

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air)	File No. 15-MD-2666
Warming Devices Products)	(JNE/DTS)
Liability Litigation)	
)	August 20, 2018
)	Minneapolis, Minnesota
)	Courtroom 9E
)	3:00 p.m.
)	
)	

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

FOR THE PLAINTIFFS: MESHBESHER & SPENCE LTD.
Genevieve M. Zimmerman
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FOR THE PLAINTIFFS (appearing by telephone:)

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(Appearances continued next page:)

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FOR THE DEFENDANT: BLACKWELL BURKE P.A.
 Jerry Blackwell
 Corey Gordon
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COURT REPORTER: Maria V. Weinbeck, RMR, FCRR
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 Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

(3:01 p.m.)

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3 THE COURT: Good afternoon, everyone. Have a
4 seat, please.

5 The folks calling in from your side are on the
6 line so here they are. Good afternoon. Hello?

7 UNIDENTIFIED COUNSEL ON TELEPHONE: Good
8 afternoon, Your Honor.

9 UNIDENTIFIED COUNSEL ON TELEPHONE: Good
10 afternoon, Your Honor.

11 THE COURT: We're on the record in the Bair Hugger
12 MDL 15-2666. Starting with the plaintiffs' counsel who are
13 on the phone, would you note your appearances for the
14 record? And I'll tell you up front, it's sometimes hard to
15 make out what you're saying so speak slowly and distinctly
16 if you would.

17 MR. ASSAAD: Gabriel Assaad for the plaintiff.

18 MR. LANGDON: Robert Langdon for the plaintiff.

19 MS. CAMPBELL: Patricia Campbell for the
20 plaintiffs.

21 MR. EMISON: Brett Emison for the plaintiff.

22 MS. ZIMMERMAN: Good afternoon, Your Honor.
23 Genevieve Zimmerman also for the plaintiffs.

24 THE COURT: Good afternoon to all five of you.
25 For the defendants?

1 MR. GORDON: Good afternoon, Your Honor. Corey
2 Gordon for 3M.

3 THE COURT: Good afternoon.

4 MR. BLACKWELL: Good afternoon, Your Honor. Jerry
5 Blackwell speaking for 3M.

6 THE COURT: Good afternoon. All right. Here's
7 what we're going to do. I know the plaintiffs did not want
8 to have or were not requesting an in person conference at
9 least not yet on this matter, but having read the party's
10 letters, it was obvious to me that it would be beneficial to
11 everyone if we did have this proceeding as if it were a
12 formal motion.

13 I don't need additional briefing on it. And what
14 I would like to do is have each of you use about five
15 minutes and tell me anything else you think I should know
16 starting with Mr. Gordon and then whoever on the plaintiffs'
17 side wishes to speak. And then I'm going to tell you, at
18 least I think I'm going to tell you how we're going to
19 resolve this situation.

20 But, Mr. Gordon, if you want to go first or,
21 Mr. Blackwell, if you're arguing.

22 MR. GORDON: Thank you, Your Honor. Very briefly,
23 I think that there are basically two buckets that these
24 issues fall into it. There's the process bucket and then
25 there's the substantive bucket of Dr. Lombardy's deposition.

1 And the process one is the one that has the potential to
2 have a great deal of impact on the whole MDL going forward.
3 We've got a lot of depositions left to do, presumably. And
4 the process, the biggest process concerns the conduct of
5 counsel. In particular, essentially ruling on their own
6 objections or ruling on their own interpretations of the
7 Court Order.

8 What happened in Dr. Lombardy's deposition,
9 despite counsel's calculations of when they went on the
10 video record and when at the direction of plaintiffs'
11 counsel went off the video record. I have 57 minutes and
12 16 seconds of actual direct exam time, and I can give the
13 Court the time stamps on that, but just to briefly bring it
14 up to where we are. And what happened was I still had time
15 left, and I asked a question and plaintiffs' counsel
16 objected and then as part of the objection said, "It has
17 been one hour and counsel has allotted his entire time for
18 deposition of this witness. Let's go off the record."
19 Boom, the court reporter went off the record, and my
20 protestations of the fact that I still had time left were
21 not recorded. I decided not to make an issue of it with
22 Dr. Lombardi there. It wasn't his issue.

23 Then we went back on the record for plaintiffs'
24 exam. It was about 30, 35 minutes. And at the end of that,
25 plaintiff said, "I think I'm almost done. I'm going to take

1 a two-minute break to talk to my colleagues, and we'll go
2 back on the record." Whereupon, he took a break. They went
3 out in the hall. They came back in and said, "We're not
4 going on the record anymore. We're done."

5 So I did not have an opportunity to put anything
6 on the record. The court reporter, oddly in my experience,
7 refused to go on the record unless both parties agreed, and
8 so my protestations again we're not included on the record.

9 Substantively, there were a series of questions
10 that I had believed to be precluded by the understanding
11 that Dr. Lombardi would not be asked any expert causation
12 opinions. And where that plays out in terms of the Axline
13 case is we've now gotten the report, the expert report of
14 Dr. Jarvis, their only case specific report. And one of the
15 things that Dr. Jarvis says is in light of my review of the
16 deposition of Dr. Lombardi, I agree that there is no
17 evidence for PJI was caused by the trash bin in the
18 operating room, the Bovey machine, chairs in the operating
19 room or the cabinets in the operating room, and that's that
20 series of questions. The obvious, kind of the dog that
21 didn't bark, is there any evidence that the Bair Hugger
22 caused it, and it seems reasonably clear from his testimony
23 that he would have said no to that as well. They didn't ask
24 it, and I was precluded from asking it. And when I say I
25 was precluded, I mean it was a force I haven't had a lot of

1 experience with. It was a very small cramped conference
2 room and five lawyers standing kind of leaning over the
3 table and telling me how under the Court Order I was
4 absolutely precluded from asking any more questions. I
5 guess because they decided that my time was up. And it was
6 not a pleasant experience for me. And, substantively, I
7 think it was potentially harmful. But on a going-forward
8 basis, it really is I don't think the way we need to
9 proceed.

10 By the way, I have a highlighted copy of
11 Dr. Jarvis's report, if the Court is interested.

12 THE COURT: Sure, I'll take that.

13 MS. ZIMMERMAN: Do you have a copy for me as well?

14 MR. GORDON: Sure.

15 THE COURT: Anything further, Mr. Gordon? Are you
16 good?

17 MR. GORDON: I'm good. Thank you, Your Honor.

18 THE COURT: Okay. Thank you. Mr. Assaad or
19 Ms. Zimmerman or whomever?

20 MS. ZIMMERMAN: Your Honor, I'm going to do the
21 best I can hear. I know Mr. Assaad is calling in
22 internationally, and I'm afraid the connection may not be as
23 good as we might hope.

24 Your Honor asked if there was anything that we'd
25 like to do to supplement the record or the letters that we

1 have submitted thus far. I would start by saying that the
2 plaintiffs would request formal motion practice be brought
3 before the Court. We think respectfully that the approach
4 that the defendants took with this particular dispute was
5 inappropriate. There are no affidavits presented before
6 Your Honor. And we certainly would be prepared to gather
7 and submit those both by the lawyers that were present
8 during the course of this deposition and also from the court
9 reporters.

10 What Mr. Gordon has not reported to Your Honor is
11 that during the pendency or during the conclusion as the
12 counsel were packing up, Mr. Gordon shouted at the court
13 reporter that she should in fact remember who was paying her
14 and asked her to get back on the record. The videographer
15 reminded the court reporter that in fact that it is against
16 policy. There was a videographer that said this, that it
17 was against the policy for anyone to go back on the record
18 without both parties consent.

19 Now what we reminded Mr. Gordon of is that there
20 is actually in fact a Court Order, Pretrial Order number 25
21 directly on point. And at the bottom of page 1, moving on
22 to the top of page 2, Judge Ericksen has confirmed that for
23 treater depositions, and that's what Dr. Lombardi was, each
24 side may use half of the total time set aside for
25 questioning and neither party may use the other's unused

1 time.

2 So as Mr. Assaad proceeded through the examination
3 that he prepared for Dr. Lombardi, he did, in fact, rely
4 upon what Mr. Gordon has done with respect to his questions.
5 And I'd be happy to provide Your Honor a copy of the
6 deposition of Dr. Narcelles, who is another treater.

7 Mr. Provencher, who is another attorney for
8 defense counsel, he did what we would normally expect in
9 this kind of a case. At the very end of his initial direct
10 examination, he says, "Dr. Narcelles, I appreciate your
11 time. I'm going to pass the witness and reserve the
12 remainder of my time." And then there's a conversation
13 about the total time. The videographer confirms it's one
14 hour and 22 minutes, and Mr. Provencher confirms in fact
15 there are eight minutes remaining.

16 Now, I appreciate that Your Honor is jumping into
17 this case a couple of years in, but the issue with respect
18 to time on depositions has been a hotly -- it's been an
19 issue throughout the course of this litigation in terms of
20 folks watching the clock closely and making sure to ask
21 questions. And an appropriate and experienced attorney such
22 as Mr. Gordon certainly could reserve time at the beginning.

23 At the beginning of the transcript that Your Honor
24 has been provided, the parties indeed confirmed that Dr.
25 Lombardy's counsel had reserved only two hours for a

1 deposition, and so that was to be split evenly, and
2 Mr. Gordon confirmed that that was his understanding as
3 well. That's at the top of page 9. And so the time was
4 equally split.

5 These are court reporters and videographers
6 arranged for by defense counsel. And if Mr. Gordon or any
7 counsel for defendant had some sort of issue or thought
8 there was an error with respect to the time keeping,
9 certainly they had the opportunity to make the record
10 despite counsel's representations to Your Honor that that
11 was not afforded to them.

12 And this is one of the dangers candidly, Judge,
13 with respect to treating an informal letter such as the
14 informal letter submitted to Your Honor as a motion because
15 we don't have affidavits from the other lawyers that were
16 here or from the court reporter and the videographer that
17 were there or information from the attorney that was
18 representing Dr. Lombardi. And certainly those would be
19 important additional facts to have particularly given the
20 kind of relief that defense counsel asks for in this letter,
21 which is to somehow preclude plaintiffs from bringing more
22 than one lawyer or more than two lawyers to a deposition.
23 Your Honor certainly could look at the transcript. No
24 plaintiffs' lawyers spoke out of turn. There was only one
25 lawyer that appeared and asked questions during the course

1 of Dr. Lombardi's questions. The questions were properly
2 limited to form objections. And other than that, the
3 deposition really went forward quite smoothly.

4 Mr. Assaad concluded his deposition and his
5 questions based on the questions that Mr. Gordon had asked
6 of this witness. And it's certainly true that the issue
7 about whether or not any kind of surgical instruments were
8 contaminated, whether the implant itself was known to be
9 contaminated or carrying bacteria, these are all issues that
10 came up in the last case that we tried. And so these are
11 the kinds of issues that we asked of this particular
12 treater, who is a fact witness with expertise, so that we
13 can try to narrow those issues so that when the jury is
14 ultimately considering this question, those outstanding
15 items of dispute where we don't really know was it the
16 sponge bucket? Was it something on the wall? Was it the
17 chair? Was it a contaminated surgical tool? Well, we've
18 eliminated those based on the testimony from Dr. Lombardi
19 and that was certainly appropriate and proper.

20 Mr. Gordon asked questions with respect to
21 causation as well, and Your Honor can look at the beginning
22 of the deposition where Dr. Lombardi's counsel declined to
23 limit her client's testimony with respect to causation. She
24 said that, you know, hey, he's a doctor. He's inclined to
25 offer expert opinions on certain things and that happens.

1 And I know we all run into this issue where there are fact
2 issues with expertise. I think Dr. Lombardi fits in that
3 situation, but we've got a lot of kind of issues in front of
4 Your Honor based on what the plaintiffs respectively believe
5 is an improper letter brief. And I trust that if one of my
6 colleagues on the phone has something critical to offer or
7 if Your Honor has questions, I'd be happy to answer them.

8 THE COURT: Why don't you stay there for a second.
9 In case there is anyone on the phone who has something that
10 they are dying to add to Ms. Zimmerman's presentation, speak
11 now.

12 MR. ASSAAD: Your Honor, this is Gabriel Assaad.

13 THE COURT: Okay, Mr. Assaad, go ahead.

14 MR. ASSAAD: I just want to add one other fact
15 that I disagree with defense counsel's position is that he
16 had more than 57 minutes. According to the time transcript,
17 it was an hour and two minutes. And even though there might
18 have been a minute or two of introductions, that would still
19 go -- it would split evenly between both the plaintiff and
20 the defendant. He still used over the allotted time, which
21 is 50 percent of the deposition, so I disagree with his 57
22 minutes. I don't know how he came to that number. But
23 either way you look at it, you gave him more time than he
24 was allotted with respect to, well, according to the Court
25 Order in the case.

1 MS. ZIMMERMAN: The last thing I would add is we
2 also in a break offered to call the Court and that wasn't
3 done.

4 THE COURT: I can tell you that the Court to the
5 extent that you were going to call me, the Court would just
6 as soon not hear from folks during the course of the
7 deposition, though obviously that can happen.

8 Ms. Zimmerman, I want to address one thing that I
9 think is -- well, you've raised the issue of whether or not
10 we need formal motion practice and briefing and affidavits,
11 and here's the way I'm approaching it.

12 Number one, I do have letters from counsel for
13 both sides. All of you are officers of the Court. I don't
14 imagine that anybody is representing anything that they know
15 to be untrue. And so affidavits from the various lawyers,
16 even if they conflict, in my view, won't add anything to
17 what is before me. I suspect that I would get an affidavit
18 from Mr. Gordon that would say essentially what Mr. Gordon
19 has said. I would get an affidavit from you or Mr. Assaad
20 or whomever else that would say essentially what your side
21 has said and that would not advance the ball. Whether or
22 not either of you would convince Ms. Sellers, the lawyer for
23 Dr. Lombardi, or Dr. Lombardi himself or the court reporter
24 or videographer to submit a declaration or an affidavit, I'm
25 frankly a little bit skeptical, but I don't think it would

1 or parties feels aggrieved by this can go visit Judge
2 Ericksen, and she may well feel that I have not given one
3 side or the other their full and fair opportunity, though I
4 dare say that I wouldn't predict that, to be honest with
5 you.

6 So, number one, on the issue of limiting the
7 number of lawyers that either side can have at a deposition,
8 I'm not going to do that. I don't think I can do that.
9 However, I can limit the number of lawyers who have a
10 speaking part and lest it's been unclear, on the plaintiffs'
11 side of the V, I expect there to be only one lawyer making
12 objections and questioning witnesses.

13 Same on the defendant's side of the V, one lawyer
14 making objections and asking questions. That will both
15 facilitate the timing and the process of the deposition and,
16 hopefully, it will at least keep some of the disruptive
17 behaviors to a minimum.

18 Number 2, on the issue of Mr. Gordon's time, I'm
19 going to order that Mr. Gordon be given an additional five
20 minutes, and here is my rationale for that. First of all, I
21 start with Judge Ericksen's order, which does indeed say
22 that for treater depositions, each side may use half of the
23 total time set aside for a deposition and neither party may
24 use the other's unused time.

25 That order is a practical order, and Judge

1 Ericksen can't possibly be expected to shall we say order in
2 advance all of the circumstances that may affect that
3 timing. The only way to understand that order is that if a
4 deposition is going to go two hours, that there's two hours
5 of testimonial time and each side gets an hour of that time.
6 That's the only sensible way of interpreting that.

7 Now, if it takes a little bit longer, two hours
8 and ten minutes, I have no doubt that the treating doctor
9 and his or her lawyer will in fact accommodate counsel on
10 the expert 10 minutes. Certainly in my experience and
11 practice, that is in fact how it worked.

12 So if we assume that each side has an hour of
13 testimonial time, and this is another reason why I do not
14 need affidavits. We start with the deposition transcript,
15 and I would say, first of all, I would remind the parties
16 that I ordered the defense to supply the transcript. The
17 plaintiffs supplied it, and I appreciate that but given the
18 issues in this case, I'm a little mystified, frankly, that
19 the plaintiff did not file a time stamped deposition
20 transcript. The questioning begins at 17:05:45, and it
21 continues to 18:04:45. That's 59 minutes of testimonial
22 running time.

23 If you then take out the 36 seconds of time that
24 was expended by a colloquy that appeared at the instigation
25 of Mr. Assaad at page 35 and 36 of the transcript, we're now

1 at 58 minutes and 24 seconds. And then if you count up the
2 number of objections that Mr. Assaad lodged, and I'm not
3 saying for any reason they were improper, they were totally
4 proper, but if we're going to hold each other strictly
5 accountable for the amount of testimonial time each side
6 has, then we take out the time of the objections, and my
7 count there were 48 objections.

8 So if we take out on average a second and a half
9 per objection, that gets us real close to 57 minutes and
10 13 seconds.

11 I say all this not because that's what I'm
12 suggesting people need to do in the future. I'm doing this
13 to illustrate what I would say is the silliness of this
14 endeavor. Mr. Gordon had some time left. In light of the
15 questioning that went on, it was appropriate that he be
16 given the opportunity to ask one or two followup questions.
17 If this were in fact at trial, and those questions were
18 asked by Mr. Assaad even in a time limited trial, I suspect
19 that he would be allowed to ask that one question, which
20 was, "is there any evidence that the Bair Hugger caused that
21 infection?"

22 Now, further on that topic, I am very skeptical
23 that Judge Ericksen will allow the questions that were asked
24 by Mr. Assaad as to whether there was any evidence that the
25 chair caused the infection, et cetera, that that line of

1 questioning will in fact be allowed in at the trial of this
2 matter, but I don't know, I'm not Judge Ericksen, and she
3 hasn't had the opportunity to fully consider the issue.

4 So in light of the fact that I am confident the
5 plaintiffs won't withdraw that line of questioning, I think
6 it is appropriate that Mr. Gordon be given an opportunity to
7 follow up on that line of questioning, and that line of
8 questioning only. I have every confidence that can be done
9 within five minutes, and I would suggest that the parties
10 work to find a way that it be done whether it's by video
11 conference or however you choose to do it.

12 MS. ZIMMERMAN: Your Honor, if I may I have two
13 quick --

14 THE COURT: In a minute. You will note, this is
15 all part of my order. I want you to have a full record so
16 that if either side chooses to go to Judge Ericksen on it,
17 she has a transparent record of what I've ordered and why.

18 You will note that I've given Mr. Gordon a little
19 bit more than the time a strict accounting would say he had
20 left to question. And I do that, I give him a little extra
21 time as a sanction to the plaintiffs or against the
22 plaintiffs for the following reasons:

23 As I understand the practice from my days, if,
24 well, you do not go off the record unless all parties agree
25 to go off the record. And I don't think it was appropriate

1 for the plaintiffs to not allow a record to be made in these
2 circumstances. Therefore, as a sanction for that, I'm
3 giving Mr. Gordon the extra 2 minutes and 45 seconds to
4 finish his questioning. That gets me to the third thing in
5 my order.

6 Number three, henceforth, if the parties have a
7 dispute, number one, they will not go off the record unless
8 all parties agree to go off the record.

9 And number two, this is more a general comment
10 then anything else. I wasn't there. Both sides have
11 alleged that the other side behaved badly. I believe the
12 lawyers can, you know, defend themselves and can take care
13 of themselves. But, honestly, the court reporter and the
14 videographer and for that matter Dr. Lombardi did not sign
15 on for this. And whether it's Mr. Gordon or Mr. Assaad or
16 all of them, all of the lawyers who are behaving in an
17 aggressive manner, while I understand that and we've all
18 done it, it is not -- it's just so unfair and unseemly to do
19 that to a court reporter, even the most seasoned one doesn't
20 really like to be stood over as lawyers argue over them. So
21 let that portion of my order be a warning to everybody. I
22 understand tempers get high. I understand there's a lot at
23 stake. I understand you've been at this for a long time,
24 but don't do that to the court reporter.

25 I believe that's all the issues that were in front

1 of me. And I know, Ms. Zimmerman, you have something you
2 wish to either clarify or bring to my attention so let me
3 start with you.

4 MS. ZIMMERMAN: Thank you, Your Honor. I think
5 just to clarify for the Court's information. We had never
6 been provided a time stamped transcript and that's the
7 reason we didn't provide that to Your Honor. We certainly
8 would have. The first time we saw it is is when Your Honor
9 got it as well.

10 THE COURT: Duly noted, and so I retract my remark
11 directed at you, Ms. Zimmerman.

12 MS. ZIMMERMAN: Thank you. So just to clarify,
13 the plaintiffs also have 25 minutes or so left of our hour,
14 and depending on the nature of Mr. Gordon's questions, we
15 may well need to exercise the remainder of that time as
16 well. And I respectfully submit that this is there's a lot
17 of other things I think that went on, but I appreciate what
18 the Court's comments have been. I think that this is the
19 reason that this kind of thing shouldn't be dealt with in an
20 informal letter and that we should have the opportunity for
21 briefing. I appreciate the Court's indulgence.

22 THE COURT: Understood. Here's my suggestion on
23 the issue you've just raised. I think a lot of this is
24 going to depend on what Dr. Lombardi chooses to do and what
25 his lawyer is willing to allow to be done.

1 So the first thing to be done is whoever is going
2 to communicate with attorney Sellers, communicate clearly
3 that I have allowed by order Mr. Gordon to have additional
4 time to finish that line of questioning. I do not have the
5 ability to order Dr. Lombardi, certainly not on the current
6 record, to sit for any continuation. So that's a matter of
7 voluntary agreement. And if Dr. Lombardi is willing to sit
8 not only for Mr. Gordon's questions but also any unused time
9 of the plaintiffs, then I would say either the parties can
10 agree or we can come back before the deposition and resolve
11 that issue as well. Okay?

12 MS. ZIMMERMAN: Yes, Your Honor.

13 THE COURT: Okay. Mr. Gordon, Mr. Blackwell,
14 anything further from your side?

15 MR. GORDON: I don't think so, Your Honor. Just
16 as an aside, I think there may be a little bit of a time lag
17 because Ms. Sellers gave birth last week.

18 THE COURT: All right. You understand what my
19 position is with respect to you having additional time to
20 complete those questions, Mr. Gordon. If you run into snags
21 of a process nature in getting this accomplished or you need
22 further guidance from the Court, by all means I expect you
23 to come back. I try to do whether it's formal or informal,
24 I try to do it as expeditiously as possible and that may or
25 may not seem fair to the plaintiffs in this particular

1 instance, but I think it's important to get the parties'
2 guidance and get them guidance quickly. So okay?

3 MR. BLACKWELL: Thank you, Your Honor.

4 MR. GORDON: Thank you, Your Honor.

5 THE COURT: All right. Court is in recess.

6 Thank you.

7 (Court adjourned at 3:38 p.m.)

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9 * * *

10 REPORTER'S CERTIFICATE

11
12 I, Maria V. Weinbeck, certify that the foregoing is
13 a correct transcript from the record of proceedings in the
14 above-entitled matter.

15
16 Certified by: s/ Maria V. Weinbeck

17 Maria V. Weinbeck, RMR-FCRR
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