

0021
11-20-15

IN RE: ALLODERM® LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

CASE CODE NO. 295

CIVIL ACTION

NOV 20 2015

MICHAEL SIMINERI and KAREN
SIMINERI, h/w,

Plaintiffs,

v.

LIFECELL CORPORATION

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. MID-L-5972-11 CM

ORDER

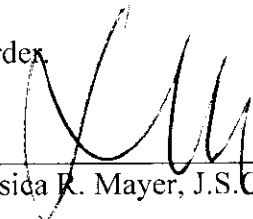
The above matter having been opened to the Court by Anapol Weiss attorneys for Plaintiffs, on application for an Order granting Plaintiffs' Motion *in Limine* to Exclude Irrelevant and Prejudicial Evidence, Testimony and Argument Related to Plaintiff Michael Simineri's Alleged Non-Compliance with Medical Instructions, and the Court having considered all papers submitted by the parties, and for good cause and the reasons ^{with the arguments of counsel,} ~~stated on the record by the Court,~~ ^{set forth in the attached memorandum of decision}

It is on this 20th day of November, 2015,

ORDERED that Plaintiffs' motion is hereby ~~GRANTED~~; **DENIED**.

IT IS FURTHER ORDERED that a copy of this Order be posted online and served on all counsel of record within seven (7) days of the date of this order.

OPPOSED



Jessida R. Mayer, J.S.C.

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE



MIDDLESEX COUNTY COURTHOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-964

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Plaintiffs'
Motion *In Limine* to Exclude Evidence and Testimony

In Re: AlloDerm® Litigation, Case Code 295

Michael Simineri and Karen Simineri v. LifeCell Corporation

Docket No. MID-L-5972-11 CM

Dated November 20, 2015

For Plaintiffs: Lawrence R. Cohan, Esq., Joseph J. Fantini, Esq., Paola Saneaux, Esq., Adrienne W. Webb, Esq., and Sol H. Weiss, Esq., Anapol Weiss.

For Defendant: David W. Field, Esq., Stephen R. Buckingham, Esq., Joseph A. Fischetti, Esq., Lowenstein Sandler LLP.

Plaintiffs Michael Simineri and Karen Simineri seek an order barring Defendant LifeCell Corporation (“LifeCell” or “Defendant”) from offering evidence, testimony or argument related to Mr. Simineri’s alleged non-compliance with medical instructions by Gerardo Garcia, M.D., Wayne Brotzman, D.O. and “any other health care provider.”¹ Defendant opposes Plaintiffs’ motion. For the reasons set forth in this memorandum of decision, Plaintiffs’ motion is **DENIED**.

Plaintiffs claim that Defendant proposes to offer testimony regarding Mr. Simineri’s alleged non-compliance with medical instructions. Plaintiffs argue that such testimony is

¹ Plaintiffs’ Brief 1.

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irrelevant and prejudicial, and thus barred by New Jersey Rules of Evidence (“N.J.R.E.”) 401 and 403. Specifically, Plaintiffs contend there is no evidence Mr. Simineri failed to comply with Dr. Garcia’s medical instructions to avoid heavy lifting for eight weeks following AlloDerm® hernia repair surgery. Plaintiffs additionally contend that evidence Mr. Simineri failed to comply with Dr. Brotzman’s medical instructions is irrelevant because a) Mr. Simineri’s poorly controlled diabetes was due to a psychological binge eating disorder that has no bearing on his ability to comply with non-food related medical instructions, and b) there is no expert opinion testimony or medical literature connecting diabetes to hernia recurrence.² Defendant counters that an order excluding evidence that does not exist is, by definition, unnecessary. Defendant additionally argues that Plaintiffs’ request to preclude “any other alleged evidence of Plaintiff’s non-compliance with medical instructions from any other health care providers” is vague and overbroad.

Evidence is relevant if the party seeking to proffer it demonstrates that it has a “tendency in reason to prove or disprove any fact of consequence to the determination of the action.” N.J.R.E. 401. In determining whether evidence is relevant under Rule 401, the inquiry focuses upon “the logical connection between the proffered evidence and a fact in issue.” Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). Put differently, “[t]o say that ‘evidence is irrelevant in the sense that it lacks probative value’ means that it ‘does not justify any reasonable inference as to the fact in question.’” Verdicchio v. Ricca, 179 N.J. 1, 33-34 (2004) (quoting State v. Allison, 208 N.J. Super. 9, 17 (App. Div. 1985)). The admissibility of relevant evidence is governed by Rule 403, which provides that relevant

² Plaintiffs did not make a separate argument as to why the introduction of Mr. Simineri’s non-compliance would be “highly prejudicial.”

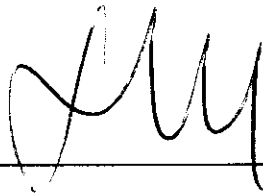
evidence should be excluded “[i]f the probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence.” N.J.R.E. 403; see State v. Thompson, 59 N.J. 396, 421 (1971) (evidence is unduly prejudicial when its probative value is “so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation.”).

Plaintiffs’ argument that Mr. Simineri’s non-compliance with Dr. Garcia’s eight-week medical instructions should be excluded because it does not exist is not a proper ground upon which to seek an order barring evidence at trial. Should Defendant attempt to argue at trial that Mr. Simineri failed to comply with Dr. Garcia’s medical instructions during the eight weeks following his AlloDerm® hernia repair surgery, Plaintiffs are free to object to a lack of foundation. Additionally, Plaintiffs’ request that the court bar evidence of “any other” failure to comply with medical instructions is overly broad and vague. Plaintiffs’ argument that other instances of non-compliance should be excluded because Defendant did not investigate other instances and because Dr. Langstein did not opine on other instances is not a proper ground upon which to seek an order barring evidence at trial. Determining relevant evidence is not based on whether a party believed the evidence to be relevant during discovery, but rather whether the evidence *is* relevant. That question cannot be answered without knowing the evidence to be presented.

Lastly, evidence that Mr. Simineri failed to comply with Dr. Brotzman’s medical instructions is probative of the state of Mr. Simineri’s diabetes in 2010 and the role diabetes may have played in his hernia recurrence. The American College of Surgeons, in an informational brochure created for ventral hernia repair patients, lists diabetes mellitus as among six “[r]isk

factors that can contribute to incisional hernia formation”³ In addition, Defendant’s expert, Dr. Langstein, opined that “[i]t is possible that [Mr. Simineri’s] poorly controlled diabetes mellitus contributed secondarily to [the hernia recurrence].”⁴ Thus, contrary to Plaintiffs’ contention, there is evidence establishing a connection between diabetes and hernia recurrence, and evidence that Plaintiffs’ diabetes existed at the time of his recurrence is relevant to causation.⁵

Therefore, Plaintiffs’ motion to bar Defendant from introducing evidence of Mr. Simineri’s failure to comply with medical instructions is **DENIED**.



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JESSICA R. MAYER, J.S.C.

³ Defendant’s Opposition Brief (“Def.’s Opp. Br.”) Ex. F.

⁴ Def.’s Opp. Br. Ex. E at 4; The admissibility of Dr. Langstein’s expert opinion was previously litigated in this case. See Simineri v. LifeCell, No. MID-L-5972-11, Memorandum of Decision on Plaintiffs’ Motions to Bar Testimony of Dr. Howard Langstein, slip op. at 17 (Law Div. Aug. 14, 2015).

⁵ However, evidence of Mr. Simineri’s non-compliance with medical instructions elicited for the purpose of proving that he acted in conformity therewith on other occasions is relevant but inadmissible. See N.J.R.E. 404 (“Evidence of a person’s character or a trait of his character, including a trait of care or skill or lack thereof, is not admissible for the purpose of proving that the person acted in conformity therewith”).