UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Stinson v. Davol, Inc., et al.
Case No. 2:18-cv-01022

EVIDENTIARY MOTIONS OPINION & ORDER No. 33

Before the Court is Plaintiff's Motion to Exclude the Opinions and Testimony of Defense Expert B.J. Pomerants, M.D., F.A.C.S. (ECF No. 103.) For the reasons that follow, Plaintiff's motion is **GRANTED IN PART**, **DENIED IN PART**, and **DENIED IN PART AS MOOT**.

I. Background[1]

Plaintiff's case is the third bellwether trial selected from thousands of cases in this multidistrict litigation ("MDL") against Defendants. The Judicial Panel on Multidistrict Litigation described the cases in this MDL as "shar[ing] common factual questions arising out of allegations that defects in defendants' polypropylene hernia mesh products can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body rejection, migration of the mesh, and infections." (No. 2:18-md-02846, ECF No. 1 at PageID #1–2.)

The relevant facts here are that in 2015 Plaintiff underwent a right inguinal hernia repair

[1] For a more complete factual background, the reader is directed to the Court's summary judgment opinion and order in this case. (Dispositive Motions Order ("DMO") No. 7, ECF No. 225.) All docket citations are to the *Stinson* case, 2:18-cv-1022, unless otherwise noted.

with an Extra-Large PerFix Plug mesh, a product manufactured by Defendants. In 2017, Plaintiff underwent exploratory surgery to determine if he had a recurrent hernia or nerve entrapment because of chronic pain in his right groin area. The explanting surgeon, Dr. Radke, noted extensive scarring and found "a large ball approximately 2.5 cm in diameter of rolled up mesh next to the pubic tubercle." (ECF No. 89-22 at PageID #1134.) Dr. Radke removed the mesh, which he described as "slow going and extremely difficult" because of the significant scarring. (*Id.*) Dr. Radke then repaired the hernia with another of Defendants' products, Bard Marlex Mesh. (*Id.*) Even after the explant surgery, Plaintiff claims to have continuing chronic pain and other complications.

The crux of Plaintiff's claims is that Defendants knew of certain risks presented by the PerFix Plug device but marketed and sold the device despite these risks and without appropriate warnings, causing Plaintiff's injuries. Plaintiff alleges that the polypropylene in the PerFix Plug degrades after implantation, which enhances the chronic inflammatory response in the body. (ECF No. 124 at PageID #4826.) Plaintiff also claims that the inflammation and resulting fibrosis are exacerbated by the PerFix Plug's shape, weight, and pore size. Plaintiff also claims that the PerFix Plug is susceptible to migration and has a high incidence of chronic pain. (*Id.*) According to Plaintiff, Defendants downplayed the rate and severity of complications caused by the PerFix Plug, even when faced with reports of negative outcomes, which created an unreasonable risk of significant and permanent harm to patients. (*Id.*)

Plaintiff brings this action to recover for injuries sustained as a result of the implantation of the PerFix Plug, alleging that Defendants knew of the risks presented by the device but marketed and sold it despite these risks and without appropriate warnings. After summary judgment, the following claims remain for trial: design defect, failure to warn, negligence, breach of express

warranty, and breach of implied warranty; the Court has reserved judgment on Plaintiff's claims for manufacturing defect, certain damages, and claims related to his current Bard Mesh implant.

II. Legal Standard

Evidentiary rulings are made subject to the district court's sound discretion, *Frye v. CSX Trans., Inc.*, 933 F.3d 591, 598 (6th Cir. 2019), including the admissibility of expert testimony, *United States v. Dunnican*, 961 F.3d 859, 875 (6th Cir. 2020). This role, however, is not intended to supplant the adversary system or the role of the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531–32 (6th Cir. 2008). Arguments regarding the weight to be given to any testimony or opinions of an expert witness are properly left to the jury. *Id.* "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

The burden is on the party offering the expert opinions and testimony to demonstrate "by a preponderance of proof" that the expert evidence is admissible. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility. *See Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) ("The Court [in *Daubert*] explained that Rule 702 displays a 'liberal thrust' with the 'general approach of relaxing the traditional barriers to "opinion" testimony.'" (quoting *Daubert*, 509 U.S. at 588)); Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.").

The district court's role in assessing expert testimony is a "gatekeeping" one, ensuring that only admissible expert testimony is submitted to the jury; its role is not to weigh the expert

testimony or determine its truth. *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021) (quoting *Daubert*, 509 U.S. at 597). Expert testimony, *i.e.*, testimony given by "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," is admissible if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In this circuit, "[t]he Rule 702 analysis proceeds in three stages." *United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016). "First, the witness must be qualified by 'knowledge, skill, experience, training, or education.' Second, the testimony must be relevant, meaning that it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must be reliable." *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 529 (quoting Fed. R. Evid. 702.).

First, an expert witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "[T]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Madej v. Maiden*, 951 F.3d 364, 370 (6th Cir. 2020) (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)). "[T]he only thing a court should be concerned with in determining the qualifications of an expert is whether the expert's knowledge of the subject matter is such that his opinion will likely assist the trier of fact in arriving at the truth. The weight of the expert's testimony must be for the trier of fact." *Mannino v. Int'l Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). A party's expert need only meet the "'minimal qualifications' requirement—not one who could teach a graduate seminar on the subject." *Burgett v. Troy-Bilt LLC*, 579 F. App'x 372, 377 (6th Cir. 2014) (quoting *Mannino*, 650 F.2d at 851); *see*

also Dilts v. United Grp. Servs., LLC, 500 F. App'x 440, 446 (6th Cir. 2012) ("An expert's lack of experience in a particular subject matter does not render him unqualified so long as his general knowledge in the field can assist the trier of fact.").

Second, expert testimony must be relevant. Expert testimony is relevant if it will "help the trier of fact to understand the evidence or to determine a fact in issue." *Bradley v. Ameristep, Inc.*, 800 F.3d 205, 208 (6th Cir. 2015) (quoting *United States v. Freeman*, 730 F.3d 590, 599–600 (6th Cir. 2013)); Fed. R. Evid. 702(a). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02], p. 702–18 (1988)). "This requirement has been interpreted to mean that scientific testimony must 'fit' the facts of the case, that is, there must be a connection between the scientific research or test result being offered and the disputed factual issues in the case in which the expert will testify." *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) (citing *Daubert*, 509 U.S. at 592). This is a case specific inquiry. *Madej*, 951 F.3d at 370 ("Whether an opinion 'relates to an issue in the case' or helps a jury answer a 'specific question' depends on the claims before the court.").

Third, expert testimony must be reliable. Rule 702 provides the following general standards to assess reliability: whether "the testimony is based on sufficient facts or data," whether "the testimony is the product of reliable principles and methods," and whether "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)–(d). To evaluate reliability of principles and methods, courts consider "'testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community,'" though these "factors 'are not dispositive in every case' and should be applied only 'where they are reasonable measures of the

reliability of expert testimony.'" *In re Scrap Metal*, 527 F.3d at 529 (citations omitted); *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (describing these factors as "flexible" (quoting *Daubert*, 509 U.S. at 594)). The objective of the reliability requirement is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

III. Analysis

Plaintiff challenges the opinions of Defendants' expert Dr. B.J. Pomerants, M.D., F.A.C.S. Dr. Pomerants is offered as a specific causation expert; however, Plaintiff claims that Dr. Pomerants "opines on a vast array of topics other than causation." (ECF No. 103 at PageID #3717.)

A. Adverse Event Data/Gold Standard

Plaintiff claims that Dr. Pomerants offers "numerous adverse events, general outcome, and complication rate opinions related to hernia mesh repairs," but does not provide any citations or references identifying the support for his opinions. (ECF No. 103 at PageID #3721.) Dr. Pomerants claims to have implanted more than 1,000 PerFix Plugs throughout the course of his career, which makes up approximately 99 percent of the inguinal hernia repairs he has performed. (ECF No. 103-1 at PageID #3746–47.) Eighty percent of those procedures involved the extra-large PerFix Plug, which is the size at issue in this case. (*Id.*) He claims that his "recurrence rate has been less than 0.5% and [his] rate of chronic pain is less than 0.5% of patients." (*Id.* at PageID #3747.)

Plaintiff argues that Dr. Pomerants should not be permitted to use or reference undisclosed tracking data in support of his opinions, nor to make any "general statements or conclusions related to the number of complications, or lack thereof, or low rates of complications associated with his

PerFix Plug repairs." (ECF No. 103 at PageID #3722.) Plaintiff also claims that Dr. Pomerants "has not followed up with his patients and has no reliable way of ascertaining that none of them had experienced complications." (*Id.* at PageID #3725.) Dr. Pomerants testified that he could not say how many patients had complications that had not been reported to him. (ECF No. 103-2 at PageID #3850–51.) Plaintiff points to this testimony, and Dr. Pomerants's testimony that he was not sure how many patients he had seen one year after implantation, to argue that Dr. Pomerants "has not followed up with his patients and has no reliable way of ascertaining that none of them had experienced complications from the polypropylene mesh and PerFix Plugs he implanted in them." (ECF No. 103 at PageID #3725.) Dr. Pomerants did testify that he could not say how many patients had complications and did not inform him; however, he also said that many of his patients who had hernia repairs come back to see him, and that his office tells patients "if they ever have any injuries or problems, to give [his] office a call and come back." (ECF No. 103-2 at PageID 3851–52.) He added that complications "would be reported in [the morbidity and mortality meetings, and] in [the] committees [at his hospital]." (*Id.* at PageID #3851.)

As Defendants point out, Dr. Pomerants "does not claim absolute precision or to have published his experience." (ECF No. 114 at PageID #4197–98.) The Court addressed a similar issue in the second bellwether case. In *Milanesi, et al. v. C.R. Bard, Inc., et al.*, the plaintiffs argued that the defendants' expert should not be permitted to testify as to his patients' outcomes because he did not have a tracking system for former patients or other methodology in place, therefore his statements that his patients have not experienced adverse outcomes would be "pure speculation and conjecture." (Case No. 18-cv-1320, ECF No. 77 at PageID #4424.) The Court allowed the expert to testify on the basis of his experience and determined that the "exact basis and extent of his opinions based on his follow-up with patients may be drawn out during

cross-examination." (Case No. 18-cv-1320, EMO No. 22, ECF No. 272 at PageID #16787.) The same reasoning applies here. Additionally, Defendants agree that Dr. Pomerants's proposed testimony will not include an extrapolation from his experience with his own patients. (ECF No. 114 at PageID #4198.)

Plaintiff points out that although Dr. Pomerants has explanted only two PerFix Plugs in his practice, Plaintiff's specific causation expert Dr. Grischkan has explanted at least 150, and that Dr. Pomerants has extremely limited experience with patients with complications from the PerFix Plug. (ECF No. 103 at PageID #3726.) He also argues that Dr. Pomerants ignored medical literature indicating complications. (*Id.*) However, these arguments also go to the strength of Dr. Pomerants's opinions, not their admissibility. Plaintiff may raise these arguments on cross-examination.

Plaintiff seeks to exclude Dr. Pomerants's description of polypropylene mesh as the "gold standard." The Court has previously addressed the use of the phrase "gold standard" to describe polypropylene mesh in the first two bellwether cases, *Johns v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1509, and *Milanesi, et al. v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1320. Defendants agree that, consistent with the Court's prior rulings, Dr. Pomerants will not opine that polypropylene mesh is the "gold standard," or offer other opinions that the Court has previously precluded surgeon experts from providing. (ECF No. 114 at PageID #4207–08.)

B. FDA Opinions

Plaintiff argues that Dr. Pomerants's opinions regarding "the FDA regulatory process, the FDA's clearance of the PerFix Plug, the purported significance of FDA clearance, and [Defendants'] adherence to the regulatory process" should be excluded. (ECF No. 103 at PageID #3728.) The Court ruled in *Johns* and *Milanesi* that no expert may opine on the background or

legal meaning of the 510(k) process. (*Id.* at PageID #3730; *see* Case No. 18-cv-1509, ECF No. 355 at PageID #18767–69.) In line with this Court's prior rulings, Defendants agree that Dr. Pomerants will not opine on "the FDA regulatory process, the FDA's clearance of the PerFix Plug, the purported significance of FDA clearance, and [Defendants'] adherence to the regulatory process." (ECF No. 114 at PageID #4207–08.)

C. MSDS and General Polypropylene Opinions

Plaintiff next argues that Dr. Pomerants is not qualified to offer opinions about "the safety of polypropylene and its use in mesh manufacturing as well as the insignificance of the warnings and precautions included in the Marlex MSDS." (ECF No. 103 at PageID #3731.) According to Plaintiff, Dr. Pomerants's surgical experience with the PerFix Plug does not qualify him to opine about the material, its characteristics, or its safety, and that even if he were qualified, his opinions are unreliable. (*Id.*) The Court has previously ruled that "[n]o expert . . . may offer MSDS opinions as to what the MSDS means because the MSDS is only admissible as evidence of notice." (Case No. 18-cv-1320, ECF No. 219 at PageID #14985.) Defendants agree that, consistent with the Court's prior rulings, Dr. Pomerants will not opine on the MSDS. (ECF No. 114 at PageID #4207–08.)

As to Dr. Pomerants's opinions regarding the safety of polypropylene generally, Defendants point to the Court's prior rulings on this issue. (ECF No. 114 at PageID #4199–4201.) For example, in *Milanesi* the Court held:

> Dr. Morrison is qualified to opine on the characteristics of polypropylene based on his extensive experience with treating hernia patients, particularly performing hernia repairs with polypropylene mesh devices and explanting the devices. (ECF No. 67-3 at PageID #2436–38.) Many courts have concluded that "a surgeon's 'extensive experience with performing mesh implant and explant surgeries can qualify him or her to opine on how the product reacts inside the body.'" *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, Nos. 2:18-cv-01509, 2:18-md-2846, 2020 WL 6605542, at *6 (S.D. Ohio Sept. 1, 2020)

> (collecting cases) (EMO No. 5). This includes "[s]urgeons without pathology expertise or experience in polymer science or biomaterials," so long as they "testify as to 'mesh degradation on a large scale, focusing on the ways a polypropylene mesh product can change after implantation in the human body,'" *id.* (quoting *Wilkerson v. Bos. Sci. Corp.*, No. 2:13-CV-04505, 2015 WL 2087048, at *20 (S.D.W. Va. May 5, 2015)), as opposed to "what's happening on the molecular level," *Wilkerson*, 2015 WL 2087048, at *20. In addition to opinions about the mesh's reaction to the body, courts have likewise concluded that surgeons are qualified to opine on a mesh device's effect on the body. *In re Ethicon Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, MDL No. 2327, 2018 WL 3575936, at *3 (S.D.W. Va. July 24, 2018). Thus, Dr. Morrison is qualified to offer his opinions as to polypropylene degradation, contraction, porosity, and surface roughening of mesh, as well as the risks posed to patients by these characteristics. *E.g., id.* (considering "degradation, inertness, weight, porosity, and cut"). For similar reasons, Dr. Morrison is also qualified to opine on the suitability of alternative materials in hernia mesh devices so long as he considers the large-scale effects on the body and the mesh.

(Case No. 18-cv-1320, EMO No. 21, ECF No. 271 at PageID #16761–62.) The same reasoning applies regarding Dr. Pomerants. Plaintiff argues that his polypropylene opinions are unreliable because they are entirely experience-based and unsupported by a reliable methodology. (ECF No. 103 at PageID #3733.) However, his report shows that he also relied on medical and scientific literature in forming his opinions. (*See* ECF No. 103-1 at PageID #3806–10.) Based on his experience as a surgeon combined with his review of scientific literature, Dr. Pomerants's opinions from the perspective of a surgeon as to the safety of polypropylene are admissible. *See Wilkerson v. Bos. Sci. Corp.*, No. 2:13-CV-04505, 2015 WL 2087048, at *20 (S.D.W. Va. May 5, 2015) ("That he has no experience in polymer science is irrelevant because Dr. Porter is not offering opinions about 'what's happening at the molecular level.' Rather, he considers mesh degradation on a large scale, focusing on the ways a polypropylene mesh product can change after implantation in the human body. His fifteen-year career as a pelvic surgeon qualifies him to render these opinions to the extent that they are applicable to his differential diagnosis in this specific case.") (internal citations omitted).

D. Mesh Design and Manufacturing Process Opinions

Plaintiff next asks the Court to exclude Dr. Pomerants's opinions regarding the design and manufacture of the PerFix Plug and Mesh Dart products. (ECF No. 103 at PageID #3738.) Plaintiff has withdrawn his manufacturing defect claim, so the portion of his motion regarding manufacturing process opinions is moot. (*See* DMO No. 7-A, ECF No. 271.)

Plaintiff argues that even if Dr. Pomerants has experience using the PerFix Plug for hernia repairs, that does not make him an expert in its design. Defendants state that, consistent with the Court's prior rulings, Dr. Pomerants "will discuss the features of the PerFix Plug and how they work with the plug and patch technique to implant it from the perspective of a surgeon, but he will not discuss the nuances of how the device was developed from the perspective of an engineer. (ECF No. 114 at PageID #4202.) As the Court has previously held, a surgeon "is qualified to offer opinions regarding the design and function of the [device] based on his knowledge and extensive experience performing hernia repair surgeries and using mesh products, including the [device]." (Case No. 18-cv-1509, EMO No. 7, ECF No. 329 at PageID #17871.) Dr. Pomerants does not offer opinions as a chemist or biomaterials expert but instead offers opinions from a surgical perspective. His lack of experience as a materials expert does not preclude this type of testimony.

Plaintiff attempts to distinguish Dr. Pomerants's design opinions from those the Court has deemed admissible in the prior bellwether cases. He points to Dr. Novitsky, who had written and presented on the specific device at issue. (*Id.* at PageID #17863–64.) However, as the Court held regarding Plaintiff's expert Dr. Babensee, if Plaintiff believes that Dr. Pomerants's scientific sources or lack of research experience regarding the PerFix Plug mean that his opinions should be afforded less weight, he may raise that issue on cross-examination. (MIL Order No. 29, ECF No. 254 at PageID #9596.)

E. IFU Opinions

Plaintiff next argues that Dr. Pomerants is not qualified to opine on the sufficiency of the PerFix Plug's IFU and warnings. Plaintiff cites to this Court's EMO No. 7 in *Johns*, claiming that the ruling supports the proposition that a surgical expert cannot opine on the adequacy of warnings. (ECF No. 103 at PageID #3739.) This selective reading of the Court's order is misleading. In EMO No. 7, the Court did exclude the expert's opinion that the device was "in no way defective in design, warning, or function." (Case No. 18-cv-1509, ECF No. 329 at PageID #17866.) However, immediately preceding that conclusion, the Court explained that it would indeed be permissible for the expert, "as an experienced hernia surgeon, [to] testify as to the risks he perceives that the [device] poses to patients and whether those risks were disclosed on the product's warnings." (*Id.* at PageID #17864.) Additionally, the Court has held several times in this MDL that while a surgeon may not testify as to the adequacy of warnings from a regulatory or legal perspective, he may testify from the perspective of a surgeon as to the risks he believes the device poses and whether those risks were disclosed in the IFU. (*See id.*; Case No. 18-cv-1509, EMO No. 5, ECF No. 310 at PageID #16796; Case No. 18-cv-1320, EMO No. 17, ECF No. 166 at PageID #13604; Case No. 18-cv-1320, EMO No. 21, ECF No. 271 at PageID #16762–63; Case No. 18-cv-1320, EMO No. 22, ECF No. 272 at PageID #16784–85.) Defendants state that Dr. Pomerants will offer his opinions as a surgeon who is an intended end user, not a legal or regulatory sufficiency opinion. (ECF No. 114 at PageID #4205.) In accordance with the Court's prior rulings, Dr. Pomerants may offer opinions from the perspective of a surgeon as to the adequacy of the PerFix Plug's IFU.

F. Irrelevant Risk Factors, Pre-Existing Conditions, and Plaintiff's Surgeon's Techniques

Lastly, Plaintiff asks the Court to exclude opinions regarding pre-existing conditions that Dr. Pomerants does not link to Plaintiff's post-implant injuries. (ECF No. 103 at PageID #3740.) In this MDL the Court has previously excluded evidence of a plaintiff's pre-existing conditions that "neither of Defendants' case-specific causation experts link . . . to any relevant medical issues." (Case No. 18-cv-1320, ECF No. 278 at PageID #16860.) Plaintiff asks the Court to exclude allegedly irrelevant risk factors and pre-existing conditions, including prior injuries and traumas. He points to page 16 of Dr. Pomerants's report, and broadly argues that opinions regarding all of the listed conditions should be excluded because they lack fit with the case and are unreliable. (ECF No. 103 at PageID #3740 (citing ECF No. 103-1 at PageID #3760).)

Consistent with the Court's prior rulings, Dr. Pomerants may offer opinions detailing how a condition can be a complicating factor if there is a nexus between these opinions and the injuries at issue in this case. (*See* Case No. 18-cv-1320, EMO No. 22, ECF No. 272.) Dr. Pomerants does not link all of these risk factors, for example cirrhosis and connective tissue disorders, to Plaintiff's case. Plaintiff is correct that general risk factors that were not present and are unrelated to this case are irrelevant and therefore inadmissible. However, opinions regarding risk factors that Dr. Pomerants does explain and link to this case, such as pre-operative pain, are relevant.

Plaintiff also points to Dr. Pomerants's opinion that Plaintiff's "obesity, non-compliance with post-operative instructions, and previous and continued use of narcotics" placed him at a higher risk of complications (ECF No. 103 at PageID #3740 (citing ECF No. 103-1 at PageID #3788)). Plaintiff argues that this is inadmissible because Dr. Pomerants does not explain how these factors could cause or contribute to Plaintiff's injuries. Defendants respond that Dr. Pomerants did explain how Plaintiff's medical conditions increased the likelihood of

complications, and point to this Court's prior rulings in support of this argument. (ECF No. 114 at PageID #4206.)

In *Milanesi*, Dr. Gillian and Dr. Gleit did not provide a causal link between the plaintiff's obesity and his injuries, but they noted that the plaintiff was obese at the time of his surgery and explained specifically how obesity was a risk factor for surgical complications. (Case No. 18-cv-1320, ECF No. 77-5 at PageID #4543 ("Obese patients put increased pressure on the repair relative to those with lower weights. The increase[d] intraabdominal pressure associated with obesity places a continuous disruptive strain on the tissues and the scar as it is trying to heal."); Case No. 18-cv-1320, ECF No. 74-6 at PageID #4079–80 ("In obese patients, the difficulty of working in the peritoneal cavity through a small hole is compounded because of the thickness of the fat overlying the muscle of the abdominal wall; in addition, the fatty tissues inside the peritoneal cavity . . . can be particularly bulky, so that the inside of the abdominal wall is not flat[.]").) The Court found that these opinions were admissible because the experts detailed how obesity was a complicating factor, and there was a nexus between their opinions and the case because the plaintiff was obese at the time of implantation. (Case No. 18-cv-1320, EMO No. 22, ECF No. 272.)

Here, Dr. Pomerants details Plaintiff's health history including his weight and BMI over time. However, he does not explain how obesity is a risk factor for complications. He states that obesity placed Plaintiff at a heightened risk of post-surgical complications and that obesity can "negatively affect the surgical outcome of hernia repairs," but aside from these conclusory statements he does not explain how obesity could negatively affect the surgical outcome or heighten the risk of complications. (ECF No. 103-1 at PageID #3760, 3788.)

The same holds true for Plaintiff's use of narcotics and non-compliance with post-operative instructions. Dr. Pomerants states in his report that Plaintiff's "previous and continued use of

narcotics" placed him at a heightened risk of complications, but does not explain how use of narcotics is a risk factor or how it relates to Plaintiff's injuries. (*Id.* at PageID #3788.) Dr. Pomerants notes that Dr. Tan instructed Plaintiff to use ice packs on his incision following his surgery, and that Plaintiff "did not confirm ice pack utilization as suggested." (*Id.* at PageID #3774.) However, Dr. Pomerants does not detail any other instructions that were not followed and does not explain how failure to use ice packs as instructed would cause or contribute to Plaintiff's injuries.

Plaintiff's motion also includes one sentence arguing that Dr. Pomerants's "criticisms and negative presumptions about Dr. Tan and Dr. Radke [are] directly at odds with the evidence" and Dr. Pomerants does not explain "how his opinions can reliably contradict this evidence," therefore his opinions regarding the surgeons' techniques should be excluded. (ECF No. 103 at PageID #3740.) Plaintiff does not point to any sections of Dr. Pomerants's report or any specific opinions he seeks to exclude or specify what "evidence" he is referring to. This portion of Plaintiff's motion is overly broad, and therefore denied.

IV. Conclusion

For the reasons set forth above, Plaintiff's Motion to Exclude the Opinions and Testimony of Dr. Pomerants (ECF No. 103) is **GRANTED IN PART**, **DENIED IN PART**, and **DENIED IN PART AS MOOT**.

IT IS SO ORDERED.

10/5/2023
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE