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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

KATHERINE O'HAVER	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 1816-CV30710
	)	
3M COMPANY	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF HER MOTION FOR NEW TRIAL

Plaintiff filed her Motion for New Trial on November 16, 2022, along with supporting Suggestions. Defendant, 3M Company ("3M"), filed its Opposition thereto on December 16, 2022. Plaintiff is entitled to a new trial because the Court abused its discretion by unduly limiting Plaintiff's cross-examination of several witnesses, including Dr. Borak (3M's general causation expert), Dr. Mont (3M's specific causation expert), and Dr. Abraham (3M's CFD expert), and for the additional reasons set forth in Plaintiff's Motion for New Trial.

INTRODUCTION

Much of Plaintiff's Motion for New Trial involves issues of cross-examination. Because the standard for the admissibility of expert testimony "is one of inclusion rather than exclusion,"[1] it is essential that opposing witnesses—and especially opposing expert witnesses—are subject to "vigorous cross-examination" and "presentation of contrary evidence." *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317-18 (Mo. App. 2018) quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Thus, while the Court is given discretion in controlling the extent and scope of cross-examination, "parties are to be given wide latitude to test qualifications, credibility,

[1] *Polski v. Quigley*, 538 F.3d 836, 839 (8th Cir. 2008).

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skill or knowledge and value and accuracy of opinion." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 60 (Mo. 1999) quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 869 (Mo. 1993) (internal quotation and citation omitted). See also *Revis v. Bassman*, 604 S.W.3d 644, 652 (Mo. App. 2020) ("The jury is entitled to know information that *might* affect the credibility of the witness and the weight to give to his testimony.") (Emphasis in original). The mandate of *Rodriguez* is *mandatory*—"parties **are to be given** wide latitude"—not discretionary.

This trial involved complex scientific issues with many competing experts and zealous advocacy on both sides. The Court was routinely called upon to rule on objections—sometimes with limited information—and, occasionally, it had to determine which side was presenting an accurate representation of the facts and the issues. In more than one instance, 3M provided misleading information upon which the Court appeared to base its rulings. Such misrepresentations invited error which can only be remedied by granting a new trial. See *Nguyen v. Haworth*, 916 S.W.2d 887, 889 (Mo. App. 1996) (the purpose of a Motion for New Trial is to allow the trial court an opportunity to reflect its actions and, if error is found in this reflection, the proper remedy is to grant a new trial.)

3M has conceded at least two of the errors identified in Plaintiff's Motion for New Trial which are sufficient to require the Court to grant a new trial. For example:

- 3M conceded that Missouri law permits an expert witness to be cross-examined with materials the expert did not review. 3M Sugg. Opp. at 38 ("a party may show an expert witness material the expert did not review in an attempt to impeach the expert's opinion, as O'Haver recognizes….").
- 3M tacitly conceded that the well-settled Missouri law is that "[a]n opinion is not objectionable just because it embraces an ultimate issue." 3M Sugg. Opp. at 32-33.

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Though Plaintiff outlined a dozen grounds for granting a new trial, 3M began its Opposition with an attempt to obscure the true facts and divert from the Court's obligation under *Nguyen* to order a new trial by using the same kind of exaggerations, half-truths, and outright falsehoods it concocted at trial (note: the following tables include references to attached exhibit numbers **in bold** and corresponding trial exhibit numbers as "Tr. Ex. __"):

3M False Claim	True Fact	Evidentiary Support
"there is no valid, scientific evidence connecting the use of the Bair Hugger system to an increased risk of joint infection"[2]	"Actually, **there is evidence that FAW use increases risk**"	**Ex. 2** (Tr. Ex. 225)
	Q. The Bair Hugger has the potential of nosocomial transmission of pathogens while it's being used for intraoperative warming, true? A. Yes, that's what it does.	**Ex. 44** Dr. Borak (Tr. 1664:9-12)
	Q. There are studies that you have reviewed and relied on in this case that show that the Bair Hugger increases the number of particles over the sterile field by one thousand fold? A. I would say it's true….	**Ex. 44** Dr. Borak (Tr. 1664:16-20)
	"I didn't say the Bair Hugger was safe."	**Ex. 44** Dr. Borak (Tr. 1645:18)
	"A significant increase in deep joint infection, as demonstrated by an elevated odds ratio (3.8, p=0.024), was identified during a period when forced-air warming was used compared to a period when conductive fabric warming was used."	**Ex. 29** (Tr. Ex. 93)
	"There is amazing concern about any particulates in the air during joint replacement surgery and **almost uniform comment that FAW increases particulates** in the air."	**Ex. 25** (Tr. Ex. 1749A)
	"DO NOT use 200 Series Warming Units in the OR. Thermal injury and **airborne contamination may result**."	**Ex. 46** (Tr. Ex. 1255)

[2] 3M Sugg. Opp. at 3.

3M False Claim	True Fact	Evidentiary Support
3M was unaware of evidence connecting the Bair Hugger to an increased risk of joint infections in 1994[3]	"Dr. Augustine and others made it clear to [Al Van Duren] **when [he] started here in 1994 that some clinicians had concerns** about particulates as causes of wound infection" and as a result, Van Duren "submitted invention disclosures for … air-free alternatives to warming patients in a sterile environment" and recommended "working on our own air-free alternative to Bair Hugger."	**Ex. 4** (Tr. Ex. 1735)

3M False Claim	True Fact	Evidentiary Support
"the warnings 3M removed from the Bair Hugger system were in no way connected to the defects O'Haver claimed"[4]	"**DO NOT use 200 Series Warming Units in the OR. Thermal injury and airborne contamination may result**."	**Ex. 46** (Tr. Ex. 1255)
	Q. And looking back, knowing what you know now, we can agree that **it was a mistake if Augustine Medical removed warnings** about airborne contamination from Bair Hugger devices that were intended for use in the operating room, correct? THE WITNESS: Yes	**Ex. 39** (Tr. Ex. 4710) p. 42
	Q. And that risk of airborne contamination is something that doctors and hospitals should be warned about, correct? THE WITNESS: Yes	**Ex. 39** (Tr. Ex. 4710) p. 42
	Q. And to your knowledge, did anyone at Arizant or 3M do anything to warn users about the risks of infection and contamination that you identified regarding the Bair Hugger? THE WITNESS: I would say just the opposite. They continually doubled down on telling the market that they were completely safe and there was no problem at all.	**Ex. 39** (Tr. Ex. 4710) p. 42

[3] *Id.*
[4] *Id.*

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3M False Claim	True Fact	Evidentiary Support
"the Bair Hugger system is not 'largely ineffective' for the first hour of surgery"[5]	"Everything else being equal, prewarming is far more effective than fluid warming or intraoperative warming, **which is largely ineffective for the first intraoperative hour**."	**Ex. 5** (Tr. Ex. 1733A)
	Q. Intraoperative warming is largely ineffective for the first hour of an operation. That's a true statement correct? A. At minimizing the reduction of core temperature. Q. But that's what the Bair Hugger is meant to do, correct? A. Yes. Q. So **it's largely ineffective for what it's meant to do for the first hour**? A. It can be, **yes**.	**Ex. 47** (Tr. Ex. 2221) p. 18
	Q. If a joint replacement surgery is less than an hour, the use of the Bair Hugger is largely ineffective, correct? A. Yes.	**Ex. 47** (Tr. Ex. 2221) p. 18
	"The few drawbacks to the use of convective warming blankets include… **limited effectiveness during the first hour** of anesthesia…"	**Ex. 45** (Tr. Ex. 1759) p. 1
	"The few drawbacks to the use of convective warming blankets include… **limited effectiveness during the first hour** of anesthesia…"	**Ex. 52** (Tr. Ex. 903) p. 3

[5] *Id.*

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3M False Claim	True Fact	Evidentiary Support
"all surgical patients, obese or not, irrespective of expected length of surgery, should be warmed."[6]	A. … So for example, bariatric surgery, **they don't recommend any warming at all**. Q. Okay. Is that because it's a dirty surgery or what? A. No, **it's because obese people don't get cold in surgery**, so obesity is protected from hypothermia.	**Ex. 1** (Tr. Ex. 2223) p. 56
	Q. So if obese patients don't get cold, is there a warning or a precaution on the Bair Hugger saying you don't need to use this with obese patients? A. No. Q. Why is that? A. Well, it's not contraindicated. It's just not indicated, because **it's not necessary**.	**Ex. 1** (Tr. Ex. 2223) p. 56
	Q. But also if the patient isn't going to become cold because they are obese, **there's also no benefit to using the Bair Hugger**, fair? A. **Yes, I would agree with that**.	**Ex. 1** (Tr. Ex. 2223) p. 56
	Q. If a joint replacement surgery is less than an hour, the use of the Bair Hugger is largely ineffective, correct? A. Yes.	**Ex. 47** (Tr. Ex. 2221) p. 18

As described in detail below, 3M's continued attempt to distort the record cannot hide the fact that Plaintiff suffered substantial, undue prejudice at trial that prevented her from fairly presenting and proving her case to the jury. Plaintiff is entitled to a new trial for all of the reasons herein. *Nguyen*, 916 S.W.2d at 889.

[6] *Id.*

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ARGUMENT

I. The Court Abused Its Discretion by Improperly Limiting Plaintiff's Cross-Examination of 3M's Witnesses

A party's right to "vigorously" cross-examine an opposing expert is the fundamental basis for the United States Supreme Court's holding in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). While the Court may exercise its discretion to control the scope of cross-examination, "*it is not within the trial court's discretion to prevent it completely*," even as to discreet areas of inquiry within a broader cross-examination. *Revis v. Bassman*, 604 S.W.3d 644, 653 (Mo. App. 2020). For example, "[c]ross-examination about *any* issue, regardless of its materiality to the substantive issues at trial, is permissible if it shows the bias or interest of the witness because a witness's bias or interest could affect the reliability of the witness's testimony on *any* issue." *Id.* (Emphasis in original.)

In *Revis*, the Court of Appeals held the trial court abused its discretion in prohibiting the plaintiff from cross-examining the defense expert about his involvement in tort reform causes. *Id.* at 653-54. Clearly, in *Revis*, the trial court had permitted *some* cross-examination of the witness. *Id.* But the trial court abused its discretion in completely prohibiting cross-examination on the topic of tort reform.

In so holding, the Court examined its decision in *Koelling v. Mercy Hospitals East Communities*, 558 S.W.3d 543 (Mo. App. 2018). In *Koelling*, the trial court had—like the *Revis* trial court—permitted some cross-examination of the witness. However, the Court of Appeals reversed the trial court because it abused its discretion in precluding the plaintiff from cross-examining a defense expert on the topic of the expert's involvement in past medical malpractice lawsuits. *Revis*, 604 S.W.3d at 653. The Court "held that, while the trial court might have, within its discretion, limited the scope of [the plaintiff]'s inquiry about prior malpractice lawsuits against

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[the defense expert] to prevent juror confusion or restrict potentially cumulative evidence, ***the trial court abused its discretion by prohibiting the plaintiff from inquiring about the defense expert's litigation experience at all***." *Id.* (Emphasis added.) (Internal quotation omitted.)

Revis acknowledged that the facts of *Koelling* were dissimilar, but "its context [was] directly on point." *Id.* The Court held the trial court abused its discretion by prohibiting the plaintiff from making ***any*** inquiry about the defense expert's tort reform efforts. *Id.* at 653-54. These cases are consistent with the holding of *Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo. 1962) in which the Missouri Supreme Court held that ***"[t]he right to cross-examine a witness who has testified for the adverse party is absolute and not merely a privilege***." (Emphasis added). See also *Gurley v. St. Louis Transit Co.*, 259 S.W.895, 898 (Mo. App. 1924) (right to cross-examination is an "absolute right" that "may not be unduly restrained or interfered with by the court.")

Here, as in *Koelling* and *Revis*, Plaintiff respectfully submits the Court abused its discretion by wholly preventing Plaintiff's cross-examination of critical defense witnesses as to inquiries relevant to the witness's bias, credibility, litigation experience, and bases for their opinions. See *Pettus*, 358 S.W.2d at 44. Plaintiff is entitled to a new trial. See *Hyde v. Butsch*, 861 S.W.2d 819, 820-21 (Mo. App. 1993) (trial court granted new trial after limiting Plaintiff's cross-examination of defense witness).

A. Dr. Mont

Nothing in 3M's Opposition excused Dr. Mont's failure to testify live at trial. 3M devoted nearly a page of its Opposition in describing Dr. Mont's religious obligations, even though Yom Kippur had ended days before Dr. Mont's testimony. There is no reason to include such argument

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other than to obfuscate and distract the Court from the severe prejudice that Plaintiff suffered. No religious obligation prevented Dr. Mont from testifying live at trial on Friday, October 7, 2022.

3M also dedicated most of a page of its Opposition to Dr. Mont's various professional obligations, including references to "500 to 700 surgeries per year," "seeing between 5,000 and 6,000 patients annually," and "editorial commitments that take at least 20 hours a month." 3M Sugg. Opp. at 6. However, **none of these obligations prevented Dr. Mont's live testimony at trial**. The truth is that Dr. Mont was at a conference… not performing any surgery, treating any patients, or editing any journal. **Exhibit 10**, at 163. Nothing prevented Dr. Mont from testifying live at trial; he simply chose not to do so.

3M False Claim	True Fact	Evidentiary Support
"the Court in no way, shape, or form, prevented cross-examination of … Dr. Mont"[7]	The Court prematurely ended Plaintiff's cross-examination mid-question: "Q. You disagree with Al Van Duren, fair enough? Dr. Mont, you testified…. THE COURT: Okay, counsel, we're going to recess for the day…."	**Ex. 44** (Tr. 1817:9-12)
Religious Obligations Prevented Dr. Mont from Testifying Live at Trial	Yom Kippur ended two days before Dr. Mont was scheduled to testify on Friday, October 7, 2022	3M Sugg. Opp., at 7, n.2
Professional Obligations Including Surgery, Patient Treatment, and Editorial Obligations Prevented Dr. Mont from Testifying Live at Trial	Dr. Mont attended a conference on Friday, October 7, 2022	**Ex. 10**, p. 163

Having agreed to serve as 3M's testifying expert, it was incumbent on Dr. Mont to make himself available for the time necessary to testify at trial. If it was foreseeable that he would be unable to do so because of religious obligations, professional obligations, or any other reason, he

[7] 3M Sugg. Opp. at 5-6.

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should have declined the job or withdrawn as an expert. As described in her Motion for New Trial, Plaintiff was unduly prejudiced by Dr. Mont's limited availability to testify at trial.

Plaintiff did not cause Dr. Mont's absence, his limited availability, nor did Plaintiff control his schedule. Trials, as the Court is well aware, are frequently unpredictable. A witness may testify unexpectedly which may shorten or lengthen their testimony considerably. Defense counsel may engage in lengthy (or brief) cross-examination. The Court's rulings may require a party to present more or less evidence. In this trial, each of these situations occurred, which resulted in Plaintiff's case taking longer than expected.

For example, Plaintiff's original estimate of time was based largely on the Court's initial indication that Plaintiff would be able to "package" 3M's corporate admissions in Plaintiff's case-in-chief with 3M playing the remainder of its deposition designations in its case. However, the Court did not allow Plaintiff to play 3M's corporate admissions in that manner, which added roughly 20 hours of deposition designations to Plaintiff's case-in-chief.

> MR. EMISON: … This trial is going to go into the third week at this point. If we're not able to streamline the deposition testimony like we'd hoped – and I understand [the court's] ruling, that's fine – but it's going to add to our presentation time.

Transcript of Pretrial Conference (9/26/22), attached as **Exhibit 48**, at p. 163.

Even then, Plaintiff mitigated the substantial increase in time by withdrawing several hours of designated testimony—reducing the additional designated runtime from fifteen hours to eight hours[8]—and foregoing completely the presentation of two witnesses. In addition, 3M engaged in lengthy, multi-hour cross-examinations of Plaintiff's witnesses including Dr. Jarvis and Dr.

[8] **Exhibit 44** at 1483:17-18.

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Bowling, and spent approximately three hours cross-examining Plaintiff herself. Plaintiff was not responsible for any of these increases in the length of trial.

Regardless, it appears that Dr. Mont maintained his schedule such that he set aside only the hours of 11:30 am until 5:00 p.m. to testify at trial—no more. **Exhibit 44** at 1818:13-17. If Dr. Mont was unable or unwilling to provide flexibility in his schedule to ensure that he could testify fully in this important trial, then he should have withdrawn. As 3M noted in its brief, "the trial length expectations were not set in stone at any point, even immediately prior to trial." 3M Resp. at 8.

3M noted in its brief that Plaintiff "got six more minutes as it relates to the cross-examination of Dr. Mont." 3M Sugg. Opp. At 9. However, 3M provided no authority suggesting such allocation to be a sufficient or reasonable limitation on Plaintiff's cross-examination. Certainly, it was not.

If "equal time" were the standard, any party could substantially abbreviate the testimony of any witness who might be subject to the kind of "vigorous cross-examination" endorsed in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). For example, a party could elicit necessary elements from an expert witness in just ten to twenty minutes and essentially immunize its witness from an effective cross-examination.

Here, as in *Hyde v. Butsch*, 861 S.W.2d 819 (Mo. App. 1993), the Court unduly limited Plaintiff's cross-examination of this critical witness, ***stopping Plaintiff's cross-examination mid-question*** and prohibiting the kind of "vigorous cross-examination" envisioned by *Daubert*. See **Exhibit 44** at p. 1817:9-12. Dr. Mont was not a "minor" or "insignificant" witness in this trial. He was 3M's primary witness on specific causation as to Plaintiff's infection. See *id.* at 1693 ("Q. Are you prepared to offer opinions on the causes of Ms. O'Haver's infection? A. I am.")

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One of the critical questions posed by this trial was whether or not the Bair Hugger provided any benefit to Plaintiff. 3M—through its corporate representative—admitted that there is "no benefit to using the Bair Hugger" with obese patients. **Exhibit 1** at 57. Plaintiff was in the middle of questioning Dr. Mont on this critical issue when the Court stopped her counsel mid-question. **Exhibit 44** at p. 1817:9-12. Counsel for Plaintiff specifically preserved for the record that "[she] would have significant additional cross," which the Court acknowledged, stating, "Yes and that's noted and I think that's been relayed and I appreciate that." **Exhibit 44** at 1824:17-21.

Notably, the Court *never excused Dr. Mont as a witness and indicated that Dr. Mont could continue his testimony on the next trial day*,[9] yet 3M failed to ensure his return to offer additional testimony during the next trial day. The Court's limitation of Dr. Mont's cross-examination unduly prejudiced Plaintiff as "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *State v. Thompson*, 280 S.W.2d 838, 841 (Mo. 1951) quoting *Alford v. United States*, 282 U.S. 687 692 (1931). A new trial is required. *Nguyen*, 916 S.W.2d at 889.

B. Dr. Borak

Plaintiff was unduly prejudiced by the Court's limitation of her cross-examination of Dr. Borak for the same reasons as discussed above with respect to Dr. Mont. Dr. Borak—like Dr. Mont—failed to set aside adequate time to appear live at trial, but instead scheduled a vacation during the same week of trial he was expected to testify. **Exhibit 44** at 1606:4-22. Like Dr. Mont, if Dr. Borak was unable to commit to sufficient time to testify live at trial, he should have withdrawn as 3M's paid witness. Instead, 3M "sandbagged" Dr. Borak's self-inflicted scheduling

[9] **Exhibit 44** at 1821:25-1822:2.

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conflict *until after 3M had already conducted its direct examination and after Plaintiff had started her cross-examination*." *Id.* A new trial is required. *Nguyen*, 916 S.W.2d at 889.

C. Dr. Abraham

The Court also abused its discretion in completely prohibiting Plaintiff from cross-examining 3M's computational fluid dynamics ("CFD") expert, Dr. Abraham, regarding Dr. Andrew Chen's non-privileged deposition testimony about 3M's non-privileged data from its internal CFD testing.

3M conducted CFD testing of the Bair Hugger in 2015. 3M's CFD testing data was produced by a third-party in other litigation. See **Exhibit 9** (Trial Exhibit 1669). 3M *never asserted privilege* with respect to **Exhibit 9** in the O'Haver litigation. Indeed, **Exhibit 9** (Trial Exhibit 1669) was received in evidence early in the trial, on Friday, September 30, 2022. **Exhibit 44** at 727:9-10. In addition, Dr. Chen was deposed shortly before trial regarding the CFD data reflected in **Exhibit 9** as well as the initial conditions and boundary conditions utilized to conduct the CFD. See, *e.g.*, **Exhibit 19**. 3M *never asserted privilege* with respect to Dr. Chen's testimony.

Despite the non-privileged nature of both Trial Exhibit 1669 (**Exhibit 9**) and Dr. Chen's deposition testimony, the Court nevertheless ordered that "no testimony or reference to Dr. Andrew Chen's testimony will be allowed." **Exhibit 44** at 1368. Plaintiff's counsel attempted to ask Dr. Abraham about the CFD that 3M conducted. See *id.* at 1970:2-9. Trial Exhibit 1669 had previously been admitted and 3M's corporate representative, Dr. Jay Issa, had already testified about 3M's internal CFD testing through video deposition testimony played to the jury. Trial Exhibit 2220, Issa Clip Report, attached as **Exhibit 49** at 18-19. The Court refused to allow Plaintiff to cross-examine 3M's expert using the already-admitted evidence, stating "[w]hether or not it's in evidence is irrelevant." **Exhibit 44** at 1970:17-23.

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Later, Plaintiff's counsel asked the Court for permission to cross-examine Dr. Abraham with Dr. Chen's testimony in which Chen testified that excess air created by the Bair Hugger comes out near the patient's arms, with none at the head and neck. *Id.* at 2000. Counsel clarified that none of the information was privileged, and counsel wanted to show the jury that Dr. Abraham's boundary conditions were "just completely different than" what 3M used. *Id.*

Boundary conditions are a critical part of any CFD analysis. Indeed, Dr. Abraham agreed that if his initial boundary conditions were incorrect, then his model was wrong; the testified, "garbage in, garbage out." **Exhibit 44** at 1994:11-19. The Court's refusal to permit Plaintiff to cross-examine Dr. Abraham on this critical aspect of his opinion was an abuse of discretion that unduly prejudiced Plaintiff.

It is well-settled that "parties *are to be given* wide latitude to 'test qualifications, credibility, skill or knowledge, and value and accuracy of opinion." *Rodriguez v. Suzuki Mtr. Corp.*, 996 S.W.2d 47, 60 (Mo 1999) quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 869 (Mo. 1993) (Emphasis added). The mandate of *Rodriguez* and *Callahan* that parties "***are to be given*** wide latitude" is **mandatory**; not discretionary. This wide latitude is consistent with the right to "vigorous cross-examination" of opposing experts described in *Daubert*. See 509 U.S. at 595.

Plaintiff was unable to challenge Dr. Abraham directly with Dr. Chen's testimony and, therefore, the jury was unable to assess what weight to grant Dr. Abraham's testimony or whether or not Dr. Abraham was a credible witness in light of the stark differences between his analysis and 3M's own analysis. Indeed, because the standard for admissibility of expert testimony "is one of inclusion rather than exclusion,"[10] it is essential that such experts are subject to "vigorous cross-

[10] *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008).

examination" and "presentation of contrary evidence." *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317-18 (Mo. App. 2018) quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Here, the Court's abuse of discretion in prohibiting Plaintiff's cross-examination of Dr. Abraham prevented the "vigorous cross-examination" and "presentation of contrary evidence" deemed essential by both the Supreme Court of the United States and Missouri courts. *Daubert*, 509 U.S. at 595.

Moreover, because a party has *the right* to "vigorously" cross-examine opposing witnesses with "contrary evidence", it was not sufficient that Plaintiff was ultimately permitted to play Dr. Chen's deposition testimony in Plaintiff's rebuttal case, well *after* Dr. Abraham testified. Plaintiff was forced to play Dr. Chen's deposition with 3M's designations. Plaintiff, therefore, was unable to directly challenge Dr. Abraham with Dr. Chen's testimony that clearly contradicted Abraham's methods, nor was Plaintiff permitted to highlight for the jury the important portions of Dr. Chen's testimony that undermined Dr. Abraham's credibility and the reliability of his opinions as Plaintiff would have done if she had been permitted to question Dr. Abraham directly about Dr. Chen's testimony. See **Exhibit 44** at 2026:4-28:4.

3M is simply wrong when it suggested that "the Court had good reason to preclude references to Dr. Chen's testimony because of concerns that the Jury would draw an impermissible adverse inference against 3M." See 3M Sugg. Opp. at 22. ***Trial Exhibit 1669 was already in evidence.*** **Exhibit 9**. ***The jury had already heard 3M's corporate admission that it had conducted an internal CFD analysis which was not provided to even the highest-level Bair Hugger employees***. **Exhibit 49** at 18-19. There was no "good reason" to completely prohibit Plaintiff from cross-examining 3M's expert witness as to evidence that had already been admitted.

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In *Revis* and *Koelling*, discussed above, the Court of Appeals held that "it [was] not within the trial court's discretion to prevent [the cross-examination on an issue of bias or credibility] entirely." *Revis*, 604 S.W.3 644, 653, 654 (Mo. App. 2020). Here—as in *Revis* and *Koelling*—the Court abused its discretion in prohibiting all inquiry into Dr. Chen's non-privileged testimony or the non-privileged underlying data of his CFD analysis. A new trial is required to cure this error. See *Nguyen v. Haworth*, 916 S.W.2d 887, 889 (Mo. App. 1996) (the purpose of a motion for new trial is to allow the trial court an opportunity to reflect on its actions during trial and, if error is found in this reflection, the proper remedy is to grant a new trial).

D. Limiting Cross-Examination to Material Reviewed by the Expert and Preventing Plaintiff from Cross-Examining Defense Experts as to 3M Admissions

In its Opposition, 3M conceded that "a party may show an expert witness material the expert did not review in an attempt to review the expert's opinion." 3M Sugg. Opp. at 38. It is, therefore, undisputed that the absolute right of a party to cross-examine opposing witnesses discussed above extends to materials the expert did not review. See, *e.g.*, *Rodriguez v. Suzuki Mtr. Corp.*, 996 S.W.2d 47, 60 (Mo. 1999) (parties to be given wide latitude in cross-examination); *State v. Brooks*, 960 S.W.2d 479, 492-93 (Mo. 1997) (party may impeach expert by demonstrating he had not reviewed relevant materials); *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358, 363 (Mo. App. 1984) (party may impeach expert with relevant materials the expert did not review). In her Motion for New Trial, Plaintiff included numerous examples of the Court refusing to permit cross-examination of 3M's experts using materials the expert had not reviewed. Many of these examples remain unrefuted by 3M. Plaintiff addresses below some of her examples and stands on her Motion for New Trial as to those not referenced here.

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1. Trial Exhibit 134A – Dr. Borak

Trial Exhibit 134A (attached previously as **Exhibit 8**) is an internal 3M document that proved 3M's legal department overrode 3M's clinical specialists and stopped all clinical research into the Bair Hugger in July 2015 because of "the ongoing legal situation" involving claims that the Bair Hugger caused surgical infections. Trial Exhibit 134A had already been admitted into evidence during the video testimony of 3M's Medical Director, Michelle Hulse-Stevens.

The Court abused its discretion in prohibiting cross-examination of Dr. Borak concerning Trial Exhibit 134A because, as the Missouri Supreme Court has noted, "[i]t is well established that an expert witness may be cross-examined regarding [even] facts not in evidence to test his qualifications, skills, and creditability or to test the validity and weight of his opinion." *Brooks*, 960 S.W.2d at 493. Like virtually all areas of cross-examination, "[w]ide latitude is afforded the cross-examination of witnesses to test qualifications, credibility, skill or knowledge, and the value and accuracy of the expert's opinion." *Id.* Experts may be cross-examined using hearsay and other material that does not need to be admissible as evidence. *Id.* This is also consistent with the mandate from the Supreme Court that expert witnesses be subject to "vigorous cross-examination." *Daubert*, 509 U.S. at 595.

Here, Plaintiff did not seek to cross-examine Dr. Borak with "facts not in evidence,"[11] but with an exhibit that was *already admitted into evidence*. Plaintiff had an ***absolute right*** to cross-examine Dr. Borak regarding this document—which 3M intentionally withheld from him. See *id.* at 493 ("The state *had the right* to rely on appellant's prison records in cross-examining Dr. Engum, regardless of the records' admissibility."). The Court abused its discretion in prohibiting this cross-examination. A new trial is required. *Nguyen*, 916 S.W.2d at 889.

[11] *Brooks*, 960 S.W.2d at 493.

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2. Trial Exhibit 1749A – Dr. Borak

As with Trial Exhibit 134A, above, the Court abused its discretion when it prohibited Plaintiff from cross-examining Dr. Borak with Trial Exhibit 1749A (previously attached as **Exhibit 25**). A key issue at trial—and one of the bases for Dr. Borak's opinion—was a statement by the International Consensus of Orthopedic Surgeons that there was no "definitive" proof that forced-air warming caused surgical infection.[12] Plaintiff attempted to cross-examine Dr. Borak on this issue with Trial Exhibit 1749A in which 3M's Medical Director acknowledged that the International Consensus was "not necessarily evidence based, it allows opinion to carry weight", which would have tested Dr. Borak's credibility and the value and accuracy of his opinions. See, *e.g.*, *Brooks*, 960 S.W.2d at 493 (party has the right to cross-examine a witness with materials to test the witness's credibility and the value and accuracy of their opinion). Again, even though Plaintiff had the absolute right to test Dr. Borak's credibility and the value of his opinion with even inadmissible hearsay evidence,[13] Trial Exhibit 1749A *had already been admitted as evidence*.

3M argued that Plaintiff is not entitled to a new trial because she was permitted to ask Dr. Borak *if he* believed the International Consensus was opinion based. See 3M Sugg. Opp. at 32. However, what Dr. Borak believed was at odds with what 3M—through its Medical Director—acknowledged in Trial Exhibit 1749A; that the International Consensus *was opinion based*. The Court abused its discretion in prohibiting Plaintiff from challenging Dr. Borak's credibility and the value of his opinions with 3M's own internal statements. A new trial is required. *Nguyen*, 916 S.W.2d at 889.

[12] See, *e.g.*, 3M Closing Argument, **Exhibit 44** at 2367:23-24.
[13] *Brooks*, 960 S.W.2d at 493.

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3. Cause of Plaintiff's Infection – Dr. Borak

3M tacitly admits the Court's error in prohibiting Plaintiff from cross-examining Dr. Borak as to whether the Bair Hugger "is a potential cause for this jury to consider in determining whether it contributed to her deep joint infection." See 3M Sugg. Opp. at 32-33. 3M objected that the question "invades the province of the jury." **Exhibit 44** at 1688:25-89:1. The Court sustained 3M's objection, stating "That's a question for the jury to decide." *Id.* at 1689:8-9. Respectfully, the Court abused its discretion in sustaining 3M's objection.

In its Opposition, 3M conceded—as it must—that the well-settled Missouri law is that "[a]n opinion is not objectionable just because it embraces an ultimate issue." R.S.Mo. § 490.065.2(3)(a); *Doe v. McFarlane*, 207 S.W.3d 52, 64 (Mo. App. 2006); *Lee v. Hartwig*, 848 S.W.2d 496, 498 (Mo. App. 1992). 3M, forced to concede the Court's error, argued only that Plaintiff did not suffer prejudice. 3M, however, is not the judge of Plaintiff's prejudice. Plaintiff was entitled to ask the question under Missouri law and must have been prejudiced because she had the right to challenge the expert's credibility and value of his opinions regardless of whether the opinion embraced the ultimate issue. Plaintiff's follow-up question was not a sufficient alternative. Indeed, 3M never objected that any follow-up question was cumulative or that it also invaded the province of the jury. A new trial is required. *Nguyen*, 916 S.W.2d at 889.

4. Impeachment Documents – Dr. Mont

As with Dr. Borak, the Court prohibited Plaintiff from impeaching Dr. Mont with documents that 3M had produced to Plaintiff but had not provided to its expert. The Court issued a blanket prohibition on cross-examining Dr. Mont with any document not in his possession. **Ex. 44** at 1779:1-19. In limiting Plaintiff's cross-examination, the Court acknowledged the prejudice to which it was subjecting Plaintiff. See *id.* ("I'm not confident that you're going to be able to

conduct your cross-examination as you want."). The Court abused its discretion in denying Plaintiff her right to "cross-examin[e] … witnesses to test qualifications, credibility, skill or knowledge, and the value and accuracy of the expert's opinion." *Brooks*, 960 S.W.2d at 493. A new trial is required. *Nguyen*, 916 S.W.2d at 889.

5. Trial Exhibit 3253 – Dr. Abraham

3M—in its Opposition—conceded the well-settled Missouri law that an expert witness may be cross-examined as to documents that had not been provided to them, *Ball*, 672 S.W.2d 358, 363 (Mo. App. 1984), even if such documents are inadmissible hearsay evidence. *Brooks*, 960 S.W.2d at 493. Though 3M tacitly admitted the Court's abuse of discretion it argued that Trial Exhibit 3253 (previously attached as **Exhibit 28**) would not have sufficiently challenged Dr. Abraham's opinions. 3M's "say so" is not a sufficient basis to judge the veracity of Trial Exhibit 3253.

Trial Exhibit 3253 was an email from Dr. Farhad Memarzadeh that was forwarded to employees of 3M. **Exhibit 28**. Dr. Abraham relied on a Letter to the Editor written by Dr. Memarzadeh. 3M went to great pains to paint Dr. Memarzadeh as an independent and unbiased researcher who just happened to find that the Bair Hugger did not cause airborne contamination during surgery.

> Q. And you would agree with me too that when Dr. Memarzadeh did his study and got his findings ***he was not doing that as a paid consultant for lawyers and litigation, was he***?
>
> A. I don't know whether that was the case or not. His publication is one page compared to Dr. Elghobashi's multiple page document….
>
> ***
>
> Q. My question being that Dr. Memarzadeh in his study he was doing it as a researcher for the National Institutes of Health, that's true, isn't it?
>
> A. He was at NIH at the time, yes.

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Exhibit 44 at 1015:6-22 (3M cross-examination of Dr. Jarvis) (Emphasis added).

