

FILED

AUG 16 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
LAW DIVISION – BERGEN COUNTY

This document relates to:

Nancy Susong v. Ethicon, Inc. et al.
(BER-L-00793-15)

MASTER CASE NO. L-11575-14
Gynecare Litigation, Case No. 291

Stacie McKnight v. Ethicon, Inc. et al.
(BER-L-10227-14)

**DECISION TO SEVER
NANCY SUSONG V. ETHICON, INC.**

Carolyn Tays and Alvie Tays, Jr. v.
Ethicon, Inc. et al. (BER-L-11577-14)

This court is in receipt of plaintiffs' Motion in Limine (filed three weeks late) to preclude defendant Ethicon from offering general expert testimony from Bryce Bowling, M.D. at the November Prolift trial, as he was a treating physician of plaintiff Nancy Susong.

The November Prolift trial includes three plaintiffs: Stacie McKnight, Nancy Susong, and Carolyn Tays. On March 29, 2019, defense counsel designated three general causation experts: Dr. Rogers, Dr. Bowling, and Dr. Winkler to testify at trial. Aware of the issue surrounding Dr. Bowling's testimony in Susong, defense counsel designated him to testify as a general expert in only the Tays and McKnight matters.

In correspondence dated August 12, 2019, from Kelly S. Crawford, Esq., the defendants set forth that the motion is untimely as the July 19, 2019 pre-trial scheduling order deadline for such motions was July 19, 2019. Further, Ms. Crawford argues that the pre-trial scheduling order,

pursuant to this court's written opinion dated June 6, 2019, allows defendants to use Harvey Winkler, MD, Bryce Bowling, MD, and/or Robert Rogers, MD as general experts in this three-plaintiff consolidated trial.

By reply letter dated August 13, 2019, submitted to this court from Daniel C. Burke, Esq., plaintiffs put forth that, "Although it was circulated to plaintiffs' counsel prior to its submission to the court, [the pre-trial scheduling order] unfortunately contains a material misstatement of fact that went unnoticed until after the motion deadline had passed. Plaintiffs' counsel was more focused on the deadlines that would usually be included in a scheduling order, as opposed to the mischaracterization of this court's June 6, 2019, written opinion slipped in by defense counsel, and failed to address the issue." Mr. Burke further writes that... "[Ms. Crawford's] letter does confirm what her intention was in throwing in that language...[as well as] [d]efendants' audacious attempt...to falsely characterize this court's prior order..."

Preliminarily, this court notes two points. First, the disparaging and accusatory language toward defense counsel is disconcerting and further use of similar insinuations will not be countenanced by this court by either side during remaining pre-trial matters and the trial itself. Second, this court must note that its order of June 6, 2019 solely addresses whether or not defense counsel could substitute Dr. Salil Khandwala in place of Dr. Rogers as one of their general causation experts at the trial. It does not opine or rule on the admissibility of testimony as to any expert.

The August 12, 2019 letter from Ms. Crawford seeks guidance as to whether or not defense counsel is required to respond to the late filed motion in limine pertaining to Dr. Bowling. As a result of this letter, this court reviewed the in limine motion in question and now recognizes the significant issue underlying the present dispute.

The issue now before this court is the parsing of the Hon. Carol E. Higbee's, P.J.cv August 3, 2012 order, which was issued by Judge Higbee after remand from the Appellate Division (In re: Pelvic Mesh), as to whether or not Dr. Bowling can present general liability testimony during the upcoming three-plaintiff trial. While he is designated as a general expert in only the Tays and McKnight cases, if called to testify, plaintiffs argue that his testimony is precluded because it will impact the Susong case wherein he is a treating physician. In support of their in limine motion, plaintiffs argue that, "[o]f course, the reality is, a **general expert** is, necessarily, going to be testifying in every case. The whole point of a general expert is to give opinions that apply to all cases on that topic. It is undisputed that New Jersey law forbids treating physicians from serving as experts against their own patients. Thus, this court should prevent Dr. Bowling from giving general expert opinions in this case. Those opinions would clearly impact the case against his former patient, Ms. Susong, as any general opinions will bear on all three of these consolidate cases." The defense disagrees. In Ms. Crawford's May 29, 2019 letter, page 10, concerning prior issues with Dr. Rogers, defense argues that "[a] fair reading of the In re: Pelvic Mesh Appellate Division decision would not preclude Defendants from calling Dr. Bowling to testify as a general expert (as opposed to case-specific expert) in a case in which a former patient was a plaintiff." The issue before this court is unquestionably one of first impression that will impact the testimony allowed and/or elicited at this three-plaintiff trial and inevitably fall under appellate review from one party or the other.

Nothing in any June or July orders, misinterpreted or not, changed what plaintiffs knew as of March 29, 2019.¹ Therefore, this court understands the defense position that the filed motion in

¹ This court notes that when pre-trial motions were initially filed on April 23, 2019, twenty-four days after Dr. Bowling was designated in Tays and McKnight, plaintiffs did not object to the use of Dr. Bowling *at all* in those motions. In their August 13, 2019 letter plaintiffs inform the court that they are now, *only after noticing Ms. Crawford's interpretation of the June 6, 2019 order*, objecting to the use of Dr. Bowling as a general expert in the *entire* trial.

limine is late. Further, unlike a Kemp motion, this motion seeks to disqualify Dr. Bowling, not for the substance of his testimony, but pursuant to In re: Pelvic Mesh. As there is no precedent for this decision, the defense would arguably be entitled to replace Dr. Bowling if plaintiffs are successful in this motion. As the MCL judge overseeing this litigation, this issue needs to be decided upon proper motion by the parties at a time prior to pre-trial motion practice for bellwether cases, thereby providing notice to counsel as to this court's decision on this issue.

With the trial just three months away, it is too late for defense counsel to now replace Dr. Bowling and designate a new general causation expert. Based upon past precedent, plaintiffs' counsel would invariably argue against any such late designation. Further, if this court would or would not allow Dr. Bowling to testify as a general causation expert in the upcoming three-plaintiff trial, this issue would now lead to a novel appellate review argument and potential reversal. Given the extraordinary time, effort, finances, and judicial resources that will be spent on the upcoming MCL trial, this court has decided to sever the Susong case from the Tays and McKnight matters, thereby eliminating any issue pertaining to Dr. Bowling's ability to testify as a general causation expert at the upcoming trial. The Susong matter will be rescheduled for a date in 2020.

Dated: 8/16/2019



Rachelle L. Harz, J.S.C.