

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY * 16-md-02753-LM
LITIGATION * March 7, 2019
* 4:08 p.m.
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* * * * *

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

For the Plaintiffs: Jonathan D. Orent, Esq.
Motley Rice, LLC

Susan A. Lowry, Esq.
Upton & Hatfield, LLP

Adam M. Evans, Esq.
Hollis Law Firm, PA

For the Defendant: Katherine A. Armstrong, Esq.
Dechert, LLP

John E. Friberg, Esq.
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Court Reporter: Susan M. Bateman, LCR, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
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1 P R O C E E D I N G S

2 THE COURT: Hello. This is Judge McCafferty.

3 MR. ORENT: Good afternoon, your Honor.

4 THE COURT: Let me do this before everybody
5 introduces themselves. I've got a court reporter here and I
6 am going to state the docket number and case name and then
7 have counsel -- lead counsel introduce themselves, and we'll
8 proceed from there. And nobody put your phone on hold during
9 this telephone conference. It sounds a little bit like
10 somebody might be in their car so there is some background
11 noise.

12 Okay. Now that's better.

13 All right. This is In Re: Atrium, the MDL, docket
14 number 16-md-02753-LM, and this is a matter that was brought
15 to the Court's attention by counsel seeking informal
16 resolution of a dispute regarding a deposition that I believe
17 is scheduled for tomorrow and so you need to put the issue
18 before me.

19 Go ahead, Attorney Orent.

20 Let me have counsel identify themselves for the
21 record. Go ahead.

22 MR. ORENT: Jonathan Orent for the plaintiffs, your
23 Honor.

24 MS. ARMSTRONG: Good afternoon, your Honor.

25 This is Katherine Armstrong for the defendants.

1 THE COURT: Okay. Is that it for lead counsel?

2 MR. FRIBERG: Jack Friberg, but I'm with Katherine
3 Armstrong.

4 THE COURT: Okay. All right then.

5 Attorney Orent, go ahead.

6 MR. ORENT: Your Honor, this issue arises on the
7 heels of your order earlier this week wherein you upheld in
8 part and reversed in part your --

9 THE COURT: Okay. We're having trouble. Hold on
10 one second. Let me see -- I can't get it any louder. Our
11 court reporter is having trouble hearing.

12 MR. ORENT: Let me try this, your Honor.

13 I apologize. I'm on my cellphone.

14 THE COURT: That does it.

15 MR. ORENT: Is this better?

16 THE COURT: That's much better. Go ahead.

17 MR. ORENT: Okay. So this instant issue follows on
18 the heels of the order that your Honor issued earlier this
19 week wherein your -- (sound drops off) -- that where a
20 treating physician gives two depositions that the discovery
21 deposition piece, the defendants would go first and that --

22 THE COURT: I'm having trouble hearing you so we're
23 going to have you start again, and let me just see if there's
24 a bad connection here. Hold on one second. Hold on.

25 (Off the record)

1 THE COURT: Okay. Counsel, can you hear me?

2 MS. ARMSTRONG: Your Honor, this is Katherine
3 Armstrong. I can hear you.

4 THE COURT: All right.

5 Attorney Orent, go ahead and try to speak. Let me
6 make sure I can --

7 MR. ORENT: I can hear you as well, your Honor.

8 THE COURT: Okay. This is much better. We changed
9 telephones basically. So we're on a new telephone and I can
10 hear everyone much better.

11 Okay. Attorney Orent, would you please start from
12 scratch?

13 MR. ORENT: Okay. And again, apologies, your
14 Honor.

15 This issue comes -- is follow-up to the order that
16 your Honor issued earlier in the week wherein you allowed
17 defendants to go first in discovery depositions of doctors if
18 there was going to be a discovery deposition. But where
19 there was only a videotaped deposition or where there was a
20 videotaped trial deposition, the plaintiffs would go first in
21 the video deposition.

