

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: NUVARING PRODUCTS)
LIABILITY LITIGATION)

) Case No. 4:08-MD-01964 RWS
)

TELEPHONE STATUS CONFERENCE
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
SEPTEMBER 20, 2011

APPEARANCES
for Plaintiffs:

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PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

Appearances Continued:

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(PROCEEDINGS STARTED AT 10:32 AM.)

THE COURT: All right. Let's do it again. We are here today in the multidistrict case styled *In Re: NuvaRing Products Liability Litigation*, Cause No. 4:08-MD-1964. On behalf of the plaintiffs, would counsel make their appearances, please?

MR. DENTON: Yes, Your Honor. Roger Denton, Kris Kraft, and Ashley Brittain for the plaintiffs.

MR. SHKOLNIK: Hunter Shkolnik on behalf of the plaintiffs, Your Honor. Good morning.

MR. BLAU: Steven Blau and Jason Brown on behalf of the plaintiffs.

MR. RHEINGOLD: Paul Rheingold, Your Honor, plaintiff.

MR. RHEINGOLD: David Rheingold, plaintiff.

MS. SCOTT: Carmen Scott on behalf of the plaintiff.

THE COURT: Any other plaintiffs counsel? On behalf of defendant?

MR. BALL: Dan Ball, Bryan Cave, for defense.

MS. GEIST: Melissa Geist, Reed Smith, for the defendants, Your Honor. Good morning.

MR. YOO: And Thomas Yoo as well.

THE COURT: All right. We're here today on a status conference in the litigation. I have in front of me proposed agendas by the parties. First on the agenda filed by Ms.

1 Kraft is oral argument on plaintiffs' motion to compel
2 defendants to remove redactions.

3 MR. DENTON: Your Honor, Roger Denton. We just spoke
4 with Mr. Ball just briefly. I think what would be appropriate
5 is that we -- they've asked for a hearing, and we're okay with
6 that. We would ask for a date, I believe.

7 THE COURT: Right. That was on their agenda, a
8 hearing date. All right. So we will put that down for oral
9 argument in person. Is that what I'm hearing from you?

10 MS. GEIST: Yes. Yes, Your Honor. This is Melissa
11 Geist for the defendants. The plaintiffs have on their
12 agenda, Your Honor, as you indicated an oral argument on the
13 pending motion for redaction. We also have, Your Honor, as
14 Agenda Item No. 2 on the defendants' agenda, a request for
15 oral argument on our two related motions concerning discovery.

16 THE COURT: Okay. We'll take that up at the
17 conclusion of the other items.

18 Number 2 on the plaintiffs' submission was issues
19 involving treating physicians as expert witnesses. That was
20 going to be briefed, and it's my understanding the parties
21 asked not to brief it. So is that an indication that this
22 issue has been resolved?

23 MR. DENTON: It's an indication that we are
24 continuing to have a dialogue, Your Honor, and I think Dan
25 Ball and I are making progress on that.

1 THE COURT: Okay. We can put that on the bottom of
2 the list when we do our oral argument if you haven't reached
3 the conclusion.

4 MR. DENTON: Thank you.

5 THE COURT: All right. Then we have the obvious. We
6 have to give Ms. Kraft trouble. She has two number twos.

7 MR. DENTON: I did give her some trouble, Your Honor.

8 THE COURT: Setting a date for the next status
9 conference by phone. But I'd say the next conference will be
10 oral arguments, so there won't be any reason to set an interim
11 phone conference.

12 Then we have the defendants' agenda. Parties'
13 agreement regarding replacement of dismissed MDL bellwether
14 cases.

15 MR. BALL: Yeah, Thomas, do you want to handle that?

16 MR. YOO: Sure. Your Honor asked for briefing from
17 the parties on the defendants' request to replace three cases
18 that had been dismissed by the plaintiffs, three cases in the
19 bellwether pool. These are not three cases out of the eight
20 that are in the final bellwether pool, but three of the
21 original, I believe it was, 25 or so cases.