Q. … Now do you know who Dr. Memarzadeh is?

A. Yes, he is the person at the National Institute of Health that carried out ***his own independent study***.

Q. Now what kind of study did he carry out?

A. It was a CFD study.

Q. And did Dr. Memarzadeh's work provide any support, foundation or assistance for the formation of your opinions?

A. His work confirmed my opinions.

Q. And who did Dr. Memarzadeh work for?

A. The National Institute of Health.

Q. And what was the National Institute of Health looking at that's referenced here in the plaintiff's exhibit, what were they studying?

A. They wanted to know whether a forced air warmer like the Bair Hugger could increase or disrupt airflow and increase risk to patients.

Q. And have you relied on Dr. Memarzadeh's work also?

A. I have cited – I will say his work confirms my findings.

Exhibit 44 at 1918: 2-21 (3M direct examination of Dr. Abraham) (Emphasis added).

Dr. Memarzadeh was far from an independent, unbiased researcher. Trial Exhibit 3253 showed that Dr. Memarzadeh was communicating directly with 3M about his research before it was published, that he performed much of his work while traveling on an airplane, and that he sent a draft of his Letter to the Editor to 3M for comments and revisions before it was published. **Exhibit 28**.

Trial Exhibit 3253 directly refuted Dr. Abraham's testimony that Memarzadeh's work was "independent." **Exhibit 28**. In fact, Dr. Memarzadeh acknowledged in this correspondence with

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3M's paid consultant (and forwarded to 3M employees) that the "air warmer changes particle trajectories (***for example, more particles are in the upper parts of the room, therefore less particles are vented through low exhausts and door gaps***." *Id.* at 1. Memarzadeh then suggests publishing his data as a "note to editor" that presented his findings that were favorable to 3M and omitting his findings that the Bair Hugger increases particles in the upper part of the room that are not removed by exhaust vents close to the floor. *Id.*

Plaintiff sought to cross-examine Dr. Abraham using Trial Exhibit 3253 in order to challenge Abraham's credibility, to show that Dr. Memarzadeh's Letter to the Editor was not an "independent" study, and to challenge the value and accuracy of Abraham's opinions. See, *e.g.*, *Rodriguez*, 996 S.W.2d at 60 (Mo. 1999) ("parties are to be given wide latitude to test qualifications, credibility, skill or knowledge and value and accuracy of opinion").

3M objected, in part, that Dr. Abraham had not seen Trial Exhibit 3253. **Exhibit 44** at 1929:5, 16-20. Plaintiff's counsel responded, "That's the point. He hasn't seen it." *Id.* at 1930:5-6. The Court abused its discretion and sustained 3M's objection because the witness had not seen Trial Exhibit 3253. *Id.* at 1930:7-16.

As 3M has conceded, Plaintiff had an absolute right to cross-examine Dr. Abraham with Trial Exhibit 3253 and the Court abused its discretion in prohibiting Plaintiff from doing so. *Brooks*, 960 S.W.2d at 493. A new trial is required. See *Nguyen*, 916 S.W.2d at 889 (the purpose of a motion for new trial is to allow the trial court an opportunity to reflect on its actions during trial and, if error is found in this reflection, the proper remedy is to grant a new trial).

6. Trial Exhibits 3295 and 3296 – Dr. Abraham

During his direct examination, Dr. Abraham made much of an experiment he conducted to "validate" his CFD analysis. **Exhibit 44** at 1912:5-13:24. Ignoring the fact that Dr. Abraham

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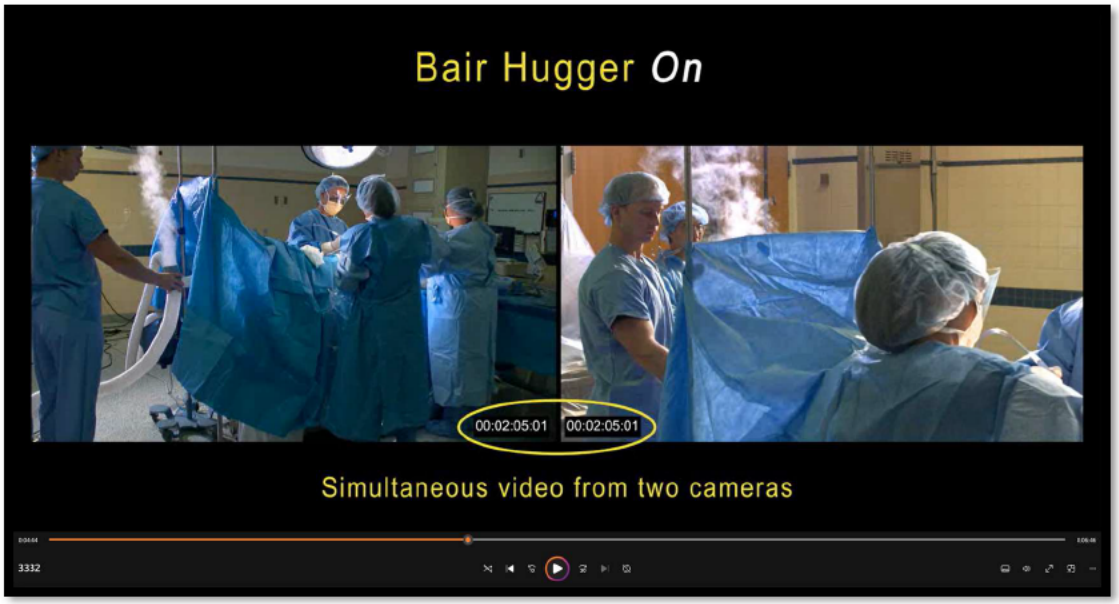
conducted his "validation" experiment ***before*** he performed his CFD analysis, *id.* at 1941:14-16, Plaintiff had the right to cross-examine Dr. Abraham on other experiments that would test his qualifications, skills, credibility, and the validity and weight of his opinion. *Brooks*, 960 S.W.2d at 463.

Dr. Abraham's opinion was that 100 percent of the Bair Hugger's waste air escaped from the area around the patient's head and neck. **Exhibit 44** at 1994:20-22. Dr. Abraham testified that it was impossible for waste heat to be forced by the excess airflow down the surgical drapes where it could escape at the bottom of the drape near the floor. *Id.* at 1994:23-95:25.

> Q. And it [excess warmed air] can be pushed down or it can be pushed up depending on the geometry of the room and what's holding it together?
>
> A. No, I disagree.
>
> Q. You don't think that this [excess warm air] could be pushed down, right?
>
> A. When the hot air comes out of that blanket it is buoyant. It's like a hot air balloon and it will rise. Hot air does not go down on its own. Heat rises. It's an adage that is true. Heat rises.

Id. at 1995:17-20.



Defense Trial Exhibit 3332 (Dr. Abraham's "experiment")

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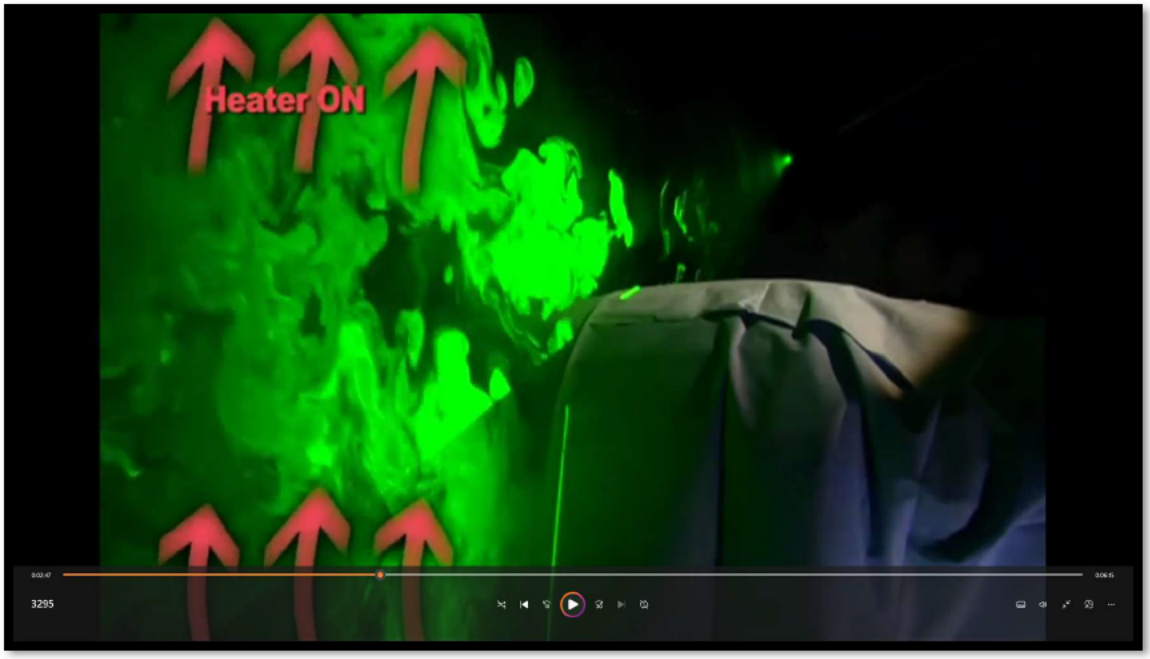
However, the video that accompanied the McGovern study *directly refuted* both Dr. Abraham's "validation" experiment and his testimony and clearly showed heated airflow escaping from bottom of the surgical drape near the floor.



Defense Trial Exhibit 3295

The McGovern video demonstrated that excess heated air from the Bair Hugger migrated down the surgical drape, escaped near the operating room floor, and created thermal plumes that brought contaminants directly into the sterile field. See Defense Trial Exhibits 3295 and 3296. The narration accompanying Defense Trial Exhibit 3295 stated: "When the heater is turned on, the heated waste air escapes from below the drape and then rises alongside the surgical table easily penetrating the downward laminar flow ventilation. Eventually, the warm air cools, loses buoyancy, and falls into the surgical field."

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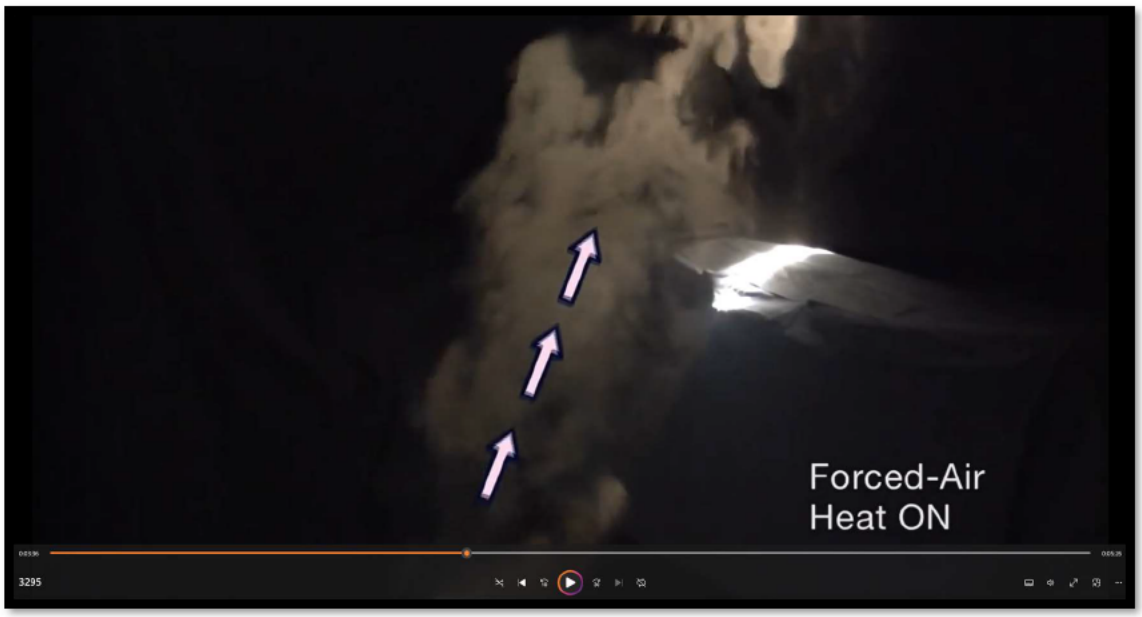
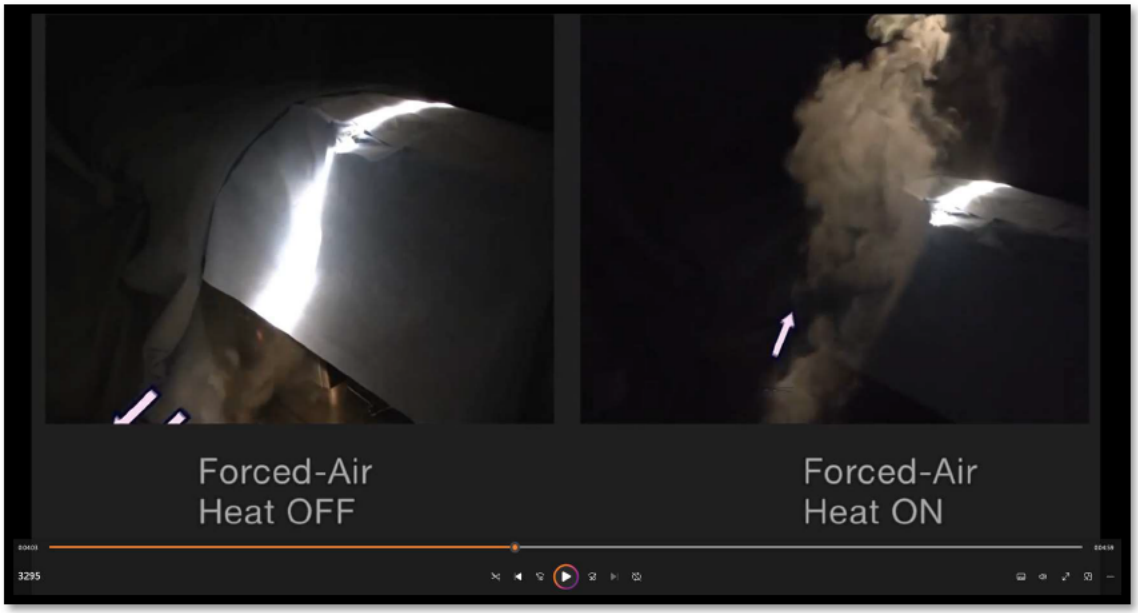


Defense Trial Exhibit 3295



Defense Trial Exhibit 3295

3M—again—conceded that Missouri law permits an expert to be cross-examined with materials the expert did not review. 3M Sugg. Opp. at 38. See also *Brooks*, 960 S.W.2d at 493; *Ball* at 672 S.W.2d at 363. Having acknowledged Plaintiff's right to cross-examine Dr. Abraham with the McGovern video, 3M is forced to disingenuously suggest that the video is not *relevant* to

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Dr. Abraham's opinions. *Id.* Clearly, the McGovern video was highly relevant to challenge Dr. Abraham's credibility and skill as well as the validity of Dr. Abraham's CFD analysis and "validation" experiment. *Brooks*, 960 S.W.2d at 493. The Court abused its discretion in preventing Plaintiff from cross-examining Dr. Abraham on this critical evidence and a new trial is required. *Nguyen*, 916 S.W.2d at 889.

7. 3M Corporate Admissions – Dr. Abraham

A critical element of Dr. Abraham's opinions was his belief that the Bair Hugger did not increase particles over the sterile field.

> Q. If hot air comes out of the drape near the ground – if it does it is going to pick up particles and bacteria and bring them right back up, right?
>
> A. I disagree.
>
> Q That's what all the studies show. That's what every single study ever studied shows, correct, other than yours?
>
> A. I disagree.

Exhibit 44 at 2002:20-03:1.

When Plaintiff attempted to challenge Dr. Abraham's testimony, the Court abused its discretion and prohibited Plaintiff from cross-examining Dr. Abraham using 3M's corporate admissions that "every single study indicates that the Bair Hugger increases the particle count over the sterile field." *Id.* at 2003-04; **Exhibit 32**. The Court erroneously believed that an expert witness must have seen the deposition clip in order to be cross-examined with it. **Exhibit 44** at 2004:3-15.

> THE COURT: Have you established that he [has] seen this deposition clip. My memory is that he didn't remember having the deposition played to him during his deposition. So you haven't established that he's – what one position he has made with this.\

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> MR. FARRAR: The fact that he hasn't see Al Van Duren's deposition directly him [sic] as an expert is evidence.
>
> THE COURT: I don't know that you've established that. I don't think that's been established.
>
> MR. FARRAR: That he hasn't seen it? I didn't understand you.
>
> THE COURT: Yes. The objection is sustained….

Id.

Here, the Court erred and abused its discretion because, as 3M has conceded, "a party may show an expert witness materials the expert did not review in an attempt to impeach the expert's opinions". 3M Sugg. Opp. at 38; *Brooks*, 960 S.W.2d at 493; *Ball* at 672 S.W.2d at 363.

3M—forced to concede the Court's error—again misleadingly attempted to rewrite the facts of the case and Mr. Van Duren's testimony. 3M falsely represented that Van Duren's testimony established that—as of March 2017—3M's *internal* studies showed that the Bair Hugger increased particles above the surgical field, but that it did not establish there were no *external* studies to refute that. 3M Sugg. Opp. at 39. 3M's characterization is simply not true.

Mr. Van Duren testified—as 3M's corporate representative—as follows:

> Q. Okay. And you stated in your last 30(b)(6) deposition that ***every single study performed***, looking at particles over the surgical site, showed an increase on [sic] the amount of particles when the Bair Hugger is used as compared to when the Bair Hugger is not used?
>
> A. In absolute numbers, yes.

Exhibit 1 at 20. (Emphasis added). Nothing in Van Duren's testimony suggests—as 3M misrepresented—that it was limited to only *internal studies* or that it was limited only to *2017 and before*.

Indeed, Van Duren also testified about this topic at his January 25, 2022, deposition in which he made explicit that he was referring to *all studies through January 2022*.

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> Q. All right. Mr. Van Duren, I'm sorry about that. When we took a break, it's on your 30(b)(6) deposition, page 258, line 5 through 13, and the question was: "Okay. Based on the data that we have today, ***including the study funded by 3M as well as other studies***, ***every single study indicates*** that the Bair Hugger increases the particle count over the sterile field, correct? And you answered, "In absolute numbers, correct." It says – the question is: "Yes. Okay. And you have no internal studies to refute that, correct?" The answer is: "No, we don't." that was an accurate answer that you gave in 2017, correct?
>
> A. It was.
>
> Q. ***As far as you know today, is that still an accurate answer***?
>
> A. To my knowledge.

Trial Exhibit 2221, attached hereto as **Exhibit 47** at 11.

Forced to concede the Court's error and in an effort to fraudulently deny the harm and prejudice to Plaintiff, 3M violated its duty of candor to the Court and knowingly misrepresented its corporate testimony. Plaintiff had the absolute right to challenge Dr. Abraham's credibility as to the foundation for his opinions. The Court abused its discretion in preventing Plaintiff from doing so. A new trial is required to cure the substantial prejudice Plaintiff suffered. *Nguyen*, 916 S.W.2d at 889.

II. The Court Abused Its Discretion by Improperly Preventing Plaintiff from Rebutting and Responding After 3M Injected the Issue of a Lack of Similar Incidents or Claims by Asserting that the Bair Hugger Had Not Been the Subject of Previous Claims or Complaints

During opening statement, 3M told the jury that the Bair Hugger was used 50,000 times each day with more than 300 million uses in total and yet no one had "ever contacted 3M to say that the Bair Hugger caused surgical site infection." **Exhibit 44** at 348:2-8. 3M doubled down in closing argument, telling the jury that "[o]nly these lawyers and their experts say that[the Bair Hugger] is somehow dangerous". *Id.* at 2400:20-24. 3M's clear implication was that Plaintiff was alone and "on an island" with her claim and, therefore, her claim must not be valid. Not only was

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3M's statement demonstrably false—3M admitted that clinicians had expressed concerns to the Company about the Bair Hugger causing surgical site infections since at least 1994[14]—3M intentionally created the misleading appearance of an absence of other accidents or claims for which the Court prohibited any response or rebuttal.

3M False Claim	True Fact	Evidentiary Support
No one "ever contacted 3M to say that the Bair Hugger caused surgical site infection" and "[o]nly these lawyers and their experts say that [the Bair Hugger] is somehow dangerous."	"Clinicians had expressed concerns about this very issue…. Dr. Augustine and others ***made it clear to me when I started here in 1994 that some clinicians had concerns about particulates as causes of wound infection***. As a result of those conversations, I submitted invention disclosures for joule heating devices in December, 1994 and in May, 2002, that specifically addressed the advantage of using RF heating as an air-free alternative to warming patients in a sterile environment. The disclosures were resubmitted in the 3M patent system in 2011 as N037600."	**Ex. 4** (Trial Exhibit 1735)

Evidence that a particular product was never the subject of previous *claims or complaints* may potentially be admitted, but only if a sufficient foundation is laid to show that, during the period during which no *claims or complaints* occurred, the product was used under conditions substantially similar to those faced by the plaintiff, and the number of comparable usages was sufficient to make the absence of other incidents meaningful. *McJunkins v. Windham Power Lifts, Inc.*, 767 S.W.2d 95 (Mo. App. 1989) (noting the general rule is that proof of the absence of other accidents is not admissible because it raises collateral issues which tend to confuse and mislead the jury). 3M never established any such foundation for its assertions.

[14] See **Exhibit 4** (Trial Exhibit 1735).

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Where a defendant—like 3M—injects the issue of the absence of other accidents *or claims* involving the same or similar products, ***the plaintiff is entitled to rebut such evidence with evidence of similar accidents or defects***. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 152 (Mo. 1998).

As described in Plaintiff's Motion for New Trial, Plaintiff's claim was substantially similar to those cases in the MDL, each of which involved common questions of fact. Mot. New Trial at 60. Indeed, 3M agreed that Ms. O'Haver's claim shared factual issues with those in the MDL because it sought to remove Plaintiff's claim to the MDL despite the MDL court lacking jurisdiction over Plaintiff's claim. **Ex. 37** at 5. 3M wrote:

> The allegations in this case against 3M are copied directly from the allegations in the Master Complaint in the MDL. Plaintiff here alleges, ***like all the MDL plaintiffs***, that she developed an infection as a result of the use of the Bair Hugger system during her November 29, 2016 left total knee arthroplasty.

Id. (Emphasis added). Indeed, over Plaintiff's objection and after considering the arguments of counsel, the United States Judicial Panel on Multidistrict Litigation (JPML) found that "the *O'Haver* action involves common questions of fact with actions transferred to MDL No. 2666" in that the "actions in the MDL share factual questions arising from allegations that post-surgery use of a Bair Hugger forced air warming system causes serious infections due to the introduction of contaminants into open wounds." JPML Transfer Order, attached hereto as **Exhibit 50** at 1.

The Court abused its discretion in prohibiting Plaintiff from rebutting 3M's assertion to the jury that no other claims involving the Bair Hugger causing surgical infection existed. 3M knew its representation to the jury was false. 3M knew more than 5,000 substantially similar claims had been made in cases filed in the Bair Hugger MDL. Plaintiff was unduly prejudiced by the Court's rulings prohibiting her from rebutting 3M's false claims. A new trial is required to cure this prejudice. *Nguyen*, 916 S.W.2d at 889.

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III. The Court Abused Its Discretion by Improperly Prohibiting Plaintiff from Playing Dr. Chen's Testimony in Plaintiff's Case-in-Chief

As described above, Dr. Andrew Chen produced a non-privileged summary of an CFD analysis that 3M conducted in 2015. **Exhibit 9** (Trial Exhibit 1669). Dr. Chen also gave non-privileged deposition testimony concerning 3M's CFD testing in which he discussed critical elements of the CFD testing, including initial assumption, boundary conditions, and excess heat and air flow from the Bair Hugger. See, generally, **Exhibit 19**.

3M, in its Opposition, suggested—without evidence or citation—that Dr. Chen's testimony "had minimal probative value" and that Plaintiff "transparently intended to play it for the Jury with the sole purpose of having the jury draw an adverse inference against 3M for having conducted its CFD testing under the aegis of the attorney-client privilege." 3M Sugg. Opp. at 18. As described in Section I.C., above, both assertions are blatantly false. Dr. Chen's testimony was highly relevant and probative.

In addition, there was no need to utilize Dr. Chen's testimony to establish that 3M had conducted secret testing that it kept hidden from even those at the highest levels of the company because that testimony came directly from 3M itself during Jay Issa's video testimony.

Q. Did you look at any internal CFD studies performed by 3M?

A. Actually, yesterday, it was the first time that counsel shared with me a CFD that I was not aware of that was done in 2015.

Q. 2015?

A. Correct.

Q. What study was that? Who performed that study?

A. The one that was shared with me yesterday, it was a CFD done by Andy Chen at 3M on the request from legal.

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Q. You're telling me that the only CFD internal study performed by 3M on the Bair Hugger was a study that was requested by legal?

A. The internal one that I'm talking about, Andy Chen, yes.

Q. That's the only one you're aware of?

A. That's the only one I'm aware of, yes.

Q. And you saw the report?

A. Yeah, I saw the report.

Exhibit 49 at 18-19.

As described in Plaintiff's Motion for New Trial, Dr. Chen's work was critical to Plaintiff's theory of the case and was important evidence of 3M's own testing that directly contradicted that of 3M's retained litigation expert, Dr. Abraham. In rebuttal, there was no context available to explain Dr. Chen's work, why it was important, or how it directly refuted the boundary conditions—and, therefore, the conclusions—of Dr. Abraham.

Moreover, because the undisputed evidence at trial was that the only internal CFD testing 3M had ever performed concerning the Bair Hugger was done at the request of its legal department and not shared with the highest levels of its Bair Hugger management, Plaintiff had the absolute right to argue that evidence to the jury including "all reasonable inferences from the evidence." M.A.I. 3.01; *State v. McFadden*, 369 S.W.3d 727, 748 (Mo. 2012); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 870 (Mo. 1992). The Court abused its discretion in broadly prohibiting any testimony or reference to Dr. Chen's testimony[15] and in wholly preventing Plaintiff from arguing any inferences surrounding 3M's internal CFD testing and should grant a new trial to cure the undue prejudice. *Nguyen*, 916 S.W.2d at 889.

[15] **Exhibit 44** at 1368.

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IV. Discovery of 3M's Internal CFD Results

3M has not denied that it waived any and all privileges as to **Exhibit 9** (Trial Exhibit 1669) in this litigation. Rather, 3M claims—without authority—that "the components of the CFD are segregable and that the data are distinct from the results." 3M Sugg. Opp. at 15. While 3M has couched its argument in the context of both the attorney-client and work-product privileges,[16] 3M's litigation testimony is more accurately described as attorney work product. While "[t]he attorney-client privilege protects confidential communications between an attorney and client concerning representation of the client,"[17] litigation testing conducted is more accurately described as attorney work product.

"The work product doctrine protects the 'thoughts' and 'mental processes' of the attorney preparing a case" including "documents prepared in anticipation of litigation." *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. 1995). See also *Hickman v. Taylor*, 329 U.S.495, 521 (1947) (work product doctrine protects against invading the privacy of an attorney's course of preparation). The work product doctrine thus protects "materials created or commissioned by counsel in preparation for possible litigation." *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 (Mo. App. 2008).

3M testified, through Jay Issa, that its CFD testing was done "on the request of legal." **Exhibit 49** at 18. Here, 3M's litigation testing and its results are not an "attorney-client communication" but "materials created or commissioned by counsel in preparation for possible litigation." *Id.* Indeed, 3M's own description supports this conclusion:

> In August of 2015 3M's in-house counsel Maureen Harms sought the assistance of 3M Senior Engineer Specialist Andrew Chen *as part of a consulting expert team*, to conduct privileged work *in aid of the defense of 3M in pending*

[16] 3M Sugg. Opp. at 14, n.12.
[17] *State ex. Rel. Garrabrant v. Holden*, 633 S.W.3d 356, 359 (Mo. 2021).

> *litigation* challenging the safety of the Bair Hugger patient warming system…. The *litigation testing* was conducted with the understanding that it was confidential and privileged, *at the exclusive direction of 3M's in-house and outside counsel, and in response to actual litigation pending against 3M in Texas and Kansas federal district courts*. The work took place between August and October of 2015, *and the results were shared only with 3M's in-house and outside counsel*.

3M's Suggestions in Opposition to Plaintiff's Objection to Special Master Order No. 3, attached hereto as **Exhibit 51** at 1-2. (Emphasis added). Indeed, 3M's litigation testing and results *cannot* be attorney-client communications because, by 3M's own admission, the testing and results were never communicated to the client; they were "shared only with 3M's in-house and outside counsel." *Id.* Because 3M's internal testing is work product, the associated privilege may be waived (like the attorney-client privilege) and it also may be disregarded by showing a substantial need. Rule 56.01(b)(5).

Missouri courts have found waiver to exist in a number of circumstances, and the "at issue" waiver is prominent among them. *State ex rel. Shelter Mut. Ins. Co. v. Wagner*, 575 S.W.3d 476, 481 (Mo. App. 2018) quoting *State ex rel. St. John's Reg'l Med. Ctr v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002). "The 'at issue' waiver has been described as occurring when the privilege holder makes assertions in a litigation context that puts its otherwise privileged communications in issue." *Id.* Privilege may also be waived when invoked in some fundamentally unfair way. *Id.* The rationale is that a party should not be able to use a privilege to prejudice an opponent's case or to disclose some selected communications for self-serving purposes. *Id.* "Accordingly, a privilege may be waived when a party asserts a claim that in fairness requires examination of protected communications." *Id.* Without calling it the "fairness doctrine," Missouri courts apply its rationale when analyzing privilege waiver issues. *Id.*

Here, in addition the reasons set forth in Plaintiff's Motion for New Trial, fairness requires disclosure of 3M's CFD testing results. 3M has placed its CFD results in issue by offering the

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opinions of its CFD expert, Dr. Abraham. In section I.C., above, Plaintiff established that the boundary conditions of 3M's internal testing directly contradicted the boundary conditions assumed by Dr. Abraham. Dr. Abraham conceded that if his boundary conditions are wrong then his conclusions are wrong. **Exhibit 44** at 1994:11-13.

3M placed the accuracy of Dr. Abraham's boundary conditions directly at issue. Fairness requires examination of 3M's CFD testing results to determine whether or not they are consistent with those proffered by Dr. Abraham.

The Court abused its discretion in prohibiting discovery as to the results of 3M's litigation testing. As described in Plaintiff's Motion for New Trial, she has substantial need for the litigation testing results, which have no substantial equivalent. In any event, 3M has waived any work product (or attorney-client) privilege because it has put the issue of its CFD results "at issue" and fairness requires disclosure of the results. *Shelter*, 575 S.W.3d at 481. Plaintiff has suffered undue prejudice which requires the grant of a new trial to cure.

V. The Court Abused Its Discretion by Prohibiting Dr. Jarvis from Testifying About the Demonstrative Video that Accompanied the McGovern Study

In its Opposition, 3M was forced to admit that it included the McGovern video on its Exhibit List as Defense Trial Exhibits 3295 and 3296. Yet at trial, 3M created a false impression for the Court that it was completely unaware that the McGovern video existed, representing to the Court that "we received last night a video that is an airflow visualization that Mr. Emison would like to use with Dr. Jarvis. It was done by a Dr. McGovern. *It has not been disclosed at all in this litigation or in other prior litigation* with respect to Dr. Jarvis." **Exhibit 44** at 716:10-20. In addition, it is undisputed that the McGovern report—upon which Dr. Jarvis relied—included an express reference to the McGovern video and the web address at which it could be found.

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Supplementary material

A video demonstrating forced-air warming is available with the electronic version of this article on our website at www.jbjs.org.uk

3M could not have been surprised by the content of the McGovern video. 3M's misrepresentation to the Court at trial was yet another example of 3M's cavalier disregard for the truth.

Forced to concede any lack of surprise, 3M claimed the video narration was "not neutral, but expressed the viewpoints of 3M competitor Scott Augustine." 3M Sugg. Opp. at 43. 3M provided no citation, authority, or other basis for this outrageous statement. The narration was provided by the McGovern authors and was included as supplementary material for their article which was peer-reviewed and published in an authoritative scientific journal.

In addition, 3M now argues that the demonstrative video was "full of hearsay." *Id.* **Of course, it was!** The entire McGovern article was hearsay. Every journal article relied on by any expert in this case was hearsay. Every 3M expert witness relied on hearsay, which was read and displayed, and played—even those with narration—to the jury. Missouri law expressly permits experts to rely on inadmissible hearsay testimony as a basis for their opinions. See R.S.Mo. § 490.065.

Dr. Jarvis properly relied on the McGovern study including the "video demonstrating forced-air warming," which was available with the electronic version of the McGovern paper and at the web address provided by the authors. Plaintiff laid a proper foundation that the video would help the jury understand Dr. Jarvis's very complex scientific testimony. The Court abused its discretion when it was misled by 3M as to 3M's knowledge of the McGovern video. Plaintiff suffered substantial undue prejudice that can only be cured by granting a new trial. *Nguyen*, 916 S.W.2d at 889.

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VI. Remaining Issues

As to the remaining issues raised in Plaintiff's Motion for New Trial, Plaintiff believes she has adequately set forth her arguments and authorities. For these issues, Plaintiff stands on her Motion for New Trial.

CONCLUSION

The purpose of a Motion for New Trial is to allow the trial court an opportunity to reflect on its actions during trial and, if error is found in this reflection, the proper remedy is to grant a new trial. *Nguyen*, 916 S.W.2d at 889. Plaintiff, for the reasons stated herein and in her Motion for New Trial, respectfully requests the Court grant her Motion for New Trial due to the undue prejudice inflicted by the errors identified herein.

Plaintiff notes that the Court has just 90 days after the date that Plaintiff filed her Motion for New Trial in which the Court retains jurisdiction to grant the motion. See Rule 78.06, 81.05. Ninety days after Plaintiff filed her Motion is **Tuesday, February 14, 2023**. Plaintiff requests oral argument on her motion in order to address any questions the Court might have.

WHEREFORE, Plaintiff respectfully requests the Court GRANT her Motion for New Trial, for oral argument on her Motion, and for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January 2023, a true and correct copy of the foregoing was filed and electronically served on the following counsel of record via the Court's electronic filing system.

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