ORAL ARGUMENT - 1/16/97
96-0881
BRISTOL-MYERS V. MARSHALL

YOUNG: May it please the court. Rule 174 and the case law under it acknowledge that a TC has broad discretion in ordering consolidated or separate trials. But that same case law indicates that that discretion is not unlimited and must be exercised in such a way as to protect against the dual risks of jury confusion and prejudice to the parties. The nature of the breast implant litigation makes the potential for that confusion and prejudice from a consolidated trial particularly acute.

CORNYN: Are there different standards we ought to apply in breast implant litigation from other mass court litigation?

YOUNG: Not in the sense of one law for breast implant cases and another law for other cases. But the standards that this court has laid down and should lay down will apply differently in breast implant cases because of the characteristics of that litigation than they do in other litigation because of the characteristics of that litigation. The rules and principles are the same, the application is different.

ENOCH: We might agree that there's something unique here. Haven't there already been a number of trials that have occurred in Texas that have been consolidated, not unlike this where they've gone to verdict and there's a history here?

YOUNG: There's a very short history your honor. First of all to our knowledge there has never been a multi-plaintiff breast implant trial outside the State of Texas. Within the State of Texas there has never been a trial of as many as 9 plaintiffs as is proposed here. In fact the largest number that we are aware of is 4. And we are not aware of any multiple manufacturer trials certainly outside the context of a woman who has multiple implants with different manufacturers.
PHILLIPS: How many trials have there been altogether outside...

YOUNG: There have only been a handful of breast implant trials altogether. While there may be a mass of cases and there may be a great pretrial management problem for breast implant cases in the state. There are not courts who's trial dockets are languishing because the courts are preoccupied trying breast implant cases. That simply hasn't occurred.

PHILLIPS: What percentage of all breast implant cases that are pending in state courts across the nation are in Texas courts, approximately?

YOUNG: I do not have that number. The number that I have is that about 10,000 plaintiffs

are pending in Texas.

PHILLIPS: How many are in the MDL or...

YOUNG: I don't have that number. I do know that we anticipate that as a result of the global settlement as things stand now approximately half or more of the Texas cases will be resolved by the global settlement. That global settlement is in a critical phase I might add. It's entering a final opt out period between now and early summer and by the end of that period if plaintiffs are not given the false hope that they can beat up on a defendant through a mass trial in Texas, we hope that a large number of women will elect to take those settlements and reduce the case load accordingly.

ENOCH: My question really wasn't going to judicial efficiency. It was really going to the history experience. One thing that we are trying to analyze this from a perspective view but in terms of cases already tried and already held, the real parties argue that the results of those cases demonstrate that there's no confusion. And none of the things that you're talking about.

YOUNG: I don't think the results demonstrate that all your honor. First of all we have a very small sample and in only one case that I am aware of do we have a widely disparate result between two commonly tried plaintiffs. That was a case in which the plaintiff who recovered nothing was a nurse. And it may very well have been that the jury reasoned that being a nurse she was already aware or should have been aware of the risks of breast implantation. And it presents a very different case to say that the jury was able to differentiate between those two plaintiffs, who I might add had the same manufacturer than they would have in the case of a multiple manufacturer trial involving 9 plaintiffs where you don't have a health care professional as one of the plaintiffs.

CORNYN: Before cases are actually tried isn't a lot of what's been written about juror attribution in the strength of one case sort of spilling over into another case really speculative?

YOUNG: Well we don't know if it is or not. I suppose in that sense you would say yes it is.

CORNYN: We don't know there's really been any harm until after the jury's come back because they may differentiate between cases?

YOUNG: You won't know until after there has been a track record and you won't know in an individual case where there is some degree of differentiation is that the product of a well reasoned and nonprejudiced evaluation of the facts, or is it a false attribution, or a problem of jury confusion. That's part of our point about why mandamus is appropriate and this is raised by the Dow Bryer court. This is not something that you can sort out afterwards except in the very most extreme case where they give a bunch of widely disparate plaintiffs the same amount of money or something like that. And even there you're not sure what the cause of that was.

ABBOTT: How many plaintiffs are too much when they are grouped together all suing one

manufacturer alone?

YOUNG: Well I would say that depends your honor on some other factors beyond a number of manufacturers. It depends heavily on implant date. These cases are heavily state of the art dependent. And it would never be appropriate in our view to try together two plaintiffs with widely disparate implant dates because you've got differing issues regarding the state of the manufacturer's knowledge, the state of the industry's knowledge, these are learned intermediary warning cases so you have issues of what the medical profession knew, and what the plaintiffs' implanting doctor knew or didn't know.

ABBOTT: But all of that information is still going to come into the jury even if you have a single plaintiff depending on when they received their implantation. In other words, the state of the art information is going to come into the record any way of what other manufacturers knew, of when who knew what, and so...

YOUNG: In a limited sense that's correct your honor. But we're not going to be presenting the jury with what the industry knew in 1989 in the case of a woman whose implant took place in 1973. And that's the real potential not only for confusion, but for prejudice. We don't think even the most conscientious juror can evaluate the evolved state of medical knowledge in those later years without applying it to the plaintiff in the earlier years or without engaging in some impermissible inferences. For example: the fact that the product was improved over time is a recognition by the manufacturer that there was a prior deficiency. And that's a grave concern in these cases.

OWEN: Is there evidence in the record that shows when there were differentiations between the state of art and state of knowledge? You would expect there would be some breaking points along the time lime. Is there evidence in the record where the TC could have said: well we can try 79 and 78 cases together, but not...

YOUNG: Well first of all in this particular consolidation the time span runs the gambit. It's about an 18-20 year consolidation. In response to your specific question there is evidence concerning the package inserts for each of the various plaintiffs. And the court can see and the TC can see how those evolved over a period of time. That's the extent of the evidence in the record about the specifics of the evolving state of the art.

ENOCH: What was the basis for this judge to consolidate these cases?

YOUNG: What happened in this case was that this judge was designated as the coordinating judge for Dallas County. He picked a number of cases, a much larger number than this - something like 22-23 of those cases, and we do not know the basis for his selection of those 22 -23. He merely took all of the cases pending in Dallas and put asterisks by certain of the cases and said these will be the cases that are tried.

BAKER: Weren't they all in his court?

YOUNG: They were all consolidated in his court as the judge for pretrial purposes. But the cases were actually pending in all the different Dallas county courts. A couple of weeks later, he altered his rulings and gave the parties a chance to, whose cases were filed other than in the 14th court, to opt back to their home courts. And the vast majority if not all of them did so. So the cases that are before the court in the proceeding today are all cases now that are pending in the 14th district court. They are what is left of those 23 or so cases that the respondents elected for trial initially. And we do not have any indication in the record of his reasoning process in selecting those cases.

PHILLIPS: So at this point in Dallas county there is no breast implant judge as it were?

YOUNG: There is a breast implant judge but the cases in the 14th court are not engaged in consolidated pretrial with those.

CORNYN: If Judge Marshall had ordered a consolidated trial on a single issue of causation in these breast implant cases all of the breast implant cases pending in Dallas county would you be here?

YOUNG: Yes we would for two reasons. First of all this court's ruling in _____ v. Hughes that it is impermissible in Texas to try a personal injury case in a bifurcated fashion between liability and damages. And that is what a causation trial would be is a trial a part of the liability issue separate and distinct from the jury that's going to be hearing damages.

CORNYN: So the Texas courts cannot do what federal courts have done in _____?

YOUNG: That is correct as an overwriting rule of law. Beyond that rule of law a general causation trial will not work in the breast implant litigation because the most that it would ever determine is that breast implants either or, or or not in the abstract capable of causing disease. If that is to be a useful finding it must be differentiated first of all among the many, many different types of conditions and syndromes that these plaintiffs claim to be suffering from. This is not a type of litigation where there is a recognized set of symptoms that either is or isn't caused by the product. This is a cluster of symptoms and unless you are going to ask the jury in the general causation trial: Do breast implants cause joint pain? do breast implants cause female problems? do breast implants cause (these 9 plaintiffs claim 28 different conditions).

CORNYN: So is your position you can't try two breast implant cases together?

YOUNG: Not categorically so. No your honor it is not. It is that until we have a track record in Texas of trying breast implant cases and until individual judges have familiarity because they've tried several breast implant cases, we think that one ought to be the norm. We also think that one ought to be the norm and ought to be the maximum where you have different manufacturers, where

you have materially different implant dates, where you have materially different implant types, the record shows 3 major different implant types in this case, and where you have materially different symptomatology. Once all of those factors are the same, once we have our track record, it may be possible to try more than one case at a time. But even in that case we would caution that there is an outer limit based on two factors: one the jury's shear ability to assimilate a massive detail about a large number of people, all of whom are going to have different causation, and differing individual causation and differing damages.

CORNYN: Until that time it would be an abuse of discretion to try more than one at a time?

YOUNG: We believe so. And the second factor is what is referred to in the Dalbrier(?) case and in some of the medical literature, the problem of false aggregation. If the jury sees a number of women all claiming sickness, and all having had breast implants, it may be tempted to infer from the presence of those women, that breast implants cause disease. And what is not seen are the large number of women in the general population who have those same symptoms but no breast implants. Or the large number of people in the general population who have breast implants but don't have those symptoms. In short they are getting a skewed epidemiological sample if you have a large number of plaintiffs grouped for trial.

PHILLIPS: Have there been any Daubird(?) or Robinson type of hearings on the expert witnesses...

YOUNG: Indeed there have been some in this case. And that leads into what Mr. Harrod is going discuss. We believe that the way to manage the breast implant docket in Texas is first of all to allow the local settlement to do the best job that it can of whittling down the docket. And second to encourage proper use of Robinson to whittle these cases down to size, to resolve the cases where there is no genuine issue of scientific causation, and to go from the issue of systemic injury down to the issue of localized injury in as many cases as possible.

