

IN RE: DIET DRUG LITIGATION
VENUED IN BERGEN COUNTY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY

DOCKET NO. BER-L-6016-04
DOCKET NO. BER-L-6015-04
DOCKET NO. BER-L-6006-04
DOCKET NO. BER-L-6013-04
DOCKET NO. BER-L-6050-04

OPINION

FILED
JAN 17 2005
ROBERT C. WILSON
J.S.C.

DECIDED: JANUARY 13, 2006

WILSON, J.S.C.

This matter arises out of Plaintiffs' claim for damages alleged to have incurred from the manufacture, sale, distribution and/or use of the diet drug Pfenfen. The Defendant's motion currently in front of the Court seeks to allow Defendant's counsel to conduct *ex parte* interviews with the individual plaintiffs' physicians as a means of informal discovery. These are referred to as Stempler interviews from the New Jersey Supreme Court decision of Stempler v. Speidell, 100 NJ 368 (1985).

Plaintiffs argue that these *ex parte* interviews should be prohibited because they violate privacy rights protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Further, Plaintiffs contend that Stempler interviews are inappropriate in mass tort litigation. Plaintiffs contend that the Courts have consistently held that informal discovery interviews are inappropriate in multi-docketed cases.

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Jim Goodman
DEPUTY CLERK

Recent History of New Jersey Court Opinions Regarding the Availability of Stempler Interviews

This area of law had been relatively undeveloped in case law until the past 20 years. Since Stempler was decided in 1985, however, a growing number of courts in New Jersey have addressed the issue currently before this Court.

In Smith v. American Home Products Corp. Wyeth-Averst Pharmaceutical, 372 NJ Super. 105 (Law Division 2003), Judge Corodemus found that Stempler interviews were not prohibited by HIPAA. She also found, however, that under the Stempler-Court's analysis that when the matter involves "extreme cases" that *ex parte* interviews are not mandatory. Rather, it is discretionary to the court. The Smith decision held that the court's discretion in such matters extends to denying Stempler interviews and ordering formal discovery proceedings in lieu thereof, because mass tort cases are "extreme."

Stempler interviews were denied in Smith because of the large number of cases that had been filed and the very short period of time before trial was to begin. The Smith decision did not outright bar the allowance of Stempler interviews in future mass tort cases.

In a Case Management Conference from January 2, 2004, Judge Charles J. Walsh, further opined that Stempler interviews were inappropriate in mass tort cases. Judge Walsh denied allowing these *ex parte* communications in the matter of Bonanno v. American Home Product. This again concerned another set of diet

drug mass tort cases. He noted the difficulty to control and administer these interviews for such a large docket of cases.

Both Smith and Bonanno were used in deciding against a similar motion to conduct Stempler interviews in In Re Vioxx, by Judge Carol E. Higbee, on November 17, 2004. Citing Bonanno, Judge Higbee explained that the decision on whether to allow Stempler interviews must be based upon the ability to manage them in the mass tort arena, when there are hundreds being conducted simultaneously. This Court recognizes, as did the Vioxx Court, that while the unpublished opinion of the Bonanno Case Management Conference is not controlling and reliance on such is disfavored by the Court Rules, the problems faced in both those situations and the current litigation are similar.

Court's Analysis of Stempler Interviews and Their Utility to the Pending Diet Drug Litigation

Defendant cites the two April 28, 2005 decisions by Judge Charles Walsh of Sholar v. Wyeth and White v. Wyeth, docket numbers BER-L-2568-04 and BER-L-2572-04, respectively. In both cases, motions seeking to conduct Stempler interviews were GRANTED in related diet drug litigation. The defendant argues that the appropriateness of Stempler interviews in cases involving the same matter currently before the Court, controls the application of Stempler interviews. The Court disagrees.

