SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 9

BC628589 January 21, 2025
JENNIFER ROBI VS MERCK & CO INC ET AL 10:00 AM

Judge: Honorable Elaine Lu
Judicial Assistant: R. Arraiga/A. Rosas
Courtroom Assistant: M. Tavakoli

CSR: L. Johnson, CSR# 10119
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Natalie Armour via LACC; Michael Lin Baum via LACC; Bijan Esfandiari, Esq. via LACC -- See additional appearances below.

For Defendant(s): Jason T. Burnette via LACC; Deanne Lynne Miller via LACC; John M. Walker via LACC

NATURE OF PROCEEDINGS: Final Status Conference;

The matter is called for hearing.

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Lora J. Johnson, CSR#10119, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The Court and counsel confer in reference to pre-trial issues, exhibits, MIL Nos. 5 & 31, and witness schedule.

Kaiser has already sent a settlement agreement to Plaintiff. Plaintiff confirms that Plaintiff and Kaiser will sign a settlement agreement by 4:30 on January 22, 2025.

All parties (including Plaintiff and Merck) agree that if Plaintiff and Kaiser do not have a fully executed settlement agreement signed by Plaintiff and Kaiser by 4:30 pm on January 22, 2025, this would be grounds for a mistrial, and the parties stipulate to a mistrial so that the trial may begin anew with Kaiser participating. The Court sets a Non-Appearance Case Review for 4:25 pm on January 22, 2025 for confirmation of the status of the settlement between Plaintiff and Kaiser.

Plaintiff and Merck have stipulated to a new trifurcation instruction to be read immediately after CACI 117.

The parties have agreed to provide each other with at least 48 hours of notice before calling a witness to the stand.

With respect to deposition transcript designations, the parties agree to the following procedure: No less than 72 hours before they intend to play any portion of a deposition audio or video recording, each party must submit those excerpts of the deposition transcript designations that they wish to play (together with objections, counter designations, and objections to the counter designations) to the Court. The Court requests that the party seeking to introduce such deposition audio or video recording meet and confer with Opposing Counsel, and the parties are to jointly file such excerpts of the deposition transcript designations that they wish to play (together with objections, counter designations) no later than 72 hours before they wish to play the excerpt, with a courtesy hard copy to Department 9. Once a party requests rulings on deposition transcript designations in this way, the party may not withdraw the request; the designated portions will have to be played to the jury.

On January 13, 2025, Merck's motion #31 for an order in limine excluding, or, alternatively, limiting evidence, testimony, and/or argument regarding the expert opinions of Dr. Stephen Amato, came on for a Rule 402 hearing. The Court provided Merck with the opportunity to cross-examine Dr. Stephen Amato concerning his opinions as set forth in his declaration of direct testimony, and Plaintiff conducted a re-direct examination. Having reviewed the parties' papers and hearing the testimony of Dr. Amato, the Court finds that Dr. Amato "has provided a reasonable scientific explanation for his conclusions and used a scientifically accepted methodology for reaching them based on the available data," and his testimony rests upon "good grounds, based on what is known." (Garner v. BNSF Railway Co. (2024) 98 Cal.App.5th 660, 679.) Dr. Amato's opinion has sufficiently reliable evidentiary support, and the matters upon which Dr. Amato has relied in formulating his opinions provide a reasonable basis for Dr. Amato's opinions. (Lockheed Litigation Cases (2004) 115 Cal.App.4th 558, 563 [citing Evid.Code, § 801, subd. (b); People v. Gardeley (1996) 14 Cal.4th 605, 618; and Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135–1136].) Pursuant to Evidence Code sections 801-802 and Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, the Court hereby DENIES Merck's motion in limine #31.

As to Merck's Motion in Limine 5 to exclude evidence, testimony and/or argument regarding injuries and side effects Plaintiff does not allege or attribute to Gardasil, as well as foreign regulatory actions or events related such unalleged action, Plaintiff has agreed not to elicit such testimony that Plaintiff did not receive warnings about the risk of infertility, miscarriage, MMF, or death before her first Gardasil dose. As an offer of proof, Plaintiff has stated that in terms of the biological plausibility of Gardasil causing POTS, one or more of Plaintiff's expert witnesses

may testify regarding a risk of developing a constellation of auto-immune conditions, infertility, miscarriage, macrophagic myofasciitis ("MMF"), or death from vaccines such as Gardasil. "I]t is not the trial court's proper function to second-guess the judgment of a qualified expert who has provided a reasonable scientific explanation for his conclusions and used a scientifically accepted methodology for reaching them based on the available data, even if the data itself is inconclusive." (Garner v. BNSF Railway Co. (2024) 98 Cal.App.5th 660, 679.) Accordingly, Merck's Motion in Limine 5 is DENIED insofar as it seeks to exclude expert opinion regarding biological plausibility. However, Plaintiff is forewarned that if Plaintiff introduces any evidence of deaths occurring in India caused by administration of the Gardasil vaccine, the Court will find that such evidence opens the door for Merck to introduce evidence that those Gardasil vaccine doses in India resulted from Merck donating those vaccines and not from commercial profit. Plaintiff has stated an intention to present evidence that Merck voluntarily withdrew Vioxx from the market shortly before the introduction of the Gardasil vaccine, and Merck had significant financial incentive at that time to push Gardasil to market without adequate testing and without adequate disclosures. If Plaintiff introduces any evidence of deaths occurring in India caused by administration of the Gardasil vaccine, it will be important to correct any misimpression that the jury may have that these deaths may have resulted from aggressive sales and advertising practices for commercial gain in India – as in the United States. Thus, if Plaintiff introduces any evidence of deaths occurring in India caused by administration of the Gardasil vaccine, the Court will revisit its ruling on Plaintiff's motion in limine 18 and allow Merck to correct any misimpression that it aggressively marketed, sold and profited from Gardasil vaccines in India. The Court has weighed the probative value of such evidence against the danger of undue prejudice and risk of necessitating undue consumption of time. The Court has determined that if Plaintiff opens the door to this line of questioning (i.e., results of Gardasil administration in India), the probative value of such evidence is not substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (EV. CODE § 352.)

The parties have reached a stipulation as to Carlos Sattler testifying remotely from Peru as Plaintiff's first witness.

The parties confirm that their Third Revised Joint Exhibit List filed on 1/21/25 identifies the universe of all their non-impeachment exhibits.

Plaintiff marked exhibits 3576 through 3688 and added them to the exhibit list on the evening of 1/20/25. Merck withdraws its timeliness objection to Plaintiff's marking of these exhibits based on the following agreement of the parties: (1) Plaintiff will use Exhibits 3576 through 3670 only for impeachment purposes with Carlos Sattler; (2) there is no similar limitation (i.e. use for

impeachment purposes only) for Exhibits 3671 through 3688 (medical records); and (3) the parties will not begin their opening statements before Monday January 27.

At least one of the exhibits (Exhibit 9240) on the flash drive containing the parties' non-impeachment exhibits is not properly labeled with each page reflecting the exhibit number and page number.

The parties all agree in court today that prior to calling any witness to the witness stand, the party calling the witness will prepare two sets of properly tabbed exhibit binders containing hard copies of all the exhibits that will be referenced and used during that witness's direct examination: one for the court and one for the witness. The two sets of properly tabbed exhibit binders must be distributed at the outset of the witness's examination. The other party will likewise prepare two sets of properly tabbed exhibit binders containing copies of all exhibits that already appear on the parties' joint exhibit list that will be referenced and used during that witness's cross-examination: one for the court and one for the witness. These exhibit binders need NOT include impeachment exhibits that do not appear on the parties' joint exhibit list. These two sets of properly tabbed exhibit binders must be distributed at the outset of the witness's cross-examination.

Based on the parties' stipulation to prepare exhibit binders for each witness's direct examination and cross examination, the Court rescinds its order requiring the parties to deliver to Department 9 one complete set of the parties' joint exhibit binders.

In preparation for cross-examination of witnesses, each party should pre-mark five copies of all impeachment exhibits with each page properly paginated to reflect the exhibit number and page number so that they are ready for distribution during cross-examination.

The trial remains firmly set for January 22, 2025 at 8:30 am.

The Court's Judicial Assistant shall give notice to all parties.

Clerk's Certificate of Service By Electronic Service is attached.

Additional appearance for Plaintiff(s):
K. Rachel Lanier via LACC