IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS

GLENN ABRAMS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PATRICIA ABRAMS **Plaintiff,**	§	
V.	§	**CASE NO. 4:15-CV-841**
3M COMPANY; AND ARIZANT HEALTHCARE, INC., Defendants.	§	

PLAINTIFFS ORIGINAL COMPLAINT AND DEMAND FOR JURY TRIAL

Comes Now Plaintiff, GLENN ABRAMS, by and through undersigned attorney brings this Complaint against Defendants 3M COMPANY and ARIZANT HEALTHCARE, INC. (hereinafter referred to collectively as "Defendants"), and alleges as follows:

This is an action for damages relating to Defendants' design, development, testing, assembling, manufacturing, packaging, promoting, marketing, distribution, supplying and/or selling the defective device sold under the trade names of Bair Hugger Forced Air Warming device (hereinafter "Bair Hugger", or "Defective Device").

I. PARTIES

1. At all times relevant to this action, Plaintiff was a resident of Plano, Texas.

2. Defendant 3M is a corporation organized and existing under the laws of the State of Delaware doing business in the State of Texas. 3M engages or has engaged in business in this State and may be served by serving its registered agent, CT Corporation System, at its registered address, 350 N. St. Paul St., Suite 2900, Dallas, Texas 75201.

3. Defendant Arizant Healthcare, Inc. ("Airzant") is a corporation organized and existing

under the laws of the State of Delaware doing business in the State of Texas. Arizant engages or has engaged in business in this State and may be served by serving its registered agent, CT Corporation System, at its registered address, 350 North St. Paul St., Suite 2900, Dallas, Texas 75201.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1332, as complete diversity exists between Plaintiff and Defendants, and the amount in controversy exceeds $75,000.

5. Defendants are subject to *in personam* jurisdiction in this court, and venue is proper within this district pursuant to 28 U.S.C. § 1391, as a substantial number of the events, actions, or omissions giving rise to the Plaintiff's claims occurred in this district. At all times relevant to this matter, Defendants 3M Company ("3M") and Arizant Healthcare, Inc. ("Arizant") (collectively the "Defendants") conducted substantial business in this district. Defendants did (and do) business within the State of Texas and have had substantial, continuous, and systematic contacts with the State of Texas, have consented to jurisdiction in the State of Texas, and/or committed a tort in whole or in part in the State of Texas, and many other states, against thousands of Plaintiffs, including Plaintiff herein, as more fully set forth below. On information and belief, Defendants also marketed, advertised, and sold the defective devices in the District of Texas, and many other states, made material omissions and representations in each of these districts, and breached warranties in these districts.

III. SUMMARY OF THE CASE

6. The Defendants, directly or through their agents, apparent agents, servants or employees designed, manufactured, marketed, advertised, distributed and sold the Bair Hugger.

7. As a result of the defective design of the Bair Hugger, Plaintiff Patricia Abrams suffered a severe surgical site infection which ultimately resulted in her death.

8. On or about December 14, 2013, the Bair Hugger was used on Plaintiff during the course of Plaintiff's cardiac surgery.

9. Because the Bair Hugger was used, contaminants were introduced to Plaintiff's open surgical wound, resulting in an infection, and subsequent death on December 31, 2013.

10. The Defendants concealed and continue to conceal their knowledge of the Bair Hugger's unreasonably dangerous risks from Plaintiff, other consumers, and the medical community.

11. The Defendants failed to conduct adequate and sufficient post-marketing surveillance after they began marketing, advertising, distributing and selling the Bair Hugger.

12. As a result of the Defendants' actions and inactions, Plaintiff was infected and died due to the use of the Bair Hugger. Accordingly, Plaintiff Glenn Abrams seeks compensatory damages individually and as personal representative of the estate of Patricia Abrams.

IV. FACTUAL BACKGROUND

13. More than 50,000 Bair Hugger units are currently in use across the country.

14. The Bair Hugger consists of a portable heater/blower connected by a flexible hose to a disposable blanket that is positioned over (or in some cases under) surgical patients. The system warms patients during surgery by blowing hot air on a patient's exposed skin.

15. The hot air produced by Bair Hugger accumulates under the surgical drape covering the patient and escapes from under the surgical drape below the level of the surgical table or at the head end of the surgical table. This escaped air creates air flow currents that flow against the downward air flow of the operating room. As this warmed air rises, it deposits bacteria from the floor of the surgical room into the surgical site.

16. At some point between 2002 and 2009 the Defendants reduced the efficiency of the air filtration of Bair Hugger blowers. This action reduced the safety of such blowers.

17. As a result of these actions by the Defendants, the internal airflow paths of Bair Hugger blowers become contaminated with pathogens.

18. The pathogens contaminating the internal airflow paths of Bair Hugger blowers incubate and proliferate therein.

19. These pathogens are then expelled from the interior of the Bair Hugger blower by the outward airflow, travel through the hose into the disposable blanket and escape into the operating room.

20. The Defendants have been aware of the pathogenic contamination of the airflow paths of Bair Hugger blowers since at least 2009.

21. The Defendants have actively and aggressively marketed the Bair Hugger as safe in both general and orthopedic surgeries despite their knowledge to the contrary.

22. In a communication to the Food and Drug Administration ("FDA") in September 2000, Defendants represented that the Bair Hugger's filtration system meets HEPA ("High Efficiency Particulate Air") Standards. This statement was false at the time Defendants made it and it remains false today. To meet HEPA standards, an air filter must be capable of removing 99.97% of all particles 0.3 microns or larger. The filter of the Bair Hugger, which is marketed as HEPA compliant, is only capable of removing less than 65% of all such particles. When the Defendants made these representations, they had actual knowledge of their falsity.

23. In June of 1997, in a letter to the FDA, the Defendants admitted that "air blown intraoperatively across the surgical wound may result in airborne contamination." The Defendants addressed this flaw in their products by making further misrepresentations to the FDA when they stated that the risk of contamination by air flow is obviated because all "Bair Hugger Blankets designed for use in the operating room feature a tape barrier which prevent [sic] air from migrating toward the surgical site." That statement by the Defendants was and is patently false. A number of

Bair Hugger blankets marketed as safe for use in surgeries do not utilize a taped edge at all. Instead, those blankets blow contaminated air directly toward the surgical field. Also, the statement that the taped barrier would contain the contaminated air is false because it ignores the fact that the heated air from the Bair Hugger rises against the general downward airflow of the operating theatre. The presence of a tape edge does nothing to prevent the Bair Hugger from facilitating the movement of pathogens from the floor of the operating room to the surgical site. When the Defendants made these representations, they had actual knowledge of their falsity.

24. In their website, www.fawfacts.com/laminar_airflow/ (last visited July 17, 2015), the Defendants make the following misrepresentations:

a. Contamination mobilized by the convection currents generated by the Bair Hugger cannot reach the surgical site because "[a]ir velocity within the operating room is many times stronger than that of a forced-air warming blanket";

b. "The air emerging from the blanket is directed downward by the surgical drape and emerges under the operating room table and is drawn away through the laminar system's return air inlets;"

c. "It's been suggested that warm air rising above the Bair Hugger blanket could interfere with the downward laminar flow toward the surgical site. It should be noted that the Bair Hugger warming unit delivers less than one percent of the airflow of a laminar flow system and the momentum of the downward air is far greater than the upward momentum imparted to the air above the blanket."

25. The statements in the preceding paragraph are false and intentionally misleading. Through these statements, the Defendants disguise the fact that the issue is not the strength of the airflow in a laminar system but the heat of the air generated by the Bair Hugger. The cold air circulated with the operating room, having a higher density than the air heated by the Bair Hugger, falls to the floor which forces the contaminated air at the floor of the operating room, now warmed by the waste heat from the Bair Hugger, to rise into the sterile field and the surgical site. The heated air rises, and is not "drawn away" as the Defendants falsely claim in their advertisement.

26. In an advertisement that appeared in multiple medical publications as early as 2010, available online at http://www.fawfacts.com/_asset/zn062p/AJIC.pdf (last visited December 9, 2015), the Defendants made the following false and deliberately misleading claims:

> "While simple logic makes it clear that forced air warming has no impact on laminar conditions, science also supports this. A forced air warming blanket delivers less than one percent of the airflow of a laminar flow system and therefore is unable to affect laminar flow ventilation systems."

As published scientific research, before and after this statement, has demonstrated, this statement is untrue. The exhaust generated by the Bair Hugger creates convective airflow patterns which disrupt the laminar flow of the operating theater.

27. In a communication that appeared in *Healthcare Purchasing News* in July of 2012, the Defendants' public relations and communications specialist Greta Deutsch stated "some conductive-warming manufacturers have alleged that forced-air warming increases bacterial contamination of operating rooms or interrupts laminar airflow. These accusations have no factual basis." Again, this statement ignores numerous published studies documenting the adverse effects the Bair Hugger has on laminar airflow.

28. The publication of numerous peer-reviewed studies identifying and documenting the critical safety shortcomings of the Bair Hugger should have prompted the Defendants to redesign or discontinue their product. Instead, those criticisms only caused the Defendants to amplify their efforts to champion the Bair Hugger. These publications include, but are not limited to, the following:

a. Albrecht M, et al. Forced-air warming blowers: An evaluation of filtration adequacy and airborne contamination emissions in the operating room. *Am J Infect Control* 2010;39:321-8;

b. Leaper D, et al. Forced-air warming: a source of airborne contamination in the operating room? *Orthopedic Rev.* 2009;1(2):e28;

c. McGovern, P.D., et al. Forced-air warming and ultra-clean ventilation do not mix. *J Bone and Joint Surg-Br.* 2011;93-B(11):1537-1544;

d. Legg, A. et al. Do forced air patient-warming devices disrupt unidirectional downward airflow? *J Bone and Joint Surg-Br.* 2012;94-B:254-6;

e. Belani, K., et al. Patient warming excess heat: The effects on orthopedic operating room ventilation performance. *Anesthesia & Analgesia* 2012 (prepublication on-line) 2013;117(2):406-411;

f. Dasari, K.B., et al. Effect of forced air warming on the performance of operating theatre laminar flow ventilation. *Anaesthesia* 2012;67:244-249.

29. The effect of these misrepresentations was to mislead healthcare providers about the safety of the Bair Hugger for use in surgical procedures. The Defendants were aware of the falsity of their misrepresentations at the time those misrepresentations were authored.

30. Rather than alter the design of their product or warn physicians of the dangers associated with the Bair Hugger, as numerous studies confirm, the Defendants have chosen to "double down" on their efforts to promote their defective product.

31. Plaintiff Abrams' physicians and hospital relied upon the above representations and advertisements to Plaintiffs' detriment. Any reasonable and competent physician or hospital would not use a Bair Hugger in a surgery if they were fully apprised of the dangers and risks associated with doing so. However, through misrepresentations to the public, the medical community, and the FDA, the Defendants actively and knowingly concealed the propensity of these devices to cause infection in surgeries.

32. As a result of the failure of the Defendants' Bair Hugger to maintain the sterility of the surgical area and the Defendants' wrongful conduct in designing, manufacturing, and marketing this defective product, Plaintiff and Plaintiff's physician were unaware, and could not have reasonably known or have learned through reasonable diligence, that Plaintiff had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of the

Defendants' acts, omissions and misrepresentations.

V. CAUSES OF ACTION

COUNT ONE - NEGLIGENCE

33. Plaintiff restates the allegations set forth above as if fully rewritten herein.

34. The Defendants owed Plaintiff a duty to exercise reasonable care when designing, manufacturing, marketing, advertising, distributing, and selling the Bair Hugger.

35. The Defendants failed to exercise due care under the circumstances and therefore breached this duty by:

a. Failing to properly and thoroughly test the Bair Hugger before releasing the device to market;

b. Failing to properly and thoroughly analyze the data resulting from the pre-market tests of the Bair Hugger;

c. Failing to conduct sufficient post-market testing and surveillance of the Bair Hugger;

d. Designing, manufacturing, marketing, advertising, distributing, and selling the Bair Hugger to consumers, including Plaintiff, without an adequate warning of the significant and dangerous risks of the Bair Hugger and without proper instructions to avoid the harm which could foreseeably occur as a result of using the device;

e. Failing to exercise due care when advertising and promoting the Bair Hugger; and

f. Negligently continuing to manufacture, market, advertise, and distribute the Bair Hugger after Defendants knew or should have known of its adverse effects.

36. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer

the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

37. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff Patricia Abrams. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT TWO – TEXAS DECEPTIVE TRADE PRACTICES ACT

38. Plaintiff restates the allegations set forth above as if fully rewritten herein.

39. Plaintiff was a consumer of the Bair Hugger. Defendants, through written and oral statements to Plaintiff misled Plaintiff and his physicians to believe that the Bair Hugger FAW was safe and fit for the purpose intended when used under ordinary conditions and in an ordinary manner. Plaintiff and his physicians relied on those statements to Plaintiffs detriment.

40. The Defendants are in violation of Chapter 17 of the Texas Business and Commerce Code, i.e., the Texas Deceptive Trade Practices Act in the following circumstances:

a. Breach of express or implied warranty which resulted in Plaintiffs economic damages and mental anguish. Tex. Bus. & Com. Code § 17.50(a)(2);

b. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which they do not. Tex. Bus. & Com. Code § 17.46(5);

c. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. Tex. Bus. & Com. Code § 17.46(7);

d. Failing to disclose information concerning goods or services which was

> known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. Tex. Bus. & Com. Code § 17.46(24).

41. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

42. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT THREE - STRICT LIABILITY

43. Plaintiff restates the allegations set forth above as if fully rewritten herein.

44. The Defendants, or entities under their control, manufactured, sold, distributed, marketed or supplied the Bair Hugger in a defective and unreasonably dangerous condition to consumers, including Plaintiff.

45. Specifically, the Defendants failed to warn of the injuries suffered by Plaintiff as a result of using the Bair Hugger, and they introduced into the stream of commerce a defectively designed or manufactured product.

46. The Defendants designed, manufactured, sold, distributed, supplied, marketed or promoted the Bair Hugger, which was expected to reach and did in fact reach consumers, including

Plaintiff, without substantial change in the condition in which it was manufactured and sold by the Defendants.

47. Plaintiff and Plaintiff's physicians used the Bair Hugger in a manner normally intended, recommended, promoted and marketed by the Defendants.

48. The Bair Hugger failed to perform safely when used by ordinary consumers, including Plaintiff, including when it was used as intended and in a reasonably foreseeable manner.

49. The propensity of the Bair Hugger's internal air flow passageways, including its non-HEPA compliant filter, to become contaminated with pathogens makes the Bair Hugger unreasonably dangerous when used in the way it is ordinarily used and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.

A. Strict Liability - Failure to Warn

50. Plaintiff restates the allegations set forth above as if fully rewritten herein.

51. Because the Defendants researched, developed, designed, tested, manufactured, inspected, labeled, distributed, marketed, promoted, sold and otherwise released into the stream of commerce the Bair Hugger and in doing so, directly advertised or marketed the product to the FDA, health care professionals, and consumers, or persons responsible for consumers, they had a duty to warn of the risks associated with the use of the Bair Hugger.

52. Defendants failed to adequately warn health care professionals and the public, including Plaintiff and Plaintiff's physician and hospital, of the true risks of the Bair Hugger, including that the Bair Hugger would circulate contaminated air in the recovery and operating rooms and that the vented heat from Bair Hugger would mobilize floor air contaminated with pathogens into the surgical site, causing surgical site infections, and requiring further treatment and/or death.

53. Defendants failed to provide timely and reasonable warnings regarding the safety and efficacy of the Bair Hugger. Had they done so, proper warnings would have been heeded and no health care professional, including Plaintiff's physicians, would have used Bair Hugger and no patient, including Plaintiff Patricia Abrams, would have allowed use of the Bair Hugger.

54. The failure to provide timely and reasonable warnings, instructions, and information regarding the Bair Hugger to Plaintiff or Plaintiff's physician rendered the Bair Hugger unreasonably dangerous.

55. Bair Hugger, which was researched, developed, designed, tested, manufactured, inspected, labeled, distributed, marketed, promoted, sold and otherwise released into the stream of commerce by Defendants, was defective due to inadequate post-marketing warnings and/or instructions because Defendants failed to provide adequate warnings to health care professionals and the consuming public, including Plaintiff, and continue to aggressively promote Bair Hugger.

56. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

57. The Defendants' conduct described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

B. Strict Liability - Defective Design and Manufacture

58. Plaintiff restates the allegations set forth above as if fully rewritten here.

59. The design of the Bair Hugger, or its component parts, makes the Bair Hugger unreasonably dangerous, taking into consideration the utility of the device and the risk involved in its use.

60. At all times relevant to this action, an economically and technologically feasible safer alternative design existed, which in reasonable medical probability:

a. would have prevented or significantly reduced the risk of Plaintiff's infection and subsequent injuries and
b. would not have impaired the utility of the device

61. Specifically, the Bair Hugger is defective in its design in that it is not reasonably fit, suitable or safe for its intended purpose or its foreseeable risks exceed the benefits associated with its design.

62. The defective condition of the Bair Hugger rendered it unreasonably dangerous or not reasonably safe and the Bair Hugger was in this defective condition at the time it left the hands of the Defendants. The Bair Hugger was expected to and did reach Plaintiff and Plaintiff's physicians without substantial change in the condition in which it was designed, manufactured, labeled, sold, distributed, marketed, promoted, supplied, and otherwise released into the stream of commerce.

63. Defendants knew or should have known of the danger associated with the use of the Bair Hugger, as well as the defective nature of the Bair Hugger, but have continued to design, manufacture, sell, distribute, market, promote, or supply the Bair Hugger so as to maximize sales and profits at the expense of the public health and safety, in conscious disregard of the foreseeable harm caused by Bair Hugger.

64. As a direct and proximate result of the Defendants' actions, omissions and

misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

65. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT FOUR - BREACH OF EXPRESS WARRANTY

66. Plaintiff restates the allegations set forth above as if fully rewritten herein.

67. The Defendants expressly represented to Plaintiff and other consumers and the medical community that the Bair Hugger was safe and fit for its intended purposes, that it was of merchantable quality, that it did not produce any dangerous side effects, and that it was adequately tested.

68. The Bair Hugger does not conform to the Defendants' express representations because it is not safe, has numerous and serious side effects, and causes severe and permanent injury.

69. At all relevant times, the Bair Hugger did not perform as safely as an ordinary consumer would expect, when used as intended or in a reasonably foreseeable manner.

70. Plaintiff, other consumers, and the medical community reasonably relied upon the Defendants' express warranties for the Bair Hugger.

71. At all relevant times, the Bair Hugger was used on Plaintiff by Plaintiff's physicians for the purpose and in the manner intended by Defendants.

72. Plaintiff and Plaintiff's physicians, by the use of reasonable care, could not have discovered the breached warranty and realized its danger.

73. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

74. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT FIVE - BREACH OF IMPLIED WARRANTY

75. Plaintiff restates the allegations set forth above as if fully rewritten herein.

76. The Defendants designed, manufactured, distributed, advertised, promoted and sold the Bair Hugger.

77. At all relevant times, the Defendants knew of the use for which the Bair Hugger was intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

78. The Defendants were aware that consumers, including Plaintiff, would use the Bair Hugger for treatment in conjunction with surgical procedures.

79. Plaintiff, Plaintiff's physician, and the medical community reasonably relied upon the

judgment and sensibility of the Defendants to sell the Bair Hugger only if it was indeed of merchantable quality and safe and fit for its intended use.

80. The Defendants breached their implied warranty to consumers, including Plaintiff; the Bair Hugger was not of merchantable quality or safe and fit for its intended use.

81. Consumers, including Plaintiff, Plaintiff's physician, and the medical community reasonably relied upon the Defendants implied warranty for the Bair Hugger.

82. Plaintiff and Plaintiff's physician, by the use of reasonable care, would not have discovered the breached warranty and realized its danger.

83. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

84. The Defendant's conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT SIX - NEGLIGENT MISREPRESENTATION

85. Plaintiff restates the allegations set forth above as if fully rewritten herein.

86. The Defendants made negligent misrepresentations with respect to the Bair Hugger including, but not limited to, the following particulars:

a. The Defendants represented through the labeling, advertising, marketing materials, seminar presentations, publications, notice letters, and regulatory submissions that Bair Hugger has been tested and found to be safe and effective for the warming of patients during orthopedic implant surgery; and

b. The Defendants represented the Bair Hugger was safer than other patient warming systems.

87. Defendants did not exercise reasonable care or competence in obtaining or communicating the information to the public regarding the characteristics and qualities of the Bair Hugger.

88. Plaintiff and Plaintiff's physicians did, in fact, reasonably rely upon the representations.

89. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

90. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT SEVEN - FRAUDULENT MISREPRESENTATION

91. Plaintiff restates the allegations set forth above as if fully rewritten herein.

92. The Defendants made fraudulent misrepresentations with respect to the Bair Hugger including, but not limited to, the following particulars:

a. The Defendants represented through the labeling, advertising, marketing materials, seminar presentations, publications, notice letters, and regulatory submissions that the Bair Hugger has been tested and found to be safe and effective for the warming of patients during orthopedic implant surgery; and

b. The Defendants represented Bair Hugger was safer than other patient warming systems.

93. Defendants knew that their representations were false, yet they willfully, wantonly, and recklessly disregarded their obligation to provide truthful representations regarding the safety and risks of Bair Hugger to consumers, including Plaintiff, and the medical community.

94. The representations were made by Defendants with the intent that doctors and patients, including Plaintiff, rely upon them.

95. The Defendants' representations were made with the intent of defrauding and deceiving Plaintiff, other consumers, and the medical community to induce and encourage the sale of Bair Hugger.

96. Plaintiff and Plaintiff's physicians did in fact rely upon the representations. In the absence of the Defendants' representations, the Bair Hugger would not be used in surgeries such as the one at issue in this case.

97. The Defendants' fraudulent representations evidence their callous, reckless, and willful indifference to the health, safety, and welfare of consumers, including Plaintiff.

98. As a As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

99. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

COUNT EIGHT - FRAUDULENT CONCEALMENT

100. Plaintiff restates the allegations set forth above as if fully rewritten herein.

101. Defendants fraudulently concealed information with respect to the Bair Hugger including, but not limited to, the following particulars:

a. The Defendants represented through the labeling, advertising, marketing materials, seminar presentations, publications, notice letters, and regulatory submissions that the Bair Hugger was safe and fraudulently withheld and concealed information about the substantial risk of using Bair Hugger; and

b. The Defendants represented that Bair Hugger was safe and safer than other alternative systems and fraudulently concealed information that demonstrated that Bair Hugger was not safer than alternatives available on the market.

102. The Defendants had sole access to material facts concerning the dangers and unreasonable risks of the Bair Hugger.

103. The concealment of information by the Defendants about the risks of the Bair Hugger was intentional, and the representations made by Defendants were known by the Defendants to be false.

104. The concealment of information and the misrepresentations about Bair Hugger were made by the Defendants with the intent that doctors and patients, including Plaintiff and Plaintiff's doctors, rely upon them.

105. Plaintiff and Plaintiff's physicians relied upon the representations and were unaware of the substantial risks of the Bair Hugger which the Defendants concealed from the public, including Plaintiff and Plaintiff's physicians.

106. As a direct and proximate result of the Defendants' actions, omissions and misrepresentations, Plaintiff Patricia Abrams suffered a severe surgical site infection, requiring aggressive life saving procedures that ultimately failed resulting in a painful and prolonged death. Plaintiff Glenn Abrams, as Patricia's husband has also suffered a great loss and will continue to suffer the remainder of his life. Plaintiff Glenn Abrams seeks compensatory damages for wrongful death, both individually and as personal representative of Patricia's estate.

107. The Defendants' conduct as described above was committed with knowing, conscious, wanton, willful and deliberate disregard for the value of human life and the rights and safety of consumers such as Plaintiff. Defendants' conduct warrants, if allowed by the Court upon motion, an award of punitive damages against Defendants in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

VI. WRONGFUL DEATH

108. Plaintiff restates the allegations set forth above as if fully rewritten herein.

109. Plaintiff Glenn Abrams is the surviving husband and statutory beneficiary of Patricia Abrams. Patricia would have been entitled to bring this action against Defendant if she had lived. Plaintiff brings this action pursuant to §71.002 of the Texas Civil Practice & Remedies Code.

110. The Defendant's wrongful conduct and negligence proximately caused the death of Patricia.

111. Plaintiff Glenn Abrams has suffered injury, including, but not limited to actual damages, loss of companionship, loss of household services, and society, and past and future mental anguish.

Accordingly, Plaintiff seeks actual damages. Such amounts are to be determined at trial, but exceed the minimum jurisdictional limits of this Court.

VI. SURVIVAL ACTION

112. Plaintiff restates the allegations set forth above as if fully rewritten herein.

113. Plaintiff Glenn Abrams is the surviving husband and statutory beneficiary of Patricia Abrams. Patricia would have been entitled to bring this action against Defendant if she had lived. Plaintiffs bring this survival claim against Defendant pursuant to §71.021 of the Texas Civil Practice & Remedies Code.

114. Plaintiff seeks damages for physical pain and suffering and other damages suffered by Patricia prior to her death.

115. Plaintiff alleges there is no administration is pending for Patricia Abrams.

116. The Defendant's wrongful conduct and proximately caused the death of Patricia Abrams.

117. Patricia Abrams suffered injury, including, but not limited to pain, mental anguish, and lost earning capacity. At the time of her death, Patricia was a registered 300 hour yoga instructor working at three studios and loved her job. Accordingly, Plaintiffs seek actual damages, including funeral and medical expenses and exemplary damages. Such amounts are to be determined at trial, but exceed the minimum jurisdictional limits of this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants, jointly and/or severally, as follows:

1. For an award of compensatory damages in excess of one million dollars ($1,000,000.00);

If allowed by the Court upon motion, an award of punitive damages in the amount to be proven at the time of trial, and sufficient to punish the Defendants or to deter the Defendants and others from repeating the injurious conduct alleged herein;

2. For pre-judgment and post-judgment interest on the above general and special damages;

3. For costs of this suit and attorneys' fees; and

4. For all other relief that Plaintiff may be entitled to at equity or at law.

5. For such further and other relief that this Court deems just and equitable.

Plaintiff demands a trial by jury on all counts and issues.

Respectfully Submitted,

THERING & ASSOCIATES, PLLC

/s/Daniel Thering

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