

#1026
11-20-15

IN RE: ALLODERM® LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

CASE CODE NO. 295

CIVIL ACTION NOV 17 2015

MICHAEL SIMINERI and KAREN
SIMINERI, h/w,
Plaintiffs,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

v.

Docket No. MID-L-5972-11 CM

LIFECCELL CORPORATION

ORDER

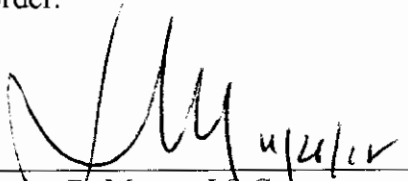
Defendant.

The above matter having been opened to the Court by Anapol Weiss attorneys for Plaintiffs, on application for an Order granting Plaintiffs' Motion *in Limine* to Exclude Evidence, Testimony, and Argument Related to Plaintiff Michael Simineri's Past Cigarette Smoking, and the Court having considered all papers submitted by the parties, and for good cause and the reasons ~~stated on the record by the Court,~~ ^{set forth in the attached memorandum of decision,}

It is on this 20th day of November, 2015,

ORDERED that Plaintiffs' motion is hereby ~~GRANTED~~; DENIED

IT IS FURTHER ORDERED that a copy of this Order be posted online and served on all counsel of record within seven (7) days of the date of this order.



Jessica R. Mayer, J.S.C.

OPPOSED

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE



MIDDLESEX COUNTY COURTHOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-964

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Plaintiffs'
Motion *In Limine* to Exclude Evidence and Testimony

In Re: AlloDerm® Litigation, Case Code 295

Michael Simineri and Karen Simineri v. LifeCell Corporation

Docket No. MID-L-5972-11 CM

Dated November 20, 2015

For Plaintiffs: Lawrence R. Cohan, Esq., Joseph J. Fantini, Esq., Paola Saneaux, Esq., Adrienne W. Webb, Esq., and Sol H. Weiss, Esq., Anapol Weiss.

For Defendant: David W. Field, Esq., Stephen R. Buckingham, Esq., Joseph A. Fischetti, Esq., Lowenstein Sandler LLP.

Plaintiffs Michael Simineri and Karen Simineri seek an order barring Defendant LifeCell Corporation ("LifeCell" or "Defendant") from offering evidence, testimony or argument related to Mr. Simineri's past cigarette smoking. Defendant opposes Plaintiffs' motion.

Plaintiffs claim that Defendant proposes to offer testimony regarding Mr. Simineri's history of cigarette smoking. Plaintiffs argue that such testimony is irrelevant and prejudicial, and thus barred by New Jersey Rules of Evidence ("N.J.R.E.") 401 and 403. Specifically, Plaintiffs contend that Mr. Simineri's history of cigarette smoking, which allegedly began in 1984 and concluded in 1994, is too remote in time to his 2007 hernia repair with AlloDerm® to be relevant, and that no expert opinion or medical literature on the record establishes to the contrary. Plaintiffs

additionally contend that the minimal or nonexistent probative value of the evidence is outweighed by the risk of misleading the jury and causing Plaintiffs undue prejudice due to “anti-cigarette smoking bias.” Defendant counters that while Mr. Simineri stopped smoking cigarettes in 1994, the evidence will establish that Mr. Simineri continued to smoke cigars through the time of AlloDerm® implantation and hernia recurrence, and expert opinions and medical literature will establish that tobacco use impacts wound healing and is a risk factor for hernia recurrence.

Evidence is relevant if the party seeking to proffer it demonstrates that it has a “tendency in reason to prove or disprove any fact of consequence to the determination of the action.” N.J.R.E. 401. In determining whether evidence is relevant under Rule 401, the inquiry focuses upon “the logical connection between the proffered evidence and a fact in issue.” Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). Put differently, “[t]o say that ‘evidence is irrelevant in the sense that it lacks probative value’ means that it ‘does not justify any reasonable inference as to the fact in question.’” Verdicchio v. Ricca, 179 N.J. 1, 33-34 (2004) (quoting State v. Allison, 208 N.J. Super. 9, 17 (App. Div. 1985)). The admissibility of relevant evidence is governed by Rule 403, which provides that relevant evidence should be excluded “[i]f the probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence.” N.J.R.E. 403; see State v. Thompson, 59 N.J. 396, 421 (1971) (evidence is unduly prejudicial when its probative value is “so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation.”).

Here, evidence of Mr. Simineri’s history of tobacco use, including his cigarette use, is relevant to whether alleged shortcomings of AlloDerm® were the proximate cause of Plaintiff’s

hernia recurrence. In addition, the probative value of the evidence is not substantially outweighed by the potential risk of undue prejudice or confusion.

Mr. Simineri testified in his deposition that he stopped smoking cigarettes in 1994. However, he further testified that he currently smokes “sometimes one, sometimes none, sometimes two” cigars per day.¹ In addition, medical records from 2002 indicate that Mr. Simineri reported smoking one to two cigars each day² for the previous four years without discontinuance, and medical records from 2010 and 2011 indicate that he reported being a smoker.³ Thus, the evidence establishes that Mr. Simineri’s tobacco use was not remote in time to his AlloDerm® implantation and hernia recurrence. According to Plaintiffs’ own surgical expert, Dr. LeBlanc, smoking is “highest on the list” of conditions that impact proper wound healing.⁴ Mr. Simineri’s surgeon, Dr. Garcia, also testified that tobacco use is a co-morbidity that impacts proper wound healing.⁵ Therefore, Mr. Simineri’s history of tobacco use gives rise to the inference that he may have had an elevated risk of recurrence at the time of implantation, a fact question relevant to whether the AlloDerm® graft was the proximate cause of his hernia recurrence.

Finally, the probative value of the evidence is not substantially outweighed by the risk of undue prejudice or confusion. First, as discussed, evidence of Mr. Simineri’s tobacco use has significant probative value regarding his body’s ability to heal and susceptibility to hernia recurrence. Second, Plaintiffs fail to elucidate why testimony regarding cigarette smoking, but not cigar smoking, would “inflamm[e] the jury and fuel anti-smoking bias” to the point of being “highly prejudicial.” Finally, even assuming, *arguendo*, that the probative value of Mr. Simineri’s

¹ Defendant’s Opposition Brief (“Def.’s Opp. Br.”) Ex. A at 191:16-192:10.

² Def.’s Opp. Br. Exs. B, C.

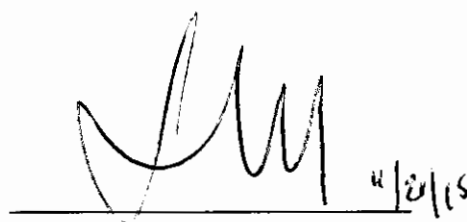
³ *Id.* Exs. D, E.

⁴ *Id.* Ex. H at 54:20-55:16.

⁵ *Id.* Ex. G at 101:16-102:19.

cigarette smoking is minimal and the prejudice from “anti-smoking bias” is great, the introduction of Mr. Simineri’s cigar habit at the time of implantation would, itself, trigger such bias. Thus, no additional prejudice would result from allowing the Defendant to explore the history of Mr. Simineri’s tobacco use.

Therefore, because evidence of Mr. Simineri’s history of tobacco use, including his cigarette smoking, is relevant and admissible, and the probative value of the evidence is not substantially outweighed by the risk of undue prejudice or confusion, Plaintiffs’ motion is **DENIED**.

A handwritten signature in black ink, appearing to read "JM", is written over a horizontal line. To the right of the signature, the date "4/21/15" is written.

JESSICA R. MAYER, J.S.C.