IN RE DePuy ASR™ Hip Implants LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

CASE NO. 293
MASTER DOCKET NO. BER-L-3971-11

CIVIL ACTION

ORDER

THIS MATTER having been opened to the Court on motion by defendants DePuy Orthopaedics Inc., DePuy Inc., Johnson & Johnson, Johnson & Johnson Services Inc., and Johnson & Johnson International ("Defendants") seeking separate bellwether trials in the Gullo, BER-L-0499-12, and Coughlin, BER-L-5353-12, matters; having been jointly opposed by Plaintiffs Barbara Gullo ("Gullo") and Kevin ("Coughlin") and Kathleen Coughlin ("Mrs. Coughlin") (collectively, "Plaintiffs"); the Court having considered moving papers, opposition thereto, supplemental papers as requested by the Court, and the argument of counsel; and good cause having been shown;

For the reasons set forth in the accompanying opinion;

IT IS on this 13th day of August 2013,

ORDERED:

1. Defendants' motion seeking separate trials is DENIED.
2. A copy of this Order shall be served on all counsel within seven (7) days and posted on the court's website.

BRIAN R. MARTINOTTI, J.S.C.

IN RE DePuy ASR™ Hip Implants LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY CASE NO. 293 MASTER DOCKET NO. BER-L-3971-11 CIVIL ACTION

Argued: July 11, 2013[1]
Decided: August 13, 2013

Susan Sharko, for defendants (Drinker Biddle & Reath, LLP, attorneys).

David Buchanan, for plaintiff Barbaro Gullo (Seeger Weiss, attorneys).

Ellen Relkin, for plaintiffs Kevin and Kathleen Coughlin (Weitz & Luxenberg, attorneys).

MARTINOTTI, J.S.C.

Before this Court is a motion by defendants DePuy Orthopaedics Inc., DePuy Inc., Johnson & Johnson, Johnson & Johnson Services Inc., and Johnson & Johnson International ("Defendants") seeking separate bellwether trials in the Gullo, BER-L-0499-12, and Coughlin, BER-L-5353-12, matters. This motion was jointly opposed by Plaintiffs Barbara Gullo ("Gullo") and Kevin ("Coughlin") and Kathleen Coughlin ("Mrs. Coughlin") (collectively, "Plaintiffs").

The issue is whether the Gullo and Coughlin cases should be tried separately based on the factual differences raised by Defendants and the potential for jury confusion during trial. Defendants argue that Plaintiffs' cases are substantially different with

[1] Record supplemented. See infra text accompanying note 4.

respect to the "critical elements" mentioned below, specifically regarding causation. Conversely, Plaintiffs argue that Gullo and Coughlin share the same claims, including failure to warn, and both require a showing of Defendants' knowledge of the product defects.

BACKGROUND/FACTS[2]

On April 17, 2013, the Court issued a case management order classifying the Gullo and Coughlin cases as bellwether cases and ordering that the cases be tried together on January 13, 2014.[3] See Case Management Order 19, dated April 17, 2013, Case Management/Status ¶ 3. On May 28, 2013, the Court held a case management conference in which the parties discussed the cases. See Case Management Order 21, dated May 29, 2013, Case Management/Status ¶ 3.

On June 4, 2013, Defendants filed this motion for separate bellwether trials in the Gullo and Coughlin cases. Opposition was filed on June 24, 2013, and reply was filed on July 3, 2013. Oral argument was held on July 11, 2013, at which time the Court asked counsel to supplement the record arguing or setting forth the percentage of the trial which they believe will consist of generic versus plaintiff specific testimony, as well as their arguments as to the possibility of two juries hearing the generic evidence simultaneously

[2] The facts are limited to those material to the instant motion. For an overview of underlying facts, see the New Jersey Judiciary Multicounty litigation Center website, http://www.judiciary.state.nj.us/mass-tort/depuy/index.htm.

[3] Prior to a case management conference, each party is required to submit an agenda. The Court reviewed same, conferred with counsel, and subsequently went on the record for the April 17, 2013, conference. During that conference, Plaintiff requested the cases be tried jointly, which was granted without prejudice to this motion. Also, the first MDL trial will begin on September 9, 2013, and the first New Jersey bellwether trial, McDonald, BER-L-1856-12, is scheduled to begin October 21, 2013. See Case Management Order 20, dated May 24, 2013, and Pre-Trial Order, dated July 26, 2013.

before begin separated for the plaintiff-specific portion of the trial.[4] See Case Management Order 22, dated July 11, 2013, Case Management/Status ¶ 3(c).

I. The Plaintiffs[5]

A. Gullo

Barbara Gullo, married and 72 years old, began having hip problems in the summer of 2008 and had ASR XL total hip replacement surgery in December 2008 from which she successfully recovered and returned to work as a secretary. After the product was recalled in August 2010, Gullo had her chromium and cobalt levels drawn on four separate occasions, showing increased chromium and cobalt levels. She underwent revision surgery in September 2011 and, due to an infection, a second revision surgery in October 2011. In November 2011, Gullo suffered a heart attack.

Defendant notes that Gullo attributes her heart attack to her multiple surgeries despite her alleged risk factors, and therefore Defendants will have to introduce expert testimony, specific to this Plaintiff, as to causation relating to the heart attack. Finally, in contrast to Coughlin, Gullo is seeking lost wages, but her spouse is not claiming loss of consortium.

B. Coughlin

Kevin Coughlin, married and age 60, began feeling hip pain in the 1990s and underwent total hip replacement surgery in June 2009 from which he initially recovered well. In April 2011, due to the recall and Coughlin's complaints of pain, Coughlin underwent a revision surgery and a blood test that showed elevated chromium and cobalt

[4] In the supplement submissions, both parties rejected the suggestion of two juries as their first option.
[5] Parties dispute the relevance of the facts. Defendants argue that each difference further distinguishes the individual Plaintiffs, while Plaintiffs argue that most differences are immaterial to adequacy of the label and causation and that Plaintiffs are therefore substantially similar.

levels. In October 2012, he began to have some right inguinal area swelling, for which he was referred to a urologist, although the issue remains undiagnosed.

Defendants argue that Coughlin suffers from several health issues that caused him to experience pain, such as arthritis and degenerative joint disease, making it difficult to attribute any particular pain specifically to the ASR XL product. Defendants argue that they will need case specific experts to explain Coughlin's medical conditions and causation. Finally, Coughlin's wife is a named plaintiff seeking damages for loss of consortium, but unlike in Gullo, Coughlin is not seeking lost wages.

II. Defendants' Argument

Defendants contend that separate trials are justified because the differences in the Plaintiffs' cases outweigh any similarities, and that those differences would result in confusion to the jury and violate Defendants' due process rights if the cases remain consolidated. Defendants also contend that the Gullo case should not serve as a bellwether case as it is not representative of the range of cases. Defendants assert that Gullo is certain to be tried as a bellwether case, and an arguably inappropriate one, so long as it is consolidated with another case.

Defendants argue that products liability cases often require separate trials based on factual differences. Though Defendants concede two similarities between Gullo and Coughlin – that Plaintiffs are New York residents who received ASR XL hip replacement systems – Defendants also argue that the facts underlying each Plaintiff's case are completely different, warranting separate trials.

Defendants' supplement contends that two ASR trials have already taken place and each took approximately six weeks. Approximately 2 weeks of that time was case-

specific testimony – therefore four weeks was generic testimony – although Defendants argue that there was only three weeks of live generic testimony. Defendants argue that this live generic testimony is not a sufficient amount to justify joint trials.

Regarding the possibility of two juries, Defendants suggest that it would add two weeks to the trial, totaling eight weeks for the consolidated trial. Defendants also argue that multiple juries would be cumbersome, as presentation of the evidence would be disjointed and repetitive. Finally, Defendants cite State v. Corsi, 86 N.J. 172, 178 (1981), in which the Court stated, with respect to a criminal cases, that multiple juries are not recommended absent an uncomplicated situation, minimal movement of the juries, and physical separation of the juries.

III. Plaintiffs' Argument

Plaintiffs argue that the cases should remain consolidated because New Jersey courts favor consolidation, and the minor differences in Plaintiffs' cases do not warrant separate trials. To support their contention that a jury would not be confused by a consolidated trial, Plaintiffs cite several consolidated products liability cases in which the differences among plaintiffs were more significant, such as differences in package inserts (Levaquin litigation) and differences in residencies (Vioxx litigation).[6] Plaintiffs note that, despite these differences, the cases were consolidated and juries were able to return separate verdicts for each plaintiff, which Plaintiffs argue demonstrates the juries' ability to avoid confusion in consolidated cases.

[6] See Amended Order Consolidating Cases For Trial, In re. Levaquin Litig., Case No. 286 (Law Div. May 3, 2011), attached as Pls.' Ex. 5; Andrew Pollack, Mixed Verdicts for Merck in Vioxx Cases, N.Y. Times, Mar. 3, 2007, available at http://www.nytimes.com/2007/03/03/business/03vioxx.html (explaining how one jury engaged in a two-phase process, the first of which required them to examine defendant's behavior, and the second of which related to plaintiff-specific causation resulting in differing verdicts between two plaintiffs).

Plaintiffs also argue that the cases are legally and factually similar. Plaintiffs indicate that all claims are the same between Gullo and Coughlin, except Coughlin additionally asserts claims under New York's General Business Law §§ 349-50 and Mrs. Coughlin asserts a claim for loss of consortium. Moreover, New York law governs both Plaintiffs' cases.

Factually, Plaintiffs argue that Defendants did not accurately describe Plaintiffs' medical histories. Rather, Plaintiffs argue that both Plaintiffs underwent hip replacement surgery due to degenerative joint disease, and both underwent revisions due to pain and elevated metal ion levels. Further, Plaintiffs contend that each Plaintiff's surgeon uses the same sales distributor from the upstate western New York region, and both products were implanted around the same time, therefore the same Instructions For Use are applicable.

Finally, Plaintiffs suggest that Defendants' primary reason for filing this motion is to have the Court reconsider its decision to try Gullo as a bellwether case. Plaintiffs argue that Gullo is an appropriate bellwether case and, even so, parties had ample opportunity to submit these arguments to the Court prior to the Court's selection.

With respect to the Court's request for a supplement, Plaintiff argues, based on the two ASR cases already tried, the majority of the witnesses and exhibits relate to generic testimony. Specifically, Plaintiffs state that one case had 17 company representatives as general fact witness while the other had 11; one case had 10 expert witnesses that Plaintiff argues were applicable to multiple cases, while the other also had 10; the remaining 10 and 9 witnesses, respectively, were case-specific. Therefore, Plaintiff argues that the majority of the witnesses related to multiple cases, justifying a consolidated trial.

However, Plaintiffs argue that a consolidated trial with one jury and two verdicts, rather than two individual juries, would be most effective.[7] Plaintiffs, like Defendants, cite Corsi, supra, for the proposition that multiple juries should be used only in rare situations. Plaintiffs further argue that multiple juries opens the door for error, prejudice, and complication, even the possibility of each jury reaching inconsistent verdicts based on generic questions of fact regarding design defect and adequacy of the label. Therefore, Plaintiffs argue that one jury reaching two verdicts would be a better option because it would prevent inconsistency in deciding similarly situated issues, while still allowing the jurors to evaluate the individual facts of each case.

DECISION

Rule 4:38-1(a) governs consolidation of cases. The purpose of this rule is "to eliminate multiplicity of litigation and to enable the courts so to arrange pending causes that the same facts and transactions would not undergo the inconvenience of double litigation." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. Super. 143, 144 (Ch. Div. 1951); accord K.M. v. S.S.M., 2008 N.J. Super. Unpub. LEXIS 985, at *11 (App. Div. 2008) ("The rule-based right to consolidation turns on, among other things, an analysis of the need to avoid inconsistent rulings with the importance of conserving judicial resources.").

Under Rule 4:38-1(a), the Court may, on its own motion, order actions consolidated "when actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending." R. 4:38-1. In evaluating whether cases have common questions of law and fact thereby qualifying them for consolidation,

[7] Despite this argument, Plaintiffs consent to using two juries, as they would rather use two juries in a consolidated trial than have two separate trials.

the Court must examine whether the cases "share the same critical elements of defendant's knowledge of inherent risks of the product, proximate cause of failure to warn, and allocation of damages." Pressler, Current N.J. Court Rules, comment on R. 4:38-1 (2013).

It is through the bellwether process[8] that the Court often begins trying MCL cases, and the same policies supporting consolidation – i.e. avoiding duplicative litigation – also support the bellwether process. As such, bellwether trials "can draw on many of the standard practices for managing complex trials," including joint trials, bifurcated trials, or "[a] consolidated common issues trial with some plaintiffs presenting their claims against defendants on all issues, yielding findings on common issues." Manual of Complex Litigation (Fourth) 22.93; see also New Jersey Multicounty Litigation (Non-Asbestos) Resource Book [hereinafter Resource Book] 22-33, 4th ed. (Jan. 2013). This Court is of the opinion the purpose underlying consolidation is magnified in MCL; namely, the addition of more cases from which to select those that will best represent the universe of the Plaintiffs' claims and test the sufficiency of the defenses interposed by the Defendants. These additional samples may provide parameters which will form the foundation of potential settlement ranges or frame issues for future litigation.

The Court finds that the cases should remain consolidated for trial. First, the Court is persuaded by New Jersey's strong public policy of consolidation and judicial efficiency. See R. 4:38-1; Pressler, Current N.J. Court Rules, comment on R. 4:38-1

[8] As quoted in the Manual of Complex Litigation, the court in In re Chevron USA, Inc., 109 F.3d 1016, 1019 (5th Cir. 1997), stated, "A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to a universe of claimants has as a core element representativeness--that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence . . . ." Manual of Complex Litigation (Fourth) 22.315 & n. 441.

(2013); K.M., supra, 2008 N.J. Super. Unpub. LEXIS 985, at *11; Judson, supra, 17 N.J. Super. at 144. Second, there are a sufficient number of similar legal and factual issues such that separate trials would lead to multiplicity of litigation – the exact situation Rule 4:38-1 attempts to avoid. Specifically, both Plaintiffs' cases are governed by New York law, and Plaintiffs' claims are substantially identical, therefore common questions of law exist. Common questions of fact also exist and, although there are some differences, the Court finds it sufficient that: Plaintiffs underwent ASR XL hip replacement surgery due to degenerative joint disease; Plaintiffs underwent revisions due to pain and elevated metal ion levels; Instructions for Use were the same at the time of each Plaintiffs' surgery; and Plaintiffs' surgeons interacted with the same sales distributor.

The Court notes the factual differences raised by Defendants that could affect causation, however the Court also realizes that, particularly in a medical and products liability setting, no two Plaintiffs will have identical factual backgrounds. If courts were to deny consolidation based solely on factual differences that may affect causation, cases would never be consolidated. As outlined in the Resource Book, one can see that consolidation is an option that is employed to "to structur[e] trials to achieve greater efficiency and expedition in the resolution of MCL cases." Resource Book 22-23. Because consolidation is a viable option in multicounty litigation and because these two cases do have a fair number of similarities, the Court does not believe that consolidation will cause prejudice to the Defendants or confusion to a jury.

Defendants rely heavily on In re Consolidated Parlodel Litigation, 182 F.R.D. 441 (D.N.J. 1998), for the proposition that consolidation is not appropriate for products liability actions. However, as previously discussed, the Resource Book lists

consolidation as a method for handling trials with large numbers of plaintiffs. Because the Resource Book defines the class of cases that may become multicounty litigations as "large numbers of claims associated with a single product," "mass disasters," and "complex environmental cases and toxic torts," the portion discussing trial consolidation must be applicable to product liability cases. Resource Book 1 (emphasis added).

Further, with respect to the information requested by the Court in the parties' supplements, the Court finds that the majority of the testimony in the case is generic testimony. Defendants' supplement states that only one-third of the trials already conducted consisted of case-specific testimony. Additionally, the Court is not persuaded by Defendants' argument that the trial would be prolonged by two weeks – totaling eight weeks – if the trials were joined. If each case were tried separately, twelve weeks of trial would be required according to Defendants' calculations that each case takes six weeks. The difference of four weeks is substantial considering it equates to two-thirds of the original six-week projection per trial, or the amount of generic testimony. The Court does not find it efficient to repeat four weeks of generic testimony.

Finally, Defendants' argument regarding the appropriateness of Gullo as a bellwether case is irrelevant with respect to consolidation. Defendant argues that Gullo, when consolidated with Coughlin, will definitely be tried despite Defendants' contention that it should not be a bellwether case. Thus, Defendants appear to seek separate trials so that Gullo will not be tried. Both parties had an opportunity to submit their bellwether trial selections and arguments and, from those submissions, the Court chose these bellwether cases. The time has passed for trial selection discussion and such discussions

are not relevant to the issue of consolidation, as no new facts have come to light of which the Court is aware.

CONCLUSION

Accordingly, and for the reason set forth above, Defendants motion is DENIED.