

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: St. Jude Medical, Inc. File No. 01-MD-1396
Silzone Heart Valves (JRT/FLN)
Products Liability Litigation

Minneapolis, Minnesota
February 5, 2008
2:35 P.M.

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

(TELEPHONE STATUS CONFERENCE)

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1 2:35 P.M.

2 (In chambers via telephone.)

3 THE COURT: Okay. Ready to go everyone?

4 MR. CAPRETZ: We are.

5 THE COURT: Sorry for the delay. Had to
6 finishing a sentencing. It's good to have you all on the
7 status conference here today. I see we've got a bit of an
8 agenda to go through.

9 The first issue I see is the status of the
10 appeal. Any word on that? I think the case was argued,
11 what, was that in October?

12 MR. ANGSTREICH: Yes, Your Honor.

13 THE COURT: Okay. So but nothing further, right?

14 MR. ANGSTREICH: No word as of today.

15 MR. CAPRETZ: No clues.

16 THE COURT: No rebriefing order or anything like
17 that?

18 MR. ANGSTREICH: No.

19 THE COURT: Okay. Discovery, are there any
20 issues right there right now?

21 MR. CAPRETZ: We do have a few, a few depositions

22 remaining, and Steve will cover that.

23 THE COURT: Okay. Steve?

24 MR. ANGSTREICH: Yes, Your Honor. Your Honor, we

25 have the deposition of Dr. Gregory Wilson to take. He is

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1 one of the generic experts, and we're going to do a
2 videotape of him. I just found out that he is ill and at
3 home with bed rest, and I'm trying to figure out how his
4 condition is going to impact the completion of the
5 deposition.

6 I'm waiting to speak with him, but we need to
7 complete his deposition so that we have it for any of the
8 remanded cases, as well as the cases pending in Ramsey
9 County. In addition to that, we are going to be issuing
10 subpoenas to certain of the doctors and people involved in
11 the AVERT study to get the latest information from them as
12 well as to schedule a few depositions relating to that
13 subject.

14 It has come to our attention through the
15 discovery that has taken place in Canada, that there is
16 documentation out of AVERT post Dr. Grunkemeier's latest
17 report which demonstrates a statistically significant
18 increase in the thromboembolic event aspect of the Silzone
19 arm, so we need to complete that.

20 But with that discovery, we should be complete.

21 MR. KOHN: Your Honor, this is Steve Kohn for

22 St. Jude. I have not heard anything about reopening what
23 apparently is case specific discovery regarding the AVERT
24 trial until it was just announced a minute ago by
25 Mr. Angstreich.

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1 And we need an opportunity to talk to some people
2 at St. Jude, but preliminarily I think our position is that
3 case specific discovery ended a long time ago, and we
4 certainly, we are willing to meet and confer with
5 Mr. Angstreich about his request, but at this point our
6 position is that discovery is closed and there is no basis
7 to reopen it.

8 MR. ANGSTREICH: Well, Your Honor, we will wind
9 up arguing that because, as the Court is aware, we have
10 been confronted with Dr. Grunkemeier's 2006 AVERT report.
11 In fact, the experts in this case were all asked questions
12 about it.

13 It has now become clear to us that
14 Dr. Grunkemeier had in his possession information that
15 demonstrated a statistically significant increase in
16 thromboembolic events post the time frame that he froze his
17 data when he issued his report, but we will bring that to
18 the Court's attention, and we will discuss it with Mr. Kohn
19 and then if we have to bring it to the Court's attention.

20 But we certainly -- we certainly did not expect
21 that Dr. Grunkemeier and/or St. Jude would have information

22 in its possession yet not reported in the AVERT report that
23 they are criticizing our expert's conclusions based upon.
24 So but we thought it important to bring to the Court's
25 attention what we feel is some discovery that needs to be

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1 done.

2 THE COURT: Well, as a next step, why don't you
3 meet and confer about it between the two sides, and then I
4 would be happy to hear a motion if we need to.

5 MR. ANGSTREICH: We will do that, Your Honor.
6 Thank you.

7 MR. CAPRETZ: Your Honor, if I may, I would add
8 that as I know all the parties are familiar with that we do
9 have two pending trials. So there is a bit of urgency
10 about making sure we get an opportunity to complete all
11 discovery that is needed in a timely fashion. The first of
12 these two trials will take place in April in Arkansas in a
13 remanded case.

14 So we have to be sensitive to that.

15 THE COURT: Okay. The -- which is the Arkansas
16 case?

17 MR. CAPRETZ: That's the Arkansas case, and that
18 I'm trying to think, Daugherty is the case, Coy Daugherty
19 versus St. Jude Medical.

20 THE COURT: Okay.

21 MR. CAPRETZ: And that's set for trial from

22 everything we hear from counsel, as a matter of fact I have
23 a communication from him here today that, you know, that
24 will be going to trial as scheduled.

25 THE COURT: Speaking of trial, let's talk for a

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1 moment about the -- is it Jurgena case, the one that we set
2 for trial?

3 MR. CAPRETZ: Which one, Your Honor?

4 THE COURT: Jurgena?

5 MR. CAPRETZ: Jurgena, yeah. Yeah. That's the
6 one that we have, and we had been trying to communicate
7 through staff who have been very gracious and helpful, but
8 we understood the Court wanted to talk or be involved in
9 what we were doing and see whether or not we were all in
10 agreement.

11 We had that case set for trial for early March.
12 I think it was on the calendar for like March 3rd, if I
13 recall correctly, but due to exigencies on both St. Jude
14 Medical's counsel's part and our own, we have had -- the
15 discovery process has been a little more elongated, case
16 specific discovery, than was anticipated.

17 And as a result, we have had to push things back,
18 and we were then looking at a trial date or at least we
19 were suggesting a trial date in late May or early June, and
20 I was told that Mr. Kohn had his trial calendar booked
21 during that time, and he wouldn't be available until the

22 summer. So that's where we left it at the current time.

23 It's important to note for the Court that this is

24 not an MDL matter. I'm not quite sure why it wasn't joined

25 in the MDL, but we actually filed the suit in your court.

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1 And so it's tied, obviously, to the MDL proceedings, but it
2 wasn't one that was put into the MDL repertoire.

3 THE COURT: Mr. Kohn?

4 MR. KOHN: Yes, Your Honor. Mr. Capretz is
5 correct. There are at least seven or eight more
6 depositions, all of medical doctors, I believe, and perhaps
7 some other experts to take before the case will be ready
8 and probably some post designations motions. I have two
9 trials set between now and -- I have one in late April and
10 another one in the middle of June.

11 So for me, the earliest that I could be available
12 to try this would be sometime probably the third week of
13 July or after that time, and I've told that to Mr. Capretz.
14 The other issue that, this case has not been mediated, and
15 we have suggested to Mr. Capretz that we mediate it before
16 Mr. Carey.

17 In fact, we have a tentative date from Mr. Carey
18 of March the 5th and an alternative of March the 1st, and I
19 think I have been informed by -- from Mr. Capretz's office
20 that he was not agreeable to those dates. So I don't know
21 whether it's going to be possible to get the case on for

22 mediation, but I think it's a case that is ripe for

23 mediation, if we can do it.

24 MR. CAPRETZ: Well, we're significantly apart,

25 and we're viewing this as a case that we're going to be

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1 trying, Your Honor. Although Mr. Carey apparently has had
2 a successful time with various cases in this litigation, we
3 take exception as to his ability to work the difficulties
4 out that we have in this case, and we're open to mediation.

5 We're always open to serious negotiations, but we
6 do not believe Mr. Carey will be in a position to provide
7 the advice and counsel and direction that we feel would be
8 necessary to get us into a frame where we might be able to
9 settle the case.

10 We would be open to, and we mentioned this to
11 Reed Smith, we would be open to other potential mediators,
12 maybe even Judge Solum, or there are several outstanding
13 mediators in the Twin City area, but we have a problem with
14 the mediator.

15 THE COURT: Well, I think that following our
16 practice in, with all the cases that are in the MDL, it
17 should receive a mediation session just to see what
18 happens. It may not be possible to settle it, Mr. Capretz,
19 but I do think a session is worthwhile.

20 Is there a particular reason in this case why
21 Mr. Carey is not appropriate?

22 MR. CAPRETZ: Well, Your Honor, we haven't -- I
23 don't want to be disrespectful of Mr. Carey, but we have
24 not found Mr. Carey to be -- we found him to be a very
25 pleasant and gregarious person, and we have not found him

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1 to be effective in many of the instances that we have had
2 with him.

3 MR. KOHN: I would just point out. I don't know
4 what the issue is with him. Mr. Carey has settled four
5 other of Mr. Capretz's cases in mediation, as well as a
6 considerable number of other MDL cases. At least it's
7 St. Jude's opinion that he is the appropriate person. He's
8 certainly up to speed on the issues, and he has time
9 available in early May.

10 So our view is that this case ought to be
11 mediated and the sooner the better.

12 MR. CAPRETZ: We agree with the mediation
13 concept, and I disagree, however, Steve, with your concept
14 that four other cases were settled through his good
15 auspices. I think they were settled, and he was involved
16 perhaps with several, but I'm not sure it was because of
17 his presence.

18 Again, we're open to mediation. We're open to
19 negotiation. We just need to have a mediator that we're
20 going to, that we believe would be helpful in getting the
21 case resolved.

22 THE COURT: Well, I would like to see the case go
23 through mediation as soon as that's possible, as soon as
24 the parties can get ready for it. I mean, I'm inclined to
25 say go to Mr. Carey. If the parties want to agree to go to

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1 another mediator such as Mr. Solum, I'm not opposed to
2 that, and that certainly would be fine, but that would have
3 to be in the agreement of both sides.

4 Absent that, I think you ought to go to Mr. Carey
5 on this and just see what happens, at least for a first
6 go-around, and if there are problems we can discuss that
7 later, but I would like to give it a shot with him or if
8 you wish to agree on Mr. Solum, that's fine, too, because
9 he surely knows the case, and he's an effective mediator.

10 MR. KOHN: We're certainly available to go
11 forward on March the 5th, and Mr. Carey has this case on
12 his calendar for that date.

13 MR. CAPRETZ: That date wasn't discussed with
14 counsel, Steve, and therefore I'm not available on that
15 time, but we can communicate further. I will let the Court
16 know that we're filing what we consider to be a very
17 serious motion to allow us to plead punitive damages.

18 This case involves a gentleman from Nebraska who
19 had this contaminated valve, if you will, implanted three
20 days, three days prior to the date when the company
21 officially pulled them off the shelves. And we know the

22 company had notice as of January 6th of what the AVERT
23 findings were likely to be, but he was unfortunately put in
24 harm's way.

25 And we feel very strongly about the value of that

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1 claim, so with that, that's why I say it's going to be very
2 difficult to try to reach an accord.

3 THE COURT: Okay. Well, let's give it a shot and
4 work out another date, then, is I think what we need to do
5 there.

6 MR. CAPRETZ: Okay.

7 THE COURT: Let's see. The pending claims in the
8 MDL, where are we at right now?

9 MR. CAPRETZ: According to counsel for St. Jude
10 Medical, and I have no reason to doubt it, they have only
11 two, Hasenbank and Wilkinson files, and both counsel have
12 been notified by myself of the St. Jude Medical request
13 that those be remanded.

14 I spoke with Louisiana counsel -- I think they
15 have the Wilkinson claim -- at the end of last week and
16 told them about it and asked them if they had any
17 objections or concerns or questions. The gentleman, I also
18 invited him up here to appear at the conference. If he
19 wanted to speak up, counsel wanted to speak up on the
20 issue.

21 They did appear early and went off the line.

22 They said they had no objection to the remand, so that case
23 is ready. I was not able to make contact with the attorney
24 in Kansas on the Hasenbank file, although I called his
25 office and I also sent a fax to his office saying that the

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1 matter was being considered for remand by St. Jude Medical
2 and whether or not they had any opinions or questions about
3 the procedure, but they have not communicated with me
4 whatsoever.

5 So I suspect there is no objection, and that was,
6 according to St. Jude Medical, those are the only two
7 nonclass type of actions that are pending at the current
8 time.

9 MR. KOHN: The only other one that I'm aware of,
10 Your Honor, is the McFadden case, which I understand is
11 being dismissed.

12 MR. CAPRETZ: Yes. Yes. That's one of our
13 cases, Your Honor, and we agreed and the claimant is aware
14 that we are planning on dismissing that claim. I would say
15 for the Court's edification that there are several pending
16 claims.

17 We have a tolling agreement with St. Jude Medical
18 on two or three, two of the class representatives that have
19 individual claims in our view that we're in communication
20 with St. Jude Medical and exchanging information to see
21 whether or not an accord could be reached. If an accord

22 cannot be reached on those claims, it's very possible that
23 there will be some additional individual claims within the
24 MDL that would be before Your Honor.

25 THE COURT: Okay. Well that's fine. Just let me

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1 know if that happens. So just looking at the list that was
2 revised on the 4th of February here, Bailey, I know the
3 Grovatt one is the class.

4 What about Bailey?

5 MR. CAPRETZ: Bailey is a part. That was the
6 original filing, and the names were just switched. That
7 case name was just switched to the master complaint, and
8 Grovatt is a part of the Bailey complaint or vice versa.

9 THE COURT: Okay.

10 MR. CAPRETZ: They're all part of the same master
11 complaint.

12 THE COURT: So there is not a separate individual
13 complaint there?

14 MR. CAPRETZ: No. I don't know. Pardon me. I
15 said no a little prematurely. She is one under
16 investigation with the current medical records that I spoke
17 of earlier that we had these potpourri of cases that were
18 talking to St. Jude Medical through counsel's office.

19 So she may have an individual claim. I just am
20 not able to say at this point in time.

21 THE COURT: Okay. So it's not an individual

22 claim right now?

23 MR. CAPRETZ: Not listed as an individual claim

24 right now.

25 THE COURT: And Sanchez?

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1 MR. CAPRETZ: Sanchez is also one of ours, and I
2 think that's tied in with the master complaint, and he is
3 under -- his individual claim, if any, is under
4 investigation. Both sides are getting current medical
5 records to discuss.

6 THE COURT: Okay. And we talked about McFadden
7 and Hasenbank and Wilkinson, and what did you say about
8 Jones earlier?

9 MR. KOHN: Jones has been settled, Your Honor.
10 We're just waiting to get the closing documents.

11 THE COURT: Okay. Then we have the Jurgena
12 matter, and the Daugherty matter, that's the one you want
13 to move back to Arkansas?

14 MR. KOHN: It's already been remanded, Your Honor
15 and it is scheduled to be tried in Arkansas --

16 THE COURT: Okay.

17 MR. KOHN: -- in April.

18 THE COURT: Okay. That sounds good. In terms of
19 trial date, I mean I would like to get this on as soon as
20 possible. I recognize there is some more depositions to be
21 taken and the issue that Mr. Angstreich raised may have to

22 be resolved here soon as well, but, you know, I'm prepared

23 to put it on the calendar just as fast as I can get it on

24 as soon as we're ready to do it.

25 I mean, in terms of my schedule, I'm fairly tied

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1 up with trials through the end of April into the first part
2 of May. I've got a window there of six weeks which we
3 haven't set anything yet for. Once the middle part of the
4 summer rolls around, late June and end of July, there is a
5 lot of conflicts in there, and August is always not a
6 particularly easy month to try a case, and I'm usually at
7 the American Bar Association meeting in August which takes
8 some time.

9 So if we can't fit it in in that window of May
10 1st through June 15th, we would probably set it for the
11 first of September.

12 MR. KOHN: The first of September is agreeable
13 with St. Jude, Your Honor, and the problem with the window
14 that the Court suggested is that I'll be in trial on the
15 Daugherty case in the first couple of weeks of May, and
16 then I have another case in San Francisco that starts in
17 the middle of June.

18 So really, September 1 is probably a realistic
19 date.

20 MR. CAPRETZ: Well, we, you know, we're reluctant
21 to have the claimant wait that long because as we have seen

22 in other heart valve litigations, we have lost some people
23 with the passage of time. We'll go with whatever has to be
24 with the Court. We will be available to tee this trial up
25 for mid-May anytime.

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1 I'm a little tied up in the middle of July, but
2 anytime through August, but if September is the earliest
3 that can be arranged, so be it.

4 THE COURT: Well, it's possible we could start it
5 sometime in the latter part of August. I mean, that's
6 possible. I'm just not sure. We're looking at the
7 calendar now. If, you know, if some of these other matters
8 go away, I'm happy to slip this in relatively quickly to
9 try it because it's an old case. All of these are getting
10 old now, and I have a high priority set on them.

11 So, for example, if for some reason the Daugherty
12 case goes away, we could look at moving it up, but I would
13 just ask the parties to advise me on the status of that
14 case, if you could, Mr. Kohn.

15 MR. KOHN: Yes, I will be happy to, Your Honor.

16 MR. CAPRETZ: We would be happy to do that, and
17 we would greatly appreciate your notifying us if something
18 opens. We will be flexible, at least on our end, if we
19 could set the trial earlier. It would be appreciated.
20 Otherwise, should we put in September 1? Is that a weekday
21 Monday or --

22 THE COURT: Well, that's a Monday. That's

23 probably, is that the holiday?

24 MR. CAPRETZ: Labor Day?

25 THE COURT: It might be. It's the first Monday.

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1 We could start either the 19th or the 26th of August.

2 Those are possibilities.

3 MR. CAPRETZ: Well, either one is fine with me.

4 Steve?

5 MR. KOHN: Either one is fine with me, too.

6 THE COURT: Why don't you hold that period of

7 time starting the 19th of August, and we'll probably set

8 this for sure at our next status conference which we

9 probably ought to do by the 1st of April.

10 MR. CAPRETZ: That's fine.

11 THE COURT: But hold the time. Okay?

12 MR. CAPRETZ: Shall we put the next status

13 conference down while we're at that point?

14 THE COURT: Yeah, that's fine. Early April,

15 let's see. How about the week of the 8th of April. Does

16 that work for people?

17 MR. KOHN: That's fine.

18 MR. ANGSTREICH: The week of April 7th?

19 THE COURT: Yeah.

20 MR. ANGSTREICH: That's fine.

21 MR. CAPRETZ: Fine with me.

- 22 THE COURT: Probably do one over a lunch hour.
- 23 Let's see. I'm starting a long criminal case that week.
- 24 How about Thursday the 10th over, say 12:30 central time?
- 25 Does that work?

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1 MR. KOHN: That's fine.

2 MR. ANGSTREICH: Perfect.

3 MR. CAPRETZ: 12:30, April 10th. That's a
4 Thursday?

5 THE COURT: Right.

6 MR. CAPRETZ: Okay. The only other item we had
7 on the agenda was a report, and I would ask Steve
8 Angstreich if he would be kind enough to take care of that,
9 the report on Ramsey County litigation, and we can talk
10 into the Canadian litigation, and you can segue right into
11 that, Steve, and I can maybe add two cents.

12 MR. ANGSTREICH: Your Honor, there are eleven or
13 twelve cases pending in Ramsey County. Eight of them were
14 the subject of motions that we just argued before Judge
15 Gearin, a motion to amend two of the cases to plead
16 punitive damages, a motion to ask the Court to have the
17 trials, three trials -- one trial for three cases, one
18 trial for two cases, and one trial for three cases.

19 And then we argued a spoliation motion, and at
20 the same time we argued I believe five or six motions in
21 limine that were applicable across the board for all of the

22 cases. That was in the beginning of January for all of
23 those motions except the punitive damages, which we just
24 argued last week.

25 At the same time, we argued the class

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1 certification motion last week in the O'Neil case, which is
2 the attempt to have a class certified for about 14,000
3 Europeans in Minnesota state court applying Minnesota law,
4 and we should know Her Honor's rulings on these we're
5 hoping in the near future, at which point we need to then
6 have a case management conference and schedule the trials.

7 And that's the status of the litigation in the
8 Ramsey County cases as far as I'm aware of.

9 THE COURT: The Canadians?

10 MR. CAPRETZ: The Canadians, we will let Steve
11 Kohn if he will. I can just open it saying discovery is
12 still active. I think it's set for trial, is that October,
13 Steve?

14 MR. KOHN: No. The Ontario class was set for
15 trial on March 30th, and it's my understanding it was just
16 continued for a year to the spring of 2009. Discovery in
17 that case is still going on. The British Columbia class,
18 there is a tentative settlement that has yet to be approved
19 by the Court, and as far as I know, the Quebec class, there
20 is no activity at this time.

21 THE COURT: Okay. Thank you. Anything else we

22 need to talk about today?

23 MR. ANGSTREICH: No. I don't believe so, Your

24 Honor.

25 THE COURT: Okay. Well, let's -- let's keep an

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1 eye on the schedule here so we can get the Jurgena case on
2 as quickly as possible. Let's do the mediation first and
3 see how that goes. Okay?

4 MR. CAPRETZ: All right.

5 THE COURT: Thank you, everyone. We will talk to
6 you.

7 MR. ANGSTREICH: Thank you, Your Honor.

8 MR. KOHN: Thank you.

9 * * *

10 I, Kristine Mousseau, certify that the foregoing
11 is a correct transcript from the record of proceedings in
12 the above-entitled matter.

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16 Certified by:
Kristine Mousseau, CRR-RPR

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