UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
***Stinson v. Davol, Inc., et al.*,**
Case No. 2:18-cv-01022

MOTIONS IN LIMINE OPINION & ORDER NO. 54

Plaintiff's Motions *in Limine* ("MIL") Nos. 27 & 31

Plaintiff Aaron Stinson and Defendants C.R. Bard, Inc. and Davol, Inc. filed various MILs to exclude evidence in this case. Now before the Court are (A) Plaintiff's MIL No. 27 to Exclude All Evidence Related to Defendants' Unfounded Argument That Plaintiff Sought Medical Care Because of the Upcoming Trial Date (ECF No. 282); and (B) Plaintiff's MIL No. 31 to Preclude Certain Evidence and Arguments Related to Causation as Violative of Maine Law (ECF No. 286).

I. Background[1]

Plaintiff's case will be tried as the third bellwether selected from thousands of cases in this multidistrict litigation ("MDL") titled *In Re: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation*, 2:18-md-2846. The Judicial Panel on Multidistrict Litigation described the cases in this MDL as "shar[ing] common factual questions arising out of allegations

[1] For a more complete factual background, the reader is directed to the Court's summary judgment opinion and order in this case. (Dispositive Motions Order ("DMO") No. 7, ECF No. 225.) All docket citations are to the *Stinson* case, 2:18-cv-1022, unless otherwise noted.

that defects in defendants' polypropylene hernia mesh products can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body rejection, migration of the mesh, and infections." (Case No. 2:18-md-02846, ECF No. 1 at PageID #1–2.)

Plaintiff brings this action to recover for injuries sustained as a result of the implantation of an Extra-Large PerFix Plug hernia mesh device, alleging that Defendants knew of the risks presented by the device but marketed and sold it despite these risks and without appropriate warnings. After summary judgment, the following claims remain for trial: design defect, failure to warn, negligence, breach of express warranty, and breach of implied warranty.

The relevant facts here are that in 2015 Plaintiff underwent a right inguinal hernia repair with an Extra-Large PerFix Plug mesh, a product manufactured by Defendants. In 2017, Plaintiff underwent exploratory surgery to determine if he had a recurrent hernia or nerve entrapment because of chronic pain in his right groin area. The explanting surgeon, Dr. Radke, noted extensive scarring and found "a large ball approximately 2.5 cm in diameter of rolled up mesh next to the pubic tubercle." (ECF No. 89-22 at PageID #1134.) Dr. Radke removed the mesh, which he described as "slow going and extremely difficult" because of the significant scarring. (*Id.*) Dr. Radke then repaired the hernia with another of Defendants' products, Bard Marlex Mesh. (*Id.*) Even after the explant surgery, Plaintiff claims to have continuing chronic pain and other complications.

II. Standards

"Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure explicitly authorize a court to rule on an evidentiary motion *in limine*." *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 348 F. Supp. 3d 698, 721 (S.D. Ohio 2016). The practice of ruling on such

motions "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). "The purpose of a motion *in limine* is to allow a court to rule on issues pertaining to evidence prior to trial to avoid delay and ensure an evenhanded and expedient trial." *In re E.I. du Pont*, 348 F. Supp. 3d at 721 (citing *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004)). However, courts are generally reluctant to grant broad exclusions of evidence before trial because "a court is almost always better situated during the actual trial to assess the value and utility of evidence." *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998); *accord Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). Unless a party proves that the evidence is clearly inadmissible on all potential grounds—a demanding requirement—"evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Ind. Ins. Co.*, 326 F. Supp. 2d at 846; *see also Koch*, 2 F. Supp. 2d at 1388 ("[A] court is almost always better situated during the actual trial to assess the value and utility of evidence."). The denial, in whole or in part, of a motion *in limine* does not give a party license to admit all evidence contemplated by the motion; it simply means that the Court cannot adjudicate the motion outside of the trial context. *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Irrelevant evidence is" inadmissible. Fed. R. Evid. 402. A court may exclude relevant evidence under Federal Rule of Evidence 403 "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Evidentiary rulings are made subject to the district court's sound discretion.

Frye v. CSX Trans., Inc., 933 F.3d 591, 598 (6th Cir. 2019); *see also Paschal v. Flagstar Bank*, 295 F.3d 565, 576 (6th Cir. 2002) ("In reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.").

III. Analysis

A. Plaintiff's MIL No. 27

Plaintiff asks the Court to prevent Defendants from arguing that Plaintiff "strategically increased his visits to the doctor because of the upcoming trial date." (ECF No. 282.) Defendants respond that they may include in their opening argument the dates of Plaintiff's medical treatment and the date the Court set a trial date, but they have not yet decided whether they wish to do so. (ECF No. 290 at PageID #10306.) The Court agrees with Defendants that a ruling is premature. Plaintiff's motion is therefore reserved, and no party may mention or introduce evidence on the subject without prior approval of the Court.

B. Plaintiff's MIL No. 31

Plaintiff asks the Court to exclude all "evidence, references, inferences, testimony, documents, or argument asserting that the second mesh implant or explant caused Plaintiff's injuries and damages and not the PerFix Plug." (ECF No. 286.) Plaintiff claims that, in compliance with this Court's June 20, 2023 Order (Case No. 18-md-2846, ECF No. 763), he "does not intend to make any references to the type of mesh used during the second implant surgery or that the second mesh implant was also manufactured by Defendants." (ECF No. 286 at PageID #10237.) However, if Defendants argue that the second mesh caused Plaintiff's injuries, then "Plaintiff should be permitted to correct the record and inform the jury that the second mesh

implant is made from the same polypropylene resin as the Per[F]ix Plug and was also manufactured by Defendants." (*Id.*)

On June 20, 2023, the Court issued an order denying Defendants' request that the Court replace the third and fourth bellwether cases due to lack of representativeness. (Case No. 18-md-2846, ECF No. 763.) Part of Defendants' challenge to the representativeness of this case was the issue of a second of Defendants' products, a Bard Mesh, which was implanted in Plaintiff in 2017 and explanted in a May 2023 surgery. (*Id.*) In the Order, the Court set forth the following restrictions on evidence regarding the Bard Mesh:

- The PSC will not be permitted to identify the Bard Mesh by name, mention that it is a product manufactured by Defendants; or mention that it is made of polypropylene;
- The PSC will not be permitted to use evidence regarding the Bard Mesh or its explantation to argue that all hernia mesh devices are dangerous and defective; and
- *Defendants will have the opportunity to posit that there was intervening or superseding causation as to the orchiectomy due to the second surgery and the Bard Mesh.*

(*Id.* at PageID #8804–05 (emphasis added).) Plaintiff did not file anything objecting to the June 20, 2023 Order, and the Court's language was clear and unambiguous. Plaintiff cannot use a motion *in limine* to circumvent the Court's prior ruling. Therefore, Plaintiff's motion is denied.

IV. Conclusion

For the reasons set forth above, Plaintiff's MIL No. 27 (ECF No. 282) is **RESERVED** and Plaintiff's MIL No. 31 (ECF No. 286) is **DENIED**.

As with all *in limine* decisions, this ruling is subject to modification should the facts or circumstances at trial differ from that which has been presented in the pre-trial motion and memoranda.

IT IS SO ORDERED.

10/6/2023
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE