

1 THE FOLLOWING PROCEEDINGS WERE HAD ON
2 AUGUST 1, 1991, IN OPEN COURT:)

3 THE COURT: All right. Show the jury's
4 back all present. I trust you had a good day off and are
5 refreshed. Continue to remind you not to discuss the case
6 with anyone.

7 Mr. Carlson, you may call your next
8 witness.

9 MR. CARLSON: Your Honor, we'd call Roger
10 Burch.

11 -----
12 ROGER BURCH

13 having been first duly sworn to tell the truth, the whole
14 truth, and nothing but the truth, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. CARLSON:

17 Q State your name for us please, sir.

18 A Roger Burch.

19 Q Spell your last name first.

20 A B-U-R-C-H.

21 Q And what's your business, profession or occupation?

22 A I'm an optometrist.

23 Q Where do you practice?

24 A Caney, Kansas.

25 Q And did you have occasion to have a patient by the

1 name of Sandra Allen?

2 A Yes, I did.

3 Q And tell me what you did with regard to Sandra?

4 A Sandra's been a contact lens patient since 1987. She
5 came in in the last -- in March of '90 and I replaced her
6 contact lenses.

7 Q When was the first time that you saw her?

8 A 1987.

9 Q When did you fit her with a set of contact lenses?

10 A In 1987. However, she came in wearing contact lenses
11 from another doctor in 1987.

12 Q And you fit her with one set of lenses?

13 A One set in 1987 and then again a pair in 1990.

14 Q Let me hand you what's been marked as Defendant's
15 Exhibit 25, and ask you if you can identify that for me,
16 please, sir.

17 THE COURT: We already have a 25.

18 Q (By Mr. Carlson) Let me hand you what's been marked
19 Defendant's Exhibit 26, and could you tell me what that
20 is, sir?

21 A This is a letter that I sent to Mr. Corgan on May
22 16th, 1991.

23 Q And is there indicated on that particular letter a
24 prescription with regard to contact lenses?

25 A Yes, there is.

1 Q And would you tell us, sir, what the power on those
2 particular contact lenses are?

3 A Power on the right lens is minus 4.75. On the left
4 it's minus 4.25.

5 Q And who was that prescription for?

6 A It was for Sandra Allen.

7 Q If you would, sir, give me the date of that
8 prescription.

9 A The prescription would be -- I don't know the date.
10 March of 1990.

11 Q What type of a lens were these?

12 A These were soft contact lenses called Vistamarc
13 lenses.

14 MR. CARLSON: Your Honor, we would move
15 admission of Defendant's Exhibit 26.

16 MR. CORGAN: It's cumulative as to his
17 testimony.

18 THE COURT: 26 allowed.

19 MR. CARLSON: Your witness.

20 -----

21

CROSS-EXAMINATION

22 BY MR. CORGAN:

23 Q Doctor, if I understand correctly, the last time you
24 saw Sandra Allen was in March of 1990, is that correct?

25 A That's correct.

1 Q And at that time you gave to her the lenses that
2 you've told us about?

3 A Yes.

4 Q And that would be minus 4.75 and minus 4.25?

5 A That's true.

6 Q Doctor, where did those lenses come from?

7 A They were ordered from a lab in Florida, a lab by the
8 name of Vistacon.

9 Q And did you have to order them that day or prior to
10 that time or how is it that you had those?

11 A The lenses that I fit Sandra with were lenses I had
12 in stock already.

13 Q What do you mean by that?

14 A Eye doctors who fit contact lenses, we fit -- if
15 we're able to, unless it's a very special prescription, we
16 fit out of an accumulation of stock lenses we have so that
17 we don't have to order the lenses and put the patient off
18 a day or two later, so that we can do it the same day if
19 possible. So most of us fit out of a lens stock.

20 Q What does your lens stock consist of as far as range?

21 A Range of powers usually I would stock from minus 0.25
22 power up to minus 8.00 power.

23 Q Minus 8. what?

24 A .00

25 Q Now, on these various ranges, how -- well, how do you

1 go from like one to another? Do you understand?

2 A Lenses were made in the steps of .025. They're
3 called quarter diopter steps.

4 Q So if we have a lens that's 4.75, that would be the
5 next step?

6 A The next step in the more minus direction would be
7 minus 5.00. In the less minus direction it would be minus
8 4.50.

9 Q Now, is there anything in between there as far as
10 what you can get in a lens?

11 A Not in the soft contact lenses.

12 Q Okay. So it's -- when you look at those steps I'm
13 going to go to .25 either up or down?

14 A Yes, sir.

15 Q Now, doctor, when you get these in stock lenses, how
16 do you know that they're a minus 4.75 or minus 8 or
17 whatever it is?

18 A With a soft contact lens you can read the power, but
19 it's difficult to read the power. So most often eye
20 doctors rely heavily on their lab to know that they're
21 sending us a lens that we get that's marked on the bottle.
22 Secondly, we slip the lens on the patient and refract them
23 through to make sure that it's -- the power is consistent
24 with what we want.

25 Q What do you mean refract or whatever you said?

1 A Refract means determine whether or not we have the
2 right prescription on the patient. Determine how they see
3 through it and put other lenses in front of them with the
4 contact lenses to see if we can make it poorer or better.

5 Q So when you have one of these in stock lenses, if I
6 were to go to your office there in Caney and pull out one
7 of these in stock lenses, what would I find? I mean,
8 physically describe to me what I would find when I went to
9 your stock?

10 A Well, the lens -- you would see hundreds of lenses in
11 bottles, little small bottles, and if you would look in
12 the bottles you'd see a contact lens in it. If you took
13 it out you could see a soft contact lens.

14 Q Now, in that particular bottle, how do I know that
15 that bottle contains a minus 4.75 versus minus 6?

16 A We rely pretty heavily and have confidence in the lab
17 that sends us the lenses that they're sending us what we
18 order, and then we double check this by putting it on the
19 patient's eye.

20 Q Is it marked somewhere on the bottle?

21 A Yes, sir. It's marked on the bottle label.

22 Q As far as the ability to see, what difference do we
23 find in steps, if that makes any sense?

24 A Optometrists try to make people see 20/20 if they
25 have a healthy eye and if everything is normal with their

1 eye, and if you have a lens prescription on the patient
2 that's not exactly right they may see poorer than 20/20.
3 If you're a step or two off the prescription most probably
4 the patient is not going to see nearly as clearly as you
5 would like for them to see.

6 Q Well, what would that -- let's say my prescription is
7 minus 4.75 and I end up with a 5.25 lens or a 4.5 lens,
8 can you tell me -- can you translate some sort of
9 difference in my ability to see with that?

10 A If you're talking about just a step or two off then
11 probably the patient would not hardly notice much at all.
12 It would be too close for them to tell. The doctor would
13 be able to tell it, but the patient -- it would probably
14 be difficult for them to tell it.

15 Q And as you refract that through or attempt to see how
16 the fit is, you rely then on the patient, what they tell
17 you?

18 A Yes.

19 Q Now, doctor, can you translate for me in terms of
20 correction to 20/20 vision what a -- range of minus 4.25
21 and minus 4.75 means?

22 A That type of a prescription, if the patient didn't
23 have any contacts or glasses on, would see about 20 over
24 400.

25 Q What does that mean?

1 A Well, it means -- we measure in terms of 20/20
2 vision. That's what the standard vision is used for a
3 person with a healthy eye. 20/20 means that -- 20/400
4 would mean that what a person could see clearly at 400
5 feet, a person with standard vision, the person with
6 20/400 vision would have to move up within 20 feet to see
7 it.

8 Q Okay. If I understand correctly then, doctor, if I
9 have 20/20 vision and this is a point at 20/20 I can be
10 400 feet away and see that point, but if I have 20/400 I
11 have to be 20 feet away from the same point, is that
12 right?

13 A Yeah, that's true.

14 Q In other words, if I have had the uncorrected vision
15 of 20/400, I have to be 380 feet close than a person with
16 20/20 vision?

17 A To see it clearly.

18 Q Now, doctor, what would a range of minus 4.5 to a
19 minus 5 -- where would that fit into this uncorrected
20 20/20 range? Are we still talking in the area of 20/400?

21 A Yes. Perhaps a little poorer than 20/400, but
22 approximately 20/400.

23 Q Now, doctor, in your experience, would you expect a
24 person with uncorrected vision of 20/400 to be able to
25 function say to drive a car, to work at their job without

1 having their correction in the way of either glasses or
2 contact lenses?

3 A With this type of correction you would pretty much
4 have the correction on as soon as you got out of bed and
5 went to bed. You'd want to wear it all the time.

6 Q Well, if I were in your place of business and I was
7 there for an eye examination and I had uncorrected vision
8 of 20/400, can you give me any example of what I could or
9 could not see in regard to your eye chart?

10 A The eye chart -- the big E on the eye chart is -- a
11 person that sat in my chair without any correction on can
12 barely see the big E with 20/400 vision.

13 Q And that's the type of vision we're talking about in
14 regard to Sandra Allen, is that correct?

15 A Yes, sir.

16 Q Now, doctor, have you had an opportunity to examine a
17 contact lens in regard to this particular case?

18 A Yes.

19 Q Okay. And can you tell us the facts and
20 circumstances surrounding that?

21 A An O.S.B.I. agent brought the lens to me to look at,
22 and I examined the lens with my assistant, who helps me
23 with contact lens examinations. We touched the lens and
24 looked at it. They brought it to us in an envelope. The
25 lens was dried and probably had been dried out for a

1 considerable amount of time. It was very brittle. We
2 soaked the lens in saline solution so that we could handle
3 it without breaking it and examined it.

4 Q Why was it important for you to soak it in the saline
5 solution?

6 A It's a soft contact lens. When it dries out for a
7 period of a few days, even a few hours probably, it gets
8 like a potato chip. It gets brittle and if you start
9 trying to look at it and examine it when it's brittle
10 you'd break it pretty quickly probably.

11 The lens was also saturated in what
12 appeared to be blood. It was dry and discolored.

13 Q Now, after you put it in the saline solution, what
14 did you do then?

15 A After it set and hydrated where we could handle it --

16 Q What do you mean by hydrated?

17 A Soaked up water. We took the lens and looked at it
18 in our hands and inspected it and put it under a lens
19 called a lensometer, which measures power, and tried to
20 get a power reading on the lens.

21 Q And were you able to do that?

22 A With soft contact lenses it's difficult to read the
23 power on them. We got what we thought was a fairly
24 reliable reading.

25 Q And what reading did you determine as a result of

1 your reading of the lensometer?

2 A I read the power of approximately 4.50.

3 Q Now, doctor, I believe you told us that the
4 particular lens you described was a Vistamarc.

5 A Vistamarc lens.

6 Q Are there any -- Does Vistamarc make any type of
7 marking on their lenses?

8 A No.

9 Q Is there any way to identify that as being a
10 Vistamarc lens?

11 A Not really.

12 Q Now, doctor, I believe you said you read the lens and
13 you found it to be minus 4.50. What other observations,
14 if any, did you make about the lens?

15 A Lynn and I both determined that the lens was not a
16 tinted lens; that it was a clear lens. We determined that
17 there were no markings on the lens. We determined that it
18 appeared to be a 14.0 diameter.

19 Q Okay. And why are those things important or relevant
20 as far as being clear, no markings and 14.0 diameter?

21 A Soft contact lenses, they come in different colors,
22 they come in different markings, different companies have
23 them marked in different ways. They come in different
24 diameters, they come in different powers.

25 Q The lens you prescribed for Sandra Allen, did it have

1 any color to it?

2 A I don't think it did.

3 Q And what about markings?

4 A No markings.

5 Q And what would have been the diameter of that?

6 A Diameter was not taken with an instrument. It was --
7 I inspected it and the diameter, I thought, was consistent
8 with the Vistamarc lens.

9 Q Now, doctor, based on your examination, did you form
10 an opinion as to whether the lens you examined was the
11 lens of Sandra Allen?

12 A I determined that the lens was consistent with the
13 type of lens I dispensed to Sandra Allen.

14 Q And what do you mean by that?

15 A I mean that I dispensed that lens to other patients
16 too, but it's the kind of lens that I think Sandra Allen
17 left my office with.

18 Q And what do you base that on?

19 A My looking at the fact that there were no markings
20 and power and the diameter and just from years of
21 experience of using that kind of a lens.

22 Q Is there something that's different about Vistamarc
23 versus other lenses?

24 A Vistamarc lens is a lathe cut lens. Some lenses are
25 molded and some soft lenses are spun cast. It's difficult

1 to tell them apart, very difficult, but usually a lathe
2 cut lens had a little different feel to it that I can't
3 describe. It's just a feel that you have.

4 Q Did you find anything in your examination to be
5 inconsistent with that being Sandra Allen's lens?

6 MR. CARLSON: Objection, asked and
7 answered.

8 THE COURT: You may answer.

9 A Repeat the question.

10 Q (By Mr. Corgan) Yes. Upon your examination of the
11 lens, did you find anything about the lens to indicate to
12 you that it was inconsistent with that lens being her
13 lens?

14 A The only thing that was perhaps inconsistent was the
15 fact that I didn't read the power exactly on minus 4.75 or
16 minus 4.25; however, with a soft contact lens they're very
17 difficult to read the power on. When you take it out of
18 solution it immediately begins to dry up, which most
19 probably would have an effect on the power. But since I
20 read it so closely it was my opinion that was consistent
21 with what I sent her home with.

22 MR. CORGAN: That's all. Thank you.

23 -----
24 REDIRECT EXAMINATION

25 BY MR. CARLSON:

1 Q Dr. Burch, when you have a problem with a contact
2 lens, it's a fact, is it not, that you -- what you do is
3 you will refer to a lab, isn't that correct?

4 A I'm not sure I understand the question, sir.

5 Q I'll try to make it clear. If you have a problem
6 with a contact lens most generally, if a patient comes in
7 and they say to you these don't fit me, you know, I can't
8 read with them, I can't see, I'm having some problems, you
9 will generally refer to a lab and send that lens to a lab
10 and ask them what's the matter with that particular lens,
11 do you not?

12 A Sometimes that could happen. Most often it doesn't
13 happen.

14 Q Well, let me ask you, you said that the variance in a
15 particular lens or tolerance you said was .25. Was that
16 what you said?

17 A I said that I read the lens minus 4.50.

18 Q I understand. But with regard to the tolerance in
19 the lens, in regard to the contact lens, you said the
20 tolerance, I think you said, went by increments of .25.

21 A Lenses are made in .25 increments.

22 Q Well, let me ask you, sir, you're familiar with the
23 Contact Lens Society of America, are you not?

24 A Yes.

25 Q And you're familiar with this particular journal, are

1 you not, sir?

2 A No, I'm not familiar with that journal.

3 Q If I were to represent to you that the power of this
4 particular -- a particular contact lens, the tolerance is
5 in the order of .125 rather than .25, would you agree with
6 me?

7 A I don't know that I can agree with you or not.

8 Q Okay. And what we mean by tolerance is we mean that
9 if you step from say five, the next particular step would
10 be 5.125 rather than 5.25. Do you see what I'm saying?

11 A Yes, sir. But I don't believe you can order a .125
12 lens. Not in a soft lens. That's what I'm saying.

13 Q But you wouldn't disagree with me that that is the
14 particular tolerance within contact lenses, would you,
15 sir?

16 A Yes, I would agree with that.

17 Q Okay. And those standards are set up by a particular
18 group called ANSI, are they not?

19 A Yes, that's true.

20 Q Which would be American National Standard Institute,
21 isn't that true?

22 A Yes, sir.

23 Q Now, with regard to Vistamarc, that is a large
24 company, is it not?

25 A Yes, sir.

1 Q And it's one of the largest contact manufacturers in
2 the world, is it not?

3 A It might be.

4 Q And many, many people order contact lenses from
5 Vistamarc, would they not?

6 A Yes.

7 Q In other words, optometrists or ophthalmologists all
8 over the country would order lenses from Vistamarc. Would
9 you agree with that?

10 A Yes.

11 Q So the fact that it may be consistent with a
12 Vistamarc lens -- there could be a lot of lenses
13 consistent with a Vistamarc lens, correct?

14 A Yes, sir.

15 Q And do you have any estimation? There's probably
16 thousands out there, aren't there?

17 A I suppose.

18 Q Now, you put this particular lens on Sandra Allen and
19 she looked through it and had no problems seeing?

20 A Yes, sir.

21 Q Sandra Allen never came back to you and complained at
22 all about her sight with those contact lenses, did she?

23 A She made a phone call about a month later and she was
24 having -- she was having some red irritated eyes. She
25 attributed it to allergies and I spoke with her about it

1 and suggested she either see me or see somebody close by
2 and she went to her medical doctor, I believe.

3 Q Okay. A lot of times that is just because maybe the
4 contact lens is irritating their eyes somewhat?

5 A Yes, sir. Or the patient could have allergies and
6 have problems.

7 Q All right. But she had no particular problems with
8 her sight, correct?

9 A I don't believe so.

10 Q All right. Now, wouldn't you agree with me, sir,
11 that if we had a contact lens that was somewhere between
12 minus 5.25 and minus 5.75, that would be an appreciable
13 difference from her lenses? Wouldn't you agree with that?

14 A In terms of power, yes.

15 Q All right. Now, with regard to particular lenses
16 that you prescribe, those were able to correct her vision
17 to where she was able to see 20/20?

18 A Yes, sir.

19 Q And that's what you indicated in your particular
20 letter?

21 A Yes.

22 Q Now, would you agree with me, sir, that you are not
23 an expert in the area of reading powers of soft contact
24 lenses?

25 A I would say that I'm not and I would say that I've

1 not met the man that is either.

2 Q I'm sorry?

3 A I'm saying that in our offices my expertise in
4 reading soft contact lenses is probably as good as any
5 other eye doctor out in the field and I know of -- do not
6 hold myself out as being an expert, no.

7 Q Would you agree with me, sir, that this last week,
8 Tuesday, you called Duffins Laboratory in Tulsa?

9 A I did.

10 Q And you called Duffins Laboratory in Tulsa and you
11 talked with a Cathy Oliver, isn't that correct?

12 A That's true.

13 Q All right. And you know Duffins Laboratory, don't
14 you?

15 A Yes.

16 Q You use them all the time, don't you?

17 A Yes, sir.

18 Q On a regular basis?

19 A Yes, sir.

20 Q And you asked Duffins Laboratory how you go about
21 reading a soft contact lens, isn't that correct?

22 A I asked them how they read soft contact lenses.

23 Q All right. And the reason that you did that is
24 because you value their opinion, do you not?

25 A I did that because they are a lab I use a lot and I

1 think they're a good lab, but I did it because I wanted to
2 make sure I read soft contact lenses like everyone else
3 reads them, the same technique.

4 Q All right. Well, that's one of our points though.
5 You would agree with me that when you have a problem or
6 when you're unsure about something you will refer to a
7 contact lens laboratory, correct?

8 A No, sir. That's not true.

9 Q You have never done that?

10 A I've done it, but not in the basis that I'm looking
11 for their opinion and I don't have one. I might talk with
12 them looking for their opinion on an equal basis trying to
13 figure something out.

14 Q Your testimony was, sir, that you thought this
15 particular lens was 4.50, is that correct?

16 A I thought it was in that power range, 4.50.

17 Q But would you agree with me, sir, that there's no way
18 that you can swear here today that the contact lens that
19 you looked at was the power of Sandra Allen? Would you
20 agree with that?

21 A Yes, sir.

22 MR. CARLSON: That's all we have.

23 -----

24

RE-CROSS-EXAMINATION

25

BY MR. CORGAN:

1 Q Doctor, can you swear today that the contact lens you
2 looked at was not the power of Sandra Allen?

3 A Yes, sir.

4 Q And why is that?

5 A The lens that I looked at I thought was consistent
6 with the type of lens and power and everything that I sent
7 her home with.

8 Q Now, doctor, in regard to this issue of the .125 and
9 tolerance, are we talking about there that that is the
10 range that the manufacturer wants to get to, the tolerance
11 they want to get to as they make a lens?

12 A That's true.

13 Q So if I understand correctly, if we're within that
14 tolerance then a 4.75 could actually be plus or minus
15 .125, which would be -- am I close? Is that right? Well,
16 my math is not good. I need to go over one. Okay. That
17 was my math. Let's start over there. 475 plus 125. 4875.
18 Now, do I understand then that in actuality when we're
19 talking about tolerance, a 4.75 lens could, in fact, be a
20 4.875 power?

21 A Yes.

22 Q Or it could be .125 less than 4.75?

23 A Yes, sir.

24 Q So when we're talking about tolerance, we're talking
25 about range on each side, is that correct?

1 A Yes.

2 Q Now, doctor, I believe you said that you don't
3 consider yourself to be an expert in reading soft
4 contacts. Why is that?

5 A I don't hold myself out to be an expert any more than
6 any other doctor out in the field at reading a soft
7 contact lens.

8 Q What is there about a soft contact that causes
9 difficulty in making that reading?

10 A When you pick up a soft contact lens or take it out
11 of a patient's eye it's hydrated to the maximum amount
12 that you can hydrate it. When you hold it up and take it
13 in to the air it immediately starts having a little bit of
14 a change because it starts losing its water content. The
15 technique to read a soft lens in most offices is to take a
16 hold of the lens with like a pair of plastic tweezers and
17 hold it under a lensometer and read it.

18 Q Now, I believe you said that you are acquainted with
19 the people that -- at Duffins.

20 A Yes, I am.

21 Q Do you know that -- if they have any particular
22 expertise in regard with certain type of lenses?

23 A Duffins Optical sales soft contact lenses that other
24 companies send to them. They're soft lenses from big
25 companies. They primarily are a hard lens maker, gas

1 permeable lens maker.

2 Q Now, is there a difference between the gas permeable
3 and the soft contact?

4 A Gas permeable has not got near the water content the
5 soft contact lens has.

6 Q And what, if any, affect does the water content on a
7 soft contact have in your ability to make a reading?

8 A The soft lenses just are more difficult to read
9 because they lose their -- they start losing their water
10 content as soon as you get them into the air. With a gas
11 permeable it pretty much retains its water and it's much
12 more easily read in the lensometer.

13 MR. CORGAN: I think that's all.

14 -----

15 REDIRECT EXAMINATION

16 BY MR. CARLSON:

17 Q If I were to represent to you the date that you read
18 this particular lens was approximately May 17th, 1991,
19 would you disagree with me?

20 A No, sir.

21 Q Okay. That's when it was brought to you, correct?

22 A Well, I'll have to see the letter that I wrote to
23 tell you that for sure. The letter that I had first in my
24 hand. Yes, sir. Let's see. I'm not sure of the date I
25 first read the lens.

1 Q Let me ask you -- maybe this document will help you.

2 A Yes, sir. May 17th, 1991 is when I read the lens.

3 MR. CARLSON: That's all we have, Your
4 Honor.

5 MR. CORGAN: Nothing further.

6 THE COURT: Thank you very much, doctor.

7 Next witness.

8 MR. CARLSON: Your Honor, we'd call Daniel
9 Dooley.

10 -----

11 DANIEL NORRIS DOOLEY

12 having been first duly sworn to tell the truth, the whole
13 truth, and nothing but the truth, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. CARLSON:

16 Q State your name for me please.

17 A Daniel Norris Dooley.

18 Q And would you tell me what your business, profession
19 or occupation is?

20 A I'm investigator for the Chief Medical Examiner's
21 Office.

22 Q And where do you work?

23 A Tulsa, Oklahoma.

24 Q And were you working there on June the 12th of 1990?

25 A Yes, sir.