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TRANSCRIPT—ROBERTA WALBURN

Interviewee: Roberta Walburn
Interviewer: Carson Backhus
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Carson Backhus: All right, this is Carson Backhus interviewing Roberta Walburn on February 20, 2023, for the Minnesota Historical Society Tobacco Control Oral History Project. We're meeting today at the Ciresi Conlin Law Firm in downtown Minneapolis. Roberta, thank you again so, so, so much for agreeing to speak with me today. I'm very, very excited about this.

Roberta Walburn: Well, thanks, Carson, for your interest.

CB: Of course. Could you just begin please by stating and spelling your full name?

RW: Roberta, R-O-B-E-R-T-A Walburn, W-A-L-B-U-R-N.

CB: Thank you. Thought we'd start off easy.

RW: Yes.

CB: All right. And then could you please tell me where and when you were born?

RW: Yeah, I was born in New York City in 1952.

CB: And then, could you tell me a little bit about your family growing up?

RW: Yeah. So, I was born in the city, but pretty much grew up in northeastern New Jersey, kind of a bedroom suburb of New York. I have two sisters, and my mother was a journalist turned high school English teacher, and my father was an accountant. [I also had a brother who was killed when he was 21.] No lawyers anywhere in my family. We moved to

Buffalo, New York when I was in high school, and I went to college at the University of Michigan in Ann Arbor. Went back to Buffalo for a couple years to work on the *Buffalo Evening News* after college, and then came to Minnesota in 1977 for a job on the then *Minneapolis Tribune*, as a reporter.

CB: Got you, okay. Was there anything that brought you to Minneapolis specifically, or was it just the job was available and you went?

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RW: Well, at that time, the *Minneapolis Tribune* had a phenomenal reputation. The reporter who sat next to me at the *Buffalo Evening News*, his dream job was the *Minneapolis Tribune*.

CB: Was it really?

RW: Yeah, he used to talk about it all the time. So that got me interested and I kind of followed it. Then I was doing a lot of running back then and the people I ran with thought that it was really cool to run in subzero weather, so they liked Minneapolis, too. Anyway, it seemed like a nice place, and they gave me a job.

CB: And then around what time did you kind of shift from reporting more into lawyer?

RW: So I worked for a couple years on the *Tribune*. I was stationed in St. Cloud for two years. I was the one person St. Cloud Bureau, covering everything from St. Cloud to Bemidji. So kind of a third of the state. St. Cloud was a lonely outpost, but the reporting was great. There were a bunch of stories that had legal connotations during that time. The Willmar 8 Bank Strike, which you're too young to remember, but it was eight women working at the bank in Willmar—

CB: Yes, that sounds very familiar now.

RW: —went on strike, because they kept promoting men over [them]. Then the other really big story when I was out there was they were building a high voltage power line across Minnesota. The farmers were protesting and running the surveyors off their land with their snowmobiles, and even tearing down some powerlines and stuff. Dozens and dozens of farmers were getting arrested, so there's a lot of legal proceedings. As a quick aside, that's where I met Paul Wellstone, because he was out there organizing, helping to organize the farmers.

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Anyway, I interacted with a lot of lawyers, some of whom were so understanding and explaining in layman's terms what was going on, and some of them were really snotty. And so, I thought, if I got a law degree, I would understand more, it would help my journalism. I didn't go to law school to become a lawyer. I went to enhance my journalism career. So after three years, working fulltime on the *Tribune*, I started law school at the University of Minnesota. So I was going to law school during the day and working as a part time police reporter nights and weekends.

CB: And then how soon was it after you finished your degree that you decided to leave reporting?

RW: So around my second year of law school, one of my reporter colleagues thought that I would hit it off with Judge Miles Lord, who was then the chief federal judge in Minnesota and quite a character, kind of a prairie populist. So the reporter and I and Miles went out to lunch, and the next thing I knew, Miles was offering me a clerkship for when I graduated, a one year clerkship. I still was going to stay in journalism, but I thought, I mean,

Miles was a living legend. I actually wrote a book about him.

CB: Really?

RW: Yeah, I can give you a copy before you leave. Yeah, he was something else. So I decided, I could always go back to journalism, but clerking for Miles Lord would be a once in a lifetime opportunity, which it was. And so, while I was clerking for Judge Lord, he took on the biggest case in the country, which was the Dalkon Shield IUD litigation, it was women who were injured by an IUD, the Dalkon Shield, some of them lost their fertility, some of them had these horrible infections, some of them died. It was a massive case, thousands of women suing.

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He took on those cases while I was clerking for him. One of the lead attorneys for the women was Mike Ciresi, so that's where my paths crossed with Mike. And just watching Mike and his team in action in the courtroom, when you clerk for a judge, you see a lot because it's like you condense 10 years of practice into one year, because you just see different lawyers and different cases every day, and you see different styles and what works and what doesn't. Mike and the lawyers working with him were the best lawyers I'd seen and I loved the enthusiasm and passion they brought to their case. They were the best lawyers I'd seen in the courtroom. I liked the fact that they were going toe-to-toe with a huge corporation, the manufacturer at the time was one of the largest corporations in the country. So when my clerkship was done, I went to work at, then, I guess the firm was called Robins, Zelle, Larson & Kaplan at the time, where Mike was.

CB: Did you ever regret not going back into journalism at all?

RW: I mean, I missed it. There's nothing like the newsroom, especially when you're

young. But, you know, I was so fortunate in my law career in both most of the kinds of cases that I got to do and the people I was working with. And, strangely enough, I think my writing developed better when I was a lawyer, because, yeah, you have more space to work with. You know, in a newspaper it's—

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And also, the thing that frustrated me as a reporter, and why I thought a law degree would help my journalism was as a reporter, you're just doing the same story. You have like, eight hours to do a story. And then the next day, it's another story. When you write your tenth snowstorm of the century story, it's repetitive. So I wanted to do more enterprise reporting, where I got more time and more space. But as a lawyer, you know, the cases that I worked on with tobacco being the prime example, I got to concentrate on one big case for years at a time, and then the writing that went with it.

Like my signature brief, as a lawyer, is writing this incredible facts section so that by the time you get to—so a brief is typically you start with a statement of facts, you write your facts, and then you do your legal argument. So a lot of lawyers rush through the statement of facts, because they think everything's in the legal argument. My view is, in most cases, by the time a judge is done reading the statement of facts, he or she should know what the outcome is. And so, I got to, you know, develop my writing with lots of space to write statements of fact.

CB: And I guess a similar question, maybe, but how did your career as a journalist then inform your career as a lawyer? What skills did you use that were the same?

RW: Yeah, so a lot of the skills were transferable. And I felt like, sometimes, it even gave me an unfair advantage because, for one thing, Mike and I shared this philosophy, was

facts drive cases. So not just writing your brief but facts and discovery which when we get to tobacco litigation, that's the ultimate. But so, really developing the facts and trying to find out what happened.

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In a lawsuit, you have more tools to use to get [facts]. As a reporter, if someone slams the door in your face, that's basically it. You can do a FOIA request. But that's got a lot of limitations. So, doing that, writing, obviously, and then just being able to work fast, because a lot of lawyers are kind of plodding, no offense to all the lawyers out there, but being able to work fast, and being able to get to the heart of what matters without getting lost in the forest.

CB: I'm sure you have so many stories from your time with Ciresi before the tobacco trial began, but what were a few of the highlights, maybe, of your time there?

RW: So I went to work at the law firm in January of '85. And within a couple of weeks, I was on a plane to India with Mike because we ended up representing the government of India in the Bhopal gas leak disaster litigation, which was the biggest industrial disaster in the history of the planet. And so, for the next, I guess, a year and a half, we were going back and forth to India, which was an incredible experience. But also, Mike and I bonded during that period, obviously. There were a couple other people traveling with us. But it was an intense way to get an introduction to a legal practice.

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CB: Fair enough. Fast forwarding a little bit, then, what made you decide to take on the lawsuit against the tobacco industry?

RW: So we started thinking about it in 1988, or '89, so five or so years before we actually filed suit. We had just wrapped up litigation involving another IUD, the Copper-7

IUD representing women. And so, in a case like that, the firm is representing more than 100 women. We had a couple trials that lasted three or four months with 100 more cases in potential trials left to go. So you're looking at the future and that's all you see, for years, out there. Then one day you wake up and the case is all settled, and that's how, you know, that kind of litigation tends to go. So, all of a sudden, we had time to think about what we wanted to do.

We started to think, what's the biggest challenge out there? And we started to think about tobacco. At that time, there had been 35 years or so of litigation against the industry, started in the early 1950s, and no plaintiff had ever won one penny. Then at the same time, in that period in the 1980s, there was a phenomenal attorney in New Jersey named Marc Edell, who was making some progress in the tobacco litigation representing individual smokers. He started to do, to our knowledge, the first substantive discovery of the tobacco industry documents.

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It was intriguing what he was finding. So we decided that we would do a study, or due diligence, and see if we wanted to do that case. We did it on and off for the next five years or so. So we're doing other things, other cases in the meantime. I left the firm for a year to work for Paul Wellstone. So it wasn't like we were doing it full time, but we did a lot of work before we decided to file.

CB: Why do you think you and Mike Ciresi were the only ones that wanted to, like you said, you wanted the biggest challenge out there, why wasn't anybody else asking that question and looking into the tobacco industry? Were there people doing that at the time, or was it just you?

RW: I think there were probably a few people around the country doing it, but not the way we were doing it. I think we just delved into it in more depth. Since I never had a dream of being a lawyer anyway, I didn't care if I wasn't following the traditional lawyer path. So just to go back a little bit when I started at the law firm, other associates in my experience level would belittle the work I was doing, because I wasn't doing the traditional take a deposition, argue a motion. But I'm like, "Oh, yeah, but I'm going to India every month." I didn't care because it didn't matter to me. If I didn't like it at the law firm, I was going to go back to journalism, so I didn't really care.

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So when the opportunity came to look into tobacco, again, I didn't care that I wasn't being the most productive lawyer during that period of time. I was doing a lot of work that we weren't getting paid for. Other people would worry about that, but I didn't really care. Then Mike, you know, always had this big vision and we were a good team.

CB: Can you describe, what was the actual work that you're doing now, when you were investigating tobacco at this period? What led to that?

RW: So, for starters, there was 35, 40 years of litigation history. I started gathering pleadings and materials from other cases around the country and reading as much as I could about the litigation, really immersing myself in it. And then talking to some of the lawyers, who had been involved, including going out to New Jersey a couple of times to meet with Marc Edell, and just talking to him about his experience, and getting more pleadings and information on the case to read.

It quickly became apparent that, up until this time, every case had been filed by an individual smoker, or their family, so a smoker who had gotten lung cancer, or died, and they

sued the tobacco industry, and it quickly became apparent that we would have to find a different model. Because what's the definition of insanity? Doing the same thing over and over expecting a different result. So as part of the research, I was seeing the extraordinary healthcare costs that smoking was causing.

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And so, we started to fix on looking at a different kind of plaintiff, being a state that paid a lot of healthcare costs or a healthcare provider. So that came pretty early. But then the challenge became, what are your causes of action? Because it's not a typical personal injury case. There had never really been a case that we were aware of that was framed like this. Now, they're more common, these healthcare recovery costs, but back then, they weren't. And so, we did a lot of research, looking at the laws in all 50 states to see what their statutes and laws were.

And, as it turned out, Minnesota had as good a legal framework as any state. So we started thinking about suing in Minnesota. And the facts and the legal theories that we started to gravitate to. The three big changes from how we were going to frame the case were going to be, one, who were the plaintiffs? The state and Blue Cross. Two, instead of focusing on the product, cigarettes, the cigarette kills when used as intended, but it's a legal product, we were going to focus on the conduct of the industry. That would be starting with the big lie at that time, they were still not admitting that smoking caused cancer, or any other disease, and was addictive. And then, the third thing that we focused on for making the case different was how are we going to prove their conduct? And that was through document discovery.

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So we knew the AG's office, under Skip, had some attorneys that were doing a lot of

work in tobacco control efforts, including Doug Blanke and Tom Pursell. And so, we started meeting with them and they were pretty excited. And then Blue Cross was sort of a happenstance. So, one day in this five year period, an in-house attorney of Blue Cross, Tom Gilde, G-I-L-D-E, it was a blind call to our office saying, so a lot of healthcare providers do subrogation cases. So, if there's like a big mass tort, the plaintiffs recover for their personal injuries, but then healthcare providers come in and recover their healthcare costs.

So Tom was interested just in talking to someone in our mass tort department about what big mass torts we might see on the horizon. And, you know, we were having a pretty good conversation, so I thought I'd test out tobacco. So I said, "Well, what about tobacco?" And instead of running for the doors, eyes lit up, and it turned out that, you know, Blue Cross, their CEO at the time was Andy Czajkowski, I don't know how to spell it.

CB: No worries.

RW: And a couple other people, Dick Niemiec, and their general counsel, Chap Milis, were. Anyway, they turned out to be a great group of people. That was the partnership that was formed.

CB: And then at what point do you start getting some pushback from all of this?

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RW: Well, at the law firm, it wasn't exactly the most popular idea. I think when I first made partner, Mike, at my first partner's meeting, I had me stand up and talk about prospective tobacco litigation, because people were going, "Hm?," you know? So, I mean, some people were excited, and some people just thought it was a fool's errand.

CB: Were they worried about their—

RW: Yeah, financial, because we're going to do it essentially on a contingency fee

basis. But Mike, I can't remember when he became chairman of the firm, but at some point, he became chairman of the firm, and he was on the executive board anyway, all through this period. He was just adamant that we were going to do this. I was insulated from a lot of the pushback. I just did my thing, so I tried to stay out of firm politics. And, you know, at the AG's office and Blue Cross, I mean, they were very enthusiastic.

CB: So can you remind me of the timeline here, with the settlement talk that was happening. Was that around the same time?

RW: That was a little later. So we filed in, I think, August of 1994 and the settlement talk was probably a couple of years down the road, after a bunch of other states started suing.

CB: Can you describe a little bit of Skip's participation in all of this?

RW: Yeah. So, I mean, you can't say enough about Skip Humphrey and his leadership role in this. First, to have the courage to take it on. He also shared our vision, which was, this case is not just about the money, it's about shining the light on the industry conduct, and that will come through the document discovery.

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I don't know what kind of pushback he got when we first filed. Other people like Doug [Blanke] could tell you more about that. But eventually, the majority of states filed kind of copycat lawsuits, but we felt that we were the only state that was treating this like an actual lawsuit, where you prepare for trial and you bring motions and you do document discovery, and other states were filing and then waiting for a settlement, right?

So when the settlement talk did start, almost every other state wanted to take the money and run. Skip Humphrey, who had been the attorney general for a long time at that point, and these were his buddies around the country, he stood almost alone in opposing the

settlement and the tobacco industry wouldn't settle unless they had everyone on board. I think there were only maybe two other attorney generals who stood by Skip. And so, he had, you know, displayed enormous courage and fortitude in standing up to his colleagues, essentially, with billions of dollars on the table and saying, "No, we're not going to settle until we get the documents, and the documents are public." It wasn't the money that was the holdup. One of the main purposes of the case was to uncover the truth.

CB: Why was there this flood of copycat cases, you said, from the other states?

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RW: Money.

CB: Did they see the work you were doing and were they inspired by that? Or was it they were going to—

RW: Most of the states, I have no idea. The states that were the most supportive of us were Connecticut, Wisconsin, and I think Maryland, to a certain degree. The state that was our main adversary was Mississippi. So their attorney general was Mike Moore. His lead outside counsel was Dickie Scruggs. And so, again, I was insulated from a lot of this, but I was at a couple of meetings when they flew in, I believe, Dickie Scruggs' private plane up, to St. Paul, to meet with Skip, and we went to a couple of those meetings where they were trying to convince us to settle.

They knew the document discovery we were doing and they thought we were wasting our time. They were kind of making fun of it. So we did three and a half years of document discovery. At the beginning, nobody knew what was going on at the beginning. It was really slow going, for ourselves as well. So it's kind of a leap of faith that we were going to hit the jackpot.

So the document discovery was a huge part of the work, but the other huge part of the work was framing our legal theories, which again, were a little bit creative, although they were founded in hard rock Minnesota law, but they were still being used in a different way. So there was a lot of briefing and work on the legal theories as well.

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And, yeah, so most of the other states were content just to adopt our legal theories. Then when we get into more of the documents, like when we were getting millions of pages of documents, not only were people not doing their own discovery, for the most part, in other states, but they weren't even willing to go through the documents. Going through 35 million pages of documents was a lot of work, but getting the documents was more work. Again, I think there were only maybe two states that sent a couple of attorneys every once in a while, to help us review them. And instead, what these other states did was, and I'll talk about this more in detail, but when we used to go to the document depository down on Hennepin and review the documents, it ended up being one to two percent of the documents to copy and bring back to our office for further analysis. That one to two percent became known as the Minnesota select set. So these other states, instead of doing their own discovery, would say, "We just want the Minnesota select set." And then they would get mad at us when we wouldn't settle.

CB: And then fast forward and maybe a little bit to the documents. Is there anything major that I've missed leading up to this, do you think?

RW: No, I think, yeah.

CB: Perfect. Okay. Can you talk about some of the key strategies that the tobacco industry used to avoid producing all these documents you were after?

RW: So in that five year due diligence period before we sued, I'd be reading these pleadings from other cases, and I'd see that other attorneys were serving document requests. That's how you start the effort to get documents, is you serve the other party with a list of categories of the documents.

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I would see that they were serving document requests, and there'd be some litigation and motions over documents, and then the trail would just end. And I was like, "Well, this is odd." It just turned out that their way of litigating is just to stall, and obstruct, and wear you out. If you're just representing a single plaintiff, a single injured person, you probably don't have the resources to fight that. So that was one way. Then, they just hit you with massive numbers of people and resources. So, in the Minnesota case, just in our state alone, there were more than 35 law firms representing the tobacco companies, most of them from out of state. We had one law firm.

Philip Morris, alone, said in court one day that they were spending \$1.2 million each week, just on the tobacco litigation. So we had like a core team of about 10 lawyers. So, yeah, you're outnumbered, and they're objecting to everything and then they play word games. So, we serve our first round of document requests, there's probably about 100 different categories, give us your documents on smoking causing cancer, give us your documents on addiction, give us your documents on document destruction.

So we had 100-some categories and we didn't get a single document back in response to that. Instead, we got a mound of paper of objections. Some of their objections are, we don't understand the words that you're using. So they didn't understand what the words smoking and health meant, they didn't understand what the words say for cigarettes meant, they didn't

understand what addictive meant, they didn't understand what document destruction policies are.

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So just like mountains of objections. Before you can bring a motion, in most courts, you have to go to a meeting and confer with the other side to see if you can work out your differences, right? We used to go to these meet and confers, and mostly at these meet and confers, it was mostly myself and Susan Richard Nelson, who's now a federal judge in St. Paul. We would go to these meet and confers for the plaintiffs, because her part of the case was producing the documents for the state and Blue Cross. They were serving their own document requests on us and defending that part of the case.

Susan and I would go to these meetings, and there'd be a couple dozen tobacco lawyers, maybe 30, all men. So, in four years of litigation, I don't remember ever seeing [more than] two women for the tobacco companies. It was just all men. We would go and we'd sit around these rooms, and they'd say, "Yeah, we don't know what you mean by this word or that word." So that's one way they did it. Then they claimed privilege on a lot of documents, even like scientific research, they would say, "It's attorney client privilege, we're not producing it," and privilege is really hard to break. And, in addition, certain types of documents and research were done, or shipped overseas, which legally should not make a difference, but practically, it did.

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So they had multiple strategies for just not producing things. At the first meet and confer I think what they said is, "We'll give you all the documents that have been produced in other litigation, would that satisfy you?" But, no.

CB: No, it would not. [laughs] And what were the practical reasons that shipping documents overseas wasn't helpful?

RW: Well, because it doesn't matter where a document is located. If it's a Philip Morris document, Philip Morris has control over it. But in conjunction with overseas, they would have different corporate subsidiaries that would make it doubly hard to figure out who has control over the documents.

CB: How did you end up breaking the privilege?

RW: So I'm going to take the long route to answering that.

CB: Please.

RW: But because, as I said, breaking privilege is really hard. The only case I've ever done it in all my years as a lawyer is the tobacco case, because lawyers write the rules, and they protect their own stuff. So, in breaking privilege, in a case like this, timing is everything. If we had moved too early, we didn't think we'd be successful. We knew we were going to go after the privilege documents, but we knew we wanted to build a foundation for getting there. So, at one of our first meetings with the tobacco companies, Mike was at that meet and confer and he said to the tobacco company lawyers, "You know, we're going to be coming after your privileged documents, guys, just so you know it. We're going to be coming after them," and the words used were "like bees to honey." So, just put them aside in a room because we're going to get to that later.

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But we built our strategy. So we knew from the start that document discovery was going to be one of the keys to the case. And so, in our team meetings early on, we would strategize. We knew the document requests would be key. Marc Edell, when we met with him

in New Jersey, told us it was really important to get a document depository for the documents because he didn't have one. And so, he would go to review the documents, and he got about a million pages of documents. He would go to the defense lawyers' offices to review the documents. They would bring in like four boxes and he'd review them, and then they'd take those away. He said he couldn't keep track. Or, they'd bring out new documents, is this the same? He said, "You need a depository with a third party to administer it so that there's some integrity to the collection." So we asked the court to establish a document depository. We ended up having two, one down Hennepin Avenue, which is just closing now, right, I think?

CB: Yes.

RW: And then one in Guilford, England, for the British American Tobacco documents. So we knew that. We knew we were just going to have to be persistent. We just started, the meet and confers, bringing motions to compel. We had standard monthly hearings in front of Judge Fitzpatrick, who was amazing, who did really unbelievable work on the case. And so, monthly hearings, and we could have brought 100 motions to fill every month, but we would try and narrow it down to the top, most important 10. So we just started chipping away a little bit. And then one of the big things we did was, have you heard about the 4A indexes?

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CB: Yes, I think so.

RW: Okay, so when we were just sitting around as a team strategizing how we're going to get these documents, we thought, "Okay, this industry's been in constant litigation since the early 1950s. They've hardly produced any documents. They got all these law firms around the country. What have they been doing?" Then around the time we were filing, a

former legal assistant for one of the companies, Merrell Williams? Yeah. He had been a legal assistant working at Brown & Williamson, reviewing documents, categorizing them and stuff. Then he stole a few thousand documents, put them under his shirt or whatever.

And so we knew that they were collecting the documents and doing something with them. We said, "Well, what would you do if you were the tobacco companies, and you had all these lawyers and unlimited amounts of money? Well, you would index the documents, right?" In one of the very first motions in front of Judge Fitzpatrick, we asked him to order them to produce their existing document indexes. In the case management order, which was one of the first orders in the case, he issued an order saying the tobacco companies have to produce their existing document indexes.

So I got the order. The lead counsel for the tobacco companies were the attorneys representing Philip Morris, because they were the biggest player in the industry, they were the lead counsel. So, their lead counsel at that time was out in California. So I called them up and said, "Yeah, we want your document indexes," and he said, "We don't have any." And I'm like, "That doesn't sound right."

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But I learned my lesson on another case, when I was a younger lawyer, you can't go to a court and say, "I think he's lying." You need proof. I can't just go to the court and say, "He says he doesn't have any, but I don't believe him." So, every week, I would call him up and say, "Where are your document indexes?" And he would say, "You're sounding like a broken record," he'd make fun of me, "We don't have any," blah, blah, blah. So, this went on for, I think, a couple of months. And then one day, we were at a small meet and confer, I forget what the reason was, it wasn't about this. Mike was there, and I was there. There were maybe

just 10 tobacco company lawyers, which was not even a quorum for them.

And so, I thought, well, you know, I'll use this opportunity to ask again. So, I asked, "Where are the document indexes?" And one of the lawyers said, "Well, we don't have any." But then one of the lawyers in the second row started to smirk. And to this day, Mike and I just think, "Why did he do this?" So, "Well, what's so funny?" And he said, "Well, we don't have indexes, we have databases." That goes back to what I was talking about earlier about playing word games, they don't understand what you're asking for. "Well, what's an index? We don't know what an index is." So now we had something to go back to the court with.

So the judge issued a second order saying, "Produce the databases." And now the industry said, "Well, we can't produce them because they're privileged and they're a work product." We brought another motion saying, "Well, produce them for the in-camera review, for the court to review." And now they said they were too voluminous to produce in camera. They go from they don't exist to they're so voluminous that we can't produce them in camera. In fact, RJ Reynolds, just one company, said it spent \$90 million on its indexes, nine-zero.

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So, now the judge is getting into it, because by the end, we had eight orders from the trial court, and then an appeal to the Minnesota Court of Appeals, and the Minnesota Supreme Court, and the US Supreme Court. It took 16 months before this was done. But now the judge is getting into it. And so he issued an order someplace in the middle of this odyssey that said, he divided it into two types of indexes, the 4A indexes were these indexes created by attorneys before our litigation, and the 4B indexes were every party had an index, the documents that were producing in this litigation. So that's how it got the name 4A indexes.

So, now the judge said, “Well, produce random samples of your indexes.” And he went through them. When I said that Judge Fitzpatrick did an amazing job, it wasn’t because he was ruling in our favor all the time. He worked really hard and he created a great record. And so, an example of that is, he went through these indexes, and some companies had multiple indexes, and they had different fields of information. So we didn’t want their subjective attorney comments, “This document really hurts us.” We just wanted the objective information, what’s the date of it, who’s the author, who’s the recipient, what’s the title? That kind of thing.

That’s all we wanted. And so he went through meticulous detail and said, “These are the fields and information.” We didn’t know what to ask for, because we didn’t have the indexes. He went through and said, “These are the objective fields and information that the plaintiffs can get.” And then they appealed that order. By the time we got the indexes, which was after 16 months of litigation, or probably about two years into the case, by this point, people were starting to pay attention to the Minnesota litigation.

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And in fact, when the document indexes were ordered produced to us, I think was Clinton the president? I think Clinton was president at the time. And he issued a statement on the documents saying, “This is the roadmap to the tobacco company documents.” And, I mean, it was an invaluable tool. But we were getting documents using other strategies as well, but with the indexes, we could run searches of—by this point in time, the 35 million pages of documents didn’t come in all at once, it was a rolling production. In fact, it continued all the way through trial.

We had a team of about six core document reviewers, who would go to the depository

every day. They were all partners except for one associate, which is not a normal law firm strategy. Usually, they have younger lawyers. But so, our team was kind of the renegades of the law firm that, not everybody, but didn't necessarily fit in with the rest of the law firm. And so, for us, in this case, reviewing documents was the highest calling. So the team would go there, flag the documents. I would read all the documents that they brought back so I had a sense of the whole.

Every Friday afternoon, we had a team document meeting to talk about what we were finding in the depository, to kind of try and keep on the same page, because you can get lost in all this paper. We had to keep our focus on, we're going to go to trial with this case, we need to figure out what documents are going to support our claims.

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And so, we would talk about it, and then we would have a document of the week contest, where each attorney would put in their entry, a dollar per entry, and argue why their document was the best document found that week. Then we would take the pool money and go out and get beers afterwards. But it was the best way to keep everyone on the same page, because when you're arguing, people get really passionate about their document being the best, and we would argue about why it was great, and why another document was better.

By this point, we're getting the indexes, we're starting to learn about who the key players were at the companies, and what key dates were, and key terms. And then you send out more document requests. If you find a key scientist, you'd send out a document request saying, "We want all their files," it's just kind of like peeling back the layers of an onion.

And the documents weren't produced in any kind of order, they were just thrown into boxes, just a mishmash of stuff. Attachments weren't attached to the documents. There was a

lot of junk in there, like tobacco beetle documents, like the insect. I mean, it's just a mess. But little by little, you start to figure out what's going on. Then you get the document indexes, so you can now search yourself like, okay, what did this scientist write? Who was copied on this? What happened around this date? And then find out the terms they were using.

So we weren't getting a lot of documents about targeting kids in marketing. And then when we got the document indexes, we found out that they didn't call them kids who were underage, they called them young adults. So now we could ask for documents about young adults. It's just this constant learning and chipping away at the defenses, and building the case.

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And so, during this time, we had a protective order, so we couldn't release our documents to the public. The exception was, if you attached the document to a motion, it became public. And so when we were bringing our motions to compel, we had to tell the judge why we think this person is so important, because well, because this document. So a couple of reporters in the Twin Cities, and then there was a great reporter in Los Angeles, who was following this case closely. They would just start getting our motions and our documents and start to write about it. So people around the country were gradually coming to understand what was going on in Minnesota.

And so, eventually, I think, when did we start moving on privilege? Probably at least two and a half or three years into the litigation we started to move on privilege. We were going to use the documents that we had to break privilege. We had two bases for breaking privilege. One was that the documents weren't privileged in the first instance. So they were doing scientific research, but they would have an attorney copied on it, and then claim it was

privileged. Well, just copying an attorney on a scientific study doesn't make it privileged. But they wanted to keep it secret because their big lie was, so going back to the 1950s, the reason litigation started in the 1950s was that was the time when the first hard scientific evidence on smoking causes lung cancer became public.

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It was a combination of epidemiological studies and mouse back painting studies, where they took the cigarette tar condensate from cigarettes and painted it on the shaved backs of mice, and tumors grew. So it caused a nationwide sensation and scare. And if you read the documents from the early 1950s, the industry thought they were done. I mean, this was an existential threat to the industry. The heads of the major tobacco companies gathered, I think, in the Plaza Hotel in New York City in 1954 to talk about how they were going to meet this threat. And that's when, in our theory of the case, the conspiracy and the big lie began.

Instead of admitting cigarettes cause cancer, they banded together, told the public they were going to research and get to the bottom of this, but instead, either didn't undertake the research or undertook the research and hid it under claims of privilege, or sending it abroad, or doing the research abroad, and then telling the public, reassuringly, it's not proven that smoking causes any disease. So, that was the big lie. That was the big conspiracy.

CB: That's the Firm statement, then?

RW: The Frank Statement?

CB: Frank Statement, yeah.

RW: Yeah, which I have here. So, yeah, that was the Frank Statement. That was the kickoff of our conspiracy, big lie theory. When we're moving on privilege, we were seeing

evidence that the lawyers were controlling the scientific research, and so that if they had research that was harmful to the industry, it wouldn't be disclosed.

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So, first basis for breaking privilege was it's not privileged material, it's science. And then the second basis is, there's a crime fraud exception to the privilege.

CB: Remind me what crime fraud means?

RW: Yeah, so crime fraud means even if a document is privileged, it loses its privilege if the attorney is counseling the client on an ongoing or future crime or fraud. So if a client comes to you and said, "I killed this guy yesterday," tells the attorney, that's privileged communication, because it happened in the past. But if the client says, "I'm going to kill this guy tomorrow," that's—you know. So that's the crime fraud exception. In fact, it's been in the news in the last couple of weeks with some investigations into Trump, if you pay attention to that.

So anyway, those were the two bases, we moved on privilege. We had a lot of documents that we had already gotten that were not privileged that would support that. We went through multiple, multiple hearings on privilege, and Judge Fitzpatrick appointed a special master, a private attorney from St. Paul, Mark Gehan, to oversee it, because it became so much work. We didn't get the full load of privileged documents until a couple months into trial, when the tobacco companies' appeal to the US Supreme Court was denied.

CB: I keep seeing the number 39,000 around. Was that the 39,000 pages that was released?

[00:54:01]

RW: Yeah.

CB: Okay. What was it like? How did you feel when you saw that that claim was going to be upheld? What was going through your minds' then?

RW: Well, it happens in a piecemeal way.

CB: Okay, so not one, huge euphoric moment.

RW: Yeah. By the time the last appeal was denied in the Supreme Court, we were in trial. I mean, we were prepared to go all the way through trial without those documents. Yeah. It was a big deal, but there was a lot going on.

CB: How's your throat feeling? Do you want to take a break at all?

RW: I'm okay. Do you want to take a break?

CB: I'm good.

RW: Okay.

CB: And were you being sequestered during all of this? You were staying at the St. Paul Hotel.

RW: During trial?

CB: Okay, it's not at this time.

RW: Yeah. So, pretrial, we weren't sequestered. But the tobacco team, we took over a corner of one of the floors, devoted one big office, we called it the Batcave. And that's where we did most of our document review.

CB: Then maybe heading into the trial a little bit, if that's okay. Can you just start with talking a little bit about the atmosphere in the courtroom? Because you were in the courtroom or parts of it, right?

RW: The whole thing.

CB: The whole thing, okay.

[00:55:52]

RW: Our trial team of lawyers, six lawyers, and a couple of paralegals moved into a floor of the St. Paul Hotel. The tobacco companies' lawyers had a different floor of the hotel. We stationed an off-duty St. Paul police officer at the elevators of our floors to control. We had the room swept for bugs randomly. We wouldn't even know when they were going to do it. So, Judge Fitzpatrick, he was a great judge but it was really frustrating for us for the first two or three years, because he was very cautious, and almost never spoke from the bench. So he was hard to read, very cautious, giving the tobacco companies every benefit of the doubt.

We'd come back from the monthly status hearings, at least I came back, very frustrated, because I thought it was really obvious that they were stalling. When you have a thousand legal professionals and they say they can only produce 10 boxes a month, that doesn't make sense to me. He never really said much, but sort of like how we were building our case, step by step, he was getting it.

One of the reasons I like working on cases like tobacco, where you're doing one case for months or years at a time in front of a single judge, is that too many times, judges cut the baby in the middle. So if the other side is making outrageous arguments, but you're playing it straight, you're losing because the judge is going to cut in the middle over it, and the middle is not the middle, the middle is—

CB: Got you.

[00:58:00]

RW: And I don't like making arguments that aren't real. So it can be frustrating at the beginning of a case because you're not getting what you want. But over time, judges learn who's being straight with him and who's not. And so, by the time he got to trial, the judge

was pretty much onto their gamesmanship. One of the things he did was he ran a really strict courtroom. So you needed a badge to get into the courtroom and sit there. If anybody was talking, or like Mary Hurt, Richard Hurt, our expert from the Mayo Clinic, his wife was chewing gum one day in court, and he kicked her out, I think. So, the courtroom, it was businesslike. It was a strict courtroom, which was great.

Each side had a war room in the courthouse. The tobacco companies, but not us, had a live feed of the trials so they could sit in their war room and watch, and their lawyer would sit down in the war room, watching. Like, you're not in the courtroom?

CB: Bizarre. Maybe, specifically, can you talk a little bit about Richard Hurt and his testimony? Because you used him to kind of get some of those documents out to the public, correct?

RW: Yeah. Well, so Richard Hurt was an addiction specialist from the Mayo Clinic. So, early on, within a couple of months of us filing our case, when we were looking, we wanted to get the best experts in the country. And it turned out one was in our backyard.

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So we met with Richard. The Mayo Clinic was not used to having its doctors be experts in any kind of case. They weren't thrilled with this. Richard had never been an expert before, which, there's pluses and minuses to having experts who've never testified before. If they've testified too much, they look like they're just professional witnesses, but it's pretty scary having somebody who's never testified before in a case like this. Richard was really passionately against what the tobacco industry was doing.

So, he signed on, and almost every month we went down to Mayo to meet with him, and he would teach us the science of addiction. We would bring him documents from the

depository that dealt with how the tobacco companies view addiction, including—and this was one of the revelations of our documents—how they were manipulating the form of tobacco to optimize its addictive potential. So, before our case, you think of tobacco, it's an agricultural product, they harvest it, they dry it, they roll it up into cigarettes.

There was a news story or two right around the time we were filing, making allegations that the tobacco companies were manipulating the amount of nicotine in the cigarettes, which the companies were denying. But it turned out from our documents, what they were doing was manipulating the form and the pH of the nicotine to make it have a more immediate impact, which enhances its addictive potential.

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So we were bringing these documents to Richard and he was like, nobody even knows about this. His mind has been blown by these documents. He turned out to be just an amazing witness and we used him as our lead witness on trial, our first one. You should really interview him.

CB: Yes, he's definitely on my list. What were some of the other major takeaways from the documents that floored you, similarly to nicotine?

RW: Well, so on the theme of the big lie, if you had to say like, we're the top 10 documents from the case, so one of them was certainly called the 1958 Trip Report. So, in 1958, three scientists from British American Tobacco came to the United States to find out what the industry knew about the dangers of smoking and they visited many of the US tobacco companies. They went around the country, interviewed their scientists, and they went back and they wrote a report, which stayed hidden in their files until we discovered it decades later. And so, what they said in that report was that essentially, the industry knows that

smoking causes lung cancer. The reason it was such a great document, and obviously won document of the week, whenever that was discovered was, so, it's old, it pushes the big lie all the way back into the 1950s.

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They know it causes lung cancer, but they're still denying it 40 years later. And the other thing that made it a great document was it linked all of the, or most of the tobacco companies together, so it wasn't just one company. It was an early, early indication of the industry wide conspiracy. There were a bunch of documents like that over the years, where internally they're admitting causation.

And then, similarly, there were documents about addiction, not going back that far, but about the addictive potential, and marketing to underage kids—

CB: Young adults.

RW: —young adults, yeah, and manipulating the form of the nicotine. I think those are some of the big categories.

CB: Okay. Anything else about the trial we should talk about, really? I know there was obviously so much to it. Are there any other stories you have you'd like to share specifically about the trial?

RW: Yeah, the trial's kind of a big blur.

CB: Yeah, fair enough. [laughs] What was it like? Because you were asking the questions to, oh my gosh, what was her name, the U of M scientist, right? Perry?

[01:06:01]

RW: Yeah, Cheryl Perry.

CB: Yeah. So, what was that like, to be the one actually physically asking the

questions in that courtroom with that pressure?

RW: It's kind of anti-climactic. I actually think that cases are won or lost in the trenches before you get into the courtroom.

CB: Interesting. Okay. And did you know then that this case—I mean, it wasn't won, I guess, because they settled, but did you have the idea of going into the trial then that you were going to be successful, however you would define success?

RW: Yeah, so, I mean, different attorneys think about that differently. Mike is like a, what do you call it when you just envision it? Like manifest it. That's what he does. I just go day to day like, what do I have to do today? So I don't think about the long term so much.

CB: And then how did you feel about the outcome of the trial when it finally happened?

RW: Yeah, again, it was like, we didn't know it was going to settle. It was the last day. I think it was a Friday. Thursday, the tobacco companies did their closing arguments. Friday morning, Mike was going to give his closing arguments, and then it was going to go to the jury. We knew there were settlement discussions going on. But we were focused on trial.
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We walked down from the St. Paul Hotel to the courtroom that morning thinking we were going to do closing arguments. Then when we got to our war room, we got a call that the case was settled. So, again, you go from being in the war zone to being done. So, I mean, at that point, it's hard to absorb it all.

CB: Do you wish that it had gone to the jury?

RW: Not really, because it would be hard to imagine getting a better result. You might still be appealing it today. It's nice to have a clean ending where you get pretty much what

you were after.

CB: And then, I'm curious as well about the impact that the lawsuit had on you, personally. I'm curious about, how were you doing? Were you okay?

RW: I was tired. It probably took a couple years to recover. I went and did a fellowship with the World Health Organization in Geneva, Switzerland, so that was part of my recovery period. And this goes also to the impact of our case. So it's a UN agency. They have treaty-making authority, but they'd never used it, and they were going to use it to do essentially a treaty. They called it the Framework Convention on Tobacco Control that would regulate tobacco worldwide.

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Because when the industry is looking at some countries that are less resourced than the United States, their tobacco control laws are not necessarily as stringent as ours, and ours aren't that great either but at least to establish a backdrop of tobacco regulation. So I went there and worked on their tobacco control for about a year, which was a nice way to decompress, because I was doing good work, but it wasn't litigation. Then I also spent a few months, I guess it was before I went to WHO, working with the Department of Justice lawyers in Washington, so commuting to Washington when they were in the stage of getting their RICO case ready for filing.

CB: All right, then, yeah, switching over to impacts then, maybe. Overall, what did the settlement signify for the tobacco control movement?

