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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: ORTHO EVRA PRODUCTS LIABILITY LITIGATION

MELISSA BOWER, # 09-oe-40064
MONISHA SHANNON, # 09-oe-40043
MEGHAN BORYCZ, # 10-oe-40001

Plaintiffs,

vs. June 14, 2010
1:05 p.m.

JOHNSON & JOHNSON, ET AL.,
Defendants.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Christopher Hood, Esq.
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801 West Superior Avenue
Cleveland, Ohio 44113
216/357-7087

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

1 THE COURT: Good afternoon, ladies and
2 gentlemen.

3 I presume each of you have -- would you go off
4 the record for a moment?

13:06:48 5 (Discussion had off the record).

6 THE COURT: All right. Let's go back on the
7 record.

8 As you know we're here in the case of Bower
9 versus Johnson & Johnson for oral argument on the
10 defendant's -- pardon me -- motion for summary judgment.

11 There has been a response, a reply, and a
12 surreply, as to all of which I have read.

13 Since this is J & J's motion, I would presume
14 J & J would go first and have the right to reserve some time
15 for a reply.

16 How long do you each request?

17 MS. KEYSE-WALKER: Your Honor, I think my
18 total, 15 minutes would be fine.

19 MR. HOOD: I agree, Your Honor.

13:07:17 20 THE COURT: Very good.

21 MS. KEYSE-WALKER: I would like to reserve
22 five minutes.

23 THE COURT: I'm sorry?

24 MS. KEYSE-WALKER: I would like to reserve
13:07:25 25 five minutes.

1 THE COURT: Okay.

2 MS. KEYSE-WALKER: Thank you, Your Honor.

3 My name's Irene Keyse-Walker. I am
4 representing Johnson & Johnson. And there are actually
13:07:33 5 three motions for summary judgment in this case, the Bower
6 case, the Shannon case and the Borycz case.

7 Because this is a motion for summary judgment,
8 we really only have two questions: What are the material
9 undisputed facts and what is the governing law that applies
10 to them?

11 We believe it is certainly undisputed that all
12 of the events at question here took place in Michigan. The
13 plaintiff is a Michigan resident. She was prescribed Ortho
14 Evra in Michigan. She was -- purchased her Ortho Evra in
13:08:04 15 Michigan. She was treated in Michigan. There is no event
16 that did not take place in Michigan that is important to her
17 product liability claim in this case.

18 Those are the material facts because those
19 dictate that since this is a diversity jurisdiction case,
13:08:23 20 that the law of Michigan controls her claim.

21 The law of Michigan codified their product
22 liability cause of action in statutes Chapter 600 inter
23 alia, statute 2946, Section 5, which, under Michigan law,
24 states that a manufacturer, when the product is a drug in a
13:08:46 25 product liability claim, the manufacturer is not liable and

1 the drug is neither defective nor unreasonably dangerous so
2 long as it has been approved by FDA and that approval
3 remains in good standing.

4 It is a broad immunity with a very specific
13:09:02 5 and narrow exception. The narrow exception is when there
6 has been information withheld or fraudulently misrepresented
7 to the FDA such that the FDA either would have withdrawn its
8 approval -- would not have approved the drug or would have
9 withdrawn its approval had it known of this information.

13:09:22 10 In this case, we have moved for summary
11 judgment on the grounds that there is no evidence and
12 plaintiff has no evidence that the FDA has found that there
13 was fraud that would either have prevented the approval of
14 Ortho Evra or caused it to be withdrawn.

13:09:40 15 And that's important because the governing law
16 in this case is the *Garcia* case out of the Sixth Circuit
17 which interpreted the Michigan statute and very specifically
18 held that when you interpret the exception for the immunity
19 in the Michigan statute, you have two ways you can go. If
13:10:01 20 you want to say that state law or State Court or state
21 juries' findings of fraud on the FDA is an exception, that
22 is preempted by the *Buckman* case out of the U.S. Supreme
23 Court because states cannot police the FDA. The FDA polices
24 the FDA.

13:10:22 25 But if you can say that the FDA, that the

1 federal part of that exception has itself found fraud, then
2 you can raise that as an exception to the immunity that's
3 granted as part of the statute.

4 So that's the governing law that we have in
13:10:42 5 the *Garcia* case, and the arguments that have been made
6 against summary judgment have no application.

7 The first argument is, well, we have three
8 counts that cite to Minnesota Consumer Sales Practices Act
9 violations, but, Your Honor, there is no basis for the
13:11:00 10 application of Minnesota law, much less Minnesota statutes,
11 to this action.

