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Superior Court of New Jersey, Law Division
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FILED

JAN 28 2019

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

Prepared by the court

JULIA FLORES,

Plaintiff,

v.

ETHICON, INC. et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-10655-14 MCL
MASTER CASE NO. BER-L-011575-14

In Re Pelvic Mesh/Gynecare Litigation,
Case No. 291

ORDER AND DECISION

OLGA REGINA GOMEZ,

Plaintiff,

v.

ETHICON, INC. et al.,

Defendants.

DOCKET NO. BER-L-10726-14 MCL

KATHY MCFALL,

Plaintiff,

v.

JOHNSON & JOHNSON et al.,

Defendants.

DOCKET NO. BER-L-11513-14 MCL

YVETTE REYES,

Plaintiff,

v.

JOHNSON & JOHNSON et al.,

Defendants.

DOCKET NO. 12431-14 MCL

PRELIMINARY STATEMENT

Before this court is defendants' motion regarding choice-of-law. It is the argument of defense counsel that this court must undertake a choice-of-law analysis regarding the liability issues and certain damage issues pertaining to the TVT-O trial scheduled before this court on October 15, 2019. This TVT-O bellwether pool originally involved four Texas plaintiffs who were implanted with the TVT-O device in Texas. As a result of prior motions pertaining to the statute of limitations, only the Yvette Reyes case is going forward. The cases of plaintiffs Julia Flores, Olga Regina Gomez, and Kathy McFall have been dismissed. However, if the instant motion concerned all four plaintiffs or just the one remaining plaintiff, the following analysis and conclusion would be the same.

This court has already determined in its oral decision, given October 19, 2018, in the matter of *Rios v. Bard*, BER-L-018689-14, that the New Jersey Supreme Court's decision rendered on October 13, 2018, *In re Accutane Litig.*, 235 N.J. 229 (2018), requires the application of New Jersey law to the substantive issues in all cases in the Bard MCL. As previously stated in *Rios*, this court finds that our New Jersey Supreme Court in *In re Accutane* did, in fact, change, overrule, and overturn the New Jersey choice-of-law rules pertaining to

MCL litigation. *In re Accutane* specifically discusses the applicability of New Jersey law to MCL litigation.

Defense counsel suggests that the Court's opinion concerned only the plaintiff's claims pertaining to the adequacy of the defendants' warnings. Defendants also advocate that pursuant to *In re Accutane*, this court must analyze which state law applies to the substantive liability and compensatory damage issues in the upcoming TVT-O trial pursuant to New Jersey's choice-of-law principles. This court disagrees with both arguments.

ANALYSIS

This court, in applying *In re Accutane*, finds that the New Jersey Supreme Court was seeking to apply a single standard as to consolidated cases in MCL litigation to ensure predictable and uniform results rather than disparate outcomes among similarly situated plaintiffs. The New Jersey Supreme Court wrote:

Removed from the equation will be the fortuity of the place where individual plaintiffs reside and where the injury occurred. Of course, each plaintiff controls his or her fate. Plaintiffs can choose to bring suit in the state where they reside and the injury occurred and probably enjoy the benefit – if it is a benefit – of their own state law.

In re Accutane Litig., 235 N.J. 229, 263 (2018).

This language and the tenor of the opinion speak to MCL litigation as a whole going forward and does not carve out any exception for choice-of-law analysis for a particular case or cause of action in any MCL litigation.

This court's understanding of the New Jersey Supreme Court's decision to apply New Jersey law in all MCL cases going forward is further confirmed by the direction provided in the following language:

In the long run, applying New Jersey's PLA in such circumstances as here is not an approach that advantages one side or the other. In this case, plaintiffs apparently believed that New Jersey law is not as beneficial to their cause as the laws of other jurisdictions. However, as viewed by the Appellate Division, the Roche warnings are adequate under the laws of eight other jurisdictions. Today, plaintiffs complain about the application of New Jersey law in this MCL case. Tomorrow, in another such case, defendants may be the disappointed party.

Id. at 523.

The court continues:

It is understandable that the parties want to apply the law of the jurisdiction that will give them the greatest advantage. In this case, we are not picking sides or winners, but merely establishing a reasonable rule of law that can be implemented by our courts and that can best advance the administration of justice.

Id. at 524.

In the upcoming trial, this court recognizes that the law of the state of Texas is seemingly more favorable to the defense regarding design defect and failure to warn claims. Likewise, in the *Rios* matter, this court recognized that the law of the state of California was seemingly more favorable to the defense regarding design defect and failure to warn claims. But as our Supreme Court has now guided us, it is not picking sides or winners, but "merely establishing a reasonable rule of law that can be implemented by our courts and that can best advance the administration of justice." *Id.*

The Court sought to avoid the type of choice-of-law motion practice that was before this court in *Rios* and again now, where one side is advocating a choice-of-law analysis that they believe is most advantageous to their case, notwithstanding that the case is part of an MCL. The Court has held that such motion practice and arguments regarding choice-of-law are no longer

necessary and should no longer burden MCL litigation. The rule has now been established that New Jersey substantive law applies to all cases filed in New Jersey MCL litigation.

Defense counsel argues in its brief that *In re Accutane* fails to provide the constitutional protections of due process and Full Faith and Credit found in the United States and New Jersey Constitutions and equal protection rights pursuant to the 14th amendment. These constitutional concerns were not addressed before the New Jersey Supreme Court, and there was no petition for writ of *certiorari* filed to the Supreme Court of the United States. These constitutional concerns were never raised until the instant motion before this court. Clearly, this New Jersey trial court does not have jurisdiction to review or address these constitutional arguments as they may relate to the Court's decision in *In re Accutane*. This court is simply implementing the precedential determination set by the Court regarding choice-of-law analysis as it concerns MCL litigation.

CONCLUSION

Accordingly, this court finds that New Jersey law applies to all substantive issues in the Yvette Reyes case scheduled for trial on October 15, 2019, all cases filed in the pelvic mesh/Gynecare MCL Litigation, and all cases filed in MCL litigation before this court.

Dated: January 28, 2019



Rachelle L. Harz, J.S.C.