Appeal No. 17-10030

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

MARGARET AOKI,

Plaintiff-Appellee

v.

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON

Defendants-Appellants

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Northern District of Texas
Hon. Ed. Kinkeade
Case No. 3:14-cv-1994-K

BRIEF OF APPELLEES

Kenneth W. Starr
5404 Point Wood Circle
Waco, TX 76710
Telephone: (254) 644-4970
Email: Ken_Starr@baylor.edu

W. Mark Lanier
THE LANIER LAW FIRM
6810 FM 1960 Rd W
Telephone: (713) 659-5200
Fax: (713) 659-2204
Email: wml@lanierlawfirm.com

Counsel for Plaintiffs-Appellees

(*additional counsel listed on inside cover*)

May 17, 2017

Consolidated with:
Case No. 17-10031

JAY CHRISTOPHER; JACQUELINE CHRISTOPHER,

Plaintiffs-Appellees

v.

DEPUY ORTHOPAEDICS, INC. AND JOHNSON & JOHNSON

Defendants-Appellants

Consolidated With
Case No. 17-10032

DONALD GREER,

Plaintiff-Appellee

v.

DEPUY ORTHOPAEDICS, INC. AND JOHNSON & JOHNSON

Defendants-Appellants

Consolidated With
Case No. 17-10034

RONALD KLUSMANN; SUSAN KLUSMANN,

Plaintiffs-Appellees

v.

DEPUY ORTHOPAEDICS, INC. AND JOHNSON & JOHNSON

Defendants-Appellants

Consolidated With
Case No. 17-10035

ROBERT PETERSON; KAREN PETERSON,

Plaintiff-Appellees

v.

DEPUY ORTHOPAEDICS, INC. AND JOHNSON & JOHNSON

Defendants-Appellants

Additional counsel for Plaintiffs-Appellees:

Arthur R. Miller
THE LANIER LAW FIRM (Of Counsel)
New York University, School of Law
Vanderbilt Hall 430F
40 Washington Sq. South
New York, New York 10012
Telephone: (212) 992-8147
Email: Arthur.r.miller@nyu.edu

Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court
P.O. Box 1190
Alexandria, Louisiana 71301
Telephone: (800) 256-1050
Fax: (318) 561-2591
E-mail: rarsenault@nbalawfirm.com

Wayne Fisher
FISHER, BOYD, JOHNSON & HUGUENARD, LLP
2777 Allen Parkway, 14th Floor
Houston, Texas 77019
Telephone: (713) 400-4000
Fax: (713) 400-4050
Email: wfisher@fisherboyd.com
Email: justinp@fisherboyd.com

Jayne Conroy
SIMMONS HANLY CONROY
112 Madison Avenue
New York, New York 10016
Telephone: (212) 784-6402
Fax: (212) 213-5949
E-mail: jconroy@simmonsfirm.com

CERTIFICATE OF INTERESTED PERSONS

In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., No. 17-10030:

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. and Johnson & Johnson, Defendants-Appellees.

3. Kenneth W. Starr; The Lanier Law Firm, PC (Arthur R. Miller, W. Mark Lanier, Kevin Parker, M. Michelle Carreras); Fisher, Boyd, Johnson & Huguenard, LLP (Wayne Fisher, Justin Presnal); Neblett, Beard & Arsenault (Richard J. Arsenault, Jennifer M. Hoekstra); Simmons Hanly Conroy (Jayne Conroy, Andrea Bierstein), counsel for Plaintiffs-Appellees.

4. Skadden, Arps, Slate, Meagher & Flom LLP (John H. Beisner, Stephen J. Harburg, Jessica D. Miller, Geoffrey M. Wyatt); Kirkland & Ellis, L.L.P. (Paul D. Clement, Jeffrey M. Harris, Michael D. Lieberman, Kevin M. Neylan, Jr.); 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.

Respectfully submitted:

/s/ Kenneth W. Starr
Kenneth W. Starr
5404 Point Wood Circle
Waco, TX 76710
Telephone: (254) 644-4970
Email: Ken_Starr@baylor.edu

/s/ Arthur R. Miller
Arthur R. Miller
THE LANIER LAW FIRM (Of Counsel)
New York University, School of Law
Vanderbilt Hall 430F
40 Washington Sq. South
New York, New York 10012
Telephone: (212) 992-8147
Email: Arthur.r.miller@nyu.edu

/s/ W. Mark Lanier
W. Mark Lanier
THE LANIER LAW FIRM
6810 FM 1960 Rd W
Telephone: (713) 659-5200
Fax: (713) 659-2204
Email: wml@lanierlawfirm.com

/s/ Richard J. Arsenault
Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court
P.O. Box 1190
Alexandria, Louisiana 71301
Telephone: (800) 256-1050
Fax: (318) 561-2591
E-mail: rarsenault@nbalawfirm.com

/s/ Wayne Fisher
Wayne Fisher
FISHER, BOYD, JOHNSON & HUGUENARD, LLP
2777 Allen Parkway, 14th Floor
Houston, Texas 77019
Telephone: (713) 400-4000
Fax: (713) 400-4050
Email: wfisher@fisherboyd.com
Email: justinp@fisherboyd.com

/s/ Jayne Conroy
Jayne Conroy
SIMMONS HANLY CONROY
112 Madison Avenue
New York, NY 10016
Telephone: (212) 784-6402
Fax: (212) 213-5949
E-mail: jconroy@simmonsfirm.com

STATEMENT REGARDING ORAL ARGUMENT

This appeal arises from a nine-week trial in one of the largest multidistrict litigation proceedings pending in the federal court system. The complexity of this case and its voluminous record are themselves sufficient reasons to make oral argument appropriate. Further, the main issue in this appeal stems from the district court's denial of a Rule 60(b)(3) motion which Defendants used to impugn the conduct of Plaintiffs' lead trial counsel. Appellees believe that oral argument would assist this Court's understanding of the *ad hominem* nature of this appeal in ways that could not be achieved through the mere review of a cold record. For these reasons, Appellees respectfully request oral argument.

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PRELIMINARY STATEMENT

This is a second appeal in the second-round bellwether cases in the Pinnacle Hip Implant MDL,[1] this one arising from the district court's denial of a Rule 60(b) motion for a new trial. The motion for a new trial was based on defendants' claim that Plaintiffs' counsel made misrepresentations to the court and to the jury at the trial. The district court, the Hon. Ed Kinkeade, correctly denied the Rule 60 motion because there were no misrepresentations: Plaintiffs' counsel's statements to the jury that two of Plaintiffs' expert witnesses, Dr. Bernard Morrey and Dr. Matthew Morrey, had not been compensated were 100% true. *Neither witness had been paid so much as a penny, directly or indirectly, for his trial testimony and neither witness had any arrangement or understanding with Plaintiffs' counsel that he would* ever *be paid as an expert*. Moreover, the opinions offered by both witnesses had been formed during the long years of their experience as orthopaedic surgeons; they were not the product of work as paid experts and neither of

[1] The second bellwether trial, the subject of this appeal, involved the consolidation of five cases, involving five patient-plaintiffs and three spouse-plaintiffs, all of whose claims arose under Texas law. The trial is sometimes referred to as the "*Aoki* trial," after the first of the plaintiffs in alphabetical order. The trial is also the subject of a separate appeal directly from the verdict, which is Case No. 16-11051 in this Court.

the Morreys were compensated by Plaintiffs in any way for the time it took to formulate these opinions. In fact, Matthew Morrey was a treating physician in the case, and Bernard Morrey was his father. This stood in sharp contrast to the opinions of certain of Defendants' experts, which were formed while the witnesses were on Defendants' payroll in various capacities, a point that Plaintiffs' counsel noted, accurately, in his closing. Although the Morreys were *later* paid by Plaintiffs' counsel and consequently were treated by Plaintiffs as retained experts in connection with the *third* bellwether trial,[2] the representations made at the second trial that they were not compensated witnesses and that their opinions were not paid-for were entirely true at that time.

