

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP. IMPLANTABLE
DEFIBRILLATORS PRODUCTS
LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to All Actions

**AMENDMENT TO
PRETRIAL ORDER NO. 32**

After the Court issued PTO No. 32, Dr. Myerburg's attorney contacted the Court and asked for permission to submit a letter seeking a protective order limiting the scope of Dr. Myerburg's deposition. The Court has reviewed the letter and filed it on CM/ECF. (Doc. No. 1632.)

The Court is sympathetic to Dr. Myerburg's public policy arguments and recognizes that there is a difference of opinion on whether panel members should be subjected to discovery. Any of Dr. Myerburg's or Guidant's arguments, however, are outweighed by the fact that Dr. Myerburg occupied the unusual role as both one of Clasby's¹ treating physicians and the Chair of the Independent Panel. Given Dr. Myerburg's dual role, Plaintiffs are entitled to take his discovery deposition because such testimony is reasonably calculated to lead to the discovery of admissible evidence concerning at least one of Clasby's claims or defenses, including, but not limited to, admissible evidence as to bias or interest. Dr. Myerburg's argument as to nonparty

¹ Clasby is one of the five bellwether plaintiffs that Guidant and the PSC mutually selected.

expert testimony may have merit as applied to other panel members, but it does not carry much weight here because Dr. Myerburg was one of Clasby's treating physicians. In that capacity, Dr. Myerburg's relationship to Guidant and how it relates, if at all, to his role as Clasby's treating physician is an appropriate subject of inquiry under the discovery rules, whether a question calls for an answer or response in his capacity as an expert or a fact witness.

Finally, to the extent that Dr. Myerburg's letter is an informal request to limit his deposition to two hours, that request is denied. Plaintiffs shall take his deposition in accordance with the deposition protocols outlined in PTO No. 3, although the Court is not implying that Dr. Myerburg's deposition needs to last seven hours. Absent an agreement among the parties, this deposition shall take place no later than May 14, 2007.

Therefore, as stated previously, Plaintiffs shall be limited to the three areas of discovery described in their April 20, 2007 letter. They may not seek any documents or testimony about the Independent Panel's internal deliberations and will be held to the topic descriptions listed in their April 20, 2007 letter. This means that they may seek testimony related to Dr. Myerburg's own recollection of documents and statements the Panel received and concerning Dr. Myerburg's own knowledge about the Panel's published conclusions, as long as Dr. Myerburg's recollection does not concern the Panel's *completely* closed-door, executive sessions. Plaintiffs may also seek the evidentiary basis for the Panel's conclusions to the extent that the discovery goes to bias, as opposed to the Panel's executive sessions.

IT IS SO ORDERED.

Dated: April 24, 2007

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court