

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**Chief Judge Wiley Y. Daniel**

Civil Action No. 08-cv-00091-WYD-CBS

WAYNE WATSON and  
MARY WATSON,

Plaintiffs,

v.

DILLON COMPANIES, INC., d/b/a/  
KING SOOPERS, also d/b/a  
INTER-AMERICAN PRODUCTS, INC., et al.,

Defendants.

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**ORDER**

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THIS MATTER came before the Court as part of a status conference held on June 13, 2012. For reasons stated on the record at the June 13, 2012 conference and set forth below, I deny the Kroger Defendants' request to file a motion in limine regarding the testing conducted in Plaintiff's home using the Innova Model 1312 Photoacoustic Multi-Gas Monitor.<sup>1</sup>

The Kroger Defendants claim that Dr. Martyny and National Jewish Hospital failed to calibrate and maintain the Innova Model 1312 Photoacoustic Multi-Gas Monitor prior to conducting various tests at Plaintiff's home. They seek to file a motion in limine pursuant to Fed. R. Civ. P. 403 excluding this evidence at trial. However, since this is an evidence-driven issue, I believe pretrial briefing is both unnecessary and a waste of resources. Instead of reviewing the parties' opposing arguments pretrial, I find that this

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<sup>1</sup> There have been numerous orders entered in this matter detailing both the procedural and factual background of this case. Those orders are incorporated by reference herein.

issue requires consideration of the specific evidence offered and received in the context of the trial. Therefore, should the Kroger Defendants seek to renew this request at trial, they may do so at an appropriate time outside the presence of the jury. I will hear testimony and receive admissible evidence regarding the reliability of the Innova Model 1312 Photoacoustic Multi-Gas Monitor and determine whether this evidence is admissible at trial under the governing rules. Accordingly, until I have made a ruling on this issue, no party shall mention this evidence in front of the jury at any phase of the trial.

Based on the foregoing, it is

ORDERED that the Kroger Defendants' request for leave to file a motion in limine regarding the admissibility of the Innova Model 1312 Photoacoustic Multi-Gas Monitor and related testing is **DENIED**. It is

FURTHER ORDERED that at trial, no party shall mention the Innova Model 1312 Photoacoustic Multi-Gas Monitor or the related test results in front of the jury until I have resolved this issue outside the presence of the jury.

Dated: June 22, 2012

BY THE COURT:

s/ Wiley Y. Daniel  
Wiley Y. Daniel  
Chief United States District Judge