

UNITED STATES DISTRICT COURT
DISTRICT MINNESOTA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN RE: ST. JUDE MEDICAL, INC.,
SILZONE HEART VALVES PRODUCTS
LIABILITY LITIGATION

Civil No. : 01-1396

TRANSCRIPT

OF

PROCEEDINGS

(DEFENDANT'S MOTION TO
STRIKE CLASS ALLEGATIONS)

The above-entitled matter came on for hearing
before Judge John R. Tunheim, on January 13th, 2009, at the
United States District Courthouse, 300 South Fourth Street,
Minneapolis, Minnesota 55415 at approximately 10:10 a.m.

CALIFORNIA CSR NO. : 8674

ILLINOIS CSR NO. : 084-004202

IOWA CSR NO. : 495

RMR NO. : 065111

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

LEVY, ANGSTREICH, FINNEY, BALDANTE, RUBENSTIN &
COREN, 1616 Walnut Street, 18th Floor, Philadelphia,
Pennsylvania 19103, by STEVEN E. ANGSTREICH, Attorney at Law;
and

ZIMMERMAN, REED, 651 Nicollet Mall, Suite 501,
Minneapolis, Minnesota 55402, by J. GORDON RUDD, JR., and
DAVID CIALKOWSKI, Attorneys at Law, appeared as counsel on
behalf of Plaintiffs.

REED, SMITH, CROSBY, HEAFEY, L. L. P., 435 Sixth
Avenue, Pittsburgh, Pennsylvania 15219, by JAMES C. MARTIN,
Attorney at Law; REED, SMITH, CROSBY, HEAFEY, L. L. P., 1999
Harrison Street, Suite 2400, Oakland, California 94612-3572,
by STEVEN M. KOHN, Attorney at Law; REED, SMITH, CROSBY,
HEAFEY, L. L. P., 355 South Grand Avenue, Suite 2900, Los
Angeles, California 90071, by DAVID E. STANLEY, Attorney at
Law; REED, SMITH, CROSBY, HEAVEY, L. L. P., Two Embarcadero
Center, Suite 2000, San Francisco, California 94111, by
STEVEN J. BORANIAN, Attorney at Law; and

HALLELAND, LEWIS, NILAN, SIPKINS & JOHNSON, 600
Pillsbury Center South, 220 South Sixth Street, Minneapolis,
Minnesota 55402, by BRADLEY J. BETLACH, Attorney at Law,
appeared as counsel on behalf of Defendant.

ALSO PRESENT: LIZ PORTER, in-house counsel for
St. Jude Medical, Inc.

1 THE COURT: I apologize for the delay. It's
2 Civil Case Number 01-1396, In re: St. Jude Medical, Inc.,
3 Silzone Heart Valves Products Liability Litigation.

4 Counsel, would you note your appearances this
5 morning.

6 MR. ANGSTREICH: Good morning, your Honor,
7 Steven Angstreich for Les Grovatt and the class, if there is
8 one.

9 MR. RUDD: Gordon Rudd -- good morning, your
10 Honor -- for the plaintiffs.

11 MR. CIALKOWSKI: David Cialkowski for the
12 plaintiffs, your Honor.

13 THE COURT: Good morning to all three of you.

14 MR. MARTIN: James Martin for St. Jude Medical,
15 your Honor.

16 MR. STANLEY: Good morning, your Honor, David
17 Stanley for St. Jude Medical.

18 MR. BORANIAN: Steven Boranian for St. Jude
19 Medical.

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

21 MR. BETLACH: Brad Betlach, St. Jude.

22 MS. PORTER: Liz Porter from St. Jude Medical.

23 THE COURT: Good morning to all of you. We're
24 going to address the defendant's motion to strike the class
25 allegations first this morning.

1 Mr. Martin, are you making that argument?

2 MR. MARTIN: Yes, I am, your Honor.

3 THE COURT: You may proceed.

4 MR. MARTIN: Thank you, your Honor. And good
5 morning again. As St. Jude's briefing establishes, the
6 Eighth Circuit has written what should be the final chapter
7 on whether a class action is possible in these heart-valve
8 cases. Having addressed precisely that question, the Eighth
9 Circuit unanimously said no because of the numerous
10 individual issues that would have to be litigated under
11 Minnesota's consumer fraud statute. There's nothing
12 ambiguous or open-ended about the court's reasoning. And,
13 your Honor, unlike its prior opinion, the Eighth Circuit
14 offered no suggestion or hint that anything further needed to
15 be done on a class-wide basis. Now, plaintiffs say, however,
16 that they get another shot here, even though their class is
17 the same, their charging allegations are the same, and the
18 record showing the diverse reasons for implanting the heart
19 valves remains exactly as considered previously by the Eighth
20 Circuit. Now, they advance three principle reasons for
21 justifying their attempt at class certification again, the
22 first is that labeling their charging allegations as
23 omissions solves any problems regarding the predominance of
24 common issues that infected the prior class; second, they say
25 that the U.S. Supreme Court's decision in Bridge changed the

1 burden of proof thereby altering the Eighth Circuit's
2 analysis under Group Health; and finally, they contend that
3 Minnesota's consumer fraud law endorses there are no manifest
4 injury lawsuits, seeking purely private relief for their
5 functioning heart valves. None of these arguments, your
6 Honor, supports the continued maintenance of this alleged
7 class. Let's take the first one. Plaintiffs contend that in
8 a case involving omissions, no proof of individual reliance
9 is required. They then advise the court that by offering
10 Dr. Butchart's affidavit and eliminating claims for medical
11 monitoring and personal injury, they've solved every problem
12 the Eighth Circuit had with the prior class. In fact, they
13 go so far as to say that the Eighth Circuit endorsed this
14 view and agreed a class could be certified on that basis.
15 But that argument, your Honor, takes considerable liberties
16 with the Eighth Circuit's reasoning and it doesn't stand up
17 to a close examination of the opinion. To begin with on this
18 point, there's nothing conceptually different in plaintiffs'
19 allegations of omissions from what the Eighth Circuit looked
20 at previously. They're exactly the same, allegations of
21 deceptive conduct. If you look at pages five and six, 11 and
22 24 and 25 of our motion, you'll see that comparison. And
23 whether these allegations are cast as misrepresentations or
24 omissions, plaintiffs claim the same thing, what St. Jude
25 said and reported about the valve allegedly is incomplete or

1 misleading. The Eighth Circuit, your Honor, assumed that the
2 plaintiffs could offer that kind of circumstantial proof
3 under Group Health, but it's what the Eighth Circuit had to
4 say in response to that that controls the result in this
5 proceeding. No matter what circumstantial proof plaintiffs
6 might offer to meet their preliminary burden under Group
7 Health, the Eighth Circuit unequivocally held that St. Jude
8 is permitted to introduce direct evidence showing that it's
9 allegedly deceptive conduct, however cast, had nothing to do
10 with the reasons for implant. And it's the right to
11 introduce that evidence, your Honor, that defeats class
12 certification in these cases. Under Group Health, there is
13 no recovery without a causal nexus to the defendant's
14 conduct. If the defendant's allegedly deceptive conduct had
15 no impact on the transaction or event there is no recovery
16 under the consumer fraud statutes. Here we know from the
17 undisputed record that there are reasons that the valve was
18 implanted that had nothing to do with anything St. Jude did
19 or said, and everything that St. Jude did or said did not
20 reach all consumers or physicians. Again, that's a matter of
21 undisputed fact. This case is not like a mass advertising
22 case, your Honor, or a securities case where, presumptively,
23 everyone did hear or read the same thing. Whatever omission
24 St. Jude is charged with requires a case-by-case inquiry to
25 see if it impacted the decision to implant at all.

1 THE COURT: Under this theory, though,
2 Mr. Martin, how could any consumer fraud action in Minnesota
3 be certified as a class when all a defendant needs to do is
4 to say, "We think that there are differences in how it may
5 have impacted someone who may have heard the pitch and we get
6 to try to offer rebuttal evidence"?

7 MR. MARTIN: Well, let me respond to that in
8 two ways, your Honor, the first is that there may be
9 instances in which there are mass public advertisements or
10 class-wide offerings that don't just create this kind of
11 individualized dispute on what a plaintiff may have heard or
12 why a decision to purchase a product or a stock was made.
13 However, your Honor, we don't even need to get to that in
14 this case because the Eighth Circuit already assumed that
15 that circumstantial proof would be forthcoming. And in these
16 cases specifically, where there's a learned intermediary
17 between the consumer and the purchase, and where there is no
18 evidence that these representations existed on a class-wide
19 basis but there rather were individualized private
20 conversations, that issue defeats class certification because
21 it confounds the liability inquiry and requires a
22 case-by-case inquiry. And we don't have to look far for
23 that. That's exactly what the Eighth Circuit held. And
24 that's why offering up Dr. Butchart, your Honor, doesn't
25 change the analysis in any respect. Even if his declaration

1 is credited as providing circumstantial proof that St. Jude's
2 alleged omissions are capable of deception, that doesn't
3 impact the right, the Eighth Circuit has already declared,
4 that we have to rebut that showing, and it is that rebuttal
5 showing again that the Eighth Circuit made clear requires
6 individualized inquiries and that defeats class
7 certification. There's not a word or suggestion in the
8 Eighth Circuit's analysis, your Honor, that how plaintiffs
9 choose to label that circumstantial proof can change the need
10 for those inquiries on this record that the Eighth Circuit
11 already considered. Now, even if the plaintiffs go ahead and
12 eliminate their allegations of medical monitoring and
13 personal injury damages, the result's the same, there is no
14 ambiguity here. The Eighth Circuit said that the problems
15 with the remedies, like medical monitoring and personal
16 injury damages, only added to the individualized inquiries,
17 they did not eliminate them. Solving any problems with the
18 remedies sought does not make the predominance problems on
19 liability go away, and the Eighth Circuit made it clear that
20 those predominance problems on liability alone prevent a
21 class, full stop, period, end of the analysis.

22 If more were needed, your Honor, the Eighth
23 Circuit's analysis of Rule 23(c)(4) closes the book on the
24 matter. No one had raised the possibility of specific issues
25 certification, but the court addressed it in anticipation

1 that plaintiffs might come back with some pared down or
2 scaled down version of the class they tried before. But in
3 addressing 23(c)(4), the Eighth Circuit made it clear that
4 there's no fallback position, there is no selection of issues
5 or relief that can avoid being overtaken by individualized
6 inquiries. If the Eighth Circuit thought otherwise, it would
7 have addressed Rule 23(c)(4) in an entirely different way,
8 leaving the door open for something new. But it didn't.
9 What it did was exactly the opposite, it said it didn't have
10 to address St. Jude's constitutional and conflict-of-law
11 issues because the class certification question was settled.
12 Now, in a final effort to dodge this language, your Honor,
13 the plaintiffs claim that their arguments on the burden of
14 proof should be certified to Minnesota's Supreme Court.
15 There's no reason to take that step. Plaintiffs haven't
16 pointed to, and there is not any debate, under Minnesota law
17 about the burden or manner of proof under Group Health. From
18 Group Health to the present, cases like Tuttle, Flynn and the
19 Eighth Circuit's opinion here all treat the parties'
20 respective burdens of proof under the statute the same way.
21 And even if there was a debate, your Honor, for reasons I've
22 noted, it has no effect on the outcome here. No matter how
23 plaintiffs attempt to prove a material omission -- directly,
24 circumstantially or by presumption -- Minnesota case law,
25 most notably, Group Health, establishes that St. Jude does

1 have the right to rebut that circumstantial evidence,
2 precisely as the Eighth Circuit held. And it's that
3 undisputed right, your Honor, in every case, with every
4 consumer, that takes the class certification issue out of the
5 predominance bucket and establishes the predominance of
6 common issues does not exist, and never will exist, in any
7 effort to try these cases. It's this unique context, your
8 Honor, that the Eighth Circuit has held warrants that result.

9 THE COURT: Well, I'm not sure how unique it
10 is. I mean, I tend to agree with you. I'd still like an
11 example of what type of Minnesota consumer fraud action is
12 certifiable as a class under your theory and what plaintiffs
13 would have to allege in order to succeed in achieving class
14 certification status.

15 MR. MARTIN: Okay, your Honor. Two responses
16 to that. I'll provide an example, but then I want to come
17 back to this case, that the question is settled for purposes
18 of these proceedings anyway.

19 On the first point, if there was evidence of
20 mass communications to the plaintiffs over a long period of
21 time, advertising that formed the basis of a bargain, and
22 that evidence was misleading or deceptive in some respect,
23 all consumers received it, and the defendant does not suggest
24 that there is anything else unique about the transactions
25 themselves beyond that advertising, you could cross the Group

1 Health reliance threshold with that evidence and the class
2 action could proceed.

3 THE COURT: Well, you could still raise a
4 question as to whether the individuals actually relied on any
5 of those representations or omissions; correct?

6 MR. MARTIN: You could, your Honor. And as a
7 matter of fact, if that's substantiated in the record and
8 those individual questions will proliferate, then you can
9 have a class action. But that's not a problem with Minnesota
10 consumer fraud law, that's what Rule 23 provides, and that's
11 what the Eighth Circuit addressed and held. When you take
12 this situation, where the record evidence is undisputed that
13 there is rebuttal evidence showing no causal nexus under
14 Group Health and that exists in the majority of the
15 transactions involving the consumers, then class
16 certification goes away, as it would in any other kind of
17 case, because the liability questions don't have common
18 issues. Instead, you have to try it individual by
19 individual. And all the case laws agrees, under Rule 23,
20 that a class action doesn't have any utility in those
21 circumstances. But, again, your Honor, I want to reenforce
22 the point, backing up to revisit, that is against the mandate
23 of the Eighth Circuit. They've already said what happens in
24 this case. And we don't have a class on the liability
25 question alone. The court could not have been clearer. And

1 that's why there's no need to certify anything to the
2 Minnesota Supreme Court, your Honor, because the outcome
3 under Rule 23 is already settled here.

4 Now, looking at the plaintiffs' second argument
5 under Bridge, to start with, the idea that Bridge prompts a
6 change in the analysis is a little hard to fathom or
7 comprehend. In the Bridge case, the Supreme Court addressed
8 issues concerning Congress's intent in enacting a federal
9 statute. There's no reliance on state law in the opinion and
10 state law wasn't implicated in any way. No federal court
11 properly adhering to Erie constraints could look to a federal
12 case, decided under federal law and construing a federal
13 statute, as a dispositive predictor of a state law on an
14 issue that the federal court did not even address. And
15 that's particularly true here, your Honor, where there is no
16 intervening state case, suggesting that the federal decision
17 in Bridge portends a change for state law. The issue
18 addressed in Bridge also had nothing to do with the causal
19 nexus burden that drove the Eighth Circuit's decision here.
20 Bridge was concerned with the capacity to bring a lawsuit
21 under R.I.C.O. and whether a plaintiff must have relied on
22 the purported misrepresentation or mail fraud in order to
23 bring the suit. The relevant issue here, though, your Honor,
24 relates to the burden of proof on causation and actual injury
25 and, in that respect, Bridge aligns fully with Group Health.

1 Both the U. S. Supreme Court and Minnesota law agree that
2 there must be reliance by someone on the fraud before
3 recovery is possible and it's the need for individualized
4 proof on that causal nexus or reliance that forecloses class
5 certification here.

6 Now, lastly, your Honor, on your third point,
7 Mr. Grovatt does not have standing to bring this recycled
8 class action even if we get to Minnesota's consumer fraud
9 statutes. And there are at least two independent reasons for
10 that. First of all, this lawsuit, as it's presently
11 constituted, does not involve the requisite public benefit
12 Minnesota cases, following the Ly case, require. And without
13 that public benefit there is no cause of action. And, your
14 Honor, this extends beyond the right to recover attorneys'
15 fees as the plaintiffs suggest. Minnesota law makes it clear
16 that this goes to whether you can bring a claim under the
17 statute at all. Now, plaintiffs respond that class action
18 presumptively meets the public benefit requirement because
19 it's brought on behalf of a large number of consumers who
20 allegedly are victims of deceptive conduct, but that's not
21 what the test for public benefit is under Minnesota law.
22 And, in fact, if that reasoning were adopted, it would
23 substantially undercut the policies that Minnesota law
24 intends to further by this public benefit requirement.
25 Minnesota case law establishes that its consumer fraud

1 statute operates only as broadly as those circumstances when
2 the plaintiff is occupying the role of a private attorney
3 general. Minnesota cases like Collins and Schaaf describe
4 the role. It arises where plaintiffs sue for public wrongs,
5 supported by independent statutory violations or conduct that
6 affects the public at large. The lawsuits in these types of
7 cases expose the wrongful conduct and they bring it to an
8 end. But none of that is replicated in these cases as
9 they're presently constituted. The valve implants are purely
10 private transactions that have no impact on the public at
11 large. The information received is discreet and private as
12 well. What each physician and patient knew in these cases
13 varied from case to case, as the Eighth Circuit has already
14 found. And there's nothing to enjoin. St. Jude recalled the
15 valve before the litigation began, and there's no vindication
16 of a broader public interest brought about by the filing of
17 these lawsuits. These cases, in the end, involve only
18 private one-on-one transactions subject to individualized
19 proof and seeking purely private relief. The rejoinder that
20 a lot of people are involved seeking these private remedies
21 doesn't create a public benefit where none can otherwise be
22 found. The focus of the public benefit inquiry is on the
23 character of the relief sought and obtaining a purely private
24 remedy for a lot of people doesn't change the substance of
25 the relief in any respect. Now, the reasoning in Ly also

1 cuts off any attempt to stretch the statute to reach a case
2 involving purely private recoveries like this one. And
3 that's true, again, even if multiple plaintiffs are involved.
4 Ly establishes that Minnesota's public benefit requirement is
5 intended to prevent end-runs around the American rule by
6 turning every private lawsuit into an opportunity to recover
7 attorneys' fees. That policy choice, which has been stated
8 and restated by Minnesota's own courts, is part of the
9 statutory scheme, and there's no suggestion in any case that
10 that policy choice would have any less force in the context
11 of a class action. In fact, if the court were to adopt a
12 contrary view, it would materially compromise that public
13 policy. Every class action, even those seeking only private
14 benefits like this one, per se would be deemed to provide a
15 public benefit and avoid the application of the American
16 rule. That would compromise Minnesota's policy in the most
17 dramatic way possible.

18 Now, finally, your Honor, and alternatively,
19 the plaintiffs can't meet the manifest injury requirement
20 required for cases involving an alleged product defect.
21 Plaintiffs' class definition expressly limits their class to
22 those with functioning heart valves who have sustained no
23 manifest personal injury from the implantation of the valve.
24 The Briehl case from the Eighth Circuit, 172 F.3d 623, and
25 the Simplicity case from this district, 553 F.Supp 2d 1110,

1 are directly on point in these circumstances. Both construe
2 Minnesota's consumer fraud statute, and both hold that as
3 long as the product is functioning as intended attempts to
4 recover the cost of the product are too speculative to
5 support relief.

6 THE COURT: I think we've been arguing about
7 this issue of whether there were actual injuries in these
8 individuals since the first day of this litigation.

9 MR. MARTIN: Your Honor, we have. But the
10 Briehl case and the Simplicity case, in the context of a
11 defective product, take this to another level. What they
12 provide is that the manifest injury has to be tied to the
13 malfunctioning of the product before relief can be supported.
14 Plaintiffs have no Minnesota case to the contrary. And both
15 those cases construe Minnesota statutes. There is no debate
16 here about the functioning of the product. The class
17 definition provides that the valves are doing what they're
18 expected to do and that is the factor that eliminates the
19 ability to recover, consistent with Briehl and consistent
20 with Simplicity. Plaintiffs have two cases they say are to
21 the contrary, State v. Humphrey -- which does not even
22 address the issue, it simply talks about the burden of proof
23 under the statute -- and the Yarrington case, which talks
24 only about the question of reliance, not a question of
25 whether a plaintiff with a properly functioning product can

1 recover where it hasn't malfunctioned. In fact, the only
2 support they have to the contrary, your Honor, comes from
3 out-of-state cases construing other state statutes. But
4 there is no reason to go casting about here where you have
5 the Briehl case from the Eighth Circuit and the Simplicity
6 case from this district. And until there's a product
7 malfunction that results in manifest injury, any claim to
8 relief under the consumer fraud statute is too speculative
9 and the lawsuit is premature.

10 Your Honor, the time has come, consistent with
11 the Eighth Circuit's opinion, to bring these class
12 proceedings to a close. There are only a handful of lawsuits
13 left and, most certainly, the MDL has achieved its purpose.
14 But whether we look at the Eighth Circuit's reasoning or what
15 Minnesota law independently requires under its consumer fraud
16 statute, continuing this class is a legal misfire.
17 Principles of repose, judicial economy and, most importantly,
18 the law of this case, all compel that these class proceedings
19 should end, and we urge the court to grant the motion to
20 strike and so hold.

21 THE COURT: Thank you, Mr. Martin.

22 MR. MARTIN: Thank you.

23 THE COURT: Mr. Angstreich.

24 MR. ANGSTREICH: Good morning, your Honor.

25 THE COURT: Good morning.

1 MR. ANGSTREICH: We filed a second amended
2 motion for class certification. I feel like I'm arguing
3 whether or not your Honor should grant it as opposed to
4 whether we should be striking the allegations. There is no
5 question, however, that certain allegations within the
6 Complaint as amended would need to be stricken based upon the
7 Eighth Circuit's ruling. The court there said: "Plaintiffs'
8 effort to recover damages -- the cost of the medical care
9 arising out of the use of the product, together with any and
10 all consequential damages recoverable under the law, past and
11 future medical expenses, past wage loss, loss of future
12 earning capacity, past and future pain and suffering,
13 disability and emotional distress" -- obviously have to come
14 out. They have to be stricken, because we're seeking,
15 essentially, as the Eighth Circuit recognized would be a
16 viable case, a claim for restitution.

17 I want to start with the no harm, no foul
18 concept. With due respect to Judge Kyle, the concept that a
19 defective product, where there's a retrofit available to
20 avoid the problem, doesn't quite equate with this case, where
21 the only retrofit available to these patients is to have the
22 heart valve removed and a non-silzone heart valve put in, and
23 also doesn't equate with this case where there is, in fact, a
24 premium price that was paid for this product. And that
25 wasn't the case in either of the other two cases cited. The

1 one thing that I did find rather astounding here is that
2 "Where a product performed satisfactorily and never exhibits
3 an alleged defect, no cause of action lies." I thought this
4 product was taken off the market because, in fact, it was
5 defective. It can't be sold. The FDA won't let it be sold.
6 St. Jude Medical has not tried to put it back on the market.
7 The evidence that will come in on the merits phase of this
8 case is that it is defective, has been defective in numerous
9 ways. So I find it strange to argue that it has never
10 exhibited a defect. How could you say that. Of course it
11 exhibited a defect. It's off the market.

12 The Eighth Circuit did not terminate this case
13 as a class action. What it did say was there are two
14 problems here. If you look at the language of the case, it
15 says: "Given the showing by St. Jude that it will present
16 evidence concerning the reliance or nonreliance of individual
17 physicians and patients on representations made by St. Jude"
18 -- that's the first aspect of it -- and the second is that
19 the damages that we sought are individualized. Now, again,
20 with due respect to this panel, damages really have never
21 been, in the history of class actions, a function of whether
22 or not certification should be appropriate. But we recognize
23 that the Eighth Circuit said that there are certain damages
24 that should be stricken from this. But it really went to
25 representation. And Mr. Martin's concession that there could

1 be a class action under Minnesota consumer fraud law -- it
2 wasn't a concession. What he effectively said was if the
3 defendant decides that the defendant doesn't want to assert
4 that some member of the class didn't rely, then you can
5 certify it. So it's all within the defendant's hands.
6 That's really not what class certification is all about.

7 So let's talk about what is the difference
8 between an omission and a misrepresentation and why does the
9 Eighth Circuit not impact omissions. If you look at almost
10 the end of the decision here, the court says: "We recognize
11 that plaintiffs may present certain issues that are common to
12 all of their claims..." It goes on to say: "Whether a
13 certain published representation" -- again, talking only
14 about representation -- "was materially false may be
15 amendable to common resolution. If liability were
16 established, then the entitlement of plaintiffs to
17 restitution may be decided on a class-wide basis." Certainly
18 it did not say that restitution -- which is a damage recovery
19 -- would not be appropriate. The court went on to say: "The
20 district court did not limit its class certification to
21 specific issues that may be amenable to class-wide
22 resolution. And there's a conflict in authority on whether
23 such a class may properly be certified under Rule 23." And,
24 then, it ends with: "We reverse the class certification
25 order of the district court and remand for further

1 proceeding." This is a further proceeding that we think is
2 important.

3 Omissions require a materiality test. It is an
4 objective test. And what the Supreme Court in Affiliated
5 Ute, and all of the cases that have followed it, have said
6 with respect to omissions is that you can't go to Mr. Smith
7 and say to Mr. Smith, "Had you known 'X,' what would you have
8 done?" That's an inappropriate approach. And what we're
9 saying is the omissions here, as Dr. Butchart has provided to
10 the court, were material. Any reasonable implanting surgeon
11 would have wanted to know about them. St. Jude says that
12 we're challenging safety and efficacy. We're not challenging
13 efficacy. That was never efficacious. It was never allowed
14 to be sold as an efficacious valve for fighting paravalvular
15 endocarditis. What we are saying is that the omissions went
16 to the safety of the valve and no implanting surgeon would
17 have implanted an unsafe valve. That's why it's material.
18 And you don't get to challenge and ask a doctor, "Well, if
19 you knew that this valve was unsafe" -- because I don't know
20 any doctor who would say it. "If you knew that the valve was
21 unsafe, would you have implanted it anyway?" That's a kind
22 of silly question to ask. That's why the second step that
23 the Eighth Circuit allowed with respect to the
24 misrepresentations -- "Did you see it?" "What would you have
25 done if you had seen it?" -- are different when you deal with

1 an omission. And the case law is very clear on that, that we
2 don't go behind -- we're not dealing with the subjective
3 intent of people, we're testing the omission on the issue of
4 materiality, just as you do in a securities fraud case.

5 THE COURT: So is St. Jude prohibited from
6 offering rebuttal evidence in this kind of a setting?

7 MR. ANGSTREICH: Only rebuttal evidence as to
8 materiality. It is the same way you challenge any material
9 omission, is it material or isn't it material. Now, you
10 don't go to Mr. Smith, the person whose heart had the valve
11 implanted, and say, "If you had known about an unsafe valve,
12 would you have wanted your doctor to implant it?" That's not
13 the way you do it. However, they had the opportunity to
14 bring in experts to say that these omissions with respect to
15 safety are not material or they're not an omission because of
16 "X." You can challenge it, but you can't go behind and get
17 into the subjective mind of the class member. That's the
18 difference between an omission and a misrepresentation.
19 Because, as the case law that we've cited says, that's not
20 the test. The test is whether or not the omission is
21 material. And materiality means a reasonable person would
22 not have done what that person did had it known the truth.
23 So you don't go into every individual, because we're dealing
24 with a reasonable man's standard. And that's the way the
25 jury is charged. The jury isn't charged with balancing,

1 "Well, there are 50 people who said yes and 50 people who
2 said no." The question is whether or not the jury determines
3 from the evidence that a reasonable person would have acted
4 in a different fashion had the truth been known.

5 THE COURT: But don't you think the circuit
6 opinion can be read to state that whether it's a
7 misrepresentation or an omission -- and sometimes the
8 difference between the two isn't very significant -- that
9 individualized rebuttal is now appropriate?

10 MR. ANGSTREICH: No, I don't read it that way
11 at all, your Honor, especially because we're dealing with an
12 objective standard versus a subjective standard. And I agree
13 that when you're dealing with a subjective standard -- which
14 is, is a particular statement a misrepresentation to
15 Dr. Jones as compared to Dr. Smith -- you might be able to
16 get behind it. With due respect to the Eighth Circuit, your
17 Honor, if reliance can be established classwide for purposes
18 of the plaintiffs meeting its test, I didn't believe that the
19 Eighth Circuit was correct in going behind it and saying,
20 "But now we're going to allow the defendant to raise it."
21 But that's what we have to live with. The question is, when
22 you have an objective standard, do you face that same
23 argument. We do believe that -- and, by the way, I might not
24 have said it, but we don't believe, and have never said, that
25 there's no injury here. I might have started that way. We

1 believe that Bridge did change the landscape. Group Health,
2 which is a Minnesota case, applied and looked to the Lanham
3 Act, a federal statute, for guidance. Civil R.I.C.O. is a
4 remedial statute. It's designed to prevent fraud in the
5 civil arena. The consumer fraud statute is a remedial
6 statute. The purpose of both statutes are the same. The
7 Supreme Court said, in a class context, the plaintiff didn't
8 have to see the misrepresentation, the plaintiff didn't have
9 to rely upon the misrepresentation. It's not an element to
10 establish the cause of action, it's not an element to
11 establish causation as long as, in that context, somebody was
12 deceived. Now, there can't be any question in this case but
13 somebody was deceived because we have presented evidence that
14 this product came out in the marketplace, there was a
15 deception. So we think that the reasoning of the Eighth
16 Circuit in allowing the defendant to go behind to challenge
17 the reliance is something that is different than was before.
18 And simply because it's R.I.C.O. versus the state consumer
19 fraud statute, the underlying purpose of the legislation is
20 what is controlling.

21 We're faced again with the question of whether
22 or not this product should be governed by Minnesota law and
23 whether or not we should be permitted again to go forward.
24 And, quite frankly, there's nothing that's been said today
25 that wasn't said in every one of the other arguments that has

1 and restitution could be an appropriate remedy, then there
2 must be a consumer fraud case that can be brought for those
3 remedies. If you take St. Jude's argument to its logical
4 conclusion, as your Honor has asked Mr. Martin, there is no
5 class action for consumer fraud, so a trust fund could never
6 happen. But the Eighth Circuit has recognized that both of
7 those are viable remedies for the appropriate case. We say
8 this is the appropriate case. Your Honor did certify this
9 case, both as an omission and a misrepresentation case. The
10 Eighth Circuit focused on only the misrepresentation aspect
11 and never did really focus on the question that the court was
12 asked to review after the first certification order, but went
13 around on this individual reliance defense argument. We
14 submit --

15 THE COURT: Presumably that would be available
16 next time.

17 MR. ANGSTREICH: One would think so. Although
18 the interesting thing, your Honor, is that, traditionally,
19 courts don't look for the constitutional impediment first, if
20 there is a non-constitutional impediment to get rid of the
21 case. The first argument on 23(f) could have said, "We don't
22 see any way that you can certify this case. It's
23 noncertifiable." It didn't do that. The second panel,
24 although it left open that other issue, also didn't say that
25 this case cannot be certified. In fact, it did say that

1 there are circumstances where both restitution and a trust
2 fund would be a viable alternative as a remedy. And as we
3 submit, your Honor, this is the appropriate case. We think
4 that the motion, except as it relates to the prayer for
5 relief, should be denied. And, in fact, we should not have
6 to come back again to argue class certification if your Honor
7 believed that the class should have been certified on a
8 misrepresentation and an omission case. We've given you the
9 50-state analysis, we've excluded the five states which raise
10 issues that would impact the LeFleur factors. We don't
11 believe that we wanted to do that, so we've taken them out.
12 And, really, if this motion is denied, except as to that
13 limited area, the court should certify an omissions case and
14 allow the case to go forward. Thank you.

15 THE COURT: Thank you, Mr. Angstreich.

16 Do you have anything else, Mr. Martin?

17 MR. MARTIN: Your Honor, just two minutes, if
18 you allow me?

19 THE COURT: Go ahead.

20 MR. MARTIN: On the last point first, your
21 Honor, it was clear that these proceedings were intended to
22 be confined to the motion to strike from the prior status
23 conferences and that the class certification issue was for
24 another day. We don't agree that the next step, if this
25 motion is denied, is certification, under any circumstances.

1 Let me make a few major points on the high
2 points of that argument, the first is that the effort to
3 import the securities law objective materiality test here
4 simply has no relevance and misapprehends the burden of proof
5 under Group Health. The Group Health causal nexus burden, as
6 we know from the Eighth Circuit's opinion, and, in fact, from
7 the Minnesota Supreme Court's opinion in Group Health,
8 depends on what happened in the particular transaction. And
9 if the defendant can rebut the notion that the deceptive
10 conduct had nothing to do with the transaction or supply that
11 proof, then Group Health says that that comes in. The second
12 thing is that the opinion assumes -- that is, the Eighth
13 Circuit's opinion -- that circumstantial proof of some kind
14 is going to be offered, whether by misrepresentation or
15 omission or otherwise, and the court's unequivocal that it's
16 the right to present that rebuttal evidence on liability
17 alone that defeats predominance. This whole notion of
18 changing the remedies or going to restitution as being a way
19 to circumvent that is a misreading of the opinion, as we've
20 demonstrated. The court always says that this liability
21 issue matters. And, in fact, its analysis under 23(c)(4) at
22 the end is an effort to send the message that you can't
23 reconfigure this case to meet that. There's no explanation
24 for the court going there otherwise.

25 Lastly, your Honor, on these issues of the

1 Bridge case injecting something new here that requires a
2 change, there's nothing in Bridge that relates to this case,
3 and the portions of Bridge that do align perfectly with Group
4 Health. The first reliance question is always one of
5 standing; it was in Group Health and it was in Bridge.
6 That's the question that the Supreme Court addressed and
7 that's the question that it resolved. When the court got to
8 the causal nexus issue, it aligns perfectly with Group
9 Health. That, it said, required specific evidence of
10 reliance. And it is that evidence, your Honor, that ends the
11 class certification inquiry here under the Eighth Circuit's
12 mandate.

13 Now, on the consumer fraud side of the
14 equation, the plaintiffs have said that there are injuries to
15 others from this defective product, so, therefore, they ought
16 to be able to go forward under the consumer fraud statute.
17 That, too, is a misapprehension of what Minnesota law
18 provides. As set forth in Briehl, the issue is for the
19 people who have products that have not malfunctioned, can
20 they go forward piggybacking off of those who have, and
21 Briehl says no, and it says so unequivocally.

22 On the public/private benefit issue, no one has
23 explained to this point how receipt of restitution or
24 anything else is other than a purely private remedy. This
25 isn't the end of consumer fraud class actions. If there was

1 deceptive conduct ongoing here, the AG could enjoin it and a
2 private plaintiff could stop it. But it's not. And there
3 isn't any. And, so, all we're left with is a purely private
4 remedy that Minnesota law says doesn't meet the requirements
5 of the statute. And, your Honor, finally, the sum total of
6 that argument is complaint and an effort to revisit the
7 Eighth Circuit's holding. But we're not here to do that.
8 The mandate of the Eighth Circuit has to be followed and
9 these class proceedings should come to an end.

10 THE COURT: It would be helpful, Mr. Martin, if
11 you could give me precisely what type of rebuttal evidence
12 you would intend to introduce to meet the claims.

13 MR. MARTIN: Your Honor, two responses to that.
14 We provided that rebuttal evidence already and the Eighth
15 Circuit addressed it. You can see from the court's opinion
16 that there was evidence already in the record that people
17 implanted these valves without ever considering anything that
18 St. Jude did or said. And that breaks the causal nexus chain
19 under Group Health. And that's the evidence that the Eighth
20 Circuit came back to. So record evidence is already there
21 divorcing the implantation of these valves from St. Jude's
22 conduct and that's what gave rise to the Eighth Circuit's
23 holding.

24 THE COURT: So individual testimony of alleged
25 victims in the case who did not take into account any type of

1 representation or alleged omission as part of the process of
2 deciding what to do? Or are you focusing more on doctors?

3 MR. MARTIN: Consumers and physicians. And,
4 your Honor, I'm not coming by this here at the podium. It's
5 in the Eighth Circuit's opinion. They cited to the record
6 evidence. And that's why I said, your Honor, this issue was
7 already in front of them. They understood perfectly what we
8 were trying to do. They put it in terms of the Group Health
9 burden specifically, taking into consideration the plaintiffs
10 would offer circumstantial proof, but then looking at the
11 evidence that was already of record, they said, this is going
12 to be an individual issue. And none of that has changed.

13 THE COURT: But it's individuals and physicians
14 stating that they either did not know or did not rely on any
15 representations that might have been made. Is that what it
16 is?

17 MR. MARTIN: It goes beyond that, your Honor.
18 The record evidence shows that some people were aware of what
19 St. Jude said but didn't believe it. Other people said they
20 would never take the word of the manufacturer on anything,
21 including their reps. They made their own investigations.
22 Other people said they implanted their valve because they did
23 it on the advice of a colleague. I mean, I could catalog
24 this evidence, but, again, I'd be revisiting something that's
25 already happened and the Eighth Circuit has said defeats

1 class certification. So I'd also like to add that the Eighth
2 Circuit's mandate tells me that I've already solved this
3 problem and that the class can't go forward. But that was
4 all of record before, the Eighth Circuit paid attention to it
5 specifically and highlighted in its opinion, and that's what
6 dictates the outcome now.

7 THE COURT: Okay. Anything else,
8 Mr. Angstreich?

9 MR. ANGSTREICH: Your Honor, if I could just
10 focus on that for a moment, that inquiry. It says: "Given
11 the showing" -- this is in the opinion by St. Jude -- "that
12 it will present evidence concerning the reliance or
13 nonreliance on individual physicians and patients on
14 representations." That's what the Eighth Circuit focused on.
15 In every single fraud case -- securities, consumer fraud --
16 the issue goes to what information was in the public domain.
17 When we come to situations of omissions as opposed to
18 misrepresentations, the inquiry is, is that omission
19 material. And if it's material, would a reasonable person
20 want to know before acting. That's the inquiry. And what
21 Mr. Martin is suggesting is that he would be able to go to a
22 physician or a patient and say, "If you knew that this valve
23 was unsafe, would you have still implanted it or wanted it
24 implanted?" or, "Had you known this fact, what would you have
25 done?" All the cases dealing with omissions say that's not

1 the test. They can rebut materiality, as it is rebutted in
2 every single case. I'm not asking them to admit liability.
3 They can attempt to show that the omissions were either not
4 omitted, in fact they were in the public domain. These were
5 not pieces of information that were withheld. Two, the
6 pieces of information that were withheld didn't go to the
7 safety of the coating or the valve. Three, even if it went
8 to the safety of it, here are the leading experts in the
9 world who say it's not material. Every securities fraud case
10 dealing with omissions is a balancing of the experts who say,
11 "That piece of information isn't material" and it's then up
12 to the jury to determine whether or not, one, it's material;
13 and two, how would a reasonable person -- objective standard
14 -- have acted with that information. So we're not saying
15 they're foreclosed from rebutting materiality and the
16 omission. We're saying that that inquiry that troubled the
17 Eighth Circuit, that allowed the Eighth Circuit to say, on
18 the representation area, St. Jude's going to do it and
19 therefore it creates individualized issues, as well as the
20 overwhelming damage remedies that we were seeking caused it a
21 significant concern. And if you read the very end of it, it
22 says: "Given the individual issues discussed above" -- which
23 are causation, damages and applicable defenses. So damages
24 and applicable defenses. And that defense relating to
25 reliance on "Did you see it?" "Didn't you see it?" That

1 goes to a misrepresentation. It doesn't go to an omission
2 because, quite frankly, you can't see an omission. So it
3 doesn't matter whether they saw it or they didn't see it.
4 And for that reason there is a significant difference, and
5 for that reason the Eighth Circuit's decision does not
6 foreclose your Honor from considering it. Thank you.

7 THE COURT: Thank you, Mr. Angstreich. Thank
8 you, counsel. The court will take the arguments under
9 advisement and will issue a written order as quickly as
10 possible. If the motion is denied, the court would then
11 check with the parties to determine whether a hearing is
12 sought on the class certification motion. If the motion is
13 granted, obviously we don't need to address that.

14 Anything else we need to address today while
15 we're here?

16 MR. ANGSTREICH: No, your Honor.

17 MR. MARTIN: No. Thank you, your Honor.

18 THE COURT: Okay. Very well. Thank you all.
19 And, again. My apologies for our late start this morning.
20 Court's in recess.

21 THE CLERK: All rise.

22 (Court stood in recess at approximately 10:55
23 a.m., on January 13th, 2009).

24

25

1 STATE OF MINNESOTA)

2)ss.

3 COUNTY OF HENNEPIN)

4

5 I, Ronald J. Moen, Official Court Reporter, CSR, RMR,
6 and a Notary Public in and for the County of Hennepin, in the
State of Minnesota, do hereby certify:

7 That the said proceeding was taken before me as an
Official Court Reporter, CSR, RMR, and a Notary Public at the
8 said time and place and was taken down in shorthand writing
by me;

9 That said proceeding was thereafter under my direction
10 transcribed into computer-assisted transcription, and that
the foregoing transcript constitutes a full, true and correct
11 report of the transcript of proceedings which then and there
took place;

12 That I am a disinterested third person to the said
13 action;

14 That the cost of the original has been divided between
the parties who ordered the transcript of proceedings, and
15 that all parties who ordered copies have been charged at the
same rate for such copies.

16 That I reported pages 1 through 35.

17 IN WITNESS THEREOF, I have hereto subscribed my hand
18 this 28th day of January, 2009.

19

20 s/ Ronald J. Moen
21 RONALD J. MOEN,
Official Court Reporter,
CSR, RMR

22

23

24

25