PHILLIPS: If we don't build it they won't come type of docket?

YOUNG: And beyond that we think it blinks of reality to think that if we have at the end of that process a 1,000 cases left, that the lawyers and judges of Texas are going to insist on replowing the same ground 1,000 times in a row to reach what will then be a predictable outcome. We think if judicious selection of representative plaintiffs is made and those cases are fairly tried, they will promote further settlements and the breast implant cases will go away.

HECHT: Are you aware of a multiplaintiff breast implant case being tried anywhere in the state except Harris county?

YOUNG: I am not aware of specifics. But I believe there have been. I know there has been a 2 plaintiff trial in Dallas county.

HECHT: And are you aware of any that are on appeal?

YOUNG: I am not you honor but perhaps Mr. Herrod is.

* * *

HERROD: May it please the court. I represent 3M. There have been several Daubert hearings in Dallas county, including in this case where Judge Marshall struck every single one of plaintiffs' causation experts, which indicates why in this particular case a consolidated trial is even more prejudicial because the main issue in most breast implant cases is whether breast implants are capable of causing disease.

CORNYN: Maybe I misunderstood. You said he struck all of the plaintiffs' causation witnesses.

HERROD: Yes. There's a June hearing which is referenced in volume 24, Tab 4 of the July 14 hearing transcript.

CORNYN: How come the case isn't over?

HERROD: Because they are going forward on local claims, and we have no guarantee that...

CORNYN: On local claims?

HERROD: Local injury claims. Claims that say breast implants didn't cause disease, but breast implants caused scarring, capsular contracture, things of that nature. Also at the time this mandamus was filed it was immediately after he applied that ruling to codefendants 3M and Bristol, it was initially obtained as to only Baxter. The mandamus was filed because we have no guarantee that Judge Marshall will not change his ruling at trial and as plaintiffs chose to call no witnesses at their Daubert hearing, we thought there was a risk at trial that Judge Marshall might reconsider it and then the ruling goes away. But as is postured now before this court general causation is not an issue, which means now you're going to have a trial that involves 9 plaintiffs and you're only looking at their local injuries. And as our briefing indicates especially the appendix which talks about what the plaintiffs have, it's all very different.

CORNYN: I thought part of your argument was the risk in a case where the scientific validity of causation was very controversial, perhaps some would say dubious, that there was a risk of juror attribution of causation. But you're saying that's not an issue here because these are all individual...

HERROD: We are saying that should not be an issue if what Judge Marshall said on Sept. 5 actually were to occur at the trial of this case. But under Robinson he can go ahead and allow those witnesses to testify anyway. In other words we don't have any guarantee that because he indicated

that he's not going to let them testify now, that at trial he in fact will not let them testify. So in our briefing we have addressed the alternative position of what happens if that ruling goes away.

CORNYN: You want us to grant a mandamus on the basis of he may change his mind?

HERROD: No, no, no. My argument is is the mandamus is even more appropriate if he does not change his mind. Although as you pointed out we do have the alternative argument that says it's still appropriate if he does not change his mind. As far as other Daubert hearings there was a recent opinion that came out of the federal court in Oregon after a lengthy 6 month process which included a week of live testimony which excluded every single one of plaintiffs' expert witnesses on the grounds that they could not among others there was no statistical significant epidemiology an important term showing a doubling of the risk of breast implants, which I understand is before this court in the Havener case. A similar issue on the 2.0. This was a 9th circuit case, the circuit from which Daubert originated in the bendectin context. In New York there was also a similar ruling by Judge Weinstein who is the author of many of the asbestos consolidation cases at the DC level. We cite those cases on appeal in our briefing. The general causation of witnesses in those cases every single one of them also excluded.

In New York Judge Weinstein said that we should not have multiple plaintiff trials until he has experienced trying single plaintiffs local injury cases at which point an assessment will be made, which is consistent with the second circuit of repetitive stress injury litigation case which we cite for this court in our briefing. And that was also an appeal of Judge Weinstein's consolidation ruling.

ABBOTT: For over a decade with regard to asbestos cases, they have been tried with multiple plaintiffs with a wide range of injury along with multiple dependents. Certainly more than are involved in this case sometimes up to in excess of 10 defendants. Why should breast implant litigation be treated differently than asbestos litigation?

HERROD: Two reasons. One is your question over a decade. Breast implant litigation compared to asbestos is in its infancy. Asbestos litigation is much more matured. We have much more experience with it. The second reason is that breast implant litigation is not the same as asbestos litigation. For example: in asbestos litigation a plaintiff may have been exposed to many, many products from many, many defendants. That ordinarily is not the case in breast implant litigation. We don't have the defendants pointing the finger and saying: no, those weren't my implants. They were your implants. We have medical records and we know what manufacturer made the plaintiff's implants. So in breast implant litigation unlike asbestos we could easily segregate these cases by manufacturer. Judge Marshall couldn't do it because he only had these 4 cases. Where in the Dallas county pool and as it's worked in Harris county with Judge Schneider and now with Judge Lloyd, they will go ahead and have all the cases pending in the county and they will select those plaintiffs that are most similar and they will set them to trial against one manufacturer.

