



## Giddings v. Bristol-Myers Squibb Co.

2001 | Cited 0 times | D. Maryland | May 4, 2001

### MEMORANDUM OPINION

Plaintiff, Mark Giddings, on behalf of the deceased, Pauline Rodman, brings this diversity action against Bristol-Myers Squibb Co. ("Bristol-Myers"), Medical Engineering Corp. ("MEC"), and MEC Subsidiary Corp. (formerly known as "Surgitek"). The complaint includes 30 counts. Plaintiff's main allegations are based in products liability on theories of strict liability, negligence, negligence per se, and breach of warranty in the use of Defendants' products in her reconstructive breast implant surgery (Counts I-V, VII, VIII, XIII, XXX). Plaintiff also seeks relief for fraud (Counts IX, X, XII), enterprise liability (Counts XV-XVII, XXI, XXII, XXIV), intentional infliction of emotional distress (Count XVIII), negligent infliction of emotional distress (Counts XIX, XX), violations of the Lanham Act (Count XXVI), and violations of the Magnuson-Moss Act (Count XXVII).

Presently before the Court is Defendants' Motion for Partial Summary Judgment as to (1) Plaintiff's wrongful death claim and (2) any other alleged injuries of general disease referenced in Plaintiff's complaint. Defendants do not include Plaintiff's claim for inflammation of the breast tissue in this motion. Therefore, Plaintiff's tort and breach of warranty claims can survive summary judgment based upon this complained injury. Rather, Defendants' motion appears to be geared toward the extent of injuries that Plaintiff may assert.

The motions have been fully briefed by all parties. No hearing is deemed necessary. See Local Rule 105.6. The Court has considered the arguments made in support of, and opposition to, the respective motions. For the reasons set forth below, the Court will grant Defendant's Motion for Partial Summary Judgment.

### Background

In April of 1975, Pauline Rodman underwent a modified radical mastectomy to treat cancer in her right breast. About a year and a half later, Ms. Rodman developed a tumor at the scar site which was removed and treated with radiation. In June of 1979, Ms. Rodman underwent reconstructive breast implant surgery using a silicone implant manufactured by Bristol-Myers and its affiliate companies, MEC and Surgitek. The surgery was performed by Dr. Bahman Teimourian. In February of 1979, prior to her breast implant surgery, Ms. Rodman complained to her oncologist, Dr. David Haidak, of a slight intermittent tremor of her left hand.

In November of 1980, Ms. Rodman complained to her general physician, Dr. Far M. Taleghani, of



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pain in her left shoulder, leg, and hand. Dr. Taleghani referred Ms. Rodman for an electromyogram(EMG). Two days later, during her visit for the EMG, Ms. Rodmancomplained of stiffness in the fingers of her left hand, stiffness of both hips, and muscle cramps of the left foot. Ms. Rodman also reported that she had been experiencing these symptoms for the last several years but that they had intensified and had become more frequent in the last year. The EMG failed to show any abnormalities in the muscles of either the upper or lower extremities. Dr. Taleghani then referred Ms. Rodman to a neurologist, Dr. Richard Restak.

On July 23, 1981, Dr. Restak saw Ms. Rodman for the first time. Dr. Restak diagnosed Ms. Rodman as having a mixed neurologic syndrome, "not a pure picture of Parkinson's disease." (Ex. 1., Pl.'s Opp'n Summ. J.) Dr. Restak continued to treat Ms. Rodman's condition from 1981-1992. Over the years, Ms. Rodman's symptoms became increasingly worse and her health continued to degenerate.

In June of 1992, Ms. Rodman returned to her plastic surgeon, Dr. Teimourian, because the implant had moved up to the capsulor contracture. (Ex. 4., Defs.' Mot. Partial Summ. J.) Subsequently, on October 8, 1992, Dr. Teimourian, upon Ms. Rodman's request, removed the implant. Upon removal, it was determined that the implant had ruptured, requiringthe operative site to be cleaned of all loose silicone. (Ex. 15., Defs.' Mot. Partial Summ. J.)

In June of 1994, Ms. Rodman's MRI report revealed characteristics typical of people with Parkinson's Disease. (Ex. 9., Defs.' Mot. Partial Summ. J.) On July 15, 1996, Ms. Rodman died of cardiac arrhythmia. The Medical Examiner's report revealed findings of Parkinson's disease as a contributing factor in Ms. Rodman's death. (Ex. 13., Defs.' Mot. Partial Summ. J.)

Plaintiff, as personal representative of his deceased mother's estate, filed suit against Defendants in January of 1997. In his complaint, Plaintiff alleged that Ms. Rodman suffered injuries and ultimately died as a result of the silicone breast implant that she received and that Defendants, by negligently manufacturing and distributing the implant, proximately caused Ms. Rodman's injuries and ultimate death. In February 2001, Defendants filed this action for partial summary judgment.

### Discussion

In reviewing a motion for summary judgment, the court must review the facts in the light most favorable to the nonmoving party. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine*, 501 U.S. 496, 520, 111 S.Ct. 2419 (1991) (citations omitted). Rule 56(c) of the Federal Rules of Civil Procedure provides that the entry of summary judgment is proper, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393 (4th



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Cir. 1994); see *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998).

As a case brought before the federal court under diversity jurisdiction, the substantive laws of the forum state, Maryland, apply. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In Maryland, "[r]egardless of the recovery theory, the plaintiff in product liability litigation must satisfy three basics from an evidentiary standpoint: 1) the existence of a defect; 2) the attribution of the defect to the seller; and 3) a causal relation between the defect and the injury." *Jensen v. American Motors, Corp.*, 50 Md. App. 226, 234, 437 A.2d 242, 247 (Md. Ct. Spec. App. 1981) quoted in *Foster v. American Home Products Corp.*, 29 F.3d 165, 168 (4th Cir. 1991) (finding that the same causation requirement applies to actions for negligent misrepresentation of a product). "[P]roof of defect and causation is also required to support [Plaintiff's] breach of warranty claim." *Miskin v. Baxter Healthcare Corp.*, 107 F.Supp.2d 669, 672 (D. Md. 1999), *aff'd*, 213 F.3d 632 (4th Cir. 2000) (unpublished opinion).

Defendants assert that they are entitled to partial summary judgment on the grounds that Plaintiff failed to satisfy his burden of establishing a causal connection between Ms. Rodman's injuries/death and the breast implant she received. In response to Defendants' claim, Plaintiff relies on the statements and theories of three experts as evidence to support his causation claim: (1) Richard Restak, MD, Ms. Rodman's treating physician; (2) Pierre J.J.B. Blais, PhD, a research specialist in materials and medical devices with long term contact with humantissue; and (3) Andrew S. Tegeris, MD, an expert in pathology and toxicology.

In cases like this one, it is true that "[e]xpert testimony is usually necessary since the evidence relating to causation involves technical medical questions beyond the common knowledge of laypersons, and the interaction of a breast prosthesis with the human body raises technical questions requiring expert testimony." *Miskin*, 107 F.Supp.2d at 672. However, in order to be entitled to consideration at summary judgment, the testimony must be such as would be admissible as evidence. *Id.* at 671; see also Fed.R.Civ.P. 56(c). As discussed below, Plaintiff has failed to present any evidence that demonstrates a genuine issue of material fact. In the absence of contradictory evidence showing a genuine dispute as to a material fact, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

### 1. Richard Restak, MD

Plaintiff relies on the testimony of Dr. Restak to support his claim that there was a causal connection between the breast implant and Ms. Rodman's injuries and ultimate death. Yet, Plaintiff himself concedes that "Dr. Restak's testimony does not state to a reasonable degree of certainty [that] the defective silicone implant caused Ms. Rodman's condition." (Pl.'s Opp'n Mem. at 3). Rather, Dr. Restak only states that the silicone "could be" the cause of Ms. Rodman's Parkinsonism. *Id.* However, the mere possibility that Defendants' silicone breast implants could have caused Ms. Rodman's conditions is not sufficient to support a causation claim at summary judgment. See *Davidson v. Miller*, 276 Md. 54, 60 (1975) (holding that expert testimony cannot be received as evidence unless it is



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in terms of the "certain or probable and not of the possible."); see also *Miskin*, 107 F.Supp.2d at 671-72. ("[T]o support causation in the face of a summary judgment challenge, evidence which amounts to a probability, not just a possibility, must be identified by the non-moving party, to guard against 'raw speculation' by the fact finder."). As a result, as to Dr. Restak, Plaintiff has failed to show the requisite causation to survive summary judgment.

### 2. Pierre J.J.B. Blais, PhD

Plaintiff states that Dr. Blais, having reviewed Ms. Rodman's pathology material, would provide testimony "regarding the identity, integrity, defects, reactivity, toxic chemistry and biology of silicone . . . in general and specifically regarding Plaintiff's implant." (Pl.'s Opp'n Mem. at 3) However, a review of Dr. Blais' affidavit, as attached, offers no causal connection between Ms. Rodman's breast implant and the injuries she suffered. In fact, in the entire 6-page affidavit, Dr. Blais makes only two general statements regarding similarities between Defendants' product and Ms. Rodman's breast implant.

First, Dr. Blais stated that breast implants like the one inserted in Ms. Rodman consisted mostly of silicone. (Blais Aff. ¶ 6) However, there is no dispute as to whether the implant Ms. Rodman received contained silicone. Second, Dr. Blais stated that his examination of breast implants similar to Ms. Rodman's revealed that many of Defendants' products were defective. (Blais Aff. ¶ 17) Again, the defective element is not at issue here. Defendants' sole argument at summary judgment is that Plaintiff has failed to establish causation. Thus, even drawing all reasonable inferences in favor of Plaintiff, Dr. Blais' statements have no evidentiary value and nonetheless fail to offer any evidence of a material issue of fact to dispute Defendants' challenge to causation.

### 3. Andrew S. Tegeris, MD

Plaintiff identifies Dr. Tegeris as a pathology and toxicology expert who, having reviewed Ms. Rodman's autopsy slides and medical records, will testify "regarding his histopathological findings" but fails to provide the details of his testimony. (Pl.'s Opp'n Mem. at 4)

This is similar to the situation in *Miskin v. Baxter Healthcare Corp.*, 107 F.Supp.2d 669, 672 (D. Md. 1999), *aff'd*, 213 F.3d 632 (4th Cir. 2000) (unpublished opinion). In *Miskin*, the plaintiff, in response to the defendant's motion for summary judgment, relied on a treating physician as a source of evidence to support her causation claim. *Id.* at 673. Similarly, the plaintiff provided no description of what the doctor would testify to at trial and no affidavits or deposition testimony excerpts. *Id.* Given this lack of evidence, the court concluded that plaintiff had failed to produce any evidentiary facts to challenge defendant's motion for summary judgment. *Id.*

Similar to the plaintiff in *Miskin*, Plaintiff provides no details as to what Dr. Tegeris would testify to at trial. Further, Plaintiff has not produced an affidavit by Dr. Tegeris nor a deposition testimony



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excerpt. Accordingly, the Court finds that, as to Dr. Tegeris also, Plaintiff has failed to present any evidentiary facts to survive Defendants' summary judgment motion.

### Conclusion

Outside of the inflammation of the breast, the Court finds that Plaintiff has failed to make a showing sufficient to establish causal connection between Ms. Rodman's breast implant and her medical conditions and ultimate death. Thus, even drawing all justifiable inferences in favor of Plaintiff, the Court still finds that Plaintiff has failed to meet his evidentiary burden at summary judgment and that Plaintiff's alleged injuries of death and disease with no causal connection to inflammation of the breast must fail.

Based on the above findings, the Court will grant Defendants' Motion for Partial Summary Judgment. An Order consistent with this Opinion will follow.

### ORDER

For the reasons stated in the accompanying Memorandum Opinion dated May 4, 2001, IT IS this 4th day of June, 2001 by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motion for Partial Summary Judgment [38-1] BE, and the same hereby IS, GRANTED; and
2. That the Clerk of the Court mail copies of this order to all counsel of record.

Alexander Williams, Jr. United States District Judge

