

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:
ALL ACTIONS.

ORDER

This matter is before the Court on Defendants’ Brief Regarding the Lack of Representativeness of *Stinson* and *Bryan*. (ECF No. 739.) Defendants argue that the third and fourth bellwether cases, *Stinson v. Davol, Inc., et al.*, Case No. 18-cv-1022, and *Bryan v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1440, are no longer representative of the entire pool of cases in this MDL due to the plaintiffs’ recent medical developments, and therefore Defendants ask the Court to “replace *Stinson* and *Bryan* with new bellwether cases that are actually representative of a significant portion of the cases in this MDL.” (*Id.* at PageID #88.)

I. Stinson

Defendants argue that *Stinson* is no longer representative of the cases in this MDL because Mr. Stinson has undergone an additional surgery in which a second of Defendants’ hernia mesh devices, a Bard Mesh, was removed, in addition to the removal of Mr. Stinson’s right testicle and his spermatic cord. (*Id.* at PageID #87.) They therefore ask the Court to allow selection of a different case to be tried in its place. Defendants’ request that the Court replace *Stinson* with a new bellwether trial case based on representativeness is denied. This case was representative when selected for trial. As Defendants note, when this case was selected Mr. Stinson had “the second

most commonly alleged device at issue (the PerFix Plug) and his alleged injury (pain) was the most commonly alleged injury in the MDL.” (ECF No. 739 at PageID #86–87.) “What makes a bellwether trial representative . . . is litigation- and fact-specific. . . . With the parties’ participation and cooperation, the [C]ourt here engaged in a lengthy bellwether plaintiff selection process.” *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 927 n.7 (6th Cir. 2022).

However, as Defendants point out, the Bard Mesh implanted in 2017 “was not discussed by any of the experts designated by the plaintiffs in the Bellwether Trial Pool cases.” (ECF No. 739 at PageID #90.) While the parties’ medical experts will be supplementing their reports following Mr. Stinson’s May 2023 surgery, any new claims regarding the Bard Mesh would also likely involve lengthy discovery and supplementation of materials science and regulatory expert reports. However, the PSC has made clear that they do not seek to add any additional claims or attribute causation to the Bard Mesh. (*See* ECF No. 736 at PageID #8518 (“I just want to comment that we’re not making a legal claim on the Bard Mesh[.]”); ECF No. 740 at PageID #8590 (“[Mr. Stinson] is not making claims against the Bard Mesh that was implanted in 2017 and recently removed.”).) Instead, the PSC intends to argue that “all other injuries [Mr. Stinson] suffered, including undergoing a surgical removal of the Bard Mesh and the orchiectomy, were the result of the defective PerFix [Plug] implant.” (*Id.*) If the PSC were to bring claims or argue causation as to the Bard Mesh, the parties would be entitled to full discovery on the product, which has not been conducted. Therefore, because the PSC contends that they can prove the PerFix Plug caused the orchiectomy, evidence regarding the Bard Mesh will be subject to the following restrictions:

- 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 explanation to argue that all hernia mesh devices are dangerous or 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.

II. Bryan

Defendants argue that *Bryan* is also no longer representative due to ongoing changes in the plaintiff's medical condition. According to Defendants, at the time that *Bryan* was selected as a bellwether case “the only current complaint was pain,” which was an alleged injury “common to more than 81% of claimants in the MDL.” (ECF No. 29 at PageID #100.) Mr. Bryan did not seek treatment for groin pain in over five years, and the ongoing medical developments “make his case a moving target.” (*Id.* at PageID #101.)

Defendants claim that groin pain and testicular issues are new injuries that were not present when *Bryan* was selected as a bellwether. However, as the PSC points out, Mr. Bryan mentioned groin/testicular pain multiple times in his 2019 deposition. (*See* ECF No. 740-1 at PageID #8599 (“if I lift anything that’s over ten pounds it hurts in my left testicle”), 8600 (describing left testicular pain that started in 2015), 8601–02 (describing testicular pain in summer of 2015 that caused him to “almost drop[] to [his] knees”), 8603 (describing a painful squeezing sensation in his left testicle that happened “constantly” between summer 2015 and his explant surgery), 8605 (describing a 2017 emergency room visit due to left testicular pain).) Unlike *Stinson*, which the PSC selected, the *Bryan* case was selected by Defendants to be a bellwether case. Defendants selected *Bryan* in December of 2021, over two years after his deposition. Defendants were therefore aware of his complaints of groin/testicular pain and cannot now claim it is a new injury. Additionally, any claims that he may have new injuries or an orchiectomy that set his case apart from others in the MDL are speculative because he has not had any such surgery at this time.

Accordingly, Defendants' request that the Court replace *Stinson* and *Bryan* with new bellwether cases is **DENIED**.

IT IS SO ORDERED.

6/20/2023
DATE

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