

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| * * * * * | * CIVIL ACTION |
| BOBBY DON BOWERSOCK | * NUMBER 08-02635-ML |
| | * |
| VS. | * DECEMBER 4, 2014 |
| | * 12:00 P.M. |
| | * |
| DAVOL, INC. and | * |
| C.R. BARD, INC. | * PROVIDENCE, RI |
| * * * * * | * |

BEFORE THE HONORABLE MARY M. LISI
DISTRICT JUDGE
(Plaintiff Bowersock's Motion to Remand)

APPEARANCES:

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| FOR THE PLAINTIFF: | ROBERT THOMAS DASSOW, ESQ. HOVDE DASSOW & DEETS LLC. Meridian Tower, Suite 500 201 West 103rd Street Indianapolis, IN 46290 |
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| FOR THE PLAINTIFF: (VIA TELEPHONE) | DONALD A. MIGLIORI, ESQ. MOTLEY RICE LLC 321 South Main Street Providence, RI 02903 |
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| FOR THE DEFENDANT: (VIA TELEPHONE) | JOHN P. HOOPER, ESQ. REED SMITH LLP 599 Lexington Avenue New York, NY 10022 |
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| Court Reporter: | Denise P. Veitch, RPR One Exchange Terrace Providence, RI 02903 |
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1 DECEMBER 4, 2014 -- 12:00 P.M.

2 THE COURT: Are you Mr. Dassow?

3 MR. DASSOW: I am, Judge.

4 THE COURT: Am I pronouncing your name
5 correctly?

6 MR. DASSOW: Dassow.

7 THE COURT: Dassow.

8 MR. DASSOW: I would say good morning or good
9 afternoon, but it's so close I'm not sure which.

10 THE COURT: Well, whatever; just we're happy to
11 have you here.

12 And I understand we have both Mr. Hooper and
13 Mr. Migliori on the line.

14 MR. MIGLIORI: Yes, your Honor.

15 MR. HOOPER: You do, your Honor.

16 THE COURT: Are you together?

17 MR. HOOPER: John Hooper. I'm sure you're happy
18 not to have me there.

19 THE COURT: Are you two together, or are you in
20 different places?

21 MR. HOOPER: We're in different places, your
22 Honor. I'm in my office in New York in a mediation.

23 THE COURT: Okay. And, Don, where are you?

24 MR. MIGLIORI: I am on my way to visit your
25 favorite witness, Dr. Klosterhalfen, for a week of

1 depositions in Germany.

2 THE COURT: Well --

3 MR. DASSOW: Bring three translators, Don.

4 THE COURT: As you know, we have Mr. Dassow
5 here. The matter is before the Court this morning on
6 the Plaintiff's motion to remand the Bowersock case to
7 the Southern District of Indiana.

8 And, Mr. Dassow, I just want to say I appreciate
9 your coming and being here physically, but I also must
10 tell you I am always concerned about the cost of
11 litigation, and I hope you were informed by my clerk
12 that you could have participated by telephone, as
13 Mr. Migliori and Mr. Hooper are, so I want to make sure
14 you know that.

15 MR. DASSOW: Thank you, your Honor. I do
16 understand that and I'm here because, I'll get into it,
17 of the importance of the case and how strongly we feel
18 about it. But I do appreciate that, your Honor.

19 THE COURT: Okay. So if you want to come
20 forward then and make that presentation, and I'll just
21 ask you, if you could, to speak somewhat slowly and
22 loudly so that Mr. Hooper and Mr. Migliori can hear
23 what you're saying.

24 MR. DASSOW: I will do my best. I tend to speak
25 rather quickly, but I will certainly slow down, your

1 Honor.

2 THE COURT: Okay.

3 MR. DASSOW: Your Honor, Plaintiffs respectfully
4 request that this Court remand the case back to
5 Indianapolis, the federal court there, and have the
6 presiding judge take over the trial of the case and the
7 pretrial proceedings.

8 And why, you ask, am I here and why did I travel
9 from Indianapolis? We ask that because this case was
10 filed September 30th, 2008, six years ago.

11 Mrs. Bowersock died October 31st, 2006, eight years
12 ago, with a recalled device that was defective in her
13 body. Because of the family's condition, the
14 disabilities both of her son as well as the guardian's
15 families, as we noted in our affidavits, we need this
16 case remanded because we have complied with each and
17 every one of your requirements under your March 2013
18 order. This case needs to be remanded to Indianapolis
19 because these mediations have been unsuccessful.

20 We also request this case be remanded because
21 this is an important case. This is a death case. This
22 is very unique facts and circumstances with regard to
23 the family.

24 THE COURT: As I understand it, Mr. Dassow,
25 after Mrs. Bowersock passed, an autopsy was conducted;

1 is that correct?

2 MR. DASSOW: Correct. That was autopsy number
3 one, your Honor.

4 THE COURT: There was a second autopsy?

5 MR. DASSOW: Correct. The body had to be
6 exhumed.

7 THE COURT: Okay. I was going to get to that.

8 MR. DASSOW: Okay.

9 THE COURT: But shortly after she passed, there
10 was an autopsy conducted.

11 MR. DASSOW: Correct.

12 THE COURT: So the parties have the benefit of
13 the findings of the physician who conducted that
14 autopsy.

15 MR. DASSOW: That's correct, your Honor.

16 THE COURT: Okay. And as I understand it, the
17 patch was not explanted at that time. Is that correct?

18 MR. DASSOW: It was not explanted at that time
19 because of, I would say, the issue was unknown to the
20 pathologist at the time that there was any litigation
21 going on, so it was not explanted. It remained *in vivo*
22 at that point.

23 THE COURT: Okay. And somewhere along the way,
24 somewhat recently the Plaintiffs in this case undertook
25 to have the body exhumed, and it was at that point that

1 the patch was actually explanted; is that correct?

2 MR. DASSOW: That is correct, your Honor. And
3 I'm happy to expound on that, but yes, that's accurate.

4 THE COURT: And as I understand it, that patch
5 has now been examined by your expert and the defense
6 expert.

7 MR. DASSOW: Exactly.

8 THE COURT: So to a certain extent in this case,
9 and I believe it was at the suggestion of the Court,
10 some case-specific discovery has been conducted in this
11 case, which puts it in a posture different from many of
12 the other cases that are transferred here and no
13 case-specific discovery is conducted.

14 MR. DASSOW: That is absolutely accurate, your
15 Honor.

16 THE COURT: Okay. And I guess, and the
17 Defendants have suggested that rather than remand at
18 this point, that they have no objection to lifting of
19 the stay in this case to permit you to complete your
20 case-specific discovery.

21 How much time do you need to get the case ready
22 for trial?

23 MR. DASSOW: Your Honor, I would say that we
24 would be able to try the case, if it was under *Lexicon*,
25 if it was remanded today --

1 THE COURT: Let's leave *Lexicon* aside for a
2 moment, and I appreciate that you had your clients
3 submit affidavits with regard to the *Lexicon* issue, but
4 quite frankly I thought that was unnecessary. You
5 either waive it or you don't, and I've heard any number
6 of plaintiffs' lawyers say we don't waive, which is
7 fine. So let's leave that aside for the moment.

8 So I take it as a given that the case is going
9 to be tried in Indianapolis.

10 MR. DASSOW: Correct.

11 THE COURT: The only question is whether I try
12 it or somebody else does.

13 MR. DASSOW: I think that that's correct, your
14 Honor.

15 THE COURT: Okay.

16 MR. DASSOW: If I could comment on that.

17 THE COURT: No, we're not going to go there at
18 this point. Let's take it a step at a time.

19 MR. DASSOW: Okay.

20 THE COURT: So knowing that you have the benefit
21 of all of the common discovery that was completed in
22 this case within the confines of the MDL, and that you
23 have access to all of that information through
24 Mr. Migliori and his Plaintiffs Steering Committee,
25 tell me now in terms of the specific facts of this case

1 what your time frame is in actually getting it ready
2 for trial.

3 MR. DASSOW: Your Honor --

4 THE COURT: How much do you need?

5 MR. DASSOW: I would say less than a year, your
6 Honor.

7 THE COURT: Well, something more specific than
8 that. I mean, you're here asking me to remand it.
9 You'd be having this conversation in Indianapolis if I
10 were to grant your motion, so --.

11 MR. DASSOW: Sure. I would say, Judge, we can
12 have this ready in nine months, completely ready to go.

13 THE COURT: Mr. Hooper, do you have a sense from
14 your perspective, since this was part of your
15 suggestion, whether that's realistic, given what you
16 know about the case?

17 MR. HOOPER: Yes, your Honor. Actually there's
18 so much work that has to be done I think the nine
19 months is realistic. It would be hard to do it in less
20 than nine months.

21 THE COURT: Okay.

22 MR. HOOPER: I have to touch base with our trial
23 team to confirm that the minimum amount they need to do
24 it to get through July, so I would propose we do a CMO
25 through discovery complete, everything done by

1 September.

2 THE COURT: Let me make a suggestion to you,
3 since you both seem to be on the same page as far as
4 that's concerned. What I'm considering doing,
5 Mr. Dassow, is to give you some relief today, but maybe
6 not everything you're asking for, and that is to lift
7 the stay with regard to case-specific discovery. But
8 in order for me to do that, what I want to do is set a
9 discovery schedule that you all can live with, and I
10 think it may not be fair to put you on the spot today
11 where you haven't really had the chance to think that
12 through; you know, first you said yes, less than a
13 year, and now, you know, nine months, and I would want
14 to include, in that schedule, deadlines for the
15 disclosure of expert reports and all that sort of
16 thing.

17 So what I'm going to suggest to you is this. I
18 will go ahead and lift the stay with respect to
19 case-specific discovery in this case only, and Kerrie
20 can take care of doing a text order for me to that
21 effect.

22 THE CLERK: Yes, your Honor.

23 THE COURT: Then what I'm going to ask you to
24 do, Mr. Dassow, is to get to Mr. Hooper.

25 Mr. Hooper, it might be a good idea to bring

1 Mr. Brown in at this point.

2 MR. HOOPER: I think actually probably
3 Mr. Alexander.

4 THE COURT: Mr. Alexander; one of those folks
5 who is going to try it, because they're the ones that
6 are going to have to live with the schedule.

7 MR. HOOPER: All right. I understand that, your
8 Honor, and we will certainly work closely with counsel
9 to come up with a proposed order in the next week or
10 so.

11 THE COURT: Can you live with that, Mr. Dassow?

12 MR. DASSOW: Your Honor, with all due respect, I
13 think that this reason I came here is, with all due
14 respect, this case needs to go back to Indianapolis and
15 I --

16 THE COURT: I understand that's what you want to
17 have happen, and I understand that your clients are
18 concerned about the passage of time and all of that.
19 But let me just make this suggestion to you. I have
20 been living with this case longer than you have.

21 MR. DASSOW: Right.

22 THE COURT: I have tried, I think -- Mr. Hooper,
23 you can correct me; Mr. Migliori, you can, you always
24 correct me whenever you have the chance -- I think I
25 have tried the only two cases that have gone to trial

1 in the country. And I have a magistrate judge who is
2 assigned to this case who is also extremely well-versed
3 in the issues that we've had to deal with in these
4 cases. I have presided over the discovery disputes
5 that we've had from day one, as has Magistrate Judge
6 Almond. And so case-specific discovery in this case is
7 really not going to be held in a vacuum; it has to be
8 held in the context of all that has gone before, and
9 for that reason I feel it's important for me to, rather
10 than issue a suggestion of remand at this point, to
11 retain jurisdiction over the case while case-specific
12 discovery is ongoing. And this is why I suggest to you
13 any hearings that might need to be held can be done
14 either through video conferencing or telephone
15 conferencing and you can go forth and do your
16 discovery, and then I can take up the remand question
17 later on.

18 Whether the case is tried to an Indiana judge
19 and jury, or with me presiding with a jury through an
20 inter-circuit assignment, I can cross that bridge at
21 the appropriate time.

22 But I think today I can give you the relief
23 you're seeking, while at the same time giving you what
24 I think is a benefit, and that is the benefit of my and
25 Magistrate Judge Almond's intimate knowledge of the

1 case, the issues, the facts, the rulings that have
2 previously been made, so that you don't all have to
3 reinvent the wheel in Indianapolis.

4 And I have very good friends in Indianapolis, by
5 the way, on the court there and so I know and respect
6 them and know the good work they do, but they've not
7 lived with this case for the seven years I have.

8 MR. DASSOW: And, Judge, if I could, a couple of
9 comments. One, this has gone fabulously with the MDL;
10 you've settled thousands of cases. There are just a
11 handful of cases left, and that's why we're here. This
12 is a unique case of the other ones that are remaining.

13 When this case goes back, under the rules, the
14 chief justice guidelines as well as the latest Ninth
15 Circuit decision with regard to the standards of the
16 judge that will sit, you obviously know more about this
17 case than anybody else, and your magistrate. And one
18 of the goals throughout all of the MDLs is that when
19 the cases are remanded, that your Honor would educate
20 and provide all of the guidance to the sitting judge,
21 so that makes complete sense.

22 THE COURT: And I'm not there yet, and that's
23 why I'm suggesting to you that at least for the
24 duration of pretrial discovery in your case, I think it
25 is a benefit to you and your clients and the other side

1 to have two judicial officers who are so well-versed in
2 the facts and the law involving these cases, and so for
3 that reason I'm going to deny your motion insofar as it
4 asks for remand now, and, instead, afford you the
5 relief that I think will assist you and your clients in
6 moving the case forward, by retaining jurisdiction, but
7 at the same time lifting the stay so that you can go
8 ahead and complete the case-specific discovery you need
9 to do anyway in order to tee it up for trial. And so
10 what I'm going to ask you to do is to get with
11 Mr. Hooper.

12 And, Mr. Hooper, whoever it is from your trial
13 team who ought to be talking with Mr. Dassow, you ought
14 to do that within the next 24 hours, at least, so that
15 you can come to terms and put together an order that
16 sets forth the deadlines that you all are going to
17 need. For instance, the deadline for the disclosure of
18 expert reports, the deadline for the closure of fact
19 discovery, the deadline for the closure of expert
20 discovery, deadlines for the filing of any dispositive
21 motions and pretrial memos. And you can look at the
22 ones that we did in the earlier cases and use those as
23 a template.

24 MR. HOOPER: Your Honor, it's John Hooper. Can
25 I make one point for counsel's benefit?

1 THE COURT: Sure.

2 MR. HOOPER: Since your Honor concluded the last
3 trial, we've had several cases set for pretrial
4 discovery that were moving towards trial. Every one of
5 those settled, was dismissed, didn't go forward to
6 trial. So I think there's a real track record on the
7 Court's behalf, but also on counsel's behalf, to learn
8 and understand these cases more. And we've actually
9 just settled two of counsel's three cases, so I don't
10 think we're going to have any difficulty coming to
11 agreement on a CMO.

12 And I would just represent to your Honor that my
13 client hopes that the discovery will lead towards a
14 resolution, because we try to resolve as many of these
15 cases as possible.

16 THE COURT: Well, I understand that, and that's
17 another reason why I think it makes sense for me to
18 retain jurisdiction while case-specific discovery is
19 ongoing, is that we've been down this road before.

20 MR. DASSOW: Understood, your Honor. As a
21 little background, we've tried three mediations. I
22 have to be honest with you, the second mediation in
23 front of Ms. Zangari was completely fruitless. We flew
24 out here, we came out here in good faith, and they
25 provided nothing with regard to the settlement. But

1 what's important, your Honor, is that -- and I
2 appreciate, Mr. Hooper, we've settled two of the cases
3 and I know he settled thousands of cases.

4 The problem with the case is we were told that
5 they only reviewed 40 pages of material when we came
6 out with Ms. Zangari and -- of medical records, 40
7 pages of medical records, when over the years we've
8 produced upwards of 2,000, and it's just a little bit
9 frustrating for us to go through what your Honor --

10 THE COURT: Well, I mean, I think -- I
11 appreciate all of that, Mr. Dassow. And, as I said, I
12 appreciate that you saw fit to come out here to make
13 the point of how important it is for you to get this
14 case rolling toward trial, because it looks like that's
15 where it may have to go. But I think that there is a
16 benefit to you and your clients, as I've said, for me
17 to retain jurisdiction while you get it ready for
18 trial. You're not there yet, and I don't want to delay
19 that process any longer.

20 I appreciate your concern about getting it
21 going, but, frankly, I think you're better off having
22 someone who has dealt with the case all along to assist
23 you with discovery. If there are discovery disputes in
24 this case, you don't want to have to start educating
25 somebody new, and so we can deal with it very swiftly.

1 I can tell you that Magistrate Judge Almond is, I don't
2 know if you've dealt with him at all, but he's -- I
3 hope he's listening -- he's just terrific, and if you
4 have a problem, a discovery dispute, he'll get you
5 folks on the phone within hours to get it resolved.
6 And I think that that actually, you will find, will be
7 to your benefit and that of your clients, so that if
8 you think you need nine months to get it done, this
9 case will get done in nine months. And then if I
10 decide that it should go back to Indiana, it will go.

11 Is Judge Barker still sitting?

12 MR. DASSOW: She's still sitting, but she's
13 senior status.

14 THE COURT: She doesn't have this case though,
15 does she? Okay.

16 MR. DASSOW: She doesn't have this case.

17 THE COURT: Okay.

18 MR. DASSOW: But Judge Barker, yeah.

19 THE COURT: Well, she'll wish she did.

20 MR. DASSOW: In May she went senior status.

21 THE COURT: Yes, I know, I know. Or if I decide
22 I'm going to come out and do it, you're going to get
23 your trial. So you can go back and tell your clients
24 the case is still in Rhode Island; however, we're going
25 to get moving forward and I can tell you when your

1 trial is going to be, because you're going to get an
2 order that you and Mr. Hooper are going to hammer out
3 that will tell them precisely when they're going to
4 have their trial.

5 So, Mr. Hooper, perhaps in the CMO that you
6 develop with Mr. Dassow you can say that, you can
7 include a provision that says that I have stayed the
8 order -- and I can't remember when it was issued, what
9 the docket number is or any of that, but it would be
10 cleaner, I think, than just doing a text order if we
11 have that actually included in the CMO that's going to
12 be entered in this case. So would you make sure that's
13 in there?

14 MR. HOOPER: I will, your Honor. So you mean
15 staying the order as to this particular case with
16 regards to --

17 THE COURT: Yes, lifting the order that stays
18 case-specific discovery. That's what I mean.

19 MR. HOOPER: As to this case. Okay. Thank you,
20 your Honor.

21 THE COURT: Okay.

22 Mr. Dassow, I hope that the next time I see you
23 is either you're going to tell me the case got settled,
24 or maybe you don't have to see me to tell me that, or
25 that I say, "Plaintiff's counsel, are you ready to make

1 your opening statement?"

2 MR. DASSOW: Yes, your Honor. I appreciate
3 that.

4 So that we're clear on the record, you're
5 lifting the stay so that we do case-specific discovery
6 in this court.

7 THE COURT: And we're actually going to issue an
8 order that sets deadlines that you're going to hammer
9 out with Mr. Hooper.

10 MR. DASSOW: Sure. And then your Honor is not
11 going to be ruling upon the actual remand itself with
12 regard to who would try the case?

13 THE COURT: I'm going to deny it without
14 prejudice to refileing at such time as discovery is
15 completed.

16 MR. DASSOW: Okay.

17 THE COURT: Okay?

18 MR. DASSOW: Okay, your Honor. I understand.

19 THE COURT: So it's just cleaner if I do it that
20 way.

21 MR. DASSOW: Okay.

22 MR. HOOPER: Your Honor, since Mr. Dassow is
23 traveling, it sounds like probably today or tomorrow
24 morning, and I'm in a mediation all day, would it be
25 okay with your Honor if we get together on this by the

1 end of business Monday? We'll try to work out our
2 schedules and try to do something tomorrow, but I think
3 that would be --

4 THE COURT: Sure.

5 Is that okay with you?

6 MR. DASSOW: That's fine, that's fine.

7 If I would request the Court one other matter.
8 We had, we came out here for the mediation the last
9 time, October 31st I believe, in the building next
10 door --

11 THE COURT: Right.

12 MR. DASSOW: -- and that's where we got two of
13 the cases done. And I guess what I'd like to know,
14 which would be helpful going forward, is whether
15 Defendants are going to respond with regard to any
16 settlement proposals in the near future, or if we're
17 just going, just so I know that I can instruct the
18 clients.

19 THE COURT: Why don't you have that conversation
20 with Mr. Hooper when you are talking about putting
21 together the Case Management Order in this case.

22 MR. DASSOW: Okay.

23 THE COURT: Okay? All right.

24 Mr. Hooper, go back and do whatever it is you're
25 doing.

1 And, Mr. Migliori, are you in an airport
2 somewhere?

3 MR. MIGLIORI: I actually switched the flight.
4 We're heading to the airport as soon as I hang up the
5 phone.

6 THE COURT: Well, you be careful on the road,
7 all right. And good luck with that and tell
8 Dr. Klosterhalfen I said *Guten Tag*.

9 MR. MIGLIORI: For sure I will.

10 THE COURT: All right. Thank you.

11 MR. HOOPER: Thank you, your Honor.

12 MR. MIGLIORI: Sure.

13 THE COURT: Denise, I'm so sorry. Do you want
14 me to spell it? G-u-t-e-n T-a-g, two words. Thank you
15 very much.

16 MR. DASSOW: Thank you.

17 THE COURT: I understand. We're off the record
18 now.

19 (ADJOURNED)

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C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Denise P. Veitch

Denise P. Veitch, RPR

December 9, 2014

Date