

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
Calvin Christensen, Edward)
Karkoska, Jerry Cullins and)
Wilfred Delude,)
)
Plaintiffs,) File No. 07CV3960
)
vs.) Minneapolis, Minnesota
) April 22, 2011
Ortho-McNeil Pharmaceutical,) 3:20 P.M.
Inc., et al.,) (Via Telephone)
)
Defendants.)
)

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

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**

For the Defendants: **JOHN DAMES, ESQ.**
TRACY J. VAN STEENBURGH, ESQ.

Court Reporter: **KRISTINE MOUSSEAU, CRR-RPR**
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Proceedings recorded by mechanical stenography;
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KRISTINE MOUSSEAU, CRR-RPR
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1 3:30 P.M.

2 (In chambers.)

3 THE COURT: Good afternoon, everyone. We're
4 ready here finally.

5 MS. VAN STEENBURGH: Hello, Your Honor.

6 THE COURT: I apologize for the delay. That was
7 supposed to be a much shorter sentencing, but it went
8 longer than anticipated.

9 Just for the record this is In Re: Levaquin
10 Products Liability Litigation, MDL number 08-1943, and we
11 are focusing today on an issue relative to civil case
12 number 07-3960, Christensen, et al, versus Johnson &
13 Johnson, et al.

14 Let's briefly have counsel note appearances for
15 the record, first for the plaintiff.

16 MR. GOLDSER: Good afternoon, Your Honor. Ron
17 Goldser.

18 THE COURT: And for the defense?

19 MS. VAN STEENBURGH: Tracy Van Steenburgh.

20 MR. DAMES: John Dames, Your Honor.

21 THE COURT: Okay. Thanks for waiting again. I
22 really apologize. We have this afternoon I guess the
23 defendants' motion, Rule 35 motion, for an order compelling
24 an independent medical exam. Is that correct?

25 MS. VAN STEENBURGH: Yes, Your Honor.

1 THE COURT: Are you prepared to make a short
2 argument, Ms. Van Steenburgh?

3 MS. VAN STEENBURGH: I am, Your Honor.

4 THE COURT: Go ahead.

5 MS. VAN STEENBURGH: Thank you. I really have
6 two points to make with respect to this IME, and before I
7 make those two points, the one thing I will say is that
8 Mr. Goldser and I have talked. He has no objection to the
9 person we've identified as the orthopedic physician who
10 would be conducting the IME, so that's not an issue.

11 I think the two issues are the purpose of the
12 IME, the necessity of it and the timing, so let me turn
13 first to the purpose. What we would like to do is have
14 Dr. Cederburg assess the functionality and the current, if
15 any, limitations due to the orthopedic issue raised by the
16 Achilles tendon rupture that's the subject of the lawsuit.

17 What has happened with Mr. Christensen is that he
18 has lots of medical conditions, including having had a hip
19 replaced. He has severe COPD, and he has a lot of
20 functional limitations, and we need to parse out what is
21 causing some of those limitations.

22 The surgeon who repaired his Achilles tendon, his
23 deposition was taken in February of 2010. The last time
24 that Mr. Christensen saw him was in 2006. Mr. Christensen
25 had his hip replaced in 2007. The last records we have

1 about an orthopedic looking at him for that or anything
2 related is February of 2007.

3 Dr. Clark is Mr. Christensen's current treating
4 physician, but he is not an orthopedic, and Mr. Christensen
5 hasn't seen an orthopedic, and yet this case has a lot to
6 do with an orthopedic condition.

7 Dr. Clark also indicated in his letter to the
8 Court when we were going through the issue of whether
9 Mr. Christensen could appear at trial that Mr. Christensen
10 had mentioned something about Achilles issues, although
11 when deposed on this, Dr. Clark couldn't remember what it
12 was that Mr. Christensen said. However, he included it in
13 his letter.

14 So I think that there is a good reason for taking
15 the IME. We need to determine what it is, if he is still
16 having issues with his Achilles tendon, to determine what
17 those are, and there is no better person to determine that
18 than an orthopedic.

19 I know that the plaintiffs on the second point
20 have objected -- well, actually on the first point have
21 objected because they say there is everything that we need
22 in the medical records. I think I have covered that in
23 terms of, there is a huge gap, and if he is still having
24 issues, as he represents he is, we need to determine that.

25 With respect to the timing, I understand that

1 plaintiffs think that this is not something, that it's too
2 late to do an IME. Frankly, I'm not sure how we could have
3 done it earlier for a couple of reasons. One, we didn't
4 know that this case was going to go to trial, and at one
5 point, in fact, Mr. Saul indicated that this case might be
6 dismissed.

7 It would have been foolhardy and a waste for
8 everyone to go through an IME if in fact the case were
9 going to be dismissed. We also didn't pick this case until
10 April 6th because the plaintiffs had determined that in
11 fact they didn't want this case to go to trial and so had
12 indicated that Mr. Christensen was not able to appear at
13 trial, and I won't go through the sequence, as the Court
14 knows how that works.

15 So I'm not sure how we could have done it sooner.
16 I mean, doing an IME two years ago would not be helpful for
17 a case that is just going to trial now, so that wouldn't
18 have really been a good solution. The IME is scheduled for
19 May 5. It's scheduled to take place in Worthington so that
20 Mr. Christensen does not have to travel.

21 We could have Dr. Cederburg turn a report around
22 quickly. I haven't spoken with him, but I would hope to
23 vouch that we could do something within ten days. If the
24 plaintiffs want to take his deposition, we will make him
25 available. It is not like there aren't other depositions

1 that are going to have to be taken in this case.

2 The plaintiffs are still giving us fact witnesses
3 that we may end up having to take, and Dr. Clark's
4 deposition is going to be taken, so it's not like this will
5 be the only deposition that has to be taken.

6 So we think for all of those reasons that it
7 would be appropriate in this case to have an IME. We have
8 made the Court aware of this on several occasions during
9 our status conferences that we are interested in doing
10 this, so it's been no secret.

11 And I think from long before the Schedin trial we
12 made the Court aware that we were going to ask for an IME
13 in any further bellwether case, so it should come as no
14 surprise. Thank you, Your Honor.

15 THE COURT: Thank you, Ms. Van Steenburgh.

16 Mr. Goldser.

17 MR. GOLDSER: Thank you, Your Honor. I didn't
18 count the number of days, although perhaps I should have,
19 but we are at almost precisely the same point in time in
20 the Christensen matter where defendant requested an IME in
21 the Schedin matter, and while there were many arguments
22 that were raised by plaintiff opposing the IME in Schedin,
23 the Court focused on timeliness and necessity as the two
24 prongs for denying the request in that case.

25 Since we're at exactly the same posture here, the

1 same arguments come forth. Sure. We could scramble and
2 get an IME done if we needed to. I think
3 Ms. Van Steenburgh's argument about the other things that
4 we really need to do give weight more to not doing an IME
5 than to doing it because we've got a lot of other things to
6 do, but more really to the point is the necessity and
7 duplicativeness of conducting an IME at this point.

8 Think about who the witnesses are going to be
9 that are going to testify about Mr. Christensen's
10 condition. Obviously, Mr. Christensen will testify, and in
11 his deposition, taken fairly recently, he described, and
12 these are my words, that his condition is self-limiting,
13 that he does not have pain in his ankle to a great extent
14 because he uses his cane but that he is not able to walk
15 and play golf as he used to do.

16 To be sure, there is some impact on his ability
17 from his respiratory condition as we argued about
18 concerning his ability to come to trial. So we have Mr.
19 and Mrs. Christensen who will talk about his current
20 condition. We have Dr. Donohue, the orthopedist, who saw
21 Mr. Christensen over a limited period of time and quite
22 some time ago, but at the end of the deposition by
23 Mr. Essig on behalf of the defense, Dr. Donohue was asked:

24 Are there any restrictions?

25 Answer: No, which means there are no orthopedic

1 restrictions, which gets you back to the notion of
2 restrictions being self-limiting based on pain. There is
3 no physical impairment that is there, save and except the
4 usual kinds of weakness that result from such a surgery.

5 We have Dr. Clark who can testify about the
6 ongoing complaints that Mr. Christensen has raised about
7 his Achilles tendon to the extent that he has raised any in
8 his visits over time. So it's not like there has been
9 nobody seeing him. Dr. Clark has seen him, and as
10 Ms. Van Steenburgh mentions, we are going to be taking
11 Dr. Clark's trial deposition sometime in the middle of May,
12 and anything that they want to ask about Mr. Christensen's
13 current condition can be asked.

14 We have Dr. Holmes coming from defense who is
15 going to talk about the causation issue. He's an
16 orthopedist, and he can certainly comment on orthopedic
17 issues based on his knowledge and experience and the
18 records that exist.

19 We are, apparently, are going to have a
20 pulmonologist come and testify on behalf of the defendant
21 to talk about presumably the nature of Mr. Christensen's
22 respiratory condition and, I assume, although I haven't
23 seen a report, why Levaquin was appropriate and the
24 limitations one may have as a result of respiratory illness
25 on one's functionality.

1 So to add one more grain of sand to this sizable
2 dune is not going to get you any higher on the dune than
3 you were before. It just doesn't add much to what is
4 already going to be available, and in light of the timing
5 and all the other things that we have to get done, it seems
6 to me to be the lowest priority item that we should focus
7 on between now and time of trial.

8 So it's on that basis that I think the Court
9 should exercise its abundant discretion and deny the
10 motion.

11 THE COURT: Thank you, Mr. Goldser.

12 MS. VAN STEENBURGH: May I reply shortly, Your
13 Honor?

14 THE COURT: Yes. Go ahead, Ms. Van Steenburgh.

15 MS. VAN STEENBURGH: I just have two comments.
16 With respect to the other depositions, you bet I mentioned
17 them, but none of those are ones the defendants want to
18 take. We have agreed that rather than having
19 Mr. Christensen appear at trial that we would allow
20 plaintiffs to take his deposition and his wife's deposition
21 and preserve those for trial.

22 We have also agreed that rather than call
23 Dr. Clark live, they can preserve his testimony by
24 videotape. So that is not of the defendants' making, and I
25 think the other thing is, we need to find out what it is

1 that Mr. Christensen has now put his Achilles tendon at
2 issue.

3 What I hear Mr. Goldser saying is, well,
4 Dr. Donohue said back in 2010 and Mr. Christensen back in
5 2010 in their deposition this, that and the other thing,
6 but just recently, he has said he has got problems, issues.
7 He didn't say pain. Issues with his Achilles tendon, and
8 the Court will recall during the Schedin trial,
9 Mr. Schedin, who didn't testify about this, apparently
10 attributed his having to crawl up the stairs by hand as
11 being attributable to his Achilles tendon.

12 And we want to find out what it is that the
13 limitations are that Mr. Christensen is now experiencing,
14 especially since he just within the last month put in a
15 declaration and had his doctor attest that there were
16 Achilles tendon issues, and the orthopedic is the best way
17 to do that to assess the functionality, and we think we
18 have made a timely request, Your Honor.

19 THE COURT: Mr. Goldser, anything else?

20 MR. GOLDSER: Nothing, Your Honor.

21 THE COURT: Mr. Dames, anything you would like to
22 add?

23 MR. DAMES: No, Your Honor.

24 THE COURT: Okay. The Court finds the motion in
25 order in this case and will grant the motion for an order

1 compelling an independent medical examination. I think we
2 are at a little bit earlier time. I don't think that there
3 is the kind of difficulty attached to getting the
4 independent medical exam done that we had in the Schedin
5 case.

6 It's going to be done in Worthington. The doctor
7 would be made available for a deposition if necessary, and
8 I do think the Court's experience with the Schedin trial
9 makes this probably a good medical examination for purposes
10 of making clear exactly what was caused by the drug and
11 what was not caused by the drug for clarifying these issues
12 for the jury.

13 So the Court finds the motion to be in order and
14 will grant it, and let's go ahead and get this done. I
15 guess, did you say May 5th?

16 MS. VAN STEENBURGH: Yes, sir.

17 THE COURT: Okay. We will get that done on May
18 5th. Anything else we should talk about today?

19 MR. GOLDSER: I don't think so, Your Honor. We
20 have our status conference next Wednesday afternoon.

21 THE COURT: Okay. Sounds great. Okay. Thank
22 you.

23 MR. GOLDSER: Thank you.

24 THE COURT: Have a good Easter, everyone.

25 MS. VAN STEENBURGH: Thank you. You, too, Your

1 Honor.

2 MR. DAMES: See you next week, Your Honor.

3 THE COURT: Okay.

4 (Court was adjourned.)

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6 * * *

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

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13 Certified by: s/ Kristine Mousseau, CRR-RPR
14 Kristine Mousseau, CRR-RPR

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