22 It appears the parties are in agreement that those
23 cases may be replaced, and we're happy to meet and confer with
24 plaintiffs' counsel on an appropriate discovery schedule for
25 the three new cases.

1 THE COURT: Okay. Is that correct?

2 MR. DENTON: Your Honor, from our side, that's fine.

3 THE COURT: Okay. When we get back together, I will
4 put down the list of things to make sure that we have actually
5 agreed on. If not, we will figure out how to agree.

6 Then No. 2, as Ms. Geist alluded, is setting a date
7 for oral argument. Then we have No. 3, status of trial pool
8 case, Tracey Curl. Apparently, there's been some issue with
9 the expert reports.

10 MR. YOO: Yes, Your Honor. The Curl case is one of
11 the eight in the final trial pool. We have received expert
12 reports for all of the cases except the Curl case. We've
13 heard from plaintiffs' counsel in the case that they were not
14 able to secure expert reports in support of their claims on
15 that case. So the question becomes, what is going to happen
16 with this case?

17 It appears that this case is headed toward a
18 dismissal, and we believe if that's going to happen, the case
19 should be dismissed with prejudice immediately before the
20 parties and the court expend additional resources dealing with
21 the case.

22 We believe the appropriate remedy is for the
23 defendants to put another case in the Curl slot, and I think
24 we can do that by next Monday. And we believe that the
25 plaintiff should have 30 days thereafter to supply expert

1 reports in that replaced case, and we'll take some time to do
2 discovery as to those experts and provide our case-specific
3 reports in that case.

4 I think on the completion of depositions of the
5 experts in that case, that can probably coincide with the
6 December 15 deadline that the parties have agreed to for
7 case-specific depositions for the other cases, and then we can
8 supply the defense case-specific reports in the case by
9 January 15, which will also coincide with the other deadline.

10 MR. RHEINGOLD: Your Honor, this is Paul Rheingold.
11 I'll speak to the first part because we are counsel for Curl.
12 We will accept the dismissal with prejudice because we are
13 unable to get an expert to testify to causation. The second
14 part, replacement, I would leave to other people to comment
15 on.

16 MR. BALL: So this is Dan Ball, Judge. Essentially
17 what we're asking for is now that Curl is being dismissed with
18 prejudice is to keep the trial pool even, that we, by Monday,
19 will choose another case from the bellwether pool to put in
20 there, and then Thomas has set forth the deadlines for
21 case-specific expert and going forward.

22 MR. DENTON: Your Honor, Roger Denton. I'd like to
23 talk to them about that. If we're talking about now needing
24 to go get additional experts for a new case yet to be picked,
25 I'm not sure if those deadlines are going to be doable. I

1 think we'd like -- I'd like to have a dialogue with them. We
2 certainly need to know which firm is involved depending on
3 which case they may pick.

4 I guess I'm not adverse to the concept. I just want
5 to make sure that we have a little more understanding of the
6 detail before we commit to specific deadlines on a case yet to
7 be picked.

8 MR. YOO: Your Honor, Thomas Yoo. We're happy to
9 discuss details with Mr. Denton or any of the other
10 plaintiffs' counsel. Just so we're clear, we're talking about
11 putting in place of Curl to be dismissed with prejudice a case
12 that has already been worked up as part of the original trial
13 pool. So it would simply be a matter of taking the evidence
14 in the case and going out and finding case-specific experts to
15 provide reports.

16 We assume in the scheme of things as we're discussing
17 this that they're going to use the same generic experts. If
18 they choose to use different generic experts, then that will
19 obviously affect scheduling, but assuming we're talking about
20 the same generic experts who have already provided expert
21 reports, then it would simply be a matter of going out and
22 getting case-specific reports for this particular case.

23 We think 30 days is reasonable, and that would also
24 allow us to catch this case up with the rest of the pack. So
25 that was our thinking, but on these kinds of details we're

1 happy to speak with Mr. Denton.

2 MR. DENTON: We need to talk because I don't think 30
3 days is reasonable in a case that's been in the deep freeze
4 for a number of months in a specific agreement that we were
5 only working up these other eight and other ones were sitting.
6 And there may be depositions that need to be taken. I'm not
7 adverse to working through it. I'm just telling you in my
8 view, not even knowing whose case it is or what the status of
9 that case may be, 30 days isn't enough, and so we need to talk
10 about that, and perhaps parties should meet and confer before
11 we waste the Court's time on this.

12 THE COURT: Sounds -- 30 days did sound a little
13 aggressive to me, just to send the signal if you want one.
14 What I'm thinking is, you all should meet and confer and then
15 someone from each side, why don't you all call me next Tuesday
16 on September 27, at three o'clock, and tell me what you've
17 decided, because first you're going to have to identify the
18 plaintiff and then figure out what you -- work out a
19 reasonable schedule how to get them into the trial pool of
20 eight.

21 So I'll give you some time to do that, and then we'll
22 talk on Thursday at three o'clock -- I mean Tuesday the 27th
23 at three o'clock, just to see if you've worked out a schedule.
24 Otherwise, we'll work one out to kind of get that one in the
25 loop.

1 MR. YOO: That sounds good. Thank you, Your Honor.

2 THE COURT: So on a theory, as Mr. Yoo knows, that we
3 don't treat this case any different than any other case, will
4 I be seeing an unopposed motion to dismiss the Curl case, or
5 how is that going to come to fruition?

6 MR. BALL: I would suggest Mr. Rheingold file a
7 dismissal with prejudice.

8 MR. RHEINGOLD: Correct.

9 THE COURT: Okay. Mr. Rheingold?

10 MR. RHEINGOLD: Yes, we accept it. We already told
11 them this quite a while ago.

12 THE COURT: Very good. That brings us to status of
13 scheduling plaintiffs' case-specific experts for depositions
14 and outstanding issues. Boy, that's a sweeping one there,
15 outstanding issues. Don't miss anything there, Melissa.

16 MS. GEIST: Your Honor, this is Melissa Geist, and I
17 did indeed put that, and I apologize because I didn't mean to
18 imply there were really any serious issues. I'm happy to
19 report, Your Honor, that the parties have worked very
20 cooperatively, I think, in getting on calendar over the next
21 couple of months. The vast majority of the experts --

22 COURT REPORTER: Ms. Geist, I'm having a little
23 trouble hearing you.

24 MS. GEIST: Sure. I said that the parties have
25 worked very cooperatively in getting on calendar over the next

1 couple of months, the vast majority of all of the experts that
2 have been named by the plaintiffs as generic and most of the
3 case specific. At this point in time, Your Honor -- and I
4 have had communications out with plaintiffs' counsel. We're
5 waiting for additional dates for Dr. Shore, who is a vascular
6 surgeon on two of the cases, Dr. Rickert, who is a
7 hematologist, and Dr. Nitzberg, N-I-T-Z-B-E-R-G, who is also a
8 vascular surgeon.

9 So I'm hopeful, Your Honor, that I will hear from
10 plaintiffs' counsel with additional dates for those three
11 experts in the upcoming days.

12 THE COURT: Any dissent to that view of the world?

13 MR. DENTON: Pardon, Your Honor?

14 THE COURT: Any disagreement with Ms. Geist's summary
15 of the status of expert depositions?

16 MR. DENTON: Your Honor, I'd have to defer to the
17 lawyers that have those case-specific experts. Those aren't
18 my file.

19 MS. GEIST: I believe, Your Honor, these are
20 case-specific experts that have been designated by Mr.
21 Rheingold and Ms. Leonard and Mr. Blau, so we have had
22 communications, Your Honor, and I'm hopeful that they will
23 provide us with those additional dates.

24 MR. RHEINGOLD: We are, too. It's Paul Rheingold.
25 It's just a matter of scheduling busy doctors' time.

1 THE COURT: Okay. All right. That brings us to
2 scheduling oral argument and the next status conference in St.
3 Louis. Had you all talked about what works for you all, or do
4 you need to get together and give me some dates?

5 MR. BALL: On the status conference, Mr. Denton and I
6 had talked about October 31, which is a Monday, as a
7 possibility because --

8 THE COURT: That's the multidistrict litigation
9 transferee judges conference. We'll all be getting together
10 to conspire against all the lawyers.

11 MR. BALL: Well, we would not want to interfere with
12 that conspiracy.

13 THE COURT: No, you wouldn't.

14 MR. DENTON: We should just all show up. It's at the
15 Breakers, isn't it, Your, Honor?

16 THE COURT: Correct.

17 MR. DENTON: I think the hearing should be in West
18 Palm Beach.

19 THE COURT: Well, we can go to the West Palm Beach
20 Courthouse if you want.

21 **(DISCUSSION OFF THE RECORD.)**

22 THE COURT: All right. So what's the alternative to
23 October 31?

24 MR. BALL: We are kind of open on that. I think the
25 reason we picked that as like the earliest date for the status

1 conference was because everybody is going to be pretty tied up
2 with the generic experts, so I think even --

3 THE COURT: How does November 3 look?

4 MR. BALL: There is a depo that day, I know.

5 THE COURT: Okay. All right.

6 MS. GEIST: Unfortunately, as Mr. Ball just said, the
7 calendar -- I'm looking at our expert calendar, because we
8 have been working so well together in getting everything on
9 calendar --

10 THE COURT: The last thing I'm going to do is mess it
11 up. So why don't you all get together and give me some
12 alternative dates in November.

13 MR. YOO: Okay. We'll do that.

14 MS. GEIST: Thank you, Your Honor.

15 THE COURT: Then we'll pick one that works for
16 everybody. Keeping in mind that I do belong also -- I'm a
17 member of the holiday-of-the-month club, and November 11 is
18 Veterans Day, observed by the federal government, probably not
19 so much by law firms. So I'd be happy to come meet with you,
20 but I'm not going to bring the court security staff in and
21 everybody else. So just don't call back with November 11 as
22 your date.

23 All right. So we'll look forward -- and if I hear
24 from you by then, then when I have this conference on
25 September 27 you all can give me the dates then, but hopefully

1 you can tell me something before then as to what dates work in
2 November.

3 MR. BALL: Would it be possible to move that
4 September 27 one day?

5 THE COURT: Which way you going?

6 MR. BALL: The 28th or 29th.

7 MR. YOO: That works for me.

8 THE COURT: Let's look and see what time works best.
9 What's better for you all, in the morning or afternoon?

10 MR. BALL: Either.

11 MR. YOO: Not too early, Your Honor.

12 THE COURT: Oh, okay. We'll do it during your lunch
13 hour at 2:30 my time, 12:30 your time, the 28th, Wednesday the
14 28th.

15 MR. BALL: Thank you.

16 THE COURT: All right. Anything else we should talk
17 about today?

18 MR. YOO: Your Honor, this is Thomas Yoo. I know
19 that there is an ex parte hearing set aside for plaintiffs'
20 counsel after this call. We can't tell from the papers what
21 the ex parte is about. I'm sure plaintiffs' counsel would say
22 that's the whole point of filing something under seal. We
23 just question --

24 THE COURT: It's about representation of particular
25 clients.

1 MR. YOO: Okay.

2 THE COURT: It's nothing substantive.

3 MR. YOO: Well, I don't know how much more of the
4 Court's time is going to be needed by the affected plaintiff's
5 counsel to resolve these issues, but it's our hope that there
6 isn't a need for ongoing ex parte communications with the
7 Court over this matter. It's just I think Your Honor
8 understands being in the dark here --

9 THE COURT: No. I'm just telling you it's about
10 which attorneys represent which clients. It's a process
11 issue. It has nothing to do with the substance.

