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United States District Court,
E.D. Pennsylvania.

In re ORTHOPEDIC BONE SCREW PRODUCTS
LIABILITY LITIGATION.
This Document Relates to All Actions.

MDL No. 1014.
|
Feb. 13, 1997.

*PRETRIAL ORDER NO. 764 SECOND¹ CASE
MANAGEMENT ORDER*

BECHTLE, District Judge.

Part A. Introduction

*1 This Order sets forth a discovery schedule for all civil actions consolidated in MDL No. 1014 that were originally filed in or transferred to and docketed in the Eastern District of Pennsylvania pursuant to  28 U.S.C. § 1407. Civil actions originally filed in or transferred to and docketed in the Eastern District of Pennsylvania *after* October 15, 1995, are treated in Part B below. In view of the fact that all case-specific fact discovery on liability and damages has been completed in civil actions originally filed in or transferred to and docketed in the Eastern District of Pennsylvania *on or before* October 15, 1995, those case are separately addressed in Part C below.

In establishing the discovery deadlines contained in this Order, the court has taken into account the fact that with respect to many of the civil actions covered by this Order,

the parties have substantially completed fact discovery as to liability and damages including fact discovery associated with the development and marketing of pedicle fixation devices as well as identification, disclosure, and expert discovery as to plaintiffs' and defendants' generic experts.² As for case-specific, pre-remand, expert discovery,³ which to date has not been substantially completed, the court will require by this Order that each plaintiff identify and provide expert discovery with respect to at least one duly-qualified, medical expert on the issues of injury and causation. Thereafter, defendant will be required to similarly identify, and provide expert discovery with respect to at least one corresponding rebuttal expert.

The court will defer to the transferor courts on whether the parties may identify additional case-specific liability expert witnesses as well as whether additional time should be afforded to engage in expert discovery with respect to any additional experts permitted to be named. While this court will recommend to the transferor court that such applications be considered, the fact that one cannot predict how various transferor courts will rule upon any such request from the parties causes this court to encourage the parties to complete as much liability expert discovery as possible on the issues of injury and causation prior to remand.

Because case-specific expert testimony on the issue of damages is usually local in character, and would likely require updating following remand in any event, the court will not require that case-specific, expert discovery on the issue of damages be completed prior to remand, although all *fact* discovery that can be completed on damages shall be completed prior to the remand order date. The parties are permitted to separately develop expert evidence if they so choose.

For purposes of this Order, the court establishes a "Discovery Initiation Date" ("DID"), which is

(1) the first day of the month following the date that a civil action is filed in or transferred to and docketed in the Eastern District of Pennsylvania to the extent that such event occurs on or after March 1, 1997; or

*2 (2) March 1, 1997, for those civil actions that were originally filed in or transferred to and docketed in the Eastern District of Pennsylvania before March 1, 1997.

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(3) The Special Master may extend the deadlines established by this Order for good cause shown.

Part B. Civil Actions Filed in or Transferred to and Docketed in this Transferee Court After October 15, 1995.

1. Within two (2) months of the DID, plaintiff shall deliver to defendant, the Plaintiffs' Legal Committee ("PLC"), and the Special Master the following:

(a) A completed Notice of Defect (Exhibit A);

(b) The questionnaire and authorizations required by Pretrial Order No. 396; and

(c) The additional authorizations to obtain social security and workers' compensation records (Exhibits B and C, respectively), together with the documents described in Exhibits B and C to the extent that such documents are in the possession, custody, or control of plaintiff or plaintiff's counsel.

2. Within two (2) months of the DID, defendant may schedule any medical examinations of plaintiff pursuant to and in accordance with the requirements of Fed.R.Civ.P. 35, except that a Plaintiff shall not be required to travel an unreasonable distance for medical examinations. Disputes concerning whether plaintiff is being asked to travel an unreasonable distance for a medical examination shall be presented to the Special Master. In the event that a medical examination is to take place requiring plaintiff to travel more than fifty (50) miles, the party requesting the examination shall tender to plaintiff's counsel five (5) calendar days in advance of such examination a sum equal to the reasonable round-trip travel and lodging expenses to be incurred by plaintiff, and one attorney for plaintiff, to attend the examination.

3. Within two (2) months of the DID, the parties, upon reasonable notice, may secure and

test medical devices or other items that are relevant to this litigation.

4. Within four (4) months of the DID, all fact discovery pertaining to liability and damages shall be completed.

5. Within five (5) months of the DID, each plaintiff shall in accordance with Fed.R.Civ.P. 26(a)(2)(A) identify at least one duly-qualified, medical expert who will provide the disclosures required by Fed.R.Civ.P. 26(a)(2)(B), including case-specific opinions sufficient to support plaintiff's claim that plaintiff suffered an injury that was caused by the product and/or conduct of the defendant.

6. Within six (6) months of the DID, defendant shall deliver to plaintiff and the PLC the following:

(a) The identification, in accordance with Fed.R.Civ.P. 26(a)(2)(A), of defendant's duly-qualified, medical, case-specific, liability expert who will testify in opposition to plaintiff's case-specific, liability expert, together with the disclosures with respect to such expert as required by Fed.R.Civ.P. 26(a)(2)(B); and

(b) The identification of-any of plaintiff's medical records previously obtained by defendant if plaintiff was not previously given specific notice by defendant that such records were being obtained pursuant to plaintiff's authorization.

*3 7. If any party wishes to take the deposition of an expert identified pursuant to Paragraphs 5 or 6 of this Part, such party shall take that deposition within seven (7) months of the DID. Other than the experts provided for in Paragraphs 5 and 6 of this Part, the parties may, but are not required to, identify, make disclosures on, and provide discovery with respect to additional case-specific liability experts within seven (7) months of the DID.

8. All parties are expected to rely, where needed, on the proposed generic experts identified and discovered in this MDL proceeding pursuant to Pretrial Order No. 68.⁴

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Hereafter, no additional generic expert shall be offered as a witness to testify at trial without a court Order expressly allowing that witness to appear for cause shown.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Part C. Civil Actions Filed in or Transferred and Docketed in this Transferee Court On or Before October 15, 1995.

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The discovery that remains in those civil actions that were originally filed in or transferred to and docketed in the Eastern District of Pennsylvania on or before October 15, 1995, is relatively limited as noted above. Accordingly, the following schedule shall apply to those cases.⁵

MDL DOCKET NO. 1014.

NOTICE OF ALLEGED DEFECT

1. Plaintiffs shall deliver to defendant’s counsel:

- (a) on or before April 15, 1997, a signed Notice of Defect (Exhibit A); and
(b) on or before May 15, 1997, case-specific liability expert identification and required disclosures pursuant to Rule 26(a)(2)(A) and (B), respectively, and in accordance with Paragraph 5 of Part B above.

2. Within one (1) month after receiving plaintiff’s identification and required disclosures described in Paragraph 1(b) of this Part, defendant shall identify and make required disclosures with respect to defendant’s corresponding rebuttal expert in accordance with Paragraph 6 of Part B above.

3. Defendant may conduct an independent medical examination of plaintiff or any device on or before June 15, 1997.

4. The parties may take the deposition of any case-specific expert on or before August 15, 1997.

SO ORDERED.

_____ is a plaintiff who _____ is in possession, custody or control of an explanted device which is the subject of the above-referenced litigation.

_____ is not in possession, custody or control of an explanted device which is the subject of the above-referenced litigation.

Plaintiff claims that he/she sustained injury as a result of the following indicated mechanisms of injury [check out defendant’s version]

- _____ fracture of orthopedic bone screws
_____ bending of orthopedic bone screws
_____ cracking of orthopedic bone screws
_____ corrosion of orthopedic bone screws
_____ fretting of orthopedic bone screws
*4 _____ galling of orthopedic bone screws
_____ metal sloughing of orthopedic bone screws
_____ migration of orthopedic bone screws
_____ use of metallic components having a different chemical composition
_____ loosening of orthopedic bone screws
_____ pull out of orthopedic bone screws
_____ stress shielding

EXHIBIT “A”

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- _____ spinal stabilization
- _____ pedicle fracture
- _____ pedicle micro-fracture
- _____ intrinsic design features which make screw placement blind, inaccurate and imprecise
- _____ system design which is incapable of bearing and withstanding the loads, stresses, and strains to which it is subjected in the human body
- _____ excessive bulk
- _____ raises the mechanical stress at levels adjacent to the fused level
- _____ creates a mechanism for infection
- _____ foreign body reaction with inflammation
- _____ contains carcinogenic materials
- _____ contains toxic materials
- _____ creates a vehicle which produces increased venous pressure
- _____ other (specify in detail)

IN RE: ORTHOPEDIC BONE SCREW PRODUCTS LIABILITY LITIGATION

MDL DOCKET NO. 1014

AUTHORIZATION FOR RELEASE OF SOCIAL SECURITY RECORDS

I, _____, do hereby authorize the Social Security Administration to release the following information about myself to Legal Record Services, 4040 Chestnut Street, Philadelphia, Pennsylvania 19104, or LBS Associates, Inc., c/o Linda Biddle Snyder, RN, 112 E. Main Street, Suite 105, Elkton, Maryland 21921, or Litigation Management, Inc., 1300 E. 9th Street, Suite 1900, Cleveland, Ohio 44114, or Litigation Reprographics and Support Service, 601 Poydras Street, New Orleans, Louisiana 70130, or the PLAINTIFFS' LEGAL COMMITTEE, c/o Calvin C. Fayard, Jr., Arnold A. Levin/John J. Cummings, III/W. Hugh Sibley, 320 Walnut Street, Suite 600, Philadelphia, Pennsylvania 19106-3875, or:

any and all records of statements made by me, forms or applications that I have submitted, and the results of any medical examination or adjudication regarding Social Security benefits that I have claimed due to disability.

By: _____

Attorney for Plaintiff

You are hereby authorized to allow these attorneys or their representatives to inspect, copy and reproduce any and all information in your possession pertaining to my social security benefits including, but not limited to, any claim for benefits, investigative report, medical evaluation, hearing transcript, photograph, status report, award or determination.

EXHIBIT "B"

Copies of this document are to be accepted with the same authority as the original, and I specifically authorize you to release records without the necessity of an original authorization.

Signature:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Date of Birth:

Social Security Number:

Address:

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

*5 IN RE: ORTHOPEDIC BONE SCREW PRODUCTS
LIABILITY LITIGATION

MDL DOCKET NO. 1014

*AUTHORIZATION FOR RELEASE OF INSURANCE
INFORMATION*

I, _____, do hereby authorize any insurance company which has provided me with health, disability, or workers' compensation insurance coverage to release to Legal Record Services, 4040 Chestnut Street, Philadelphia, Pennsylvania 19104, or LBS Associates, Inc., c/o Linda Biddle Snyder, RN, 112 E. Main Street, Suite 105, Elkton, Maryland 21921, or Litigation Management, Inc., 1300 E. 9th Street, Suite 1900, Cleveland, Ohio 44114, or Litigation Reprographics and Support Service, 601 Poydras Street, New Orleans, Louisiana 70130, or the PLAINTIFFS' LEGAL COMMITTEE, c/o Calvin C. Fayard, Jr., Arnold A.

Footnotes

¹ The court's first case management Order is Pretrial Order No. 286, which governs select cases originally filed in or transferred to and docketed in the Eastern District of Pennsylvania prior to July 7, 1995, otherwise known as "Remand Group IA" cases. Pretrial Order No. 286 is not changed or otherwise affected by this Order.

Levin/John J. Cummings, III/AW. Hugh Sibley, 320 Walnut Street, Suite 600, Philadelphia, Pennsylvania 19106-3875, or:

any and all information concerning any injuries, sickness, disorders or disabilities incurred by me or rehabilitation services or benefits received by me which you have concerning medical examination, diagnosis, or treatment for any physical, psychological or emotional disorder or disability, including information relating to my ability to work. I am a party involved in a lawsuit pending in the United States District Court for the Eastern District of Pennsylvania entitled "In Re: Orthopedic Bone Screw Products Liability Litigation, MDL Docket Number 1014."

You are hereby authorized to allow these attorneys or their representative to inspect, copy and reproduce any and all information in your possession pertaining to my insurance including but not limited to any claim for benefits, investigative reports, medical evaluation, hearing transcript, photographs, status reports, award or determination.

Copies of this document are to be accepted with the same authority as the original, and I specifically authorize you to release records without the necessity of an original authorization specifying the insurer by name.

Signature:

Date of Birth:

Social Security Number:

Address:

All Citations

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- 2 The court refers to generic experts as those experts whose opinions have general applicability across all cases.
- 3 “Case-specific, pre-remand, expert discovery” or “expert discovery” in this Order means the expert identification required by [Fed.R.Civ.P. 26\(a\)\(2\)\(A\)](#) and all disclosures required by [Rule 26\(a\)\(2\)\(B\)](#).
- 4 In Pretrial Order No. 68, the court established comprehensive procedures concerning the discovery of expert opinions on matters of general applicability. “Matters of general applicability” are those matters that are expected to be applicable to all cases consolidated in MDL No. 1014 on an across-the-board basis, in contrast to case-specific matters, which are matters concerning individual issues of causation and injury. Pretrial Order No. 68 is not changed or otherwise affected by this Order.
- 5 The court shall hereby extend the May, 1, 1997, discovery deadline established in Pretrial Order No. 684 to August 15, 1997, for civil actions that were originally filed in or transferred to and docketed in the Eastern District of Pennsylvania *on or before* October 15, 1995.

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