RW: I think the documents had the biggest impact, which was our hope all along, to just shine a light on the industry's conduct. I think, around the world, when I was with WHO, public health officials and attorneys from countries all around the world were looking at these

documents, and I think it was helping inform their thoughts on tobacco control. All the peer review literature that Monique [Muggli] and Richard Hurt worked on. I don't know how many peer reviewed articles there are in the literature, but just shining a light on industry conduct is a helpful thing.

[01:12:23]

CB: Absolutely. Do you think the tobacco industry actually changed after the settlement?

RW: Yeah, it changed, but not enough. They did admit causation and addiction. Part of the settlement, a big part of the settlement was all the documents became public. So it was hard for them to keep denying that. That was one of the biggest changes.

CB: What are some of the ways that they were able to kind of get out of changing more drastically?

RW: I'm probably not the best person to ask, just because I haven't paid as much attention to it. But, like Doug Banke, I'm sure would like to talk about that. But they're an industry with a thousand lives.

CB: Interesting. And then, some of the settlement money, too, what do you think of the way that it's been spent?

RW: It's obviously disappointing that it wasn't used for the purposes for which it was being. We were told that you couldn't dedicate the money in the settlement, that it had to go into the general coffers and then it's up to the legislature. After, what, the first couple of years, they just took the dedicated money and used it for whatever. And the money's still coming in.

[01:14:06]

CB: We talked about making sure that the documents are accessible to the public.

What do you make of the depository closing now?

RW: At this point in time, I think it's fine. I think all the documents are online anyway. I still like handling paper, so I would rather be in a depository than looking at things online. But after 25 years, I think it's okay. It's kind of surprising and rewarding that it lasted this long, which was due to the DOJ litigation.

CB: My list of questions is almost done, my last one being, where would you place the trial in your life?

RW: Yeah, I mean, it's obviously a singular event. Sometimes it feels like it was yesterday and sometimes it feels like it was another lifetime. It just kind of floats out there in its own world.

CB: Did you ever do anything past the trial that got close to that same—I mean, you've done so much, obviously.

RW: Yeah, but I mean, I knew during the case, during the four years, that there was never going to be anything like it. It was just obvious that this was a once in a lifetime opportunity and to make the most of it and enjoy it, it just felt like this was exactly what I'm supposed to be doing that period of time.

[01:16:04]

And nothing like that. It's just like so many things aligned to make it the perfect time, the perfect opportunity, the perfect people on the team to be doing it with.

CB: Have I missed anything? I feel like there must be a hole somewhere that I'm forgetting about.

RW: Not really. No, I think your questions were really good. Just one thing that I

would like to talk about that's posttrial, but as a result of the trial, is the foundation that was set up with some of the attorneys' fees from the case. So now it's called the Ciresi Walburn Foundation. But originally, it was the Robins Kaplan Miller & Ciresi Foundation. And so, the Robins law firm took \$30 million and endowed this foundation.

It's a separate legal entity, it's an independent legal entity. We have our own board of directors right now. Only three of the eight or nine people are attorneys, the rest are community people. We've had a focus on making the lives of children and youth in Minnesota better, stemming from one of the focuses of the tobacco case being on marketing to kids. We've kind of refined our grant giving over the years, but for at least the last 10 years, we're focused on the education inequities in Minnesota. Part of that is trying to inform people that, contrary to what popular belief might be, Minnesota schools are among the worst in the nation for children of color.

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And then, the large part of our giving is helping kids from pre-K up through college, children of color, to have better access to better schools.

CB: That's very cool.

RW: Yeah. It is cool.

CB: And it's still active?

RW: Yeah. And that's how I spend a large chunk of my time now.

CB: Really? Okay. Can you give some of the examples of, I guess, how is the money being used?

RW: Well, so one of the things that we've done, this is a minor part of our money, but it has a big impact, we hope. So we've done billboards. We like to think that our philosophy

in the foundation is similar to the philosophy of tobacco litigation, which is to go big and bold, you know? And since we're an endowed foundation, we don't have to raise money so we don't have to worry about what people think.

So, our first billboards were just these big billboards that said, "Minnesota Schools—Worst In The Nation For Our Children Of Color". And then we've done a few other billboards, so one of our big focuses on our grants, which I'll talk about in a minute, is the science of reading and that we're not teaching kids how to read the right way.

[01:20:00]

One of our last billboards was, "Minnesota White Kids Can't Read Either," or half, or whatever. It's on our website, if you Google the Ciresi Walburn Foundation. So, anyway, people went crazy over that. That's one thing is like trying to call attention to the fact that this state is not what people think it is for education inequities. But then, the bulk of our grant giving, for pre-K, because the science is well established that that's one of the most effective ways to spend money, is quality pre-K education. So we support some pre-K schools, give scholarships to kids going to pre-K, and have supported some think tanks have been advocating for more pre-K.

For K through 12, we support schools that do a better job of educating Brown and Black children than the public schools—well, than Minneapolis public schools. So it might be charter schools, which are public schools. We support high performing charter schools, and some private schools, that are predominantly Black and Brown children. Then our most recent endeavor is a college scholarship program for African American men, which is now at St. Thomas.

CB: Very cool. What were some of the grants that you were just referring to?

[01:22:00]

RW: Yeah, most of the grants are to the schools or organizations. Some of them are to the individual scholars for the St. Thomas students. One of our big recent grants is, I mentioned the literacy issue and the science of reading, to the Robbinsdale School Districts, so we're giving them a big three-year grant to use the most rigorous, up to date research on how to teach kids to read in grades one through three in Robbinsdale.

CB: And did the tobacco trial form this work then? Like it's streamlined directly from that.

RW: Yeah, both the money, obviously, but also trying to make lives better for Minnesota kids.

CB: I think that's all my questions. Anything else before we sign off?

RW: I don't think so. You did a good job, so thanks.

CB: Cool. No, you did a good job. Awesome. I will stop this, then.

[End of interview]