. He has given an answer. But,
25 doctor, if you can answer, please answer again.

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1 Q. You have been asked this in a number
2 of depositions as to how many cases you have
3 reviewed and served as an expert for the
4 Reminger & Reminger firm in past depositions;
5 true?
6 A. Yes, I have.
7 Q. And can you tell me the number of
8 cases that you have reviewed for the
9 Reminger & Reminger firm?
10 A. I can only make a rough guess since I
11 don't know with precision nor do I keep those
12 numbers.
13 Q. Go ahead.
14 A. I started reviewing cases back around
15 1996, and at that point, very few cases. And in
16 the late '90s, while this has always been a
17 very, very small part of what I do in my week, I
18 guess at the high point I might have reviewed,
19 and I'm guessing, six, eight, ten, maybe 12
20 cases in a year.
21 I guess of those that I review -- and
22 again for the record I'm guessing here, I'm just
23 guessing -- but I would say among those that I
24 review for the defense, probably about half of
25 those are related to the Reminger firm.

8 (Pages 29 to 32)

<p style="text-align: right;">Page 33</p> <p>1 Q. Now, since you are asked that so 2 frequently in depositions, one of the favorite 3 questions that plaintiff's lawyers like to ask 4 you, can you tell me why, so that you wouldn't 5 be guessing or saying that you are guessing at 6 subsequent depositions, why you haven't decided 7 to be more precise and to keep records on the 8 number of cases that you review? 9 MR. WARNER: Objection. You can 10 answer. 11 A. Well, with all due respect, just 12 because I'm asked a question doesn't mean I 13 should necessarily change my patterns of 14 practice. 15 Q. So you have decided intentionally not 16 to maintain any type of an inventory basis to 17 the number of cases that you have reviewed for 18 Reminger? 19 MR. WARNER: Note my objection. The 20 whole tenor has changed away from the facts to 21 more of a -- 22 MR. MISHKIND: Rob, this deposition 23 is going to stop in a second if you don't stop 24 making speeches. I am tired of this. I want to 25 get on with this. Note an objection but don't</p>	<p style="text-align: right;">Page 35</p> <p>1 you will remind me what I might have said in a 2 previous deposition, I will be glad to attest to 3 the veracity of those comments. 4 Q. I will remind you at the appropriate 5 time. Today I'm asking you questions as to how 6 many times you had reviewed cases up to the 7 present date for the Reminger & Reminger firm. 8 A. Except for the information that I 9 have already given you, which is a guess or an 10 estimate, I'm not able to give you a more 11 specific number. 12 Q. Do you have any idea as to the number 13 of cases you have given deposition testimony on 14 behalf of any of the Reminger & Reminger 15 doctors, or the doctors represented by 16 Reminger & Reminger? 17 MR. WARNER: Note my objection. 18 A. Except to say that most cases end up 19 with a deposition, I can't tell you exactly. 20 Q. More than ten? 21 A. Same answer. I think yes, but I 22 don't know the numbers. 23 Q. More than 20? 24 A. Well, if you are pressing me for a 25 more detailed guess, the information I have</p>
<p style="text-align: right;">Page 34</p> <p>1 make speeches. 2 MR. WARNER: Note my objection. Go 3 ahead, doctor. 4 MR. MISHKIND: I am doing the exact 5 same thing I do with any other witness and I 6 have been doing this for 23 years. Don't tell 7 me how to take the deposition. I am getting to 8 questions about his background and his bias and 9 you know darn well that this is appropriate and 10 it's inappropriate for you to be making these 11 speeches, so stop it. 12 Q. Doctor, have you reviewed more than 13 ten cases for the Reminger & Reminger firm? 14 A. Since 1996 you are asking? 15 Q. Sure. 16 A. Yes. 17 Q. More than 20? 18 A. I can't give you -- I don't have 19 those numbers, I'm sorry. 20 Q. So that in previous depositions, if 21 you did answer that question in terms of the 22 numbers, today, with regard to that question, 23 you don't have that recollection? 24 A. Well, I have never kept those kinds 25 of records so I don't recall those numbers. If</p>	<p style="text-align: right;">Page 36</p> <p>1 already given you is that beginning in the late 2 1990s, perhaps I did -- and these are guesses 3 and I want to be clear, I don't want to be 4 nailed down for a guess -- but perhaps I have 5 done an average of eight to ten cases a year. 6 And let's say, I'm going to guess, let's call it 7 ten, and let's say, let's call it ten over a 8 four years time, which is 40. And let's guess 9 that 20 percent of those or 25 percent, let's 10 call it 25 percent were for the plaintiff, which 11 comes down to 30. And let's say that half of 12 those or so were related to the Reminger firm, 13 which comes down to 15. So I'm going to guess 14 that over time I have given probably over 15 to 15 20 depositions for the Reminger firm, but I 16 can't give you -- that's the best I can do with 17 these guesses and this is pretty rough. 18 Q. Doctor, in providing expert opinion 19 testimony, you realize that you shouldn't guess; 20 correct? 21 A. I'm doing the very best I can to 22 answer your questions, Mr. Mishkind. 23 Q. In providing expert testimony in a 24 case, you realize you shouldn't guess. 25 MR. WARNER: Objection. Asked and</p>

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1 answered.
2 MR. MISHKIND: No, it isn't, Rob.
3 A. When pressured by repeated questions
4 from you to answer with information that I don't
5 have any precise form, I have no other
6 alternative in response to your repeated
7 questioning to try and come up with the best
8 estimate or guess that I have.
9 Q. Doctor, different question. I'm not
10 talking about the numbers. Focus on my
11 question.
12 In providing an expert opinion in a
13 case, whether it's this case or any other case,
14 can we agree that in providing answers to
15 questions, your role as an expert witness is not
16 to provide answers where you guess in response
17 to questions; true?
18 A. I would say my role is to identify
19 the information that I give you as certain. An
20 estimate, a guess, or I have no idea at all.
21 That I believe is the most appropriate way to
22 respond.
23 Q. This year, how many times have you
24 testified at trial in a medical malpractice
25 case?

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1 A. I don't think any more than two, if I
2 can recall. I don't recall exactly, but it's
3 not more than two. I don't think it's even
4 three. I think it's just a couple.
5 Q. One case was in Akron; correct?
6 A. Perhaps you can remind me of the case
7 and the date.
8 Q. Does the name Antonino ring a bell to
9 you?
10 A. It does.
11 Q. Does spring of 2003 ring a bell to
12 you?
13 A. I don't recall the dates.
14 Q. Do you remember the name of the
15 doctor that you were defending in that case?
16 A. I don't.
17 Q. Do you remember the name of the other
18 at least one other case -- and I recognize that
19 there might be a third, but I think you have
20 said no more than two, maybe three -- do you
21 remember the name of or the location of the
22 second case in which you testified?
23 A. Again, I'm guessing even with those
24 numbers, because I don't have that information
25 with me, nor do I specifically recall, so I want

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1 to be clear that even these are guesses, but I
2 don't recall the names of other cases or
3 doctors.
4 Q. Do you remember the counties that you
5 testified in?
6 A. No.
7 Q. The cases that you have testified in
8 in 2003, can we agree were as defense expert?
9 A. The Antonino case was. The others, I
10 don't specifically recall.
11 Q. Can you state under oath that the
12 other cases were -- strike that.
13 Doctor, I am having a difficult time
14 understanding if there has been several cases
15 that you have testified in in 2003 in trial,
16 two, three, four? Again, I am not pinning you
17 down to the numbers, but it hasn't been a lot;
18 true?
19 MR. WARNER: Objection.
20 A. Correct.
21 Q. Have all of the cases been in Ohio,
22 to the best of your recollection?
23 A. I remember going to West Virginia in
24 the winter, but I can't recall whether it was
25 December or January. And I don't know, I don't

Page 40

1 recall the details of that case. But I think
2 largely I have been in Ohio in 2003.
3 Q. The West Virginia case was the Estate
4 of Dennis Cowan versus Dr. Husari; correct?
5 A. That sounds right.
6 Q. And you were testifying on behalf of
7 Dr. Husari in that case; true?
8 A. Again, when these cases are done, I
9 let them go. I don't recall.
10 Q. You don't retain it even in your
11 memory?
12 A. Correct.
13 Q. When is the last time you walked into
14 a courtroom in the State of Ohio that you can
15 state to a probability, where you can say
16 something other than I'm guessing, that you were
17 testifying in a medical malpractice case on
18 behalf of a plaintiff or a patient?
19 A. I believe I testified in Dayton some
20 time ago on behalf of a plaintiff, but I can't
21 give you the date.
22 Q. Well, I can. It was May 9, '02. Do
23 you remember that case on behalf of the Estate
24 of Castle?
25 A. I don't remember the details.

