

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: ZIMMER NEXGEN KNEE) Docket No. 11 C 5468
IMPLANT PRODUCTS LIABILITY)
LITIGATION,)
)
) Chicago, Illinois
) May 7, 2014
) 10:27 a.m.

TRANSCRIPT OF PROCEEDINGS - Motions
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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1 THE CLERK: 11 C 5468, Zimmer NexGen Knee Implant
2 Products Liability on a motion.

3 MR. BECKER: Good morning, your Honor.

4 Tim Becker for the plaintiffs and colead counsel.

5 MR. RUSCH: Jacob Rusch for the plaintiffs.

6 MR. RONCA: Jim Ronca for plaintiffs, your Honor.
7 Good morning.

8 THE COURT: Good morning.

9 MS. PIERSON: Good morning, your Honor.

10 Andrea Pierson for the defendants.

11 THE COURT: Good morning.

12 MR. O'NEAL: Jim O'Neal for the defendants and
13 Haroon Anwar for the defendants.

14 THE COURT: Okay. Good morning.

15 We are here on the plaintiffs' motion for sanctions
16 and other relief in connection with the testimony of
17 Dr. Bertin. And I did have a chance to review the briefs
18 that were filed on both sides.

19 I understand the thrust of the defendant's position
20 to be, among other things, that if the plaintiffs object to
21 the admission of Dr. Bertin's testimony at trial, they are
22 certainly free to present those objections at an appropriate
23 time.

24 MR. O'NEAL: Your Honor, Mr. Ronca and I had a
25 hallway conference this morning, and I believe we resolved

1 this issue.

2 THE COURT: Oh, that's wonderful.

3 MR. RONCA: We have. Shall we tell you what it is?

4 THE COURT: Sure.

5 And let me say even before you do this -- and not
6 to grease the wheels too much -- when people ask me about my
7 MDL, I always say, the lawyers are terrific. It's really
8 hard fought, but they are really terrific, and usually they
9 get things worked out, which has been the case.

10 All right. So tell me what your resolution is.

11 MR. RONCA: Okay. Do you want me to go and you
12 tell me where I'm wrong or if I'm wrong?

13 MR. O'NEAL: Sure.

14 MR. RONCA: So the initially deposition of
15 Dr. Bertin will be treated for the purpose of this case as
16 his Rule 26 report.

17 THE COURT: Okay.

18 MR. RONCA: The rules of a Rule 26 report apply.
19 In other words, his opinions cannot go outside the reasonable
20 bounds of that deposition.

21 THE COURT: Okay.

22 MR. RONCA: We are not striking new territory.

23 Plaintiffs have the right to request at a mutually
24 convenient date, including the convenience of Dr. Bertin,
25 another deposition of Dr. Bertin before he leaves for the

1 Philippines.

2 THE COURT: Which is what date?

3 MR. BECKER: We don't have the date yet, but -- oh,
4 when is he leaving?

5 THE COURT: Yes.

6 MR. RONCA: June 26th.

7 THE COURT: He is leaving June 26th.

8 MR. RONCA: In that deposition we will not retread
9 the ground that was covered in the earlier deposition,
10 particularly on the factual issues.

11 There were a few factual questions that Dr. Bertin
12 said, I'll get that for you. I don't have it with me. Jim
13 and I -- Jim O'Neal and I, for purposes of the record, agreed
14 we will figure out what those things are that will be
15 somewhat repetitive of the prior deposition.

16 But the idea is to not retread old ground but to
17 ask questions as if we had received a report -- and we are
18 talking about the expert now -- and whatever opinions that we
19 see are not just his thoughts about certain things, but
20 things that go to the nature of the case, that go to the
21 ultimate issues in the case, like, what do you think about
22 plaintiffs' allegations?

23 And, again, I believe we will be able to work out
24 all those questions in terms of the areas that we will be
25 able to cover.

1 Then there will be a redirect examination, which
2 will be responsive to what questions we ask, but will not
3 strike brand-new territory.

4 Is that it?

5 THE COURT: Mr. O'Neal, anything you want to add?

6 MR. O'NEAL: Yes.

7 My understanding of that, the effect, as I
8 understand, of the Rule 20 -- treating the direct as a Rule
9 26 disclosure is not that we have to do a direct all over
10 again. That direct stands as his direct.

11 THE COURT: Sure.

12 MR. O'NEAL: They certainly preserve specific
13 objections to questions in the normal fashion with
14 depositions.

15 My understanding is that, given the resolution and
16 the treatment as a Rule 26, this resolves the issue of
17 alleged failure to disclose expert testimony in advance. So
18 that issue won't have to be dealt with when at some point
19 your Honor and maybe other trial judges are considering the
20 admissibility of Dr. Bertin's testimony.

21 MR. RONCA: Right. We will not later raise an
22 objection that we didn't get a Rule 26 report because we are
23 treating the first deposition as the Rule 26 report. But all
24 other objections to admissibility, as we have had in all the
25 depositions, would remain to be ruled on later, if raised.

1 THE COURT: All right. That sounds fine.
2 Are there other issues we need to address this
3 morning?

4 MR. RONCA: Yes.

5 THE COURT: Okay.

6 MR. O'NEAL: Are we up to the 60 days?

7 MR. RONCA: Yes.

8 MR. O'NEAL: We have had some difficulty getting
9 all the discovery needed for the expert reports completed in
10 time. Plus on the defense side, one of our experts has just
11 had heart bypass surgery and everything is, as a result, in a
12 state of some uncertainty.

13 The parties have agreed that we can -- subject to
14 the Court's approval, that the expert disclosure deadlines
15 for both sides may be extended by 60 days.

16 MR. RONCA: Yes.

17 THE COURT: I'm fine with that.

18 MR. O'NEAL: And we were playing around with what
19 dates those means. But if the Court is agreeable, we will
20 submit a proposed order that lays out new dates.

21 THE COURT: That's fine.

22 MR. RONCA: If we push it 60 days, I think one of
23 these dates happens like the day before Christmas or the day
24 after New Year's. So we might want to tweak those dates a
25 little bit.

1 But we found out on Monday -- and I think the
2 defendants found out very close to Monday -- that they have a
3 problem with one of their main experts. And it's only fair
4 to not -- you know, you could delay a trial if an expert
5 suddenly got ill. So we agree.

6 THE COURT: All right. You may have something
7 else. Let me break in for a moment here.

8 I had a chance to visit our Rockford courthouse
9 yesterday. And I know we have talked about the possibility
10 that one or more of the exemplar trials would take place
11 there.

12 I can tell you that the courthouse is beautiful.
13 It's fantastic. It's lovely compared to this building, which
14 has kind of a utilitarian look.

15 This is a building that has the grace and dignity
16 of a courthouse but also the accoutrements of the 21st
17 century. So it would be a great place to try any of these
18 cases.

19 I know that there has been some interest in the
20 jury pool. I am working with the Clerk's office on that. My
21 perspective -- my personal perspective is that you should
22 have this data if we can possibly get it to you.

23 It may be that we will ask that the lawyers in this
24 case keep the demographic data confidential. You are welcome
25 to discuss it among yourselves. I think that's because --

1 and I have to tell you that I am uncertain about all the
2 machinations here, but I think that's because we are supposed
3 to release data at certain intervals, and it may be that that
4 interval hasn't come yet. Again, I am uncertain about this.
5 But my personal view is that you should get access to this
6 data if we could possibly get it to you. I am working toward
7 that goal.

8 The courthouse has capacity, including an
9 additional -- I think it has a spare courtroom and a visiting
10 judge's chambers. So I could, with no trouble at all, try a
11 case out there.

12 We do need -- and I know that you are aware of this
13 more significantly for your own witnesses' sake. We do need
14 to get dates so that I can let them know you need to preserve
15 the courthouse for me on the following dates. And I have
16 talked to the judges out there and the clerk, and they are
17 fine with it. They need to know so they could be ready, but
18 it would work fine if you would like to try a case in
19 Rockford.

20 MR. RONCA: So we thought that there would be some
21 setup of a timing for us to discuss with the Court about
22 where -- which cases go first, when, and where.

23 THE COURT: Sure.

24 MR. RONCA: We have a conference scheduled for next
25 Friday, but neither side thinks that there is really any

1 issues.

2 THE COURT: So you may not need to come in next
3 Friday.

4 MR. RONCA: It would save money.

5 THE COURT: Sure. I think that makes sense. Why
6 don't we just put it off to the next date. I can't remember
7 what our next date is.

8 MR. RONCA: Well, the next date is in July. Our
9 only question is, would you want it in June or just wait
10 until July?

11 THE COURT: Why don't we just leave it in July.
12 But if somebody thinks that it would be good to advance, let
13 me know.

14 MR. BECKER: Your Honor --

15 THE COURT: Mr. Becker.

16 MR. BECKER: Given your willingness to try and
17 supply us the data, I was the one -- and this probably goes
18 back to my days of being a criminal defense attorney that
19 hears the dog whistle of *Batson* in my head over and over
20 again.

21 THE COURT: Sure.

22 MR. BECKER: So having those -- having that data
23 would be important to briefing the motion. It's not so much
24 important to me on what date the next CMC falls as long as we
25 have sufficient time to cull through, review, and go through

1 the data related to the demographics.

2 So if the Court thought it could get us that data
3 in the next week or two, I think we could probably tee up the
4 briefing for June. But if this is something that the Court
5 is contemplating --

6 THE COURT: No, I don't think it will take long.
7 Assuming it's going to happen, it's not going to take long.

8 Now, would you have an objection to maintaining
9 confidentiality?

10 MR. BECKER: I haven't spoken with my colleagues,
11 but I can assure you we would not on the plaintiffs' side of
12 the aisle.

13 MR. O'NEAL: No. I would have to show it Zimmer --
14 the lawyers at Zimmer, of course.

15 THE COURT: Right.

16 MR. O'NEAL: But otherwise --

17 THE COURT: All right. Let me tell you there is
18 some history here. There was a case where the data was
19 requested in a case -- not of mine; another judge in this
20 building -- and it was released pursuant to protective order.
21 And the very next day a reporter came into the Clerk's office
22 with the data.

23 And I said to my clerk, I just don't -- I can't
24 imagine these lawyers doing that. I don't see that
25 happening. But I thought I should review it.

1 And, again, I don't know, to be honest with you,
2 whether it does have to remain confidential. I am just
3 asking, if we do impose that condition, will that be a
4 problem for you? You are telling me it won't be.

5 MR. O'NEAL: No.

6 THE COURT: All right. Well, then I will pursue
7 this. I would expect that we can get some resolution. I
8 don't think it should take a whole lot of time.

9 All right. So I will be seeing you in July unless
10 somebody lets us know that you need to get in sooner. Just
11 so you are aware, I am around in June, and I am really around
12 much of July until the very last week. If you do need to get
13 into the court, that should be fine.

14 MR. O'NEAL: Thank you.

15 THE COURT: All right. Thank you.

16 MR. RONCA: Thank you, your Honor.

17 THE COURT: Have a safe trip back, everybody.

18 (An adjournment was taken at 10:37 a.m.)

19 * * * * *

20 I certify that the foregoing is a correct transcript from the
21 record of proceedings in the above-entitled matter.

22 /s/ Frances Ward
23 Official Court Reporter
24 F

May 29, 2014.