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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a-MAGNUM CAUSE NUMBER
HIP IMPLANT PRODUCTS LIABILITY 3:12MD02391
LITIGATION

TUESDAY, FEBRUARY 16, 2016

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT L. MILLER, JR.

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*Proceedings reported in machine shorthand. Transcript
produced by computer-aided transcription, Eclipse.*

1 **THE COURT:** Good afternoon.

2 This is Cause Number 12MD2391, also MDL2391,

3 **In Re: Biomet M2a-Magnum Hip Implant Products Liability**

4 **Litigation**, and we are gathered for a telephonic conference

5 that the parties requested, I guess, last week.

6 If I could have you folks state your appearances for
7 the record.

8 **MR. WARD:** Yes.

9 Navan Ward for the plaintiffs.

10 **THE COURT:** Mr. Ward.

11 **MR. WARD:** Good afternoon.

12 **MR. LaDUE:** And John LaDue for Biomet.

13 **THE COURT:** Mr. LaDue.

14 **MR. WINTER:** Good afternoon, Your Honor.

15 John Winter for Biomet, as well.

16 **THE COURT:** Mr. Winter.

17 Well, what can I do for you?

18 **MR. WARD:** Well, Your Honor, we both appreciate --
19 both parties appreciate you taking time out of your schedule to
20 have this phone conference with us.

21 The parties, as we are proceeding with our meeting
22 and conferring upon the Exhibit A and Exhibit B cases of your
23 scheduling order, we've come across a couple of issues that we
24 need clarification on, and the parties -- and, actually,
25 Mr. LaDue made a great suggestion and we all agreed that,

1 hopefully, we can get you to get on the phone and help us with
2 a couple preliminary issues so we can move forward with regards
3 to the Exhibit A and Exhibit B cases.

4 The first issue -- and there's a couple issues. The
5 first issue is the scope of the questions that Biomet would be
6 able to ask plaintiffs in Exhibit A, the statute of limitation
7 group of cases, or Exhibit B, the missing devices cases;
8 essentially, should the questioning be limited to just
9 questions around the SOL issue or questions around the missing
10 device issue or should it be a full deposition.

11 Now, I want to say, you know, very early on, that the
12 Plaintiffs Steering Committee's position is that we don't have
13 a position. We have suggested and recommended that Biomet, you
14 know, speak to the various counsel of record and determine or
15 make a determination of how that particular deposition will go.

16 Now, the reason why we don't have a -- the reason why
17 we don't have a position on this one way or the other,
18 Your Honor, is because, as the plaintiffs have continued to be
19 in contact with the counsel of record for the Exhibit A and
20 Exhibit B cases, quite frankly, it's been the PSC's
21 understanding, as well as the counsel of record's
22 understanding, that the questions that would be asked in these
23 depositions would, indeed, be limited to the statute of
24 limitations issues and/or missing device issues, as evidenced
25 by the scheduling order only asking to the written discovery

1 responses or request and responses.

2 And so when during this meet-and-confer process it
3 was learned -- Biomet told us, the Plaintiffs Steering
4 Committee, for the first time, that they, indeed, intended on
5 taking a full deposition.

6 Our communications with counsel of record has
7 resulted in either, one, some of the plaintiffs' counsel
8 wanting to restrict and limit the areas of questioning to just
9 SOL or missing device issues because of concerns that, you
10 know, a full deposition may very well bring up discovery issues
11 that they would not be able to address until down the road,
12 once this case gets either at their local jurisdiction or
13 selected for a discovery group down the road in MDL, and that
14 they would not be able to address those until then.

15 Now, other individual counsel, they mentioned that
16 they've not had the same concerns and they are fine with the
17 defendants taking a full deposition, as long as, you know, they
18 won't have an opportunity to take another deposition down the
19 road, increasing the cost of what a second deposition would be.

20 And so with the competing concerns that the various
21 people in Exhibit A and Exhibit B have, the Plaintiffs Steering
22 Committee is not -- we're not in a position to be able to make
23 a call when Biomet, you know, tells us what they're intent to
24 do and for us to agree to it or not, and so that, essentially,
25 is the basis, from at least Plaintiffs Steering Committee's

1 perspective, on this first issue that we need clarification on.

2 **THE COURT:** Okay. And that goes to both List A and
3 B?

4 **MR. WARD:** Yes, Your Honor.

5 **THE COURT:** Okay. Why don't you go ahead and pose
6 the second issue so that I can hear from the defense on both
7 issues at the same time.

8 **MR. WARD:** Sure.

9 So, the second issue that the parties need
10 clarification on is the scope of the cases that should be
11 included on Exhibit B, the missing device cases, essentially,
12 which cases should properly be included on Exhibit B, based on
13 what the defendants have previously contended with regard to
14 that particular discovery track, as well as what the Court has
15 acknowledged with regards to that particular discovery track's
16 purpose, is to interpret your order or orders in order to
17 determine if a party has violated it.

18 And the Plaintiffs Steering Committee completely
19 agrees that your order, the scheduling order, does and should
20 include any case in that discovery track that will assist the
21 court, other courts, or other jurisdictions with regards to
22 interpreting your particular order.

23 We certainly understand -- we certainly understand
24 that there are cases in there that will give the Court guidance
25 and give everyone else guidance as to, you know, the facts of

1 their cases and if, indeed, there are issues in those cases
2 where the Court's order was violated or not.

3 However, there are cases in Exhibit B that, quite
4 simply, should not be in Exhibit B that, quite simply, will not
5 assist other courts, this Court, or any other jurisdiction in
6 the goal of being able to determine if a party violated this
7 particular order or the particular orders.

8 Now, I reference order or orders. The March 2013
9 order that explicitly is titled "Explant Preservation Order" is
10 what the Plaintiffs Steering Committee would contend is the
11 proper order setting out the parties' requirements to preserve
12 particular devices.

13 However, the defendants, they point to the
14 October 2012 Pretrial Order Number 1, which is, essentially, an
15 order that, generally, addresses various matters with regards
16 to the inception of this MDL.

17 Biomet points to a one-sentence paragraph, 13, which
18 does not address device preservation but, instead, relates to
19 preservation of documents or other records.

20 And, actually, in the event that you, Your Honor,
21 don't have Paragraph 13 memorized, I can read it to you. It's
22 a one-sentence paragraph. It states, "All parties are not to
23 take" -- excuse me. "All parties are to take reasonable steps
24 to preserve documents and other records (including electronic
25 documents) containing information potentially relevant to the

1 subject matter of litigation." That's the end of the
2 paragraph.

3 Now, even if we look at and use the October 2012
4 Pretrial Order Number 1, Paragraph 13, as the foundational
5 order that puts a requirement on the parties to preserve the
6 device, it says, clearly says, in that particular paragraph,
7 "All parties," and it only applies to parties to a lawsuit.

8 Here, the Exhibit B includes several plaintiffs that
9 have had revisions before they had -- before they filed a
10 lawsuit and/or even was represented by plaintiff's counsel.
11 These are non-parties, who would not have even had the ability
12 to violate any of the Court's orders, and they should be taken
13 off.

14 Now, the reason why they should be taken off is
15 important, Your Honor, because, instead of being in a discovery
16 track that will, essentially, be able to determine the facts
17 around their missing device, they will be, more properly, able
18 to be placed in either Group 1 or Group 2. These are the two
19 groups that both parties are trying to identify and be able to
20 properly place, 1 and/or Group 2 clients, prior to the next
21 court deadline, I think, at the end of this month where Group 1
22 would be activated.

23 So, if a plaintiff is in an Exhibit B track for
24 missing device when there's no possible way that they could
25 have violated your order and should not have been in that

1 track, then that is prejudicing them to not be able to
2 participate in Group 1, Group 2, and, for that matter, even if
3 they're not going to be in Group 1 or Group 2, having them go
4 forward with depositions that, again, won't fulfill the purpose
5 of interpreting your order with regards to them violating it,
6 because, quite frankly, they were not parties and they could
7 not have violated your particular order.

8 And, so, because there are a lot of those cases, it's
9 the Plaintiffs Steering Committee's position -- and the reason
10 why we are needing clarification is to be able to understand
11 and know who should or what group of clients should properly be
12 in Group Exhibit B, and it's our position, if they had a
13 revision prior to, more specifically, the March 2012 order -- I
14 apologize. It's our position that, if they had a revision
15 prior to filing a case and/or even having hired a lawyer, then
16 they are not in a position to violate your order and should not
17 be on Exhibit B.

18 **THE COURT:** So, on this point, then, you're seeking,
19 effectively, a construction of the language in the October 2012
20 and March 2013 orders to see if I read them the way you do; is
21 that right?

22 **MR. WARD:** Yes, Your Honor.

23 **THE COURT:** Okay.

24 **MR. WARD:** Yes, Your Honor, with regards to who would
25 be the proper plaintiffs that would be a part of Exhibit B,

1 based on either one of those orders.

2 **THE COURT:** Okay. All right. Mr. Winter or
3 Mr. LaDue.

4 **MR. WINTER:** Your Honor, Mr. Winter will respond, and
5 I'll take the second issue first, Your Honor.

6 Paragraph E of Paragraph 4 of your December 21, 2015
7 order specifically references the October 12 order that you
8 entered, and every case that is on Exhibit B is a plaintiff who
9 was revised after the date in your order.

10 And, as I have explained to Mr. Ward -- because he
11 brought up four of his own cases as evidence that they
12 shouldn't be on Exhibit B. And, Your Honor, I will not get
13 into why, having seen Exhibit B multiple times before it was
14 entered, this issue wasn't raised, but we, actually, have a
15 difference of opinion as to what we think your order means, as
16 opposed to what Mr. Ward thinks your order means. We have a
17 view as to what the law says as to what a party's obligations
18 are to preserve evidence, whether or not they are represented
19 by counsel and whether they're reasonably contemplating
20 litigation, and that means you, actually, have not filed your
21 lawsuit. But that's something that, given discovery, we will
22 then present to you in the context of a summary judgment
23 motion, and you will -- you know, you're going to do what
24 you're going to do.

25 But, for someone on either our side or the

1 plaintiffs' side to, sort of, prejudice and say, "Well, you
2 know, I haven't contacted a lawyer; therefore, spoliation
3 doesn't apply," or, "I got revised, and then figured out I
4 needed to file a lawsuit, but I already lost my device," these
5 are all sorts of variations, Your Honor, that will be very
6 helpful with these cases to have the benefit of your
7 interpretation of the meaning of your orders and what people
8 did, with knowledge or without knowledge of your orders, and
9 whether they should have had knowledge or should not have had
10 knowledge.

11 These types of issues come up all the time, and it's
12 your order. I think you have a view as to what your order
13 meant. I would never pre-suppose to say, "Judge Miller, how
14 are you going to rule," which is what this is about.

15 So, we think the point about Exhibit B -- there were
16 cases, Your Honor, which we will tell you, where, shortly after
17 Exhibit B was entered, we got proof that a missing device had
18 been found, and, you know, they amended their fact sheet, and
19 they said, "We now have the device." We have a very limited
20 number of those cases, and we agree to take them off Exhibit B
21 because, obviously, you know, the issue of spoliation was off
22 the table. But, for all the other cases where we've been
23 contacted, we've said, "We have a difference of view, plaintiff
24 versus defendants, as to, you know, what a parties' obligations
25 are," so I don't see a basis to change Exhibit B.

1 As to the first issue, Your Honor, if you go to
2 Paragraph 3 -- and it, actually, also, applies to
3 Paragraph 4 -- there are specific discovery requests that
4 needed to be answered on the question of statute of limitations
5 or spoliation. Then, there was a requirement to provide all
6 medical records, all X-rays, et cetera, et cetera, and then
7 there would be a deposition.

8 We never envisioned the deposition to be limited to a
9 specific issue. In fact, when we've talked to plaintiffs, as
10 Mr. Ward told you, they're ready, willing, and able to have
11 their plaintiff deposed once, and we will only get one
12 deposition, and we will not get any other discovery in these
13 cases because they will not be in either, you know, Group 1 or
14 Group 2.

15 Your order, in Paragraph 8, talks about the need to
16 get some discovery moving, case specific, in the context of the
17 MDL. We can't see how, you know, in the world it makes sense
18 to do one limited deposition and then come back, you know, if
19 the summary judgment motion is unsuccessful, to do another
20 deposition on remand. It's not efficient for either plaintiff
21 or defendant, and we, actually, haven't heard a plaintiff say
22 to us they want to do it in this limited way, as we've started
23 to reach out to schedule.

24 This came up when we sent the list of SOL plaintiffs
25 to the PSC saying, "This is the proposed order that we have,

1 and we just want to let you know that, you know, we intend to
2 take a deposition of this plaintiff, understanding that, if we
3 make a summary judgment motion, it's limited to statute of
4 limitations for, you know, Paragraph 3 and spoliation for
5 Paragraph 4."

6 **THE COURT:** Okay. Thank you, sir.

7 Mr. Ward, do you wish to respond?

8 **MR. WARD:** Yeah.

9 With regards to the first issue and the scope of the
10 deposition, scope of questioning, you know, again, you know,
11 I'm in a position where I have to, you know, again, speak on
12 both sides of the concern about that. We've talked with the
13 great majority of people in Exhibit A and Exhibit B, and those
14 are the concerns on each side. Quite frankly, I see the
15 concerns on each side.

16 Me, personally, for my cases, I have not decided yet,
17 but it's very likely, even though I've not decided yet, that I
18 won't mind a full discovery that would be taken once and not
19 have to be taken again.

20 But, again, in the -- but I don't think that I have
21 the right or ability, as a member of the Plaintiffs Steering
22 Committee or Plaintiffs Executive Committee, to be able to
23 speak for those that have concerns against it, because I,
24 certainly, see, you know, some of the issues that they may have
25 with regards to a deposition being outside the scope of what

1 this particular discovery track is meant for, and so, you know,
2 again, that is the reason why we, the Plaintiffs Steering, has
3 not taken a position on that particular issue.

4 And as to the second issue with regards to Exhibit B,
5 Mr. Winter is correct that there are some cases that they have
6 felt are appropriate to be taken out, cases where the device
7 has been found. Also, they've taken out cases where the
8 plaintiff is now a pro se plaintiff, and so they have taken
9 people out because those people would not have, obviously, been
10 able to help the core issue of what has been articulated as a
11 reason for the discovery track.

12 And I think, in the December 7th hearing, Your Honor,
13 you know, hit it on the head, you know, on Page 8 of the
14 transcript where you were in a dialogue with Ms. Fulmer. You
15 had isolated the question here. You, essentially, said "...
16 that it would be cases [where] the preservation had been
17 ordered, the explant took place, and the device wasn't
18 preserved -- if it's those cases and limited to those cases,
19 I'm not sure how state law comes into play and the differences
20 in state law, because it would, simply, be what happens when a
21 specific order isn't followed in federal court, wouldn't it?"
22 That's the question that you asked.

23 And we -- I agree with Ms. Fulmer. Her response is,
24 "I don't disagree with you at all, Your Honor."

25 We don't disagree with you at all, because it is

1 concerning -- cases that are in Exhibit B should be concerning
2 clients who've had the ability to either be subject to your
3 order and if they did or did not follow that specific order.

4 Again, non-parties, people who would have no idea
5 that an order existed, that they would have even had a lawsuit
6 or even had filed their lawsuit, had not yet filed a lawsuit,
7 those people, people in that category, should not be subject to
8 being on Exhibit B. Instead, their case should be looked at
9 where it should be properly placed in Group 1, Group 2, or
10 otherwise. And to deny those clients and those plaintiffs who,
11 again, will not be able to give any instructive facts or
12 information to this Court, being able to make the decision,
13 they should not be on that particular exhibit because it won't
14 further the process of being able to get an understanding of
15 what the Court's order will be and being able to apply that to
16 other jurisdictions.

17 **THE COURT:** Thank you, sir.

18 I guess nobody has a burden on this, so, Mr. Winter,
19 I'll give you a second round, as well.

20 **MR. WINTER:** Thank you, Your Honor.

21 Your Honor, individuals, we believe, under the
22 Federal Rules, have obligations to preserve evidence, whether
23 or not they are represented by a lawyer, if they reasonably
24 anticipate litigation.

25 You entered an order in October. And, yes, there may

1 be people who say, "I didn't have a computer. I couldn't do
2 this. I didn't know that. I didn't do this. I didn't do
3 that," and their failure to be aware of a publicly available
4 order, you know, that's something you'll take into account when
5 you rule on summary judgment.

6 But the notion that you have to have been represented
7 by a lawyer, have filed a lawsuit, and then ignored your order
8 as the only grounds for you to make some type of ruling, we
9 just don't believe is the law. Now, we may be wrong, and
10 you'll tell us on the summary judgments. But all these cases
11 on Exhibit B comply with what you ordered in Paragraph E or
12 D -- I apologize, Your Honor -- of Paragraph 4 of your
13 December 21 order, and this has been vetted by everyone
14 multiple times.

15 So, we have a difference of what your order means in
16 certain sets of facts, but that's why Exhibit B was created,
17 because that should inform how other judges make rulings after
18 you have ruled, and the fact that we have, probably, fifteen or
19 twenty other cases since then that, probably, fit this but, you
20 know, were filed afterwards, so this is very important for the
21 litigation, Your Honor, to get your views on these issues.
22 Mr. Ward has crystallized a factual scenario that's going to
23 apply to many cases. Either he's right or we're right, but you
24 have to decide.

25 **MR. WARD:** Your Honor, if I may?

1 **THE COURT:** No. We've had two rounds. Let me go
2 ahead and see what I can do for you here.

3 We have two issues. One of them, I think, raises a
4 procedural question and the other one raises a legal question.

5 The first is the scope of the questions of the
6 plaintiffs on the two lists, the two exhibits, whether they
7 should be limited to the topic of the list they're on; in other
8 words, whether statute of limitations or spoliation or whether
9 they should be a single deposition of a plaintiff not to be
10 bifurcated, and I think, inconsistent with the idea behind the
11 MDL process that we're trying to reduce the expense and
12 inconvenience to witnesses and parties, I think we need to
13 presume that they will be a single deposition, that whatever's
14 discoverable is available for questioning during those
15 depositions. Certainly, that's the way I think we've
16 approached the depositions of the defendants' witnesses -- that
17 was my understanding -- and I think we would do the same here.

18 We have -- I recognize, as well, that we've got,
19 what, sixty-eight -- yeah, sixty-eight -- plaintiffs listed,
20 and it may be that there is a case or two or three where
21 there's a reason why a plaintiff would not be able to sit for a
22 full deposition and that additional information or time might
23 be required, and certainly I'll entertain any motions by
24 counsel of record explaining why it would be unfair, unjust,
25 inconvenient, whatever it might be, to give a full deposition

1 at this point. On the one hand, the cases are getting a little
2 long in the tooth, so they should be ready. On the other hand,
3 discovery has been stayed, so there may be instances where that
4 matters.

5 But the presumption on these, unless I rule to the
6 contrary, these will be anticipated to be single -- a single
7 deposition of each plaintiff, not to be bifurcated, between
8 issues concerning statute of limitations or spoliation, on the
9 one hand, and the rest of the case on the other.

10 The second issue that we have, I think, presents a
11 legal question, and that is the interpretation of whether we
12 look at the Court's orders -- let's put it that way. I think,
13 as part of that, we have to figure out what orders we're
14 talking about -- but the application of the Court's orders to
15 people who were not parties at the time, who may or may not
16 have known, may or may not have had counsel when their hip
17 implants were explanted, under current federal law, and I don't
18 think I can answer that without having the backdrop of the
19 individual cases. My understanding is we set it up this way so
20 that we could get the backdrop, the factual backdrop, and the
21 law could be argued with the factual backdrop in mind.

22 It may be that some or many of these cases will turn
23 on state law, if the defense is wrong, as far as the import of
24 the Federal Rules of Civil Procedure on people who don't have
25 actual knowledge of an order. I don't know, because I haven't

1 begun to research this, because I figured you folks would do a
2 good job of educating me when the summary judgment motion
3 briefing came through. And if that's the case, then I don't
4 anticipate resolving state law spoliation issues. To the
5 extent I can resolve federal law spoliation cases, I think that
6 that's appropriate for me to do. And I don't think I can
7 decide, at this point, what the law is or how it applies to
8 various what are, at this point, to me, hypothetical
9 situations. I know you folks know better, that they're not all
10 hypothetical, but I don't know what all facts I would need to
11 know.

12 So, I guess the best I can do for you here is that,
13 as far as the first issue, I'll go ahead and rule today that
14 the depositions of plaintiffs on Exhibits A and B are expected
15 to be the only deposition that will be taken of the plaintiff
16 and, accordingly, would not be limited to the issues giving
17 rise to their placement on Exhibits A and B; provided, however,
18 that an individual counsel of record can request an adjournment
19 of the deposition or some other arrangements, in light of the
20 unique circumstances of that plaintiff.

21 And that with respect to the applicability of -- no,
22 it's not applicability, I guess. As to whether cases have been
23 improperly placed on Exhibit B because it includes people who
24 are not parties to the lawsuit at the time of the explanation,
25 I'm, simply, going to defer ruling on that until the summary

1 judgment briefing.

2 Did that give you the rulings you needed, Mr. Ward?

3 **MR. WARD:** Yes. Yes, Your Honor. That is very
4 helpful. Thank you, Your Honor.

5 **THE COURT:** And Mr. Winter?

6 **MR. WINTER:** Very helpful, Your Honor. Much
7 appreciated. Much appreciated; you looking at this quickly.

8 **THE COURT:** Okay. Well, that's what I'm here for,
9 and you folks are doing a good job limiting the number of times
10 I have to do it, so I appreciate that, too.

11 So, I will see you next month, I believe, or is it --
12 well, I don't know. I don't have the docket sheet, so I don't
13 know when I'm going to see you next, but I'll see you then.

14 Thank you, folks.

15 **MR. WINTER:** Thank you, Your Honor.

16 **MR. WARD:** Thank you, Your Honor.

17 **(Proceedings concluded.)**

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CERTIFICATE

I, DEBRA J. BONK, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATED THIS 17th DAY OF FEBRUARY, 2016.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER