

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

3 -----  
4 IN RE: BAIR HUGGER FORCED )  
5 AIR WARMING DEVICES PRODUCTS ) File No. 15-md-2666  
6 LIABILITY LITIGATION ) (JNE/FLN)  
7 )  
8 ) Courtroom 9W  
9 ) Minneapolis, Minnesota  
10 ) Thursday, August 17, 2017  
11 ) 1:30 p.m.  
12 )  
13 -----

14  
15  
16  
17  
18  
19 BEFORE THE HONORABLE FRANKLIN L. NOEL  
20 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

21  
22  
23  
24  
25  
**(MOTIONS HEARING - DOCKET ENTRY 623)**

26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

Proceedings recorded by mechanical stenography;  
Transcript produced by computer.

APPEARANCES:

1 For the Plaintiffs: MESHBESHER & SPENCE, LTD.  
 2 BY: GENEVIEVE M. ZIMMERMAN, ESQ.  
 3 1616 Park Avenue South  
 Minneapolis, Minnesota 55404

4 For the Defendants: BLACKWELL BURKE P.A.  
 5 BY: COREY L. GORDON, ESQ.  
 6 MONICA L. DAVIES, ESQ.  
 431 South Seventh Street, #2500  
 7 Minneapolis, Minnesota 55415

8 For Third-Party BY: J. RANDALL BENHAM, ESQ.  
 9 Dr. Scott Augustine: 6581 City West Parkway  
 Eden Prairie, Minnesota 55127

10  
 11 \* \* \*

## P R O C E E D I N G S

## IN OPEN COURT

12  
 13  
 14 THE COURT: Good afternoon. Please be seated.

15 Okay. This is *In Re Bair Hugger Forced Air*  
 16 *Warming Devices Products Liability Litigation*, 15-2666.

17 We're here for a hearing on the defendants' motion for  
 18 further discovery from Dr. Augustine.

19 Let's get everybody's appearance on the record.  
 20 Let's go -- the moving party is 3M.

21 MR. GORDON: Corey Gordon and Monica Davies on  
 22 behalf of 3M.

23 MR. BENHAM: Representing Dr. Augustine and the  
 24 Augustine entities, J. Randall Benham.

25 MS. ZIMMERMAN: And representing the MDL

1 plaintiffs, Your Honor, Genevieve Zimmerman.

2 THE COURT: Okay. Mr. Gordon, you are up.

3 MR. GORDON: Thank you, Your Honor.

4 And to expand a little better, to clarify, what we  
5 are seeking is additional discovery not only from Dr.  
6 Augustine and his companies, but from three hospitals that  
7 were part of a -- or that comprise the basis of a  
8 publication that Dr. Augustine is responsible for that came  
9 out either at the very end of June or the very beginning of  
10 July.

11 Just to tee it up, I -- I'm still old. I use the  
12 ELMO. This is a publication that Dr. Augustine authored.  
13 It came out the end of June, beginning of July, in kind of a  
14 pay-for-play publication. It's an online thing. You pay  
15 600 euros and it gets published.

16 And the significance of this -- I can understand  
17 why the plaintiffs have gone to great lengths in their  
18 moving papers to say, ah, nothing to see here, just move  
19 along, it's really not important, but I will explain why  
20 that's -- that is not an accurate depiction of how the  
21 plaintiffs have used it and clearly will intend to use it.

22 But what -- in this paper Dr. Augustine purports  
23 to summarize infection joint -- joint infection data from  
24 three unidentified hospitals, Center 1, Center 2 and Center  
25 3, and compares their joint infection rates when they were

1 using Bair Hugger versus when they were using HotDog. And,  
2 remarkably enough, the infection rates with the Bair Hugger  
3 are much higher, you know, almost three -- say three times  
4 or four times as high as when they switched to HotDog,  
5 which, of course, would be pretty compelling evidence.

6 I want to address the, first of all, the issue  
7 that the plaintiffs' experts don't care about this, this is  
8 just one more piece of the puzzle, just, you know, how they  
9 have tried to minimize it. After we made this motion, we  
10 had the opportunity to complete the deposition of Jonathan  
11 Samet. Dr. Samet is their -- plaintiffs' epidemiologist and  
12 sort of their key witness on the increased risk, the  
13 quantification of increased risk. And Dr. Samet was  
14 talking -- in his first deposition he had brought up the  
15 Augustine paper, but in the second deposition he left no  
16 ambiguity as to -- as to its centrality to how he views the  
17 case and the opinions he intends to offer.

18 I would -- and if I may read to the court, this  
19 was from his deposition on August 8th, 2017. Again, this is  
20 after the motion was made. We had been talking about a  
21 commentary he had written in response to an article  
22 suggesting that the observational studies were prone to  
23 false positives. And my question was, "And correct me if I  
24 am wrong, but part of your opinion is based on your  
25 conclusion that the McGovern paper does not represent a

1 false positive, is that correct," to which he replied,  
2 "Well, the McGovern paper is certainly part of the evidence  
3 that I considered. To the extent that the P value is less  
4 than .05, that's a helpful indication that the results are  
5 not arrived by chance alone. And then, of course, since the  
6 McGovern paper, there's been a second report that  
7 essentially corroborates the findings in other hospitals."  
8 And I said, "You're talking about exhibit -- the Augustine  
9 publication?" He said, "Yes, I am. Yes." "Okay," I said,  
10 "so" --

11 THE COURT: Which at the time the Augustine  
12 publication had not been published or it had been?

13 MR. GORDON: As of the time of the deposition it  
14 had been published.

15 THE COURT: It had been published?

16 MR. GORDON: Yes.

17 THE COURT: Okay.

18 MR. GORDON: And so this is Dr. Samet saying so --  
19 I said to him, "So specifically my question with McGovern is  
20 your opinion is predicated at least in part on your  
21 determination the McGovern findings do not represent a false  
22 positive; is that correct?" He said, "That's correct,  
23 essentially." I said, "Have you similarly concluded that  
24 the Augustine publication is not based on false or is not a  
25 false positive?" He says, "Well, again, yes. And with two

1 papers that corroborate each other I think the likelihood  
2 that both are, quote, 'false positive' diminishes. And  
3 there's, you know, with P values and assessment of the role  
4 of chance, there are other ways to generate false positives,  
5 but with two papers with quite -- quite similar findings I  
6 think the strength of evidence from the epidemiological side  
7 has -- has grown."

8           So the notion that their expert don't think --  
9 it's not that important, it's just one more, you know, one  
10 little pine cone in this forest of scientific trees, not the  
11 case. The Augustine paper is clearly central at least to  
12 Dr. Samet's opinion. I could read you some excerpts from  
13 some of the other depositions, but the point is that before  
14 Dr. Augustine published his so-called study he -- the only  
15 thing the plaintiffs had to point to that actually they can  
16 say that's real evidence of an actual increased risk was the  
17 McGovern paper. At the very outset of this litigation they  
18 were saying McGovern, McGovern, McGovern. My partner Mr.  
19 Blackwell said, you know, write that down, Your Honor's --  
20 underline it, you are going to hear a lot about McGovern.  
21 Well, we have spent a lot of time addressing McGovern, and  
22 we feel pretty confident we will be able to demonstrate to  
23 the court that, as the authors of the McGovern paper  
24 themselves conclude, you can't draw any causal conclusions  
25 from it. One could be said a little bit more strongly than

1 that, but the point is that the McGovern paper by itself is  
2 -- is not going to be very valuable.

3           Along comes this Augustine study with supposedly  
4 showing very similar numbers, almost, actually, almost  
5 identical numbers to the McGovern paper, the huge decrease  
6 in periprosthetic joint infections when they switch from  
7 Bair Hugger to HotDog.

8           Now, this actually isn't the first we have seen of  
9 Dr. Augustine's paper. Dr. Augustine is a prolific ghost  
10 writer, kind of in the style of Dalton Trumbo. The first  
11 time he, to our knowledge from what we have seen --

12           THE COURT: I'm not sure who should be insulted by  
13 that. Mr. Trumbo or Mr. Augustine.

14           MR. GORDON: Mr. Trumbo absolutely should be  
15 insulted.

16           THE COURT: Go ahead.

17           MR. GORDON: And for the benefit of those younger  
18 folks in the courtroom, Google it.

19           THE COURT: It's a movie. Go see it.

20           MR. GORDON: But this was -- to our knowledge, the  
21 first time he tried writing this up he ghost-wrote it for  
22 Dr. Gauthier. And the reason I want to draw the court's  
23 attention to this is for whatever reason in this draft he  
24 specifically called out Center 1 as being Ridgeview Medical  
25 Center, Waconia, Minnesota. And I'm just going to do a

1 side-by-side. I don't know if this is going to work very  
2 well. But the numbers are absolutely identical with the  
3 exception of there's little change in the calculated odds  
4 ratio, but the actual broad, broad data, the raw numbers for  
5 the infection rates were the same there. So we had talked  
6 to Dr. Gauthier about that. Of course, he said I don't know  
7 anything about Ridgeview, I didn't have anything to do with  
8 that.

9 The second, well, again, the second one we were  
10 aware of where Dr. Augustine ghost-wrote, at least he  
11 included his name this time, but he ghost-wrote it for  
12 Augustine and McGovern. Now, both McGovern and Augustine  
13 have testified that McGovern had absolutely nothing to do --  
14 to do with this. Augustine sent it to McGovern and said  
15 will you, you know, hey, you can add your name on another  
16 publication here. McGovern kind of slow walked it and said,  
17 well, I'm not really doing orthopedics anymore, I'm not so  
18 sure. But, again, you have the same raw data, but this time  
19 the numbers become identical. Why? Well, the statistical  
20 analysis was done by a name that might be familiar to the  
21 court as well. Mark Albrecht, who had been an employee of  
22 Augustine's, but at this time is no longer an employee, but  
23 he was still under kind of a repayment contract, because  
24 Augustine had funded some of his education as part of a  
25 negotiated exit deal. To deal with paying back the tuition,

1 he agreed to undertake some additional work, including this  
2 study. So Albrecht is the statistical analyst, again, a  
3 name that is familiar to you. He was the statistical  
4 analyst in McGovern. He's actually kind of the key behind  
5 all of the studies that the plaintiffs use. But now let's  
6 circle back to this. We didn't -- we weren't --

7 THE COURT: Let me interrupt for a second and ask  
8 what is --

9 MR. GORDON: Sure.

10 THE COURT: So you've talked about this being an  
11 online publication. Orthopedic Reviews. Is it peer  
12 reviewed? Is it like a medical journal or --

13 MR. GORDON: It is a medical journal. It is peer  
14 reviewed in the sense that, when you submit your paper, you  
15 are required apparently to identify the names of two people  
16 that you recommend as reviewers.

17 It's purely coincidental, Your Honor, but I  
18 received yesterday in the mail my monthly issue of *Skeptical*  
19 *Inquirer* magazine. I recognize it's probably not as -- not  
20 a commonly-known magazine, but I am literally leafing  
21 through it. There's an article on predatory journals.  
22 What's this? So I start reading it. There is this whole  
23 world out there of online publications that this particular  
24 author and several others refer to as predatory journals,  
25 that they -- they prey on people who want to get their

1 papers published and for a fee they will run it through a,  
2 quote, peer-review process. It will be published online.  
3 And some of them are legitimate. Some of them are -- it's a  
4 spectrum.

5 But the point is whether -- whether it was a  
6 legitimate publication or kind of a fly-by-night, whatever,  
7 it is a -- it does purport to be a peer-reviewed  
8 publication. And to your point, I kept hearing that from  
9 Dr. Samet. He kept -- when I tried to challenge him or I  
10 tried to challenge the -- the underlying bona fides of this  
11 study, both he and I should point out Dr. Jarvis, their  
12 infectious disease expert, kept pointing out, well, this is  
13 peer-reviewed, it's peer-reviewed. Well, peer reviewers can  
14 only review what's in front of them, even if they're acting  
15 in the best of faith. What wasn't in front of the peer  
16 reviewers we presume are the actual underlying data for --  
17 and we only have underlying data for Richard. And that's  
18 the whole point of this motion. We can only debunk one  
19 prong of this -- this multicenter so-called study.

20 In the study Dr. Augustine published he claims  
21 this is -- these are hip and joint infections -- or hip and  
22 knee joint infections. And the protocol for his so-called  
23 study was one year of Bair Hugger followed by a 60-day  
24 washout period and however many months of data were  
25 available for the HotDog. Okay? So from that you would

1 expect, well, we're going to see both hip and knees and  
2 we're going to see a continuous period of time where, you  
3 know, year one is Bair Hugger, years two and/or three are  
4 HotDog with a 60-day buffer. When we actually got the raw  
5 data from, pursuant to a subpoena to Ridgeview, well, it  
6 turns out, if you -- if you look at the numbers -- I can  
7 take the court through this. I would actually love to take  
8 the court through this, but I am guessing you probably don't  
9 want to have me go into detail on this. What Dr. Augustine  
10 did was he ignored the hip data and he took the knee data  
11 only from -- from 2006, disregarded the -- completely  
12 ignored the 2007 data, and then lumped together '08 and '09  
13 to come up with the numbers that he puts here. Trust --  
14 well, you don't have to trust me. They match and I would be  
15 happy to show you why they do. But the significance of this  
16 is several -- several-fold. Number one, 2007 was still a  
17 Bair Hugger year. The switch didn't occur till 2008. So  
18 what he did was take these data. Okay. Knee -- the worst  
19 -- worst period for knee in the Bair Hugger period was 2006.  
20 So he used that as his Bair Hugger period, completely  
21 disregarded a full year of Bair Hugger use where there was  
22 zero infections. Then he looks at the two years of HotDog,  
23 again, knee infections only.

