

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

|                              |   |                           |
|------------------------------|---|---------------------------|
| ROBERT DENTON, as Personal   | ) | Jacksonville, Florida     |
| Representative of the Estate | ) |                           |
| of LINDA L. DENTON,          | ) |                           |
|                              | ) |                           |
| Plaintiff,                   | ) | No. 3:09-cv-10036-J-37JBT |
|                              | ) |                           |
| -vs-                         | ) | July 31, 2012             |
|                              | ) |                           |
| R.J. REYNOLDS TOBACCO CO.,   | ) | 2:07 p.m.                 |
| et al.,                      | ) |                           |
|                              | ) |                           |
| Defendants.                  | ) | Courtroom 10B             |
|                              | ) |                           |

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**TRANSCRIPT OF JURY TRIAL**  
**(VOLUME VI- AFTERNOON SESSION)**

BEFORE THE HONORABLE MARCIA MORALES HOWARD  
UNITED STATES DISTRICT JUDGE

OFFICIAL COURT REPORTER:

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(Proceedings reported by stenography;  
Transcript produced by computer.)

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## P R O C E E D I N G S

July 31, 2012

2:07 p.m.

- - -

COURT SECURITY OFFICER: All rise.

This Honorable Court is now in session.

02:07:28

THE COURT: Okay. As to Dr. Kaplan, I'm going to

02:07:28

allow the discussion -- his discussion of --

02:08:33

MR. COFER: He's in the courtroom, your Honor.

02:08:40

THE COURT: That's okay. Thank you.

02:08:43

I'm going to allow the questions about the 1988  
Surgeon General's definition as we discussed, not the  
transition.

02:08:45

02:08:53

02:08:55

MS. BROWN: Got it.

02:08:56

THE COURT: The other matters that we talked  
about, that is, issues relating to whether it's easier or  
harder to get off of cocaine and heroin, I don't think I  
understand the relevance of that line of testimony, and so --  
unless you can tell me why we need to hear that -- and for  
that discussion, we might need Dr. Kaplan to leave but --

02:08:58

02:09:01

02:09:14

02:09:18

02:09:27

02:09:31

MS. BROWN: Your Honor, I would like to address  
that when you are ready.

02:09:36

02:09:38

THE COURT: Sir, I'm going to ask you to excuse  
yourself for just a moment, but I'll tell you, Miss Brown,  
it's 2:10, and we need to start.

02:09:43

02:09:45

02:09:48

*(Dr. Kaplan exits courtroom.)*

1 THE COURT: Go ahead. 02:09:51

2 MS. BROWN: Do you want us to come up to sidebar? 02:09:58

3 THE COURT: No. I'll let him leave. I'm trying 02:10:01

4 to tell you, you'll need to be quick about it because we 02:10:04

5 really need to get to the jury. Okay. Go ahead. 02:10:06

6 MS. BROWN: Your Honor, Dr. Kaplan is going to 02:10:10

7 talk about the differences in brain changes between nicotine 02:10:12

8 and drugs of abuse, like heroin and cocaine. 02:10:16

9 Dr. Cummings, when testifying about this same 02:10:20

10 issue -- I can give you cites of his transcript if you would 02:10:22

11 like -- Dr. Cummings discussed receptors. He compared 02:10:26

12 changes and says almost identical to other drugs of abuse 02:10:30

13 like cocaine and heroin. 02:10:33

14 Does nicotine act on the same parts of the brain 02:10:34

15 as other drugs of abuse? He said it was established in the 02:10:36

16 field. He said it was established by the Surgeon General. 02:10:40

17 He read the Surgeon General's Report. He was asked about his 02:10:43

18 experience treating cocaine and heroin. He explained brain 02:10:46

19 changes, called them permanent and drugs like heroin and 02:10:50

20 cocaine. He explains nicotine being addictive. The same 02:10:53

21 would be true for a cocaine addict and a heroin addict. 02:10:56

22 So Dr. Cummings clearly discussed these drugs and 02:11:00

23 the comparison as far as how they work on one's brain, and he 02:11:03

24 compared them to nicotine. 02:11:08

25 Dr. Kaplan ought to be able to do the same thing 02:11:10

1 and provide his opinions. 02:11:13

2 THE COURT: Let me see the portion of his 02:11:14  
3 testimony that you are relying on, the portions of 02:11:16  
4 Dr. Cummings or Burns. I can't remember which one. Let me 02:11:21  
5 see the portions of Dr. Cummings' testimony that you have 02:11:24  
6 relied on. 02:11:26

7 MS. BROWN: Yes. 02:11:27

8 MS. BARNETT: Your Honor, I would ask for a copy 02:11:29  
9 as well and a chance very briefly to respond. 02:11:31

10 THE COURT: Do you have a copy for Miss Barnett? 02:11:38  
11 (Document tendered.) 02:12:11

12 MS. BROWN: Thank you. 02:12:13

13 THE COURT: What page are you referring to? 02:12:29

14 MS. BROWN: Seventy-nine, starting at line 6. I 02:12:31  
15 can do these one at a time or just give you the list. 02:12:36

16 THE COURT: Give me the list, please. 02:12:40

17 MS. BROWN: 79-6; again, starting at 81, line 3; 02:12:42  
18 81, line 17; 83, line 17; 84, starting at line 21; 103, 15, 02:12:49  
19 and 16; and 104, 9. 02:13:00

20 THE COURT: All right. Give me a moment. 02:13:05

21 All right. It does appear that Dr. Cummings -- 02:16:58  
22 and I remembered him talking about the cocaine and heroin 02:17:06  
23 because I remember expressing my own surprise at it, but he 02:17:10  
24 was asked, and there was some suggestion that, perhaps, he 02:17:13  
25 was asked about these things in cross, but that he was asked 02:17:16

1 in direct examination about the nicotine receptors and the 02:17:19  
2 fact that the circuitry, I think is what the word is supposed 02:17:47  
3 to be, and these are almost identical to other drugs like 02:17:52  
4 cocaine and heroin. 02:17:56

5 He testified in response to a direct question that 02:17:57  
6 the pharmacological and behavioral process that determine 02:18:00  
7 tobacco addiction are similar to those that determine 02:18:04  
8 addiction to drugs such as heroin and cocaine. He was asked 02:18:06  
9 about the success rate for quitting smoking versus other 02:18:12  
10 drugs. That was a direct question where he said that based 02:18:16  
11 on his clinical experience and his review of the evidence -- 02:18:19  
12 and paraphrasing -- but that the relapse rate is virtually 02:18:25  
13 identical to cocaine, heroin, and nicotine addiction. 02:18:29

14 He was asked about changing structures of the 02:18:33  
15 brain and the up regulating, and he said it's actually -- 02:18:37  
16 it's altered in persons who are chronic users of cocaine, 02:18:50  
17 heroin, and nicotine. 02:18:54

18 He also testified that -- referring to nicotine as 02:18:59  
19 a drug of addiction, that the same being true of a cocaine 02:19:05  
20 addict and a heroin addict. So it does seem to be fairly 02:19:08  
21 responsive to -- and I stopped, but there are a couple of 02:19:13  
22 other references -- that it does seem that that would be 02:19:16  
23 fairly responsive to Dr. Cummings' testimony on those issues, 02:19:20  
24 and it wasn't that the defendants brought those things out in 02:19:27  
25 cross-examination. 02:19:33

1                   So, Miss Barnett?

2                   MS. BARNETT: Yes, the cross-examination was at  
3 63, 64. I apologize if I made that more confusing.

4 Here's -- I understand the Court's ruling. None of those  
5 things are anywhere in Dr. Kaplan's report, and I wasn't -- I  
6 didn't cross-examine him in his deposition about them. They  
7 are new to me.

8                   If they wanted to have an expert -- they had our  
9 expert reports 30 days, 45 days before ours. They could have  
10 had an expert. So to try to shoe horn Dr. Kaplan, I have a  
11 problem.

12                   Understanding what the Court is saying, if  
13 Dr. Kaplan was talking about his clinical experience with his  
14 own patients, at least that's within what he said he was  
15 relying on; and so I have less of an objection to him talking  
16 about his own clinical experience. But for him to start  
17 talking about brain changes and imagery, your Honor, he's not  
18 studied in this area. He's not published in this area. He's  
19 not done any research on it. He doesn't teach on it, and  
20 he's not qualified except for to say he's read other reports,  
21 which is exactly why, before his deposition, we tried to find  
22 out everything he was going to rely upon in giving opinions.

23                   So it's, one, brain changes and neurotransmitters.  
24 There's no way you can say that falls under this expert  
25 witness report, which the purpose of Rule 26 is for us not to



1 be surprised. Unlike Dr. Cummings, who's opinions that he  
2 gave, one, come from the Surgeon General, and two, were in  
3 his report. So I have a huge, huge, concern about him being  
4 allowed to give opinions far outside of here, and we would  
5 have filed a Daubert motion. I would move to excuse him also  
6 because he's not qualified to talk about these things.

7 THE COURT: Miss Brown, give me a proffer of what  
8 he's going to actually testify to on the cocaine and heroin.

9 MS. BROWN: He's going to testify consistent with  
10 his expert report how they affect the brain. I'll show you  
11 where it is. It says, "The psycho, pharmacological, and  
12 neurophysiological effects of various drugs, substances, and  
13 behaviors." That's in the first paragraph under "Summary of  
14 Anticipated Testimony."

15 THE COURT: Right. That's sort of the general  
16 description, and then he goes on to give his specific  
17 opinions.

18 What is he going to testify to specifically  
19 relating to heroin and cocaine?

20 MS. BROWN: He's going to briefly explain how  
21 those drugs are different, how they work differently on the  
22 brain than nicotine does, and it's a very, very, short part  
23 of his testimony. He's also going to mention withdrawal --

24 THE COURT: What's the basis of his testimony on  
25 the --

1 MS. BROWN: He's a clinical psychiatrist. His 02:22:08  
2 whole profession endeavors in the study of the brain, and he 02:22:10  
3 is a medical doctor. He's testified this way in all of the 02:22:13  
4 other cases. That's his field. That is his expertise. 02:22:17

5 THE COURT: He's testified about heroin and 02:22:22  
6 cocaine in all the other cases, Miss Brown? 02:22:24

7 MS. BROWN: No. He testified about brain changes 02:22:26  
8 in other cases. 02:22:29

9 THE COURT: Brain changes related to what? 02:22:30

10 MS. BROWN: Nicotine versus heroin and cocaine. 02:22:33

11 MS. BARNETT: Not in federal court where there is 02:22:36  
12 a Rule 26 requirement, your Honor, just to be clear. 02:22:38

13 MS. BROWN: His response directly to Dr. Cummings' 02:22:41  
14 testimony. He's not going to do anything beyond responding 02:22:43  
15 to that testimony. That's how his testimony will come in 02:22:47  
16 this afternoon, your Honor. 02:22:50

17 Your Honor, I don't want to interrupt your 02:23:37  
18 reading, but I can give you a specific example of 02:23:39  
19 Dr. Cummings' testimony that Dr. Kaplan will discuss. 02:23:42

20 THE COURT: I think you're misunderstanding the 02:23:46  
21 issue that I'm considering right now, which I've said that I 02:23:50  
22 think the testimony you're proposing is probably fairly 02:23:53  
23 responsive to Dr. Cummings. 02:23:56

24 The question, though, is whether it is beyond his 02:23:58  
25 report and should be excluded because the plaintiffs didn't 02:24:04

1 have -- these weren't opinions that he previously disclosed. 02:24:09

2 MS. BROWN: Sure. You are right, he didn't say 02:24:15  
3 "heroin." He didn't say "alcohol." He said, "Psycho, 02:24:17  
4 pharmacological, and neurophysiological effects of various 02:24:21  
5 drugs, substances, and behaviors"; and I think that's about 02:24:25  
6 as specific as you can get in terms of the type of testimony 02:24:28  
7 that we are anticipating. There are just a couple of 02:24:32  
8 questions, Judge. 02:24:36

9 THE COURT: Miss Brown, when you say that that 02:24:37  
10 opinion, that general summary of anticipated testimony is as 02:24:41  
11 specific as you can get, I have to say that -- well, that 02:24:48  
12 description is anything but specific. I mean, it just -- 02:25:09  
13 it's laughable to say that is as specific as someone can get. 02:25:13  
14 So I don't think that's the position you want to be taking. 02:25:18

15 To the extent that Dr. Kaplan, based upon his 02:25:23  
16 clinical experience, can testify and can address the 02:25:42  
17 statements by Dr. Cummings that nicotine addiction is 02:25:47  
18 essentially the same as cocaine and heroin, I think that's 02:25:51  
19 entirely fair game. To the extent that you are going to go 02:25:53  
20 into the brain mapping of the neuroreceptors, I'm not sure 02:25:59  
21 that I see that was -- I mean, I don't see how that was 02:26:11  
22 disclosed in his Rule 26 report. I'm allowing some deviation 02:26:25  
23 to directly address Dr. Cummings, but -- and were all of 02:26:29  
24 doctor -- I have Dr. Cummings' reports up here, but it's very 02:26:39  
25 lengthy. 02:26:44

1           His opinions about the similarities to cocaine and 02:26:45  
2 heroin, were those in that report? 02:26:52

3           MR. COFER: Your Honor, I cross-examined 02:26:55  
4 Dr. Cummings. Candidly, I don't remember whether they were 02:26:57  
5 in the report; but to be truthful, Cummings has testified so 02:26:59  
6 many times that I looked at his other depositions. I've 02:27:04  
7 cross-examined him at other times, so I didn't focus so much 02:27:07  
8 on his report. I focused on what his testimony typically is. 02:27:10

9           THE COURT: Sure. 02:27:14

10           Where are those opinions in Dr. Cummings' report, 02:27:16  
11 Miss Barnett? 02:27:34

12           MS. BARNETT: I have to get a page cite, 02:27:35  
13 your Honor. I hadn't expected this. I can certainly do it. 02:27:37  
14 I know he talks about the Surgeon General's Report. I know 02:27:40  
15 that's included. We gave them voluminous reliance materials 02:27:42  
16 from Dr. Cummings that cover all these topics. 02:27:48

17           To say a clinical psychiatrist has knowledge of 02:27:50  
18 brain receptors and imaging, that's not what clinical 02:27:53  
19 psychiatry is, and that's the difference. That's why we 02:27:56  
20 asked over and over for any reliance materials, any articles 02:27:59  
21 so we could fairly cross-examine him on his opinions; but I 02:28:04  
22 do believe they are covered in his report, but I'm not 02:28:08  
23 prepared to give you a page and line cite because I don't 02:28:11  
24 have the Cummings file with me. 02:28:14

25           I know there was no objection made that it was 02:28:16

1 outside the scope of his report, and there were plenty of 02:28:18  
2 objections made about his opinions being outside the scope of 02:28:22  
3 his report. 02:28:27

4 THE COURT: All right. I think at this point, 02:28:29  
5 what we are going to do is I will direct Miss Brown to limit 02:28:31  
6 the questions to those that I've said that I found 02:28:34  
7 appropriate, and then we can -- I suppose if, at the end, you 02:28:37  
8 all still want to try to go into that with respect to the 02:28:41  
9 imaging and brain receptors, I'll have to address it at the 02:28:52  
10 conclusion of direct testimony. But for your questions when 02:28:58  
11 he comes back in, Miss Brown, I'm going ask you to limit the 02:29:01  
12 questions to what he has determined based upon his clinical 02:29:06  
13 treatment of patients, including the different drugs, all 02:29:11  
14 right? 02:29:15

15 MS. BROWN: Yes, your Honor. 02:29:15

16 THE COURT: Okay. Let's have Dr. Kaplan. 02:29:17

17 MS. BARNETT: Would it be appropriate to ask for a 02:29:21  
18 request for non-lengthy narrative answers before the jury 02:29:24  
19 comes back in? 02:29:28

20 THE COURT: Yes, yes. 02:29:29

21 MS. BARNETT: Thank you, your Honor. 02:29:31

22 THE COURT: Doctor, while you are coming back up, 02:29:37  
23 if I can ask you, sir, to put your professorial hat aside and 02:29:50  
24 try to give us a short, direct answer to the questions and 02:30:01  
25 not quite such a long narrative. In other words, Miss Brown 02:30:04

1 is going to ask you the questions, but obviously you can give 02:30:07  
2 a complete answer, but I need you not to lecture the jury, 02:30:12  
3 okay? 02:30:19

4 THE WITNESS: Yes, your Honor. 02:30:20

5 THE COURT: All right. Thank you. Let's have the 02:30:21  
6 jury, please. 02:30:23

7 COURT SECURITY OFFICER: All rise for the jury. 02:30:31

8 *(Jury enters courtroom at 2:30 p.m.)*

9 COURT SECURITY OFFICER: Thank you. Please be  
10 seated. 02:30:33

11 THE COURT: Miss Brown. 02:30:33

12 MS. BROWN: Thank you, your Honor. 02:30:37

13 - - - 02:30:40

14 DIRECT EXAMINATION (Continued) 02:30:42

15 BY MS. BROWN: 02:30:42

16 Q. Dr. Kaplan, is there a manual that psychiatrists use 02:31:14  
17 for diagnosing substance dependence? 02:31:17

18 A. There is. 02:31:19

19 Q. What is that manual? 02:31:20

20 A. The manual is called the DSM-IV, "The Diagnostic and 02:31:22  
21 Statistical Manual," the fourth edition. 02:31:26

22 Q. What is the current version? 02:31:28

23 A. The current version is DSM-IV-TR, which means text 02:31:30  
24 revised. 02:31:34

25 Q. I'm going to just call it DSM-IV for the purposes of my 02:31:34

1 questions.

02:31:38

2 A. Sure.

02:31:39

3 Q. Did you bring yours with you today?

02:31:39

4 A. I did.

02:31:41

5 Q. Can you show us your manual?

02:31:41

6 A. Sure. My copy, DSM-IV.

02:31:43

7 Q. Is the DSM-IV used only for substance dependence?

02:31:47

8 A. No. The DSM-IV manual includes the criteria that is

02:31:51

9 necessary to diagnose people with a variety of different

02:31:57

10 mental disorders like depression, anxiety, and various

02:32:00

11 substance abuse and dependence disorders.

02:32:05

12 Q. Can you tell us briefly how the DSM-IV was prepared?

02:32:07

13 A. Sure. The American Psychiatric Association, which

02:32:11

14 psychiatrists are members of, publish the DSM manual. So

02:32:13

15 groups of experts on different disease states, different

02:32:17

16 disorders get together. They discuss from their clinical

02:32:21

17 practice, from the research what criteria they think should

02:32:24

18 be necessary to diagnose someone with a mental illness or a

02:32:28

19 substance dependence, an addiction.

02:32:32

20 They go out into the field, psychiatrists try it,

02:32:34

21 they get feedback, back and forth, and they have various

02:32:37

22 meetings. And eventually, if there is enough of a need,

02:32:40

23 enough of an interest in changing the criteria, they will

02:32:43

24 publish a new document over time.

02:32:46

25 Q. What is the purpose of the DSM-IV?

02:32:48

1 A. The purpose is to provide specific criteria so that 02:32:50  
2 when clinicians talk to each other, when you do research, 02:32:56  
3 everyone knows what it means if you say someone has a major 02:32:59  
4 depressive disorder, someone has nicotine dependence, to make 02:33:02  
5 the definition, the criteria as specific as possible. 02:33:05

6 Q. Do you use DSM-IV in your practice to diagnose 02:33:09  
7 substance dependence, including nicotine dependence? 02:33:13

8 A. I do. 02:33:17

9 Q. How does the DSM-IV help you evaluate if someone is 02:33:17  
10 nicotine dependent? 02:33:22

11 A. There are various criteria for substance dependence, 02:33:23  
12 including nicotine dependence. So the first part of the 02:33:26  
13 criteria involves what we call the threshold part, the use of 02:33:29  
14 it, the maladaptive use of substance. 02:33:35

15 In this case, nicotine has to lead to clinically 02:33:38  
16 significant impairment, has to really impair someone's life 02:33:40  
17 in terms of relationships as a wife, as a husband, as a 02:33:43  
18 parent, friends, affects them in their jobs, education, other 02:33:48  
19 important areas of their life, hobbies, sports, things like 02:33:54  
20 that. So the use of substance has to have a very negative 02:33:57  
21 effect on the important life roles. 02:34:00

22 Then after the threshold diagnosis, there are 02:34:03  
23 seven potential criteria, and the person needs to fulfill 02:34:05  
24 three out of those seven other criteria to decide if they are 02:34:09  
25 or are not dependant or addicted. 02:34:12



1 Q. The jury has heard some methods relating to nicotine 02:34:16  
2 dependence or addiction. I want to ask you about a couple of 02:34:21  
3 those. 02:34:24

4 In your clinical experience, are you familiar with 02:34:24  
5 the Fagerstrom test? 02:34:26

6 A. I am. 02:34:28

7 Q. What is the Fagerstrom test? 02:34:28

8 A. The Fagerstrom test is a series of questions that looks 02:34:30  
9 at basically heaviness of smoking. So it's not a tool to 02:34:35  
10 diagnose addiction. It's not a definition of addiction. It 02:34:39  
11 looks at smoking behavior and determines heaviness of 02:34:43  
12 smoking. In fact, any smoker who takes a test is assumed to 02:34:48  
13 be addicted. The test looks at degree of dependence. So 02:34:52  
14 it's not to decide if someone is addicted or not. 02:34:57

15 Q. Was the Fagerstrom test meant to be used to diagnose 02:35:00  
16 people with nicotine addiction or dependence? 02:35:04

17 A. No, it's not a tool to diagnose. It's a tool to 02:35:06  
18 observe heaviness of smoking. 02:35:09

19 Q. In your clinical experience, are you familiar with the 02:35:11  
20 Heaviness of Smoking Index? 02:35:13

21 A. I am. 02:35:15

22 Q. What is that? 02:35:16

23 A. The HSI, or Heaviness of Smoking Index, is essentially 02:35:16  
24 two of the questions in the Fagerstrom test. So it looks at 02:35:22  
25 how long does it take a person who is a smoker to smoke that 02:35:26

|    |   |          |
|----|---|----------|
| 1  | first cigarette in the day and how many cigarettes per day do | 02:35:30 |
| 2  | they smoke on average. It looks at heaviness of smoking. It   | 02:35:33 |
| 3  | does not diagnose or provide criteria to diagnose whether     | 02:35:37 |
| 4  | they are addicted or dependent. Everyone is assumed to be     | 02:35:40 |
| 5  | dependent on those tests. It looks at heaviness of smoking,   | 02:35:43 |
| 6  | not if they are or are not dependent.                         | 02:35:48 |
| 7  | Q. Can you diagnose someone as addicted based solely upon     | 02:35:51 |
| 8  | the fact that they smoke regularly?                           | 02:35:55 |
| 9  | A. No, you can't.   | 02:35:57 |
| 10 | Q. Are there regular smokers who are addicted and regular     | 02:35:58 |
| 11 | smokers who are not addicted?                                 | 02:36:01 |
| 12 | A. Sure.  | 02:36:03 |
| 13 | Q. Are there regular smokers who choose to quit and           | 02:36:04 |
| 14 | regular smokers who choose not to quit?                       | 02:36:08 |
| 15 | A. That's also true.  | 02:36:10 |
| 16 | Q. Can you diagnose someone as addicted or dependent based    | 02:36:11 |
| 17 | upon the number of cigarettes they smoke per day?             | 02:36:17 |
| 18 | A. You cannot.  | 02:36:20 |
| 19 | Q. What if it's a lot, like two or three packs per day?       | 02:36:21 |
| 20 | A. Even if it's a lot, that's not part of the criteria to     | 02:36:24 |
| 21 | determine if a person is or is not addicted to nicotine.      | 02:36:27 |
| 22 | Q. Can you diagnose someone as addicted based solely on       | 02:36:31 |
| 23 | how long they have smoked?                                    | 02:36:35 |
| 24 | A. You cannot.  | 02:36:36 |
| 25 | Q. Regardless of the definition that you apply to             | 02:36:37 |

1 addiction, can it be difficult for some people to quit  
2 smoking?

3 A. Absolutely. It varies depending on the person, but  
4 whether or not someone is considered addictive to nicotine,  
5 it still can be difficult for them to quit for some of these  
6 smokers.

7 Q. Do you help people quit smoking in your clinical  
8 practice, whether they are addicted or not addicted?

9 A. I do. I mean, I diagnose whether they are or not.  
10 Nonetheless, I tell all my patients to stop smoking. So  
11 whether they are addicted or not, I see it as my role to  
12 assist them in quitting if they want to. So even if they are  
13 not addicted, I provide various treatments to assist my  
14 patients in quitting.

15 Q. Why would a person who is not addicted want or need  
16 help to quit smoking?

17 A. Even if people are not addicted, it can still be  
18 difficult to quit. So those people that are interested,  
19 there are a variety of treatments, therapies that will  
20 increase their chances of being successful. So even if they  
21 are not addicted, if they are interested, we certainly try to  
22 provide assistance for them.

23 Q. Dr. Kaplan, you've told us that you use the DSM-IV,  
24 which you have with you today, to evaluate nicotine  
25 dependence in your clinical practice.

1           In this case did you use the DSM-IV to evaluate  
2 whether Linda Denton was addicted or dependent?

3 A.       I did.

4 Q.       What did you do?

5 A.       I looked at all the available information that was  
6 available to me. I looked at depositions from her husband,  
7 from her friend, her daughter, four of her children. I  
8 looked at a variety of medical records. I looked at academic  
9 records; and based upon all that information, I analyzed,  
10 based on the information that's available, if Mrs. Denton  
11 would have fulfilled the criteria or not.

12 Q.       And what did you conclude, Dr. Kaplan?

13 A.       After analyzing all the available information, it's my  
14 opinion that she would not fulfill the DSM-IV criteria for  
15 nicotine dependence. In other words, she was not addicted to  
16 nicotine.

17 Q.       And can you explain to the jury what the basis is for  
18 your conclusion?

19 A.       Sure. So, again, looking at the criteria, first, you  
20 have this threshold diagnosis; and I looked at if there is  
21 any evidence that Mrs. Denton, when she was a smoker, had  
22 clinically significant impairment in major life roles as a  
23 mother, as a wife, as a friend, her roles going to church and  
24 other activities.

25           Based on what I analyzed, what I learned about

1 Mrs. Denton, she lived her life many years, about thirty  
2 years, as a smoker; but while she smoked, she lived her life.  
3 She lived her life as a mother and wife.

4           Many people said many wonderful things about what  
5 a wonderful mother she was. She had friendships, went to  
6 church and did other things. She smoked while she did many  
7 activities, but smoking -- there is no evidence that smoking  
8 led to clinically significant impairment in these major life  
9 roles so that she would not fulfill that part, the threshold  
10 part of that criteria.

11           I looked at the seven other available parts of the  
12 definition; and based on review of the information, I felt  
13 that she had, one, fulfilled one out of the seven other  
14 criteria.

15 Q.     Let's go back to that threshold criteria.

16           What types of things would show clinically  
17 significant impairment in Linda Denton's life?

18 A.     As a consequence of abusing the substance, in this case  
19 the nicotine, cigarettes, you would look for whether there  
20 were significant problems associated in their life. Not  
21 medical problems, problems in terms of relationships and  
22 choices they make and things like that.

23           For example, Mrs. Denton was good friends with her  
24 friend Mary Melvin, and at times -- there was a time when  
25 Mary's daughter had asthma and she asked Mrs. Denton, "Please

1 don't smoke in the house. Don't smoke around my daughter. 02:40:42  
2 She has asthma." Mrs. Denton decided to smoke outside, but 02:40:45  
3 she didn't stop coming, didn't change their relationship. 02:40:50  
4 She was still dear friends, as far as I can tell from the 02:40:52  
5 information I reviewed. If she would have stopped going, if 02:40:54  
6 they had arguments, that would have been an example of 02:40:57  
7 clinical significant impairment. 02:40:59

8 While she lived her life when she smoked, I don't 02:41:01  
9 find any evidence that she had significant arguments or 02:41:05  
10 problems with her husband or her children. I don't find 02:41:07  
11 information that she stopped going to things that were 02:41:11  
12 important for her as a consequence of her smoking behavior. 02:41:13

13 If you look at all the information, again, she 02:41:17  
14 lived her life. She was a smoker during most of her adult 02:41:19  
15 life, but there was no evidence that the smoking behavior 02:41:23  
16 impaired her ability to live her life as she chose. 02:41:25

17 Q. Did you also look at whether Linda Denton was addicted 02:41:29  
18 based on the current Surgeon General's definition? 02:41:32

19 A. I did. 02:41:36

20 Q. And did Linda Denton satisfy that definition? 02:41:36

21 MS. BARNETT: Objection, your Honor. 02:41:40

22 THE COURT: Can you rephrase your question, 02:41:44  
23 Counsel? 02:41:45

24 BY MS. BROWN: 02:41:47

25 Q. Did Linda Denton satisfy the Surgeon General's 02:41:47

1 definition of addiction?

02:41:51

2 A. She did not.

02:41:52

3 Q. Why not?

02:41:54

4 MS. BARNETT: Objection, your Honor.

02:41:55

5 THE COURT: Overruled.

02:41:56

6 THE WITNESS: If you look at the criteria, the '88

02:41:58

7 and current Surgeon General's definition, it looks at

02:42:03

8 compulsive. Compulsive is defined as an overwhelming craving

02:42:06

9 or desire to obtain a substance, compulsive use of a

02:42:11

10 psychoactive substance. So the substance has to affect the

02:42:17

11 brain chemistry. Nicotine does that. That is

02:42:19

12 self-reinforcing.

02:42:22

13 You smoke something bad that you like and you want

02:42:22

14 to smoke again. Compulsive use of a psychoactive substance

02:42:25

15 that is self-reinforcing. She did not have compulsive use.

02:42:29

16 I don't find any evidence in the information I reviewed that

02:42:33

17 she had an overwhelming desire or need to use the substance.

02:42:35

18 She did, though -- it was psychoactive, and I

02:42:38

19 think it was self-reinforcing. Something about nicotine she

02:42:42

20 liked that made her want to do it again; but based on the

02:42:45

21 analysis of the data, since it's not compulsive use, she

02:42:48

22 would not fulfill the '88 Surgeon General's definition of

02:42:53

23 addiction.

02:42:57

24 Q. Can you briefly tell us what "psychoactive" means?

02:42:57

25 A. Sure. Psychoactive means a chemical somehow has some

02:43:00

1 effect on brain chemistry. So active, it has an effect;  
2 psycho, it's affecting the brain. Psychoactive.

3 Q. If there is no clinical cigarette impairment or no  
4 compulsive use, does that mean a person is making a healthy  
5 choice?

6 A. No, it doesn't mean that. Smoking has risks in various  
7 people, and it's not a healthy choice in terms of health  
8 behavior whether or not they fulfill criteria for addiction  
9 or not.

10 Q. Let's turn to the topic of nicotine. What is nicotine?

11 A. Nicotine is a chemical. It can bind to receptors in  
12 the brain and as a consequence --

13 MS. BARNETT: Objection, your Honor.

14 THE COURT: Let me see counsel for a moment.

15 *(The following was held at sidebar:)*

16 MS. BARNETT: I do have Dr. Cummings' report  
17 just -- since the Court asked, on Page 6, where he talked  
18 about the Surgeon General's Report, and this is someone who  
19 knows about determining addiction to drugs such as heroin and  
20 cocaine. It goes on for pages; but, yes, it has a huge  
21 number of materials he cited to, so that was in his report.

22 I can speak to my objection if you want to hear.

23 THE COURT: Yes.

24 MS. BARNETT: He's not an expert on brains. He's  
25 not a neuroscientist. He hasn't done any studies in this



1 area. He can only possibly be talking about anything on 02:45:15  
2 nicotine receptors from articles that he's read. I don't 02:45:18  
3 know what they are, and I wouldn't have any way to do 02:45:21  
4 anything with that information at this point, but it's beyond 02:45:23  
5 the scope of what his opinions were in this case. 02:45:26

6 They had every opportunity to have an expert on 02:45:29  
7 these topics and they chose not to. I'm not prepared to 02:45:32  
8 cross-examine him on these topics because they are not in his 02:45:36  
9 report and that's the point of Rule 26. They are also beyond 02:45:40  
10 his expertise. He's not qualified. 02:45:44

11 THE COURT: Why is he qualified to give these 02:45:46  
12 opinions, Miss Brown? 02:45:48

13 MS. BROWN: Your Honor, first of all, the time for 02:45:49  
14 filing any Daubert motions has long passed. Right here in 02:45:51  
15 his report, the behavior of smoking and pharmacology of 02:45:55  
16 nicotine. He's taken courses in medical school about 02:45:57  
17 nicotine. 02:46:00

18 My question was just what is nicotine, and the 02:46:00  
19 answer was, a chemical. He is starting to go on to talk 02:46:03  
20 about brain receptors, and that's something that he knows 02:46:07  
21 about from his clinical experience as a psychiatrist. 02:46:10

22 I can ask him in his clinical experience, if you 02:46:14  
23 would like me to do that. My question was, simply, what is 02:46:17  
24 nicotine? He knows that from his medical background. He 02:46:20  
25 knows that from working with his patients. 02:46:22

1           THE COURT: Miss Barnett, I mean, I'm trying to -- 02:47:03  
2 I get that there were specific opinions as to Miss Denton, 02:47:09  
3 but I mean, doesn't -- how is it that he's not qualified to 02:47:13  
4 talk about nicotine in terms of addiction? He says he treats 02:47:31  
5 it. He is a clinical psychiatrist. Psychologist. I can't 02:47:38  
6 remember which. 02:47:47

7           MS. BROWN: Psychiatrist. He's an M.D. 02:47:48

8           THE COURT: I'm actually talking to Miss Barnett. 02:47:50

9           MS. BARNETT: I'm not -- I wasn't going to object 02:47:55  
10 if he talked about his clinical experience working with 02:47:57  
11 patients; but when he starts talking about what happens 02:48:00  
12 inside the brain, that is not from his clinical experience. 02:48:02  
13 He does not -- he hasn't done imaging studies, he's done no 02:48:06  
14 work on nicotine addiction, on nicotine receptors, on 02:48:10  
15 nicotine in the brain. That's outside his area of 02:48:14  
16 experience. 02:48:17

17           He's a psychiatrist. He sees patients, he gives 02:48:17  
18 them medicine; and in fact, he's talked about doing other 02:48:20  
19 research he's done on antidepressants, but he has no 02:48:23  
20 background or experience that's been disclosed to us to talk 02:48:26  
21 about what happens inside the brain. And it's true, his -- 02:48:29  
22 counsel did not ask the question, but this is an experienced 02:48:32  
23 witness who's testified plenty of times. 02:48:34

24           When he went into the brain, that's when I made my 02:48:37  
25 objection because I understood the Court to say, "Let's hold 02:48:39

1 off on what's happening inside the brain."

02:48:41

2 MS. BROWN: Your Honor, may I be heard briefly?

02:48:44

3 THE COURT: Yes.

02:48:46

4 MS. BROWN: He's an M.D. He's a board certified  
5 clinical psychiatrist. He has had training in how the brain  
6 reacts to certain chemicals, and I would like to be able to  
7 ask him about nicotine and also nicotine neuroreceptors and  
8 how that works within the brain; and that's clearly within  
9 his expertise, within his experience, within his treating.

02:48:47

02:48:49

02:48:52

02:48:55

02:48:58

02:49:01

10 He is an M.D. Dr. Cummings is not. He's a  
11 psychologist, and he was allowed to testify about all of  
12 these things. This is an M.D., before this jury, to discuss  
13 nicotine as a chemical and the effects on the brain. He's  
14 absolutely qualified to testify, and is also responsive to  
15 Dr. Cummings testimony in this trial. Directly responsive.

02:49:05

02:49:08

02:49:10

02:49:22

02:49:25

02:49:27

16 THE COURT: I mean, I don't know how you separate  
17 out him talking about how nicotine works from the  
18 pharmacology of nicotine, and I -- I think he can testify to  
19 that. I don't think he can testify about cocaine and heroin  
20 on those things at all, period, and that's the last I'm going  
21 to hear on that because I'm now convinced that this expert  
22 disclosure is insufficient to say the effect of various drugs  
23 and to suggest that means heroin and nicotine. I just don't  
24 accept that.

02:50:02

02:50:10

02:50:16

02:50:20

02:50:25

02:50:30

02:50:35

02:50:42

02:50:47

25 MS. BROWN: Do you mean heroin?

02:50:48

1           THE COURT: Yes, heroin and cocaine. Thank you. 02:50:50

2           How far are you intending to go with him on this 02:50:52

3 question of nicotine, how nicotine works? 02:51:01

4           MS. BROWN: I just asked him what was nicotine. I 02:51:07

5 was going to ask him what is dopamine. What is the effect of 02:51:10

6 dopamine, what things cause responses. I'm going to ask him 02:51:13

7 about that nicotinic receptors. I will not ask him anything 02:51:17

8 about the drugs of abuse, and we will move on; but the jury 02:51:21

9 is entitled to have him testify as the clinical psychiatrist 02:51:25

10 and as an M.D. what his -- and in his clinical experience, 02:51:29

11 training and education, what nicotinic receptors are. We 02:51:34

12 heard that from Dr. Cummings. This is within his wheelhouse, 02:51:38

13 and that's as far as I'm going to go. 02:51:41

14           THE COURT: Okay. Miss Barnett, I'm -- 02:51:43

15           MS. BARNETT: May I speak? 02:51:51

16           THE COURT: Absolutely. 02:51:53

17           MS. BARNETT: There is treating patients, there is 02:51:54

18 giving them drugs to treat them. He can talk about relapse 02:51:58

19 rates and people's struggle, but there is an entire medical 02:52:01

20 profession and scientific profession. Dr. Cummings talked 02:52:06

21 about his knowledge of studies on brains on autopsy, in 02:52:09

22 imaging, on the studies in animals. 02:52:14

23           There is no way he has this information without 02:52:18

24 relying on those kinds of sources. And as a psychiatrist, 02:52:20

25 you don't look in people's heads and determine nicotine 02:52:23

1   receptors, and that's where they are going way beyond what's   02:52:27  
2   here and what he's qualified to say. And if we had known, we   02:52:31  
3   would -- we haven't, but we will file a Daubert motion next   02:52:35  
4   time, but we went to great pains to give a full and complete   02:52:38  
5   Rule 26 expert witness disclosure, and it was before they   02:52:41  
6   disclosed their experts, so they could have had an expert on   02:52:45  
7   this.   02:52:48

8           MS. BROWN: Your Honor, that is just not true. He   02:52:48  
9   is a medical doctor. He does have training. He's not going   02:52:50  
10   to talk about imaging, to the extent that counsel is   02:52:53  
11   concerned about reading diagrams, imaging studies. We are   02:52:56  
12   not going to go there.   02:53:02

13           Dr. Cummings has not been to medical school.   02:53:03  
14   That's a big deal. It's a big deal, and he was allowed to   02:53:05  
15   testify based on his reading of reports. We have a clinical   02:53:09  
16   psychiatrist here who's board certified and has been working   02:53:12  
17   in this area for 22 years. He can talk about this stuff. He   02:53:15  
18   knows about it. He's especially equipped to talk about it.   02:53:20  
19   Now, we let Cummings go all over the place with nicotine   02:53:28  
20   receptors.   02:53:32

21           THE COURT: Just because you don't object to   02:53:33  
22   Cummings on those issues doesn't --   02:53:36

23           MS. BROWN: I understand, but Cummings keeps   02:53:39  
24   coming up and what was in his report and all of that, so I   02:53:41  
25   just want to be clear.   02:53:44

1           THE COURT: Cummings keeps coming up, Miss Brown, 02:53:45  
2 because your argument was you should be allowed to introduce 02:53:48  
3 this testimony because Dr. Cummings talked about it. 02:53:51

4           MS. BROWN: That's right. 02:53:53

5           THE COURT: So, that's why Cummings is coming up, 02:53:54  
6 because you brought him up. That doesn't work. 02:53:57

7           What I'm struggling with, really, is the absence 02:54:03  
8 of any mention of this line of testimony in the Rule 26 02:54:08  
9 report. Otherwise, as I said, that's the only part I'm 02:54:12  
10 struggling with. 02:54:20

11          MS. BROWN: The pharmacology -- 02:54:21

12          THE COURT: Wait, Miss Brown. You've read that. 02:54:24  
13 I read that statement to you the first time. You have now 02:54:26  
14 reread it to me three times. I referred to it. I know it's 02:54:29  
15 in that general -- 02:54:32

16          MS. BROWN: My apologies. 02:54:33

17          THE COURT: But it's, as I said, obviously not 02:54:38  
18 that clear, and I'm trying to make sure that you both get a 02:54:40  
19 fair trial. Both sides. 02:54:47

20          MS. HENNINGER: I was going to ask maybe if you 02:54:54  
21 not do it at this time, but I was going to ask. As I see it, 02:54:57  
22 the psychiatrist and medical doctors, perhaps, the question 02:55:01  
23 should be: Does nicotine release dopamine? What other kinds 02:55:04  
24 of activities release dopamine? That is something that a 02:55:08  
25 psychiatrist clearly can be asked. I'm having a hard time 02:55:12

1 understanding the distinction of what he's supposedly not 02:55:16  
2 allowed to talk about, and maybe it's just a misunderstanding 02:55:19  
3 in the way everything is being communicated to your Honor, 02:55:23  
4 because I don't think that anybody is going to be suggesting 02:55:27  
5 he's talking about receptors and, you know, doing 02:55:29  
6 up-regulation. 02:55:34

7 MS. BROWN: He's going to hit up-regulation, 02:55:34  
8 down-regulation. 02:55:37

9 THE COURT: So he will talk about receptors? 02:55:38

10 MS. BROWN: Nicotinic receptors. We are not going 02:55:41  
11 to go into any other drugs. 02:55:44

12 THE COURT: I don't know that -- I just don't know 02:55:46  
13 that I think that's appropriate for a clinical psychiatrist 02:55:49  
14 based on these disclosures of what he was going to be 02:55:52  
15 testifying about. I mean, there are very specific disclosure 02:55:57  
16 in here about his opinions as to Mrs. Denton. 02:56:09

17 If you want to talk to him about -- I don't know 02:56:17  
18 that I really know what the pharmacology of nicotine really 02:56:24  
19 means. I guess, to me, it means the addictive properties, 02:56:29  
20 and I think that, to some extent -- to the extent that 02:56:36  
21 talks -- that that goes into the effect it has on brain 02:56:41  
22 receptors, I think I'm okay with that, but not then going 02:56:49  
23 into this up-regulating and down-regulating. 02:56:54

24 MS. BROWN: Okay. 02:56:57

25 THE COURT: So I think it is -- he has to -- in 02:56:58

1 order to treat his patients, he has to have an understanding 02:57:05  
2 of how nicotine -- some understanding of how nicotine works 02:57:07  
3 on the brain, so I'll allow you to tread somewhat into that. 02:57:11  
4 But to the extent that you have been going into the 02:57:14  
5 up-regulating and the down-regulating, I think if you want to 02:57:17  
6 disclose an expert on that, you could have clearly disclosed 02:57:20  
7 an expert on that. 02:57:23

8 I only briefly went through his deposition 02:57:24  
9 testimony a bit. He did say he had given all his opinions, 02:57:26  
10 and I didn't see anything remotely close to that. Maybe I 02:57:30  
11 missed it because I only had a half hour and I was doing a 02:57:33  
12 lot of things in that half hour. 02:57:36

13 MS. HENNINGER: Hopefully including eating. 02:57:38

14 THE COURT: I might lose weight during this trial. 02:57:40

15 MS. BROWN: Would it change your opinion if he 02:57:43  
16 discussed it during his deposition? 02:57:46

17 THE COURT: Probably not at this point. 02:57:51

18 MS. BROWN: Okay. 02:57:53

19 THE COURT: But if he discussed up-regulating and 02:57:55  
20 down-regulating? 02:57:59

21 MS. BROWN: Discussed nicotinic receptors. 02:58:00

22 THE COURT: I said you could ask, explain how the 02:58:03  
23 receptors worked. Did he discuss up-regulating and 02:58:08  
24 down-regulating? 02:58:10

25 MS. BROWN: I don't recall if he said those 02:58:10



1     *specific words in his deposition.* 02:58:12

2             *THE COURT: We are not going to go there. The* 02:58:14  
3     *brief understanding of how nicotine works on the brain, I* 02:58:16  
4     *think, though, is part and parcel of how he would treat. I* 02:58:19  
5     *cannot agree it would be beyond his expertise to understand* 02:58:23  
6     *that given what his qualifications are.* 02:58:29

7             *MS. BARNETT: I don't object, having read all the* 02:58:31  
8     *transcripts of this witness, to leading questions to cover* 02:58:34  
9     *this quickly and get it over with, because he will launch --* 02:58:37  
10    *he will go, and I'm not being critical of him. It's hard to* 02:58:40  
11    *control a witness sometimes. I'm telling you right now, I* 02:58:45  
12    *don't object to leading questions.* 02:58:48

13            *THE COURT: See if you can lead him through it,* 02:58:49  
14    *Miss Brown.* 02:58:51

15            *MS. BROWN: Thank you.* 02:58:53

16            *(Sidebar ended.)* 02:58:55

17    BY MS. BROWN:

18    Q.     Dr. Kaplan, is nicotine addictive? 02:59:08

19    A.     Nicotine can be addictive in some smokers, yes. 02:59:11

20    Q.     Why do you say it can be addictive? 02:59:15

21    A.     Well, because not all people that smoke cigarettes 02:59:17  
22    become addicted to nicotine. Some do. About 50 percent. 02:59:21  
23    And some don't. 02:59:25

24    Q.     What is dopamine? 02:59:30

25    A.     Dopamine is a chemical which is called a 02:59:33

|    |  |          |
|----|--|----------|
| 1  | neurotransmitter. We all have dopamine in our brains, and    | 02:59:36 |
| 2  | dopamine is responsible in different parts of the brain for  | 02:59:40 |
| 3  | producing different effects.                                 | 02:59:43 |
| 4  | Q. Does nicotine cause a release of dopamine in the brain?   | 02:59:45 |
| 5  | A. It can, sure.   | 02:59:49 |
| 6  | Q. Is nicotine the only thing that releases dopamine?        | 02:59:49 |
| 7  | A. No. Dopamine is released in different parts of the        | 02:59:53 |
| 8  | brain as a consequence of various behaviors, life            | 02:59:56 |
| 9  | experiences, and substances. If you are engaged in a         | 03:00:00 |
| 10 | behavior you enjoy, the middle part of your brain called the | 03:00:03 |
| 11 | mesolimbic area secretes dopamine. If you ingest a           | 03:00:06 |
| 12 | substance, that can influence dopamine.                      | 03:00:10 |
| 13 | Dopamine can be released in different parts of the           | 03:00:12 |
| 14 | brain and can produce pleasure and enjoyment feeling. The    | 03:00:16 |
| 15 | side of the brain it affects is our ability to move. So      | 03:00:19 |
| 16 | people with Parkinson's disease don't have enough dopamine.  | 03:00:21 |
| 17 | The right part of the brain is for organizing, focusing,     | 03:00:25 |
| 18 | concentrating. Different parts of the brain, dopamine does   | 03:00:29 |
| 19 | different things.  | 03:00:31 |
| 20 | Q. Can food cause the release of dopamine?                   | 03:00:32 |
| 21 | A. It can. Things like chocolate. Some people really         | 03:00:34 |
| 22 | enjoy chocolate, so ingestion of chocolate can lead to       | 03:00:38 |
| 23 | increases of dopamine in the middle part of the brain. For   | 03:00:43 |
| 24 | some people, that's a sense of pleasure or enjoyment.        | 03:00:45 |
| 25 | Q. Can exercise cause a release of dopamine?                 | 03:00:48 |

|    |   |          |
|----|---|----------|
| 1  | A. Also, some people actually find exercise enjoyable,        | 03:00:50 |
| 2  | especially when they do it on a frequent basis. As a          | 03:00:55 |
| 3  | consequence, during exercise, parts of the brain secrete more | 03:00:57 |
| 4  | dopamine.   | 03:01:01 |
| 5  | Q. Can watching the Olympics cause the release of dopamine    | 03:01:02 |
| 6  | in the brain?   | 03:01:06 |
| 7  | A. If your team wins and you enjoy it, yes. Anything          | 03:01:06 |
| 8  | that's enjoyable may be related to increases of dopamine in   | 03:01:09 |
| 9  | different parts of our brain.                                 | 03:01:12 |
| 10 | Q. Does the human brain change constantly in response to      | 03:01:13 |
| 11 | different stimuli in your clinical expertise?                 | 03:01:17 |
| 12 | A. It does. From the time we are born until the time that     | 03:01:20 |
| 13 | we get older, the brain is really amazing and adapts to       | 03:01:23 |
| 14 | changes, adapts to our life circumstances. It adapts to       | 03:01:28 |
| 15 | food, it adapts to substances we give it. So the brain is     | 03:01:32 |
| 16 | always changing, adapting, depending upon the environment we  | 03:01:35 |
| 17 | provide it with.  | 03:01:38 |
| 18 | Q. Does smoking cigarettes cause permanent brain changes      | 03:01:39 |
| 19 | according to your education, experience, and clinical         | 03:01:42 |
| 20 | treatment of patients?  | 03:01:45 |
| 21 | MS. BARNETT: Objection, you Honor.                            | 03:01:47 |
| 22 | THE COURT: Sustained.   | 03:01:49 |
| 23 | BY MS. BROWN:   |          |
| 24 | Q. Based on your education, training, and experience, I       | 03:01:53 |
| 25 | want to talk about some general reasons why people smoke.     | 03:01:55 |

|    |               |  |          |
|----|---------------|--|----------|
| 1  | A.            | Sure.  | 03:02:00 |
| 2  | Q.            | Have we prepared a demonstrative that shows reasons why      | 03:02:00 |
| 3  |               | people smoke?  | 03:02:03 |
| 4  | A.            | Yes, we have.  | 03:02:04 |
| 5  | Q.            | And this is Defendant's Demonstrative No. 10.                | 03:02:05 |
| 6  |               | MS. BROWN: Will you put that up, Leah?                       | 03:02:14 |
| 7  |               | MS. BARNETT: We have no objection, your Honor.               | 03:02:16 |
| 8  | BY MS. BROWN: |  |          |
| 9  | Q.            | Dr. Kaplan, will you briefly take us through this list?      | 03:02:18 |
| 10 | A.            | Sure. This is a list of some of the reasons why people       | 03:02:20 |
| 11 |               | smoke. People smoke for taste, some people smoke for         | 03:02:23 |
| 12 |               | relaxation or stress relief. People smoke for the effects of | 03:02:28 |
| 13 |               | nicotine. They smoke as a consequence of their associations  | 03:02:33 |
| 14 |               | with friends and family. For the social aspects, social      | 03:02:35 |
| 15 |               | parts of smoking. For image, some people to look older. The  | 03:02:40 |
| 16 |               | feel, tactile feel. The oral feel. Enjoyment, pleasure, and  | 03:02:45 |
| 17 |               | weight control or suppression of appetite.                   | 03:02:50 |
| 18 | Q.            | Is it fair to say that people smoke for reasons other        | 03:02:52 |
| 19 |               | than nicotine, Dr. Kaplan?                                   | 03:02:55 |
| 20 | A.            | That's true.   | 03:02:56 |
| 21 | Q.            | In looking at this list, why did Linda Denton smoke,         | 03:02:58 |
| 22 |               | among the list of reasons that we have here? And we've       | 03:03:03 |
| 23 |               | prepared a demonstrative to discuss the reasons why Linda    | 03:03:09 |
| 24 |               | Denton smoked?   | 03:03:15 |
| 25 | A.            | Yes.   | 03:03:15 |

|    |  |          |
|----|--|----------|
| 1  | MS. BROWN: Let's put that up, Leah. This is                | 03:03:16 |
| 2  | Defendant's Demonstrative 11.                              | 03:03:18 |
| 3  | THE COURT: Any objection to Defendant's 11?                | 03:03:21 |
| 4  | MS. BARNETT: It's fine, your Honor. No                     | 03:03:23 |
| 5  | objection.   | 03:03:25 |
| 6  | THE COURT: All right. Now, you may publish.                | 03:03:25 |
| 7  | BY MS. BROWN:  | 03:03:29 |
| 8  | Q. What are the reasons why Linda Denton smoked?           | 03:03:30 |
| 9  | A. So based on review of the available information and     | 03:03:33 |
| 10 | depositions, there is information that suggests that taste | 03:03:37 |
| 11 | was an important factor for her. She enjoyed the flavor of | 03:03:41 |
| 12 | one brand of cigarette. Relaxation, stress relief. Several | 03:03:45 |
| 13 | people described the fact that they thought that she felt  | 03:03:49 |
| 14 | less anxious, more relaxed; and at times when she was more | 03:03:52 |
| 15 | stressed, she may smoke more cigarettes. Anxiolytic or     | 03:03:57 |
| 16 | anti-anxiety effect seems to be important. Nicotine was an | 03:04:01 |
| 17 | important factor for her.                                  | 03:04:05 |
| 18 | Nicotine can produce various effects. Nicotine             | 03:04:06 |
| 19 | can also reduce stress. It can lead to a pleasurable       | 03:04:08 |
| 20 | feeling, so I think nicotine was important for her.        | 03:04:14 |
| 21 | Q. The next category is friends and family. Did            | 03:04:16 |
| 22 | Mrs. Denton's parents smoke?                               | 03:04:20 |
| 23 | A. They did.   | 03:04:21 |
| 24 | Q. Did other family members smoke?                         | 03:04:21 |
| 25 | A. Sure. Brothers, uncles, friends. Many people in her     | 03:04:23 |

1 close environment smoked cigarettes on a regular basis. 03:04:28

2 Q. Dr. Kaplan, would you agree that one of the most 03:04:31  
3 important factors in determining whether a person will start 03:04:34  
4 smoking is whether their friends and family smoke? 03:04:37

5 A. I do. 03:04:40

6 MS. BARNETT: Objection. 03:04:42

7 THE COURT: Hold on. The jury will disregard the 03:04:42  
8 answer, and I am sustaining the objection to the leading 03:04:45  
9 question. 03:04:47

10 BY MS. BROWN: 03:04:51

11 Q. Dr. Kaplan, tell us why we have checked friends and 03:04:52  
12 family on this list in terms of why Linda Denton smoked. 03:04:55

13 A. In my clinical experience, the environment that we are 03:05:01  
14 raised in -- 03:05:05

15 MS. BARNETT: Your Honor, I object. 03:05:06

16 MS. BROWN: What's the basis for the objection? 03:05:12

17 THE COURT: Let me see counsel. 03:05:20

18 *(The following was held at sidebar:)* 03:05:22

19 THE COURT: Miss Barnett, what's the objection? 03:05:33

20 MS. BARNETT: The objection is this opinion he's 03:05:39

21 about to give was not one that was disclosed. She gave a 03:05:41

22 list about things she liked about smoking and the influence 03:05:46

23 of family and initiation of smoking, influence of family in 03:05:48

24 general and initiation of smoking, but what causes people to 03:05:52

25 start smoking is not covered in this report. Enjoyment, 03:05:55

1 fine. Sex, stress, coffee, I even gave them taste, but this  
2 is beyond the scope of his report.

3 THE COURT: Miss Brown?

4 MS. BROWN: Linda Denton was aware that several  
5 members of her immediate family developed lung cancer. There  
6 is so much evidence in the record that their family smoked;  
7 and if we are going to go through every time I ask a question  
8 and see if there is a specific word that's in his expert  
9 report and see if it matches what he's testifying on the  
10 stand -- they are obviously things that he reviewed.

11 He's entitled to opine on that. I can ask him in  
12 his clinical experience if that makes any difference; but,  
13 clearly, that's something that he saw and that he's entitled  
14 to opine on, and that's exactly what he's doing. I don't see  
15 how it's beyond the scope of this report at all.

16 We can go back to his deposition and go through  
17 the questions and answers that he provided then about the  
18 reasons why Mrs. Denton smoked, but that was part and parcel  
19 of his examination of her and determining whether or not she  
20 was addicted to nicotine under DSM-IV. They are all things  
21 that he reviewed.

22 THE COURT: I'll sustain the objection. Move on.

23 (Sidebar ended.)

24 BY MS. BROWN:

25 Q. Moving on from friends and family to social aspects.

|    |   |          |
|----|---|----------|
| 1  | Did Linda Denton smoke for social aspects, according to your  | 03:07:30 |
| 2  | review of the record?   | 03:07:34 |
| 3  | A. I believe so. There is testimony that part of her          | 03:07:35 |
| 4  | behavior when she smoked was to smoke with other people, have | 03:07:41 |
| 5  | conversations while she smoked. So I think the social part    | 03:07:45 |
| 6  | of smoking was important in her smoking behavior.             | 03:07:48 |
| 7  | Q. What about the next one, image or to look older. Was       | 03:07:52 |
| 8  | that a reported reason why Linda Denton smoked?               | 03:07:55 |
| 9  | A. I don't find any evidence for that from Mrs. Denton.       | 03:07:57 |
| 10 | Q. How about feel?  | 03:08:02 |
| 11 | A. Also, I don't find evidence that she smoked for the        | 03:08:03 |
| 12 | feeling or putting something in her hands or around her lips. | 03:08:07 |
| 13 | I don't find any evidence of that.                            | 03:08:10 |
| 14 | Q. Was there any evidence that Linda Denton smoked for        | 03:08:11 |
| 15 | enjoyment?  | 03:08:15 |
| 16 | A. I believe so. Several people described the fact -- the     | 03:08:15 |
| 17 | belief that she enjoyed smoking, that she got pleasure from   | 03:08:19 |
| 18 | smoking. So I think that was an important factor for          | 03:08:22 |
| 19 | Mrs. Denton.  | 03:08:24 |
| 20 | Q. What about to control weight or suppress appetite? Was     | 03:08:25 |
| 21 | that something you saw in terms of why Linda Denton smoked?   | 03:08:28 |
| 22 | A. No, I don't find any evidence that the appetite            | 03:08:30 |
| 23 | suppressing effect of cigarettes or nicotine was important    | 03:08:33 |
| 24 | for Mrs. Denton.  | 03:08:36 |
| 25 | Q. Dr. Kaplan, were there reasons Linda Denton chose to       | 03:08:38 |



|    |   |          |
|----|---|----------|
| 1  | smoke besides nicotine?                                       | 03:08:42 |
| 2  | A. I believe so.  | 03:08:43 |
| 3  | Q. Would you disagree with someone who says that nicotine     | 03:08:44 |
| 4  | is the only reason people smoke in your clinical opinion?     | 03:08:47 |
| 5  | A. I would disagree with that.                                | 03:08:51 |
| 6  | Q. Why would you disagree?                                    | 03:08:52 |
| 7  | A. I don't believe that to be accurate. I think nicotine      | 03:08:54 |
| 8  | is one of the reasons why smokers smoke. It's not the only    | 03:08:56 |
| 9  | reason. The importance of nicotine varies in different        | 03:09:00 |
| 10 | smokers, so people do smoke for a variety of reasons, some of | 03:09:04 |
| 11 | those reasons unrelated to the effects of nicotine.           | 03:09:07 |
| 12 | Q. According to the documents you've reviewed in this         | 03:09:10 |
| 13 | case, when did someone first actually see Linda Denton smoke? | 03:09:12 |
| 14 | A. According to what I reviewed, at the age of 16 is when     | 03:09:16 |
| 15 | she was first observed to smoke cigarettes.                   | 03:09:20 |
| 16 | Q. Let's talk in general about whether smokers can quit       | 03:09:22 |
| 17 | smoking. How is the clinical psychiatrist such as yourself    | 03:09:26 |
| 18 | especially qualified to discuss a person's ability to quit    | 03:09:30 |
| 19 | smoking?  | 03:09:33 |
| 20 | A. Well, psychiatrists are the experts in human behavior.     | 03:09:34 |
| 21 | Changing behavior is one of the things that we work with      | 03:09:39 |
| 22 | patients on. We are trained; we have experience. So when      | 03:09:42 |
| 23 | someone chooses to quit smoking, it's a behavioral change.    | 03:09:45 |
| 24 | We look at it, and we are trained in the examination of       | 03:09:49 |
| 25 | biological, the psychological, the social factors involved in | 03:09:52 |

|    |  |          |
|----|--|----------|
| 1  | change. So psychiatrists have a lot of experience in       | 03:09:56 |
| 2  | assisting people and analyzing changes and behavior,       | 03:09:59 |
| 3  | including things like quitting cigarette smoking.          | 03:10:03 |
| 4  | Q. Based on your education, training, and experience, can  | 03:10:07 |
| 5  | all smokers quit?  | 03:10:10 |
| 6  | A. Vast majority can. There are times when, let's say,     | 03:10:11 |
| 7  | someone had a severe cognitive problem like Alzheimer's,   | 03:10:15 |
| 8  | dementia, or severe head injury where they couldn't think, | 03:10:19 |
| 9  | organize, focus, things like that. That person might be    | 03:10:23 |
| 10 | unable to quit. Outside of severe cognitive problems,      | 03:10:26 |
| 11 | smokers can quit smoking.                                  | 03:10:30 |
| 12 | Q. Was there any evidence that Mrs. Denton had any of the  | 03:10:32 |
| 13 | cognitive problems that you just described?                | 03:10:35 |
| 14 | A. No evidence. She is described as being intelligent,     | 03:10:37 |
| 15 | bright. I didn't find anything in the medical records she  | 03:10:40 |
| 16 | had any cognitive dysfunction. I don't think that is a     | 03:10:44 |
| 17 | factor for Mrs. Denton.                                    | 03:10:47 |
| 18 | Q. Based on your education, training, and experience can   | 03:10:49 |
| 19 | even long-term smokers quit?                               | 03:10:52 |
| 20 | A. They can, sure.   | 03:10:55 |
| 21 | Q. Can people who smoke more than a pack a day quit?       | 03:10:55 |
| 22 | A. They can.   | 03:10:59 |
| 23 | Q. Can addicted smokers quit?                              | 03:10:59 |
| 24 | A. They can and they do.                                   | 03:11:02 |
| 25 | Q. In your experience, how do most smokers quit?           | 03:11:04 |

|    |    |   |          |
|----|----|---|----------|
| 1  | A. | In my experience, the vast majority of smokers just           | 03:11:08 |
| 2  |    | quit by themselves, without getting any professional          | 03:11:12 |
| 3  |    | assistance. They usually quit cold turkey, just stop          | 03:11:15 |
| 4  |    | smoking.  | 03:11:18 |
| 5  | Q. | Is that without the patch, without nicotine gum,              | 03:11:19 |
| 6  |    | without any assistance at all?                                | 03:11:21 |
| 7  | A. | Correct.  | 03:11:23 |
| 8  | Q. | Does that mean it's easy for everybody to quit?               | 03:11:24 |
| 9  | A. | No. As I stated previously, smoking -- quitting               | 03:11:27 |
| 10 |    | smoking can be difficult for some smokers, whether or not     | 03:11:30 |
| 11 |    | they use methods to assist them in quitting or whether they   | 03:11:35 |
| 12 |    | are not addicted. Quitting smoking for some people can be     | 03:11:40 |
| 13 |    | difficult.  | 03:11:43 |
| 14 | Q. | In your clinical treatment, what are the most important       | 03:11:43 |
| 15 |    | factors in determining whether a smoker is going to be        | 03:11:46 |
| 16 |    | successful in quitting?                                       | 03:11:49 |
| 17 | A. | The two most important factors in changing one's              | 03:11:50 |
| 18 |    | behavior in quitting smoking are motivation and commitment.   | 03:11:54 |
| 19 |    | So motivation is a strong desire to change one's behavior, in | 03:11:58 |
| 20 |    | this case, quitting; and commitment is developing a plan of   | 03:12:02 |
| 21 |    | action and following through with that plan to successfully   | 03:12:05 |
| 22 |    | achieve your goal. In this case quitting smoking. So          | 03:12:08 |
| 23 |    | motivation and commitment are the two most important factors  | 03:12:11 |
| 24 |    | in terms of analyzing the success of a quit attempt.          | 03:12:15 |
| 25 | Q. | In your clinical experience, does it commonly take more       | 03:12:19 |

1    than one try for someone to quit smoking?

03:12:23

2    A.     It does.   Some people take three, four, five times to  
3    try until they are successful in quitting on a long-term  
4    basis.   So it certainly could take more than one time to be  
5    successful in quitting.

03:12:25

03:12:28

03:12:32

03:12:35

6    Q.     And in your clinical experience, ultimately, who is  
7    responsible for having the motivation and making the effort  
8    to quit?

03:12:36

03:12:39

03:12:42

9    A.     Ultimately, it's the smoker.   You can't make people do  
10   things they don't want to do.   It's up to the smoker to  
11   decide if they want to follow through with a serious quit  
12   attempt.

03:12:43

03:12:47

03:12:50

03:12:54

13   Q.     Can anyone else control the smoker's motivation to quit?

03:12:54

14   A.     No, they can't.

03:12:59

15   Q.     Can anyone else control the level of effort that a  
16   smoker puts into quitting?

03:12:59

03:13:02

17   A.     Can't do that either.

03:13:04

18   Q.     Are there some smokers in your experience who simply do  
19   not want to quit?

03:13:05

03:13:08

20   A.     Sure.

03:13:09

21   Q.     Do you have patients that tell you they don't want to  
22   quit?

03:13:10

03:13:14

23   A.     I do.   In my experience, about 40 percent of people  
24   that smoke on a regular basis are not interested in quitting.

03:13:14

03:13:18

25   Q.     Are they aware of the risks of smoking?

03:13:21

1 A. They are quite aware. I know that because I discuss it 03:13:23  
2 with them when I see them in my office. Nonetheless, at 03:13:27  
3 least at that time in their life, they are not interested in 03:13:31  
4 quitting. 03:13:33

5 Q. According to your review of the evidence in this case, 03:13:33  
6 was Mrs. Denton aware of the risks of smoking? 03:13:37

7 A. She was. 03:13:40

8 Q. So why would someone continue smoking if they were 03:13:41  
9 aware of the risks? 03:13:46

10 A. People continue to engage in a lot of behaviors that 03:13:48  
11 may not be healthy behaviors, but they have their own 03:13:54  
12 reasons. 03:13:57

13 We looked at a lot of reasons why I believe 03:13:57  
14 Mrs. Denton smoked. This is part of being a human being. We 03:13:59  
15 often make decisions that are not so healthy. I have 03:14:03  
16 patients that have had heart attacks and are overweight, high 03:14:07  
17 cholesterol, and they eat fried chicken and they eat high-fat 03:14:11  
18 meals. They know it's not healthy, but it's a choice that 03:14:15  
19 they make in their life. 03:14:18

20 I have patients who, when they are in Florida, lay 03:14:19  
21 out in the sun. Some get skin cancer. After being diagnosed 03:14:21  
22 with skin cancer, they still lay out in the sun. They don't 03:14:25  
23 wear sun block. Not a healthy choice, but they do it 03:14:28  
24 nonetheless. 03:14:31

25 See, it's not uncommon for healthy people, human 03:14:32

1 beings -- we decide in our lives -- we weigh the risks and 03:14:35  
2 benefits and we decide what we want to do. Sometimes those 03:14:38  
3 decisions are not so healthy, but it's still that 03:14:40  
4 individual's choice to make that decision. 03:14:43

5 Q. Is motivation something that you actually work with 03:14:45  
6 your patients on? 03:14:48

7 A. I try. Ultimately, it's up to them, but I try to get 03:14:48  
8 people excited about changing, about quitting. I provide as 03:14:52  
9 much reason as I can. So I try to motivate them, but 03:14:55  
10 ultimately it's going to be up to them to how they take that 03:14:58  
11 and what they want to do with it. 03:15:02

12 Q. Of the patients who have come to you for help to quit 03:15:04  
13 smoking, how many have been successful? 03:15:08

14 A. Of my patients who have come to me for assistance in 03:15:10  
15 quitting and are committed to quitting, I would say about 70, 03:15:12  
16 75 percent have a successful quit. 03:15:18

17 Q. Is nicotine one of the reasons that some smokers find 03:15:20  
18 it difficult to quit? 03:15:23

19 A. It's one of the reasons, sure. 03:15:25

20 Q. In what ways can nicotine make it harder for people to 03:15:27  
21 quit smoking? 03:15:30

22 A. Well, depends on the benefits that some people get from 03:15:31  
23 nicotine. If it's something they like about it and you do it 03:15:36  
24 on a frequent basis, it can be difficult. 03:15:39

25 Let's say a person smokes a pack a day, 20 03:15:42

1 cigarettes a day, and say they smoked for ten years. For ten  
2 years they are smoking 20 cigarettes a day, and they may find  
3 some pleasure from smoking. A consequence of nicotine,  
4 whether it's focus, enjoyment, reduced appetite, increased  
5 energy, antianxiety effects, something about it they like.

6 When you do something repetitively and you try to  
7 stop, often people miss that. So it's motivation to continue  
8 the behavior. That's part of the reason.

9 Some people who are regular smokers, when they  
10 quit they have withdrawal symptoms and sometimes those  
11 withdrawal symptoms can make it more difficult to quit. So  
12 there are reasons that nicotine may influence how difficult  
13 it may be to quit, but it doesn't prevent them from choosing  
14 to quit and it doesn't stop them from quitting.

15 Q. What are the withdrawal symptoms associated with  
16 quitting smoking?

17 A. There are potential withdrawal symptoms if someone is a  
18 regular smoker when they stop. These symptoms can include  
19 feeling somewhat sad, blue, angry, agitated, anxious. Some  
20 people get more hungry, and as a consequence they can gain  
21 weight. Some people have difficulty sleeping, some people  
22 have some difficulty focusing. Some people notice a  
23 reduction in their heart rate after they have quit. Some  
24 people have some of these -- some people have most of these,  
25 so those are potential withdrawal symptoms that people can

1 have if they drastically reduce or if they stop smoking. 03:17:08

2 Q. Is nicotine withdrawal relatively mild? 03:17:11

3 A. It is. It is. First of all, of regular smokers, only 03:17:16  
4 about 50 percent of people will have withdrawal, and of 03:17:21  
5 those -- 03:17:23

6 MS. BARNETT: Your Honor, I object to the 03:17:24  
7 narrative. 03:17:25

8 THE COURT: You can go ahead and finish your 03:17:29  
9 answer, and if you will just try to keep them short, please. 03:17:30

10 THE WITNESS: Yes, your Honor. 03:17:33

11 Of those people who do get withdrawal, it's 03:17:34  
12 generally mild. 03:17:37

13 BY MS. BROWN: 03:17:38

14 Q. Does the amount a person smokes or the length of time a 03:17:38  
15 person smokes predict the withdrawal symptoms a person will 03:17:41  
16 experience when they try to quit? 03:17:44

17 A. Interestingly, it does not. The length of smoking or 03:17:46  
18 the amount of smoking does not affect the chance that they 03:17:50  
19 will have to have cigarette withdrawal symptoms. 03:17:55

20 Q. Besides smoking, are there other behaviors that are 03:17:57  
21 difficult to quit in your studies of human behavior? 03:18:01

22 A. Sure. Anything you do on a repetitive basis. And if 03:18:03  
23 you enjoy it, you get something positive out of it, it's 03:18:08  
24 tough to quit. A lot of people have gained weight over the 03:18:12  
25 years and they want to try to lose weight. People have to 03:18:17



1 try numerous times, have numerous failures in their attempts 03:18:21  
2 to lose some weight. Some people have problems like gambling 03:18:26  
3 and things like this. They have to try numerous times to be 03:18:29  
4 successful in no longer gambling. There are numerous 03:18:33  
5 behaviors that we engage in in our life. If there is 03:18:36  
6 something about those behaviors you like, you do it 03:18:41  
7 repetitiously, it can be very difficult to quit or to change 03:18:44  
8 those behaviors. 03:18:48

9 Q. Can a person rationally decide I don't want to quit 03:18:48  
10 smoking; I enjoy it? 03:18:52

11 A. They can. 03:18:53

12 Q. Based on your experience at different stages of 03:18:54  
13 people's lives, do they weigh the risks versus pleasures of 03:18:57  
14 the activities differently? 03:19:02

15 A. They do. As we get older, hopefully most of us mature. 03:19:03  
16 We gain life experience and we think about things differently 03:19:07  
17 than we did when we were younger. So people weigh the risks 03:19:11  
18 and benefits of a wide variety of behaviors, including 03:19:14  
19 cigarette smoking, as they get older. 03:19:18

20 Q. Now, talking specifically about Mrs. Denton, did 03:19:20  
21 Mrs. Denton always have the ability to quit smoking in your 03:19:24  
22 opinion? 03:19:28

23 A. It's my opinion that she always had the ability to quit 03:19:29  
24 smoking if she desired and so chose to quit. 03:19:32

25 Q. What is your basis for that opinion? 03:19:35

1 A. Based on several things. First of all, in 1996, she 03:19:37  
2 did quit. I didn't find any evidence based on medical 03:19:42  
3 records and descriptions of Mrs. Denton that she had any 03:19:46  
4 cognitive problems. She had personality characteristics that 03:19:49  
5 I think were helpful if she wanted to quit. People described 03:19:53  
6 her as independent, decisive, intelligent, strong. 03:19:57

7 These are the kind of personality characteristics 03:20:01  
8 that can assist people in making changes in their behavior if 03:20:03  
9 they want to. I didn't find any evidence that she had the 03:20:06  
10 type of withdrawal symptoms that would have had a significant 03:20:08  
11 impact on her decision, her ability to quit. So for all 03:20:11  
12 those reasons, I think she was capable during the entire time 03:20:16  
13 of smoking of quitting if she wanted to. 03:20:20

14 Q. Could she have quit when she was a young woman? 03:20:23

15 A. She could have. 03:20:26

16 Q. How would you describe her when she was 16? 03:20:27

17 A. Based on the information I reviewed, I think she was 03:20:30  
18 actually quite mature for her age. Quit school early, got a 03:20:32  
19 full-time job, moved in with her sister, supported herself, 03:20:37  
20 got married, had a child relatively quickly after she got 03:20:41  
21 married. And many people described her as a very loving 03:20:44  
22 person. Wonderful wife, wonderful mother. Mature 03:20:47  
23 descriptions of someone at that age. So I think she was, for 03:20:53  
24 her age, quite mature. 03:20:56

25 Q. Could she have quit when she was 18 and had her first 03:20:59

1 child?

03:21:03

2 A. She could have.

03:21:03

3 MS. BARNETT: Your Honor, I object.

03:21:04

4 THE COURT: I'm going to sustain and tell the jury  
5 to disregard.

03:21:12

6 BY MS. BROWN:

03:21:14

7 Q. At any time during her life, if Mrs. Denton had been  
8 sufficiently motivated and committed to quitting, could she  
9 have quit smoking?

03:21:15

03:21:18

03:21:22

10 A. At any time in her life she could have, yes.

03:21:23

11 Q. You mentioned this, but did Mrs. Denton ever choose to  
12 quit smoking for good?

03:21:26

03:21:29

13 A. She did. When she had some medical problems and saw a  
14 doctor, she had some tests done. She quit in 1996,  
15 successfully quit, and didn't smoke after that period of  
16 time.

03:21:31

03:21:34

03:21:41

03:21:44

17 Q. What did she do to quit smoking at that time?

03:21:44

18 A. Like most people, she quit cold turkey, just stopped  
19 smoking. That's the way she quit.

03:21:47

03:21:51

20 Q. Are you aware of any other efforts she made to quit  
21 smoking or cut down before that time?

03:21:53

03:21:56

22 A. Not quit, but cut down. There were several times  
23 during approximately a 30-year history of her smoking that  
24 she attempted to cut down. There was also one time when she  
25 went to see a doctor. I think she fractured her thumb, and

03:21:58

03:22:02

03:22:06

03:22:12

|    |   |          |
|----|---|----------|
| 1  | the doctor gave her a nicotine replacement patch and she      | 03:22:15 |
| 2  | tried that once. So those were the times that I recall.       | 03:22:18 |
| 3  | Q. When she tried to cut back, how long did her attempts      | 03:22:21 |
| 4  | last?   | 03:22:23 |
| 5  | A. Didn't last very long. She never actually stopped          | 03:22:24 |
| 6  | smoking for 24 hours or greater.                              | 03:22:28 |
| 7  | Q. Is there any type of standard for how long a person        | 03:22:30 |
| 8  | must quit to be considered a serious quit attempt?            | 03:22:33 |
| 9  | A. There is. Based on the Surgeon General's definition, a     | 03:22:37 |
| 10 | serious quit attempt is defined as someone who quit for 24    | 03:22:42 |
| 11 | hours or greater.   | 03:22:46 |
| 12 | Q. Based on your review of the records, did Linda Denton      | 03:22:46 |
| 13 | have any serious quit attempts before her final quit in 1996? | 03:22:50 |
| 14 | A. Prior to her final quit, she did not have any serious      | 03:22:54 |
| 15 | quit attempts.  | 03:22:57 |
| 16 | Q. Did she ever throw her cigarettes away and hide her        | 03:22:58 |
| 17 | ashtrays?   | 03:23:01 |
| 18 | A. She did not.   | 03:23:02 |
| 19 | Q. If you are trying to quit smoking, why is it important     | 03:23:03 |
| 20 | to get rid of your cigarettes and get rid of your ashtrays?   | 03:23:06 |
| 21 | A. Temptation. You don't want to be near or associate         | 03:23:10 |
| 22 | with something that you want to quit engaging in. So one of   | 03:23:12 |
| 23 | the common recommendations when we provide smoking cessation  | 03:23:17 |
| 24 | assistance, if someone goes to a group, et cetera, is to tell | 03:23:20 |
| 25 | them, first and foremost, throw out your cigarettes, throw    | 03:23:23 |

1 out the ashtrays, throw out things that remind you of that  
2 behavior.

3 Q. Dr. Kaplan, if you are trying to quit smoking, is  
4 family support important in your clinical experience?

5 A. It is. I mean, the more support, the more  
6 encouragement --

7 MS. BARNETT: Your Honor, I object.

8 THE COURT: Overruled.

9 BY MS. BROWN:

10 Q. You may answer.

11 A. Sure. I think family support is awfully important in  
12 changing one's behavior. So the more encouragement, support,  
13 et cetera, you get from people that are close, close friends,  
14 close family, it can assist people in, No. 1, getting  
15 motivated; No. 2, in being successful in changing their  
16 behavior.

17 Q. Dr. Kaplan, did Mrs. Denton ever attend a smoking  
18 cessation clinic?

19 A. She did not.

20 Q. Did you see any evidence that she ever called a stop  
21 smoking hotline?

22 A. I did not find any evidence of that.

23 Q. Is there any evidence she had used nicotine gum?

24 A. No evidence of that.

25 Q. And you've mentioned that she did try the nicotine

1 patch at one time.

03:24:25

2 A. Correct.

03:24:27

3 Q. Can you tell us about that?

03:24:27

4 A. Sure. I believe she fractured a thumb and went to see  
5 the doctor for that.

03:24:29

03:24:34

6 MS. BARNETT: Your Honor, cumulative. We just had  
7 this testimony.

03:24:35

03:24:37

8 THE COURT: I think he talked about how she got  
9 it, but you can describe what happened in that quit attempt.

03:24:39

03:24:41

10 BY MS. BROWN:

03:24:48

11 Q. Go ahead, Dr. Kaplan.

03:24:48

12 A. Sure. So she did put the patch on. Once she wore the  
13 patch, she smoked cigarettes; and the recommendation is, you  
14 replace the patch for -- you replace the cigarettes for the  
15 patch. You're not supposed to smoke on top of it. She  
16 developed subsequent side-effects -- headaches, nausea -- and  
17 stopped the patch and did not use it after that time.

03:24:49

03:24:54

03:24:58

03:25:02

03:25:05

03:25:09

18 Q. Did Mrs. Denton know people who had successfully quit  
19 smoking?

03:25:12

03:25:16

20 A. She did.

03:25:16

21 Q. Who did she know that had successfully quit?

03:25:17

22 A. For one, her husband. Her husband quit in 1973, after  
23 he coughed up some blood and was concerned about getting ill.  
24 See, he didn't smoke since '73. Brother quit, daughter quit,  
25 so she was exposed to different people during her life that

03:25:20

03:25:23

03:25:29

03:25:34

|    |  |          |
|----|--|----------|
| 1  | were regular smokers and then quit smoking.                  | 03:25:38 |
| 2  | Q. Did she ever ask them for advise on how to quit?          | 03:25:41 |
| 3  | A. I don't find evidence of that, no.                        | 03:25:45 |
| 4  | Q. Did she ever ask anyone for any kind of assistance to     | 03:25:46 |
| 5  | quit?  | 03:25:49 |
| 6  | A. I also don't find evidence of that.                       | 03:25:50 |
| 7  | Q. Based on your evaluation of the materials in this case,   | 03:25:52 |
| 8  | was Mrs. Denton somebody who could complete the things she   | 03:25:56 |
| 9  | set out to do?   | 03:25:59 |
| 10 | A. I believe so.   | 03:26:00 |
| 11 | Q. If she didn't really want to stop smoking over all of     | 03:26:01 |
| 12 | those years, is there any surprise that she did not stop?    | 03:26:06 |
| 13 | A. It's not surprising. As I stated, you can't make          | 03:26:11 |
| 14 | people do something that they don't want to do.              | 03:26:14 |
| 15 | Q. Did her family help her quit in 1996, according to your   | 03:26:18 |
| 16 | review of the records?                                       | 03:26:22 |
| 17 | A. I believe so. There is some testimony that her            | 03:26:23 |
| 18 | daughters went into the house and washed up the house, tried | 03:26:28 |
| 19 | to get the smell of smoke out in order to assist her in no   | 03:26:33 |
| 20 | longer smoking.  | 03:26:38 |
| 21 | Q. In your experience, is it common for patients to quit     | 03:26:40 |
| 22 | smoking when they have some kind of a health scare?          | 03:26:43 |
| 23 | A. It is. That's actually quite common. If something         | 03:26:46 |
| 24 | happens and they are concerned that some behavior is         | 03:26:49 |
| 25 | associated with causing that health scare, that's when, at   | 03:26:51 |

1 least, for them it's enough for them to make that decision  
2 that they are going to quit.

3 Q. Does the fact that Mrs. Denton was able to quit in 1996  
4 tell you anything about her motivation and commitment to quit  
5 at that time?

6 A. It does. I think she was much more motivated and  
7 committed to quit when she successfully quit in 1996.

8 Q. Is there any reason, if she had been sufficiently  
9 motivated in this quitting prior to 1976, Mrs. Denton could  
10 not have quit earlier?

11 A. No, it's my opinion, if sufficiently motivated or  
12 committed, she could have quit at any time during the years  
13 she smoked cigarettes.

14 Q. Even if Mrs. Denton was addicted to nicotine, could she  
15 have quit?

16 A. If she was -- which that's not my opinion -- but if she  
17 was addicted, she still could have quit smoking cigarettes.

18 Q. Is there anything about nicotine that impaired her  
19 ability to make a decision to quit smoking?

20 A. No.

21 Q. Was Mrs. Denton always in control of her decision to  
22 smoke or not to smoke?

23 A. She was.

24 Q. Dr. Kaplan, have you ever heard the term "constrained  
25 choice"? Is that a medical term?



|    |                 |   |          |
|----|-----------------|---|----------|
| 1  | A.              | Not a medical term. It's more of a kind of              | 03:28:05 |
| 2  |                 | sociological term.                                      | 03:28:08 |
| 3  | Q.              | In your opinion, was Mrs. Denton's choice to quit       | 03:28:09 |
| 4  |                 | smoking constrained at any time during her life?        | 03:28:12 |
| 5  | A.              | It was not.   | 03:28:14 |
| 6  | Q.              | Did Mrs. Denton ever lose control of her free will to   | 03:28:16 |
| 7  |                 | decide to start, stop, or continue smoking?             | 03:28:20 |
| 8  | A.              | She did not lose control over her free will to make a   | 03:28:24 |
| 9  |                 | choice about her smoking behavior.                      | 03:28:27 |
| 10 |                 | MS. BROWN: Thank you, Dr. Kaplan. I have no             | 03:28:30 |
| 11 |                 | further questions at this time.                         | 03:28:31 |
| 12 |                 | THE WITNESS: Thank you.                                 | 03:28:35 |
| 13 |                 | THE COURT: Miss Henninger, do you want to inquire       | 03:28:36 |
| 14 |                 | or is it plaintiff's witness?                           | 03:28:38 |
| 15 |                 | MS. HENNINGER: No, your Honor.                          | 03:28:41 |
| 16 |                 | THE COURT: Miss Barnett?                                | 03:28:42 |
| 17 |                 | MS. BARNETT: It might take me a second to set up.       |          |
| 18 |                 | THE COURT: Sure.  | 03:28:43 |
| 19 |                 | CROSS-EXAMINATION                                       | 03:28:44 |
| 20 | BY MS. BARNETT: |   | 03:28:46 |
| 21 | Q.              | Good afternoon, Dr. Kaplan.                             | 03:29:38 |
| 22 | A.              | Good afternoon.   | 03:29:39 |
| 23 | Q.              | You found, based on all the evidence you reviewed, that | 03:29:40 |
| 24 |                 | Linda Denton was a successful, loving mother, right?    | 03:29:43 |
| 25 | A.              | Correct.  | 03:29:45 |

|    |    |  |          |
|----|----|--|----------|
| 1  | Q. | And in fact, you testified she was a wonderful mother?     | 03:29:45 |
| 2  | A. | My understanding, that's what people said about her,       | 03:29:48 |
| 3  |    | yes.   | 03:29:51 |
| 4  | Q. | She cared for her kids, based on your review of the        | 03:29:51 |
| 5  |    | information?   | 03:29:54 |
| 6  | A. | I believe so.  | 03:29:54 |
| 7  | Q. | Raised them well?  | 03:29:55 |
| 8  | A. | I believe so, yes.   | 03:29:56 |
| 9  | Q. | Were her children grown up, educated, and loved?           | 03:29:56 |
| 10 | A. | I believe so.  | 03:30:01 |
| 11 | Q. | And she was very committed to her husband?                 | 03:30:02 |
| 12 | A. | Yes.   | 03:30:04 |
| 13 | Q. | And you agree, in the evidence you reviewed, you saw       | 03:30:05 |
| 14 |    | information that Linda Denton tried light and low-tar      | 03:30:09 |
| 15 |    | cigarettes to reduce her risk of getting cancer, right?    | 03:30:13 |
| 16 | A. | I did see testimony --                                     | 03:30:15 |
| 17 |    | MS. BROWN: Objection. Foundation. Beyond the               | 03:30:17 |
| 18 |    | scope of this witness's expertise.                         | 03:30:20 |
| 19 |    | THE COURT: Overruled.                                      | 03:30:21 |
| 20 |    | BY MS. BARNETT:  | 03:30:22 |
| 21 | Q. | I'll ask again, Dr. Kaplan.                                | 03:30:22 |
| 22 |    | Did you see information in the evidence you                | 03:30:24 |
| 23 |    | reviewed in forming your opinions that Linda Denton tried  | 03:30:26 |
| 24 |    | light and low-tar cigarettes to reduce her risk of getting | 03:30:28 |
| 25 |    | cancer?  | 03:30:32 |

1 A. Well, I don't know if it was described as reducing her 03:30:32  
2 risk of getting cancer, but I believe in the deposition that 03:30:35  
3 she tried low-tar cigarettes, perhaps to assist her in 03:30:39  
4 reducing smoking. 03:30:45

5 Q. To assist her in stopping smoking? 03:30:47

6 A. In reducing smoking. 03:30:49

7 Q. Okay. Do you remember if you testified in your 03:30:50  
8 deposition that you remembered seeing evidence that she tried 03:30:59  
9 light and low-tar cigarettes to reduce her risk? 03:31:01

10 A. I may have said that. I would have to see the 03:31:05  
11 transcript, but I may have said that, sure. 03:31:08

12 Q. You don't remember now whether you saw that information 03:31:10  
13 or not in the depositions you reviewed? 03:31:12

14 MS. BROWN: Objection, your Honor. This is 03:31:14  
15 improper impeachment. 03:31:15

16 THE COURT: Let me see counsel. 03:31:19

17 *(The following was held at sidebar:)* 03:31:22

18 THE COURT: How is it important, Miss Brown? 03:31:32

19 MS. BROWN: She is asking if he remembers 03:31:34  
20 testifying a certain way, and he's answered the question and 03:31:37  
21 now she is continuing to asking him if he remembers. He 03:31:40  
22 answered the question. If she wants to impeach him with his 03:31:43  
23 deposition -- 03:31:46

24 THE COURT: Maybe I misunderstood the question. I 03:31:46  
25 thought she asked if he remembered seeing that testimony from 03:31:48

1 other people to impeach the opinion that he's given that she  
2 wasn't motivated to try and stop smoking.

3 MS. BROWN: The way I heard the question, it was  
4 how he testified in his deposition. Maybe I misunderstood.

5 THE COURT: Well, you did ask him if he had  
6 testified about something in his deposition, and it shouldn't  
7 be a memory test as to what he did or didn't testify to.

8 So to the extent she's asking if he remembers the  
9 testimony of other witnesses he reviewed in basing his  
10 opinion, that's okay. To the extent that he knows there  
11 was -- if you were going to ask him about his prior  
12 deposition testimony, if you -- if he doesn't remember it,  
13 then I think the appropriate thing for you would be to just  
14 show it to him.

15 MS. BARNETT: That was my next step. That was my  
16 next step, was to ask if he remembered and then show it to  
17 him.

18 THE COURT: All right.

19 (Sidebar ended.)

20 THE COURT: Go ahead.

21 BY MS. BARNETT:

22 Q. We were talking, Dr. Kaplan, and I was asking you  
23 whether you recall reading testimony and evidence in this  
24 case that Linda Denton tried light and low-tar cigarettes to  
25 reduce her risks.

|    |                 |   |          |
|----|-----------------|---|----------|
| 1  | A.              | I recall there being testimony that she tried low-tar         | 03:33:22 |
| 2  |                 | cigarettes. It may have been to reduce her risk. I honestly   | 03:33:27 |
| 3  |                 | don't recall right now, but that was the reason, but that     | 03:33:31 |
| 4  |                 | could be accurate.  | 03:33:34 |
| 5  | MS. BARNETT:    | If I could approach, your Honor? I                            | 03:33:35 |
| 6  |                 | have a copy of his deposition.                                | 03:33:37 |
| 7  | THE COURT:      | You may. Could you give counsel a                             | 03:33:39 |
| 8  |                 | page and line cite, please?                                   | 03:33:41 |
| 9  | MS. BARNETT:    | Yes. Page 217, lines 6 through 8.                             | 03:33:43 |
| 10 | BY MS. BARNETT: |   | 03:34:23 |
| 11 | Q.              | Do you see where I am?  | 03:34:23 |
| 12 | A.              | Yes. I'm just reading. Thank you.                             | 03:34:24 |
| 13 | Q.              | Did I ask you the question: Do you remember the               | 03:34:27 |
| 14 |                 | testimony that Mrs. Denton tried light and low-tar cigarettes | 03:34:28 |
| 15 |                 | to reduce her risk?   | 03:34:31 |
| 16 |                 | Do you see where I asked that?                                | 03:34:33 |
| 17 | A.              | I do.   | 03:34:34 |
| 18 | Q.              | What was your answer?   | 03:34:34 |
| 19 | A.              | I said, I do.   | 03:34:35 |
| 20 | Q.              | And you have no reason to disbelieve that testimony           | 03:34:37 |
| 21 |                 | that you reviewed, right?                                     | 03:34:40 |
| 22 | A.              | I said, I have no reason to believe that any of the           | 03:34:42 |
| 23 |                 | testimony is untrue.  | 03:34:45 |
| 24 | Q.              | And now I'm asking you the question outside of the            | 03:34:46 |
| 25 |                 | deposition. So put that aside.                                | 03:34:48 |

|    |  |          |
|----|--|----------|
| 1  | My next question is this: Do you have any reason             | 03:34:52 |
| 2  | to believe that the testimony you reviewed about Mrs. Denton | 03:34:55 |
| 3  | trying light and low-tar cigarettes to reduce her risk was   | 03:34:58 |
| 4  | untrue?  | 03:35:01 |
| 5  | A. I have no reason to believe that.                         | 03:35:02 |
| 6  | Q. And in fact, in your clinical practice you've had your    | 03:35:03 |
| 7  | own patients try light and low-tar cigarettes, thinking it   | 03:35:06 |
| 8  | might be less risky?   | 03:35:09 |
| 9  | A. I've seen that in my practice, that's true.               | 03:35:11 |
| 10 | Q. And you also saw in your review of the evidence that      | 03:35:13 |
| 11 | Mrs. Denton believed if cigarettes were so dangerous, the    | 03:35:18 |
| 12 | government would not allow them to be sold, right?           | 03:35:22 |
| 13 | A. I did see testimony to that, yes.                         | 03:35:24 |
| 14 | Q. You don't have any reason to think that her friend was    | 03:35:26 |
| 15 | dishonest when she reported this was one of Mrs. Denton's    | 03:35:28 |
| 16 | beliefs?   | 03:35:31 |
| 17 | A. I have no reason to think they were dishonest efforts.    | 03:35:31 |
| 18 | Q. And no reason to believe that Linda Denton, herself,      | 03:35:34 |
| 19 | didn't believe this when she made those comments?            | 03:35:36 |
| 20 | MS. BROWN: Objection. Speculation. Calls for                 | 03:35:39 |
| 21 | hearsay.   | 03:35:42 |
| 22 | THE COURT: Overruled.  | 03:35:46 |
| 23 | THE WITNESS: Can you repeat?                                 | 03:35:49 |
| 24 | THE COURT: You can answer the question.                      | 03:35:50 |
| 25 | Can you repeat the question, please?                         | 03:35:51 |

1 BY MS. BARNETT:

03:35:53

2 Q. Probably not exactly the same.

03:35:53

3 You don't have any evidence to support or any  
4 reason to believe that Linda Denton did not believe that the  
5 government wouldn't allow cigarettes to be sold if they were  
6 so dangerous?

03:35:55

03:35:57

03:36:01

03:36:04

7 MS. BROWN: Objection. Calls for state of mind.

03:36:05

8 THE COURT: I'm going to sustain that objection.  
9 That was a different question.

03:36:07

03:36:09

10 The question was whether you had any reason to  
11 believe that Mrs. Denton herself didn't believe whatever  
12 statement she had made.

03:36:10

03:36:13

03:36:17

13 THE WITNESS: I have no reason to believe whatever  
14 Mrs. Denton said is not accurate.

03:36:20

03:36:23

15 THE COURT: All right.

03:36:25

16 MS. BARNETT: And thank you, your Honor.

03:36:27

17 BY MS. BARNETT:

18 Q. Based on your review of the evidence, Mrs. Denton's  
19 friend, Mary Melvin, believed Linda Denton did not realize  
20 the severity of the risk of smoking?

03:36:31

03:36:34

03:36:36

21 A. I don't know if those are the exact words. I think she  
22 said something like that. She also described --

03:36:40

03:36:44

23 Q. I'm sorry to cut you off, but you'll have an  
24 opportunity to talk about other things.

03:36:49

03:36:52

25 MS. BARNETT: I would ask the Court to ask the

03:36:56

1 witness to answer my questions.

03:36:58

2 THE COURT: Let's just stick with answering her  
3 question. Miss Brown will follow up on anything that needs  
4 to be followed up.

03:36:59

03:37:01

03:37:04

5 THE WITNESS: Yes, your Honor.

03:37:05

6 BY MS. BARNETT:

03:37:06

7 Q. Are you unclear whether or not Mrs. Denton's best  
8 friend described that she believed Linda Denton did not  
9 understand the severity of the risks?

03:37:06

03:37:09

03:37:12

10 A. I believe she said that.

03:37:13

11 Q. So you recall that from your review of the evidence?

03:37:15

12 A. My recollection, I believe I recall that she said that  
13 in her deposition.

03:37:18

03:37:21

14 Q. And in fact, that's something you've also heard from  
15 your own patients in your clinical practice, that the  
16 government wouldn't allow them to be sold if they were so  
17 dangerous?

03:37:21

03:37:24

03:37:28

03:37:31

18 A. If my patients have said that, it's been pretty rare.  
19 Some patients may have said that, but I do not recall with  
20 any frequency my patients saying things like that. A few may  
21 have over the years, but that's not something I hear very  
22 often.

03:37:32

03:37:36

03:37:40

03:37:44

03:37:46

23 Q. Do you remember what you told me about this in your  
24 deposition?

03:37:46

03:37:48

25 A. I don't recall that specific question.

03:37:49



1 Q. Okay. Look at Page 153, if you would, Dr. Kaplan, 03:37:50  
2 lines 17 through 20. I asked you: Have you heard that 03:37:56  
3 before in your clinical experience, people who thought it 03:38:08  
4 can't be that dangerous because it's allowed to be sold? 03:38:11  
5 Your answer was: I've heard people say that, yes. 03:38:14  
6 Right? 03:38:17  
7 A. Yes, but that was a different -- 03:38:18  
8 Q. Excuse me. Was that your answer? 03:38:19  
9 MS. BROWN: Your Honor, please allow the witness 03:38:21  
10 to answer. 03:38:24  
11 THE COURT: I will allow him to answer. 03:38:25  
12 THE WITNESS: I did answer that way, but that's 03:38:27  
13 different than the question you just asked me. 03:38:28  
14 THE COURT: What is your next question, Counsel? 03:38:33  
15 BY MS. BARNETT: 03:38:36  
16 Q. When you gave me that answer in your deposition, was it 03:38:36  
17 accurate? 03:38:39  
18 A. That was accurate, sure. 03:38:39  
19 Q. And you agree, when a person is in denial, they will 03:38:41  
20 sometimes look for information to validate their beliefs? 03:38:45  
21 A. That's part of the definition of denial. That's 03:38:49  
22 correct. 03:38:52  
23 Q. And we talked about -- you've already talked about some 03:38:52  
24 of the testimony that you've reviewed. Out of all the 03:38:54  
25 depositions that you read, you did not determine any 03:38:57

1 witnesses were untruthful or insincere? 03:38:58

2 A. I don't find any evidence of that, no. 03:39:01

3 Q. You found that all the people that were deposed were 03:39:04

4 credible? 03:39:07

5 A. I believe so. 03:39:07

6 Q. And they all seemed genuine and truthful? 03:39:08

7 A. As far as I know. 03:39:11

8 Q. And that included Bobby Denton? 03:39:11

9 A. As far as I know, he was telling the truth, yes. 03:39:14

10 Q. And the four children whose depositions you reviewed? 03:39:16

11 A. As far as I know, sure. 03:39:19

12 Q. You gave some testimony a little bit -- something about 03:39:21

13 Mrs. Denton smoking at 16. You determined, did you not, that 03:39:31

14 most likely Linda Denton started smoking at 14? 03:39:34

15 A. Correct. The question was -- 03:39:37

16 MS. BARNETT: Your Honor, I just ask for him to 03:39:42

17 answer the question that I've asked. 03:39:44

18 THE COURT: Yes, I'm going to agree. Sir, if you 03:39:46

19 will, just answer her question, and we will let Miss Brown 03:39:48

20 follow up. 03:39:51

21 BY MS. BARNETT: 03:39:52

22 Q. You determined most likely Linda Denton started smoking 03:39:53

23 at 14, correct? 03:39:56

24 A. I did. 03:39:57

25 Q. And you are aware there is evidence she began smoking 03:39:57

1 as early as age 13, aren't you?

03:40:00

2 A. Mr. Denton, on a second deposition, said that he  
3 believed she started at the age of 13.

03:40:03

03:40:07

4 Q. Let me ask you about Exhibit 573, already admitted,  
5 which is the 1996 Surgeon General's Report. It should come  
6 up on that screen.

03:40:12

03:40:16

03:40:20

7 You are aware, aren't you, that the 1996 Surgeon  
8 General's Report concludes that people who begin to smoke at  
9 an early age are more likely to develop severe levels of  
10 nicotine addiction than those who start at a later age? You  
11 are aware of that conclusion, right?

03:40:33

03:40:36

03:40:39

03:40:43

03:40:45

12 A. I'm aware that's in the report.

03:40:47

13 Q. And as I recall, when we discussed this, you don't  
14 agree with the Surgeon General, but you do agree that the  
15 younger people, when they start, they may be more likely to  
16 become addicted, right?

03:40:48

03:40:55

03:40:57

03:41:01

17 A. I think that's accurate. The earlier people engage in  
18 a behavior like smoking, the more likely they are to become  
19 addicted; but I disagree with this, that they are more likely  
20 to have severe levels.

03:41:02

03:41:05

03:41:08

03:41:12

21 MS. BARNETT: Your Honor --

03:41:14

22 THE COURT: Hold on a minute, sir. She's asking  
23 you whether you agree or disagree. I'll let Miss Brown ask  
24 you how you agree or disagree, okay?

03:41:15

03:41:20

03:41:25

25 THE WITNESS: I'm sorry, your Honor.

03:41:26

|    |   |          |
|----|---|----------|
| 1  | THE COURT: Go ahead.  | 03:41:28 |
| 2  | BY MS. BARNETT:   | 03:41:28 |
| 3  | Q. It's true, in your clinical practice, Dr. Kaplan, the    | 03:41:29 |
| 4  | younger people are when they start smoking, the more likely | 03:41:33 |
| 5  | they are to become addicted to nicotine?                    | 03:41:36 |
| 6  | A. That's right.  | 03:41:39 |
| 7  | Q. You mentioned you talked -- when you were being asked    | 03:41:39 |
| 8  | questions before about changes in the brain -- you remember | 03:41:43 |
| 9  | that testimony a minute ago? You are aware that there are   | 03:41:45 |
| 10 | pretty significant changes in the brain from the time the   | 03:41:48 |
| 11 | person is born until early adulthood, aren't you?           | 03:41:50 |
| 12 | A. I am actually aware of the fact that there are changes   | 03:41:53 |
| 13 | in the brain that occurs throughout one's life, even into   | 03:41:55 |
| 14 | adulthood.  | 03:42:00 |
| 15 | Q. And do you remember at your deposition telling me they   | 03:42:02 |
| 16 | are pretty significant changes in the brain from the time a | 03:42:06 |
| 17 | person is born until early adulthood?                       | 03:42:08 |
| 18 | A. That's true.   | 03:42:11 |
| 19 | Q. And the brain is not fully developed until the 20s?      | 03:42:12 |
| 20 | A. That's true.   | 03:42:16 |
| 21 | Q. One of the areas of significant changes, based on your   | 03:42:17 |
| 22 | clinical experience, from birth to adulthood is in the area | 03:42:20 |
| 23 | of the brain thought to be involved with assessing risk,    | 03:42:22 |
| 24 | right?  | 03:42:26 |
| 25 | A. Correct, in the frontal lobes.                           | 03:42:28 |

|    |    |   |          |
|----|----|---|----------|
| 1  | Q. | Let me ask you about the DSM. That's the book you are       | 03:42:30 |
| 2  |    | relying on for your opinions today, correct?                | 03:42:33 |
| 3  | A. | Correct.  | 03:42:36 |
| 4  | Q. | I'm going to ask you about a statement on Page 268,         | 03:42:36 |
| 5  |    | which is just the DSM?                                      | 03:42:42 |
| 6  |    | MS. BARNETT: This is not an exhibit, your Honor.            | 03:42:46 |
| 7  |    | It's the material he relied upon, so it's a demonstrative   | 03:42:47 |
| 8  |    | that I would use a few pages from.                          | 03:42:50 |
| 9  |    | MS. BROWN: No objection.                                    | 03:42:53 |
| 10 |    | THE COURT: All right. Go ahead.                             | 03:42:55 |
| 11 |    | MS. BARNETT: And 268. Right under "Course."                 | 03:42:57 |
| 12 |    | That's not it. There you go. Really, the first sentence.    | 03:43:04 |
| 13 |    | BY MS. BARNETT:   |          |
| 14 | Q. | You are aware, aren't you, that the DSM-IV, the box you     | 03:43:11 |
| 15 |    | are relying on, nicotine intake usually begins in the early | 03:43:14 |
| 16 |    | teens with 95 percent of those who continue to smoke by age | 03:43:17 |
| 17 |    | 20 becoming regular daily smokers.                          | 03:43:21 |
| 18 |    | You are aware of that being in there, aren't you?           | 03:43:26 |
| 19 | A. | I am.   | 03:43:29 |
| 20 | Q. | I want to talk for a minute about the DSM-IV. One           | 03:43:29 |
| 21 |    | criteria for determining substance abuse is criteria four,  | 03:43:33 |
| 22 |    | which is someone having a persistent desire or unsuccessful | 03:43:41 |
| 23 |    | efforts to cut down or control their smoking.               | 03:43:46 |
| 24 |    | That's criteria four, right?                                | 03:43:48 |
| 25 | A. | Not the way you asked the question. That's part of the      | 03:43:50 |

1 criteria for substance dependence, not for substance abuse. 03:43:53

2 Q. Right. There is criteria -- well, nicotine doesn't 03:43:59  
3 fall under substance abuse, right? 03:44:02

4 A. That's correct. 03:44:03

5 Q. So under substance abuse, one of the criteria is a 03:44:04  
6 person having a persistent desire or unsuccessful efforts to 03:44:08  
7 cut down and control substance abuse, correct? 03:44:12

8 A. No. Again, it's not for substance abuse. It's for 03:44:15  
9 substance dependence. 03:44:19

10 MS. BARNETT: I hope I'm not saying substance 03:44:20  
11 abuse. Can you put up Page 197, or if we can get -- 03:44:22

12 THE COURT: You are saying abuse. 03:44:26

13 MS. BARNETT: My fault then. 03:44:28

14 BY MS. BARNETT:

15 Q. Let's just read it. Number four, could you highlight 03:44:29  
16 the fourth criteria there. That's what I'm asking about. 03:44:33  
17 That's criteria four in the DSM-IV, correct? 03:44:40

18 A. For substance dependence, that's correct. 03:44:44

19 Q. And substance dependence. Those are the criteria you 03:44:46  
20 are using in saying she was not addicted to nicotine, right? 03:44:50

21 A. That's correct. 03:44:52

22 Q. But you did find that Mrs. Denton met criteria four 03:44:53  
23 based on your review of the evidence, right? 03:44:58

24 A. I think so, yes. 03:44:59

25 Q. There was no testimony from any witness who said 03:45:01

1 Mrs. Denton was not serious about her quit attempts, right? 03:45:08

2 A. There was no testimony, correct. 03:45:14

3 Q. And there is no medical record that says she wasn't 03:45:15  
4 serious or motivated in trying to quit smoking, is there? 03:45:18

5 A. There was no documentation to have that in the medical 03:45:22  
6 records, that's correct. 03:45:24

7 Q. And her friends -- her friend, Mary Melvin in 03:45:24  
8 particular, said Linda Denton tried very hard to quit, didn't 03:45:27  
9 she? 03:45:32

10 A. I believe she said that. 03:45:32

11 Q. Let's be up front. You talked about quitting. If a 03:45:34  
12 person quit, that does not mean the person is addicted, 03:45:45  
13 right? 03:45:48

14 A. That's correct. 03:45:48

15 Q. I want to look in the DSM, the book you used, at some 03:45:51  
16 statements about quitting. Page 265. One of the things that 03:45:55  
17 the book you used says, is that although more than 80 percent 03:46:17  
18 of individuals who smoke express a desire to stop smoking, 03:46:22  
19 and 35 percent try to stop each year, less than 5 percent are 03:46:26  
20 successful in unaided attempts to quit. 03:46:30

21 That's one of the things the DSM-IV says about 03:46:33  
22 nicotine dependence, correct? 03:46:36

23 A. It does -- well, not about nicotine dependancy, but 03:46:39  
24 about smoking behavior. But it does say that, yes. 03:46:43

25 Q. Is it in the section under nicotine-related disorders? 03:46:46

1 A. It does, but it's describing -- it's not describing 03:46:52  
2 people that only have nicotine dependence. It's describing 03:46:56  
3 smokers in general. 03:47:00

4 Q. Okay. My question is: Does the book you relied on say 03:47:03  
5 this in the section about nicotine-related disorders? 03:47:06

6 Yes or no. 03:47:09

7 A. It does, sure. 03:47:10

8 Q. All right. Let me ask about another one which is at 03:47:11  
9 the bottom. One of the things the DSM-IV also says is, the 03:47:15  
10 more rapid onset of nicotine effects with cigarette smoking 03:47:23  
11 leads to a more intensive pattern that is more difficult to 03:47:27  
12 give up because of the frequency and rapidity of 03:47:31  
13 reinforcement and the greater physical dependence on 03:47:35  
14 nicotine. 03:47:38

15 It also says that in this section, doesn't it? 03:47:39

16 A. It does. 03:47:41

17 Q. And over on Page 264, up at the top one, one of the 03:47:43  
18 things the book you relied upon says is that the relative 03:48:09  
19 ability of these products to produce dependence or induce 03:48:12  
20 withdrawal is associated with the rapidity characteristic of 03:48:15  
21 route of administration, smoked over oral or transdermal and 03:48:20  
22 the nicotine content of the product. 03:48:24

23 That's one of the things it says, too, isn't it? 03:48:26

24 A. It says that, yes. 03:48:29

25 Q. And you are aware that the DSM-IV estimates that 80 to 03:48:35



1 90 percent of regular smokers have nicotine dependence, 03:48:40  
2 right? 03:48:43

3 A. I don't agree with that, but I am aware that it says 03:48:43  
4 that. 03:48:46

5 Q. And the DSM-IV lists several features that are 03:48:47  
6 associated with -- several features that are associated with 03:48:51  
7 nicotine dependence appear to predict a greater level of 03:48:54  
8 difficulty in stopping nicotine use. 03:48:58

9 You are familiar with that discussion in the book, 03:49:00  
10 aren't you? 03:49:02

11 A. I am. 03:49:03

12 Q. One of the features associated with nicotine dependence 03:49:03  
13 that predicts a greater level of difficulty in stopping 03:49:05  
14 nicotine use, according to the DSM, is smoking soon after 03:49:09  
15 waking, right? 03:49:14

16 A. It does say that, yes. 03:49:15

17 Q. And certainly the evidence is Linda Denton smoked soon 03:49:16  
18 after waking, right? 03:49:21

19 A. I'm sorry. Can you repeat that question? 03:49:22

20 Q. Certainly. 03:49:24

21 The evidence in this case is Linda Denton 03:49:25  
22 smoked -- you can take that down -- Linda Denton smoked first 03:49:27  
23 thing after waking? 03:49:30

24 A. Within a relatively brief period of time after waking, 03:49:32  
25 that's correct. 03:49:36

|    |    |  |          |
|----|----|--|----------|
| 1  | Q. | Five to ten minutes, is what you told me in your             | 03:49:36 |
| 2  |    | deposition, right?   | 03:49:38 |
| 3  | A. | That's a relatively brief period of time, yes.               | 03:49:38 |
| 4  | Q. | Is that what you told me in your deposition?                 | 03:49:41 |
| 5  | A. | I did say that.  | 03:49:42 |
| 6  | Q. | And do you remember testimony that she started -- she        | 03:49:43 |
| 7  |    | had her first cigarette as soon as her feet hit the floor in | 03:49:46 |
| 8  |    | the morning?   | 03:49:50 |
| 9  | A. | Yes, I remember hearing that testimony, reading that         | 03:49:50 |
| 10 |    | testimony.   | 03:49:52 |
| 11 | Q. | And again, smoking soon upon waking, according to DSM,       | 03:49:52 |
| 12 |    | is one of the factors that's associated with a greater level | 03:49:57 |
| 13 |    | of difficulty in stopping nicotine use, is that correct?     | 03:50:01 |
| 14 | A. | In some people.  | 03:50:05 |
| 15 | Q. | Does the DSM-IV say for some people?                         | 03:50:05 |
| 16 | A. | It -- it doesn't say that specifically, but that's what      | 03:50:08 |
| 17 |    | it means. For some people, it is associated with more        | 03:50:10 |
| 18 |    | difficulty in quitting.                                      | 03:50:13 |
| 19 | Q. | The words "for some people" don't show up in that            | 03:50:16 |
| 20 |    | section, do they?  | 03:50:18 |
| 21 | A. | They don't, but that's my experience.                        | 03:50:19 |
| 22 | Q. | Okay. Do you disagree with the DSM-IV on this point,         | 03:50:21 |
| 23 |    | too?   | 03:50:26 |
| 24 | A. | Not in that -- some people it can happen. I agree with       | 03:50:26 |
| 25 |    | that.  | 03:50:30 |

|    |    |  |          |
|----|----|--|----------|
| 1  | Q. | In fact, you don't agree that nicotine is addictive,         | 03:50:30 |
| 2  |    | right?   | 03:50:33 |
| 3  | A. | No, nicotine is addictive.                                   | 03:50:33 |
| 4  | Q. | I thought I heard you say only maybe it is addictive?        | 03:50:35 |
| 5  | A. | It's potentially addictive. Some people become               | 03:50:38 |
| 6  |    | addicted to cigarettes. Some people do not.                  | 03:50:41 |
| 7  | Q. | Let's talk some more about the features listed in the        | 03:50:43 |
| 8  |    | DSM that are associated with the greater level of difficulty | 03:50:48 |
| 9  |    | in stopping nicotine use.                                    | 03:50:51 |
| 10 |    | Another one is smoking while ill, right?                     | 03:50:53 |
| 11 | A. | Correct.   | 03:50:56 |
| 12 | Q. | And do you remember there is evidence that Mrs. Denton,      | 03:50:57 |
| 13 |    | even after her diagnosis while -- after her hospitalization, | 03:51:00 |
| 14 |    | while she was ill, she still tried to continue to smoke,     | 03:51:05 |
| 15 |    | right?   | 03:51:08 |
| 16 | A. | I think there is some evidence she tried a cigarette or      | 03:51:09 |
| 17 |    | two.   | 03:51:13 |
| 18 | Q. | Your memory is the evidence was a cigarette or two           | 03:51:13 |
| 19 |    | after her diagnosis?   | 03:51:16 |
| 20 | A. | Something like that, that she tried smoking a few times      | 03:51:17 |
| 21 |    | after her diagnosis.   | 03:51:22 |
| 22 | Q. | So is your opinion in this case based, in part, upon         | 03:51:23 |
| 23 |    | your understanding that she didn't smoke more than a couple  | 03:51:27 |
| 24 |    | of cigarettes after she was diagnosed?                       | 03:51:30 |
| 25 | A. | I have to look back at the specific information, but         | 03:51:32 |

1 it's my understanding that she did not smoke on a regular  
2 basis after diagnosis and she may have tried a few cigarettes  
3 after her diagnosis and I think a few times in the hospital.

4 Q. So in that -- let me try to ask a very clear question  
5 because I would like an answer to it.

6 Is your opinion in this case based, in part, upon  
7 your understanding that Mrs. Denton only had a couple of  
8 cigarettes after she was diagnosed with lung cancer?

9 A. My opinion is not based on that fact.

10 Q. But you will agree, even if it's only a few cigarettes,  
11 there is certainly evidence she smoked while she was ill?

12 A. There is information that after she was diagnosed she  
13 smoked a few cigarettes. In terms of while she was ill, I  
14 don't recall documentation of respiratory difficulties or  
15 other pulmonary symptoms during that time.

16 Q. So you don't consider a lung cancer diagnosis and  
17 hospitalization to be ill?

18 A. Of course. It's a severe medical problem.

19 Q. And she smoked after that, based on the evidence that  
20 we have?

21 A. I believe a few times, yes.

22 Q. And of course, one of the other features associated  
23 with a greater level of difficulty in stopping is when  
24 someone has difficulty refraining from smoking, right?

25 A. Correct.

1 Q. One of the things you said a little while ago is you 03:53:11  
2 didn't find her smoking to be compulsive. 03:53:31

3 Did I hear that right? 03:53:35

4 A. Based on the definition of compulsion being an 03:53:35  
5 overwhelming desire or need to obtain a substance, to use a 03:53:38  
6 substance, based on that definition, I would not consider her 03:53:42  
7 smoking behavior compulsive. 03:53:46

8 Q. There is no witness who testified that her use was not 03:53:48  
9 compulsive, is there? 03:53:58

10 A. I did not read any witnesses saying that her use was 03:54:01  
11 not compulsive. 03:54:05

12 Q. And by the way, I'm sure this is perfectly clear to 03:54:06  
13 anyone, but anything you know about Mrs. Denton smoking comes 03:54:09  
14 from the records you reviewed, not any independent knowledge 03:54:12  
15 you have, correct? 03:54:15

16 A. Correct. The depositions and medical records and some 03:54:15  
17 academic records. 03:54:18

18 Q. And you remember her family members saying she always 03:54:19  
19 smoked, she couldn't live without it, she had to have a 03:54:24  
20 cigarette, right? You remember that testimony? 03:54:27

21 A. I do. 03:54:29

22 Q. You remember her daughter saying she smoked all the 03:54:30  
23 time, right? 03:54:33

24 A. I do. 03:54:34

25 Q. Do you remember that testimony? 03:54:34

1           Her son said the same thing. She smoked all the  
2 time; she couldn't live without it; she was always smoking.  
3 That was his testimony, right?

4 A.       Correct.

5 Q.       The other daughter said her mother planned social  
6 activities around her ability to smoke, is that right?

7 A.       One daughter said that.

8 Q.       Are you suggesting that some other daughter said  
9 something contrary to that?

10 A.       Actually, my recollection is that one daughter said  
11 that she didn't plan her activity around smoking, and that if  
12 there was a place she couldn't smoke, she would just smoke  
13 outside.

14 Q.       Well, I guess we will see if counsel can come up with  
15 that.

16           Your recollection is that you believe there is  
17 deposition testimony that a daughter said she did not plan  
18 her life around smoking?

19 A.       No, one daughter said that; and, I believe, the other  
20 daughter said that she lived her life, she made her choices  
21 while she was a smoker, and if there was a place that she  
22 couldn't smoke, then she would smoke outside.

23 Q.       Who said that?

24 A.       I believe it was -- I think it was Karrie, but I might  
25 be -- one of the daughters said she lived her life, made her

1 choices around her smoking behavior. The other one said that 03:55:39  
2 she did not. Maybe not those specific terms. 03:55:42

3 Q. That's interesting, because we talked about this. You 03:55:55  
4 base your opinion about her controlling her smoking, in part, 03:55:58  
5 on the fact that at family and friends' houses she went 03:56:02  
6 outside to smoke and didn't smoke inside, right? 03:56:05

7 A. That's an example of control, yes. 03:56:08

8 Q. That's the only control example you gave me in your 03:56:10  
9 deposition, isn't it? 03:56:12

10 A. Correct. 03:56:18

11 Q. And that's not a diagnostic criteria in the DSM-IV 03:56:18  
12 book, is it? Going outside to smoke as opposed to smoking 03:56:22  
13 inside? 03:56:25

14 A. No, but it's an example of one's ability to choose in 03:56:26  
15 certain environments not to participate in the behavior. 03:56:29

16 Q. But it's not listed in the DSM-IV, correct? 03:56:31

17 A. That's correct. It's one more decision of her smoking 03:56:34  
18 behavior. 03:56:37

19 Q. And you don't know how long it lasted before she went 03:56:37  
20 outside to smoke, right? 03:56:40

21 A. Correct. 03:56:42

22 Q. You don't know whether she wanted one every 5 minutes 03:56:42  
23 or 15 minutes or every 5 hours, right? 03:56:45

24 A. Correct. 03:56:48

25 Q. And you don't know, if she had to go outside, how many 03:56:48

1 steps to go outside to smoke?

03:56:51

2 A. I do not know that.

03:56:53

3 Q. You don't know if she went out in the rain, sleet, and  
4 snow, no matter what the weather was, to smoke? You don't  
5 know those things?

03:56:55

03:56:57

03:57:00

6 A. I mean, I do not know what the weather was when she  
7 went out to smoke, no.

03:57:03

03:57:06

8 Q. But you are willing to base your opinion she controlled  
9 her smoking based on the fact that she would go outside when  
10 people asked her as opposed to smoking in their house, right?

03:57:07

03:57:09

03:57:12

11 A. That and not just when people asked her. She made the  
12 choice not to smoke in front of grandchildren and not to  
13 smoke in all the children's homes, my understanding is, even  
14 though only one of the children asked her not to smoke in her  
15 home.

03:57:16

03:57:19

03:57:22

03:57:25

03:57:28

16 Q. For all those -- those are things we talked about. For  
17 all those things you just now told us about, same thing: You  
18 don't know how long she went, how long she waited, right?

03:57:30

03:57:37

03:57:40

19 A. I do not know.

03:57:45

20 Q. Or how she stepped away?

03:57:46

21 A. I don't know that.

03:57:48

22 Q. Three steps away, outside every five minutes, that's  
23 control for you, right?

03:57:48

03:57:51

24 A. I don't have evidence that every five minutes she went  
25 outside and stepped three steps. I don't have evidence of

03:57:53

03:57:57



|    |  |          |
|----|--|----------|
| 1  | that.  | 03:58:00 |
| 2  | Q. You don't know at all which way?                        | 03:58:00 |
| 3  | A. I do not know how long it took her to go outside or how | 03:58:04 |
| 4  | many steps it took.  | 03:58:07 |
| 5  | Q. Let's talk about the DSM-IV. There was a DSM-III in     | 03:58:08 |
| 6  | the '80s. Then the III revision, then the IV in '94, and   | 03:58:12 |
| 7  | then, finally, the DSM-IV-TR in 2000, right?               | 03:58:17 |
| 8  | A. Correct.  | 03:58:20 |
| 9  | Q. And now there is a new one, a DSM-V in the works,       | 03:58:21 |
| 10 | right?   | 03:58:24 |
| 11 | A. In the works, not out yet.                              | 03:58:25 |
| 12 | Q. You haven't looked at any of the proposals to see what  | 03:58:26 |
| 13 | changes will be made to nicotine dependence criteria, have | 03:58:29 |
| 14 | you?   | 03:58:32 |
| 15 | A. I have not looked at that, no.                          | 03:58:32 |
| 16 | Q. And you're not involved in the development of new       | 03:58:33 |
| 17 | criteria for nicotine or substance dependence at all, are  | 03:58:36 |
| 18 | you?   | 03:58:40 |
| 19 | A. I am not.   | 03:58:40 |
| 20 | Q. And you use the DSM today, but you agree, as I think    | 03:58:41 |
| 21 | you said already, there is many different definitions of   | 03:58:44 |
| 22 | addiction and dependence, right?                           | 03:58:47 |
| 23 | A. Sure.   | 03:58:49 |
| 24 | Q. And there is many different definitions of addiction    | 03:58:49 |
| 25 | and dependance that are used by different professionals,   | 03:58:52 |

1 right?

03:58:54

2 A. There are.

03:58:55

3 Q. And whether or not a person is found to be addicted  
4 depends, in some cases, on which criteria you use, right?

03:58:55

03:58:58

5 A. That's true.

03:59:02

6 Q. And you testified actually in the Engle trial, itself,  
7 there is lots of definitions of addiction in the medical and  
8 psychiatric profession, and no one agrees?

03:59:03

03:59:07

03:59:09

9 A. I believe I gave that testimony, although I do agree in  
10 the psychiatric profession that there is fair agreement that  
11 the DSM-IV criteria is the criteria that we use a variety of  
12 substance dependence disorders, including nicotine.

03:59:12

03:59:16

03:59:20

03:59:25

13 Q. And that's different than what you swore to a jury and  
14 told them in the Engle trial, right?

03:59:27

03:59:30

15 A. Well, I --

03:59:32

16 Q. Excuse me.

03:59:33

17 MS. BARNETT: Your Honor, I would ask him to  
18 answer my question.

03:59:34

03:59:36

19 MS. BROWN: Objection, your Honor.

03:59:37

20 THE COURT: I think if you can show him the  
21 testimony, Miss Barnett, and give counsel a line and page  
22 cite.

03:59:38

03:59:40

03:59:44

23 MS. BARNETT: Sure.

03:59:45

24 May I approach, your Honor?

03:59:50

25 THE COURT: You may.

03:59:52

|    |  |          |
|----|--|----------|
| 1  | (Document tendered.)   | 03:59:55 |
| 2  | THE COURT: Can you give counsel a page and line              | 04:00:19 |
| 3  | cite, please?  | 04:00:22 |
| 4  | MS. BARNETT: Yes. Sorry, your Honor.                         | 04:00:24 |
| 5  | Page 46275.  | 04:01:04 |
| 6  | THE COURT: Do you have that, Miss Brown?                     | 04:01:14 |
| 7  | MS. BROWN: Not quite.  | 04:01:17 |
| 8  | THE COURT: Just let us know.                                 | 04:01:20 |
| 9  | MS. BARNETT: Page 46275. And Dr. Kaplan, you                 | 04:01:23 |
| 10 | find it, too.  | 04:01:26 |
| 11 | THE WITNESS: I found it. What line, please?                  | 04:01:27 |
| 12 | BY MS. BARNETT:  | 04:01:29 |
| 13 | Q. Thirteen through twenty-two. I'll read it. You tell       | 04:01:30 |
| 14 | us if this was your testimony.                               | 04:01:32 |
| 15 | As far as you are concerned, there is a lot of               | 04:01:34 |
| 16 | definitions of addiction, just all kind of definitions of    | 04:01:36 |
| 17 | addiction in the medical profession, psychiatric profession. | 04:01:39 |
| 18 | No one agrees. Everyone -- it's like a subjective            | 04:01:42 |
| 19 | definition. There are hundreds of them out there, right?     | 04:01:45 |
| 20 | That's your view of it?                                      | 04:01:48 |
| 21 | And your answer was: Well, that's reality. There             | 04:01:49 |
| 22 | are numerous definitions of addiction, both in the medical   | 04:01:52 |
| 23 | community and in the lay public.                             | 04:01:54 |
| 24 | That was your testimony, right?                              | 04:01:56 |
| 25 | A. Correct.  | 04:01:57 |

1 Q. And you, yourself, in your clinical practice, you have 04:01:58  
2 used other definitions than the one you are applying today, 04:02:01  
3 right? 04:02:06

4 This is not from the transcript. 04:02:07

5 A. I'm sorry, can you repeat that? I am trying to find 04:02:08  
6 that in the transcript. 04:02:11

7 THE COURT: Yes, ma'am? 04:02:13

8 MS. BROWN: Your Honor, before she moves on, can 04:02:13  
9 we read the entire answer? 04:02:16

10 THE COURT: Is there a remainder of the answer 04:02:19  
11 that's necessary? 04:02:20

12 MS. BROWN: There is. It goes down to 277, 04:02:22  
13 line 3. 04:02:26

14 THE COURT: All right. I don't have a copy of it 04:02:26  
15 to -- 04:02:29

16 MS. BARNETT: Sure. Here's what he said: Even 04:02:30  
17 your own experts come up with their own definition when asked  
18 questions. No, that's not what psychiatrists use. We use  
19 the word "dependence." We haven't used the word "addiction"  
20 in almost 15, 20 years. 04:02:48

21 THE COURT: Okay. 04:02:48

22 BY MS. BARNETT: 04:02:49

23 Q. So, Dr. Kaplan, the question I was asking you, in your 04:02:50  
24 own practice, you've used different definitions for addiction 04:02:54  
25 or dependence than the DSM, which is what you are testifying 04:02:57

1 about today, right?

04:03:01

2 A. In the past I did, yes, that's correct.

04:03:02

3 Q. And you have used other definitions of dependence and  
4 addiction when you've testified as a paid witness in court,  
5 right?

04:03:04

04:03:07

04:03:10

6 MS. BROWN: Objection. Argumentative.

04:03:11

7 THE COURT: Overruled.

04:03:13

8 THE WITNESS: In the past, I have, yes.

04:03:15

9 BY MS. BARNETT:

04:03:17

10 Q. And let me ask you this: In your clinical experience,  
11 medical doctors who are not psychiatrists generally don't use  
12 the DSM in determining if someone has nicotine dependence,  
13 right?

04:03:22

04:03:25

04:03:28

04:03:32

14 A. They actually use the word "addiction" most of the  
15 time.

04:03:32

04:03:35

16 Q. But they don't use the DSM in determining -- let me  
17 start over.

04:03:36

04:03:39

18 In your clinical experience, medical doctors who  
19 are not psychiatrists generally don't use the DSM in  
20 determining if someone has nicotine dependence or addiction,  
21 right?

04:03:39

04:03:42

04:03:46

04:03:49

22 A. Correct. In my experience they don't use any  
23 diagnostic criteria.

04:03:49

04:03:52

24 Q. They don't use the DSM in your experience, right?

04:03:53

25 A. That's correct.

04:03:56

1 Q. And likewise, when everyday regular people use the term  
2 "addiction" they don't mean that you have to meet the DSM  
3 criteria, diagnostic criteria, right?

4 A. I believe that's true, sure.

5 Q. And you're not purporting to tell the jury what the  
6 legal standard is for addiction, is that right?

7 A. I'm not an attorney. I'm providing information about  
8 different medical definitions of addiction.

9 Q. You're not telling them there is some legal definition  
10 that the DSM is the only way to determine addiction or  
11 dependence, are you?

12 A. I'm sorry, can you repeat that question, please.

13 Q. Sure. You're not telling the jury that the law has  
14 defined addiction or dependence as only meaning the DSM  
15 criteria, are you?

16 MS. BROWN: Your Honor, objection.

17 THE COURT: Ladies and gentlemen -- let me see  
18 counsel at sidebar for a moment.

19 *(The following was held at sidebar:)*

20 THE COURT: What's your objection, Miss Brown?

21 MS. BROWN: Counsel is suggesting Dr. Kaplan is  
22 providing some instruction of law or legal definition to the  
23 jury. I think that suggestion is improper. He's not doing  
24 that. It's an improper question.

25 THE COURT: Miss Barnett, you've established

1 through him that there are various different ways of 04:05:15  
2 determining either addiction or dependence, depending which 04:05:18  
3 word you want to use. 04:05:21

4 MS. BARNETT: It's straight out of his deposition, 04:05:24  
5 but I'll move on. 04:05:26

6 THE COURT: All right. 04:05:27

7 MS. BARNETT: I'll just move on. 04:05:28

8 (Sidebar ended.) 04:05:29

9 BY MS. BARNETT: 04:05:37

10 Q. In fact, in your work as a paid witness for the 04:05:44  
11 cigarette companies you told judges and juries that you were 04:05:48  
12 critical of the DSM for determining nicotine dependence, 04:05:50  
13 haven't you? 04:05:53

14 A. In the past I was, sure. 04:05:54

15 Q. And these are the very same criteria that you are 04:05:55  
16 asking this jury to use today? 04:05:57

17 A. Over the years I've changed my opinion in regards to 04:05:59  
18 the DSM diagnosis; but you are right, years ago, I was 04:06:02  
19 trained -- 04:06:06

20 Q. Excuse me. 04:06:06

21 THE COURT: Go ahead with your next question. 04:06:09

22 BY MS. BARNETT: 04:06:11

23 Q. You agree there is mixed views on whether the DSM 04:06:14  
24 criteria is a valid tool for diagnosing nicotine dependence, 04:06:19  
25 aren't there? 04:06:23

1 A. That's true, sure.

04:06:23

2 Q. Specifically you are aware of peer-reviewed published  
3 studies that questions its use, right?

04:06:24

04:06:27

4 A. Not questions its use, but there have been some studies  
5 that question the validity of certain criteria.

04:06:30

04:06:33

6 Q. Well, the DSM-IV itself says some of the criteria don't  
7 apply to nicotine dependence well, correct?

04:06:36

04:06:41

8 A. It does say that, yes.

04:06:43

9 Q. But you are aware of peer-reviewed published studies  
10 that question the validity of the criteria for diagnosing  
11 nicotine dependence, aren't you?

04:06:45

04:06:48

04:06:52

12 A. Correct.

04:06:53

13 Q. And you are not aware of any study that establishes  
14 that the DSM criteria are valid for diagnosing nicotine  
15 dependence or addiction, right?

04:06:54

04:06:58

04:07:02

16 A. Well, I don't believe that's true. I've read  
17 studies -- or at least a study in the past. I just don't  
18 recall the study, but there was some earlier data that felt  
19 there was a valid instrument. I don't recall the study. I  
20 tried to find that. I couldn't find it. I believe there is  
21 some data in the past. There several studies, though, that  
22 do show it's a reliable instrument.

04:07:04

04:07:08

04:07:12

04:07:17

04:07:20

04:07:24

04:07:26

23 Q. When I asked you at your deposition if you could point  
24 me to a single study, any study that establishes the DSM  
25 criteria as valid for diagnosing nicotine dependence, you

04:07:31

04:07:33

04:07:37



1 couldn't cite me to one, could you? 04:07:40

2 A. I still can't. My recollection is that I've reviewed 04:07:42  
3 and seen articles on validity. I don't recall -- 04:07:45

4 MS. BARNETT: Your Honor. 04:07:50

5 THE COURT: You've answered the question. Go on. 04:07:50

6 BY MS. BARNETT: 04:07:53

7 Q. You are telling us today you think you remember some 04:07:53  
8 and you've looked, but you still can't find one that you can 04:07:55  
9 give us the name of? 04:07:58

10 A. Correct. 04:08:00

11 Q. In fact, you use to testify under oath for these same 04:08:00  
12 cigarette companies that nicotine was not addictive at all, 04:08:04  
13 didn't you? 04:08:08

14 A. Based on certain definitions as we discussed, correct. 04:08:08  
15 Using traditional definitions it does not cause intoxication; 04:08:12  
16 therefore, it would not be considered an addictive substance. 04:08:16

17 Q. And so you use to testify under oath to judges and 04:08:18  
18 juries that nicotine is not addictive, right? 04:08:21

19 A. Based on certain definitions, that's correct. 04:08:23

20 Q. And thus, your opinion at that time was, no one is 04:08:25  
21 addicted to nicotine, correct? 04:08:29

22 A. If you use the definitions, traditional definitions, 04:08:31  
23 that include the need for intoxication, that would be 04:08:35  
24 correct. Under those definitions, nicotine would not be 04:08:38  
25 considered an addictive substance. 04:08:40

1 Q. That's right. Back in -- in other trials you picked a 04:08:42  
2 different definition and told juries, under oath, that no one 04:08:45  
3 was addicted to nicotine, right? 04:08:49

4 MS. BROWN: Objection. Asked and answered. 04:08:50

5 THE COURT: Sustained. 04:08:52

6 BY MS. BARNETT: 04:08:53

7 Q. And just like -- 04:08:53

8 THE COURT: I sustained the objection. I just 04:08:55  
9 want to make sure you understood. 04:08:57

10 MS. BARNETT: I did. I was moving on, your Honor. 04:08:59

11 THE COURT: Okay. 04:09:01

12 BY MS. BARNETT: 04:09:02

13 Q. Do you know that the CEOs for the cigarette companies 04:09:03  
14 did the same thing in front of Congress and took a different 04:09:06  
15 definition of nicotine dependence and swore to Congress that 04:09:08  
16 it wasn't addictive? 04:09:12

17 MS. BROWN: Your Honor, objection. This is 04:09:13  
18 improper, argumentative, hearsay. 04:09:14

19 THE COURT: Sustained. 04:09:17

20 BY MS. BARNETT: 04:09:19

21 Q. And back when you used to testify that nicotine was not 04:09:23  
22 addictive, you openly criticized the DSM criteria as being 04:09:26  
23 too broad and too vague, didn't you? 04:09:31

24 A. In those trials where I utilized more traditional 04:09:33  
25 definitions. Initially when the DSM came out, honestly, I 04:09:38

1 wasn't a big fan of it. I had some questions about the  
2 usefulness. My opinions over the years have changed, but  
3 sure, when it first came out and started using it, I had some  
4 criticisms.

5 Q. So you are telling this jury that your testimony  
6 criticizing the criteria you want them to apply today was  
7 because the DSM-IV at the time was new and just out and  
8 criteria were knew and just out?

9 A. No, the criteria were not new at that time; however,  
10 during that time, myself and many other psychiatrists, people  
11 that trained under certain criteria still focused on more  
12 traditional definitions that separated drugs that can cause  
13 addiction as being intoxicating versus drugs that are not.

14 When new criteria come out, it can take  
15 clinicians, including myself, years and years of clinical  
16 experience before they decide if those are the criteria that  
17 they find most helpful in their practice.

18 Over time I've changed my mind, and for quite a  
19 while I've used the DSM criteria exclusively in my clinical  
20 practice and also in terms of legal cases.

21 Q. But you're not telling the jury when you made that  
22 testimony that this was new criteria, are you?

23 A. Wasn't new. The DSM --

24 Q. Okay.

25 MS. BARNETT: Your Honor, I've asked him to answer

1 my question. I'm trying to be patient here.

04:11:22

2 THE COURT: I think you've answered the question,  
3 sir.

04:11:24

04:11:26

4 Next question.

04:11:27

5 BY MS. BARNETT:

04:11:27

6 Q. You testified specifically that the DSM-IV criteria you  
7 want the jury to apply here were broad and vague and I'm not  
8 a big fan of it, right? That was your testimony then?

04:11:27

04:11:31

04:11:35

9 A. I did say that, sure.

04:11:38

10 Q. And you believed it then and said it under oath then,  
11 right?

04:11:39

04:11:41

12 A. Correct.

04:11:42

13 Q. And to be clear, they are the very same ones that you  
14 applied in this case, correct?

04:11:42

04:11:46

15 A. Correct.

04:11:48

16 Q. In your clinical practice, do you rely on a careful  
17 clinical history taken from a patient?

04:11:48

04:11:52

18 A. I try to be as careful as possible in asking them a  
19 series of questions to obtain information, sure.

04:11:54

04:11:58

20 Q. In your clinical practice, do you do a careful clinical  
21 history from your patients?

04:12:00

04:12:05

22 A. I believe so.

04:12:06

23 Q. Is that something you rely upon in your clinical  
24 practice?

04:12:07

04:12:10

25 A. I utilize it. I don't know if I would use the word

04:12:11

|    |  |          |
|----|--|----------|
| 1  | "rely," but I try to take as careful a history as possible.  | 04:12:13 |
| 2  | Q. All right. Well, let me ask you to have a look at your    | 04:12:18 |
| 3  | deposition in this case, on Page 70, and see if we can sort  | 04:12:22 |
| 4  | this out. Lines 22 through 24.                               | 04:12:24 |
| 5  | A. What page, please?  | 04:12:34 |
| 6  | Q. Page 70, Lines 22 through 24.                             | 04:12:36 |
| 7  | I asked you, In your clinical practice, when you             | 04:12:56 |
| 8  | treat patients you rely upon a careful clinical history,     | 04:12:59 |
| 9  | don't you? And you said, Without equivocation, I do, sure.   | 04:13:03 |
| 10 | Right?   | 04:13:06 |
| 11 | A. Correct. I said that.                                     | 04:13:07 |
| 12 | Q. Are you changing that testimony today?                    | 04:13:08 |
| 13 | A. I'm not changing it. I mean, "rely" is not a word I       | 04:13:10 |
| 14 | use in terms of when I think about getting a history from my | 04:13:14 |
| 15 | patients. But, no, that's accurate.                          | 04:13:17 |
| 16 | Q. And that relying on a careful clinical history is         | 04:13:19 |
| 17 | something that's accepted and expected in the field of       | 04:13:22 |
| 18 | psychiatry prior to giving a diagnosis, correct?             | 04:13:25 |
| 19 | A. Correct. When you treat patients, sure.                   | 04:13:29 |
| 20 | Q. The DSM specifically states the diagnosis -- if you are   | 04:13:32 |
| 21 | going to apply the DSM criteria, the diagnosis of substance  | 04:13:36 |
| 22 | dependence requires obtaining a detailed history from the    | 04:13:41 |
| 23 | individual, right? It says that?                             | 04:13:44 |
| 24 | A. Sure. When possible, sure.                                | 04:13:46 |
| 25 | Q. It doesn't say when possible, does it?                    | 04:13:47 |

1 A. It doesn't say that, but there is different uses of DSM 04:13:50  
2 when it comes to forensic settings. 04:13:53

3 Q. Do you happen to have Page 202? Can we have -- 04:13:55

4 THE COURT: Let me see counsel at sidebar for just 04:14:11  
5 a moment. 04:14:13

6 *(The following was held at sidebar:)* 04:14:14

7 THE COURT: Miss Barnett, how much more do you 04:14:24  
8 have? 04:14:28

9 MS. BARNETT: I thought I would be done by now. 04:14:30  
10 It's taking longer than I thought. Maybe 30 minutes. 04:14:31

11 THE COURT: We have a problem because I was 04:14:34  
12 relying on y'all's estimation and made an appointment that 04:14:36  
13 has to be kept at 4:45. 04:14:41

14 MS. BARNETT: I'm sorry. 04:14:44

15 THE COURT: Well, it's not you alone. Lots of 04:14:46  
16 things took longer, but I've just got to figure out what to 04:14:53  
17 do. I never make appointments during trial. Y'all were so 04:14:59  
18 sure we were going to be done. 04:15:10

19 MS. BARNETT: I'll be quick. 04:15:16

20 THE COURT: Well, they have been sitting for two 04:15:24  
21 hours. Let's go ahead and give them a ten-minute recess and 04:15:27  
22 I'll figure out my scheduling issue. 04:15:31

23 Yes, sir. 04:15:35

24 MR. COFER: We can hold him over, if you need to 04:15:35  
25 go at 4:45. We can bring him in and finish him in the 04:15:38

1 morning.

04:15:41

2 THE COURT: I know that's an option.

04:15:42

3 MR. COFER: We were not trying to --

04:15:45

4 THE COURT: No, I didn't think that at all.

04:15:47

5 Sorry, I'm not that nice, but thank you.

04:15:49

6 I just kind of wanted to go ahead and --

04:15:52

7 MS. BARNETT: Get it done.

04:15:57

8 THE COURT: Yes. I wanted everybody to be able to

04:15:58

9 go home today knowing that the evidence was closed, and so it

04:16:00

10 bothers me that I have now created the problem; but I really

04:16:03

11 thought, based on everything we said, we would have no

04:16:08

12 problem being done by 5 o'clock.

04:16:10

13 So I'm going to give them a ten-minute recess and

04:16:12

14 I'll figure out what to do.

04:16:17

15 (Sidebar ended.)

04:16:20

16 THE COURT: Ladies and gentlemen, we are going to

04:16:29

17 go a little further today, but you've been sitting for a

04:16:32

18 while and I need to give you a break. So I'm going to ask

04:16:35

19 you to -- we will be in recess until 4:30. So I'm just going

04:16:38

20 to remind you to follow all of those instructions that you

04:16:44

21 now know by heart and, I'm sure, repeating to your family

04:16:47

22 constantly. But just follow all of those instructions, and

04:16:50

23 we will see you back in the courtroom at 4:30.

04:16:53

24 COURT SECURITY OFFICER: All rise for the jury.

04:16:56

25 (Jury exits courtroom at 4:16 p.m.)

|    |   |          |
|----|---|----------|
| 1  | COURT SECURITY OFFICER: Please be seated.                   | 04:17:11 |
| 2  | THE COURT: All right. We will be in recess. You             | 04:17:11 |
| 3  | may step down, sir.   | 04:17:16 |
| 4  | <i>(Recess taken from 4:17 p.m. to 4:28 p.m.)</i>           | 04:17:18 |
| 5  | COURT SECURITY OFFICER: All rise.                           |          |
| 6  | This Honorable Court is now in session.                     | 04:28:57 |
| 7  | THE COURT: Okay. Let's have the jury and we will            | 04:28:57 |
| 8  | continue. I've made other arrangements. So we will plow     | 04:28:59 |
| 9  | through it.   | 04:29:08 |
| 10 | MS. BARNETT: Thank you, your Honor.                         | 04:29:09 |
| 11 | MR. COFER: Your Honor, Mr. Sprie told me before             | 04:29:25 |
| 12 | we rest I have to approach and redo some motions. So I'll   | 04:29:29 |
| 13 | ask for permission.   | 04:29:34 |
| 14 | THE COURT: Okay.  | 04:29:36 |
| 15 | COURT SECURITY OFFICER: All rise for the jury.              | 04:29:37 |
| 16 | <i>(Jury enters courtroom at 4:29 p.m.)</i>                 |          |
| 17 | COURT SECURITY OFFICER: Thank you. Please be                |          |
| 18 | seated.   | 04:29:56 |
| 19 | THE COURT: Miss Barnett, you may continue.                  | 04:29:56 |
| 20 | BY MS. BARNETT:   | 04:30:02 |
| 21 | Q. I think where we left off, Dr. Kaplan, you agree that    | 04:30:02 |
| 22 | the DSM-IV says to make a diagnosis of substance dependence | 04:30:05 |
| 23 | it is required to obtain a detailed history from the        | 04:30:10 |
| 24 | individual, right?  | 04:30:12 |
| 25 | MS. BROWN: Counsel, can we have a reference and             | 04:30:13 |



|    |  |          |
|----|--|----------|
| 1  | may I have a copy, please?                                   | 04:30:16 |
| 2  | THE COURT: I think she said Page 202.                        | 04:30:17 |
| 3  | MS. BARNETT: Page 202.                                       | 04:30:20 |
| 4  | MS. BROWN: Do you have a copy for me?                        | 04:30:22 |
| 5  | (Document tendered.)   | 04:30:32 |
| 6  | THE COURT: Go ahead.   | 04:30:33 |
| 7  | BY MS. BARNETT:  | 04:30:34 |
| 8  | Q. Sure. You weren't able to do that here, right, obtain     | 04:30:35 |
| 9  | a detailed history from Mrs. Denton, correct?                | 04:30:39 |
| 10 | A. Correct.  | 04:30:43 |
| 11 | Q. And you agree the DSM is not designed to be used in       | 04:30:43 |
| 12 | diagnosing dead people, right?                               | 04:30:48 |
| 13 | A. Correct.  | 04:30:51 |
| 14 | Q. And it's not designed to be used in assessing people      | 04:30:51 |
| 15 | who are not currently smoking, right?                        | 04:30:55 |
| 16 | A. Also correct.   | 04:30:57 |
| 17 | Q. And I'm right, never in your clinical practice, or have   | 04:30:58 |
| 18 | you ever used the DSM to determine whether a deceased person | 04:31:03 |
| 19 | was nicotine dependent, right?                               | 04:31:07 |
| 20 | A. No, not in a clinical practice; but in forensic cases,    | 04:31:09 |
| 21 | it's the standard.   | 04:31:12 |
| 22 | Q. Exactly. The only time or place you've ever used this     | 04:31:13 |
| 23 | standard to a deceased person who by definition is no longer | 04:31:16 |
| 24 | smoking is when you are hired to testify on behalf of the    | 04:31:20 |
| 25 | cigarette company to determine nicotine dependence, right?   | 04:31:24 |

|    |    |   |          |
|----|----|---|----------|
| 1  | A. | Specifically for nicotine dependence, that's correct.         | 04:31:26 |
| 2  | Q. | Let's talk about your work. I think you told counsel          | 04:31:29 |
| 3  |    | on direct examination you've be paid around a million dollars | 04:31:30 |
| 4  |    | for your work for the cigarette companies?                    | 04:31:33 |
| 5  | A. | My work as a consultant in forensic cases,                    | 04:31:35 |
| 6  |    | tobacco-related cases, yes, over 15 years, about a million    | 04:31:39 |
| 7  |    | dollars.  | 04:31:43 |
| 8  | Q. | Am I right, a million dollars for your work on behalf         | 04:31:43 |
| 9  |    | of the cigarette companies in these cases, right?             | 04:31:45 |
| 10 | A. | In the defense, yes. Correct.                                 | 04:31:47 |
| 11 | Q. | And in the Szymanski trial the figure you gave was 700-       | 04:31:49 |
| 12 |    | to \$750,000. Do you remember that?                           | 04:31:53 |
| 13 | A. | I do.   | 04:31:55 |
| 14 | Q. | And that was in October of last year?                         | 04:31:55 |
| 15 | A. | Correct.  | 04:31:57 |
| 16 | Q. | So you've made 250- to \$300,000 more in the last             | 04:31:58 |
| 17 |    | however many -- less than a year?                             | 04:32:04 |
| 18 | A. | I have not made that much, no.                                | 04:32:05 |
| 19 | Q. | Okay. So is the million dollars accurate?                     | 04:32:07 |
| 20 | A. | I mean, it's my best guesstimate. I don't keep records        | 04:32:13 |
| 21 |    | like that, but approximately.                                 | 04:32:17 |
| 22 | Q. | And was it accurate when you told the jury on direct          | 04:32:18 |
| 23 |    | exam in Szymanski that you had at that point made 700- to     | 04:32:22 |
| 24 |    | \$750,000 from the cigarette companies?                       | 04:32:25 |
| 25 | A. | It was my best understanding at that time, yes.               | 04:32:27 |

|    |    |   |          |
|----|----|---|----------|
| 1  | Q. | And you've been hired as a paid witness for the             | 04:32:31 |
| 2  |    | cigarette companies in about 25 to 30 cases since the Engle | 04:32:36 |
| 3  |    | decision, right?  | 04:32:39 |
| 4  | A. | Approximately.  | 04:32:40 |
| 5  | Q. | And before that, you had more cases, maybe 20 or so         | 04:32:41 |
| 6  |    | cases before the Engle decision?                            | 04:32:45 |
| 7  | A. | Over 15 years, in terms of being involved as a witness      | 04:32:46 |
| 8  |    | for the defense, that's correct.                            | 04:32:52 |
| 9  | Q. | So am I right, 20 cases for the cigarette companies         | 04:32:54 |
| 10 |    | before Engle and 25 to 30 since Engle, is that right?       | 04:32:59 |
| 11 | A. | It's approximately right, sure.                             | 04:33:03 |
| 12 | Q. | When I took your deposition last September, you had         | 04:33:06 |
| 13 |    | another six files you were working on for the cigarette     | 04:33:11 |
| 14 |    | companies, right?   | 04:33:14 |
| 15 | A. | Six files for the defense in tobacco cases, yes.            | 04:33:15 |
| 16 | Q. | And you have more since then, don't you?                    | 04:33:19 |
| 17 | A. | A few more, yes.  | 04:33:22 |
| 18 | Q. | And when you first were contacted by the lawyers for        | 04:33:23 |
| 19 |    | the cigarette companies about working on these cases, you   | 04:33:28 |
| 20 |    | were, what, six, seven years out of your medical training?  | 04:33:30 |
| 21 | A. | Not out of my medical training; but in terms of from        | 04:33:36 |
| 22 |    | when I started my practice, about seven years.              | 04:33:38 |
| 23 | Q. | Six or seven years out of your residency, right?            | 04:33:41 |
| 24 | A. | Out of my residency, right.                                 | 04:33:44 |
| 25 | Q. | Residency is part of your medical training, right?          | 04:33:46 |

1 A. Yes.

04:33:48

2 Q. So six or seven years out of your medical training is  
3 when you were first hired to work on these cases for the  
4 cigarette companies, right?

04:33:49

04:33:52

04:33:54

5 A. To work with the attorneys that are part of the  
6 defense, yes.

04:33:55

04:33:58

7 Q. And you understand the defense, that's the cigarette  
8 companies, don't you?

04:33:59

04:34:04

9 A. I do, but I don't work for cigarette companies. I'm in  
10 practice for myself, but I am involved in tobacco cases where  
11 I'm providing opinions in regard to the defense.

04:34:05

04:34:09

04:34:12

12 Q. We will go through this in more detail in just a  
13 second; but at the time you were first hired, you hadn't  
14 published anything or conducted any studies or gotten grants  
15 in the area of smoking cessation or nicotine dependence, had  
16 you?

04:34:16

04:34:19

04:34:21

04:34:24

04:34:27

17 A. That's correct.

04:34:27

18 Q. So you weren't selected based on your body of academic  
19 or scientific work in the field, correct?

04:34:28

04:34:32

20 A. I don't know what criteria they used to select, but I  
21 did not publish data on nicotine dependence.

04:34:34

04:34:37

22 Q. And you hadn't been involved -- when you were hired to  
23 work on these cases for cigarette companies, you hadn't been  
24 involved in the working with the Surgeon General's office and  
25 the National Cancer Institute in studying these issues,

04:34:41

04:34:44

04:34:47

04:34:51

1 right?

04:34:54

2 A. That's correct.

04:34:54

3 Q. So you weren't hired based on that type of work either,  
4 correct?

04:34:54

04:34:57

5 A. I don't know the criteria they used in deciding whether  
6 they wanted to utilize my services or not.

04:34:57

04:35:00

7 Q. But you know it was not based on your work for the  
8 Surgeon General or the National Cancer Institute, right,  
9 because you hadn't done any of that kind of work?

04:35:02

04:35:04

04:35:06

10 A. I had not done that kind of work, that's correct.

04:35:08

11 Q. So that could not have been one of the reasons, right?

04:35:11

12 A. That makes sense.

04:35:13

13 Q. Your opinions in this case are based on the DSM-IV and  
14 on your clinical experience working with patients, right?

04:35:14

04:35:17

15 A. And on the Surgeon General report, correct.

04:35:20

16 Q. But you spend 40 percent of your time as a paid  
17 witness, testifying in cases and giving depositions,  
18 reviewing files, right?

04:35:24

04:35:27

04:35:30

19 A. Specifically for tobacco cases, or in general in my  
20 forensic practice?

04:35:32

04:35:37

21 Q. Well, I said as a paid witness. I meant for all kinds  
22 of cases, but let me ask the question again if it wasn't  
23 clear.

04:35:37

04:35:41

04:35:44

24 You spend 40 percent of your time working as a  
25 paid witness, right?

04:35:44

04:35:47

|    |    |   |          |
|----|----|---|----------|
| 1  | A. | I mean, I charge for my services in my forensic               | 04:35:51 |
| 2  |    | practice. I don't look at it as a paid witness; but about     | 04:35:54 |
| 3  |    | 40 percent of my time involves providing consultation in      | 04:35:58 |
| 4  |    | legal cases, that's correct.                                  | 04:36:02 |
| 5  | Q. | Which you are paid for, right?                                | 04:36:03 |
| 6  | A. | Yes, I am paid for my time.                                   | 04:36:10 |
| 7  |    | MS. BROWN: Objection. Asked and answered.                     | 04:36:11 |
| 8  |    | THE COURT: It's asked and answered. Move on.                  | 04:36:13 |
| 9  |    | BY MS. BARNETT:   | 04:36:16 |
| 10 | Q. | And in this forensic work or the being hired as an            | 04:36:17 |
| 11 |    | expert work, in addition to your work or cigarette companies  | 04:36:22 |
| 12 |    | you also work for insurance companies, right?                 | 04:36:24 |
| 13 | A. | I don't work for insurance companies. I work for              | 04:36:27 |
| 14 |    | myself, but I do provide consultation in terms of disability  | 04:36:29 |
| 15 |    | issues for some insurance companies, that's correct.          | 04:36:33 |
| 16 | Q. | You are paid by insurance companies to investigate            | 04:36:35 |
| 17 |    | claims for disability, right?                                 | 04:36:40 |
| 18 | A. | I review disability files. I don't investigate, but I         | 04:36:43 |
| 19 |    | review disability files to look for information in regards to | 04:36:46 |
| 20 |    | whether there is evidence of impairment or restrictions from  | 04:36:51 |
| 21 |    | working.  | 04:36:53 |
| 22 | Q. | And you are paid for that work, right?                        | 04:36:53 |
| 23 | A. | I charge for my time, yes.                                    | 04:36:56 |
| 24 |    | MS. BROWN: Objection. Asked and answered.                     | 04:36:58 |
| 25 |    | THE COURT: Overruled.   | 04:37:02 |

1 BY MS. BARNETT:

04:37:03

2 Q. And you are also hired to do work for the insurance  
3 companies when a patient is seeking treatment to give an  
4 opinion about whether or not you think the treatment is  
5 needed, right?

04:37:03

04:37:06

04:37:10

04:37:11

6 A. I don't really follow your question.

04:37:15

7 Q. You do work for insurance companies, right?

04:37:16

8 A. I don't work for insurance companies. I work for  
9 myself. I don't work for insurance companies. But I don't  
10 really follow your question in terms of treatment.

04:37:22

04:37:24

04:37:26

11 Q. One of the things that you are paid to give opinions  
12 about is whether or not a patient who is seeking treatment  
13 whether that treatment is necessary?

04:37:30

04:37:33

04:37:39

14 A. I don't do that.

04:37:41

15 Q. No? Well, let me ask you to turn to Page 205 in your  
16 deposition, lines 10 through 13. The question was --

04:37:42

04:37:49

17 THE COURT: Hold on. Let them find it first.

04:38:00

18 MS. BARNETT: I'm sorry.

04:38:04

19 THE WITNESS: 205, okay.

04:38:06

20 BY MS. BARNETT:

04:38:07

21 Q. Lines 10 through 13. So you're hired by insurance  
22 companies to review cases, to form opinions about whether  
23 treatment was appropriate or whether or not a person is  
24 impaired by a disorder.

04:38:07

04:38:12

04:38:15

04:38:17

25 And you said, correct, right?

04:38:19

1 A. I did say that, yes.

04:38:21

2 Q. And that's accurate, isn't it?

04:38:22

3 A. That is accurate, but I don't believe that's the way  
4 you asked the question; but I do comment -- in reviewing  
5 disability cases, if I believe that the person is receiving  
6 the types of treatment that are based on certain clinical  
7 guidelines, I do provide that information.

04:38:24

04:38:26

04:38:30

04:38:34

04:38:38

8 Q. And in your practice now, you estimate 50 percent of  
9 the patients who seek help for stopping smoking meet the  
10 criteria in the DSM for nicotine dependence?

04:38:41

04:38:46

04:38:49

11 A. Approximately.

04:38:53

12 Q. We talked about this in your deposition. Your cases in  
13 the last four years -- we had a list of cases. We had ten  
14 out of ten cases in the last four years, and ten out of those  
15 ten cases, in each one you found that the individual was not  
16 addicted, right?

04:38:54

04:38:56

04:38:58

04:39:02

04:39:06

17 A. I did give that testimony, but I reviewed my testimony,  
18 and that's not accurate. Two Engle trials that I've been  
19 involved with cases, I did find that the person was addicted.

04:39:07

04:39:13

04:39:18

20 Q. So now your testimony is eight out of ten they were not  
21 addicted, and you found two where you believe that you found  
22 they were addicted?

04:39:21

04:39:25

04:39:28

23 A. That they did fulfill criteria for addiction, that's  
24 correct.

04:39:30

04:39:35

25 Q. There is at least one more since then I'm aware of, the

04:39:35



1 Scott case. You found also that she was not addicted, right? 04:39:37

2 A. I believe so, but I have to review the file. I don't 04:39:40  
3 recall. 04:39:43

4 Q. And you've testified in the Szymanski trial, which we 04:39:43  
5 talked about, since I took your deposition. You also found 04:39:47  
6 Mr. Szymanski was not addicted, right? 04:39:49

7 A. Correct, he was not. 04:39:51

8 Q. You put a list up -- or they put a list up for you to 04:39:52  
9 talk about all the reasons that Linda Denton smoked. 04:39:56

10 Do you remember that testimony? 04:39:58

11 A. I do. 04:39:59

12 Q. Do you recall telling me at your deposition, we don't 04:39:59  
13 have information about what a desired effect, if any, she had 04:40:03  
14 from smoking. 04:40:08

15 Do you remember that testimony? 04:40:08

16 A. I do. Sure. 04:40:10

17 Q. Are you telling me -- we talked something about fried 04:40:11  
18 chicken and sunbathing. You're not telling this jury that 04:40:14  
19 fried chicken and sunbathing have the same addictive 04:40:18  
20 qualities as nicotine, are you? 04:40:21

21 A. I never said those behaviors were addictive. 04:40:22

22 Q. I'm asking, are they? Is eating fried chicken 04:40:25  
23 something people become addicted to? 04:40:28

24 A. I don't believe so. 04:40:30

25 Q. What about sunbathing? 04:40:31

1 A. I don't believe that's addictive. 04:40:33

2 Q. All right. The final area I want to talk to you about 04:40:35

3 is your work in the field -- in this field. You currently 04:40:37

4 have no hospital privileges, right? 04:40:43

5 A. That's correct. My clinical practice is outpatient 04:40:46

6 practice. I am designing -- 04:40:49

7 MS. BARNETT: Excuse me -- 04:40:53

8 THE COURT: I'm going to allow him to complete his 04:40:53

9 answer. 04:40:55

10 MS. BARNETT: Okay.

11 THE WITNESS: I am designing a residential 04:40:56

12 treatment program where I will treat people with dual 04:40:58

13 diagnoses, but currently I'm not working out of a hospital. 04:41:01

14 BY MS. BARNETT: 04:41:04

15 Q. And you haven't had hospital privileges for at least 04:41:04

16 ten years, right? 04:41:07

17 A. Yes. I chose not to. My practice has been focused, my 04:41:08

18 clinical practice, on my outpatient practice. 04:41:12

19 Q. Over the past ten years, if you had a patient who 04:41:13

20 needed to be admitted to a hospital, you would have to get 04:41:15

21 another psychiatrist to do it for you, right? 04:41:18

22 A. Sure. I'll work with different colleagues. If my 04:41:20

23 patients need to be hospitalized, I call them up to work with 04:41:23

24 them to get appropriate care. 04:41:26

25 Q. And if your patient is in the hospital and needs 04:41:27

|    |  |          |
|----|--|----------|
| 1  | treatment, again, for the last ten years, you've needed to | 04:41:30 |
| 2  | get another psychiatrist to treat that patient in the      | 04:41:33 |
| 3  | hospital, correct?   | 04:41:37 |
| 4  | A. That's correct.   | 04:41:38 |
| 5  | Q. You mentioned an award you got. That was an award you   | 04:41:38 |
| 6  | got in your medical training, right?                       | 04:41:40 |
| 7  | A. Correct.  | 04:41:43 |
| 8  | Q. Did you say -- are you -- did you tell the jury you are | 04:41:43 |
| 9  | board certified in forensic psychiatry?                    | 04:41:47 |
| 10 | A. No, I didn't say that. I said I'm board certified in    | 04:41:49 |
| 11 | forensic medicine.   | 04:41:51 |
| 12 | Q. Are you board certified -- you're not board certified   | 04:41:52 |
| 13 | in forensic psychiatry?                                    | 04:41:55 |
| 14 | A. Correct. I did not do a residency in forensic           | 04:41:57 |
| 15 | psychiatry.  | 04:42:01 |
| 16 | Q. I think we said this. Other than the DSM -- and I       | 04:42:04 |
| 17 | would guess the Surgeon General -- the basis for your      | 04:42:08 |
| 18 | opinions is your clinical experience, right?               | 04:42:10 |
| 19 | A. Sure.   | 04:42:13 |
| 20 | Q. And that means your work with patients who are smokers  | 04:42:14 |
| 21 | trying to quit, right?                                     | 04:42:16 |
| 22 | A. Yes, for over 22-plus years.                            | 04:42:17 |
| 23 | Q. So let's talk about that. Most of your clinical work    | 04:42:19 |
| 24 | is in general psychiatry, right?                           | 04:42:22 |
| 25 | A. That's correct.   | 04:42:23 |

1 Q. And most of your patients have either major depressive 04:42:25  
2 disorder or they are bipolar or anxiety or even you have some 04:42:28  
3 schizophrenic patients, right? 04:42:33  
4 A. I do. 04:42:33  
5 Q. All of those patients -- those kind of disorders cause 04:42:34  
6 chemical changes in the brain, right? 04:42:37  
7 A. We think the cause of many of these disorders are 04:42:40  
8 imbalances in those neurotransmitters we talked about before. 04:42:43  
9 That's our theories, sure. 04:42:47  
10 Q. The vast majority of any work you've done with people 04:42:48  
11 trying to quit smoking are those kind of patients, patients 04:42:51  
12 who have other disorders and they are seeking your treatment 04:42:54  
13 for, as well, correct? 04:42:56  
14 A. That's correct. 04:42:57  
15 Q. Because patients generally don't come to see you solely 04:42:58  
16 for help stopping smoking? 04:43:01  
17 A. That is also correct. 04:43:02  
18 Q. And of all your clinical work, 10 percent or less is 04:43:03  
19 purely for treatment of addiction? 04:43:07  
20 A. Correct. Most of the people that I treat who have 04:43:08  
21 addictions have dual diagnosis. So they have depression, 04:43:11  
22 anxiety at the same time they have an addiction, which 04:43:15  
23 actually is very common. 04:43:18  
24 Q. So to be clear, of your clinical work, 10 percent or 04:43:19  
25 less is purely for addiction treatment, right? 04:43:22

1 A. Currently, that's accurate.

04:43:24

2 Q. And less than 1 percent -- less than 1 percent of your  
3 clinical work is helping people solely to stop smoking,  
4 right?

04:43:25

04:43:29

04:43:33

5 A. If that's the only reason they come to see me, that's  
6 correct.

04:43:33

04:43:36

7 Q. And in the last five years, you've seen maybe only five  
8 to ten patients -- well, let me ask you this:

04:43:36

04:43:40

9 Over your 21 years as a psychiatrist, you've  
10 treated maybe 30 or 40 patients solely to stop smoking,  
11 right?

04:43:47

04:43:50

04:43:54

12 A. For that being the only reason they came to see me,  
13 that's correct.

04:43:54

04:43:58

14 Q. And last year you had, what, 600, 700 patients?

04:43:58

15 A. Correct, but these are people that I've been treating  
16 over time. Most of them are not new patients.

04:44:03

04:44:07

17 Q. Okay. Of those 600 or 700 patients, maybe 30 of those  
18 who have other serious mental health issues have also asked  
19 you to help them stop smoking, right?

04:44:09

04:44:17

04:44:21

20 A. No. People with dual diagnosis, in other words -- I'm  
21 sorry. People that have psychiatric problems and are  
22 smokers, no, it's much higher than that.

04:44:25

04:44:28

04:44:31

23 Q. Do you remember in your deposition telling me that you  
24 guesstimated that you had about 30 people that you treated  
25 for quitting smoking including those with co-morbidities?

04:44:35

04:44:46

04:44:49

1 A. I would have to look at our discussion. I don't know 04:44:54  
2 if the question was focused on people just who came to see me 04:44:57  
3 for nicotine issues or people that I've treated over time 04:45:02  
4 with psychiatric problems that want assistance; but I work 04:45:06  
5 with hundreds of patients over the years to help them quit 04:45:09  
6 smoking. But, again, most of them had psychiatric problems 04:45:13  
7 and then they were also smokers. 04:45:16

8 Q. Let's look at Page 187 of your deposition, lines 16 04:45:17  
9 through 21. I asked in the last year, how many people -- 04:45:22

10 A. Can I have a second, please, to read a little bit 04:45:37  
11 before it? 04:45:39

12 Q. Certainly. 04:45:41

13 MS. BROWN: What line? 04:45:42

14 MS. BARNETT: Lines 16 through 21. 04:45:44

15 THE COURT: Tell us when you've read that, Doctor. 04:46:06

16 THE WITNESS: Yes, your Honor. 04:46:09

17 Okay. I'm ready. 04:46:20

18 BY MS. BARNETT: 04:46:30

19 Q. All right. Just the question was, In the last year how 04:46:30  
20 many people have sought your assistance to quit smoking? Not 04:46:33  
21 just to quit smoking. I'm talking about co-morbidities. 04:46:37  
22 Your answer was, Sure, sure, I understand your question. 04:46:40  
23 The answer is, I don't know. I'm going to give 04:46:43  
24 you a guesstimate. Thirty. It may be a little more; it may 04:46:45  
25 be a little less. 04:46:48

1           You've had a chance to read that, right? 04:46:49

2   A.    Yes.  So that's accurate in the last year.  For some 04:46:51

3   reason -- maybe I wasn't listening to you accurately.  I 04:46:52

4   thought you meant in my career as an psychiatrist, but that's 04:46:55

5   correct, in the last year, about 30 patients. 04:47:00

6   Q.    So to wrap that up, you had 600 to 700 patients in the 04:47:02

7   last year.  Maybe 30 of those, including everybody with other 04:47:05

8   diseases, too, are ones that you assist to help stop smoking, 04:47:10

9   right? 04:47:13

10   A.    Yes. 04:47:14

11   Q.    And only half of those or so would be nicotine 04:47:14

12   dependent, in your opinion, right? 04:47:18

13   A.    Well, no.  I have more patients who smoke cigarettes, 04:47:20

14   but those are the people that were interested in quitting. 04:47:24

15   But about -- 04:47:27

16   Q.    Excuse me, if I could try to make my question clearer? 04:47:28

17   A.    Sure. 04:47:31

18   Q.    Of the 30 you treated, your opinion is, half -- roughly 04:47:31

19   half are nicotine dependent under the DSM criteria, right? 04:47:36

20   A.    That's accurate, sure. 04:47:40

21   Q.    Of the ones you've treated to stop smoking, you don't 04:47:41

22   know how many quit and remained quit, is that right? 04:47:46

23   A.    Sure.  Because sometimes people quit for years and they 04:47:51

24   may start up again.  So if I don't have follow-up over the 04:47:55

25   years, a lot of patients that I treat over time -- some 04:47:59

|    |  |          |
|----|--|----------|
| 1  | patients leave and go elsewhere, so I don't have any method  | 04:48:02 |
| 2  | of determining if they quit for good or if they, you know,   | 04:48:05 |
| 3  | quit for a shorter period of time.                           | 04:48:10 |
| 4  | Q. Right. That's all I asked. You don't know, right?         | 04:48:12 |
| 5  | You don't know how many stayed quit, right?                  | 04:48:15 |
| 6  | A. I know some of them did because I still treat them over   | 04:48:17 |
| 7  | time, but I can't say for all of them. I don't have that     | 04:48:20 |
| 8  | information.   | 04:48:23 |
| 9  | Q. And you don't know how many of them have relapsed? You    | 04:48:23 |
| 10 | can't give us a percent of the total you've treated who have | 04:48:26 |
| 11 | relapsed?  | 04:48:29 |
| 12 | A. I don't know that. I don't keep that information.         | 04:48:30 |
| 13 | Q. You agree, you only see a teeny-tiny portion of smokers   | 04:48:32 |
| 14 | in this world, right?  | 04:48:35 |
| 15 | A. Oh, sure.   | 04:48:36 |
| 16 | Q. Your CV -- we have a copy of your resume. It says         | 04:48:37 |
| 17 | you've lectured to thousands of physicians, doesn't it?      | 04:48:41 |
| 18 | A. I have, sure.   | 04:48:44 |
| 19 | Q. It lists some 14 publications and three research          | 04:48:45 |
| 20 | programs that you have participated in, correct?             | 04:48:49 |
| 21 | A. Correct.  | 04:48:51 |
| 22 | Q. You've even put out a cassette tape that you sold to      | 04:48:51 |
| 23 | people to treat their depression, right?                     | 04:48:56 |
| 24 | A. Years ago I developed a self-help program to help         | 04:48:57 |
| 25 | people with depression.                                      | 04:49:01 |



|    |    |   |          |
|----|----|---|----------|
| 1  | Q. | But you've never written an article on nicotine           | 04:49:02 |
| 2  |    | dependence or addiction, have you?                        | 04:49:05 |
| 3  | A. | That's correct.   | 04:49:06 |
| 4  | Q. | You've never written an article on smoking cessation,     | 04:49:06 |
| 5  |    | have you?   | 04:49:09 |
| 6  | A. | That's correct.   | 04:49:09 |
| 7  | Q. | You've never written an article on tobacco dependence     | 04:49:09 |
| 8  |    | in smokers?   | 04:49:13 |
| 9  | A. | That's correct's. That's not been a focus of my           | 04:49:13 |
| 10 |    | career.   | 04:49:16 |
| 11 | Q. | You talked a little bit about research that you've done   | 04:49:17 |
| 12 |    | about medications in the brain. Do you remember that?     | 04:49:20 |
| 13 |    | Earlier today you were asked questions about that?        | 04:49:22 |
| 14 | A. | I do remember that, sure.                                 | 04:49:24 |
| 15 | Q. | Of your lectures to thousands of doctors you've given,    | 04:49:25 |
| 16 |    | other than five lectures on using antidepressants to help | 04:49:29 |
| 17 |    | stop smoking, you've never lectured on smoking cessation, | 04:49:32 |
| 18 |    | correct?  | 04:49:36 |
| 19 | A. | That's right.   | 04:49:36 |
| 20 | Q. | Those five lectures were part of your work as a paid      | 04:49:37 |
| 21 |    | lecturer for those drug companies, right?                 | 04:49:40 |
| 22 | A. | Not those lectures, no.                                   | 04:49:48 |
| 23 | Q. | Were you giving lectures on using antidepressants in      | 04:50:02 |
| 24 |    | what's called an off-label way to treat smoking?          | 04:50:07 |
| 25 | A. | Sure. Over the years I've given lectures on various       | 04:50:11 |

1 uses of medications. I've given some lectures for community  
2 health centers, the clinicians who work out of these places,  
3 at universities; not paid for, but I provided lectures on  
4 different uses, off-label uses for different medications.  
5 And for years we have used antidepressants off label to help  
6 people quit smoking. So I have provided those lectures, but  
7 those were not paid for.

8 Q. You've also given paid lectures for pharmaceutical  
9 companies, right?

10 A. Sure.

11 MS. BROWN: Objection. Relevance.

12 THE COURT: I'm going to sustain the objection.

13 BY MS. BARNETT:

14 Q. You haven't gone to any classes or lectures dealing  
15 solely with nicotine dependence, have you?

16 A. No. Most of the information that I educate myself on  
17 is based on literature. I do some continuing medical  
18 educational focused on that, but not presentations, no.

19 Q. So you haven't gone to any classes or lectures that  
20 dealing solely with nicotine dependence, right?

21 A. Correct.

22 Q. While you've participated in research, which is on your  
23 CV, none of that research has studied the effects of nicotine  
24 on the brain, right?

25 A. Correct.

|    |    |  |          |
|----|----|--|----------|
| 1  | Q. | And none of your research has studied tobacco                | 04:51:25 |
| 2  |    | dependence in smokers, right?                                | 04:51:29 |
| 3  | A. | Well, I do research. I educate myself. In terms of           | 04:51:30 |
| 4  |    | doing research on human beings and publishing the data, that | 04:51:35 |
| 5  |    | I don't do; but I've researched the literature, and I        | 04:51:38 |
| 6  |    | continued to do that in regards to the variety of            | 04:51:41 |
| 7  |    | nicotine-related issues.                                     | 04:51:43 |
| 8  | Q. | Is there any research -- original research that you've       | 04:51:44 |
| 9  |    | done on tobacco dependence in smokers that appears on your   | 04:51:48 |
| 10 |    | resume?  | 04:51:52 |
| 11 | A. | It is not.   | 04:51:53 |
| 12 | Q. | And you've never been asked to contribute to any             | 04:51:54 |
| 13 |    | Surgeon General's Report on cigarette smoking, have you?     | 04:51:58 |
| 14 | A. | No.  | 04:51:59 |
| 15 | Q. | Never been asked to contribute to any Surgeon General's      | 04:52:00 |
| 16 |    | Report on nicotine addiction, have you?                      | 04:52:02 |
| 17 | A. | That's correct.  | 04:52:04 |
| 18 | Q. | You've never been asked to contribute to the Surgeon         | 04:52:04 |
| 19 |    | General's Reports on smoking cessation, have you?            | 04:52:09 |
| 20 | A. | That's correct.  | 04:52:11 |
| 21 | Q. | Have you been asked by the National Cancer Institute to      | 04:52:11 |
| 22 |    | write on cigarette smoking?                                  | 04:52:14 |
| 23 | A. | No. That's not the type of clinical practice I have.         | 04:52:16 |
| 24 | Q. | So, no, you haven't?   | 04:52:20 |
| 25 | A. | I have not.  | 04:52:22 |

1 Q. You do write articles, right? 04:52:22

2 A. Some, but mostly what I -- 04:52:24

3 Q. Excuse me. You've got them listed on your CV, the 04:52:26

4 articles you've published, right? 04:52:30

5 A. Sure, but even that's not the focus of my clinical 04:52:32

6 practice. 04:52:37

7 Q. Do you have an opinion of who has done more research on 04:52:38

8 nicotine addiction, you or the cigarette companies? 04:52:43

9 MS. BROWN: Your Honor, objection. Argumentative. 04:52:46

10 THE COURT: I'm going to sustain the objection. 04:52:48

11 BY MS. BARNETT: 04:52:51

12 Q. You spent a lot of time testifying to this jury about 04:52:51

13 what you think Mrs. Denton and her family did do and didn't 04:52:53

14 do. 04:52:56

15 Have you spent any time considering what 04:52:58

16 responsibility the cigarette companies should have for the 04:53:00

17 choices they made? 04:53:02

18 MS. BROWN: Your Honor, objection. 04:53:03

19 THE COURT: Sustained. 04:53:05

20 MS. BARNETT: I don't have any further questions. 04:53:07

21 THE COURT: Miss Brown? 04:53:10

22 REDIRECT EXAMINATION 04:53:14

23 BY MS. BROWN:

24 Q. Dr. Kaplan, the focus of your practice has always been 04:53:36

25 patient care, hasn't it? 04:53:39

|    |    |   |          |
|----|----|---|----------|
| 1  | A. | That's been the focus, yes.                                   | 04:53:40 |
| 2  | Q. | Not research?   | 04:53:41 |
| 3  | A. | Not research.   | 04:53:42 |
| 4  | Q. | Not publishing?   | 04:53:43 |
| 5  | A. | Not publishing.   | 04:53:45 |
| 6  | Q. | And not testifying in courts like this one?                   | 04:53:46 |
| 7  | A. | That's not the focus of my practice, no.                      | 04:53:48 |
| 8  | Q. | Miss Barnett kept suggesting that you work for tobacco        | 04:53:51 |
| 9  |    | companies. Do you work for tobacco companies?                 | 04:53:54 |
| 10 | A. | I don't work for anyone. I have my own clinical               | 04:53:56 |
| 11 |    | practice.   | 04:53:59 |
| 12 | Q. | Have any of the tobacco companies or their                    | 04:54:00 |
| 13 |    | representatives ever told you what definition of addiction or | 04:54:02 |
| 14 |    | dependence to adopt?  | 04:54:05 |
| 15 | A. | Never.  | 04:54:07 |
| 16 | Q. | Have the tobacco companies ever told you how to testify       | 04:54:07 |
| 17 |    | in court?   | 04:54:11 |
| 18 | A. | Never.  | 04:54:12 |
| 19 | Q. | When did the DSM-IV come out?                                 | 04:54:14 |
| 20 | A. | The DSM-IV came out mid-Nineties, and then the TR in          | 04:54:17 |
| 21 |    | 2000.   | 04:54:22 |
| 22 | Q. | So mid-Nineties. How many years ago; 15, 20 years ago?        | 04:54:23 |
| 23 | A. | Approximately, yes.   | 04:54:29 |
| 24 | Q. | Why do you use the DSM-IV today?                              | 04:54:30 |
| 25 | A. | I use the DSM-IV because I believe it's the most useful       | 04:54:34 |

1 diagnostic criteria to diagnose people who do or don't have  
2 addiction.

3           It's been a process. Like other clinicians, I've  
4 tried different diagnoses; but over the years, it's my  
5 opinion clinically that this is the most accurate, most  
6 helpful diagnostic criteria. So for many years now I've used  
7 it exclusively in my practice.

8 Q.     Why did you conclude that Mrs. Denton was not dependent  
9 based on the criteria in DSM-IV?

10 A.     After analyzing the information that's available,  
11 again, I don't believe she had clinically significant  
12 impairment; and then if you look at the seven other  
13 criteria -- and I utilized all the information available to  
14 me -- I felt she had one out of those seven criteria.

15 Q.     If she doesn't meet the threshold criteria of  
16 clinically significant impairment and she only meets one out  
17 of seven of the remaining, does she meet the criteria?

18 A.     No. She would be considered not addicted or not  
19 dependent upon nicotine.

20 Q.     Is the DSM-IV appropriate for use in forensic medicine?

21 A.     It is. In terms of a set of criteria that's used in  
22 legal matters, even if a person is deceased and you are  
23 trying to come up with organized information in regards to  
24 someone who is deceased, the DSM is the standard that  
25 psychiatrists utilize in legal matters.

1 Q. Miss Barnett asked you some questions about light or  
2 low-tar cigarettes.

3 Have you ever told any of your patients that  
4 smoking is safe?

5 A. I tell them the opposite actually.

6 Q. You were also asked some questions about Mary Melvin,  
7 Linda Denton's friend. Do you recall that?

8 A. I do.

9 Q. Do you also recall that Mary Melvin asked Mrs. Denton  
10 to quit smoking at least 50 times?

11 A. I believe so, yes.

12 Q. And do you recall Mrs. Denton's response?

13 A. I believe she said it was none -- it's none of your  
14 business. Something like that.

15 Q. Do you recall --

16 A. I'm sorry. Like, mind your own business, or something  
17 like that.

18 Q. Do you recall Mrs. Melvin's reaction to her friend's  
19 diagnosis of lung cancer?

20 MS. BARNETT: Objection. Relevance, your Honor.

21 THE COURT: Sustained.

22 BY MS. BROWN:

23 Q. Do you recall if Mrs. Melvin was mad at her friend  
24 because she could have quit and didn't?

25 MS. BARNETT: Objection.

|    |  |          |
|----|--|----------|
| 1  | THE COURT: The jury will disregard that. I                   | 04:57:07 |
| 2  | sustained the objection, counsel.                            | 04:57:10 |
| 3  | BY MS. BROWN:  | 04:57:12 |
| 4  | Q. In all the depositions that you read, was this anyone     | 04:57:13 |
| 5  | that actually saw Mrs. Denton smoke before 1966?             | 04:57:15 |
| 6  | A. No.   | 04:57:20 |
| 7  | Q. Have you ever doubted that smoking can be difficult to    | 04:57:20 |
| 8  | quit?  | 04:57:25 |
| 9  | A. No. Before I was a doctor, and even since I've been a     | 04:57:26 |
| 10 | clinician, clearly, people do have difficulty quitting       | 04:57:30 |
| 11 | smoking.   | 04:57:34 |
| 12 | Q. And is that true no matter how you define addiction?      | 04:57:34 |
| 13 | A. It's true. No matter how you define addiction,            | 04:57:38 |
| 14 | whatever definition you want to use, it can be difficult for | 04:57:41 |
| 15 | some people to quit.   | 04:57:44 |
| 16 | Q. Do all smokers, including addicted smokers, have the      | 04:57:45 |
| 17 | choice to quit?  | 04:57:49 |
| 18 | A. They do.  | 04:57:50 |
| 19 | Q. Did Linda Denton have the choice to quit smoking?         | 04:57:51 |
| 20 | A. She did.  | 04:57:56 |
| 21 | Q. Did she have the ability to do so at any point in her     | 04:57:56 |
| 22 | life?  | 04:58:00 |
| 23 | A. She did. She had the ability from the time she started    | 04:58:01 |
| 24 | smoking until she stopped to quit smoking if she chose to    | 04:58:04 |
| 25 | quit.  | 04:58:10 |



|    |    |  |          |
|----|----|--|----------|
| 1  | Q. | Even if she was addicted?                                    | 04:58:10 |
| 2  |    | MS. BARNETT: Your Honor, it's cumulative.                    | 04:58:12 |
| 3  |    | THE COURT: Sustained.  | 04:58:15 |
| 4  |    | BY MS. BROWN:  | 04:58:18 |
| 5  | Q. | Did any of the questions that were asked by                  | 04:58:19 |
| 6  |    | Miss Barnett, asking you to look at certain records, change  | 04:58:21 |
| 7  |    | your opinion in any way?                                     | 04:58:26 |
| 8  | A. | No, they did not.  | 04:58:28 |
| 9  | Q. | Do you believe to a reasonable degree of scientific          | 04:58:30 |
| 10 |    | probability that Mrs. Denton was not addicted to nicotine,   | 04:58:33 |
| 11 |    | using the DSM-IV?  | 04:58:37 |
| 12 | A. | I do.  | 04:58:39 |
| 13 | Q. | How about using the Surgeon General's '88 definition?        | 04:58:41 |
| 14 | A. | I also believe that she was not addicted using the           | 04:58:45 |
| 15 |    | Surgeon General's '88 definition.                            | 04:58:48 |
| 16 | Q. | Dr. Kaplan, is a persistent desire to cut down the same      | 04:58:51 |
| 17 |    | thing as sincere motivation and commitment to quit smoking?  | 04:58:56 |
| 18 | A. | It is not.   | 04:59:00 |
| 19 | Q. | Can you explain the difference between the two?              | 04:59:00 |
| 20 | A. | Sure. I mean, it's not uncommon for people to have the       | 04:59:04 |
| 21 |    | desire to want to change. That's pretty common. But          | 04:59:08 |
| 22 |    | developing a plan of action, getting motivated, getting      | 04:59:15 |
| 23 |    | committed to actually quit, that's a different situation. So | 04:59:19 |
| 24 |    | someone can be interested in quitting; but choosing to quit, | 04:59:23 |
| 25 |    | following through, those are two different types of people,  | 04:59:26 |

1 two different types of situations.

04:59:31

2 Q. Do you believe that Mrs. Denton chose to smoke and  
3 could have quit at any time if she was sufficiently motivated  
4 and committed?

04:59:34

04:59:37

04:59:40

5 A. I do.

04:59:41

6 MS. BROWN: Thank you, Dr. Kaplan. I don't have  
7 any other questions today.

04:59:48

04:59:50

8 THE COURT: Thank you.

04:59:51

9 MS. BARNETT: I have one question, your Honor.

04:59:52

10 RE CROSS-EXAMINATION

04:59:56

11 BY MS. BARNETT:

04:59:56

12 Q. Talking about this threshold of clinical significance  
13 you were just asked about --

05:00:03

05:00:05

14 A. Yes.

05:00:06

15 Q. -- it's your opinion, if the jury were to adopt your  
16 interpretation, if someone was married to a smoker and all  
17 their friends are smokers and their job allows them to smoke,  
18 even if they smoke five packs a day, they would never be  
19 nicotine dependent under the DSM-IV, right?

05:00:07

05:00:11

05:00:14

05:00:18

05:00:22

20 A. I'm sorry. Can you repeat the question?

05:00:24

21 Q. Sure. Let me get the deposition.

05:00:26

22 MS. BROWN: Which deposition, Counsel?

05:00:39

23 MS. BARNETT: The deposition in this case.

05:00:40

24 MS. BROWN: Page?

05:00:42

25 MS. BARNETT: I'm working on it. Excuse me,

05:00:44

1 your Honor.

05:00:47

2 Someone who smokes three packs a day --

05:01:15

3 THE COURT: Miss Barnett, you were going to give  
4 us the page and line numbers.

05:01:18

05:01:20

5 I was going to ask the question first, but I will,  
6 sure. Look at Page 77, if you would, line 24, through page  
7 78, line 8.

05:01:21

05:01:24

05:01:28

8 THE WITNESS: Can I have a second to read before  
9 and after, please?

05:01:36

05:01:37

10 THE COURT: I'll tell you what, counsel has it.  
11 You can go ahead and ask your question and then we will let  
12 you go ahead.

05:01:39

05:01:40

05:01:43

13 THE WITNESS: Thank you, your Honor.

05:01:46

14 MS. BARNETT: I'm sorry, your Honor.

05:01:48

15 BY MS. BARNETT:

16 Q. I asked you, Someone who smokes three packs a day,  
17 someone smokes three packs a day, but their wife smokes, too,  
18 she's fine with it, the kids are fine with it, is not  
19 impairing their social relations, it's not impairing their  
20 work because they work at a place where they can smoke all  
21 the time, in your opinion, that's not a maladaptive pattern  
22 on substance abuse because there is no clinically significant  
23 impairment or distress?

05:01:50

05:01:52

05:01:56

05:01:59

05:02:01

05:02:05

05:02:08

05:02:11

24 And you said, didn't you, In that example you just  
25 gave, that would be accurate, yes.

05:02:12

05:02:14

1 Right? That was your testimony? 05:02:16

2 A. I'm sorry. Can you please tell me where you are 05:02:19  
3 reading from? 05:02:22

4 Q. Page -- you know what -- well, Page 77, line 24, to 05:02:23  
5 Page 78, line 8. I thought -- are you there? I'll read it 05:02:32  
6 again. 05:02:39

7 A. I'm reading it. 05:02:40

8 Q. I asked you, Three packs a day, somebody smokes three 05:02:41  
9 packs a day, but their wife smokes two, she's fine with it, 05:02:44  
10 the kids are fine with it, it's not impairing their social 05:02:48  
11 relations, it's not impairing their work because they work at 05:02:51  
12 a place where they can smoke all the time, in your opinion 05:02:53  
13 that's not a maladaptive pattern of substance abuse because 05:02:56  
14 there is no clinically significant impairment or distress? 05:03:00

15 And you said, In the example you just gave, that 05:03:03  
16 would be accurate. 05:03:06

17 Right? That was your testimony? 05:03:06

18 A. Right. So the example -- 05:03:07

19 Q. I just -- 05:03:09

20 THE COURT: I'll allow him to finish his answer. 05:03:10

21 THE WITNESS: The fictitious example you provided, 05:03:13  
22 given the information you gave me, yes, using the DSM 05:03:18  
23 criteria, that would not be considered clinically significant 05:03:24  
24 impairment. 05:03:26

25 MS. BARNETT: That's all the questions that I 05:03:29

1 have.

05:03:30

2 THE COURT: Thank you, sir.

05:03:32

3 May I see counsel?

05:03:33

4 *(The following was held at sidebar:)*

05:03:34

5 THE COURT: Before you get to Mr. Sprie's

05:03:42

6 instructions, is that the last witness?

05:03:58

7 MR. COFER: Yes.

05:04:02

8 THE COURT: Okay. Can I let the jury go and we

05:04:02

9 can do all this not whispering?

05:04:07

10 MR. COFER: Sure. I'll do whatever you want to

05:04:10

11 do.

05:04:11

12 THE COURT: And you're not proposing any rebuttal

05:04:11

13 case, right?

05:04:15

14 MS. BARNETT: No.

05:04:16

15 THE COURT: Okay. Why don't I just let the jury

05:04:16

16 go and tell them that -- I'm going to let you rest in front

05:04:19

17 of the jury and I'm going to recognize you to rest.

05:04:26

18 The arguments that -- the motions that you wish to

05:04:31

19 make, I'm going to preserve them and you are going to make

05:04:33

20 them for me after the jury leaves, okay?

05:04:37

21 MR. COFER: I just have to read one sentence.

05:04:39

22 For the record, your Honor, we renew our Rule 50

05:04:42

23 motions.

05:04:46

24 THE COURT: I haven't even ruled on them, but

05:04:47

25 okay, they are renewed. Okay.

05:04:49

|    |   |          |
|----|---|----------|
| 1  | MS. HENNINGER: And mine.                                      | 05:04:51 |
| 2  | THE COURT: All right. Mr. Walker and Mr. Sprie                | 05:04:52 |
| 3  | are protected.  | 05:04:56 |
| 4  | MS. BARNETT: We have one very small one as well.              | 05:05:00 |
| 5  | THE COURT: Okay. I will hear that after we let                | 05:05:03 |
| 6  | the jury go. So I'm going to recognize you to rest and you    | 05:05:05 |
| 7  | to rest, and then I'll tell the jury that concludes the       | 05:05:08 |
| 8  | evidence, that we are going to start at 9 tomorrow morning    | 05:05:10 |
| 9  | with the closing arguments. I'll just remind them that        | 05:05:13 |
| 10 | because they haven't heard your arguments that they still     | 05:05:17 |
| 11 | can't form any opinions, okay?                                | 05:05:20 |
| 12 | MR. COFER: Okay. Thank you.                                   | 05:05:21 |
| 13 | THE COURT: All right.   | 05:05:22 |
| 14 | (Sidebar ended.)  | 05:05:27 |
| 15 | THE COURT: Mr. Cofer?   | 05:05:28 |
| 16 | MR. COFER: Yes, your Honor. Philip Morris rests.              | 05:05:42 |
| 17 | Thank you.  | 05:05:44 |
| 18 | THE COURT: All right. Miss Henninger?                         | 05:05:45 |
| 19 | MS. HENNINGER: R.J. Reynolds rests.                           | 05:05:48 |
| 20 | THE COURT: Okay. Ladies and gentlemen, what that              | 05:05:51 |
| 21 | means is we have concluded -- we have concluded with the      | 05:05:54 |
| 22 | evidence portion of the trial, and what comes next is the     | 05:05:59 |
| 23 | attorneys' closing arguments. It's too late to do that at     | 05:06:02 |
| 24 | 5 o'clock in the afternoon. So I'm going to let you all go    | 05:06:05 |
| 25 | home and we will start tomorrow morning with the arguments of | 05:06:08 |

1 the attorneys, and then I'll give you my instructions on the  
2 law.

3 It's very tempting, now that you know you've heard  
4 all the evidence, to start thinking about it and trying to  
5 figure the case out and try to figure out what you believe.  
6 I must remind you that it is premature for you to do that.

7 Even though you've heard the evidence, you haven't  
8 heard the arguments of the attorneys and you have not heard  
9 my instructions on the law, and those two things are critical  
10 in your -- in the course of your ultimate deliberations.

11 So I'm going to remind you not to form or express  
12 any opinions about the case, don't discuss it with anybody or  
13 let anybody discuss it with you or in your presence. Don't  
14 go do any research. As I've been telling you throughout the  
15 trial, all of the information that is appropriate for you to  
16 consider and that you need in order to reach a verdict in  
17 this case is presented inside this courtroom.

18 Don't communicate over any social media, do not  
19 read or listen to any media reports, and as I said, don't  
20 form or express any opinions.

21 I think I'm going to ask you to be here at 9 a.m.,  
22 and we will start at 9:15 with the attorneys' closing  
23 arguments. We might start -- if you are all here a little  
24 earlier than that, we might start earlier, but just shoot to  
25 be here at 9 o'clock.

|    |  |          |
|----|--|----------|
| 1  | Have a nice evening.   | 05:07:32 |
| 2  | COURT SECURITY OFFICER: All rise for the jury.               | 05:07:33 |
| 3  | <i>(Jury exits courtroom at 5:07 p.m.)</i>                   |          |
| 4  | COURT SECURITY OFFICER: Please be seated.                    | 05:07:46 |
| 5  | THE COURT: Okay. The defendants have renewed                 | 05:07:46 |
| 6  | their motions for judgment as a matter of law.               | 05:07:56 |
| 7  | Ms. Barnett, you had a motion?                               | 05:08:00 |
| 8  | MS. BARNETT: Yes, your Honor. Under Rule 50A,                | 05:08:03 |
| 9  | the defendants have had an opportunity to be fully heard on  | 05:08:07 |
| 10 | whether or not smoking was the cause of Mrs. Denton's lung   | 05:08:10 |
| 11 | cancer.  | 05:08:15 |
| 12 | They have presented absolutely not one piece of              | 05:08:16 |
| 13 | evidence that it was anything but smoking. Dr. Burns         | 05:08:18 |
| 14 | testified that it was smoking. Dr. Pitocchi testified that   | 05:08:21 |
| 15 | it was smoking. They have had no expert, there was no        | 05:08:24 |
| 16 | cross-examination that would indicate anything else. So we   | 05:08:28 |
| 17 | would ask under the rule to resolve that issue against the   | 05:08:30 |
| 18 | defendants and instruct the jury that there is no issue,     | 05:08:33 |
| 19 | there is no basis which for them to find anything other than | 05:08:36 |
| 20 | smoking.   | 05:08:40 |
| 21 | Sure, we have an issue about addiction and its               | 05:08:40 |
| 22 | role, but whether or not the cancer was caused by the        | 05:08:43 |
| 23 | cigarettes has been resolved. And your Honor is certainly    | 05:08:46 |
| 24 | aware of how we got to this point.                           | 05:08:49 |
| 25 | We asked to keep out the suggestion, the hint, the           | 05:08:53 |



1 taint of some spooky family gene, and we were unsuccessful.  
2 We have been unsuccessful in asking for a limiting  
3 instruction; and we just don't want the jury to be confused  
4 when the defendants themselves admitted in this court that  
5 there is no evidence of any family history of cancer and  
6 there is no evidence of anything else causing her cancer.

7 THE COURT: Mr. Sprie?

8 MR. SPRIE: Your Honor, the plaintiffs have a  
9 burden of proof on causation. The jury is free to believe or  
10 disbelieve plaintiff's witnesses. I can provide the Court  
11 with numerous cases that support the proposition that the  
12 jury can either credit or discredit the testimony of  
13 plaintiff's witnesses, even if there is no contrary evidence  
14 on an issue put on by the defendants. We would, therefore,  
15 think that plaintiff's motion needs to be denied.

16 THE COURT: Let me see the case law.

17 MR. SPRIE: Let me just -- may I cite it for the  
18 record?

19 THE COURT: Sure.

20 MR. SPRIE: *Sartor versus Arkansas Natural Gas*  
21 *Corp.*, 321 U.S. 620, 1944. *Gregg versus U.S. Industries*, 887  
22 F.2d 1412, Eleventh Circuit, 1989. *United States versus*  
23 *0.161 Acres of Land*, 837 F.2d 1036, Eleventh Circuit, 1988.  
24 *Murphy versus City of Flagler Beach*, 846 F.2d 1306, Eleventh  
25 Circuit, 1988. *Tyler versus Beto*, 391 F.2d 993, which is a

1 Fifth Circuit case from 1968.

05:10:54

2 THE COURT: Do you have those cases for me?

05:11:01

3 MR. SPRIE: Yes.

05:11:06

4 (Document tendered.)

05:11:11

5 THE COURT: All right. I'll take a look at the  
6 cases over the evening hours.

05:11:12

05:11:53

7 Yes, Miss Henninger?

05:11:55

8 MS. HENNINGER: Your Honor, I feel it necessary to  
9 point out that we have heard argument earlier today on R.J.  
10 Reynolds' Rule 50 motion for the grounds that plaintiff had  
11 not proven that R.J. Reynolds -- smoking of their cigarettes  
12 caused her lung cancer.

05:11:57

05:11:59

05:12:03

05:12:05

05:12:10

13 So for all the reasons we stated in our Rule 50  
14 motion as to why we should obtain a judgment as a matter of  
15 law as to claims the plaintiffs assert against Reynolds,  
16 those arguments are equally applicable as to any opposition  
17 to their motion for judgment as a matter of law that they  
18 just made now.

05:12:12

05:12:15

05:12:18

05:12:22

05:12:25

05:12:29

19 THE COURT: I'm sorry. I know I should have  
20 followed that, but --

05:12:31

05:12:33

21 MS. HENNINGER: Let me try again.

05:12:36

22 THE COURT: I almost had it, but I lost it midway  
23 through, and it's not your fault. But if you could, repeat  
24 it, please.

05:12:37

05:12:39

05:12:42

25 MS. HENNINGER: Sure.

05:12:43

1           As you know, for Mr. Walker's arguments, 05:12:44  
2 R.J. Reynolds filed a motion for judgment as a matter of law 05:12:47  
3 on the grounds that none of plaintiff's experts gave the 05:12:51  
4 opinion that smoking of Reynolds' cigarettes caused or 05:12:54  
5 contributed to cause Mrs. Denton's lung cancer. 05:12:58

6           They have now filed a motion for judgment as a 05:13:02  
7 matter of law against both defendants, claiming that we did 05:13:06  
8 not present any evidence to support -- in opposition of their 05:13:09  
9 lung cancer claim or the causation of their lung cancer 05:13:15  
10 claim. 05:13:17

11           All I'm trying to state -- and apparently not very 05:13:18  
12 clearly -- is that for the reasons stated in our motion as to 05:13:21  
13 why their claims against Reynolds fail, Reynolds would assert 05:13:25  
14 in opposition for their motion that they are currently 05:13:29  
15 making. 05:13:33

16           Do you want me to back up again? 05:13:37

17           THE COURT: Okay. So all they're arguing right 05:13:39  
18 now is the only evidence -- the only evidence the jury heard 05:13:42  
19 was smoking caused Linda Denton's lung cancer, so they are 05:13:46  
20 moving for judgment as a matter of law on the sole issue of 05:13:50  
21 smoking caused Linda Denton's lung cancer. 05:13:55

22           Okay. So how is that relating to -- 05:13:58

23           MS. HENNINGER: They are bundling smoking 05:14:09  
24 together; and as you well know, there is a difference between 05:14:11  
25 the smoking of R.J. Reynolds brands -- 05:14:15

1 THE COURT: Okay. 05:14:18

2 MS. HENNINGER: -- and smoking of other brands. 05:14:18

3 So to the extent that their motion is aimed at smoking, I 05:14:20

4 would just respectfully remind the Court of my earlier 05:14:25

5 motion. 05:14:28

6 THE COURT: You are saying, to the extent that 05:14:28

7 it's smoking of R.J. Reynolds products. 05:14:30

8 MS. HENNINGER: Yes, ma'am. 05:14:33

9 THE COURT: Okay. I get that. 05:14:34

10 MS. HENNINGER: I'm sorry. It's after five. 05:14:36

11 THE COURT: I'm sure I was just being slow. 05:14:38

12 Okay. As to -- sorry. Too much paper, but you 05:14:42

13 have all given it to me. 05:15:27

14 MS. HENNINGER: Speaking of which, your Honor, 05:15:28

15 there are some Dr. Cummings transcripts that were handed to 05:15:30

16 you earlier. I think those were my versions. I don't know 05:15:33

17 if that's amongst your papers. If you do find them -- 05:15:36

18 THE COURT: Dr. Cummings?

19 MS. HENNINGER: I think they were used when we 05:15:40

20 were talking about Dr. Kaplan's testimony. If not, it's no 05:15:41

21 big deal. I can print out new ones. 05:15:48

22 THE COURT: We will get back to that. 05:15:52

23 Here they are. Can you return those (handing). 05:15:56

24 The case law on statute of repose does anything 05:16:04

25 but shed light on the question of whose burden it is. I 05:17:49

1 don't think that the McKelroy or the Duda cases are 05:17:55  
2 particularly helpful in resolving the issue. 05:18:03

3           The Duda and Son's case describes statute of 05:18:11  
4 repose as an affirmative defense; and from that, there is a 05:18:14  
5 footnote that says that Firestone bears the burden of proving 05:18:19  
6 the applicability of the statute of repose. That's a product 05:18:23  
7 liability case, which is in a very different -- it's a very 05:18:26  
8 different thing that the defendant is being required to prove 05:18:30  
9 than in the fraudulent concealment where somehow the 05:18:35  
10 defendant would have to prove the absence of the reliance. 05:18:38  
11 But I guess the way I'm viewing this -- and I'm persuaded, in 05:18:51  
12 part, by my reading of the novel and the Hess decisions 05:18:59  
13 is that in order for Miss Denton -- I'm sorry, for Mr. Denton 05:19:08  
14 to prove his claim, he has to have established the elements 05:19:15  
15 of the fraud claim. One of those elements is reliance, which 05:19:22  
16 under the statute of repose has to have occurred within the 05:19:27  
17 12 years before the filing of the lawsuit. 05:19:31

18           So in order -- so it seems to me that in order for 05:19:33  
19 the plaintiff to prove that the cause of action exists, the 05:19:38  
20 plaintiff has to prove the reliance within the applicable 05:19:44  
21 period. 05:19:50

22           I wish I could find clearer case law, but that 05:19:50  
23 seems to be the approach that's being taken by the 05:19:56  
24 intermediate appellate courts. Obviously the Florida Supreme 05:20:01  
25 Court hasn't addressed this issue. I know all of my 05:20:07

1 colleagues here in Jacksonville will be happy when some of 05:20:11  
2 these issues are resolved once and for all and we can get our 05:20:14  
3 marching orders; but in the interim, the best I can do is try 05:20:19  
4 to read the tea leaves in the way that the courts are dealing 05:20:23  
5 with it. And it appears to me that the approach has been 05:20:28  
6 that it's part of the plaintiff's proof of the existence of 05:20:33  
7 the cause of action. So that's -- for purposes of preparing 05:20:37  
8 your closing arguments, that's the way it's going to be 05:20:43  
9 approached. 05:20:45

10 As to the motions, I'm taking them under 05:20:47  
11 advisement. I may rule on them before the closing 05:20:53  
12 statements, or I may just defer ruling on them until we get a 05:20:55  
13 verdict. 05:21:00

14 I've ruled on everything with regard to the 05:21:06  
15 instructions, right? Do I owe you all anything? 05:21:11

16 MS. BARNETT: No, you don't owe us anything. Yes, 05:21:14  
17 you have ruled. 05:21:18

18 MR. SPRIE: You've addressed all issues, 05:21:20  
19 your Honor. 05:21:22

20 THE COURT: Okay. We will have -- I need to -- 05:21:22  
21 it's my personal practice that I read through the edited jury 05:21:30  
22 instructions one final time, myself, with my version to make 05:21:35  
23 sure that nothing got changed, and so I need to do that this 05:21:40  
24 evening. But you all know what the instructions are, so you 05:21:43  
25 don't need our final copy this afternoon, do you? 05:21:48

|    |  |          |
|----|--|----------|
| 1  | MR. COFER: No, your Honor.                                   | 05:21:52 |
| 2  | MS. BARNETT: No, your Honor.                                 | 05:21:53 |
| 3  | THE COURT: Okay. And the verdict form is done.               | 05:21:54 |
| 4  | So is there anything else that we need to do?                | 05:21:58 |
| 5  | Yes, sir.  | 05:22:01 |
| 6  | MR. COFER: I think counsel -- I think we would               | 05:22:02 |
| 7  | appreciate some guidance in terms of how long we have. I     | 05:22:04 |
| 8  | also want to talk about the use of demonstratives in closing | 05:22:07 |
| 9  | and what the Court expects. So just really backing up -- to  | 05:22:10 |
| 10 | show my ignorance -- we argue before you read the            | 05:22:17 |
| 11 | instructions?  | 05:22:22 |
| 12 | THE COURT: Yes.  |          |
| 13 | MR. COFER: Well, that explains your comment about            | 05:22:23 |
| 14 | us not reading instructions then. Okay. We can read some     | 05:22:24 |
| 15 | focused instructions if it goes to our arguments?            | 05:22:30 |
| 16 | THE COURT: Yes.  | 05:22:34 |
| 17 | MR. COFER: Okay.   | 05:22:37 |
| 18 | THE COURT: And I assume that's the way you all               | 05:22:38 |
| 19 | have been doing these cases, that you argue and then you get | 05:22:44 |
| 20 | the instructions, right?                                     | 05:22:46 |
| 21 | MR. COFER: Frankly, I've only tried state court              | 05:22:47 |
| 22 | cases, and they instruct first. Right? Yes, they read        | 05:22:50 |
| 23 | instructions before we do the arguments. So that's fine. I   | 05:22:53 |
| 24 | didn't know.   | 05:22:56 |
| 25 | THE COURT: Well, I have done it in the reverse at            | 05:23:05 |

1 the request of counsel, and in particular cases I really 05:23:11  
2 don't have the strongest feeling about it; but it was my 05:23:13  
3 assumption that we were doing it the old-fashioned way. And 05:23:19  
4 I think I might have even told the jury that's the way we 05:23:22  
5 were going to do it. I know in my normal instructions, the 05:23:26  
6 ones I'm accustomed to using, I tell them the order of the 05:23:29  
7 trial. 05:23:33

8 Hold on a moment. 05:23:38

9 Yes, I told them at the beginning, in the 05:23:59  
10 preliminary instructions I gave them, I said we would finish 05:24:02  
11 with the evidence and the lawyers would have their arguments 05:24:05  
12 and after that I would instruct them on the applicable law. 05:24:06

13 All right. As far as length, how much time does 05:24:11  
14 plaintiff have left? 05:24:19

15 MR. CONNOR: Somewhere between 60 and 80 minutes, 05:24:26  
16 I think. 05:24:29

17 MS. BARNETT: I'm pretty sure we have more time 05:24:29  
18 than we used. I think we have more than a couple of hours. 05:24:32  
19 I think we have -- I could be wrong about that, but based on 05:24:35  
20 the last where we were. So we would -- I think we have -- 05:24:38  
21 we -- 05:24:43

22 THE COURT: How long do you anticipate your 05:24:43  
23 closing, Miss Barnett? 05:24:45

24 MS. BARNETT: I wish I had a better -- I wish I 05:24:48  
25 knew -- I wish I was a lot further along than I am, 05:24:56



1 your Honor. I think an hour and a half has been typical. I 05:24:58  
2 would sure hope to be shorter than that because I think 05:25:01  
3 that's hard for a jury, but I think that's what Mr. Cofer has 05:25:04  
4 asked for, and I don't have a problem with that amount. I'll 05:25:09  
5 divide it, some at the end and some at the beginning. 05:25:14  
6 Certainly no more than that. 05:25:19

7 THE COURT: And Mr. Cofer, when you say -- are you 05:25:21  
8 still thinking -- I think an hour and a half is torture for a 05:25:27  
9 jury. I have to tell you, it's my -- and I didn't feel this 05:25:32  
10 way when I was out there, I admit; but after a while of 05:25:37  
11 sitting up here and watching jurors' faces, I really think 05:25:41  
12 that 30 minutes you are great. After about 45, they are 05:25:45  
13 looking at you, like, when are you going to end? And beyond 05:25:50  
14 that, I think you lose them, personally, just watching faces. 05:25:54  
15 Now, I get that you all want to get everything in. 05:26:00

16 Tell me what you want to do, Mr. Cofer, and then 05:26:05  
17 I'll figure out what I'll let you all do. And I'm going to 05:26:09  
18 hear from you as well, Miss Henninger. 05:26:12

19 MR. COFER: I just threw an hour and a half out 05:26:14  
20 there yesterday. I have no idea. I think the last state 05:26:16  
21 court case I tried, I think we had three defendants, and so 05:26:20  
22 that's how much time we were allowed. I mean, candidly, I'm 05:26:22  
23 going to try to have mine at 45 to 50 minutes, but I don't 05:26:26  
24 know how long it takes. I think Miss Henninger -- 05:26:31

25 MS. HENNINGER: I would like an opportunity to at 05:26:33

1 least have ten minutes. I think I did my opening in less  
2 than seven minutes, but I would like ten to fifteen range,  
3 probably shying on the ten side.

4 MR. COFER: I would hope -- obviously, we will  
5 coordinate our closings. We are not going to repeat what  
6 each other has said. I would hope we could get ours done in  
7 an hour. What I don't want to do is -- I'm going to go  
8 first. I don't want to have a situation where I'm afraid of  
9 cutting into Miss Henninger's time.

10 I would think if we had an hour and 15, that would  
11 give everybody plenty of time, with the idea -- frankly, I  
12 don't think we would use that. I think you gave us 45  
13 minutes for closing [sic]. I don't think I used half an  
14 hour. I'm not sure.

15 THE COURT: I wrote down what time you started,  
16 but you must not have gotten close enough that I started  
17 monitoring. I write down the start time and -- I'll tell you  
18 what, I'm going to ask you all to shoot for an hour per side.  
19 I'm going to say, if you hit an hour and 15 minutes, I'm  
20 going to say to wrap it up. I'll give you a little bit of  
21 time to wrap it up, and that's per side.

22 So, Mr. Cofer and Miss Henninger, you all will  
23 split that time. And Miss Barnett, you'll use that for your  
24 initial arguments and for your rebuttal argument, and that  
25 should be true rebuttal.

1 MS. BARNETT: Yes, your Honor. 05:27:57

2 THE COURT: Okay. And the question about the 05:27:58  
3 demonstratives? 05:28:01

4 MR. COFER: Demonstratives, we did not use any in 05:28:02  
5 opening. I would like to use some in closing. I'll share 05:28:05  
6 them with counsel. Very few. Mostly it will be stuff that's 05:28:09  
7 in evidence. I think maybe one or two others, but I'll give 05:28:13  
8 those to counsel in advance. I wanted to make sure that the 05:28:16  
9 Court was okay with even the concept of demonstratives. 05:28:18

10 THE COURT: Yes. When you say, in advance, you 05:28:21  
11 need to exchange them this evening. 05:28:23

12 MR. COFER: (Hanging). 05:28:28

13 THE COURT: Thank you. If there is an issue with 05:28:29  
14 them, I guess I'll have to hear it in the morning. 05:28:30

15 MR. COFER: Yes, ma'am. 05:28:34

16 MS. HENNINGER: If demonstratives were used during 05:28:35  
17 trial, we could clearly tell the other side as well if we 05:28:37  
18 intended to use them. 05:28:39

19 THE COURT: Yes, if it's something that -- if it 05:28:41  
20 was a demonstratives that was used in trial, there is no 05:28:43  
21 problem using it. And if there is an exhibit that was used 05:28:46  
22 in trial, that's okay. If you are going to start reading 05:28:50  
23 those tobacco documents to the jury in your closings, they 05:28:54  
24 might get up and walk out. 05:28:58

25 Okay. The podium will be -- we will move the 05:29:03

1 podium into the middle, and I'll ask you all to stay at the 05:29:14  
2 podium in your closings. 05:29:17

3 Any other issues or guidance that I can give you 05:29:21  
4 before I let you go? 05:29:25

5 MS. HENNINGER: My apologies. Will the ELMO -- if 05:29:26  
6 I recall, in opening there was no ELMO attached to the 05:29:29  
7 podium. Will we still have the ability to use -- 05:29:32

8 THE COURT: This is the podium that you will be 05:29:35  
9 using for your closings. So if you want something to be put 05:29:37  
10 up on the ELMO during your closing, if you could just have 05:29:39  
11 someone else over there doing that for you rather than 05:29:45  
12 walking back and forth. 05:29:47

13 MS. HENNINGER: Okay. Thank you. 05:29:49

14 THE COURT: And just so you all know, what I do, 05:29:50  
15 when I get to the point of reading the verdict form, you'll 05:29:53  
16 see Madam Deputy get up and quietly walk over to the ELMO; 05:29:58  
17 and as I'm reading the verdict form to the jury, she will 05:30:03  
18 display it so they can follow along. I do think it's very 05:30:07  
19 important that they we make sure the jurors understand the 05:30:11  
20 verdict form completely, and so she will be doing that 05:30:14  
21 function for me, because I'm technologically impaired. 05:30:17

22 MS. BARNETT: I believe your Honor said that you 05:30:22  
23 will send one set of instructions back with the jury. Am I 05:30:25  
24 recalling that correctly? 05:30:27

25 THE COURT: Yes, I'll send a set of the final 05:30:29

1 instructions back with the jury. 05:30:32

2 MS. BARNETT: Thank you. 05:30:34

3 THE COURT: Okay. Any other issues? 05:30:35

4 What is it they say? Speak now or forever hold 05:30:43

5 your peace. 05:30:47

6 Okay. We are in recess. Have a good evening. 05:30:48

7 Let's say 8:45, just in case. Hopefully we won't need the 05:30:54

8 time. I'll see you in the morning. 05:31:01

9 *(Proceedings adjourned at 5:34 p.m.)* 05:34:30

10 - - -

11 UNITED STATES DISTRICT COURT )

)

12 MIDDLE DISTRICT OF FLORIDA )

13 C E R T I F I C A T E

14 I certify that the foregoing is a correct transcript  
15 from the stenographic notes taken in the above-entitled  
16 matter by the undersigned.

17  
18 /S/Scott N. Gamertsfelder, RMR  
19 Official Court Reporter

Date: July 31, 2012

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