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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR : 2:14 MN 2502

Status Conference in the above-captioned matter held on Friday, October 24, 2014, commencing at 9:07 a.m., before the Honorable Richard M. Gergel, in Courtroom III, United States Courthouse, 83 Meeting Street, Charleston, South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
Official Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

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A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

- Margaret Branch, Esquire
- Turner W. Branch, Esquire
- Jayne Conroy, Esquire
- James J. McHugh, Jr., Esquire
- Joshua M. Mankoff, Esquire
- Mia L. Maness, Esquire
- Mark C. Tanenbaum, Esquire
- Frank M. Petosa, Esquire
- Ann Estelle Rice Ervin, Esquire
- Joseph F. Rice, Esquire
- Jessica Perez, Esquire
- Blair H. Hahn, Esquire
- Christiaan Marcum, Esquire
- David F. Miceli, Esquire
- Catherine Heacox, Esquire
- Michael Heaviside, Esquire
- Elizabeth Chambers, Esquire
- Matthew Munson, Esquire
- Lisa Gorshe, Esquire
- Matthew Mokwa, Esquire
- Steven Maher, Esquire
- Robert K. Jenner, Esquire
- Lindsey Craig, Esquire
- Daniel Gallucci, Esquire

APPEARED FOR DEFENDANTS:

- Michael T. Cole, Esquire
- David E. Dukes, Esquire
- Mark S. Cheffo, Esquire
- Sheila Brodbeck, Esquire
- Lyn Pruitt, Esquire
- Mark Jones, Esquire
- Ted Mayer, Esquire
- Douglas Fleming, Esquire
- Julie Fink, Esquire

1 THE COURT: Our agenda is more limited than other
2 times, which is a good thing. Perhaps a few drinks together
3 has helped, sharing each other's company may have helped
4 resolve some of these.

5 We have this spousal privilege issue. Let me thank y'all
6 for briefing this. I'm sometimes surprised how some issues
7 have a mountain of case law, and others you'd think would have
8 been discussed many times, actually has pretty sparse case
9 law. This is one of those issues where I was very confident
10 that there would be a lot case law out there, and there really
11 isn't. And it actually then requires us to use our common
12 sense, which is a good device to use from time to time.

13 And let me tell you my take about all this. The spousal
14 privilege is based on the high value we give to the sanctity
15 of marriage, right, that's the purpose of the spousal
16 privilege. That is also one of the purposes of asserting a
17 loss of consortium claim, that is, we value that relationship
18 and we can allow compensation for it.

19 So it would be ironic if the result of asserting a loss of
20 consortium claim is you then lose the -- you just waive
21 entirely the spousal privilege. That doesn't make sense to
22 me.

23 On the other hand, it wouldn't seem particularly fair that
24 you would go and put in issue something about the consortium
25 relationship, and then hide behind the privilege so that the

1 defendant couldn't provide a meaningful defense.

2 And that then put to mind, you know, my experience in
3 medical malpractice litigation where a patient sues his
4 physician for malpractice, and surely the communications
5 relevant to that claim could not be privileged, because the
6 defendant physician then wouldn't be able to defend himself.

7 On the other hand, it certainly doesn't waive the
8 privilege as to all other physicians, or even as to that
9 physician, regarding matters not relevant to the case. You
10 don't get -- you wouldn't give up the privilege; we say
11 there's a strong value in it.

12 So sort of what I come down on this is that to the extent
13 it's really that Curlee case kind of does it, says listen, to
14 the extent it relates to the consortium claim, it's waived.
15 That is, if you, you know, you and your wife have talked about
16 your relationship -- you know, one of two-edged swords of a
17 consortium relationship, it gets into the nature of the
18 relationship, you give up something about your privacy there,
19 because you're saying, hey, you damaged my relationship with
20 my spouse, but what was that relationship? That's fair
21 inquiry. And anybody who's casually asserting one of those
22 claims and found out that one spouse was cheating on the
23 other, has learned the effect of opening the door on an issue
24 like that. And so to the extent that the communication at
25 issue relates to the consortium claim, then I do think it's

1 waived.

2 But as to other matters, I don't think it's waived, and I
3 find it's not waived. In particular, talking about the
4 liability claim. It's not waived. It's not relevant to that.
5 It is waived as it relates to the spousal claim.

