IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANN MCCRACKEN,

Plaintiff,

-vs-

DEPUY ORTHOPAEDICS, INC., et al.,

Defendants.

Case No. 11 dp 20485

O R D E R

KATZ, J.

BACKGROUND

This case is one of several thousand pending before the Northern District of Ohio pursuant to a transfer order from the Judicial Panel on Multidistrict Litigation ("JPML"). In December 2010, the JPML granted centralization of litigation concerning "whether DePuy's ASR XL Acetabular Hip System, a device used in hip replacement surgery, was defectively designed and/or manufactured, and whether DePuy failed to provide adequate warnings concerning the device, which DePuy recalled along with another ASR device, the ASR Hip Resurfacing System, in August 2010." *In re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, 1:10 md 2197 (N.D.Ohio) (Doc. No. 1) (footnotes omitted).

In this case, Plaintiff Ann McCracken, had hip replacement surgery and was implanted with an ASR Hip in August 2009. Plaintiff then began experiencing symptoms which led her surgeon to conclude she should undergo a revision surgery to replace the implant. In January 2011, Plaintiff underwent the revision surgery. She initiated suit against DePuy Orthopaedics, Inc., DePuy International Ltd., Johnson & Johnson, and Johnson & Johnson International ("Defendants"). The causes of action include: (1) strict liability-defective design; (2) strict

liability-failure to warn; (3) negligence; (4) breach of express warranty; (5) breach of implied warranty of merchantability; (6) breach of implied warranty of fitness; and (7) violation of New York General Business Law § 349.

This case has been designated as a bellwether case and is scheduled for trial commencing September 9, 2011, in Cleveland, Ohio.

Pending now before the Court are several pretrial motions:

- Defendants' Motion permitting use of split-screen videotaped deposition at trial;
- Defendants' Motion in Limine No. 4 to exclude evidence of the amount of compensation paid to defendants' experts for other ASR LX hip implant cases;
- Defendants' Motion in Limine No. 2 to exclude evidence of DePuy's voluntary recall of ASR LX hip implant;
- Plaintiff's Motion in Limine No. A to exclude defendants' use of videotape depositions involving two cameras at trial;
- Plaintiff's Motion in Limine to exclude all references to FDA evidence regarding 510(k) clearance; and
- Plaintiff's Motion in Limine D to exclude all evidence and references related to Broadspire Services, Inc.

As the above motions have been fully briefed and were, in part, the subject of oral argument on July 24, 2013, they are ready for disposition.

LEGAL STANDARD

A. Liminal Motions

While not explicitly addressed in the Federal Rules of Evidence or Civil Procedure, motions in limine "may be directed toward barring specified evidence or argument and may be based on any of the grounds available under the Federal Rules of Evidence." 3 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 16.77[4][d][ii] (3d ed. 2013). The practice of liminal rulings "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984).

Motions in limine are generally used to ensure evenhanded and expeditious management of trials as the "prudent use of the *in limine* motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered by the jury." *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 440 (7th Cir. 1997). The court has the power to exclude evidence in limine only when evidence is clearly inadmissible on all potential grounds. *Luce, supra.*

The party moving to exclude evidence has the burden of establishing the inadmissibility of the evidence for any purpose. *Mason v. City of Chicago*, 631 F.Supp.2d 1052, 1056 (N.D. Ill. 2009)(citation omitted). The trial court is afforded broad discretion in such a ruling, *Branham v. Thomas Cooley Law Sch.*, 689 F.3d 558, 560 (6th Cir. 2012), or its decision to defer ruling until the evidence unfolds at trial. *Graves v. District of Columbia*, 850 F.Supp.2d 6, 11 (D.D.C. 2011) (citations omitted).

Denial of a motion in limine does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded. The court will entertain objections on individual proffers as they arise at trial, even though the proffer falls

within the scope of a denied motion in limine. *See United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989) (citation omitted).

B. Applicable Evidentiary Rules

The evidentiary rules which apply to the motions at issue are Fed. R. Evid. 402, 403 and 407.