Those decisions are easily distinguished from the current motions. In those decisions Judge Walsh was only facing the litigation of thirteen (13) causes of action. Further, those cases were headed to trial within only one and a half months and directly after Judge Walsh held that the plaintiffs' were entitled to be relieved of their heeding presumption. The effect of the abrupt switch in the burden of carrying the evidence onto the defendant should not be overlooked as to why Judge Walsh made a contrary decision to what he and Judge Higbee thought should be the treatment of Stempler interviews in mass tort cases. The Court also notes that the diet drug litigation docket had been greatly reducing in size when Judge Walsh rendered his new opinion permitting Stempler interviews in direct contravention to his opinions in Bonanno. Even in granting the defendants' motions in Sholar and White, Judge Walsh pointed out the discretion a court must be afforded in mass tort situations when he wrote that, "the Court agrees with [the Smith Court] that mass torts are 'extreme' cases, requiring special management."

Judge Higbee stated in Vioxx that, "Stempler interviews were **designed** to allow a simpler, cheaper, more efficient and informal means of discovery than depositions (*emp. added*)." That is not their result, however. Just as in that case, in the present matter, none of those goals will be achieved by granting the defendant's motion. Allowing Stempler interviews to be conducted in the current litigation will only open the "floodgates of litigation" in terms of an abundance of motion practice. This motion practice will arise out of the difficulty of overseeing the *ex parte* interviews on the part of the court.

In mass tort dockets, the alleged efficiency of allowing Stempler interviews does not outweigh the impracticality of doing so. The Court does not have unlimited judicial resources nor unlimited time. To permit these interviews opens a "Pandora's Box." Litigation over the litany of potential problems (ie: length of notification of plaintiffs' doctors, valid consent disputes, valid authorization submission on HIPAA, etc.) will severely limit the Court's ability to move these cases to trial. The Court finds it important to note that such disputes occurred over just the handful of Stempler interviews which Judge Walsh did allow. Additionally, the defendant is now aware and has had abundant time to anticipate the shifting of the heeding presumption in these cases. This removes yet another major factor that the Sholar and White Court utilized in permitting Stempler interviews.

Possible conflict of law between New Jersey and the various states of the plaintiffs' physicians provides yet another reason that Stempler interviews are inappropriate in the pending litigation. Plaintiffs' physicians reside in states across the country, including but not limited to Arizona and Arkansas. Under New Jersey conflict of law principles, the Court is to apply the "governmental interest" test and determine the law of the state with the greatest interest in the outcome of the litigation. Fu v. Fu, 160 NJ 108, 117 (1999). As Judge Walsh highlighted in his April 28, 2005 opinion, this is a two-step analysis.¹ The issue in

¹ The Court must first determine, "on an issue by issue basis, whether there is an actual conflict between the laws of the states. If so, it must determine which state has the most significant relationship to the parties and occurrence." Fu, 160 NJ at 118.

the pending litigation is the sheer variety of jurisdictions to which the Court will be forced to apply this test to. In the previous decision from April 28, 2005, only 13 cases (all from North Carolina) were being analyzed. As discussed supra, the vast number of cases currently ready to be restored is near 4,000. Additionally, there exists a disparity of jurisdictions involved due to this number. The result of conducting conflict of law analyses in a mass tort case, such as this, can only further slow the progress of these matters. The Court is also conscious of the disparate effect that this analysis may produce. Certain states may allow Stempler interviews, while others may not. The result could be that similar cases tried by this Court will have divergent results solely due to the forum state of plaintiffs' physicians, and the information then gathered during these informal *ex parte* interviews. In the interest of fairness and to avoid numerous conflict of law decisions the use of Stempler interviews should be DENIED.

Conclusion

The Court, under Stempler, has been given discretion to forbid Stempler interviews in "extreme cases." The pending action is just that. Upon reinstatement of the previously vacated Pfen-Fen cases on January 20, 2005, the number of cases to return to the Court's docket will be in the thousands. The motions to restore these cases are unopposed. The Court will be faced with the second largest mass tort litigation in New Jersey, which will become irretrievably delayed further upon the granting of defendant's motion. These cases were

already needlessly delayed for almost a year when the parties requested dismissal because they had indicated they would be settled. As of today, the Court is aware that less than 1,000 cases have been filed with stipulations of dismissal with prejudice, leaving a potential of over 4,000 cases to be adjudicated. As the previous progeny of mass tort decisions hold, regular discovery through full physician depositions should be completed in lieu of Stempler interviews. As such, the defendant's motion is DENIED. An appropriate form of Order has been attached.



Hon. Robert C. Wilson