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In re: Zimmer NexGen Knee Implant Products Liability Litigation, Not Reported in Fed....

2016 WL 3281032

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

IN RE: ZIMMER NEXGEN KNEE IMPLANT
PRODUCTS LIABILITY LITIGATION.
This Document Applies to All Cases.

MDL NO. 2272

|
Master Docket Case No. 1:11-cv-05468

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Signed 06/10/2016

CASE MANAGEMENT ORDER NO. 11

HON. [REBECCA R. PALLMEYER](#), United States
District Judge

*1 On December 10, 2015, the Court entered Case Management Order No. 8, which required all plaintiffs to provide evidence or certification of loosening of a NexGen Flex femoral component, a 5950 NexGen MIS Stemmed Tibial Component, or any other tibial component implanted with a NexGen Flex femoral component. (See Doc. 1256 in Case No. 1:11-cv-05468, ¶¶ 1-2.) On January 22, 2016, the Court entered Case Management Order No. 9, which required each plaintiff to designate his or her case as a “Track One” or “Track Two” case. (See Doc. 1651 in Case No. 1:11-cv-05468, ¶¶ 1-4.) Plaintiffs in Track One were required to submit one or more of the following: (1) a medical record demonstrating knee flexion greater than 120 degrees; (2) a certification by counsel that he or she had reviewed the medical records and conferred with the client, and as a result, had a reasonable and good faith basis for contending that the client achieved high flexion activity; and/or (3) a medical record demonstrating implantation and subsequent loosening of a 5950 NexGen MIS Stemmed Tibial Component. (*Id.*)

On January 22, 2016, the Court also entered Case Management Order No. 10, wherein the Court stated its commitment to have full resolution of these consolidated proceedings by the end of 2017. To that end, the Court identified a bellwether trial schedule and a plan for global mediation. (See Doc. 1652 in Case No. 1:11-cv-05468). It is now clear to the Court that additional support for Plaintiff’s claims is necessary in furtherance of the goals set forth in Case Management Order No. 10.

Therefore, the Court now determines that an order in the nature of the order used in *Lore v. Lone Pine Corp.*, No. L33606-85 (N.J. Super. Ct. Law Div., Monmouth Co., Jan. 1, 1986), is necessary to ensure that certain cases in Track One have sufficient merit to proceed to trial and orders the following:

1. Plaintiffs who meet the following criteria shall provide the Expert Declaration form attached to this order by September 13, 2016.

- a. Plaintiff has complied with CMO-2, CMO-8, and CMO-9, **and**,
- b. Plaintiff has designated his or her case as a Track One case under CMO 9, **and**,
- c. Plaintiff intends to pursue any of the following claims:
 - (1) femoral loosening resulting from high flexion activities, regardless of the tibial component implanted;
 - (2) loosening of a tibial component other than an MIS 5950 tibial component resulting from high flexion activities;
 - (3) tibial loosening resulting from high flexion activities of an MIS tibial component which was implanted with a drop down stem.

For the sake of clarity, Plaintiffs who intend to pursue a claim regarding loosening of a MIS 5950 tibial component without a drop down stem are **not** required to provide an Expert Declaration form under this order even if that claim includes a theory that high flexion activity contributed to or enhanced the loosening of the MIS 5950 tibial component, unless a Plaintiff is also pursuing a claim of femoral loosening resulting from high flexion

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activities, as described in section c.1. If Plaintiffs who wish to allege femoral loosening in addition to loosening of a MIS 5950 Tibial Component without a stem extension fail to complete the Expert Declaration form, those Plaintiffs will be precluded from pursuing a theory that the femoral component loosened due to high-flexion at trial. If Plaintiffs who allege loosening of a MIS 5950 Tibial Component with a stem extension fail to complete the Expert Declaration form, they will be precluded from pursuing a high-flexion theory at trial.

*2 Plaintiff's counsel should email completed Expert Declarations to defense counsel, Faegre Baker Daniels LLP, at nicole.brett@faegrebd.com.

2. Failure of Plaintiffs subject to the terms of paragraph 1 to provide the signed Expert Declaration before September 1, 2016 may result in the dismissal of a Plaintiff's case with prejudice, as set forth below:

a. For any Track One, high-flexion Plaintiff who is required to comply with this order and fails to comply with this Order in a timely and complete manner, Zimmer will notify the plaintiff and the Court of the failure to comply by filing a notice of non-compliance on the MDL's Master Docket on September 21, 2016.

b. Any non-compliant Plaintiffs will then have until October 21, 2016 to provide the expert declaration required in paragraph 1 and to file a brief with the Court showing cause for the failure to provide the expert declaration before the September 21, 2016 deadline.

c. On November 4, 2016, Zimmer will file a final list of Plaintiffs who still have yet to comply with this Order. The Court will promptly dismiss those Plaintiffs' cases with prejudice.

d. The Court will also review any briefs attempting to show cause for late compliance and determine whether good cause exists, such that those cases can proceed, rather than being dismissed with prejudice.

3. New Cases and Cases Without a Served Plaintiff Fact Sheet or Proof of Loosening

In cases in which the Plaintiff has not yet served a Plaintiff Fact Sheet, proof of loosening, and proof of high-flexion under CMO Nos. 2, 8, and 9, or in which a Complaint has not been filed as of the date of this Order,

Plaintiffs meeting the criteria of paragraph 1c above shall submit the Expert Declaration attached to this Order within 180 days of the date upon which the case was filed. If a Plaintiff in such a case fails to comply with this Order and provide the Expert Declaration within that time frame, upon written notification by Zimmer, Plaintiffs shall have 30 days to comply. The failure to supply the Expert Declaration shall subject a Plaintiff to the deficiency process outlined in Case Management Order No. 2.

SO ORDERED.

PLAINTIFF'S MEDICAL DECLARATION OF CAUSATION

1. Plaintiff's name: _____

2. Plaintiff's counsel: _____

3. Plaintiff's Civil Action No.: _____

4. Name of medical declarant: _____

5. Date of Plaintiff's implant surgery: _____

6. Date(s) of Plaintiff's revision surgery or surgeries: _____

7. I am an orthopaedic surgeon. I have attached my curriculum vitae to this declaration.

8. I certify that I have reviewed and considered the evidence made available to me, which included Plaintiff's medical records, x-rays and/or x-ray reports and the declaration of Plaintiff. Upon consideration of same, I can state to a reasonable degree of medical certainty that Plaintiff's engagement in high-flexion activity, including activities which required flexion greater than 120 degrees was a cause of the loosening of Plaintiff's (*specify femoral, tibial, or both*) knee component(s).

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I hereby declare under the penalty of perjury that the foregoing is true and correct.

Executed on: _____

Surgeon Declarant's Signature

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