24 Now, if he had just looked at -- if he had  
25 followed the protocol of one year, the 60-day washout and

1 then the remainder of time with HotDog, he would have  
2 started with 2007 being the Bair Hugger year, zero  
3 infections, and that would have been compared against two  
4 years of HotDog infections where there were, you know, a  
5 couple. In other words, it certainly wouldn't have shown --

6 THE COURT: Well, couldn't he also have combined  
7 2006-2007? You still would have had six infections against  
8 the 2008-2009 two infections.

9 MR. GORDON: And we would certainly have no  
10 quarrel if he had done that and said that's what he was  
11 doing. And if he had said we're only looking at knees and  
12 we're combining two years of one and two years of another,  
13 the statistical significance would -- would evaporate under  
14 those circumstances.

15 But then take a look at hip. If you look at just  
16 hips, there's certainly no statistical significance and Dr.  
17 Samet conceded this in cross-examination, but if anything --  
18 well, quite literally, the numbers are slightly higher in  
19 the HotDog period, if you include hips. Now, if you just  
20 look at combined, the numbers are pretty close. The point  
21 is this is the classic cherry-picking of data to support  
22 your conclusion or what might be referred to as the Texas  
23 sharpshooter, the fallacy.

24 Dr. Augustine clearly wanted to bolster the  
25 McGovern paper. Dr. Augustine clearly wanted to show that,

1       hey, his HotDog, you know, that dramatically reduces  
2       infections, so he took these data from Ridgeview. There's  
3       only one way you can present these in a way that shows a  
4       dramatic drop switching from Bair Hugger to HotDog. That's  
5       by ignoring your own protocol and skipping a year and using  
6       only knee data. Any other way and, if anything, it makes --  
7       it shows the HotDog is better.

8                Okay. That's what he did with Ridgeview. We know  
9       that because we had the advantage of knowing that he had  
10       done this with Ridgeview and we had subpoenaed them, and we  
11       were, you know, satisfied that this was sufficient.

12               THE COURT: And what did you get from Ridgeview in  
13       terms -- you haven't deposed anybody at Ridgeview, correct?

14               MR. GORDON: That's exactly right. And that's  
15       part of our motion, is --

16               THE COURT: Okay.

17               MR. GORDON: -- I think we need at this point now  
18       we need to depose somebody.

19               THE COURT: We will see. But this is data that  
20       you were able to pull from documents that Ridgeview produced  
21       pursuant to a subpoena?

22               MR. GORDON: That's correct.

23               THE COURT: Okay.

24               MR. GORDON: That's exactly right. And to that  
25       point, part of our motion -- we're not asking for additional

1 documents from Ridgeview. We just want a chance to depose  
2 somebody to lay the foundation for this and make sure it  
3 says what we believe it says.

4 But there are two other -- two other centers here.  
5 And the importance of this is that -- now, when plaintiffs  
6 were examining, cross-examining one of our experts, Yale  
7 epidemiology professor Jonathan Borak, and this is -- this  
8 testimony is Tab 3 to Monica Davies' affidavit -- he  
9 actually, truth be told, he was the one who kind of finally  
10 noticed this and correlated the numbers and showed what --  
11 well, he, being the scientist that he is, he didn't say that  
12 it was fraudulent, but it's fraudulent, but he, you know, he  
13 explained that this was cherry-picked data. And plaintiffs  
14 asked him, well, what do you mean by the cherry-picking?  
15 And he went through a very elaborate discussion explaining  
16 this, to which the very next question from plaintiffs'  
17 counsel was how about the other two centers? Answer, I  
18 don't have any data on them. And that's why we are here.  
19 We don't have any data on them. We didn't -- we didn't know  
20 this was being published. We didn't think it was going to  
21 be relied upon by plaintiffs' experts and certainly not to  
22 the extent it is clearly being relied upon.

23 THE COURT: I thought you did know it was going to  
24 be published and for a while there was the tease back and  
25 forth about where it was going to be published. You didn't

1 know where, but you knew it was going to be. Is that --

2 MR. GORDON: Towards the end of discovery, that's  
3 right.

4 THE COURT: Okay.

5 MR. GORDON: Yeah. When we deposed Dr. Augustine,  
6 yes, he said it was going to be published and he refused to  
7 tell us where or when. You know, we didn't know when, but,  
8 yes, but that was at the end of discovery and at that point,  
9 you know, we, you know, we -- I don't think we would have  
10 had time -- that, by the way, was the first time we -- of  
11 the three centers, the second one we -- we have reason to  
12 believe that it is, as Dr. Augustine confirmed in his  
13 deposition, the free-standing day surgery center in  
14 Wisconsin, Fox Valley. And we learned for the first time at  
15 his deposition that the third center is a Nassau Community  
16 Hospital on Long Island in New York.

17 But, again, you know, if plaintiffs' experts, who  
18 said nothing about it in their initial expert reports, if  
19 they had not brought it up, had said nothing about it, had  
20 no impact whatsoever, you know, we wouldn't -- it wouldn't  
21 be a litigation issue. And, you know, they keep wanting to  
22 hammer us that we're trying to use the litigation for  
23 nefarious purposes, for marketing, for intimidation,  
24 whatever. No. Then we would have -- then we would have  
25 gone after these immediately. This became a litigation

1 issue when it was injected into it by plaintiffs, by their  
2 experts, particularly Dr. Samet, a key expert, clearly using  
3 it, viewing it as something to bolster his testimony and by  
4 using it to cross-examine our experts. You know, at that  
5 point it became, okay, we got to, you know, we need  
6 something on this.

7 THE COURT: Okay. Anything else?

8 MR. GORDON: I think that's it, Your Honor.

9 THE COURT: Okay. Mr. Benham.

10 MR. BENHAM: Good afternoon, Your Honor.

11 It seems to me that the reopening of discovery is  
12 largely a mechanics of the MDL issue, so I'm generally going  
13 to rely on what I've submitted to the court and defer to  
14 plaintiffs to make their own arguments here, particularly  
15 since nearly everything we just heard related to them and  
16 their experts rather than to my client, but I will make a  
17 couple of points. One is --

18 THE COURT: But it is your client's publication,  
19 correct?

20 MR. BENHAM: Absolutely.

21 THE COURT: And what is your understanding of what  
22 Orthopedic Reviews is and is it a genuine peer-reviewed  
23 journal?

24 MR. BENHAM: Well, I can tell you the little bit  
25 that I personally know through conversations with Dr.

1 Augustine and others in the office, and I hope you will  
2 understand that that might be imperfect and not take it as  
3 evidence.

4 My understanding is that it's a legitimate  
5 peer-review publication, which does in fact ask for  
6 suggestions as who in the field might be appropriate people  
7 to review it. I'm not certain if those suggestions are  
8 taken or if they were taken in this case. It's been spoken  
9 of as a pay-for-play publication. My understanding is that  
10 600 or so euros is the fee that is charged to make it open  
11 access, rather than to cause people to have to purchase  
12 copies of it or go through some service that they belong to.  
13 So my understanding is that it's an open-access fee, not,  
14 you know, get your name in the  
15 top-thousand-lawyers-in-the-country sort of deal.

16 THE COURT: Okay.

17 MR. BENHAM: But I will admit my personal  
18 knowledge of that is pretty limited and that's -- that's  
19 what I understand.

20 I think the key point is that this publication,  
21 which had not yet occurred, but the article was in fact a  
22 topic in Dr. Augustine's deposition. They could have asked  
23 him virtually any questions they wanted to, other than where  
24 is it going to be published. That was not answered, as Dr.  
25 Augustine said, out of fear that they would somehow squelch

1 the publication of it, 3M would, but apparently they asked  
2 the wrong questions or spent their time in the wrong way.  
3 And even if they did use their time badly in the first seven  
4 hours, they have still got four hours left that you gave  
5 them a couple of months ago and have chosen not to use. So  
6 one would think that they could use some portion of those  
7 four hours and get these questions asked.

8 THE COURT: But those four hours are going to be  
9 used? Has that been scheduled or is it --

10 MR. BENHAM: No. Nothing.

11 THE COURT: -- that you're thinking they are done?

12 MR. BENHAM: The only communication I have had --  
13 excuse me -- about the four hours was -- excuse me --  
14 several weeks ago there was an inquiry from the defense  
15 counsel saying tell me what dates you are available, with no  
16 beginning and end or, you know, for the rest of your lives.  
17 I wrote back to them and said maybe plaintiffs and defense  
18 counsel should talk to each other and come up with a range  
19 of dates and our schedules are probably a lot more open than  
20 yours are. And I didn't get an answer to that email or any  
21 other dates. So my belief is that there's no hurry on 3M's  
22 part. They would like to stretch this out as long as they  
23 can, because intimidation is the purpose.

24 Dr. Augustine has stated that he hopes to gather  
25 additional information from HotDog customers about what

1 their experiences were with Bair Hugger previously and what  
2 their experiences are with my client's product now and  
3 publish them, if he is able to, or encourage them to publish  
4 it, if they are able to. But what 3M is shouting to the  
5 world is cooperate with Augustine and 3M will make your life  
6 miserable. You will have to do document discovery; there  
7 will be depositions; you will have to hire attorneys.  
8 Ridgeview is an example. This was not a pleasant experience  
9 for them and stressful on what had been a very cooperative  
10 relationship between Ridgeview and my client.

11 So, you know, I think it's interesting that the  
12 word "intimidation" should come from Mr. Gordon's mouth  
13 other -- before even mine, but that is an underlying factor  
14 here. If they wanted to get this discovery done, it could  
15 have been done by now; or if they wanted to ask these  
16 questions, they could have asked them in the first  
17 deposition.

18 So I would request that the court bring this to an  
19 end and not allow 3M to continue to have a chilling effect  
20 on future research in this area, other than research that  
21 they sponsor and pay for and publish themselves.

22 THE COURT: Okay.

23 MR. BENHAM: Thank you.

24 THE COURT: Thank you.

25 Ms. Zimmerman.

1 MS. ZIMMERMAN: Thank you, Your Honor. Good  
2 afternoon. May it please the court.

3 As the court is aware, what 3M has really brought  
4 here is a motion not just for additional discovery from  
5 Augustine, but what the motion is is a motion to reopen  
6 discovery, not just with respect to the deposition that this  
7 court has already granted I think four additional hours on.  
8 Of course, that's not been taken up or has not been  
9 scheduled at this point. But it is -- it's a motion to  
10 reopen discovery unilaterally. And I think that this court  
11 is aware that Rule 16 and Rule 30 addressed these, but I  
12 think that Judge Schiltz really outlined the issue in a very  
13 complicated case that was before him I think in 2012. Land  
14 O'Lakes, which is cited in our papers, involved a very  
15 complicated environmental case, multiple defendants,  
16 conflict-of-law analysis, and at one point there was a  
17 motion for to reopen discovery. And Judge Schiltz said that  
18 "In every case, and particularly in every case involving an  
19 ongoing environmental cleanup, evidence that one side or the  
20 other might find helpful may come to light after the close  
21 of discovery. But for courts to adjudicate cases with some  
22 semblance of efficiency, the record cannot be an ever-moving  
23 target. At some point the record must hold still and a  
24 court must be able to decide the case based on the record  
25 before it."

1           Now, I would like to point the court to what is  
2           likely to happen here if defendants' motion is carried. We  
3           are going to delay Daubert motions that we are three weeks  
4           away from filing, because we are just not going to be in a  
5           position for either side to be making fulsome challenges to  
6           the experts that have been disclosed who may or may not need  
7           to update their reports. We have motions. We have  
8           responses. We have replies. I think that we have got three  
9           days now set aside on three different court calendars to  
10          here these motions in October. There is almost no way that  
11          the trial date of February 26 can possibly stick if  
12          defendants are allowed to unilaterally reopen discovery, not  
13          just for additional time for deposing Dr. Augustine, but to  
14          do this additional discovery of these additional hospitals.

15                 Now, Your Honor had some questions about the  
16          nature of the -- of this Orthopedic Review journal. I do  
17          know a few things I think that may provide some additional  
18          information. It is my understanding that the Orthopedic  
19          Review journal has a board of editors and reviewers, all of  
20          them have medical degrees and specialty in orthopedic  
21          surgery, and, as I understand it, the acceptance rate for  
22          publication even in the online journal is less than  
23          80 percent. So most of the time these articles are  
24          declined. Now --

25                 THE COURT: I'm sorry.

1 MS. ZIMMERMAN: They decline 80 percent of the  
2 articles that are submitted.

3 THE COURT: Okay. So the accepted -- the  
4 declination rate history is 80 percent.

5 MS. ZIMMERMAN: Declination rate is 80 percent. I  
6 apologize if I misspoke.

7 THE COURT: Not the acceptance rate is an 80  
8 percent.

9 MS. ZIMMERMAN: Exactly. So there are many times  
10 during the year that --

11 THE COURT: So something just over 20 percent --

12 MS. ZIMMERMAN: Are accepted.

13 THE COURT: -- are accepted.

14 MS. ZIMMERMAN: That's correct.

15 THE COURT: Okay.

16 MS. ZIMMERMAN: And I can't represent to the court  
17 what a peer-review acceptance rate might be for other  
18 journals, but that's my understanding with respect to this  
19 Orthopedic Review.

20 Now, I will also say that at the beginning of this  
21 and during the meet-and-confer process the plaintiffs said  
22 that we would take a position of not opposing at least the  
23 additional time with Augustine on the condition of a couple  
24 things. One, the plaintiffs want to have the opportunity to  
25 cross-examine Dr. Augustine as well. We have questions

1 about this article. It was just published for the first  
2 time at the end of June. We have questions about how it was  
3 that this device that had a warning on it in the late '80s  
4 and early '90s about airborne contamination and the risk of  
5 infection, why was that warning taken off. The plaintiffs  
6 want to know that. And we have had a total of about two  
7 minutes to depose Dr. Augustine at this point, because the  
8 seven hours expired. At this point the only time that's  
9 been allotted has been allotted for 3M. But we had said,  
10 look, if you guys want to reopen this, as long as you are  
11 going to give us open time, equal time with Augustine, with  
12 any of these other folks, we won't oppose your motion.

13 But another thing that's come up in the course of  
14 the depositions that have happened in the last six weeks, we  
15 have learned that one of the key scientists or experts that  
16 defendants have proffered, Dr. Abraham from St. Thomas, he  
17 is not able to disclose to us any of the underlying data for  
18 his report. It's apparently been destroyed, was not  
19 provided with his report, but he does say that some version  
20 of that report has been submitted to and accepted for  
21 publication some unknown place. And so -- and I have  
22 mentioned this to Your Honor because it's clear that this  
23 process has kind of just a self-fulfilling prophesy. I  
24 mean, plaintiffs are certainly going to want to know what  
25 exactly is this new version of Dr. Abraham's report, what

1 are the facts that are underlying that report, if they can  
2 be discovered or have those been destroyed as well. And  
3 that's certainly going to be relevant for, again, Daubert on  
4 general causation. I assume that Dr. Abraham will be  
5 disclosed on specific causation as well. And all this to be  
6 done in the next six months. So I think that it's really  
7 important that we just think about what the impact is on the  
8 scheduling order here.

9 A couple of comments with respect to comments that  
10 opposing counsel had about the data that's been provided by  
11 Ridgeview. Ridgeview has not provided the raw data. So  
12 there is no debunking that has happened by 3M at this point.  
13 This is just their speculation that it's flawed. And  
14 plaintiffs, as I said, have questions about this article as  
15 well. But to the extent that the court has been told that  
16 this is in fact the raw data that they have obtained from  
17 Ridgeview, that is not the case. The table that Mr. Gordon  
18 put up on the ELMO, that is not the raw data. Additionally,  
19 3M has had a draft --

20 THE COURT: So wait a minute. What is it?

21 MS. ZIMMERMAN: As I understand it, the table that  
22 he prepared or that he presented is their kind of conclusion  
23 about what the data shows. It's not the raw data that's  
24 come in from Ridgeview. That has not been produced pursuant  
25 to the subpoena. This is -- these are tables --

1 THE COURT: What did Ridgeview -- what did  
2 Ridgeview produce?

3 MS. ZIMMERMAN: So Ridgeview produced a number of  
4 different tables and other information, but not the full raw  
5 data of all the trials that were -- that were conducted by  
6 Augustine and by Ridgeview. So, I mean -- and that's my  
7 understanding. If the court is interested in additional  
8 information on specifically what Ridgeview has produced thus  
9 far, we are happy to provide that, but it is my  
10 understanding that they do not have the raw data at this  
11 point.

12 3M has had a draft of the paper at issue. Dr.  
13 Augustine's new paper has been in their possession for  
14 nearly two years. They did ask questions of Dr. McGovern at  
15 his two-day-long deposition in early January. Dr. McGovern  
16 absolutely stood by the published paper that we have cited  
17 to and that plaintiffs' experts have cited to in their  
18 prepared written expert reports. But Dr. Augustine --  
19 pardon me. Dr. McGovern had some questions posed to him  
20 about this potential draft paper, that Dr. Augustine wanted  
21 him to join him on as a coauthor and Dr. McGovern declined,  
22 but that doesn't -- that doesn't impact the viability or the  
23 reliability of the testimony that was provided by Dr.  
24 McGovern under oath about the results of his study.

25 Now, Dr. Samet did not agree to any of the

1 conclusions that Mr. Gordon has offered to the court today  
2 with respect to dependency on his -- or on this new  
3 Augustine article in offering his opinions. Plaintiffs'  
4 experts were all disclosed on March 31st, including Dr.  
5 Samet. None of them have provided supplemental reports.  
6 They all stand by the reports that they submitted. This  
7 publication was only --

8 THE COURT: Which does not include this  
9 publication because it didn't exist.

10 MS. ZIMMERMAN: Exactly. It couldn't have.

11 And, certainly, the plaintiffs' experts reviewed  
12 it in passing. I think that it had been available at the  
13 time of Dr. Samet's initial deposition for something like 12  
14 or 13 days. He was deposed I think on the 11th of July.  
15 But somewhere around there. So he read it in passing and he  
16 had some questions posed to him, but as the portion of  
17 the --

18 THE COURT: So when you get to trial, are you  
19 going to be offering this study?

20 MS. ZIMMERMAN: No, we won't. I would like to  
21 know some more about this study, but our experts have said  
22 they've read it, it's interesting to them, but they stand by  
23 the opinions that they offered in their report that they've  
24 been deposed about.

25 THE COURT: And will your experts have anything to

1 say about this in their testimony?

2 MS. ZIMMERMAN: At this point they -- no. I don't  
3 know enough about the study, but what I do know is that our  
4 experts offered their opinions in writing on the 31st of  
5 March. They stand by those opinions. They do not include  
6 this new Augustine study, and they -- they have remained  
7 unwavering in the opinions that they offered supportive of  
8 plaintiffs' claims.

9 THE COURT: Well, right, which, as I understand  
10 it, there's nothing inconsistent between this study and  
11 their opinions. So my question, though, is let's say for a  
12 moment that I deny the defendants' motion. Will they be  
13 sandbagged at trial when your expert gets up and says, oh,  
14 by the way, this other study that came out after my  
15 March 31st report --

16 MS. ZIMMERMAN: No.

17 THE COURT: -- supports what I said 100 percent,  
18 and now not only is it this McGovern study, but we have got  
19 Augustine, and the two together prove beyond all doubt that  
20 this is the case?

21 MS. ZIMMERMAN: Right.

22 THE COURT: Will that happen?

23 MS. ZIMMERMAN: No, it will not happen. As an  
24 officer of the court and as a member of the co-lead for the  
25 plaintiffs in this case, we are not going to be offering

1 this study, particularly given when it's been disclosed in  
2 this process.

3 Now, it's possible that there could be some new,  
4 you know, Center for Disease Control or if there was a  
5 recall or there's many things that could happen. And I  
6 think that Judge Schiltz in his Land O'Lakes' opinion  
7 recognized as much and said, look, this is kind of a moving  
8 target and science is something that is always developing.  
9 There may be things that come up along the way, but  
10 plaintiffs are certainly prepared to stipulate right now  
11 that we are not going to rely -- our experts have not relied  
12 on this study up to this point. We will not be offering  
13 testimony about Dr. Augustine's new publication that came  
14 out in June.

15 You know, the last few remarks that I would have,  
16 and then unless the court has additional questions, you  
17 know, I think that it's pretty rich to hear a ghost-writing  
18 allegation from 3M given the, I mean -- and Your Honor is  
19 aware that this is perhaps something that happens from time  
20 to time, but one of the big focuses of the depositions over  
21 the last six weeks has been, well, and really the  
22 depositions for the last two years, has been 3M's  
23 involvement with the Sessler/Olmsted study, because this is  
24 a study that 3M has pointed to for the past six years,  
25 walking around the country telling all the doctors this

1 device is super, super safe, everything is tested. And then  
2 you know how many of their 13 experts point to the  
3 Sessler/Olmsted study? One. Now, that's because 3M  
4 ghost-wrote it and it's because there is flaws in their  
5 study, and we will get to that I suspect at trial, but this  
6 is a thing that -- this process is going to be evolving.  
7 There are people that -- you know, industry gets interested  
8 in researching and supporting studies that look into the  
9 safety and efficacy of their devices. I assume that that's  
10 what Dr. Augustine is doing. Certainly, that's what 3M  
11 represents that they have done. But particularly given that  
12 Your Honor has said we don't get to talk about HotDog, we  
13 continue to have sideshows about this Augustine issue, you  
14 know, two years I think from the very first time I was in  
15 front of you on an Augustine deposition motion and we are  
16 still not done with it. And the plaintiffs would just like  
17 to get past this. We have good solid experts who have done  
18 particle testing, who have done computational fluid dynamics  
19 analysis, who are prepared to stand on the reports that they  
20 have offered, that they have been deposed on, and they are  
21 supportive of plaintiffs' claims in this case.

22 So we would respectfully submit that the  
23 defendants' motion be denied and that if it is granted that  
24 plaintiffs be granted equal time at any of the depositions  
25 that are scheduled by defense counsel such that we are not

1 prejudiced.

2 THE COURT: Let me just make sure I am  
3 understanding exactly what you are saying. So when Mr.  
4 Gordon tells me that the study has been injected into the  
5 evidence, you are saying it's only by reason of questions  
6 that he asked?

7 MS. ZIMMERMAN: That's correct.

8 THE COURT: Okay. Anything else?

9 MS. ZIMMERMAN: That's all, Your Honor.

10 THE COURT: Thank you.

11 Anything else, Mr. Gordon?

12 MR. GORDON: Yeah.

13 I am sorry to do this, Your Honor, but I must  
14 correct -- Ms. Zimmerman was not present at the Samet  
15 deposition. She may be unaware. It was not injected by  
16 questions that I asked. It was injected by the plaintiffs.  
17 The plaintiffs, according to Dr. Samet's testimony,  
18 plaintiffs' counsel provided Dr. Samet prior to the  
19 deposition with a copy of the publication. Dr. Samet  
20 brought it up first. Dr. Samet -- and I -- you know, the  
21 idea that plaintiffs aren't going to -- aren't going to go  
22 there, I think that we will not be offering testimony, how  
23 do you unring the bell? Unprompted, I was asking him about  
24 the McGovern paper and he says, "And then, of course, since  
25 the McGovern paper there has been a second report that

1 essentially corroborates the findings in other hospitals.  
2 With two papers that corroborate each other, I think the  
3 likelihood that both are false positives diminishes."

4 THE COURT: What about Ms. Zimmerman's offer to  
5 stipulate that they are not going to rely on this at trial?

6 MR. GORDON: Unless they are withdrawing Dr.  
7 Samet, Dr. Jarvis and Dr. Stonnington, all of whom brought  
8 it up --

9 THE COURT: Sua sponte all three of them?

10 MR. GORDON: Yes. Well, in Jarvis' case it was on  
11 his list of additional materials considered and we went  
12 through that. I don't know if that would swap it, but --  
13 and I wasn't at Stonnington's, so I shouldn't be making  
14 representations about how it first came up. My  
15 understanding is that he's the one who brought -- but I may  
16 be mistaken. But I was at Samet's and I know, because I was  
17 really, you are really going to go there, Dr. Samet. I  
18 mean, that was my reaction. You are kidding me.

19 This notion -- I think counsel said that these are  
20 not the raw data from Ridgeview or some such thing. That's  
21 a Ridgeview Bates number. RMC. RMC total joint infection  
22 rates. I don't know what -- why these aren't the raw data.  
23 These are the numbers. These are the exact numbers that Dr.  
24 Augustine used in his publication. By the way, Dr.  
25 Augustine has had this on his website for, you know, a year

1 or two, again, using the exact same numbers, although at  
2 least he was honest enough on the website to say that it was  
3 knee infection only. Those are the Ridgeview data. But  
4 that underscores my point. If they are going to get up and  
5 tell this court those aren't the data, we don't know what  
6 these are, we don't know where these are coming from, okay,  
7 that's why now it becomes critical we take a deposition of  
8 somebody, you know, a 30(b)(6) of Ridgeview, to find out  
9 what this document is, where, you know, where this came  
10 from, lay the foundation.

11 We are not asking for a delay. We don't believe  
12 there needs to be a delay in the Daubert hearing. If we  
13 can't get the discovery done in time to present it to the  
14 court for consideration in a timely manner, well, then we  
15 don't. Frankly, I think we have enough -- ample evidence to  
16 demonstrate the frailty of the plaintiffs' experts'  
17 opinions. But if we get past -- if Daubert is denied and we  
18 are going to trial, we need the evidence. We need to be  
19 able to -- and this isn't just some sort of peripheral, you  
20 know, non-party study that came out.

21 THE COURT: But I guess I'm not following why a  
22 stipulation or even an order of the court that this  
23 Augustine study is simply not in evidence, it's not a --  
24 it's not a thing, it's not admissible, it's not going to be  
25 relied upon, can't ask about it, it's not going to be an

1 issue at trial, why isn't that enough to give you whatever  
2 you need regarding the Augustine study?

