

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products)	
Liability Litigation,)	File No. 08-md-1943
)	(JRT/AJB)
)	
)	Minneapolis, Minnesota
)	June 11, 2012
)	11:15 A.M.
)	

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs:	CHARLES ZIMMERMAN, ESQ. RONALD S. GOLDSER, ESQ. GENEVIEVE ZIMMERMAN, ESQ. KEVIN FITZGERALD, ESQ.
Via telephone:	KRISTIAN RASMUSSEN, ESQ. ELLIOT OLSEN, ESQ.
For the Defendants:	TRACY J. VAN STEENBURGH, ESQ. DANA LENAHAN, ESQ.
Via telephone:	JAMES IRWIN, ESQ. WILLIAM ESSIG, ESQ.
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11:15 A.M.

(In open court.)

THE COURT: You may be seated. Civil case number 08-1943, and I guess I could -- that's the MDL number. In Re: Levaquin Products Liability Litigation. I won't mention the individual case numbers, Straka and Christensen, but we know we're going to talk about those today.

Counsel, would you note appearances, please.

MR. GOLDSER: Good morning, Your Honor. Ron Goldser for plaintiffs.

MR. FITZGERALD: Good to see you again, Your Honor. Kevin Fitzgerald for plaintiffs.

THE COURT: Good morning to both of you.

MR. ZIMMERMAN: Good morning, Your Honor. Charles Zimmerman on behalf of plaintiffs, no relationship to my partner.

MS. ZIMMERMAN: Genevieve Zimmerman on behalf of plaintiffs.

THE COURT: Good morning to both of you.

MS. VAN STEENBURGH: Good morning, Your Honor. Tracy Van Steenburgh on behalf of defendants.

MS. LENAHAN: Dana Lenahan on behalf of defendants.

1 THE COURT: Good morning to both of you.

2 Okay. We have a proposed agenda here.

3 Mr. Goldser?

4 MR. GOLDSER: Thank you, Your Honor. I see you
5 have your complement of externs here with us this morning.
6 I hope they have learned a lot. I'm not sure whether we
7 can teach them anything this morning, but we will try.

8 We start off with the usual listing of federal
9 and state cases that remain filed and pending, and I
10 presume Mr. Essig on the phone has that for us.

11 MS. VAN STEENBURGH: Either Mr. Essig or I can.

12 THE COURT: I forgot to ask who was on the
13 telephone. Who is on the telephone today?

14 MR. RASMUSSEN: Kristian Rasmussen, counsel for
15 plaintiffs.

16 MR. OLSEN: Elliot Olsen on behalf of the
17 plaintiffs.

18 MR. IRWIN: Good morning, Your Honor. Jim Irwin
19 for defendant.

20 MR. ESSIG: Good morning, Your Honor. Bill Essig
21 also on behalf of the defendants.

22 THE COURT: Okay. Thank you. Just anytime you
23 wish to speak, just chime in. Okay?

24 MR. IRWIN: Thank you, Judge.

25 THE COURT: It's getting more difficult to see

1 you raising your hand.

2 All right. Go ahead, Ms. Van Steenburgh.

3 MS. VAN STEENBURGH: Thank you, Your Honor, and
4 Mr. Essig, would you rather do the honors here, or would
5 you like me to go ahead?

6 MR. ESSIG: I guess I will earn my keep here
7 today with a quick one here. Your Honor, it's 1787 served
8 cases pending in the MDL, and just to translate into the
9 other jurisdictions, we believe there are five non New
10 Jersey state court tendon cases left out there, three in
11 Illinois, one in Pittsburgh, one in Mississippi, and that's
12 the numbers that I have.

13 THE COURT: And how many total in New Jersey?

14 MR. ESSIG: I don't have that number at my
15 fingertips.

16 Tracy, do you have that one?

17 MS. VAN STEENBURGH: I don't have that number,
18 but it's fluctuating, Your Honor, because there have been
19 settlements in the New Jersey litigation, so there have
20 been dismissals.

21 THE COURT: Do we have a rough amount or not?

22 MS. VAN STEENBURGH: I don't know the answer to
23 that. I can get that, though.

24 THE COURT: Okay. Do you have any idea,
25 Mr. Goldser?

1 MR. GOLDSER: At one point I thought there was
2 1900 roughly cases in New Jersey, and my understanding is
3 that it's somewhere between 403 and 450 cases that have
4 been resolved by the settlement.

5 Do you know about the numbers on settlement?

6 MS. VAN STEENBURGH: I don't know. I think that
7 number is correct and that there are others that are being
8 settled as we speak so --

9 THE COURT: All right.

10 MR. GOLDSER: Which dovetails nicely with
11 coordination with other jurisdictions. I'll take other
12 jurisdictions first. The Illinois trial remains on track
13 for I believe September 12th. I believe there are some
14 summary judgment motions being argued this week in
15 Illinois.

16 New Jersey, as indicated, there have been some
17 settlements, as I understand it, and all I know is that
18 there are three firms who have settled their cases. That
19 would be Mike London's firm, Rick Meadow's firm and the
20 Parker Waichman firm.

21 To my knowledge, there has been no money
22 dispersed yet, and there has not been a formal written
23 settlement agreement signed yet.

24 Is that true?

25 MS. VAN STEENBURGH: I believe that is true, Your

1 Honor, and as to those settlements, however, they are going
2 to affect the MDL because some of the law firms that are in
3 New Jersey are settling their MDL cases as part of the New
4 Jersey settlement, and so it's going to lower the numbers
5 here in the MDL.

6 I also believe, I don't know if -- Ron, you may
7 know better than I whether the Reich & Binstock firm is
8 going to be resolving in New Jersey versus the MDL or
9 whether that's --

10 MR. GOLDSER: As I understand it, there are 20
11 some odd cases from Mr. Binstock's firm that were settled
12 as part of the Rick Meadow, the Lanier law firm group. He
13 is settling only those cases in New Jersey. The remainder
14 of his MDL cases remain for the MDL, but it does beg
15 another issue that is on the agenda for today, and that is
16 item number 10, the proposed amendment to PTO 3, the
17 assessment issue, and I think Mr. Fitzgerald will speak to
18 that on our behalf.

19 THE COURT: All right.

20 MR. FITZGERALD: Thank you, Ron. Good morning,
21 Your Honor. As the Court is aware, we filed an amended
22 pretrial order number 3, the common benefit assessment
23 order, in early April. We had that issue removed from the
24 agenda from the last status conference, and since that
25 time, we have been negotiating with counsel in New Jersey

1 to see if we could reach some consensus on the assessment
2 order.

3 We have not reached any consensus to date, and I
4 think it's unlikely that will happen. We have been trying
5 to reach consensus that recognized what we believe is a
6 significant disparity in work done between the MDL and New
7 Jersey.

8 We anticipate there will be briefing on this
9 issue in the short term, and in the meantime I think as
10 everybody has just mentioned, there have been some cases
11 that are settling in New Jersey, and we want to again
12 remind both defendants and the Court of the obligations
13 under the current existing pretrial order number 3.

14 And I'm not going to go through the various cases
15 that that pretrial order attaches to because I believe the
16 Court is aware, but suffice it to say, we believe the
17 current PTO attaches to all the cases of the three firms
18 that Ron just mentioned, and also in pretrial order number
19 3, it notes that before defendant makes any payment on any
20 claim of tendon disorder resulting from Levaquin,
21 regardless of where that claim is venued, regardless of
22 whether that claim is subject to a lawsuit, defendant shall
23 notify PSC and the MDL court of the proposed payment of
24 that claim.

25 So I think that before these issues are fully

1 briefed before Your Honor, we may be facing a situation
2 where the New Jersey litigants have to advise or the
3 defendants have to advise this Court and the PSC of any
4 claims that they would like to pay that are being settled
5 in New Jersey.

6 THE COURT: You indicate there have been
7 negotiations. Are they continuing or are they done?

8 MR. FITZGERALD: We haven't closed the door on
9 those negotiations yet, but in all honesty I think that we
10 probably will not be able to reach a sufficient consensus
11 between the MDL and New Jersey.

12 THE COURT: Okay. Do they have any common
13 benefit fund order in that court or not?

14 MR. FITZGERALD: They do not, no.

15 THE COURT: All right. How close are we to
16 payment, Ms. Van Steenburgh, do you know?

17 MS. VAN STEENBURGH: Not that close.

18 THE COURT: All right. Okay. So you expect the
19 next step would be briefing?

20 MR. FITZGERALD: We're continuing to discuss that
21 issue, and I think that that's probably likely. Hoping to
22 avoid it, but it's not looking like we will.

23 THE COURT: All right.

24 MR. GOLDSER: I would imagine as part of that
25 that before any payment is made this issue will be brought

1 to the Court's attention, and the matter will be resolved
2 so that we don't find ourselves with payment having been
3 made and having to do a claw-back, to use a favorite
4 Minnesota court term these days.

5 The next item on the agenda is the Rule 59 motion
6 in Straka, if the Court wants to take that up next?

7 THE COURT: Let's go.

8 MR. GOLDSER: Okay. I'll take that, Judge. The
9 issue is really pretty straightforward. This is a new
10 trial motion. It's not a motion for judgment as a matter
11 of law, and so we have to pay attention to that rule's
12 standard of review, not judgment as a matter of law,
13 because they're different.

14 And the standard of review on a new trial motion,
15 the verdict is so contrary to the preponderance of the
16 evidence as to imply that the jury failed to consider all
17 the evidence or acted under some mistake. Also, whether
18 the verdict is justified by the evidence presents a factual
19 question, and the District Court must properly weigh the
20 evidence.

21 So you have the ability to weigh the evidence and
22 determine whether the verdict is so contrary to the
23 preponderance of the evidence to imply that the jury failed
24 to consider it all or acted under some mistake, and I think
25 based on the briefing as we described it to you, as well as

1 hopefully what I can convince you of today, you'll find
2 that that has to be true.

3 The first thing that we've got to confront is the
4 question of the liability that the jury answered question,
5 verdict question number 1, was there an inadequate warning,
6 and defense tries to say well, wait a minute, there are
7 several theories that the plaintiffs proceeded upon and a
8 the jury could have found in plaintiff's favor on any one
9 of those theories and then it follows that no causation
10 would be justified, a finding of no causation would be
11 justified. That's just not so.

12 While during the course of the trial and in
13 private hearings out of the hearing of the jury, private
14 hearings with the Court on the record but not in front of
15 the jury, you know, we may have argued about comparative
16 toxicity and improper language in the label, but when you
17 come down to it, the question is what did the jury get
18 presented with in closing argument? What was the argument
19 that was made by Mr. Morris at the time that presumably
20 prevailed upon the jury to make a plaintiff finding on
21 question number 1?

22 And I would commend to the Court Mr. Morris's
23 closing argument. You know, read all of it. It's
24 transcript pages 2917 through 2966. It's not a huge
25 amount. It's about 50 pages. There is some discussion

1 throughout about the failure to communicate theory, but it
2 really comes down to this at the very end of Mr. Morris's
3 argument. He's going through the jury instructions, and
4 then he gets to the instruction about what constitutes a
5 failure to warn.

6 And he says, "Down below it says whether the
7 warnings were in a form the prescribing physician could
8 reasonably be expected to notice and understand." That's
9 the failure to communicate claim and prong out of the jury
10 instruction.

11 "This is the instruction that tells you what the
12 defendants' duty is. They have a duty to make sure that
13 she'll notice and understand. That's where the whole
14 family of labeling comes in, and understand that when we've
15 talked about that these many weeks, we've talked about it
16 because that's their duty, and we say they did not
17 reasonably discharge it."

18 Then without missing a beat, Mr. Morris's very
19 next words are, "Then you're going to have a verdict form.
20 This is it, and this is what -- this is really what it
21 boils down to: Did the defendants fail to provide
22 reasonably adequate warnings of the risk associated with
23 Levaquin to plaintiff's prescribing physicians as
24 submitted? The answer to that question is yes."

25 There is no possible way to construe the

1 presentation to the jury other than that we proceeded on
2 one theory, and that was the failure to communicate theory.
3 That's what they found. Yes, I agree there was some
4 evidence throughout the course of the trial where we talked
5 about comparative toxicity, but that's not what we asked
6 the jury to find.

7 So if you take that as a given, that's where we
8 will start, you then get to the question of causation, and
9 the jury's finding of causation has to be rendered
10 consistent with that finding of failure to communicate in
11 order for this verdict to stand, and it doesn't. There
12 are, we have identified, five possible ways that a jury
13 could find no causation, and they are at page 10 of our
14 opening brief.

15 I will go through them. The first is that if the
16 evidence showed that despite the failure to warn,
17 Dr. Baniriah would have prescribed Levaquin anyway, if that
18 were true, then there would be a finding of no causation.
19 We have gone through in copious detail, and you know the
20 record well having presided over the trial that there is no
21 evidence, not a scintilla, not a shred, not a whiff of
22 evidence that Dr. Baniriah would have prescribed Levaquin
23 anyway.

24 The testimony is absolutely unequivocal that had
25 she known she would not have prescribed Levaquin. There is

1 just no evidence. There is no way the jury could have
2 found no causation based on that prong. If there were
3 evidence that Levaquin was the only medication or treatment
4 available to treat Mr. Straka's community-acquired
5 outpatient pneumonia, there was a lot of testimony about
6 potential alternative drugs, but nowhere, particularly the
7 defense pulmonologist, did he say that it was the only
8 medicine that could have been used.

9 He said it was a medicine that could have been
10 used, but he never said it was the medicine that should
11 have been used, the only exclusive medicine. And
12 Dr. Baniriah said in her testimony that there were many
13 alternatives, as did a number of the other doctors, as did
14 the IDSA guidelines, as did the Sanford Guide. All of
15 those things suggested that there were alternatives.

16 There was no testimony. There was no expert
17 testimony. There was no one who said that Levaquin was the
18 only drug that could have been used. That any other factor
19 caused Mr. Straka's tendon ruptures to the exclusion of
20 Levaquin, this is a specific causation question. There
21 were a number of things that the defendant pointed to, the
22 awkward step off of a curb, the aggressive exercise.

23 Even if you construe those things in favor of the
24 defendant, which we contested, but even if you did, no one
25 said that the awkward step was a cause of the right tendon

1 rupture, much less the cause, the exclusive, the only
2 cause.

3 After all, causation is a question of substantial
4 contributing factor, and even if there were an awkward
5 step, that doesn't exclude the notion that Levaquin was a
6 substantial contributing factor, but if you parse the
7 record, you will see not one witness, not defense, not
8 plaintiff, who said that the step in fact caused either as
9 a partial factor or as a whole factor.

10 Look at the medical records. It doesn't say it.
11 Look at the testimony. It doesn't say it. The only one
12 who said it was defense counsel, and of course, that's not
13 evidence. The same is true of the aggressive exercise. A
14 lot of talk about aggressive exercise, but nowhere did
15 anyone, anyone say that aggressive exercise was a cause,
16 much less the cause.

17 No one testified that it was a -- that the
18 aggressive exercise was a substantial contributing factor,
19 much less the exclusive factor, and so that covers items 3
20 and 4 on page 10 of the brief, and item number 5 is mind
21 boggling.

22 Defendants suggest that the jury could find that
23 Levaquin as a matter of generic, general causation does not
24 cause tendon ruptures, and defendants' best argument in
25 their brief is, well, we admit that there was an

1 association, but they have never admitted that there was
2 general causation. That's their best argument. It doesn't
3 smack of truth, but I mean there were some witnesses who
4 said that, most notably Dr. Kahn.

5 That doesn't get you to the point of saying that
6 Levaquin affirmatively does not cause tendon ruptures. No
7 witness said that. The jury could not have found that, and
8 in all of this, there is this notion of the obligation of
9 Dr. Baniriah to have read the label, and you know, she said
10 she read labels.

11 She didn't remember exactly what she read or when
12 she read it, but even if that were true, the Eighth
13 Circuit's cases in *Yarrow* and *Cornish* make clear that the
14 failure to read by the doctor is not a factor that the
15 Court or the jury may consider in this context. *Yarrow*:
16 "Any failure of the patient's physician to learn of the
17 warnings from sources other than the manufacturer did not
18 relieve the manufacturer of liability."

19 *Cornish*: "It is argued that this negligence,"
20 the failure to keep up with literature, "was an intervening
21 proximate cause of plaintiff's injury and that the trial
22 court erred in failing to so instruct the jury. We find
23 this argument without merit. There is no question of
24 intervening proximate cause in this case. The sole issue
25 was whether appellant," defendant, "negligently failed to

1 make reasonable efforts to warn plaintiff's doctor. If
2 defendant did so fail," which they did here and the jury so
3 found, "it is liable regardless of anything the doctors may
4 or not have done."

5 As I think the Court is aware, we were recently
6 in front of the Eighth Circuit on *Schedin*. That argument
7 happened now about a month ago. My crystal ball says that
8 the Eighth Circuit's calendar is coming to a close, and
9 they will be going through a new rotation of law clerks,
10 and so with any luck, that means we will have a decision in
11 the near future, but you never know.

12 My point is this: Although this argument about
13 Dr. Beecher's failure to read warnings was not made before
14 this Court, that argument was made in the Eighth Circuit.
15 We had an opportunity to talk about *Yarrow* and *Cornish* in
16 the Eighth Circuit.

17 Now, I don't know if the Eighth Circuit is going
18 to reach those questions and decide whether *Yarrow* and
19 *Cornish* are still viable because they were late sixties
20 cases or whether they apply to these circumstances. I'm
21 here to tell this Court that it's possible that the Eighth
22 Circuit will give us some guidance on the meaning of *Yarrow*
23 and *Cornish*.

24 If the Eighth Circuit finds those cases to be
25 still viable, and I don't know why they wouldn't --

1 THE COURT: Were there questions from the Court
2 on those cases?

3 MR. GOLDSER: I don't remember that there were.
4 No, I don't think so, not specifically. The Court was not
5 overwhelming active and talked about a number of other
6 things, but that argument was not quite central to what was
7 going on, but certainly it was discussed, and perhaps
8 they'll address it. Perhaps they won't.

9 But we think that in the context of this case as
10 the law sits here right now, *Yarrow* and *Cornish* are
11 controlling in this circuit, and as a result,
12 Dr. Baniriah's purported failure to read has absolutely
13 nothing to do with this case and the question of causation.

14 THE COURT: How does the adoption of the learned
15 intermediary defense coming after *Yarrow* and *Cornish* affect
16 those decisions?

17 MR. GOLDSER: If I remember reading *Yarrow* and
18 *Cornish* correctly, both of those decisions said that the
19 duty to warn ran from the company to the doctor, and that's
20 what the learned intermediary defense is. That's the only
21 duty to warn.

22 So even though there may not have been a formal
23 adoption of the learned intermediary defense by that name
24 and the Court saying we adopt it like this Court did I
25 think in *Moses* in 1994, the learned intermediary concept

1 was part and parcel of *Yarrow* and *Cornish*. We note, of
2 course, that the defense did not discuss *Yarrow* and *Cornish*
3 at all in their response to the motion as it stands.

4 We don't think this verdict can stand up when you
5 look at the evidence, not the arguments of counsel. There
6 is no way this jury could have found an absence of
7 causation when they found that there was an inadequate
8 warning.

9 Now, there are a few other issues raised on the
10 motion, and I won't go into the juror issue, and I'll talk
11 only briefly about the Senior Citizens Act issue. We still
12 think that the question of whether the Senior Citizens Act
13 claim should have been presented to the jury is something
14 that this Court should render an opinion on so that in the
15 event these issues go up to the Eighth Circuit, we have
16 this Court's guidance to the Eighth Circuit.

17 I'm more interested in the notion that if you
18 were right initially, and I concede that perhaps you were,
19 but I won't give up on that argument, if you were right
20 that it was not a jury question, then it's a question for
21 the Court, and I don't believe a court has answered the
22 question of whether the Senior Citizen Act has been
23 violated.

24 If you find that it wasn't something that needs
25 to be put to the jury, then it should be answered by the

1 Court on its own decision as a bench issue, and so
2 rendering a final judgment without that decision having
3 been made was improper, and we would like at the very least
4 to have the verdict reopened for this Court to address the
5 senior citizen claim.

6 Now, we have tried to argue it such that you have
7 before you our position substantively on why you should
8 rule in our favor, but if you would prefer to have further
9 briefing argument, any other evidence if there is any, I
10 don't know what it would be, but if there is any, we would
11 be happy to kind of tee that up in one package for you.

12 I don't think that has been ruled on yet, and I
13 think we're entitled to get a ruling. That's what I have
14 on this motion.

15 THE COURT: Thank you, Mr. Goldser.

16 Ms. Van Steenburgh?

17 MS. VAN STEENBURGH: Thank you, Your Honor. As
18 Mr. Goldser indicated, there are three bases for their
19 motion for a new trial. One has to do with the issue of
20 the verdict on causation; the second, the juror; and the
21 third, the senior citizen statute.

22 I'm not going to talk about the juror issue,
23 either. I think it's briefed. The law is pretty clear on
24 that. With respect to the Senior Citizen Act, I think that
25 the Court, and you can see it in our brief, the Court

1 reached the right decision. It's complicated. I'm not
2 sure exactly what the legislature was up to. I'm not sure
3 anybody is crystal clear on that, but in terms of it being
4 a derivative action and an enhancement of civil penalty,
5 that is the correct interpretation based upon the case law
6 and the way the statute is written.

7 With respect to the issue of whether the Court
8 should go ahead and take a look at that if it is a legal
9 issue, there is no need for the Court to do so because the
10 jury has already rendered a verdict on the Consumer Fraud
11 Act, and that disposes of the issue such that there is
12 nothing to be decided under the Senior Citizens Act,
13 because that act is completely dependent upon a finding or
14 a verdict under one of the other statutes, and the jury did
15 return a verdict on behalf of the defendants on the
16 consumer fraud statute.

17 With respect to the issue that Mr. Goldser spent
18 most of his time on, which is the issue of causation,
19 really there are two issues. One is, was there a theory
20 other than failure to communicate during the trial, and the
21 second one is, all right, assuming that is the only theory,
22 is there some way that the jury was somehow inconsistent by
23 saying that in fact defendants were liable for a failure to
24 warn, but there was no causation.

25 You know, on the first issue, I have to be honest

1 with you. I was absolutely taken aback that the plaintiffs
2 presented the position that they present any evidence or
3 took the position that they were presenting a theory other
4 than failure to communicate. That was certainly news to
5 the defense after this case was tried.

6 And in fact, there are jury instructions that
7 completely go to the comparative labeling issue, and there
8 were witnesses who testified, Dr. Smith in particular,
9 portions of Dr. Bisson's testimony, portions of Dr. Blume's
10 testimony, that would have been wholly unnecessary had they
11 followed merely a failure to communicate claim.

12 I can appreciate that Mr. Morris made his best
13 argument in closing, but that's not evidence. He can
14 choose what he wants to do during closing and what he wants
15 to emphasize and what jury instructions he wants to read,
16 but that does not mean anything in terms of what the jury
17 was ultimately required to decide, and there were plenty of
18 avenues that the jury could have gone down given the three
19 different theories, failure to communicate, inadequacy of a
20 label and the comparative labeling issue that were
21 presented to them.

22 And in terms of finding on whichever one of those
23 that there was a failure to warn, it is not inconsistent
24 that there could be a finding and a verdict on the jury's
25 part with no causation, but even if we go down the failure

1 to communicate path, there is no inconsistency even in that
2 regard because I think that as I went through each of the
3 items that Mr. Goldser went through on page 10 of his
4 brief, we shouldn't forget that the burden is on the
5 plaintiff to prove causation. It isn't on the defendant to
6 prove there is no causation.

7 The first one, the evidence show that despite the
8 warning Dr. Baniriah would have prescribed Levaquin anyway,
9 her failure to read it or her decision not to read it, the
10 jury can decide what it wants to. It is not a question of
11 the duty and whether she breached the duty. We weren't
12 even in this issue of an intervening cause, and that
13 actually draws me to the *Yarrow* and *Cornish* cases.

14 As Mr. Goldser said, those cases talked about the
15 fact that it was, there was no intervening cause, and
16 that's exactly what's happened with the learned
17 intermediary doctrine is that you're not looking at the
18 doctrine, its failure as an intervening cause.

19 The actor to whom the communication is going is
20 the doctor. Superseding or intervening cause usually talks
21 about a third party out here where there is some other
22 cause, but this is the actor upon which there is an issue.
23 And there was no -- actually, the Court was right about not
24 giving that superseding intervening instruction in this
25 particular case.

1 The jury could have very easily found without any
2 issues of whether it was the doctor's duty or not that
3 there just was no causation, and that was the plaintiff's
4 obligation was to prove that in fact there was causation.
5 The same thing with the trauma and exercise.

6 You don't need an expert to testify that in fact
7 it was or was not a contributing factor, although we did
8 have Dr. Zizic actually testify that it was a possibility,
9 and he is their specific expert on causation for purposes
10 of Mr. Straka's case.

11 So the fact that the jury could decide on its own
12 that maybe that was the cause of his Achilles tendon
13 rupture, it is perfectly within the province of the jury to
14 make that decision. The jury didn't have to decide if this
15 was the only medication. There was certainly a plethora of
16 reasons that the jury could have decided that in fact there
17 was no causation even if the jury decided that the failure
18 to warn was inadequate in this particular case.

19 So the -- in sum and substance, the obligation by
20 Dr. Baniriah to read the label is kind of a red herring.
21 No matter what happened in this particular case, the burden
22 was on the plaintiffs to prove causation. That they were
23 presented theories upon which there could have been other
24 potential causes, that was for the jury to decide.

25 The evidence, there was sufficient evidence. We

1 put forth all of that evidence in our brief, and I will not
2 go through it song and verse for the Court, but there was
3 plenty of evidence in the record, plenty that the jury
4 listened to that would make the evidence sufficient for a
5 jury to return the kind of verdict that it did in this
6 particular case.

7 So I think that when you look at the standard for
8 the new trial, as Mr. Goldser set forth, is it so contrary
9 to the preponderance of the evidence? No. There was
10 plenty of evidence of trauma, the failure by Dr. Baniriah
11 to read the multitude of other causes on the comparative
12 labeling, that there was nothing, no causation as to
13 Mr. Straka, if that's the theory they went down, or that
14 any of the other possible causes that we have laid out in
15 our briefing, which I again won't go through in detail.

16 So there were options, and there was plenty of
17 evidence for the jury to render the verdict it did, and so
18 it is not inconsistent, and there were avenues other than
19 the single avenue that the plaintiff would like the Court
20 to go down here.

21 Thank you.

22 THE COURT: Thank you.

23 MR. GOLDSER: Judge, I don't believe
24 Ms. Van Steenburgh met any of the arguments that I just
25 gave you. If you suppose that plaintiff went forward and

1 did their case in a vacuum and that vacuum is the absence
2 of any cross-examination by defendant or in the absence of
3 any evidence by defendant, Ms. Van Steenburgh's argument is
4 that this jury could find no causation, and then if you
5 apply that notion to the standard of a new trial, such a
6 verdict would be so contrary to the preponderance of the
7 evidence as to imply that the jury failed to consider all
8 of the evidence or acted under some mistake.

9 So if you're talking about a complete nullity
10 from the defense, a verdict of no causation, in the face of
11 the evidence that was presented by plaintiff, and there
12 were reams of it, such a verdict would not stand under the
13 new trial motion.

14 Now, if that's true, then you go to the question
15 of well, all right, they did do cross-examination, and they
16 did present some evidence, and you have to ask yourself
17 what did they present that would fairly rebut any of these
18 other things, and would a jury be able to find in the
19 record that you have that an awkward step off a curb by
20 itself, without Levaquin, with no expert testimony, with no
21 lay testimony, with no medical record evidence that an
22 awkward step would be the exclusive cause of Mr. Straka's
23 right tendon rupture?

24 I don't think a jury could do that in the face of
25 this standard of the preponderance of the evidence to imply

1 that the jury failed to consider all of it. That awkward
2 step notion standing by itself doesn't get you anywhere
3 close. It's as much like a nullity, the hypothetical I
4 gave you just moments ago, as it is anything else.

5 There was no evidence, and the same is true for
6 each and every other item that Ms. Van Steenburgh just
7 recited either orally or the defense recited in their
8 brief. There is no evidence that they presented, other
9 than counsel argument, that can get to a contrary finding
10 in light of the preponderance of the evidence, which this
11 Court has the opportunity to weigh on this motion.

12 THE COURT: Let me ask you a question,
13 Mr. Goldser. I don't have any insight into jury decision
14 making in this case, but if you would assume for a moment
15 that the jury determined listening to Dr. Baniriah that she
16 didn't read the warning and wouldn't have read the warning.

17 MR. GOLDSER: Okay.

18 THE COURT: Or whatever her practice was, and I
19 realize she gave a number of conflicting views on the
20 subject, why can't the jury then find that there is no
21 causation?

22 MR. GOLDSER: Because that's not a factor that
23 the Eighth Circuit allows you to consider, allows the jury
24 to consider under *Cornish* and *Yarrow*. As I cited from
25 *Cornish*, there is no question of intervening proximate

1 cause. The sole issue was whether appellant, defendant,
2 negligently failed to make reasonable efforts to warn
3 appellant's doctors. If appellant, defendant, did so, it
4 is liable regardless of anything the doctors may or may not
5 have done.

6 Why does that rule make sense? It makes sense
7 because a doctor, and even Baniriah said this, if I had
8 known, I would have done something. It was clear from her
9 testimony that when she was presented with things she did
10 pay attention. You know, my favorite expression to you
11 over a number of years appearing in the court in this case
12 is, I don't know what I don't know.

13 How can you blame the doctor for not having
14 picked up that one sentence in the middle of the paragraph
15 in six point font when their sales reps didn't call it out
16 to her, and even though she doesn't rely on sales reps, she
17 certainly pays attention to them. When they didn't send
18 her a dear doctor letter, and even though she may not read
19 every dear doctor letter, she tries.

20 That's why this rule of law in *Yarrow* and *Cornish*
21 makes sense, and to say that the duty runs directly to the
22 doctor, therefore, the causation, the intervening causation
23 issue is irrelevant, that makes no logical sense at all
24 because if there was no statement to the doctor, then there
25 is nothing that you can say that she could have or would

1 have or been able to do about it because she wouldn't have
2 known. She wouldn't have known.

3 Therefore, defendant is liable regardless of
4 anything the doctors may or may not have done, and so if
5 you go back to the liability question of was it a failure
6 to communicate or was it, you know, some other theory that
7 plaintiffs proceeded upon?

8 This Court well knows, and Ms. Van Steenburgh
9 well knows, from day one of law school that even though you
10 plead a lot of things in the complaint, by the time you go
11 to the jury you can decide precisely what theory you're
12 going to proceed upon, and that's exactly what happened
13 here.

14 Mr. Morris and plaintiff proceeded upon one
15 theory, and his closing argument and the record makes that
16 very clear. That was one theory, and that was the basis
17 upon which we proceeded.

18 Finally, returning to the Senior Citizen Act
19 claim, to say that the jury decided the consumer fraud
20 claim against plaintiffs answers the Senior Citizen Act
21 issue is wrong for two reasons: One, the Consumer Fraud
22 Act claim as written on the verdict said basically was the
23 Consumer Fraud Act violated. That combines both the
24 liability and causation questions.

25 And it's entirely possible that the jury could

1 have found that the Consumer Fraud Act was violated by a
2 failure to communicate, like they found in question number
3 1, or that they found that the Consumer Fraud Act was not
4 violated because of a lack of causation, as they found in
5 question number 2.

6 So if they found that the Consumer Fraud Act was
7 violated, then Ms. Van Steenburgh's argument is basically
8 wrong, and we won't know and we don't know because there
9 was only one question on the Consumer Fraud Act claim.

10 But be that as it may, there are other statutes
11 in the Senior Citizen Act, most notably the deceptive trade
12 practices claim, which were not ruled upon by the jury and
13 which do have different standards, and I know the defense
14 argument that plaintiff dismissed the Deceptive Trade
15 Practices Act as a separate claim, and that's true, because
16 the remedy for violation of the Deceptive Trade Practices
17 Act under that statute is equitable relief.

18 But under the senior citizens statute, the
19 penalties provision applies if there is a violation of the
20 Deceptive Trade Practices Act, and we did not dismiss the
21 Senior Citizens Act claim, and so we are permitted to
22 proceed under the Deceptive Trade Practices Act for the
23 civil penalty purposes that was not ruled upon by the jury.
24 So that issue is still open and alive.

25 Thank you very much.

1 MS. VAN STEENBURGH: Just a couple further
2 comments, Your Honor. First on the consumer fraud question
3 that went to the jury, if the plaintiffs didn't like the
4 verdict form, they had plenty of chance to object to it and
5 could have added whatever they wanted or at least brought
6 it to the Court's attention.

7 Having gone through the charging conference, they
8 did not ask that that verdict form be changed when the
9 question was asked of the jury, did the defendants violate
10 the Consumer Fraud Act, so that's number one.

11 Number two, Mr. Goldser picks on the Senior
12 Citizens Act as saying, well, we dismissed the Deceptive
13 Trade Practices Act because you can only get injunctive
14 relief. Well, you know, there is the False Advertising Act
15 that is also included in there. The way I'm hearing this
16 is, we only have to plead under the Senior Citizens Act and
17 then you defendants get to guess which of the other
18 consumer fraud acts we're proceeding under here, and if we
19 dismiss them, we don't have to tell which ones we are and
20 we're just going to then after the fact after the trial
21 say, well, there was enough evidence under the Deceptive
22 Trade Practices Act, enough under the False Advertising
23 Act.

24 If nothing else, notice to the defendants as to
25 what theory they're proceeding on as opposed to a slight of

1 hand after the trial, you know, requires at least some
2 fairness to the defendants. I think it's a convoluted way
3 of trying to create something that really isn't there under
4 that particular act, and so we would go back to saying to
5 the Court that in fact the Court's interpretation of that
6 act is correct.

7 It's derivative. There was an issue of Consumer
8 Fraud Act. They kept that claim. The jury found in fact
9 in defendants' favor on that claim. There is nothing more
10 to be done under the Senior Citizens Act.

11 With respect to the other issue, which is again
12 the issue of causation, it kind of boggles my mind in some
13 ways. I thought of the scenario, why isn't it the jury
14 couldn't have said the defendants failed to warn by virtue
15 of the fact they didn't have a comparative label, but in
16 fact that didn't cause Mr. Straka's injuries, that in fact
17 Dr. Baniriah, who testified she didn't know the label for
18 any of the fluoroquinolones and had never read it, that's
19 one thing, or maybe in fact it was trauma or, you know,
20 there are other possibilities the jury could have come up
21 with.

22 I understand that the plaintiffs want to pull
23 this into the failure to communicate claim. However,
24 here's the jury instruction that was read to the jury.
25 Plaintiff alleges that defendants failed to warn his

1 prescribing doctor about potential risks associated with
2 Levaquin. Specifically, plaintiff claims that defendants
3 failed to adequately communicate to plaintiff's prescribing
4 doctor the potential risks associated with Levaquin and its
5 simultaneous use with corticosteroids in the elderly.

6 Plaintiff also claims that defendants failed to
7 warn plaintiff's prescribing doctor about the potential
8 risk of tendon injuries with Levaquin as compared to other
9 fluoroquinolones. That was an instruction given to the
10 jury. The jury was told, there is more than one theory out
11 here.

12 The fact that the plaintiffs emphasize one or the
13 other doesn't matter. The jury was instructed, and
14 certainly could have gone down many avenues with respect to
15 its decision regarding failure to warn and then causation.
16 The other thing that I think is a little bit confusing in
17 terms of what Mr. Goldser said, he said, well, you know,
18 now it's possible that Levaquin actually could have caused
19 this.

20 The connection between causation is not whether
21 Levaquin did or didn't. I mean, there is a medical
22 causation issue, but it's the connection between the
23 failure to warn, which the jury said the conduct of, you
24 know, the failure to warn by the defendants, the question
25 is, did that failure to warn cause Mr. Straka's injuries,

1 and the jury had plenty of evidence during the trial to
2 make a determination that in fact there may have been a
3 failure to warn, whether it be because there wasn't another
4 warning about another fluoroquinolone, because the tendon
5 emphasis wasn't as high, although I have to say that
6 Dr. Baniriah testified that in fact what she thought was
7 missing from the warning was the fact that the words
8 "tendon effects" were not bolded, corticosteroids and the
9 elderly were not included.

10 And when she read the very warning that was in
11 operation for Mr. Straka, she said, yep, tendon effects is
12 embolded, and there is something about corticosteroids, and
13 there is something in here about the elderly. So all of
14 the issues that she said would have caused her to do
15 something different actually were in the warning at that
16 very time, and that testimony is very clear.

17 I do think that the *Yarrow* and *Cornish* cases are,
18 and I forgot to mention that those cases did not come up
19 specifically in front of the Eighth Circuit, but Judge
20 Riley did ask several questions about, well, is there
21 anything in the FDA regulations? Is there anything that
22 requires a manufacturer to send out a dear doctor letter?
23 Are you asking us to create a duty here and say that there
24 is a common law responsibility that doesn't exist outside
25 of what the FDA requires that in fact they have to

1 communicate in these other ways to ensure that the doctor
2 knows about this.

3 So I do think that the Eighth Circuit was
4 interested, although it was not within the specific
5 confines of discussing those two cases, and I do think that
6 those two cases were at a different time and at a different
7 place and that the learned intermediary doctrine has come
8 into place, and there is a different regulatory scheme, and
9 we have talked to the Court about that before, so I won't
10 reiterate those points.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Ms. Van Steenburgh.

13 MR. GOLDSER: I know it's time to move on, and I
14 don't want to make any further arguments because even
15 though I could, and Ms. Van Steenburgh is wrong, the Court
16 should grant our motion, and let's just leave it at that,
17 except to say one thing, and that is, Mr. Morris noted in
18 his closing argument that Mr. Irwin had conceded medical
19 causation in his closing argument, and the Court might pay
20 attention to that.

21 So unless you want to respond to that one
22 notion --

23 MS. VAN STEENBURGH: No.

24 MR. GOLDSER: -- we can move on with the agenda.

25 THE COURT: Let's go on to number 4.

1 MR. GOLDSER: Excuse me. Number 4 is the motion
2 to stay execution without a supersedeas bond in the
3 Christensen case. The Christensen case has been appealed.
4 Plaintiff's briefing is due in a couple of weeks. There is
5 a judgment for costs against Mr. Christensen of some
6 \$60,000. We have asked for a stay of execution pending
7 appeal on that judgment.

8 We are still negotiating a resolution of the
9 Christensen case in a way that will make this motion moot.
10 Right now it's tied into the rest of the settlement
11 negotiations, which we're going to pick up this afternoon.
12 I don't know whether that tying arrangement will remain in
13 effect.

14 I don't see any request by the defendant to jump
15 out and try to collect this judgment from Mr. Christensen.
16 As the Court knows, he is in his eighties.
17 Mrs. Christensen has since died since the trial. He is on
18 his own. He's not a wealthy man. We would certainly love
19 to be able to proceed with the appeal without burdening
20 Mr. Christensen with the notion of an execution.

21 But really what I would like to do at the very
22 least is have any execution stayed at least on a temporary
23 basis while we discuss whether we can resolve that appeal
24 of its own right, and if not, then perhaps we can revisit
25 this motion on a longer term basis if in fact the appeal

1 does go forward. That's where I would like to leave that
2 issue for today, and I don't know what Ms. Van Steenburgh
3 will say in that regard.

4 MS. VAN STEENBURGH: I won't, because Ms. Lenahan
5 will be taking over those duties.

6 THE COURT: Okay. Go ahead, Ms. Lenahan.

7 MS. LENAHAN: Well, I'll be fairly brief. Our
8 position on this is that we have not reached a settlement
9 with regard to the Christensen case. The appeal is going
10 forward, and as Mr. Goldser said, the briefs are due in a
11 couple weeks. So it is our position that a supersedeas
12 bond is required here.

13 That's the law generally is that an appellant
14 must post a full bond if he's going to appeal, and there is
15 no reason here that the Court should exercise its
16 discretion any differently.

17 Certainly we're sympathetic with
18 Mr. Christensen's financial situation, though the plaintiff
19 has presented nothing specifically in the context of its
20 motion to support the idea that it cannot cover the --
21 Mr. Christensen cannot cover those costs. The plaintiff
22 also suggested in the brief that there were other ways of
23 accommodating it through the MDL, but it was really
24 cryptic.

25 We're not sure what that means, but if that's the

1 case, then certainly it shouldn't be a large burden for the
2 plaintiff to secure a bond in this case, and to be quite
3 frank, though the plaintiff's financial condition, whatever
4 it is, if it is in jeopardy is unfortunate, that's actually
5 a further reason why we would require a bond in this case.

6 I mean, simply because defendants are not going
7 to collapse if they're unable to collect this judgment
8 doesn't mean that they're not entitled to it and they're
9 not entitled to the security that they would be afforded
10 under the rules.

11 Thank you.

12 THE COURT: All right. Thank you.

13 MR. GOLDSER: I don't hear any present effort by
14 the defense to try to collect this judgment, so I don't
15 know why they wouldn't stipulate to a stay. Be that as it
16 may, we hope we can negotiate the resolution of this appeal
17 so that this issue does not need resolution by the Court,
18 and if the Court is willing to stay its hand for the time
19 being, we will certainly advise you as quickly as we know
20 something, and if we don't and if the defense wants to move
21 forward on the motion and wants to move forward on
22 execution, we will deal with that when the time comes.

23 The next item, the substitution of party upon
24 death under Rule 25 is an item that Ms. Van Steenburgh has
25 raised for the agenda today. Holly was kind enough to

1 ferret out all of the cases to which that is relevant. In
2 my review of the cases, they fall into several categories:
3 Motions have been filed to substitute parties. Motions are
4 not due yet. Cases have been dismissed, and there are I
5 believe three cases in which more than 90 days has expired
6 since the notice of suggestion of death has occurred.

7 I have been in touch with at least one of the
8 firms of those three, and I know they're planning on filing
9 some sort of substitution imminently, and I have told them
10 it behooves them to do so imminently. I have not had
11 contact with the other two yet. I don't know if we're
12 talking about arguing motions to substitute.

13 I don't really know if there is an argument to
14 oppose it, but certainly in the motions that have been
15 filed, I'm not aware of any replies that have been filed,
16 or I may have missed some of those.

17 THE COURT: How many have been filed?

18 MR. GOLDSER: Oh, a lot. I have 24, 24 motions
19 to amend to substitute following the suggestion.

20 MS. VAN STEENBURGH: I think this came up on the
21 agenda, Your Honor, in part because your calendar clerk
22 asked us to make a determination as to how we were going to
23 go forward and what we were going to do on this. The
24 reason the suggestions of death have been filed, we have
25 filed over 60, and part of it is to have the plaintiffs

1 determine whether they're going to go forward with their
2 cases or not, and we have one, two, three, four, five, six
3 that have passed the 90-day period.

4 So we believe those automatically should be
5 dismissed, unless we've seen dismissals, and those include
6 the Lewis Saul and Zimmerman Reed law firms, so those are
7 those.

8 With respect to the others where there have been
9 motions to substitute, we're not going to oppose those
10 motions. The proper party needs to be included, but this
11 is also a way if some of the plaintiffs' attorneys decide
12 or the plaintiffs or their personal representatives decide
13 they don't want to go forward, this is a way to make sure
14 that that is brought to their attention and so that they
15 can make that kind of determination.

16 And so if they decide not to and they let the 90
17 days pass, those cases will be automatically dismissed.

18 MR. GOLDSER: I think we're pretty much on the
19 same page. I don't know of six. I only know of three. If
20 the other three happen to be Mr. Saul's cases or our cases,
21 we have either filed dismissals or are in the process of
22 filing dismissals or have filed our motions in a timely
23 fashion.

24 So there really are only three. I don't know
25 what folks are doing with those three at this point in

1 time, but I am reaching out to them. So those are the only
2 ones of consequence. I know there are some coming up with
3 deadlines imminently. We will be reaching out to those
4 folks and make sure they respond.

5 THE COURT: If there are late motions,
6 Ms. Van Steenburgh, are you intending to file something
7 opposing those motions to substitute past the 90 days?

8 MS. VAN STEENBURGH: The likelihood is that we
9 will. There is ample time. The rule does require 90 days.
10 It's as simple as keeping a chart as to what is going on
11 with your cases, so if in fact they file late motions, we
12 probably will oppose those.

13 MR. GOLDSER: We will see if and when those
14 motions get filed. Excuse me, Your Honor. Item 6 is PFS,
15 plaintiff fact sheet deficiencies. Ms. Van Steenburgh put
16 that on the agenda. I don't know the details of that. She
17 will have to tell the Court.

18 THE COURT: Okay.

19 MS. VAN STEENBURGH: We just thought we would
20 bring it to the Court's attention that currently there are
21 143 plaintiffs who have failed to provide us with the
22 plaintiff fact sheets. Actually, that number goes up
23 higher with some multiple plaintiff cases, but we put that
24 at 143.

25 And I think we are just flagging the issue for

1 the Court because it becomes, it is a chronic problem, and
2 at some point we need to bring to the Court's attention
3 some of these that are so late that we may need the Court's
4 assistance in creating a rule that if they don't get filed
5 by a certain date they automatically get dismissed. So
6 it's merely to let the Court know.

7 THE COURT: All right.

8 MR. GOLDSER: It would be useful for me to know
9 who they are so that I can follow up on them, and I presume
10 you're making contact directly with plaintiffs' counsel?

11 MS. VAN STEENBURGH: No. When plaintiffs'
12 counsel asks us for an extension we will give them an
13 extension if they want them, but we don't call them and let
14 them know. I mean, it's their obligation to get those
15 plaintiff fact sheets, and we just note the date that
16 they're deficient.

17 MR. GOLDSER: All right. So you're not sending
18 deficiency letters?

19 MS. VAN STEENBURGH: You know what? Wrong. We
20 are sending deficiency letters. I think they have all gone
21 out for the 143.

22 MR. GOLDSER: If you wouldn't mind sending me a
23 list of that so that we can follow up, that would be great.

24 MS. VAN STEENBURGH: You're copied on all of
25 them.

1 MR. GOLDSER: And we didn't put on the agenda
2 whether or not there are defendant fact sheet deficiencies,
3 but I am sure we can file something along the line. When
4 defendant fact sheets are deficient, we will ask for
5 judgment, too. That's okay. We've talked about that
6 before.

7 The final pretrial order and suggestion of
8 remand, that's number 7 on the agenda. We have talked
9 about this before to some extent. We have exchanged
10 proposed pretrial orders on this subject, and the nice
11 thing about those pretrial orders is that if you compare
12 them, it will identify for you the issues that exist
13 between the parties.

14 I have created a combined order, which I'm happy
15 to hand up to the Court, which will show you what the
16 issues are. We can go through some of them today or not as
17 the Court sees fit. I can also then outline, if you would
18 like, just what the issues are, and we can do it that way.

19 When I do hand this up, and let me do that now.
20 As a red line version, anything that is ordinary text
21 without underlining or strike-out is agreed language.
22 Anything that is underlined or stricken are plaintiffs'
23 requests. Particularly where you have got a lot of
24 underlining of things, those are additions that plaintiff
25 would like to have in its proposed order.

1 There are wordsmithing issues to be sure and
2 things that aren't overwhelmingly important, but if you
3 were to go through, you will see that there are really
4 eight issues that this proposed order raises, some of which
5 I know we want to talk about, some of which maybe we can't
6 or don't have to.

7 What additional discovery needs to be done in the
8 context of the MDL? What is the evidence of the black box
9 warning mailing to doctors? What is the available use of
10 prior testimony, both deposition testimony and trial
11 testimony in forthcoming trials? How do we address the
12 question of punitive damages in states other than
13 Minnesota?

14 How do we handle the 1404 venue transfer motions?
15 What do we do about alternative dispute resolution for
16 individual cases prior to remand, as opposed to trying to
17 settle cases en masse? What do we do about the assessment
18 order, which we have discussed already, and how do we
19 handle statute of limitations issues in individual cases?

20 I can go down some of those and give you a little
21 bit more notion of what I perceive the issues to be, and
22 then we can decide whether we're going to discuss them
23 further or not. From plaintiffs' perspective, we see the
24 role of the plaintiffs' steering committee in the MDL as
25 winding up.

1 We have talked about whether or not there need to
2 be bellwether trials. We don't think so. We think that
3 there is a little bit more discovery that needs to be done
4 or on an MDL-wide basis for use in individual plaintiff
5 trials. There are some depositions of company employees
6 that need to be taken. Certainly Dr. Minton's deposition
7 needs to be finished.

8 There are some outstanding third-party subpoenas
9 and documents which may ultimately necessitate some
10 depositions. Those need to be addressed. There is not a
11 lot that remains to be done, so as a steering committee, we
12 believe it's our responsibility to complete that and make
13 it available to individual plaintiff's counsel when cases
14 get remanded. So that's what that issue is about.

15 The second issue, evidence of the black box
16 warning mailing, you may remember this issue coming up
17 specifically in the context of the Straka trial. There was
18 a question of whether the black box warning was ever mailed
19 to Dr. Baniriah. We've confronted this issue in a couple
20 of other cases.

21 I know that I've got this issue going on in a New
22 Jersey state court case right now, and I continue to
23 believe there is evidence of some kind that the defendant
24 fact sheet reflects that defendant did in fact do a mailing
25 of the dear doctor letter, black box warning to doctors

1 with a given list of doctors' names and given dates of
2 mailing.

3 We have never seen that, and that's, as you can
4 imagine, quite important to doctors' notification and
5 whether they knew or should have known of the issue,
6 particularly in some of the post black box warning cases.
7 So that issue has to be dealt with somewhere along the
8 line.

9 As we get ready to remand the cases and go on to
10 additional trials, we have talked about this issue before,
11 the use of prior testimony, how do you get to use the
12 testimony of some witnesses that have appeared in these
13 prior trials in subsequent cases, most notably the experts.

14 And you heard our motion before Straka to
15 videotape the experts so that we could use them in
16 subsequent cases. The Court denied the motion, and we're
17 still faced with the question of how do you use those
18 experts in subsequent trials, and so we have to deal with
19 that.

20 Punitive damages on nonMinnesota cases. Do
21 states allow punitive damages? What's the standard? Who
22 addresses that, this Court or the remand court? We have to
23 deal with that. The 1404 venue transfer motions, we've
24 danced around this issue at length over time. We had a
25 conversation with defense on, last week, I think it was

1 Thursday or Friday, where I suggested that the defendant
2 actually bring their motions or at least identify for whom
3 they're going to bring their motions, and then plaintiffs
4 can decide whether they want to stipulate to a venue
5 transfer or oppose a venue transfer.

6 As I think this Court knows, in the *HRT*
7 litigation, there were multiple motions to transfer venue
8 under 1404, and I think they were brought by plaintiffs.
9 Even though the case was filed here originally to take
10 advantage of Minnesota's statute of limitations, counsel
11 wanted to try the case in the home jurisdiction of the
12 plaintiff.

13 And so I think every one of those motions was
14 granted, so if defendant brings a venue transfer motion and
15 plaintiff wants to agree, I think it will happen, but if
16 plaintiff wants to try the case here for whatever reason,
17 then they can oppose it, and then that will be the
18 decisions that you have to make.

19 So we can circumscribe this problem substantially
20 by identifying the cases, where it should be made, where
21 the motion should be made and whether plaintiffs stipulate
22 or don't stipulate. Alternative dispute resolution, you
23 know, we have been talking about settling cases in groups,
24 and we have another conference with Judge Boylan this
25 afternoon.

1 Mr. Zimmerman will address the status of
2 settlement shortly, but, you know, you've got to deal with
3 individual cases on an individual basis at some point when
4 you're talking about remanding them, and so we need to put
5 into play some mechanism to address that. We've got to
6 deal with the assessment issues as we talked about.

7 We also have to deal with statute of limitations
8 issues, is that an issue this Court addresses or the remand
9 court deals with and how do you deal with that. So I'm not
10 arguing these motions particularly. I am highlighting that
11 these are the issues of substance that this proposed
12 pretrial order in its red line form will lay out for you.

13 And I think you can see to a great extent what
14 the respective parties believe ought to happen, and to the
15 extent it requires further explanation or explication, we
16 can certainly do that for you, but that's what this
17 proposed order is designed to do.

18 MS. VAN STEENBURGH: Well, Your Honor, last
19 Wednesday at my request we had a meet and confer, both in
20 terms of the two proposed remand orders and also about
21 picking the next Minnesota case for trial, and we did have
22 a conversation, and we had agreed at that time to exchange
23 red line drafts, so if there were questions about each of
24 our drafts.

25 And I did red line mine, and it has not gotten to

1 the other side, and I haven't seen anything from them. I
2 won't go through all of these things. We certainly can
3 talk about some of those issues off line still at a meet
4 and confer with the plaintiffs, but I just wanted to
5 highlight a couple of things, and this is going to go into
6 the version that I give them.

7 There is no more discovery to be done, other than
8 Neil Minton's deposition. I think we are done. They have
9 identified that maybe they will want to take some of the
10 company witnesses, but my question to them in my red line
11 version is, who, what, when. If you don't know by now
12 after three trials, it's a little puzzling to me.

13 Prior testimony, we certainly can talk about
14 that. Punitive damages we believe is a trial court issue.
15 You've decided that each time there is a trial, and we
16 think that is probably not going to be an MDL judge issue
17 under 1407. We think that that may be more of a trial
18 court issue.

19 The forum nonconvenience thing, I would make a
20 proposal to the Court. Rather than having us bring a bunch
21 of motions, we could actually provide the Court with a list
22 of the cases for each of the attorneys, and the Court can
23 do an order to show cause as to why the case shouldn't be
24 transferred. That may be the easier way because, and this
25 came to me after Mr. Goldser said during the meet and

1 confer there are a lot of plaintiffs' attorneys who may not
2 want to be here, and they may not oppose the motion.

3 So maybe it is that the plaintiffs need to
4 explain why they want to stay here as opposed to having the
5 case transferred elsewhere, so that's the proposal I had
6 agreed to. The plaintiffs and I throw that out for the
7 Court's consideration.

8 The last issue in terms of this list, and I will
9 stop, is the ADR. I think we tried very hard to work on
10 settlement, and again, we are going to meet with Magistrate
11 Judge Boylan, and Mr. Zimmerman can make his comments. If
12 there are individual cases and those cases get remanded,
13 certainly a trial court or a magistrate judge in another
14 jurisdiction is well suited to talking about individual
15 specific cases for purposes of settlement.

16 I'm not sure that has to be done on a
17 case-by-case basis still in the MDL genre. Thank you, Your
18 Honor.

19 MR. GOLDSER: The order to show cause idea on the
20 forum nonconvenience cases is a good one. My only concern
21 is that if it's drafted as an order to show cause,
22 sometimes that shifts the burden of who has to step forward
23 and who has the burden of proof. My recollection, and I
24 haven't looked at this in a while, is that the burden is on
25 the moving party to transfer venue.

1 And so if an order to show cause is done, I would
2 want to make sure that that burden stays where it belongs,
3 but other than that, I was suggesting bring me a list of
4 the people you want to make the motions on, and let's get
5 plaintiffs' counsel to decide whether they're in or they're
6 out, and I don't have a problem with that notion.

7 The bigger question, a broader question is, here
8 is a list of eight issues and its language. How does the
9 Court want to handle getting these resolved at this point
10 in time, recognizing that we're going to talk separately in
11 a few moments about the next Minnesota trial case. What
12 would you like us to do?

13 THE COURT: As to what?

14 MR. GOLDSER: As to how to resolve these eight
15 issues that are in this order, whether they need to be
16 resolved, when they need to be resolved, would you like us
17 to do any further negotiation, meet and confer, would you
18 like any further briefing or letters to the Court of our
19 respective positions so you can enter an order?

20 THE COURT: I think, you know, Ms. Van Steenburgh
21 suggested there was some more meeting and conferring that
22 could be done here. At some point in time we're just going
23 to have to tee it up and resolve it in the courtroom.
24 There is a whole list of things that are remaining. I'm
25 not sure the entire list would remain after further

1 discussion.

2 MR. GOLDSER: And we're happy to do that. At
3 least you have an idea of what the universe of issues is as
4 we perceive them at this point in time as we talk about
5 remand of cases and teeing up other cases for trial.

6 The last issue of litigation before we talk about
7 settlement is where we are with regard to selecting the
8 next cases for trial. As I've already said, we don't
9 believe that we're in bellwether land anymore. We don't
10 think that picking a case that has a likely negative value
11 is a useful function.

12 We don't think it makes economic sense to spend
13 that kind of money on trials, particularly if they're not
14 likely to result in a verdict, that plaintiffs should be
15 able to choose the cases that they think are meritorious
16 and that we should go forward on that basis.

17 Whether we do it as a single trial or multiple
18 trials has also been an issue that we danced around for a
19 while. Mr. Fitzgerald is going to address this issue in
20 greater depth and tell you where we are on the issue and
21 what we would like the Court to do.

22 MR. FITZGERALD: Thank you, Ron. Your Honor,
23 again as Ron noted, we do think that the bellwether phase
24 is over. We think that the next trial to go forward in
25 October should be plaintiffs' selection and plaintiffs'

1 selection alone as far as the plaintiff or plaintiffs'
2 cases to be tried.

