

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STACY SHERFEY, et al. : CIVIL ACTION
: :
v. : :
: :
JOHNSON & JOHNSON, et al. : NO. 12-4162

MEMORANDUM

McLaughlin, J.

August 17, 2012

This action was filed in the Court of Common Pleas of Philadelphia County on June 27, 2012 by Stacy Sherfey, as an individual and as administrator of the estate of her son, Tracen, and her husband Neil Sherfey. The Sherfeys are residents of Nevada. They allege that when Stacy Sherfey administered three doses of Infant's Tylenol to Tracen over two days in February, 2009, he experienced acute liver failure and died. Compl. ¶¶ 102-08. They bring products liability claims against Johnson & Johnson ("J&J"); Johnson & Johnson Sales and Logistics Company; McNeil-PPC, Inc. ("McNeil"); a number of their high-level executives; Wal-Mart Stores, Inc., where the plaintiffs allege they purchased the Infants' Tylenol; Inmar, Inc.; Carolina Supply Chain Services, LLC; and Carolina Logistics Services, LLC. The plaintiffs allege that an improper or inadequately publicized recall of medicines by the defendants led them to remain ignorant of risks associated with Infants' Tylenol and caused their son's death.

The defendants removed the action to this Court on July

20, 2012, asserting that complete diversity exists between the plaintiffs and all properly joined defendants. As part of their Notice of Removal, the defendants designated this action as related, under Local Rule 40.1, to two actions before the undersigned, one recently dismissed and one pending: In re McNeil Consumer Healthcare, et al., Marketing and Sales Practices Litigation, MDL No. 2190 ("the MDL"), and Moore v. Johnson & Johnson, et al., No. 12-490. As a result of that designation, this action was assigned to the undersigned.

In the MDL, a number of actions were consolidated in this Court on behalf of plaintiffs who had suffered only economic injury as a result of having purchased drugs manufactured at plants with quality control problems and the alleged inadequate recall referred to above. See In re McNeil, ___ F. Supp. 2d ___, 2012 WL 2885392, at *1 (E.D. Pa. July 13, 2012). The Moore plaintiffs are Washington residents who purchased "Very Berry" Children's Tylenol at a Costco store in Union Gap, Washington, and have brought a products liability action against a similar set of defendants. Moore v. Johnson & Johnson, Civil No. 12-490, Docket No. 1 Ex. A at ¶ 22 (E.D. Pa.).

The plaintiffs moved on July 24, 2012 to strike the defendants' designation and have the case reassigned by the Clerk of Court pursuant to this Court's random assignment system. The Court will grant the motion because this case is not "related" to

Moore or the MDL under Local Rule 40.1.

I. The Rule

Local Rule 40.1 ("Assignment of Court Business")

provides:

. . . .

(b)

(3) Related Cases. At the time of filing any civil action or proceeding, counsel shall indicate on the appropriate form whether the case is related to any other pending or within one (1) year previously terminated action of this court.

A. Civil cases are deemed related when a case filed relates to property included in another suit, or involves the same issue of fact or grows out of the same transaction as another suit

Newly filed cases marked by counsel as "related" to earlier cases are automatically given to the judge before whom those earlier cases were assigned. The case may be referred to the assignment clerk for reassignment if the judge "is of the opinion that the relationship does not exist." Local Rule 40.1(c)(1).

II. Discussion

The plaintiffs assert that this action "diverge[s] significantly" from Moore and the MDL. The defendants argue that (1) there are a number of factual allegations that are identical or nearly identical in both Moore and the instant case; (2) both

cases ultimately assert the same products liability theories of recovery; (3) almost all the same defendants are named; (4) the same "transactions or occurrences" are at issue in all three cases, namely quality control problems at McNeil and a deficient recall of medicines produced at its plants. The Court concludes that although similar issues of fact and law as those in Moore and the MDL are undoubtedly raised by this case, the similarities are insufficient to render this case "related" to either as defined by Local Rule 40.1.

In interpreting the language of Rule 40.1(b)(3)(A), other judges of this Court have concluded that setting forth similar legal theories and having the same general factual basis giving rise to the claims in suit do not suffice for a case to be "related" to another. The case of Sellers v. Phila. Police Comm'r Timoney, No. 01-3760, 2002 WL 32348499 (E.D. Pa. Feb. 7, 2002), is instructive. Four cases had been filed in this Court alleging police misconduct in connection with the Republican National Convention; the first-filed, Franks v. City of Philadelphia, was randomly assigned to Judge Pollak, and three subsequent cases were marked by plaintiffs' counsel as related: Fried v. City of Philadelphia, Cooper v. Mitchell, and Sellers. All four cases set forth the same general set of allegations: federal, state, and municipal law enforcement had "conspired to frustrate the activities of . . . demonstrators" at the

convention. Sellers, 2002 WL 32348499 at *1.

Judge Pollak concluded that Fried and Cooper were related to Franks under Rule 40.1, but that Sellers was not. Although Fried and Cooper were “hardly identical,” they arose out of arrests resulting from surveillance and undercover activity by police officers occurring at a single warehouse where protesters were organizing, as had the Franks plaintiffs. Sellers, by contrast, involved an “arrest and detention [that] took place at a different time and place and under different circumstances” than in Franks, and was thus unrelated. Id. at *2-*3.

Indeed, another judge of this Court concluded that cases are not related even if similar legal theories are advanced against largely the same defendants. See, e.g., Ignatyev v. Chertoff, No. 08-1547, 2008 WL 1757841, at *2 (E.D. Pa. Apr. 16, 2008) (Baylson, J.) (rejecting relatedness argument, because naturalization case was “as ‘related’ to [the earlier action] as it is to any other naturalization case in this district”). Rule 40.1 should be applied sparingly because the policies underpinning the system of random assignment encourage transparency, fairness, and avoiding the appearance of arbitrariness. See id.; In re Yagman, 796 F.2d 1165, 1177-78 (9th Cir. 1986) (in interpreting Central District of California local rule permitting “direct transfer” of cases, cautioning courts to be “meticulously careful” in actions that diverge from

random assignment).

As with Ignatyev and Sellers, the general facts giving rise to the claims in the MDL, Moore, and this case are similar and may well require similar proof. That this case is a wrongful death suit, however, ensures that factual issues relating to the plaintiffs' pre-injury behavior, injury, and causation will be distinct from any such issues in Moore or in the MDL. The plaintiffs in this action allege the purchase of a different medicine on a different date and from a different retailer than those in Moore, and they set forth a categorically different injury than that alleged by the plaintiffs in the MDL.

Finally, the Court has considered the argument raised by the defendants that the issue of relatedness was decided by the undersigned at oral argument in Moore on April 5, 2012. See Moore, Tr. Hr'g Apr. 5, 2012 at 21 (No. 12-490 Docket No. 54) ("[L]ooking at the standard, I do think they are related."). However, the circumstances of the relatedness argument at the Moore hearing, which was held on a pending motion to remand, were far more limited than that before the Court on the instant motion. In Moore, the Court repeatedly inquired of plaintiffs' counsel whether or not he intended to argue that that case had been marked related (to the MDL) improperly. See id. at 11. The Moore hearing itself was held almost three months after the case had been removed, and although the Court did not address the

waiver argument, see id., its decision was not made on briefing as thorough as that on the instant motion.

The Court will grant the motion and refer this case to the assignment clerk for random assignment. The virtues of transparency, avoiding the appearance of arbitrariness, and upholding the integrity of the random assignment system weigh in favor of a narrow interpretation of Rule 40.1 and for random assignment despite the similarities between this case, Moore, and the MDL.

An appropriate order will issue separately.

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ORDER

AND NOW, this 17th day of August, 2012, upon consideration of the plaintiffs' Motion for Random Assignment and to Strike the Defendants' Designation of Related Actions (Docket No. 7), the defendants' responses thereto, and for the reasons stated in a memorandum of law bearing today's date, IT IS HEREBY ORDERED that the motion is GRANTED.

The above-captioned case is referred to the assignment clerk for random assignment pursuant to Local Rule 40.1(c)(1).

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.