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

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May 31, 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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INTRODUCTION AND SUMMARY OF ARGUMENT

When Dr. Bernard Morrey took the witness stand, plaintiffs' counsel already had promised to donate $10,000 to Dr. Morrey's preferred charity. And when plaintiffs called Dr. Matthew Morrey to the witness stand, he testified with the unequivocal expectation that he would be paid for his time. Each doctor later received checks for $30,000 or more for his testimony in this trial. Yet when plaintiffs' counsel stood to argue evidentiary motions, to make objections, to cross-examine defendants' experts, and to deliver their closing argument, they repeatedly insisted that both of the Morreys were financially disinterested volunteers, testifying solely out of concern for the plaintiffs.

Plaintiffs attempt to avoid the consequences of those misrepresentations by manufacturing confusion where none exists. They suggest that the record is unclear about *when* plaintiffs' counsel promised $10,000 to Dr. Bernard Morrey's charity of choice, but the record unambiguously shows that the promise occurred in December 2015—*i.e.*, one month before trial began. Plaintiffs also suggest that Dr. Matthew Morrey's expectation of compensation is irrelevant because he might have thought *defendants* would be the ones paying his fees. But it strains credulity to suggest that Dr. Morrey expected defendants to pay him for testifying that their products were defective. Sure enough, when trial ended, Dr. Morrey asked *plaintiffs*, not defendants, how to submit his invoice.

Indeed, the fact that Dr. Matthew Morrey fully expected to be paid, but did not yet know how much, only makes matters worse, as this arrangement could have suggested that the amount of his payment was contingent on the value of his testimony and the outcome of the trial. While plaintiffs favorably contrasted the Morreys' purportedly uncompensated testimony with that of defendants' compensated experts, the contrast would have run in the opposite direction if the jury concluded that the Morreys were working on contingency while defendants' experts would receive the same fixed compensation win, lose, or draw. Plaintiffs surely would not have written Dr. Matthew Morrey a $30,000 check if his testimony had not been effective or if the jury had returned a defense verdict; plaintiffs' counsel acknowledged as much in the letters enclosing payment, which emphasized that the Morreys' testimony was "particularly instructive" and "made a real difference with the jury." RE14, 17; ROA.17-10030.26883; ROA.17-10030.26885.

The same problem inheres in the $35,000 payment to Dr. Bernard Morrey. Even assuming it came as a surprise to the doctor and was a spontaneous, post hoc gesture by plaintiffs, the generous payment to a testifying expert after a successful trial in which plaintiffs trumpeted their experts' uncompensated status renders those statements highly misleading and creates a loophole that the legal system should not countenance.

Plaintiffs contend that their undisclosed payment arrangements with the Morreys did not undermine the fairness of the trial, but that argument reads like the closing argument plaintiffs could have made if the truth about the payments had been known at trial. For example, plaintiffs insist that the Morreys' compensation does not cast any doubt on their credibility because the defense experts were paid more; because the Morreys formed their opinions before this litigation; and because Dr. Bernard Morrey admirably donated part of his compensation to charity. Perhaps the jury would have agreed. Or perhaps the jury would have discounted the Morreys' testimony based on the exact same arguments plaintiffs (repeatedly) made about defendants' experts—*i.e.*, that the Morreys were merely being "paid to advocate an opinion." ROA.17-10030.16191. Or perhaps the jury would have found the Morreys' testimony even less persuasive because their fees appeared to be contingent on a favorable outcome.

For present purposes, it does not matter which version the jury would have believed. What matters is that defendants were unable to impeach the Morreys on the basis of their compensation arrangements—or to invoke the Morreys' compensation in response to plaintiffs' attacks on defendants' experts—because those arrangements were not disclosed at trial. Defendants also could not adequately prepare to cross-examine the Morreys because plaintiffs never provided expert reports for the Morreys as required by Rule 26. In both respects, plaintiffs'

misrepresentations prevented defendants from fully and fairly defending themselves. Rule 60(b)(3) thus requires a new trial—one where all relevant facts are disclosed, and one where plaintiffs do not secure a strategic advantage via repeated misrepresentations about their experts' compensation arrangements.

ARGUMENT

I. Plaintiffs Misrepresented Their Expert Witnesses' Compensation Arrangements.

A. Both before and during trial, plaintiffs repeatedly told the court and the jury that Dr. Bernard Morrey was an unpaid witness testifying solely out of concern for the plaintiffs. *See* Blue Br.18-20 & n.4. Plaintiffs now admit that Mr. Lanier donated $10,000 to Dr. Bernard Morrey's preferred charity, and later wrote him a $35,000 check, to compensate him for his work on the case. Red Br.26-27. Yet plaintiffs dispute any suggestion of impropriety, offering two reasons why their trial representations were purportedly not false: that the actual *payments* were made after trial, and that plaintiffs had not yet promised this money at the time Dr. Morrey testified. Neither argument withstands scrutiny: the first is irrelevant and the second is demonstrably false as to the charitable donation.

Plaintiffs first note that, according to Dr. Morrey's deposition testimony, the $10,000 payment "was made *after* the trial." Red Br.26.[1] As an initial matter, it is

[1] Plaintiffs incorrectly characterize defendants' opening brief as stating that Mr. Lanier "had already made the $10,000 donation to St. Rita's at the time of the trial."

rather odd (and telling) that plaintiffs, both in the district court and in this Court, rely on Dr. Morrey's testimony instead of producing the actual check or offering their own explanation about the timing of that donation. But, in all events, the timing of the *payment* is irrelevant. What matters is not when plaintiffs' counsel cut the check, but when they *promised* to do so. If, as the evidence shows, the promise of a donation came *before* trial, then plaintiffs' representations *during* trial—that "Bernard Morrey wasn't compensated" and was "not a paid witness"—were false.

Perhaps recognizing that the timing of the promise is what matters, plaintiffs assert that "there is no evidence whatsoever" that Mr. Lanier made the promise "before the end of the trial." Red Br.37; *see id.* at 27. Not so. The record indisputably shows that Mr. Lanier made the promise during a conversation at Dr. Morrey's house in December 2015, one month before the *Aoki* trial began. That conversation was discussed during both the *Aoki* trial and at the later *Andrews* trial. During the *Aoki* trial, Mr. Lanier and Dr. Morrey recounted a meeting and conversation between Mr. Lanier, his co-counsel Ernest Cannon, and Dr. Morrey:

> Q. All right. I met you -- Ernest and I came to your home and -- and had a chance to visit with you, I think in December, wasn't it?
> A. Yes.
> Q. And we met you –
> A. Something like that.

Red Br.37. In fact, defendants stated only that the *promise* to make this donation occurred before trial, not that the *payment* did. *See* Blue Br.1, 15, 21 (stating that Mr. Lanier "agreed before trial to donate $10,000.").

> Q. Something like that?
> A. Late in the year.
> Q. Yeah. And then you met with Mr. Roberts and another gentleman, a lawyer for the -- the Johnson & Johnson/DePuy folks, Mr. Conner. They got to visit with you in your home independently of us, right?
> A. We met in a neutral location in Bastrop.
> Q. Bastrop, Texas?
> A. Yes. It's between La Grange and Austin.
> Q. All right. You live in La Grange, outside of La Grange?
> A. Yes. That's where my wife is from.
> Q. And your wife, by the way, makes the best apple pie in the world. And that needs to be on the record, Your Honor.
> A. I'll tell her.

ROA.17-10030.10094-95.

Mr. Lanier and Dr. Morrey later recounted that same meeting during the *Andrews* trial. This time, however, the story had changed, and they mentioned Mr. Lanier's promise to donate money to Dr. Morrey's preferred charity:

> Q. So the jury knows, there was a point in time where you and your wife graciously accepted me and Mr. Ernest Cannon, my mentor in law -- you welcomed us into your home to talk to us about the history of metal-on-metal implants and implants in general. Do you remember that?
> A. Yes.
> Q. You also welcomed Mr. Roberts and some of the team from Johnson & Johnson/DePuy into your home likewise, right?
> A. No. We met at a neutral site.
> Q. Oh, okay. 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 about a $10,000 check, is my memory.
> A. That's correct.
> …
> Q. And so the jury knows everything we can tell 'em, your wife has now at this point in my life made me two apple pies.
> A. Correct.
> Q. And it's the best apple pie you've ever eaten in your life, isn't it?
> A. Yeah. They turned out good.

ROA.17-10030.28505-07; Tr.Vol.10 at 146-48, 153-54, *Andrews v. DePuy Orthopaedics, Inc.*, No. 15-cv-3484 (N.D. Tex. Oct. 19, 2016).

Those two exchanges plainly refer to the same meeting (right down to the apple pie), which took place one month before the *Aoki* trial began, and during which Mr. Lanier asked Dr. Morrey about a "charity that you support that I could give some money to." Thus, when plaintiffs' counsel insisted during the *Aoki* trial that Dr. Bernard Morrey would not be compensated for his work on the case, those representations were demonstrably false. Plaintiffs do not even attempt to argue (nor could they) that a contribution to a charity of Dr. Morrey's choosing is different in any meaningful way from a direct payment to Dr. Morrey. *See* Blue Br.21 (collecting cases).

B. Plaintiffs' defense of the $30,000 payment to Dr. Matthew Morrey is equally unavailing. Plaintiffs concede that Dr. Morrey testified with the expectation that he would be paid, but they speculate that he might have expected to be paid by *DePuy and J&J*. Red Br.38-39. That is utterly implausible. Dr. Morrey was called to testify by the plaintiffs (two of whom were his patients), and he offered opinions directly adverse to DePuy's and J&J's interests—including that metal-on-polyethylene implants are "always … a safer alternative than metal-on-metal," ROA.17-10030.10985, and that metal-on-metal devices are inherently "defective," ROA.17-10030.11155. Neither the record evidence nor common sense supports the fanciful notion that Dr. Morrey thought DePuy and J&J would pay him to undermine their defense. Indeed, when Dr. Morrey inquired about how he should submit an invoice for his expert fees, he made that inquiry to plaintiffs' counsel, not to counsel for DePuy and J&J. *See* ROA.17-10030.26910.

Plaintiffs repeatedly emphasize that defendants had paid Dr. Morrey's employer $10,000 for his *pre-trial* deposition, and suggest that this fact shows Dr. Morrey might have expected defendants to pay for his trial testimony as well. Defendants compensated Dr. Morrey for his time at his deposition based on the plaintiffs' representation (later revealed to be false) that Dr. Morrey was just a neutral, non-retained expert. At trial, however, it was the plaintiffs (not defendants) who called Dr. Morrey to testify, and he offered testimony that unequivocally

supported plaintiffs' theory of the case. Under those circumstances, it would have been absurd to suggest that Dr. Morrey was such an ingénue that he expected compensation for his trial testimony in support of plaintiffs to come from the defendants. In all events, the undisputed facts show that Dr. Morrey knew enough to direct his inquiries about his invoice to *plaintiffs' counsel*. ROA.17-10030.26910. And plaintiffs' counsel ultimately paid him *double* the amount he was expecting after hearing his testimony and achieving a lopsided victory at trial. ROA.17-10030.26914.

Plaintiffs contend in the alternative that Dr. Morrey's subjective expectation of payment does not matter, because "[n]o one could expect that Plaintiffs' attorneys would be mind-readers and would know that Dr. Matthew Morrey thought he might get paid." Red Br.29. But Rule 60(b)(3) "applies to both intentional and unintentional misrepresentations," making it irrelevant whether plaintiffs' counsel knew about Dr. Morrey's expectation of payment. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995); *accord Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965). The only question is whether plaintiffs' assertions about Dr. Morrey's lack of financial incentive were misleading in light of the revelation that Dr. Morrey always expected to be paid (with the amount of payment possibly contingent on whether plaintiffs prevailed, *see infra* Part II). The answer to that question is yes. Regardless of whether plaintiffs knew about Dr. Morrey's expectation of payment,

the jury was left with the demonstrably false impression that defendants' experts were hired guns while the plaintiffs' experts were testifying for purely altruistic reasons.

In all events, a lawyer does not need to be a "mind-reader" to know that expert witnesses generally expect to be compensated for their time. *See, e.g.*, Fed. R. Evid. 706(c) (providing that court-appointed expert witnesses are "entitled to a reasonable compensation"). Indeed, plaintiffs' counsel's arguments and actions during and after trial make clear that they knew exactly how expert compensation works. If plaintiffs' counsel were unaware that expert witnesses are typically compensated, they surely would not have made such a big deal about how Dr. Morrey was purportedly volunteering his time. *See* RE13; ROA.17-10030.10939 ("I think it's very important for the Court to know and the record to reflect that … [w]e have no economic arrangement with [Dr. Morrey]."). And if plaintiffs' counsel were unaware that Dr. Morrey expected compensation, they surely would have reacted with surprise when Dr. Morrey asked him whether to submit an invoice; instead, they just told Dr. Morrey "don't worry about that," and then sent him a check for $30,000, more than double the amount Dr. Morrey had initially expected to receive. RE17; RE18; ROA.17-10030.26885; ROA.17-10030.26910.

C. Finally, plaintiffs suggest that *defendants* are to blame for the non-disclosure of the Morreys' compensation arrangements because defendants failed to

uncover plaintiffs' deception before trial. Plaintiffs note, for example, that when defendants deposed Dr. Matthew Morrey before the *Aoki* trial, they did not "inquire whether Dr. Morrey expected to receive any payment from Plaintiffs in connection with his trial testimony." Red Br.18. But the reason that defendants did not see a need to make that inquiry is that plaintiffs explicitly represented that Dr. Morrey was a non-retained expert witness and never provided defendants with an expert report suggesting otherwise. Indeed, even when plaintiffs submitted their belated and insufficient "expert report" for Dr. Morrey in the middle of the trial, *see infra* 16-17, that report made no mention of any compensation arrangement. *Contra* Fed. R. Civ. P. 26(a)(2)(B)(vi) (requiring expert report to include, *inter alia*, "a statement of the compensation to be paid for the study and testimony in the case"). Plaintiffs cannot argue that defendants somehow waived or forfeited any inquiry into Dr. Morrey's compensation merely because defendants took plaintiffs at their word about the status of this witness.

II. Plaintiffs' Misrepresentations Prevented Defendants From Fully And Fairly Presenting Their Case.

A. As plaintiffs concede, *see* Red Br.18-21, a central focus of their trial strategy was presenting the Morreys as neutral, unbiased expert witnesses who were testifying solely for altruistic reasons. No matter how the jurors felt about the other experts who offered "bought testimony," they could always trust Dr. Bernard Morrey, who was "not a paid witness," and Dr. Matthew Morrey, who "wasn't

compensated" for his time. *See* Blue Br.9. That false contrast imbued the Morreys with an aura of objectivity and credibility, shielded the Morreys from cross-examination about potential bias resulting from their financial arrangements, and allowed plaintiffs to repeatedly disparage the defense experts as hired guns.

Plaintiffs nonetheless insist that their failure to disclose their financial arrangement with the Morreys was harmless because "the possibility for bias" was "exponentially greater" for the defense experts, who purportedly were paid more than the Morreys. Red Br.43-44; *see* Red Br.21-24. But the jury may well have disagreed with that view had it known all the facts. While certain defense experts received more *total* compensation than the Morreys, the opposite is true when it comes to *hourly rates*: Plaintiffs paid the Morreys approximately $2,000 per hour for their work on this case, *see* Blue Br.12-13, but not a single defense expert charged an hourly rate exceeding $900. Had defendants known about the payments to the Morreys, they certainly would have raised this issue on cross-examination—and could have used it to rehabilitate their own experts following plaintiffs' cross-examinations, which focused heavily on the defense experts' fees.

Moreover, plaintiffs' arrangement with the Morreys created a uniquely pernicious risk of bias (or the appearance thereof). Dr. Matthew Morrey expected to be paid for his testimony, *see supra* Part I, but did not know *how much* he would be paid until the check arrived. It thus would have been quite natural for Dr. Morrey

to believe that the amount of his payment was contingent at least in part on the effectiveness of his testimony and the outcome of the trial—the bigger the win, the bigger the payday. Sure enough, after plaintiffs won a half-billion-dollar verdict, they sent Dr. Morrey $30,000—double what he expected to receive—explaining that this payment was warranted because Dr. Morrey's testimony was "well received" by the jury and "helped five people get justice." RE17; ROA.17-10030.26885. Had the testimony been less "well received" by the jury, or had plaintiffs not prevailed, perhaps Dr. Morrey would have been less well compensated (or not compensated at all). The open-ended nature of Dr. Morrey's compensation arrangement—which contrasted unfavorably with defendants' experts, who would receive the same fixed amounts win, lose, or draw—could have led to a potentially devastating cross-examination if defendants had known about this arrangement during trial.

The same risk arose with respect to Dr. Bernard Morrey. Plaintiffs' counsel promised before trial to donate money to Dr. Morrey's charity of choice, but then (according to plaintiffs) withheld that donation until after trial. Under those circumstances, Dr. Morrey may have believed that plaintiffs would follow through with the donation only if the trial went well for them. And, sure enough, after plaintiffs prevailed, they *both* made the donation *and* sent an additional $35,000 to Dr. Morrey, explaining that payment was warranted because Dr. Morrey's testimony "made a real difference to the jury." RE14; ROA.17-10030.26883.

Plaintiffs attempt to neutralize the $35,000 payment by suggesting that it was entirely unexpected by Dr. Morrey and entirely unplanned at the time of trial. *See* Red Br.18-19, 24-26. But even assuming that payment was both unexpected and spontaneous, it remains problematic in light of plaintiffs' repeated comparisons between Dr. Morrey's purportedly uncompensated testimony and defendants' paid experts. The legal system cannot and should not tolerate a dynamic where plaintiffs proclaim two key experts uncompensated, dismiss defendants' experts as hired guns, and then, after a highly favorable verdict, convert the former into the latter with checks for $30,000 or more. The late-breaking checks, even if entirely spontaneous, render the statements at trial highly misleading and would create a loophole that the judicial system should not tolerate.

Importantly, the question is this appeal is not whether the Morreys were *actually* biased by their fee arrangement, but whether it was fair for plaintiffs to misrepresent the relevant facts. It was not. Plaintiffs' misrepresentations enabled them to advance the false narrative that the Morreys were independent experts volunteering their time, and prevented defendants from cross-examining the Morreys about their financial incentives. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978) ("Mutual knowledge of all the relevant facts … is essential to proper litigation."). Given the possibility that the Morreys were (or thought they were) retained on a contingent basis, that cross-examination would

have been particularly effective. After all, evidence of a witness's financial incentive is "classic evidence of bias." *Crowe v. Bolduc*, 334 F.3d 124, 132 (1st Cir. 2003); *see Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980) ("A pecuniary interest in the outcome of a case may, of course, bias a witness."). By denying defendants the opportunity to conduct that cross-examination, plaintiffs undermined the trial's fundamental fairness.

Plaintiffs speculate about various other reasons why the jury might have trusted the Morreys even if plaintiffs had been forthcoming about the fee arrangement. For example, they suggest that the jury would have viewed Dr. Bernard Morrey even more favorably if they knew he donated his compensation to charity, Red Br.44, or that the jury would have found Dr. Matthew Morrey credible because he supposedly formed his opinions before this litigation began, Red Br.20, 44-45. Maybe, maybe not. But those are the precise types of arguments that should have been raised at trial before a jury that was fully informed about all the relevant facts. As plaintiffs' counsel acknowledged during the *Andrews* trial, "the jury ought to be able to know" all of the facts about expert compensation so that it can make its own decision about whether a particular witness is credible. ROA.17-10030.28506.

B. Plaintiffs' misrepresentations further undermined the trial's fairness by interfering with defendants' trial preparation. 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 scrutinize the Morreys' expert opinions before trial. Blue Br.23-25.

Plaintiffs dismiss that concern on the ground that "Defendants took the deposition of Dr. Matthew Morrey *twice* before the trial and met informally with Dr. Bernard Morrey." Red Br.45; *see id.* at 15, 18. But that misses the point altogether. Neither of the Morreys filed an expert report *before* those depositions, thereby preventing defendants from effectively probing their expert opinions or examining the factual bases for those opinions. Indeed, expert reports are so essential to ensuring meaningful depositions that the Federal Rules *prohibit* expert depositions until after the required report is filed. Fed. R. Civ. P. 26(b)(4)(A). By insisting that they Morreys were "non-retained" experts exempt from the reporting requirement, plaintiffs placed defendants at a significant disadvantage in preparing for trial and deciding how to "prepare an effective cross-examination." *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1142 (5th Cir. 1980).

Plaintiffs also contend that their misrepresentations caused no unfairness because defendants "received an expert report from Dr. Bernard Morrey during the trial and were given an opportunity to take his deposition then." Red Br.45. But that so-called report provided far too little, and the offered deposition came far too late. As defendants explained in their opening brief—and as plaintiffs do not dispute—the "expert report" submitted during trial was merely a summary of Dr. Morrey's

trial testimony, and was prepared not by Dr. Morrey but by plaintiffs' counsel. Indeed, Dr. Morrey *never even saw or reviewed* the report. Blue Br.25. And, most critically for present purposes, the "expert report" did not mention the $10,000 donation or any arrangement for compensation, even though Fed. R. Civ. P. 26(a)(2)(B)(vi) requires "a statement of the compensation to be paid for the study and testimony in the case."

Moreover, a mid-trial deposition would have done little to cure the unfairness, as taking that deposition would have required defendants to divert resources from an ongoing trial just to obtain information to which they should have had access long before trial under the Federal Rules of Civil Procedure. Allowing that manifestly insufficient fix to spare plaintiffs from the consequences of their deception would "completely undermine" the purpose of Rule 26(a)(2)'s expert-report requirement. *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008).

C. Defendants' opening brief cited several cases in which courts afforded relief under Rule 60(b)(3) based on misrepresentations similar to the ones at issue here. *See* Blue Br.25-27 (citing *Rozier*, 573 F.2d 1346; *United States v. Cinergy Corp.*, 2008 WL 7679914 (S.D. Ind. Dec. 18, 2008); *In re Vioxx Prods.*, 489 F. Supp. 2d 587 (E.D. La. 2007)). While plaintiffs deny that they committed any wrongdoing, and attempt to distinguish these cases on that basis, they do not argue that any of defendants' cases was wrongly decided. In particular, plaintiffs do not dispute that

a new trial is appropriate when a party falsely claims that one of its witnesses is uncompensated, *Cinergy Corp.*, 2008 WL 7679914 at *13-14, when a party's misrepresentations undermine the opposing party's ability to impeach an expert witness, *In re Vioxx*, 489 F. Supp. 2d at 594-95, or when a party withholds information it had a duty to produce, *Rozier*, 573 F.2d at 1339.

All three of those things happened here. Plaintiffs' counsel repeatedly insisted that the Morreys were uncompensated, even though Dr. Bernard Morrey already was promised a $10,000 donation, and even though Dr. Matthew Morrey expected that he would be paid. *Cf. Cinergy Corp.*, 2008 WL 7679914 at *10-11. Those misrepresentations deprived defendants of the opportunity to impeach the Morreys on the basis of that compensation by, for example, emphasizing that the Morreys' compensation was contingent on the substance of their testimony. *Cf. In re Vioxx*, 489 F. Supp. 2d at 595. And those misrepresentations provided plaintiffs with an excuse to withhold the expert reports that Rule 26 requires, thereby depriving defendants of their ability to fully and fairly prepare for trial. *Cf. Rozier*, 573 F.2d at 1339. Simply put, plaintiffs' counsel's misrepresentations prevented "the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure." *Id.* at 1345-46.

CONCLUSION

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

Respectfully submitted,

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May 31, 2017

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 4,370 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 May 31, 2017 and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 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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