Relevant evidence is admissible under Fed. R. Evid. 402. Pursuant to Fed. R. Evid 401, "evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." Stated differently, "truth finding must be a central purpose" and the reason for admitting relevant evidence is that the "probability of ascertaining the truth about a given proposition increases as the amount of the trier's knowledge grows." WEINSTEIN'S FEDERAL EVIDENCE, § 402.02 (Matthew Bender 3d 2013).

Relevant evidence may be excluded under Fed. R. Evid. 403 where "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." In considering exclusion under Rule 402, "[t]he trial court's discretion should be exercised with recognition that the remedy of exclusion is extraordinary and to be invoked sparingly" and "should strike the balance in favor of admission in most cases." *Id.* at § 401.02. In making its determination a court "consider[s] whether the search for the truth will be helped or hindered by the interjection of distracting, confusing, or emotionally charged evidence." *Id.*

Subsequent remedial measures are addressed in Fed. R. Evid. 407 and exclude such evidence as an admission of fault. As stated in the Advisory Committee Notes, the reasons are two-fold:

> (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . ; and
>
> (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

With these rules in mind, the Court now turns to the motions at issue *in seriatim*.

DISCUSSION

A. Split-Screen Video Depositions at Trial

The Defendants move for permission to use a split-screen videotape in displaying recorded deposition testimony at trial. In support of their motion, Defendants submit this display using two cameras, one focused on the deponent and one on the lawyer conducting the deposition, simulates the exchange the jury would see in the courtroom.

Plaintiff opposes the use of the split-screen or two-camera method. She contends there is no rule or authority which provides for a split screen or a second camera. It is true that Fed. R. Civ. P. 30(b)(3) addresses the method of recording, however, there are no prohibitions on the use of a split-screen method. *See* 7 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 30.23[1][b] (3d ed. 2013) ("There is no requirement that a deposition be taken all in one method of recording. Nor is there any rule or judicial precedent to prevent the deposing party from switching to a different medium for the subsequent portion of a continued deposition") (footnote omitted).

In this case, the presentation of a split-screen method is no different from what the jury would see in the live courtroom, therefore, no prejudice results to either side. Defendants' motion on this issue is granted and Plaintiff's is denied.

B. Evidence Pertaining to Expert Compensation

Defendants move to exclude evidence of the amount of compensation paid to Defendants' experts for other ASR XL Hip implant cases. In support, the Defendants state that evidence of payments to their experts in other lawsuits is not relevant to the present action. Introduction of evidence of compensation in other ASR lawsuits would confuse or mislead the jury. The Defendants do not object to the admission of testimony regarding fees paid to its experts in this lawsuit.

In contrast, Plaintiffs argue the evidence of payments to experts in all ASR cases is admissible to show bias. Moreover, they argue the appropriateness of such a line of inquiry regarding an expert witness will aid the jury in determining the witnesses credibility.

The amount of fees paid to Defendants' experts in this specific litigation is a proper subject of inquiry at trial. However, to allow Plaintiff to inquire on the totality of fees generated in this MDL would, in this Court's view, open the door to misleading information and juror confusion.

Therefore, the Court will allow Plaintiff to inquire as to the number of times the expert prepared to or did, in fact, testify on behalf of the Defendants but such inquiry should not be limited to just ASR cases or ASR litigation. Nor should the inquiry mention ASR cases. The inquiry should be as to services rendered to or on behalf of Defendants, not to exceed 2-3 years, or as agreed between the parties. It is that which may be inferred by the jury to create bias. The Plaintiffs may, of course, inquire as to the expert's hourly rate. For these reasons, Defendants' motion in limine No. 7 is granted.

C. Voluntary Recall of ASR

The Defendants seek to exclude evidence of DePuy's voluntary recall of the ASR LX hip

implant. They contend that the policy considerations behind subsequent remedial measures are exactly the reasons why evidence of their recall should not be allowed at trial. Defendants ask that the remedial documents associated with the recall as well as the recall itself be prohibited from introduction at trial.

Plaintiffs argue the recall, which occurred in August 2010, is not a subsequent remedial measure because it occurred prior to her revision surgery in 2011. It is Plaintiff's position that her injury, at least in part, occurred after the recall, thereby characterizing the recall as pre-injury taking it outside of the realm of Rule 407. This Court disagrees.

The claims in this litigation allege the product was defectively designed. Plaintiff was implanted with the product in 2009. As noted in her complaint, "*[a]s a result of her defective ASR Hip*, plaintiff, Ann McCracken, began experiencing symptoms, including, but not limited to, pain and loss of mobility, and suffering from loss of enjoyment of life." (Compl. at ¶79) (Emphasis added). Her injury began with the initial implantation and, but for that event, she would not have suffered injury, including the revision surgery.

Assuming the Plaintiff will claim her harm commenced before the recall, in this instance, the recall is a subsequent remedial measure which, if it had occurred prior to the implantation, would have prevented the harm. As such, the recall is inadmissible under Rule 407. *See Hughes v. Stryker Sales Corp.*, 2010 WL 1961051 *4 (S.D. Ala) (noting other cases in which product recalls were subject to exclusion under Rule 407). Defendants' motion is granted.

If evidence at trial differs from foregoing, the Court will revisit this issue.

D. Evidence and References Related to Broadspire

Plaintiff moves to exclude all evidence and reference related to Broadspire Services, Inc. She argues the evidence regarding the Broadspire payments constitutes a collateral source which

was funded by the Defendants. According to Plaintiff, this evidence is only implicated in a punitive damages calculation.

Defendants submit the evidence regarding Broadspire does not constitute a collateral source. Because the Defendants were making the payments, and Broadspire was processing them, this evidence does not, in Defendants' view, constitute a collateral source. Moreover, the allegations contained in Plaintiff's complaint at ¶ 108 support the inclusion of this evidence.

As alluded to by counsel at oral argument, Broadspire and its role in this litigation is truly unique. Unlike the recall notice, Broadspire's presence is not considered a measure which "would have made an earlier injury or harm less likely to occur" under Rule 407. Nor is this evidence of a collateral source.

Therefore, at this juncture, the Court will deny Plaintiff's motion on Broadspire subject to the following conditions: The evidence regarding Broadspire is admissible because of the punitive damages claim and will be subject to a special limiting instruction. The Court also notes that this ruling is subject to modification depending upon how the evidence unfolds at trial.

E. References to FDA 510(k) "Clearance"

Plaintiff moves to exclude references to the Food and Drug Administration ("FDA"), including evidence that the FDA gave 510(k) "clearance" to the ASR XL Orthopaedic Hip Implant. She objects to admission of this evidence on the basis of irrelevance and being substantially outweighed by the danger of unfair prejudice, confusing the issues and misleading the jury.

Counsel for both sides deftly briefed the distinction between 510(k) clearance and premarket approval by the FDA. Both sides agree that the 510(k) clearance is based upon an equivalency standard and is not a stamp of approval by the FDA insofar as it pertains to safety.

In contrast, the premarket approval process is much more rigorous and requires a demonstration of the device's reasonable assurance of safety and effectiveness for its intended use. These differences are important.

The Court is persuaded that Defendants are entitled to present evidence of the 510(k) clearance as it represents the process by which the device came to be on the market and is, therefore, relevant. Despite Plaintiff's protestations, the probative value outweighs the danger of unfair prejudice or jury confusion and this evidence will also be subject to a special jury instruction. Therefore, Plaintiff's motion to exclude evidence of 510(k) clearance is denied.

CONCLUSION

The Supreme Court has noted the provisional nature of liminal rulings as "the judge may always change his mind during the course of trial." *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000) (citation omitted). Where the evidence unfolds different from the proffer, sufficient to cause the issue to be revisited, the court is "free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Luce*, 460 U.S. at 41-42.

With this proviso in mind, the Court grants Defendants' motion on the issue of the split screen (Doc. No. 34) and denied Plaintiff's motion (Doc. No. 44). Defendants' motion in limine No. 4 excluding evidence of expert compensation (Doc. No. 36) is granted. Defendants' motion No. 2 excluding evidence of the voluntary recall (Doc. No. 38) is granted. Plaintiff's motion No. C excluding evidence of 510(k) clearance (Doc. No. 48) is denied as is their motion No. D to exclude evidence regarding Broadspire (Doc. No. 50).

IT IS SO ORDERED.

s/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE