Case No. 17-10030

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED, PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

MARGARET AOKI,
Plaintiff-Appellee,

v.

DEPUY ORTHOPAEDICS, INCORPORATED; JOHNSON & JOHNSON,
Defendants-Appellants.

(*Continued Caption on Inside Cover*)

On Appeal from the United States District Court
For the Northern District of Texas (Kinkeade, J.)
No. 13-cv-01071

SEALED OPENING BRIEF FOR DEFENDANTS-APPELLANTS

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April 17, 2017

Consolidated with
Case No. 17-10031

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

JAY CHRISTOPHER; JACQUELINE CHRISTOPHER,

Plaintiffs-Appellees,

v.

DEPUY ORTHOPAEDICS, INCORPORATED; JOHNSON & JOHNSON,

Defendants-Appellants.

Consolidated with
Case No. 17-10032

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

DONALD GREER,

Plaintiff-Appellee,

v.

DEPUY ORTHOPAEDICS, INCORPORATED; JOHNSON & JOHNSON,

Defendants-Appellants.

Consolidated with
Case No. 17-10034

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

RONALD KLUSMANN; SUSAN KLUSMANN,

Plaintiffs-Appellees,

v.

DEPUY ORTHOPAEDICS, INCORPORATED; JOHNSON & JOHNSON,

Defendants-Appellants.

Consolidated with
Case No. 17-10035

ROBERT PETERSON; KAREN PETERSON,

Plaintiffs-Appellees,

v.

DEPUY ORTHOPAEDICS, INCORPORATED; JOHNSON & JOHNSON,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

Aoki et al. v. DePuy Orthopaedics, Inc. et al., Nos. 17-10030, 17-10031, 17-10032, 17-10034, 17-10035.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Margaret Aoki, Jay Christopher, Jacqueline Christopher, Donald Greer, Richard Klusmann, Susan Klusmann, Robert Peterson, Karen Peterson, Plaintiffs-Appellees;
2. DePuy Orthopaedics, Inc.; Synthes, Inc.; DePuy Synthes, Inc.; Johnson & Johnson International; Johnson & Johnson, Defendants-Appellants;
3. The Lanier Law Firm, PC (Arthur R. Miller, W. Mark Lanier, Richard P. Meadow, Kevin Parker, M. Michelle Carreras); Fisher, Boyd, Johnson & Huguenard, LLP (Larry Boyd, Wayne Fisher, Justin Presnal); Neblett, Beard & Arsenault (Richard J. Arsenault, Jennifer M. Hoekstra); Simmons Hanly Conroy (Jayne Conroy, Andrea Bierstein); Franklin D. Azar & Associates, P.C. (Franklin D. Azar, Robert O. Fischel, Tonya L. Melnichenko, Nathan J. Axvig); Kiesel & Larson LLP (Paul R. Kiesel, Helen Zukin, Matthew A. Young); Parker Waichman LLP (Jerrold S. Parker); Kenneth W. Starr; Counsel for Plaintiffs-Appellees;

4. Kirkland & Ellis LLP (Paul D. Clement, Jeffrey M. Harris, Michael D. Lieberman, Kevin M. Neylan, Jr.); Skadden, Arps, Slate, Meagher & Flom LLP (John H. Beisner, Stephen J. Harburg, Jessica D. Miller, Geoffrey M. Wyatt); Locke Lord LLP (Michael V. Powell, Seth M. Roberts); Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (Richard E. Sarver, Andrea Mahady Price); Quattlebaum, Grooms & Tull PLLC (Steven W. Quattlebaum); Counsel for Defendants-Appellants.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. The order at issue here denied Appellants' motion for relief from a $151 million judgment. In light of the massive amount at stake and the extensive record in this case, Appellants believe that oral argument would assist the Court in resolving the appeal.

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STATEMENT OF JURISDICTION

The district court (Kinkeade, J.) entered its order denying Defendants-Appellants' motion for a new trial on December 9, 2016, and Defendants-Appellants filed notices of appeal on January 5, 2017. The district court had jurisdiction under 28 U.S.C. §1332(a)(1), and this Court has jurisdiction under 28 U.S.C. §1291.

PRELIMINARY STATEMENT

This is the second appeal arising from the second trial in one of the largest multi-district litigation ("MDL") proceedings currently pending in the federal court system, in which more than 9,000 plaintiffs allege defects with "Pinnacle Ultamet" hip implants. This particular trial involved five plaintiffs, lasted more than two months, and culminated in a $502 million jury verdict against defendants, which the district court reduced to $151 million under Texas' statutory cap on exemplary damages.

A strange thing happened on the way to the *third* trial: Plaintiffs produced checks they had sent to two of their key expert witnesses in the second trial—experts who plaintiffs' counsel repeatedly told the jury were volunteering their time "because of concern" for the plaintiffs, and experts whose purportedly *pro bono* testimony plaintiffs' counsel repeatedly contrasted with defendants' "bought testimony." Further investigation revealed that plaintiffs' counsel, Mark Lanier, had agreed before trial to donate $10,000 to a charity of the first expert's choosing, and

then sent him a check for another $35,000 after trial. The second expert admitted that he expected to be paid all along—in no small part because Lanier told him "don't worry about" sending an invoice—and then, sure enough, received a check for $30,000 as soon as the trial was over.

