This Order has been prepared and filed by the Court.

ANNTRINETTE WILSON-JOHNSON, Plaintiff(s), v. ORGANON USA INC., ORGANON PHARMACEUTICALS USA INC., and ORGANON INTERNATIONAL INC., Defendant(s)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-597-10 CIVIL ACTION **ORDER**

FILED

MAY 29 2012

BRIAN R. MARTINOTTI
J.S.C.

THIS MATTER having been opened to the Court upon the Defendants Organon USA Inc., Organon Pharmaceuticals USA Inc., and Organon International Inc.'s (hereinafter "Defendants") Motion to Modify the Court's June 23, 2010 Order ("the *Stempler* Order") to include Plaintiffs' Counsel;

For the reasons set forth in the accompanying Opinion;

IT IS on this 29th day of May, 2012,

ORDERED:

1. Defendants' Motions is DENIED;

2. A copy of this Order shall be served upon all counsel of record within seven (7) days of counsel's receipt thereof, and shall be posted on the Judiciary's website.

BRIAN R. MARTINOTTI, J.S.C.

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

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ANNTRINETTE WILSON-JOHNSON, Plaintiff(s), v. ORGANON USA INC., ORGANON PHARMACEUTICALS USA INC., and ORGANON INTERNATIONAL INC., Defendant(s)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-597-10 CIVIL ACTION **OPINION AND ORDER**

Submitted: May 16, 2012[1]
Decided: May 29, 2012

On the Briefs:
For Plaintiff: Hunter J. Shkolnik, Esq., Nicholas R. Farnolo, Esq. (Napoli Bern Ripka Shkolnik & Associates, LLP)
For Defendants: Melissa A. Geist, Esq., Daniel K. Winters, Esq. (Reed Smith, LLP)

MARTINOTTI, J.S.C.

Before this Court is Defendants' Motion to Modify the Court's June 23, 2010 to Include Plaintiff's Counsel; namely, to require that any conversations between Plaintiff's

[1] By way of e-mail correspondence dated May 18, 2012, all counsel waived oral argument on this Motion.

counsel and Plaintiff's treating physician be transcribed.[2] Plaintiff has OPPOSED this Motion.

FACTS[3]

In May 2010, Defendants requested that this Court enter an order granting Defendants' the right to conduct *ex parte* interviews of Plaintiff's treating physicians and health care providers pursuant to *Stempler v. Spiedell*, 100 N.J. 368 (1985). On June 23, 2010, this Court granted Defendant's motion and entered an order ("the *Stempler* Order") requiring that "Any interview must be recorded and transcribed at defendants' sole cost and expense..." and "Plaintiff's counsel shall not interfere or take steps to discourage the physician's participation. They may contact the physician to advise them about the interviews and express the concerns about the scope and extent to which Plaintiff's continue to assert the physician-patient privilege." *Id.*

Sometime before the March 1, 2012 deposition of Dr. David L. Gandell, Dr. Gandell spoke briefly with Justin Betz, an attorney for Plaintiff. (Gandell Dep. at 11:25-12:14). Specifically, though his recollection was unclear as to the precise wording, Dr. Gandell recalled being asked whether or not Defendant advised him of the risks of NuvaRing® before he began prescribing the drug. (*Id.* at 12:22-13:3). Dr. Gandell advised Plaintiff's counsel that he was not comfortable answering such a question off the record. (*Id.*). Plaintiff's counsel then asked Dr. Gandell if he would be represented by counsel, because there may be an attempt to shift blame towards Dr. Gandell. At deposition, Dr. Gandell recalled:

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[2] The Court's June 23, 2010 Order applies to all plaintiffs in these consolidated matters. Defendants have alleged that a violation of that Order occurred in the above-captioned matter.

[3] The Court focuses only on those facts relevant to the instant application.

Q. Okay. What types of specific questions were you being asked?

A. ...He did then ask me if I was going to be represented by counsel, and indicated that there may be an attempt by your – by you to shift blame from the company onto me as a practitioner. And I said no, I wasn't going to be represented by counsel, because I did nothing wrong and didn't think that this was going to be something focused on me. And I was being asked to come and give information regarding just what had happened with the patient and her records.

Q. Okay. So you were told by the plaintiff's attorney that we as the defendants might try to shift the blame onto you?

A. Yes.

(Gandell Dep. at 12-15). Dr. Gandell then asked if Plaintiff's counsel intended to bring a suit against him, and was advised that they had no intentions of doing so, at that time. (*Id.* at 14:9-15:3). Following this colloquy, Mr. Betz ceased questioning Dr. Gandell.

Based largely on this conversation between Dr. Gandell and Plaintiff's counsel, Defendants now request that this Court modify its June 23, 2010 Order to require plaintiffs' counsel to "have a court reporter transcribe all substantive conversations with plaintiffs' physicians and provide Defense counsel with such transcript(s) fourteen days prior to the deposition."