3 MR. GORDON: There are two -- there are two  
4 aspects to that. One is the aspect of how do you unring the  
5 bell with Dr. Samet? He's already --

6 THE COURT: You are not unringing anything. The  
7 jury hasn't heard the testimony. And the order will  
8 presumably cover or the stipulation would cover that that  
9 part of Samet's testimony will not be presented to the jury.  
10 Period. End of sentence.

11 MR. GORDON: I understand -- well, I understand  
12 what you are saying, but what would be in effect asking Dr.  
13 Samet to ignore something that he has already read,  
14 considered and volunteered as being strong corroboration for  
15 the essence of his opinion, the essence of his opinion.  
16 And, frankly, the essence of this case is that the McGovern  
17 study shows, you know, an increased odds ratio of 3.8 when  
18 you switch from Bair Hugger to HotDog. That's the  
19 underpinning of this entire case. It's the underpinning of  
20 Dr. Samet's testimony. He's already read it. He's already  
21 said this strongly, you know, this provides strong  
22 corroboration. It's, you know, it makes -- one  
23 observational study. I mean, he concedes not very -- it's  
24 not very strong data. Two, now you got strong. So you are  
25 asking him to --

1           But the flip side of the coin is we need to use  
2           the Augustine study. Why? Because Dr. Augustine is the  
3           epicenter of this case. Dr. Augustine is the raison d'être  
4           of this case. Dr. Augustine is the one who went to  
5           plaintiffs' lawyers and said, hey, let's get going on a  
6           lawsuit, I will write it, I will ghost-write a guide for  
7           you, you can put your name on it. Dr. Augustine is the one  
8           who fomented these, all the studies upon which they rely.  
9           He has -- Mark Albrecht had his hand in them. Mark Albrecht  
10          wrote them. Mark Albrecht did the statistical analysis.  
11          And of critical importance, not only will we -- what these  
12          Ridgeview data show and what I suspect the other two  
13          hospitals will show is the extent to which Dr. Augustine and  
14          Mr. Albrecht will go to manipulate the data, to cherry-pick  
15          it, to manipulate -- to twist it and manipulate it to come  
16          up with a result that looks pretty compelling, and they did  
17          the same thing in McGovern.

18                 THE COURT: Let me ask this question. When was  
19                 the first time that you knew the identities of Centers 1, 2  
20                 and 3?

21                 MR. GORDON: Centers 1 and 2 would have been  
22                 relatively early on, because it was in a draft -- draft  
23                 paper that appeared to be by Dr. Gauthier. So we knew those  
24                 identities. In fact, that's why we began pursuing discovery  
25                 from Ridgeview, because that was specifically one of the

1 things -- one of the tasks that Mr. Albrecht agreed to  
2 perform after his -- after he left Augustine's employment,  
3 was completing the -- I think it was referred to as the  
4 Waconia study.

5 THE COURT: And so when you started seeking or  
6 pursuing discovery from Ridgeview, could you not have also  
7 sought it from the Nassau Hospital and whatever the third  
8 one was?

9 MR. GORDON: Knowing, yes. We didn't learn the  
10 identity of Nassau until -- well, that's a long story, if  
11 you are interested in it. The Nassau didn't become --  
12 didn't become -- first of all, that first draft, there were  
13 three -- three centers. It was Ridgeview, the St. Croix  
14 Valley and then Wansbeck General Hospital. Wansbeck General  
15 Hospital. Does that name ring a bell? That's actually Dr.  
16 McGovern's, the hospital there, but in the McGovern papers  
17 it's described as Northumbria Hospital Trust. The specific  
18 hospital within the trust was Wansbeck General. So what  
19 Augustine was doing was taking the data from McGovern and by  
20 changing the name of the center it makes it look like, wow,  
21 now there are three big, you know, big centers completely  
22 different than Northumbria that are coming with up these  
23 same numbers. But he dropped Wansbeck. And by the time he  
24 had ghost-written it for himself and Dr. McGovern, it was  
25 just unidentified Centers 1, 2 and 3. We already knew by

1 correlating the numbers what 1 and 2 were. We had no idea  
2 what 3 was until Augustine's deposition.

3 But the point of all this, Your Honor, this isn't  
4 stuff that's peripheral. This isn't, you know, this isn't a  
5 groundwater contamination case where, you know, a public  
6 entity, you know, periodically is doing additional  
7 groundwater testing and somebody wants to do more discovery  
8 about that. This is -- at the heart of this case is  
9 scientific fraud. At the heart of this case is scientific  
10 fraud done by Dr. Augustine and his minions. For -- for  
11 competitive purposes he weaponized litigation, he weaponized  
12 science, and it is central to this litigation.

13 THE COURT: All right. Well, let me -- whether it  
14 is or isn't, you have known that since before there was an  
15 MDL, because I had the issue as a miscellaneous case with  
16 Walton and Johnson. Before there was an MDL, you knew that  
17 it was Dr. Augustine at the epicenter of whatever it is that  
18 became the MDL. And that's why I asked about when you knew  
19 about these other centers. Why has that discovery not been  
20 pursued until now after discovery is closed?

21 MR. GORDON: Well, two simple reasons. First of  
22 all, I was very happy with the discovery we had going into  
23 the expert deposition, particularly, Dr. Samet's deposition.  
24 It was plaintiffs who injected that. I was, honestly, Your  
25 Honor, I was stunned.

1 THE COURT: Gobsmacked? Were you gobsmacked?

2 MR. GORDON: I was gobsmacked. Indeed I was, Your  
3 Honor.

4 I mean, seriously, we had had a discussion amongst  
5 ourselves about it. Do you think they are -- they are going  
6 to use Augustine. And I was wrong. My -- my view was no,  
7 there's no way. They know what a fraudulent study it is.  
8 There is no way they are going to show it to their experts.  
9 There is no way their experts are going to say one word  
10 about it. And when out of nowhere Dr. Samet starts talking  
11 about this new study, I was gobsmacked. And there's no --  
12 well, they are not -- they are the ones who gave it to him,  
13 and he's the one who said this. Now, you know --

14 THE COURT: Okay.

15 MR. GORDON: So it -- it really is a central  
16 issue. And, A, it can't be cured just by, you know, well,  
17 we won't talk about it. We need to talk about it, because  
18 it's part of -- it's the whole modus operandi of Dr.  
19 Augustine. And, two, I mean, how do, well --

20 THE COURT: Okay. I think I --

21 MR. GORDON: Thank you, Your Honor.

22 THE COURT: I think I got all the points.

23 MS. ZIMMERMAN: Your Honor, if I may, just one.

24 Mr. Gordon has now showed, again, this -- the idea  
25 that this document from Ridgeview -- it is certainly a

1 Ridgeview document, but raw data is like -- it is like an  
2 Excel spreadsheet, where there is entries for every single  
3 patient. So that's not what he is showing you. That's a  
4 summary of raw data, perhaps.

5 THE COURT: But prepared by Ridgeview, correct?

6 MS. ZIMMERMAN: Exactly.

7 THE COURT: Not by the lawyers?

8 MS. ZIMMERMAN: I think that that's right. And so  
9 I may have mispoken.

10 THE COURT: Okay.

11 MS. ZIMMERMAN: I apologize. But we do not have  
12 the raw data yet.

13 And, again, with respect to Dr. Samet, he said a  
14 strong corroboration, but it's for the opinion that he had  
15 already formed and provided in this case, so --

16 THE COURT: And do you have any information  
17 regarding who brought it up first? Whether Dr. Samet or Mr.  
18 Gordon?

19 MR. BENHAM: I don't. I don't, Your Honor. I was  
20 at a different deposition that day.

21 THE COURT: Okay. And the deposition transcript  
22 is or isn't something that's before me or in the record  
23 somewhere?

24 MS. ZIMMERMAN: I believe portions of it are  
25 attached to our response, and I think portions of it are

1 also attached to Mr. Gordon's response. I mean, I think the  
2 issue is that the plaintiffs' experts are kind of damned if  
3 they do and damned if they don't, if you will pardon my  
4 language. I mean, if we don't -- if we don't provide them,  
5 you know, these collective experts with the new study or  
6 whatever it is, then they will say that it's not a complete  
7 or, you know, they don't have a complete picture of what's  
8 out there; and if we do provide it, then they say, well, you  
9 relied on it and, you know, now the bell can't be unring.

10 THE COURT: Okay.

11 MS. ZIMMERMAN: So, you know, from the plaintiffs'  
12 perspective they put off this Augustine deposition till the  
13 very last day of discovery and this is a risk that they  
14 took, so --

15 THE COURT: Okay.

16 MS. ZIMMERMAN: Thank you.

17 THE COURT: Which reminds me. I'm sorry. One  
18 more question for you, Mr. Gordon. What's the story on  
19 these other four hours that haven't been taken yet? They  
20 are going to get taken?

21 MR. GORDON: Yes, Your Honor.

22 MS. ZIMMERMAN: Not scheduled.

23 MR. GORDON: Part of the reason they weren't taken  
24 immediately was we had 20 expert depositions to get done in  
25 a very short period of time. But, more importantly, once we

1 found out, once we saw that it was actually published, we  
2 saw what was going -- oh, and the third thing was we were  
3 trying to resolve the confidentiality designation of the  
4 Ridgeview issue. It was a motion before Your Honor. So  
5 we -- we delayed --

6 THE COURT: All right.

7 MR. GORDON: -- so we could have our ducks in a  
8 row before we did that.

9 To Your Honor's question about the -- about the  
10 Samet transcript, there's only a portion of it -- I believe  
11 it's Exhibit 2 to Ms. Davies' affidavit, but beginning on  
12 page 30 I asked him --

13 THE COURT: Okay. I just wanted to know if I had  
14 it and, if so, where. You just answered that.

15 MR. GORDON: Okay. I'm not sure it's the full  
16 context.

17 THE COURT: Okay.

18 MR. GORDON: So we would be happy to submit the  
19 full transcript.

20 THE COURT: All right. So let's talk for a moment  
21 about scheduling a hearing on the issue regarding contact  
22 with treating physicians. I have two dates that Theresa has  
23 given me. One is Monday, August 28th at 10:00 a.m. or  
24 Friday, September 1st at 10:30 a.m.

25 Do the parties have a preference?

1 MS. DAVIES: Either would work for defendants,  
2 Your Honor. We prefer the 28th, if that's possible.

3 MS. ZIMMERMAN: And I think that works for us as  
4 well, Your Honor.

5 THE COURT: The 28th?

6 MS. ZIMMERMAN: Yes.

7 THE COURT: Okay. The 28th it is at 10:00 a.m.

8 Now, what -- I don't know. What's today's date?  
9 Today is the 17th?

10 MS. ZIMMERMAN: Yes.

11 THE COURT: Does that give us enough time to  
12 actually let the rules play out, or do you need a scheduling  
13 -- a briefing schedule of some sort that's different than  
14 what the local rule provides?

15 MS. ZIMMERMAN: I think we need a departure  
16 because we have only got, what, 11 days.

17 THE COURT: Right. So that would be 14th, and  
18 today is already the 17th. Okay. So who is -- who wants to  
19 do what?

20 This is your motion to allow contact with treating  
21 physicians? Is that a correct statement?

22 MS. DAVIES: Yes, we are the parties that are  
23 seeking that relief.

24 THE COURT: Okay. And when can you get a memo  
25 done?

1 MS. DAVIES: By the end of next week or middle of  
2 next week?

3 THE COURT: Well, let's put it this way. There  
4 are 11 days now between today and the 28th. Correct? Have  
5 I counted that correctly? So if we cut that in half, you  
6 get five and a half.

7 MS. DAVIES: Okay.

8 MS. ZIMMERMAN: So if it was like noon on the  
9 23rd, maybe?

10 MS. DAVIES: We will get the memo in whenever Your  
11 Honor needs it.

12 THE COURT: Let's say you get your memo in by the  
13 22nd and the plaintiffs get theirs in by the 25th. Does  
14 that work?

15 MS. ZIMMERMAN: Yes, Your Honor.

16 THE COURT: Does that work for you, Ms. Davies?

17 MS. DAVIES: Yes. Thank you.

18 THE COURT: Okay. And that will mean Chad will be  
19 working on the weekend to be prepared to prepare me for a  
20 hearing on Monday the 28th at 10:00 a.m.

21 MS. ZIMMERMAN: Thank you, Your Honor.

22 THE COURT: Okay. Thank you.

23 MS. ZIMMERMAN: Sorry about that.

24 THE COURT: As to the current motion that's Docket  
25 Entry 623, I will take that under advisement. I will issue

1 an order shortly, hopefully very shortly.

2 And we are in recess.

3 MS. DAVIES: Thank you, Your Honor.

4 MR. GORDON: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (Court adjourned at 2:25 p.m., 08-17-2017.)

7 \* \* \*

8 I, Renee A. Rogge, certify that the foregoing is a  
9 correct transcript from the record of proceedings in the  
10 above-entitled matter.

11 Certified by: /s/Renee A. Rogge  
12 Renee A. Rogge, RMR-CRR

13

14

15

16

17

18

19

20

21

22

23

24

25