

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: April 12, 2019]

***IN RE: DAVOL/C.R. BARD HERNIA*** :  
***MESH MULTI-CASE MANAGEMENT*** : **Master Docket No. PC-2018-9999**  
:  
**This Document Relates to:** :  
**ALL CASES** :

**DECISION**

**GIBNEY, P.J.** C.R. Bard, Inc. (Bard) and Davol Inc. (Davol) (collectively Defendants) move this Court to adopt a procedural order (Procedural Order No. 5 or Defendants' Order) concerning treating physicians of Plaintiffs in this master docket. Plaintiffs object and move for adoption of a competing order (Plaintiffs' Order) to merge this docket with related Master Docket PC-2008-9999, which closed in 2017 (the 2008 Docket). Jurisdiction is pursuant to G. L. 1956 § 8-2-14.

**I**

**Facts and Travel**

On February 9, 2018, Plaintiffs filed a Master Long Form Complaint and Jury Demand,<sup>1</sup> seeking to recover for personal injuries allegedly caused by medical devices designed, manufactured, and distributed by Defendants. The devices at issue are hernia repair products intended for permanent implantation in the human body. Plaintiffs allege that these medical devices are unreasonably dangerous and defective, and present risks including chronic pain, infection, and death.

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<sup>1</sup> The Plaintiffs incorporate this Master Long Form Complaint by reference into individual Short Form Complaints.

On August 14, 2018, Defendants moved this Court to adopt Procedural Order No. 5. Therein, Defendants propose protocols for communications with and depositions of Plaintiffs' treating physicians. Procedural Order No. 5 contains sections pertaining to (1) ex parte communications with treating physicians, (2) depositions of treating physicians, (3) disclosure of documents prior to depositions of treating physicians, and (4) use of treating physicians as expert witnesses.

Plaintiffs object to this Court's adoption of Defendants' Order. Instead, they move for the adoption of Plaintiffs' Order, which proposes the merger of this Master Docket with the related 2008 Docket.<sup>2</sup> Plaintiffs' Order additionally proposes the adoption of all orders entered in the 2008 Docket, with the exception of "The Common Benefit Order" or "unless superseded by a new order of this Court." *See* Ex. J, Pls.' Mem. Opp'n Defs.' Mot. Adoption Procedural Order. Defendants object to the Court's adoption of Plaintiffs' Order.

## II

### Standard of Review

It is well-settled that a trial justice has broad discretion over discovery. *State v. Lead Indus. Ass'n, Inc.*, 64 A.3d 1183, 1191 (R.I. 2013). Upon a party's motion and showing of good cause, this Court "may make any [discovery] order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Super. R. Civ. P. 26(c). The Supreme Court reviews discovery orders under a *de novo* standard of review. *Sandy Point Farms, Inc. v. Sandy Point Village, LLC*, 200 A.3d 659, 662 (R.I. 2019) (citing

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<sup>2</sup> In 2008, Defendants were the subjects of a related litigation involving numerous individuals seeking redress for personal injuries allegedly caused by Defendants' hernia repair devices. *In re: All Individual Kugel Mesh Cases*, PC-2008-9999 (R.I. Super. Sept. 11, 2008). These cases were consolidated into the 2008 Docket, which closed in 2017, shortly before the filing of the within Complaint.

*Cashman Equip. Corp., Inc. v. Cardi Corp., Inc.*, 139 A.3d 379, 381 (R.I. 2016)). However, the Supreme Court will not disturb these decisions absent a finding of abuse of discretion. *Id.* (citing *Lead Industries Ass’n, Inc.*, 64 A.3d at 1191).

### III

#### Analysis

Given the high volume of cases in this coordinated action, Defendants argue that Procedural Order No. 5 is necessary to promote efficiency and fairness in all aspects of discovery related to Plaintiffs’ treating physicians. Citing this Court’s order pertaining to ex parte communications in the 2008 Docket,<sup>3</sup> Defendants argue that Procedural Order No. 5 is “consistent with the spirit” of that order, in that it precludes Defendants from having ex parte communications with Plaintiffs’ treating physicians regarding issues of Plaintiffs’ treatment but moves discovery forward by allowing Defendants to communicate with these physicians’ offices to schedule depositions. Defendants further argue that Procedural Order No. 5 is consistent with other courts’ recent treatment of ex parte communications with treating physicians, and reference orders from the United States District Courts for the Northern District of Georgia, the District of New Hampshire, and the District of Arizona, as well as the Superior Court of New Jersey.<sup>4</sup>

Plaintiffs object, arguing that Procedural Order No. 5 seeks to allow Defendants to have ex parte communications with Plaintiffs’ treating physicians, while placing unworkable limits

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<sup>3</sup> See *In re: All Individual Kugel Mesh Cases*, No. PC-2008-9999, (R.I. Super. Aug. 26, 2008) (Gibney, J).

<sup>4</sup> *In re: Ethicon Physiomesher Flexible Composite Hernia Mesh Products Liability Litigation*, MDL Docket No. 2782 (N.D. Ga. Dec. 12, 2017) (Order Regarding Communications With Plaintiffs’ Treating Physicians); *In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation*, MDL No. 2753 (D.N.H. Jan. 5, 2018) (Case Management Order No. 3E(i)); *IN RE: Bard IVC Filters Products Liability Litigation*, MDL No. 15-2641-PHX DGC (D. Ariz. Feb. 6, 2017) (Case Management Order No. 21); *In re Pelvic Mesh/Gynecare Litigation*, No. ATL-L-6341-10 (N.J. Super. Law Div. Dec. 3, 2013).

upon Plaintiffs' ability to communicate with these physicians. According to Plaintiffs, this Court considered the issues presented in the within motion at two instances in the 2008 Docket, both times rejecting similar arguments that Defendants now present to the Court. *In re: All Individual Kugel Mesh Cases*, No. PC-2008-9999, Apr. 28, 2008, Gibney, J. (Protective Order Prohibiting Ex Parte Communications); *In re: All Individual Kugel Mesh Cases*, No. PC-2008-9999 (R.I. Super. Aug. 26, 2008) (Gibney, J.) (Decision). Plaintiffs further argue that courts disfavor the procedural limits Defendants seek to place upon Plaintiffs' communications with their physicians, which were specifically rejected by the United States District Court for the District of Rhode Island in a related federal multidistrict litigation. *In re Kugel Mesh Hernia Repair Patch Litig.*, MDL Docket No. 07-1842ML, 2008 WL 2420997 (D.R.I. Jan. 22, 2008). Instead, Plaintiffs seek to merge this docket with the 2008 Docket, and adopt essentially all orders therein, through this Court's adoption of Plaintiffs' Order.

In reply, Defendants assert that Plaintiffs mischaracterize Procedural Order No. 5 and submit that Defendants' Order is distinct from the proposed order that this Court rejected ten years ago. Defendants specifically assert that the plain language of Procedural Order No. 5 allows Plaintiffs' counsel to have ex parte contact with Plaintiffs' physicians, but that certain details regarding these communications should be disclosed to Defendants. Defendants finally argue that Plaintiffs must file an alternate order, rather than moving for this docket to be merged with the 2008 Docket.

Rhode Island recognizes a statutory patient-physician privilege. *See* G.L. 1956 §§ 5-37.1-1 *et seq.* Under the Confidentiality of Health Care Communications and Information Act (CHCCIA), "a patient's confidential health care information shall not be released or transferred without the written consent of the patient, or his or her authorized representative." Sec. 5-37.3-4;

*see also In re Bd. of Med. Review Investigation*, 463 A.2d 1373, 1373-74 (R.I. 1983). The purpose of the physician-patient privilege is to foster trust between patients and their physicians and to encourage patients to disclose sensitive details of an illness to a physician by eliminating the fear that this information may later be disclosed. 45 *Am. Jur. Proof of Facts* 2d 595 (originally published in 1986); *see also* § 5-37.3-2 (stating that the CHCCIA seeks “to establish safeguards for maintaining the integrity of confidential health care information that relates to an individual”).

Rhode Island likewise prohibits defendants from engaging in *ex parte* communication with either past or present treating physicians of plaintiffs. 2 *A Practical Guide to Discovery and Depositions in Rhode Island, Ex Parte Contacts With Health Care Professionals* § 33.10 (Mark B. Morse, Esq. & Hon. Patricia A. Hurst eds., 1<sup>st</sup> ed. 2010 & Supp. 2016). Specifically, disclosure of confidential health information relevant to a civil litigation is permissible “only under the discovery methods provided by the applicable rules of civil procedure.” Sec. 5-37.3-4(b)(8)(ii). A plaintiff may “consult with [his or her] own physician and to obtain that patient’s own health care information,” but disclosure may take place “through informal *ex parte* contacts with the provider by persons other than the patient.” *Id.* (noting that “[n]othing in this section shall limit the right of a patient, or his or her attorney, to consult with that patient’s own physician and to obtain that patient’s own health care information”).

In its August 26, 2008 Decision, this Court addressed these issues and concluded that the confidentiality of the plaintiffs’ health care information “significantly outweighed” the potential inconveniences presented to defendants if prohibited from *ex parte* contact with plaintiffs’ treating physicians. *In re: All Individual Kugel Mesh Cases* (R.I. Super. Aug. 26, 2008) (Gibney, J.). Accordingly, this Court granted the plaintiffs’ 2008 motion to prohibit the defendants from

ex parte communications with plaintiffs' treating physicians, reiterating its previous protective order. *Id.*; see also *In re: All Individual Kugel Mesh Cases* (R.I. Super. Apr. 28, 2008) (Gibney, J.) ("Defendants shall not engage in ex parte communication with Plaintiffs' health care providers"). The United States District Court subsequently denied a related motion by Defendants, stating the "proposed limitations [were] unnecessary and unworkable." *In re: Kugel Mesh Hernia Repair Patch Litigation*, 1:07-md-01842-ML-LDA, Order on Defendants' Motion to Define the Scope of Plaintiffs' Ex Parte Contact with Treating Physicians (D.R.I., Jan. 12, 2012).

After reviewing Procedural Order No. 5, the Court is not satisfied that the order is necessary in this litigation, as it presents procedural hurdles to both parties while potentially compromising the physician-patient privilege. Barring exceptions not applicable here, "[e]x parte interviews provide no information that cannot be gathered through formal discovery under the [Superior Court] Rules of Civil Procedure . . . [such as] [P]laintiff interrogatories, [P]laintiff questionnaires, depositions, and [D]efendants' own sales representatives." 2 A Practical Guide to Discovery and Depositions in Rhode Island, *Ex Parte Contacts With Health Care Professionals* § 33.10 (Mark B. Morse, Esq. & Hon. Patricia A. Hurst eds., 1<sup>st</sup> ed. 2010 & Supp. 2016); see also § 5-37.3-4(b)(8)(ii) (disclosure of patient health care information may only occur through established federal or state methods of discovery). Therefore, this Court declines to extend the limits of Defendants' permitted discovery—as Defendants propose in Procedural Order No. 5—to methods beyond those permitted under Rhode Island law. Sec. 5-37.3-4(b)(8)(ii); see also Super. R. Civ. P. 26-33.

The Court is likewise unpersuaded by Defendants' statement that they will "not communicate with the physician about any plaintiff the physician has treated or is currently

treating” in the event that “[Defendants] retain as an expert a physician who has treated or is currently treating a plaintiff in another case in this coordinated action.” As the Court stated in its August 26, 2008 Decision, the risk of disclosure of confidential health information is not outweighed by this “Scout’s Honor” promise. *In re: All Individual Kugel Mesh Cases* (R.I. Super. Aug. 26, 2008) (Gibney, J.). Accordingly, the Court declines to adopt Defendants’ Order.

The Court now turns to Plaintiffs’ Order, which moves for the merger of the 2018 Master Docket at issue with the closed 2008 Docket, and the adoption of essentially all orders therein. Although Plaintiffs present relevant legal support for this Court’s denial of Defendants’ Order, Plaintiffs have failed to offer the requisite good cause necessary to support the adoption of their broad proposed order. *See* Super. R. Civ. P. 26(c) (stating that parties must show good cause prior to a trial court’s adoption of a discovery order). Plaintiffs move for consolidation of two dockets, rather than simply the adoption of a discovery order, and this Court has the discretion to consolidate proceedings “as may tend to avoid unnecessary costs or delay.” Super. R. Civ. P. 42(a). However, this Court entered over sixty orders in the 2008 Docket including orders to seal documents, orders removing various parties from trial schedules, and countless orders to admit out-of-state attorneys *pro hac vice*. Rather than avoiding unnecessary costs or delay, the Court finds that the merger of the dockets at issue would unreasonably complicate the proceedings, and lead to unfair and at times illogical results. *See Martin v. Howard*, 784 A.2d 291, 296 (R.I. 2001) (explaining that the Superior Court Rules of Civil Procedure “should always be ‘construed and administered to secure the just, speedy, and inexpensive determination of every action.’”) (quoting Super. R. Civ. P. 1). Accordingly, Plaintiffs’ motion in its present form is denied.

## **IV**

### **Conclusion**

For the foregoing reasons, Defendants' motion for this Court to adopt Procedural Order No. 5 is denied. Additionally, Plaintiffs' motion to merge this Master Docket, PC-2018-9999, with closed docket PC-2008-9999, and essentially adopt all procedural orders therein is also denied. Neither Plaintiffs nor Defendants are precluded from moving for this Court's adoption of future procedural orders, but the Court declines to adopt either party's proposed order at this time.





## **RHODE ISLAND SUPERIOR COURT**

### ***Decision Addendum Sheet***

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**TITLE OF CASE:** In Re: Davol/C.R. Bard Hernia Mesh Multi-Case Management  
This Document Relates to: ALL CASES

**CASE NO:** Master Docket No. PC-2018-9999

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 11, 2019

**JUSTICE/MAGISTRATE:** Gibney, P.J.

**ATTORNEYS:**

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