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11-20-15

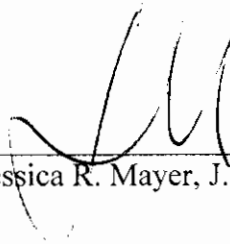
<p>IN RE: ALLODERM® LITIGATION</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY</p> <p>CASE CODE NO. 295</p> <p>CIVIL ACTION</p> <p>NOV 20 2015</p>
<p>MICHAEL SIMINERI and KAREN SIMINERI, h/w,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>LIFECCELL CORPORATION</p> <p style="text-align: right;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY</p> <p>Docket No. MID-L-5972-11 CM</p> <p>ORDER</p>

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 Irrelevant and Prejudicial Evidence, Testimony and Argument Regarding Plaintiff's September 2010 Coughing Episode, and the Court having considered all papers submitted by the parties, and for good cause and the reasons ^{set forth in the attached memorandum of decision,} ~~stated on the record by the Court,~~ ^{and the arguments of counsel}

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.


11/2/15

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NOT FOR PUBLICATION WITHOUT THE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 coughing episodes.¹ Defendant opposes Plaintiffs' motion.

Plaintiffs claim that Defendant proposes to offer testimony regarding Mr. Simineri's two coughing episodes in 2010 and 2012. 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 2010 coughing episode is irrelevant because it

¹ The court's decision addresses both Plaintiffs' Motion in limine to Exclude Irrelevant and Prejudicial Evidence, Testimony and Argument Regarding Coughing Episodes and Plaintiffs' Motion in limine to Exclude Irrelevant and Prejudicial Evidence, Testimony and Argument Regarding Plaintiff's September 2010 Coughing Episode.

occurred five months after he was diagnosed with a hernia recurrence. Plaintiffs additionally contend that Mr. Simineri's 2012 coughing episode is irrelevant because it occurred over a year after his hernia recurrence surgery. Finally, Plaintiffs argue that, even assuming the episodes were not chronologically irrelevant, the only evidence of a relationship between coughing episodes and hernia recurrence is the unsubstantiated personal opinion of Defendant's expert Dr. Langstein. Defendant counters that while Mr. Simineri's 2010 coughing episode occurred after his hernia recurrence diagnosis, it occurred prior to his hernia repair surgery and may have aggravated the hernia. In addition, Defendant argues that Dr. Langstein's expert opinion testimony was previously vetted by this court in response to Plaintiffs' motion to exclude Dr. Langstein's causation testimony,² and that Plaintiffs' motion is just an impermissible "second bite at the apple." Finally, Defendant observes that even if this court did reconsider its prior ruling, Dr. Langstein's opinion is supported by medical literature and his own personal medical experience.³

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

² See Simineri v. LifeCell, No. MID-L-5972-11, Memorandum of Decision on Plaintiffs' Motions to Bar the Testimony of Dr. Howard Langstein, slip op. at 17 (Law Div. Aug. 14, 2015).

³ Defendant did not oppose Plaintiffs' motion as to Mr. Simineri's 2012 coughing episode.

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 2010 coughing episode and its impact on his previously diagnosed hernia is relevant in determining damages that may be attributable to the alleged failure of his AlloDerm® graft. Mr. Simineri was diagnosed with a hernia recurrence in April 2010. However, the hernia was not severe enough to require surgical repair until just after the September 8, 2010 coughing episode. According to Dr. Langstein’s expert opinion, which was previously considered to be admissible by this court,⁴ coughing can aggravate a preexisting hernia.⁵ In addition, published medical literature indicates coughing as a mechanism of recurrence for hernias.⁶ Based on the timeline of Mr. Simineri’s coughing episode relative to his hernia recurrence, Dr. Langstein’s expert opinion and published medical literature, the jury may infer that the 2010 coughing episode aggravated the hernia beyond the initial damage allegedly caused by the AlloDerm® graft.

However, evidence of Mr. Simineri’s 2012 coughing episode is irrelevant to this action. That episode occurred over a year after Mr. Simineri’s successful hernia repair with a non-

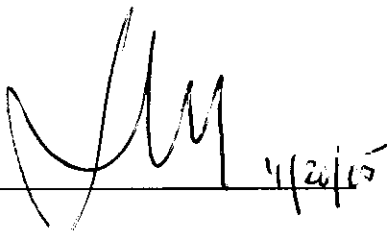
⁴ See Simineri v. LifeCell, No. MID-L-5972-11, Memorandum of Decision on Plaintiffs’ Motions to Bar Testimony of Dr. Howard Langstein, slip op. at 17 (Law Div. Aug. 14, 2015); Plaintiffs’ arguments as to the credibility of Dr. Langstein’s expert opinion go to the weight of his opinion, not the admissibility of his opinion, and may be raised at trial.

⁵ Defendant’s Opposition Brief (“Def.’s Opp. Br.”) Ex. A at 4; Ex. B at 202:17-203:5, 203:14-204:3.

⁶ Def.’s Opp. Br. Ex. C at 1; Ex. D at 136; Ex. E at 2.

AlloDerm® product following his hernia recurrence. The 2012 episode is not alleged to have had any impact on Mr. Simineri's medical condition and Mr. Simineri does not seek damages from Defendant due to injuries sustained as a result of that episode. For those reasons, and for the reason that Defendant did not oppose Plaintiffs' motion on this point, testimony regarding the 2012 coughing episode is barred.

Therefore, Plaintiffs' motion to bar Defendant from introducing evidence of Mr. Simineri's 2010 coughing episode is **DENIED**. Plaintiffs' motion to bar Defendant from introducing evidence of Mr. Simineri's 2012 coughing episode is **GRANTED**.


4/20/15

JESSICA R. MAYER, J.S.C.