



Bostic et al v. GlaxoSmithKline LLC et al

2015 | Cited 0 times | E.D. Kentucky | December 9, 2015

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY

SOUTHERN DIVISION

PIKEVILLE HEATHER BOSTIC, et al., Plaintiffs, v. GLAXOSMITHKLINE, LLC, et al.,
Defendants.

Civil No. 15-84-ART

MEMORANDUM OPINION

AND ORDER

*** ** Heather Bostic took ondansetron, generic Zofran, to treat morning sickness during the first trimester of her pregnancy. R. 1-1 at 6. Zofran is a drug meant to prevent nausea and vomiting caused by chemotherapy and radiation cancer treatments. See Ondanestron Information, FDA, available at <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm271924.htm> (last visited Dec. 7, 2015). Sadly, daughter, D.B., was born with multiple congenital defects, including a missing kidney and a hole in her heart. Id. When D.B. was about seven months old, she got sick and started vomiting. Id. at 7. A doctor prescribed D.B. Zofran for her nausea, and Heather Bostic gave one dose of it to D.B. Id. Tragically, the next day, D.B. stopped breathing and died from cardiopulmonary arrest. Id. at 8.

In August 2015, plaintiffs Heather and Timothy Bostic filed a malpractice suit in Pike County Court against the pediatrician who prescribed Zofran to D.B., Dr. Aaronda Wells, the East Kentucky Medical Group, P.S.C. -1 at 7, 9. In addition, the Bostics sued three pharmaceutical companies Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 1 of 7 - Page ID#: 722

for products liability Defendants nufacturer, GlaxoSmithKline LLC, and manufacturers and distributors, Teva . The Bostics also sued DataBank contracts with pharmacies to provide drug information to consumers, for failure to warn. Id. at 11.

GlaxoSmithKline removed the case to federal court, alleging diversity jurisdiction. R. 1. Although the



Bostic et al v. GlaxoSmithKline LLC et al

2015 | Cited 0 times | E.D. Kentucky | December 9, 2015

Bostics and the Healthcare Defendants are all Kentucky citizens, GlaxoSmithKline argues that citizenship because they are fraudulently misjoined to the suit. R. 1 at 14 15. In the

alternative, GlaxoSmithKline and the Pharmaceutical Defendants ask the Court to use Federal Rule of Civil Procedure 21 to sever the claims against the Healthcare Defendants and retain jurisdiction. R. 1; R. 3.

The Bostics filed a motion to remand, R. 22, arguing that the Healthcare Defendants are properly joined and the Court should not sever them from the suit. The Bostics are correct: the Healthcare defendants are properly joined. And the Court will not exercise its discretion to sever them under Rule 21. Therefore, this case is remanded to state court for lack of jurisdiction.

I. The Healthcare Defendants Are Properly Joined. The Pharmaceutical Defendants argue that the Healthcare Defendants are fraudulently misjoined. R. 3-1 at 4. Courts sometimes employ the doctrine of fraudulent misjoinder when a non- *Murriel-Don Coal Co. v. Aspen Ins. UK Ltd.*,

790 F. Supp. 2d 590, 599 (E.D. Ky. 2011). For example, if a Kentucky plaintiff sues an Ohio Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 2 of 7 - Page ID#: 723

driver for causing a car crash and then joins a Kentucky plastic surgeon for performing a botched facelift that occurred six months earlier, the surgeon is fraudulently misjoined. *Id.* Under the fraudulent misjoinder doctrine, the federal court could therefore sever the claim against the surgeon to obtain diversity jurisdiction. *Id.* Though the claim against the surgeon is *Id.* Fraudulent misjoinder, however, is a questionable doctrine invented by the courts and remains *Id.* at 599 600 (explaining the many problems with the fraudulent misjoinder doctrine).

Moreover, even applying this questionable doctrine, the Healthcare Defendants are not fraudulently misjoined. 1

Under both federal and Kentucky rules of civil procedure, there is no misjoinder and . *Id.* at 600 (citing Fed. R. Civ. P. 20(a)(2) and Ky. R. Civ. P. 20.01). claims against the Healthcare Defendants, DataBank, and the Pharmaceutical Defendants meet those requirements. First, the same occurrence death gives rise to all of the claims. The Bostics See, e.g., R. 3-1 at 31, 36, 49. Second, a common question of fact arises as to all the defendants: did Zofran or its generic True, some questions of fact or law are specific to the Healthcare Defendants, e.g., was Dr. Wells negligent in prescribing Zofran to D.B.? But one common question is enough to show proper joinder, and here there is one. Fed. R. Civ.

1 No consensus exists as to whether courts should analyze joinder under federal or state rules. *Id.* Both sets of rules lead to the same result here, so there is no need to decide. Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 3 of 7 - Page ID#: 724



Bostic et al v. GlaxoSmithKline LLC et al

2015 | Cited 0 times | E.D. Kentucky | December 9, 2015

P. 20(a)(2); Ky. R. Civ. P. 20.01. Therefore, even if it could, the Court would not sever the Healthcare Defendants using fraudulent misjoinder.

II. The Court Will Not Sever the Healthcare Defendants Under Rule 21. GlaxoSmithKline argues that, even if the defendants are not fraudulently misjoined, the Court should sever the Healthcare Defendants and thereby preserve federal jurisdiction. Federal Rule of Civil Procedure 21 permits a court, in its discretion, to against a party, Fed. R. Civ. P. 21, as long as that party is not required under Rule 19. *Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 36 F.3d 540, 546 (6th Cir. 1994) (laying out requirements for necessary parties under Rule 19(a)); *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 764 (6th Cir. 1999) (outlining requirements for dispensable parties under Rule 19(b)).

Newman-Green,

Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989). Courts whether [severance] of a nondiverse party will prejudice any of the parties in the litigation. *Id.* at 838; *Hardaway v. Checkers Drive-In Restaurants, Inc.* x 854, 855 (4th

Cir. 2012); see also 1 Fed. Proc., L. Ed. § 1:241 (stating that courts should consider prejudice to any party when deciding to sever a dispensable party).

Severance would prejudice the plaintiffs here. If the Court severed the Healthcare Defendants, the Bostics would have to litigate on two fronts: in state court against the Healthcare Defendants and in federal court against the Pharmaceutical Defendants and DataBank. And the overlap between the two cases means the Bostics would have to Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 4 of 7 - Page ID#: 725

duplicate their efforts. For example, the Bostics would have to prove in both cases that

Moreover, a [her] she wants to sue. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005). Here, the Bostics

chose to sue all the defendants together in state court. All of the defendants are properly joined. There is a common nucleus of fact, involving one harm allegedly caused by multiple defendants. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) under the Federal Rules of Civil

Procedure.). There is no good reason to contravene the plaintiffs decision here. 2

The Pharmaceutical Defendants respond that the Court should sever the Healthcare Defendants so the case can join a federal multidistrict litigation about Zofran and ondansetron in the District of Massachusetts. In *re Zofran (Ondansetron) Products Liability Litigation*, No. 1:15-MD-02657-FDS (D. Mass.). They cite a recent Eastern District of Kentucky case in support of their argument, *Mayfield*,



Bostic et al v. GlaxoSmithKline LLC et al

2015 | Cited 0 times | E.D. Kentucky | December 9, 2015

No. CIV.A. 15-19-DLB, 2015 WL 3440492 (E.D. Ky. May 28, 2015). The Mayfield court severed non-diverse defendants a doctor and clinic so that the case could join a federal products-liability MDL about allegedly defective pelvic mesh. Id. at *2. Transfer to the MDL, the court noted, for the plaintiffs. Id. at *5.

Here, however, the benefit to the plaintiffs from the In re Zofran MDL is less certain. The See Mayfield,

2 Therefore, the Court need not rule whether the Healthcare Defendants are necessary or indispensable parties under Rule 19. Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 5 of 7 - Page ID#: 726

2015 WL 3440492, at *5. First, the claims against the Pharmaceutical Defendants are distinct from those in the MDL. The MDL focuses on whether Zofran/ondansetron at 1, In re Zofran, No. 1:15-MD-02657. The Bostics allege that ingestion

the Bostics also allege that ingestion of Zofran caused Resolving that issue requires facts about the effect of Zofran on infants, which fall outside the scope of the MDL.

Second, the claims against DataBank also fall outside the scope of the MDL. DataBank contracts with pharmacies to provide information about Zofran or ondansetron to consumers. R. 3-1 at 49 50. To resolve the Bostic claims against DataBank, a court must identify what duty DataBank owed the plaintiffs, if any, and whether DataBank knew or had -label use. Id. at 51 52. Those issues also fall MDLs can have many benefits, including the elimination . D.E. 3 at 1, In re Zofran, No. 1:15-MD-02657 (entered Oct. 13, 2015). But decisions to sever must See Soberay Mach. & Equip. Co. v. MRF Ltd., Inc., 181 F.3d 759, 765 (6th Cir. 1999) (discussing what makes a party indispensable under Rule 19(b)). In this case, the benefits of the In re Zofran MDL do not extend far enough to outweigh the prejudice to the Bostics from being forced to litigate on two fronts. Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed: 12/09/15 Page: 6 of 7 - Page ID#: 727

CONCLUSION The Healthcare Defendants are properly joined in this suit, and severing them would prejudice the Bostics. Because the Bostics and the Healthcare Defendants share Kentucky citizenship, this Court lacks subject matter jurisdiction. Therefore, this case is remanded to state court.

Accordingly, it is ORDERED that: (1) The Pharmaceutical Defenda motion to sever, R. 3, is DENIED. (2) motion to remand, R. 22, is GRANTED. This case is

REMANDED to state court. (3) All pending motions are DENIED AS MOOT, and this case shall be

STRICKEN This the 9th day of December, 2015. Case: 7:15-cv-00084-ART-EBA Doc #: 32 Filed:



Bostic et al v. GlaxoSmithKline LLC et al

2015 | Cited 0 times | E.D. Kentucky | December 9, 2015

12/09/15 Page: 7 of 7 - Page ID#: 728

