

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air	)	File No. 15-MD-2666
Warming Devices Products	)	(JNE/FLN)
Liability Litigation	)	
	)	November 17, 2016
	)	Minneapolis, Minnesota
	)	Courtroom 12W
	)	10:00 a.m.
	)	
	)	

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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN D. NOEL  
UNITED STATES MAGISTRATE JUDGE

And THE HONORABLE WILLIAM H. LEARY III  
RAMSEY COUNTY JUDGE

**(STATUS CONFERENCE)**

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24 Proceedings recorded by mechanical stenography;  
 transcript produced by computer.

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

(10:15 a.m.)

1  
2  
3 THE COURT: Good morning. Please be seated. All  
4 right. We have all of your appearances. We have the joint  
5 agenda. I know that you will be back in court at 1:00 this  
6 afternoon. I have a thought about the December meeting.  
7 How do you -- should we have a conference in December or  
8 should we forget it? How about that for hitting you with  
9 something that you weren't -- Ms. Zimmerman? They're  
10 thinking, they're thinking.

11 MR. BLACKWELL: Go ahead, Genevieve.

12 MS. ZIMMERMAN: I think in light of the upcoming  
13 discovery cut-off, it may well be worth our time to continue  
14 and have a conference if the Court has it scheduled, and if  
15 that works for you.

16 MR. BLACKWELL: And my thought was perhaps we  
17 could wait and see a little bit whether we have an issue  
18 with respect to the items she brings.

19 THE COURT: All right. Perfect. Now, it's on the  
20 calendar, and I'm ready to go. I just didn't want to make  
21 you come in if there was a point.

22 All right. Well, let's just run through the  
23 agenda. Number one is the pretrial order with the amended  
24 scheduling order. Is there anything to discuss about that  
25 now?

1 MR. BLACKWELL: No, Your Honor.

2 MS. ZIMMERMAN: No, Your Honor.

3 THE COURT: I didn't think so. And then the  
4 plaintiff fact sheets. Ms. Zimmerman?

5 MS. ZIMMERMAN: Just briefly for the benefit of  
6 those folks that are on the telephone, we have now rolled  
7 out an electronic portal where the plaintiff's attorneys  
8 will be able to submit the information for the fact sheets  
9 online. Those passwords, I think, have been submitted,  
10 logins and passwords have been submitted or instructions to  
11 get those. And counsel on the phone I think should be  
12 advised that they will be due December 26th for any case  
13 that had been filed prior to September 27th, and then just  
14 follow the pretrial order for other deadlines going forward.

15 THE COURT: In view of the fact that you were  
16 primarily saying that for the benefit of the folks on the  
17 phone, could someone on the phone unmute and just confirm  
18 that you were able to hear that?

19 MS. THAYER: Wendy Thayer here. Yes, we heard  
20 that.

21 THE COURT: Okay, thanks very much.

22 MS. ZIMMERMAN: And if anyone has any questions,  
23 the Pritzker firm here in Minneapolis has been helping to  
24 handle the logins.

25 THE COURT: Excellent. You all got my order on

1 the bellwether?

2 MS. ZIMMERMAN: Yes, Your Honor.

3 MR. BLACKWELL: Yes, Your Honor. Could I?

4 THE COURT: My view was that someone had to make a  
5 decision, so I thought it might as well be me.

6 MR. BLACKWELL: Could I just raise just a small  
7 matter with respect to it?

8 THE COURT: Okay.

9 MR. BLACKWELL: And I'm glad to see Judge Leary  
10 here too. Good morning, Your Honor. This relates to  
11 coordination with respect to the Ramsey County cases that  
12 ought to be included. It might require a little  
13 coordination. The plaintiff's leadership committee in the  
14 Ramsey County State Court case is not the same as the  
15 leadership here, and so there may be a bit of coordination  
16 between them with respect to picking the bellwether.

17 And the second item relates to the plaintiff's  
18 fact sheets. Presently there's not an order in Ramsey  
19 County with respect to creating those. And that would be  
20 another coordination matter that perhaps Judge Leary could  
21 work with Your Honors with respect to that to coordinate  
22 between the two courts.

23 JUDGE LEARY: Can I ask, Ms. Zimmerman, are you  
24 part of that group?

25 MS. ZIMMERMAN: Yes, Your Honor, and I can

1 represent to all of the judges here that there is actually a  
2 resolution about leadership in Ramsey County, and I have  
3 been tasked as the liaison or lead counsel for Ramsey County  
4 cases. So we're happy to use the same fact sheet if that  
5 would facilitate things. I think that probably makes a lot  
6 of sense. There's no reason to do something different.  
7 There isn't an order yet in Ramsey County that those be  
8 submitted on the same time frame, but we can do that.

9 MR. BLACKWELL: Right, and my comment was more  
10 just major housekeeping that Ms. Zimmerman is the liasion as  
11 you say, but the rest of the group is not necessarily the  
12 same from the plaintiff's leadership group. I understand  
13 there were one or two other firms in Ramsey.

14 MS. ZIMMERMAN: Initially, there were a couple of  
15 other firms, and there was an interim group of lead counsel  
16 of four firms. At least one of those firms has dismissed  
17 the Ramsey County cases and refiled for the part of the MDL.  
18 And as I understand it, the other two firms are happy to  
19 follow the will of the Court.

20 JUDGE LEARY: I would request, Mr. Blackwell and  
21 Ms. Zimmerman, if you feel that there are orders that need  
22 issue out of Ramsey County, then speak with each other,  
23 submit a proposed order in that regard, and I'll take a look  
24 at it.

25 MR. BLACKWELL: Yes, we'll do that. We just

1 wanted to make sure it was consonant in Ramsey Court and  
2 Federal Court here, so.

3 THE COURT: Let me explain some of the reasoning  
4 behind the way my order separated out the MDLs from the  
5 Ramsey County cases for the initial random selection that I  
6 will do.

7 In order to -- well, we had discussed making the  
8 Ramsey County cases part of the bellwether pool, and  
9 statistically it wouldn't work. There just wouldn't be  
10 enough chance. If we have roughly 50 cases in Ramsey County  
11 and roughly a thousand cases here, if we just put them in  
12 that big pool, they wouldn't -- you wouldn't necessarily get  
13 what you want. You know, and you really want some  
14 bellwether cases possibly in Ramsey County, so that you can  
15 see how they go. So that's the only reason that they're  
16 separated out.

17 And with that as background, and with what Judge  
18 Leary has said, and the fact that, Ms. Zimmerman, you're in  
19 both of the leadership positions, it seems that any issues  
20 there should be able to be worked out on the housekeeping  
21 end of things.

22 MS. ZIMMERMAN: Absolutely.

23 THE COURT: Okay.

24 MR. BLACKWELL: Thank you, Your Honor.

25 THE COURT: Yes, thanks very much. And speaking

1 of numbers, that's the next item on our agenda. So 892?

2 MS. YOUNG: Your Honor, this was as of Friday.

3 THE COURT: Hold on, hold on. I skipped a page.  
4 It's because that was a Freudian skip. Judge Noel, do you  
5 want to take this one?

6 MAGISTRATE JUDGE NOEL: So this is the foreign  
7 discovery that is the followup to what happened in the UK.  
8 Who wants to, Ms. Ahmann?

9 MS. AHMANN: Yes. Thank you, Your Honors. As an  
10 update, we have reached an agreement with one of the authors  
11 McGovern who will appear voluntarily and a consent order has  
12 been entered, and his deposition has been confirmed with the  
13 date of December 9th, and plaintiffs have been advised of  
14 that.

15 As to the remaining study authors, there was a  
16 hearing in the High Court, and the Court did issue an order  
17 ordering those witnesses. There's four of them to appear,  
18 and we're working on dates with regard to those four. And I  
19 have been in communication with the plaintiff that there's  
20 tentative dates that I just found out this morning are still  
21 in limbo, but we're trying to get those firmed up for two of  
22 them. But the plan is to have the depositions take place  
23 from a period of November 30th to December 8th, and there  
24 will be the four authors sometime in that period.

25 THE COURT: Let me ask this question as I read the

1 joint report. You indicate that the High Court in London  
2 ordered that the testimony be limited to facts and not  
3 include expert testimony. I thought all these folks had  
4 were expert opinions. What do they know about facts?

5 MS. AHMANN: Well, and that is the whole issue.  
6 We want to know the facts about the studies, so we're not  
7 going to be asking them opinion questions about the studies.  
8 We're going to be asking questions about how the studies  
9 were, you know, what the protocols were, how they were  
10 carried out, and we laid that out to the High Court because  
11 the Court was concerned particularly in the UK about it  
12 being expert discovery, which they wouldn't have allowed, so  
13 that was part of the argument to the High Court. And so  
14 they are facts. It really relates to how the studies were  
15 done, what the numbers were rather than, quite frankly,  
16 opinions based upon those numbers.

17 MAGISTRATE JUDGE NOEL: So a question arises  
18 regarding, first of all, I'm not sure I understand what  
19 concerns a London court has about expert testimony. Is that  
20 not a thing in England?

21 MS. AHMANN: That's exactly right. There is case  
22 law there, particularly with regard to foreign matters, so  
23 there is case law there, which did not allow expert  
24 discovery based -- expert opinions, so that was something we  
25 had to tell the Court that that's not what we were after.

1 (Unidentified telephone speaker heard).

2 MS. AHMANN: Somebody needs to mute.

3 MAGISTRATE JUDGE NOEL: So then how are they  
4 defining experts? As I understand it, these studies are  
5 scientific studies these authors did and offered opinions  
6 about what this data shows. They can't testify to their own  
7 opinions about their own studies? Or just they can't  
8 testify about how this might relate to claims in this case  
9 or these multi-district cases?

10 MS. AHMANN: Right, I think they can't extrapolate  
11 out and that's not necessarily what we're asking them to do.  
12 We're asking them about their studies and what the protocols  
13 were and what the findings were, but that doesn't mean  
14 that's expert. So we're not going to ask them to  
15 extrapolate out.

16 THE COURT: That's -- I'm happy to go to England  
17 and straighten them out. But so my understanding of the  
18 expert -- well, here's how I imagine that the UK Court is  
19 defining an expert. It would be a person who is giving an  
20 expert opinion on the result that should be reached in the  
21 case at issue. So the depositions could fully explore what  
22 those witnesses did in their own study, and you wouldn't  
23 have -- you wouldn't have objections if there was something  
24 that sounded like an opinion as long as it was talking just  
25 about their own study. But it's where it strays over into

1 what we now allow in the United States as to the opinion on  
2 the ultimate issue.

3 MS. AHMANN: That is my understanding. And they  
4 have, they call them examiners, so there will be an examiner  
5 there to make sure, you know, that things are done according  
6 to what would be allowed in the UK, so.

7 THE COURT: Do you have any choice about the  
8 examiner? Is that someone appointed by the Court?

9 MS. AHMANN: No, you hire the examiner.

10 MAGISTRATE JUDGE NOEL: And is the examiner a  
11 lawyer, a solicitor or a barrister or just a scientific  
12 person?

13 MS. AHMANN: No, I think it's a barrister as  
14 opposed to a solicitor. Any other questions on the form?  
15 Thank you.

16 Do the plaintiffs have any observations on it  
17 regarding the foreign depositions?

18 MS. ZIMMERMAN: Yes, Your Honor.

19 MAGISTRATE JUDGE NOEL: Ms. Zimmerman?

20 MS. ZIMMERMAN: So it is our understanding, and we  
21 have very much taken a back seat approach to the depositions  
22 in the UK and let the defendants kind of push forward on  
23 that issue.

