

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products)	
Liability Litigation,)	File No. 08-md-1943
)	(JRT/AJB)
)	
)	
)	Minneapolis, Minnesota
)	May 28, 2010
)	1:39 P.M.
)	

BEFORE THE HONORABLE **JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING - VIA TELEPHONE)

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
 LEWIS J. SAUL, ESQ.

For the Defendant: **JAMES DAMES, ESQ.**
 WILLIAM ESSIG, ESQ.
 WILLIAM H. ROBINSON, JR., ESQ.
 TRACY J. VAN STEENBURGH, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1:39 P.M.

(In open court via telephone.)

THE COURT: Good afternoon, everyone. Can you hear me okay?

MR. GOLDSER: Yes.

THE COURT: Okay. We're in the courtroom because we're in the middle of a trial, and it was just easier to do it this way. This is civil case number 08-1943, In Re: Levaquin Products Liability Litigation. We have a telephone conference today, and let's have the participants indicate their names for the record.

First for the plaintiffs, Mr. Goldser?

MR. GOLDSER: Good afternoon, Your Honor, Ron Goldser for plaintiff. I trust you can hear us as well adequately?

THE COURT: We can.

MR. SAUL: Good afternoon, Your Honor, Lewis Saul also for plaintiffs.

THE COURT: For the defense?

MR. DAMES: John Dames for the defendants, Your Honor.

MR. ROBINSON: Bill Robinson for the defendants, Your Honor.

MS. VAN STEENBURGH: Tracy Van Steenburgh for the defendants.

1 MR. DAMES: I also have Bill Essig here with me,
2 Your Honor, in my office.

3 THE COURT: Okay. Very well. I believe we are
4 going to discuss the renewed motion for consolidation this
5 afternoon, is that correct, Mr. Goldser?

6 MR. GOLDSER: Ron Goldser, yes, Your Honor, I
7 believe that is correct. As Mr. Robinson and I discussed
8 yesterday in the taxicab returning from a deposition to the
9 airport, we don't think that there is anything else that
10 requires your attention at this point.

11 Obviously if the Court has questions about other
12 matters, we're happy to address them, but the only thing we
13 wanted to get your attention on was the consolidation
14 motion.

15 THE COURT: Okay. That's fine. Let's just
16 proceed with that this afternoon. Who is going to make a
17 brief argument on behalf of the plaintiffs?

18 MR. GOLDSER: Ron Goldser, Your Honor.

19 THE COURT: Mr. Goldser, I have reviewed the
20 submissions of the parties, and obviously having heard this
21 motion once before, I have substantial familiarity with it,
22 so I don't know that we need to take too long, but I
23 appreciate hearing whatever you would like to say.

24 MR. GOLDSER: Thank you, Your Honor. I certainly
25 had assumed that you had reviewed our materials and knew

1 the substance of what we were after. So I guess I will
2 jump right into the middle of the subject matter. The
3 place I would like to start is thinking about this from the
4 perspective of what the defense has said in their reply
5 memorandum on this renewed motion.

6 Basically if you follow the slippery slope of
7 their argument, and I know we alluded to this on our
8 pleadings, there is no way that any of these cases will
9 ever be consolidated simply because there will always be
10 different doctors and different states of knowledge and
11 different medical history, and of course, the standard for
12 consolidation under Rule 42 is hardly a class certification
13 standard.

14 It's very different from that, and I understood
15 what the Court was previously telling us. It is likely --
16 if I overstep I'm sure you will advise me. It is likely
17 that down the road, perhaps as early as the second trial in
18 the Court's mind, that there will in fact be consolidation,
19 and I believe that we got similar reading from Judge Higbee
20 when she addressed this issue in one of the status
21 conferences in New Jersey.

22 If that's true and if consolidation will occur at
23 some point, preferably sooner rather than later, it really
24 takes the wind out of the sails of defendants' entire
25 argument about the differences between and among these

1 cases.

2 Indeed, if you look back at your original order
3 on this issue, Your Honor, you note that as an initial
4 matter, there are substantial similarities in the facts
5 between and among the cases we propose for consolidation
6 and that there would be a substantial advantage in reducing
7 parties' costs and the Court's time and resources devoted
8 to these cases. So there are lots of reasons why these
9 cases should be consolidated and should be consolidated at
10 some point.

11 So where that takes me pretty simply is, why
12 should there be consolidation in the first case as opposed
13 to the second case, and I think there is really good reason
14 for that, and this is something I'm not sure that we really
15 have addressed because we have talked about consolidation
16 more as a general matter and as a matter of which case do
17 you do it in.

18 I was thinking about that a lot this morning,
19 thinking what difference does it make if we have a single
20 case tried the first time in order to perhaps tease out
21 some of the rulings that might be germane to that case.
22 Certainly a jury would find it very easy to hold in their
23 mind the variations between and among a plaintiff or two
24 plaintiffs or three plaintiffs.

25 That's done all the time. I don't see that as a

1 barrier to consolidation by any stretch of the imagination,
2 and of course, the Court has done this on many occasions,
3 and so, you know, keeping cases separate is not a big deal.
4 What about this notion about it being complicated,
5 particularly the first time around if we have more than one
6 case, and it struck me that it is in fact more complicated
7 if we have only one case. Now that may sound backwards,
8 but here's why:

9 If the Court is addressing evidentiary issues in
10 something of a vacuum which is created by the existence of
11 one case, it would be much more difficult for the Court to
12 think about how such rulings will be used and useful in
13 subsequent bellwether cases.

14 After all, these are bellwether cases, and the
15 purpose of these bellwether cases is, you know, many-fold,
16 to establish values of cases, to see how these cases turn
17 out when they're tried, but also if and when we don't reach
18 an ultimate resolution of these cases, to be able to send
19 back to remand courts the cases with a report on
20 evidentiary issues and how they play out.

21 Now, if you're making rulings in a single case
22 without the benefit of variations from another case at the
23 same time, those rulings may have to change the second time
24 around. Now, certainly jury instructions when you're
25 dealing with one state's cases like Minnesota, you know, if

1 you try John Schedin's case versus Cal Christensen's case,
2 I can't for the life of me imagine the jury instructions
3 are going to vary from one of those cases to the other,
4 given the similarity, their age, their gender, the nature
5 of their injuries and what have you.

6 There might be some variation in evidentiary
7 rulings to some extent, but I would think that the Court
8 would want to be very careful about making evidentiary
9 rulings in case A that might have a bearing on case B
10 without really having the particulars of case B in front of
11 you.

12 But if you do try two cases or three cases at the
13 same time, the kinds of evidentiary rulings that the Court
14 can make with consolidated cases will really be much
15 broader and have a much more beneficial effect from a
16 bellwether perspective as we go farther down the road and
17 can really get an understanding of how these cases will be
18 tried, what the evidentiary rules are so that the event of
19 remand or the event of additional bellwether cases will
20 really have a much better understanding, and you know, the
21 same really is true for a jury.

22 If the jury is thinking about what is the
23 significance of John Schedin's tendon rupture without
24 surgery versus Cal Christensen's tendon rupture, and if my
25 memory serves me correctly, and I forgot to double-check,

1 he did have surgery or another plaintiff with surgery, and
2 they can weigh the relative values of those, and they will
3 have an ability to understand how doctors in general
4 respond to warnings and changes in labeling and black box
5 warnings and practices.

6 In Schedin's case, he's got a prescribing doctor
7 from Edina. In Cal Christensen's case, he's got a
8 prescribing doctor from out in Worthington, and those kinds
9 of variations would be helpful, I would think, to a jury to
10 understand the full range of what goes on in the
11 pharmaceutical world.

12 So from my perspective, trying one case is
13 isolated and does not prove nearly as beneficial to the
14 bellwether process as trying multiple cases even from case
15 one. So starting with the first order, the Court asked us
16 to provide additional proof about the similarities in the
17 cases.

18 We have certainly done that. The cases are
19 exceedingly similar. We are at the point where little
20 further discovery or information is really going to be
21 available to the Court to decide whether they are
22 sufficiently similar to try from day one, and I think it
23 would be helpful to the Court and to juries if multiple
24 cases were tried together from the first case, so we would
25 ask that you do so.

1 In the event that the Court decides that we will
2 try a single case first, obviously plaintiffs prefer the
3 Schedin case. The defense has put up the Christensen case.
4 It seems to me that plaintiffs ought to get their first
5 pick first because we carry the burden of proof.

6 I think that's all I need to say today.

7 THE COURT: Thank you, Mr. Goldser.

8 Who is going to argue for the defense?

9 MR. DAMES: John Dames, Your Honor.

10 THE COURT: Go ahead, Mr. Dames.

11 MR. DAMES: Thank you, Your Honor. I'm going to
12 be brief because the -- I believe what Mr. Goldser has
13 argued is that he believes that there is an inevitability
14 about what the Court will do, therefore why don't we just
15 simply jump to that inevitability.

16 I believe this first trial will answer many
17 questions about the nature of this litigation, the issues
18 that the Court will have to rule upon and very complicated
19 issues that may ultimately be the subject as a result of
20 *Daubert* motions that will be brought before the Court, but
21 we will learn something of great value from the first
22 trial.

23 And to suggest otherwise I think is a little
24 misleading, and what we will learn from the first trial
25 will inform us as to whether it is even desirable to

1 consolidate cases in the future and how to consolidate
2 cases if that is the Court's decision, but as the manual
3 suggests, the best thing to do with an immature tort is to
4 try a single case.

5 And I believe that is good advice, particularly
6 since a single trial here is close upon us and will be
7 somewhat abbreviated, that is it's not going to go on
8 forever. It will be something that we will be easily able
9 to accomplish within a three- to four-week period, and then
10 I think a lot of the issues that plaintiff raises about the
11 similarities of cases will come to light.

12 And the kinds of similarities and the kinds of
13 rulings that the Court may wish to make in a consolidated
14 case informed as to how those issues are applied to each
15 plaintiff because after all, as a multiple plaintiff case
16 proceeds, the evidentiary rulings the Court will make will
17 have to be subject or limited to one plaintiff at a time.

18 I mean, it is going -- things may be admissible
19 as to one plaintiff and not admissible as to another
20 plaintiff. I find it to be more confusing abstractly to me
21 certainly to think of trying something for the first time
22 with multiple plaintiffs when these cases after all are not
23 identical, and I want to be able to point out how many
24 differences exist.

25 We took the deposition a couple days ago of

1 Dr. Zizic, who is the case specific expert identified by
2 plaintiff. We didn't complete his testimony, but he issued
3 case specific reports on each of the six bellwether
4 plaintiffs.

5 In the course of the deposition, we went through,
6 of course, what the diagnoses were for each plaintiff, what
7 the predisposing factors to the development of tendon
8 rupture were for each plaintiff. Now, we got through only
9 a couple, so we still have some time to spend with
10 Dr. Zizic, but already differences are coming out.

11 As an example, Mr. Schedin had gout issues for a
12 prolonged period of time. Now, there is a disagreement.
13 Dr. Zizic believes that the gout that Mr. Schedin had,
14 although abstractly that is a predisposing factor and could
15 be a cause of tendon rupture, that in his case it didn't
16 rise to the level of it, but that is a predisposing factor
17 he had and was not present in the others.

18 Mr. Schedin had significant kidney issues.
19 Kidney deficiencies can cause tendon rupture. Mr. Schedin
20 was a steroid user. Mr. Schedin had serious knee problems
21 and had knee replacement surgery. That is a problem in
22 terms of his recovery.

23 Mr. Schedin clearly is old, and that is an
24 independent risk factor for tendon rupture, and he had in
25 terms of the propriety of his prescription for Levaquin, he

1 had a failure with a prior antibiotic and so was put on
2 Levaquin to address the infection the other antibiotic
3 failed to treat.

4 Now, I could go on, and I would bore the Court,
5 but there are a series of very different factors in each
6 case that go to causation, that go to the adequacy of the
7 warning, that go to the ability to recover from whatever
8 the tendon issue is and the nature and length of time the
9 recovery would take.

10 There is also the issue of the propriety of the
11 warnings of each physician in light of the physical
12 condition of the plaintiff, in light of the time frame the
13 prescriptions were given and in light of the prior
14 experience and antibiotics of these plaintiffs, and the
15 knowledge will have some variables in it for each
16 prescribing physician.

17 One prescribing physician, Mr. Schedin's doctor,
18 Dr. Beecher, says candidly in his deposition I was
19 responsible. Another prescribing physician Dr. Baich,
20 which was for Mr. Kirkes, said I knew about tendon rupture.
21 He was aware of tendon rupture, and in his case, in fact,
22 Mr. Kirkes brought to him his own patient insert with the
23 underlying tendon rupture to show the doctor that that was
24 something he had been informed about and wanted to discuss
25 because he now had leg pain.

1 So each case will have so many variables that
2 some of them, some of them the Court may ultimately deem
3 are not significant, but others the Court may determine
4 are, and that will be a very important analysis to apply to
5 the way the cases are organized in the future. So I do
6 think it's premature.

7 I'm not suggesting that I am necessarily right at
8 the end of the day or Mr. Goldser is necessarily wrong.
9 I'm suggesting that what we need to do is to have this
10 first trial on an individual basis so we can identify which
11 issues are in fact significant, which are not quite so
12 significant, which may be in common with other cases and
13 which may not.

14 So that is an experience we cannot avoid. I
15 think that it is important to have it and to learn from it.

16 Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Dames.

18 Mr. Goldser, did you wish to say anything else?

19 MR. SAUL: Your Honor, this is Lewis Saul. May I
20 have a moment or two?

21 THE COURT: You may, Mr. Saul.

22 MR. SAUL: Thank you. Let's talk about what is
23 really going on here, not what the plaintiffs are arguing
24 or not what the defendants are arguing. What is really
25 going on here is the plaintiffs want, among other things,

1 they want three plaintiffs because, first, they have the
2 same injury. They're the same age, around the same time as
3 the drug was prescribed, and it's helpful obviously if the
4 Court -- if the jury sees that there is three plaintiffs
5 all with the same injury.

6 That's why the defendants don't want to
7 consolidate a trial. They don't want the jury to see three
8 people, three plaintiffs, with the same jury because at
9 trial they're going to argue that this just doesn't happen
10 to very many people and it's a very rare occurrence.

11 Plaintiffs want the jury obviously to see that
12 it's not a rare occurrence, and here is three plaintiffs,
13 same age, same state, same injury. The other thing that --
14 the other matter that I would like to bring to the Court's
15 attention, and most of these bellwether trials and most
16 products liability cases right at the day of trial or day
17 before trial or whatnot, the cases settle.

18 And I'm concerned because our patients, our
19 clients are all elderly, and I don't want to push this case
20 on forever, and we want to get to it. So we get the trial.
21 We settle the case. Next case up, we settle that case, and
22 it goes on and on. And that is really unfair to these
23 plaintiffs who just had their cases filed, all of them, the
24 bellwethers, a few years ago.

25 Just one last comment in closing. As Mr. Dames

1 said, we would learn a lot from one plaintiff. I think we
2 would learn three times as much from a consolidated trial
3 with three plaintiffs. With that, I rest.

4 THE COURT: Thank you, Mr. Saul.

5 Mr. Goldser, did you want to have any follow-up?

6 MR. GOLDSER: I have two comments, Your Honor,
7 two things that I agreed with Mr. Dames about. One was the
8 one that Mr. Saul just mentioned, that is we will learn
9 more from multiple plaintiffs than we will from a second or
10 from a single trial, and the other thing that Mr. Dames
11 said was that he was easily confused, and I would like the
12 record to reflect that I agree with him on that.

13 THE COURT: Okay. Well, now that we've got that
14 settled --

15 MR. DAMES: I don't know what just happened.

16 THE COURT: You must be confused then, Mr. Dames.

17 MR. DAMES: I am, Your Honor.

18 MR. GOLDSER: My point made.

19 THE COURT: Okay. Anything else anyone wishes to
20 say on the motion?

21 MR. DAMES: No, not at this end, Your Honor, not
22 from the defense.

23 MR. GOLDSER: Not for plaintiffs, Your Honor.

24 THE COURT: Okay. I am going to deny the
25 plaintiffs' motion to consolidate the first trial. I have

1 looked at this issue carefully. This is an integral part
2 of the management of a multi district litigation set of
3 cases.

4 I find specifically but only as to this issue for
5 the first trial that the plaintiffs have not met their
6 burden of showing that judicial convenience and economy
7 would outweigh at this stage the risks of prejudice and
8 possible confusion, so I'm going to deny this motion. This
9 is not a precedent for the second case.

10 It may be that we do one or two individual cases,
11 and then we will have a basis to go forward with handling a
12 number of cases at one time. Frankly, looking at all of
13 the issues in the case, the varying issues involving
14 physicians' knowledge and dosages and medical histories and
15 the injury and treatment, although surely there are
16 similarities among these three plaintiffs, the Court would
17 feel more comfortable, since this is a bellwether trial, in
18 addressing one of the plaintiffs first and really
19 understanding what the case is all about, and I think we
20 would be in a much better position at that point to
21 determine what particular cases can be consolidated.

22 I do anticipate if we are trying a number of
23 cases within this multi district litigation that there will
24 be consolidated trials. In light of that, I will also give
25 the plaintiffs their choice of the first case, which I

1 believe would be Mr. Schedin.

2 Is that correct, Mr. Goldser?

3 MR. GOLDSER: Yes, it is, Your Honor.

4 THE COURT: Okay. We will start with
5 Mr. Schedin.

6 MR. GOLDSER: Okay.

7 THE COURT: If there is, if we are approaching a
8 last minute settlement, I would expect the parties to be
9 ready with another trial. We have the dates set aside in
10 November. I do want to try a bellwether case for this MDL
11 during that period of time unless everyone agrees that
12 there are no cases that should be tried.

13 So if there is any possible chance of settlement
14 in Mr. Schedin's case, I want to be teed up with another
15 one to be ready to go at that same time, November 8th, I
16 believe it is, that we set that.

17 As to Mr. Saul's concern about juries seeing that
18 there are more victims, certainly I will not permit the
19 defense nor would I expect them to try to argue that this
20 is an isolated kind of situation, that that simply given
21 the nature of these cases would not be an appropriate
22 argument, so I think we can address that issue.

23 The good point that Mr. Goldser makes about the
24 applicability of broader evidentiary rulings, I understand
25 that, and that is an intriguing aspect to consider for

1 purposes of consolidation, but I just feel that weighing
2 all of the facts and circumstances here under Rule 42, as
3 the Court must, that we would be more precise, we would be
4 more, we would learn more about the future of this MDL by
5 trying one case first and then moving on to consider the
6 possibilities of consolidation after that period of time.

7 I do say this at the same time as recognizing
8 that the plaintiffs have presented three cases with
9 substantial similarities. There is no question that that's
10 true, but I just think that given our current
11 circumstances, it would be the Court's preference to try
12 one case first, see how it goes and then gather together
13 and see what this means for the rest of the MDL.

14 I think it will also be instructive, I hope, for
15 the cases that are present in the state of New Jersey, and
16 I think that's part of what we're trying to do here as well
17 is to make sure that those cases get handled expeditiously,
18 and whatever assistance the federal MDL can provide to the
19 state and whatever assistance the state case can provide to
20 us, that I think would be helpful.

21 So I'm going to deny the motion at this point in
22 time. Let's prepare for the trial with Mr. Schedin and go
23 forward from there.

24 Anything else we need to address today?

25 MR. DAMES: No, Your Honor. Thank you very much.

1 I do -- maybe I should mention this, and that is, we will
2 try a case, and it will be the Schedin case first, but for
3 a second case, for a second trial, would it be -- I don't
4 know. It may be premature to decide, but I was going to
5 suggest that we would like to select the next case for
6 trial, but the Court hadn't yet determined what that format
7 will be, so I will just wait.

8 THE COURT: Yeah. Mr. Dames, I appreciate that,
9 and I am probably inclined to allow the defense to choose
10 the second case if we try a second single case, but I
11 really think that we should inform ourselves a little bit
12 more, perhaps even about the first trial, before we decide
13 that the second case will be a single case.

14 MR. DAMES: Thanks, Your Honor. I was speaking
15 too soon, but then I was simply confused.

16 THE COURT: That's okay. It's understandable.

17 Mr. Goldser, did you have anything else for
18 today?

19 MR. GOLDSER: No, I don't, Your Honor. Thank you
20 for your consideration.

21 THE COURT: Okay. Mr. Saul, anything from you?

22 MR. GOLDSER: No. Just wanted to wish everyone a
23 happy Memorial Day.

24 MS. VAN STEENBURGH: Your Honor, I do have a
25 question. This is Tracy Van Steenburgh. I think by your

1 ruling you're not indicating that we should stop proceeding
2 with the other bellwethers that we have been continuing to
3 do discovery on. So to address Mr. Saul's concern, I mean
4 if there was something that would happen with this case, we
5 would be ready to go with another one.

6 I'm assuming that you're suggesting we keep
7 moving forward with the discovery of those other cases.

8 THE COURT: I am suggesting that. I do want to
9 use this time in November which has been set aside for a
10 bellwether trial and one never knows. There could be a
11 settlement. There could be other issues relative to
12 Mr. Schedin that we might have to substitute someone else,
13 but hopefully we will be able to go forward with that.

14 I do think that we should proceed in getting all
15 of the bellwether cases that have been narrowed down and
16 identified prepared so that we can substitute another one
17 if necessary.

18 MS. VAN STEENBURGH: Great. Thank you.

19 THE COURT: Okay. Very well. Do we have another
20 time set here for a hearing yet or --

21 MR. GOLDSER: Judge, we have the June 22nd
22 summary judgment hearing in the Karkoska case.

23 THE COURT: Okay. Very well. We will see
24 everyone on June 22nd then.

25 MR. DAMES: Take care, Your Honor.

1 THE COURT: We can have a status conference at
2 that time, too, if there are other issues to discuss.
3 Okay?

4 MR. ROBINSON: Your Honor, I'm sorry. This is
5 Bill Robinson. I am out that week, and I was going to ask
6 to be excused from the hearing in the Karkoska case.
7 Mr. Dames will argue that.

8 Would the Court excuse me from the status
9 conference that day?

10 THE COURT: That would be fine, unless Mr. Dames
11 is going to be confused that day.

12 MR. ROBINSON: Judge, he is always confused.
13 That is not unheard of.

14 THE COURT: That's fine, Mr. Robinson. That's
15 fine.

16 MR. ROBINSON: Thank you, Your Honor.

17 THE COURT: Okay.

18 MR. DAMES: Fine.

19 THE COURT: Thank you. We will be in recess.

20 MR. DAMES: Okay.

21 MR. GOLDSER: Thank you.

22 MS. VAN STEENBURGH: Thank you.

23 THE COURT: Okay.

24 **(Court was adjourned.)**

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I, Kristine Mousseau, certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

Certified by: _____ s/Kristine Mousseau
Kristine Mousseau, CRR-RPR