10 (Pages 37 to 40)

<p>Page 41</p> <p>1 Q. Montgomery County, Ohio, that's 2 Dayton? 3 A. If that's Dayton. I know that it was 4 in Dayton. 5 Q. You testified in that case on behalf 6 of the plaintiff in a nonsmall cell lung cancer 7 case; true? 8 A. Again, I don't recall the details. 9 Q. Tell me any other case that you've 10 testified in that you recall. You haven't been 11 doing this that long; right? It's not as if you 12 have been serving as an expert witness for 10 or 13 15 years. 14 A. Correct. 15 Q. Can you recall any cases, doctor, 16 that you have testified in a courtroom on behalf 17 of a plaintiff in a lung cancer case, actually 18 walked into the courtroom and testified on 19 behalf of the patient, other than in the 20 Montgomery, Ohio case? 21 A. Again, I don't retain this 22 information in my memory, so not that I 23 specifically recall. 24 Q. You testified recently in May or June 25 in Cuyahoga County in a nonsmall cell carcinoma</p>	<p>Page 43</p> <p>1 I understand that you don't, for 2 whatever reason, you don't keep the details in 3 your mind, but are you unable to tell me that in 4 a case that you had your deposition taken, a 5 lengthy deposition that you then went to trial 6 and testified, are you telling me -- and I'll 7 move on, doctor, I'll move on, I promise you 8 I'll move on -- are you telling me that you 9 don't remember whether that case was a nonsmall 10 cell lung cancer case? 11 A. I will tell you what I recall about 12 this case. I remember Mr. Riemenschneider, as 13 you are jogging my memory, was the defense 14 attorney, and I recall Mr. Eisen, I recall the 15 lengthy deposition, I recall that Mr. Eisen 16 utilized a videotape at the trial of one of my 17 prior testimonies, I think in trial, and 18 probably this was a nonsmall cell lung cancer 19 case and I know that I was working with the 20 attorney representing the physician. And these 21 are the details that I can recall. 22 Q. When you say probably was a nonsmall 23 cell lung cancer, is that a guess or are you 24 comfortable with making that statement? 25 A. I am comfortable with saying it was</p>
<p>Page 42</p> <p>1 case on behalf of the defendant. Do you 2 remember that? 3 A. Again, I don't retain that. 4 Q. Richard Morris versus Azem. 5 A. The name rings a bell, but I don't 6 recall the details of the case. 7 Q. Do you remember giving depositions to 8 Attorney Eisen? 9 A. I remember Mr. Eisen. 10 Q. And in fact, your deposition was over 11 two sessions, wasn't it? 12 A. I remember Mr. Eisen putting me 13 through a particularly lengthy deposition. He 14 is memorable. 15 Q. And who knows, I may fall into that 16 category as well by the time we are done, 17 doctor. 18 A. I would be happy to do that. 19 Q. But that was a nonsmall cell cancer 20 case, a lung case, as well, was it not? 21 A. Again, I don't recall the details of 22 that case. 23 Q. And again, it was just in June. The 24 trial was just in June, so it's only been two 25 months. Let me finish the question first.</p>	<p>Page 44</p> <p>1 probably a nonsmall cell lung cancer case, but I 2 don't recall the details. 3 Q. How many cases do you currently have 4 open back at your house that you are 5 participating as an expert at some stage or 6 another? 7 A. To answer that question, I would have 8 to go to where I keep the records in my house 9 and count them up. 10 Q. You told me that you have worked with 11 Mr. Warner before. Do you have any other active 12 cases with Mr. Warner currently? 13 A. Again, I don't specifically remember. 14 I would have to go look at those records to tell 15 you. 16 Q. So you would be able to -- 17 A. Excuse me, the answer is yes, because 18 we actually have a trial coming up in the fall. 19 So I can think of one other case that I 20 definitely have with Mr. Warner. 21 Q. What's the type of cancer in that 22 case? 23 A. I don't recall. I haven't looked at 24 those records in a while. 25 Q. Are you still reviewing eight to ten</p>

<p>Page 45</p> <p>1 cases a year?</p> <p>2 A. I have pretty much stopped in recent</p> <p>3 months taking any new cases because I have been</p> <p>4 quite busy at the hospital so I haven't taken</p> <p>5 new cases in quite a while.</p> <p>6 Q. What is quite a while?</p> <p>7 A. A few months.</p> <p>8 Q. What is a few months?</p> <p>9 A. I can't give you a specific number.</p> <p>10 Q. More than two or three?</p> <p>11 A. Over the last few months, I don't</p> <p>12 believe I have taken any new cases. And you can</p> <p>13 press me and I can't tell you exactly whether</p> <p>14 that means May or whether that means June, I</p> <p>15 can't tell you.</p> <p>16 Q. So all the cases that you have</p> <p>17 currently predate a few months ago?</p> <p>18 A. Initial review, correct.</p> <p>19 Q. Are you currently serving at the</p> <p>20 request of any plaintiff's attorneys as an</p> <p>21 expert?</p> <p>22 A. I believe so, yes.</p> <p>23 Q. Tell me the name of any attorneys</p> <p>24 that you are currently working for.</p> <p>25 A. There is an attorney in Florida by</p>	<p>Page 47</p> <p>1 A. Well, again, I don't retain that</p> <p>2 information. I would have to look at the</p> <p>3 records and go through them and figure that out.</p> <p>4 Q. As you sit here right now, can you</p> <p>5 tell me the names of any other plaintiff's</p> <p>6 attorneys other than Mr. Krieger that you have</p> <p>7 been retained?</p> <p>8 A. Not that I specifically recall.</p> <p>9 Q. When is the last time your deposition</p> <p>10 was taken?</p> <p>11 A. I had a deposition taken a couple</p> <p>12 weeks ago. If you let me look at my palm, I</p> <p>13 could probably tell you.</p> <p>14 (Pause.)</p> <p>15 A. Well, I can tell you that I had a</p> <p>16 predeposition phone conversation on August 5th,</p> <p>17 so sometime a few days after that I had a</p> <p>18 deposition, but I don't have the time of it in</p> <p>19 my palm. But I have the predeposition phone</p> <p>20 conversation that was the week of August 5th.</p> <p>21 Q. And who was the attorney that you</p> <p>22 were working for?</p> <p>23 A. Conversations with a Mr. Aughenbaugh.</p> <p>24 Q. That case would have been with the</p> <p>25 Hanna, Campbell law firm; correct?</p>
<p>Page 46</p> <p>1 the name of Kreiger, and I believe that he is in</p> <p>2 South Florida. Whether it's Palm Beach County</p> <p>3 or Dade County, I can't tell you. I have never</p> <p>4 been to his office. But he is somewhere in</p> <p>5 South Florida and he is a plaintiff's attorney</p> <p>6 and I am working with him. I haven't heard from</p> <p>7 him in quite a long time, but that case is still</p> <p>8 active.</p> <p>9 Q. Do you know what type of cancer it</p> <p>10 is?</p> <p>11 A. I think it's a lung cancer case.</p> <p>12 Q. Do you know what type of lung cancer?</p> <p>13 A. I think it's nonsmall cell, but I'm</p> <p>14 not positive of the details.</p> <p>15 Q. Has your deposition been taken in</p> <p>16 that case?</p> <p>17 A. Yes, I believe so. I have a vague</p> <p>18 recollection of him coming up here in the winter</p> <p>19 and doing that deposition.</p> <p>20 Q. What's Mr. Kreiger's first name?</p> <p>21 A. Ed.</p> <p>22 Q. And it's K-R-E-I-G?</p> <p>23 A. I-E- or E-I, I'm not sure.</p> <p>24 Q. Any other plaintiff's cases that you</p> <p>25 are currently participating in?</p>	<p>Page 48</p> <p>1 A. I think that's right.</p> <p>2 Q. Since that deposition was just taken</p> <p>3 a couple weeks ago, I presume that you remember</p> <p>4 what type of cancer that was?</p> <p>5 A. I think this was a nonsmall cell lung</p> <p>6 cancer case. That's my recollection.</p> <p>7 Q. It was a discovery deposition?</p> <p>8 A. Correct.</p> <p>9 Q. A plaintiff's lawyer took your</p> <p>10 deposition?</p> <p>11 A. Correct.</p> <p>12 Q. Who was the plaintiff's lawyer?</p> <p>13 A. I don't remember.</p> <p>14 Q. A case out of Summit County, a doctor</p> <p>15 in Summit County?</p> <p>16 A. I think so.</p> <p>17 Q. You have never worked for anyone at</p> <p>18 Becker & Mishkind, have you?</p> <p>19 A. I don't think so.</p> <p>20 Q. You have certainly been</p> <p>21 cross-examined by lawyers from Becker &</p> <p>22 Mishkind; correct?</p> <p>23 A. Well, the name doesn't ring a bell</p> <p>24 for me, so I wouldn't necessarily know that.</p> <p>25 Q. When is the next time that you are</p>

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1 scheduled, since you have your palm with you,
2 when is the next time you are scheduled for a
3 deposition?

4 (Pause.)

5 A. This might take me a little while.
6 If you want me to spend the time, I would be
7 happy to.

8 Well, I have a note here that either
9 on September 8th or September 30th I'm having a
10 deposition with Mr. Lenson. It looks to me like
11 it's September -- one of those two dates. I am
12 doing a deposition with Mr. Lenson on a case
13 called Zucker. But I can't tell you more in
14 detail than that. It looks like it's going to
15 be the 30th.

16 Q. Just one more request before you put
17 your palm away. Before August 5 with Dick
18 Aughenbaugh, when was the last time you had your
19 deposition taken?

20 A. Well, bear with me and I'll go
21 through it.

22 (Pause.)

23 A. If you really want to take the
24 time -- I'm back into June now. I am back into
25 May. If you really want me to take time to do

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1 deposition might actually have been cancelled,
2 because I think the Coon deposition was more
3 recent than May 20th, because I remember that.

4 So again, we can take the time and go
5 through it, but I think that might have been
6 cancelled for May 20th and rescheduled more
7 recently and I missed it. Because I think
8 that's fairly fresh in my memory.

9 Q. What type of cancer was that?

10 A. If I remember correctly, I think this
11 patient had penile cancer.

12 Q. Doctor, can we agree that as to the
13 cases that you have given deposition or actually
14 appeared at trial, the vast majority have been
15 for physician medical providers; correct?

16 A. I think the split is around -- and
17 again this is a guess or an estimate, call it
18 what you will. I think perhaps 20 to 25 percent
19 of the cases have been for the plaintiff and the
20 remainder for the defense.

21 Q. And the only one that you are able to
22 or the only two that you are able to tell me
23 about from memory that you are either serving or
24 have served as a plaintiff's expert is the
25 Montgomery County, the Dayton case that we have

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1 this, I will be glad to. I apologize for
2 keeping you waiting.

3 (Recess had.)

4 A. I found one. I can't promise that in
5 this rapid review that I didn't miss something,
6 so I don't want to be nailed if I inadvertently
7 flipped over one here, but basically the first
8 one I can find going backwards was May 20th, and
9 this is with Attorney Mingus in a case called
10 Coon.

11 Q. C-O-O-N?

12 A. Right.

13 Q. And Mr. Mingus is with the
14 Reminger & Reminger firm; correct?

15 A. Correct.

16 Q. And you were serving as an expert
17 defending a doctor in that case; correct?

18 A. Correct.

19 Q. You mentioned Mr. Lenson. He is with
20 Ulmer & Berne. Did you know that?

21 A. Yes.

22 Q. And you have done other cases with
23 Mr. Lenson before, as well; correct?

24 A. Correct. Let me correct myself. As
25 I think about this, I think that the Coon case

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1 talked about, and Mr. Krieger's case; is that
2 correct?

3 A. Well, I believe you asked about --
4 I'm trying to think. You asked about current
5 cases. Do you want me to think of any other
6 cases I have been involved in that have been for
7 the plaintiff over the years?

8 Q. Well, let me make it easier. Have
9 you served as an expert witness for a plaintiff
10 in Cleveland, Ohio?

11 A. I don't believe so.

12 Q. In fact, isn't it true that you, for
13 whatever reason, but you, in cases involving
14 Cleveland situations, would prefer not to be
15 involved in testifying against a Cleveland
16 physician?

17 A. That's correct.

18 Q. In fact, we can expand that and take
19 that into the Northeastern Ohio area, for
20 whatever reason you would prefer not to be
21 involved in testifying against a physician in a
22 medical malpractice case; true?

23 A. Correct.

24 Q. Other than the Montgomery, Ohio,
25 Dayton, Ohio case, do you remember any other

13 (Pages 49 to 52)

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1 cases that you have testified in on behalf of a
2 plaintiff that involved nonsmall cell lung
3 cancer?

4 A. I'm sure they exist, but I can't
5 recall offhand.

6 Q. And by testify, you mean deposition
7 or trial?

8 A. True.

9 Q. The cases that you have testified for
10 lawyers at Reminger & Reminger -- and obviously
11 you know that I have a great number of your
12 depositions -- but is it fair to say that over
13 the period of time that you have been testifying
14 by way of deposition or trial at the request of
15 Reminger attorneys, that you have testified that
16 the delay in diagnosis in any cancer case did
17 not affect or harm the patient; true?

18 A. Ask me that question once more. I
19 want to make sure I understand it.

20 Q. I will put aside all of the
21 introduction about the number of depositions.
22 When you have been testifying in the defense of
23 doctors represented by Reminger & Reminger, can
24 we agree that you have either taken the stand
25 and/or given deposition testimony that any

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1 particular physician was not violated; true?

2 A. Well, it depends upon the case
3 whether I have been asked to be involved for
4 purposes of standard of care or proximate cause
5 or both. So it varies from case to case.

6 Q. Listen to my question. Standard of
7 care.

8 A. So your question is have I ever been
9 involved in a case where my opinions have
10 pertained to standard of care and not proximate
11 cause -- or I'm sorry, I am not following.

12 Q. Where you have been asked to provide
13 testimony on standard of care on behalf of a
14 physician and is it fair to say that in those
15 cases where you provided standard of care
16 testimony that your testimony has been that the
17 standard of care was not violated?

18 A. So you are asking if I have been
19 retained for standard of care with an opinion
20 that would be adverse to the defense attorney
21 and have I taken the stand with that unfavorable
22 opinion?

23 Q. Yes.

24 A. Not that I specifically recall.

25 Q. And in proximate cause -- and you

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1 alleged delay of a diagnosis of a cancer did not
2 affect or harm the patient?

3 A. My involvement would really be in one
4 of two areas. It would be either defense
5 regarding the standard of care or defense
6 regarding proximate cause, and some cases are
7 one, some are the other, some are both. And so
8 those would be the categories in which I have
9 been involved in assisting with the defense of
10 attorneys with Reminger & Reminger or really any
11 other case where I have worked with the defense.

12 Q. But in cases for the defense where
13 you have given deposition testimony or taken the
14 stand, is it fair to say that when you have been
15 asked to provide standard of care opinions, your
16 testimony has been that the standard of care was
17 not violated?

18 A. Well, by definition for me to be
19 involved in a case for the defense attorney, my
20 opinions in order for them to want to work with
21 me would have to be favorable in terms of either
22 standard of care or proximate cause or both.

23 Q. So my statement is accurate, when you
24 have taken the stand in cases, you have taken
25 the position that the standard of care of that

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1 know what proximate cause means, don't you?

2 A. Yes.

3 Q. Have you testified when you have been
4 a defense expert and have been asked to provide
5 proximate cause testimony, have you, to your
6 knowledge, ever taken the stand and admitted
7 under oath that the delay in diagnosis was the
8 proximate cause of the death or harm or injury
9 to the plaintiff?

10 A. Let me be clear and I want to clarify
11 my last statement. And that is that there are
12 certainly times when I could imagine disagreeing
13 with the actions, i.e., standard of care, and
14 that I might have felt that that was immaterial
15 because it didn't affect the outcome of the
16 patient.

17 So if you are asking me if I have
18 ever, to answer your last question accurately,
19 is it conceivable that I have testified that
20 perhaps I thought the standard of care was
21 violated but that it did not affect the outcome,
22 perhaps I might have given that testimony. I
23 don't specifically recall.

24 Q. You are board certified in internal
25 medicine?

14 (Pages 53 to 56)

<p>Page 57</p> <p>1 A. Correct.</p> <p>2 Q. You are familiar with the issue of</p> <p>3 standard of care in medical malpractice cases;</p> <p>4 true?</p> <p>5 A. Yes.</p> <p>6 Q. And you are certainly qualified to</p> <p>7 provide opinions as to whether an internist met</p> <p>8 or violated the standard of care in terms of</p> <p>9 ordering diagnostic studies to follow up a</p> <p>10 patient who is diagnosed with pneumonia; true?</p> <p>11 A. Correct.</p> <p>12 Q. In fact, you have been called upon in</p> <p>13 a number of cases to provide expert testimony as</p> <p>14 to whether a physician did or did not violate</p> <p>15 the standard of care in terms of not timely</p> <p>16 diagnosing lung cancer; true?</p> <p>17 A. True.</p> <p>18 Q. In fact, you have been called upon by</p> <p>19 defense attorneys in penile, kidney, breast</p> <p>20 cancer, and in other types of other cancers to</p> <p>21 provide standard of care testimony that was</p> <p>22 favorable to the doctor; i.e., that the doctor</p> <p>23 did not violate the applicable standard of care</p> <p>24 in his diagnostic workup of that patient; true?</p> <p>25 A. It's a very long question. I'm</p>	<p>Page 59</p> <p>1 opinions in this case besides those four</p> <p>2 opinions that you intend to provide or are</p> <p>3 certainly in a position to provide at the time</p> <p>4 of the trial of this case?</p> <p>5 A. No.</p> <p>6 Q. As I understand it, in this case, you</p> <p>7 have not been asked to provide any opinions</p> <p>8 pertaining to the standard of care for</p> <p>9 Dr. Mansnerus; correct?</p> <p>10 A. Correct.</p> <p>11 Q. You are certainly qualified as an</p> <p>12 internist to provide such opinions if you were</p> <p>13 so asked to do so; correct?</p> <p>14 A. I certainly haven't focused on this</p> <p>15 in this case, but I have not been asked to</p> <p>16 render standard of care opinions.</p> <p>17 Q. Let's try the question again. Let's</p> <p>18 read it back so there is no question and listen</p> <p>19 to the question carefully.</p> <p>20 (Record read.)</p> <p>21 MR. WARNER: Note my objection. He</p> <p>22 has answered the question.</p> <p>23 Q. Do you understand my question?</p> <p>24 MR. WARNER: Asked and answered.</p> <p>25 A. I guess I don't understand the</p>
<p>Page 58</p> <p>1 sorry, ask me again.</p> <p>2 Q. You have testified in a number of</p> <p>3 cancer cases, not just lung cancer; true?</p> <p>4 A. Correct.</p> <p>5 Q. And you have provided expert opinion</p> <p>6 in a number of those cases without repeating the</p> <p>7 categories of cancers that the physician did not</p> <p>8 violate the standard of care as it relates to</p> <p>9 his patient; true?</p> <p>10 A. Sure. Not in all cases, but I have</p> <p>11 certainly at certain points testified to that</p> <p>12 effect, yes.</p> <p>13 MR. WARNER: Counsel, the doctor is</p> <p>14 being offered in this case on the issue of</p> <p>15 proximate cause.</p> <p>16 MR. MISHKIND: I understand that.</p> <p>17 Q. Doctor, Plaintiff's Exhibit 1 is your</p> <p>18 report; true?</p> <p>19 A. Correct.</p> <p>20 Q. And does it contain -- actually, it</p> <p>21 contains four opinions starting at the bottom of</p> <p>22 page two and continuing on to page three;</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. Have you arrived at any other</p>	<p>Page 60</p> <p>1 question.</p> <p>2 Q. Doctor, we have already talked about</p> <p>3 the fact that you are board certified in</p> <p>4 internal medicine and that you have testified</p> <p>5 with regard to the standard of care of other</p> <p>6 internists as it relates to the issue of whether</p> <p>7 the internist met or fell below the standard of</p> <p>8 care in a cancer case; true?</p> <p>9 A. True.</p> <p>10 Q. In this case, you have not been asked</p> <p>11 to provide such opinions; correct?</p> <p>12 A. Correct.</p> <p>13 Q. Let me ask you first, do you know why</p> <p>14 you were not asked to provide such opinions?</p> <p>15 A. No.</p> <p>16 Q. I take it, however, that if you were</p> <p>17 asked to provide such opinions, you are</p> <p>18 qualified, based upon your training and</p> <p>19 experience and knowledge in the area, to provide</p> <p>20 such opinions; true?</p> <p>21 A. So I understand your question and we</p> <p>22 are not talking about all of internal medicine,</p> <p>23 since I am not necessarily skilled in every</p> <p>24 aspect, but if you would clarify for me what</p> <p>25 aspect of internal medicine you are referring</p>

<p>Page 61</p> <p>1 to, then I could answer your question. 2 Q. You are certainly qualified, based 3 upon your training, experience, if you had been 4 asked to provide opinions as to whether or not 5 Dr. Mansnerus met or fell below accepted 6 standards of care in terms of his follow up of 7 this patient who had a presumed diagnosis of 8 pneumonia; true? 9 A. Yes. I would have to rereview the 10 records to formulate those opinions, but the 11 answer is yes. 12 Q. And again, you're qualified to do so, 13 but for whatever reason you were told not to 14 comment on the standard of care; true? 15 A. Well, I will state that additionally 16 I was asked to focus on proximate cause. 17 Q. And not to focus on the standard of 18 care? 19 A. Stated in the positive, I was 20 directed to focus on a particular area. I 21 wasn't told to avoid another area, but simply to 22 focus on one area. 23 Q. With regard to standard of care, 24 would you defer, as it relates to the standard 25 of care for internal medicine, would you defer</p>	<p>Page 63</p> <p>1 opinion as it relates to the standard of care 2 provided by an internist -- and this is a 3 general question -- would you defer to 4 Dr. Rozman as an internist or do you feel 5 qualified to provide standard of care opinions 6 on internal medicine issues as it relates to 7 whether a particular diagnosis was timely made 8 in accordance with the standard of care? 9 A. It would depend upon the specific 10 situation. 11 Q. You are not going to take the stand 12 in this case, are you, and testify based upon 13 your review of the records and your knowledge of 14 this case that the standard of care was complied 15 with by Dr. Mansnerus; true? 16 MR. WARNER: Note my objection. He 17 indicated he is here for proximate cause. 18 MR. MISHKIND: I can still ask him 19 the questions. Your objection is noted. Go 20 ahead. Doctor. 21 A. I haven't formulated any opinions 22 thus far regarding standard of care here, so 23 therefore, I'm not prepared to answer your 24 question. 25 Q. But as you sit here right now, given</p>
<p>Page 62</p> <p>1 to Dr. Rozman? 2 A. Well, I don't follow your question. 3 Q. Do you know whether Dr. Rozman is an 4 expert in this case? 5 A. Before beginning this morning, I 6 briefly skimmed some expert reports that I have 7 not reviewed pertaining to experts working with 8 Mr. Warner in the case. 9 Q. Was Dr. Rozman -- 10 A. I believe Dr. Rozman was one of them. 11 Q. Do you know if Dr. Rozman has 12 provided opinions on the standard of care for an 13 internal medicine specialist? 14 A. Well, I would feel better looking at 15 the documents since I skimmed it. 16 Q. I understand. Listen to my question. 17 It has nothing to do with -- you know 18 Dr. Rozman, don't you? 19 A. I do. 20 Q. You have served as an expert in cases 21 where you and he have testified on behalf of 22 doctors defended by Reminger & Reminger; true? 23 A. I don't specifically recall that, but 24 I don't dispute it. 25 Q. In general, if Dr. Rozman had an</p>	<p>Page 64</p> <p>1 the fact that you have reviewed this case, you 2 are not in a position, correct, to say that the 3 care provided by Dr. Mansnerus met the 4 applicable standard of care; true? 5 MR. WARNER: Objection. Asked and 6 answered. 7 A. I'm not prepared to offer an opinion 8 either way. 9 Q. Doctor, I am not asking you the 10 converse. I'm asking you based upon your 11 knowledge and review in this case, can we agree 12 that you are not prepared to testify that 13 Dr. Mansnerus met the applicable standard of 14 care with regard to his patient? 15 MR. WARNER: Objection. Asked and 16 answered. 17 A. Well, I want to be clear, because in 18 answering that question it could imply that I 19 have an opinion either way. 20 Q. Doctor, don't read anything in terms 21 of implications. It's a very simple question. 22 There may be another question that could be 23 asked after that, but I just want this question 24 answered, and that is, based upon your knowledge 25 and experience and your review of this case, is</p>

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1 it fair to say that based upon what you see at
2 this particular point, you are not in a position
3 to take the stand and to answer questions that
4 would suggest that Dr. Mansnerus met the
5 applicable standard of care in this case?
6 MR. WARNER: Objection. That's about
7 the fourth time you asked the question.
8 Doctor, answer the question again, if
9 you can.
10 MR. MISHKIND: No, no. Quit with if
11 you can. He is going to answer the questions.
12 MR. WARNER: He answered it four
13 times.
14 MR. MISHKIND: No, he hasn't.
15 MR. WARNER: Have Vivian read it
16 back.
17 MR. MISHKIND: You continue to march
18 around and pace around, but I am going to have
19 him answer the question.
20 MR. WARNER: Since you raised it,
21 it's hard for me to sit extended times and
22 that's why I've chosen to walk. I'm sorry it's
23 bothering you. It's not meant to interfere with
24 your deposition. I apologize if it is.
25 MR. MISHKIND: You are doing a good

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1 concerning the December 1999 x-ray, do you?
2 A. No.
3 MR. WARNER: Note my objection. That
4 x-ray is missing. We have been denied the
5 opportunity to review it, counsel, due to your
6 expert losing it.
7 MR. MISHKIND: Rob, make an
8 objection, don't make speeches.
9 MR. WARNER: That's an unfair
10 question. I wanted all of them to look at it,
11 but your expert denied me the right to do it.
12 MR. MISHKIND: We will do it one more
13 time because you are acting so unethically. Be
14 quiet.
15 MR. WARNER: Provide the film so we
16 can look at it.
17 MR. MISHKIND: Be quiet. Stop acting
18 like an absolute rookie.
19 Q. Listen to my question. My question
20 is, you don't have any basis to dispute the
21 radiological interpretation provided by the
22 radiologist in December of 1999, do you?
23 MR. WARNER: Note my objection. The
24 court has ruled on this and is not going to
25 allow you to go into this area.

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1 job. But go ahead, doctor.
2 A. I have not reviewed this case with
3 respect to standard of care.
4 MR. WARNER: I object to your insult
5 that I am trying to do something here. My
6 stomach is uncomfortable now and I need to walk
7 and I am trying not to interfere, but you are
8 trying to bring me personally into the case and
9 that's not my goal and intent. Leave me out of
10 it. Quit making comments about me, counsel.
11 MR. MISHKIND: Rob, be quiet and I
12 won't make comments. Doctor, go ahead, please.
13 A. As I said, I have not reviewed this
14 case with respect to standard of care, so I will
15 not be pushed into offering an opinion either
16 way regarding standard of care.
17 Q. All right, doctor. You are not an
18 expert in radiology, are you?
19 A. I am not.
20 Q. In fact, can we agree that you rely
21 on radiologists in terms of their
22 interpretations of chest x-rays?
23 A. Correct.
24 Q. In this case, you don't have any
25 basis to dispute the radiological interpretation

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1 MR. MISHKIND: Why don't you go ahead
2 and we will take a half hour so you can make
3 various speeches and then we will continue with
4 the deposition, which we are obviously not going
5 to finish today because of your bantering.
6 Q. There is some silence, so, doctor, I
7 guess you can try to answer.
8 A. Perhaps after that discussion, you
9 could refresh my memory as to the question.
10 Q. The radiological interpretation of
11 this film, you have seen it; correct?
12 A. I have seen the radiology report.
13 Q. Right. And that's what I mean,
14 radiological interpretation. The printed
15 interpretation, correct?
16 A. Correct.
17 Q. Based upon what the radiologist has
18 written in that report, do you have any basis,
19 solely on the basis of that report, to dispute
20 his interpretation?
21 A. Can we look at that report?
22 Q. Sure, go right ahead. Do you have it
23 or would you like me to make it easy for you?
24 A. Perhaps you could just make it easy
25 for me.

17 (Pages 65 to 68)

<p>Page 69</p> <p>1 Q. There you go. 2 MR. WARNER: Note my objection. Go 3 ahead. 4 A. I can't say that some other 5 radiologist may not credibly disagree upon 6 reviewing the film, but as an internist and an 7 oncologist, I have no data with which to 8 disagree with this interpretation. 9 Q. And doctor, from the standpoint of 10 the opinions that you have arrived at in this 11 case -- and you have arrived at opinions on 12 proximate cause; correct? 13 A. Correct. 14 Q. Is it fair to say that you were able 15 to arrive at those opinions that you hold to a 16 reasonable degree of medical probability? 17 A. Correct. 18 Q. And you have been able to arrive at 19 those opinions to a reasonable degree of medical 20 probability without having seen the original 21 film in this case; correct? 22 A. Correct. 23 Q. Could I have that back for a second, 24 please. If you need to see it again, I would be 25 happy to hand it back to you.</p>	<p>Page 71</p> <p>1 Q. What hospitals do you have privileges 2 at besides UH? 3 A. Currently just University. 4 Q. Did you have privileges somewhere 5 else recently? 6 A. I have had privileges at other area 7 hospitals, though I haven't extensively 8 practiced there; Geauga Hospital, St. John West 9 Shore, I think for a time Lake East and West 10 Hospitals. 11 Q. I take it you have never had your 12 privileges suspended or revoked? 13 A. No. I mean, perhaps for a day 14 because of late signatures on medical records, 15 but nothing, no real revocation. 16 Q. How many times has that happened? 17 A. Oh, it happens to all of us 18 periodically, but it's not a formal censure, 19 it's simply an administrative event. 20 Q. But to you personally, how many times 21 has that happened? 22 A. Oh, maybe a couple over the years. 23 Q. Have you ever applied for privileges 24 at a hospital and been denied? 25 A. No.</p>
<p>Page 70</p> <p>1 Do you know Dr. Mansnerus? 2 A. No. 3 Q. Dr. Mansnerus also has privileges at 4 University Hospitals, but you have never crossed 5 paths with him? 6 A. Not that I can recall. 7 Q. Has he ever referred cases to you? 8 A. Not that I can recall. 9 Q. You and Dr. Rozman have a 10 professional relationship; correct? 11 A. We know one another professionally, 12 yes. 13 Q. He has referred patients to you; 14 correct? 15 A. I believe so. I can't recall 16 specifics, but I certainly know him. 17 Q. Well, you have been asked that 18 question very recently and I don't necessarily 19 need to pull out that deposition, but there was 20 no question when you were asked recently about a 21 working relationship with Dr. Rozman, you did 22 indicate that Dr. Rozman refers patients to you. 23 Do you recall that? 24 A. I don't recall, but I don't dispute 25 it.</p>	<p>Page 72</p> <p>1 Q. Who is your malpractice carrier? 2 A. I don't even know. 3 Q. You don't know who your malpractice 4 carrier is? 5 A. I don't. 6 Q. Are you a member of a group? 7 A. I'm a member of University 8 Physicians, Incorporated. 9 Q. Is your malpractice insurance 10 provided through that group? 11 A. Yes. It's a large group and they 12 change carriers periodically, so I don't even 13 know. 14 Q. Have you ever been sued for 15 malpractice? 16 A. Yes. 17 Q. How many times? 18 A. Twice. 19 Q. Any of those cases still pending? 20 A. No. 21 Q. How long ago was that misfortune? 22 A. A long time ago. 23 Q. In the '90s, '80s? 24 A. I was once sued in the early '80s 25 when I was in an emergency room in New</p>

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1 Hampshire. And I was once sued and the case was
2 dropped, so I don't know if I need to mention
3 that, when I practiced near Boston in the late
4 '80s.
5 Q. Never been sued then in Cleveland?
6 A. No.
7 Q. Do you lecture from time to time on
8 the topic of nonsmall cell lung cancer?
9 A. Yes.
10 Q. When is the last time you lectured on
11 it?
12 A. Probably sometime in the spring.
13 Q. To whom?
14 A. To medical residents.
15 Q. Here at UH?
16 A. Correct.
17 Q. Was this like a grand round type of
18 lecture or was it --
19 A. It's part of the educational program
20 for the medical residents rotating through the
21 oncology unit.
22 Q. Do you maintain in your files any
23 type of written material that you provide to the
24 residents to supplement your lectures?
25 A. I don't distribute any material when

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1 the aggregate of my experience and training and
2 I read scores of articles every week.
3 Q. Since preparing this report in
4 October, have you reviewed any medical
5 literature on the topic of nonsmall cell lung
6 cancer?
7 A. Probably hundreds of articles.
8 Q. Any that you consider to be reliable
9 sources of information that would be relevant to
10 the Gill case?
11 A. No single reference, but again, my
12 opinions are based on the aggregate of my
13 experience and my reading and my general
14 knowledge.
15 Q. And basically what I want to find out
16 from you is, when you take the stand at trial,
17 are you going to testify that a particular
18 article or a particular reference within a
19 textbook, whether it be Devita's or any other
20 textbook, is in your opinion authoritative or
21 generally reliable as it relates to the issues
22 that you are going to be testifying to, and that
23 is proximate cause in nonsmall cell lung cancer?
24 A. Well, we haven't begun to talk about
25 trial testimony, but as we sit here today, I

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1 I talk to them.
2 Q. Have you appeared within the last,
3 let's say, four or five years at any type of a
4 convention, seminar, or medical gathering where
5 you address the issue of diagnosis, treatment
6 and prognosis of nonsmall cell lung cancer?
7 A. You don't mean talking to the
8 residents, you mean some other venue?
9 Q. Let's put aside the residents, but
10 where you were an invited speaker or where you
11 spoke to a medical society or convention on that
12 topic.
13 A. I haven't spoken to a medical society
14 or a convention regarding lung cancer in recent
15 memory.
16 Q. Have you reviewed any medical
17 literature besides the AJCC staging manual,
18 which I believe you have a page there.
19 A. Correct.
20 Q. Have you reviewed any other medical
21 literature in arriving at the opinions that you
22 have expressed in your report of October 22,
23 2002?
24 A. I haven't done any specific research,
25 but this report, as you know, is the result of

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1 certainly have no plans to do so.
2 Q. And certainly for the record, if you
3 determine that there is a reliable or
4 authoritative text or journal or chapter that
5 you, for whatever reason, deem to be that in
6 your opinion, and that you intend to acknowledge
7 that at the time of trial, I would ask that you
8 notify Mr. Warner so that I'm aware of that
9 before you take the stand. Okay?
10 A. Fair enough.
11 Q. Thank you. There are several other
12 doctors that are experts in this case.
13 Dr. Botham. Do you know Dr. Botham?
14 A. I know Dr. Botham.
15 Q. How do you know him?
16 A. He used to be at Mt. Sinai and I
17 believe that he was for a time at University. I
18 believe he is now at the Clinic. But, yes, we
19 have certainly shared patients and interacted
20 over the years.
21 Q. How long have you known Dr. Botham?
22 A. I can't tell you in particular. I
23 have been in Cleveland since 1991, so over
24 those, you know, 12 years I have had
25 intermittent contact with him, but I can't tell

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1 you any more specifics.
2 Q. I meant to ask you this at the
3 beginning more out of curiosity than anything
4 else, but at some point in time were you
5 considering becoming a rabbi?
6 A. That was simply part of my education
7 as I was in my undergraduate years.
8 Q. That was between your undergraduate and
9 before starting in medical school?
10 A. It was actually my senior year in
11 college.
12 Q. You were in Massachusetts for
13 undergraduate?
14 A. Correct.
15 Q. At Brandeis. And then your senior
16 year you went to New York where you were at the
17 Jewish Theological Seminary of America?
18 A. Correct.
19 Q. Was that the entire senior year?
20 A. Correct.
21 Q. But there wasn't a plan to enter and
22 become a rabbi?
23 A. I had already been accepted to
24 medical school at that point.
25 Q. But were you also considering

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1 Q. Do you know anything at all about his
2 reputation as an oncologist?
3 A. No.
4 Q. No basis for you to say that you have
5 an opinion that he is not qualified to provide
6 opinions as it relates to issues of proximate
7 cause? You may disagree with his opinions, but
8 do you have any basis to say that he doesn't
9 have the qualifications and training to provide
10 opinions in this case?
11 A. I have no opinion either way.
12 Q. So, therefore, you won't say on the
13 stand, it's my opinion that he is not qualified
14 to provide opinions; correct?
15 A. I have no information with which to
16 reach such a conclusion.
17 Q. And Dr. Sutherland, any knowledge at
18 all about his reputation?
19 A. No.
20 Q. Did you see the report from a
21 pathologist in this case? Did Mr. Warner show
22 that to you?
23 A. In my very brief skimming of those
24 reports, there was a report from Dr. Kaisi the
25 pathologist, but I couldn't tell you what's in

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1 becoming a rabbi?
2 A. I had plans and followed through on
3 those plans to go to medical school.
4 Q. I understand you had plans to go to
5 medical school, but were you considering the
6 possibility of becoming a rabbi, or was it
7 simply just an interest and you had no intention
8 of potentially pursuing that as a career?
9 MR. WARNER: Note my objection.
10 A. This was so many years ago. This is
11 30 years ago. I don't really recall those
12 personal issues, but I had been accepted to
13 medical school and my intention all along was to
14 go.
15 Q. Do you know Dr. Sutherland?
16 A. I don't.
17 Q. Do you know Dr. Steele?
18 A. I don't.
19 Q. Have you ever appeared as an expert
20 in a case where Dr. Steele was either on the
21 same side with you or an expert for the
22 plaintiff?
23 A. His name rings a bell, so I think
24 that I have read his testimony before in
25 different cases, but I can't recall the details.

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1 it.
2 Q. You don't hold yourself out as an
3 expert in pathology, do you?
4 A. No.
5 Q. You don't hold yourself out as an
6 expert in surgery?
7 A. Well, I don't perform surgery, but
8 certainly much of my expertise pertains to the
9 appropriateness of surgery and the outcome of
10 surgery and things like that. I know a lot
11 about that, but I wouldn't want to perform
12 surgery.
13 Q. Certainly a patient that is diagnosed
14 with nonsmall cell lung cancer at a Stage 1
15 would be a surgical candidate; true?
16 A. Depending upon the details of that
17 patient, that answer could be complex, but to be
18 simple about it, most patients with Stage 1
19 small lung cancer will undergo surgery as their
20 primary treatment.
21 Q. I meant to ask you before but we got
22 off on some of our discussions. I know what you
23 charged in the past and I want to find out what
24 you charge now for purposes of deposition
25 testimony.

20 (Pages 77 to 80)

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1 A. For a deposition, \$400 per hour.
2 Q. When did you increase that to \$400
3 per hour?
4 A. At some point, and I can't recall
5 exactly, I can't recall when, but at some point
6 in the past I increased that from \$350 to \$400.
7 Q. What about your charge for trial
8 testimony?
9 A. \$500 an hour.
10 Q. And when did you increase that to
11 \$500?
12 A. The same answer, I don't recall
13 exactly.
14 Q. How about review of medical records?
15 A. \$300 an hour.
16 Q. In 2002, which would be the last
17 calendar year, can you tell me from your
18 medical/legal work what your income was from
19 reviewing depositions and trial testimony?
20 A. I don't have that number.
21 Q. You don't recall when you filed your
22 tax return what that figure was?
23 A. Well, my tax return is, of course, a
24 family tax return, number one, and number two, I
25 do a fair amount of lecturing on medical topics

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1 or services that provide experts to attorneys?
2 A. No.
3 Q. Have you ever made your name
4 available to any such entities?
5 A. No.
6 Q. Do you know how, for example, the
7 attorney down in Florida obtained your name?
8 A. No idea.
9 Q. Besides Ohio, what other states --
10 and we know West Virginia, we know Florida --
11 what other states do you know you have reviewed
12 medical situations that have arisen in those
13 other states?
14 A. The only other state that I can
15 recall is Kansas and then I reviewed one case in
16 Northern California.
17 Q. The Kansas and Northern California
18 case, both were on behalf of the defendant;
19 true?
20 A. I don't specifically recall.
21 Q. Do you know how the attorneys
22 contacted you in Northern California or in
23 Kansas?
24 A. No idea.
25 Q. Can you give me a percentage as to

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1 and am reimbursed for that, and those funds for
2 quote, unquote, outside income are all grouped
3 together by my accountant.
4 Q. And Joyce Gray would have been the
5 accountant that would have done your 2002
6 return; correct?
7 A. Correct.
8 Q. Have you at the present time, doctor,
9 maintained any type of record to memorialize who
10 the attorney is that you have worked for and
11 what the name of the case is and anything about
12 the subject matter of the case that you have an
13 ongoing document of sorts?
14 A. I don't have any such record.
15 Q. So unless you maintain the file at
16 the end of a case, other than perhaps good or
17 bad memory, you would have no record of that
18 particular past experience; true?
19 A. Correct.
20 Q. Do you normally keep the records or
21 do you dispose of them after the case is over?
22 A. I dispose of them when the case is
23 over.
24 Q. Have you ever provided your name as
25 an expert witness through any of the companies

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1 what percentage of your income from doing
2 medical/legal work or what your percentage of
3 income is derived from working as an expert
4 witness for lawyers?
5 A. I believe it's a small percentage,
6 but without knowing the specific breakdown of
7 outside lecturing and so forth, the
8 complications which I just described, I can't
9 give you that number.
10 Q. With nonsmall cell lung cancer, can
11 we agree that the earlier that you diagnose
12 nonsmall cell lung cancer from a stage
13 standpoint, the better the prognosis?
14 A. So you are saying Stage 1 generally
15 has a better prognosis than Stage 2, than 3,
16 than 4?
17 Q. Yes, sir.
18 A. In general, the answer is yes, though
19 there is some overlap.
20 Q. If Mr. Gill had been diagnosed in a
21 Stage 1 with his nonsmall cell cancer, is there
22 anything about his prior medical history that
23 would have made his prognosis worse or better
24 than the statistics that you know to exist in a
25 Stage 1 nonsmall cell lung cancer case?

21 (Pages 81 to 84)

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1 A. I am looking to see what I know about
2 his past medical history.

3 Q. To do that, you are looking at which
4 exhibit is that, doctor?

5 A. I am looking at Exhibit 2, and my
6 report, which I believe is Exhibit 1.

7 Q. Yes, sir.

8 A. I'm not aware that he had any other
9 serious underlying medical conditions that would
10 necessarily have adversely affected his outcome.

11 Q. Can we agree -- and if not, tell me
12 why we can't agree -- that in general, with
13 regard to all types of lung cancers, including
14 nonsmall cell, as well as all others, that it's
15 always best to diagnose cancer as early as
16 possible?

17 A. Well, not necessarily, because in
18 many cases it doesn't make any difference.

19 Q. So there are certain cancers that if
20 diagnosed at what one would perceive to be a
21 Stage 1, because of the personality or the
22 characteristics of that cancer, the likelihood
23 of the patient surviving isn't any different
24 than if it's diagnosed at a Stage 4?

25 A. Well, that's a different question.

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1 her cancer after five years, say with Stage 1 or
2 cancer, the likelihood is that that patient is
3 cured from that particular cancer. It doesn't
4 mean there may not be a risk of a second
5 primary, but if someone is disease free in terms
6 of their cancer at five years with lung cancer,
7 they are probably cured.

8 Q. And with nonsmall cell lung cancer,
9 there are going to be certain patients that are
10 diagnosed at Stage 1 yet still die; correct?

11 A. Correct.

12 Q. But more likely than not, from a
13 statistical standpoint, if one is diagnosed at
14 Stage 1 and there are no other comorbidities or
15 other factors that would make their prognosis
16 worse, you would agree that from a legal
17 standpoint, diagnosis of Stage 1, nonsmall cell
18 lung cancer at Stage 1, the patient is likely to
19 survive with appropriate treatment?

20 A. Yes. There is some data that
21 suggests that some patients with 1, being lung
22 cancer, may have as poor as a 40 percent
23 five-year survival. But in the aggregate,
24 patients with Stage 1 lung cancer who undergo
25 resection more likely than not will be cured.

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1 Q. Okay.

2 A. That's a different question. But in
3 general, someone diagnosed with a Stage 1 would
4 by statistical likelihood have a better outcome
5 than somebody with a Stage 4.

6 Q. And there are certain circumstances
7 where a patient may -- strike that.

8 When we talk about probability of
9 survival in cancer cases -- and you know this
10 from your prior testifying experience. You know
11 that we deal with greater than 50 percent?

12 A. Yes.

13 Q. So that if someone has a five-year
14 survival, that is statistically greater than a
15 percent from a legal standpoint, you recognize
16 that to a probability that patient will survive;
17 correct?

18 A. Correct.

19 Q. Why are the five-year survival
20 statistics, why have they been used in lung
21 cancer cases?

22 A. They are a common metric across
23 different types of cancer simply for reasons of
24 consistency. In the case of lung cancer, if a
25 patient had no evidence of recurrence of his or

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1 Q. And aren't the statistics somewhere
2 in the range of 60 to 80 percent on Stage 1?

3 A. Overall, that's right. Stage 1B
4 isn't quite that good, but certainly 1A is.

5 Q. Treatment of choice on a nonsmall
6 cell lung cancer with that 60 to 80 percent
7 survival statistic is surgical resection;
8 correct?

9 A. Yes. Based on the very latest
10 information, we are beginning to consider
11 adjuvant chemotherapy in those patients, but
12 this is very new and very controversial.

13 Q. When Mr. Gill was ultimately
14 diagnosed in, was it July or August? The CT,
15 was it in August, doctor? I think you are
16 looking at --

17 A. The CAT scan, well, the first
18 presentation that was concerning was June, but
19 his CAT scan was on July 25th.

20 Q. Okay. And that showed, was that a
21 five centimeter?

22 A. CT of the neck showed a 4 by 3
23 centimeter mass and CT of the chest showed a 4.5
24 by 4 centimeter mass.

25 Q. And then at the time of -- I'm sorry.

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1 That was in July, the CT?
2 A. Correct.
3 Q. In August, I think there is another
4 reference to the size of the mass in the lung,
5 which might have been different than what the CT
6 showed. Do you recall that?
7 A. I don't have any other measurement of
8 the tumor in the lung in my notes.
9 Q. So that the end of July, the tumor in
10 the lung was 4.5 centimeters?
11 A. Correct. By the way, Dr. Olenki, I
12 believe in his note describes this -- perhaps
13 this was just a summary or an estimate as a 4
14 centimeter left upper lobe mass. So he does give
15 another measurement. I don't know that he
16 disagreed, but he left off the decimal point.
17 Q. And 4.5 or 4, we are not going to
18 quarrel over that; correct?
19 A. Correct.
20 Q. And that reference by Dr. Olenki was
21 in August; correct?
22 A. Correct.
23 Q. That's the reference that I was
24 referring to without any notes in front of me.
25 The CAT scan in July showed a single

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1 cancer patients, a few weeks is essentially a
2 blink of an eye.
3 Q. And I'm not trying to quarrel with
4 you, but I was referring to a month. But you
5 would still stand on this 4.5, maybe slightly
6 smaller?
7 A. Maybe not even appreciably smaller,
8 but perhaps slightly smaller.
9 Q. What about in May, two months before?
10 A. I would say ditto. It's a very short
11 interval.
12 Q. What about in April?
13 A. I think we can even go all the way
14 back to six months previously and the tumor
15 might have been a little bit smaller, but it
16 won't have been dramatically smaller.
17 Q. Can you tell me to a probability or
18 would you just be guessing as to what size the
19 tumor would have been if we went back six
20 months?
21 A. I can't give you a measurement, but
22 the important concept is that the tumor stage
23 wouldn't have been dramatically different
24 because these tumors are so many years old.
25 It's a short interval life span of that cancer,

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1 nodule in the lung; true?
2 A. Well, it's my understanding that only
3 one chest CT scan was done during July and
4 August, and that the original report described a
5 single mass, but that other observers felt that
6 there were separate pulmonary nodules when they
7 reviewed that scan.
8 Q. If, in fact, we had a singular
9 nodule, let's say 4.5 centimeters, end of July,
10 are you able to tell me how large that nodule
11 was in the lung in June?
12 A. I would say essentially the same size
13 to a little bit smaller, because these grow over
14 so many years.
15 Q. And are you able to tell me to a
16 probability what size that nodule would have
17 been if we start from the 4.5 centimeter the end
18 of July, in June how large that nodule would
19 have been?
20 A. I think it would have been
21 essentially the same.
22 Q. And I think you said essentially the
23 same but maybe slightly smaller?
24 A. Perhaps, but it's such a short
25 interval that when we think of intervals in

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1 so you can press me for measurements and I can't
2 give you the precise measurements except to say
3 that looking at what we know about how old and
4 how slowly cancers grow, how old cancers are and
5 how slowly they grow, this is a very short
6 interval of time.
7 Q. Was there anything about Mr. Gill's
8 nonsmall cell lung cancer that would cause you
9 to say that with early diagnosis at what one
10 would consider to be a Stage 1, that his
11 prognosis would have been worse than the
12 statistical percentages that we look at in the
13 AJCC staging manual or in the literature for a
14 Stage 1 nonsmall cell lung cancer?
15 A. Well, I want to be clear. I don't
16 really look. I don't even know what they are in
17 terms of statistics in that manual. All I use
18 that manual for is the matrix of characterizing
19 particular stages.
20 But I think I can answer your
21 question by saying that if it had been
22 theoretically possible to have diagnosed this
23 patient's cancer in Stage 1, then I would stick
24 by the predicted statistical outcomes that we
25 have talked about this morning.

23 (Pages 89 to 92)

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1 Q. So in that situation, if his nonsmall
2 cell cancer had been diagnosed in Stage 1, it's
3 likely he would have survived?
4 A. Correct.
5 Q. When Mr. Gill was diagnosed, what
6 stage would you say he was? Stage 4 at the
7 time?
8 A. Correct.
9 Q. And Stage 4 involves a distant
10 metastasis?
11 A. A distant metastasis and it can also
12 involve nodules in the lung outside of the lobe
13 in which the primary tumor is located.
14 Q. The distant metastasis in this case,
15 was this the femur?
16 A. The femur, and also, at least per
17 Dr. Olenki, since I haven't seen the CT, at
18 least per Dr. Olenki's report and Dr. Dowlati's
19 report, that -- I'm sorry, per Dr. Olenki's
20 report there were separate nodules in the lung,
21 so that he would render him for a nodule outside
22 of the left upper lobe Stage 4 and the
23 metastasis in the left femur, the area radiated
24 would also have rendered him Stage 4.
25 Q. There is no description as to the

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1 growing for quite a long time from the first
2 single metastatic cell that occurred.
3 Q. But again, we don't have the benefit
4 in the medical records of any description of the
5 size of those other growths in the lungs as of
6 August to correlate whether or not it was a half
7 centimeter, a one centimeter?
8 A. Only to know that there is a lower
9 limit of resolution of what a CAT scan can pick
10 up.
11 Q. There was no evidence of any lymph
12 node involvement prior to June of the year of
13 diagnosis, was there, in June of 2000?
14 A. The only other information we have is
15 that in December of 1999, we know that the
16 patient had pain in the chest and arm on the
17 left. So in retrospect, given the fact that he
18 had chest and arm pain in the same location
19 where in June he had tenderness on exam, and in
20 the same location where soon after that the
21 cervical mass was detected, it is certainly in
22 my view more likely than not that these are all
23 part of one whole.
24 Q. Is there any evidence of
25 Dr. Mansnerus palpating any swelling in any of

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1 size of the other nodules other than what we
2 might refer to as the primary nodule, which is
3 either 4 or 4.5 centimeters; correct?
4 A. Of course the disease in the neck.
5 Q. I am talking about the lungs, doctor.
6 A. Correct.
7 Q. So we don't know, do we, what size
8 any additional tumors were in the lungs as of
9 July or August when he was diagnosed; true?
10 A. Correct. I might be able to arrive
11 at an opinion if I were to review the chest CT
12 scan, but I haven't seen it.
13 Q. We don't know, do we, to the extent
14 that there were other nodules in the lungs as of
15 July or August, we don't know how long those
16 other nodules existed prior to July or August,
17 separate and apart from the 4.5 centimeter one
18 that we have been referring to; correct?
19 A. Well, we don't, but we have some
20 idea, which is to say that a CAT scan can
21 perhaps identify a nodule half a centimeter in
22 size. It's hard to pick up something much
23 smaller than that on a CAT scan. And so if, in
24 fact, there were other nodules that were half a
25 centimeter in size, even those had to have been

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1 the lymph nodes back in December when he saw
2 Mr. Gill -- he saw him twice in December, didn't
3 he?
4 A. Right. I don't think that a lymph
5 node examination was performed, at least as I
6 recall, during those visits.
7 Q. In the early part of December and the
8 end of December, at least no evidence from what
9 you have seen reading the deposition or seeing
10 in the medical records; true?
11 A. Well, we might have to go back and
12 look at the visit in particular, but looking at
13 my notes, I certainly didn't make any notation
14 of a lymph node examination having been
15 performed, but I can't attest to what might be
16 in there if we go back and look.
17 Q. Those records, those notes that you
18 made were made at or near the time that you
19 reviewed Dr. Mansnerus' records; correct?
20 A. Correct.
21 Q. And in January, when he returned, the
22 early part of January, there is no evidence that
23 there was any type of examination of the neck or
24 the abdomen or the armpits, or to look for any
25 type of lymph node involvement; true?

24 (Pages 93 to 96)

<p>Page 97</p> <p>1 MR. WARNER: Objection. 2 A. Again, looking at my notes, I don't 3 see that I made a notation of that. You know, 4 if it's a critical point to be thorough, we 5 should probably go back and look at the record. 6 Q. If it's not there, then we will 7 accept that as a fact, but certainly from the 8 standpoint, and assuming that he did not examine 9 the abdomen or the armpits or the neck area for 10 any lymph node involvement, what you are saying 11 is that more likely than not, given what you see 12 in July, that there would have been some nodal 13 involvement back in December or January? 14 A. I'm saying that more likely than not 15 there would have been nodal involvement. 16 Whether it would have been specifically palpable 17 on examination at that time, I cannot comment. 18 Q. What was the treatment that Mr. Gill 19 was subjected to once the diagnosis was made in 20 August? 21 A. He received a combination of 22 chemotherapy and radiation. 23 Q. And is there a reason why the chemo 24 and the radiation -- strike that. Was the chemo 25 and radiation successful to any extent?</p>	<p>Page 99</p> <p>1 Q. Do you know in this case from 2 anything that you have reviewed how the 3 remaining six months of his life, how 4 uncomfortable or painful it was to him? 5 A. I don't have specific information in 6 that regard. 7 Q. Does the response, even though you 8 look at the same type of patient in their 40s, 9 with the kind of medical history that he had, 10 does each patient respond differently when they 11 are diagnosed with an advanced stage of lung 12 cancer to chemotherapy and radiation? 13 A. I'm not sure what you mean by that. 14 Q. I guess what I'm talking about, the 15 dying process, in terms of how a patient that's 16 diagnosed with advanced lung cancer, are there 17 certain patients that experience an excruciating 18 death and a lot of pain and suffering and others 19 that are more comfortable and aren't impacted as 20 much by the same course of treatment? 21 A. Well, I believe that in this day and 22 age, no patient with lung cancer should have to 23 be in significant pain if appropriate 24 medications are given to them. 25 Q. But you don't know what medications</p>
<p>Page 98</p> <p>1 A. Well, I don't have information as to 2 whether he had a transient response, but we do 3 know that soon thereafter disease progressed and 4 he died, so it doesn't appear that ultimately it 5 altered his outcome. 6 Q. Can we agree that from what you have 7 reviewed in this case that it's likely that when 8 Mr. Gill was diagnosed first that he had 9 advanced nonsmall cell lung cancer? 10 A. I do believe that when he was 11 diagnosed he had advanced nonsmall cell lung 12 cancer. 13 Q. And can we further agree based upon 14 what you reviewed, and your knowledge, training 15 and experience, that most likely that the 16 treatment, the chemo and the radiation that he 17 had from that point up to the time of his death 18 that it was unpleasant and was likely painful to 19 the patient? 20 A. Well, I doubt that it was painful. 21 But certainly, this treatment can cause fatigue 22 and a decrease in what we call performance 23 status. It certainly has side effects, but I 24 would hope that he certainly didn't experience 25 much pain.</p>	<p>Page 100</p> <p>1 he received during the course, balance of his 2 life, do you? 3 A. No. 4 Q. And to that extent, you don't know 5 about his pain and suffering that he experienced 6 between August and when he died the following 7 year; correct? 8 A. I don't have any information in that 9 regard. 10 Q. Thank you. If Mr. Gill had been 11 diagnosed at Stage 1 and had surgical resection, 12 even though you are not a surgeon, what is the 13 usual recuperative period and adjunctive therapy 14 that one receives in a Stage 1 nonsmall cell 15 cancer? 16 A. Those are two separate questions. I 17 think we can leave out adjunctive therapy since 18 we were not using adjuvant therapy in 1999. 19 Q. Okay, fine. 20 A. So your question is how long is the 21 recovery period after a thoracotomy for cancer 22 removal? 23 Q. Correct. 24 A. The answer is in general several 25 months.</p>

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1 Q. Are people then able to resume their
2 normal activity after a thoracotomy?

3 A. In general, yes. They may have some
4 increased shortness of breath. Occasionally
5 people have prolonged chest wall discomfort from
6 the surgical wound, but generally a few months.

7 Q. Putting aside the lung, the issue of
8 the lung nodules, in terms of distant
9 metastasis, would you consider the neck,
10 swelling in the neck as a distant metastasis?

11 A. Well, swelling in the neck is what we
12 call an N3 node. So it places a patient in a
13 very bad prognostic category; that is to say,
14 3B. So in the staging manual, it is not an M1,
15 but an N3, so it's a matter of semantics, but it
16 has a profound impact on giving the patient a
17 terrible prognosis.

18 Q. When you add the femur, the evidence
19 of metastasis to the femur, how does that impact
20 the prognosis? Does it make it worse?

21 A. Well, a patient with a 3B lung cancer
22 has a well over 80 percent likelihood of dying,
23 and so you add in a distant metastasis in bone
24 and it doesn't make a heck of a lot of
25 difference, unfortunately; that the prognosis

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1 a lot of my patients compete in marathons, but I
2 just saw a woman who was vital appearing,
3 healthy feeling who I diagnosed with metastatic,
4 including bone, nonsmall cell lung cancer, so
5 it's a very common occurrence that people come
6 to us feeling fine and are found to have Stage 4
7 disease.

8 Q. Why is the prognosis better? You
9 just referred to small cell; right?

10 A. Yes.

11 Q. Why is the prognosis better from a
12 histopathological standpoint in nonsmall cell
13 than it is with the patient you just referred to
14 that had small cell?

15 A. I don't follow the question.

16 Q. What is it about the growth or the
17 nature of the cell as it relates to the cancer
18 in small cell versus nonsmall cell? Why is it
19 worse in terms of survival in a small cell as
20 compared to a nonsmall cell?

21 A. So your question is why does a
22 patient with metastatic small cell cancer have a
23 worse prognosis than a patient with a nonsmall
24 cell lung cancer?

25 Q. That is well stated.

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1 for these patients is that there is an
2 overwhelming likelihood that they will die.

3 Q. Was there any evidence that he had
4 distant metastasis to the femur prior to July?

5 A. I believe the first evidence of that
6 was the head scan, so I don't think that that
7 area -- I'm sorry, it was the bone scan done in
8 August, and I don't believe we have any
9 information either way before that time.

10 Q. You wouldn't expect someone that had
11 distant metastasis to the femur to be able to
12 run in a marathon, would you?

13 A. Oh, sure. People can have
14 asymptomatic metastases for long periods of
15 time.

16 Q. So his ability to run or participate
17 in a marathon in April wouldn't factor into your
18 opinion as to whether or not he did or did not
19 have distant metastasis at that time?

20 A. No.

21 Q. How many patients have you had that
22 have had advanced nonsmall cell lung cancer,
23 Stage 3, Stage 4, and have competed in a
24 marathon?

25 A. Well, I can answer you this way. Not

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1 A. They don't. There is no difference
2 in prognosis. They both will die from their
3 conditions.

4 Q. Can we agree, though --

5 THE WITNESS: I have to go.

6 MR. MISHKIND: It's 9:30. What I
7 would ask you to do is to let Mr. Warner know
8 what your availability is and then we will
9 reschedule the deposition. What I would like to
10 do is --

11 MR. WARNER: Give the exhibits to the
12 court reporter and mail them back to the doctor.

13 MR. MISHKIND: That's fine.

14 -----

15 (Deposition adjourned at 9:30 a.m.)

16 -----

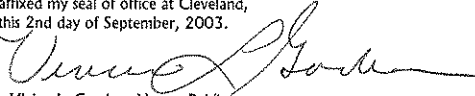
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CERTIFICATE

1
2
3 State of Ohio,
4 SS:
5 County of Cuyahoga.
6
7
8 I, Vivian L. Gordon, a Notary Public within
9 and for the State of Ohio, duly commissioned and
10 qualified, do hereby certify that the within
11 named NATHAN LEVITAN, M.D. was by me first duly
12 sworn to testify to the truth, the whole truth
13 and nothing but the truth in the cause
14 aforesaid; that the testimony as above set forth
15 was by me reduced to stenotypy, afterwards
16 transcribed, and that the foregoing is a true
17 and correct transcription of the testimony.

18 I do further certify that this deposition
19 was taken at the time and place specified and
20 was adjourned; that I am not a relative or
21 attorney for either party or otherwise
22 interested in the event of this action. I am
23 not, nor is the court reporting firm with which
24 I am affiliated, under a contract as defined in
25 Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my seal of office at Cleveland,
Ohio, on this 2nd day of September, 2003.


Vivian L. Gordon, Notary Public
Within and for the State of Ohio
My commission expires June 8, 2004.

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