22 There is a deposition scheduled for tomorrow
23 morning and the doctor has been a doctor that we are -- have
24 been trying to get the deposition of, and Mr. Evans is his
25 counsel in that case and he could speak to the details, but

1 we've been trying for many weeks, actually months to get this
2 doctor's deposition. The doctor has allowed us a four-hour
3 time block to do the deposition.

4 As part of a meet and confer process, the
5 plaintiffs have offered to the defendants to conduct a
6 discovery deposition prior to a video deposition but that
7 both depositions would take place during that four-hour block
8 and that each party would have two hours to divide between
9 the discovery piece and the video trial deposition as they
10 wished. So that if one party wanted to spend 45 minutes of
11 their two hours doing discovery, that 45 minutes would go
12 first, the parties would then go off the record, and then we
13 would do a videotaped deposition after the fact.

14 Defendants have opposed that position. Defendants
15 have taken the position with plaintiffs that either they are
16 entitled to more time than the plaintiffs or that only the
17 discovery depositions should go forward tomorrow.

18 Given the amount of difficulty in scheduling this
19 deposition, as well as the cost and expense of going out to
20 Tampa to conduct this deposition, we think it makes no sense
21 to have to go back, particularly when we don't have a willing
22 doctor to come back necessarily or at least her schedule has
23 not been such that that has been something that has been
24 easily achievable.

25 And in fact while I do have some degree of comfort

1 that we may be able to reach a global resolution of this
2 issue beyond tomorrow, at least as far as tomorrow goes I
3 think that we need the Court's guidance as to the proper
4 procedure to use.

5 And so it would be plaintiffs' position pursuant to
6 your order that the four-hour block, that the defendants
7 would get to go first for a short discovery deposition
8 utilizing as much of their two hours as they want to, and
9 that then the plaintiffs would go first on a video deposition
10 using whatever time that plaintiffs wanted to, and that
11 defendants could cross then with the balance of their time.

12 In short, that, your Honor, is plaintiffs' position
13 and the issue that we need the Court's guidance on given the
14 pendency of the deposition tomorrow.

15 THE COURT: Okay. All right.

16 Attorney Armstrong, go ahead.

17 MS. ARMSTRONG: Your Honor, let me echo Mr. Orent's
18 comment that the defendants are willing to continue to work
19 with plaintiff to try to reach a process for these
20 depositions on a global basis, but we need guidance for
21 tomorrow because we haven't gotten to that point yet.

22 This was a deposition that was noticed by
23 defendants on February 22nd. And it's our intent to take
24 discovery depositions. As we've, you know, previously noted
25 to the Court, we don't have an opportunity to talk to the

1 doctors in advance of their deposition. It's our first time
2 to communicate with them about the plaintiff's case, and so
3 for us these truly are discovery depositions and we believe
4 that we should be able to take a discovery deposition before
5 there is a trial deposition.

6 There's a couple of problems with the idea of
7 trying to do it all at one time as Mr. Orent is proposing.
8 The first is he knows there's a four-hour time limit on this
9 deposition. It's not starting until 1 o'clock tomorrow.
10 Trying to go do both a discovery deposition and a trial
11 deposition in the same sitting just time-wise is difficult.

12 And the other problem is that it's just hard. I
13 mean, we would like an opportunity to take a discovery
14 deposition by just the information that we get in a discovery
15 deposition and just like we would for trial, you know, tailor
16 our cross-examination based upon the information that we've
17 gotten in the discovery deposition. And it's hard to do that
18 when, you know, you're only taking a five minute break
19 between the discovery deposition and the trial deposition.

20 One of the things that we would propose -- I know
21 that there's a short time frame to get all the depositions
22 completed, and while you normally like to have all
23 depositions taken before a discovery cutoff so that people
24 don't use trial preservation depositions as an end run around
25 discovery cutoff, we would be willing to work with them on

1 timing.

2 I mean, it's possible that this case is not
3 selected as a trial pool and we could take a discovery
4 deposition tomorrow that's not videotaped. And then if the
5 case was selected as a trial pool, reach agreement on the
6 timing of, you know, when a trial deposition would have to be
7 conducted by. But if it's not selected and it doesn't go to
8 trial for, you know, not this year and we don't know when
9 it's going to go to trial, we could work on the timing of
10 that issue.

11 THE COURT: Okay. As I listen to you both, I find
12 both of you to be very reasonable in what your concerns are
13 and what you're proposing.

14 What troubles me I think and makes this unique is
15 that it's tomorrow, and it looks like it's unique also in
16 that it's only four hours. And it looks as though this is
17 something that counsel had pre-agreed to or at least
18 preplanned somewhat. So I feel somewhat limited and
19 constrained in terms of tomorrow's deposition.

20 I think if forced to give you direction, I would
21 say go forth with plaintiffs' proposal because that is what
22 essentially it sounds like you had agreed to ahead of time,
23 or am I wrong on that?

24 MS. ARMSTRONG: We had not agreed to that ahead of
25 time. It was originally noticed as a videotaped deposition

1 just because we've been videotaping all depositions,
2 including discovery depositions, in this litigation.

3 When we got the Court's order, we amended our
4 deposition because we understand in doctor's depositions we
5 can't take a discovery deposition that's videotaped. So we
6 amended it to delete the video, and we received a cross
7 notice from plaintiffs which wanted to keep the videotaped
8 part of it. So that's how the dispute arose. I think we --

9 THE COURT: Excuse me. How would you go forth if
10 you kept the videotaped deposition designation for tomorrow's
11 deposition? Would it be -- would it be a four-hour
12 videotaped deposition if you hadn't amended it and changed it
13 to discovery only?

14 MS. ARMSTRONG: If we hadn't amended it, it would
15 have been a four-hour videotaped deposition, yes.

16 THE COURT: Okay. All right.

17 MR. ORENT: Your Honor, if I might --

18 THE COURT: No, no. Just a second. I just want to
19 make sure I'm understanding before you guys come at me with
20 something new.

21 So this was agreed to by counsel and described as a
22 videotape deposition. The understanding was the doctors
23 were only going to be -- the doctor was only going to be
24 available for four hours, and so the understanding then was
25 it was going to be videotaped for the whole four hours.

1 Then defense counsel indicated in light of my
2 recent order that defense counsel was going to designate this
3 as a deposition, a discovery deposition instead, and it
4 sounds to me as though plaintiff has then made a compromise
5 proposal to resolve the situation at least for tomorrow.

6 So if I were simply going to order what was
7 pre-agreed to, go forth tomorrow, what would happen is you
8 would have a videotaped deposition that would last four
9 hours. So plaintiffs' counsel would go first. You would
10 cross. Then plaintiff would redirect.

11 So plaintiff has offered to split it up such that
12 you get -- which I do not think is ideal, but it looks like
13 that's the situation you're faced with. Plaintiff is
14 offering, okay, well, then do a discovery deposition for the
15 first two hours, and then we'll do the videotape deposition
16 for the remaining two hours.

17 That seems like a reasonable counteroffer in light
18 of the fact that this was noticed up originally as a
19 videotaped deposition.

20 MS. ARMSTRONG: Your Honor.

21 THE COURT: Go ahead.

22 MS. ARMSTRONG: One thing I would note is that when
23 we noticed it, we didn't have an appreciation that your Honor
24 was going to treat videotaped depositions -- I mean, these
25 days pretty much all depositions are videotaped. Even

1 discovery depositions.

2 From our perspective -- this is a discovery
3 deposition and we're fine not videotaping it under your court
4 order, but from our perspective it's a discovery deposition
5 because this is our first time speaking with the doctor. And
6 so when we got the Court's order, we amended our deposition.
7 And until we got the cross notice we were the only ones that
8 ever noticed the deposition. We amended the deposition to
9 delete the videotape so it would be consistent with the
10 Court's order. But from our perspective, you know, what
11 makes this a discovery deposition is the fact that we never
12 talked to this doctor before, and that's still going to be
13 true tomorrow.

14 THE COURT: Right. Well --

15 MR. ORENT: Your Honor.

16 THE COURT: Go ahead.

17 MR. ORENT: Your Honor, this from the onset --
18 defendants are now talking as though there is a right out
19 there to conduct this deposition more than --

20 THE COURT: You're a little bit muted. Can you
21 talk more into your microphone?

22 MR. ORENT: I apologize, your Honor. I'm on a
23 cellphone. It's a little bit tricky.

24 What I was saying is that the defendants are now
25 using your order to create a right to conduct a second

1 deposition. We are already going to be jointly asking the
2 Court for a 90-day extension jointly of all of the dates for
3 the upcoming trials and the bellwethers. The primary reason
4 for that is because we've had difficulty nailing these
5 doctors down for deposition. This is something that your
6 Honor has heard time and time again over the last several
7 weeks, even several months, at the case management
8 conferences.

9 And what's happening now is that after we've --
10 we've actually gone ahead and we've gotten dates, and what
11 has happened is that by and large the plaintiffs have given
12 doctor dates to the defendants and the defendants by
13 agreement have been the ones that have noticed them. Now
14 defendants are withdrawing the notice that everybody
15 originally thought was going to be a deposition, a videotape,
16 and that would be it. That would be both side's one
17 opportunity --

18 THE COURT: I'm sorry. I'm missing some of your
19 words. Perhaps it's because you're speaking quickly and your
20 cellphone has not got a great microphone or speaker.

21 Could you just say that again?

22 MR. ORENT: Sure.

23 So the expectation was that these individuals would
24 be deposed only one time. There was never an expectation
25 that we would have a second bite at the apple by either

1 party. The idea has always been -- and Mr. Cheffo when he
2 first reached the issue of who goes first --

3 THE COURT: Slow down. Slow down. I'm losing your
4 words. When you're slow, I can hear you.

5 MR. ORENT: Okay. The issue when Mr. Cheffo first
6 raised this was who goes first in the deposition. And the
7 first time that we heard this notion of doing second rounds
8 of depositions of these doctors was in defendant's papers
9 last week.

10 The notion that there is now two different
11 depositions that should occur is very new to everybody here,
12 and we had preexisting deposition notices and we've been
13 working for literally months to schedule these depositions.
14 And what happened here is on the eve of the deposition the
15 defendants withdrew the notice that all of the parties were
16 traveling under and decided that they wanted to unilaterally
17 now make this a quote-unquote discovery deposition instead of
18 the only deposition that would occur of this doctor in the
19 case.

20 And so the rules are -- the defendants are seeking
21 to change fundamentally the rules that we've already been
22 operating under for the last six months. And I think what
23 the plaintiffs have offered is a more than fair way to deal
24 with this issue, which is the defendants proclaim that they
25 are concerned about the ex parte communications and they

1 don't know what the doctors are going to say. So if we give
2 the defendants half of the time of the total deposition and
3 they can allocate it between discovery deposition and
4 videotape, that meets their needs.

5 But to create the cost, the time, the scheduling,
6 and the logistical difficulty makes absolutely no sense for
7 us when we are so far down the line already on this issue and
8 that we've already been pursuing the doctors with a single
9 deposition. This would fundamentally change the way that
10 we've been doing things by agreement up till now, and we
11 don't think that's fair, nor do we think it's appropriate in
12 light of the mandate to move litigation along quickly and
13 cheaply. It just makes no sense to send lawyers back to
14 Tampa for the same deposition flying -- a whole new set of
15 airfare and court reporters and all the logistical things
16 that need to occur when we can do it all on one space, and
17 that's what everyone had always intended this to be.

18 THE COURT: All right.

19 MS. ARMSTRONG: Your Honor.

20 THE COURT: Go ahead.

21 MS. ARMSTRONG: I don't disagree that in the normal
22 course of discovery and in trial preparation defendants are
23 deposed only once. In fact, the federal rules, you know, say
24 you can only depose a witness once without leave of court,
25 but I think there is a -- you know, we've got a little bit of

1 a distinct difference here because of the unique situation
2 that the doctors are in.

3 And to me fundamentally depositions are a discovery
4 tool. That's what they're used for. A deposition to
5 perpetuate testimony is something completely different but --
6 and so the discovery rule. Now, the rules permit us if, you
7 know, you can satisfy a hearsay exception, say the witness is
8 unavailable or it's a party, that type of thing, there are
9 certain circumstances in which we can use deposition
10 testimony even if it's taken for discovery at trial, and
11 that's why parties videotape depositions, even discovery
12 depositions these days, but it's fundamentally a discovery
13 tool.

14 So that's what we view these depositions as.
15 Whether there needs to be a second deposition or not, that
16 depends on the parties' choice, and the Court has -- you
17 know, the Court indicated that, you know, in a trial
18 deposition the plaintiffs would go first and made the
19 distinction of videotaping and not videotaping between
20 discovery and trial depositions, and we accept that.

21 But fundamentally, you know, it doesn't solve the
22 prejudice to us of not being able to conduct a discovery
23 deposition before having to do a trial deposition of somebody
24 when the plaintiffs -- they get to take our witnesses and,
25 you know, usually -- doctors should be neutral. I mean, they

1 may, you know, have relationships with their patients that
2 make them a little less than neutral, but fundamentally they
3 should be neutral witnesses.

4 When we take the plaintiffs' depositions, you know,
5 obviously counsel can talk with their client as much as they
6 want, but we get to go first in the deposition.

7 When they take our witnesses, the company
8 witnesses, we get to talk to them as much as we want, but the
9 plaintiffs get to go first in the deposition.

10 Here the plaintiffs are seeking the opportunity to
11 talk to the doctors as much as they want prior to deposition
12 and to go first in the deposition by characterizing these as
13 trial preservation depositions when in fact they should be a
14 discovery tool.

15 Now, we think it should be a discovery tool, and if
16 that means we can't videotape, that's fine, but if they want
17 to do a preservation deposition afterwards -- and again,
18 they may not need to do that in every case if the case
19 doesn't go to trial -- that's a decision they can make after
20 the discovery deposition is taken, but it seems -- it's hard
21 to do it in any one sitting.

22 THE COURT: I completely agree with what you're
23 saying. What you're saying is reasonable, and I think what
24 you're saying is consistent with what would happen in the
25 normal case.

1 Here -- and I'm just not clear on the timing, but I
2 think that Attorney Orent is suggesting that a deposition
3 schedule was drawn up and agreed to and maybe even by prior
4 defense counsel, I don't know that, but that there is an
5 agreement as to the order and scheduling of these depositions
6 and there's been an agreement to videotape the depositions.
7 When I hear videotaped depositions, I certainly think that
8 you're going to be using the videotape for trial. So I think
9 of those as trial depositions.

10 But to use an order that I wrote on a very minute
11 question which dealt with the order of questioning of
12 treating physicians at a deposition, it did not deal with
13 whether we designate it as a videotaped deposition, as a
14 discovery deposition. You didn't really ask me to help you
15 with that dispute or that question, and it sounds as though
16 there has been an agreement reached as to how these
17 depositions are designated and how you even went about
18 deciding who would notice up what depositions.

19 And to the extent there has been agreement reached
20 with respect to how these are designated, it seems to me that
21 there really is no basis to change those arrangements and
22 those agreements. Especially with regard to tomorrow.

23 So what I would say, having heard this issue, is
24 that I think that Attorney Orent's resolution is a reasonable
25 one. And I would say with respect to tomorrow that is what I

1 order, that you essentially do as Attorney Orent has
2 proposed. In fact, I think he could argue that originally it
3 was basically a four-hour trial deposition at least as the
4 parties had designated these depositions. So with respect to
5 tomorrow, that seems to me to be a fair resolution of this.

6 With respect to the future, I think this is an
7 issue that experienced and highly professional counsel such
8 as yourselves can reach an agreement on because I think both
9 of you make very reasonable arguments and points.

10 Without understanding and knowing exactly how it
11 was you came to this agreement with respect to how you
12 designate each deposition and who noticed up what doctors, I
13 don't know the history of that. I don't know the details of
14 that. But I do know that parties did reach an agreement and
15 that that probably took some time, and it sounds as though
16 it's been somewhat challenging to schedule these doctors for
17 depositions.

18 Let me also just ask a question. So you've got a
19 doctor in Tampa for one of these cases and it's a treating
20 physician, and the treating physician is saying I am only
21 going to do four hours and I can only start at 1:00 p.m., let
22 me ask you -- and this is just for the future hypothetically
23 because tomorrow I think you do what Attorney Orent has
24 proposed. But in the future when a doctor sets such extreme
25 time limits and is difficult to schedule, why couldn't you

1 both just agree, all right, this is a critical witness, this
2 is a bellwether trial, we are going to do a discovery
3 deposition and then we're going to subpoena? You can file
4 for a subpoena within a hundred miles of where the doctor
5 works in Florida and subpoena the doctor to a videotaped
6 deposition after. Tell me why that is not feasible.

7 Again, I know there is a general rule in our case
8 management order that no witness be deposed on the same
9 subject more than once, but ultimately with treating
10 physicians if you're running into difficulty and counsel
11 agree, the Court is certainly going to allow you an exception
12 to that rule.

13 So let me ask that just hypothetically for future
14 cases.

15 MS. ARMSTRONG: So, your Honor, speaking for the
16 defendants, I think that that's an option that we would be
17 willing to discuss with the plaintiff, but I think -- and I
18 don't want to speak for the plaintiff. I think the goal of
19 both parties is to share -- to participate in the deposition
20 of the doctors voluntarily without a compulsory subpoena, but
21 if it comes to that -- I mean, Mr. Orent and I have had
22 discussions about, you know, recalcitrant doctors who aren't
23 even giving us time for discovery depositions and whether it
24 might be necessary to subpoena them. It's kind of a last
25 resort for us, but it's certainly a possibility. And what

1 your Honor is proposing is one of the options that I think we
2 would like to discuss with counsel for the future
3 depositions.

4 THE COURT: Well, I would be open to an
5 arrangement, if counsel both agree to an amendment to the
6 case management order on depositions, to allow that to
7 happen. Especially where you know this treating physician is
8 -- there's going to be a trial. And in that case if it
9 really is going to be a doctor who is going to testify but
10 the doctor is outside the subpoena power of this Court, it
11 seems to me that Attorney Armstrong makes a very good
12 argument that defense counsel is entitled to know what this
13 witness is going to say ahead of time and what's even better
14 would be to have a transcript of that discovery deposition
15 that she can then use to cross-examine during the videotaped
16 deposition.

17 I think that both of you are reasonable here. I
18 think that with respect to tomorrow I am not going to
19 radically change things. I think that Attorney Orent's last
20 minute sort of counterproposal makes sense to me as a way to
21 resolve this on a short-term basis due to this unique
22 circumstance, so that's how I'm going to direct you at this
23 point.

24 And then, further, I hope that counsel can sit down
25 and try to reach some agreement with respect to the remainder

1 of these because obviously, you know, I would expect that
2 counsel can agree on this at a meet and confer. All right?

3 MR. ORENT: Your Honor, if I could just add that
4 Ms. Armstrong and I had been discussing the reason that we
5 did limit today's argument for tomorrow is largely because of
6 the fact that individuals would be already traveling and so
7 things had already logistically moved beyond, but I do have
8 full confidence and I think, speaking for her, maybe speaking
9 for Ms. Armstrong, as well, we both left the conversation
10 this morning with her with a sense of optimism.

11 So I don't doubt that we will reach a fundamental
12 agreement. We did need some clarification today as to the
13 immediate issue, and so thank you, your Honor, for that.

14 THE COURT: All right. Thank you, counsel. Good
15 luck in your travels tomorrow.

16 MS. ARMSTRONG: Thank you, your Honor.

17 MR. ORENT: Thank you.


18 (Conclusion of hearing at 4:40 p.m.)
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C E R T I F I C A T E

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I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3-13-19


SUSAN M. BATEMAN, LCR, RPR, CRR
LICENSED COURT REPORTER, NO. 34
STATE OF NEW HAMPSHIRE