PREPARED BY THE COURT

IN RE: PELVIC MESH/BARD LITIGATION	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: BERGEN COUNTY** **CASE No. 292** **MASTER DOCKET NO. BER-L-17717-14** **Civil Action**

DECISION AND ORDER REGARDING CONSOLIDATION

I. INTRODUCTION

Before this court is an application by Plaintiffs seeking to set multi-plaintiff consolidated trials, rather than single plaintiff trials. This application was opposed by Defendant C.R. Bard, Inc.

The issue is whether any, or all, of the product specific cases should be tried together based on the Plaintiffs' assertions that these matters primarily involve common questions of law and fact, arise from the same transaction or series of transactions, and that contrary to Defendant's argument, individual issues do not predominate.

There are currently five cases pending in the Bellwether Pool.[1] At the Case Management Conference held on January 10, 2019, Plaintiff's counsel argued that a sixth case, Peggy McAllister v. CR Bard Inc., BER-L-018545, should be added to the current pool. The court also entertained a December 12, 2018, letter from Defendants requesting that the matter of Kathy Mosby v. CR Bard Inc., et al, BER-18993-14 be added to the current bellwether pool. For organization of this decision, this court is dividing the five current bellwether cases based on product type; there are the Align matters which include Gasper and Oliver, and the Avaulta matters, which include Asmussen, Cruz, and Green.[2] By this court's prior order, the trial for the Align plaintiff(s) is scheduled in September 2019, and for the Avaulta plaintiff(s) the trial is scheduled in January 2020.

II. ARGUMENT OF PLAINTIFFS

Plaintiffs contend that within the cases for each product, there are several common questions of law or fact arising out of the same transaction or series of transactions that warrant consolidation of some, or all, of the individual cases for trial purposes. Specifically, Plaintiffs argue that within the cases for each product, the products at issue are essentially the same and thus the design and warnings associated with each product are the same. Further, the specific product is marketed for the treatment of the same or similar conditions. (Pls. Br. at 2.); See also (Def. Br. at 6.) ("[T]he Align mesh slings are indicated to treat an entirely different condition-stress urinary incontinence-than the Avaulta line of products, which are indicated to treat pelvic organ prolapse."). Therefore, Plaintiffs conclude that the "mass of general liability and causation

[1] 1) Becky Sue Asmussen v. CR Bard Inc., 017894-14, 2) Norma Cruz v. CR Bard Inc., 017504-14, 3) Jane Gasper v CR Bard Inc., 003159-15, 4) Mary Green v. CR Bard Inc., 017671-14, 5) Diane Oliver v. CR Bard Inc., 000880-15

[2] The Asmussen and Cruz matters involve both Align and Avaulta products

evidence applicable to the device is the same for each case on a particular product." (Pls. Br. at 2.) Although they acknowledge several differences exist in the individual cases for each product, Plaintiffs argue that there are sufficient similarities to warrant a consolidation of trials.

In support of their position, Plaintiffs cite several matters where courts have consolidated trials for purposes of efficiency and practicality. Notably, Plaintiffs rely on the decisions of the Honorable Brian R. Martinotti, U.S.D.J.[3] in the matter of In re DuPuy ASR Hip Implants Litigation, BER-L-3971-11, Case No. 293 and of the 11th Circuit in Eghnayem v. Boston Scientific, 873 F.3d 1304 (11th Cir. 2017), which affirmed the decision of the Honorable Joseph R. Goodwin, U.S.D.J. In both instances[4], the trial courts ordered consolidation of separate matters involving the same or similar products into one trial. This court finds the rationale of both decisions compelling.

At oral argument, Plaintiff's counsel repeatedly lamented the lack of trials that have taken place since the Pelvic Mesh/Bard MCL began in 2010,[5] while defense counsel repeatedly lamented they have not had a single plaintiff "defense pick" proceed to trial.

III. ARGUMENT OF DEFENDANT

The thrust of Defendant's argument is that individual issues predominate in each of the bellwether cases. Defendants point out that in each individual case, the Plaintiff has a different medical history, different preexisting conditions, and different implanting physicians. Furthermore, in some cases there are different products implanted, different injuries, and

[3] At the time of the DePuy ruling, The Hon. Brian R. Martinotti U.S.D.C., was a judge presiding over the MCL docket in Bergen County Superior Court. He presently sits as a judge in the United States District Court for the District of New Jersey.
[4] An MCL setting existed in the DePuy action, while an MDL setting existed in the Boston Scientific action
[5] Only Mary McGinnis et al., v. CR Bard Inc. et al., BER-L-1754314, has gone to trial.

different damages. Defendants contend that the existence of any or all of these discrepancies demands the "complex medical and legal causation analysis" to occur individually in each case. (Def. Br. at 8)

Defendants contend that there would potentially be different state law governing each individual case. However, Defendant's brief was submitted on September 11, 2018, and since then the state law argument has been rendered moot as a result of this court's recent decision in Rios v. Bard, which, in light of Accutane, found that New Jersey law will govern this MCL. See generally In re Accutane Litig., 235 N.J. 229 (2018); See generally Sandra and Ernest Rios v. C.R. Bard Inc., BER-L-018689-14 (N.J. Super. Ct. Law Div. Oct. 19, 2018).

Finally, Defendants express concern that consolidation of trials would severely prejudice them in that a, "jury will unfairly assume merely by there being more than one plaintiff that there is something wrong with [Defendant's] products." (Def. Br. at 2)

IV. ANALYSIS

For the reasons set forth below, this court will consolidate the Gasper and Oliver cases into one consolidated Align trial in September of 2019.

In the DePuy decision, Judge Martinotti focuses on several factors to arrive at the conclusion that the MCL would be enhanced by conducting multi-plaintiff trials. The DePuy court cites the New Jersey Multicounty Litigation (Non-Asbestos) Resource Book, which offers that, "[a] consolidated common issues trial with some plaintiffs presenting their claims against defendants on all issues, yielding findings on common issues" is proper practice for managing complex trials. See New Jersey Multicounty Litigation (Non-Asbestos) Resource Book 22-33, 4th ed. (Jan. 2013). This court is in agreement with Judge Martinotti in that this standard should also apply to

bellwether MCL trials when there is a "sufficient number of similar legal and factual issues, such that separate trials would lead to multiplicity of litigation." DePuy BER-L-3971-11 at 9; See also R. 4:38-1 ("[a court may order actions consolidated] when actions involving a common question of law or fact arising out of the same transaction or series of transactions is pending."). Specifically, this court agrees with Plaintiffs that the standard demands only substantially identical issues, not completely identical, for consolidation to be appropriate. See DePuy BER-L-3971-11 at 9. ("[T]he court also realizes that, particularly in a medical and products liability setting, no two plaintiffs will have identical factual backgrounds. If courts were to deny consolidation based solely on factual differences that may affect causation, cases would never be consolidated.").

DePuy cites several factors, which in totality amounted to a finding that their cases were substantially similar enough to warrant consolidation. First, the cases in that matter were governed by the same state law. Second, the plaintiffs' claims were substantially identical. The trial court in Eghnayem provided several other more specific considerations. See generally In re: Boston Scientific Corporation Pelvic Repair System Products Liability Litigation, Case 2:12-md-02326 (S.D. W.Va. 2014). Namely, that court focused on the identity of the implanting physician, location of implantation, residence of plaintiffs, risks of jury confusion and prejudice, the overall burden on the parties, availability of witnesses, timing issues, expenses, common issues of fact, and the manufacturer of the product. Id.

Here, as in DePuy, this consolidated trial will be governed by only one state's law, New Jersey. Furthermore, both Gasper and Oliver present substantially identical design defect and failure to warn claims. This court is not persuaded that the difference between the "Align TO Hook," which was implanted in Gasper, and the "Align TO Halo," which was implanted in

Oliver, presents any issues that would make either Plaintiff's claim substantially dissimilar to the other. On the factors presented in Boston Scientific, there is overlap in Gasper and Oliver regarding the location of the implantation (New Jersey), the residence of the plaintiffs (New Jersey), the condition treated (stress urinary incontinence), the timing of the procedures (about seven months apart), the manufacturer of the products (Bard), and the expert witnesses that will testify on behalf of each plaintiff. (Pls. Br. at 4-5).

This court acknowledges that the cases are not completely identical and not every factor discussed *supra* that warrants consolidation is present. For instance, the implanting physicians are different in each case and the plaintiff in Gasper underwent a revision procedure. The Eghnayem court specifically addresses the defendant's concern that different doctors performed the implantation procedures. In Eghnayem, as in our matter, "most of the evidence went toward the common claims among the plaintiffs: (1) whether [the product] was a defective medical device and (2) whether [the product's] warnings were sufficient." Eghnayem 873 F.3d at 1314. "The only evidence that went to the individual claims came from the more-easily-distinguishable doctors who did each plaintiff's implantation, and concerned comparatively straightforward questions: (1) did the [product's] design cause that plaintiff's injuries, and (2) did the lack of sufficient warnings influence that doctor's decision to implant [the product]." Id. This court agrees with the Eghnayem analysis. In our trial there will be separate evidence relating to the failure to warn claims, but the similarities in the cases, particularly as to the claims of design defect, outweigh any differences. In addition, this court will ensure that there is organized presentation of evidence and both cautionary and specific jury instructions will be given to the jury to avoid any possible confusion that might arise due to any differences.

Eghnayem also addresses the Defendants' concerns on causation issues in its finding that "[a]lthough each plaintiff's proof of causation was necessarily different, generally differences in causation are not enough, standing alone, to bar consolidation of products liability claims." Id. Once again, this court acknowledges that no two cases are identical, however the cases at issue here present sufficient similarities to warrant their consolidation for trial purposes.

This court also wishes to address Defendants' concerns that a prejudice towards them naturally exists and/or increases proportionally to the number of claims heard against them at a single trial. This concern can be alleviated by proper jury instructions. Furthermore, in this particular consolidated trial, there are only two cases, certainly not an overwhelming number which will automatically create prejudice against Defendant in the minds of the jurors.

Defendant also point out in their briefing that a single plaintiff "defense pick" from the bellwether pool has not yet gone to trial in the MCL.[6] Defendants cite In re Bristol-Myers Squibb Co., 975 S.W.2d 601 (Tex. 1998) as rationale for proceeding with a number of single plaintiff trials before proceeding with any consolidation. "Until enough trials have occurred so that the contours of various types of claims within the litigation are known, courts should proceed with extreme caution in consolidating claims." Id. at 603. This court acknowledges this concern, but is not persuaded by Defendant's rationale as to why they are entitled to proceed to trial on a single plaintiff "defense pick" before any potential consolidation. This MCL is nine years old; the evidence that Plaintiffs will present to the jury is already known to the defense and will not present surprise to them. This court does not believe there is any lack of caution residing in its

[6] The court acknowledges that McGinnis, the only case from this MCL to go to trial at this point, was a plaintiff pick.

decision to consolidate two cases together for trial purposes. Also, both Oliver and Gasper are "defense picks".

Finally, this court acknowledges Plaintiff's concern that only one trial has taken place since the onset of this MCL in 2010. The time has come for these cases to move forward and be tried.

V. CONCLUSION

This court finds that for the reasons set forth above, namely in light of the sufficient overlap and similarity between the facts and law in the Oliver and Gasper cases, a proper balance between efficiency and fairness is achieved by ordering those two cases consolidated for trial purposes in September of 2019. In the event that one, or both, of these cases resolve prior to trial, the McAlister case shall be substituted in the September 2019 trial slot. Accordingly, the parties shall continue to prepare the McAlister case as if it is part of the September 2019 trial setting.

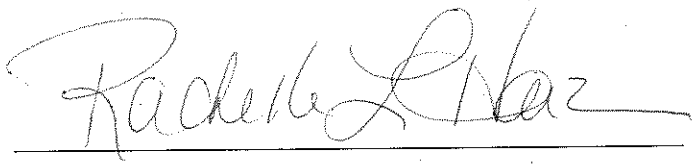
This court temporarily reserves on a final ruling concerning consolidation of the Avaulta cases which constitute the remainder of the current bellwether pool.[7] Assuming this court is satisfied with the procedural aspects of the consolidated Align trial, the parties can expect that this court will consolidate the Asmussen, Cruz, and Green cases for the January 2020 Avaulta trial.

Furthermore, new bellwether pools, consisting of four cases each, shall be selected for two trials, one for Avaulta Solo and another for Align. The new Align bellwether pool will include both the McAllister and Mosby cases. The remainder of the cases in the pools will be randomly

[7] Green, Cruz, and Asmussen

generated by a computer program at our next Case Management Conference, scheduled for February 20, 2019, with all parties present.

Dated: January 18, 2019



Rachelle L. Harz, J.S.C.