

1 took to get the clock fixed. I don't hold out great
2 hope.

3 Mr. Kelly, you may give the closing portion of
4 the plaintiffs' closing argument.

5 MR. KELLY: Thank you, Your Honor.

6 Good afternoon. I appreciate that you have
7 been here every day and every minute that I have been
8 here, that you have been here on time and that you have
9 been patient and that you have listened all day and in
10 each one of your heads, you're saying one way or the
11 other, enough already. We get it. We don't need any
12 more speeches.

13 I actually understand that, but I've been doing
14 this for a long enough time that I know this. I have an
15 obligation to Mr. Kransky to make sure that when we
16 leave here that we have made clear all of the points
17 that have been muddied up. That we have made sure that
18 the evidence has been presented clearly and fairly so
19 that we can make sure that you have the evidence not to
20 make a decision on sympathy because I hope you have
21 observed we have not done that. We have not made the
22 sympathy play.

23 And, ladies and gentlemen, we have not tried to
24 make you angry. We have actually tried to find the
25 truth here, and we are so confident at the end of this

1 that you will find the truth. So indulge me, please. I
2 will not spend two hours. I will not spend an hour and
3 a half, I promise, because the judge will be down here
4 on me. But I need to make sure that those issues, at
5 least in my observation, have been uncleared, made
6 muddy, confused, get cleared up.

7 Counsel finished by saying DePuy is a good
8 company. DePuy is a self-critical company. Respect
9 that. Congratulate us. Pat us on the head. Send us on
10 our way. Don't punish us. We did good here. But over
11 the last six weeks, all of the evidence shows otherwise.
12 And a self-critical company is just that. Is honest and
13 complete and thorough and full and fair in its
14 self-criticism. When it looks at whether its product is
15 performing well or poorly, it looks at the product
16 first.

17 Throughout this whole trial, throughout the
18 whole period of time that this product was on the
19 market, it was all about blaming somebody else or
20 someone else. You know, there was kind of this obscure
21 attack, oh, the plaintiffs keep bringing up this
22 defective -- Exhibit 1024. Can we put this up for a
23 minute, please.

24 They said, "Oh, but you don't talk about the
25 paragraph up above." Would you pull up slide 6.

1 As though DePuy's acknowledgment after all of
2 these people have been implanted with a defective
3 product and/or hurt that this is an excuse, many factors
4 contribute to the overall revision rate. We don't know
5 what it is. Ladies and gentlemen, that is not an
6 excuse. That is a confession. That is an
7 acknowledgment that they never did the homework. They
8 never tested the product. They never figured it out,
9 and they made the clinical study, Mr. Kransky and other
10 patients like him. But more than that, just like this
11 trial -- in fact, would you turn off that slide for a
12 minute.

13 I think I'm the one with the most white hair
14 and certainly the most wrinkles and the most years on my
15 odometer. There are some things that are common in
16 extensive cases. It goes something like this. Attack
17 the plaintiff. Attack the plaintiffs' lawyers. Muddy
18 up the issues. Change the debate. Move the discussion.
19 And we saw it here. It started with the opening
20 statement, which attacked Mr. Kransky. Does Mr. Kransky
21 smoke? He did. Did he have operations? He did. Did
22 he deny anything? He did not. Did Mr. Kransky make
23 this and fail to test it and put it in himself and
24 ignore the complaints of other doctors? He did not.

25 Mr. Zellers said in his opening Mr. Kransky

1 didn't choose to be here. Mr. Kransky didn't choose to
2 be here. Mr. Kransky would have very much liked to have
3 a product that performed correctly and safely and gave
4 him restoration of motion, elimination of pain and last
5 until the day he died. Mr. Kransky is here because
6 unbeknownst to his doctor and unbeknownst to
7 Mr. Kransky, he received the ASR XL artificial hip. He
8 didn't do anything wrong.

9 It wasn't his fault when he fell off a roof
10 when he was 16 that he was going to get this hip. When
11 Jennifer testified and talked about his damages, she
12 said something that has just stuck with me since then.
13 "You know, my dad could deal with all of it because most
14 of it could be treated." But every night when he went
15 to bed, the hip still hurt, and when he went to
16 chemotherapy, the hip hurt. And when he got up in the
17 morning, the hip hurt. Yeah, he had an abdominal aortic
18 aneurysm. Yes, he had diabetes. Yes, he was exposed to
19 Agent Orange. But all of those things got managed and
20 treated, and this was with him all the time.

21 He didn't come in here and make things up. He
22 didn't say to you, "Oh, my life is still ruined." He
23 said at a time in his life when he was going to enjoy
24 the things that everyone works hard for and he was
25 dealing with other medical problems, this was the last

1 thing he needed. But what happened? He was attacked.
2 And then the attack moved to his doctors.

3 I sat here in the opening statement and counsel
4 said, "the Kransky lawyers," as though I was waiting for
5 the bailiff to arrest me. Let me tell you something. I
6 am so proud to be a Kransky lawyer. I am so proud to
7 have this job and this career and be here and help with
8 finding the truth and making sure that people who do
9 wrong get punished. I am happy. I am glad. I am
10 honored that I'm a Kransky lawyer. So what I want to
11 clear up are the things that are all about what the case
12 is not. I want to go back to that slide because that
13 slide and the explanation that counsel wants you to
14 focus on, I embrace it. Do you know why? Because it's
15 more of the same.

16 They took the product off the market. They
17 decided it was defective. They came here and brought
18 people to say it's not defective. One of the very nice
19 things about our system of justice is that 12 people who
20 have never met each other before are now all together,
21 and everybody has different experience and everybody has
22 different jobs and everybody has a different view of the
23 world. And everybody has common sense. And this is the
24 place where we ask you not to leave it at home. We ask
25 you to use it as a filter to filter out that which is

1 bunk and not believable, that which is contrived and
2 made up, and please do.

3 And what is the excuse? The self-critical
4 company on which you should applaud and congratulate
5 them, a device which injures at least 8,000 people so
6 far in the United States, different doctors, different
7 sex, different height, different weight, different
8 hospitals, different X-rays. The only thing those
9 people have in common is this. And so the reasonable
10 manufacturer, the company that's making devices that
11 goes in human beings has a responsibility to say, "You
12 don't have to be a scientist to figure this out. You
13 know, we've got a problem."

14 You don't have to wait until there's 8,000.
15 The suggestion here is, "Oh, we didn't know until we
16 took it off the market." Think of somebody who makes
17 toasters. They work fine for two years and then they
18 all explode. "We were pretty sure they weren't going to
19 explode. It's really not our fault." This is no
20 toaster. This is something that's going in God's finest
21 creation. This is something that's supposed to
22 eliminate pain, restore mobility, and survive and give
23 you back the mobility, the motion, the things you need
24 to get around.

25 Mr. Panish had said earlier and he's right,

1 there's very little we do that doesn't involve your hip.
2 Bending over to get your newspaper, going up the stairs,
3 sitting on your commode, getting the groceries out of
4 your trunk, getting in and out of bed, lying down,
5 standing up, walking, running, twisting, bending. It's
6 all happening right here every time. Every day. This
7 is not a complicated piece of machinery. This didn't
8 take, as they like to say, rocket science. It has two
9 pieces. One moves on the other. This one's not
10 supposed to move, and they're not supposed to wear on
11 the edge.

12 We are not asking someone to get us to Mars.
13 We are asking you to make sure that when they put this
14 in human beings, they don't end up hurt worse than when
15 they started. It doesn't seem like it's an unreasonable
16 request. And when the people started, remember this was
17 different. It was unique. I tried to make that point
18 yesterday. They had never made this before. There was
19 no track record. This isn't about whether polyethylene
20 had a track record. This is about the market which was
21 fully saturated. There were good and accepted and
22 long-lasting devices on the market. This entire thing
23 from start to finish was about money. It was about
24 money for DePuy. It was about money for the designing
25 doctors. It was about keeping it on the market to make

1 more money.

2 Can we look at slide 34. It was about the
3 price differential. It didn't work as well, but it made
4 a lot more money. It was about Mr. Berman and
5 Exhibit 527. Just the top line there, Mr. Stovall,
6 please, up to the word "120 percent."

