

November 14, 2011

VIA HAND DELIVERY

Joseph H. Orlando, Clerk
Superior Court of New Jersey, Appellate Division
R.J. Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625

David R. Kott
Partner
T. 973.622.4444
F. 973.624.7070
dkott@mccarter.com

Re: In re Pelvic Mesh/Gynecare Litigation
Docket No. AM-667-10
Law Division Case No. 291, Master Case No. L-6341-10

Dear Mr. Orlando:

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102-4056
T. 973.622.4444
F. 973.624.7070
www.mccarter.com

On behalf of Amicus Curiae The Product Liability Advisory Council, Inc. (PLAC), I enclose an original and 5 copies of the following documents:

1. PLAC's Amicus Curiae Brief in Further Support of Defendants-Appellants Ethicon, Inc. and Johnson and Johnson's Appeal; and
2. Certification of Service.

Kindly file the originals and copies and return a stamped "filed" copy to my messenger, who has been instructed to wait for same. Please charge the filing fee to our Firm's account, No. 66800 (reference number 100578/00003).

Thank you for your attention to this matter and please contact me with any questions or concerns.

Very truly yours,



David R. Kott

Enclosures

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HARTFORD

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PHILADELPHIA

STAMFORD

WILMINGTON

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cc: Adam M. Slater, Esq. (2 via hand delivery) (w/encl.)
Jillian A.S. Roman, Esq. (2 via hand delivery)
(w/encl.)
Kelly S. Crawford, Esq. (2 via hand delivery)
(w/encl.)

In re Pelvic Mesh/Gynecare
Litigation,

: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO. AM-667-10T4
: Hon. Paulette M. Sapp-Peterson
: Hon. Victor Ashrafi
:
: ON APPEAL FROM AN ORDER OF THE
: SUPERIOR COURT OF NEW JERSEY,
: LAW DIVISION, ATLANTIC COUNTY,
: PURSUANT TO GRANT OF MOTION FOR
: LEAVE TO APPEAL
: CASE NO. 291
: Master Case No. L-6341-10
:
: SAT BELOW:
: HON. CAROL E. HIGBEE, P.J.CV.
:
:
:

**BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS
CURIAE IN FURTHER SUPPORT OF DEFENDANTS-APPELLANTS ETHICON, INC.
AND JOHNSON & JOHNSON'S APPEAL**

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
973-622-4444
Attorneys for Amicus Curiae,
Product Liability Advisory
Council, Inc.

David R. Kott
Of Counsel

David R. Kott
Gary R. Tulp
On the Brief

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Directive # 7-09, Mass Tort Guidelines and Criteria for Designation, available at <http://www.judiciary.state.nj.us/mass-tort/index.htm>.6

PRELIMINARY STATEMENT

This brief is submitted on behalf of amicus curiae, the Product Liability Advisory Council, Inc. (PLAC) in further support of the appeal of defendants Ethicon, Inc. and Johnson & Johnson (collectively, defendants). On July 21, 2011, this Court granted defendants' motion for leave to appeal an interlocutory trial-court order that, if permitted to stand, would impose far-reaching harmful effects on all defendants in mass torts or centrally managed cases. On July 22, 2011, this Court granted PLAC's motion for leave to appear as amicus curiae in support of defendants' motion and, in turn, in support of defendants' appeal. Pursuant to this Court's August 23, 2011 Scheduling Order, PLAC submits this brief simply to emphasize how the supplemented, more developed, record fully reflects the severity of the conditions caused by the trial court's perilous ruling.

In the interest of the efficient resolution of this matter, PLAC relies on, and incorporates by reference herein, PLAC's Amicus Curiae Brief in Support of Defendants' Application for Leave to File an Interlocutory Appeal, filed with this Court on June 27, 2011. As set forth at length in that brief and in defendants' submissions, this Court should reverse the order under review because, contrary to established law and public

policy, it impermissibly alters the foundational and well-settled rights and principles essential to the New Jersey justice system at large and the centralized case-management system in particular. The trial court's ruling exalts wholly inapplicable physician-patient-privilege concerns over the fundamental truth-seeking function of our court system, to the substantial detriment of any New Jersey manufacturer that finds itself named as a defendant in a centrally managed case. Underscoring the trial court's impermissible reliance on the physician-patient privilege is the undisputed reality that absolutely no physician-patient confidentiality concerns are implicated by the discovery protocol proposed by defendants. Additionally, the trial court's decision contravenes the public-policy values on which the Supreme Court expressly relied when establishing the mass-tort and centralized-case-management system, and which are echoed in the trial judge's first Case Management Order in this very matter.

The events that have transpired since the entry of the trial court's order demonstrate the gravity - and the accuracy - of the concerns detailed in PLAC's initial brief. Moreover, those events illustrate that the discovery protocol proposed by defendants - and employed by at least three federal judges to address the same issue in multi-district litigations - is a

sound means of ensuring a fair judicial process and eliminating even the slightest potential confidentiality concerns.

ARGUMENT

I. THE MORE FULLY DEVELOPED RECORD FURTHER DEMONSTRATES THAT THE TRIAL COURT'S RULING UNNECESSARILY RENDERS THE TRUTH-SEEKING MISSION OF THE COURT SYSTEM SUBORDINATE TO INAPPLICABLE PRIVACY CONCERNS.

As discovery in this matter has progressed in accordance with the subject ruling, defendants (and the court) unfairly have become further deprived of the ability to properly litigate this matter and ascertain the truth with the benefit of the most helpful expert testimony. Primarily, and as set forth at length in PLAC's earlier submission, the truth-seeking function of the justice system always trumps a personal-injury plaintiff's right to confidentiality in his or her medical records. See N.J.S.A. 2A:84A-22.4; Stigliano by Stigliano v. Connaught Labs., Inc., 140 N.J. 305, 312 (1995); State v. Schreiber, 122 N.J. 579, 587 (1991); Stempler v. Speidell, 100 N.J. 368, 377 (1985); Hague v. Williams, 37 N.J. 328, 336 (1962); Lazorick v. Brown, 195 N.J. Super. 444, 451-52 (App. Div. 1984). It also is axiomatic that specialized expert opinion is essential to "assisting the trier of fact to understand the evidence or to determine a fact in issue" in such complex matters as this one. N.J.R.E. 702; accord Kemp ex rel. Wright v. State, 174 N.J. 412, 424 (2002).

As predicted, the more developed record now shows that forcing defendants to conduct discovery with undue regard for inapplicable patient-confidentiality concerns has eliminated defendants' and the court's access to the type of evidence that is essential to the just resolution of the claims at issue here. See Kemp ex rel. Wright, supra, 174 N.J. at 424; N.J.R.E. 702. In particular, the 76 new cases filed just since June 2011 have given rise to the concomitant likely disqualification of 280 to 350 members of a finite, highly specialized pool of physicians. The disqualification of those experts means that, even if no new cases are filed (which is highly unlikely), the cumulative loss of potential experts likely will climb above 1,300 doctors. That number is significant by itself. But its impact is especially astounding when one considers that fewer than 2,000 doctors even use the specific products at issue here.

Contrary to the trial court's decision, nothing about this matter's status as a centrally managed litigation justifies the foregoing statistics or the hampering of defendants' already limited ability to retain qualified experts in the defense of an exponentially growing number of lawsuits. Indeed, as explained at length in defendants' brief, federal courts managing multi-district litigations (MDLs) involving discovery disputes identical or similar to this one have proven that any

confidentiality concerns can be accounted for without limiting the factfinder's access to the most helpful expert opinion. See In re Seroquel Products Liability Litigation, No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 34631, at *9-*14 (M.D. Fl. Mar. 21, 2008); In re Prempro Products Liability Litigation, MDL No. 4:03-cv-1507-WRW (E.D. Ark., Dec. 7, 2005); In re AMS Litigation, No. 87-11183 (D. Minn. May 8, 1998). Defendants in this matter provided a recommended discovery protocol that mirrored the successful protocols countenanced in those MDLs, but the trial court rejected it, preferring instead to guard privacy interests that do not exist in complex personal-injury matters. See N.J.S.A. 2A:84A-22.4; Stigliano by Stigliano, supra, 140 N.J. at 312; Schreiber, supra, 122 N.J. at 587; Stempler, supra, 100 N.J. at 377; Hague, supra, 37 N.J. at 336; Lazorick, supra, 195 N.J. Super. at 451-52.

PLAC respectfully submits that the members of New Jersey's manufacturing community do not deserve to be denied access to a fair, truth-seeking court system merely because they typically are the defendants in mass torts and centrally managed litigation. The more fully developed record now shows that the proliferation of filings since defendants commenced this appeal has only exacerbated the already severe consequences occasioned by the trial court's ruling.

II. THE MORE FULLY DEVELOPED RECORD PROVES THAT THE TRIAL COURT'S RULING CONTRAVENES THE PUBLIC-POLICY RATIONALES UNDERLYING THE SUPREME COURT'S MASS-TORT AND CENTRALIZED-MANAGEMENT GUIDELINES.

Without belaboring the arguments set forth in PLAC's initial amicus curiae brief, it is more apparent than ever that the order under review frustrates the policy bases underlying New Jersey's centralized-case-management system. See R. 4:38A; Directive # 7-09, Mass Tort Guidelines and Criteria for Designation ("Supreme Court Guidelines") at 1, available at <http://www.judiciary.state.nj.us/mass-tort/index.htm>. In light of the current record, it is evident that the trial court's ruling will continue to "unreasonably delay the progress, increase the expense, . . . complicate the process[], . . . [and] prejudice [the defendants]." Supreme Court Guidelines at 2.

The filing of 76 new cases since the commencement of this appeal, bringing the total to 299 cases and disqualifying a likely total of over 1,300 potential experts, unquestionably frustrates the public-policy principles listed above and discussed at length in PLAC's initial brief. This litigation would be prolonged unreasonably, indefinitely, and unduly expensively if defendants are required to continually re-start expert discovery or retain physicians with limited expertise and/or no experience in the United States. Moreover, the

order's contravention of the above-discussed principles is not limited solely to this case. All mass torts and centrally managed cases, which frequently (if not always) require specialized expert opinion and involve members of New Jersey's manufacturing community, will be affected by the far-reaching decision. Accordingly, PLAC respectfully submits that this Court should reverse the decision below in order to vindicate the fair, expedient, and just system implemented by the Supreme Court for managing mass torts and centrally managed cases.

CONCLUSION

For the foregoing reasons, and those expressed in the Product Liability Advisory Council, Inc.'s (PLAC) initial brief, amicus curiae PLAC respectfully requests that this Court reverse the trial court's decision.

MCCARTER & ENGLISH, LLP
Attorneys for Amicus Curiae,
Product Liability Advisory
Council, Inc.

By:



David R. Kott
A Member of the Firm

Dated: November 14, 2011

ADDENDUM A

**Corporate Members of the
Product Liability Advisory Council**
as of 8/8/2011

3M	GlaxoSmithKline
Altec Industries	The Goodyear Tire & Rubber Company
Altria Client Services Inc.	Great Dane Limited Partnership
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Bombardier Recreational Products, Inc.	Johnson & Johnson
BP America Inc.	Johnson Controls, Inc.
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Cirrus Design Corporation	Lincoln Electric Company
Continental Tire the Americas LLC	Magna International Inc.
Cooper Tire and Rubber Company	Marucci Sports, L.L.C.
Crown Cork & Seal Company, Inc.	Mazak Corporation
Crown Equipment Corporation	Mazda (North America), Inc.
Daimler Trucks North America LLC	Medtronic, Inc.
The Dow Chemical Company	Merck & Co., Inc.
E.I. duPont de Nemours and Company	Michelin North America, Inc.
Eli Lilly and Company	Microsoft Corporation
Emerson Electric Co.	Mitsubishi Motors North America, Inc.
Engineered Controls International, Inc.	Mueller Water Products
Environmental Solutions Group	Mutual Pharmaceutical Company, Inc.
Estee Lauder Companies	Navistar, Inc.
Exxon Mobil Corporation	Niro Inc.
Ford Motor Company	Nissan North America, Inc.
General Electric Company	Novartis Pharmaceuticals Corporation
General Motors Corporation	PACCAR Inc.

Corporate Members of the Product Liability Advisory Council

as of 8/8/2011

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Techtronic Industries North America, Inc.

Thor Industries, Inc.

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07101-0652
(973) 622-4444
Attorneys for Amicus Curiae
The Product Liability Advisory Council, Inc.

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) PURSUANT TO GRANT OF MOTION FOR
) LEAVE TO APPEAL
) CASE NO. 291
) Master Case No. L-6341-10
)

SAT BELOW:
HON. CAROL E. HIGBEE, P.J. CV.

CERTIFICATION OF SERVICE

GARY R. TULP, of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and I am associated with the law firm of McCarter & English, LLP, counsel for Amicus Curiae, the Product Liability Advisory Council, Inc. (PLAC). I am familiar with the facts set forth herein.

2. On November 14, 2011, I caused to be served via hand delivery on the Clerk of the Appellate Division an original and 5 copies of PLAC's Amicus Curiae Brief in Further Support of

Defendants-Appellants Ethicon, Inc. and Johnson & Johnson's
Appeal, and Certification of Service.

3. On November 14, 2011, I caused to be served via hand
delivery 2 copies of the foregoing papers on each of the
following:

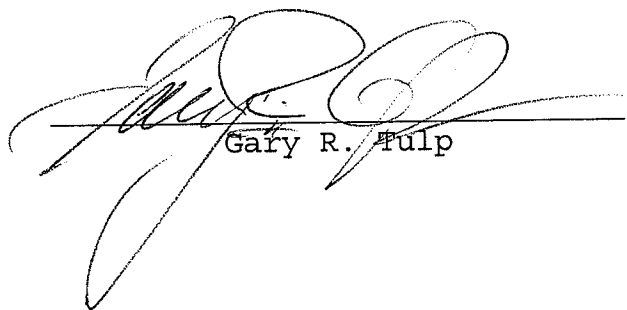
Adam M. Slater, Esq.
Mazie Slater Katz & Freeman LLC
103 Eisenhower Parkway
Roseland, New Jersey 07068
Attorneys for Plaintiffs-
Respondents

Jillian A.S. Roman, Esq.
Cohen, Placitella & Roth, P.C.
Two Commerce Square, Suite 2900
2001 Market Street
Philadelphia, PA 19103
Attorneys for Plaintiffs-
Respondents

Kelly S. Crawford, Esq.
Riker, Danzig, Scherer, Hyland & Perretti, LLP
Headquarters Plaza, One Speedwell Avenue
Morristown, New Jersey 07962
Attorneys for Defendants-Appellants

I hereby certify that the foregoing statements made by me
are true. I am aware if any of the foregoing statements made by
me are willfully false, I am subject to punishment.

Dated: November 14, 2011



Gary R. Pulp