

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air)	File No. 15-MD-2666
Warming Devices Products)	(JNE/DTS)
Liability Litigation)	
)	
)	Minneapolis, Minnesota
)	March 8, 2019
)	Courtroom 9E
)	11:09 a.m.
)	
)	

**BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)**

APPEARANCES

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 MS. HARRIS: Good morning.

2 THE COURT: Well, I have read everything that was
3 submitted, and I'm happy to hear whatever arguments we have,
4 okay?

5 MS. ZIMMERMAN: Thank you, Your Honor. And may it
6 please the Court, Genevieve Zimmerman here on behalf of the
7 MDL Plaintiffs. We have had the opportunity to be in front
8 of Your Honor and this court on a number of issues of late,
9 but also with respect to motions to strike expert reports
10 and expert testimony obviously in the past six months or so.
11 Your Honor is aware the Defendants brought a motion to
12 strike expert reports the Plaintiffs had disclosed in the
13 Axline matter, though their motion to strike was also
14 captioned in the general MDL, and that's principally why we
15 followed suit here in this instance.

16 That motion practice was, I believe, September,
17 and we had an order from Judge Ericksen then affirming
18 Your Honor's decision to strike our expert reports, and that
19 was Document 1580, which was filed on November 6th of 2018.

20 Fast forward now, we have the Trombley matter.
21 Plaintiffs have disclosed two case-specific experts; one
22 from Dr. William Jarvis who is an infectious disease doctor,
23 and then, two, from Dr. Brown who is a nephrologist, and he
24 is really not speaking in any way to the Bair Hugger
25 specifically, but really to the kind of kidney damage and

1 issues that he believes Ms. Trombley has suffered as a
2 result of the infections that she had.

3 Shortly after disclosing those reports -- and
4 actually I'm thinking about timing, I know both of those
5 doctors have been deposed already -- Defendants then
6 disclosed six different case-specific expert reports in the
7 Trombley matter. Most of those experts are experts that we
8 have dealt with throughout the course of this case in terms
9 of general causation and case-specific. Many of them have
10 been here or upstairs, I guess, when we tried the Gareis
11 case. So some of their -- their generalized opinions are
12 certainly something that we're well aware of. The reason
13 for the motion to strike is that they have significantly
14 supplemented their opinions with respect to general
15 causation issues in our estimation, including what we would
16 call backfilling with citations and things like that that
17 were available at the time of their original report.

18 Additionally, as we detail in our motion papers, a
19 number of these expert reports we really don't believe are
20 truly rebuttal reports. You know, by way of example, I
21 would turn the Court to, you know, Exhibit 1 in our
22 response, which is the report of Dr. Abraham, and he says
23 right, you know, in the first paragraph of his report, In
24 this report, I expand on the opinions I expressed in my
25 earlier reports. There was no CFD engineer disclosed in

1 Trombley, so anything that he's doing here is -- is not
2 truly rebutting anything that was provided in Trombley;
3 rather, it is supplementing with additional citations, many
4 of which were available beforehand, and we think that that's
5 improper rebuttal.

6 THE COURT: Is -- Let me stop you there for a
7 second. So obviously I haven't read the Gareis trial
8 transcript, but your CFD expert, Elghobashi?

9 MS. ZIMMERMAN: Excellent. Yes, Your Honor.

10 THE COURT: Okay. He testified in Gareis; right?

11 MS. ZIMMERMAN: Absolutely, Your Honor.

12 THE COURT: So -- And did he testify to both the
13 general -- his general causation opinions and then specific
14 to Gareis?

15 MS. ZIMMERMAN: Yes, yes, Your Honor, he did.

16 THE COURT: So here's my -- here's my concern.
17 I'll be upfront with you about Abraham. I think it's the
18 report about which I have the greatest concern to be honest
19 with you. It seems like there's a whole bunch of -- it may
20 not be CFD, but airflow general causation-type background
21 that seems new to me.

22 MS. ZIMMERMAN: We agree, Your Honor.

23 THE COURT: I thought you might.

24 MS. ZIMMERMAN: Well, and, you know, I think that
25 at the end of the day, the -- the timeline of the expert

1 reports here is kind of actually interesting. So
2 Dr. Abraham, in his various depositions, has testified that
3 the CFD that he did, he completed in 2015. It was before
4 Science Day in this case. It was before he ever knew about
5 who Dr. Elghobashi was, so the work that he did was really
6 truly not rebuttal ever. It was his own study. And we can
7 take issue with that; but, you know, one of the issues that
8 has percolated up through these briefs is, you know, what's
9 rebuttal, what's sur-rebuttal, what's permissible, you know,
10 and I understand that all of that is important. But in
11 terms of who had what documents and who was really
12 responding, I guess, to different kind of experts, it's
13 actually true that what Abraham did was not actually a
14 response to Elghobashi, because that wasn't produced until
15 the end of March of '17. Now they are both doing kind of
16 their own studies, I guess, and really that's what the fact
17 finder is for, to figure out, you know, which -- which
18 version holds water.

19 But in terms of whether or not Abraham was really
20 a rebuttal -- I mean, and I know that some of the briefing
21 presented to this Court has said, look, Plaintiffs have had
22 his CFD forever because there happened to be some YouTube
23 videos. It's true that there are some YouTube videos of
24 what Abraham claims he did. We did not, however, have a
25 copy of his report or any of his CFD until the time that

1 expert reports were made, which, from Defendant's
2 perspective, I believe was June of 2017; so while Elghobashi
3 did his study and he did use many of the same inputs that
4 Abraham did based on information available on this YouTube
5 video, it's not as if we had his written report beforehand.
6 And that's kind of getting into the weeds, I guess, on
7 issues that have been before the Court about rebuttal or
8 sur-rebuttal and whether or not Dr. Nathan Bushnell was
9 properly disclosed and that sort of thing.

10 But really focussing on what Abraham has disclosed
11 with respect to Trombley, this isn't -- I mean, there was no
12 CFD that was done in the Trombley OR by Dr. Elghobashi.
13 He's done two; one on the Model 750, and then he did another
14 CFD on the Model 505. And really the principal difference
15 is that while both of them show a statistically significant
16 number of squames reaching the sterile field in less than a
17 minute, they are slightly different because the airflow
18 essentially is stronger in one model than the other, which
19 is what he had opined on when he did his first CFD.

20 But then in an abundance of caution, and
21 particularly knowing that the Gareis Bair Hugger model was a
22 505, Dr. Elghobashi went back and actually did do the
23 computational fluid dynamics on the 505 to say, yes, while I
24 said I thought it would -- the same thing would happen, now
25 I have done the study and I can show you exactly what does

1 happen with the 505. But he has not done anything for
2 Trombley, and much like 3M has not done, you know,
3 individual OR simulations for HCMC or, you know, Fairview
4 Ridges or United Hospital across -- you know, across the
5 river close to my house. They did do some CFD in the past,
6 but they did one; and based on a model, then they go out and
7 they market it as safe for use for everybody.

8 That's kind of frankly what's happened with
9 Elghobashi. He's done CFDs on a model OR, and the only
10 thing that's different in each one are the models of the
11 Bair Hugger. There's a 750 and there's a 505. And
12 Defendants did have the opportunity at trial in Gareis to
13 cross-examine him and say, Well, isn't it true that the
14 actual OR dimensions in the Gareis case were a little
15 different than the ones that you modeled in your CFD? And
16 he acknowledged, yeah, they are a little different. And his
17 testimony at trial was, in my expert opinion, if -- you
18 know, that he modeled a best case scenario OR, an OR that
19 was, you know, technically very modern; and that if the Bair
20 Hugger is impacting airflow in that modern OR, it's only
21 going to be -- the effect of the Bair Hugger will only be
22 worse in substandard operating rooms, and that's essentially
23 what came out in Gareis.

24 So with respect to Dr. Abraham's report in
25 Trombley, we just think that it is -- it's completely

1 improper and not rebuttal, and we think that it ought to be
2 stricken.

3 THE COURT: Here's -- Let me ask you this, so
4 here's -- and maybe we do need to get further into the
5 weeds, but here's -- here's what is troubling, I guess,
6 about Abraham. A lot of his report -- Let me back up. I
7 generally understand the notion that if you are going to
8 opine on, you know, a specific plaintiff's case, you -- you
9 obviously can't just do it in a vacuum. You have to say,
10 Hey, here's why this thing is important, and I get that.
11 And I understand, and that's -- and that's going to
12 necessarily sweep in what you could call general causation,
13 because you have to have context for this. What's a little
14 bit troubling, and I'm sure Mr. Goss or Ms. Harris are
15 champing at the bit to get up and talk about this, but if
16 you look at Abraham's opinion, I don't know, the first
17 whatever many pages are about airflow, if you will, fluid
18 dynamics, generally. There are photos of what happens when
19 somebody walks. There are photos, you know, around a
20 doorway. There are all sorts of sort of general causation
21 things that say, you know, this is what happens in an
22 operating room. And I understand -- I'm sorry. I know this
23 is a long-winded question. I understand that they can say
24 and all these things were present or not present, as the
25 case may be, in Ms. Trombley's operating theater, but it's

1 kind of like a lot of these things are present in every
2 operating room. And so that's where I'm struggling, because
3 if Dr. Abraham didn't disclose these before or there's not
4 an expert who didn't disclose these things before, why isn't
5 that new and general causation?

6 MS. ZIMMERMAN: Exactly, Your Honor. I mean --
7 And I think part of it is that, you know, I assume everybody
8 has talked to various members of the jury in Gareis, and
9 they -- we both, I think, understand the import of various
10 pieces of testimony, particularly doors opening, which was
11 not in Dr. Abraham's first report, but was absolutely
12 something the jurors latched onto. And so from our
13 perspective, it was known and knowable. It goes to general
14 causation. It wasn't in his first report, and he shouldn't
15 be able to put it in here now and say, Oh, this is all
16 Trombley specific. Because as Your Honor notes, a great
17 deal of the report that's disclosed in Trombley really is
18 very general. Certainly I understand that there needs to be
19 some context provided, but -- but this is more than just
20 context.

21 You know, additionally, while he has some -- you
22 know, he has a number of pictures of -- you know, towards
23 the back of the report of the operating room as it exists
24 now, the operating room that Trombley was in, everybody
25 knows that it's not -- there's no kind of foundation that

1 that's what the operating room looked like on the day of the
2 Trombley surgery in 2015, I think it was. So, you know, and
3 maybe that's -- you know, maybe that's going to be part of a
4 motion in limine or some other, you know, kind of motion
5 down the road if Dr. Abraham is permitted to go forward, or
6 maybe there's an objection on just foundation because
7 there's no foundation to say that this is actually, you
8 know, a correct and true depiction of the operating room as
9 it existed at the time of the surgery. But I guess that is
10 kind of a small piece of the broader issue that we have.
11 And he's disclosed a 36-page report when there was no CFD
12 expert provided in the Trombley matter.

13 And so we really think that, you know,
14 particularly with respect to Dr. Abraham, and you can see
15 from the citations in terms of, you know, the years for the
16 various reports, a great number of these citations were
17 available certainly well before his general causation report
18 was due. I mean the very first one he cites to, Whyte, is
19 from 1974, '76.

20 THE COURT: Hang on, Ms. Zimmerman. I think you
21 might be going a little fast.

22 MS. ZIMMERMAN: I'm sorry. I apologize. I have a
23 habit of doing that.

24 So, yes, so we think that that -- that Abraham's
25 report, just in its entirety, is not appropriate rebuttal,

1 and it's an attempt to backfill his general causation
2 opinion.

3 And before I turn, I guess, to the other reports
4 in this, I would point the Court back to kind of the way --
5 I mean, I know that this is -- we have an MDL, so there's
6 5,000-some cases as the Court certainly is aware, and then
7 we have the Trombley case that's getting ready to be tried.
8 And I think that in various different motions that have been
9 brought, that the Defendants have attempted to kind of
10 recast the idea or the general understanding in courts
11 across the country about what is general causation and what
12 is specific causation, and how does bifurcating discovery in
13 an MDL impact expert reports down the road in cases that
14 actually go to trial.

15 So we -- we provided some citations to the
16 Reference Manual on Scientific Evidence and the Manual for
17 Complex Litigation. General causation is typically
18 understood to be essentially do the Plaintiffs have some
19 admissible evidence to support the claims that they are
20 making. And it's not generally understood to be this is the
21 universe of all evidence that the Plaintiffs have, but just
22 if Plaintiffs can't even get past this hurdle, we ought to
23 stop this MDL right now. Stop the bleeding. If they want
24 to go on appeal, they can do it, but let's not bother Judge
25 Schultz and Judge Ericksen once a month and have everybody

1 bring in all these motions for years and years if the
2 Plaintiffs can't even clear that basic hurdle. And we got
3 past that. We certainly -- I mean, the Court made the
4 appropriate decision and said, there is sufficient evidence
5 here. And that's not the full universe of evidence that we
6 know. You know, if and when we have the ability to bring
7 folks, particularly corporate folks from 3M to the witness
8 stand and ask them about some additional documents, I'm
9 confident there's going to be more evidence that makes it
10 much stronger, the Plaintiffs' claims, and the expert
11 opinions that we've disclosed go to that as well.

12 But what Defendants have really attempted to do in
13 their Motion to Strike in August or September, when we were
14 here on the Plaintiffs' experts, is to say, Look, you --
15 that's all the more you got. You're stuck with the expert
16 reports that you disclosed on March 31st of 2017, and,
17 essentially, this MDL is frozen in time at that point. And
18 that's not what the Reference Manual on Scientific Evidence
19 or the Manual for Complex Litigation contemplates. That's
20 not typically the way an MDL is done.

21 So one thing, I think the Court has evidence and
22 interest in being practically minded, I think it may be
23 helpful to kind of sit down and talk about how are we going
24 to, from an administrative standpoint, look at each of the
25 obligations that are going to be made on these 5,000 cases

1 if we're going to trial on each one. If someone files a
2 case tomorrow, are they limited to what was known or
3 knowable on March 31st of 2017? I don't think that that's
4 typically what the rules contemplate, and so I think that
5 there may -- there may be an opportunity here for the
6 parties and the Court to work together in a collaborative
7 way so that we don't have this ongoing motion practice
8 about, well, they're out, but then you should be out, and
9 that sort of thing.

10 THE COURT: That -- that point is well taken. Is
11 your view -- It seems to me there are three things that are
12 going on here. No. 1 -- well, the easy one, in my view, is
13 research, peer-reviewed articles, things that -- that are
14 published after an expert issues their report. That seems
15 like proper supplementation to me.

16 MS. ZIMMERMAN: We agree, Your Honor.

17 THE COURT: The second thing is what about those
18 pieces of literature that support a previously issued
19 opinion that were available at the time but nobody's
20 perfect, you find them after the fact?

21 MS. ZIMMERMAN: Right.

22 THE COURT: What's your view of that? Is that
23 out?

24 MS. ZIMMERMAN: I think it's difficult,
25 Your Honor, because while on the one hand, you know, you are

1 right, no one is perfect, but we are afforded the
2 opportunity to explore -- both sides are afforded the
3 opportunity to explore the basis for an expert's opinions.

4 THE COURT: Right.

5 MS. ZIMMERMAN: And if experts are permitted to --
6 I mean, we can turn to Dr. Mont's report. It is a monster,
7 and it is full of new citations, the vast majority of which
8 were certainly known or knowable. I don't think -- You
9 know, even having deposed this guy a couple of times, I
10 don't think I could do it in seven hours; but I do need to
11 have that opportunity. And that's what the rules afford to
12 the Plaintiffs here is to really understand what the basis
13 are of the opinions so that we can -- we can know that and
14 we can use it to potentially cross-examine and impeach him
15 at the time of trial, and also just to make sure that he's
16 qualified to be offering the opinions that he's offering,
17 because as we note in our -- in our report -- or in our
18 motion to the Court, again, we disclose two experts, an
19 infectious disease doctor and a nephrologist. They've -- In
20 the general causation phase, they had an infectious disease
21 doctor, Dr. Wenzel. They promised to the jury he was going
22 to show up. He never did. He's not had a report issued
23 since.

24 And so now Dr. Mont, who is an orthoped, and the
25 new anesthesiologist, who of course has got a top-to-bottom

1 new opinion on general causation and case-specific issues,
2 and their epidemiologist are essentially trying to cover the
3 waterfront with attacking Dr. Jarvis, our infectious
4 disease -- yeah, our infectious disease doctor. I mean,
5 given that these folks have previously, under oath,
6 disclaimed expertise in infectious disease, you know, query
7 whether they really have the capacity or foundation to serve
8 as experts that rebut Dr. Jarvis, and that's, I guess, part
9 of the question that we've raised with the motion here.

10 THE COURT: Right.

11 MS. ZIMMERMAN: I mean, they can bring, I guess,
12 the experts that they want to bring.

13 THE COURT: Yeah, and I think their -- you are
14 really arguing, in part, a *Daubert* issue I think, or you are
15 suggesting that, which is not before me.

16 MS. ZIMMERMAN: Yeah.

17 THE COURT: But here's where I think you may find
18 that I'm not in agreement necessarily with the Plaintiffs'
19 position. Two things; one, I don't think their experts -- I
20 don't think you get to -- I'm phrasing it this way, but I
21 don't think you get to decide what their -- what experts
22 there are; right? So if you only put up a damages expert,
23 but you still go forward with the theory, obviously, of
24 liability, I think they still get to bring in experts to
25 address your theory of liability, even if -- so it's not tit

1 for tat --

2 MS. ZIMMERMAN: Tit for tat, yeah.

3 THE COURT: -- on who the experts are. The second
4 thing, and I think this really gets to Dr. Mont, on the one
5 hand you are right, he's giving very generalized opinions
6 on, for example, diabetes, but, you know, the risk factors
7 for infection are specific to individuals, and so there
8 that -- that doesn't seem to be crossing the line to me, but
9 I think you think it does.

10 MS. ZIMMERMAN: Well, I do think it does,
11 Your Honor, respectfully, and I would point, in terms of an
12 example, to the exclusion of Dr. Yadin David. So when we
13 did a general causation report for him, and, in retrospect,
14 I'm not sure honestly that we needed one, because if we're
15 talking about what the Bair Hugger is generally capable of,
16 that probably isn't the stage of the case where we have to
17 prove there were reasonable alternative designs then. But
18 he did offer a number of reasonable alternative designs in
19 his initial report. And then when we offered a supplement
20 on that, evidencing, I think, seven or eight additional
21 reasonable alternative designs, all of which were known to
22 the Defendants at the time, the idea was, well, those were
23 known or knowable at the time he issued his March 17th
24 report, and so it should have been in there, and the
25 Defendants are in some ways disadvantaged by the fact that

1 there's new general causation kind of reasonable alternative
2 design opinions there. Fast forward now to your question
3 about diabetes and Dr. Mont. If Dr. Mont thought that
4 diabetes was a risk factor that predisposed patient
5 population generally, isn't that really something that
6 belonged also in his general causation report?

7 THE COURT: It exposes every potential -- It
8 exposes the patient population that has diabetes.

9 MS. ZIMMERMAN: Correct, Your Honor.

10 THE COURT: And I guess the question is, is that a
11 distinction with or without a difference?

12 MS. ZIMMERMAN: From the Plaintiffs' perspective,
13 it's a distinction with a meaningful difference, because we
14 would have had an opportunity to really delve into what
15 Dr. Mont's opinions are about the role that diabetes may
16 play in predisposing someone to infection. And now perhaps
17 we have the opportunity to ask him that in the Trombley
18 matter, but just as Dr. David was not permitted to say, Oh,
19 there's also -- you know, it wasn't just the one reasonable
20 alternative design that I pointed to, it was all these other
21 ones, you know, we -- we think that they're really, you
22 know, similar -- similar issues before the Court and with
23 respect to the -- the properness, I guess, of a disclosure
24 and whether something is general causation or case-specific.

25 And then turning also to the anesthesiologist, I

1 think it's Dr. Dutton, it's certainly not Plaintiffs'
2 position that each set of -- and I think I've represented
3 this to the Court before -- that each party is going to be
4 forever limited to those experts that were disclosed in the
5 general causation phase or that we used in Gareis, because
6 at this point, it's looking like we have a lot of cases and
7 potentially a lot of trials to have; however, we certainly
8 would need to depose Dr. Dutton on issues including both
9 general causation and specific causation, because I can't
10 impeach him with the deposition testimony or the trial
11 testimony from Dr. Hannenberg, because they probably have
12 different opinions.

13 And so I guess then the next question the
14 Plaintiffs have are, well, could we -- if, for example, I
15 get a new expert that's going to opine on a reasonable
16 alternative design, do I get a new report top to bottom, put
17 all of the stuff in that the Court wouldn't let me put in
18 with respect to the Axline case and Dr. David? I mean, I
19 don't want to forecast problems for the Court, but there's a
20 couple cooking -- a couple are cooking down the road, you
21 know, and so I guess those are some of the issues that are
22 certainly percolating from the Plaintiffs' perspective, and
23 we think that it really does impact, you know, the ability
24 to try the Trombley case in a fair manner, and it's going to
25 impact the rest of the MDL, what ultimately gets decided

1 about -- about disclosures and limitations on those.

2 THE COURT: Okay.

3 MS. ZIMMERMAN: I think you -- you generally
4 understand, and I'm happy to answer any questions that you
5 have or forecast additional issues for the Court. You've
6 had enough this morning it sounds like.

7 THE COURT: Please don't. Well, let me just tell
8 you where I -- where I am in terms of I -- how I think I'll
9 approach this whole issue. I think that there's broad,
10 though not precise agreement between the parties, even on
11 what the general principles are here about what's proper and
12 not proper; maybe not. But I plan to look very carefully at
13 each and every report and try and make a determination about
14 whether it's -- you know, is it specific to the case or
15 appropriate context, or is it really kind of a do-over.

16 MS. ZIMMERMAN: Right.

17 THE COURT: And that's what I think you're asking
18 me to do, and that's what I think I probably have to do.

19 MS. ZIMMERMAN: Yeah, I'm sorry to put that burden
20 on the Court, but that is what we're asking.

21 THE COURT: Yeah.

22 MS. ZIMMERMAN: And I think I kind of envision
23 it like a -- I mean, I don't know if it would be helpful to
24 the Court the way we do before a trial when we sit down and
25 rule on objections in depositions or something. We're happy

1 to assist in any way we can, but we do think that that --

2 THE COURT: No, you've highlighted everything, and
3 that does assist the Court, but, okay.

4 MS. ZIMMERMAN: And I'll obviously stand by to
5 answer any questions the Court may have.

6 THE COURT: One other that's going to sound
7 frankly very picky, but some of the highlighting you've
8 given me is in different colors. I am assuming that the
9 color of the highlighting is not of significance to the
10 argument; correct?

11 MS. ZIMMERMAN: Yeah, not significant enough to
12 trouble Your Honor with it.

13 THE COURT: Okay. All right. Thank you.

14 MS. ZIMMERMAN: Thank you.

15 THE COURT: Mr. Goss? Ms. Harris?

16 MR. GOSS: Thank you, Your Honor. May it please
17 the Court. So I'm here to tell you that you don't have to
18 do it. You don't have to rewrite our experts' reports.

19 THE COURT: You know I like him better now; right?

20 MR. GOSS: You don't have to do it, and here's the
21 reason why. So -- And there's been a lot of replowing of
22 old ground and talk of recasting and foreshadowing, but I
23 really want to focus on what's in front of the Court right
24 now. And really the -- the key precedent to this motion is
25 the Court's prior motion on the David and Bushnell --

1 Plaintiffs' -- actually, Defendants' prior motion on the
2 David and Bushnell reports. And what the Court ordered in
3 that case was not that general cause discovery is forever
4 set in stone, that these expert reports are forever set in
5 stone, that you can never cite an article in future reports
6 that you already cited somewhere else, or that you can't
7 bring in any new articles. What the Court ruled, and Judge
8 Ericksen affirmed, is that you can't bring in an expert who
9 has major new opinions previously undisclosed. So we were
10 confronting --

11 THE COURT: On general causation?

12 MR. GOSS: On general causation, right, and that's
13 an important distinction, because the reports that we
14 challenged previously really were not case-specific. They
15 weren't specific to Nancy Axline's case. David titled his a
16 supplemental expert report, and he raised these seven new
17 alternatives that he wanted to talk about. And -- and
18 that's an important distinction because, as the Court
19 recognized at the time, we no longer had the opportunity to
20 get discovery from the manufacturers about -- about those
21 devices, and the feasibility of turning one of those things
22 into the Bair Hugger or vice versa, and that's really what
23 was going to be the issue to be tried.

24 So Dr. Jarvis issued a case-specific report in
25 Axline, and he talked a lot about general things. He talked

1 about the McGovern study. He talked about the CFD. He
2 talked about Stocks and Darouiche. But we took that to be
3 his analysis of those sources in the context of Ms. Axline's
4 case. He also brought in a new article, and we didn't
5 challenge that report because it was a case-specific report.
6 We challenged the two that were not case-specific. There
7 was David, which was, by its own terms, a supplement, and
8 there was Bushnell, which was -- everybody agreed was a
9 sur-rebuttal to Dr. Abraham.

10 So -- so I think, you know, there's --
11 Ms. Zimmerman talked about recasting specific versus general
12 causation discovery. I don't think this order did that. I
13 think what this order did was it said, here's a guy with
14 seven new opinions on a major issue that the trier is going
15 to have to decide, and we're on the eve of trial, so we're
16 not going to do that. So that's the -- the scope issue.

17 THE COURT: Let me stop you for a second.

18 MR. GOSS: Sure.

19 THE COURT: I think Ms. Zimmerman said that -- or
20 maybe I merely viewed it this way -- that when you compare
21 Dr. David to Dr. Mont, they are almost like they are on a
22 spectrum. David comes in and says, Here are seven
23 additional alternative designs. Dr. Mont says, Geez,
24 there's a number of risk factors. She has these. And those
25 are not entirely dissimilar, although I understand that

1 Dr. Mont's discussion of, for example, diabetes may not
2 apply and wouldn't be applied to Ms. Axline.

3 MR. GOSS: Right.

4 THE COURT: So here's the question, are those on a
5 spectrum? Is there a line between them? And is there a
6 disclosed general causation expert on your side of the case
7 that talked about all the risk factors for infection?

8 MR. GOSS: The answer to the last question is --
9 is yes.

10 THE COURT: And who is that?

11 MR. GOSS: And so it was Dr. Mont, but also
12 Dr. Wenzel, and we didn't promise the jury that he would
13 come to trial. Plaintiffs did. But that's neither here nor
14 there. Dr. Wenzel, Dr. Borak, and I couldn't point you to
15 the chapter and verse exactly, but I know diabetes came up,
16 so it's not a new issue.

17 THE COURT: Okay.

18 MR. GOSS: And the difference, it's a difference
19 in kind and not in degree. Because the difference is
20 Dr. Mont is issuing a case-specific opinion about
21 Ms. Trombley who has diabetes. He can't do a specific
22 causation analysis without addressing her diabetes.
23 Dr. Jarvis, in his case-specific report for Ms. Trombley,
24 addresses her diabetes, and he says, I ruled it out.

25 So -- Which that also gets to this question of

1 what's rebuttal and what isn't. And we've been over this a
2 few times, but really what the rule says is what's rebuttal
3 and what's initial depends on the burden of proof, which
4 party has the burden of proof. So it doesn't depend on
5 timing, and it doesn't depend on, oh, is this person
6 responding point for point to this person. It depends on
7 the burden of proof.

8 And so what all of our experts are doing in their
9 Trombley case-specific reports is responding to things that
10 Dr. Jarvis says. He talks about CFD. He talks about the
11 heating, ventilation and air conditioning. Now, he may or
12 may not have expertise in those things, but clearly he
13 intends to talk about them. And unless Plaintiffs are going
14 to say, We're not going to show the CFD, we're not going to
15 talk about it, we have to be able to rebut it with -- with
16 Dr. Abraham. And so what he is doing is -- is rebutting
17 Dr. Jarvis.

18 And -- and if the Court would like to hear, I can
19 kind of elaborate on Dr. Abraham's exuberant additions of
20 literature and why -- why that happened, why he's doing
21 that.

22 THE COURT: I would. Do you understand why --
23 what I -- Do you understand why I said what I said at the
24 beginning of this, that I was perhaps most troubled by
25 Dr. Abraham's report?

1 MR. GOSS: I do, Your Honor. I do.

2 THE COURT: Okay.

3 MR. GOSS: Because he added a lot of citations,
4 but here's the reason why. When he testified at the Gareis
5 trial, he wanted to talk about something that was in his
6 rebuttal report where he said that the opening and closing
7 of doors has a substantial effect on airflow in the
8 operating room, okay. And he was starting to testify about
9 that, and then he wanted to talk about a study that was
10 cited in Dr. Elghobashi's initial report, but it wasn't
11 cited in Dr. Abraham's report. And it's the Saarinen study,
12 a study out of Finland that actually did a CFD analysis
13 backed by a smoke experiment to show the movement of air
14 when a mannequin moves through a door and into a room, okay.
15 And Plaintiffs objected. They said Rule 26, Your Honor, he
16 doesn't get to talk about that because it wasn't in his
17 report. It was in Dr. Elghobashi's, but it wasn't in his,
18 so he doesn't get to talk about that.

19 And there was a lengthy sidebar. I have the trial
20 transcript from that discussion. But Dr. Abraham could see
21 that there was a chance he wasn't going to be able to talk
22 about this issue that was actually pretty significant to his
23 analysis of Mr. Gareis' -- specific causation in
24 Mr. Gareis's case, so -- and then ultimately the Plaintiffs
25 based -- one of their arguments for a new trial in Gareis

1 was that -- that his testimony about the Saarinen article
2 was allowed, and Plaintiffs said that that's -- it was a
3 violation of Rule 26, and -- and that it was prejudicial.

4 And so what the -- I have it here somewhere. What
5 the Court ultimately ordered on the -- denied the motion for
6 a new trial, and on page 9 of the order, this is Document
7 No. 519, the Court said, Dr. Abraham's report did opine on
8 the phenomenon behind the Saarinen study, and she quotes his
9 initial report on that. She notes that the admission of the
10 evidence was not prejudicial to Plaintiffs because the
11 meaning of the Saarinen study was painfully clear to
12 everybody that if you open a door, you can feel the wind,
13 it's going to have an impact on the airflow. Okay. So she
14 denies the motion for a new trial.

15 But this was a serious enough issue for Plaintiffs
16 to raise it in a lengthy sidebar during his testimony and to
17 base a request for a new trial in Gareis on it. So he felt
18 compelled to come back and say, All right, you are saying I
19 didn't disclose enough. Now I'm going to disclose a number
20 of articles that are going to address this point; so really
21 Plaintiffs, to some degree, invited the supplementation.

22 Now is he going to talk about each of these
23 studies at trial? No, he's not. Ultimately he just needs
24 to be able to show the evidence -- the scientific evidence
25 that opening and closing doors in a surgery like

1 Ms. Trombley's would -- would make a huge difference in
2 airflow and would make any air coming out of the Bair
3 flow -- Bair Hugger essentially irrelevant.

4 THE COURT: Let me ask you this, do you have
5 accessible to you Dr. Abraham's report in this case?

6 MR. GOSS: Yes, I do.

7 THE COURT: So let's look at -- let's look at
8 page 18 of the report. There's a bunch of pictures there in
9 green light -- or green-lighted conditions showing they are
10 stills from a video, I guess.

11 MR. GOSS: Yeah.

12 THE COURT: Flow visualization of recirculation
13 area under different shaped luminaries or luminaires.

14 MR. GOSS: Oh.

15 THE COURT: I would call those lights, but in any
16 event.

17 MR. GOSS: Let's see, 18 -- Are you sure it's 18?

18 THE COURT: Maybe not. No, it's 5. I'm sorry. I
19 have -- I have it on a thing that also --

20 MR. GOSS: Okay.

21 THE COURT: -- gives me different numbers.

22 So --

23 MR. GOSS: Yes, I see it.

24 THE COURT: -- did Dr. Abraham, in his initial
25 report, talk about the effect of essentially lamps in the

1 operating room on circulation?

2 MR. GOSS: Yes.

3 THE COURT: And were these -- and now we're
4 getting really kind of nitty-gritty on this. Were these
5 photos or this video discussed before?

6 MR. GOSS: No.

7 THE COURT: Okay.

8 MR. GOSS: Not this article.

9 THE COURT: So here's their point, I think, and
10 the reason I have concern or I'm not certain what to do
11 about Dr. Abraham is it seems like all of this stuff is not
12 case-specific but rather general and could have been
13 disclosed before, and so how isn't that just the same as, I
14 believe it was -- who was it other than Dr. David?