7 In the U.S. the -- and you know all of this
8 needs to be seen in context and timing; right? Because
9 this is the day after Mr. Hunt proved with his -- now
10 he's accused of using a mathematical formula, which
11 everyone agrees was accurate, but it was some kind of a
12 sin to have done a mathematical formula to show that
13 this device doesn't work correctly. It's our leading
14 differentiator, and it's one of the key drivers of our
15 120 percent growth.

16 We have, I'm sure more often than you would
17 like, pointed out we can't find anything that says what
18 about the patients? It's all about the business. It's
19 all about the dollars. We have to keep selling this.
20 And you know --

21 Your Honor, could I go up to that easel?

22 It wasn't just DePuy. Dr. Schmalzried may well
23 be an excellent doctor, but he is a much better
24 capitalist. Having the doctors decide if it was safe or
25 not when they had a vested financial interest in the

1 product is two steps beyond a conflict of interest.
2 It's like having the rabbits carry the lettuce. It's
3 not getting there.

4 Their interest was in selling more. You want
5 the proof, the real proof of that? It's April of 2007.
6 It's Graz, Austria on a meeting that is supposed to be
7 about business. The ASR surgeons are getting together.
8 It's Exhibit 2997. Remember it's now been two years,
9 and they have heard the noise, the chirping. We
10 demonstrated in the evidence that as early as 2005
11 people are making noise. They're worried about metal
12 ions. It's not performing the way your other product
13 does. There's something wrong. Some doctors are
14 quitting.

15 Let me pause there for a minute and say
16 everyone in the case has the opportunity to bring
17 whatever witness they want. You can do it by subpoena.
18 You can do it by agreement. You can bring people or
19 not. This is a case about a defective medical product,
20 and we have heard a lot about how good this defective
21 medical product was. The only doctor who came here to
22 tell you it was a great product had never used it.
23 Where are all the happy users? Where are all the people
24 who put it in at the correct angle and had no
25 casualties? Let me come back here because, you know,

1 you can sit through with your common sense, "What were
2 they thinking about? This is before lawsuits. This is
3 before lawyers." This is before all of it.

4 What are they thinking about at their meetings?
5 They're thinking about how much money are we going to
6 make. These are the doctors. This entire exhibit I
7 went through with Dr. Schmalzried chronicles, if we go
8 to page 3, the doctors aren't looking at complaints.
9 They're looking at sales drivers.

10 Page 4. They're not concerned about the metal
11 ions. They're concerned about the numbers. What's the
12 margin? How many can we sell? In what countries can we
13 sell them? If we sell more, we make more. These are,
14 ladies and gentlemen, just so there's no confusion, we
15 go back to the cover. This is not marketing. This is
16 the doctors who are supposed to be concerned with
17 safety. Page 5, market opportunity. Page 9, brand
18 sales evolution. And on and on and on.

19 This is not about why are the patients doing
20 poorly? This is about how much can we make. I am not
21 going to play the game, this game of it's all lawyer
22 driven. Dr. Hansen's a bad person. You know, the
23 lawyers influenced the medical records. Mr. Johnson
24 influenced the medical records. I have no idea who
25 Mr. Johnson is. Mr. Johnson has nothing to do with

1 Exhibit 16.

2 Can you put that up.

3 Whatever Mr. Johnson may have done, this is not
4 Mr. Johnson. This is DePuy. When Dr. Hansen opened up
5 that hip and saw that, he described it in his records
6 and now he's criticized a year or two years later that
7 he didn't use the word "pseudotumor." Please, I invite
8 you, I beg you, look in the operative report. He
9 excised a large mass of synovial tissue at the top of
10 the cup. Dr. Swenson described it as gray.

11 Could you put that up?

12 Counsel didn't put that up. He put up the
13 first page. You know, my life is too short to go, like
14 they said in opening statement, on snippets. I'm not
15 coming here to fool anybody or hoodwink anybody. I
16 enjoy sleeping at night, and I enjoy feeling good about
17 what we do. That is not normal. Dr. Swenson called it
18 a pseudotumor. And the defense likes Dr. Swenson
19 because some things he says, they like. Some things he
20 says, they don't like. It's kind of like putting a
21 queen-sized sheet on a king-sized bed. They just can't
22 get it all on there at once. It just won't fit right.

23 They don't like the fact that Dr. Swenson, the
24 five examples he gave you, they were all put in between
25 40 and 45 degrees, and the business of the angles, the

1 business of the angles, Dr. Schmalzried comes in and
2 says, "Mine are between 25 and 61 and that's normal and
3 acceptable." Dr. Cuckler agreed, well, really, it would
4 be normal and expected and anticipated for the
5 manufacturer to know that this needs to go in at the
6 place where it would work best in the patient.
7 Everybody doesn't come in the same size. I did say
8 that. Because you don't put a mass-produced product on
9 the market and tell all the doctors that it's suitable
10 for everyone and then say, "Oh, you put it in wrong" and
11 blame the doctors, blame the patients, blame someone
12 else, especially when you, yourself, are making a
13 product which your company president has testified in
14 this case on videotape is suitable for 99 percent of the
15 patients.

16 You know the problem with that? The problem
17 isn't dislocation. The problem isn't wear or
18 osteolysis. The problem is that that product sells for
19 \$1,100 less a unit. You don't want to be selling those.
20 They work great, but there's no margin. You want to
21 sell these. And you want to sell them even if they
22 don't work until the noise gets so loud, so loud that we
23 don't have any choice. Was it voluntary? Yeah. Why?
24 Because they'd run out. They had decided in 2009. You
25 saw the testimony. We're not making anymore. At this

1 point, we're getting out. We're going to recall them.
2 And we're going to claim we're surprised. But you see,
3 they're not entitled to be surprised because it's their
4 job to carefully and closely follow the failure rates.

5 Counsel went to great lengths talking about,
6 "Well, you know, our complaint rates look good." Well,
7 the problem with that is that if your complaint system
8 doesn't work, it's not very appropriate or fair or
9 suitable to rely on it. What we know is that the
10 complaint system from the evidence in this case, it
11 didn't work. It did not work. We know that because in
12 the crush of all of the evidence -- can we look at slide
13 22, Exhibit 2954 -- we know that because as early as
14 September of 2009 and this is not the lawyers. This is
15 not the Kransky lawyers. This is the DePuy executive
16 management review team recognizing there's no mechanism
17 for tracking and trending specific product issues.

18 This results in difficult to know the number of
19 complaints that have occurred for a specific issue.
20 Decision that no corrective action is necessary is not
21 always backed by adequate rationale. It's difficult to
22 connect information about an existing issue with a new
23 complaint, e.g., CAPA, HHE, recall. They know the
24 system doesn't work. They're not collecting and
25 reporting the complaints, and they are relying on that

1 because they intuitively know from the noise that the
2 product isn't safe to keep selling it and to do their
3 paperwork HHEs and to keep selling it and to keep
4 selling it.

5 We've seen the slide that said, "Well, we only
6 knew about 16,000 -- excuse me, there were 16,000 sales,
7 and we had something like 16 failures." Dr. Baron, if
8 you remember Dr. Baron who's the epidemiologist.

9 If we could look at slide 42.

10 And let me also take a step back and say in my
11 experience, there's nothing very unique in this case.
12 There were three witnesses who had never been retained
13 experts in their entire lives who came here and
14 testified. Dr. Bobyn, who felt fundamentally a moral
15 obligation to get involved when he saw what had
16 happened. Dr. Baron, who had never been involved with
17 litigation, and Dr. Swenson, who never testified as a
18 retained expert in a case in his entire life.

19 We asked them is this the way to do the
20 analysis of complaint data, and Dr. Baron, who no one
21 questioned his credentials, "I would say it would be a
22 naive, crude, potentially misleading estimate of
23 something." But it certainly would not be the basis
24 upon which any reasonable person would rely in trying to
25 make a decision as to whether a product is performing

1 correctly. You would not, as everyone has acknowledged,
2 send the doctor with the financial interest to go talk
3 to the other doctors and say, "You're doing it wrong"
4 and then fail to report the complaints. You would not
5 ignore the fact that the sales reps are getting the
6 data, and, my God, you would not come in here and
7 suggest to you that doctors are doing revision surgeries
8 because of the recall, that there is some global
9 conspiracy that has sprung from the ground with DePuy
10 innocently as the aim of its actors.

11 I sat there looking at these charts. I don't
12 want to take too much time with it to give it credence,
13 but reason with me for 30 seconds. Before there was
14 ever a recall, they've already decided there are too
15 many revisions, and at the time of the recall for the
16 first time in history, they sent a letter to the doctors
17 and they said to the doctors, "Get the patients in here,
18 get them examined, check their blood levels." First
19 time it ever happened.

20 Within 180 days, the doctors got the patients,
21 got the blood levels, recognized what was happening,
22 started taking X-rays and you want to know why that
23 number is high because when you look at the other
24 evidence we put in the case, we know that failures are
25 happening in a window of two to three years and the

1 single biggest year for sales for the DePuy ASR XL --
2 can I see slide 10?

3 2007. Surprise, surprise. The ones in 2010
4 are hurting people right on schedule. And they're going
5 to keep hurting people.

6 Here's the story. Counsel told you it's a
7 difficult case to argue. It is a difficult case to
8 argue when you're on this side of it over here.

9 Let me look at slide 11 because I have to
10 address this. I actually felt like I spent too much
11 time questioning Dr. Ballon-Landa, and I felt like I was
12 boring you, but I thought it was important because I
13 thought much of what he said was completely unbelievable
14 that someone would get an infection that nobody knew
15 about three and a half years ago, that it would never
16 infect the parts of you that were supposed to be
17 infected you when you have a portacath, that it would be
18 invisible, that it would go to the hip that was probably
19 not supposed to be infected since the other one was
20 plastic and Staph epi likes plastic not metal, that
21 there would be negative cultures that an oncologist
22 would decide were contaminated, probably because
23 50 percent of all Staph epi cultures are contaminated
24 but that he would now have an infection.

25 I don't know Dr. Ballon-Landa. I never met him

1 before he came here. All I know is what you know that
2 on November 6 of 2012, he learned for the first time he
3 was going to work in this case. On November 5, 2012, he
4 had never heard of the ASR. Never. Hadn't heard a
5 word. He did a literature search. Those were his
6 articles. Every article he found said the milky fluid
7 and symptoms of the ASR mimic an infection.

8 Were Mr. Kransky's doctors concerned about
9 infection? For God's sake, I hope so. It is the single
10 biggest risk of any surgery. Did any of Mr. Kransky's
11 doctors diagnose an infection? Not even close. Who
12 diagnosed an infection? A doctor from San Diego a year
13 later who has never seen an ASR surgery, who had never
14 been at a hip surgery where an infected hip was removed,
15 who had only researched it and found papers that said it
16 mimicked infection. And what about -- may I see slide
17 -- the people who actually knew Mr. Kransky, and I'm
18 sorry if it was tedious for me to go through that list
19 with you. But this is where the common sense comes in.
20 Three years of people seeing Bill Kransky. Dr. Trotsky.
21 You got to look at him. By the way, we played
22 Dr. Trotsky's video not to suggest that there was a
23 systemic injury but for this purpose. This is not a man
24 who had his surgery because a lawyer wanted him to.
25 Dr. Trotsky thought he was dying. We're not suggesting

1 to you he was dying, but we are suggesting to you that
2 Dr. Trotsky's motivation was to help a patient. Now he
3 goes on the evil list. Everyone everywhere across state
4 lines is out to get DePuy.

5 Holy Rosary Hospital. He was there for three
6 months. Do you think anyone who takes his pulse, takes
7 his temperature, looks at him, charts his vitals, keeps
8 him for three months to get him ready for surgery, do
9 you think they'd miss the fact he's got an infection?
10 He's sick. He's frail. He's heading for the operating
11 room. Do you think any reasonable physician who cared
12 about his patients, who wanted to make sure his patients
13 survived would operate on a patient who was infected or
14 suggested that he was infected from his pre-op workup?
15 What are we thinking?

16 Dr. Hansen. Dr. Hansen -- and I would invite
17 you that testimony can be reread or replayed. I'm not
18 sure what the court does here. He didn't have a dog in
19 this fight. If you remember, he was the only doctor who
20 would operate on Mr. Kransky because the other doctors
21 knew it was an ASR and wouldn't touch him. And what did
22 he say? He said, "I'm kind of a patient advocate. I
23 might have included that language because I wanted to
24 make sure the surgery got paid for." Let me reiterate.
25 You criticize Dr. Hansen because he didn't put something

1 in his chart. First, you criticize him because he took
2 pictures. And I'm telling you, ladies and gentlemen,
3 and you know from your common sense, if we did not have
4 that picture, if we did not by the grace of God have
5 that picture, you would have heard there was nothing
6 there, that Hansen was somehow in with some group of
7 lawyers, that he was a bad doctor, that this never
8 happened, that Mr. Kransky had other problems.

9 The oncology people. I want to take a step
10 back and spend four minutes on this. This whole
11 business about the cultures is complete, total utter
12 bunk. Every patient who has chemotherapy has a lowering
13 of their immune system. All doctors are concerned about
14 it. Every doctor is concerned about it because, as I
15 tried to establish, those doctors, those people trying
16 to save people's lives, the last thing they want to do
17 is cure the cancer and have the patient die of pneumonia
18 or sepsis or something else. They are mindful and
19 watchful. And the portacath, is it a risk to get
20 infection? It is. Dr. Ballon-Landa agreed. 30 to
21 40 percent of the time the portacath gets infected. Not
22 a hip. The portacath. That's where the bacteria is.
23 It's plastic. Did that happen? No.

24 What is the next most likely thing to get
25 infected? A plastic hip. Remember I asked him. It's

1 actually most likely because a plastic hip given its
2 surface area and surface characteristics. That's right.
3 Until there was a lawsuit and somebody went back to
4 string it all together. No one, not the Mayo Clinic,
5 not Dr. LeBeau, not Powell Valley Hospital, not
6 Dr. Fiddler, not Miles City veterans hospital. Nobody.
7 Here is the list. Counsel asked you to consider the
8 evidence. Here's the evidence. Every doctor who saw
9 Bill Kransky who diagnoses his infection -- could I have
10 slide 18.

11 I think their testimony speaks volumes. I've
12 got about 4,000 pages of medical records. A 65-year old
13 man with a number of conditions and problems. And you
14 know what? Occasionally he has to take antibiotics.

15 Do you have that? I think the defense used
16 this slide. I want to talk about it for a second
17 because if we're going to talk about what's fair and
18 what's honest and what's not misleading, let's talk
19 about this.

20 Can we make that a little bit bigger?

21 For one thing, you don't have a systemic
22 infection, it goes away in a week. Nobody has said
23 that. It doesn't happen. But what have we got? In
24 January of '09, he has his kidney taken out; so they
25 give him antibiotics which is consistent with surgery.

1 This is not my chart. In December of '08, he undergoes,
2 you'll see in the records, something called cystoscopy
3 where they are trying to figure out if the kidney is
4 working correctly; so they actually place a catheter up
5 through the penis and the ureter. They give him the
6 classic antibiotic for that because they don't want a
7 urinary tract infection.

8 In November of '08, he's got an infection on
9 his left cheek. That's up here. This is not Staph epi.
10 In October, he's got another cystoscopy because they're
11 concerned. I'm actually going backwards. This is
12 before the nephrectomy. They're trying to figure out
13 why there's blood in his urine. You can just read these
14 with me. In February, when they put a portacath in,
15 it's a surgery, you give someone antibiotic. He's got a
16 cough in January. He's got Cipro which is after the
17 cystoscopy in April of '09. November of '09.
18 Post-cystoscopy. That's having to do with evaluating
19 the ureter and kidneys.

20 Now, this is the Staph epi is very unusual.
21 Very unusual. In July of 2010, the Staph epi is causing
22 sinusitis. Very odd. Should be written up in the
23 medical literature. In February of '11, he's got
24 bronchitis. In April of 2011, he has acute abdominal
25 aortic aneurysm.

1 I asked Dr. Ballon-Landa, "Dr. Ballon-Landa, if
2 one of your medical students told you that there was a
3 Gram stain that was positive, that that was proof of
4 infection, would you fail them?" "I would actually have
5 to talk to them." "Why is that?" "Because the Gram
6 stain doesn't confirm a bacteria. The Gram stain is an
7 indication to do a culture." And I said, "Isn't it
8 correct that there's a lot of discussion about actually
9 getting rid of Gram stains because of all the false
10 positives?" "Yes, there is." Then they did the
11 culture. The culture was negative. "I still believe
12 there's an infection."

13 This case, ladies and gentlemen, is about what
14 is more likely true than not true. It isn't about
15 reasonable doubt. It is not about a reasonable doubt.
16 It is about, as Mr. Panish illustrated, what is more
17 likely true when we filter through your common sense.
18 What makes more sense? You know what makes more sense.
19 That Mr. Kransky had a hip that was defective. It was
20 defective on the day it came on the market. Mr. Smith
21 told us it was never tested to be challenged. Would you
22 buy an automobile where they only drove it on flat level
23 ground? And then when you went off the road making a
24 left turn, expect the manufacturer to say, "Well, we
25 didn't know you were going to turn it." "Well, of

1 course." "These cars won't operate when you turn them.
2 It works excellent in the garage."

3 This, the safest place for this is in the box.
4 It's not in the person. You want to say this wasn't
5 defective? You told the doctors the truth? Where are
6 the people to come and say that? Where are the doctors
7 who did that? You want to say to them, "Oh, no, we're
8 not going to send a message to Mr. Ekdahl, who couldn't
9 be here, for what has happened to Mr. Kransky, for
10 putting this on the market in the first place without
11 testing it."

12 Apparently everyone knows that at high angles,
13 it sheds more metal. "We don't know what a safe level
14 of metal is. It doesn't matter to us. We're going to
15 wait and see. We're not going to test these to make
16 sure they're safe when we have another product on the
17 market" -- and let me take two minutes on that.

18 Counsel says, "Well, there wasn't a track
19 record for polyethylene." You know what?
20 Dr. Schmalzried told us that the polyethylene had been
21 on the market -- or actually Dr. Bobyn told us the
22 polyethylene had been on the market since 1998. It was
23 actually when he wrote his article in 2004, it was
24 really doing quite well.

25 Do we have the article? DePuy's own brochure.

1 This is 2000. You know the old polyethylene that was so
2 dangerous and would break, the old polyethylene that was
3 so bad for people, you remember Dr. Cuckler said, "Well,
4 I was reading this paper that you cited 88 percent at
5 30 years." 88 percent at 30 years of the old poly?
6 DePuy has a better product on the market that we saw
7 from our earlier graphs. Graphs that fail at the rate
8 of .5 percent a year, and it's been on the market since
9 1998? It only sells for about two-thirds of what this
10 sells for.

11 This is not the kind of behavior that any
12 civilized country can approve of. We live in a really
13 complicated world. Everybody is really busy. All of us
14 trust certain things. When we turn on the tap, we trust
15 that the water is clean. When we get in the car, we
16 trust the Department of Motor Vehicles has correctly
17 licensed everybody else. When we buy something in the
18 market, we assume that the people who grew it took the
19 appropriate care and the people who put it in the box
20 did a good job.

21 And God knows when we go and have something put
22 in our body, we trust that the people who are making the
23 money and who are profiting have done all the testing to
24 make these two decisions. We have looked at it in every
25 possible way, and we have determined it can't hurt you.

1 Or we have looked at it in every possible way, and we
2 have determined it might hurt you and here is exactly
3 how. So that people like Mr. Kransky can make an
4 informed and appropriate and fair choice, armed with all
5 the evidence provided by their doctor.

6 No one has testified that the doctors were told
7 about the complaints in Europe. No one has testified
8 that the doctors were ever told about James Anderson,
9 the really nice Scottish kid who actually designed the
10 fix and then was told, "No thanks, James. The dollars
11 don't work." Nobody was told about Dr. Beverland.
12 Nobody was told about Dr. Bom. Nobody was told only one
13 head size was tested and it wasn't this one at the
14 perfect angle and we decided they're all fine. Nobody
15 was told that in June of 2007 when we retested a
16 different size and found out the wear was 16 times what
17 is permissible that we decided we're going to change the
18 test so that 16 times the wear is acceptable.