24 It is our understanding that these are not  
25 discovery depositions either, so the process on what exactly

1 we're going to be learning here I think is something we have  
2 yet to figure out. So these are supposedly, as we  
3 understand it, trial depositions, and they're going to be  
4 limited, I gather, to the facts and the methods and the  
5 conclusions reached in the particular studies that have been  
6 identified. But I think that there are some limitations on  
7 what kind of questions can even be asked of these witnesses  
8 about their studies, at least that's my understanding.

9 MS. AHMANN: Yes.

10 MAGISTRATE JUDGE NOEL: But the plaintiffs intend  
11 or it's the plaintiffs plan to have lawyers present for  
12 these depositions.

13 MS. ZIMMERMAN: Absolutely, Your Honor.

14 MAGISTRATE JUDGE NOEL: And will you be asking  
15 questions?

16 MS. ZIMMERMAN: Yes, we well.

17 MAGISTRATE JUDGE NOEL: Okay.

18 MS. ZIMMERMAN: And pursuant to the High Court's  
19 order, we all had to identify the documents that we would  
20 question the witness about as of yesterday. I think that  
21 they need the documents 14 days before any depositions go  
22 forward.

23 MAGISTRATE JUDGE NOEL: Okay.

24

25

1 MS. ZIMMERMAN: One additional matter, we learned  
2 during the deposition of Mr. Van Duren I think in the last  
3 week or so, that the research of Mr. Harper, and he was the  
4 subject of the voluntary cancelled deposition back in  
5 September, we learned that he was and is actually on the 3M  
6 advisory board, so the plaintiffs are investigating our  
7 options with respect to rescheduling that deposition while  
8 we are in the UK.

9 MAGISTRATE JUDGE NOEL: I had one other question  
10 actually for -- I'm sorry, were you done, Ms. Zimmerman?

11 MS. ZIMMERMAN: Yes, Your Honor.

12 MAGISTRATE JUDGE NOEL: There was -- hold on one  
13 second. Never mind, it relates to a different matter.  
14 Scratch that.

15 JUDGE LEARY: May I ask a couple of questions?

16 THE COURT: Judge Leary, would you come up here so  
17 that the people on the phone are able to hear you?

18 JUDGE LEARY: I'm still a little bit confused  
19 about the parameters of these foreign depositions. And if  
20 you're going to go to England to take them, I think as far  
21 as I'm concerned, I would want to have a clear understanding  
22 of whether that's going to be productive. And it seems to  
23 me from what I've heard so far is nobody is really certain  
24 what can be asked or what will be allowed to be answered.  
25 So my question is this, I'm going to call them authors

1       instead of experts, with regard to the authors of these  
2       articles, let's assume an author reaches four conclusions.  
3       Will you be allowed to ask with regard to conclusion one  
4       what were the facts you relied upon in coming to this  
5       conclusion? Can that be asked?

6               MS. AHMANN: Oh, I would believe that's a fact.  
7       Yes, that's a fact question, Your Honor.

8               JUDGE LEARY: Okay. So when you're talking about  
9       extrapolation, you're talking about taking information from  
10      the author's article and then applying it more directly or  
11      directly or indirectly to the litigation here, correct?

12              MS. AHMANN: Yeah, I think we're allowed to ask  
13      questions about the study, how it was conducted, what the  
14      findings were, but.

15              JUDGE LEARY: Okay, but you can ask questions  
16      about the nexus between the conclusions and the study and  
17      the other information they might have relied on?

18              MS. AHMANN: I believe so. I mean I have to say  
19      that I'm not, you know, I didn't do the argument before the  
20      High Court, but we did an argument and submitted information  
21      to show them that this is what we were -- this is what we  
22      were asking about and that it wasn't expert testimony and  
23      the Court was satisfied.

24              We submitted questions. We submitted requests for  
25      documents which by and large they rejected, but we submitted

1 questions, and for the most part, or topics, those were  
2 allowed by the High Court.

3 And so there is an idea I mean where exactly that  
4 boundary is going to be, I can't tell you, and I don't quite  
5 frankly know if anybody can tell you. But the questions and  
6 the general topic areas were something that the High Court  
7 had at the time of the hearing.

8 JUDGE LEARY: Well, I'll just make this  
9 observation. It does seem to me to be worthwhile if either  
10 sides of this litigation can get together and reach some  
11 sort of agreement as to the parameters in which they  
12 understand the depositions of these authors will be taken,  
13 and maybe in advance submit it to the examiner. And so you  
14 know before you go across the ocean where you are rather  
15 than, I mean at this point in time my impression is you  
16 don't know where you are, in terms of what you'll be able to  
17 allow to ask these authors.

18 MS. AHMANN: Well, I mean I agree with you, and we  
19 will. We'll make that effort to talk with the plaintiffs  
20 but --

21 MR. BLACKWELL: It might be helpful to Your Honors  
22 if after this hearing today we gave Your Honor a copy of the  
23 High Court's order that does spell out what we can and can't  
24 go into in the deposition in some detail.

25 JUDGE LEARY: Well, yeah, again, I'll make my own

1 observation. Those individuals who are going to -- those  
2 authors who are going to be presented are subject to the  
3 laws of England. They're not subject -- we don't -- my  
4 court, District Court, Federal District Court doesn't have  
5 any jurisdiction over them. So you can send that to us, but  
6 that still doesn't necessarily solve the problem in terms of  
7 what are the parameters of what you can ask? So you can  
8 send the opinion of the High Court as to this, that, or the  
9 other thing, but I don't feel I'm in a position to say, you  
10 know, based on this order, you can ask this, that or the  
11 other thing. I think you need to talk between yourselves,  
12 either sides of the party, to try to reach an understanding  
13 as to what you think the parameters of that opinion are and  
14 then try to clarify it.

15 MR. BLACKWELL: Even after we have agreed with  
16 respect to that, there's an examiner there that still ends  
17 up in front of the High Court in London, which will  
18 ultimately be at least the arbiter in the UK about what we  
19 can and can't do, but we've got plenty of ground to cover  
20 with these studies in terms of what they did, who was  
21 involved, what were the considerations, what things weren't  
22 considered, how did you reach the findings you reached in  
23 your study, which is ground central for us, you know.