12 MR. YOO: Okay.

13 THE COURT: It's an internal dispute among counsel as
14 to whose clients are whose.

15 MR. RHEINGOLD: Your Honor, it's Paul Rheingold
16 speaking, and of course I will be on the next conference.
17 Both sides have provided their papers to Ms. Geist at her
18 request, so the defendants do have knowledge about which cases
19 are involved.

20 THE COURT: Does that help, Mr. Yoo?

21 MS. GEIST: We have partial disclosures, Your Honor,
22 from certain plaintiffs' counsel, and other plaintiffs'
23 counsel have taken the position that filing under seal
24 entitles an ex parte communication with the judge. Again,
25 Your Honor, we're not interested in sticking our nose where it

1 doesn't belong. We just wanted to get some assurances that
2 any of the discussions that are going on with the Court that
3 did not include us and to which we had not been copied do not
4 involve any substantive discussions of the case.

5 THE COURT: That's certainly a reasonable concern,
6 and you have my absolute assurance that that is not the case.

7 MS. GEIST: Thank you, Your Honor.

8 MR. SHKOLNIK: Your Honor, this is Hunter Shkolnik.
9 I know our papers were -- filed papers were served on Ms.
10 Geist pursuant to her request, so I don't know what papers are
11 missing. If there's anything that my office didn't provide
12 you, please let us know right now, and while you're on the
13 phone we'll give it to you, but I thought we gave you
14 everything.

15 MS. GEIST: Thank you, Mr. Shkolnik. No. We do have
16 your papers, and we do have Mr. Rheingold's papers. We also
17 have the Blau, Brown, and Leonard papers as well, and I thank
18 counsel for that.

19 MR. RHEINGOLD: Your Honor, Paul Rheingold again.
20 With relation to the motion that was made yesterday for an in
21 camera hearing, without getting into any detail or substance
22 about it, I'm wondering what procedure we would use to set up
23 the hearing and what briefing there would be before the
24 hearing was held.

25 THE COURT: Are you talking about the representation

1 issues?

2 MR. RHEINGOLD: No, Your Honor. There was a new
3 motion yesterday which also involved --

4 THE COURT: I haven't had a chance -- I know you'll
5 find it hard to believe, I haven't had a chance to read it
6 yet.

7 MR. RHEINGOLD: No. Well, it's briefed because it's
8 asking for a hearing before Your Honor in camera relating to
9 plaintiffs' issues. The only question I'm raising, because I
10 don't have another forum to ask this question, is could we
11 work out a procedure whereby the moving party briefs the
12 issue, we respond, and then we have a hearing before Your
13 Honor?

14 THE COURT: On the issue of the representation?

15 MR. RHEINGOLD: No, Your Honor.

16 THE COURT: I'm confused what the issue is.

17 MR. RHEINGOLD: Okay. Aside from what's coming up
18 after we hang up and restart again --

19 MR. DENTON: Why don't we do that, Paul, after we
20 relieve the defendants of a plaintiff-only confidential
21 conversation?

22 MR. RHEINGOLD: That's fine, as long as we don't hang
23 up today, Your Honor, at some point without knowing when this
24 new motion will be heard and what the procedure will be for
25 it.

1 THE COURT: Okay. Anything further?

2 MR. BALL: So that's our cue to leave, right?

3 THE COURT: We're going to hang up, and they are
4 going to call in in about ten minutes. Take a short break.

5 THE CLERK: Mr. Rheingold, we'll call you. What's a
6 good number for you right now?

7 (OFF THE RECORD.)

8 (PROCEEDINGS CONCLUDED AT 10:52 AM.)

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 19 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 29th day of September, 2011.

/s/Shannon L. White
Shannon L. White, RMR, CRR, CCR, CSR
Official Court Reporter