3 We agree with the defendants that the next trial
4 will be of a Minnesota resident/Minnesota filed case. When
5 you look at that list of cases, there are 40 cases fitting
6 that description of 10 different law firms. Seven of those
7 cases are clients of my firm. We are actually going to be
8 filing dismissals in two of those cases this week.

9 We are continuing to evaluate these cases to
10 figure out what is the next most appropriate case for
11 trial. We need some additional time to get that done, and
12 I think that we should have that accomplished by the end of
13 the month and --

14 THE COURT: June, okay.

15 MR. FITZGERALD: That will give us sufficient
16 time to get either one or more plaintiffs --

17 THE COURT: How many names are you anticipating?

18 MR. FITZGERALD: Multiple. I don't know if it
19 will be two, three, four, but I think that's probably the
20 ball park.

21 THE COURT: All right.

22 MS. VAN STEENBURGH: I can't help myself. I find
23 it amusing they say we're not in the bellwether phase
24 anymore, but when they asked for an extension of their
25 briefing in the Christensen case, the reason was that trial

1 counsel was working on the next bellwether case, so I don't
2 know. I don't know if we're in the bellwether phases or
3 not. It depends on what the argument is, I guess, each
4 day.

5 There are 40 Minnesota resident/Minnesota filed,
6 but there are really only 26 cases to choose from. Some of
7 the Minnesota resident/Minnesota filed cases the person is
8 deceased. Whether they're going to go forward with a
9 personal representative --

10 THE COURT: Are those included in the 26?

11 MS. VAN STEENBURGH: No, those aren't.

12 THE COURT: Okay.

13 MS. VAN STEENBURGH: The 26 I have on my list are
14 people who are either plaintiffs who are alive or they are
15 not old bellwether cases, so not Kirkes, not Karkoska, not
16 Sharon Johnson. So these are all new cases that have been
17 filed since then.

18 Just to give the Court some sense of what's out
19 there, not necessarily for these Phase III cases, but I was
20 going to give the Court a broader overview, and the Court
21 can kind of decide whether a bellwether is appropriate or
22 not. The Phase III cases, you recall, is kind of the big
23 bulk of the cases that were filed after a certain point.

24 In the Phase III, we have 55 post black box cases
25 that were filed, 54 that involve tendonitis or

1 tenosynovitis, 124 cases that are non Achilles tendon
2 rupture, so biceps and rotator cuffs and knees and that
3 kind of thing, and we have 80 cases where the plaintiff is
4 under 50.

5 The reason I bring that up is that all of those
6 involve different evidence than we have seen thus far in
7 the three cases that we have tried. I'm not suggesting one
8 way or another. A bellwether might actually do some good.
9 If we tried a post black box case, it might tell you
10 something about the other post black box cases that are out
11 there.

12 If it's a non Achilles tendon rupture case, it
13 might tell you something about the other 123 that are out
14 there. The under 50, you know, there is a lot of
15 literature that talks about over 65, so what do you do with
16 the under 50? So it may say something about the other 79
17 cases out of the total 80 that are out there.

18 So it might be some value to picking a bilateral
19 or singular Achilles tendon rupture case, and we agree that
20 the next cases should be tried as a Minnesota
21 filed/Minnesota resident. It would be too hard to do all
22 the discovery across the country for any forum
23 nonconvenience cases that are before the Court.

24 We disagree that the plaintiffs should pick the
25 next case. We think that given the October trial date,

1 really realistically maybe work up three cases and we each
2 pick one or maybe the Court ends up picking one. They pick
3 one. We pick one. If they don't like our case, they can
4 dismiss the case that we pick, and we will pick another
5 one.

6 We don't think it should all be whatever case the
7 plaintiff wants to choose after we have been down this road
8 as the next case that needs to be tried with the Court.
9 There are a variety of firms involved besides the Zimmerman
10 Reed and Lewis Saul law firms, so there are some other law
11 firms that would have to be included in this.

12 We think that there could be discovery done in up
13 to three cases and then narrow it down and get one case
14 ready for trial, and how that selection process happens,
15 other than plaintiff gets to pick whatever case they want,
16 we're happy with that.

17 THE COURT: So are you anticipating submitting
18 names by the end of the month as well?

19 MS. VAN STEENBURGH: Oh, yeah. We could easily
20 do that. Absolutely.

21 THE COURT: Let's get this worked up so that at
22 the end of the month, perhaps in early July, we can have a
23 status conference where we can focus in on the names.
24 Okay?

25 MS. VAN STEENBURGH: In that regard, should there

1 be a number that you would like us to submit out of them?

2 THE COURT: Well, I haven't really given the
3 matter too much thought at this point in time, whether we
4 should try one or if we should try three, for example, as
5 an alternative to the trying of one. I don't know. I can
6 hear arguments both ways on that.

7 MS. VAN STEENBURGH: Well, I have to say that
8 when we had our meet and confer last Wednesday when we were
9 talking about it, I think we all agreed that trying a multi
10 plaintiff case on this short notice would probably not work
11 out as well. So all of us were focusing on one case at
12 that point.

13 THE COURT: Okay.

14 MR. GOLDSER: I'm not sure that we did all agree
15 that one case by itself would be a good idea because I
16 didn't agree to that, and when we decide these cases, which
17 cases are to be tried, I think it may be necessary to
18 decide, are we still in the bellwether phase or are we not?

19 From our perspective, the differences that
20 Ms. Van Steenburgh recited are di minimus and that the
21 record that we have developed can be used at least in part
22 in all of those cases. The difference between an Achilles
23 tendon rupture and a bicep tendon rupture is only the
24 difference in the part of the body and the forces that went
25 into causing the rupture.

1 But the mechanism of injury is otherwise the
2 same, for example. So I don't think we need to deal with
3 learning more about cases by a further bellwether process.
4 So early July we'll provide names. You know, I think it
5 behooves the plaintiffs to decide if the cases are viable
6 to try or not viable to try, and if they are, we should try
7 them. If they're not, we should dismiss them.

8 That leaves the report of settlement from
9 Mr. Zimmerman is the only remaining item --

10 THE COURT: Okay. Good afternoon, Mr. Zimmerman.

11 MR. ZIMMERMAN: Good afternoon, Your Honor. I
12 guess close but no cigar would be a way we could talk about
13 where we have been and where we are. We're meeting with
14 Magistrate Judge Boylan this afternoon in a little while,
15 about a half hour, I believe. Everybody has hardened their
16 position.

17 I don't stand before you being pessimistic or
18 optimistic. I'm kind of agnostic, I guess. We have made a
19 lot of progress. We haven't gotten it done. Until you do
20 get it done, it's a whole lot of nothing, but I will remain
21 on my feet, so I guess hope breeds eternal. That's
22 probably the best I can do.

23 THE COURT: All right. Very well. Do you have
24 anything to add, Ms. Van Steenburgh?

25 MS. VAN STEENBURGH: No, Your Honor.

1 THE COURT: All right. Well, I know you've got
2 the meeting with the magistrate judge today, and I
3 appreciate that.

4 Can we set another date here? Let's do that
5 next. What does Monday the 9th look like?

6 MR. IRWIN: It's good for Irwin, Your Honor.

7 MS. VAN STEENBURGH: I'm going out of town on the
8 8th and won't be back until the 13th. I'm gone that whole
9 week, Your Honor.

10 THE COURT: The morning of the 17th could work as
11 long as it's early.

12 MS. VAN STEENBURGH: I'm open on that date.

13 MR. GOLDSER: -- it's okay by me.

14 THE COURT: I have to be someplace at 11:00 that
15 day, so -- downtown Minneapolis, so if we did it at 9:00,
16 would that work? Okay. Let's set it tentatively for 9:00
17 on Thursday the 17th of July.

18 Anyone on the phone want to weigh in on that?

19 MR. IRWIN: It's okay for Irwin, Your Honor.

20 MR. ESSIG: Fine with me, Your Honor.

21 MR. GOLDSER: I have it as a Tuesday.

22 THE COURT: Yes. It's a Tuesday. I'm sorry.
23 Okay. Very well. The Court will take the two motions
24 under advisement and will issue written orders shortly on
25 them.

1 I appreciate the arguments today, and good luck
2 on your talks next, and we will be in recess.

3 THE CLERK: All rise.

4 * * *

5 I, Kristine Mousseau, certify that the foregoing
6 is a correct transcript from the record of proceedings in
7 the above-entitled matter.

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11 Certified by: s/ Kristine Mousseau, CRR-RPR
12 Kristine Mousseau, CRR-RPR

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