19 Changing the test was an available option.
20 Changing what's acceptable wasn't the option. The
21 option was in the DHF. It must perform as well or
22 better than anything we have. It must wear the same or
23 less than anything we have. I really don't invite you
24 to go through 2600 pages of a DHF, but I am here to tell
25 you, you will find nothing that says, "If we think it's

1 doing as good as other things that look like it, it's
2 fine." That's not science. That's not safety. That's
3 not patient safety. That's finding a way to keep
4 selling them.

5 Counsel says there is no perfect hip. That's
6 true. That's why at ten years 2 percent failed. That's
7 why between .2 and .5 percent may fail. But, ladies and
8 gentlemen, this is not an imperfect hip. This is a
9 public health disaster. Somebody, and the somebody is
10 you, needs to say, "For what you have done to
11 Mr. Kransky, you need to pay the bill," and as
12 Mr. Panish said, when Mr. Ekdahl gets up and goes down
13 and gets his Indiana Star Tribune and opens it up, he
14 needs to know that you have spoken. You have spoken the
15 truth, not based on sympathy, and not based on being
16 mad. Based on taking the steps to protect you and the
17 other people in your community.

18 That's the only thing that's going to get their
19 attention because if you show up in that van or write
20 them the letter, he's not talking to you. And if you
21 send a message it's okay, everybody's getting patted on
22 the head. Good work. Good work. We announced it was
23 defective and you convinced them it wasn't and that we
24 should be congratulated. This is the place where it all
25 stops. This is the place. This is why this system

1 exists. This is why I go to work. This is why we come
2 here and resolve disputes this way because somebody
3 needs to tell them, "Don't make Bill Kransky come to
4 court. Build these things right. Don't let this happen
5 again. Put procedures and process in place that protect
6 the people of this country. That is your job. If
7 you're going to make them and make the money and profit,
8 okay. It's a free enterprise system, but with that
9 comes the responsibility to do it right, to do it safe,
10 to test it, and make sure that people are taken care of
11 and that the remedy is not coming for the lawsuit; so
12 they can be accused of being Mr. Kransky, the fake
13 claimant.

14 Because all he did was work his whole life and
15 have a host of other problems and have the real bad luck
16 to get this thing put in him. This isn't about anything
17 other than making an award to Bill Kransky. We talked
18 about people all over the place and other claimants.
19 This is about Bill Kransky. You need to make an award
20 that is full, fair, thorough and complete and that is
21 exclusively based on the evidence and that is based on
22 your common sense and what you have seen and what you
23 have heard. You need to make a punitive damage award
24 that is full, fair, thorough and complete, whether it's
25 2 percent or 4 percent, as Mr. Panish has suggested, or

1 some other number that you know not on the spur of the
2 moment, and I invite you to talk about this and to
3 reason about it and to decide, "What do we have to say
4 to them that they won't do it anymore." That's what
5 that's about. It's about sending the message that says,
6 "Do not ever do this again."

7 So I hit my time limit. And I'm going to stop.
8 And this is really what I hope. I hope that this has
9 been and will be a positive experience. I hope that you
10 make the right decision, and I actually hope at some
11 point that you're driving through Miles City and that
12 you're happy with your verdict and that you see
13 Mr. Kransky at Walgreens or somewhere else and that you
14 feel so good about what you have done that you would
15 want to walk up to him and say, "We were jurors on your
16 case. I am so happy about the verdict we reached."

17 We trust in your common judgment.

18 Thank you, Your Honor.

19 THE COURT: All right. I'm going to read the
20 jury instructions now. I'd like to avoid people coming
21 and going. Feel free to stay but please avoid wandering
22 in and out while the instructions are read.

23 Members of the jury, you have now heard all of
24 the evidence and the closing arguments of the attorneys.
25 It is my duty to instruct you on the law that applies to