24 JUDGE LEARY: And you're saying that the order out  
25 of England allows you to ask those questions.

1 MR. BLACKWELL: Yes, that kind of factual  
2 exploration, yes.

3 JUDGE LEARY: Okay, good, thank you.

4 MAGISTRATE JUDGE NOEL: Anything else with respect  
5 to the foreign discovery?

6 MR. BLACKWELL: No, Your Honor.

7 MS. ZIMMERMAN: One last thing, I think the  
8 plaintiffs want to make clear that we are reserving all of  
9 our rights and arguments with respect to the admissibility  
10 and use of these depositions down the road.

11 MAGISTRATE JUDGE NOEL: Let me ask this, which  
12 actually Judge Ericksen raised is are these authors that  
13 we're talking about are the folks whose studies came up  
14 during science day? Some of them?

15 MR. BLACKWELL: Yes, Your Honor.

16 MS. ZIMMERMAN: Some of them. The plaintiffs  
17 didn't use any of these studies during science day.

18 MAGISTRATE JUDGE NOEL: That's my question, I  
19 guess. So these folks, these studies are or are not studies  
20 that your testifying experts at trial are going to be  
21 relying upon?

22 MS. ZIMMERMAN: You know, at this point, I don't  
23 know what they will rely on. I mean we have --

24 MR. BLACKWELL: Your Honor, I hope they rely on  
25 them because they're in the Plaintiff's Complaint, and so

1 these would be the studies that they have cited in their  
2 long form Complaint that support their theories that the  
3 Bair Hugger causes surgical site infection, so we wanted to  
4 get to these study authors. There weren't a whole lot of  
5 studies discussed by the plaintiffs on science day. I think  
6 there maybe was one. But these studies are in their  
7 Complaint, and these are authors of the studies they were  
8 relying on in the Complaint, so we wanted to get to the  
9 foundation for the opinions that they espoused in their  
10 studies.

11 MAGISTRATE JUDGE NOEL: Okay.

12 MS. ZIMMERMAN: It is our expectation that they  
13 will certainly be studies that the experts will have  
14 considered, and they've come up in the number of the  
15 depositions that have been taken thus far. But, I think  
16 that this case is a case that we're building on science that  
17 we're going to disagree about as we go forward. But the  
18 experts that we're going to bring into court are going to  
19 have additional testing that they've done, and they will be  
20 looking at these including these peer reviewed studies that  
21 Mr. Blackwell references and that these depositions are  
22 scheduled to explore in some way. But they are all peer  
23 reviewed studies as well. So the fact that the plaintiffs  
24 and defense attorneys are going to come in and do another  
25 review of the studies, I guess is what we think we can do.

1           MAGISTRATE JUDGE NOEL: Okay. Was there something  
2 one of your colleagues wanted to?

3           MS. CONLIN: No, I was just going to say that, you  
4 know, there is a belief that these studies may be relied on  
5 by some of the experts on both sides. My expectation is  
6 that 3M's experts are going to say these studies aren't what  
7 they say they are, and I think that's the factual  
8 exploration that they're going after in the UK.

9           MAGISTRATE JUDGE NOEL: Okay, thank you. That  
10 does bring us then to the numbers that Judge Ericksen was  
11 going to inquire about. Who has that information?

12          MR. OSTERHOLM: Your Honor, we actually have an  
13 updated number. There are currently 916 cases filed into  
14 the MDL.

15          THE COURT: I thought we were closer to a  
16 thousand. And did you want to stay here for the state cases  
17 too? Overview of related State Court proceedings?

18          MR. OSTERHOLM: My colleague Ms. Zimmerman may be  
19 in a better position to answer that.

20          MS. ZIMMERMAN: I don't think that there are any  
21 updates other than what is reflected in the joint report,  
22 but we're happy to talk to the Court about that. I believe  
23 that there are still 47 or 50 odd cases assigned to Judge  
24 Leary, and then the other cases that are in different  
25 jurisdictions in Illinois, Texas. There's a new case in

1 Montana, and then Iowa and Canada.

2 THE COURT: I thought that a few minutes ago I  
3 heard that some of the Ramsey County cases were dismissed  
4 and filed as part of the MDL, so wouldn't that change the  
5 number?

6 MS. ZIMMERMAN: It happened months and months ago,  
7 so this number, I think, is accurate.

8 MS. YOUNG: Good morning, Your Honor. Just a  
9 brief update on the Iowa State Court case. That has been  
10 removed to Federal Court and will be tagged to the MDL  
11 shortly. And then we had done a review of the docket  
12 recently and noticed there are a number of dismissals. I  
13 think five without prejudice, and one with prejudice. And  
14 we aren't getting notice of all of those because we haven't  
15 appeared in every individual case, and so I would ask that  
16 either plaintiff's liaison counsel or someone do give us  
17 service copies of stipulations for dismissal going forward.

18 THE COURT: Did we not send you a list of all the  
19 cases back when we were trying to clean up the docket?

20 MS. YOUNG: I don't believe so.

21 THE COURT: All right. So plaintiff's liaison  
22 counsel will make sure that you're informed on all of those?

23 MR. OSTERHOLM: Yes, yes, we can go ahead and do  
24 that.

25 MAGISTRATE JUDGE NOEL: Those dismissals though

1 are not settlements. Those are dismissals because some  
2 discovery was made during the course of the thing that there  
3 is no case.

4 MS. YOUNG: We were asked to sign one stipulation  
5 for dismissal with prejudice but don't have any  
6 understanding as to the basis for any of the dismissals.

7 MAGISTRATE JUDGE NOEL: Okay.

8 THE COURT: Thank you. Nothing new in Canada.

9 MS. YOUNG: No, Your Honors, the only update on  
10 Canada is that the plaintiff's counsel there has asked for a  
11 case status conference, and we expect that would happen in  
12 the early part of 2017.

13 MR. HULSE: Your Honors, could I say a quick  
14 statement on the *Lawson* case in Texas?

15 THE COURT: Yes.

16 MR. HULSE: Just some learnings we're having from  
17 the *Lawson* case, which is a case where there is also a med  
18 mal claim against the doctor and the hospital.

19 THE COURT: Did you say "learnings?"

20 MR. HULSE: "Learnings," yeah, I think that that  
21 will be useful. In that case there's been a real struggle  
22 with product identification, and our conclusion from this is  
23 that this is going to be a persistent issue in these cases  
24 where the medical records don't include a clear  
25 identification of a Bair Hugger. And so what we're getting

1       into is --

2               THE COURT:   Could I just interrupt you right  
3       there?

4               MR. HULSE:   Yes, sure.

5               THE COURT:   Are you saying something different  
6       from what plaintiff's counsel has mentioned in connection  
7       with some of the discovery disputes that it's the brand or  
8       the model of Bair Hugger?  Or are you saying --

9               MR. HULSE:   Whether a Bair Hugger warming unit was  
10       actually used at all in a surgery.  And so I just want to  
11       highlight this as something that through the bellwether  
12       process that we're likely, if the Lawson case, which is the  
13       only case that's sort of proceeding through the medical  
14       records part of the case right now is an indication of  
15       something that we're all going have to grapple with as part  
16       of that discovery that we do on the bellwether cases.  So  
17       it's --

18              MAGISTRATE JUDGE NOEL:  Is it an issue of whether  
19       there was a warming device used or whether the warming  
20       device that was used was made by 3M subsidiaries.

21              MR. HULSE:   The latter, Your Honor, exactly.  
22       That's right, and what we found --

23              MAGISTRATE JUDGE NOEL:  How many other makers out  
24       there are they that are making warming devices?  Forced air  
25       warming devices?

1           MR. HULSE: Several others like Stryker.  
2           Augustine, of course, has a warming device. And warming is  
3           not always used too. And, of course, the patient themselves  
4           they're out at the time, and so they don't have a  
5           recollection, and then medical records can be, as we found,  
6           have been conflicting in terms of what warming is used.

7           There's also pre-operative warming that's often  
8           used, and a 3M device, the Bair Paws device is often used in  
9           pre-warming. That's a blower that connects to a gown and  
10          that can cause confusion in the -- in the sort of the  
11          determination that this is a Bair Hugger case. It may be  
12          that there's a mistake like there appeared to be in this  
13          case about what the 3M, at what stage a 3M device was used.  
14          Basically, you've got an indication that a 3M device was  
15          used pre-operatively, and then unclear records about whether  
16          a 3M device was used operatively.

17          THE COURT: Or post-operatively to warm up the  
18          surgeon who was cold from operating in a cold room.

19          MR. HULSE: Absolutely. You have the potential  
20          for 3M products warming at all three stages: Pre, intra and  
21          post. And so, again, I just wanted to raise it with Your  
22          Honors, Judge Leary, it's an issue that we are likely to  
23          contend with in cases going forward.

24          MAGISTRATE JUDGE NOEL: So is the defendant  
25          developing some strategy or plan to sort of figure out a way

1 to address that more broadly in all the cases in an  
2 efficient, targeted way? Or are you just sort of taking it  
3 see how it goes?

4 MR. HULSE: Our conclusion is the only real way to  
5 address it is with through discovery of the medical  
6 providers. And it will in some cases like the Lawson case  
7 require depositions of like nurses, and so forth. But  
8 there's no way based on our records, I mean all we can know  
9 is whether there is a Bair Hugger device, warming air  
10 devices at the hospital, but that doesn't necessarily mean  
11 that it was used and that there aren't other companies'  
12 devices.

13 And so that's as far as we can take it from that  
14 point forward. It involves, it's going to require discovery  
15 of medical records and potentially depositions, to the  
16 extent that the medical records don't tell you, depositions  
17 of the nurses who are on staff at the time to say, yes, a  
18 Bair Hugger was actually used during that surgery.

19 MAGISTRATE JUDGE NOEL: Wasn't this the topic of a  
20 prior discovery conference regarding the plaintiffs wanting  
21 to get your list of what hospitals had your which models?

22 MR. HULSE: It was related to that, Your Honor,  
23 but part of the point that we made is you cannot draw that  
24 conclusion just from the fact that there may have been a  
25 Bair Hugger assigned to that, that went to that hospital.

1                   MAGISTRATE JUDGE NOEL: Are the plaintiffs'  
2 lawyers in Lawson represented anywhere in our leadership  
3 team here or no?

4                   MR. HULSE: No.

5                   MS. ZIMMERMAN: No, Your Honor.

6                   MAGISTRATE JUDGE NOEL: Okay, thank you.

7                   MR. HULSE: Thanks, Your Honors.

8                   MAGISTRATE JUDGE NOEL Ms. Zimmerman, did you want  
9 to say anything on these issues.

10                  MS. ZIMMERMAN: Just that we are not experiencing  
11 that as a difficulty. I mean it can be problematic, and  
12 there is a lot of variation from medical records from one  
13 hospital to another. But there are some records where it  
14 will actually say, they'll have a little logo Bair Hugger  
15 with the little bear on it, and the nurse or whoever checks  
16 it off.

17                  We can find it in billing reports. I mean there  
18 are actually reports that we find now. We don't have the  
19 serial number for the actual heating unit most of the time,  
20 and I believe that that's going to be information that's  
21 going to be in the custody of the defendants. But at least  
22 we are not seeing that this is an issue with respect to the  
23 filings in either Ramsey County or the MDL. And I do know  
24 that defendants have submitted letters to various attorneys  
25 who have filed cases where I assume based on a customer list

1 or something, the defendants are of a belief that there was  
2 no Bair Hugger in that particular hospital.

3 So I think that if there was a sense by the  
4 defendants that a majority or a large number of cases either  
5 in Ramsey County or before this Court, we're involving  
6 hospitals that didn't have Bair Huggers, I suspect we would  
7 be getting a lot of these letters because I've seen the  
8 letters that do go out.

9 THE COURT: What are the other companies that make  
10 forced air?

11 MS. ZIMMERMAN: There are a few. There's a  
12 company called Smiths Medical, I believe. There is another  
13 Stryker has a smaller market share, but they have another  
14 product that is forced air warming. But to my  
15 understanding, forced air warming made by 3M and the Arizant  
16 Company, the Bair Hugger, is over 90 percent of the market  
17 share.

18 THE COURT: Okay.

19 MR. BLACKWELL: And Augustine makes the HotDog  
20 that's in some hospitals.

21 THE COURT: No, no, it was just I didn't realize  
22 that there were other companies that made also the forced  
23 air warming blanket. So do you know when there's a form  
24 with a picture of a little bear for the nurse to check, is  
25 it like kleenex? You know, maybe there's Puffs or

1 something, and do they --

2 MS. ZIMMERMAN: That could be.

3 THE COURT: Who knows, yeah, but I guess you'll  
4 find out.

5 MS. CONLIN: Actually, Your Honor, most hospitals  
6 are single source suppliers. In other words, that once  
7 you're in at a hospital, they're not choosing amongst  
8 various models.

9 THE COURT: That makes sense.

10 MS. CONLIN: And, you know, some of these other  
11 companies have -- they don't have, they may have products on  
12 the market, but they're not necessarily forced air warming.

13 THE COURT: Okay.

14 MR. BLACKWELL: And our point really is a straight  
15 forward one that if we're going to pick a bellwether case  
16 where the claim is that the Bair Hugger causes SSIs when  
17 used during surgeries, we want to make sure we've got  
18 positive ID that there's a Bair Hugger being used in the  
19 surgery. And there is some fuzziness, as the Lawson case  
20 indicates, that that may not be the case simply because it's  
21 in a pleading or the Bair Huggers were at a hospital,  
22 generally.

23 MS. ZIMMERMAN: I suspect we'll take that up at  
24 the appropriate time down the road.

25 THE COURT: If you find out before December 28th

1 that some cases shouldn't be in the pool, let me know, would  
2 you?

3 MS. ZIMMERMAN: Absolutely. And to the extent  
4 that the Court is interested, there are other warming  
5 products that are not forced air like the Augustine product  
6 and other kind of --

7 THE COURT: I know that. I just, when one of you  
8 lawyers said that there are other forced air warming things,  
9 that was, I perhaps should have known that. I just was not  
10 aware of that. I didn't remember that from science day.

11 Number 5 then, additional pretrial orders, nothing  
12 there. Discovery, you'll be -- well, let's, Ms. Zimmerman?

13 MS. ZIMMERMAN: Thank you, Your Honor.

14 Starting out with number 6, the status of  
15 discovery, we in the joint report reflected the fact that  
16 there have been some ongoing issues with respect to the  
17 privilege log. It is our expectation that that issue will  
18 likely come to a head in time for the status conference in  
19 December, so that's my expectation at this point.

20 With respect to the Computer Assisted Review, the  
21 CAR protocol, which was stipulated to and entered by this  
22 Court, the plaintiffs request that the Court be made aware  
23 of the fact that we still don't have any of these documents.  
24 This hasn't been done, hasn't been, none of the car protocol  
25 has been implemented, so we are getting some e-mails but the

1 actual agreed upon process to identify the electronically  
2 stored information has not yet commenced, and we have even  
3 as of this morning no date by which these are going to be  
4 completed.

5 And so what I'd like to do, you know, we've had  
6 Mr. Ciresi has taken a couple of deposition in the last few  
7 weeks, as has Ms. Conlin. We have left these depositions  
8 open pending review of the documents that are going to be  
9 produced pursuant to the CAR protocol. But we're at this  
10 point I think 63 days away from the close of general  
11 causation discovery. And so I'd like to have my colleague  
12 Mr. Parekh come up to talk a little bit more in detail about  
13 the specifics of what we have and where we're at. But given  
14 the deadlines in this case, we really request that there be  
15 a deadline by which these CAR protocol documents be  
16 produced.

17 MAGISTRATE JUDGE NOEL: So whose more appropriate  
18 to respond to this question, you or your colleague? And the  
19 question is what's your response to my understanding from  
20 reading this statement the defendants contend some of that  
21 delay is caused by the collaborative process that the  
22 protocol calls for, and that the plaintiffs have some  
23 responsibility for the delay?

24 MS. ZIMMERMAN: I think that Mr. Parekh is  
25 prepared to handle this as well.

1           MR. PAREKH: So, just to clarify a little bit, the  
2 CAR protocol does call for a collaborative effort, and we're  
3 in the process of that collaborative effort, so there is  
4 parts of it that are going forward. The initial process was  
5 that there would be an identification of random documents.  
6 The plaintiffs would get to review those documents and turn  
7 those around back to the defendants within 14 days, which we  
8 did.

9           The part of the delay on the CAR protocol actually  
10 stems from much further back in time, which is when we had  
11 the dispute over the custodian issue, defendants  
12 unilaterally stopped this process and that led to weeks of  
13 delay where nothing happened over protests by plaintiffs  
14 that we should continue with that process even with that  
15 dispute outstanding.

16           At this point, we've finished step one, I believe,  
17 I think, as of today, which is the initial seed set of  
18 documents, and then the next step is that we need to do some  
19 iterations to hit the 80 percent, sort of the satisfaction  
20 level that we've all agreed to.

21           The issue is the turnaround time on some of these  
22 things has been taking a significant amount of time from  
23 defendant's side. I mean we've tried to turn things around  
24 as fast as possible from the plaintiffs' side, and we have.  
25 But, I mean just as one example, you know, we sent a list of

1 documents that we said from a log that we thought should be  
2 included as relevant documents when defendants had  
3 identified them as irrelevant documents. It took  
4 approximately two weeks for us to get a copy of those  
5 documents back to us so that we could actually review them,  
6 and then we turned those around in, I believe, four days at  
7 this point. They came in on Friday, and we turned them  
8 around.

9 So it's just, it's taking longer than we believe  
10 it should, but I think having a deadline by which all of  
11 these documents must be produced would be helpful in terms  
12 of spurring the process along. Deadlines make people work  
13 harder and work more efficiently, and so that's what we were  
14 asking for.

15 MAGISTRATE JUDGE NOEL: And do you have a proposed  
16 deadline in mind that you would suggest?

17 MR. PAREKH: We think having discovery completed  
18 by the December 15th conference would be -- I think would  
19 allow us enough time between now and then to get everything  
20 done.

21 MAGISTRATE JUDGE NOEL: Okay. Mr. Hulse?

22 MR. PAREKH: The documents received by plaintiffs.

23 MR. HULSE: Your Honors, the plaintiffs here  
24 insisted on a collaborative process. The process that we  
25 agreed to bakes in multiple two week iterations for them to

1 review and challenge each stage that we run at in order to  
2 achieve 80 percent.

3 I agree, we haven't always moved as fast as we  
4 could. You've seen our position that we think the majority  
5 of this owes to the plaintiffs. We have produced a very,  
6 very substantial amount of e-mail both between the prior CAR  
7 process that was done for the prior litigation, but much  
8 more so through key word searches that we've agreed upon  
9 with plaintiffs. And our belief is that much of what is  
10 going to be produced out of this process is, just to put a  
11 word on it, going to be "junk" because we have agreed on for  
12 this purpose extremely broad relevance criteria that's going  
13 to generate a lot of stuff that just relates to Bair Hugger  
14 in some sense.

15 That said, I think the plaintiffs know, and Mr.  
16 Parekh knows that finishing this process by a date in  
17 December given these 14 day challenge procedures that  
18 they've requested and they got here is not realistic. We  
19 all have a discovery cut-off right now at the end of January  
20 that we have to abide by, obviously, but arbitrarily moving  
21 that up is simply not realistic.

22 Now, before we came in here today, Mr. Parekh and  
23 I, Mr. Parekh made clear to me the position he was going to  
24 express, but we did have a very productive discussion about  
25 things we could do, agreements that we could reach to

1 streamline this protocol that we agreed to to move through  
2 the remainder of the process far more quickly than the  
3 protocol would provide.

4 If we are able to implement that, finish our  
5 discussion and implement it, my suggestion would be that we  
6 come back, Your Honors, within two weeks when we have  
7 significantly moved now the -- now that we've got the  
8 training set agreed, move the rest of the process forward.  
9 And if the plaintiffs are dissatisfied at that point with  
10 the progress of things, then absolutely they should take it  
11 up with Your Honors about whether something additional needs  
12 to be ordered.

13 But I don't think that is what they're asking for  
14 today, at least in front of the Court in terms of deadline  
15 is realistic or can be accomplished under the existing  
16 protocol. And the only way we would have a prayer of doing  
17 that is rescinding the protocol to eliminate the  
18 collaborative portions of it.

19 MAGISTRATE JUDGE NOEL: If the Court were inclined  
20 to impose a deadline, and I don't know whether it is or  
21 isn't, but if it were, what deadline would you suggest the  
22 Court impose?

23 MR. HULSE: Simply the discovery close date.  
24 Obviously, if the plaintiffs conclusion that there was  
25 something that was material to them that they needed before

1 a deposition they took, I assume that they will as they've  
2 said raise that with the Court. But as in any large scale  
3 litigation, there is going to be ongoing document production  
4 through the end of discovery. We have produced nearly all  
5 of everything else in addition to the nearly a million pages  
6 of e-mail and attachments that we've produced.

7 The plaintiffs have had no problem using e-mail,  
8 using plenty of e-mail in the depositions that they've taken  
9 so far. And like I said, we believe that it is what has  
10 actually been produced is the most important stuff and what  
11 much of what is likely to be produced in the remainder of  
12 this process is of minimal relevance at best. But, again,  
13 it's, I think, it's simply not compatible with the protocol  
14 as we have it today to get this process fully completed by a  
15 month from now.

16 MAGISTRATE JUDGE NOEL: Okay. Thank you.

17 THE COURT: Mr. Parekh, would you say that you  
18 actually made a motion for a December 15th deadline such  
19 that it has to be ruled on?

20 MR. PAREKH: Yes, Your Honor, we would make a  
21 formal motion.

22 THE COURT: Okay, well, all right. So if there's  
23 a motion, the motion is denied because we've got the  
24 collaborative process. If somebody is not following it as  
25 they're supposed to be following it, let us know in the

1 interim, and we can hopefully have a more -- it would be a  
2 more effective way for the Court to intervene rather than  
3 what strikes me right now, I mean I feel hard pressed to  
4 say, okay, we said discovery ending now. Now this part has  
5 to end on December 15th.

6 So I'm not going to order that but, obviously, as  
7 you're going through, have in mind everything that you've  
8 all talked about today, and come to us in the course of the  
9 process. You know if they say they're supposed to get  
10 something done in two weeks and they don't get it done, then  
11 let us know.

12 MR. PAREKH: Your Honor, our only concern is that  
13 when we agreed to the two-week time frame that was months  
14 ago and now that we're sort of that the initial process  
15 didn't start for about three months, that the protocol was  
16 entered.

17 THE COURT: Well, when, stage 1 of the iterative  
18 process often takes the longest, so you're there, and I  
19 would prefer to see how things go from here on rather than  
20 jump in right now with a sledgehammer.

21 MR. PAREKH: I understand, Your Honor. Thank you.

22 THE COURT: Other discovery issues? You will be  
23 meeting? Meeting and conferring. Okay, so you'll be at  
24 1:00, would you like to be in Judge Noel's courtroom? Is  
25 that what you're planning?

1 MS. ZIMMERMAN: Wherever the Court would prefer.

2 THE COURT: Let's say Judge Noel's courtroom.

3 Okay. Deposition update.

4 MS. ZIMMERMAN: There is one additional issue with  
5 respect to the depositions, and this arises out of the  
6 deposition of Mark Albrecht, which was done in two parts.  
7 The second part concluded on Saturday afternoon. The  
8 defendants used the full seven hours, and the witness  
9 declined to continue to offer testimony. Mr. Gordon, Corey  
10 Gordon suggested that he may be bringing a motion to the  
11 Court to require or seek an order to have Mr. Albrecht  
12 appear for additional deposition. I think he said he has a  
13 couple additional hours.

14 The plaintiffs, additionally, and I don't know if  
15 that is a motion you intend to bring or not, but the  
16 plaintiffs have not yet had an opportunity to question  
17 Mr. Albrecht at all.

18 MAGISTRATE JUDGE NOEL: I'm sorry, ten seconds of  
19 context, who is Mr. Albrecht?

20 MS. ZIMMERMAN: He is a former employee of the  
21 Arizant and Augustine company.

22 MR. BLACKWELL: He's an author of several of the  
23 studies that are at issue.

24 THE COURT: He's a U.S. study author.

25 MS. ZIMMERMAN: He is, and he lives here in

1 Minnesota.

2 THE COURT: One more time. You want more hours?

3 MR. BLACKWELL: Yes, Your Honor. And this is,  
4 assume Ms. Zimmerman is simply teeing it up today, but we do  
5 intend to come to the Court with a specific proposal for how  
6 much more time we need, and what we'd like to cover. This  
7 is the first deposition we've come upon where our seven  
8 hours was up, and we still have other ground yet to cover,  
9 and plaintiffs need to ask questions also. He's a very  
10 central researcher and witness.

11 MAGISTRATE JUDGE NOEL: Is he represented by  
12 counsel?

13 MS. ZIMMERMAN: No, he's not.

14 MAGISTRATE JUDGE NOEL: He just said, "I'm done,"  
15 at seven hours because he's read the rule?

16 MR. BLACKWELL: That's correct. He's pretty  
17 savvy.

18 THE COURT: Do the plaintiffs intend to take his  
19 deposition then separately?

20 MS. ZIMMERMAN: We do expect to notice his  
21 deposition. We certainly don't expect we would take seven  
22 hours, but we do object to defendants getting more than  
23 seven hours for his deposition. And we've taken at this  
24 point some of the most key 3M employees, Mr. Ciresi and  
25 Ms. Conlin have taken in the last few weeks, in less than

1 seven hours, and we certainly could have gone over seven  
2 hours. But the point of the rule is that there is a limited  
3 period of time, and we have to focus our time and our  
4 attention. And we think that with respect to Mr. Albrecht  
5 that the seven hours has come and gone, and we may have some  
6 questions if we decide to notice his deposition, but that  
7 there is no reason that 3M be allowed additional time with  
8 this witness.

9 MR. BLACKWELL: This is my point about jumping the  
10 gun on this. We haven't even petitioned the Court to  
11 explain why we need to do this yet, yet we want to do it  
12 properly and formally. And the plaintiffs have -- we should  
13 have a fair opportunity to respond to that, but so the Court  
14 can see what we've covered and have some sense of what is  
15 yet to be covered, and we'd like to be able to present that  
16 to the Court in the proper fashion.

17 THE COURT: All right. We're warned that a motion  
18 may be forthcoming. Get ready for it.

19 MR. BLACKWELL: Thank you, Your Honor.

20 THE COURT: Well, unless I've skipped ahead again,  
21 I'm on page 10, which is the signature page.

22 All right. Let me ask about the December time,  
23 and this has to do with your flight schedules. I'm not sure  
24 why we set 10:00. I think I picked that because I thought  
25 you needed time to get into town or something. 9, 9:30, 10?

1 MS. ZIMMERMAN: That's fine with the plaintiffs,  
2 Your Honor.

3 THE COURT: So if we say, let's say 9:30, but I  
4 don't want to just do that if it's going to mean that people  
5 have to flight in the night before whereas otherwise they  
6 wouldn't.

7 MS. ZIMMERMAN: It's going to be fine, Your Honor.  
8 I think anyone who would have to fly in probably has to fly  
9 in the night before anyway, and an earlier hearing may  
10 actually facilitate departure later in that day.

11 THE COURT: Because originally we had it in the  
12 afternoon. So let me just -- all right. Well, let's say  
13 9:30. I was looking at the 10:00, and I thought, well,  
14 that's an odd time. I wonder how that happened.

15 MR. BLACKWELL: And, Your Honors, I will say I  
16 will not be here on December 15th. I have to choose on that  
17 date between this Court and my wife. And as she will be in  
18 Saint Kitts, I must be with her. So I will not be here.

19 THE COURT: So now you're not even being  
20 excessively uxorious.

21 MR. BLACKWELL: Not at all, Your Honor. So I  
22 won't be here. My hope is that it won't be necessary, but  
23 we'll see.

24 MAGISTRATE JUDGE NOEL: I would just observe you  
25 have a table full of qualified colleagues so.

1 THE COURT: There's only one empty chair. That's  
2 for the really qualified person.

3 MR. BLACKWELL: Yes, Your Honor. I couldn't agree  
4 more, and they also hope it won't be necessary.

5 THE COURT: All right. Thank you all. We're in  
6 recess.

7 MAGISTRATE JUDGE NOEL: We'll see you all at 1:00  
8 in 9W.

9 (Court adjourned at 11:07 a.m.)

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14 I, Maria V. Weinbeck, certify that the foregoing is  
15 a correct transcript from the record of proceedings in the  
16 above-entitled matter.

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Certified by: s/ Maria V. Weinbeck

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Maria V. Weinbeck, RMR-FCRR

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