15 MS. ZIMMERMAN: Yadin David or Nathan Bushnell.

16 THE COURT: Yeah, why isn't this just like Nathan
17 Bushnell?

18 MR. GOSS: Because it's not a sur-rebuttal for one
19 thing, and that's why Bushnell was excluded.

20 THE COURT: It's a supplementation in your view?

21 MR. GOSS: Well, it is. It -- it's -- Well, what
22 it is is it's a further discussion of why lights matter.
23 There were surgical lights in Ms. Trombley's surgery. They
24 were moved during the surgery. And essentially what -- the
25 way I see Plaintiffs' argument, it's kind of like, well, you

1 know, you cited cases in support of your motions in the MDL,
2 so now when you bring motions in in Trombley, you won't be
3 able to cite those cases again. Really, citing literature
4 is kind of like citing cases. You don't boil the ocean the
5 first time you do it. You may go back and you find
6 additional things that further support your point, but
7 really what I want to make clear is that this -- he ties
8 this to his analysis of Ms. Trombley's case of what would
9 have or could have happened in her OR. So this is not --
10 this is not a report that we intend to submit as an MDL
11 report.

12 THE COURT: Right.

13 MR. GOSS: This is a case-specific report. And
14 he's really again responding to Dr. Jarvis who says, yeah,
15 lights don't cause infections, cabinets don't cause
16 infections, nothing causes infections except the Bair Hugger
17 in terms of what was in that room, and this is Dr. Abraham,
18 again, elaborating on that in the context of her case; and,
19 again, with a view toward, he had this experience where he
20 almost didn't get to testify about certain things because
21 there was an argument about whether he had adequately
22 disclosed them.

23 THE COURT: Got you. Okay.

24 MR. GOSS: Okay.

25 THE COURT: Anything further, Mr. Goss, that we

1 should talk about?

2 MR. GOSS: I will take a quick look at my notes,
3 but...

4 Oh, the only other thing I would say, Your Honor,
5 and this kind of goes to the lack of prejudice, so the *Aviva*
6 *Sports* case is kind of on point. This is from 2011. It's
7 829 F.Supp.2d 802 at page -- let's see -- I have the head
8 notes -- oh, 820 to 821.

9 THE COURT: Okay.

10 MR. GOSS: So there's -- This is in the context of
11 a summary judgment motion where the party resisting the
12 motion brought in new expert reports to respond to the
13 arguments made in favor of summary judgment, and there was a
14 motion to strike those -- those reports. And what Judge
15 Ericksen said here is -- is that the other side argues that
16 these declarations are new opinions which were submitted
17 outside the discovery deadline. The Court does not find
18 that these declarations contain new opinions, they contain
19 no new material information and present no opinions that
20 were not provided during discovery. So, you know, that
21 supports the idea that it's okay to provide additional
22 support as long as you aren't opening up a new front on the
23 battlefield.

24 The other thing that I would --

25 THE COURT: That's your point about Dr. David?

1 MR. GOSS: Yeah -- yes, sir.

2 THE COURT: Okay.

3 MR. GOSS: And the other thing I want to say is
4 this isn't a situation where these reports, you know, come
5 out and there's no opportunity to do any discovery about
6 them. We've offered depositions for each one of these
7 experts. Two -- two of them have been accepted.
8 Dr. Abraham, we don't have an accepted date for him yet.

9 THE COURT: Okay.

10 MR. GOSS: But there's an opportunity to explore
11 these things and decide how much they matter or don't
12 matter, so that -- that's my last point on it, Your Honor.

13 THE COURT: Okay. Thank you.

14 Yeah, go ahead, Ms. Zimmerman.

15 MS. ZIMMERMAN: Thank you, Your Honor. I want to
16 start kind of with this discovery piece at the end, because
17 I think one thing we've missed a few times, and this is --
18 I'll take this on myself with respect to Yadin David,
19 discovery on general causation issues concluded the day that
20 we provided our reports, so the notion that any reasonable
21 alternative design that was identified by Yadin David that
22 they would have had the opportunity to do discovery on it,
23 that's just false. I mean, discovery was closed that day.
24 So I appreciate that that's kind of touching back on this --
25 the order and the dispute we had in the fall, but it's not

1 actually that they would have had the opportunity to do
2 discovery on these third-party witnesses or companies that
3 had other products, and, by the way, they were known very
4 well to the Defendants. Mr. Goss referred to Dr. Jarvis'
5 report -- the case-specific reports he's done in Gareis and
6 Axline and now in Trombley, and you are right, and he's
7 right, they definitely -- he cites back to McGovern, but
8 that was cited in his general causation report. And so they
9 have had, you know, multiple depositions now to explore his
10 opinions with respect to how McGovern, you know, addresses
11 the general causation piece, and then get into what they
12 really think about the case-specific opinions that he's
13 offering.

14 Abraham is a different boat altogether. Mr. Goss
15 makes the argument that Dr. Abraham was nearly excluded from
16 providing testimony. Yeah, that's right. It wasn't in his
17 report, despite the fact that apparently Dr. Abraham thought
18 that this was so specific and critical to his analysis, so
19 specific and critical, but it wasn't cited anywhere in his
20 report; so, yeah, we -- we made a motion, and we did have a
21 sidebar that said he shouldn't be allowed to use this --
22 this report and this video that he had never talked about.
23 And we still think that was error, and I appreciate that --
24 you know, that that's an issue before the Eighth Circuit at
25 this point. But the Plaintiffs are entitled to know what

1 the Defendants' experts are going to testify about at trial,
2 and we are entitled to explore the basis for that so we can
3 bring appropriate motions and figure out both at the *Daubert*
4 stage, if necessary, or motions in limine, or, you know,
5 during trial objections about foundation, and that's
6 absolutely something we're entitled to do.

7 So I really do think that, you know, as we compare
8 kind of Mont and Yadin David, you know, if you look at their
9 general causation reports, you know, Mont then -- you know,
10 what should he have in there if he's going to opine on risk
11 factors that may predispose someone to an infection.
12 Shouldn't he have a generalized discussion, I guess, if
13 there are risk factors out there? Opioids is new in
14 Trombley. He hadn't talked about opioids before. Diabetes,
15 I mean, that's not exactly some sort of rare condition.
16 There's a tremendous number of people in the population that
17 suffer from diabetes. We think that any opinions about
18 diabetes and the role that may play in general causation
19 ought to have been disclosed back then, and that attempts to
20 put in 10 or 15 or 20 new articles on each of these things,
21 that that's not timely, and it shouldn't be permitted. So I
22 appreciate the Court's time today, and obviously happy to
23 answer any questions you may have.

24 THE COURT: So now I hear your argument a little
25 bit differently, but maybe in addition to what I said

1 earlier, you are saying, in a sense, that Dr. Mont is like
2 Dr. David because Dr. Mont is saying there are risk factors,
3 and here they are as they apply to Ms. Trombley?

4 MS. ZIMMERMAN: Yes.

5 THE COURT: And then he identifies risk factors
6 that weren't disclosed, at least according to your argument
7 before; right?

8 MS. ZIMMERMAN: Yes, Your Honor.

9 THE COURT: And so Dr. David said, there are
10 reasonable alternative designs.

11 MS. ZIMMERMAN: There's a couple.

12 THE COURT: And here's a couple, and now I want to
13 tell you --

14 MS. ZIMMERMAN: Yeah.

15 THE COURT: -- there's seven other ones?

16 MS. ZIMMERMAN: Yep.

17 THE COURT: Okay. Okay. This case is set for
18 trial May --

19 MS. ZIMMERMAN: May 13th, I believe.

20 THE COURT: May 13th?

21 MS. ZIMMERMAN: Yes. And Your Honor had given us
22 through, I think -- anticipating -- I don't know if you are
23 able to rule from the bench today, but that we will have I
24 think until the 21st to complete depositions on this.

25 THE COURT: Of this month?

1 MS. ZIMMERMAN: Of this month, like two weeks.

2 THE COURT: Yeisch (phonetic).

3 MS. ZIMMERMAN: Abraham is at least local. I
4 can't speak to his schedule, but he is here. He's at
5 St. Thomas, so he's a little bit closer, and I don't know
6 that we're going to take the depositions of all these folks,
7 but it depends on --

8 THE COURT: Right. Here's what I would say --
9 Shoot. To the extent that we don't get the order out as
10 quickly as we did in the -- in the other motion in Axline,
11 if I allow, right, you gotta have the opportunity to depose
12 them. And I know that that's not always a great solution
13 because, of course, you've got that thing called trial
14 coming up; but to the extent that it helps, rest assured
15 that if -- if we get the motion out, and it's the 20th, and
16 we say, yeah, Dr. Mont is in, you don't have to depose him
17 the next day. We'll figure that out.

18 MS. ZIMMERMAN: Thank you, Your Honor.

19 THE COURT: Okay.

20 MS. ZIMMERMAN: And it's not our expectation that
21 Dr. Mont obviously would be excluded completely.

22 THE COURT: Right.

23 MS. ZIMMERMAN: But, you know --

24 THE COURT: But what opinions or what he can say,
25 understood.

1 MS. ZIMMERMAN: Yeah.

2 THE COURT: Okay.

3 Yep, Mr. Goss.

4 MR. GOSS: So a date has been accepted for
5 Dr. Mont's deposition.

6 THE COURT: Okay.

7 MR. GOSS: Obviously we can meet and confer if
8 that needs to change, but I think it's the 21st -- --

9 MS. ZIMMERMAN: I think that's right.

10 MR. GOSS: -- is the date that's been accepted.
11 And then the only other thing I want to just be -- make sure
12 I'm clear on is Dr. Jarvis says in his report, I ruled out
13 diabetes.

14 THE COURT: Right.

15 MR. GOSS: So Dr. Mont has to be able to respond
16 to that in some fashion.

17 THE COURT: Understood. Okay. Anything further
18 we need to talk about today?

19 MR. GOSS: I wasn't prepared to talk about
20 anything else, Your Honor.

21 MS. ZIMMERMAN: I don't think so. Thanks.

22 THE COURT: All right. What I would say in
23 general, I think following up on Ms. Zimmerman's point, is
24 it -- it might make some sense for the parties to confer on
25 some kind of general ground rules. Yes, you can cite to

1 reports issued at this time or something like that. It
2 certainly would be a productive discussion in my view.

3 MS. ZIMMERMAN: We're happy to do that,
4 Your Honor.

5 MR. GOSS: Yeah, sure.

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

8 MR. GOSS: Thank you, Your Honor.

9 THE LAW CLERK: All rise.

10 (Court adjourned at 12:02 p.m.)

11 * * *

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13

14 I, Erin D. Drost, certify that the foregoing is a
15 correct transcript from the record of proceedings in the
16 above-entitled matter.

17

18 Certified by: s/ Erin D. Drost

19 Erin D. Drost, RMR-CRR

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