IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

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

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff Katherine O'Haver respectfully moves the Court, pursuant to Rule 78.01, to set aside the verdict herein and to grant her a new trial in the above-captioned cause for good cause shown as follows:

This was a very complex trial with dozens of corporate documents, multiple corporate depositions, complicated scientific principles, competing scientific studies, and zealous advocates on both sides. The Court was peppered with dozens of complicated questions with little time to reflect given the constraints of the trial.

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 v. Haworth*, 916 S.W.2d 887, 889 (Mo. App. 1996). See also *Swift v. Bagby*, 559 S.W.2d 635 638 (Mo. App. 1997). Respectfully, Plaintiff submits her Motion for New trial because errors made during the trial—whether individually or cumulatively—unduly prejudiced Plaintiff and the proper remedy is granting a new trial. *Id.*

Even if the Court were to determine that no single error, standing alone, was sufficient to grant a new trial, the cumulative effect unduly prejudiced Plaintiff and requires a new trial. See *Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. Div. 2 1959) overruled on other grounds (without undertaking to determine whether any single instance of alleged error, standing alone, would constitute reversible error, the Court determined that, "in their totality, they do."). See also *Wiedower v. ACF Indus., Inc.*, 763 S.W.2d 333, 337 (Mo. App. 1988) overruled on other grounds (new trial may be ordered for cumulative error); *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526 (Mo. App. 1991) (new trial may be ordered due to cumulative error).

In this case, several errors warrant the grant of new trial:

1. The Court did not afford Plaintiff an opportunity to complete her cross-examination of 3M's expert, Dr. Mont. R.S.Mo. § 491.070. See also *Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo. 1962) (the right to cross-examine a witness "is absolute and not a mere privilege"); *Hyde v. Butsch*, 861 S.W.2d 819, 820-21 (Mo. App. 1993) (trial court granted motion for new trial after limiting the plaintiff's cross-examination).
2. The Court did not afford Plaintiff an opportunity to complete her cross-examination of 3M's expert, Dr. Borak. See R.S. Mo. § 491.070; *Pettus*, 358 S.W.2d at 44; *Hyde*, 861 S.W.2d at 820-21.
3. The Court erred in finding the results and conclusions of 3M's internal CFD testing were protected by the attorney client and/or work product privileges. See Rule 56.01(b)(3); *Edwards v. Mo. State Bd. Of Chiropractic Exam'rs*, 85 S.W.3d 10, 27 (Mo. App. 2002) (privileges can be waived by voluntary disclosure).

4. The Court erred in prohibiting Plaintiff from playing Dr. Andrew Chen's deposition testimony concerning non-privileged portions of 3M's internal CFD testing during Plaintiff's case-in-chief. See Rule 56.01(b)(3); *Edwards* 85 S.W.3d at 27.

5. The Court erred in prohibiting Plaintiff from cross-examining 3M's expert witnesses with Dr. Andrew Chen's non-privileged deposition testimony concerning 3M's internal CFD testing. See Rule 56.01(b)(3); R.S. Mo. § 491.070; *Pettus*, 358 S.W.2d at 44; *Hyde*, 861 S.W.2d at 820-21. Allowing portions of Plaintiff's deposition designations in rebuttal did not cure the prejudice suffered by denying impeachment of 3M's expert while he was on the stand. The prejudice could not have been cured in rebuttal because Defendant's expert was left unimpeached, and 3M's counter-designations of Dr. Chen's testimony diluted any impeachment of Dr. Abraham on rebuttal days after his testimony.

6. The Court erred in prohibiting Plaintiff from "arguing the evidence and all reasonable inference from the evidence during closing arguments." *State v. McFadden*, 369 S.W.3d 727, 748 (Mo. 2012). See also MAI 3.01; *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 870 (Mo. 1993) quoting *Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 844 (Mo. 1992) (in closing argument counsel is given wide latitude to suggest inferences from the evidence, even where such inferences may seem illogical or even erroneous).

7. The Court erred in prohibiting Plaintiff from submitting evidence of industry custom or standard in support of her negligence claims. See *Pierce v. Platte-Clay Elec. Co-op., Inc.* 769 S.W.2d 769, 772 (Mo. 1989) ("Evidence of industry custom or standard is admissible proof in a negligence case.").

8. The Court erred in prohibiting Plaintiff from cross-examining numerous 3M experts with materials that 3M failed to provide its experts, including internal 3M documents that had already been admitted into evidence. See *Rodriguez v. Suzuki Mtr. Corp.*, 996 S.W.2d 47, 60 (Mo. 1999) (parties are to be given wide latitude in cross-examination); *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358, 363 (Mo. App. 1984) (party may impeach an expert with relevant materials the expert did not review); *State v. Brooks*, 960 S.W.2d 479, 492-93 (Mo. 1997) (party may impeach an expert by demonstrating he had not reviewed relevant materials). The Court also improperly prohibited Plaintiff from cross-examining 3M's expert as to whether or not the Bair Hugger was a potential cause of Plaintiff's deep joint infection based on the Court's mistaken belief that such testimony was prohibited because it embraced an ultimate issue. See R.S.Mo. § 490.065.2(3)(a).
9. The Court erred in prohibiting Plaintiff's Expert, Dr. Jarvis, from testifying about the demonstrative video that accompanied the McGovern study, both of which Dr. Jarvis relied on in forming his expert opinions. R.S.Mo. § 490.065.1(3), 490.065.2(2).
10. The Court erred when it refused to permit Plaintiff from presenting evidence and argument to the jury regarding more than 6,000 lawsuits alleging the Bair Hugger caused surgical infection substantially similar to Plaintiff's injury. See *Morgan Publications Inc. v. Squire Publishers, Inc.*, 26 S.W.3d 164, 170 (Mo. App. 2000) quoting *Kelly v. Jackson*, 798 S.W.2d 699, 704 (Mo. 1990) (the law indulges a liberal attitude toward argument, particularly where the comment is a fair retort or responds to prior arguments of opposing counsel).

11. The Court erred in admitting a significant amount of hearsay evidence and improper expert opinion testimony. Much of this testimony was admitted through the videotaped testimony of Mark Albrecht and Dr. Scott Augustine. Neither witness was designated as an expert witness by any party. Both were called as fact witnesses by 3M during 3M's presentation of evidence. A large portion of both witnesses' testimony consisted entirely of hearsay evidence (substantial portions of hearsay documents were simply read into the record), improper opinion testimony, and improper leading questions. See *Interest of D.S.H. v. Green County Juvenile Officer*, 562 S.W.3d 366 (Mo. App. 2018) (reversing judgment based on trial court's improper admission of hearsay testimony); *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. 2010) (reversing judgment based on trial court's improper admission of hearsay testimony).

12. The Court erred in permitting 3M to impeach its own witness, Dr. Scott Augustine, by highlighting Dr. Augustine's federal misdemeanor guilty plea from 2004. See *Dement v. City of Bonne Terre*, 669 S.W.2d 278, 280 (Mo. App. 1984) (the general rule is that one cannot impeach his own witness); *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995) (in a civil proceeding, a witness can only be impeached by a *conviction*, not a guilty plea).

Plaintiff respectfully requests the Court, as described in *Nguyen* to "reflect on its actions during trial and, if error is found in this reflection" to grant a new trial. *Nguyen*, 916 S.W.2d at 889.

I. INTRODUCTION AND BACKGROUND

This case was tried to a jury from September 27 to October 13, 2022, on which the jury entered its verdict finding for Defendant. The Court entered Judgment on the verdict on October 18, 2022. This case involves Plaintiff Kathy O'Haver's claims against Defendant 3M, who manufactured and sold a device called the Bair Hugger forced air warmer. Plaintiff asserted claims of negligence, failure to warn, and strict liability. Plaintiff also asserted a claim for punitive damages.

Numerous internal 3M documents proved the Bair Hugger's dangerous propensity to contaminate the sterile field surrounding surgical patients without providing any benefit, which 3M's corporate admissions confirmed. For example, 3M knew that every study showed the Bair Hugger increased the number of airborne particulates in the sterile field,[1] 3M knew that there was evidence that the Bair Hugger increased the risk of surgical infection,[2] 3M knew that there was evidence that the Bair Hugger increased the risk of infection since at least 1994,[3] 3M removed warnings about potential airborne contamination from the Bair Hugger when it was moved into operating rooms during surgery,[4] 3M knew that forced air warming was largely ineffective during the first hour of surgery,[5] 3M knew that many surgical patients do not get cold enough during surgery to require active warming,[6] 3M knew that "obese people don't get cold in surgery" so

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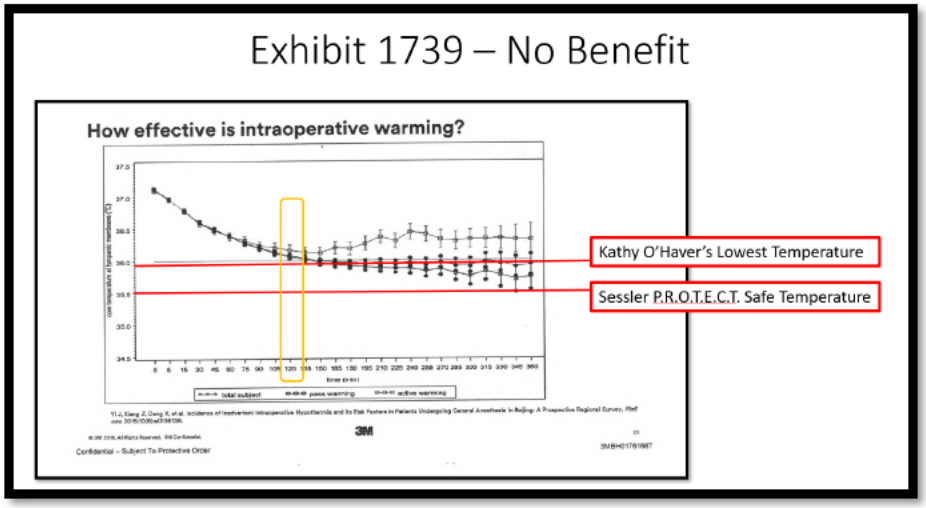
[1] Trial Exhibit 2223, Dep. Tr. Van Duren (4/14/2022), p. 132, attached hereto as **Exhibit 1**.
[2] Trial Exhibit 225, attached hereto as **Exhibit 2**. In addition, 3M's general causation expert, Dr. Borak, testified at trial that he was unaware of evidence that the Bair Hugger is safe, and confirmed that he was not aware of any other warming device that increases *bacteria* over the sterile field other than the Bair Hugger. Rough Tr. 10/7/2022, p. 68, attached hereto as **Exhibit 3**.
[3] Trial Exhibit 1735, attached hereto as **Exhibit 4**.
[4] **Exhibit 1** at 141.
[5] Trial Exhibit 1733A, attached hereto as **Exhibit 5**.
[6] Trial Exhibit 1739, attached hereto as **Exhibit 6**. See also Plaintiff's demonstrative of Trial Exhibit 1739 used in closing argument.

surgical warming is "not necessary" and there is "no benefit to using the Bair Hugger,[7] 3M knew that the evidence it cited for the benefits of forced air warming was weak, outdated, and not relevant to the modern medical practices of today,[8] and 3M's legal department, in July 2015, stopped all clinical research on the Bair Hugger's risks and benefits due to "the ongoing legal situation."[9] Even 3M's main causation expert, Dr. Borak, could not exclude the Bair Hugger as a cause of Katherine O'Haver's deep joint infection[10] nor would he agree that the Bair Hugger was safe.[11]

Despite 3M's subjective knowledge of the Bair Hugger's dangerous propensity to disrupt airflow and contaminate the sterile field, it failed to provide *any* of its internal documents to its experts hired to defend the company at trial. It also conducted testing which 3M has improperly kept secret from the public and health care regulators by claiming attorney-client and work product privileges. However, 3M waived any claim of privilege when 3M disclosed a substantial portion of that testing—including an October 15, 2015, test report that described in detail the



[7] **Exhibit 1** at 307:13-308:9, 130:12-19, 211:609.
[8] Trial Exhibit 1668, attached hereto as **Exhibit 7**.
[9] Trial Exhibit 134A, attached hereto as **Exhibit 8**.
[10] **Exhibit 3** at 83.
[11] *Id.* at 39.

"[c]omputational fluid dynamic analysis and experimental flow visualization [] used to study a plume of air effusing from the upper body Bair Hugger blanket as an independent component and integrated into a 'non-laminar' operating room." Trial Exhibit 1669, at 1, attached hereto as **Exhibit 9**.

3M's report described "[i]nitial experiments" done to examine the characteristic behavior of the Model 750 blower for flow rate and delivered temperature in order to calculate the energy rate as well as testing of "the Bair Hugger for volumetric flow" in order "to determine the boundary condition for a CFD model of the blanket with an actual operating room." *Id.* at 1, 2. The test report includes photographs and illustrations, descriptions of testing conditions, formulas used during the testing, and description of test data. *Id.*, generally. The test report lost any privilege protection when it was produced to third parties, produced to attorneys representing plaintiffs in other Bair Hugger litigation, produced to Plaintiff in this litigation, and identified and marked as exhibits in 3M's corporate depositions in this case (without objection). There is no dispute that no privilege exists to protect Trial Exhibit 1669.

Despite 3M's production of Trial Exhibit 1669, it refused to produce related documents showing the results of its testing, suggesting that the results would have supported Plaintiff's claims and would have been unfavorable to 3M. See *Johnson v. Mo. Bd. of Nursing Administrators*, 130 S.W.3d 619, 629 (Mo. App. 2004) (assertion of privilege justified an inference that had the defendant answered truthfully rather than asserting privilege, her answers would have been unfavorable to her or would have corroborated testimony given by her opponent's witnesses).

II. STANDARD FOR REVIEW OF A MOTION FOR NEW TRIAL

The Court may grant a new trial upon good cause shown. Rule 78.01. 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. See *Nguyen v.*

Haworth, 916 S.W.2d 887, 889 (Mo. App. 1996); *Swift v. Bagby*, 559 S.W.2d 635, 638 (Mo. App. 1977). In reviewing a trial court's grant of new trial, the trial court's grant of new trial is presumptively correct and reviewing courts "indulge[] every reasonable inference favoring the trial court's ruling." *Nguyen*, at 888-89.

III. ARGUMENT AND AUTHORITY

1. The Court Committed Reversible Error in Refusing to Allow Plaintiff the Opportunity to Complete Her Cross-Examination of Defense Expert Dr. Michael Mont

The Court abused its discretion and unduly prejudiced Plaintiff in preventing Plaintiff from completing her cross-examination of Dr. Michael Mont, 3M's main expert on the direct causation of Plaintiff's deep joint infection.

Plaintiff has the *statutory* right to cross-examine a witness. R.S.Mo. § 491.070 provides, in pertinent part, "[a] party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness . . . on the entire case . . . ." The Missouri Supreme Court emphasized that *"[t]he right to cross-examine a witness who has testified for the adverse party is absolute* and not a mere privilege." *Pettus v. Casey,* 358 S.W.2d 41, 44 (Mo. 1962) (emphasis added).

In fact, it is said to be the "'essence of a fair trial that reasonable latitude be given the cross-examiner . . . .'" *State v. Thompson,* 280 S.W.2d 838, 841 (Mo. 1951) (quoting *Alford v. United States,* 282 U.S. 687, 692 (1931)). For nearly a century, the Missouri courts have held that the right of cross-examination "is an absolute right" and "*may not* be unduly restrained or interfered with by the court"[12]:

> The right of cross-examination is a right the law freely accords to any litigant who finds himself confronted by an adverse witness, and *it may not be*

[12] *Gurley v. St. Louis Transit Co. of St. Louis,* 259 S.W. 895, 898 (Mo. App. 1924) (emphasis added).

> *unduly restrained or interfered with by the court*. The right of a litigant to cross-examine an adverse witness within proper bounds is an *absolute right*, and *it is not within the discretion of the court to say whether or not the right will be accorded*. The right of cross-examination is regarded of such consequence that it is made one of the chief grounds for the exclusion of hearsay evidence. If the right to cross-examine an adverse witness be denied or unduly limited or restrained, the testimony given by the witness would, in a very marked degree, partake of the character of hearsay testimony. *It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstances that may tend to show* his relations with, feelings toward, *bias or prejudice* for or against either party, *or that may disclose a motive to* injure the one party or to befriend or *favor the other*. . . .

Gurley v. St. Louis Transit Co. of St. Louis, 259 S.W. 895, 898 (Mo. App. 1924) (emphasis added).

The United States Supreme Court also recognized the fundamental importance of cross-examination, particularly as to expert witness testimony, with its oft-quoted statement that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Missouri courts have adopted this standard. See *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 319 (Mo. App. E.D. 2018). The Court violated these bedrock principles of a fair trial by refusing to grant Plaintiff her statutory, absolute right to conduct a fair and full cross-examination of 3M's expert Dr. Mont, to Plaintiff's substantial prejudice.

The Court's Scheduling Order setting this case for trial beginning September 26, 2022, was entered on March 31, 2021. 525 days later[13]—less than two weeks before trial—3M first notified Plaintiff's counsel and the Court that Dr. Mont failed to preserve adequate time to provide his expert testimony in this case and failed to preserve adequate time for him to give his testimony in person.[14] Because Dr. Mont failed to preserve adequate time to provide his testimony, 3M

[13] On September 7, 2022.
[14] September 7, 2022, conference call.

informed Plaintiff and the Court that Dr. Mont's testimony must be given remotely and during a limited window of time from 11:30 a.m. until 5:00 p.m. on Friday, October 7, 2022. Because the trial date had been scheduled for 525 days (approximately 18 months), Dr. Mont's limited availability was *entirely* his own making and completely avoidable.

Though Dr. Mont's conflict was entirely preventable and of his own making, Plaintiff, nevertheless, offered to depose Dr. Mont by videotape prior to trial. 3M *never responded* to Plaintiff's offer and did not raise the issue of Dr. Mont's availability again until the eve of trial at the September 26, 2022, pre-trial conference.

At the September 26, 2022, pre-trial conference, Plaintiff expressed her concern not only that she would be prejudiced in being forced to remotely (rather than in person) cross-examine 3M's critical defense expert, but also expressly raised the concern of an inability to complete her cross-examination.

> THE COURT: So do you have an objection to Dr. Mont testifying remotely?
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> MR. EMISON: I do, Your Honor. And this came up at our initial pretrial conference about three weeks ago. And we talked about that. I do – on a technological basis, I do, *even more, now that I know he's going to be at a mandatory conference for part of the day is only going to be available for part of the day. I worry about our opportunity to complete a cross-examination of Dr. Mont, especially if there may be technical issues*….

Tr. 9/26/2022 Pretrial Conference, at 163 (emphasis added), attached hereto as **Exhibit 10**.

Over Plaintiff's objections, the Court permitted Dr. Mont's remote testimony on Friday, October 7, 2022. 3M was able to fully complete its direct examination of Dr. Mont, using 100 minutes of time. Plaintiff, however, was not permitted a reasonable amount of time to complete her cross-examination of Dr. Mont.

Approximately 46 minutes into Plaintiff's cross-examination on October 7, the Court called a sidebar to ask Plaintiff's counsel how much longer she intended to cross-examine Dr.

Mont. **Exhibit 3** at 161-62. Plaintiff's counsel responded, "It would be my expectation under normal circumstances without a witness's limitation that this cross would continue until Tuesday. I understand that both the witness and the court's ruling don't permit me to do that." *Id.* at 162. The Court stated that it would only allow Plaintiff the same amount of time as 3M took on direct examination, a total of 100 minutes for cross-examination. However, after only 32 minutes, at 5:04 p.m., the Court interrupted Plaintiff's cross-examination, ruling that Plaintiff would be allowed to go only two minutes more before the Court would recess for the day. *Id.* at 208.

Shortly thereafter, the Court interrupted Plaintiff's counsel again—mid-question—and called a recess for the day. *Id.* at 210. Plaintiff preserved her objection as to her inability to complete her cross-examination of 3M's expert witness, stating that "the plaintiff's position is that the defendant conducted their cross-examination [of Plaintiff's witnesses] that they [3M] deemed appropriate. And we [Plaintiff] shouldn't be penalized for that on the back end of the case during their [3M's] presentation of the evidence. *Id.* at 214.

In addition, Plaintiff's counsel objected that they still had "significant additional cross" with respect to 3M's expert, Dr. Mont. *Id.* at 217. For example, Dr. Mont admitted on cross-examination that he had not considered any internal 3M documents and that it was possible that internal documents might change some of his opinions. *Id.* at 187-88. The Missouri Supreme Court has held that a party may impeach an expert witness by demonstrating that he had not reviewed relevant materials and that his opinion may have changed had he been provided such materials. *State v. Brooks*, 960 S.W.2d 479, 493 (Mo. 1997). By the time Dr. Mont was called to testify, dozens of internal 3M documents showing (1) the Bair Hugger's lack of any benefit; and (2) the Bair Hugger's dangerous propensity to cause deep joint surgical infections had been

received into evidence by the Court.[15] In addition, the jury had heard 3M's testimonial admissions that the Bair Hugger increased the risk of surgical infection,[16] every study shows that the Bair Hugger increases airborne particles over the sterile field,[17] and that 3M removed warnings of airborne contamination from the Bair Hugger.[18] Had Plaintiff been granted a reasonable amount of time to cross-examine Dr. Mont, she would have impeached his testimony using every single one of these exhibits and corporate admissions that directly contradicted his opinion testimony.

Notably, the Court *never* excused Dr. Mont as a witness[19] nor released him from his obligation to return. In fact, the Court noted that 3M could make Dr. Mont available on Tuesday morning for additional testimony. *Id.* at 214-15. Monday, October 10, 2022, was a court holiday. 3M did not clarify that it would not return Dr. Mont to the witness stand for continued testimony until that day. At that point, Plaintiff was left without any opportunity to complete her cross-examination as she indicated was necessary on October 7, 2022.

Dr. Mont's self-inflicted scheduling conflicts during a trial set 525 days beforehand appears to have been a well-designed trial tactic – the same tactic that defense counsel used to a similar intended effect in *Reddick v. Smith & Nephew*, MDL NO. 1:17-MD-2775-CCB, No. 1:17-cv-944 (D. Md. Aug. 4, 2021, morning session), attached hereto as **Exhibit 17**. In that August

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[15] See, *e.g.*, Trial Exhibits 134A, 225, 1668, 1733A, 1735, 1739, attached hereto as **Exhibits 8, 2, 7, 5, 4, and 6**.

[16] **Exhibit 3** at 68 (3M's expert, Dr. Borak, conceded that the Bair Hugger is the only warming device that increases bacteria over the sterile field).

[17] **Exhibit 1** at 132.

[18] *Id.* at 141.

[19] The Court routinely engaged in a practice of confirming with the parties that the witness may be excused. See, *e.g.*, Rough Tr. 9/29/22, at p. 100 (Dr. Bowling), *Id.* at 194 (Dr. Elghobashi) attached hereto as **Exhibit 11**; Rough Tr. 10/3/2022, at 95 (Dr. Jarvis), attached hereto as **Exhibit 12**; Rough Tr. 10/4/2022, at 68 (Dr. David), attached hereto as **Exhibit 13**; Rough Tr. 10/5/2022, at 96 (Dr. Smith), *Id.* at 108 (Mr. Barnes), *Id.* at 113 (Ms. Johnson), attached hereto as **Exhibit 14**; **Exhibit 3** at 83 (Dr. Borak); Rough Tr. 10/12/2022, at 61 (Dr. Abraham) attached hereto as **Exhibit 15**; Rough Tr. 10/13/2022, at 45 (Dr. Anderson).

2021 trial, Dr. Mont also raised scheduling limitations mere days before trial. As a result, his direct examination did not begin until 11:00 a.m. on a Wednesday. *Id.* While the defendant was allowed a full day to present Dr. Mont's direct examination, the plaintiff was limited to one hour of cross on Thursday. *Id.* Cross-examination resumed on Friday for four hours, but Dr. Mont explained he had a scheduled vacation that would not permit him to stay all day and he was allowed to leave without Plaintiff being able to complete his cross-examination. *Id.* This truncated cross-examination substantially impaired the plaintiff's ability to fully cross-examine him.

As in *Reddick,* Mont's ploy here of presenting self-inflicted scheduling conflicts significantly impeded Plaintiff's cross-examination, making it more cumbersome and time-consuming for Plaintiff, and limiting Plaintiff's ability to present impeachment exhibits to the witness (as described in greater detail below). The combination of this tactic and the Court's unreasonable limitation of Plaintiff's cross-examination time left her without sufficient time to present the jury with crucial impeachment evidence.

A similar situation arose in *Hyde v. Butsch*, 861 S.W.2d 819 (Mo. App. 1993), in which the trial court limited the plaintiff's cross-examination of the defendant's expert witness. The plaintiff's cross-examination began at 4:10 p.m. on a Friday; at 4:55 p.m., after a juror had indicated he had to pick up his daughter at 5:30, the court announced that the plaintiff had five minutes to complete her cross-examination. *Id.* at 820.

Over the plaintiff's objection, the court terminated plaintiff's cross-examination and asked defendant's expert whether he could return on Monday. *Id.* The expert responded that it would pose an extreme hardship as it would be difficult to notify his patients who had appointments on Monday. *Id.* at 821. After the court instructed the witness to step down, the plaintiff renewed her

objection and advised the court of the specific areas on which she had been unable to cross-examine him. *Id.*

On plaintiff's motion, the trial court *granted plaintiff a new trial*, finding that it had abused its discretion in limiting the plaintiff's cross-examination and failing to order the expert to return to testify. *Id.* at 820. The appellate court affirmed the trial court's grant of a new trial, signaling its approval of the trial court's reconsideration of a ruling when "it believes its discretion was not wisely exercised and that prejudice to the losing party resulted." *Id.* at 821.

The right to cross-examine a witness is "absolute" and not within the Court's discretion to say whether or not this absolute right will be accorded. *Gurley*, 259 S.W.at 898. The right to cross-examination "may not be unduly restrained or interfered with by the court." *Id. Hyde* establishes the model this Court should follow as it "reflect[s] on its actions during trial"[20] and, in the exercise of its wise discretion, should order a new trial to remedy Plaintiff's inability to complete her cross-examination of Dr. Mont. *Hyde*, 861 S.W.2d at 821. The Court's limitation of Plaintiff's cross-examination unquestionably had a substantial prejudicial impact on the jury's verdict and constitutes reversible error. As the Supreme Court has said: "'Prejudice 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.'" *Thompson,* 280 S.W.2d at 841 (quoting *Alford v. United States,* 282 U.S. 687, 692 (1931)). *Thompson's* holding is equally applicable here: "[f]or this improper restriction of the right of cross-examination this case must be reversed and remanded for a new trial." *Id.*

[20] *Nguyen*, 916 S.W.2d at 889. See also *Swift*, 559 S.W.2d at 638.

2. The Court Committed Reversible Error in Refusing to Allow Plaintiff the Opportunity to Complete Her Cross-Examination of Defense Expert Dr. Jonathan Borak

The Court not only unduly limited Plaintiff's cross-examination of Dr. Mont, it also unfairly limited Plaintiff's cross-examination of 3M's chief general causation expert, Dr. Jonathan Borak. Like Dr. Mont's self-inflicted conflict, 3M's chief general causation expert, Dr. Borak scheduled a family vacation during this trial setting that was established 18 months beforehand. See **Exhibit 3** at 1-2. 3M's untimely disclosure of this conflict was *even more prejudicial* than that of Dr. Mont because 3M did not disclose the limitation until the morning of October 7, 2022[21], *after* Plaintiff had already begun her cross-examination of Dr. Borak.

Plaintiff asked for at least an additional two hours to cross-examine Dr. Borak. *Id.* at p. 3. The Court indicated she would allow 70 additional minutes and would then determine if she would limit Plaintiff's time to cross-examine Dr. Borak. *Id.* At 67 minutes into Plaintiff's continued cross-examination, the Court asked Plaintiff how much additional time was needed. *Id.* at p. 67. Plaintiff indicated she needed at least 15-20 additional minutes. *Id.* The Court gave Plaintiff 10 additional minutes of cross-examination and indicated it would permit an additional five (5) minutes for re-cross examination. *Id.*

At the time required by the Court, counsel for Plaintiff indicated, "I'm done with cross-examination." *Id.* at 74. Plaintiff's counsel also stopped his re-cross examination of the witness at the time required by the Court. Plaintiff's counsel sought to preserve his objection as to the limitation of his time as previously discussed with the Court. *Id.* at 83. Plaintiff's counsel

[21] 3M did not disclose Dr. Mont's vacation on the record until the morning of October 7, 2022. 3M did e-mail counsel for Plaintiff at approximately 9:00 p.m. on Thursday, October 6, 2022, after 3M had fully questioned Dr. Mont on direct examination and after Plaintiff had begun her cross-examination.

indicated that he did not complete his re-cross examination as he would have done had he not been limited by the Court. *Id.* at 83-84. Plaintiff was substantially and unduly prejudiced by her inability to complete her cross-examination of 3M's primary general causation expert.

For the same reasons expressed in Section 1, *supra*, the Court abused its discretion in unfairly limiting Plaintiff's cross-examination and re-cross examination of Dr. Borak. While the unfair limitation of cross-examination of either Dr. Mont or Dr. Borak, alone, was sufficient to warrant the grant of a new trial, the cumulative effect of these limitations is unquestionably unduly prejudicial. *These two experts were 3M's experts on general and specific causation*. No experts were more critical to 3M's defense. 3M claimed throughout the trial that the Bair Hugger was not the cause of Plaintiff's surgical infection. Plaintiff's inability to complete her cross-examination of these two critical witnesses "unduly restrained"[22] her ability to counteract 3M's evidence and left much of the testimony from these witnesses unchallenged.

Like the trial court in *Hyde*, this Court should, after reflecting on these actions,[23] grant a new trial because of its undue restraint of Plaintiff's "absolute right"[24] to cross-examine both Dr. Mont and Dr. Borak. See *Hyde*, 861 S.W.2d at 821.

3. The Trial Court Erred in Finding that the Conclusion to 3M's CFD Test was Work Product Protected and in Excluding the Testimony of its Employee, Dr. Andrew Chen, as to the Results of the CFD Test

The Court erred in finding the test results and additional materials concerning 3M's internal computational fluid dynamics (CFD) study were protected by work product privilege. 3M waived its privilege as to a substantial portion of the underlying data and analysis of its study, because (1) 3M—through its corporate designee—characterized the findings of its analysis without preserving

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[22] *Gurley*, 259 S.W. at 898.
[23] See *Nguyen*, 916 S.W.2d at 889.
[24] *Gurley*, 259 S.W. at 898.

any privilege, (2) 3M's underlying data and analysis were provided to non-lawyers outside of 3M, (3) portions of the underlying data and analysis were provided to non-party testifying witnesses, and (4) Plaintiff has substantial need for these materials and cannot obtain their equivalent because 3M's knowledge of its internal CFD analysis is relevant to Plaintiff's negligence, failure to warn, and punitive damages claims and 3M's internal analysis has no equivalent. Any one of these alone is sufficient to waive the privilege.

a. Legal Analysis

It is axiomatic that attorney-client and attorney work product privileges can be waived by voluntary disclosure. See, *e.g., Edwards v. Mo. State Bd. Of Chiropractic Exam'rs*, 85 S.W.3d 10, 27 (Mo. App. 2002). Moreover, work product protection is not absolute. Rule 56.01(b)(3) governs the production of tangible work product. *Ratcliffe v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 547 (Mo. App. 2008). Rule 56.01(b)(3) states that such material is discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adversary party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Additionally, Rule 56.01(b)(4) provides for the discovery of "facts known and opinions held" by experts retained in litigation once they have been designated as trial witnesses. *Edwards*, 85 S.W.3d at 27 quoting *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 834 (Mo. 2000). Indeed, "Missouri cases require an expert to produce at deposition the materials that the expert *has reviewed* in order that the opposing attorney may be able to 'intelligently cross-examine the expert concerning what facts he used to formulate his opinion.'" *Id.* (emphasis added). Thus, "[a]ll material given to a testifying expert must, if requested, be disclosed." *Id.* at 836. "This bright line

rule includes both trial preparation materials and opinion work product that is given to and reviewed by the expert." *Id.*

b. 3M Waived Any Privilege Through Voluntary Disclosure

3M waived any privilege to its internal CFD analysis because (1) it voluntarily produced a report of the underlying data without protection of any privilege; (2) its corporate designee, Jay Issa, discussed the analysis and its conclusion at his February 3, 2022, deposition; and (3) it provided its CFD analysis to non-attorney, non-3M personnel.

First, 3M voluntarily produced a report of the underlying data and testing that was conducted. This report was voluntarily produced without any work product or attorney-client privilege and admitted as evidence at trial. See **Exhibit 9** (Trial Exhibit 1669). While 3M produced the underlying testing data and analysis, it refused to produce the study's results and conclusions. 3M waived its privilege as to the study's results by failing to protect the study's underlying data and analysis included in Trial Exhibit 1669.

Second, 3M waived its privilege as to the test results when the Company – through its corporate designee, Jay Issa – volunteered a description of the study's results and conclusions without objection:

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.

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. I saw the report.

Q. **Did you see the conclusions?**

A. **Yeah. The conclusion was neutral, yeah.**

Q. Neutral?

A. **Neutral.** Sorry. That's my Texan accent.

Q. **What do you mean by neutral?**

A. **There was nothing to be concerned about in this one.**

Dep. Tr. Issa (2/3/22) at 73:13-74:16 (emphasis added), attached hereto as **Exhibit 18**. Dr. Issa further indicated that the document does not indicate on its face that it was protected by the attorney-client privilege.

In addition, Dr. Issa testified:

Q. Was the document explained to you?

A. I was explained that it was asked, and there was no reason at the time to share it with the business. That's why I was not aware of it. **The conclusion did not go in any direction**, and more were needed.

Id. at 315:20-25 (emphasis added).

3M's corporate witness voluntarily disclosed and discussed the study parameters under oath and on the record where he *described the results of the study* without objection. Because 3M refused to produce the actual results, the only evidence of the study's conclusions are 3M's own

self-serving descriptions of those conclusions as "neutral" and/or "did not go in any direction" without Plaintiff's ability to verify the conclusions or cross-examine the Company on its description. 3M has waived any privilege protection for these documents by its voluntary disclosure of the protected information. See *Edwards*, 85 S.W.3d at 27.

Finally, 3M waived its privilege by providing the documents to at least one non-3M employee who was not subject to privilege protection. Counsel for Plaintiff obtained the 17-page CFD document through third-party discovery of Jennifer Wagner. Production of this material to non-employees waived the privilege not only as to the seventeen-page report, but also as to whatever additional scientific analysis that was performed, or conclusions reached based on the non-privileged underlying data.

c. Plaintiff Has Substantial Need for 3M's Internal CFD

Even if 3M's analysis and conclusions of its internal CFD study were protected by the work product privilege, Plaintiff is entitled to the information because she has a substantial need for the information and an inability to obtain a substantial equivalent. See Rule 56.01(b)(3). Plaintiff's claims include counts alleging negligence, failure to warn, and punitive damages. 3M's knowledge—more than a year before Plaintiff's surgery—that the Bair Hugger disrupts airflow in an operating room is highly relevant, critical evidence as to Plaintiff's claims. Plaintiff has a substantial need for this information.

If 3M's internal testing showed—as Plaintiff suspects it does—that the Bair Hugger disrupts airflow over the sterile field, then the fact that 3M failed to share this information with senior level employees, like Jay Issa, or with its engineers, doctors, sales staff, and other employees responsible for the design, testing, and marketing of the Bair Hugger is critical evidence supporting Plaintiff's claims. Although Plaintiff's expert performed a CFD analysis, it is not the substantial

equivalent of 3M's own, subjective, internal knowledge based on its own testing. Simply, there is no substantial equivalent to 3M's own internal testing.

d. Conclusion

The Court abused its discretion and committed reversible error in failing to require 3M to produce critical, relevant, and non-privileged information concerning the internal CFD testing performed by Andrew Chen and others in 2015. 3M waived any privilege as to the testing by voluntarily producing the underlying data and test report, by describing the results and conclusions of the testing in deposition testimony, and by providing such information to non-attorney, non-3M employees. Even if the materials were protected by the attorney work product privilege, such privilege is not absolute, and the Court erred in not requiring 3M to produce the test results because Plaintiff has shown a substantial need and there is no substantial equivalent.

4. The Court Abused its Discretion in Prohibiting Plaintiff from Playing Dr. Chen's Deposition During Plaintiff's Case-in-Chief

The Court abused its discretion and caused Plaintiff substantial undue prejudice in prohibiting Plaintiff from playing Dr. Chen's non-privileged deposition testimony during Plaintiff's case-in-chief (in addition to preventing Plaintiff from cross-examining 3M's experts with Dr. Chen's testimony as described *infra*). As described above, 3M waived any privilege as to Trial Exhibit 1669 (attached as **Exhibit 9**) and the facts, data, and work described therein. Plaintiff deposed 3M's employee, Dr. Andrew Chen about his non-privileged work reflected in Trial Exhibit 1669 and sought to play designated portions of Dr. Chen's testimony during Plaintiff's case-in-chief.

There simply was no basis for the Court to preclude Plaintiff from playing this critical evidence during her case-in-chief or to prohibit Plaintiff from cross-examining 3M's retained experts with this non-privileged, admitted evidence. The Court abused its discretion in prohibiting

Plaintiff's use of this testimony—even after the Court had admitted Trial Exhibit 1669 into evidence—in ruling that "no testimony or reference to Dr. Andrew Chen's testimony [would] be allowed." **Exhibit 14** at 14.

As described above, Dr. Chen's work was critical to Plaintiff's theory of the case and was critical evidence of 3M's own testing that directly contradicted that of 3M's retained litigation expert, Dr. Abraham. Plaintiff was precluded from exploring this evidence in her case-in-chief (and was similarly prohibited from using this evidence to cross-examine and impeach Dr. Abraham during 3M's presentation of evidence). Plaintiff's presentation of this evidence in rebuttal was insufficient to cure undue prejudice imposed by the Court's abuse of discretion.

In rebuttal, there was no context available to explain Dr. Chen's work and how it directly refuted the initial boundary conditions—and, ultimately, the conclusions—of 3M's retained expert, Dr. Abraham. Plaintiff should have been permitted to impeach Dr. Abraham in real-time with his false assumptions and the fact that Dr. Chen testified not just that Dr. Abraham's assumptions were incorrect, but that any conclusions based on those incorrect assumptions would be unreliable and false. See Chen Tr. 59:8-11, attached hereto as **Exhibit 19**. Leaving the attempted impeachment testimony in rebuttal—buried within 3M's counter-designations—watered down the evidence to the point it was meaningless to the jury. The Court abused its discretion in prohibiting the cross-examination and impeachment of 3M's key expert witness which fundamentally prejudiced Plaintiff Katherine O'Haver.

5. The Court improperly prohibited Plaintiff from cross-examining 3M's expert witnesses with Dr. Andrew Chen's non-privileged deposition testimony concerning 3M's internal CFD testing

The Court abused its discretion in prohibiting Plaintiff from cross-examining 3M's expert regarding Dr. Chen's CFD analysis.

a. Legal Standard

It is well-settled that parties have wide latitude in impeaching expert witnesses: "In the exercise of [its] discretion in situations involving the cross-examination of expert witnesses, parties *are to be given* wide latitude to 'test qualifications, credibility, skill or knowledge, and value and accuracy of opinion." *Rodriquez v. Suzuki Mtr. Corp.,* 996 S.W.2d 47, 60 (Mo. banc 1999) (quoting *Callahan v. Cardinal Glennon Hosp.,* 863 S.W.2d 852, 869 (Mo. banc 1993)) (emphasis added). In that regard, ***a party may impeach an expert with relevant materials the expert did not review***. For example, an expert may be cross-examined on "articles and treatises which he does not recognize, so long as *some other expert* has testified that the publications are authoritative." *Ball v. Burlington Northern R. Co.,* 672 S.W.2d 358, 363 (Mo. App. E.D. 1984) (Emphasis added).

So, too, a party may impeach an expert witness by demonstrating that he had not reviewed relevant materials and that his opinion *might* have changed had he been provided with such materials. Instructive is *State v. Brooks,* 960 S.W.2d 479 (Mo. banc 1997). There, the defense called an expert witness, Dr. Eric Engum, in the penalty phase of the trial to testify with respect to the defendant's mental deficiencies. *Id.* at 492. Dr. Engum had testified that the lack of structure in the defendant's life affected his personality problems. *Id.* The prosecution asked Dr. Engum whether he had been provided the defendant's prison records and whether was aware of his aggressive antisocial behavior in prison. *Id.*

Over objections that were overruled, Dr. Engum answered negatively to both questions. *Id.* Dr. Engum was further asked whether he was aware that the defendant had tried to sexually assault his cell mate. *Id.* He again answered that he was unaware. The prosecution asked whether such information affected Dr. Engum's opinion about appellant's personality traits, to which he replied that it might. *Id.* The defense appealed, arguing, among other things, that the trial court had erred

in overruling his objections to the state's cross-examination because no foundation had been laid for admission of the prison records and the records were hearsay. *Id.* at 493.

The appellate court held "the prosecution did not exceed the scope of cross-examination in asking Dr. Engum about whether he had been provided appellant's prison records in making his determination [that defendant's "personality disorder would be controlled by the structured environment of a prison"] and whether his opinion would be different if he knew about appellant's conduct in prison. The state ***had the right*** to rely on appellant's prison records in cross-examining Dr. Engum, regardless of the records' admissibility." *Id.* (emphasis added).

Courts in other jurisdictions are in accord that an expert may be cross-examined with material the expert did not consider. For example, the Illinois Supreme Court explained:

> "On cross-examination, counsel may probe the witness's qualifications, experience and sincerity, weaknesses in his basis, the sufficient of his assumptions and the soundness of his opinion." . . . *An expert may also be cross-examined with respect to material reviewed by the expert but upon which he did not rely*. . . . "*Counsel is also permitted to test the knowledge and fairness of the expert by inquiring into what changes of condition would affect her opinion* . . . . Likewise, an expert may be cross-examined for the purpose of explaining, modifying, or discrediting his testimony, as well as to ascertain what factors were taken into account and *what ones disregarded in arriving at his conclusions* . . . .

People v. Pasch, 152 Ill.2d 133, 179 (1992) (citations omitted; emphasis added). *See also State v. Boys,* 321 So.3d 1087, 1107-08 (La. App. 2021) (cross-examination of expert with arrest record not considered by expert was proper to support argument that expert's opinion was based on incomplete information.).

This rule makes logical and practical sense. If this were not the rule, a party could successfully insulate their experts and make them "impeachment-proof" by limiting the materials considered to only those which support the expert's opinions, knowing the Court would shield the expert from a true examination as to the basis for their opinions by excluding any inquiry as to evidence that tends to undermine or contradict the expert's opinion.

b. Plaintiff Was Entitled to Impeach 3M's Computational Fluid Dynamics Expert, Dr. Abraham, Using Dr. Chen's Data and Testimony

As described above, 3M's legal department commissioned a computational fluid dynamics ("CFD") study of the Bair Hugger in 2015. See **Exhibit 9** (Trial Exhibit 1669). Portions of this study were produced in discovery and any privilege associated with such production was waived. Plaintiff deposed Dr. Andrew Chen, one of the authors of 3M's internal CFD study, shortly before trial. Dr. Chen testified that the initial boundary conditions 3M used in its internal CFD analysis were substantially different from those that Dr. Abraham used.

Plaintiff sought to impeach Dr. Abraham by identifying the different fundamental boundary conditions that 3M used versus those that Dr. Abraham used in his analysis. Rough Tr. 10/11/2022 at p. 133, attached hereto as **Exhibit 20**. Notably, this evidence had already been received by the Court. See **Exhibit 9** (Trial Exhibit 1669). Plaintiff asked Dr. Abraham if he knew that a CFD had been done internally by 3M. **Exhibit 20** at 133. Counsel for 3M objected that Plaintiff sought to have the jury draw an adverse inference from the fact that Mr. Chen was part of 3M. *Id.*

3M had filed a motion in limine asking the Court to preclude any *argument* that suggested an adverse inference from the fact that 3M conducted a CFD study in 2015 but failed to provide the results of that testing to anyone outside of 3M's legal department. Plaintiff believes the Court's ruling on that motion in limine was incorrect as reflected in Section 6, *infra*. Nevertheless, Plaintiff's cross-examination of Dr. Abraham on this issue did not advocate for an adverse inference, but merely sought to impeach Dr. Abraham as to critical differences between his boundary conditions and the boundary conditions used by Dr. Chen for 3M.

Notably, much of the work that Dr. Chen performed was not subject to any privilege objection and had *already been received as evidence* at trial before Dr. Abraham's cross-

examination. **Exhibit 9** (Trial Exhibit 1669). In fact, the Court acknowledged the Chen materials *were* in evidence and abused its discretion in precluding Plaintiff from impeaching 3M's expert with *admitted evidence*, stating, "*[w]hether it's in evidence or not is irrelevant*" and ordered Plaintiff to "[m]ove on." **Exhibit 20** at 134 (emphasis added).

The issue of Dr. Chen's internal CFD analysis came up again later in Dr. Abraham's cross-examination. See *id.* at 160. A critical component of Dr. Abraham's opinion testimony was that residual heated air from the Bair Hugger escaped only from the head and neck of the patient. 3M's non-privileged analysis showed residual heated air escaping from around the patient's arms. See *id.* Plaintiff sought to impeach Dr. Abraham using Dr. Chen's deposition testimony where he testified that air comes out of the arms and not the head and neck like Dr. Abraham opined.

Dr. Chen was asked in his deposition about the initial boundary conditions and the fact that the Bair Hugger inlet would be around the arms in the OR CFD model. **Exhibit 15** at p. 2. Dr. Chen testified that it would be an error to assume that all of the Bair Hugger's residual heat escaped at the head and neck. **Exhibit 19** at 53-55, 59. Dr. Chen confirmed in his deposition testimony that a CFD model (like that prepared by Dr. Abraham) that used the wrong position for the Bair Hugger's air inlet would be unreliable. *Id.* Dr. Chen's testimony would have established on cross-examination that Dr. Abraham's CFD modeling was *wrong* and *unreliable* based on 3M's own internal analysis.

3M objected that Dr. Abraham had not relied on Dr. Chen's deposition. The Court sustained 3M's objection and abused its discretion in preventing Plaintiff from impeaching 3M's expert witness with 3M's own internal analysis that utilized diametrically opposing initial boundary conditions, which rendered Dr. Abraham's opinion unreliable. See *Rodriguez*, 996 S.W.2d at 60; *Ball*, 672 S.W.2d at 363.

6. The Trial Court Erred in Precluding Plaintiff from Arguing an Adverse Inference from the Fact that 3M Performed a CFD Test but Refused to Disclose the Test Conclusion

The Court abused its discretion and committed reversible error in precluding Plaintiff from "arguing the evidence and all reasonable inferences from the evidence during closing arguments." See *State v. McFadden*, 369 S.W.3d 727, 748 (Mo. 2012) (counsel "is allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments.").

a. Factual Background

By July 2015, 3M made the decision at its highest levels that it would no longer pursue clinical research of the Bair Hugger "[g]iven the ongoing legal situation". Trial Exhibit 1887, attached hereto as **Exhibit 21**. Michelle Hulse-Stevens, 3M's Medical Director, testified in deposition testimony played to the jury that "discussions about doing [a] study just stopped after we had this input from our legal team." Trial Exhibit 2224, Hulse-Stevens Dep. Tr. at 259:4-9, attached hereto as **Exhibit 22**. However, in October 2015, 3M's legal department directed 3M employees to conduct a computational fluid dynamics (CFD) analysis for litigation testing purposes. See **Exhibit 9** (Trial Exhibit 1669). The results of this testing were not provided to any clinical personnel responsible for the Bair Hugger, including Jay Issa, who was responsible for the patient warming division at the time. **Exhibit 18** at 73:13-74:16, 315:20-25. 3M's internal testing was, however, provided to non-3M employees, which waived 3M's privilege as to a seventeen-page report containing a description of the testing parameters, the testing itself, and the testing data.[25] **Exhibit 9** (Trial Exhibit 1669).

[25] As described above, Plaintiff contends 3M waived its privilege as to other portions of its testing, including the results and conclusions of its analysis.

3M's conduct in stopping all clinical testing of the Bair Hugger by July 2015 was a critical component of Plaintiff's case at trial. During closing argument, Plaintiff's counsel argued that the Company's legal department should not be permitted to dictate what clinical testing would be performed on a medical device like the Bair Hugger. See, *e.g.*, **Exhibit 16** at p. 87. Plaintiff intended to (1) argue that 3M's litigation department had not just killed testing it didn't like, but it also conducted testing that it kept secret from the Company's clinical personnel responsible for the Bair Hugger and the scientific community at-large, see *id.* at p. 2; and (2) argue that the jury draw a reasonable inference from the evidence—as permitted by MAI 3.01—that if the results of 3M's internal testing supported its position at trial, then 3M would have provided those results to its expert witnesses and to the jury. See **Exhibit 13** at 73-76.

The Court abused its discretion and committed reversible error in prohibiting Plaintiff from arguing the "reasonable conclusions" to be drawn from this evidence and in further restricting Plaintiff's argument regarding 3M's internal CFD—that had been admitted into evidence—in suggesting that the Court would consider any relief 3M requested if Plaintiff violated her order during closing argument. **Exhibit 16** at 2-3.

b. Legal Analysis

MAI 3.01 instructs the jury that it "*must*" consider "the evidence *and the reasonable conclusions [it draws] from the evidence*." (Emphasis added). The Missouri Supreme Court has provided further guidance on the appropriate scope of closing argument, holding that "[c]losing argument is designed to advise the jury and opposing counsel of each party's position and to advocate to the jury what that party believes the jury should do." *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. 2012). Thus, counsel "is allowed to comment on the witnesses' credibility during closing argument" and "is allowed to argue the evidence *and all reasonable inferences* from the

evidence during closing arguments." *Id.*at 747, 748. (Emphasis added). Indeed, the trial court is to afford "wide latitude to suggest inferences from the evidence" and such latitude is so broad as to apply even where "the inference may seem illogical or even erroneous." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 870 (Mo. 1993) quoting *Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 844 (Mo. 1992). See also *Morgan Publications, Inc. v. Squire Publishers, Inc.*, 26 S.W.3d 164, 170 (Mo. App. 2000).

A review of the case law reveals that this question may be one of first impression in Missouri. Plaintiff has not identified an opinion which addresses arguing an adverse inference as to test results that have been withheld on the grounds of work product privilege even though underlying testing had been produced. However, a comparable analysis is routinely performed with respect to the assertion of the Fifth Amendment constitutional privilege against self-incrimination when asserted in a civil case. See *Johnson v. Mo. Bd. Of Nursing Administrators*, 130 S.W.3d 619, 629 (Mo. App. 2004). If an adverse inference is permitted even when asserting a *constitutional* privilege, it must be permitted when asserting a different privilege under similar circumstances.

In *Johnson*, the Court of Appeals resolved the question of whether permitting an adverse inference to be drawn from a civil defendant's assertion of her Fifth Amendment privilege against self-incrimination violated that privilege. *Id.* at 627. There, the defendant claimed the AHC erroneously considered her silence after claiming the privilege as "independent, affirmative 'evidence' against her." *Id.* The Court of Appeals disagreed and found the adverse inference to be proper. *Id.*

The Court began its analysis by reciting that "the Fifth Amendment privilege against self-incrimination has long been held to be properly asserted by parties in civil proceedings." *Id.* at 628.

> A witness' privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. The constitutional privilege against self-incrimination may, therefore, be asserted not only at trial, but during the discovery stage as well.

Id. (internal quotation and citation omitted).

While the normal rule is that no negative inference is permitted from a defendant's assertion of the privilege in a criminal case, "courts have never held that a Fifth Amendment claimant ***in a civil proceeding*** must be shielded from all possible negative consequences that may attend his invocation of the privilege. In fact, ***civil claimants have been denied certain benefits and exposed to negative consequences as a result of having invoked the privilege***." *Id.* (emphasis in original).

In explaining *why* an adverse inference is permissible in civil cases, the Court noted that "[d]eciding whether to take the Fifth is a matter of personal choice, to be exercised in view of the facts of the particular case" and that a "***party making this choice must weigh the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts***." *Id.* (emphasis added). "***Accordingly, a party who asserts the privilege against self-incrimination must bear the consequence of a lack of evidence***." *Id.* (emphasis added).

In discussing the potential consequences of asserting privilege, the Court noted Wright, Federal Practice and Procedure, § 2018: "In some cases if a party claims the privilege and does not give his or her own evidence, ***there will be nothing to support his or her view of the case and***

an adverse finding or even a directed verdict or grant of summary judgment will be proper." *Id.* at 628-29. (Emphasis added).

The Court noted another potential negative consequence from asserting privilege as described by the United States Supreme Court: That reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefits: "[T]he prevailing rule is that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence against them: the Amendment does not preclude the inference where the privilege is claimed by a *party to a civil cause*. Moreover, this adverse inference may be drawn by the fact finder at either the summary judgment stage or at trial." *Id.* at 629 quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (internal quotation omitted) (emphasis in original).

The Court further explained that one of the reasons for imposing an adverse inference upon a party asserting privilege is the "substantial problems for the opposing party, who is deprived of a source of information that could conceivably be determinative in a quest to discover the truth." *Id.* Because "privilege may be initially invoked by one party during discovery and then later waived at a time when the other party can no longer secure the benefits of discovery, the potential for unfair advantage or exploitation is apparent." *Id.*

Applying these various principles to the facts in *Johnson*, the Court of Appeals held that the defendant's assertion of privilege justified an inference that had the defendant answered truthfully rather than asserting privilege, her answers would have been unfavorable to her or would have corroborated testimony given by her opponent's witnesses. *Id.* at 631. As in *Johnson*, 3M's withholding of evidence under its assertion of privilege required it to make the same choice in

weighing "the advantage of the privilege… against the advantage of putting forward his own version of the facts." *Id.* at 628.

There may be no privilege in American legal philosophy more important than the constitutional privilege against self-incrimination. If an adverse inference may be drawn from the assertion of the constitutional privilege against self-incrimination, then an adverse inference certainly may be drawn from the assertion of other privileges. Thus, the outcome of *Johnson*, permitting an adverse inference, should apply to 3M's assertion of work-product privilege as to the conclusions of its testing it withheld from the jury.

c. Plaintiff Was Entitled to Argue an Adverse Inference

Plaintiff was entitled to argue an adverse inference from 3M's failure to produce the results and conclusions of its internal CFD analysis. Here, 3M voluntarily waived any privilege as to a description of its secret CFD testing and its underlying data. This information was admitted evidence at trial and was discussed in testimony by 3M's designated corporate representative and (ultimately) its employee that conducted the testing. Evidence of 3M's testing was put before the jury.

3M, however, asserted work product privilege as to the results and conclusions of the testing that was put before the jury. Thus, the jury was presented with underlying facts and data but created a "lack of evidence"[26] as to the results. Like the defendant who asserted her Fifth Amendment privilege in *Johnson*, 3M engaged in a "personal choice to be exercised in view of the facts of the particular case" and that in making that choice "*must weigh the advantage of the privilege" "against the advantage of putting forward [its own] version of the facts*." *Johnson*, 130 S.W.3d at 628 (emphasis added).

[26] *Johnson*, 130 S.W.3d at 628.

As in *Johnson*, 3M—in asserting its privilege—"must bear the consequence of a lack of evidence." *Id.* 3M identified no Missouri case in support of its Motion in Limine that disagreed with *Johnson's* analysis and holding. As with the Fifth Amendment privilege, there is nothing to forbid an inference against 3M when it has refused "to testify in response to probative evidence against it", particular when that evidence resulted from 3M's own waiver of the work product privilege. *Id.* at 629.

Having waived—even partially—its work product privilege, 3M put the evidence of its testing into this litigation. Having done so, 3M weighed the advantage of asserting its privilege versus the advantage of setting forth the evidence it withheld from the jury,[27] and the Court abused its discretion and unduly prejudiced Plaintiff in preventing Plaintiff from arguing the evidence and the reasonable conclusions and inferences from the evidence as permitted by MAI 3.01 and Missouri law.

7. The Court Abused its Discretion in Prohibiting Plaintiff from Presenting Evidence of Industry Custom in Warning of the Risk of Airborne Contamination from Forced Air Warming

3M brought a motion *in limine*—well after the time permitted to do so under the Court's Scheduling Order had expired—to prevent Plaintiff's design expert, Dr. David from testifying about a warning of airborne contamination given by a 3M competitor, Stryker, regarding its substantially similar Mistral forced air warming product called the Mistral-Air. See **Exhibit 12** at 162-168. See also Trial Exhibit 382, attached hereto as **Exhibit 23**. In fact, the Stryker Mistral-Air is so substantially similar that Stryker identified the Bair Hugger Model 750 as a predicate device in its application for FDA 510(k) clearance of the Mistral-Air, telling the FDA that the Mistral-Air "has the same intended use and performance as the predicate devices," including the

[27] *Johnson*, 130 S.W.2d at 628.

Bair Hugger Model 750 at issue in this case. Mistral-Air 510(k) application, p. 2, attached hereto as **Exhibit 24**.

While industry custom or standard does not definitively establish a legal standard of care, the Missouri Supreme Court had made clear that such evidence "is admissible proof in a negligence case." *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 772 (Mo. 1989). In *Pierce*, the Supreme Court held that, "[c]onsistent with this Court's precedents, we again hold that *evidence of industry standards is generally admissible as proof of whether or not a duty of care was breached*." *Id.* (emphasis added).

Here, Plaintiff sought to present evidence of an airborne contamination warning provided by a substantially similar forced air warming competitor. See **Exhibit 12** at 162-168. Plaintiff's expert, Dr. David, had reviewed Trial Exhibit 382, attached as **Exhibit 23**, and included references and opinions about Exhibit 382 in his expert report. *Id.* at 164. Trial Exhibit 382 is a technical manual for the Stryker Mistral-Air, which Dr. David identified as operating similarly to the Bair Hugger. *Id.* at 165-66. Stryker included the following warning to customers using the Mistral-Air: "The Mistral-Air® Plus warming unit is fitted with an air filter; however airborne contamination should be taken into consideration when using the warming system." **Exhibit 23** (Trial Exhibit 382). See also **Exhibit 12** at 166. Dr. David testified this information was important to his opinions because it showed a device that functions "very similar to Bair Hugger" and yet carries a clear communication to the user that there is risk associated with use of the device. *Id.* Dr. David testified in his offer of proof that this evidence proved that such a warning was technologically and economically feasible and that it demonstrated that "the industry" knew there was a risk of airborne contamination. *Id.* 166-67.

The verdict director required Plaintiff to prove that 3M failed to use ordinary care in failing to warn of the risk of airborne contamination. MAI 25.09 [1990 New]; MAI 11.10(II) [1996 Revision]; MAI 19.01 [1986 Revision]. The Missouri Supreme Court has made clear that "[e]vidence of industry custom or standard is admissible proof in a negligence case." *Pierce*, 769 S.W.2d at 772.

The Court's refusal to permit Plaintiff to present this evidence abused its discretion and unduly prejudiced Plaintiff because it left the jury with only 3M's representation that there was no risk of airborne contamination and, thus, no reason to warn of the Bair Hugger's dangerous propensity to contaminate the sterile field during surgery. Indeed, 3M's counsel doubled down and exacerbated the Court's error in telling the jury about warnings: "Creating a warning, what does this warning say other than there's no evidence that links force-air warming to an increased risk of SSIs/PJIs." **Exhibit 16** at 113.

3M told the jury over and over and over that there was *no risk of airborne contamination* from forced air warming, when it *knew* there was evidence of industry standard (that had been wrongly excluded) showing exactly the opposite and warning users about that risk. Plaintiff was unduly prejudiced when the Court prohibited Plaintiff's use of industry custom and standard evidence to counter 3M's false statements about the evidence of contamination and the increased risk of infection caused by forced air warming. A new trial is an appropriate remedy because the Court abused its discretion and unduly prejudiced Plaintiff.

8. The Court Abused its Discretion in Limiting Plaintiff's Cross-Examination of Defense Experts to Materials the Experts Reviewed in Forming Their Opinions

The Court abused its discretion when it refused to allow Plaintiff to impeach 3M's experts, Dr. Borak, Dr. Mont, Dr. Abraham, and Dr. Anderson, with evidence the experts were made aware of at trial, including evidence that had already been received by Court. The Court erroneously

refused to permit cross-examination and impeachment of the experts using such evidence on the grounds that the experts had not relied upon such evidence in forming their opinions.

As described in Section 5, *supra*, parties have wide latitude in impeaching expert witnesses. *Rodriquez,* 996 S.W.2d at 60. This right extends to materials the expert did not review. See *Ball*, 672 S.W.2d at 363; *Brooks*, 960 S.W.2d at 493; *Bowman*, 497 S.W.3d at 320; *Pasch,* 152 Ill.2d at 179; *Boys,* 321 So.3d at 1107-08. This rule makes logical sense as a party could effectively insulate its experts against impeachment on cross-examination by only providing favorable materials, knowing that any unfavorable materials the expert had not reviewed would be excluded.

Despite Plaintiff's right to cross-examine 3M's experts on materials they had not reviewed in forming their opinions, the Court repeatedly prohibited Plaintiff from impeaching 3M's witnesses regarding materials relevant to the witness's credibility and the reliability of their opinions.

Examples of the Court's improper limitation of Plaintiff's cross-examinations include:

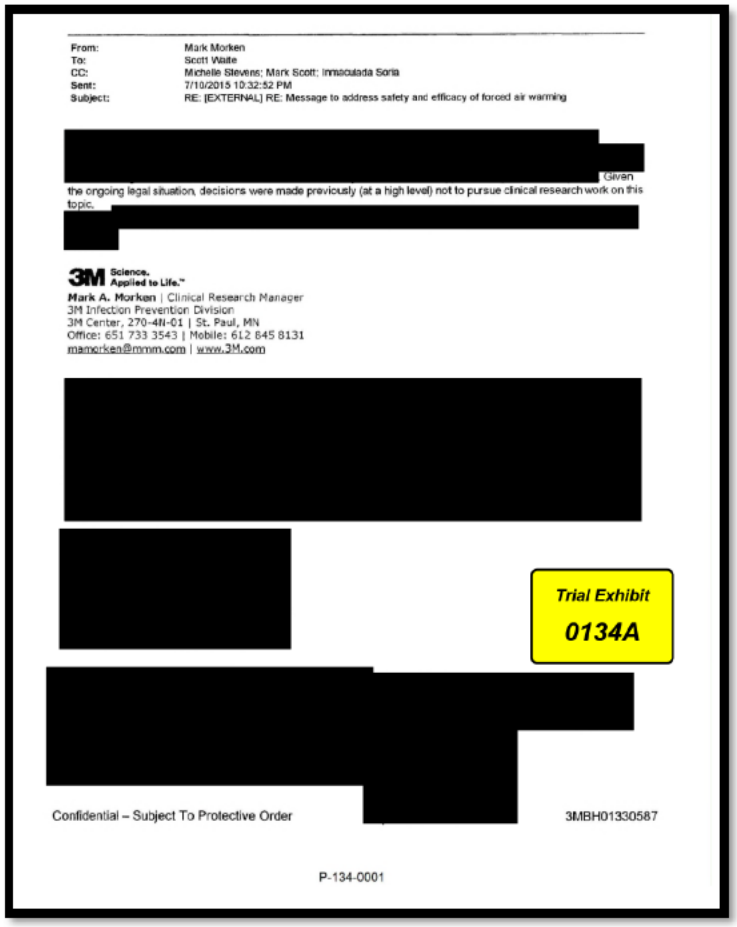
a. Dr. Borak

i. The Court Erred in Prohibiting Cross-Examination with Trial Exhibit 134A, Which Had Been Received as Evidence

Dr. Borak was 3M's primary expert on infectious disease and general causation. Plaintiff attempted to impeach Dr. Borak with *internal* 3M documents that had been *admitted into evidence*. **Exhibit 3** at 30; Trial Exhibit 134A[28]. Exhibit 134A was an internal 3M email admitted into evidence during the video testimony of 3M's Medical Director, Michelle Hulse-Stevens. This email documented how 3M's legal department stopped all clinical research involving the Bair

[28] Attached as **Exhibit 8**.

Hugger in July 2015 because of "the ongoing legal situation" involving claims that the Bair Hugger caused surgical infections. **Exhibit 8** (Trial Exhibit 134A).



From: Mark Morken
To: Scott Waite
CC: Michelle Stevens; Mark Scott; Inmaculada Soria
Sent: 7/10/2015 10:32:52 PM
Subject: RE: [EXTERNAL] RE: Message to address safety and efficacy of forced air warming

[redacted] Given the ongoing legal situation, decisions were made previously (at a high level) not to pursue clinical research work on this topic. [redacted]

3M Science. Applied to Life.™
Mark A. Morken | Clinical Research Manager
3M Infection Prevention Division
3M Center, 270-4N-01 | St. Paul, MN
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mamorken@mmm.com | www.3M.com

[redacted]

Trial Exhibit
0134A

[redacted]

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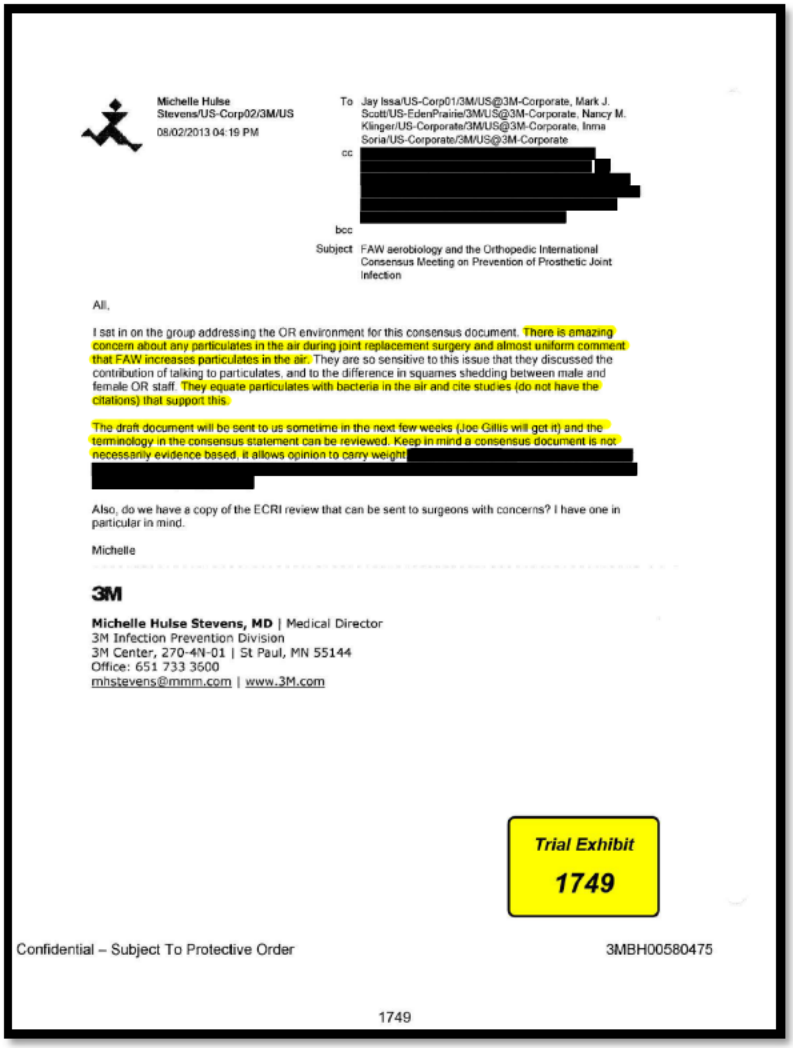
P-134-0001

The Court erroneously treated this admitted evidence and admission of a party opponent as though it were an *external* study for which foundation as to its authoritativeness needed to be laid. **Exhibit 3** at 30. In this instance, 3M intentionally refused to provide its internal documents and the testimony of its employees to any of its experts. See, *e.g.*, *id.* at 29. The point in cross-examining Dr. Borak with 3M's internal document was for impeachment of the witness's credibility and how such information might affect his opinions. See *Brooks,* 960 S.W.2d at 479; *Pasch,* 152 Ill.2d at 179.

ii. The Court Erred in Prohibiting Cross-Examination with Trial Exhibit 1749A, Which Had Been Received as Evidence

One of 3M's main defenses presented at trial was that the International Consensus of Orthopedic Surgeons voted that there was no "definitive" proof that forced air warming caused surgical infections like that which Plaintiff suffered.[29] Plaintiff attempted to counter this argument with 3M's expert by questioning him regarding an internal 3M email from its Medical Director, Michelle Hulse-Stevens, that the International Consensus was "not necessarily evidence based, it allows opinion to carry weight." Trial Exhibit 1749A, attached hereto as **Exhibit 25**.

[29] See, *e.g.*, 3M Closing Argument, **Exhibit 16**, at 113 ("Question Number 1: 'Does the use of forced-air warming during orthopedic procedures increase the risk of subsequent SSIs/PJIs?' Recommendation: 'There is no evidence to definitively link forced-air warming to increases risk of SSIs/PJIs.'



Michelle Hulse
Stevens/US-Corp02/3M/US
08/02/2013 04:19 PM

To Jay Issa/US-Corp01/3M/US@3M-Corporate, Mark J. Scott/US-EdenPrairie/3M/US@3M-Corporate, Nancy M. Klinger/US-Corporate/3M/US@3M-Corporate, Inma Soria/US-Corporate/3M/US@3M-Corporate
cc [redacted]
bcc
Subject FAW aerobiology and the Orthopedic International Consensus Meeting on Prevention of Prosthetic Joint Infection

All,

I sat in on the group addressing the OR environment for this consensus document. 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. They are so sensitive to this issue that they discussed the contribution of talking to particulates, and to the difference in squames shedding between male and female OR staff. They equate particulates with bacteria in the air and cite studies (do not have the citations) that support this.

The draft document will be sent to us sometime in the next few weeks (Joe Gillis will get it) and the terminology in the consensus statement can be reviewed. Keep in mind a consensus document is not necessarily evidence based, it allows opinion to carry weight [redacted]

Also, do we have a copy of the ECRI review that can be sent to surgeons with concerns? I have one in particular in mind.

Michelle

3M

Michelle Hulse Stevens, MD | Medical Director
3M Infection Prevention Division
3M Center, 270-4N-01 | St Paul, MN 55144
Office: 651 733 3600
mhstevens@mmm.com | www.3M.com

Trial Exhibit
1749

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1749

The jury had already heard Hulse-Stevens' video testimony about this exhibit. The Court had already admitted the exhibit as evidence. See **Exhibit 11** at 91-94; **Exhibit 12** at 67. However, the Court abused its discretion and prohibited the impeachment of 3M's main causation expert using 3M's corporate admission that had been admitted in evidence because "[t]he jury hasn't seen [the document] with this witness. There's been no foundation laid with this witness. The objection is sustained." **Exhibit 16** at p. 47.

There is simply no rule that requires a party to re-establish foundation for admitted evidence with each subsequent witness who may be examined with the admitted evidence. The Court abused its discretion in prohibiting Plaintiff from cross-examining the expert because

Missouri law permits the cross-examination of experts with materials the expert has not reviewed, *Brooks*, 960 S.W.2d at 493, including evidence that has already been admitted. See, *e.g.*, *Ball*, 672 S.W.2d at 363 (proper to cross examine expert using summaries of medical articles that had previously been admitted into evidence).

iii. The Court Erred in Prohibiting Plaintiff from Cross-Examining Dr. Borak on the Cause of Plaintiff's Deep Joint Infection

The Court further abused its discretion when it prohibited Plaintiff from cross-examining Dr. Borak regarding the Bair Hugger as a potential cause of Plaintiff's deep joint infection. **Exhibit 3** at 83. Plaintiff asked Dr. Borak if the Bair Hugger "is a potential cause for this jury to consider in determining whether it contributed to her deep joint infection". *Id.* 3M objected that the question "invades the province of the jury." *Id.* The Court replied, "That's a question for the jury to decide. The objection is sustained." *Id.*

The Court abused its discretion in sustaining 3M's objection because Missouri law provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." R.S.Mo. § 490.065.2(3)(a). "This statute clearly allows an expert to testify as to his opinion concerning an ultimate issue, such as whether a party was negligent." *Lee v. Hartwig*, 848 S.W.2d 496, 498 (Mo. App. 1992). Therefore, "it is not a valid objection that the expert's opinion goes to the ultimate issue for the jury to decide, *or that the expert's opinion invades the province of the jury*." *Doe v. McFarlane*, 207 S.W.3d 52, 64 (Mo. App. 2006) (emphasis added).

b. Dr. Mont

i. The Court Erred in Prohibiting Plaintiff from Impeaching Dr. Mont as to his Support of a Medical Device that Had Been Recalled

Dr. Mont was 3M's primary expert on orthopedic surgery and specific causation of Plaintiff's infection. Plaintiff attempted to cross-examine Dr. Mont as to his testimony in support

of a medical device that had been recalled. **Exhibit 3** at 148-49. Counsel for 3M objected and at sidebar, Plaintiff clarified that the question "absolutely goes to bias… who he represents, what kind of testimony he gives and the fact that he's not giving consistent testimony." *Id.* at 149. Counsel for Plaintiff continued her explanation: "I mean I think about whether or not he'd defending a product that even the manufacturer agrees is in fact defective is relevant for the jury to consider when they're looking at his credibility here." *Id.* at 149-50. The trial court abused its discretion in failing to permit Plaintiff to "test [the] qualifications, credibility, skill or knowledge, and value and accuracy of [the expert's] opinion." *Rodriquez v. Suzuki Mtr. Corp.,* 996 S.W.2d 47, 60 (Mo. banc 1999).

ii. The Court Erred in Prohibiting Plaintiff from Cross-Examining Dr. Mont with Impeachment Documents Not in His Physical Presence During His Remote Testimony from Maryland

The Court prohibited Plaintiff from cross-examining Dr. Mont with materials that had not been physically provided to the expert before his cross-examination. See **Exhibit 3** at 168-73. The Court had not required Plaintiff to provide hard copy exhibits to the remotely testifying expert before pronouncing its order from the bench during Plaintiff's cross-examination. In fact, Plaintiff raised such concerns during the Court's teleconference on September 7, 2022, and again on October 5, 2022. See **Exhibit 14** at 4-11.

On October 5, 2022, Plaintiff objected further to Dr. Mont's remote testimony and raised concerns about Dr. Mont's forthrightness on the stand as well as logistical issues in presenting cross-examination exhibits to the witness. *Id.* Counsel for 3M objected to Plaintiff having an attorney in the room with Dr. Mont during his remote testimony. *Id.* at 4-5.

3M's counsel specifically represented that documents could be shown to the witness remotely *without the need for Plaintiff's counsel to be present*. Counsel stated: "And the idea is

to have the exhibits and things to him ahead of time. If not, if plaintiff is by plaintiff's counsel *we can put them up where he can see them and respond to them in cross-examination*." *Id.* at 6. The Court then clarified that it would *not* permit Plaintiff's counsel to be in the room to hand the witness exhibits. *Id.* 3M's counsel again reiterated its intent to use a shared screen with the witness. *Id.*at 7. Again, the Court said, "I guess the issues that you see is not being able to overcome I don't see them. I think this situation will we just got to figure out – I didn't realize this was going to be an issue. I believe that I ruled about 10 days ago that this was going to be allowed." *Id.* at 8. The court reiterated, "[a]nd so to me I don't believe someone needs to be present during his testimony. I don't have concerns." *Id.*

The rough transcript makes it difficult to determine additional discussions from the bench, but the Court ultimately modified its ruling and permitted Plaintiff to fly an attorney to Maryland potentially to courier exhibits but reiterated the Court's ruling prohibiting any attorney from remaining present in the room from which Dr. Mont testified. *Id.* at 10-11. Based on the Court's ruling, the Court's pronouncements from the bench that the Court did not see any issues that could not be overcome with Dr. Mont's remote testimony, and the unduly prejudicial expense that would be incurred by flying an attorney to Maryland to act only as a courier and to sit in the hallway during Dr. Mont's testimony, Plaintiff proceeded to cross-examine Dr. Mont as the Court initially instructed.

During Dr. Mont's cross-examination, Plaintiff attempted to impeach Dr. Mont with Exhibit 2243,[30] which was a copy of The Copyright Transfer Agreement that contained the conflict-of-interest policy for the Surgical Technology publication. **Exhibit 3** at 168. Plaintiff sought to publish the document for demonstrative purposes in order show the witness what he had

[30] Attached hereto as **Exhibit 26**.

agreed to in publishing a paper in the journal. *Id.* The witness was testifying remotely from Maryland, at 3M's request and over Plaintiff's objection, and did not have a physical copy in front of him. *Id.*

The Court noted the potential prejudice to Plaintiff, stating: "After the ruling I made in the timeframe that I did it. ***I'm not confident that you're going to be able to conduct cross-examination as you want***." *Id.* at 172 (Emphasis added). The Court also indicated that it believed Plaintiff intentionally created the problem, stating: "I will tell you think is a path that you're choosing"; and "You've decided to ignore the Court's ruling and create this issue."

Respectfully, Plaintiff neither created the issue nor ignored the Court's ruling. As reflected above, Plaintiff consistently raised the practical issues surrounding the remote cross-examination of a key defense scientific expert starting on September 7, 2022, when 3M first raised the issue. It was impossible for Plaintiff to know what exhibits may be required on cross-examination because it is impossible to know what questions 3M would ask the witness; what answers the witness would give; and what statements the witness might make that would require impeachment with cross-examination materials. For example, Dr. Mont's report was 68-pages long and contained numbered references to nearly 100 studies. Mont Expert Report, attached hereto as **Exhibit 27**. He also relied, generically, on his "prior depositions, court testimonies, and various written reports previously provided for opinions with respect to general causation or any of the matters relevant to this case." *Id.* at 4. The shear breadth of Dr. Mont's opinions as reflected in his report prevented Plaintiff from anticipating precisely which of the nearly 100 studies cited in his report he would discuss with the jury and which of those studies would require impeachment of Dr. Mont's testimony.

Both 3M and the Court initially opposed Plaintiff's request to send a representative to the remote testimony site and assured Plaintiff that no undue harm would result from the witness's remote testimony without Plaintiff's representative present. Ultimately, Plaintiff acquiesced to the Court's position (and 3M's as well) on that issue and Plaintiff should not have been penalized for doing so by having the Court unfairly limit Plaintiff's cross-examination of this key defense expert. Plaintiff was unduly prejudiced, and it is proper for the Court to grant Plaintiff a new trial.

c. Dr. Abraham

i. The Court Erred in Prohibiting Plaintiff from Impeaching Dr. Abraham with 3M's Internal Correspondence

Dr. Abraham was 3M's computational fluid dynamics expert. In support of his opinions, Dr. Abraham relied on a Letter to the Editor written by Dr. Memarzadeh. Plaintiff attempted to impeach Dr. Abraham by showing that the Memarzadeh letter was written at 3M's request and that Dr. Memarzadeh allowed 3M to preview and edit the substance of the letter. See **Exhibit 20** at 97-98. In discovery, 3M produced email correspondence proving 3M's secret involvement in Dr. Memarzadeh's letter.

3M's correspondence was included on its Exhibit List as Exhibit 3253, attached hereto as **Exhibit 28**. In the correspondence with a paid 3M consultant, Dr. Memarzadeh noted that the Bair Hugger "changes particle trajectories" in the operating room that causes "more particles in the upper part of the room, therefore less particles are vented [out of the room] through low exhausts [vents] and door gaps." *Id.* Dr. Memarzadeh suggested publishing his work (that he mostly completed while traveling by airplane) and present only the portion about lack of direct particle deposition on patients and excluding "the vented-out particles." *Id.* See also **Exhibit 15** at 3.

3M failed to provide this information to its expert and Plaintiff sought to impeach the expert's credibility and reliability by questioning him about the correspondence. See *Brooks*, 960

S.W.2d at 493 (cross-examination permitted using hearsay documents not previously seen by the expert). After 3M's objection, Plaintiff's counsel explained that because the expert relied on Memarzadeh's letter to the editor, Plaintiff must be permitted to impeach the expert by showing that 3M paid for the letter. **Exhibit 20** at 98. The following exchange occurred:

> THE COURT: [It's an] email that he's never seen before.
>
> MR. FARRAR: Your Honor. That's the point. Hasn't seen it.
>
> THE COURT: [It's an] email. So has relied on this there to prove the point that he knows nothing about. So there's no foundation can be [laid] for this exhibit.
>
> MR. FARRAR: The point is he's using unreliable literature I get to point out show the jury that that is unreliable literature and why it's unreliable.

Id. at 98. 3M had represented the Memarzadeh letter as having the imprimatur of the National Institute of Health[31] and Plaintiff impeach the expert by showing that it did not.

3M had characterized Dr. Memarzadeh's Letter to the Editor as done in conjunction and with the endorsement of the National Institute of Health. 3M, through questioning of its expert Dr. Abraham, told the jury that the National Institute of health had scientists do a study similar to that which Dr. Abraham performed. *Id.* at 87. Dr. Abraham testified that Dr. Memarzadeh "is the person at the National Institute of Health [who] carried out his own *independent* study." *Id.* (emphasis added). Dr. Abraham testified that Dr. Memarzadeh's work "confirmed my opinion." *Id.*

---

[31] See **Exhibit 20** at 87 ("the National Institute of Health had scientists do the study similar to the studies that I [Dr. Abraham] did."), *id.* ("he [Dr. Memarzadeh] is the person at the National Institute of Health [who] carried out his own independent study."), *id.* ("His [Dr. Memarzadeh" work confirmed my [Dr. Abraham] opinion."), *id.* (Dr. Memarzadeh works for "the National Institute of Health …"), *id.* at 87-88 ("They [the National Institute for Health] wanted to know whether" the Bair Hugger could disrupt airflow). The Court admitted Dr. Memarzadeh's Letter to the Editor, Trial Exhibit 2714, in conjunction with this testimony. *Id.* at 88.

3M then doubled down on misleading the jury that Memarzadeh's letter was done independently through the National Institute of Health. 3M told the jury that Dr. Memarzadeh worked for the National Institute of Health and that the National Institute of Health wanted to know whether the Bair Hugger could disrupt airflow. *Id.* at 87-88.

3M's counsel knew this testimony was untrue. 3M's counsel had Trial Exhibit 3253 on its exhibit list and had produced that document to Plaintiff in discovery. Trial Exhibit 3253 confirmed that Dr. Memarzadeh's Letter to the Editor was not done "independently" in conjunction with his work at the National Institute of Health. Rather, Trial Exhibit 3253 confirmed that the basis for Memarzadeh's letter was actually done in Dr. Memarzadeh's spare time while traveling by airplane, at 3M's direction, with 3M's edits to the Letter, and manipulated to show only that data that benefited 3M's position while ignoring data that did not support 3M's position. This was critical information that 3M withheld from the jury and that Plaintiff had the right to explore with 3M's expert who had vouched for the authoritativeness and reliability of the Memarzadeh letter.

The Court abused its discretion in prohibiting the cross-examination of 3M's expert because "parties *are to be given* wide latitude" to test the credibility of an expert and the accuracy of the expert's opinions, which includes a party's ability to impeach an expert with relevant materials that the expert *did not review*. *Rodriguez*, 996 S.W.2d at 60. See also *Brooks*, 960 S.W.2d at 493; *Ball*, 672 S.W.2d at 363.

ii. The Court Erred in Prohibiting Plaintiff from Cross-Examining Dr. Abraham Using the Demonstration Video Included with the McGovern Study

The "McGovern Study" was a retrospective study that identified a 380% increased risk of surgical infection when the Bair Hugger was used during orthopedic joint replacement surgery. Trial Exhibit 93, attached hereto as **Exhibit 29**. The "McGovern Study" also included a video

component (a link to the video was included in the published study) that was included with the written materials demonstrating how the Bair Hugger disrupted airflow in an operating room to cause airborne contamination of the sterile field. See Rough Tr. 9/30/2022 at pp. 46-47, attached hereto as **Exhibit 30**. The McGovern video was known to 3M as 3M included the video twice on its own exhibit list. See 3M Exhibit List at p. 79, attached hereto as **Exhibit 31**; Trial Exhibits 3295 and 3296. See also Section 9, *infra*.

Plaintiff sought to impeach Dr. Abraham with the demonstration video that accompanied the McGovern study. **Exhibit 20** at 121-22. Dr. Abraham testified that he may or may not have seen the McGovern video. *Id.* at 122. Plaintiff sought to refresh the witness's recollection by showing the video (which had already been published to the jury with a prior witness). *Id.*

The Court abused its discretion in prohibiting Plaintiff from cross-examining 3M's expert witness with this video. First, it is well-settled that a witness may be permitted to refresh his recollection by reviewing material that might not otherwise be admissible. See, *e.g.*, *State v. Cow*, 486 S.W.2d 248, 257 (Mo. 1972) (witness permitted to refresh his recollection by reviewing a police report). Moreover, an expert witness may be impeached with relevant materials the expert did not review, including articles and treatises that the expert does not recognize, but that another expert has testified to be authoritative. *Brooks*, 960 S.W.2d at 493; *Ball*, 672 S.W.2d at 363.

Here, other experts had testified to the authoritativeness of the McGovern study and accompanying materials and Plaintiff should have been permitted to cross-examine Dr. Abraham regarding the McGovern video. Even had other experts not laid the foundation for the authoritativeness of the McGovern video, Plaintiff was entitled to impeach Dr. Abraham by identifying materials he had <u>*not*</u> considered and inquiring how consideration of such materials might impact his opinions. *Brooks*, 960 S.W.2d at 493.

The Court's ruling unduly prejudiced Plaintiff. A key element of Dr. Abraham's testimony was his opinion that the Bair Hugger's residual heat escaped only from the head and neck of the patient and that it was impossible for heat to escape from below the upper body drape because hot air rises. Dr. Abraham said that his physical experiment confirmed his CFD analysis. However, the McGovern video directly contradicted both Abraham's CFD analysis and his physical experiment. The McGovern video documented Bair Hugger residual heat escaping from beneath the upper body drape and then circulating upward to contaminate the sterile field.

Exhibit 3295

Plaintiff was unfairly prohibited from impeaching Dr. Abraham's testimony and the jury was left only with the impression that Dr. Abraham's CFD and physical experiment were uncontradicted.

iii. The Court Erred in Preventing Plaintiff from Impeaching Dr. Abraham using 3M's Corporate Admission Testimony

Plaintiff also attempted to impeach Dr. Abraham as to his testimony concerning scientific literature showing the Bair Hugger increased particle counts over the sterile field. **Exhibit 20** at 163-64. At trial Dr. Abraham disagreed with Plaintiff's counsel that every study showed the Bair Hugger increased particles over the sterile field. See *id*. at 162-63. Plaintiff's counsel asked Dr. Abraham if he knew that 3M says every study shows that increase in particles. *Id.* at 163. 3M objected that the question misstated testimony, which the Court sustained.

Plaintiff sought to play 3M's corporate admission as reflected in Al Van Duren's March 7, 2017, corporate testimony on behalf of 3M. *Id.* 3M's corporate admission was:

> Q. 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?
>
> A. In absolute numbers, yes.
>
> Q. … And you have no internal studies to refute that; correct?
>
> A. No, we don't.

Admission Video Clip 66, the transcript of which is attached hereto as **Exhibit 32**. This corporate admission (and admitted testimony) was crucial in undermining Dr. Abraham's opinions that no particles reached the sterile field due to the Bair Hugger's use.

3M objected that, because it had not provided Dr. Abraham with all of Mr. Van Duren's depositions regarding the Bair Hugger, Plaintiff had not "established any foundation that this is part of Al Van Duren's deposition [he] actually read." **Exhibit 20** at 163. The Court abused its discretion in sustaining 3M's objection because no such foundation was necessary. See *Rodriguez*, 996 S.W.2d at 60; *Ball*, 672 S.W.2d at 363. The Court compounded the prejudice to Plaintiff by precluding counsel from asking if such information would be important for the expert to see.

Exhibit 20 at 164.[32] The Court again abused its discretion because this is precisely the kind of question that is necessary to test and to impeach the opinions of an opposing expert witness.

d. Dr. Anderson

i. The Court Erred in Prohibiting Plaintiff from Impeaching Dr. Anderson with a Study that had Previously Been Identified as Authoritative

The Court abused its discretion in prohibiting Plaintiff from cross-examining 3M's expert, Dr. Anderson, with a study that prior experts testified to be authoritative. Plaintiff sought to impeach Dr. Anderson with a study by Bernard. Dr. Anderson failed to consider this study in forming his opinions and Plaintiff sought to test his opinions and his credibility based on that failure. Counsel for Plaintiff offered to provide the Court case law supporting Plaintiff's ability to cross-examine the expert using the Bernard study, but the Court refused, saying "I don't need you to. I've got a good handle [on] things." **Exhibit 15** at 162.

Missouri law does, in fact, permit an expert witness to be impeached with relevant materials the expert did not review, including articles and treatises that the expert does not recognize, *but that another expert has testified to be authoritative*. *Ball*, 672 S.W.2d at 363. The Court erred and abused her discretion in failing to follow the rule set forth in *Ball*. Counsel for Plaintiff clarified for the Court that the foundation establishing that the Bernard case report was an

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[32] The rough draft reads:

> Q. Have you or have you not seen the deposition testimony for Al Van Duren says that the company spokesman 30 6B deposition that every study December looked at the issue shown the Bair Hugger increases particles over the surgical site
> A. No, I have not seen that?
> Q. Would that be something as a company that would be important to you to see?
> MR. BLACKWELL: Objection. This is improper questioning for an expert.
> THE COURT: Sustained.

Exhibit 20 at 164.

authoritative study had already been established by both Dr. Jarvis and Dr. Bowling earlier in the trial, as is appropriate under *Ball*. However, the Court abused its discretion and prohibited cross-examination and impeachment of Dr. Anderson with the Bernard report because Anderson had not seen the report. **Exhibit 15** at p. 163-64.

ii. The Court Erred in Prohibiting Plaintiff from Impeaching Dr. Anderson using 3M's Internal Documents and Corporate Admissions

Plaintiff also attempted to impeach Dr. Anderson with 3M's own documents and corporate testimony. **Exhibit 15** at 168-69. Plaintiff attempted to cross-examine Dr. Anderson as to studies that 3M had considered conducting but then refused to perform. Earlier evidence had established that 3M had considered conducting additional studies as to the Bair Hugger's dangerous propensity to cause surgical infection. One of those studies was a bacteriological study that had been approved by 3M's medical board. However, 3M's legal department had overruled its medical board and halted all studies concerning the Bair Hugger over concerns about the "ongoing legal situation." **Exhibit 22** at 253:16-254:7. See also **Exhibit 21** (Trial Exhibit 1887). 3M's Medical Director had testified that "discussions about doing the study just stopped after we had this input from our legal team." *Id.* at 259:4-9.

As Plaintiff's counsel argued to the Court at sidebar, such information was directly relevant to the expert witness's credibility and the reliability of his opinions. Nevertheless, the Court abused its discretion and prohibited Plaintiff from inquiring any further after the witness answered that he had not reviewed the materials. **Exhibit 15** at 169.

e. Cumulativeness of Error

While the Court is permitted discretion in the admission of evidence and the cross-examination of witnesses, parties are to be given wide latitude to 'test qualifications, credibility,

skill or knowledge, and value and accuracy of opinion." *Rodriquez v. Suzuki Mtr. Corp.,* 996 S.W.2d 47, 60 (Mo. banc 1999) (quoting *Callahan v. Cardinal Glennon Hosp.,* 863 S.W.2d 852, 869 (Mo. banc 1993)). Here, the Court repeatedly prohibited Plaintiff from engaging in proper cross-examination of 3M's experts.

Even if any single prohibition alone might not be sufficient to conclude the Court abused its discretion such that a new trial is warranted, the cumulative effect of more than a dozen improper limitations of Plaintiff's cross-examination clearly demonstrates an abuse of discretion that substantially and unfairly prejudiced Plaintiff and warrants a new trial here. See *Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. Div. 2 1959) overruled on other grounds (without undertaking to determine whether any single instance of alleged error, standing alone, would constitute reversible error, Court determined that, "in their totality, they do."). See also *Wiedower v. ACF Indus., Inc.*, 763 S.W.2d 333, 337 (Mo. App. 1988) overruled on other grounds (new trial may be ordered for cumulative error); *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526 (Mo. App. 1991) (new trial may be ordered due to cumulative error).

9. The Court Erred in Prohibiting Dr. Jarvis from Testifying About the Demonstrative Video that Accompanied the McGovern Study

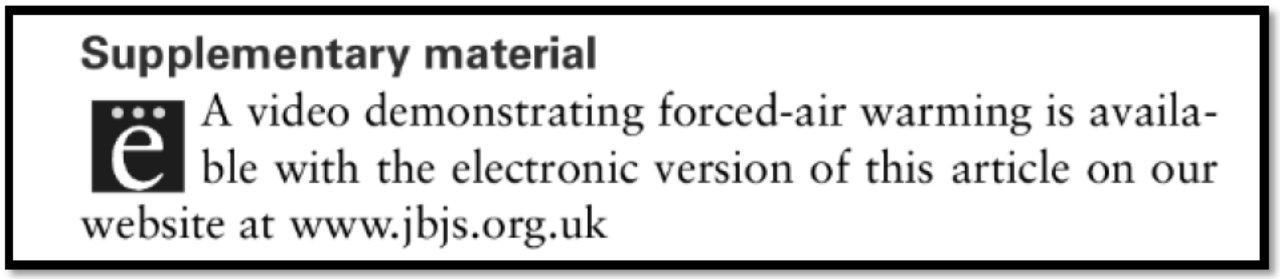
The Court abused its discretion in prohibiting Plaintiff's expert, Dr. Jarvis, from testifying about the demonstrative video that accompanied the published version of the McGovern study, which demonstrated how the Bair Hugger disrupted operating room airflow to cause airborne contamination of the sterile field. This video was included as supplementary material in the published report and confirmed how the Bair Hugger caused the reported 380% increased risk of surgical infection.

Missouri law permits an expert to "base an opinion on facts or data in the case that the expert has been made aware of or personally observed" so long as experts in the particular field

would reasonably rely on those kinds of facts or data in forming an opinion on the subject. R.S.Mo. § 490.065.2(2). See also § 490.065.1(2).

Dr. William Jarvis was Plaintiff's expert on general and specific causation of Plaintiff's deep joint infection. As part of his work in this case, Dr. Jarvis prepared a 22-page report that summarized his opinions and the materials upon which he relied, and which incorporated by reference his report on general causation. Trial Exhibit 1679, attached hereto as **Exhibit 33;** Trial Exhibit 1680, attached hereto as **Exhibit 34**. As part of his work, Dr. Jarvis relied on the McGovern Study (**Exhibit 29**, Trial Exhibit 93) in forming his opinions and both of his reports contained numerous references and discussions of the McGovern report. **Exhibit 33** (Trial Exhibit 1679) at 8, 11-12, 21; **Exhibit 34** (Trial Exhibit 1680) at 10, 12, 29.

The published McGovern study included a video showing the neutrally buoyant bubble experiment upon which the study was based as supplementary material.



Trial Exhibit 93 at 8

In his general causation report, Dr. Jarvis described the content of video in detail:

> McGovern et al. used neutral-buoyancy detergent bubbles released adjacent to a mannequin's head and at the floor level to assess particulate and air currents during a simulated hip replacement in an OR (McGovern). Bubble counts over the surgical site were greater when Bair Hugger FAWs (models 540 and 525) were used compared to conductive fabric warming. Bair Hugger FAWs generated convection currents that mobilized floor air into the surgical site area.

Exhibit 34 (Trial Exhibit 1680) at 10. The published McGovern study also included detailed descriptions of the experiment depicted in the video (including still images), which demonstrated

the disruption of airflow caused by the Bair Hugger in the experiment. **Exhibit 29** (Trial Exhibit 93) at 2-3, 5-7.

Despite the many references to the McGovern study in Dr. Jarvis's reports, the detailed description of the neutrally buoyant bubble experiment contained in both Dr. Jarvis's report and in the published McGovern study, itself, and the inclusion of the video showing the bubble experiment as supplementary material for the published study, 3M feigned surprise that Plaintiff intended to discuss the McGovern video with Dr. Jarvis and intended to play the video as demonstrative evidence to help the jury understand Dr. Jarvis's opinions. **Exhibit 30** at 1-2.

3M represented to the Court that the first it had heard of the McGovern video was on September 29, 2022, when Plaintiff informed 3M of the demonstrative material she intended to use with her witnesses the next day. *Id.* at 1. 3M also claimed the video had not been discussed during any prior Bair Hugger litigation. *Id.* *3M's representations were false and misled the Court*.[33] The truth is that 3M had long known of the video accompanying the McGovern study and *3M had included the video on its own exhibit list*. See **Exhibit 31** at 79; Trial Exhibits 3295 and 3296.

At the time 3M objected, Plaintiff was not aware 3M had included the McGovern video on its Exhibit list because the video had been described only as "https://www.youtube.com/watch?v=BKFl2rINa9g, May 16, 2011" and "https://www.youtube.com/watch?v=31jz3P3eHDU, February 24, 2011." *Id.* Nevertheless,

[33] Plaintiff notes further that despite 3M's affirmative misrepresentation to the Court about its knowledge of the McGovern video and its inclusion of the video on 3M's own exhibit list, 3M's counsel alleged that Plaintiff's counsel had not been "forthcoming with the Court" and proceeded to falsely claim that the airflow visualization conducted as part of the study was separate from the published study. **Exhibit 30** at 2-3. Again, the airflow visualization was discussed in detail in the published study. See **Exhibit 29** (Trial Exhibit 93) at 2-3, 5-7.

counsel for Plaintiff attempted to correct 3M's misrepresentation and informed the Court that Dr. Jarvis had relied on the McGovern report, which included descriptions and a link to the video itself and that 3M had known for years that Dr. Jarvis had relied on the McGovern report. **Exhibit 30** at 1-2. Granting 3M's objection, the Court prohibited Plaintiff from showing the McGovern video to the jury with Dr. Jarvis and even precluded him from discussing the video at all or how it was important to his opinions. *Id.* at 2-3.

During Dr. Jarvis's testimony, Plaintiff made an offer of proof laying the foundation for the McGovern video. See *Id.* at 46-48. Dr. Jarvis confirmed that he relied on the McGovern study, which included a link to the video, "A video demonstrating forced-air warming is available with the electronic version of this article on our website at ww.JBJS.org.uk." *Id.* at 46. Dr. Jarvis had served as an editor of a peer-reviewed journal and testified that inclusion of such supplementary materials is common as it is impossible to include a demonstrative video in a hardcopy published document. *Id.* at 46-47. Dr. Jarvis also testified that the McGovern video would help the jury understand his opinions. *Id.* at 47. Despite Plaintiff's offer of proof, the Court's ruling remained the same. *Id.*

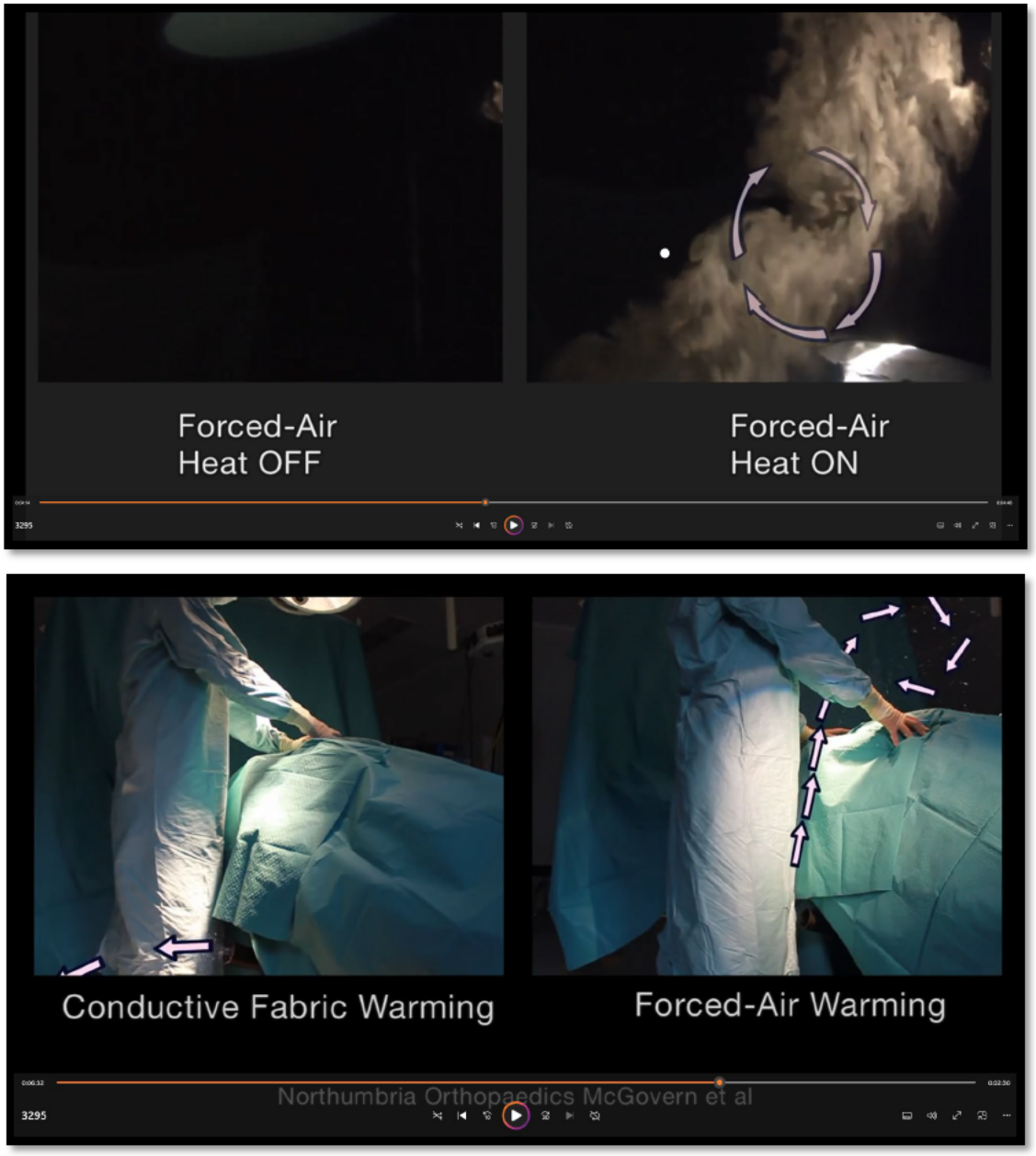
Missouri law clearly permits experts to rely on materials such as the McGovern video. R.S.Mo. § 490.065. Plaintiff laid the proper foundation to establish that Dr. Jarvis had appropriately relied on the McGovern video and that the video had been appropriately disclosed to 3M as facts and data upon which Dr. Jarvis had relied in forming his opinion. Plaintiff also laid proper foundation that the video would help the jury understand Dr. Jarvis's very complex scientific testimony establishing the causation for Plaintiff's deep joint infection. The Court abused its discretion in preventing Plaintiff from using this critical evidence with Dr. Jarvis.

Plaintiff was unduly prejudiced by the Court's refusal to permit Dr. Jarvis to discuss the McGovern video. It is simply not sufficient that an edited form of the video was played with a later witness. Dr. Jarvis was Plaintiff's primary causation expert, and his testimony was critical to proving Plaintiff's claims. The McGovern study was critically important for at least two reasons: (1) it established the Bair Hugger's 380% increased risk of surgical infection; and (2) demonstrated the airflow disruption that likely caused the documented increased risk of infection. Trial Exhibit 93. 3M based its defense on its claim that the Bair Hugger did not disrupt airflow as Plaintiff presented. In closing argument, 3M said:

> What you heard from the plaintiff's lawyer. "Heat billows out from underneath the drapes and picks up microscopic particles that could be carrying bacterial [sic] and lifts it up. Breaks through the 'forcefield' of protective air that comes down from the OR's ceiling and move germs and contaminants directly over the sterile field." That's what was said.
>
> Now what you learned in the course of this trial, this is how they got you started at the very start of the trial to get you hooked in by making a claim like this. So now you know from your experience you couldn't feel a thing from that blanket three inches from where the air comes out of it.
>
> Billow. You couldn't get billow out of that if you put it on an index card and stuck it on the drape unless you pulled the word billow off again. There's no billow from that. That's lawyer speak.
>
> ***
>
> Now I wanted to show you again what we did see. And this was from Dr. Abraham's CFD. His CFD had a specific purpose. It was to examine whether or not the exhaust air from the Bair Hugger that you all felt when you came up and were able to actually experience it, whether that air coming out of there is going to be forceful enough to disrupt the unidirectional airflow that comes down over the sterile field. He isolated everything out so he could focus on just that. And they afterwards he validated it with certain airflow visualizations that you all saw. And I want to show you a few of those just so you see it.

Exhibit 16 at 104-05, 110.

The McGovern video directly refuted 3M's representations to the jury. For example, the McGovern video showed the billowing disruption of the protective laminar flow that 3M claimed to be impossible.



Trial Exhibit 3295

Because Dr. Jarvis was Plaintiff's primary causation expert, it was critical that Plaintiff be able to present the bases for Dr. Jarvis's opinions to the jury, particularly the bases for his opinion

that the Bair Hugger disrupted the operating room airflow and contaminated the sterile field. 3M's misrepresentations to the Court about its "surprise" unduly prejudiced Plaintiff and left her causation expert unable to illustrate for the jury how and why the Bair Hugger resulted in a 380% increased risk of infection. The jury was left with the impression from Dr. Jarvis's testimony that he had not considered this video when he had and was left without any illustration of the scientific principles and physics that formed the basis of his opinion.

The Court—based on 3M's misrepresentations—abused its discretion in preventing Dr. Jarvis from testifying about this critical evidence.

10. The Court Erred in Prohibiting Plaintiff from Presenting to the Jury the Fact that More than 6,000 Lawsuits Had Been Filed Alleging the Bair Hugger was Defective and Unreasonably Dangerous Because It Caused Surgical Infection

The Court abused its discretion in prohibiting Plaintiff from informing the jury, particularly during closing argument, that more than 6,000 lawsuits had been filed against 3M alleging the Bair Hugger was defective and unreasonably dangerous because of its propensity to cause surgical infections, just like that which Plaintiff suffered.

"The law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior arguments of opposing counsel." *Morgan Publications, Inc. v. Squire Publishers, Inc.*, 26 S.W.3d 164, 170 (Mo. App. 2000) quoting *Kelly v. Jackson*, 798 S.W.2d 699, 704 (Mo. 1990). Here, Missouri law afforded Plaintiff wide latitude in responding to the unsupported statements of 3M's counsel that the Bair Hugger was used 50,000 times per day and more than 300 million times without incident. See Rough Tr. 9/28/2022 at p. 66, attached hereto as **Exhibit 35**.

During opening statement 3M's counsel told the jury that the Bair Hugger had been used 50,000 times per day and more than 300 million total and no one had "ever contacted 3M to say

that the Bair Hugger caused surgical site infection." **Exhibit 35** at 66. This statement was unsupported by any evidence[34] and was demonstratively false. 3M knew that doctors and clinicians had expressed concerns to the Company about the Bair Hugger causing surgical site infections since before 1994. **Exhibit 4** (Trial Exhibit 1735). Moreover, 3M knew that it had been sued more than 6,000 times by Plaintiffs alleging the Bair Hugger had caused a surgical site infection in precisely the same manner as Plaintiff suffered.

3M is aware that such lawsuits filed in federal court have been consolidated in *In re Bair Hugger Forced Air Warming Devices Product Liability Litigation*, MDL 15-2666. The cases in the MDL each "involve common questions of fact." MDL Initial Transfer Order, at 1, attached hereto as **Exhibit 36**. Moreover, the JPML found that

> *The actions share factual issues* arising from allegations that plaintiffs developed serious infections during their orthopedic surgeries due to the introduction of contaminants into their open wounds as a result of the use of a Bair Hugger Forced Air Warming system (Bair FAW). Specifically, plaintiffs allege that the device is defective in at least two respects: (1) the device affects airflow in the operating room, causing bacteria from the operating room floor to be deposited into the surgical site; and (2) the internal airflow paths of the device's blower can become contaminated with pathogens that can then be expelled into the operating room. The actions thus present common issues concerning the development, manufacture, testing, regulatory approval process, and marketing of the Bair FAW.

Id. at 2 (Emphasis added). These claims are substantially similar to those Plaintiff raised at trial. 3M has admitted this to be true. In its Suggestions opposing remand of Plaintiff's case back to this Court, 3M wrote:

> This case is one of more than 5,000 pending cases involving the 3M Bair Hugger patient warming system. With very few exceptions, these cases are pending in a federal multidistrict litigation proceeding, *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, MDL 2666 (the "Bair Hugger MDL). Many of the plaintiffs in the MDL first filed their lawsuits in state court, and those lawsuits were removed by 3M and then transferred by order of the Judicial Panel

[34] No witness ever testified, and no document was admitted showing, that the Bair Hugger was used 50,000 times per day or was had been used 300 million times.

> on Multidistrict Litigation. *Plaintiff Katherine O'Haver's case*, originally filed in Jackson County, *is just like those cases*.

3M's Sugg. Opp. Mtn. for Remand, p. 1, attached hereto as **Exhibit 37** (emphasis added).

In spite of this knowledge, 3M repeatedly presented testimony to the jury that infection rates were low for the Bair Hugger without establishing any required similarity to show the absence of other similar incidents. Missouri law is clear that evidence showing the *non-occurrence* of other incidents is not competent to show that a particular product is not defective unless the proponent of such evidence can prove a proper foundation. *Watkins v. Toro Co.*, 901 S.W.2d 917, 920-21 (Mo. App. 1995). If the proponent of such evidence cannot provide the appropriate foundation[35], then such evidence is held to be inadmissible because it has no reasonable tendency to prove that the product was free from danger, and it raises collateral issues which have a tendency to confuse and mislead the jury. *Id.* Such evidence, if admitted, constitutes reversible error. *McJunkins v. Windham Power Lifts, Inc.*, 767 S.W.2d 95, 100 (Mo. App. 1989).

For example, 3M's expert told the jury that 45 community hospitals in North Carolina used the Bair Hugger and had seen a 10% decline in surgical infection over time. **Exhibit 15** at 114. Another 3M expert, Dr. Anderson, was asked "if the Bair Hugger was blowing all of this air billowing as the [plaintiff's] counsel has described into surgical suites all across the country, what would you expect to see with regards to the percentage of surgical site infections?" **Exhibit 16** at 30. Dr. Anderson testified that to do so would increase the risk of surgical site infection and "it has not." *Id.* Compounding the issue, 3M's counsel told the jury in closing argument: "How in the world could it be if it [is] used by orthopedic surgeons all over the entire world safely with

[35] In order to lay a proper foundation, the party must show "that the absence occurred when the produce was used under conditions substantially similar to those faced by plaintiff and an adequate number of those situations had occurred to make the absence meaningful." *McJunkins*, 767 S.W.2d at 100.

their patients and infections rates have gone down. Only these lawyers and their experts say that's somehow dangerous and that's unacceptable." *Id.* at 146.

After each of these improper statements by 3M's experts and its counsel, Plaintiff sought curative permission to inform the jury that there were at least 6,000 lawsuits alleging substantially similar claims as Plaintiff brought in this case. During closing argument, Plaintiff's counsel said the following in seeking permission for fair response to 3M's unsupported and demonstrably false statements to the jury:

> …. Mr. Blackwell just said that only these lawyers say the Bair Hugger [is] not safe. I cannot imagine the door more open to 7,000 that they [3M] know of that have brough claims against 3M for infection with use of the Bair Hugger. That's kicking it open as [far as] you can kick it.

Id. at 147. The Court denied Plaintiff's request.

3M's repeated assertions concerning the lack of similar infections was legally and evidentiarily improper, see *Watkins v. Toro Co.*, 901 S.W.2d at 920-21, and knowingly false to both 3M and its counsel. See **Exhibit 37** at 1. Missouri law permitted Plaintiff "wide latitude" in fair response to correct the false narrative 3M presented to the jury. *Morgan Publications, Inc. v. Squire Publishers, Inc.*, 26 S.W.3d at 170. Respectfully, the Court erred in permitting 3M to repeatedly present unsupported evidence and argument of a lack of infections and prohibiting Plaintiff from correcting the false narrative by informing the jury of more than 6,000 admittedly similar claims of infection caused by the Bair Hugger.

11. The Court Erred in Admitting Hearsay Evidence and Improper Expert Opinion Testimony

The Court abused its discretion and committed reversible error in permitting 3M to play substantial portions of the video deposition of 3M's fact witness Mark Albrecht and Dr. Scott Augustine because the designated portions played to the jury were replete with hearsay testimony for which no exclusion applied.

"A hearsay statement is an out-of-court statement offered for the truth of the matter asserted therein and depends on the veracity of the statement for its value." *Thomas v. Harley-Davidson Motor Co. Group, LLC,* 571 S.W.3d 126, 138 (Mo. App. W.D. 2019) (citation omitted). "Hearsay is inadmissible unless it fits into a recognized exception, or it is used for a non-hearsay purpose." *Id.* "Generally, courts exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made." *Bynote v. National Super Markets, Inc.,* 891 S.W.2d 117, 210 (Mo. banc 1995).

While an *expert witness* may rely on inadmissible hearsay evidence "[i]f experts in that particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject," R.S.Mo. § 490.065, lay witnesses *are not permitted to do so*. Importantly, neither Mr. Albrecht nor Dr. Augustine had been endorsed as an expert witness by any party in this case. As such, neither Albrecht nor Augustine were expert witnesses, and their only potentially permissible roles were as fact witnesses at trial.

Improper admission of hearsay evidence unduly prejudices the opposing party and requires reversal where such prejudice exists. See, *e.g.*, *Interest of D.S.H. v. Green County Juvenile Officer*, 562 S.W.3d 366 (Mo. App. 2018) (reversing judgment based on trial court's improper admission of hearsay testimony); *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. 2010) (reversing judgment based on trial court's improper admission of hearsay testimony).

a. The Court Improperly Admitted Hearsay Testimony

Albrecht's testimony played to the jury included questioning that impermissibly read into the record substantial portions of several documents that the Court ultimately (and properly) excluded as hearsay.[36] For example:

Dr. Augustine's designated testimony play to the jury also included substantial questioning and reading into the record portions of several documents the Court ultimately (and properly) excluded as hearsay.[37]

> Q. I'll show you now what's been marked as Albrecht Exhibit 1.
>
> A. This is a clinical research document.
>
> Q. Okay. And – and Exhibit 1 is a report for – from certain work – research activities that were done at the Regina Surgery Center –
>
> A. Yup.

Albrecht Clip Report, p. 4, attached hereto as **Exhibit 38**.

> Q. Okay. So in describing what's shown in table 2, you – you said, "Little or no growth occurred on the agar plates"; is that correct?
>
> A. In this situation it appears that way. There are standards you can reference for what they allow for impaction, I believe. It's been a while since I've looked at the standards for the European ventilation tests. Most of these tests come from European sources.

Id. at 8.

> Q. Tell me what the – the different sampling things mean there. There are – for example, on the first one there's three actives and then there's a control. What's – what do those mean?
>
> A. So one would be sampling the air out of the Bair Hugger three times, and then the control I think would be an ambient sample of the operating theater air.

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[36] See Trial Exhibits 2739, 2740, and 3444 (each excluded on hearsay grounds).
[37] See Trial Exhibits 4163 (partial), 4164, 4165, and 4167 (each excluded on hearsay grounds).

Id. at 9.

> Q. Okay. If you flip ahead, like, five pages to – I guess is it 9 of 11, where it says, "OR HVAC ventilation results"?
>
> A. I've got 9 of 12. Yes.
>
> Q. Nine of 12, I'm sorry. And there it looks like there were five different measurements in the OR itself?
>
> A. There's four different operating theaters that were measured.

Id. at 10.

These examples represent only a very small portion of the many hearsay statements that 3M improperly read into the record and which the Court abused its discretion in allowing to be played to the jury. Additional examples include pages: 49:8-19, 50:8-25, 52:17-21, 53:13-24, 65:14-25, 66:2-19, 81:21-83:25, 86:2-11, 29:1-25, 95:9-25, 108:2-11, 114:23-115:2, 126:3-127:14, 131:2-5, 132:18-33, 174:17-20, 175:2-15, 176:9-21, 177:13-22, 178:3-10, and 203:2-21.

As with Albrecht, the Court abused its discretion in permitting improper hearsay testimony from Dr. Augustine to be played to the jury. Examples include:

> Q. Okay. So does this comport with your recollection that back in 2007, 2008 time frame, internally Augustine Biomedical + Design tried five different times to capture viable bacteria coming out of the airstream from the Bair Hugger hose, but – and using three different capture techniques, but never captured any meaningful number of bacteria?
>
> A. *That's what these test reports say*.

Augustine Clip Report, p. 2, attached hereto as **Exhibit 39** (emphasis added).

> Q. And you – *in your e-mail you say*, "I finally got this thing written," exclamation point. "See attached review, edits and comment. The yellow highlights are stats that I'm asking Mark Albrecht to recalculate. I'm also going to ask Paul McGovern to be a coauthor, but have not done that yet." *Did I read that correctly?*
>
> A. Yes.

> Q. And attached to this is a paper entitled, "Forced-Air Warming Link to Periprosthetic Total Joint Replacement Infections written by Scott D. Augustine, M.D. and Paul D. McGovern, M.D." *Did I read that correctly*?
>
> A. Yup.

Id. at 4-5 (emphasis added).

> Q. This is – the title of this is, "Next paper for review." *The top e-mail is from Mark Albrecht to Dr. Reed, McGovern, Dr. Gauthier, you, and a carbon copy to Robin Humble*.
>
> *And Mr. Albrecht says*, "Guys, Here is the next latest and greatest paper to go out. We'll target the General Surgery journal with this one. In a nutshell, the paper captures the results of an observational study done on laminar flow disruption in our laboratory when it was set up to study conventional ventilation. Please provide your thoughts and edits. We are really starting to crank these things out, which is a good thing." *Did I read that correctly*?
>
> A. Yes.

Id. at 6 (emphasis added).

These examples likewise represent only a small portion of the many hearsay statements that the Court impermissibly permitted to be played to the jury. Additional examples include pages: 36:19-37:9, 37:12-23, 37:25, 28:16-18, 41:09-15, 41:17-21, 41:23-42:04, 42:19-22, 43:7-14, 43:17-24, 44:2-4, 44:12-13, 47:16-19, 47:22, 87:12-88:6, 89:4-8, 92:6-93:22, 94:21-95:3, 95:5-13, 95:15-20, 95:23, 95:25-96:4, 97:14-98:11, 99:5-21, 99:23-24, 102:23-25, 103:13-104:20, 104:24-105:7, 105:10-21, 105:24, 106:8-13, 106:15.

b. The Court Improperly Admitted Hearsay Documents

The Court abused its discretion by improperly admitting multiple hearsay exhibits for demonstrative purposes. As explained above, Albrecht and Augustine were not identified, designated, nor endorsed as expert witnesses by any party in this case. As such, the provisions of R.S.Mo. 490.065, which permits the use of inadmissible hearsay evidence with experts, did not apply to the fact witnesses. For example, with respect to Albrecht, 3M sought to admit Trial

Exhibits 2712, 2711, 2713, and 2708 for demonstrative purposes[38]. Nothing in Missouri's evidence rules permits the use of hearsay evidence for demonstrative purposes with a lay fact witness. Moreover, even if Albrecht been endorsed as an expert—and he was not—no foundation was laid identifying any of these exhibits as authentic, much less as authoritative, reliable, or the kind of information upon which experts in his field would reasonably rely.

The Court similarly abused its discretion in admitting hearsay documents used in Dr. Augustine's deposition. As with Albrecht, the Court abused its discretion in admitting for demonstrative purposes several documents which were entirely hearsay for which no exception existed. For example, with respect to Exhibit 4161, Plaintiff properly objected as follows:

> MR. EMISON: Again this is hearsay Your Honor. This witness is not an expert witness. He was not designated to be an expert witness and is a fact witness and he is not allowed the same derogative [sic] (prerogative) as an expert witness to rely on hearsay documents.

Exhibit 15 at 64. The Court abused its discretion and received this hearsay evidence.

> With respect to Exhibit 4162, Plaintiff again objected:
>
> MR. EMISON: The differences [sic] the other studies were received for demonstrative purposes because they were shown to an expert who can rely on hearsay testimony about it. But doctor Augustine does [sic] not expert does not have that same ability.

Id. at 65. The Court abused its discretion and received this hearsay evidence.

> With respect to Exhibit 4163, Plaintiff objected:
>
> MR. EMISON: Your Honor, again, this is hearsay. Not that dictated [sic] no foundation was laid this a business record, there was [sic] a fair and accurate copy. It's not an admission of the [sic] party opponent no exclusion [sic] to hearsay has been identified.

Id. The Court abused its discretion and received this hearsay evidence.

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[38] These exhibits are attached hereto, respectively, as **Exhibits 40**, **41**, **42**, and **43.**

Each of the documents the Court received for "demonstrative" purposes consisted entirely of inadmissible hearsay for which no proper exception had been identified. Mr. Albrecht and Dr. Augustine were never identified, endorsed, nor qualified as an expert by any party. The provisions of R.S. Mo. § 490.065 did not apply to either Albrecht or Dr. Augustine. Even if the provisions of § 490.065 did apply, no foundation was laid as to the reliability of any hearsay document that would bring it within the provisions of § 490.065(2). As such, the Court abused its discretion in admitting this improper hearsay evidence and permitting its presentation to the jury.

c. Plaintiff Suffered Undue Prejudice from the Court's Improper Admission of Hearsay Testimony

Much of the improper hearsay testimony from Mr. Albrecht and Dr. Augustine served to bolster and support 3M's claim that the Bair Hugger never directly contaminates the surgical field with bacteria harbored within the machine itself. There was little, if any, evidence supporting 3M's position without this improper testimony. Plaintiff identified a number of studies showing that that the Bair Hugger did, in fact, increase the number of bacteria over the surgical field and elicited a testimonial admission from 3M that every single study showed that the Bair Hugger increased the number of particles over the sterile field and that 3M had no evidence to refute that fact.

3M utilized hearsay statements from Albrecht to bolster the studies it relied on and undermine those relied on by Plaintiff. For example, 3M improperly elicited hearsay testimony that one study showed "little or no growth occurred on the agar plates." **Exhibit 38** at 38:15-25. Albrecht testified as to hearsay test results, that "the first three rooms, that apparatus with the agar plates got no bacteria. *Id.* at 49:8-11. Other testimony simply read test data into the record regarding various particle sizes that tended to bolster 3M's argument that the Bair Hugger did not substantially increase particles of sufficient size to transport bacteria into the sterile field. *Id.* at

53:13-24. 3M also improperly read into the record additional hearsay test data with Mr. Albrecht regarding bacterial sampling, when Albrecht was neither identified as an expert nor qualified to conduct any such bacterial sampling. *Id.* at 81:21-83:25.

3M asked similar questions of Dr. Augustine regarding hearsay test data that failed to capture meaningful numbers of bacteria directly from the Bair Hugger. **Exhibit 39** (Augustine 3/31/17) at 68:2-10; (Augustine 8/3/22) at 41:9-21, 41:23-42:4, 42:19-22, 43:7-14. 3M also sought to frame Dr. Augustine has having had manipulated data to suggest the Bair Hugger was defective. Augustine 3/31/17 at 296:6-297:16. One question and answer highlights the undue prejudice from these improper questions:

> Q. *These studies* that we just talked about showed to you and Augustine Medical that the *product was safe and effective for the use* – the intended use, right?
>
> THE WITNESS: That is correct.

Id. (Augustine 8/3/22) at 47:16-19, 22 (emphasis added).

This inadmissible hearsay testimony unduly prejudiced Plaintiff and warrants a new trial. See, *e.g.*, *Interest of D.S.H. v. Green County Juvenile Officer*, 562 S.W.3d 366 (Mo. App. 2018) (reversing judgment based on trial court's improper admission of hearsay testimony); *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. 2010) (reversing judgment based on trial court's improper admission of hearsay testimony).

12. The Trial Court Erred in Permitting 3M to Impeach Its Own Witness

It was error for the Court to permit 3M, over Plaintiff's objection, to impeach its own witness, Dr. Scott Augustine. See **Exhibit 39** at 13-15.

"The general rule is that one cannot impeach his own witness since he is considered to have vouched for the witness' credibility." *Dement v. City of Bonne Terre,* 669 S.W.2d 278, 280 (Mo. App. E.D. 1984). "To warrant impeachment of one's own witness, therefore, there must be

actual surprise at the testimony the witness gives, and even then it is appropriate only where the evidence is of such an affirmative character as to be *favorable to the adverse party*, and therefore prejudicial to the party who was misled into calling the witness." *Id.*

Dr. Augustine was 3M's fact witness at trial. 3M noticed all three of Dr. Augustine's depositions and 3M elected to play Dr. Augustine's videotaped depositions during the presentation of its case. 3M's purpose in presenting Dr. Augustine's testimony was to set up a straw man upon which 3M could lay the blame for the accusations and studies showing the Bair Hugger increased the risk of surgical infections during orthopedic surgery and then topple the straw man with attacks upon his character, including improper evidence of Dr. Augustine's misdemeanor guilty plea on an unrelated matter.

Dr. Augustine pleaded guilty to a federal misdemeanor charge in June 2004. The charges did *not* relate to the Bair Hugger and stemmed from allegations that Augustine failed to disclose information related to a device called the Warmup. Plaintiff initially notes that it was improper to question Dr. Augustine as to his 2004 misdemeanor plea bargain under any circumstances. This question is governed by R.S.Mo. § 491.050:

> Any person who has been *convicted* of a crime is, notwithstanding, a competent witness; however, any prior criminal *convictions* may be proved to affect his credibility in a *civil* or criminal case and, further, any prior *pleas of guilty*, pleas of nolo contendere, and findings of guilt may be proved to affect his credibility in a *criminal case*. Such proof may be either by the record or by his own *cross-examination*, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

(Emphasis added).

The Missouri Supreme Court has interpreted this language strictly, conferring an absolute right to impeach the credibility of a witness if conferred by the plain language of the statute and finding *no right* where not conferred by the statute. See *M.A.B. v. Nicely*, 909 S.W.2d 669, 271

(Mo. 1995) (term "conviction" does not include guilty pleas or findings of guilt where imposition of sentence has been suspended). In *M.A.B.*, the Supreme Court confirmed that it was "essential to note" that "where there is no conviction, section 491.050 distinguishes between criminal and civil proceedings." *Id.* at 671. Because *M.A.B.* was a civil proceeding, the witness "could be *impeached only by proof of a conviction*." *Id.* (emphasis added). Other Missouri courts have applied this standard as directed by the Supreme Court. See, *e.g.*, *CFM Ins. Inc. v. Hudson*, 432 S.W.3d 797, 901 n.3 (Mo. App. 2014); *Hemphill v. Pollina*, 400 S.W.3d 409, 414 n.4 (Mo. App. 2013).

Dr. Augustine *was not convicted of any crime*. Dr. Augustine pleaded guilty to a misdemeanor. He received no jail time. His fine was paid by Arizant pursuant to the terms of his separation agreement and was very likely disclosed to 3M during the due diligence it performed when it paid more than $800 million to acquire Arizant. Because Dr. Augustine's misdemeanor guilty plea nearly twenty years ago as to an unrelated product is not a "conviction" under the strict interpretation of section 491.050, such evidence is inadmissible to impeach his testimony under *any* circumstances and the Court abused its discretion in allowing this testimony to be played to the jury.

Impeachment using Dr. Augustine's 2004 misdemeanor guilty plea is even more improper when done by the party calling him as a witness. Dr. Augustine was not impeached with his guilty plea by cross-examination, but *under direct examination* by the party who called him as a witness. 3M cannot claim any surprise as to Dr. Augustine's guilty plea. The plea occurred nearly twenty years ago and was well-known to his company, Augustine Medical, Arizant, and 3M. Augustine Medical forced Dr. Augustine out of the company because of the guilty plea. The company changed its name to Arizant Healthcare and was eventually acquired by 3M. 3M has had access

to Arizant and Augustine Medical's knowledge of the guilty plea and the circumstances around it since 3M acquired the company in 2010.

The Court abused its discretion in permitting 3M to set up this straw man and then "knock him down" in impeaching and attacking the veracity and character of its own witness. See *Dement* 669 S.W.2d at 280.

IV. CONCLUSION

This was a very scientifically complex trial with dozens of corporate documents, multiple corporate depositions, complicated scientific principles, and zealous advocates on both sides. The trial presented dozens of complicated questions for the Court to answer with little time to reflect given the time constraints the Court was acting under to complete the trial in the time represented to the jury. Respectfully, these complexities created issues of error that upon careful reflection as described in *Nguyen*, 916 S.W.2d at 889, warrant granting Plaintiff's Motion for New Trial.

Many—if not all—of the errors described herein caused Plaintiff substantial undue prejudice sufficient to support a new trial. However, even if any single error, standing alone, were insufficient, the cumulative prejudicial effect requires a new trial. See *Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. Div. 2 1959) overruled on other grounds (without undertaking to determine whether any single instance of alleged error, standing alone, would constitute reversible error, Court determined that, "in their totality, they do.").

WHEREFORE, Plaintiff respectfully requests the Court GRANT her Motion for New Trial 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 16th day of November 2022, 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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