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SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, P.J.Cv.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE: **In re Pelvic Mesh/Gynecare Litigation**

DOCKET #: **Case No. 291 CT; Master Case No. 6341-10**

DATE: **May 26, 2011**

MOTION: **Motion relating to the retention of expert witnesses and Cross Motion for Protective Order and to Compel Disclosures**

ATTORNEYS: **Kelly Strange Crawford – Defendant**
Adam Slater - Plaintiffs

Having carefully reviewed the papers submitted and any response received, I have ruled on the above Motion as follows:

Background

This matter arises from damages Plaintiffs claim to have incurred from the manufacture, sale, distribution and/or use of the medical device known as Pelvic Mesh, produced by Defendants Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, and/or Johnson & Johnson. Though not designated as a mass tort, due to the large number of cases that had been filed regarding the medical device, on September 13, 2010, the New Jersey Supreme Court

ordered that all litigation in this matter shall be assigned for centralized case management purposes to Superior Court, Law Division, Atlantic County for handling by Superior Court Judge Carol Higbee, with venue in such cases transferred to Atlantic County.

These cases involve personal injuries allegedly sustained from use of Pelvic Mesh. Pelvic Mesh is a synthetic mesh that physicians surgically implant to treat pelvic organ prolapse and/or urinary incontinence. Defendants seek an order from the court allowing a physician who has treated any one Plaintiff in this multi-case litigation to serve as a consultant or expert of Defendants in cases involving other Plaintiffs who have never been under that physician's care. Plaintiffs object to Defendants' motion, and seek by way of cross motion entry of a protective order precluding the defendants from consulting with or retaining plaintiffs' treating physicians as experts.

Analysis

Both Plaintiffs and Defendants focus on the case Stempler v. Speidell, 100 N.J. 368 (1985), in their briefing and they provide some conflicting interpretations of Stempler to support their respective arguments. In 1985, the New Jersey Supreme Court held that in personal injury litigation, a defendant's counsel could conduct informal interviews with a plaintiff's physician and that authorization for these interviews could be compelled from a plaintiff by a court order. Stempler v. Speidell, 100 N.J. 368, 382 (1985). Stempler involved a medical malpractice and wrongful death action brought by a decedent's estate against one of the decedent's doctors who was the attending physician at the time the decedent died. Id. at 370-371. The defendant sought to compel unrestricted authorizations that would permit the defendant's counsel to personally interview the decedent's treating physicians. The plaintiffs opposed the authorizations claiming that depositions were the only appropriate form of discovery to be used that wouldn't create an undue risk of disclosing confidential information that was not related to the litigation.

The Court weighed the interests in protecting the patient-physician privilege and the privacy interests of the plaintiffs in such cases against the defendant's right to interview a plaintiff's treating physicians instead of being restricted to formal, expensive, and inconvenient discovery methods, such as depositions and other procedures provided for by the Court Rules. Id. at 381. The Court concluded that these ex parte interviews, as well as other informal means of discovery that reduce the cost and time of trial preparation could save the parties the cost of formal depositions. Id. at 382. Consequently, the Court held that because a physician would not participate in such an interview without the consent of the plaintiff, the authorization could be compelled. Ibid. The Court recognized the need to preserve the plaintiff's privacy interests and the patient-physician privilege by requiring defendants to provide reasonable notice of the time and place of the proposed interviews. Ibid. The authorization also required defendant's counsel to "provide the physician with a description of the anticipated scope of the interview, and communicate with unmistakable clarity the fact that the physician's participation in an ex parte interview is voluntary." Ibid.

Further, the Court held that a plaintiff could seek and obtain a protective order, if an ex parte interview threatens to cause substantial prejudice to the plaintiff. Id. at 383. The protective order could either require that plaintiff's counsel be present during the interview or "in extreme cases," require that the defendant conduct a formal deposition. Ibid. The Court believed that "the flexibility afforded by our decision will permit trial courts and counsel to fashion appropriate procedures in unusual cases without interfering unnecessarily with the use of personal interviews in routine cases." Ibid.

In Smith v. Am. Home Prod. Corp. v. Wyeth-Ayerst Pharm., 372 N.J. Super. 105 (Law. Div. 2003), Judge Corodemus noted that the Supreme Court "recognized in Stempler the 'one size will not fit all' scenario when the court confronted a remedy regarding the allowance of ex

parte interviews, because of the varying cases before a trial court." Id. at 132. Judge Corodemus found that mass tort cases may sometimes fall within the Stempler Court's meaning of "extreme cases," and that allowing ex parte interviews is not mandatory, but rather up to the court's discretion and in mass tort cases, formal discovery proceedings can be ordered. Id. at 131-133. Indeed, when the New Jersey VIOXX® litigation was venued in Atlantic County, this court agreed with Judge Corodemus' ruling. This court exercised its discretion by forbidding ex parte Stempler interviews in the VIOXX® litigation, noting that VIOXX® cases were not the basic personal injury case that Stempler was, and that they were more akin to "extreme cases," that do not fit the Stempler mold. In re VIOXX®, 2004 N.J. Super. Unpub. LEXIS 6, at *8 (Nov. 17, 2004). In addition, the court recognized that an interview with the physician would not be done in place of a deposition. The defendant acknowledged it would still take a formal deposition of the doctor, so no time or cost would be saved. In re Pelvic Mesh is a coordinated multi-party litigation. As with the VIOXX® litigation, In re Pelvic Mesh is not a basic personal injury case. There are hundreds of cases involved in the litigation. It qualifies as an "extreme" case where the court's discretion should be applied.

Here, Defendants are not requesting an informal discovery interview with treating physicians. Rather, Defendants are requesting permission to retain the plaintiffs' treating physicians and consult with them ex parte to use those physicians as expert witnesses against other Plaintiffs in the litigation. Due to the nature of a coordinated complex litigation, the cases have the same disputes as to the issue of general causation and which product was allegedly defective. One Plaintiff's physician, who knows intimate details about that patient, should not be the Defense expert against a different plaintiff within the same coordinated litigation. Such an arrangement could interfere with doctor-patient privilege, impede effective medical treatment

between patients and their treating physicians, and will erode trust between patients and their doctors.

In Carchidi v. Iavicoli, 412 N.J. Super. 374 (App. Div. 2010), the plaintiff brought a medical malpractice action on behalf of her minor son against the hospital where he had been born, Cooper Health Systems (Cooper), claiming that the negligence of Cooper's doctors caused her son to suffer serious neurological conditions. Id. at 377. Since the year following his birth, the plaintiff's son had been treated by certain physicians in the neurology group at Children's Hospital of Philadelphia (CHOP). To defend the malpractice claim, Cooper sought to retain physicians as causation experts for either testifying or consulting who had never actually treated plaintiff's son, but who were worked within the same CHOP neurology group. Id. at 384. The Court did not permit Cooper to retain the CHOP physicians as experts, based on an N.J.R.E. 403 finding of substantial prejudice. Id. at 387. One of the Court's concerns was that defendants' presentation of experts from CHOP would create an unfair tactical advantage because if the plaintiff sought to "drive home to the jury the excellent qualifications of his treating doctors and the CHOP neurology team," he would be "forced to also bolster the qualifications of the intended defense experts." Id. at 386. The Court recognized the patient's right to expect loyalty from his treating physician, which would likely be impaired if members of the same neurology team were enlisted in the litigation effort "against plaintiff." Id. at 388.

In their briefing, the In re Pelvic Mesh Defendants go to great lengths to distinguish Carchidi from the pelvic mesh litigation. Defendants' argument can be distilled into three main distinctions. First, Defendants do not seek to enlist a Plaintiff's treating physician to testify against that particular Plaintiff—the physician will testify against a different plaintiff. Second, because this is a centralized litigation with many more Plaintiffs than the one in Carchidi, Defendants will be unfairly burdened in their search for experts. It is too difficult to find

physicians that perform the pelvic mesh surgery at issue who have not also acted as treating physicians for Plaintiffs. Third, many of the Plaintiffs are no longer seeking treatment from former physicians, thus, former plaintiffs' treating physicians should now be deemed eligible as expert witnesses for the defense.

The court finds such distinctions unconvincing. Addressing Defendants' first argument, the same concern remains. It is inappropriate for the defendants to use treating physicians in a litigation effort against their own patients. A coordinated multi-party litigation involves multiple cases, each with some individualized issues of law and fact, but most of the issues are the same for all plaintiffs and the same law firms defend all of the cases. If a plaintiff prevails at trial, any award for damages is exclusive to that plaintiff alone, but the purpose of bellwether trials is to pick cases where the verdicts would help determine the value of other similar cases. The separate cases in a coordinated litigation do affect each other. Common issues arise, and the court coordinating the litigation will attempt to rule on such issues broadly in one order that affects all plaintiffs. Many of the alleged injuries are identical, and much of the science testimony which expert witnesses are relied on for their testimony is the same. While Defendants insist that physicians will not be used as experts against their own patients, it is clear that a plaintiff would feel apprehensive that her physician who has treated her and who she may call as a witness in her claim against Defendants, is being paid by the same Defendants in a very similar case in the same coordinated litigation, and is testifying against another plaintiff with very similar ailments and claims. This goes for beyond the Stempler case and is more comparable to Carchidi.

The New Jersey Supreme Court has ruled that a plaintiff's "desire to preserve the physician's loyalty to the plaintiff in the hope that the physician will not voluntarily provide

evidence or testimony that will assist the defendant's cause" is an "equally if not more important interest" than the patient-physician privilege. Stempler, supra, 100 N.J. at 381.

> [M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.
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> [Hammonds v. Aetna Cas. & Surety Co., 243 F. Supp. 793, 799 (1965)].

The court also finds Defendants' second and third arguments unconvincing. Defendants claim that each plaintiff has several treating physicians, and due to the number of cases filed, 235 at this time, it is unduly burdensome to require Defendants to retain experts who are not also treating plaintiffs in the litigation. For a mass or coordinated tort litigation this is a small number of cases filed. It is unclear why Defendants cannot find a physician who has implanted pelvic mesh but whose patient is not in litigation against the manufacturers. There are many more doctors performing this surgery than plaintiffs who have filed suit.

The court understands Defendants' apprehension that Defendants have already had two treating physicians on retainer and, spent monies on employing those physicians, and do not want to have to relinquish them and go back to square one. Nevertheless, after reviewing information submitted in camera, this court has determined that Defendants have neither spent significant time or expense working with these two experts. It is within this court's discretion to bar further use of these physicians as experts or consultants.

Conclusion

Defendants shall not retain expert physicians currently on the updated June 30 list provided by Plaintiffs' counsel. Furthermore, if Defendants retain an expert who subsequently begins to treat patients who are plaintiffs in the litigation, then Defendants must notify Plaintiffs'

counsel so that Plaintiffs have an opportunity to object. The court will consider such objections on a doctor-by-doctor basis. In a case where there has been a significant investment of time and money in an expert before any of the expert's patients filed suit, the court will have to reexamine the issue. The two treating physicians Defendants previously retained as experts and/or consultants are hereby barred from working for Defendants on this litigation.

CAROL E. HIGBEE, P.J.Cv.