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. 55

Plaintiff's Motions *in Limine* ("MIL") Nos. 32 & 26

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. 32 to Exclude References to Certain Unsubstantiated Medical Conditions (ECF No. 287); and (B) Plaintiff's MIL No. 26 to Exclude All Evidence Related to Plaintiff's Irrelevant Medical History Referenced During his July 28, 2023 Deposition and Defendants' Unsupported Speculation About Sexually Transmitted Diseases/Infections (ECF No. 281).

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

[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.

described the cases in this MDL as "shar[ing] common factual questions arising out of allegations 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. 32

Plaintiff asks the Court to exclude evidence or argument that Plaintiff suffered from "any form of extensive fibrosis/scarring disorders, inflammatory disease, adhesive disease, or was prone to strong fibrotic reactions." (ECF No. 287 at PageID #10244.) According to Plaintiff, there is no evidence that he "is predisposed to, has ever been diagnosed with, or suffered from any of the above conditions, or any evidence that there is a family history of the same," therefore any such evidence would be purely speculative, prejudicial, and misleading. (*Id.*) Defendants claim that they do not intend to "inject speculation about Plaintiff having a specific 'condition' or 'disorder,' diagnoses or otherwise." (ECF No. 295 at PageID #10522.) Instead, they seek to offer evidence of other causes for Plaintiff's fibrosis, including "Plaintiff simply being prone to a stronger fibrotic response to surgery." (*Id.* at PageID #10526.)

The Court addressed a similar issue in the first bellwether case, *Johns v. CR Bard, Inc., et al.* The plaintiff in that case asked the Court to exclude evidence or argument that the plaintiff or others are "genetically or otherwise medically predisposed to forming more adhesions than others." (Case No. 18-cv-1509, ECF No. 241 at PageID #13025.) Defendants argued that some patients "have a propensity for more adhesions or more severe adhesions regardless of the type of

surgery performed," and that they should be permitted to offer evidence and arguments about "the variability in adhesions after surgery." (Case No. 18-cv-1509, ECF No. 266 at PageID #14133.) In granting in part the plaintiff's motion, the Court explained:

> Finally, Defendants' assertion that some patients are predisposed to adhesions suffers from a similar problem—it is unclear what, if any, predisposition Plaintiff has to adhesions. Defendants provide no record citation that indicates that Plaintiff was diagnosed with a predisposition. (ECF No. 266 at PageID #14133.) It should be obvious that for evidence about genetic predispositions to be relevant, Plaintiff must have a genetic predisposition.

(Case No. 18-cv-1509, MIL Order No. 9, ECF No. 393 at PageID #20948.) In support of their argument in *Johns*, Defendants relied on expert testimony that the severity of adhesions differed from patient to patient. (Case No. 18-cv-1509, ECF No. 266 at PageID #14133.) Here, Defendants similarly point to testimony from Plaintiff's surgeon that some patients "have excessive scarring or healing reactions" and that he "couldn't say one way or the other" whether Plaintiff was someone who had such a reaction. (ECF No. 295-1 at PageID #10536–37.) Defendants do not offer a compelling reason for the Court to depart from its ruling in *Johns*. The Court therefore adopts its prior reasoning. Plaintiff's motion is therefore granted.

B. Plaintiff's MIL No. 26

Plaintiff asks the Court to exclude evidence related to (1) his allegedly irrelevant medical history referenced during a July 28, 2023 deposition, specifically information about a cyst on Plaintiff's left wrist and Plaintiff's elbow pain, arm pain, shoulder pain, and knee pain, and (2) unsupported speculation about non-existent sexually transmitted diseases/infections being the cause of Plaintiff's symptoms. (ECF No. 281.)

Plaintiff notes that the cyst and pain references he seeks to exclude in this motion all postdate his hernia repair surgery, and therefore are irrelevant to Defendants' previous arguments that Plaintiff's "*pre-hernia repair surgery* pain complaints and *pre-implant* injuries affect his

current injuries." (ECF No. 281 at PageID #9979 (emphasis in original) (internal quotation omitted).) Defendants respond that although the cyst and these particular pain references are new, Plaintiff "has had a long-standing history with chronic pain throughout his body, dating as far back as the 1990s." (ECF No. 300 at PageID #10684.) Defendants point to their expert, Dr. Pomerants, who has linked Plaintiff's pre-implant pain and injuries and his perception of chronic pain post-implant. (*Id.* at PageID #10684–85.) Defendants claim that Dr. Pomerants's forthcoming supplemental opinions will include opinions on "Plaintiff's recent medical course," and argue that if Plaintiff believes those opinions are otherwise inadmissible, the proper vehicle for challenging them is a *Daubert* motion. The Court agrees that this portion of Plaintiff's motion is premature, and therefore reserves ruling. No party may mention or introduce evidence on the subject without prior approval of the Court.

The second portion of Plaintiff's motion is similar to his MIL No. 32, which the Court addressed above. According to Plaintiff, during Defendants' questioning of Plaintiff's treating physician Dr. Jacobus, Defendants asserted that the most common cause of inflammation of the epididymis, which was noted in the pathology report after Plaintiff's orchiectomy, is sexually transmitted diseases. (ECF No. 281 at PageID #9975 (quoting ECF No. 281-2 at PageID #10007).) Dr. Jacobus responded that sexually transmitted diseases were a potential cause of inflammation of the epididymis, but he was not certain that it was the most common cause. (ECF No. 281-2 at PageID #10007.) Dr. Jacobus further testified that he had no information to say that Plaintiff had or had not ever had a sexually transmitted disease, and that any conclusions about a sexually transmitted disease would be pure speculation. (*Id.* at PageID #10008.) Additionally, Defendants "never once mentioned" sexually transmitted diseases in their questioning of Plaintiff, and there is "zero evidence in the medical records or any of [Plaintiff's] discovery responses that would

indicate he ever had" a sexually transmitted disease. (ECF No. 281 at PageID #9975.)

Defendants argue that, "irrespective of whether [Defendants] ha[ve] conclusive evidence" that plaintiff had a sexually transmitted disease, it is still relevant and admissible as a potential cause of his injuries. (ECF No. 300 at PageID #10687.) The Court's above reasoning applies here, and "for evidence about [sexually transmitted diseases] to be relevant, Plaintiff must have [had] a [sexually transmitted disease]." (Case No. 18-cv-1509, MIL Order No. 9, ECF No. 393 at PageID #20948.)

IV. Conclusion

For the reasons set forth above, Plaintiff's MIL No. 32 (ECF No. 287) is **GRANTED**, and Plaintiff's MIL No. 26 (ECF No. 281) is **GRANTED IN PART** and **RESERVED IN PART**.

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