6 So, you know, sometimes we may have a question about where
7 that line's drawn. If it comes up in a deposition, give me a
8 call, I'll be glad to address it. But I think asking about
9 smoking, which is not really relating to the consortium claim,
10 would not -- that was a proper assertion of privilege.

11 And I know there's this whole issue about, well, under our
12 local Rule 30, did they timely file a response. And adherence
13 to the rules are very important.

14 On the other hand, you guys all have so much going on, I'm
15 just not going to sit and rigidly enforce the rules on this.
16 That's an important issue here.

17 You know, I've had more discussion lately about the
18 sanctity of marriage and the importance of marriage than I
19 think I've had in all the years -- I have a hearing at 11:00,
20 I have the single-gender marriage case in South Carolina and
21 I'm having a hearing at 11:00 on that. So I'm spending a lot
22 of time on this issue lately.

23 Anyway, that's sort of where I am on that. And if there's
24 any need for clarification on that, I'm glad to provide it.
25 We'll issue some order on that issue. But I think the --

1 that's sort of where I stand.

2 Now let me talk to you about the issue --

3 MR. MICELI: Your Honor, can we just ask, when that
4 comes up, the reason I want some clarification is that we've
5 never told our client not to discuss how their marriage was
6 affected; I only stopped her from answering when they asked
7 what your discussions were about the risk smoking.

8 THE COURT: Which was a proper assertion of the
9 privilege.

10 MR. MICELI: Right, thank you. And at that point in
11 time Mr. Cheffo and I had already discussed, because of some
12 production that was made that morning, we were going to be
13 before Your Honor, and we both wanted to get some
14 clarification on the issue.

15 But to get some further clarification, we're only talking
16 about conversations that they had between husband and wife
17 concerning how their marriage has been affected by her
18 diabetes.

19 THE COURT: Right. Privilege is confidential
20 communications, that is, they did -- people outside the
21 confidential relationship is not privileged. So it would be
22 communications, confidential communications relating to their
23 relationship. And, you know, the fair question is, and the
24 defendant can inquire into this, what is the nature of that
25 relationship. That's pretty private stuff, right? I mean,

1 our -- you know, a loss of consortium claim gets into the
2 sexual relationship between couples and all that. And I've
3 had many people in cases I was involved in drop the claim
4 because they did not really want the invasion of the privacy,
5 which I respect. And to the extent it's dropped, it's then
6 probably not relevant to the case. But -- So anyway.

7 Yes, Mr. Cole?

8 MR. COLE: Your Honor this is sort of part of why
9 we're getting advice for the future. I think the issue's
10 going to come up sometime, somebody is going to say something
11 like, you know, my relationship's ruined because I had to do
12 the laundry, or I can't do the laundry or whatever. But there
13 may be other reasons they can't do that, that they talked to
14 their spouse about. I would think that those would be things
15 that would go to the relationship, because they're talking
16 about --

17 THE COURT: If it's relevant to the relationship --
18 and I mean, that's going to be -- I mean, if you start
19 thinking about it, it's not exactly a constricted area, right?
20 I mean, it's a fairly broad area that you get into. And, you
21 know, I've just seen in South Carolina cases people start
22 getting into that, and the plaintiff just drops the claim
23 because it's not worth the claim, all the invasion.

24 MR. MICELI: Your Honor, because you cited the Curlee
25 case, and it mentions the three-part test, and the third part

1 to that test is, is the evidence otherwise available. When
2 they ask our clients, since this was brought in just the
3 Durocher case, I'll restrict it to Durocher, but when they
4 asked Mr. and Mrs. Durocher, how has your marriage been
5 affected, that's --

6 THE COURT: Let me say this. I wouldn't buy that
7 limitation. Because -- just because I never liked the
8 discovery you can get it somewhere else. Okay? I don't like
9 that. Okay? If they know it, no, they could ask him about
10 it. And I think that's just a little bit of a -- you know,
11 what's the old standard thing is you say give me all your
12 documents; well, they're in 7000 courthouses, go get them.
13 No. You know, you don't do that.

14 MR. MICELI: Right.

15 THE COURT: If you've got them reasonably available,
16 you have to produce them. So I would not take that part of
17 the test that if it's otherwise available somewhere else.

