

FILED

JUN 06 2019

**RACHELLE L. HARZ
J.S.C.**

This Order is prepared and filed by the Court:

In re: Pelvic Mesh/Gynecare Litigation

:
: SUPERIOR COURT OF NEW JERSEY
: BERGEN COUNTY-LAW DIVISION

:
: Master Case No. BER-L-1575-14

:
: **DECISION**

:
: McKnight v. Ethicon, Inc., et al, BER-L-10227-14
: Susong v. Ethicon, Inc., et al, BER-L-000793-15
: Tays v. Ethicon, Inc., et al, BER-L-11577-14

This court has reviewed the submissions of all counsel regarding the circumstances which led to the adjournment of the consolidated trial,¹ previously scheduled for June of 2019. These circumstances principally concern the physical condition of defendants' expert witness, Dr. Robert Rogers.

After having read these submissions, together with the information learned in a telephone conference call held on May 20, 2019, it is apparent to this court that plaintiffs' counsel agreed to adjourn the trial date upon representations from defense counsel that Dr. Rogers was physically unable to testify at the June trial. This court was not a part of the conversations or emails between and among counsel that led up to this agreement.²

¹ McKnight v. Ethicon, Inc., BER-L-10227-14 MCL
Susong v. Ethicon, Inc., BER-L-000793-15 MCL
Tays v. Ethicon, Inc., BER-L-11577-14 MCL

² This court was first apprised of the situation during a May 7, 2019 phone call from Kelly Crawford to this court's law clerk, Jolene Sproviero. The call was brief and Ms. Crawford gave no specific reasoning for the adjournment request other than to say that there was a problem with an expert and that the plaintiffs agreed to the adjournment. No further information about Dr. Rogers' situation or insight into the previous conversations between the parties was provided.

It is now known that Dr. Rogers suffered a heart attack on March 21, 2019. Subsequently, he testified in a Philadelphia trial on April 23, 2019, and is presently seeing patients and performing surgery. Regardless of what defense counsel actually represented to the plaintiffs in their discussions concerning an adjournment, the motives of defense counsel, or whether or not the plaintiffs would have agreed to an adjournment had they been aware of the preceding facts, at this juncture all of these arguments are moot. The trial date has been adjourned and these cases will go forward in October of 2019. The sole issue remaining for this court to decide is whether or not defense counsel may substitute Dr. Salil Khandwala in place of Dr. Rogers as one of their general causation experts at the October trial.

It is undisputed that the determination regarding Dr. Rogers' physical inability to testify at trial is based upon an assessment from defense counsel. This determination was not made by Dr. Rogers himself or his medical providers. Conversely, plaintiffs' counsel have put on the record that they do not agree with the defendants' assessment of Dr. Rogers' physical abilities given his activity level since the date of his heart attack. This court cannot allow a precedent to be established that any counsel, defense or plaintiff, can change their designated experts based upon their own determination as to the physical capabilities of a witness. Such a precedent would be untenable going forward. Furthermore, this court notes that defense counsel reserved its right to utilize Dr. Rogers as one of their causation experts in the October trial, should they decide to do so.³ As there is no admission by Dr. Rogers that he is physically unable to testify, or a

³ "And, should the trial team and the client reach an assurance in their minds – not in the mind of Dr. Rogers or any of his medical care providers – that his health and abilities are restored such that we believe he can resume a testifying role for an October trial setting, we would not want to take that option off the table for an October trial." (Crawford 5/29/19 Ltr. at p. 9).

showing by his physician(s) that he is physically unable to testify, Dr. Rogers will remain as one of the designated general causation experts and no substitutions will be permitted.

This court is not going to address plaintiffs' claims of intentional misrepresentations and manipulation by defense counsel. This court was not made a party to conversations or emails leading up to the adjournment request. In the future, any pertinent issues regarding trial adjournments must be brought to this court's attention so that all relevant facts can be presented and this court can make an educated determination.

Dated: 6/6/2019

A handwritten signature in cursive script that reads "Rachelle L. Harz". The signature is written in black ink and is positioned above a horizontal line.

Rachelle L. Harz, J.S.C.