

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In Re: COOK MEDICAL, INC., IVC FILTERS
MARKETING, SALES PRACTICES AND
PRODUCTS LIABILITY LITIGATION

Case No. 1:14-ml-2570-RLY-TAB
MDL No. 2570

This Document Relates to:

Brand v. Cook Medical, Inc. et al.,
Case No. 1:14-cv-6018-RLY-TAB

**PLAINTIFF’S BENCH BRIEF ON THE ADMISSIBILITY OF
“GOOD DEEDS” EVIDENCE IN THE PUNITIVE DAMAGES PHASE**

The Cook Defendants have expressed an intent to call B. Thomas Roberts during the punitive damage phase of this trial to offer testimony regarding “company conduct evidence relevant to punitive damages, including evidence of company conduct, mission, values, and evidence of community involvement, achievements, awards, and recognition.” [Cook Defendants’ Witness List, Doc. 9386 at p. 8]. Through Mr. Roberts, Plaintiff anticipates that Cook will offer evidence that it is a good corporate citizen, that it has received awards for its efforts and contributions, that it does various good deeds and that its past conduct (other than that specifically relating to the particular events in this action) has been good. All such evidence is highly improper because it is irrelevant to the punitive damage inquiry and unfairly prejudicial.

A. The Cook Defendants’ Unrelated “Good Acts” Are Irrelevant to the Punitive Damage Inquiry.

Whether good or bad, Cook’s conduct *unrelated* to the Celect IVC filter and the events which are the subject of this action is irrelevant to the punitive damage inquiry in this case. To be relevant, evidence must have a tendency to make a fact which is of consequence in determining

the action more or less probable that it would be without the evidence. FED.R.EVID. 401, *Huddleston v. United States*, 485 U.S. 681, 682092 (1988). When considering punitive damages under Indiana law, the central issues are whether the defendant “acted with malice, fraud, gross negligence or oppressiveness” and what sum is necessary to punish the defendant and deter similar conduct in the future. The fact that Cook may have made been active in its community or may have made charitable contributions, while commendable, has no bearing upon whether or not Cook acted maliciously or with gross negligence when designing the Celect IVC filter.

Simply stated, whether or not Cook has performed “good deeds” unrelated to the design of the Celect filter is entirely irrelevant to the punitive damage issue in this case. Irrelevant evidence is not admissible and must be excluded from the case. FED.R.EVID. 402.

Courts faced with the issue have declined to allow defendants to mitigate punitive damages by introducing evidence of good deeds to the jury. Specifically, courts have been unwilling to admit evidence of charitable contributions, civic activities and good deeds that were unrelated to the punitive damage issue. *See Niver v. Travelers Indem. Co. of Illinois*, 433 F. Supp. 2d 968, 994–95 (N.D. Iowa 2006)(granting motion in limine to exclude evidence of defendants’ civic activities, charitable contributions and other “good acts” as grounds for refusing or reducing punitive damages because such evidence was unrelated to the bad faith conduct at issue in the case); *Tetuan v. A. H. Robins Co.*, 738 P.2d 1210, 1240-41 (Kan. 1987)(holding that “good guy” evidence – including evidence that the drug company sponsored “orphan drugs” and engaged in philanthropic activities - is irrelevant to the issue of liability for punitive damages and is thus inadmissible); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2005 WL 3164251, at *1 (E.D. La. Nov. 18, 2005)(granting plaintiff’s motion *in limine* on defendant’s reputation and “Good Acts” under Rule 401); *David v. Caterpillar, Inc.*, 324 F.3d 851, 865 (7th Cir. 2003)(employment case

noting the absence of authority for the proposition that good deeds performed after a wrongful act can insulate the defendant from an award of punitive damages).

B. If the Cook Defendants are Permitted to Introduce Evidence of their “Good Acts,” Evidence of the Cook Defendants’ “Bad Acts” Should Also Be Admitted in Rebuttal.

If Cook is permitted to submit evidence of its reputable character and good acts that are unrelated to the design of the Celect (which it should not be permitted to do), Plaintiff should be able to rebut such contentions with evidence demonstrating that Cook is not the virtuous actor that it has portrayed itself to be. In particular, if Cook is allowed to present itself as a reputable, conscientious and responsible company based on actions unrelated to the Celect filter design, Plaintiff should likewise be permitted to go outside of the parameters of the design claim and cross Mr. Roberts on Cook’s bad acts. For example, Plaintiff should be permitted to offer evidence of Cook’s lies and manipulations of the OUS/Lyon Study.

Dated February 5, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

/s/ Ben C. Martin
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