18 But let me just say this. I think what you're -- Give me
19 an example of something that concerns you, give me something
20 very specific.

21 MR. MICELI: Well, first, what doesn't concern me,
22 Your Honor, is if they ask how has your marriage been
23 affected, I didn't instruct them at that point not to answer.

24 THE COURT: Because that's a fair question.

25 MR. MICELI: That's a fair question. Did you talk

1 to Mr. Durocher last night about this deposition? Did you
2 talk to Mr. Durocher last night about how your marriage has
3 been affected?

4 THE COURT: Which is proper assertion of the spousal
5 privilege.

6 MR. MICELI: Right. They can each testify to their
7 perception, their feelings, their observations about how their
8 marriage has been affected. When they get to the pillow talk
9 about how they specifically say it's been affected, that's
10 where I have the problem.

11 THE COURT: That is where the line should be --

12 MR. MICELI: We have a statutory privilege, and I
13 want to make sure that the rule this Court is instituting is
14 as narrow as possible.

15 THE COURT: Yeah, but let me just say this. I have
16 found, the classic thing is I get in a trial and I get 25
17 motions in limine, okay? And it's really how the question
18 comes up, it's very hard to forecast exactly. And what I say
19 to you is I'm generally available. I will make myself
20 available. Because I cannot imagine, none of us, exactly how
21 it might come up. I know how it came up in your deposition,
22 I'm comfortable with that. But I'm not going to anticipate
23 every issue, because there are some that potentially in which
24 that communication would be waived by consortium, and I'm not
25 smart enough to figure out every potential way it might come

1 up.

2 MR. MICELI: Okay.

3 THE COURT: And I -- you know, we'll feel our way
4 out, and then y'all talk to each other. And you know, one of
5 the things everybody has to figure out is how important is
6 this dispute, right? Because the things lawyers all the time
7 in litigation disagree on, but it's just not worth fighting
8 over. So y'all can sort that out.

9 MR. MICELI: Thank you, Your Honor.

10 THE COURT: Let me address this issue of the
11 searching of plaintiff documents. You know, this is now the
12 third monthly status meeting in which I will have discussed
13 this issue. And that's probably two more than was necessary.
14 When we started the case, the plaintiffs wanted to have only
15 discovery against the defendants, and I said no, discovery is
16 reciprocal, everybody has to do it. And I have piled a lot of
17 rocks on the defendants, and they squawked some, but not that
18 much. Okay? And y'all have now gotten benefit of this
19 avalanche of documents. I expect y'all to -- the plaintiffs
20 to approach your discovery obligations with every bit as much
21 vigor as you expect from the defendants. And frankly, having
22 five of the ten cases where people are producing for the first
23 time discovery responses at the deposition is not acceptable.
24 I know there are instances where people come in and say to
25 you, oh, my God, I just found some stuff in the house, they

1 were up in the attic, I didn't know I had them. That's fine,
2 everybody has that, everybody has stuff like that, there will
3 always be something. But these depositions where people say
4 no one ever asked me. Now, I know the answer is I did ask my
5 client and they never told me. Well, you know, they can be
6 sanctioned, too, it's not just the lawyer. The lawyer has a
7 duty to be vigorous.

8 And I don't want to pick on anyone, but the Lopez law
9 firm, I have to say, I instructed to go back after
10 August 15th; they didn't do it. And I'm instructing that law
11 firm to not -- no longer is a paralegal acceptable. I expect
12 a lawyer admitted pro hac vice in this Court, because I can
13 then sanction them. I expect them to go back, to go through
14 the discovery requests, and I expect the certification in ten
15 days that this has been done.

16 Is there any confusion about that?

17 MR. MICELI: No, sir.

18 THE COURT: I'm not big on sanctioning lawyers, but
19 the only way we're going to have order in this litigation, as
20 complicated as it is, is people obey the rules. And I'm not
21 worried about someone finding, as I say, finding something at
22 the last minute. And these upcoming depositions of
23 plaintiffs, we're only talking about 14, folks, this isn't
24 like we're talking about 1200. Of those 14, if they haven't
25 produced the obvious stuff, I mean, there are obvious things

1 that everybody is going to have, you ought to go back to them
2 like today, and say okay, I know you've got pictures. I know
3 you've got e-mails. I mean, come on, let's do it. And not
4 accept this stuff I'm meeting with the lawyer for the client
5 for the first time the day before the deposition. Not
6 acceptable.

7 You know, one of the raps on this type of litigation is
8 that the plaintiffs' counsel want to fly the case at
9 10,000 feet and never deal with individual people. These are
10 real people, they're real claims, and I'm not going to let you
11 just litigate the big issues. The defenses, much of this is
12 going to be tied to some of this individual evidence, and they
13 have a right to their discovery. So I'm instructing y'all --
14 now this idea that I'm going to send the plaintiffs' lawyers
15 to do their own electronic searches, no, we're not doing that.

16 I am concerned about the spoliation issue, to the extent
17 that I want every plaintiff in the case to receive a letter
18 from their lawyer about not destroying anything, a sort of
19 anti-spoliation letter just saying -- tell them, you know,
20 everything you've got, do not destroy anything, do not dispose
21 of anything, please save everything, it may be relevant to the
22 case and you're instructed not to do that. Because I don't
23 want this situation, "If I had only known, I wouldn't have
24 thrown the box out last week."

25 And again, folks, it's not just the lawyers, the clients

1 have a duty to comply with discovery as well.

2 Now, having preached my sermon, are there other thoughts,
3 observations, points either counsel, either side would like to
4 make?

5 MR. MICELI: Your Honor, I'd say we've been able to
6 deal with Pfizer's counsel on things, just last -- I think
7 this week we were a little late on getting Mr. Cheffo
8 something, and he was very cooperative in accepting it.

9 THE COURT: He's not complaining about the little
10 stuff.

11 MR. MICELI: No, no. But yesterday we received
12 supplementations in some of our cases, and I received a notice
13 that I saw for the first time right before I came to the
14 cocktail party last evening, and it has the subpoena duces
15 tecum. I haven't sent that to my client, it's being sent
16 there this morning via e-mail. The deposition is Tuesday.
17 And I'm going to do my best to -- we will -- we have met
18 multiple times with our clients. And we just want to make
19 sure that as we supplement, that there's a line that sort of
20 raised at some point between supplementation and being
21 accused --

22 THE COURT: I don't want to be a nanny in this case.
23 Y'all are among the most skilled lawyers in the United States.
24 I'm not trying to do that. What I'm trying to do is there's
25 just some things, you know, when I hear about people showing

1 up and the clients look like they're deer in headlights on
2 basic questions. I mean, everybody knows they have got
3 photographs, so if they haven't given you any photographs, you
4 know, that is not -- that's a pretty good red flag that they
5 aren't taking seriously your communications, and you need to
6 do more. And your certification under Rule 26(g) is a
7 reasonable effort. And it's not reasonable, when you have
8 nothing, to accept that as an answer, because that's not a
9 reasonable answer.

10 Listen, some of these clients, we all know they came in
11 the case maybe a little more casually than others, and they
12 may not really want to be on the train, tell them to get off
13 the train. This is serious stuff, right? This is a --
14 everybody has responsibility here, and discovery is not going
15 to be unilateral, it's going to be reciprocal.

16 Is there any confusion about that, first from the
17 plaintiff?

18 MR. MICELI: No, Your Honor.

19 THE COURT: Mr. Cheffo, have I addressed your
20 concern?

21 MR. CHEFFO: You have, Your Honor, and to
22 Mr. Miceli's point, we understand, as you said --

23 THE COURT: I am not having any problems with
24 Mr. Miceli, I know he's speaking here, has not been the source
25 of the problems.

1 MR. CHEFFO: Right. I think everything you said, we
2 agree with completely. Litigation's going to happen, it's
3 complicated, we're not in here every time somebody says I
4 forgot something. It's more the systemic issues. I think
5 you've addressed it certainly to our satisfaction. We
6 appreciate that, Your Honor.

7 THE COURT: Very good. Now, those are the two
8 matters on my agenda.

9 Mr. Hahn, have you got anything you want to bring to my
10 attention?

11 MR. HAHN: Yes, Your Honor. As is noted in the
12 agenda under the Pfizer current and former employee
13 deposition, one of the depositions that has not yet been set
14 is Joseph Feczko. And the defendants are raising an Apex
15 objection to that, and we would like to -- the Court to give
16 us an expedited briefing schedule so we can get that issue
17 resolved.

18 THE COURT: I'm not aware of it. You obviously
19 object to the Apex?

20 MR. HAHN: Yes, sir, he doesn't work for Pfizer.

21 THE COURT: Yeah. Mr. Cheffo, what's the --

22 MR. CHEFFO: I think we would be happy to brief this
23 as well, but just to give you a quick summary, Dr. Feczko was
24 the former chief medical officer of Pfizer, he's a retired
25 person. What we agreed to do, because we thought it was

1 appropriate, is to not just say we're not going to give you
2 anything; what we did was we collected his custodial file and
3 produced that, because we thought that would at least give
4 Your Honor and the plaintiffs a record on which to determine
5 whether the Apex objection is appropriate. We think that, you
6 know, we're only raising it obviously as to his time when he
7 was the chief medical officer, so we think it still applies.
8 They're not asking what he's been doing kind of lately. And
9 we think that based on the production and based on kind of his
10 level, and certainly also based on the fact that they're
11 getting many many other depositions and documents, that we
12 think it's kind of well positioned.

13 THE COURT: Would it be -- what would be a reasonable
14 time to produce something to the Court asserting your position
15 on that?

16 MR. CHEFFO: I think we can certainly do that, file
17 some papers in ten days, seven to ten days.

18 THE COURT: Seven days. And plaintiffs, how quickly
19 can you respond?

20 MR. MARCUM: Seven for us.

21 THE COURT: Seven days. I will promptly address it
22 after that. How about that?

23 MR. HAHN: Thank you, Judge. The only other thing we
24 have, there are a number of motions to dismiss before Your
25 Honor that came in this week with Michigan cases. We have

1 spoken to each of the Michigan plaintiffs that is currently
2 before Your Honor and you have proper jurisdiction. All of
3 them have agreed to dismiss their case with prejudice. As a
4 result, the defendants have agreed to drop their motion to
5 dismiss under Michigan law. So there will be no more Michigan
6 cases before Your Honor, except for the Michigan cases
7 potentially within, I believe, California consolidations that
8 are pending remand.

9 THE COURT: Okay. So you have already filed a
10 response indicating that?

11 MR. HAHN: No, sir, we have not. We just came to
12 agreement.

13 THE COURT: Would you file something? Because we
14 obviously on the -- obviously we're trying to promptly respond
15 to discovery, and if you'll do that as quickly as you could,
16 Mr. Hahn.

17 MR. HAHN: Yes, sir. I believe that's all we have,
18 Your Honor.

19 THE COURT: Okay. Mr. Cheffo, how about for the
20 defense?

21 MR. CHEFFO: I think that's it, Your Honor, it was
22 relatively short. I think we have worked out a lot of these
23 issues before today, so thank you.

24 THE COURT: Very good. You'll move to dismiss under
25 41. Why don't you just file stipulations of dismissal in

1 those cases; doesn't require any court action on my part. And
2 you can just dismiss them with prejudice in terms y'all craft
3 them, and file them, then you -- I'm glad to do it, but that's
4 the easy way to do it.

5 MR. HAHN: Thank you, Judge.

6 THE COURT: Okay? And, you know, with all the
7 resources y'all have in this, y'all can probably gin those up
8 before Mr. Cheffo leaves town, y'all can jointly sign them and
9 file it and my clerks.

10 You know, the other day we had some data come in on the
11 cases within the District of South Carolina. And number one,
12 I had one-third of the entire docket of the district, and I'm
13 one of ten, okay? So we can see the math here. And there has
14 been an increase by 900 cases this year so far in our
15 district. And if you take our cases filed this year, it's
16 basically this litigation. But the way we count cases, after
17 25, I don't get any more credit, okay? So it's as if it
18 doesn't exist, right? But I haven't had any of my colleagues
19 stand up and volunteer to help, which I'm glad all the help
20 you guys give me, because it would be awfully hard if we were
21 fighting on every issue.

22 Okay, so with that, we'll see you next month. Okay?
23 Thank you very much.

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25 (Court adjourned at 9:29 a.m.)

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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR