

Jacobson v McNeil Consumer & Specialty Pharms.

2009 NY Slip Op 33044(U)

November 19, 2009

Supreme Court, New York County

Docket Number: 105923/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 105923/2006
JACOBSON, BARRY
 VS.
MCNEIL CONSUMER & SPECIALTY
 SEQUENCE NUMBER : 016
 EXTEND TIME

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
 decided in accordance with
 the annexed decision/order
 of even date.**

FILED

NOV 30 2009

NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 11/19/09

J
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
 FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
BARRY JACOBSON and MARGARET NICHOLS,
Individually and as Administrators of the Estate of
JESSE NICHOLS JACOBSON,

Plaintiff,

-against-

MCNEIL CONSUMER & SPECIALTY
PHARMACEUTICALS, a Division of MCNEIL-PPC,
INC., JOHNSON & JOHNSON, INC., G.D. SEARLE
& CO., PHARMACIA CORP., PHARMACIA & UPJOHN
COMPANY, PFIZER, INC., JOHN DOE CORP. NOS.
1-5, JOHN & JANE DOE, M.D., NOS 1-20, AND JOHN
& JANE DOE HEALTHCARE PROVIDERS 1-20,

Defendant.
-----X

Decision/Order

Index No.: 105923/06
Seq. No.: 016

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Plt's n/m [compel] w/KMJ affirm in support, exhs	1
KMJ affid	2
EMK affirm in opp, exhs	3
RJB affirm in partial opp, exhs	4
8/25/09 Stip	5
SB affirm in partial opp	6
Magill, M.D. n/x-mot, exhs	7
KMJ supp affirm in opp	8
RJB affirm in partial opp	9
SB sur reply	10
EMF sur reply	11
10/8/09 Stip	12

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NOV 30 2009
NEW YORK
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-----X
Upon the foregoing papers, the decision and order of the court is as follows:

In this wrongful death and survival action, plaintiffs now move for leave to compel,

inter alia, further depositions of two non-party physicians.¹ Defendants G.D. Searle LLC, Pharmacia Corp., Pharmacia & Upjohn Company LLC and Pfizer, Inc. (collectively, the "Pfizer Defendants") opposes the motion.

By Stipulation dated October 8, 2009, plaintiffs' claims brought against defendants McNeil Consumer Healthcare, a Division of McNeil-PPC, Inc., incorrectly sued herein as McNeil Consumer & Specialty Pharmaceuticals, a division of McNeil-PPC, Inc., and Johnson & Johnson, incorrectly sued herein as Johnson & Johnson, Inc., (collectively herein referred to as the "McNeil Defendants") were discontinued. The McNeil Defendants, therefore, have withdrawn their opposition dated August 24, 2009 and sur-reply in opposition dated October 1, 2009.

Plaintiff seeks an order: [1] requiring Mark Fishman, M.D. to provide testimony relating to all of the topics on which he was instructed by his counsel to not answer questions; [2] requiring Mark Fishman, M.D., and/or his counsel Rafael Berman, Esq., to reimburse plaintiffs' counsel for the airfare, hotel, rental car costs and attorneys fees at the hourly rate of \$500 per hour of the second trip to depose Mr. Fishman; and [3] permitting plaintiffs to take the deposition of Rusk Rehabilitation attending physician Dr. David Magill, who was previously deposed in this case and "asked virtually no questions by plaintiff's former counsel regarding his Flagyl prescription decision."

Both Drs. Fishman and Magill oppose plaintiffs' application. Dr. Magill has also cross-moved for a protective order. The Pfizer Defendants also oppose a further deposition of Dr. Magill.

¹ Plaintiffs withdrew their application with respect to items (a) through (c) via stipulation dated August 25, 2009. Items (d) through (f) remain.

Dr. Fishman's deposition

CPLR § 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action ...”. Plaintiffs have identified six particular questions posed to Dr. Fishman which they argue he was improperly instructed to not answer (Deposition page: lines, 49:16, 53:1, 55:6, 55:18, 57:8 and 58:18). Each of these questions concern the alleged risks associated with the prescription of certain medications. However, all of the evidence adduced on this record makes it clear that Dr. Fishman, a resident, played no role in prescribing medications, but merely entered orders for the attending physician. Instructions “not to answer” violate the Uniform Rules for Conduct of Deposition, unless the questions are palpably improper. 22 NYCRR 221.2. The questions which plaintiffs seek a further deposition on in this case are not likely to lead to relevant and material information because Dr. Fishman played no role in prescribing such medications and his assessment of their risks is simply irrelevant. Therefore, there is no basis to require Dr. Fishman to submit to a further deposition, and plaintiffs’ request for reimbursement for its fees and costs is denied.

Dr. Magill's deposition

At Dr. Magill's deposition, on January 11, 2008, plaintiffs' prior counsel asked numerous questions about the fact that he prescribed Flagyl to Jesse Nichols Jacobson (“Jesse”). Plaintiffs counsel now seeks to ask whether Dr. Magill knew risk/benefit information in prescribing Flagyl, and if he had known such information, would he have still prescribed Flagyl to Jesse. Although both Dr. Magill and the Pfizer Defendants oppose this request on the basis that plaintiffs are not entitled to take another deposition merely because they are dissatisfied with plaintiffs’ prior counsel's handling of that

deposition, neither has claimed that any prejudice will result from granting plaintiffs' request.

Plaintiffs' have established that the questions they seek to ask Dr. Magill will likely lead to relevant and material information. Given the seriousness of this case, and in the absence of any prejudice to either Dr. Magill or the Pfizer Defendants, the court directs Dr. Magill to be appear for a further deposition limited in scope to whether Dr. Magill knew risk/benefit information in prescribing Flagyl and if, given such information, he would have still prescribed Flagyl to Jesse. Dr. Magill's further deposition will be held on December 15, 2009 at plaintiffs' counsel's offices beginning at 10 a.m., unless the parties otherwise agree to an earlier date and time.

To the extent that Dr. Magill seeks a protective order, that request is denied. Dr. Magill seeks a directive from this court limiting the scope of any further questions to eliciting non-expert testimony. It is clear that Dr. Magill has not been called as an expert in this case, but rather, as a fact witness. The court, therefore, finds a protective order to be unnecessary because there is no basis to anticipate that plaintiffs' questioning will exceed the limits otherwise set by this court.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
November 19, 2009

So Ordered:
HON. JUDITH J. GISCHE, J.S.C.

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