Federal Rule of Civil Procedure 60(b)(3) was designed for precisely such circumstances, providing relief to parties who were unfairly disadvantaged by the opposing party's misrepresentations or other misconduct. At trial, plaintiffs made the purported volunteer status of these two experts a central theme, repeatedly stressing to the jury that "Dr. Matt Morrey wasn't compensated" and "Bernard Morrey wasn't compensated," while disparaging defendants' experts because they were "being paid to advocate an opinion." By misrepresenting the facts about whether those experts had been or would be compensated, plaintiffs' counsel unfairly imbued them with a false aura of objectivity and credibility, both in the abstract and vis-à-vis the defense experts. Moreover, plaintiffs used their misrepresentations to justify their failure to produce expert reports, arguing that both experts were exempt from the report requirement because they were uncompensated. Plaintiffs' misrepresentations thus deprived defendants of a meaningful opportunity to prepare for cross-examination or arrange for their own experts to rebut plaintiffs' experts' opinions.

Indeed, plaintiffs' counsel himself emphasized the impact these experts had on the case, telling them in the letters accompanying their payments that their testimony was "particularly instructive" and "made a real difference to the jury." In all events, regardless of whether the outcome actually would have been different, Rule 60(b)(3) requires a new trial whenever a party obtains a judgment unfairly—by, for example, concealing or misrepresenting facts to the court and the jury. Plaintiffs' concealment of the fact that two critical expert witnesses had been paid or expected to be paid—at the same time their volunteer status was trumpeted to the jury and used to evade the expert-report requirement—deprived defendants of their ability to fully and fairly defend themselves. A new trial is warranted.

STATEMENT OF THE ISSUE

Federal Rule of Civil Procedure 60(b)(3) provides relief to parties who were unfairly disadvantaged by an opposing party's misrepresentations during trial. Here, plaintiffs obtained strategic benefit at trial by repeatedly representing that two of their expert witnesses were not being compensated for their work on the case. In reality, both experts were compensated. Are Defendants-Appellants entitled to relief under Rule 60(b)(3)?

STATEMENT OF THE CASE

A. Background on the Ultamet MDL

This appeal arises from the second trial in an MDL proceeding involving the product liability claims of more than 9,000 plaintiffs. The plaintiffs allege they

received a Pinnacle Ultamet hip implant during hip replacement surgery and were later injured by metal debris generated by the implant's metal-on-metal design. Among other things, plaintiffs claimed that the Ultamet was defectively designed and that DePuy failed to adequately warn of its risks. They also sought to impose liability on DePuy's parent company, J&J.

After pretrial proceedings for all pending cases were centralized in the Northern District of Texas, the parties and the MDL court agreed to a bellwether trial protocol. The first bellwether trial began in September 2014, and the jury returned a complete verdict for the defendants.

Rather that proceed with the original bellwether process, the district court *sua sponte* ordered that five new cases be consolidated and tried jointly in a second trial. *See* Order Consolidating Bellwether Cases For Trial, No. 3:11-MD-2244-K (N.D. Tex. Jan. 8, 2016), Dkt.606. The selected plaintiffs were Margaret Aoki, Jay Christopher, Donald Greer, Robert Peterson, and Richard Klusmann, all of whom are citizens of Texas.[1] Each had suffered from chronic hip pain for several years before being implanted with an Ultamet metal-on-metal device. Each plaintiff's surgery was initially successful, with each experiencing reduced pain and increased

[1] Three of the plaintiffs' spouses—Jaqueline Christopher, Susan Klusmann, and Karen Peterson— also were named as plaintiffs, seeking damages for loss of consortium and loss of household services.

mobility. Several years later, however, the plaintiffs began to experience pain or discomfort in their surgically repaired hips (the cause of which was sharply disputed at trial), and each subsequently underwent revision surgery to replace their implant device.

B. Plaintiffs' So-Called "Non-Retained" Experts

Before the second trial (the "*Aoki*" trial) began, plaintiffs listed Dr. Bernard Morrey and Dr. Matthew Morrey (who is Bernard Morrey's son) as expert witnesses who "ha[ve] not been retained or specially employed to provide expert testimony in this litigation." ROA.17-10030.26841-42. That designation carries material consequences under the Federal Rules of Civil Procedure by exempting them from Rule 26(a)(2)(B), which otherwise requires experts to provide a written report containing a complete statement of opinions the expert will express, the basis for those opinions, the facts or data considered by the expert in forming those opinions, and the compensation the expert will receive. The "non-retained expert" designation is properly used for witnesses who have direct knowledge of the facts of the case, such as a treating physician testifying about the medical opinions he or she formed while treating the plaintiff. *See* Fed. R. Civ. P. 26(a)(2) advisory committee's note to 1993 amendment; *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 824-26 (9th Cir. 2011) ("[A] treating physician is only exempt from Rule

26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment.").

Dr. Bernard Morrey, however, was not a treating physician for any of the plaintiffs in this case. *See* ROA.17-10030.10080-85. Accordingly, defendants moved to exclude his expert testimony on the ground that plaintiffs inaccurately designated him and improperly failed to produce an expert report. *See* ROA.17-10030.4016. In opposing that motion, plaintiffs repeatedly represented that Dr. Bernard Morrey was a "non-retained" and uncompensated expert witness. *See, e.g.*, ROA.17-10030.4075 ("Dr. Bernard Morrey was not retained or specially employed."); ROA.17-10030.4076 ("[N]o expert report was required from Dr. Bernard Morrey as a non-retained expert.").

The district court allowed Dr. Bernard Morrey to testify, on the condition that he later provide a deposition and a written report, and then return at defendants' request for additional cross-examination. ROA.17-10030.10088. During Dr. Morrey's testimony, plaintiffs' counsel emphasized his credentials, including the fact that he had performed hip surgery on former President George H.W. Bush, former First Lady Barbara Bush, and the Rev. Billy Graham. ROA.17-10030.10092. Dr. Morrey then testified at length about the core issues in the case, offering his expert opinion that there was "a design defect in the Pinnacle Ultamet hip implant" and that "there was a safer and … clinically effective alternative design." ROA.17-

10030.10151-55.[2] As plaintiffs' counsel acknowledged in his letter, Dr. Morrey's testimony "made a real difference to the jury." RE14; ROA.17-10030.26883.

A similar series of events played out with respect to Dr. Matthew Morrey. Dr. Matthew Morrey was a treating physician for two of the plaintiffs, but his proposed testimony covered far more than the medical opinions he formed during the course of treatment. For example, plaintiffs proposed that Dr. Morrey provide expert opinions on whether metal-on-metal hip implants have a "design flaw," whether metal-on-polyethylene implants are a "safer alternative to metal-on-metal," whether the product warnings were adequate, and several other topics exceeding the scope of his treatment. ROA.17-10030.26842. Because Dr. Morrey had not provided an

[2] When defendants attempted to arrange the deposition of Dr. Bernard Morrey, plaintiffs insisted that they be permitted to conduct a recorded direct examination of Dr. Morrey for use in future trials. Defendants asked the district court to disallow plaintiffs from recording "a direct examination of Dr. Morrey during a limited discovery deposition that the Court has allowed defendants to take," ROA.17-10030.11225, explaining that plaintiffs would likely seek to use that recording in "all these other cases without Dr. Morrey having filed reports," ROA.17-10030.11228. The district court denied the motion and announced that plaintiffs had "cured any error" by making Dr. Morrey available for a deposition. ROA.17-10030.11228.

Defendants never deposed Dr. Morrey, and the "expert report" he provided was just a summary of his trial testimony without any list of materials he considered in forming his opinions. In fact, Dr. Morrey admitted during his deposition for the third trial that he had never seen the "report" before and did not review it for accuracy. *See* Dkt.72 at 3-4, *Andrews v. DePuy Orthopaedics*, No. 15-cv-3484 (S.D. Tex. Sept. 19, 2016).

expert report on any of those topics, defendants moved to exclude any testimony that covered matters "beyond his role as a treating surgeon." ROA.17-10030.4116.

During argument on that motion, plaintiffs' counsel told the district court in no uncertain terms that Dr. Morrey was not being compensated for testifying: "*I think it's very important for the Court to know and the record to reflect* that Dr. [Matthew] Morrey was properly and timely disclosed as nonretained. We have no economic arrangement with him. We do not fund him. We do not pay him his time to write a report or do things like that." RE13; ROA.17-10030.10939 (emphasis added). The district court allowed Dr. Morrey to testify as an expert, as long as he agreed to provide a written expert report *after* he testified. ROA.17-10030.10940.

Dr. Morrey then testified at length about the ultimate issues in the case, offering his expert opinion that metal-on-polyethylene implants are "always … a safer alternative than metal-on-metal," ROA.17-10030.10958, that there is no "benefit in using metal-on-metal that outweighs [the] risk," ROA.17-10030.11104, and that metal-on-metal devices are "defective," ROA.17-10030.11155.[3] Indeed, there is no doubt that Dr. Matthew Morrey's testimony was critical to plaintiffs' case: in the main appeal from the judgment below, the *only* expert testimony plaintiffs cite

[3] The "expert report" Dr. Matthew Morrey later provided was just a summary of his trial testimony, and defendants decided not to recall him for further cross-examination.

in support of their marketing-defect claim is Dr. Morrey's. *See* Appellee and Cross-Appellant's Brief at 34, No. 16-11051 ("Dr. Matthew Morrey was Plaintiffs' designated expert on the adequacy of Defendants' warnings.").

As the trial continued, plaintiffs' counsel repeatedly told the court and the jury that neither Morrey had been compensated. For example, when one of defendants' experts testified that he was being compensated for his time, "[l]ike all experts on either side," plaintiffs' counsel immediately objected, insisting that the testimony was improper because "Dr. Matt Morrey wasn't compensated" and "Bernard Morrey wasn't compensated." RE13; ROA.17-10030.12787. The district court sustained the objection. RE13; ROA.17-10030.12787.

Likewise, during closing argument, plaintiffs' counsel argued that the jury should place extra weight on Dr. Bernard Morrey's testimony because he was "not a paid witness" and had charged "no expense coming to this courtroom." RE13; ROA.17-10030.16912. Plaintiffs' counsel explicitly contrasted the Morreys' purportedly *pro bono* testimony with the "bought testimony" supplied by defendants' experts. RE13; ROA.17-10030.16954.

The jury—which was instructed that it could "consider any bias evidence that the expert witness has been or will be paid for … reviewing the case and testifying," ROA.17-10030.16866—found for the plaintiffs on all causes of action other than commercial bribery and returned a colossal $502 million verdict, which included

just $536,514 in economic compensatory damages, but $141.5 million in non-economic compensatory damages and $360 million in exemplary damages. The district court later applied Texas' statutory cap on exemplary damages, reducing those damages to $9.6 million. The court then summarily denied all of defendants' post-trial motions for judgment as a matter of law and for a new trial. *See* ROA.17-10030.6607-08, ROA 17-10030.38 (Dkt.288). Defendants timely appealed from the district court's final judgment, and that appeal remains pending in a separate proceeding before this Court. *See Christopher v. Johnson & Johnson Svc, Inc.*, No. 16-11051 (appeal docketed July 11, 2016).

C. Post-Trial Disclosure of Plaintiffs' Counsel's Payments to the Morreys

Despite his repeated representations to the contrary, plaintiffs' counsel later revealed that he in fact paid both Dr. Bernard Morrey and Dr. Matthew Morrey for testifying in the *Aoki* trial. Those facts came to light during preparations for the third trial, in which plaintiffs designated both doctors as expert witnesses, this time as standard experts instead of "non-retained" experts. Before the doctors' depositions, plaintiffs produced two letters that their counsel had sent after the *Aoki* trial. One letter was addressed to Dr. Bernard Morrey and one was addressed to Dr. Matthew Morrey, and a check was enclosed with each—$35,000 for Dr. Bernard Morrey and $30,000 for Dr. Matthew Morrey. RE14; RE17.

Both letters were artfully written to give the impression that neither doctor had expected any compensation. In the letter to Dr. Bernard Morrey, Lanier professed that "in the aftermath of the trial," he had "re-evaluated the charges by the Johnson & Johnson/DePuy doctors and frankly think it unfair for you to have traveled, visited with us as well as the Johnson & Johnson/DePuy lawyers, testified, and taught the jury the medicine – all for nothing." RE14. Lanier stated that he knew Dr. Bernard Morrey "never did this for money or remuneration," but that he nevertheless was "enclosing a check for $35,000, which we HOPE you will accept with our greatest appreciation for what you have done." RE14.

Similarly, Lanier's letter to Dr. Matthew Morrey thanked the doctor for his trial testimony on behalf of "more than 9000 victims involved in the Pinnacle Multidistrict Litigation." RE17; ROA.17-10030.26885. The letter stated that Dr. Matthew Morrey's "involvement in this litigation was never for any financial gain," but that Lanier thought it "unfair for [him] to have been deposed, traveled to Dallas to testify and provided a report without receiving at least some modest compensation." RE17. Thus, even though Dr. Matthew Morrey "neither request[ed] nor requir[ed] any compensation," Lanier was enclosing "a check for $30,000." RE17.

Later, however, a different story emerged. During a deposition for the third trial, Dr. Bernard Morrey acknowledged that he received and deposited the $35,000

check—which amounted to a rate of more than $2,000 per hour. ROA.17-10030.26891. He then was asked whether he received "any other compensation … from Mr. Lanier" for his testimony at the *Aoki* trial. RE15; ROA.17-10030.26896. At that point, Dr. Morrey revealed that he and Lanier had a "preliminary discussion" before the *Aoki* trial during which Lanier agreed to donate $10,000 to a charity that Dr. Morrey selected. RE15; ROA.17-10030.26896 ("We had a preliminary discussion, and a check was given to a charitable organization.").

Additional details about this $10,000 payment emerged during the third trial. When Dr. Bernard Morrey took the stand, Lanier told the jury that he had visited Dr. Morrey before the *Aoki* trial to discuss "the history of metal-on-metal implants," and that when the doctor would not accept direct payment for his time, Lanier agreed to instead send $10,000 to the doctor's charity of choice:

> Q. I tried to pay you for that time that we took, and you would not take my money.
> A. Correct.
> Q. I asked you is there a charity that you support that I could give some money to.
> A. Yes.
> Q. And that was St. Rita's grade school; is that right?
> A. Yes.
> Q. So I sent them a check because of the time you gave us, so it was a generous check because it looked to me like they could use the money.
> A. That was a good read. Yes, it was a generous check.
> Q. All right. And I'm not patting anybody on the back or, hey, look, I gave money to a —
> A. Yeah.
> Q. I'm just saying the jury ought to be able to know that I think we wrote a $10,000 check, is my memory.

A. That's correct.

RE16; ROA.17-10030.28505-07; *see also* ROA.17-10030.10094-95 (describing the same meeting without reference to the payment).

Meanwhile, Dr. Matthew Morrey's deposition before the third trial revealed that he had expected all along to be paid for his testimony during the *Aoki* trial. When defendants' counsel asked whether he had any "hint" that he would be compensated for his work on the *Aoki* trial, Dr. Morrey answered: "Well, it wasn't that there wasn't a hint. What the conversation was was I asked should I turn in an invoice and I was told don't worry about that." RE18; ROA.17-10030.26910. Dr. Morrey then expressly acknowledged that he always had expected to be paid:

> Q. At the time you gave testimony in the last trial … did you have an expectation that you were going to be paid for the time spent giving that testimony?
> A. Yes, I thought I would.
> …
> Q. All right. So you had, at the time you testified, an expectation that you would be paid after the fact of the trial?
> A. Correct.

RE18; ROA.17-10030.26912-13. The only surprise for Dr. Morrey was the *amount* of the check: whereas he would normally charge "around $4,000 to $5,000" for a full day of testimony, plaintiffs' counsel paid him almost $2,000 *per hour*. ROA.17-10030.26904-07, ROA.17-10030.26913.

Based on those new revelations, defendants moved for a new trial under Federal Rules of Civil Procedure 60(b)(2) and (3). The district court denied the

motion. With respect to Rule 60(b)(2), the court ruled that the payments were not "newly discovered evidence" because they "had not yet been paid at the time the jury returned its verdict." ROA.17-10030.28512. In addition, the district court ruled that "Defendants have not shown how evidence of Plaintiffs' experts receiving a fraction of the compensation of Defendants' experts would have produced a different result at trial." ROA.17-10030.28513-14. With respect to Rule 60(b)(3), the court stated only that "[t]he evidence before the Court tends to show that at the time of trial there was no agreement for compensation between Plaintiffs' counsel and the Morreys." ROA.17-10030.28512. The district court did not mention the $10,000 payment to Dr. Bernard Morrey's charity of choice anywhere in its decision, nor did it discuss Dr. Matthew Morrey's admission that he expected to be paid all along. This appeal followed.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion for relief under Federal Rule of Civil Procedure 60(b)(3) for abuse of discretion, while keeping in mind that "the rule 'is remedial and should be liberally construed.'" *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978).

SUMMARY OF ARGUMENT

Plaintiffs obtained an unfair advantage at trial by falsely telling the court and the jury that two of their key expert witnesses were not being compensated for their

work on the case. Both before and during trial, plaintiffs' counsel repeatedly insisted that Drs. Bernard and Matthew Morrey were testifying *pro bono*, solely out of their concern for the plaintiffs. Indeed, a recurrent theme of plaintiffs' case was the contrast between the objectivity and independence of their own experts and the alleged biases of defendants' experts. Plaintiffs' counsel invoked that theme while arguing evidentiary motions, while objecting to defendants' expert testimony, while cross-examining defendants' witnesses, and while delivering a closing argument that expressly contrasted the Morreys' testimony with the "bought testimony" of defendants' experts. In reality, however, both Morreys were paid for their work on the case: Plaintiffs' counsel agreed before trial to donate $10,000 to Dr. Bernard Morrey's charity of choice (in lieu of direct payment) and then directly paid him $35,000 afterward. Plaintiffs' counsel also paid $30,000 to Dr. Matthew Morrey, who testified that he expected to be paid all along.

Plaintiffs' counsel's misrepresentations severely prejudiced defendants, in two independent ways. First, the misconduct prevented defendants from impeaching the Morreys' testimony, while also providing plaintiffs a wholly unwarranted basis on which to impeach defense witnesses. The Morreys were central witnesses in the case, and plaintiffs' misleading contrast between them and defendants' experts unfairly bolstered their credibility. Second, by falsely claiming that the Morreys were non-retained experts exempt from the requirement to produce an expert report,

plaintiffs' counsel deprived defendants of a meaningful opportunity to examine the Morreys' expert opinions before trial. The failure to provide expert reports is particularly troubling here, as proper reports would have included "a statement of the compensation to be paid," Fed. R. Civ. P. 26(a)(2)(B)(vi), which presumably would have prevented plaintiffs' counsel from misrepresenting facts about those payments during trial.

These are exactly the types of circumstances that warrant relief under Rule 60(b)(3), which is "aimed at judgments which were unfairly obtained," not just "those which are factually incorrect." *Rozier*, 573 F.2d at 1339. Courts routinely grant relief under the Rule when a party's nondisclosure "made a difference in the way [opposing] counsel approached the case or prepared for trial," *id.* at 1342, or where a party's misrepresentation about a witness "affected the [other party's] ability [to] impeach him," *In re Vioxx Prods.*, 489 F. Supp. 2d 587, 595 (E.D. La. 2007). The misrepresentations in this case undoubtedly did both, and there is no question that the misrepresentations were material, as plaintiffs' counsel himself stressed that "it's very important for the Court to know and the record to reflect" that the experts were not funded or paid. RE13; ROA.17-10030.10939. Under these circumstances, the defendants are plainly entitled to a new trial.

ARGUMENT

I. Defendants Are Entitled To A New Trial Because Plaintiffs' Misrepresentations About Their Expert Witnesses Prevented Defendants From Fully And Fairly Presenting Their Case.

Rule 60(b)(3) entitles a party to a new trial in the event of "fraud … , misrepresentation, or misconduct by an opposing party." The Rule offers relief to parties who suffered an adverse judgment under unfair circumstances: it is "aimed at judgments which were unfairly obtained," not just "those which are factually incorrect." *Rozier*, 573 F.2d at 1339. Accordingly, courts may grant relief under Rule 60(b)(3) when a misrepresentation "prevented the losing party from fully and fairly presenting [its] case," regardless of whether the misrepresentation "affected the outcome of the prior trial." *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981). After all, "a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" *Rozier*, 573 F.2d at 1346 (quoting *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22 (1931)); *see also Rembrandt Vision Techs. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320, 1327 (Fed. Cir. 2016).

To obtain relief under Rule 60(b)(3), the moving party must establish by clear and convincing evidence that (1) the adverse party engaged in "fraud, misrepresentation, or other misconduct," and (2) the misconduct prevented the

moving party from fully and fairly presenting its case. *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 636, 641 (5th Cir. 2005). The conduct at issue need not amount to "fraud upon the court," such as "bribery of a judge … or the fabrication of evidence," but rather includes a range of "[l]ess egregious misconduct," including "withholding information," *Rozier*, 573 F.2d at 1338-39, or misrepresenting an expert "as an objective third party with absolutely no basis to be biased," *Midwest Franchise Corp. v. Metromedia Rest. Grp., Inc.*, 177 F.R.D. 438, 442 (N.D. Iowa 1997). Because the Rule is designed to ensure fairness, even unintentional misrepresentations can justify relief. *See Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965).

A. Plaintiffs Misrepresented That Their Expert Witnesses Were Not Compensated.

1. Both before and during trial, plaintiffs' counsel repeatedly misrepresented to the court and jury that Drs. Bernard and Matthew Morrey were unpaid, non-retained expert witnesses. For instance, when defendants objected that neither doctor had produced the expert report required by Rule 26(a)(2)(B), plaintiffs' counsel assured the court that both doctors were exempt from that requirement because they were not being compensated. *See* ROA.17-10030.4075 ("Dr. Bernard Morrey was not retained or specially employed."); ROA.17-10030.10939 ("I think it's very important for the Court to know and the record to reflect that Dr. [Matthew] Morrey was properly and timely disclosed as nonretained.

We have no economic arrangement with him. We do not fund him. We do not pay him his time to write a report or do things like that.").

Similarly, after one of defendants' experts suggested that plaintiffs' experts were being compensated, plaintiffs' counsel immediately objected in front of the jury, insisting that the Morreys were not being paid to testify: "Your Honor, I object. Dr. Matt Morrey wasn't compensated. Bernard Morrey wasn't compensated." RE13; ROA.17-10030.12787. And on cross-examination of that same witness, plaintiffs' counsel returned to the topic, telling the witness that the Morreys "[left] their practices," and came "here to testify because of concern over what's being claimed in this case." RE13; ROA.17-10030.13080; *see also* ROA.17-10030.13212 ("[Dr. Bernard Morrey] … put in President Bush's metal-on-poly hips … He came and testified here, on his own.").

During closing argument, plaintiffs' counsel told the jury to place extra weight on Dr. Bernard Morrey's testimony because he was "not a paid witness" and charged "no expense coming to this courtroom." RE13; ROA.17-10030.16912. He then explicitly contrasted Dr. Matthew Morrey with defendants' expert witnesses, who he claimed offered only "bought testimony." RE13; ROA.17-10030.16954; *see also*

ROA.17-10030.16954 ("That's not bought testimony. That's not conjured. That's not rehearsed…. [T]hey don't have to make excuses.").[4]

Those representations were false. As later developments revealed, plaintiffs' counsel had already agreed to pay $10,000 to a charity selected by Dr. Bernard Morrey and would later pay another $35,000 directly to Dr. Morrey. He also paid $30,000 to Dr. Matthew Morrey, who admitted that he always had expected to be compensated for serving as an expert witness. Plaintiffs' counsel—whether intentionally or not—simply misrepresented the facts about whether the Morreys were being paid for their work on the case.

2. The district court concluded that plaintiffs did not make any misrepresentations, but its ruling provides no explanation or support for that conclusion. The court's entire analysis of this issue consisted of a single sentence of *ipse dixit*: "The evidence before the Court tends to show that at the time of trial there was no agreement for compensation between Plaintiffs' counsel and the Morreys." RE12; ROA.17-10030.28512. The court did not engage with the fact that Dr. Matthew Morrey testified that he expected to be paid (and then was paid),

[4] In his letter to Dr. Bernard Morrey enclosing a $35,000 check, plaintiffs' counsel stated, with no apparent irony, that he "pointed … out to the jury on multiple occasions" that Morrey "never did this for money or remuneration." RE14.

or the fact plaintiffs' counsel already had agreed to pay Dr. Bernard Morrey indirectly (and then paid him directly).

Indeed, the district court never once mentioned the $10,000 payment plaintiffs' counsel agreed *before trial* to make to a charity Dr. Bernard Morrey selected, even though that is the exact type of payment courts routinely recognize as equivalent to a direct payment. In *Saunders v. Commissioner*, for example, this Court held that an employee who directs his employer to pay his salary into an education fund receives a benefit equivalent to if he had accepted his salary and then contributed to the education fund himself. 720 F.2d 871, 873 (5th Cir. 1983). As this Court explained, "[o]ne need not personally receive the taxable benefits provided one has the power to determine the recipient." *Id.* So too here. Dr. Morrey received the same benefit by directing his payment to his chosen charity as he would have had he accepted direct payment and then donated on his own. *Cf. Salman v. United States*, 137 S. Ct. 420, 428 (2016) (providing inside information to a friend is equivalent to trading on that information and sending the friend the proceeds); *United States v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010) ("[T]he person who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation."). In light of that equivalency, the district court's failure to even *mention* the $10,000 payment is a clear abuse of discretion.

To the extent the district court denied the motion because "there was no agreement for compensation" at a particular *rate* or in a particular *amount*, that ruling not only ignores the $10,000 payment but also fails to recognize that plaintiffs disclaimed *any* financial relationship with the Morreys—not just a pre-negotiated one. For example, plaintiffs' counsel told the court and jury in no uncertain terms that Dr. Bernard Morrey was "not a paid witness" and that Dr. Matthew Morrey "wasn't compensated." Those statements, along with several others made throughout the course of proceedings, *see supra* pp.5-9, flatly misrepresented the nature of plaintiffs' financial arrangement with the Morreys.

B. Plaintiffs' Misrepresentations Prevented Defendants From Fully and Fairly Presenting Their Case.

1. Plaintiffs' misrepresentations about whether their experts would be compensated severely prejudiced defendants' ability to mount an effective defense, in two independent ways. First, plaintiffs' counsel relied on the misrepresentations to make plaintiffs' experts appear more credible to the jury. Plaintiffs' counsel not only held out the Morreys as particularly virtuous for testifying without pay, *see, e.g.*, RE13; ROA.17-10030.12787; ROA.17-10030.13080; ROA.17-10030.16912; ROA.17-10030.16954, but also spent hours upon hours impeaching defendants' experts because they *were* being paid:

- "Sir, you're getting paid right now to testify, aren't you?" ROA.17-10030.16149.

- "That's your paid opinion in this case, correct?" ROA.17-10030.16166.
- "Sir, you're being paid to advocate an opinion. You're not here as a neutral, an unpaid neutral, are you?" ROA.17-10030.16191.
- "So all of your testimony here is simply what you've learned being paid to research?" ROA.17-10030.14923.
- "So they're not just compensating you for your time, they're paying you a lot more for your time than you normally get to do this expert work, to come to the courtroom and give your courtroom diagnosis?" ROA.17-10030.13112.

The effect of those misrepresentations was amplified by the fact that the district court gave the standard instruction that the jury, in "deciding whether to accept or rely upon the opinion of an expert witness," should "consider any bias evidence that the expert witness has been or will be paid for … reviewing the case and testifying." ROA.17-10030.16866. Plaintiffs' counsel, by repeatedly drawing a (false) contrast between the Morreys' supposedly unbiased testimony and defendants' "bought testimony," unquestionably tainted the fairness of the trial. Indeed, plaintiffs' counsel himself acknowledged in his letters enclosing payment that the Morreys' testimony was "particularly instructive" and "made a real difference to the jury." RE14; RE17.

Second, by falsely claiming that the Morreys were non-retained experts exempt from Rule 26(a)(2)(B)'s requirements, plaintiffs deprived defendants of a meaningful opportunity to examine the Morreys' expert opinions in advance of trial.

The purpose of Rule 26's disclosure requirement is to provide information on expert testimony "sufficiently in advance of trial [so] that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26(a)(2) advisory committee's note to 1993 amendment; *see also Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1142 (5th Cir. 1980) ("The primary purpose of this required disclosure is to permit the opposing party to prepare an effective cross-examination.").

Here, although plaintiffs disclosed the general topics on which the Morreys would testify, their failure to provide expert reports prevented defendants from scrutinizing the Morreys' opinions or the factual bases for those opinions before trial. Defendants were likewise deprived of an opportunity to review a proper expert report with their own experts, which "put them at a significant disadvantage in preparing this case for trial" and deciding how to approach cross-examination. *Avendt v. Covidien Inc.*, 314 F.R.D. 547, 560 (E.D. Mich. 2016). And it is no small irony that proper expert reports would have disclosed that the Morreys were being paid, Fed. R. Civ. P. 26(a)(2)(B)(vi), which likely would have prevented the misrepresentations in the first place.

While the district court offered defendants the opportunity to depose Dr. Bernard Morrey in the middle of trial, the purpose of Rule 26(a)(2) "would be

completely undermined if parties were allowed to cure deficient reports with later deposition testimony," as the opposing party would be forced divert resources from an ongoing trial just to obtain information to which it had long been entitled. *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008). Moreover, a mid-trial deposition would have been of little value given that Dr. Morrey *never* provided the required expert report; plaintiffs' counsel provided only a summary of Dr. Morrey's testimony, which Dr. Morrey never saw or reviewed. *See* Dkt.72 at 3-4, *Andrews v. DePuy Orthopaedics, Inc.*, No. 15-cv-3484 (N.D. Tex. Sept. 19, 2016).

2. This Court has granted relief under Rule 60(b)(3) in highly analogous circumstances. In *Rozier*, for example, the defendants failed to produce a potentially inculpatory document during discovery. 573 F.2d at 1340. This Court reversed the district court's denial of relief under Rule 60(b)(3), explaining that the plaintiff was "prejudiced by [the defendant's] nondisclosure" because the document could "have made a difference in the way plaintiff's counsel approached the case or prepared for trial." *Id.* at 1342. This Court emphasized that it "cannot know what use, if any, plaintiff's counsel would have made of the [document] had it been produced … prior to trial." *Id.* at 1343. Nevertheless, because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," the defendant's withholding of information prevented "the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure." *Id.* at 1345-46; *see also In re Vioxx Prods.*,

489 F. Supp. 2d at 594-95 (granting new trial under Rule 60(b)(3) where expert misrepresented his qualifications).

Courts have also held that misrepresenting whether a witness is unpaid or unbiased is precisely the type of misconduct warranting relief under Rule 60(b)(3). In *United States v. Cinergy Corp.*, 2008 WL 7679914 (S.D. Ind. Dec. 18, 2008), for example, the defendant company falsely represented that one of its witnesses was not being compensated for his work on the case. *Id.* at *10-11. When that misrepresentation came to light, the court granted a new trial under Rule 60(b)(3), holding that the misrepresentation rendered the trial unfair because the defendant had repeatedly "contrasted Plaintiffs' paid expert witnesses' testimony with that of [its] unpaid current and former employees." *Id.* at *1; *see id.* at *13. Even though it was "difficult to determine the extent of the unfairness," the court held that "the liability trial in this matter was tainted" and granted plaintiffs' request for a new trial. *Id.* at *13-14.

Similarly, in *Midwest Franchise Corp. v. Metromedia Restaurant Group, Inc.*, 177 F.R.D. 438 (N.D. Iowa 1997), the plaintiff sought leave to depose a defense witness after trial, claiming that the witness failed to disclose he "was engaged in employment negotiations with the defendants at the time he testified." *Id.* at 440. Defendants argued that any such misrepresentation could not have prevented the plaintiff from fairly presenting its case because the witness's testimony was

unrebutted, but the court disagreed, noting that the witness's "credible demeanor" might have led the jury to give his testimony added weight. The court therefore granted plaintiff's requested relief, holding that false statements about a witness' "third party objectivity" are grounds for a new trial under Rule 60(b)(3) because they "call[] into question the fairness of the trial." *Id.*[5]

Here, too, plaintiffs' misrepresentations fundamentally undermined the fairness of the trial and defendants' ability to mount an effective defense. Indeed, plaintiffs' counsel himself acknowledged just how important the issue of expert compensation was to the trial, telling the district court that "it's very important for the Court to know and the record to reflect" that plaintiffs' experts were not funded or paid. RE13; ROA.17-10030.10939. He then proceeded to bolster plaintiffs' experts' credibility under those false pretenses, misleadingly contrasting their purportedly *pro bono* testimony with defendants' allegedly biased paid testimony. *Cf. Cinergy Corp.*, 2008 WL 7679914, at *1.

Moreover, as in *Rozier*, the improperly withheld information almost certainly would have "made a difference in the way … counsel approached the case or prepared for trial." 573 F.2d at 1342. If defendants knew the Morreys were being

[5] After the court granted the plaintiff's motion, the parties stipulated to dismissal of the case. *See* Dismissal Stipulation, *Midwest Franchise Corp. v. Metromedia Rest. Grp.*, No. 96-cv-04030-DEO (N.D. Iowa Jan. 23, 1998), Dkt.200.

compensated, they could have impeached the Morreys' credibility by raising questions about their objectivity—which would have been especially effective given that Dr. Matthew Morrey was paid at least twice his normal hourly rate. And if plaintiffs had timely produced the required expert reports, defendants would have had a meaningful opportunity to prepare to address the experts' opinions before trial. In short, plaintiffs' counsel's misrepresentations prevented "the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure." *Id.* at 1345-46.

3. Finally, the need for a new trial is magnified by the fact that this was supposed to be a "bellwether" trial that provided unbiased information about the value of the other pending cases in this MDL. *See generally In re Chevron*, 109 F.3d 1016, 1020-21 (5th Cir. 1997). Without a sufficient level of confidence in the results, "no inferences may be drawn … that would form the basis for applying such results to cases or claims that have not been actually tried." *Id.* at 1020. And because the result of each bellwether trial informs how the parties value the remaining claims in the MDL, the unfairness of the proceedings below will be multiplied several times over, undermining the reliability of entire bellwether process. Only a new trial can cure the unfairness of the proceedings below and ensure the ongoing fairness of the MDL.

CONCLUSION

For the reasons set forth above, the Court should reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,466 words as determined by the word counting feature of Microsoft Word 2016.

I certify that the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and the document has been scanned for viruses with Windows Defender, last updated April 16, 2017 and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system or by electronic mail.

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