DEFENDANTS' ARGUMENT

Defendants submit that a modification to this Court's *Stempler* Order will "level the playing field" between the parties by requiring plaintiffs' counsel to have a court reporter transcribe all substantive conversations with plaintiffs' physicians. Defendants

argue that, in *Wilson-Johnson*, Plaintiff's counsel's *ex parte* contact with a prescribing physician in advance of his deposition was a clearly improper attempt to influence the testimony given during his deposition. Given the potential prejudice that could result, Defendants submit that these types of communications should not be permitted between plaintiffs' counsel and these key prescribing physicians. Defendants further submit that, during the course of this litigation, they have had limited success in obtaining interviews with treating physicians due to the strictures placed on such communications. Defendants argue that it is fundamentally unfair that plaintiffs' counsel should have unfettered access to treating physicians, and have used that access improperly in this matter, while Defendants are constrained by the confines of the Court's June 23 Order. Therefore, Defendants request that the Court's *Stempler* Order be modified to include plaintiffs' counsel's interviews of physicians.

PLAINTIFF'S ARGUMENT

Plaintiff responds that no improper contact occurred between Plaintiff's counsel and Dr. Gandell, and that a clear reading of the transcript reveals no attempt to "influence" Dr. Gandell's testimony,[4] as Dr. Gandell was not told how to respond nor told any questions that might be asked of him. Plaintiff further submits that there is no precedent to support Defendants' request to invade the privacy of a conversation between a plaintiff and her treating physician. The lone precedent cited by Defendants, an October 29, 2009 Order from the *In Re Aredia and Zometa Litigation*, actually denies the

[4] The Court has reviewed the transcript of Dr. Gandell's recollection of the contact between him and Plaintiff's counsel. The Court finds that this conversation, as remembered by Dr. Gandell, was not an actual violation of the Court's prior Order. However, this is as close as one could proceed without violating the order. The questions about "shifting the blame" clearly offend the spirit of the Order and may have produced a chilling effect on any *Stempler* interview.

defendants' request for a *Stempler* order and restricts the *ex parte* access to treating physicians for both the plaintiffs and defendants. Instead, the right of a plaintiff's counsel to communicate and seek the assistance of a treating physician, as well as the duty of that physician to cooperate, has long been recognized in New Jersey's jurisprudence. Moreover, many courts have denied *Stempler* orders finding they would "open the floodgates of litigation" and noting the difficulty of overseeing the *ex parte* interviews on the part of the court. Plaintiff submits that the instant motion is a prime example of these concerns. Lastly, Plaintiff submits that there is no evidence that ordering Plaintiff's attorneys to transcribe all communications with Plaintiff's physicians will "level the playing filed" any more than how things currently stand. Plaintiff notes that Defendants can already conduct an informal interview with a treating physician, and they can already obtain information relating to conversations between plaintiffs and treating physicians, just as they have done here. In sum, Plaintiff argues that a ruling in favor of Defendants would serve no purpose other than to restrict Plaintiff's counsel's access to their own client's treating physicians and would be unduly burdensome to Plaintiff and her counsel.

DEFENDANTS' REPLY

In response, Defendants first argue that their Affirmative Defenses (specifically Affirmative Defenses Ten and Thirty Four)[5] do not "accus[e] Dr. Gandell of improperly

[5] Defendants' Tenth Defense states: "Plaintiff's claims are barred, in whole or in part, because Plaintiff assumed the risks disclosed by the FDA approved NuvaRing® labeling, the prescribing physicians, or other persons or entities." Defendants' Thirty-Fourth Defense states: "Plaintiff's physicians and other medical care providers, and their agents, servants and employees, were sophisticated users and learned intermediaries who had a duty to warn Plaintiff of any alleged potential complications that might result from use of the NuvaRing®. Plaintiff's physicians and other medical care providers possessed adequate information concerning warnings, precautions. and potential complications for those physicians

prescribing NuvaRing® to the Plaintiff" (Br. at 2) and do not provide counsel with a valid basis to tell prescribing physicians that Defendants will "blame" them for their patient's alleged injuries. Rather, Defendants submit that these Affirmative Defenses are not unique to the *Wilson-Johnson* matter, are clear pronouncements of the law and do not suggest that Defendants intend to blame any plaintiffs' physician, including Dr. Gandell. Next, Defendants argue that their request would, in fact, level the playing field and limit future discovery costs because the costs of transcripts are minimal compared to the unnecessary judicial resources required to litigate possible future infractions of the Court's order. Lastly, Defendants claim not to seek to prohibit or forbid any and all communications between plaintiffs' counsel and plaintiffs' physicians as ordered in the *In Re Aredia and Zometa Litigation*. Rather, Defendants seek to have the obligations imposed on them be equally applied to plaintiffs' counsel.

DECISION

This Court has already permitted Defendants the opportunity to conduct *ex parte* interviews of plaintiffs' physicians, subject to certain conditions. Accordingly, the substantive *Stempler* issue has been adjudicated. However, a brief overview of the underlying rationale is warranted.

As the *Stempler* court explained, "[u]nquestionably, defendant's counsel would prefer to seek out [favorable] evidence or discuss the prospect of [favorable] testimony in an *ex parte* interview [with a treating physician] rather than during a deposition attended by plaintiff's counsel." 100 N.J. at 381. Under such circumstances, the plaintiff's interest

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and other medical care providers to assess the risks versus benefits of the NuvaRing®. Therefore, Plaintiff's claims are barred."

is twofold: (1) "to protect from disclosure by the physician confidential information not relevant to the litigation" and (2) "to preserve the physician's loyalty to the plaintiff" so that the treater "will not voluntarily provide evidence or testimony that will assist the defendant's cause." *Id.*

New Jersey Courts have traditionally looked at *Stempler* orders with disfavor in the context of mass tort litigation, and many such courts have explicitly refused to grant *Stempler* Orders.[6] *See, e.g., In re Vioxx Litigation*, slip op. at *8 (N.J. Super. Nov. 17, 2004) (denying *Stempler* request because of judicial inefficiency and because *Stempler* was no longer the tool of efficiency the Supreme Court intended it to be); *In re Diet Drug Litigation*, slip op. at *5 (N.J. Super. Jan. 13, 2006) (denying *Stempler* request because of the potential for a "floodgate" of litigation resulting from such informal interviews). *See also In re Diet Drug Litigation*, 895 A.2d 493 (N.J. Super. 2005) (granting *Stempler* access provided defendants transcribe and serve plaintiffs' counsel with said transcript).

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[6] In fact, Defendants have previously requested and been denied this form of relief, in the former Diet Drug Litigation (*Diet Drug I*), 384 N.J. Super. 546 (Law Div. 2005). At a Case Management Conference on July 23, 2004, Judge Walsh described "the disease of skilled people," and the concerns of Defense counsel:

> Now, you're concerned that the unheard of idea that a treating physician for a plaintiff would have the audacity to talk to that plaintiff and then if those plaintiff's lawyers go first and say, what happened next, they would say something harmful to your case....So, I will give you a deposition. And if they notice the dep first, they go first. If you notice the dep first, you go first. Now, you are such proficient paper pushers – I would find it difficult to imagine that you wouldn't beat these folks in most instances....This is a disease of skilled people that you believe that the people you're deposing can be so easily corrupted...I don't believe it....And I don't think it happens in very many cases at all. You'll have the chance to depose them, and by that time you will have had the first word, the first formal word under oath. And then simply because [an adversary] goes first as opposed to you because somehow he got his dep notice there, I think it's incremental.

(Tr. at 140:9-144:11, Ex. C).

Indeed, the right of a plaintiff's counsel to communicate and seek the assistance of a treating physician, as well as the duty of that physician to cooperate, has long been recognized in New Jersey's jurisprudence. *See generally Spaulding v. Hussain*, 229 N.J. super. 430 (App. Div. 1988). The *Accutane* Court explained that:

> Physicians have an ethical duty to communicate with his patient and the patient's representatives, and to aid his client in litigation. Section 9.07 of the *Code of Medical Ethics* provides:
>
> > As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests his physician's assistance, the physician should furnish medical evidence, with the patient's consent, in order to secure the patient's legal rights.

In re Accutane Litigation, slip op. at *11-12 (N.J. Super. July 1, 2010) (noting that "this Court is not aware of any other decision which restrains counsel from talking to their clients' own doctors.").[7]

In this case, the playing field, as it currently stands, is level and modifying the current *Stempler* Order as Defendants request would serve no purpose other than to restrict Plaintiff's counsel's access to their own client's treating physicians and would be unduly burdensome to Plaintiff and her counsel. Defendants receive substantial benefit in their ability to conduct *ex parte* interviews of plaintiffs' physicians as opposed to taking formal depositions. In lieu of these formalities, the procedures currently in place, pursuant to this Court's order, "afford[s] plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate

[7] This Court is cognizant of Judge Mayer's opinion, in *In re: Aredia and Zometa*. *See* October 29, 2009 Memorandum of Decision on Defendant's Motion for *Ex Parte* Contacts with Plaintiffs' Treating Physicians (holding that "no party – Plaintiffs nor Defendants – shall engage in *ex parte* contacts with Plaintiffs' treating physicians or influence the deposition or trial testimony of Plaintiffs' treating physicians" and requiring that "[a]ll parties shall proceed by way of formal deposition of Plaintiffs' treating physicians.").

concerns as to the proper scope of the interview..." *Stempler*, 100 N.J. at 382. Requiring Plaintiff's counsel to transcribe substantive communications with Plaintiff's physicians would go far beyond the holding of *Stempler* and this Court's order. Moreover, judicial oversight of *ex parte* interviews would be tremendously difficult, if not impossible. Defendants are free to inquire, whether during a *Stempler* interview or formal deposition, about any conversation the doctor(s) may have had with Plaintiff's counsel and the substance of same. Accordingly, the Court declines to expand the scope of the current *Stempler* Order, which remains in full force and effect, without prejudice to Defendants' application for relief if there is a violation of the Order in the future.[8]

CONCLUSION

For the reasons stated herein, Defendants' Motion is DENIED.

[8] *See generally* n. 4, *supra*.