12 Minnesota could not even regulate sales in
13 Michigan of drugs if they wanted to. And Michigan residents
14 have no standing to assert Minnesota Sales Practices claims,
13:11:16 15 especially when they're urging personal injury in their
16 case.

17 So none of those counts provide any basis for
18 denying summary judgment in this case.

19 THE COURT: Those are the fraud deceit counts
13:11:31 20 6, 7 and 8?

21 MS. KEYSE-WALKER: Yes, Your Honor.

22 Then the second argument that's raised is that
23 the case of *Wyeth versus Levine* somehow changes the
24 controlling law of the Sixth Circuit in *Garcia*.

13:11:49 25 Well, in *Wyeth versus Levine*, it was a United

1 States Supreme Court case that, of course, did deal with
2 preemption, but it did not deal with *Buckman* preemption.

3 *Buckman* preemption asks the question: Do you
4 require proof of fraud on the FDA to establish your claim?
13:12:06 5 If you do, it's preempted.

6 And there is no presumption of preemption when
7 it comes to cases like *Buckman* because the question is not
8 whether states are regulating state law. The question in
9 that case is are states trying to regulate the FDA. And the
13:12:26 10 FDA is the one policing it.

11 All *Levine* said, *Wyeth versus Levine* said if
12 you have a state common law claim, a product liability claim
13 for drugs, and the FDA has established what labeling should
14 be for that drug, the FDA's establishment of labeling does
13:12:47 15 not preempt the State Court claim.

16 That's not what we have. We don't have a
17 common law claim.

18 We have a codified claim under Michigan
19 statutes. And the Michigan statute very specifically
13:13:00 20 defines product liability actions as any action, any action
21 in the law or equity that involves a drug or product
22 liability, any action in law or equity that is -- causes or
23 results from -- any action in law or equity where you have
24 personal injury caused or resulting from a product.

13:13:27 25 So we have a very broad definition, and

1 there's no question that the allegations of personal injury
2 from consuming a drug in this case fall under the definition
3 of product action.

4 So you have a statutory claim that's being
13:13:42 5 asserted and it's governed by statute, not the common law.

6 *Levine*, thus, has no effect on *Garcia*.

7 The other argument made is essentially that
8 the Second Circuit, which had also interpreted the Michigan
9 statute, the *Desiano* case, is right and the Sixth Circuit is
13:14:02 10 wrong.

11 Well, we have two reasons that that doesn't
12 apply. The first is that the Sixth Circuit, since *Levine*
13 issued, eight months after *Levine* issued, issued its
14 decision in the *Fragomeli* case where it again reiterated
15 that in the Sixth Circuit the binding governing law is that
16 set forth in the *Garcia* case.

17 *Desiano* came to a different conclusion. Two
18 different circuits can interpret federal laws and federal
19 preemption concepts and *Buckman* differently.

13:14:37 20 This case is governed by Michigan law and
21 Sixth Circuit authority, and in this case Johnson & Johnson
22 is entitled to judgment as a matter of law.

23 THE COURT: Would you refresh my recollection?

24 Did the *Buckman* -- did the *Buckman* case happen
13:14:54 25 to arise out of the diet drug MDL? I don't recall what the

1 product was.

2 MS. KEYSE-WALKER: My recollection, it was a
3 medical device case in *Buckman*.

4 THE COURT: And --

13:15:09 5 MS. KEYSE-WALKER: And --

6 THE COURT: Yeah, and the medical device was
7 before the Supreme Court as well the year before *Wyeth*.

8 MS. KEYSE-WALKER: In *Lohr*, yes.

9 THE COURT: Right.

13:15:22 10 MS. KEYSE-WALKER: And that's where the
11 Supreme Court made the distinction saying that fraud on the
12 FDA claims -- or claims that require proof of fraud on the
13 FDA are preempted because they are not a traditional area of
14 regulation by the states.

13:15:38 15 That, instead, is trying -- the state is
16 trying to regulate the FDA.

17 THE COURT: I ask the question about the
18 product involved only because as I recall the diet drug, the
19 diet drug litigation, a part of the assertion was fraud on
13:16:02 20 the FDA which at least this Court held was preempted, as
21 you've just articulated.

22 MS. KEYSE-WALKER: You're absolutely right,
23 Your Honor.

24 The name of the case, one of the Medtronic
13:16:21 25 cases, the Sixth Circuit held before *Buckman* issued that

1 there's no implied cause of action under the FDA for a
2 violation of the FDCA, so actually the Sixth Circuit
3 predicted *Buckman* in a sense and just analogized it to
4 trying to bring an action for violations of the FDA.

13:16:45 5 And that's exactly what this case --

6 THE COURT: Then they found there was no
7 private right of action under those circumstances.

8 MS. KEYSE-WALKER: That's it. That's it.

9 THE COURT: Thank you.

13:16:53 10 MS. KEYSE-WALKER: Thank you.

11 THE COURT: Mr. Hood.

12 MR. HOOD: Thank you, Your Honor.

13 My name's Chris Hood. I'm here representing
14 the plaintiffs in the three cases you're hearing.

13:17:12 15 *Riegel*, I believe, is the Supreme Court case
16 involving medical devices that preceded by a year the *Levine*
17 decision, the *Wyeth versus Levine* where the Supreme Court
18 upheld the express Congressional preemption language, the
19 language Congress chose to insert into the MDA Device Act
13:17:33 20 preempting state law causes of action, and that's *Riegel*.

21 *Buckman* involved bone screws which are also
22 medical devices, and the lower Courts in *Buckman* found them
23 preempted under the MDA due to the express text and also
24 because the claim in *Buckman* was entirely derivative of the
13:17:55 25 FDA's own regulatory requirements that there was -- in plain

1 language you don't get a cause of action in state law, that
2 you cannot derive a state law cause of action from a
3 regulation promulgated by the FDA.

4 In the case of *Buckman*, the FDA required the
13:18:15 5 bone screw maker to state the purpose to which the bone
6 screws were going to be used.

7 The consultant employed by the manufacturer
8 told the FDA, on submission, that it would be used for
9 orthopedic -- nonspinal orthopedic surgeries when, in fact,
13:18:31 10 the design all along, the business design all along was to
11 use them for spinal surgeries. And they had been
12 unsuccessful in getting them approved for that, so they
13 changed their tune, restated their purpose fraudulently, but
14 the whole reason they stated a purpose at all was that the
13:18:53 15 FDA had required them to do so under their regulations.

16 So the Supreme Court in *Buckman* said you
17 cannot derive a State Court cause of action from a
18 misrepresentation in fulfilling an FDA regulation.

19 That's all *Buckman* is.

13:19:06 20 It's quite a bit distant from this case. It's
21 quite a bit distant from *Levine*. And I'm afraid the *Garcia*
22 Court in the Sixth Circuit Court took *Buckman* and extended
23 it in a way that it's now untenable in light of *Levine*
24 because *Levine* says you can't preempt state law causes of
13:19:27 25 action unless Congress has made its intent express in the

1 text of the statute.

2 *Garcia* invalidated the Michigan statute based
3 on *Buckman*, and it's an elaboration of *Buckman* or an
4 extension of *Buckman*, rather, that's not going to hold up
13:19:49 5 under *Levine*.

6 The Sixth Circuit said that the plaintiff in
7 *Garcia* alleged she wanted to take advantage of the exception
8 but hadn't alleged a federal finding of fraud, so they
9 invalidated her claims and the Michigan exception language
13:20:06 10 as applied in her case under the supremacy clause. *Garcia*
11 is a federal constitutional decision, it's not a Michigan
12 state law decision, it's a preemption decision, it's a
13 decision by a Federal Court invalidating a state law under
14 the federal supremacy, federal constitution supremacy
13:20:26 15 clause.

16 And then as a judicial revision of that same
17 statute, it says in other cases a plaintiff could avail
18 himself or herself of that exception if they allege a
19 federal finding of fraud.

13:20:39 20 There's no language in the Michigan statute
21 that says the FDA has to find that the manufacturer
22 misrepresented the information submitted to get drug
23 approval. So *Garcia* is almost a whole clause decision.
24 It's not in the -- it doesn't utilize text in the Michigan
13:20:59 25 statute.

1 And it invalidated, as applied to the *Garcia*
2 plaintiff, it invalidated her claims -- invalidated the
3 exception, I'm sorry, in her case, but then made a rule that
4 you could go, in future cases you could use the exception
13:21:14 5 but you could only do so if the FDA has rendered its own
6 finding of fraud.

7 That's not going to stand up, I don't think,
8 whether it's this case or somebody is going to invalidate
9 *Garcia*.

13:21:26 10 This Court can do so because under Sixth
11 Circuit authority, if a subsequent U.S. Supreme Court
12 decision comes along implicating a Sixth Circuit decision,
13 in this case *Garcia* followed by *Levine*, you can follow
14 *Levine* and not follow *Garcia*. That's the Sixth Circuit's
13:21:46 15 own rule.

16 They have a prior precedent or prior panel
17 rule like most Federal Circuits where a three-Judge panel
18 can't invalidate a prior panel decision, but the Sixth
19 Circuit also says naturally, as you would think you would
13:22:02 20 agree, if a Supreme Court decision comes along and changes
21 the terrain, changes the rule, reshapes precedent, then the
22 Court, a three-Judge panel of the Sixth Circuit doesn't have
23 to follow the prior precedent.

24 *Solomon* is the Sixth Circuit case that states
13:22:20 25 that, among others.

1 And I believe --

2 THE COURT: So your -- your position is that
3 the District Court has the first opportunity to distinguish,
4 for instance, this case from the coverage of *Garcia* under
13:22:48 5 the thesis that *Wyeth* changed the scope of the inquiry?

6 MR. HOOD: Correct.

7 THE COURT: Thank you.

8 MR. HOOD: You know, I say *Levine*. I'm
9 talking about *Wyeth*.

13:23:03 10 THE COURT: Correct.

11 MR. HOOD: Okay.

12 THE COURT: I call it *Wyeth*. You call it
13 *Levine*. It's the same case.

14 MR. HOOD: There's so many *Wyeth* decisions in
13:23:13 15 the Eleventh Circuit where I practice, we have some very
16 substantial ones referred to as *Wyeth*.

17 Another main point I'd like to make is that --
18 well, now it slips my mind.

19 THE COURT: Come back to it.

13:23:36 20 MR. HOOD: Yeah.

21 I think that's it. We don't have much risk on
22 the Minnesota counts. They didn't offer any argument on
23 their papers on the Minnesota counts. They say in their
24 pleading we don't have standing to invoke Minnesota
13:23:57 25 statutory prescriptions -- proscriptions. They may be right

1 about that.

2 I do know in their pleadings, their answers in
3 this case, which is what they need to cite to if they're
4 going to try to prevail as a matter of law, they don't
13:24:11 5 invoke the Michigan statute in their answers to the three
6 complaints at issue: Bower, Shannon and Borycz. It's not
7 there.

8 What they do plead is an affirmative defense
9 of preemption, federal preemption. *Garcia* is a preemption
13:24:30 10 case and decision.

11 So let's make sure we understand what we're
12 talking about. They're not invoking the Michigan statute in
13 their pleading. *Garcia* wasn't a case decided on the
14 Michigan statute. It was decided under the federal
13:24:41 15 preemption doctrine.

16 So this is federal constitutional law, not
17 Michigan statutory law, that is primarily involved here.

18 THE COURT: Well, isn't preemption in and of
19 itself a constitutional issue of the priority of, in those
13:24:59 20 instances, of federal law over state law?

21 It derives its origins from the preemption
22 clause or clauses of the constitution, am I correct?

23 MR. HOOD: Sure, it does. Supremacy clause,
24 yes, Your Honor, absolutely.

13:25:20 25 But I think I want to make sure we understand,

1 we're not talking about a Michigan statute that says your
2 plaintiff can't go forward without a federal finding.

3 Michigan statute doesn't say anything about a
4 federal finding of fraud. It just says she can go forward
13:25:34 5 and benefit from the exception in the statute if she adduces
6 evidence in a State Court in Michigan that the manufacturer
7 didn't tell the truth.

8 That's what that statute is about. It's not
9 about a decision in a Federal Court in Ohio. We're here
13:25:53 10 because of the MDL and the transfer and the diversity
11 jurisdiction that originated prior to the transfer.

12 The Michigan statute says the plaintiff can go
13 forward with her lawsuit and benefit from the exception if
14 she shows that they didn't disclose what they were supposed
13:26:10 15 to disclose. We allege that. They don't deny our
16 allegations because there's no record yet for them to do
17 that. There's been no -- discovery hadn't concluded yet.

18 So that's what this Michigan statute says.

19 *Garcia*, the Sixth Circuit says, "Oh, no.
13:26:24 20 We're going to rewrite that statute going forward and say
21 that plaintiff can't go forward unless they allege the FDA
22 has found that the manufacturer defrauded the FDA."

23 That's a different statute. That's a made-up,
24 that's a judicial revision, a whole clause change really to
13:26:44 25 the Michigan statute. I want to make sure we understand

1 that.

2 And the point that I had forgotten and need to
3 point out, in *Levine* the Supreme Court said parallel
4 functions, state law and federal law, are fine, are
13:27:00 5 compatible. In fact, the Congress envisioned that the FDA's
6 resources are limited.

7 So to have a State Court and a jury in a State
8 Court sit in deliberation of evidence that a manufacturer
9 didn't provide -- was not truthful to the FDA, does not
13:27:20 10 usurp the FDA's function.

11 It's not a *Buckman* case. *Buckman* was decided
12 because the plaintiffs' lawyers in that case created a new
13 cause of action that had hitherto never before existed and
14 had not existed until the action about these bone screws.

13:27:42 15 That's almost a night and day difference
16 between a plaintiff in Michigan who sues for failure to warn
17 like we do, or negligence like we do, a breach of a common
18 law duty and has to make a complaint in her lawsuit such
19 that she survives the narrowing of the common law that the
13:28:04 20 legislature did when it said "We will give immunity to these
21 manufacturers, except when that plaintiff can show that the
22 manufacturer was not truthful."

23 And that's all we're saying we can do here,
24 and when we get discovery we can do that.

13:28:19 25 Now, if *Garcia* is still good law, then the

1 defendants are correct.

2 I'm saying *Garcia* does not survive scrutiny
3 under *Levine* and, like I say, it will happen somewhere. If
4 not here, then somewhere.

13:28:37 5 Thank you.

6 THE COURT: Thank you, Mr. Hood.

7 MS. KEYSE-WALKER: Really briefly, Your Honor,
8 I think we have narrowed the issue down considerably.

9 One, we know that plaintiffs disagree with the
13:28:48 10 Sixth Circuit decision in *Garcia*. And, two, we focused it
11 on the exception is what they rely on to avoid summary
12 judgment.

13 *Garcia* was written by Judge Kennedy, concurred
14 in by Judges Cook and Sutton. Now, I know those three
13:29:04 15 Judges know a heck of a lot more than I do on any of these
16 federalism issues, and *Garcia* is well-reasoned. They
17 understood *Buckman*. They looked at this exception under the
18 Michigan statute and they said, okay, the Michigan statute
19 says if there's proof that the defendant withheld or
13:29:25 20 misrepresented information to the FDA such that the FDA
21 would have denied approval or withdrawn approval had they
22 known this information, then your case can go forward.

23 So all of the proof has to be representations
24 made to the FDA and what FDA would have done or would not
13:29:46 25 have done.

1 Now, pragmatically, how do you do that? How
2 do you establish what FDA would have done or wouldn't have
3 done? There are two ways. One, you can have a state jury,
4 one here in this case here, in this case here, in this case,
13:30:02 5 come up and say, "Well, yeah, we think they withheld
6 information. The FDA wouldn't have done it." Or you can
7 say the FDA decides whether or not information was withheld
8 that would have prevented approval or caused withdrawal.

9 And that's all that *Buckman* says and that
13:30:21 10 *Garcia* says interpreting *Buckman*.

11 As a practical matter, a federal decision of
12 how a federal agency acting to carry out congressional
13 intent in a federal statute cannot be proved by state
14 jurors. That is a purely federal function.

13:30:39 15 And that is why *Buckman* says there's no
16 presumption, there's no presumption regarding state statutes
17 that seek to prove violations against a federal agency
18 because that's not a traditional task of State Courts and
19 states.

13:30:58 20 States don't go around regulating federal
21 agencies.

22 THE COURT: Pardon me for interrupting again.

23 It seems to me that what you are saying,
24 contrary to Mr. Hood who pleads for the right to present
13:31:17 25 evidence gleaned through discovery that it would have been

1 fraud on the FDA, with no known fraud so delineated, your
2 position is that such evidence has been in the possession of
3 the FDA for over a decade -- I'm just giving you my
4 experience -- since 2006 in this case, and that no finding
13:32:08 5 of fraud on the FDA has been made and, therefore, he cannot
6 prove that there was information which, if it had been
7 disclosed, would have created a decision by the FDA that it
8 had been defrauded by J & J.

9 That's pretty wordy, but isn't that where you
13:32:27 10 are?

11 MS. KEYSE-WALKER: I think that's a fair
12 reading of *Garcia*, Your Honor.

13 And I would say it's not my argument as much
14 as it's the Sixth Circuit's argument and the position that
13:32:38 15 they have taken.