ABBOTT: Do you disagree with that process

HERROD: 3M does not disagree with the process ongoing in Harris county, or Dallas county with Judge O'Neal.

CORNYN: You and Mr. Young disagree on that?

HERROD: No. I did not hear Mr. Young saying he disagreed with that.

CORNYN: I heard him say one ought to be the norm?

HERROD: And one should be the norm, and one is the norm.

CORNYN: But you think what's happening in Harris county in terms of consolidated trials is acceptable?

HERROD: We think it is acceptable both in Harris county and in Dallas county.

PHILLIPS: Of course those are only consolidated for pretrial as I understand it. Right?

HERROD: And as a result of the pretrial they learned a little bit about the plaintiffs and then they select those plaintiffs that are most similar and they set them for trial together.

PHILLIPS: But is that set back in the court in the judge of the court where it's filed or do the breast implant special docket judge try the case?

HERROD: Judge Lloyd will send it back to the judge. The trial I was in last January was tried by Judge Whittick, and that was a 3 plaintiffs trial. I don't think there was any confusion in that case, but all the plaintiffs had barely similar symptoms. They all had 3M again implants. They all had their implants within one or two years of one another. So all kinds of other company documents from other manufacturers weren't coming in and that's very different than these 9 plaintiffs who are grouped only by the computer filing system that the court spits out to the 14th DC.

PHILLIPS: What's the largest number of plaintiffs tried in a breast implant case in Texas today?

HERROD: I believe Baxter _____ trial in Dallas county in front of Judge Godby was either 4 or 5 plaintiffs, and that is the largest. Outside of Texas to my knowledge...

PHILLIPS: Did it also meet the same criteria?

HERROD: I believe Baxter has stated on this record in the context of the July 25 hearing, which was tab 4 in volume 24, that yes Baxter thought that that worked in front of Judge Godby.

In fact they did not think there was any confusion because, and this is the key, those 4-5 plaintiffs were very similar. They were all Baxter defendants. And some of the subsidiaries for example Bristol & Baxter bought companies that made implants and they made different kind of implants. So Baxter & Bristol would be concerned that not only must they be Baxter defendants, but they must be Baxter defendants that made this type of implant as opposed to another subsidiary that they both have Baxter defendants because Baxter purchased them. That's not the case with 3M because we only had 1 company that we purchased that made implants. But that also was a concern.

ABBOTT: If we were to write an opinion saying that implant plaintiffs could be tried in groups of more than one provided that they were tried against a single manufacturer, and provided that all of the women who were grouped together had similar symptoms or similar medical problems, how would we state that in an opinion so that it would be clear for the TCs to understand the range of symptoms or the range of complaints within which plaintiffs could be grouped for trial?

HERROD: There would be a couple of ways to do it and let me preface those by saying it might a little more difficult because the plaintiffs' symptoms are so subjective and vague in their efforts to get away from the epidemiology. That said however, you could segregate plaintiffs by for example plaintiffs who claim a classically defined and recognized _____ immune disease such as Scleroderma. If you have 3 Scleroderma plaintiffs you could put those Scleroderma plaintiffs together against a single manufacturer. Then you might find 3 lupus plaintiffs and put those plaintiffs together against a single manufacturer. You might find 3 a-typical connective tissue disease plaintiffs who actually have some symptoms and send them against the manufacturer. You might find 3 a-typical connective tissue disease plaintiffs who really don't have any symptoms and send them for trial against the manufacturer. Within the umbrella of a-typical connective tissue disease is basically every human element known to man which is anything that someone has they attribute to their breast implants. And this is in the record, this is in the Marshall _____ quote who is the editor of the New England Journal of Medicine that we quote in our briefing. And what that means is is that you can't just write an opinion that says anything a-typical connective tissue disease is okay to try together because that runs the gambit. But if it is something that's recognized such as lupus or Scleroderma or another classic auto immune disease try those together against the same manufacturer and that would be much less prejudicial than letting the clerk of the Dallas county courthouse spit these out to one court, and that's how they are tried. That's just as arbitrary as doing it alphabetically or doing it by the number of letters in the plaintiffs middle name or doing it by the shoe size of the plaintiff's brother.

OWEN: What percentage of the plaintiffs have had more than one implant?

HERROD: It is a significant percentage, but it's a relatively small percentage. I would estimate, I would only be estimating, that it's less than 10%, and of that 10% many of them would have the same type implants. Because it's often that they would go to the same surgeon and the surgeons tended to, not always, but tended to purchase their implants from one manufacturer. So I think it would be less than 10% and in that less than 10% there would be very few trials where you

would have a 3M implant and then Baxter implant, although that happens, and that's confusing. But there's no reason to try to make it happen as we have here where we don't need to.

HECHT: The cases you mentioned that were tried by Judge Godby and Judge Whittard did those go to verdict?

HERROD: Yes they did. Both cases were defense verdicts.

HECHT: Are there appeals?

HERROD: I do not know in the case of the Baxter case. I do know the case I participated in there was not an opinion.

ABBOTT: How many implant cases are pending in Dallas?

HERROD: Dallas has several thousand implant plaintiffs. I do not know if they have several thousand implant cases.

ABBOTT: Is several two, or four?

HERROD: There are 2,000 Australian plaintiffs alone in one case pending before Judge Tyson who is another judge who's opted out of the consolidated proceeding along with Judge Canales, with Judge Marshall. The rest of the judges are opted into the _____ proceedings with Judge O'Neal and I know that there are at least as many in that consolidated proceeding as there are Australians.

It is fair to say that there are more breast implant plaintiffs in Texas than in any other place and there are probably more in Harris county than in any other county which is why in Texas we have consolidated proceedings by county whereas California, New York, New Mexico, Tennessee, Oregon have consolidated proceedings by state.

PHILLIPS: We also have no procedure for consolidated by state.

* * * * * * * * * *

RESPONDENT

LAWYER: May it please the court. It is difficult for me to stand before the court and defend the conduct of Judge John McClellan Marshall. I believe that the court and particularly in this proceeding has on many occasions acted arbitrarily, has failed to follow the generally recognized rules applicable to procedure in his court. And I'm not going to dwell on this because there are other issues involved in this case. But Judge Marshall originally assigned all of the breast implant cases in his court plus one case from every other court in Dallas county that he was administering as the pretrial judge for trial 45 days after the entry of his order - conduct which technically is permitted

by both the rules of procedure and the Dallas local rules.

Not only did the defendants also the plaintiffs told the judge that it was a virtual impossibility for that volume of cases, and that would have involved about something on the order of 60 plaintiffs, to be ready within the 45 day period of time that he had described. The Dallas judges subsequently asked him to and he did step down as the pretrial judge in Dallas county and as his last order he remanded all of the cases to the courts where they originated.

There were still remaining in his court 5 cases and he set all of those for trial. What we have left are 3 cases, two of those settled at some point in time before this proceeding. And what we have left are 3 cases that he ordered consolidated.

PHILLIPS: When you say 3 cases is this 9 plaintiff case one of one case is that how you are counting it?

LAWYER: No, I believe it's a 6-plaintiff case, the Kemp case, and then there is a single plaintiff case, that's Dolores Williams, and then the Bailey case involves 2 plaintiffs. Now if the court were to examine the 6 plaintiff case, the Kemp case, those are 6 women whose implants were implanted between 1974 and 1991. That case involves women who have implants from different manufacturers. All 3 of the manufacturers, 2 of the women in that case have multiple implants from different manufacturers, now the other two cases Dolores Williams is a single implant case, it's a higher _____ case where the implantation was in 1977, well within the 1974-1991 Kemp case parameter. The Bailey case is 2 plaintiffs who had their implants in 1980 and 1983 respectively, well within the 1974-1991 parameters of the Kemp case.

OWEN: So you're saying basically that if the plaintiffs' lawyer joins 6 or 10 plaintiffs together in a single case you take the beginning and ending date of those implants and then you can lump anything else in with it?

LAWYER; Well I think you can do that, but the complaints that they are making here all relate to the features of a single case. That single case being the Kemp case. Now we're not before this court on an issue of whether Judge Marshall should have severed the plaintiffs in that case. There was never a motion filed to sever the plaintiffs in the Kemp case. Then all we had was a sua sponte order from the court that I, Judge Marshall in consolidating these 3 cases. Now I'm not suggesting to the court that Judge Marshall went through this thought process because I don't believe he did.

I need to point out to the court the features of this litigation that I believe would make a court ruling in this particular case, that is to mandamus this judge to deconsolidate those 3 cases, I believe it would be inappropriate because I think that the problem exists in one case, that one case being the Kemp case, if there is a problem. And there was no motion to sever. So therefore what the record that this court has to look at is that we've got this one case where you've got these plaintiffs together with no motion to sever, so theoretically at least no opposition has been expressed to that case going

to trial by itself. The only opposition has been 3 cases going to trial together. But the other 2 cases consolidated with Kemp don't add anything, don't create the problems that these defendants complain of.

ENOCH: I don't know any of the circumstances under the decision not to bring a motion to sever. Maybe it's not a particular problem, maybe it is a particular problem. But should we consider when there is consolidation the interest of the parties being consolidated into such a case. Even if we said: well the rule ought to be that the plaintiffs ought to suffer the same alleged disease, the plaintiffs ought to be substantially the same in time frame, there ought to be just one manufacturer. Could that rule be applied to just the one case saying it shouldn't be consolidated with another case where there is too broad a range as an example. You're saying there's problems all in one case and so anybody could be consolidated. But couldn't we look at here's one plaintiff who had this year, this defendant, these parties should not be subjected to a broad range of diseases, should not be subjected to a broad range of time of implants, and to put them in that case would subject them to that circumstance.

LAWYER: Well I don't know how the court would come to those conclusions based upon the record that's before it What the court would then be saying is that you've got a multiplaintiff case and a multidefendant case and while there's no complaint about that consolidation, we believe that this case ought not be put in that case and this case ought not be put in that case. But there are cases in Kemp that are substantially the same as the 2 cases that were consolidated with it. There are women in the Kemp case who match pretty well the 1977 _____ implant from the Williams case. There are women in the Kemp case who match pretty well the 1980 and 1983 implants from the Bailey case.

GONZALEZ: When you say match pretty well can you be more specific?

LAWYER: In a couple of years.

GONZALEZ: Is that the only factor that...

LAWYER: Substantially the same kind of implant. I think there's a fictional notion that there is a real distinction between implants. The harm is uniform from one implant as it is from another. The only difference would be generally speaking how quickly that harm may befall a woman who has the implants. The other thing that I, and there's a handout before the court, just to demonstrate the ongoing nature of this controversy and the development of epidemiologic studies, additional scientific studies in Nov. 1996, as shown in that handout, there was identified by a Michigan group in a study sponsored by Dow Corning Corp., that there was a significant odds(?) ratio increase in connective tissue disease, undifferentiated connective tissue disease among breast implant women.

CORNYN: Where was this published?

LAWYER: It was published in the recent presentation of abstracts at the American College of _____ meeting in Florida in November. It is an abstract. It will be published in full form whenever it's published. Generally it takes with epidemiologic studies about 9 months for them to go through the publication process. So I would anticipate some time this year.

ABBOTT: Excluding women who had implants from multiple manufacturers, what would be wrong with requiring plaintiffs to be grouped with regard to one aspect to persons who have received implants from a single manufacturer?

LAWYER: Again I don't know that this is the place to make that pronouncement or to make that evaluation because the court would be judging in advance an issue that I don't believe is before it and certainly based upon an inadequate record that such characterization or putting people together is necessary to prevent prejudice. I would not be candid with the court if I didn't tell the court that that's precisely what we proposed in Dallas. I am liaison counsel there and I proposed to the court that the best way to do this is you take the oldest case on your docket and what you would want to do is look at implant date, and we were talking only about single implant women, the others would be at a future date, and you look to the law firm that filed that case, and you search out all of the other cases that that law firm has on file and you group around that oldest case those that were closest in implant type, the implant date, to the extent that that was possible. And the predecessor to Judge Marshall, that is Judge Andrews, agreed with that process and we were indeed in the process of implementing that when Judge Andrews couldn't stand it anymore and stepped down.

So I don't have any problem with that. I mean that's sensible, it's logical, which is not a process that I can attribute to Judge Marshall. I think this was arbitrary. I think that if they had gone through the right complaint which was to file a motion to sever, which would segregate out the issue.

BAKER: Your language leads me to the question are you conceding that Judge Marshall's order was a result of an arbitrary and capricious decision?

LAWYER: Yes.

BAKER: Isn't that the first prong of the reason to grant a mandamus?

LAWYER: No.

BAKER: It is not?

LAWYER: Well frequently judges are right for the wrong reason. Just because a trial judge doesn't think through what he's doing I don't know that that's...

BAKER: I took your statement to mean that his decision, the order he entered, was arbitrary and capricious, which is different than his thought process?

LAWYER: No. What I am saying that the way he got here, got these cases together I believe to have been arbitrary.

PHILLIPS: Is it my understanding that you're saying that your argument might be quite different if the suit's plaintiff's case had been severed out, or there was an attempt to sever it out and then this same original proceeding had been brought?

LAWYER: I don't know that it would be any different. The question is is there a signature disease? Well the University of Michigan now says there is. Is there a commonality of complaints? I think that all of the literature demonstrates that there is a commonality of complaints of silicone implant women. So I don't know that my argument would...certainly I wouldn't be arguing to the court that there should have been a severance proceeding to properly preserve the error that they are attempting to present to this court to act upon. I obviously wouldn't be doing that. But by the same token I'm not here saying that I think that it's inappropriate to consolidate all of these women. It stretches my view of what ought to be consolidated. I don't think it's in the plaintiffs' favor. We told Judge Marshall that.

SPECTOR: How do you answer the argument that this cannot be remedied on appeal?

LAWYER: Well I don't understand that either. I have participated in the commencement of 3 silicone jell breast implant trials, multiplaintiff, and 3 trials in Dallas to conclusion. All of which were multiple implant trials.

GONZALEZ: Single defendant, single manufacturer?

LAWYER: No. As the case went to trial. And I will give you an example: There's a case called West Warner Sampelson in Dallas, Bristol Meyers case; it involved 1 polyurethane plaintiff and 2 nonpolyurethane plaintiffs. We argued to the court that consolidation was indeed appropriate because there is no significant difference between the impact of polyurethane implants and silicone smooth walled implants. And the court agreed with that and the cases were set for and started trial. Before evidence was put on the polyurethane case settled. And the two smooth walled plaintiffs went to trial. So that is under Bristol Meyers definition of what's a multiple implant manufacturer case, that indeed was a case involving 2 manufacturers.

GONZALEZ: Would you speak to the issue of all your causation experts being stricken; is that true?

LAWYER: Yes.

GONZALEZ: Do you purport this Michigan study is an indication to us that this is going to be your causation experts?

LAWYER: No. I submitted that to the court in an effort to demonstrate that there is currently recognized a signature disease associated with silicone products.

GONZALEZ: Where does that leave us with the causation?

LAWYER: Well I don't know what Judge Marshall is going to do. I understand that the motion to disqualify our experts was filed Friday afternoon. We did not know of it until Saturday, that is that a motion had been filed. We also found out on Saturday that Judge Marshall had set that disqualification hearing for Monday.

SPECTOR: Is that this week? When was it?

LAWYER: That was in July. It was filed on Friday, heard by him on Monday before we had any opportunity to present our version of the testimony of the experts who were sought to be disqualified. Now he subsequently granted us the opportunity to file and we did file a motion for reconsideration at the start of which he advised us that he had no intention of changing his decision. Worse than that, and maybe we will end up with before the court on some future date with regard to some of these issues, but worse than that, he disregarded the filing of the silicone jell breast implant class action and said limitations were never tolled.

PHILLIPS: Does Judge Marshall need another attorney here?

LAWYER: Probably. I wish he was here. Maybe he could explain that ruling to the court.

HECHT: You mentioned earlier that in some instances you thought that consolidation did not favor the plaintiffs. And I take it if you thought that you would be opposed to it?

LAWYER: Sure.

HECHT: Should it nevertheless go forward even if it infringes upon individual plaintiffs' rights in an effort to move things along?

LAWYER: Somebody has to complain. One thing about the judicial system it just rolls along until somebody complains. And that's kind of like where this case is. Nobody has tried to insert the cog in the wheel that would call upon a real review of the conduct of the judge from whose court the case came.

CORNYN: Do you have any expert witnesses at this point?

LAWYER: No. They filed a motion, Mr. Meyers filed their motion, they didn't seek to disqualify all our experts. Their sole motion was to not permit our experts to testify that silicone jell breast implants caused this disease. That was their motion. He struck all of our experts, our

chemists, our pathologists, all of which are people who testify about things other than the actual disease itself. They talk about silicone migration, the capsular formulations, those things. So the answer is I don't know how frankly how we are going to prove either systemic injury or localized injury.

CORNYN: It's going to be a short trial I guess.

LAWYER: Yeah, and that's fine. I have had short trial before.

CORNYN: And presumably there would be an appeal?

LAWYER: I would hope so. Again we try to evaluate whether there was any "profit" in trying to get the court to focus on that issue in a mandamus proceeding, or the limitation issue in a mandamus proceeding. I didn't feel like that it would be an embarrassment to me to be before this court arguing that it ought to be in a mandamus proceeding ruling on evidence issues, or issues relating to the statute of limitations that did not dispose completely of the case. I mean the rules just...rules are the rules.

PHILLIPS: I am just curious. Do the administrative judge practice a _____fare attitude towards individual judges who don't want to have a pretrial consolidation?

LAWYER: I don't know of any plaintiff who doesn't want pretrial consolidation.

PHILLIPS: In Houston, which is where most of these other cases are, it seems like there's always one judge who handles all of the matters at pretrial when so designated by the administrative judge. And I'm just curious to hear that are 3 courts that have opted out in Dallas.

LAWYER: I don't understand that. I practice mainly in Houston. In Dallas what we do is we handle silicone jell breast implant cases with a very limited other kind of practice up there. So yes I'm familiar with what goes on in Houston. I'd love it if this court were to order that it's more appropriate for one judge to be handling the pretrial matters - all of the pretrial matters. I don't know that you can do that. I would certainly ask you to do it if you can.

ABBOTT: I want to go back to an earlier comment you made where I think you said it would be perhaps in your best interest or the best interest of the plaintiff to have the trial with only one plaintiff at a time?

LAWYER: Oh, no.

ABBOTT: Okay I misunderstood you then. I thought you said that it would be better to have only one plaintiff at a time go to trial?

LAWYER: No. What I said I believe your honor was that there is an accumulation of a number of women where I have a personal belief that a jury can lose track. Now whether that number is 4, 5, or 6 I don't know. But I can tell the court that I believe that putting more than 6 women together in a trial is not helpful either from plaintiffs' standpoint, or the defendants' standpoint.

ABBOTT: What is a good number of plaintiffs?

LAWYER: Four.

GONZALEZ: Why four as opposed to 5, or 3? I mean what's magic in 4? Is this just your opinion, no basis?

LAWYER: Well sure. I mean I've tried a lot of these cases. I've talked to a lot of jurors. None of them have ever had any difficulty in keeping track of plaintiffs. So that's one thing I think of. The other thing I think of is that I know that in asbestos cases, although I've never tried one, that when you talk to the jury the jury in fact has had some problem in keeping the plaintiff straight where you have 10 plaintiffs. I mean it's not...I don't think that real confusion has ever been demonstrated. But if I've got 4, 5, or 6 good plaintiffs I don't want them consolidated with a topless dancer. I don't want them consolidated with someone who is going to bring a real negative to my presentation of the case. Even though that person is my client, each in his own time as it were. But no, I think that the cost, it cost $100,000-250,000 to try one of these cases for a plaintiff.

ABBOTT: Would that be even if plaintiffs were grouped together of 4 plaintiffs in one trial would you multiply that figure times 4?

LAWYER: Oh, no. I mean we've done some estimates and demonstrated I believe that each single additional plaintiff after 2 adds about 3 days each to the trial. That is to put in that person's individual complaint. The general liability testimony, which is the bulk of the trial, is the _____, same witnesses, same issues.

CORNYN: Just to clarify. You said it cost how much for the plaintiff to try one of these cases?

LAWYER: One Hundred to two-hundred and fifty thousand dollars.

CORNYN: And that's with how many plaintiffs?

LAWYER: We spent the lesser amount with 2 plaintiffs, but those were two topless dancers. And the greater sum was with respect to 3 Dow Corning clients whose cases we tried in 1995.

GONZALEZ: There was a statement made that all cases that have been tried have been verdicts for the defendants; is that true?

LAWYER: No, it's about half and half.

* * * * * * * * * *

REBUTTAL

LAWYER: May it please the court. I have a couple of points I would like to make. I'm not going to deal if the court please with the Robinson issue because I think that's rather _____ to what we are talking about today. Suffices to say that the Robinson motion were broader than have been described and the process of their disposition was not quite as it has been described.

PHILLIPS: Well it's only relevant to us if it appears that it's a directed verdict case. At this stage of the order then we have other things to deal with.

LAWYER: First of all I would emphasize what the court emphasized in CSR is this is recurring litigation and it is a problem that is arising again, and again. We have a judge in Dallas county who is purporting to set 500 plaintiffs all for trial on the same day. So if the court doesn't deal with it today, it's going to be faced with the issues sooner or later.

PHILLIPS: How about counsel's argument that procedurally there's no grounds for this mandamus because the consolidation of the 3 cases is not the real harm?

LAWYER: That is one of the points I wanted to address. Judge Andrews as coordinating judge issued a blanket order that all plaintiffs were deemed severed from one another. And that he would then group plaintiffs for trial. So when the cases entered Judge Marshall's court even though they had they were grouped under a docket number, they were deemed to be severed cases subject to...

PHILLIPS: Is that order in our record?

LAWYER: No it is not your honor. But the point that's being made is that we failed to preserve the point that we are arguing here today. And so I believe it would have been incumbent upon Mr. Raffkin to produce the record necessary to establish that point.

OWEN: Has that order ever been revoked or modified by any judge subsequently.

LAWYER: Except insofar as Judge Marshall modified it by what he did that we're challenging in this case. No it is not. And perhaps likewise by what Judge Canales has done in setting 500 cases and Judge Tyson has also set multiple cases.

But beyond that your honor, I might add there's a similar Dean severance in the Harris county cases by the pretrial judge. Beyond that I might add if you look at the moving papers while they may be styled as objections to consolidation or as motions to reconsider consolidation, in fact the relief that they seek is each of these 9 plaintiffs being tried separately. And so whether those are perhaps

misnamed or otherwise, the point was amply made to the respondent that what was being sought was individual trials

And our position overall is that how the cases are grouped by the plaintiff when filing, which docket numbers they are under, is really of virtually no relevance to the question of which plaintiffs should actually be tried except that it does make since to consider cases filed by the same plaintiffs' law firm for that fact.

I would like to speak about what we are asking this court to do. We believe that the overall guidelines ought to be those laid down in the Lone Star v. McCormack case, that trial of multiple plaintiffs should occur only when the actions relate to the substantially the same transaction, occurrence, subject matter, or question, and are so related that the evidence presented will be material, relevant, and admissible in each case in substantial part.

We think however if the court stops there then it is going to be faced with a flood of mandamus actions as the TCs attempt to apply that rather broad standard in breast implant litigation. And so we would urge the court to lay down guidelines for the exercise of discretion under that standard.

We believe that accept in the case of a plaintiff who has received multiple implants from different manufacturers it would be an abuse of discretion to try manufacturers together for a number of reasons, principle among which is the fact that these cases involve large numbers of internal manufacturer documents which are admitted against one manufacturer as admissions against interest, but which cannot effectively...the other factors would be the implant dates for the reasons that I discussed, the implant types and we do believe there is a difference between poly and smooth law in particular, and common symptomatology, duration of implant and other similar factors. And we agree with Mr. Raffkin no more than a finite number and we would add no more than 1 until the courts have built a track record.