

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

3 -----
4 In Re: St. Jude Medical, Inc. 01-MD-1396 JRT/FLN
5 Silzone Heart Valves Products
6 Liability Litigation.

7 Minneapolis, Minnesota
8 February 26, 2003
9 11:35 a.m.

10 -----
11 TRANSCRIPT OF PROCEEDINGS
12 (Telephone Conference re Defendant's Privilege Log)

13 BEFORE THE HONORABLE JOHN R. TUNHEIM,
14 UNITED STATES DISTRICT COURT JUDGE.

15 APPEARANCES:

16 On behalf of plaintiffs: James T. Capretz
17 Michael Bosko
18 Steven E. Angstreich
19 J. Gordon Rudd, Jr.
20 On behalf of defendants: Steven M. Kohn
21 David E. Stanley
22 Liz Porter

23 Court Reporter: Karen J. Grufman
24 U.S. Courthouse, Suite 1005
25 Minneapolis, MN 55415
612-664-5105

1 THE COURT: Hi, everyone. How you doing?

2 Good morning. Why don't we start with everyone just
3 identifying themselves for the record, because Ms. Grufman is
4 taking this down.

5 MR. CAPRETZ: Jim Capretz for the plaintiff.

6 MR. ANGSTREICH: Steve Angstreich for the plaintiff.

7 MR. RUDD: Gordon Rudd for the plaintiff.

8 MR. BOSCO: Mike Bosco for the plaintiff.

9 MR. KOHN: Steven Kohn for St. Jude Medical.

10 MR. STANLEY: David Stanley for St. Jude Medical.

11 MS. PORTER: Liz Porter, in-house counsel at St.
12 Jude Medical.

13 THE COURT: Okay, very well.

14 The issue we're going to talk about today involves the
15 dispute over the privilege log. And as I understand the
16 situation, and correct me where I'm wrong, the plaintiffs have
17 objected to different categories of the claimed privilege, and
18 the defendants now have come back with a fairly extensive
19 rebuttal to that, and that's really where it stands.

20 Maybe I've over-simplified it. But anyone want to add
21 anything to that?

22 MR. ANGSTREICH: That's essentially where we are,
23 Your Honor.

24 THE COURT: And as I understand it, through this
25 process, which is in part I guess a meet and confer, maybe not

1 entirely, the issues really haven't been narrowed at all on
2 the basic issue of the privilege log. Correct?

3 MR. ANGSTREICH: That's correct.

4 THE COURT: What I am inclined to do is review the
5 disputed documents myself, make the determination. I can do
6 that next week. I have some time next week when I can do
7 that.

8 So the question becomes what additional information the
9 plaintiffs should be giving to me before I do that? So let's
10 talk about that issue.

11 MR. ANGSTREICH: Okay. As we've tried to put before
12 you, Your Honor, we have the privilege log which had the bases
13 being asserted by St. Jude Medical for the privilege.
14 Predicated upon that, we reviewed it. We came to our
15 determinations. And then we received the 33-page dissertation
16 on additional facts and bases to support the contentions that
17 are contained within the privilege log.

18 Reviewing those 33 pages, it's clear to us that
19 additional facts have been presented. That we just, there's
20 just no way we can respond to whether or not in reality on a
21 given date and time there truly was a reasonable belief that
22 there was a regulatory issue with respect to the MDA, whether
23 or not as predicated upon the case law that we recited to the
24 Court during the February 13 conference, if in fact the MDA
25 issues are old and ancient history and closed issues.

1 The privilege no longer exists because that matter is
2 over. And so when we first took Jim Ladner's deposition, one
3 of the things that I tried to do was to inquire into the bases
4 for some of these privileges as it relates to in anticipation
5 of regulatory action, litigation. Regulatory action doesn't
6 appear within the four corners of that privilege log.
7 Everything was based upon in anticipation of litigation.

8 And so if all you have is our position that the privilege
9 log on its face does not reflect the request for legal advice,
10 or that legal advice was in fact provided within the four
11 corners of the document, or that the, in anticipation of
12 litigation position is not articulated beyond that it was in
13 anticipation of litigation. Or the identification of the
14 individuals having been either St. Jude employees or not
15 employees, outsiders having gotten copies of these documents.
16 We can't further respond to what has been presented by way of
17 the February 17 slash 18 letter.

18 And so what we propose is an opportunity for them to
19 identify the person or persons who have provided to them the
20 information to support the attorney/client privilege argument,
21 or work product privilege argument, and we take their
22 deposition, so that we can explore it.

23 Or alternatively, Your Honor, they're limited to that
24 which is presented in the privilege log. The order that we
25 sent to the Court as a proposed draft order actually gave them

1 the benefit of the 33-page dissertation, but only if we had
2 the opportunity to take some discovery. If we don't have the
3 opportunity to take discovery, then what we suggest is the
4 documents be provided to you in camera.

5 If after Your Honor has reviewed those documents in
6 camera you think that it's necessary for us to brief the issue
7 further, then we would provide briefs. But if the factual
8 assertions are going to be made by St. Jude in further support
9 of their privilege log, we need an opportunity to test those
10 factual assertions.

11 That's our position, Your Honor.

12 THE COURT: Mr. Kohn or Mr. Stanley?

13 MR. KOHN: Your Honor, this is Steven Kohn to
14 briefly respond.

15 Mr. Angstreich's position as stated is really no
16 different than it was at the last status conference. It was
17 my understanding, based on the Court's comments at the status
18 conference, and I'm referring particularly to the Court's
19 comments beginning at page 51 of the transcript, that what the
20 Court wanted was each side to submit its position to the Court
21 in the event the meet and confer process broke down.

22 That's what we're prepared to do. And our position is
23 fairly well set out in the 33-page meet and confer letter that
24 the plaintiffs have rejected.

25 What we propose is that, and we are already in the

1 process of doing this, is that the information that we
2 conveyed to the plaintiffs in that 33-page letter is being put
3 into the form of an affidavit by Mr. Ladner. We will submit
4 that along with all the other meet and confer materials and
5 the documents to the Court next week. And that is the way
6 it's been done in all the other cases that are cited in our
7 materials.

8 And without going through all them, there's at least ten
9 cases where the privilege log has been an issue starting with
10 Bituminous Casualty, and going all the way through the
11 numerous cases that are cited in our materials. In every one
12 of those cases, the procedure I have outlined is what's been
13 followed. There haven't been any depositions taken as Mr.
14 Angstreich proposed.

15 And similarly, when this issue was adjudicated in the
16 Ramsey County cases by Judge Bjorkman, the same procedure was
17 followed. Mr. Ladner submitted an affidavit, materials went
18 in camera, the Robins Kaplan firm submitted their brief, and
19 the court decided. And I think that's what's appropriate
20 here.

21 THE COURT: Mr. Angstreich, anything else?

22 MR. ANGSTREICH: Your Honor, the only thing that we
23 can say to you is that by having Mr. Ladner take a second
24 crack at drafting an explanation for the privilege log means
25 that we're responding to information that was never provided

1 to us at the time we presented our position to you. And
2 whether or not it's been done in other cases really isn't the
3 test. The test is what is appropriate under the circumstances
4 here.

5 We have been engaged in discovery now for a year,
6 starting with class discovery, merits discovery, at times
7 preemption discovery. And we're dealing with a privilege log
8 which, just so Your Honor knows, has now gone from 906
9 documents to 1218 documents. And we still haven't been told
10 it's over. There's no explanation where these 312 additional
11 documents came from, why they weren't produced earlier on in
12 the case. And now we're being told that Mr. Ladner should be
13 entitled to expand upon the information that was put in the
14 privilege log.

15 Our position is very clear. The privilege log is what
16 controls, and that's the guiding principle. And to say that
17 somebody can now give you a whole host of explanations and
18 bases for privilege which wasn't provided to us for -- how
19 many months? We got the first iteration of the privilege log
20 in April? I think we got -- right. Okay. I think the first
21 iteration came in April. Then in November.

22 And so we've been sitting around with a bases for this
23 privilege at a minimum for three months. And now they're
24 going to tell us that there are other reasons why the
25 information is privileged? It's just not the way. It may be

1 that that's what Ramsey County wanted to do. But that's not
2 the way it's been done in any situation where there's been a
3 dispute.

4 The basis for the privilege log is the road map. And
5 that's the way it should be. And apparently Mr. Kohn agrees
6 that the privilege log is inadequate to support a bases for
7 the privileges asserted.

8 MR. KOHN: Just to briefly respond, what I agree
9 with is it's absolutely impossible on a single document to
10 provide the complete basis for the privilege. And that's been
11 true in every other case where this matter has been litigated.

12 With all due respect to Mr. Angstreich, he is unable and
13 unwilling to cite a single case where the methodology that he
14 suggests has been employed. Because it simply doesn't make
15 any sense and it doesn't work.

16 There's no way on a privilege log you can provide the
17 kind of information that the Court needs to make a fair
18 assessment of whether these documents are or are not
19 privileged. The only way it can be done is by means of
20 affidavit, and that's the way it's always been done.

21 MR. CAPRETZ: Your Honor, if I may, this is Jim
22 Capretz.

23 I would just like to indicate and clarify what Mr.
24 Angstreich said. And that is that we just received an
25 additional 312 documents on the privilege log. I think this

1 is totally contraindicated by the intent and purpose of the
2 federal rules.

3 The obligation to provide us this privilege log existed
4 for some time. Litigation was filed almost three years ago.
5 And as Steve indicated, it's been about a year since discovery
6 has been actively going.

7 Just last night, last night at the close of business, we
8 received this expanded privilege log. And then the
9 equivocation with it was that we're not certain that this is
10 the complete log, that there may be some additional documents
11 that will be forthcoming.

12 MR. KOHN: Let me briefly respond to that, Your
13 Honor.

14 At the January 23 status conference, I advised the Court
15 and counsel that we had another approximately 300 documents
16 that we were reviewing that in all likelihood would be added
17 to the log, and that we would produce the final log on or
18 about 30 days from the date of that status conference. That's
19 the log that was served by e-mail yesterday.

20 As far as the additional 300 documents, a significant
21 number of those are simply duplicates of documents that were
22 already on the log. So there's nothing new, for the most
23 part, in the additional collection of documents.

24 As to the future, we were just served with another
25 document request a couple days ago by class counsel. And

1 until we have an opportunity to review whatever documents
2 might or might not be responsive, and what documents among
3 those might potentially be privileged, we can't say whether
4 there will be any additional documents.

5 But discovery is ongoing. And if they serve us with
6 requests that call for yet for documents that haven't been
7 produced, it could be that some of those may come from
8 privileged sources.

9 So as far as I can know at this moment with respect to
10 all of the productions that have been made up to this point in
11 time, they have the complete and final privilege log.

12 MR. ANGSTREICH: And we appreciate that. However,
13 that wasn't the representation that was made. But now that
14 it's been made, we know where that stands.

15 I just want Your Honor to know that we were not provided
16 with a listing of the documents that are duplicative. We were
17 given a 1218-page listing.

18 There is a column called duplicates. I've counted them.
19 There are 50 that are identified. And so I would ask for a
20 further delineation.

21 But that's -- we're off the reservation right now. That
22 really wasn't where we are. We really need to address, how do
23 we get this thing resolved.

24 THE COURT: This is what I would like to do. I
25 would like to get the affidavit from Mr. Ladner along with the

1 documents. And then I would like to have the defendants
2 respond to the best extent that they can to the plaintiffs'
3 view on these particular documents. I will obviously take
4 into account that the plaintiffs have not seen the documents
5 and have not had an opportunity to conduct discovery
6 concerning some of the assertions that are being made. I will
7 take that into account in my review. But I would like to
8 proceed ahead and get this done as quickly as possible.

9 Now, when will the Ladner affidavit and the documents be
10 available, Mr. Kohn?

11 MR. KOHN: The documents are available now, Your
12 Honor, and we'll provide those to the Court. The affidavit I
13 believe we can give you by Tuesday of next week.

14 THE COURT: Mr. Angstreich, how long would you like
15 to provide your materials to me?

16 MR. ANGSTREICH: The only thing that we would be
17 responding -- as I understand the game plan, Mr. Kohn is going
18 to give you the documents I identified in my letter of
19 February 5.

20 MR. KOHN: That's correct.

21 MR. ANGSTREICH: And then Tuesday, I'm going to get
22 Mr. Ladner's affidavit responding just to those documents.

23 MR. KOHN: That's correct.

24 MR. ANGSTREICH: Okay. Then I would get to Your
25 Honor, let's see, next Tuesday is the 4th? I will get to Your

1 Honor on Wednesday, the 5th -- no, no, no, I'm not going to do
2 a turnaround like that, Jim.

3 There's three days, and then Sunday I'm going to visit my
4 mother in Florida. I will be back in the office that
5 following Wednesday.

6 And I just want to make sure that Wednesday afternoon,
7 that Wednesday afternoon we'll get back to Your Honor with our
8 response.

9 THE COURT: That would be the following Wednesday?

10 MR. ANGSTREICH: The following Wednesday. So the
11 12th.

12 THE COURT: That would be fine. I will resolve them
13 by probably sometime early the following week. I will have
14 conducted the in-camera review and made the determination by
15 then.

16 MR. ANGSTREICH: Fine.

17 THE COURT: Okay?

18 MR. ANGSTREICH: Okay.

19 Obviously, Steve, you're going to send me a set of the
20 documents. Right?

21 MR. KOHN: I wasn't planning on it. That wasn't on
22 my list. I'll take it under advisement.

23 MR. ANGSTREICH: It never hurts to ask.

24 Judge, we really appreciate you talking to us.

25 THE COURT: I'll get it resolved as quickly as you

1 get it in. Thank you for your cooperation today. Okay.

2 Thank you. Bye-bye.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

CERTIFIED:
Karen J. Grufman
Official Court Reporter

21

22

23

24

25