16 It's really more a matter of process and
17 separation of power than saying who gets to say what impact
18 that information has on FDA, that FDA has had for the last
19 ten years.

13:32:51 20 Do you go through a citizens' petition process
21 under federal law where you can challenge a drug approval
22 and go right to FDA and say "You should withdraw approval,"
23 or do you go to State Courts and say "Under state law I
24 should be able to prove what FDA did"?

13:33:08 25 THE COURT: Well, that was the *Dragone* case,

1 and in that case we said that they did not have the right in
2 that case to prove fraud on the FDA. There were other
3 things involved.

4 It would seem from your position then that the
13:33:31 5 FDA is the agency which, if it investigated, had made the
6 decision that a fraud was committed on the FDA under their
7 standards.

8 Okay. I understand your position.

9 MS. KEYSE-WALKER: And really that's all I
13:33:56 10 have to say, Your Honor.

11 I mean, I understand that a three-Judge panel
12 in the Sixth Circuit cannot overrule a three-Judge panel
13 unless -- but we're not in the Sixth Circuit. *Fragomeli*
14 said *Garcia* is binding precedent, it was decided after *Wyeth*
13:34:12 15 *versus Levine*.

16 We believe this is pretty much an open and
17 shut case.

18 Thank you.

19 THE COURT: Thank you very much.

13:34:18 20 I want to get one thing final that I knew I
21 had some notes on and I just found.

22 It would appear that the defendants' position
23 with respect to the bar under Michigan law is irrespective
24 of Counts 6, 7 and 8 and the asserted by defendant
13:37:15 25 interaction with Minnesota statute, and that plaintiffs'

1 position is that those counts are segregated and separate
2 from application of Michigan law.

3 But the defendants' position is that because
4 of being a resident of Michigan, it is the Michigan law
13:37:44 5 which applies and the Minnesota law cannot apply.

6 MS. KEYSE-WALKER: (Nods affirmatively).

7 THE COURT: Which is the position as to which
8 Mr. Hood takes exception.

9 Have I stated it correctly?

13:38:02 10 MR. HOOD: If I may, Your Honor.

11 The papers are not extensive for either side,
12 and the defendants said that because we agree, and we do,
13 that we're a Michigan resident taking a drug from a Michigan
14 doctor, ingesting it in Michigan and being hurt in Michigan,
13:38:26 15 that Michigan law is the be-all, end-all, it's the four
16 corners, paints the four corners of the lawsuit; there's no
17 Minnesota statute.

18 Our response was, well, if you're going to
19 imply there's no other counts in the case, because they
13:38:43 20 didn't address the Minnesota statutes in their papers --

21 THE COURT: No, they look at the totality.

22 MR. HOOD: Yeah. And they are excluding by
23 saying what is, therefore there isn't Minnesota injuries
24 here, remedy under Minnesota statute, and I said we need an
13:38:59 25 argument.

1 I've seen class actions where people plead in
2 consumer laws that are state statutes providing remedy for
3 consumer fraud and deceptions and things like that, and
4 there are some arguments.

13:39:11 5 I'm just saying that our interest at this
6 point is contesting the status of *Garcia* and whether it's
7 dispositive because the heart of our claims are a failure to
8 warn.

9 THE COURT: I know.

13:39:27 10 MR. HOOD: We have a common law fraud, too,
11 Count 4. Our fraud is not solely invested in a Minnesota
12 statutory scheme. It's common law.

13 Thank you.

14 THE COURT: Okay.

13:39:39 15 MS. KEYSE-WALKER: And I would like to reply
16 very briefly, Your Honor, that our argument is it's not only
17 when Michigan law applies and you go to the Michigan
18 statute, you have to go to the Michigan statutory definition
19 of a product liability claim and it includes advertising,
13:39:52 20 promotion, fraud, warranty. Everything is included within
21 once you say Michigan law applies.

22 THE COURT: All right. I'll take it -- the
23 case will be -- cases will be taken under advisement.

24 And I want to thank you, Mr. Hood, although
13:40:11 25 it's probably even warmer in Birmingham.

1 MR. HOOD: At 4:00 a.m. this morning it was 82
2 and 90% humidity.

3 THE COURT: We'll take this under advisement
4 and let you know hopefully relatively quick, if I survive
5 this recent back attack.

13:40:31

6 Thank you. Okay. We're off the record.

7 (Discussion had off the record).

8 (Proceedings concluded).

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Susan Trischan

/S/ Susan Trischan, Official Court Reporter

Certified Realtime Reporter

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