In the absence of any misrepresentations, Defendants' entire argument falls apart. Defendants were not, and could not have been, prevented from fully and fairly presenting their case because everything the jury was told about the Morreys was true. Moreover, Defendants had every opportunity

[2] The third bellwether trial, which resulted in a verdict in December 2016, involved six cases, with six patient-plaintiffs and four spouse plaintiffs, all of whose claims arose under California law. That trial is sometimes referred to as the "*Andrews* trial," after the first of the plaintiffs in alphabetical order. The appeal from that case is pending as No. 17-10017 in this Court.

to obtain all relevant discovery from these witnesses; before the trial began, they took the deposition of Dr. Matthew Morrey twice and met informally, and without opposing counsel, with Dr. Bernard Morrey. With no misrepresentations and no impediment to a fair trial, the district court did not abuse its discretion in denying Defendants' Rule 60 motion.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court abuse its discretion in denying Defendants' motion for a new trial based on Plaintiffs representations that Drs. Bernard and Matthew Morrey were unretained experts, where at the time of trial, the Morreys had not been retained or compensated for their opinions, nor was there any agreement with Plaintiffs' counsel that they would ever be paid, and Defendants failed to show, by clear and convincing evidence, that there was any misrepresentation of then-existing fact or that there existed newly-discovered evidence that clearly would have produced a different result at trial?

STATEMENT OF THE CASE

The Pinnacle Metal-on-Metal Hip Implant

These cases arise from injuries the plaintiffs suffered as a result of receiving Defendants' Pinnacle metal-on-metal ("MoM") hip implant devices during hip replacement surgery.

Modern hip-replacement surgery developed in the 1960s. ROA.17-10030.10117-10118. The most successful implant, developed by orthopaedic surgeon Sir John Charnley, used a metal head and a polyethylene cup. *Id*. (The polyethylene in the cup is sometimes referred to as "poly." The combination is referred to as "metal-on-poly" or "MoP.") The "Charnley Hip" was the "gold standard" through the 1990s. ROA.17-10030.10118, 10126. In the early 2000s, studies demonstrated its impressive long-term survivorship. PX-DEMO-631 (2002 Mayo clinic study reporting "excellent" 25-year survivorship); ROA.17-10030.10121, 10129, 10140-10141; DX-915 (2000 DePuy brochure reporting over 1 million Charnley Hips implanted, with 96.2% survival rate at 32 years).

Several surgeons also tried hips metal-on-metal bearings. These early MoM implants performed miserably and were abandoned. ROA.17-10030.9522. In a 1995 internal analysis ("End-Game Memo"), DePuy

confirmed metal-on-polyethylene outperformed metal-on-metal. ROA.17-10030.9522; PX-1 (MoM failure rates were 47% at 11 years and 72.5% at 20 years, while metal-on-polyethylene had survival rates as high as 89.3% at 20 years). Nonetheless, Defendants persisted with developing and marketing the Pinnacle MoM implant.

Defendants' Pinnacle hip implant is a modular system with four components: a metal stem (which goes into the femur bone), a femoral head (attached to the stem to replace the "ball" of the hip joint), a cup (implanted in the "socket" of the hip joint), and a liner (which fits into the cup and is the surface with which the femoral head actually comes into contact). The Pinnacle cup is used with either a polyethylene (Marathon/AltrX) or metal (Ultamet) liner, and either a ceramic (Biolox Delta) or metal (MSpec/aSphere) femoral head. PX-57; PX-801. Where an implant uses a metal head and a metal liner, the bearing surface is metal-on-metal; a metal head and a poly liner creates a metal-on-poly bearing surface.

Plaintiffs' evidence showed that Defendants introduced the Pinnacle MoM hip without adequate testing. Although they were cautioned about potential problems with metal ion release and metal-wear-debris toxicity, they never conducted any clinical tests of the Ultamet metal liner before

selling it. ROA.17-10030.7239, 8400, 8428. Yet they disingenuously told surgeons they had solved the "problematic outcomes" from first-generation MoM through better technology and improved manufacturing. DX-927. Defendants also paid millions to surgeon-consultants to promote MoM/Ultamet, some of whom had royalty interests in these products. These "design-surgeons" often published pro-MoM papers in orthopaedic journals without disclosing their conflicts, thereby polluting the scientific literature.

Defendants' Pinnacle MoM implant was introduced in 2001. The MoM devices showed failures and other complications at much higher rates than been seen with MoP implants. These high failure rates along with their often dire medical consequences eventually caused surgeons to abandon metal-on-metal; the devices ultimately were taken off the market. The claims of thousands of plaintiffs who suffered injuries from the devices were consolidated by the Judicial Panel for Multi-District Litigation in the Northern District of Texas for coordinated pretrial proceedings. (Claims involving injuries from MoM hips manufactured by other companies were the subject of separate MDLs.)

The first bellwether trial began in September 2014 and resulted in a verdict for the Defendants. The second bellwether trial, the subject of this

appeal, began in January, 2016. The trial last nine weeks and resulted in substantial verdicts for each of the Plaintiffs, including punitive damage awards.

Plaintiffs' Non-Retained Experts, Bernard and Matthew Morrey

At the consolidated trial, the jury heard testimony from a father and son pair of orthopaedic surgeons, Dr. Bernard Morrey and Dr. Matthew Morrey. Dr. Bernard Morrey is one of the preeminent orthopaedic surgeons in the country, if not the world. A native Texan, he became chairman of the orthopaedics department at the famed Mayo Clinic in Rochester, Minnesota, then served on the Board of Governors at the Mayo Clinic before returning to full time practice of orthopaedic surgery. ROA.17-10030.10093-10094. He has invented numerous orthopaedic devices, including an artificial elbow, and has also invented new orthopaedic surgical procedures. ROA.17-10030.10097. His 90-page *curriculum vitae* shows his extensive publication record – over 450 peer-reviewed articles -- and his many honors and leadership positions in the world of orthopaedic surgery. ROA.17-10030.10088, 28352-28442. He has taught orthopaedic surgery all over the world for 30 years. ROA.17-10030.10093. When President George H. W. Bush needed a hip replacement, he went to Dr. Bernard Morrey for the

surgery. ROA.17-10030.10088. The same was true for Barbara Bush. ROA.17-10030.10088. Dr. Morrey also treated Billy Graham. ROA.17-10030.10088.

As he testified at trial, Dr. Bernard Morrey did not use metal-on-metal implants in his surgical practice. This decision was based on his own extensive research, as well as on his experience as a practicing surgeon. As Dr. Morrey explained, through his research and his work, he came to believe that such devices were potentially unsafe and were not worth the risks associated with them. Dr. Morrey believed that MoP implants showed such positive results that further improvements should come through incremental changes to these time-tested and safe devices, rather than through experimentation with untested and potentially riskier new designs and materials. He came to these views and based his surgical practices on them throughout the 1990's, the 2000's and the 2010's. ROA.17-10030.10117-10118, 10141-10146.

Dr. Bernard Morrey formed such a strong opinion about metal-on-metal implants in the context of his practice that when his son, Dr. Matthew Morrey, became an orthopaedic surgeon, Dr. Morrey senior taught Dr. Morrey junior about the problems with these devices. As a result, like his father, Dr. Matthew Morrey did not use metal-on-metal hip implants in his

patients. ROA.17-10030.28246. As it happened, Dr. Matthew Morrey, who practiced orthopaedic surgery at the University of Texas Health Science Center ("UTHSC"), performed the revision surgeon on Plaintiff-Appellee Dr. Donald Greer. Another surgeon had implanted a Pinnacle metal-on-metal device in Dr. Greer; when that device failed, it was Dr. Matthew Morrey who took it out and replaced it with a metal-on-poly device. In October, 2015, Dr. Morrey evaluated another one of the Plaintiffs-Appellees, Richard Klusmann.

Because he had treated Dr. Greer, Dr. Matthew Morrey was approached by Plaintiffs' counsel for his views about Dr. Greer's revision surgery and the failure of his metal-on-metal hip. Although he had not previously testified as a witness, Dr. Matthew Morrey agreed to testify in this case about Dr. Greer's revision surgery, about his examination of Mr. Klusmann's medical records, and, more generally, about the reasons for his refusal to use metal-on-metal implants in his own practice. After Dr. Matthew Morrey agreed to testify, his father also learned about the case and ultimately agreed to be a witness as well.

Neither Dr. Bernard Morrey nor Dr. Matthew Morrey was paid to act as an expert witness for Plaintiffs and no arrangement for later payment was

made. As Dr. Bernard Morrey later explained, he did not view the case as a routine matter and did not involve himself as a paid expert; rather, he chose to testify because he viewed the issue as a serious one involving the integrity of his profession:

> Q. Have you served as an expert witness in other cases?
>
> A. Yes.
>
> Q. And you normally have an hourly rate and charge about $400 an hour?
>
> A. Correct.
>
> Q. Okay. Why is it that you're not charging an ordinary hourly rate for this litigation?
>
> A. *I think what prompted my involvement was a concern about integrity*, and so I don't consider it a routine matter.
>
> Q. Okay. *You don't consider yourself working as an expert witness in this case*?
>
> A. I think this is kind of a different situation because of the implications. There's a lot of people that are involved. A lot of patients are involved, and I've not served as an expert witness in a class action suit before. If that's what this is called, with multiple defendants [sic] --
>
> Q. It's close enough.
>
> A. Yeah. So *my involvement wasn't predicated on my reimbursement*.

ROA.17-10030.27540-27541 (emphasis added). Similarly, before the trial, Dr. Matthew Morrey received no payment from Plaintiffs in connection with his

trial testimony, and there was no arrangement between him and the Plaintiffs for compensation of any kind in return for his trial testimony. In fact, as discussed below, the main compensation for Dr. Matthew Morrey came from *defendants*, who paid him $10,000 for his deposition. ROA.17-10300.27945-27946.

Plaintiffs Disclosed Dr. Bernard Morrey as a Non-Retained Expert and Provided an Expert Report for Him

On August 14, 2015, Plaintiffs provided Defendants with their expert disclosures. Dr. Bernard Morrey was disclosed as a generic expert witness who was not required to provide an expert report. ROA.17-10030.26814, 26841. The disclosure stated that Dr. Morrey "has not been retained or specially employed to provide expert testimony in this litigation." ROA.17-10030.26841. The disclosure described the facts and opinions to which Dr. Bernard Morrey was expected to testify as follows:

- The second generation of metal-on-metal hip implants was ill-conceived considering the poor performance of the first generation metal-on-metal implants, the promising clinical results obtained with cross linked metal-on-poly implants and the unresolved uncertainty about the biological response to metal wear debris and ions.
- Metal-on-poly is a safer alternative to metal-on-metal.

ROA.17-10030.28338.

Defendants did not take Dr. Bernard Morrey's deposition before the trial. Instead, Defendants sought to meet with him informally, without Plaintiffs' counsel. Dr. Morrey agreed to the meeting, which occurred in December, 2015. ROA.17-10030.10080-10088. Plaintiffs' counsel were not present at the meeting; because the meeting was informal and no court reporter was present, there is no record of what, if anything, Defendants may have asked Dr. Morrey about compensation or about any other matter at that meeting. *Id*.

The night before Dr. Bernard Morrey was scheduled to testify, Defendant moved to preclude him from doing so. ROA.17-10030.10080-10089. They insisted he was a retained expert, who should have provided a report and that because no report had been provided (and no deposition taken), he ought not be permitted to testify.

Judge Kinkeade permitted Dr. Bernard Morrey to testify, but ordered Plaintiffs to provide Defendants an expert report for him; the report was provided during the trial. *See* ROA.17-10030.10088, 28352-28442. Judge Kinkeade also ordered that Defendants be given the opportunity to take Dr. Bernard Morrey's deposition during the trial, after they had received the expert report, and further ruled that Defendants would be permitted to

recall Dr. Morrey as a witness at the trial if they wished, in light of any information in the report or at the deposition. ROA.17-10030.10080-10089.[3]

Dr. Bernard Morrey's testimony at trial followed and elaborated on the description in Plaintiffs' expert disclosure. Dr. Morrey explained his experience, over a long career, with metal-on-poly hips and the reasons he never used metal-on-metal hips. ROA.17-10030.10092-10145. He described the outcomes associated with metal-on-poly hips, including a study that he published analyzing the experience, over 30 years, of such hips at the Mayo Clinic. He described the concerns he had about the safety of the metal-on-metal hips and his view that the very good results seen with the metal-on-poly hip did not justify taking the risks associated with metal-on-metal implants, especially given the poor performance of earlier generations of metal-on-metal products. Dr. Morrey opined that metal-on-metal hips were

[3] As Judge Kinkeade noted at the time, Defendants had failed timely to object to the lack of an expert report for Dr. Bernard Morrey. ROA.17-10030.10080-10088. The Defendants did not raise the issue until quite late the night before Dr. Morrey was set to testify, when they filed their motion. But Plaintiffs had placed Dr. Morrey's name on their witness list in advance of the trial; Defendants had failed to object to Dr. Morrey being called as an expert without a report. It was for this reason, at least in part, that the court allowed Plaintiffs to provide the report during the trial. ROA.17-10030.10080-10089.

defective because there was an alternative design – the metal-on-poly hip – that was safer. For that reason, in his view – and as practiced in his long career – there was no reason to subject patients to the risks associated with metal-on-metal bearings. ROA.17-10030.10141-10145.

Following this testimony, Plaintiffs provided Defendants with an expert report for Dr. Bernard Morrey setting forth Dr. Morrey's opinions in detail. After receiving Dr. Morrey's expert report, Defendants chose not to take his deposition or to recall him for further testimony at the trial. ROA.17-10030.10080-10088.

Defendants Took Dr. Matthew Morrey's Deposition Twice and Compensated Him for His Time

In their expert disclosures, Plaintiffs disclosed that Dr. Matthew Morrey would testify as an expert in two separate capacities.[4] Like his father, he was disclosed as a general non-retained expert witness who was not required to provide an expert report. ROA.17-10030.26841. Plaintiffs

[4] As noted earlier, Plaintiffs' original expert disclosures were provide to Defendants on August 14, 2015. *See* ROA.17-10030.26841. The disclosures were amended on November 24, 2015, to include the testimony Dr. Matthew Morrey would offer with respect to his treatment of Plaintiff Richard Klusmann. *See* ROA.17-10030.26831, 26841-26842. Because Dr. Morrey began treating Mr. Klusmann in October, 2015, this information had not been included in the August, 2015 disclosures.

accurately noted that Dr. Morrey had not been "retained or specially employed to provide expert testimony." *Id.* Plaintiffs' disclosure included a detailed summary of 15 general (that is, not case-specific) topics on which Dr. Morrey would offer expert testimony. Dr. Matthew Morrey was also disclosed as a case-specific treating physician. ROA.17-10030.26844-26849. In particular, Plaintiffs disclosed that Dr. Matthew Morrey had treated Plaintiffs Donald Greer and Richard Klusmann and would offer specific opinions with respect to each of them. As a treating physician, Dr. Morrey was not required to provide an expert report. *See* Fed. R. Civ. P. 26(a)(2)(B).

Defendants took Dr. Matthew Morrey's deposition twice before the trial. On August 15, 2015, Dr. Morrey was examined at a deposition in the *Greer* case. This was the first time Dr. Morrey had ever given a deposition. *See* ROA.17-10030.26962. On December 18, 2015, Dr. Morrey was deposed again, this time in the *Klusmann* case. It was only the second time he had ever had his deposition taken. *See* ROA.17-10030.27300. At the deposition, Defendants' counsel marked Plaintiffs' expert disclosures as an exhibit, but asked no questions about the general (as opposed to case-specific) opinions disclosed there.

Although the orthopaedic practice with which he was affiliated had a procedure, and forms, to charge for the time of doctors in the practice who testified as treaters or experts, at his depositions, Dr. Matthew Morrey showed himself to be not entirely familiar with that procedure. ROA.17-10030.27994, 28151-28156. This was not surprising, given that he had not previously had occasion to use it. Apparently unbeknownst to Dr. Morrey, however, his practice group, UTHSC, charged Plaintiffs $1,000 for an initial meeting or conversation in advance of his deposition in the *Greer* case. *See* ROA.17-10030.28333-28334.[5]

Dr. Matthew Morrey was paid $10,000 for his time at the depositions, a fact of which Defendants were at all times aware – because *they were the ones that paid him*. *See* ROA.17-10030.27299-27300. But Dr. Morrey's testimony showed that he was uncertain if, how, or by whom he would be compensated for his time at the depositions:

> Q. [by Mr. Cannon] Dr. Morrey --
>
> A. Yes.

[5] The invoice for this meeting was sent by the practice group, UTHSC, and payment was made directly to UTHSC. It does not appear that Dr. Morrey was aware of the invoice or the payment. ROA.17-10030.28334.

Q. -- who's paying you today?

A. I don't know. I don't know if anybody is.

Q. I see a check over there and in the Depuy lawyer's hand. I assume he didn't bring it to me.

MR. QUATTLEBAUM: It's made out to Mr. -- Dr. Morrey.

MR. CANNON: Okay.

A. That would be this gentleman, then.

Q. (By Mr. Cannon) How much is he charging -- are you charging him?

A. Our typical fee for deposition is, I think, $750 an hour.

Q. How much?

A. $750 an hour.

Q. Is this something you do very often?

A. Not -- not terribly often, no.

Q. How many depositions have you given?

A. This being number two.

Id. Dr. Morrey later confirmed that Defendants had paid the UT Health Science Department of Orthopaedics $10,000 for his time at the depositions. ROA.17-10030.27845-27946.[6]

[6] Dr. Morrey later identified Defendants' $10,000 payment to UTHSC as the only payment he was aware of prior to the trial. ROA.17-10030.27845-27946. There is no evidence that he was aware of the earlier $1,000 payment from the Plaintiffs to UTHSC. (It appears the reason that Dr. Morrey was aware

Thus, prior to the time of the trial, Defendants were aware that Dr. Matthew Morrey had been compensated for his deposition testimony – by them. At no time during the two depositions of Dr. Matthew Morrey did Defendants inquire whether Dr. Morrey expected to receive any payment from Plaintiffs in connection with his trial testimony in the *Greer* and *Klusmann* cases. And, although Dr. Matthew Morrey had also been disclosed as a non-retained generic expert, at no time during the August and December 2015 depositions did Defendants ask him whether he expected to receive any compensation in connection with his trial testimony in that capacity. Nor did Defendants question him about the generic opinions described in Plaintiffs' disclosures.

The Statements of Plaintiffs' Counsel at Trial Were Accurate

At no time did Plaintiffs misrepresent their arrangements with the Morreys. While it is true that Plaintiffs repeatedly stated, before trial, that the Drs. Morrey were not retained experts, such statements were completely accurate: there is not a shred of evidence that, at the time of trial, either had

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of the $10,000 payment, even though that, too, went to UTHSC, was that, as described above, defense counsel brought the check to the deposition. *See* ROA.17-10030.27299-27300).

been retained by Plaintiffs as an expert or that either had been paid so much as a penny by the Plaintiffs to formulate opinions in the case or to testify at trial. Indeed, as quoted above, Dr. Bernard Morrey specifically testified that he did *not* view himself as a retained expert in this matter.ROA.17-10030.27845-27946. Dr. Matthew Morrey, by contrast, had been paid by both sides in connection with his deposition testimony as a *treater* only, but he, too, had not been retained by Plaintiffs as an expert witness.

In closing, Plaintiffs' counsel pointed out that "Dr. Morrey senior, no expense in coming to this courtroom, not a paid witness." ROA.17-10030.26866. This, of course, was true. Continuing on with respect to Dr. Morrey senior, counsel stated:

> If President Bush could talk to the surgeon and pick him, he's good enough for me. And to pick a metal-on-poly hip, good enough for me. That's who did the surgery. That the kind of hip he put in.
>
> And the reason that he was here is I called his son and said what happened here. He said I don't use this kind of hip. Why not? My dad told me not to.
>
> That's not bought testimony. That's not conjured. That's not rehearsed. That's real life. That's the way they lived. *They did not use that because they did not believe in it*, and they don't have to make excuses – oh, I forgot to tell you about the million dollars, somebody gave it to me.

ROA.17-10030.26866. (emphasis added).[7]

Moreover, counsel's statement was true for another reason besides the literal fact that the Morreys had not been paid to come to the trial and had no agreement that they would ever be paid: both Dr. Morrey senior and Dr. Morrey junior formed their opinions about metal-on-metal hips in their practice as orthopaedic surgeons, not in the context of litigation. Their opinions were formed years before they were asked to testify. 17-10030.10117-100118, 10141-10146. When Plaintiffs' counsel told the jury that the Morreys' testimony was "not bought," that "[t]hat's the way they lived," and that they "did not use that because they did not believe in it," he was telling the truth. These doctors formed an opinion based on their own experience, not on any monetary considerations, because there were no monetary considerations at the time the opinions were formed.

Nor was the statement that "Dr. Matt Morrey wasn't compensated. Bernard Morrey wasn't compensated" in any way inaccurate. *See* ROA.17-10030.26815. Again – neither of them had been paid to testify at trial; neither

[7] As described below, the defense witness referred to, who had "forgotten" about a million dollars that he had been given, was Dr. Roger Emerson. *See below* at footnote 8.

had any arrangement to be compensated for trial testimony; the only compensation that either of them had received was the money Dr. Matthew Morrey had been paid by both sides in connection with his treater depositions; and the opinions they offered were formed long before either of them became an expert witness.

Defendants' Paid Experts

At the trial, Defendants offered testimony from several expert witnesses. The evidence showed that many, if not most, of these witnesses had deep and on-going conflicts of interest because of the large sums they had been paid by Defendants over periods stretching from years to decades. For example, Dr. Brian Haas was called as an expert in the area of orthopaedic surgery. He explained the process of hip replacement surgery and the complications that can result; he also testified about the development of the Pinnacle MoM hip, which he claimed to have helped design, and offered the opinion that the device was not defective and that it was the best choice for a large percentage of his patients. ROA.17-10030.11925-11926, 11935-11936, 11955-11995, 11948, 11999-12000. On cross-examination, Plaintiffs' counsel elicited that Dr. Haas first became a consultant for Defendants in 1992; that, over the years, he received both

consulting fees and royalty payments; and that overall, he was paid more than $7 million dollars by Defendants. ROA.17-10030.12100-12132. The evidence showed, moreover, that during this time, what Dr. Haas was paid for included, *inter alia*, being a "[l]eading advocate for the use of metal-on-metal technology." Ex. 1877

Dr. Cato Laurencin was called by Defendants as to provide testimony about how orthopaedic implants are developed, including, in particular, a history of the development of hip implants. Dr. Laurencin offered opinions that Defendants had behaved responsibly in developing and bringing to market the Pinnacle hip implant and in compensating surgeons for their consulting work. ROA.17-10030.13947-13999, 14025-14026. Although Dr. Laurencin has had a distinguished career as an engineer, inventor, and orthopaedic surgeon, his areas of expertise and interest as a doctor and a researcher did not involve hips or metal-on-metal implants. ROA.17-10030.13911-13998, 14016. In order to develop the expertise necessary to offer opinions in the case, Dr. Laurencin engaged in research, reviewing literature about hip implants over a two-year period. ROA.17-10030.13911-13998, 14016. As Dr. Laurencin acknowledged on cross-examination, Defendants

paid him approximately $900,000 to develop those opinions. ROA.17-10030.14025.

Dr. Patricia Campbell was also called by Defendants as an expert witness. On cross-examination, Plaintiffs elicited that all the money to fund the laboratory where Dr. Campbell worked came from the orthopaedic implant industry and that, for the past several years, all of it came specifically from the Defendants. ROA.17-10030.13911-13470-13471. This included the money used to pay Dr. Campbell's $120,000/year salary, which came from the money provided by Defendants to her laboratory. ROA.17-10030.13911-13497-13498. In addition to her salary, Dr. Campbell admitted on cross-examination, she earned approximately $150,000 per year as an expert witness for the Defendants. ROA.17-10030.13498-134502.

Defendants also called Dr. Roger Emerson, another orthopaedic surgeon, who offered case-specific testimony about each of the five patient-plaintiffs. ROA.17-10030.16392-16521. Dr. Emerson had been paid approximately $500,000 over three years working as an expert for Defendants. ROA.17-10030.16525-16527. Before then, Dr. Emerson had been paid several million dollars by a different hip implant manufacturer, Biomet,

Inc., purportedly for design and consulting work.[8] The evidence also showed that, as a case-specific expert who earned money examining individual plaintiffs, Dr. Emerson had the potential to continue earning large sums for Defendants throughout the life of the Pinnacle MDL.

After the Trial, Plaintiffs' Counsel Unilaterally Decided to Send Money to the Morreys

Although there was no arrangement for either Dr. Morrey to be compensated for his testimony at the trial, after the trial had ended, when it became clear that their services might be required again in future trials, Plaintiffs' counsel determined to make an effort to compensate them. As explained in the April 7, 2016, cover letter sent to Dr. Bernard Morrey:

> Although you never did this for money or remuneration, and I pointed that out to the jury on multiple occasions, in the aftermath of the trial, we have 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 medicine – all for nothing.

[8] The evidence showed that Dr. Emerson was less than truthful about the extent of the payments he received from Biomet and the reasons for the payments. ROA.17-10030.16525-16527. Dr. Emerson also "forgot" about $1 million in royalties from Biomet associated with a product known as the "Mallory-Head device." ROA.17-10030.16525-16527.

> Despite your not requesting, nor requiring any compensation, we are enclosing a check for $35,000 which we HOPE you will accept with our greatest appreciation for what you have done.

ROA.17-10030.26883. Dr. Matthew Morrey received a similar letter. ROA.17-10030.26885. (noting that Dr. Morrey's "involvement in this litigation was never for any financial gain," but that "upon reflection," Plaintiffs' counsel believed it was unfair for Dr. Morrey to have exerted himself without compensation). Each letter was accompanied by a check, in Bernard Morrey's case, for $35,000, and in Matthew Morrey's, for $30,000 ROA.17-10030.26883, 26885. In addition, Plaintiffs' counsel, Mark Lanier, personally sent a check to St. Rita Catholic School, in Fort Worth, Texas – a school that Dr. Bernard Morrey had attended. ROA.17-10030.26896.

Far from attempting to conceal the post-trial payments to the Morreys, Plaintiffs' counsel – acting on behalf of the Morreys – produced the cover letters that accompanied the checks to the Defendants in connection with discovery in the next set of bellwether cases, the *Andrews* cases. *See* ROA.17-10030.26883, 26885. (showing Bates numbers).[9] After receiving copies of the

[9] Plaintiffs' counsel also recognized that, while the Morreys had both been unretained, uncompensated experts at the *Aoki* trial, because of the post-trial payments, that was not the case going forward. Accordingly, in their expert disclosures for the *Andrews* cases, Plaintiffs grouped both Drs. Morrey with

cover letters, Defendants took depositions of both of the Morreys; they examined Dr. Bernard Morrey for one day in August, 2016, and Dr. Matthew Morrey for two days in September, 2016. *See* ROA.17-10030.26887-26896, 26898-26907, 26909-26915.

At his deposition, Dr. Bernard Morrey testified unequivocally that the payment to St. Rita Catholic School was made *after* the trial:

> Q. Have you received any other compensation other than your -- the $35,000 check from Mr. Lanier for your testimony at the last trial?
>
> A. We had a preliminary discussion and a check was given to a charitable organization.
>
> Q. Which one?
>
> A. St. Regis [*sic*] Catholic School in Fort Worth.
>
> Q. And for how much money?
>
> A. $10,000.
>
> Q. And when was that check provided?
>
> A. I don't know.
>
> Q. Was it before you testified or after?

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retained experts and others who had provided expert reports. *See* ROA.17-10030.26874-26875. The disclosure for each of the Morreys referenced the witness's expert report, and did not contend that these witnesses were not required to provide reports. *Id.* Thus, Plaintiffs' most recent expert disclosures recognized that the facts had changed since the *Aoki* trial.

A. It was after.

Q. After. Any other compensation or money that was provided to any group on your behalf by the plaintiff lawyers?

A. No.

ROA.17-10030.26896. Thus, Dr. Morrey was absolutely clear that the money paid to St. Rita Catholic School was paid *after* he testified. Nor does Dr. Morrey's reference to a "preliminary" conversation show that the discussion, if not the payment, occurred prior to the trial. The word "preliminary" implies no more than the conversation occurred in advance of the payment and may not have been intended to be the last word on the subject.[10]

Dr. Matthew Morrey's testimony similarly does not show either that Dr. Morrey ever spoke to Plaintiffs' counsel about payment prior to the trial, or that he had any kind of agreement with Plaintiffs before trial that he would be paid for his time in testifying. To begin with, the record is crystal clear that Dr. Matthew Morrey received no payment for his trial testimony before the trial was completed; Defendants do not contend otherwise. And

[10] Even if the conversation did occur before the trial, it could not possibly be material to the outcome of the trial. *See below* Point C.

although Dr. Matthew Morrey testified that, at some point, he asked Plaintiffs' counsel about submitting an invoice for his time, he also testified that, to the best of his recollection, that happened *after* the trial. ROA.17-10030.26910-26911. Dr. Matthew Morrey did testify that he had some expectation that he might be paid for his testimony at the trial, but even this testimony does not show what Defendants think it shows. Dr. Morrey testified that, based on the fact that he was paid for his time testifying at deposition, and based on the usual practice of compensation for treating physicians, he had an expectation he would likely be paid for his time in testifying at trial. *See* ROA.17-10030.26911-26912. Indeed, Dr. Morrey specifically stated that this expectation was *not* based on conversations with Plaintiffs' counsel before the trial, but rather that he "assumed it [] based on the previous deposition." ROA.17-10030.26912. At no time did Dr. Morrey specify *who* he thought might pay him for his time at trial. Moreover, *the only payment Dr. Morrey knew about in connection with his previous deposition was from the Defendants*. ROA.17-10030.27845-27946. If he gave any thought to who might compensate him, there was no reason for him to expect that he would be paid *by the Plaintiffs*. This is especially true in light of Dr. Morrey's testimony that it was his experience at the deposition – for which he was

paid by Defendants – that led to his assumption that he might receive some compensation for his time at trial. ROA.17-10030.26912. And even if Dr. Morrey knew that Plaintiffs had also paid UTHSC $1,000 for time spent in a meeting as a treater, the payment from Defendants at the deposition would still have suggested that either Defendants, or both sides, would be involved in any future payments. Thus, it appears that, based on receiving compensation his deposition as a treating physician, Dr. Morrey (unbeknownst to Plaintiffs' counsel) had a vague expectation that somehow there would be compensation for the trial, but there is no indication that he had any idea what the source of that compensation would be. Furthermore, Plaintiffs argued and commented on the evidence in trial and what was known to them and their counsel. No one could expect that Plaintiffs' attorneys would be mind-readers and would know that Dr. Matthew Morrey thought he might get paid by defendants, the court, or anyone else.

The Rule 60 Motion

After taking the depositions of both of the Drs. Morrey under the caption of the *Andrews* cases, Defendants moved under Rule 60(b) for a new trial in the *Aoki* cases. *See* ROA.17-10030.26805. Defendants argued both that Plaintiffs had committed a fraud on the Court by misrepresenting the status

of the Morreys as unpaid experts, and also that newly-discovered evidence, showing that the Morreys were paid experts warranted a new trial.

On December 9, 2016, Judge Kinkeade denied the motion for a new trial. In its written decision, the court held that "Defendants have not produced clear and convincing evidence of fraud, misrepresentation, or misconduct on the part of Plaintiffs" because "[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. Judge Kinkeade also found that "the evidence at issue is not 'newly discovered' as legally defined, because the payments that are the subject of Defendants' motions had not yet been paid at the time the jury returned its verdict." *Id., citing Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 70-72 (5th Cir. 1986). Finally, Judge Kinkeade noted that in light of the far larger payments to Defendants' experts, evidence of which was introduced at trial, Defendants had "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.17-10030.28514.

This appeal (separate from and in addition to Defendants' already-pending appeal from the *Aoki* verdict) followed.

SUMMARY OF THE ARGUMENT

There was no fraud or misrepresentation with respect to any compensation of Drs. Bernard and Matthew Morrey because, up through the time of trial, there was no agreement for compensation between Plaintiffs' counsel and either of the Morreys. Neither doctor had been paid by Plaintiffs as an expert and neither had an agreement that he would be so paid. Even if there had such an agreement, Defendants were not prevented from fully and fairly presenting their case because Defendants (a) took two depositions of Dr. Matthew Morrey before the trial; (b) met informally with Dr. Bernard Morrey before the trial outside the presence of counsel for Plaintiffs or for Dr. Morrey; (c) were provided an expert report for Dr. Bernard Morrey during the course of the trial, before the close of evidence; and (d) were given the opportunity, by the court, to take Dr. Bernard Morrey's deposition during the trial and to recall him as a witness if they chose, but they declined to do either. Moreover, the comparisons that Plaintiffs' counsel drew between the Morreys and Defendants' experts were based on the fact that the Morreys formed their opinions independently of their involvement in the case, while Defendants' experts were paid to formulate the opinions they offered. This comparison, which was accurate,

was independent of the comparatively small sums the Morreys were ultimately paid after the fact for the time they spent travelling and testifying.

STANDARD OF REVIEW

A trial court is charged with exercising its sound discretion in ruling on a motion for a new trial under Rule 60(b). *See Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005). This Court reviews such a ruling only for abuse of that discretion. *Id.; Aucoin v. K-Mart Apparel Fashion Corp.*, 943 F.2d 6, 8 (5th Cir. 1991). Under this standard, "it is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion." *In re Pettle*, 410 F.3d 189, 191 (5th Cir. 2005), *quoting Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981). Appeal from the denial of a Rule 60(b) motion does not bring up for review the underlying order or judgment. *Aucoin*, 943 F.2d at 8.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL

A. Rule 60(b) Sets a High Bar that Defendants Could Not Meet

Relief under Rule 60(b) is an extraordinary remedy. *In re Pettle*, 410 F.3d at 189; *see also Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013) ("when

seeking relief under Rule 60(b)(6), a movant is required to show extraordinary circumstances justifying the reopening of a final judgment"); *In re Rodriguez*, 695 F.3d 360, 371 (5th Cir. 2012) ("Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly."). While Rule 60(b) permits a court to "correct obvious errors or injustices," *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977), "the desire for a judicial process that is predictable mandates caution in reopening judgments." *In re Pettle,* 410 F.3d at 191, *citing Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir.1998); *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir.1990); *see also Pease v. Pakhoed*, 980 F.2d 995, 998 (5th Cir. 1993) ("Courts are disinclined to disturb judgments under the aegis of Rule 60(b)").

A party may move for relief from a final judgment where there has been "fraud. . . misrepresentation, or misconduct by an opposing party," Fed. R. Civ. P. 60 (b)(3), or where there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Defendants moved in the trial court under both subsections.

The moving party has the burden of proof under both Rule 60(b)(3) and Rule 60(b)(2) and must demonstrate exceptional circumstances to justify

a new trial. *See e.g.*, *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985). With regard to Rule 60(b)(3), the moving party must prove by clear and convincing evidence that the adverse party engaged in "fraud, misrepresentation, or other misconduct." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). The clear and convincing standard is accompanied by a heavy burden for the one who is called to satisfy it. *See Baumstimler v. Rankin*, 677 F.2d 1061, 1066 (5th Cir. 1982); *accord U.S. Aid Funds, Inc. v. Roberts*, No. CIV.A. 08-1971, 2009 WL 2222943, at *11 (W.D. La. July 24, 2009) (party seeking relief under Rule 60(b)(3) must meet a "very substantial burden."), *aff'd sub nom. In re Roberts*, 376 F. App'x 398 (5th Cir. 2010). In addition to demonstrating fraud by clear and convincing evidence, the moving party must also prove that the fraud "prevented the losing party from fully and fairly presenting his case or defense." *Rozier*, 573 F.2d at 1339. Even then, in ruling on a motion for a new trial, a court must remember that Rule 60(b)(3) "is aimed at judgments which were *unfairly* obtained…." *Id.* (emphasis added).

The moving party's burden is no lighter under Rule 60(b)(2). *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 258-59 (5th Cir. 2003). The moving party must "demonstrate how this newly discovered evidence is material

and controlling and *clearly* would have produced a different result if presented before the original judgment." *Goldstein*, 340 F.3d at 258-59 (citation omitted) (emphasis added).

As explained below, Defendants were unable to meet any of these standards.

B. The Evidence Showed that Counsel's Statements at Trial Were True and that No Misrepresentation Occurred

Without a shred of evidence to support their accusations, Defendants accused Plaintiffs and their counsel, first in the district court and now in this Court, of having misled the court and the jury, of having committed fraud. Judge Kinkeade did not abuse his discretion in denying Defendants' motion for a new trial because the evidence showed that counsel's statements were true and no misrepresentations occurred. At each point, every statement to which Defendants point, was true and accurate when made.

First, when Plaintiffs argued that the Morreys need not produce expert reports because they were non-retained, the evidence shows that neither of them had been paid as an expert nor had entered into any kind of retainer to provide expert testimony, nor had any kind of agreement, formal or informal with plaintiffs' counsel, that they would be paid. *See above* pages 7-18. Thus,

the representations made that they were not retained experts were true when made. Moreover, because the trial court required Plaintiffs to provide an expert report for Dr. Bernard Morrey, any arguments Plaintiffs made about why such a report was not necessary are irrelevant.

Second, when one of Defendants' experts, Dr. Scott Nelson testified that "[l]ike all experts on either side, I'm compensated for my time that I spend on these cases," (ROA.17-10030.12787),[11] Plaintiffs' counsel's objection that this was not so because "Dr. Matt Morrey wasn't compensated. Bernard Morrey wasn't compensated" was true. Defendants have not provided any evidence that this was untrue or in any way misleading, because there is no such evidence. Neither of the doctors had been compensated for his testimony (at least by Plaintiffs). Later, when Plaintiffs' counsel asked Dr. Nelson about "all of the experts, doctors leaving their practices, coming here to testify because of concern over what's being claimed in this case," *see* ROA.17-10030.13080, the statement, describing the Morreys, was simply the truth. The same is true when Plaintiffs' counsel asked the same witness if he

[11] The evidence showed that Dr. Nelson had been paid approximately $350,000 by Defendants for his work in Pinnacle MoM cases. ROA.17-10030.12787-12788

knew that Dr. Bernard Morrey had "put in President Bush's metal-on-poly hips," and that he "came and testified here, on his own." ROA.17-10030.13212. Again, this was true: Dr. Bernard Morrey *had* come to testify without any promise of compensation, and he had done so because of his concerns about the claims Defendants were making in the case. *See* ROA.17-10030.26896, 26909-26912.

Third, Plaintiffs' counsel's statements at closing argument to the effect that the Morreys were especially credible because their opinions grew out of their practice and their testimony was not "bought" were similarly true and accurate at the time they were made. Although Defendants contend that Plaintiffs' counsel had already made the $10,000 donation to St. Rita's at the time of the trial, Dr. Bernard Morrey's testimony was to the contrary. He testified that the payment occurred *after* the trial. ROA.17-10030.26896. And while Defendants make much of the "preliminary conversation" about this payment, as discussed above, there is no evidence whatsoever that even this preliminary conversation took place before the end of the trial.[12]

[12] This Court thus need not reach, as the district court did not, the question whether a payment to a not-for-profit educational institution identified by Dr. Bernard Morrey would constitute "compensation" to Dr. Morrey

Nor are Defendants correct that Dr. Matthew Morrey "admitted that he always had expected to be compensated for serving as an expert witness," *see* ROA.17-10030.26812-26813 – or at least not in the sense Defendants mean. Dr. Morrey was unfamiliar with the procedures by which doctors are compensated for testifying at depositions and trial because he had never done it before. He did know, from his practice group, that an hourly payment was customary. But Dr. Matthew Morrey testified that his expectation that he would be paid in *this* case derived from his experience with his deposition, not from any conversations or agreements with Plaintiffs' counsel. *And the evidence clearly showed that it was Defendants who compensated Dr. Morrey for his time, not the plaintiffs.*[13] Moreover, at the second of the depositions before the *Aoki* trial, Dr. Matt Morrey was specifically asked who was paying him for the day and he answered: "I don't

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sufficient to render counsel's statements false or misleading if the payment had already occurred.

[13] In the district court, the Defendants referred to the possibility that Dr. Matthew Morrey thought he might be compensated for his time by the Defendants as "outlandish," *see* ROA.17-10030.28493, but why should this be so? They were the ones who had paid him before. As an orthopaedic surgeon with no experience as a witness in litigation, Dr. Matt Morrey had no reason to know what was customary in this context.

know. I don't know if anybody is." ROA.17-10030.27299-27300. Defense counsel then clarified that he was holding a check for Dr. Morrey. In that context, why *should* Dr. Matt Morrey have expected that Plaintiffs' counsel would compensate him for his time testifying at trial?

Defendants point to a conversation that Dr. Matt Morrey reported in which he asked Plaintiffs' counsel about sending an invoice. As noted above, Dr. Morrey's best recollection was that this conversation occurred *after* the trial. But even if it had occurred before, this conversation fails to show that Plaintiffs and Dr. Matthew Morrey expected that Plaintiffs' counsel would pay him in connection with his testimony; at best, it suggests that Dr. Morrey thought that the parties would work it out between them and somehow his practice group would receive a check. But such an understanding could not possibly show *bias* on the part of Dr. Matthew Morrey, since there is not a single shred of evidence that he expected to be compensated by *Plaintiffs* in connection with his testimony.[14]

[14] Nothing prevented Defendants, at Dr. Matthew Morrey's post-trial deposition, from asking further questions about the source of Dr. Morrey's expectations of payment, or about his arrangements in the context of the *Andrews* trial. They chose not to ask these questions and cannot complain that they lacked sufficient evidence to support their motion in the trial court.

Moreover, Defendants' theory that Plaintiffs concealed payments to the Morreys, or concealed an intention to pay them after the trial, is untenable in light of how Plaintiffs treated the issue of payment for those of their experts who *were* paid. At the trial, Plaintiffs' counsel specifically elicited from Plaintiffs' paid experts the details of their compensation. Thus, at the end of his direct examination of Plaintiffs' pathology expert, Dr. Nicholas Athanasou, Plaintiffs' counsel established that Dr. Athanasou had been paid for his time to look at pathology slides, write his report, sit for deposition, come to trial and testify and the like. ROA.17-10030.11376-11377. Counsel then asked Dr. Athanasou "how much you are being paid or how much you have been paid," and although Dr. Athansou could not recall the precise amount, he testified that it was "somewhere around 92, 95,000 dollars thus far" and that he charged an hourly rate of $500. ROA.17-10030.11376. Similarly, at the end of his direct examination of Plaintiffs' expert in marketing and corporate responsibility, Dr. Minette Drumwright, Plaintiffs' counsel asked how much the expert had been paid. She responded that it was in the neighborhood of $330,000. ROA.17-10030.7664. Plaintiffs' expert in biomechanical engineering, Dr. Albert Burstein testified, upon examination by Plaintiffs' counsel, that he had been paid approximately

$140,000 by Plaintiffs' for his time. ROA.17-10030.9565.[15] It is patently absurd to believe that Plaintiffs concealed payments in the range of $30,000 or $35,000 to the Morreys, while ensuring that payments to their other experts in far larger amounts were disclosed at trial.

Nor was it necessary for the district court affirmatively to find that the Morreys did not expect to be paid. It was Defendants' burden to present clear and convincing evidence of a misrepresentation. As the district court found, "[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. To the extent the issue was in any way doubtful or unresolved, Judge Kinkeade correctly exercised its discretion to deny Defendants' motion for a new trial.

[15] Dr. Burstein also testified about royalty payments with respect to medical devices he had invented. That testimony further highlighted the contrast with Defendants' experts. Dr. Burstein testified that although he had his name on approximately 30 patents, royalties for devices he had invented had been paid to his hospital, not to him. The hospital, in turn, had distributed approximately $2 million of royalties to Dr. Burstein upon his departure. *See* ROA.17-10030.9565-9567. Dr. Burstein, unlike Defendants' experts, had never been paid royalties by device manufacturers. *Id.*

C. Defendants Were Not Prevented From Fully and Fairly Presenting Their Case

Even if Plaintiffs' statements about the Morrey had been misleading -- which they were not – Defendants failed to show that they were prevented from fully and fairly presenting their case. Defendants claim they were deprived of the opportunity to fairly present their case in two ways, but neither is correct.

First, Defendants contend that Plaintiffs' misrepresentations prevented them from fairly presenting their case because Plaintiffs were able to undermine the credibility of Defendants' paid experts by contrasting them with the Morreys who offered their testimony as uncompensated experts. But there was nothing unfair about this comparison, because, as demonstrated above, the Morreys were in fact uncompensated experts. Plaintiffs' argument that Defendants' experts were biased because of the money they had been paid, while Drs. Bernard and Matthew Morrey had no similar bias, was a fair argument because the facts underlying it were true.

Even if the Morreys had been paid for their time in coming to trial, or had an agreement that they would be paid (which, as discussed above, the evidence shows was not the case), Defendants would still have not been

denied a fair trial, because, as noted above, the contrast Plaintiffs drew between their experts and those of the Defendants would still have been valid. As Plaintiffs' counsel made clear in his closing, the testimony of Defendants' experts was "bought" not merely, indeed not primarily, because the witnesses were paid for their time at trial. What Plaintiffs demonstrated on cross-examination, and then referred to in closing argument, was that Defendants' experts had been paid – very large sums, in fact -- to form the opinions to which they testified. For example, Dr. Haas had been paid more than $7 million by Defendants since 1992 and the money had been paid, in part, to compensate Dr. Haas for advocating the use of Defendants' products. *See* above at pp. 21-22. Dr. Laurencin was paid approximately $900,000 to research and formulate opinions in areas that were not particularly familiar to him. *See* above at p. 22-23. Dr. Emerson was paid nearly $500,000, not including compensation for his time at trial. *See* above at p. 23-24. Dr. Campbell was almost entirely dependent on Defendants for her livelihood. *See* above at p. 23.

Even if the Morreys had already been paid or promised $35,000 and $30,000 respectively (which they had not), the possibility for bias was still

exponentially greater with Defendants' experts.[16] The same is true with respect to the $10,000 check Plaintiffs' counsel sent to St. Rita Catholic School. Even if Dr. Bernard Morrey knew, in advance of the trial, that Plaintiffs' counsel intended to make this donation, Plaintiffs' counsel's point was still accurate with respect to the independence of Dr. Morrey's testimony, and the idea that the witness preferred a donation to a school he had once attended over money paid directly to him would not likely have *undermined* his credibility with the jury. In addition, Plaintiffs' disclosure at trial of the payments to their own experts further underscores that the issue with payments to Defendants' experts was not merely that they had been paid, but rather when, how much, and what for.

By contrast, both Dr. Morreys testified that they had formed their opinions about metal-on-metal hips during their years of practice as

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[16] Indeed, Plaintiffs showed that Defendants' payments to Dr. Haas - some $7 million over many years -- were not unusual in any way. Defendants had been paying doctors to use their products for decades. Plaintiffs submitted evidence that Defendants had entered into two deferred prosecution agreements, and had paid a large fine, in connection with allegations, first, that they had violated the federal Anti-Kickback Statute by paying surgeons in the United States to use DePuy implant products; and second, that they had violated the Foreign Corrupt Practices Act by paying surgeons abroad for the same reason. *See* PLT-00049; PLT-00104; Demo-3864; Demo-00121.

orthopaedic surgeons, based on their own research and observations (and, in the case of Dr. Matthew Morrey, on his father's advice). This was what Plaintiff's counsel was referring to when he argued, in closing, that "[t]hat's the way they lived. They did not use that because they did not believe in it." They had not been paid by either side to form an opinion – they had simply come to court to explain the opinions they had genuinely already formed without financial incentives of any kind, using their best professional judgment. This point would have been valid, and would not have made the trial unfair, even if either of the Morreys had been compensated for the time involved in coming to court – which, in any event, they weren't.

Defendants also claim that they were deprived of the opportunity to take meaningful discovery of the Morreys before the trial. This point is easily disposed of – Defendants took the deposition of Dr. Matthew Morrey *twice* before the trial and met informally with Dr. Bernard Morrey without the presence of Plaintiffs' counsel (or anyone else). They received an expert report from Dr. Bernard Morrey during the trial and were given an opportunity to take his deposition then, which they declined to do. Thus, even if the Morreys ought to have been disclosed as paid experts – which

was not the case – Defendants were not deprived the opportunity to take any discovery.

The cases on which Defendants rely, in which new trials were ordered, arose under entirely different circumstances and are not on point. Defendants rely especially heavily on *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978), but *Rozier* does not support their position. In that case, the court granted a new trial because a potentially prejudicial document was withheld during discovery and not disclosed prior to trial. But, unlike here, in *Rozier*, the document existed before trial, the party that should have produced the document was well aware of its existence before trial, and the party that failed to produce the document knew that it had a duty to produce it before trial. Unlike the facts in *Rozier*, here, Plaintiffs were not withholding any information relating to the Drs. Morrey's compensation – because there was nothing to disclose. There was no agreement or document regarding payment created before trial, Plaintiffs had no idea that payment would later be made to the Drs. Morrey before trial, and Plaintiffs were under no duty to provide information not yet in existence before or during trial. It was only after trial that Mr. Lanier on behalf of all Plaintiffs provided one lump sum thank you payment to each of the Drs. Morrey. See ROA.17-10300.27945-

27946, 26883, 26885. As Mr. Lanier explained in his letters to the Drs. Morrey, the payment to each doctor was not anticipated. Thus, it would have been impossible to disclose the payment made to each doctor to Defendants during discovery or any time prior to or during trial. Simply put, in *Rozier*, information was withheld; here, it was not.

The remainder of the cases on which Defendants' rely are district court cases in which the trial court's discretion was unchallenged. Nor are they on point in any event. In *In re Vioxx Prods. Liab. Litig.*, 489 F. Supp. 2d 587, 594-95 (E.D. La. 2007), for example, a new trial was granted where defense counsel misrepresented the causation expert's qualifications which "affected the [p]laintiff's ability [to] impeach [the expert] and thus to fully and fairly present her case to the jury." *Id*. Again, this was a misrepresentation of existing facts; it was not that the expert's qualifications had changed, but rather that they were misrepresented in the first place. Unlike in *Vioxx*, in this case, Defendants' ability to cross-examine the Drs. Morrey was in no way hindered or prejudiced by the fact that after the trial, Plaintiffs demonstrated their appreciation through a monetary gift. There is no basis for Defendants' contention that their ability to impeach the experts or demonstrate bias was compromised by not knowing of a future payment

that no one else knew would occur either. Defendants were able to fully and fairly present their case. *See Diaz v. Methodist Hosp.*, 46 F.3d 492, 497 (5th Cir. 1995) (holding denial of Rule 60(b)(3) motion proper when party can fully and fairly present case, even if there was fraud or misconduct).

In their search for precedents, Defendants turn to a pair of district court cases from Indiana and Iowa, but these prove to be no more help than the inapposite cases from within this Circuit. In *United States v. Cinergy Corp.*, No. 1:99-CV-1693-LJM-JMS, 2008 WL 7679914, at *8 (S.D. Ind. Dec. 18, 2008), the defendant entered into a consulting contract with a witness one month before trial, pursuant to which the witness would be paid $200 per hour for his "live testimony" at trial and for providing advice. The agreement was not disclosed. At trial, the defendant's case hinged on the credibility of the witness whose consulting contract was not disclosed; defendant repeatedly contrasted its witness to the Government's paid experts. *Id*. at *1. The witness specifically testified that he used to work for the defendant, but was now retired. *Id*. at *3. This was, of course, false, since the witness was, at the very moment he testified, working for – that is, being paid by – the defendant as a consultant. Not surprisingly, on those facts, the district court granted a new trial. But *Cinergy* has nothing to say about the

facts of this case – there was no undisclosed agreement for compensation, no false testimony or representations.

Defendants note that in the *Cinergy* case, counsel made a comparison between its purportedly non-paid witness and the other sides admittedly paid experts. But this is a common point emphasized by counsel in various types of cases when the circumstances allow. It is not improper to make such a comparison. The problem the *Cinergy* court had with the contrast was that it misrepresented the relationship between the party and its expert because they actually had an agreement of payment. *Id*. at *11. Here, Plaintiffs had no agreement with either of the Drs. Morrey. Each of the representations made by Plaintiffs at trial were true at the time made. The comparison between Plaintiffs' expert testimony not being "bought" and Defendants' hired experts was proper and wholly accurate. That Plaintiffs, months after trial, provided payment out of gratitude to the doctors, does not change the truth or accuracy of the doctors' testimony or the representations about the same at trial – the testimony was not bought testimony, there was no agreement or plan to pay the doctors for their trial testimony, and there was no indication made to the doctors that they would be paid for their testimony at trial.

Defendants also rely on *Midwest Franchise Corp. v. Metromedia Restaurant Group, Inc.*, 177 F.R.D. 438 (N.D. Iowa 1997). There it was learned after trial that a defense witness "was engaged in employment negotiations with the defendants *at the time he testified*." 177 F.R.D. at 439-40 (emphasis added). That information was not disclosed at trial and the court found that the expert's "less than forthright answers to the repeated questions by counsel for the defendants as to his third party objectivity[] calls into question the fairness of the trial." *Id*. The court found that the new information about the employment negotiations was not clear and convincing evidence that a new trial should be granted. Because the information gave the court some pause, it ruled the plaintiff could take a deposition to determine whether a new trial was justified. *Id*. The case was later dismissed without a decision as to whether a new trial was warranted. *See* ROA.17-10030.26823. Dismissal Stipulation, *Midwest Franchise Corp. v. Metromedia Rest. Grp.*, No. 96-cv-04030-DEO (N.D. Iowa Jan. 23, 1998), Dkt.200. The case lends little weight to Defendants' argument given that no decision as to whether a new trial would be appropriate was ever made.[17]

[17] Defendants acknowledge, in a footnote, that the *Midwest Franchise* case was later dismissed, *see* ROA.17-10030.26823 but fail to acknowledge the

D. There Was No Newly-Discovered Evidence, Nor, If There Had Been, Could Defendants Meet Their Burden to Show that Any Such Evidence Clearly Would Have Produced a Different Result

In the trial court, Defendants also argued that they were entitled to a new trial on the basis of newly-discovered evidence, independent of whether there had been any misrepresentations prior to or at the trial. ROA.17-10030.26826-26828. Defendants have not renewed that argument in this Court, nor could they. Judge Kinkeade clearly did not abuse its discretion when he found that the evidence at issue was not "newly discovered" because it did not exist at the time of trial. This Court has repeatedly held that "'[n]ewly discovered evidence' under Rule 60(b)(2) . . . must be evidence of facts existing at the time of the original trial." *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1358 (5th Cir. 1988), *citing N.L.R.B. v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978) ("'Newly discovered evidence' under Rule 60(b) refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant"); *accord*

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significance of this fact: the only relief granted before that dismissal was a deposition. Here, of course, Defendants took the depositions of both Dr. Matthew Morrey and Dr. Bernard Morrey after the *Aoki* trial and before filing their motion for a new trial. Thus, they had already received all the relief the court thought was warranted in *Midwest Franchise*.

Chilson v. Metro. Transit Auth., 796 F.2d 69, 70 (5th Cir. 1986) ("It is clear under the rule that to be newly discovered evidence… the evidence must have been in existence at the time of the trial.").

Nor did Judge Kinkeade abuse his discretion when he held that Defendants had failed to show that evidence of the small payments to the Morreys clearly would have produced a different result at trial. *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 258-59 (5th Cir. 2003) (moving party must "demonstrate how this newly discovered evidence is material and controlling and clearly would have produced a different result if presented before the original judgment"). Defendants' experts had been paid huge sums of money – in some instances, several millions of dollars, in others only many hundreds of thousands. The disclosure of the much smaller sums the Morreys later received would not clearly have caused the jury to weigh the testimony of the Morreys differently, especially because the opinions they offered had been formed years before, in the course of their medical practices. There was no abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and order of the district court denying Defendants' Rule 60(b) motion for a new trial.

Dated: May 17, 2017 Respectfully submitted,

/s/ Kenneth W. Starr
Kenneth W. Starr
5404 Point Wood Circle
Waco, TX 76710
Telephone: (254) 644-4970
Email: Ken_Starr@baylor.edu

/s/ Arthur R. Miller
Arthur R. Miller
THE LANIER LAW FIRM (Of Counsel)
New York University, School of Law
Vanderbilt Hall 430F
40 Washington Sq. South
New York, New York 10012
Telephone: (212) 992-8147
Email: Arthur.r.miller@nyu.edu

/s/ W. Mark Lanier
W. Mark Lanier
THE LANIER LAW FIRM
6810 FM 1960 Rd W
Telephone: (713) 659-5200
Fax: (713) 659-2204
Email: wml@lanierlawfirm.com

/s/ Richard J. Arsenault
Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court
P.O. Box 1190
Alexandria, Louisiana 71301
Telephone: (800) 256-1050
Fax: (318) 561-2591
E-mail: rarsenault@nbalawfirm.com

/s/ Wayne Fisher
Wayne Fisher
FISHER, BOYD, JOHNSON & HUGUENARD, LLP
2777 Allen Parkway, 14th Floor
Houston, Texas 77019
Telephone: (713) 400-4000
Fax: (713) 400-4050
Email: wfisher@fisherboyd.com
Email: justinp@fisherboyd.com

/s/ Jayne Conroy
Jayne Conroy
SIMMONS HANLY CONROY
112 Madison Avenue
New York, NY 10016
Telephone: (212) 784-6402
Fax: (212) 213-5949
E-mail: jconroy@simmonsfirm.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because it contains 10,933 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: May 17, 2017.

/s/ W. Mark Lanier
W. Mark Lanier

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I electronically filed the foregoing with the Clerk of 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.

/s/ W. Mark Lanier
W. Mark Lanier