

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

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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 13, 2003
9 12:45 p.m.

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11 TRANSCRIPT OF PROCEEDINGS
12 (Status Conference)

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

15 APPEARANCES:

16 On behalf of plaintiffs: Michael G. Bosko
17 Steven E. Angstreich
18 Michael Coren
19 J. Gordon Rudd, Jr.
20 Marshall Hoekel

21 On behalf of defendant: Steven M. Kohn
22 David E. Stanley
23 Tracy J. Van Steenburgh
24 Liz Porter

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

1 THE COURT: On the Court's civil calendar today is
2 case number 01-1396, In Re: St. Jude Medical Silzone Heart
3 Valves Products Liability Litigation.

4 Counsel, note your appearances, please?

5 MR. ANGSTREICH: Steven Angstreich for the class.

6 MR. RUDD: Gordon Rudd for the class.

7 MR. COREN: Michael Coren for the class.

8 MR. BOSKO: Michael Bosco for the class.

9 MR. HOEKEL: Marshall Hoekel for the class.

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

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

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

14 MS. VAN STEENBURGH: Tracy Van Steenburgh for St.
15 Jude Medical.

16 THE COURT: Good afternoon to all of you. Here
17 today for a status conference.

18 Mr. Angstreich, would you like to lead us off?

19 MR. ANGSTREICH: Yes, I would, Your Honor.

20 Your Honor, the first item on the agenda relates to the
21 deposition of James Ladner, and our request that he be
22 produced for seven hours and that we be able to have the
23 deposition continue.

24 There are really two aspects to this. One relates to
25 what we perceive to be the defendants' continued argument that

1 somehow we should not be entitled to take Mr. Ladner's
2 deposition at all, regardless what the areas of inquiry are
3 under the Shelton test. And the second relates to the conduct
4 of Mr. Ladner during the deposition.

5 I want to first start with the Shelton issue, because
6 although I thought it had been resolved back in November when
7 the issue of Mr. Ladner's deposition was first on the Court's
8 calendar, and Mr. Stanley argued through this joint status
9 report the Shelton case and the test embodied in it, and the
10 Court said there would be no limitations placed on it.
11 However, the Court viewed the three areas that Mr. Stanley
12 articulated as well as the documents that I had preliminarily
13 addressed to the Court meant that we should go forward with
14 Mr. Ladner.

15 But let's revisit Shelton for the moment. There's a
16 major difference between this case and the Shelton case, and
17 there's a major difference between Mr. Ladner and Rita Burns,
18 who was the attorney in Shelton, whose deposition was being
19 taken.

20 There's also I think a major difference -- and I guess
21 sometimes bad results make bad law, although Shelton has been
22 addressed by other courts, and I'm going to talk about that in
23 a minute. It's clear to me that the court was upset with the
24 fact that the defendant had its day in court taken away
25 through the Shenanigans of counsel. And I think that that's

1 really what you can read into the majority decision of that
2 panel.

3 If you look at Judge Battey's dissent, I think it's
4 fairly clear that he would have followed Diversified, and he
5 would have continued with the rule that says that when you
6 play fast and loose with privilege arguments, and you wait
7 until the last minute, and you stonewall everything, and you
8 have the sanction of a dismissal, that's just too bad for
9 corporate America.

10 Putting that in the context it is, Rita Burns was not
11 involved in any aspect of the AMC Jeep matter, rollovers
12 problems, historical or otherwise until the litigation.

13 Mr. Ladner joined this company in 1997, at the time the
14 Silzone project was under way in Europe, at the time when they
15 were seeking the supplemental approval through the FDA
16 process.

17 He was not a litigation counsel at the time he joined
18 this company. There was simply no litigation involved.

19 To articulate that Mr. Ladner is somehow litigation
20 counsel here, I find astounding. He has not participated in
21 this case. His appearance hasn't been entered. He hasn't sat
22 at counsel table. He's not addressed the Court in any way.

23 We have not seen him as, quote, litigation counsel in the
24 context of Rita Burns in the AMC case.

25 More importantly, we have not asked Mr. Ladner about the

1 strategy in this case. And if you read Shelton, it's very
2 clear that what the court was trying to prevent against was
3 trying to get into Rita Burns's mental processes by asking her
4 about specific documents. And I thought it was a stretch for
5 the panel to say that by asking whether these documents exist,
6 that would somehow be a clue to plaintiff's counsel that Rita
7 Burns thought those particular documents were important. I
8 mean those were the crux of the case. Anybody who would think
9 rollover tests were not germane to the case and somehow was
10 giving an insight into her strategy, I found that difficult to
11 comprehend.

12 But assuming that's where Shelton is, we didn't ask Mr.
13 Ladner for his strategy. We didn't ask for his thought
14 processes about the litigation. In fact, you can go through
15 the entire deposition, this litigation, other than asking him
16 about the privilege log, and we'll come to that in a moment,
17 was not touched upon. This all predated the events of this
18 case. It related to FDA involvement. It related to MDA
19 involvement. It related to other governmental agencies
20 throughout the world.

21 It did not touch upon the purpose for which Shelton
22 exists. If you look at Pamida Inc. versus E.S. Originals
23 Inc., which is 281 F.3d 726, a 2002 decision of the Eighth
24 Circuit, you'll find that the court says that the Shelton test
25 was intended to protect against the ills of the opposing

1 counsel in a pending case which could potentially lead to the
2 disclosure of the attorney's litigation strategy.

3 My goodness, asking Mr. Ladner about the MDA advisory,
4 and Hazel Randall, and things that happened in 1999, unrelated
5 to what happened in the United States, I cannot for the life
6 of me see how that impacts upon the evil which Shelton was
7 designed to address.

8 And if you look at Pamida, Pamida distinguished between
9 the ongoing case and a closed patent case. And what the
10 plaintiff was seeking in Pamida was information about the
11 closed patent case. And the Eighth Circuit said that's fair
12 game. That's not ongoing litigation.

13 Now, my goodness, whatever happened with the MDA,
14 whatever happened with the FDA, whatever happened with any of
15 the other regulatory bodies when I asked Mr. Ladner about
16 Australia, that's ancient history. That's not this
17 litigation. And clearly was permissible, and clearly did not
18 violate Shelton, Pamida, or one other case I just want to
19 point out to the Court, which is Philip Morris, which is
20 footnoted in St. Jude's brief, which is 209 F.R.D. 13, August
21 of 2002.

22 And in the Philip Morris case, in-house counsel was
23 involved in the corporate affairs, the business dealings,
24 managerial, public relations, advertising, scientific and
25 research and development responsibilities.

1 There is no aspect of the Silzone project from 1997, when
2 he joined the company, until the recall, and then after the
3 recall that Mr. Ladner was not involved in its part and parcel
4 of corporate business planning and philosophy.

5 And as the court in Philip Morris said, "In contrast to
6 Shelton, plaintiff is not seeking to depose counsel about the
7 defense or the litigation strategies related to this case."

8 We're not seeking that here, either. That's what Shelton
9 is designed and was designed to deal with. For whatever other
10 salutary purposes, both Pamida and Philip Morris make it very
11 clear there is no absolute privilege against taking opposing
12 counsel's deposition.

13 And there's also a distinction, as we tried to bring out
14 in our brief, between information learned and strategy and
15 advice and guidance.

16 So the first point is, Shelton doesn't apply. And for
17 St. Jude to come into this courtroom and to make an argument
18 that Mr. Ladner occupies any position is inappropriate.

19 Why is it inappropriate? Because number one, I couldn't
20 find out what he did or didn't do during his deposition.
21 Number two, there's been no affidavit from Mr. Ladner or
22 anybody in the corporation, or an opportunity to truly test
23 the issue.

24 Now, I'm not saying that Mr. Kohn would make up the fact
25 that Mr. Ladner is involved. But the reality is that it is

1 not a matter of record. We have been precluded from dealing
2 with that.

3 And if you look at what he authored and what he did in
4 the period '97 and '98 and '99, it is clear he wasn't
5 orchestrating a legal strategy. Your Honor, if he were
6 orchestrating a legal strategy during that period of time,
7 then the crime fraud exception applies. Everything is fair
8 game. Because Mr. Ladner was the mastermind behind a coverup,
9 the falsifying of information being given to the FDA, the
10 failure to provide the FDA with all of the research articles
11 which were within the knowledge and control and custody of St.
12 Jude.

13 When I asked Mr. Ladner about an FDA communication, and
14 whether he had any discussion with anybody about the FDA
15 communication, or it may have even been the Hazel Randall MDA
16 communication, he said yes, they came to ask him about legal
17 advice.

18 And my question was, what was the area? What was this
19 legal advice? There's no litigation. There's a regulatory
20 body that has asked for the company to give a response. What
21 are we talking about? What legal advice could possibly be
22 invoked there? A way to hide the truth? A way to manipulate
23 the answer to the MDA or the FDA? How can we give them
24 something but not all of it?

25 Well, that is fraud. That is improper conduct by an

1 attorney. And if that's what he was orchestrating, then he
2 has no privilege here. And he has no ability to hide behind
3 anything.

4 That's the first area that we have with respect to Mr.
5 Ladner. Case law supports our right to take his deposition.
6 The limitations imposed by Shelton don't apply to him.

7 Let's look at what happened during his deposition,
8 unfortunately.

9 On May 24, 2002, you signed PTO 16. Paragraph 16-B says
10 that if you want to instruct the witness not to answer a
11 question on privilege, that's okay, but the witness shall
12 nevertheless answer questions relevant to the existence,
13 extent or waiver of the privilege, such as the date of
14 communication, who made the statement, to whom and in whose
15 presence the statement was made, other persons to whom
16 contents of the statement was made, any other person to whom
17 the contents of the statement has been disclosed, and the
18 general subject matter of the communication.

19 Now, when I asked Mr. Ladner about, well, what was the
20 subject of the legal advice, I was told I couldn't get that
21 information. And I was told I didn't understand.

22 And Mr. Kohn continued that same attack throughout the
23 brief in opposition and his own certification that I don't
24 understand what's involved. I understood what was involved.
25 I wanted the general subject matter of the communication so

1 that we can deal with whether or not it was truly a privileged
2 communication.

3 He didn't follow the rule. Tells me I didn't follow the
4 rules. I don't know the rules.

5 But it's clear, I wanted to know, did you ever have a
6 conversation with anybody? You can't get an answer to that.
7 Why not? Well, because it could be after the litigation
8 happened, and therefore it's either privileged, work product
9 privilege. Well, that's not what PTO 16-B says. I can get a
10 yes. I can get a no.

11 So the ground rules of our own PTO 16 were not followed
12 by St. Jude Medical, to the point where it became intolerable
13 to ask the witness questions. Because if Mr. Kohn didn't
14 object and say he wouldn't answer, Mr. Ladner did it either
15 directly or his indirect approach.

16 And that's the other thing that we need to address.

17 I never did understand why a witness has difficulty
18 answering questions yes or no. Especially simple questions.

19 Did you ever have a conversation with anybody? Either
20 you did or you didn't. It's not that difficult to say yes or
21 no.

22 I never had a problem with a witness saying yes and I
23 discussed, and give me a whole speech if they want to do that.

24 The problem I always have with a witness who wants to give you
25 a speech is because you can never get to the yes or the no.

1 Mr. Ladner was a classic example of that. I asked him
2 whether or not he had a conversation with Roy Hosek about a
3 specific subject. And he said: My best recollection is that
4 I did -- blah-blah-blah-blah -- but maybe I didn't. Okay?

5 So which is it, Mr. Ladner? Which is your best
6 recollection, you did or you didn't? I got the same answer.
7 My best recollection is that I did -- blah-blah-blah -- but
8 maybe I didn't.

9 Okay, let's try it one more time. Which is it, you have
10 no recollection, or you have a recollection that you did have
11 a conversation?

12 The answer that I got is, "I can't answer your question
13 that way."

14 Well, I'm sorry, Your Honor, I'm entitled to know which
15 it is. Which is the best recollection? You did, or you
16 didn't, or you have no -- you can't have it both ways. You
17 can't give an answer that leaves the other side without
18 knowing which way the man's going to go. So that he can come
19 into the courtroom when confronted with another document, give
20 you the other answer: Well, I told you I didn't know. I
21 wasn't sure.

22 Just tell me you're not sure. Don't give me that weasel
23 word. That was one aspect of the his strategy.

24 The other aspect, despite the fact that the rules don't
25 require it, was: I will not answer a question about a

1 document until you afford me the opportunity to read the
2 entire document.

3 Now, there are times that I will agree that in order to
4 answer the question about a document, because it may have
5 happened years ago, you need to read the whole document to get
6 the context. But I showed him a five-page document, and I
7 directed him to the first line of the first paragraph. And I
8 asked him a question about that sentence.

9 And he told me he couldn't answer it. He needed to read
10 the whole five pages.

11 And I said, well, just look at the sentence and see if
12 you can answer the question.

13 I won't do that.

14 Mr. Kohn said I'm not going to let him answer the
15 question because it's not appropriate.

16 I said, well, what rule says that I can't ask a question
17 and get an answer to that? Common decency, or some such rule,
18 which I guess exists someplace, but certainly not when you're
19 cross-examining an individual.

20 But I gave Mr. Ladner an out. And I said to Mr. Ladner:
21 Tell me, do you need to read the entire letter in order to put
22 the first sentence into context? I wasn't allowed to get an
23 answer to that question.

24 Well, Your Honor, basic fundamental fairness when you
25 have a seven-hour, one-day deposition says that a witness

1 cannot sit -- and I will tell you, although I didn't time him,
2 and I didn't want to do that on the record and embarrass this
3 individual, it took minutes to read sentences. A five-page
4 letter took ten minutes for him to read.

5 And then I couldn't get an answer to the question that I
6 asked him in the first place. You have seven hours. There
7 were 113 documents that I wanted to go over with Mr. Ladner.
8 I got through 13. Thirteen.

9 And one of them I couldn't get any answers to because as
10 I was showing the document, Mr. Stanley was checking to see
11 whether or not this was a document that was inadvertently
12 produced and maybe should be privileged now, so I can't get
13 any answers. And of course at least one of them I was so
14 informed.

15 So we have two aspects to this issue. We have the first
16 aspect, which is should there be any limitation on this
17 individual who was involved from '97 until the recall and
18 thereafter.

19 And what did he do after the recall, Your Honor? He
20 talked with public relations people. He reviewed press
21 releases. I think that's the very same thing that is
22 referenced in the Philip Morris case.

23 He did damage control. It had nothing to do with
24 litigation strategy.

25 So our position is very clear, Your Honor. We were

1 entitled to take his deposition. We were entitled to inquire
2 into the areas that we did.

3 You could read that deposition. You could find that I
4 was less than thrilled with Mr. Ladner and his approach.

5 I asked Mr. Kohn on several occasions to please instruct
6 his witness to answer the question. Couldn't get a yes or a
7 no out of him. I couldn't even get him to answer this
8 question: Could you tell me their names? He told me he had a
9 conversation with people. I said could you tell me their
10 names? I got a speech. I said no, I just want to know their
11 names. Could you give me their names? I got a speech. Could
12 you give me their names? Well, if you would let me answer,
13 I'll get to it. And I got a speech. And somewhere at the end
14 I got two names, and oh, there were a whole lot of other
15 people.

16 Mr. Kohn did not instruct his witness to answer the
17 questions. It got to the point where I didn't even believe
18 that this man could have been trained as an attorney. Because
19 if you're trained as an attorney, you know you're supposed to
20 answer questions yes or no if you can. And if you can't, you
21 say I can't answer it yes or no. Here's my answer. That's
22 okay. But he couldn't even do that.

23 So again, we have an absolute right. He is not trial
24 counsel. I am not inquiring into the strategy in connection
25 with this case.

1 Number two, that deposition, it may have gone six hours,
2 that deposition was a total frustration. The full seven hours
3 is necessary. We need to do this in front of a master,
4 because I am convinced that despite PTO 16-B, I'm going to
5 face the same arguments.

6 And there's one other point that I must make, because
7 we're going to talk about this when we get to the next item,
8 which is the privilege log.

9 Mr. Ladner is the source of 90 some odd percent of every
10 document that's claimed to be privileged. Either he is the
11 author, the recipient, or the person that directed somebody to
12 do something else and therefore became the agent of Mr.
13 Ladner.

14 And what I tried to find out from Mr. Ladner in the
15 deposition, because I knew we were going to argue about the
16 privilege log at some point, was whatever you talk about in
17 anticipation of litigation, well, what was the litigation that
18 this document was created but for? Which is the test. But
19 for the fact that we anticipated, and it has to be a
20 reasonable anticipation of litigation, I created this
21 document.

22 Well, we talked about the MDA advisory. And I wanted to
23 know, well, were you anticipating litigation? Were you going
24 to sue the MDA? Did you expect the MDA to sue you? Mr. Kohn
25 instructed him not to answer.

1 Now we're going to face the privilege log issue, and
2 we're going to be told that it's not enough to just look at
3 the privilege log for you to make the decision, they're going
4 to want to supplement the privilege log and tell you what was
5 going on.

6 Well, I understand that maybe others were involved in the
7 creation of the privilege log. But Mr. Ladner acknowledged
8 that he was in fact involved.

9 Now, in 1999, unless they had already retained Mr. Kohn
10 and other outside counsel, and I'm not aware of that, somebody
11 was anticipating litigation. And we tried to find out what
12 that was.

13 And our point is that if we weren't allowed to find out
14 about that during Mr. Ladner's deposition, then, Your Honor,
15 they cannot base the privilege on anticipation of litigation.
16 Other than what may arguably fall within anticipation of
17 litigation concerning the Silzone product in the United
18 States, where the recall, after the recall came out. Because
19 then one could reasonably view the privilege log to relate to
20 the fact that they might be sued in the United States.

21 But in 1998 and 1999, and prerecall, we cannot allow them
22 now to come back before you and argue what this anticipated
23 litigation was when we were foreclosed during Mr. Ladner's
24 deposition. And it is not appropriate for St. Jude to go, oh,
25 you know what? Now that we see that we might be foreclosed

1 from all work product privilege, we'll let Mr. Ladner answer
2 the question, or we'll tell you what we were anticipating.
3 But you can't question anybody about it. But we'll tell you
4 what it was.

5 That's not the way the game is played. The cases say
6 they have that burden. Diversified, which wasn't overruled by
7 Shelton, makes it clear that the burden is upon the
8 corporation to sustain its work product and attorney/client
9 privileged communication.

10 We also have the issue with respect to communications,
11 letters and the like. We have letters in this privilege log
12 where copies went to a whole host of people inside and outside
13 the company, public relations people that are now deemed to be
14 work product privilege. Communications to an outside
15 consultant who's their medical director, who's not an
16 employee, who's a consultant that's claimed to be work product
17 and attorney/client privilege. We'll get into all of those
18 things in the argument point number two.

19 But those were the kind of things that we tried to
20 explore with Mr. Ladner as well. So that when it came time to
21 argue the privilege log, we would at least have some
22 underpinning for it. They cannot now be allowed to come
23 forward with that information.

24 So we ask that we be given the opportunity to depose Mr.
25 Ladner with the limitation that we not inquire into his

1 thought processes, his trial strategy as it relates to this
2 litigation. But anything with respect to any of the other
3 regulatory bodies, the Securities and Exchange Commission, the
4 FDA, the MDA, all of those areas.

5 The studies that were done. We're talking about the
6 research that was done, that he was in communication with the
7 researchers. The marketing department. The FDA, when we went
8 into the supplemental PMA, all of these areas deal with his
9 corporate responsibilities.

10 All of that is fair game, and we should be permitted to
11 do it, and we should be permitted to do it for seven hours in
12 front of a magistrate or master who will enforce PTO 16.

13 Thank you.

14 THE COURT: Thank you, Mr. Angstreich.

15 Mr. Kohn.

16 MR. KOHN: Thank you, Your Honor. I know it would
17 make a lot of things easier if I would just agree with
18 everything Mr. Angstreich just said.

19 MR. ANGSTREICH: Okay.

20 THE COURT: Not likely that's going to occur.

21 MR. KOHN: Unfortunately, that's not the case.

22 I'll try and make it brief, because I really believe that
23 these issues have been well briefed and the Court has before
24 it the law. But I do want to respond to some of the points
25 that were made.

1 First, let me say this. We've taken a lot of depositions
2 in this case. They've been taken by a lot of different
3 attorneys representing the class. And there's only been three
4 instances when we've had to seek court intervention, and
5 they've all been depositions when Mr. Angstreich has been
6 involved. One was the Spire deposition which I attended in
7 Massachusetts, and another one was Mr. Holmberg's deposition
8 here in Minnesota.

9 When Mr. Coren, who is here today, takes a deposition
10 using the same gadgetry that Mr. Angstreich uses, which is
11 where the document is displayed up on a screen, he says right
12 at the outset, when he's giving the admonitions to the witness
13 at the beginning, if you want to read a document in its
14 entirety, because that's your prerogative and your privilege,
15 and I'll make it available to you. And there's never been an
16 issue that's arisen in a deposition taken by Mr. Coren or by
17 any other counsel.

18 This issue of showing a witness one line out of a
19 five-page document that dates back three or four years and
20 then asking questions about it, without giving the witness an
21 opportunity to read the entire document, not only chewed up 10
22 or 15 minutes of this deposition, but is indicative of the way
23 this deposition proceeded.

24 The one thing I do agree with, the one thing I agree with
25 out of what was said, is that this deposition, if it's allowed

1 to continue, must be done before a magistrate or some other
2 person who can act as a referee. Because this is not a
3 deposition like any other deposition that's been taken in this
4 litigation.

5 I think that gets to a fundamental issue that Mr.
6 Angstreich and I disagree about. If you read the plaintiffs'
7 brief to compel a further deposition, it's quite clear that
8 what they have in mind is to do a free-ranging deposition of
9 Mr. Ladner on marketing, on regulatory issues, on product
10 development issues, seeking his knowledge, his impressions of
11 every aspect from soup to nuts of what happened with this
12 product.

13 That's contrary to the law. That's contrary to Shelton.
14 It's contrary to what we discussed at the status conference
15 back in November. And let me explain why that's true.

16 First of all, plaintiffs have already had the opportunity
17 to depose the most knowledgeable people in the company about
18 marketing, about regulatory issues, about post market
19 surveillance issues, and every other aspect of this product.
20 So they don't need Mr. Ladner's deposition to go into those
21 areas.

22 They have the burden of showing that he has some
23 information that they can't get from any other source under
24 Shelton. They haven't done that. They haven't even begun to
25 do that. There's been no articulation that I heard about what

1 it is Mr. Ladner has in any one of these areas, particularly
2 product development, where he wasn't even at the company at
3 the time, that hasn't already been given to them either in
4 documents, or by other witnesses, or in written discovery.

5 So Shelton would bar that kind of a free-ranging
6 deposition.

7 Now, let me just explain -- and this is in my declaration
8 and it's in our brief. But I'll make it short and sweet. Mr.
9 Ladner is different than other witnesses for two reasons:

10 Since the inception of this litigation back early in
11 2000, he has been the primary attorney overseeing this
12 litigation. That's point number one. So anything that he did
13 in the context of overseeing this litigation is clearly
14 privileged, both by work product and most likely by
15 attorney/client. That would include the preparation of the
16 privilege log, which was the first area Mr. Angstreich decided
17 to go into, and was the only area that really was addressed
18 before he made his preemptive call to the Court.

19 The second point is that to the extent Mr. Ladner was
20 involved in any aspect relating to the Silzone valve before
21 there was either anticipated litigation or regulatory action,
22 or before the actual onset of litigation, was in his capacity
23 as an in-house attorney at St. Jude Medical. He did not have
24 any kind of line responsibility. He was not put in a
25 nonattorney role. He was nothing more than an in-house

1 attorney, and the corporation was his client.

2 And so to the extent that Mr. Ladner has knowledge about
3 marketing, about product development, about FDA issues, his
4 knowledge in large part comes from his role as an attorney,
5 either people seeking legal advice from him, or him giving
6 legal advice to people in the corporation, or, which is
7 equally privileged, investigation into substantive areas which
8 would allow him to give legal advice. And the cases address
9 this quite clearly.

10 So in the deposition, there was a fundamental, in my
11 view, misunderstanding on Mr. Angstreich's part with respect
12 to the scope of the attorney/client privilege. Mr. Angstreich
13 apparently believed that the only time the attorney/client
14 privilege comes into play is when there's anticipated
15 litigation. That clearly is not the law. And I think that
16 caused a lot of frustration and problems in the deposition
17 that were unnecessary and in my view unfortunate.

18 And so it's because Mr. Ladner has this unique role as
19 being primarily responsible for the litigation, and being
20 someone who gave legal advice from '97 until the time the
21 litigation commenced, that we really have to be careful about
22 a deposition. Because the line between what's a foundational
23 question and what is an invasion of a substantive legal area
24 and a potential waiver of a privilege is a very fine one
25 indeed.

1 And it's a very difficult problem for Mr. Angstreich to
2 phrase his questions in a measured way that doesn't give rise
3 to a privilege response. And it's a very difficult job for me
4 representing Mr. Ladner, when I have a matter of seconds to
5 analyze the question and decide whether or not it invades a
6 privileged area.

7 That's why Shelton and the cases that follow Shelton say
8 that this kind of a deposition is disfavored, and often barred
9 altogether. And that's why we sought to get some parameters
10 put around this deposition before it took place.

11 Now, with respect to the characterization of Shelton and
12 Pamida as applying only to trial counsel, that clearly is not
13 the law. Those cases do not say that the Shelton test or the
14 holding in Pamida are limited just to attorneys who are lead
15 trial counsel.

16 Clearly, Mr. Ladner, as the primary in-house counsel
17 overseeing this litigation, is equally entitled to the Shelton
18 test as were the attorneys involved in Shelton.

19 Finally, with respect to the work product privilege.
20 Counsel would suggest that it's only when litigation actually
21 arises or when it's anticipated that the work product
22 privilege arises. And that clearly is not the case. The
23 Bituminous Casualty case clearly says that when regulatory
24 action is anticipated, that the work product privilege comes
25 into play. And that case is cited in our brief.

1 I think counsel is well aware of the fact that in the
2 middle of 1999, the MDA, which is the British equivalent of
3 the FDA, contacted St. Jude and advised them that it was
4 contemplating sending out a physicians advisory notice. And
5 Mr. Ladner was involved with the company's reaction to and
6 response to that regulatory enforcement action by the MDA.

7 And it doesn't have to be, as Mr. Angstreich attempted to
8 demonstrate in the deposition, that the company was in actual
9 litigation with the MDA. All there has to be is threatened
10 regulatory action to give rise to the work product privilege.
11 That's our position. That was our position in the deposition.
12 I think that position is supported by the law.

13 It's quite clear from a reading of the transcript that
14 whenever Mr. Angstreich got into areas that we had identified
15 before the deposition, where Mr. Ladner was the author of the
16 letter, the letter was sent outside the company, we weren't
17 contending there was any privilege that was attached to it, he
18 got an answer to every question he asked. There were pages
19 and pages and pages of testimony where there were no
20 objections interposed. And that's the bulk of the transcript.
21 It was only when counsel got into areas that either could have
22 been obtained by other witnesses, or that were clearly
23 privileged or at a minimum were on the fringe when I was
24 compelled to voice an objection.

25 My view is that there shouldn't be any further

1 deposition. Plaintiffs have not met their burden of showing a
2 need for such a further deposition.

3 We've already worked out a mechanism for dealing with the
4 privilege log. So that's not going to be an issue at a future
5 deposition. Should not be an issue at a future deposition.

6 And they have simply not come forward with any reason why
7 there needs to be a further deposition of Mr. Ladner. If
8 there is one, if the Court disagrees, it should be limited in
9 time. There's no reason in the world why they should get
10 seven hours. And there has to be some clear ground rules laid
11 down so that we don't wind up back here again with the same
12 situation.

13 Thank you, Your Honor.

14 THE COURT: Mr. Kohn, just a question or two.

15 When Mr. Ladner was hired in 1997, was there a particular
16 specialty that he was hired for? Obviously, there was no
17 litigation anticipated in 1997. So he wasn't hired for this
18 particular litigation oversight position. Was it involving
19 other litigation? Was it involving a particular product area?

20 MR. KOHN: Let me explain first, the St. Jude legal
21 department is very small.

22 THE COURT: You can explain generally, if you would
23 like. I'm just curious about how that works.

24 MR. KOHN: The St. Jude legal department
25 historically has had only two or three attorneys in it, the

1 general counsel, an associate general counsel, and they had a
2 patent attorney. So it's a very small legal department.

3 Mr. Ladner was hired to be the same position he has
4 today, which is the associate general counsel. And that job
5 entailed giving legal advice to people within the company on a
6 wide variety of issues. He did not have and has never had any
7 responsibility, any direct line responsibility, such as the
8 attorneys in Philip Morris were found to have. His job was to
9 be a lawyer within the company and to give legal advice. And
10 99 percent of what he did through the time that there became a
11 possibility of regulatory enforcement action on the horizon in
12 1999 involved giving legal advice. And his knowledge of what
13 went on at the company came through his discussing legal
14 advice or people seeking legal advice.

15 So I hope that clarifies it. He was certainly not hired
16 to oversee any particular litigation. The company has had
17 very little litigation from a products liability standpoint
18 over the years. And I think he may have handled a case or
19 two. But that's certainly not the reason he was hired.

20 THE COURT: So there are no others in positions like
21 Mr. Ladner?

22 MR. KOHN: That's correct, Your Honor.

23 If someone at St. Jude wants legal advice, they either go
24 to general counsel or to Mr. Ladner. I think there's one
25 other lawyer who has a very limited specialty. But there's

1 not a big legal staff.

2 THE COURT: Okay. Thank you, Mr. Kohn.

3 MR. ANGSTREICH: Your Honor, I have to respond,
4 because this appears to be not an issue relating to Mr.
5 Ladner's deposition, but an issue relating to my deposition
6 style.

7 We did have a conversation with the Court relating to the
8 Spire deposition because somebody invoked the joint defense
9 privilege. And the issue was, should it be applicable?

10 And if I'm being taken to task for asking the Court to
11 address the joint defense principle, then I should be taken to
12 task. But I think I had a right to do that, and I think it
13 was appropriate. And I think that the call needed to be made.

14 I don't remember any call to the Court dealing with the
15 answers to questions, or the instructions not to answer with
16 respect to Doctor Sioshansi or Mr. Bricault.

17 Mr. Holmberg, that was another very interesting
18 situation, where the witness, I was told, was leaving at a
19 certain time. Which was unacceptable to me. And as the Court
20 pointed out to St. Jude counsel, it was unacceptable to the
21 Court. And in fact, Mr. Holmberg returned and we completed
22 the deposition. There were no issues relating to the
23 questions that were asked. It was whether or not I was
24 entitled to my seven hours, or whether or not Mr. Holmberg
25 could just go home.

1 So I guess in that respect, neither Mr. Coren, Mr.
2 Sigelman, Mr. Jacobson, Mr. Capretz, or anybody else who took
3 a deposition faced the invocation of the joint defense
4 privilege, or somebody who wanted to go home without having an
5 opportunity to get the full time in. I don't think that's a
6 reflection of the issue at hand.

7 If you go through the 240 some odd pages, I respectfully
8 disagree with Mr. Kohn. There are very few pages that have no
9 objection and no instruction.

10 This is not the Shelton case. And he can keep talking
11 about we have a burden and we have a burden. The Shelton case
12 dealt with litigation counsel.

13 And as the court in Philip Morris said, which was the
14 third principle rationale driving Shelton, the animating
15 concern of Shelton is that discovery rules must not be used or
16 abused to enable a learned profession to perform its function
17 on wits borrowed from the adversary.

18 Very flowery, but that's really what this is all about.
19 This is about invading the trial strategy of in-house counsel
20 or trial counsel.

21 Shelton does not address the issue of in-house counsel
22 relating to other issues at all. Nor is there any prohibition
23 ever invoked about the taking of in-house counsel in any case.
24 And Pamida makes it very clear that a closed case is fair
25 game.

1 Now, it's very interesting. They want to rely upon
2 threatened regulatory action. The privilege log doesn't talk
3 about threatened regulatory action. It says in anticipation
4 of litigation. Very clear.

5 Now, maybe they meant to say threatened regulatory
6 action. But actually, the advisory was just a letter to the
7 medical community. It wasn't an attempt to prevent St. Jude
8 from marketing its product.

9 And the information about the advisory is critical as it
10 relates to the communications that happened with St. Jude to
11 the FDA and the other regulatory bodies when all of this
12 information came forward.

13 Now, I just have to think that we have a fundamental
14 misunderstanding and disagreement as it relates to this
15 gentleman. I asked the in-house counsel about insurance
16 questions. I was precluded from getting any information about
17 insurance. Rule 26 says I can get insurance information. I
18 was told do it by way of interrogatories.

19 It seems that not only doesn't St. Jude want us to take
20 discovery the way we would like to, they would like to tell us
21 the specific method that they would like us to follow.

22 Well, we got insurance policies, and I wanted to know,
23 very simple questions. Is there a defense under the
24 reservation of rights? I'm entitled to that information. Is
25 there coverage counsel? I'm entitled to that information.

1 What policy periods are at issue? I'm entitled to that
2 information.

3 So associate general counsel, who would be the one that
4 they would have to go to to get this information, is not going
5 to answer it in a deposition. I have to ask in an
6 interrogatory, and then it's okay? It's not privileged if I
7 do it by way of interrogatory, but it's privileged if I do it
8 by way of a deposition? That's nonsense. This was an attempt
9 by Mr. Kohn to obstruct the entire process.

10 And I have to say that Mr. Kohn says that we've worked
11 out a mechanism with respect to the privilege log. I thought
12 we had, but something has come up that clearly I don't
13 understand. Because we were supposed to get their position
14 yesterday in a letter. We gave them a grouping of documents
15 that we believe to be appropriate as examples that the Court
16 should see in camera on the various subject matters.

17 And the agreement that I reached, I thought with Mr. Kohn
18 and Mr. Stanley, was that they would either tell me that they
19 thought the documents that we selected were not truly
20 representative, if any of them were not truly representative,
21 and if they thought there were other documents that were truly
22 representative, we could reach agreement on what would be
23 submitted to you. And then we would ask you today, as item
24 number two, how do you want to go forward with it.

25 And I was supposed to get a letter to that effect

1 yesterday. Well, I didn't get the letter. So I assumed that
2 we reached agreement that the documents that I had selected
3 were in fact appropriate. But I was told by Mr. Stanley that
4 that's not the case, and they need until Monday to respond to
5 it.

6 But if it's been represented to you that we worked out a
7 mechanism, I never worked out that mechanism. I never agreed
8 that I wouldn't get the letter yesterday. I never agreed that
9 I wouldn't know what their position is today, so that we could
10 discuss it. I never agreed to that.

11 Mr. Stanley and I were to have a meet and confer on
12 Tuesday. I got an e-mail from Mr. Stanley saying is there
13 really a need to have a meet and confer, since we've
14 articulated our positions in the joint status report? I
15 responded, no, I guess not. I'll see you on Thursday.

16 And now I find out that the deal that we struck, and we
17 told Lou Jean about, with the time frames, that I would get my
18 letter in by a certain date, and they would get their response
19 to me by a certain date, isn't going to happen.

20 And I can't tell the Court what their position is with
21 respect to what we gave them. And I don't know how we get
22 guidance from you, since I don't know what they're going to
23 say about that.

24 So we have a fundamental disagreement about Mr. Ladner.

25 We have a fundamental disagreement about whether or not

1 there's something wrong with me and my ability to ask
2 questions. I've been doing this 32 years, and I think I know
3 how to ask a question. And I think if I ask a question that
4 says have you ever had a conversation with so-and-so about
5 such and such, that that's not an objectionable question. And
6 the answer should be yes or no. And if I ask about the
7 question and there is in any way an involvement of an
8 attorney/client privileged communication, that's the time to
9 raise it, and PTO 16 tells you exactly how to do it.

10 So maybe the problem wasn't with the words that were
11 spoken. Maybe the problem is with the way they were received.
12 I can't deal with that, unfortunately. The transcript says
13 what it says.

14 We don't have a burden under Shelton to address, because
15 Pamida and Philip Morris make it clear that this individual
16 comes within the rubric.

17 In addition -- this is on page seven and eight of his
18 deposition, and I know it's been provided to Your Honor: But
19 I would say that my responsibilities have been to provide
20 legal assistance to people.

21 I'm not sure I know what legal assistance is. There's an
22 FDA required document. Does it meet the requirements of the
23 FDA filing? Well, that's legal assistance. That's not
24 privileged.

25 When the in-house counsel gives the stamp of approval to

1 a document that is filed, the fact that he gave the stamp of
2 approval to the document that is filed is not a privileged
3 communication. That's his job. It is not providing legal
4 advice. It's legal assistance. That's what he said he did.

5 He also says that he, to a certain extent, he's involved
6 with the DAG division -- and that may be a typographical
7 error -- and I provided a variety of legal services and
8 assistance to people in those divisions. I have also been
9 involved at various points in time in a number of different
10 matters in the international domain.

11 Well, I think international includes the UK, Canada,
12 Australia, New Zealand, Japan, Germany, all of the areas where
13 the Silzone valves went, and have responsibility for certain
14 international matters that arise out of both of those
15 divisions. I didn't hear any word there about legal advice.

16 But that I mentioned that at the corporate level as well
17 as work that is related to our Cardiac Rhythm Management
18 Division which makes pacemaker and ICD type products.

19 I didn't hear anything about legal advice. I didn't hear
20 him say he gave legal advice to anybody. I heard him say he
21 provides legal assistance.

22 And I would suspect that an in-house counsel for a
23 company that has to file with regulatory bodies, you would
24 expect in-house counsel to review and approve the filing of
25 those documents. That's not what's involved in the giving of

1 legal advice. The seeking of legal advice and the giving of
2 legal advice. That's his own words. Not Mr. Kohn's words as
3 stated to you today. But that's Mr. Ladner's words as to what
4 his duties and responsibilities were when he was hired, and
5 his duties and responsibilities today.

6 Thank you.

7 THE COURT: Mr. Angstreich, Mr. Kohn says that all
8 the information that you seek is available from others who are
9 more expert on these points or have already been obtained from
10 others. Could you respond to that?

11 MR. ANGSTREICH: I could try. But I'll give you an
12 example.

13 Mr. Hosek wrote a letter to the marketing people that he
14 reviewed with Mr. Ladner, in which it provides in that
15 document that we have to comply with the FDA requirements with
16 respect to our marketing materials or we will jeopardize our
17 approval.

18 I don't know how Mr. Hosek would know about jeopardizing
19 the approval, what that would mean, how it would be
20 jeopardized. Certainly Mr. Ladner, who helped write the
21 document, should know that. That was an area I inquired of
22 him.

23 Yes, Mr. Hosek was the author of the document. Mr. Hosek
24 has been deposed in the case. But certainly, who would know
25 better than Mr. Ladner about it?

1 I know that Mr. Ladner reviewed protocols with respect to
2 the various studies. My question of him was what was the
3 aspect of the protocol review? In other words, it doesn't
4 help me to ask the scientist about it. The scientist will
5 tell me from his perspective, but I will get the perspective
6 from Mr. Ladner.

7 Mr. Ladner authored documents. I'm entitled to ask him
8 about that information as opposed to the recipient. That's
9 the same argument we did in November.

10 Mr. Ladner also was copied on documents that went to
11 third parties. And the question that I had for him related to
12 whether or not there were discussions concerning that with
13 him.

14 Now, if he was merely a recipient of a carbon copy,
15 that's all he has to say to me. However, if they had
16 discussions about it, aren't I entitled to test the
17 discussions? Especially when I got -- that's the problem. Do
18 I have to come before and show you where Mr. Holmberg, for
19 example, has no recollection of a particular document, and
20 thereby have to say to you Mr. Holmberg didn't remember and
21 now I'm asking Mr. Ladner?

22 I didn't abuse the issue. For somebody to say, well,
23 there's another way of getting the information, that may well
24 be true. But if Mr. Smith says this was what I meant, and Mr.
25 Jones, who got a copy of it and who may have discussed it with

1 Mr. Smith, says, well, that's not what Mr. Smith told me,
2 that's what discovery is all about.

3 And why is it -- I guess maybe the question really is,
4 where within the federal rules does it say that simply because
5 one witness tells you this is what I meant by what I said, I
6 can't ask the recipient of a carbon copy of it whether or not
7 that was his understanding as well.

8 It's part of the discovery process. It's part of the
9 testing process. And I can tell you after 32 years that I
10 have gotten some incredibly good answers from the carbon
11 copied people on letters that rebut the defense that's being
12 advanced with respect to a particular document. And that's
13 part of what you do in discovery.

14 Now, if there were some specific questions that I asked
15 that Mr. Kohn could point out which I should never have asked
16 because Mr. Ladner couldn't possibly have had any information
17 on that subject, I would suspect that the question was asked,
18 and the answer is no, and I ask the next question.

19 But I'm not seeking to waste my time, the Court's time,
20 Mr. Ladner's time, Mr. Kohn's time in taking a deposition.
21 I'm trying to get answers to questions in a particular subject
22 matter, Your Honor, where, to be very frank about it, those
23 people who supposedly have so much knowledge, they don't have
24 any knowledge. They have very limited memories.

25 I would be happy to send Your Honor the deposition of

1 Doctor Sioshansi, who got a letter from Mr. Holmberg, who I
2 asked about the particular document. And Mr. Holmberg wrote
3 it. I asked Mr. Holmberg about it. Does that mean I couldn't
4 ask Doctor Sioshansi about it?

5 Mr. Bricault was given a copy of it. Does that mean I
6 can't ask Mr. Bricault to see if somebody's memory may be
7 jogged?

8 None of the three of those people had a particular memory
9 about this document relating to the leaching of the Silzone,
10 and a concern that Mr. Holmberg expressed in that letter.

11 So the question is, is there a prohibition under the
12 rules about asking more than one person the subject matter of
13 a particular document? And as long as Mr. Ladner was
14 involved, why would Mr. Ladner be given a carbon copy of a
15 particular document?

16 And why aren't I entitled to ask him whether he did get
17 it, number one. Number two, whether he discussed it with the
18 author. Number three, whether he discussed it with anybody
19 else. Number four, if he did anything in response to it.
20 Those are the kind of questions that come from it.

21 So I really think that I was well within the bounds of my
22 questioning.

23 I do apologize to Mr. Kohn for having to ask Your Honor
24 to address the joint defense privilege, and Mr. Holmberg
25 wanting to go home early and not giving me the full

1 opportunity.

2 Doctor Flory and I spent two lovely days together. We
3 didn't seem to have a problem.

4 Thank you, Your Honor.

5 MR. KOHN: May I briefly respond, Your Honor?

6 THE COURT: Sure, Mr. Kohn.

7 MR. KOHN: First of all, we're already into number
8 two on the agenda. If you would like me to address that now,
9 I will. Otherwise, I'll wait until we get to number two,
10 which is the privilege log and how we're going to handle that.

11 THE COURT: Let's handle this first, and then you
12 can respond first on point number two.

13 MR. KOHN: Fair enough.

14 First of all, the document that Mr. Angstreich just
15 finished discussing is illustrative of my point. Because that
16 particular document was authored by Ms. Illingworth and Mr.
17 Hosek, both of whom had been deposed, and numerous people were
18 copied on that document, only one of whom was Mr. Ladner.
19 It's quite clear from the entries on the log, and I'm sure
20 counsel knew, that Mr. Ladner had given legal advice in
21 connection with that memo to Mr. Hosek. And so counsel -- and
22 Mr. Ladner was not the author, but simply provided advice
23 about it.

24 So to ask him questions about his understanding of the
25 document about what certain things meant almost necessarily

1 gets into attorney/client issues. That's point number one.

2 Point number two is the fact that numerous people were
3 copied on this document, there's no reason for them to have to
4 single out Mr. Ladner to be deposed on a document,
5 particularly when it brings into play the attorney/client
6 privilege.

7 The example was given a minute ago about a question, have
8 you ever had a conversation with. And there were a number of
9 questions like that in the deposition. The problem with that
10 kind of a question, have you ever had a conversation with, is
11 that it's vague as to time. It's impossible for me to know
12 sitting there whether he's talking about things Mr. Ladner did
13 after the recall that may be surrounded with work product
14 privilege, and that's when the conversation was, or it was at
15 some other time.

16 So if the question was asked, have you ever had a
17 conversation before the recall that didn't involve the giving
18 legal advice, that would be one thing. But that isn't the way
19 the questions were phrased.

20 The other suggestion made by counsel was that if someone
21 in the regulatory department goes to the legal department and
22 wants an opinion about an FDA submission, somehow that's not
23 seeking legal advice. Well, I think that's illustrative of
24 the fundamental difference that Mr. Angstreich and I have. I
25 believe that is seeking legal advice, and that that

1 conversation would be protected.

2 So I'll then go to the privilege issues, if you like, on
3 the privilege log.

4 THE COURT: Okay.

5 MR. KOHN: I thought we had a Rule 37 mechanism
6 worked out. And I think it already is in play.

7 What I meant by my earlier remark was that in line with
8 what we discussed at the status conference in January, class
9 counsel has given us a list of documents by category, as we
10 discussed. And I think there's approximately 50 documents and
11 maybe eight or nine categories which they claim are
12 representative.

13 We got that on around February 6, as I recall. And it
14 was my hope that we would be able to give them our response by
15 yesterday or today at the latest. Unfortunately, because of
16 the number of documents that are on that, I told Mr.
17 Angstreich before the conference today that it was probably
18 going to be Monday before he would have our response.

19 So I apologize for that. We're doing the best we can.
20 We are moving forward expeditiously. We didn't think we would
21 have 50 or 60 documents from them. I'm not being critical,
22 because I think this is the appropriate way to go about it.

23 In terms of the appropriate next step, it's our view that
24 when they receive our response, that to the extent class
25 counsel still have issues with any of the documents or

1 categories of documents that they've identified that they
2 don't feel that we have satisfied, that at that point they
3 either do one of two things. And that would be to identify
4 those documents to see if we can narrow it down any further,
5 or if they choose not to do that, to file a motion to compel,
6 and that we would respond appropriately.

7 I think to send the Court at this point in time --
8 assuming there's disagreement, I'm hoping that there won't
9 be -- 50 documents would be a waste of the Court's time and
10 probably not necessary.

11 So my suggestion would be that they get our response,
12 which is going to happen Monday or Tuesday of next week. They
13 identify to us whether they agree or disagree with our
14 position. And assuming they agree, then that's the end of the
15 inquiry. If they disagree, they simply file their motion to
16 compel or come back with an additional meet and confer.

17 I don't think it's appropriate to be submitting documents
18 in camera to the Court at this point in time until the Court
19 has the opportunity to see a motion to compel and our
20 response. And I think at that point in time, if the Court
21 feels that it needs certain documents or all the documents to
22 be looked at in camera under seal, we can address that at that
23 point in time. But I don't think it would be appropriate to
24 do that at this point.

25 So that's my suggestion. I think that we should be able

1 to get this accomplished over the next couple of weeks, get it
2 briefed, and get it before the Court, and move along
3 expeditiously.

4 THE COURT: Thank you, Mr. Kohn.

5 Mr. Angstreich.

6 MR. ANGSTREICH: Your Honor, there was an
7 understanding they would have at least 42 documents. There
8 were seven categories, six documents each. I think that's 42.
9 Maybe I gave him 50. I apologize for the extra eight. But to
10 stand here and say they didn't expect to get 50 when they
11 expected to only get 42, and they didn't bother to call me
12 yesterday to tell me, I think is just part of the stalling
13 tactic that we faced in this case.

14 And it's offensive to me. It's offensive to me because I
15 never agreed that we would meet and confer and let them
16 explain to me their position. They gave us a privilege log.
17 We read the privilege log. We believe the overwhelming
18 majority of those documents within that privilege log are not
19 deserving of protection.

20 And we said, and we discussed it with Lou Jean, we would
21 provide a representative grouping to you, so that you could
22 review it. The purpose of which was if you agreed that the
23 representative grouping established attorney/client or work
24 product privilege, that would apply to all of those documents
25 that related to MDA, FDA, SEC, whatever it happened to be.

1 Whatever the subject matter was.

2 But if you agreed that those representative documents
3 were not in fact attorney/client or work product privilege
4 based upon the descriptions in that privilege log and your
5 review of the document in camera, that we got all of them.

6 I'm not going to spend the time after Monday with Mr.
7 Kohn where he says to me, well, this is what we really meant,
8 and this was what was really involved. That's not the way it
9 works.

10 If you want to make a privilege log and you want to
11 support your position, you put it in the privilege log. And
12 I'm not going to get involved in that game.

13 What's worse is that we are now two and a half months
14 outside of when the privilege log was supposed to be complete.
15 It was promised December 31st. We have a preemption argument
16 April 9. There are a number of those documents that we
17 believe may well impact upon preemption.

18 This whole issue should have been resolved. And now I'm
19 being told on Monday we'll meet and confer, and then we'll see
20 a procedure. It can't work that way, Your Honor. Because
21 they told us why they think there's a work product and
22 attorney/client privilege. And we disagree, based upon the
23 face of the document.

24 And under Diversified, they have the burden as it relates
25 to attorney/client privilege and work product privilege. And

1 they can't sustain that.

2 And the way I thought we set the procedure up was if we
3 challenge the designation, the burden is on them. I shouldn't
4 have to file a motion to compel. We wait until Monday, we
5 file a motion to compel, we brief it, we're back here sometime
6 who knows when in March. Your Honor is going to rule, and
7 maybe I'll get it after preemption is argued.

8 I don't understand. That wasn't the mechanism. The
9 mechanism wasn't I was going to file a Rule 37 motion. The
10 mechanism was let's pick out representative documents, give
11 them to the Court, and rise or fall.

12 Your Honor I believe knows a privilege document when Your
13 Honor sees it. I'm willing to take my chance on that. I'm
14 willing to allow the Court to apply the tests that deal with
15 these documents.

16 Briefing this issue brings extraneous matters before the
17 Court that nobody has had an opportunity to test. And I
18 certainly -- what am I going to do, say the privilege log says
19 X, we believe that X clearly demonstrates that this couldn't
20 have been an anticipation of litigation.

21 And by the way, Your Honor, I tried to find out what that
22 was all about. I was precluded from doing that with Mr.
23 Ladner. And therefore, you take a look at it and see. That's
24 the best I could ever argue.

25 We talked about this back on January 23rd. And now they

1 want me to file a motion to compel? It's not right, and it's
2 inappropriate.

3 The procedure that we put in place was let's give you the
4 samples. If they're right and I'm wrong, I don't get any in
5 that category. If I'm right and they're wrong, I get it all.
6 That's the way it goes.

7 There are two other documents that I've identified, Your
8 Honor, which while they may very well be work product
9 privilege, under Rule 26, if there's no other way of getting
10 the information, the work product privilege fails.

11 Mr. Kohn asked Barbara Illingworth to provide him with a
12 list of all of the animal studies that were done by St. Jude
13 in connection with the Silzone project. We served them with
14 an interrogatory asking for this, and we were told we're
15 giving it to you in documents. You'll find them in the
16 documents. Nobody has ever told us this is a full list.

17 So I said to Mr. Kohn, I want that document. I have no
18 other way of getting this information. Nobody has been able
19 to tell us under oath every single animal study that's been
20 done by St. Jude. I took Doctor Flory twice. He couldn't
21 tell me. Kathleen Tweden is being deposed, and she hasn't
22 been able to articulate them all.

23 So that's a particular document that comes outside that
24 category of MDA, FDA, things of that nature that I
25 articulated.

1 But we need a decision. We need a decision today, as
2 opposed to two months from today.

3 And the procedure that Mr. Kohn has outlined is all well
4 and good if we had no deadlines and we had forever to deal
5 with this case. But we don't have forever.

6 And that's, that relates to the privilege log. And I'll
7 deal with Mr. Kohn if he wants to respond to that. I'll just
8 say to the Court that the methodology that we told the Court
9 had been put in place, which was I'm going to provide a letter
10 on February 12, and they'll tell me which ones they agree with
11 or don't agree with, and we'll try to get a full package
12 together. And then we'll come before you today and say we
13 have identified X documents. We want to give them to you in
14 camera. Do you feel you need a brief? And if you do, we'll
15 set a briefing schedule.

16 That was the deal that we struck. That's not the deal
17 that's been presented to you today.

18 Thank you.

19 MR. KOHN: Your Honor, the procedure that Mr.
20 Angstreich describes I think is simply not fair and won't
21 work, and is inconsistent in my experience the way this issue
22 has been handled in every other litigation I've been connected
23 with. It doesn't follow the outlines of Rule 37.

24 There's no way this Court or any other court can tell
25 from the face of the document in many instances, in some

1 instances you can, but whether it's privileged or not. And
2 there's always a meet and confer process. And there's always
3 an opportunity to brief it. And to preclude us from doing
4 that is incredibly prejudicial and I believe unnecessary.

5 Counsel didn't have to wait to begin the meet and confer
6 process over privilege until a few weeks ago. They could have
7 started that process last year. They could have started it in
8 December. So to stand up here now and say that we've
9 prejudiced them because the privilege log isn't a hundred
10 percent complete is simply wrong. They waited until the last
11 possible minute to engage in this process. And if they had
12 started sooner, we would be further along. But the fact of
13 the matter is they didn't.

14 I see no reason why this all can't be resolved in the
15 next two to three weeks. I see no reason to be flooding this
16 Court with a bunch of documents and no briefing to decide the
17 issue.

18 Thank you, Your Honor.

19 MR. ANGSTREICH: Your Honor, I'll take one minute,
20 and then turn it over I guess to Mr. Stanley on the
21 inadvertently produced issue.

22 We had one document we had a dispute over. It was an
23 e-mail. We gave it to Your Honor. Had no briefing, as I
24 recall. Your Honor reviewed it. Your Honor directed that the
25 unredacted document be provided to me.

1 We have a log of 906 documents today. There's only two
2 ways of doing a privilege log, of addressing a privilege log.
3 And that is you review them all, you get a Special Master to
4 review all 906 of them, or, as I thought we agreed, we take
5 representative samples.

6 Now, the interesting thing is I picked representative
7 samples from the privilege log without the documents based
8 upon what it said, who it was from, who it was to, and the
9 subject matter. I'm willing to live, abide by that selection
10 process.

11 Your Honor was able to determine that the information
12 within that e-mail was or was not privileged. Your Honor can
13 take the privilege log and look at the document.

14 I don't know how Mr. Kohn can give you a brief and say to
15 you this particular document is a work product document
16 because this was the litigation that was reasonably being
17 considered, or this was the regulatory matter that was
18 reasonably being considered, and then turn it to me and say,
19 well, now what you got to say about that?

20 I would say I don't know, I don't have the document. You
21 have the document. Give the Court the document and let the
22 Court make the call.

23 If the document doesn't ask for advice, what are my
24 options? What is the company's options? What should I do?
25 What can we do? What should we do? Here's what I would like

1 to do. That's what advice is. Here's my advice to you. We
2 should be doing A, B, C, and D. Your Honor can discern from
3 the document.

4 The but for test is a problem for them. Because when you
5 read the privilege log, you're going to have a problem. But
6 maybe the document will help you.

7 But you can't have the privilege log amplified by other
8 materials from the party who has the document, and then turn
9 it back to the party who doesn't have the document and say,
10 well, this proved what we say. It's the same argument that
11 we're going to deal with on item number four, which relates to
12 the personnel files.

13 And therefore, the procedure that we outlined, Mr. Kohn
14 and Mr. Stanley and I outlined, which was to give you not 906
15 documents, but what I thought would be 42 and turned out to be
16 50 documents, it might even be 55 documents, would be an
17 appropriate way of doing it.

18 Thank you.

19 THE COURT: Let's take up these first two matters,
20 and then anything else that the parties wish to talk about.

21 With respect to Mr. Ladner, I think he falls somewhere
22 between Rita Burns and whoever the counsel was in Philip
23 Morris in terms of his roles and responsibilities. This is
24 what I'm going to order, at least to the extent that I can do
25 so today:

1 I will allow additional deposition time of up to three
2 hours for Mr. Ladner. And if there is necessary reading time
3 that extends beyond two minutes on a particular document, the
4 time beyond two minutes is not to be included in the three
5 hours.

6 I will provide for a Special Master. If you would like
7 someone in attendance, I don't think that I can ask one of the
8 magistrate judges to be in attendance for three plus hours,
9 given the workload. So I will provide for a discovery Special
10 Master for this issue if that's what the parties desire. It
11 seems they do.

12 Further, I will order that the parties conduct deposition
13 in compliance with Pretrial Order 16, and in particular the
14 provisions regarding claims of privilege in 16-B. I think
15 it's important to follow that procedure that was set out in
16 the pretrial order.

17 I'm not sure I can be more direct on this point today,
18 but the plaintiff will need to confine the information sought
19 to that which is relevant and nonprivileged. Defendants, of
20 course, will be permitted to make reasonable objections based
21 upon attorney/client privilege, work product privilege, and
22 when necessary to prevent the disclosure of trial strategy,
23 which I think is the admonition from the Shelton case that is
24 unchanged by any additional glosses by other decisions.

25 I will order that each party pay his own expenses

1 involved in conducting this additional deposition.

2 Now, any further advice as to subject areas I can
3 provide, but I would probably need to have a list of the
4 subject areas the plaintiff intends to question Mr. Ladner
5 about, and I can, after hearing any response from the
6 defendant, I can make determinations on those subject areas if
7 that's necessary. I don't have enough information right now
8 without going back through everything and trying to glean
9 exactly what subject areas would be the points, or the
10 questions to be raised with Mr. Ladner.

11 But if the parties believe that's necessary and would
12 like to submit, Mr. Angstreich, a list, I can certainly make a
13 determination on the matters on that list if they would help
14 move this along. So the parties can talk about whether to
15 submit a list to me or not.

16 MR. ANGSTREICH: Very good.

17 THE COURT: With respect to the privilege log, I
18 think we need to have Monday's response by the defendants
19 before we can take this to the next step. I certainly would
20 not mind just simply making determinations on each of the
21 documents, although I think it would be important to know at
22 least the nature of the objection that's been raised and the
23 basic position of the parties on the issue. Now, that doesn't
24 suggest a full, drawn out briefing schedule, but it does
25 suggest something more than just simply tossing the document

1 into my lap.

2 So once you have had a chance, Mr. Angstreich, to review
3 Monday's response, and the response should be filed on Monday
4 by the defendants, then I would like the parties to discuss
5 exactly where you're at, if there's any narrowing that's
6 possible based on the response.

7 It may be that defendants are giving up a claim of
8 privilege or work product doctrine on a particular set of
9 documents, or it may mean that the plaintiffs are convinced
10 that the defendants have a good point on some of the
11 documents.

12 What's left, then I would be happy to review those. And
13 they should be submitted to me. But I would like to have at
14 least the basic position of the parties on each of those
15 documents, without any need for complete briefing, because I
16 understand the law on these points. But I do need to have the
17 basic position of the parties. So if you want to structure
18 something that would take not very much time to submit, that
19 would be helpful to the Court. Okay?

20 Now, what else? The inadvertently produced documents.
21 Do we need to talk about that today? It wasn't clear from the
22 status report whether that issue is teed up at this point or
23 not.

24 MR. ANGSTREICH: Your Honor, I thought the issue was
25 teed up.

1 To refresh the Court, on January 21 and January 29, I got
2 two letters from Mr. Stanley, advising that approximately 47
3 documents were claimed to have been inadvertently produced not
4 only in this litigation, but in I think every state court
5 proceeding. And he asked that we return the documents,
6 notwithstanding the fact that we have reviewed the documents
7 when we received the CD-ROMS.

8 What I did was I went to the privilege log to see whether
9 or not the particular document was listed. And those that
10 were listed, I responded based upon what the privilege log
11 said. And I sent them a letter.

12 There were a host of documents that were never on the
13 privilege log. And our position with respect to those
14 particular documents was that these were produced, they've
15 been produced to us more than, for more than two months.
16 They've been produced in other cases. They were not stamped
17 attorney/client or work product privilege. We were not
18 provided with any basis to support an inadvertent production.

19 St. Jude has not sustained its burden of establishing the
20 precautions that were undertaken to protect against
21 inadvertently produced documents. And our position was, I'm
22 sorry, we're not returning those that didn't show up on the
23 privilege log.

24 Then with respect to each and every one of the documents
25 that did appear on the privilege log, I articulated our

1 position, as we will do with respect to the ones that we've
2 identified for Mr. Kohn, the basis for why we, one, don't
3 believe that the privilege is appropriate. We've challenged
4 the privilege. That being who sent it, what the subject
5 matter was, who the recipients were. And from the description
6 itself, the absence of any reference to providing legal
7 advice, the absence of any reference to the but for
8 anticipated litigation. So we addressed each of those
9 documents on that basis.

10 We then looked again to where those documents appeared on
11 the CD-ROMS. Because that was very important to relate to the
12 argument of reasonably acting when you discover the
13 inadvertence.

14 And as I articulated to Mr. Stanley, the overwhelming
15 majority of the documents have been produced as of, I believe
16 it was October. I have my letter to Mr. Stanley so I can
17 address that. I sent him that letter on February 5.

18 By the way, Your Honor, we would propose to do the same
19 thing. We would give you a Bates number, and we would say who
20 the author is and why we think that it's not properly
21 designated.

22 But we also pointed out that CD-ROMS 1 through 57 were
23 produced as of August 21. Within the documents, a substantial
24 portion of them came within those CD-ROMS. That 58 through 74
25 were produced October 2. And that encompassed all of the

1 documents with the exception of, I believe it was seven. And
2 they were contained on CD-ROM 84. And they were produced
3 December 13, 2002. And none of the documents on CD-ROM 84
4 were stamped confidential, nor was it on the privilege log.

5 So our position to Mr. Stanley was we don't understand
6 why it took so long to discover that there had been an
7 inadvertent production, number one.

8 Number two, you didn't mark these confidential.

9 Number three, the overwhelming majority of the documents
10 that have been produced to us were produced in other
11 litigation. When you produce in another litigation, it's very
12 difficult to come before this Court and say that somehow we
13 should be able to invoke a privilege here that we didn't
14 invoke in the other case.

15 The production occurred in cases that have now been
16 settled. So I don't know that there's ever been a return of
17 these allegedly inadvertently produced documents.

18 And as I said earlier, I don't know what their procedure
19 was. And under the, I think this one has a five-prong test,
20 Shelton had a three-prong, I think it's five prongs, one of
21 the major prongs is what's your procedure for making certain
22 that you don't inadvertently produce these documents. And
23 that has never been articulated, and it wasn't articulated by
24 Mr. Stanley.

25 And so we've identified a number of them that we do

1 believe we'll return, notwithstanding the fact that we didn't
2 find the inadvertence to have been sustained. But we do
3 believe that they should be returned. And we're not going to
4 hold them to the timing of that.

5 But with respect to the others, because we challenge the
6 designation, and because we challenge the inadvertence, and
7 because we challenge the fact that they never designated them
8 confidential in the first place, that they shouldn't get them
9 all back.

10 We are willing, however, Your Honor, just so we're really
11 clear about this, in my letter to Mr. Kohn as it related to
12 the privilege log, I said to Mr. Kohn, we have no problem
13 using the documents that we've articulated in the February 5
14 letter as part of the group for the Court to decide upon. So
15 that notwithstanding the fact that we think there's been a
16 waiver, and therefore we should get to keep them, we were
17 still willing to allow the Court to review them. And if the
18 Court truly believed that the privilege should be asserted, we
19 would step away from the timeliness of asserting the
20 inadvertence and allow them to be returned.

21 THE COURT: How many of the 47 have you determined
22 that you will return? Do you recall?

23 MR. ANGSTREICH: Six.

24 Now, Your Honor, the six of the 47, but of the 47, there
25 were nine, I believe there were nine that were not on the

1 privilege log.

2 So our position is we're not going to, we're not even
3 going to address those nine, because you didn't stamp them,
4 you didn't act reasonably, you didn't act seasonably. And we
5 don't know what your precautions were. So I don't even want
6 to address those in that context.

7 Thank you.

8 THE COURT: Mr. Kohn.

9 MR. KOHN: Your Honor, what we would propose --
10 first of all, we would gratefully take back the six they have
11 agreed to return. But as to the remainder, we plan to file a
12 motion to compel return of the others next week.

13 We believe counsel is wrong. I don't think there's any
14 reason to argue it at this point. It will be in our brief.
15 We believe all the documents should be returned.

16 We don't believe that it's appropriate at this point in
17 time to address the issue of whether they are or are not
18 privileged. That has nothing to do with whether or not they
19 were inadvertently disclosed.

20 If the Court rules that they weren't inadvertently
21 disclosed, then we don't ever have to get there. So I see no
22 reason for us to have to take another 50 documents and go
23 through the same process we've already done with the previous
24 50 or 55.

25 So what I would propose is that we'll file our motion as

1 to the inadvertent production. If the Court finds that the
2 production was inadvertent and rules that they should be
3 returned, if counsel at that point still want to challenge the
4 privilege issue, we'll be happy to deal with it at that point
5 in time. But to me, it doesn't make any sense to do that at
6 this point.

7 MR. ANGSTREICH: Your Honor, before there can be any
8 briefing, we would like the identification of the in-house
9 people who had responsibility for putting together the
10 documents and stamping them and producing them on CD-ROM, so
11 we can take their deposition to determine the procedures that
12 have been placed by St. Jude to avoid the inadvertent
13 disclosure of documents. We would like to inquire when they
14 were discovered, when they discovered it, when they acted.

15 I think that that is all within their burden. And for
16 them to simply file a motion and say we acted this way, we
17 have this procedure, and not have us, give us an opportunity
18 to review and challenge that would be totally inappropriate.
19 It's their burden. And we should have an opportunity to
20 depose in-house people, because I assume that that's who was
21 involved in this, on the factual underpinnings for the claim
22 of inadvertence.

23 THE COURT: Well, we'll cross that bridge when we
24 come to it, Mr. Angstreich. Let's have the defendants file
25 the motion to compel, together with the explanation of the

1 procedure that was utilized first, and then we can see whether
2 any additional discovery may be necessary.

3 MR. ANGSTREICH: Very good, Your Honor.

4 THE COURT: Okay, any other issue that we need to
5 discuss today?

6 MR. ANGSTREICH: There is.

7 THE COURT: I don't have Mr. Capretz here to direct
8 us on to the next issue. I'm accustomed to that.

9 MR. ANGSTREICH: The personnel files, Your Honor.
10 We do need some direction from the Court with respect to
11 those. We have asked for the personnel files of certain
12 individuals based upon the testimony of Mr. Guzik. This is an
13 issue that I think is ripe for us to get the files.

14 We believe that there are documents within those files
15 that relate to performance evaluations of the people at issue,
16 because this is a goal oriented management. We have informed
17 St. Jude that they could remove any medical information, any
18 financial information. But performance evaluations are
19 clearly relevant and can lead to the discovery of admissible
20 evidence.

21 Mr. Stanley said to me, well, there's nothing in there
22 that's relevant. And I do appreciate the fact that Mr.
23 Stanley said that to me. But again, in a vacuum, and based
24 upon some of the other documents that we've seen in the case,
25 we've asked that the personnel files be turned over.

1 Mr. Stanley said we'll pick a couple of them to give to
2 the Court. And again, my problem is, well, who's doing the
3 selecting, and what may be in the files. I think there's no
4 inherent privilege to a personnel file, especially if you are
5 asking that the financial information, the medical information
6 be removed. But certainly evaluations of people, their
7 performance, commendations that they got in connection with
8 the Silzone project, for example, may very well be in those
9 files.

10 And the other thing that always bothers me when somebody
11 fights so hard not to give me nonprivileged materials when I
12 say take out all of the privileged materials, there's, that
13 suggests maybe there's something there.

14 So we have no problem if those files come to the Court in
15 camera or the files be turned over to us. But we do need
16 them. And we need them sooner than later.

17 That's on the agenda as well.

18 THE COURT: Mr. Stanley.

19 MR. STANLEY: Your Honor, this whole thing started
20 after Mr. Guzik's deposition. Mr. Coren sent me an e-mail and
21 asked if we would produce the personnel files of Mr. Guzik,
22 and I think Katherine Tweden. And Michael can correct me if
23 I'm wrong.

24 And I went and looked at the case law, and actually read
25 a case that I think you authored, the Cardenas case. And I

1 don't think that just simply saying that personnel files can
2 lead to the discovery of admissible evidence, therefore you
3 have to produce them even if you take out the medical
4 information. I think the case law says that they have a
5 burden to show that they need the information to prove some
6 aspect of their case. Cases that have come down since then
7 have basically been in the employment litigation context.
8 Never a case like this.

9 All that said, I think this is an important issue of the
10 company. We have the privacy interests of the employees.
11 What it's now morphed into, Your Honor, is they want 36
12 personnel files. Pretty much anyone that was ever in the
13 Cardiac Surgery Division, or the Heart Valve Division, as it
14 was formerly known. We think that in and of itself is
15 excessive.

16 What we had talked about was perhaps submitting Mr.
17 Guzik's personnel file to the Court. The Court could
18 determine for itself, based on a review of that file, whether
19 there was in fact justification for going in and maybe seeking
20 more information. I'm confident that when the Court reviews
21 the file, they're going to see that there's nothing in it.

22 But again, that doesn't relieve us as St. Jude attorneys
23 of protecting their privacy rights, which is what we're doing.

24 Again, this is not the subject of any formal request. So
25 if they want to move to compel, then I think they should move

1 to compel for the files that they want, and really narrow this
2 36 down. And they should move for exactly what they're
3 looking for in these files, and limit the time frame. Because
4 all these cases talk about limiting the time frame.

5 And at that point we can respond, and perhaps consider
6 giving a file or a couple of files to the Court for the Court
7 to look at.

8 But that's our position.

9 MR. ANGSTREICH: Your Honor, we continue to be
10 confronted with this formal request. We have a request for
11 all documents relating to Silzone and the Silzone project.
12 That was the first category of documents.

13 We have asked for these particular files. To say to us
14 and the Court, well, file a formal request, we'll deny it,
15 then file a motion to compel, I don't understand. We made
16 this argument. We talked about this I think six months ago in
17 the context of another issue, where we were told you need to
18 file formal requests. We made a formal request.

19 The federal rules provide for the ability to make a
20 request during a deposition, a letter, we've been using
21 e-mails, we've asked for particular materials. If they want
22 us to file a motion to compel, we'll be happy to file a motion
23 to compel.

24 I know of no privacy right of an individual, employee of
25 a company, once you tell the company you don't want to know

1 about their financial information, you don't want to know
2 about their medical condition, you want to know about
3 performance evaluations.

4 This is a goal oriented company. The performance
5 evaluations for the people who were involved in the Silzone
6 project. Now, that's not such a terribly onerous request. We
7 made it very clear to Mr. Stanley in an e-mail to him that
8 that's what we were looking for.

9 Now, if there are no such documents in their files, you
10 don't need to look at it, and certainly they'll produce
11 nothing to us. But if there are those kind of documents that
12 relate to performance evaluations in connection with Silzone,
13 then we should have them. Because they are our opportunity to
14 determine whether or not somebody got a commendation for doing
15 certain things as it relates to this project.

16 Now, does an employee have a right of privacy as to a
17 commendation or a performance review as it relates to his job
18 responsibility for the Silzone project? I don't know why that
19 would be prohibited from discovery. That's what we're looking
20 for. We don't want to examine the entire file.

21 Mr. Coren made it very clear, since this is a goal
22 oriented company, give us the performance evaluations as it
23 relates to the issues in this case, which is the Silzone
24 product. And they can say there are none in any of these
25 files, and we couldn't have an argument, and I won't have to

1 file a motion to compel if there are none. If there are, why
2 shouldn't we have them? That's really what we're looking for.

3 We have narrowed it --

4 THE COURT: How many employees are you looking for,
5 Mr. Angstreich?

6 MR. ANGSTREICH: Michael gave a list of 36. If Mr.
7 Coren could respond to that, Your Honor.

8 MR. COREN: Your Honor, Michael Coren for
9 plaintiffs.

10 Your Honor, I gave them a list of 32. They say that's
11 practically everybody in the Heart Valve Division. I think
12 that's just a little overstatement. We're talking about 36
13 people who had key positions in the various Silzone matters.
14 There are several hundred people who are listed who have
15 produced documents when we look at the document production
16 database. So I could tell you that I have not asked for
17 everybody in the valve.

18 It's a goal directed, it's a management by objective
19 company. I've asked Mr. Guzik that. He explained that they
20 set their goals. They have corporate goals, they have
21 division goals, they have personal goals. And it all relates
22 to performance.

23 And that's what we're interested in. I mean it's a
24 self-limiting thing as to time, because the Silzone EPIC at
25 St. Jude starts roughly 1995, and goes roughly to about year

1 2000, 2001, give or take.

2 So we're not talking about a tremendously great number of
3 people. We're talking about people who were very, very
4 important in the matter. People like Mr. Guzik. People like
5 Mr. Flory. People like Doctor Tweden, so on and so forth.

6 Thirty-six, Your Honor, I believe.

7 MR. STANLEY: Your Honor, I think this discussion
8 illustrates exactly why we need a formal request. Because the
9 original request I got was give us the personnel files and
10 leave out the medical information.

11 Now we're talking about all we care about is did they get
12 a commendation for Silzone. If we have a very narrowed,
13 tailored request to that kind of information, that's something
14 we can respond to. But just to ask us to willy-nilly hand
15 over the personnel files to them and let them rummage through
16 them, it's not appropriate, and the cases that we cited in the
17 report hold that.

18 I think that's why we want a very carefully tailored
19 request that we can respond to. Not just hand over the
20 personnel files and take out the medical information.

21 MR. ANGSTREICH: Your Honor, we had an argument
22 about the minutes, the corporate minutes several months ago.
23 And Mr. Stanley and I, as part of a meet and confer, agreed
24 upon the narrowing of it. I thought that's what we were doing
25 when we responded to Mr. Stanley by way of e-mail. And I sent

1 Mr. Guzik's testimony, and I said we want the documents that
2 relate to performance evaluation and reviews.

3 That's what we want. We don't want to rummage through
4 the file. We have narrowed it. I don't know why I have to
5 make a formal request, wait 30 days, have them give me an
6 answer. They know exactly what we want, performance reviews
7 and evaluations with respect to the 36 individuals during the
8 period of time as it relates to Silzone. It's a very finite
9 period. The names have been provided. And now the specific
10 documents have been requested. Their performance evaluations.

11 THE COURT: Do you agree on the dates '95 through
12 2000?

13 MR. ANGSTREICH: Well, we know the negotiations with
14 Spire began I believe in 1995. So that would be appropriate.
15 And the recall was January 21 of 2000. So I would assume that
16 unless there were commendations for handling the coverup that
17 came after January 21 of 2000, then I would want those
18 performance evaluations as well. But obviously, the year 2000
19 would be the last performance evaluation at this point,
20 anyway.

21 THE COURT: Do you have anything else?

22 MR. STANLEY: Only to say this is, again, we've had
23 discussions of why that particular information might be in a
24 personnel file. But there's never been in an e-mail or even
25 in the joint status report this narrowing of the position.

1 And again, we still feel that 36 files is completely
2 excessive.

3 THE COURT: Well, let's handle this this way. By
4 tomorrow, if you would submit a formal request which should be
5 for I presume for these 36 individuals seeking the performance
6 evaluation and employment review matters relating to Silzone,
7 the Silzone product, or the Silzone project I guess is
8 probably the better way to state it, between the commencement
9 of the negotiations with Spire in 1995 through January of
10 2000. And if you feel that that's overbroad, then you can
11 submit a motion for a protective order concerning that
12 request. You don't need to file anything further. Just
13 submit by e-mail or however you wish to communicate with Mr.
14 Stanley on that.

15 MR. ANGSTREICH: We will do that.

16 MR. COREN: We'll do that, Your Honor.

17 THE COURT: Anything further now? What's next?

18 MR. ANGSTREICH: Your Honor, the top account issue
19 is identified in the status report. The cases under item
20 number six. Mr. Stanley and I spoke about that earlier.
21 Here's the problem with these cases.

22 If the Court were to, is to rule that there is a class
23 for medical monitoring, these particular cases will be rolled
24 into the class. If on the other hand there is no class, then
25 each of these particular plaintiffs may in fact want to pursue

1 a medical monitoring claim on their own behalf.

2 To dismiss the cases today would require them to go
3 out-of-pocket again for a new filing fee. So what we
4 discussed is that they would be the last group of cases to be
5 addressed. And they're in effect in suspense or in a staying
6 mode until we know more about where it's going and nobody has
7 to do anything. There's no time frames running for them.

8 MR. STANLEY: That's fine.

9 MR. ANGSTREICH: And the last item is the next date
10 for the status conference. We have argument on preemption on
11 April 9, Your Honor.

12 THE COURT: Okay object, we were -- let's see. We
13 may want to slightly alter that April 9 date, because I'm
14 scheduled to try a case in our Fergus Falls courthouse. I
15 mean, everyone can come to Fergus Falls.

16 MR. ANGSTREICH: Mr. Rudd said no.

17 THE COURT: And it is a wonderful old courthouse.
18 But there are no direct flights into Fergus Falls. And there
19 are no indirect flights to Fergus Falls. You have to go to
20 Fargo.

21 But we are scheduled, I'm told that the case is quite
22 certain to go to trial, the 7th through the 10th.

23 Is that our plan?

24 THE CLERK: Possibly the 11th.

25 THE COURT: So we could move it to plenty of time

1 the week before, the week after. I don't know what schedules
2 are like, but let's get that adjusted right now, because I'm
3 quite sure I'll be in Fergus Falls.

4 MR. ANGSTREICH: The week after I believe would be
5 better.

6 THE COURT: It's the week Monday the 14th, Tuesday
7 the 15th, Wednesday the 16th. The 18th is Good Friday. I
8 don't know that matters, although the Court will be open.

9 MR. KOHN: Your Honor, my colleague, Mr. Martin, is
10 probably going to argue that. I would agree to any date
11 subject to talking to him.

12 THE COURT: That's fine. Why don't we set Tuesday
13 the 15th. Any problems with the plaintiffs?

14 MR. ANGSTREICH: I don't believe so, Your Honor.

15 MS. VAN STEENBURGH: Everyone will have their taxes
16 done by then?

17 THE COURT: That is probably a bad date. We
18 certainly can do the 16th, if you would rather. The 16th?
19 Okay. That's a Wednesday.

20 We were looking at for the next hearing, unless there's a
21 request for something earlier, March 18, 20, or 21 would work
22 on the Court's calendar, that week.

23 MR. ANGSTREICH: Your Honor, I start a trial on the
24 17th. I've asked for a special listing in the Eastern
25 District of Pennsylvania for the 17th. The court has not

1 agreed to that yet. It should be a one-week trial, though.

2 Would the following week be good?

3 THE COURT: The following week is not good for my
4 calendar. But the week before we could probably only do
5 Monday the 10th.

6 MR. KOHN: It may be possible, but right now there's
7 a deposition in the Canadian Silzone litigation scheduled.

8 THE COURT: On that date?

9 MR. KOHN: Right.

10 THE COURT: I'm scheduled on the 11th through the
11 14th to participate in some matters that the courts facility
12 in San Antonio. It has to do with the electronic case filing
13 project that's coming up.

14 MR. ANGSTREICH: Would April 2 be open on the
15 Court's calendar?

16 THE COURT: April 2, which is, April 2 is fine.

17 MR. ANGSTREICH: Then we would still have two weeks
18 before the preemption argument.

19 THE COURT: Wednesday, April 2. Okay with
20 everybody?

21 MR. KOHN: Fine.

22 MS. VAN STEENBURGH: 12:30?

23 THE COURT: 12:30. Let's set Wednesday the 2nd, and
24 if there's need for an earlier conference, let us know.

25 MR. ANGSTREICH: The 16th is also at 12:30?

1 THE COURT: Yes.

2 MR. ANGSTREICH: Thank you. I think that does it,
3 Your Honor. Thank you.

4 THE COURT: Mr. Kohn, anything else?

5 MR. KOHN: No, Your Honor, thank you.

6 THE COURT: Very well. Thank you. Court is in
7 recess.

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20 CERTIFIED:

Karen J. Grufman
Official Court Reporter

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