IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEVEN M. MIZEL	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	06C-02-145-JOH
	)	
v.	)	
	)	
XENONICS, INC.	)	
	)	
Defendant	)	

Submitted: January 25, 2008
Decided: February 21, 2008

MEMORANDUM OPINION

Upon Motion of the Defendant for Reargument - ***DENIED***

Norman M. Monhait, Esquire, of Rosenthal Monhait & Goddess, Wilmington, Delaware, attorney for plaintiff

William O. Lamotte, III, Esquire, of Morris Nichols Arsht & Tunnell, attorney for defendant

HERLIHY, Judge

Defendant Xenonics ("Xenonics") moves for reargument of the Court's denial of its motion to exclude plaintiff's expert, Lewis D. Lowenfels ("Mr. Lowenfels"). Defendant argues that the Court made an error of law in its decision dated January 11, 2008.[1] For a detailed factual background see the Courts decision issued on that date.

Defendant contends that the Court's distinction between the use of the testimony in *Hill v. Equitable Bank*[2] and in this case was incorrect. "Defendant respectfully submits that whether the question of 'materiality' is an ultimate question given the nature of the case, or is but a step in a theory of liability, the result should be the same [i.e. the testimony should be excluded]."[3]

The plaintiff responds that defendant has not raised an "error of law" and simply disagrees with the Court's prior holding. Therefore, as defendant has not raised an appropriate reargument issue, the motion should be denied.

Standard of Review

Under a Rule 59(e) motion for reargument, the "only issue is whether the court overlooked something that would have changed the outcome of the underlying decision."[4] Generally, reargument will be denied unless the underlying decision involved an abuse of

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[1] *Mizel v. Xenonics,* 2008 WL 116203 (Del. Super.).

[2] 1987 WL 8953 (D. Del.)(Expert testimony inadmissable as invading the province of the jury).

[3] Defendant's motion for reargument pp. 3.

[4] *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91 (Del. 1992).

discretion.[5] Finally, "[a] motion for reargument is not intended to rehash the arguments already decided by the court.[6]

Discussion

The Court agrees with plaintiff that defendant has not raised an "error of law" with regard to the Court's prior decision. Defendant's only argument is that it disagrees with this Court as to how the holding in *Hill* relates to this case.[7] The Court, however, explained in its original decision that *Hill* was inapposite because "materiality" was not the core issue presented here.

As stated before, the testimony of Mr. Lowenfels will not "invade the province of the jury" since it goes to the credibility of Mr. Mangerman. A jury determination of whether certain events, had they occurred, were "material" is not required in this case. As the testimony is for the purpose of attacking the credibility of a witness, and not to a central tenent of liability in the case, it will be helpful to the jury and therefore, will not be excluded.

Conclusion

For the reasons stated herein, defendant's motion for reargument is **DENIED**.

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J.

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[5] *Id.*

[6] *Id.*

[7] See *Kennedy v. Invacare Corp.*, 2006 WL 488590 (Del. Super.).