

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

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
	:	
THIS DOCUMENT RELATES TO:	:	
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JUDITH MINGUS	:	
v.	:	CIVIL ACTION NO. 04-23744
WYETH, et al.	:	

MEMORANDUM

Bartle, C.J.

April 21, 2006

Plaintiff Judith Mingus filed this action against Wyeth on July 9, 2004. She alleges that she is suffering from primary pulmonary hypertension ("PPH"), an almost always fatal condition, as a result of ingesting Wyeth's prescription diet drug Redux, which was withdrawn from the market in September, 1997.

Plaintiff brings claims for strict product liability and negligence. Before the court is the motion of defendant Wyeth for summary judgment "based on plaintiff's assumption of risk." Plaintiff has also filed a cross-motion "for an order striking Wyeth's assumption of risk defense." See Fed. R. Civ. P. 56. It is undisputed that Ohio substantive law is applicable.

Wyeth does not concede either that plaintiff has PPH or that, in the event she does, her PPH was caused by her ingestion of Redux. On the instant motion, Wyeth contends only that plaintiff voluntarily assumed the risk of PPH associated with taking Redux and that this voluntary assumption of risk is a

complete bar to recovery under Ohio law. Mingus responds that the doctrine of assumption of risk is inapplicable and that Wyeth should be precluded from asserting the defense.

It is uncontested that plaintiff has been severely overweight for much of her adult life. By March 1997, her weight had risen to approximately 300 pounds and was the cause of a variety of health problems, including hypertension (high blood pressure), arthritis, knee problems, and shortness of breath. Plaintiff's treating physician, Dr. Raymond Gardner, initially prescribed diet and exercise. These recommendations did not have the desired effect, and on March 15, 1997, Dr. Gardner and plaintiff discussed a prescription for the appetite suppressant Redux to help her lose weight and lower her blood pressure. Plaintiff thereafter took Redux for approximately six months and stopped only at Dr. Gardner's direction when the drug was removed from the market in September, 1997.

Dr. Gardner testified at his deposition that he gave plaintiff warnings that Redux could cause PPH at the time he first wrote plaintiff her prescription. While Dr. Gardner cannot recall the specific words he used in explaining to plaintiff the risk of PPH associated with the medication, there is no dispute that he did warn her that PPH, to which there is no known cure, could result from the use of Redux. He stated that the typical warning he gave patients to whom he prescribed Redux consisted of cautioning that "pulmonary hypertension would be a risk; that there was no definite cure; and that it could be fatal." Dr.

Gardner testified that he was under the impression that the risk of PPH associated with Redux "was very minimal."

Plaintiff's proffered testimony supports Dr. Gardner's recollection. Plaintiff recalled that Dr. Gardner had warned her that the "worst case scenario" involving Redux was pulmonary hypertension and that, to the best of her recollection, she was warned this condition has "no cure." There is no evidence in the record that plaintiff was ever given an approximation of the likelihood of developing PPH from Redux. Moreover, there is some evidence in the record that the reported risk of PPH had been estimated at that time to be 23-46 per million, but it is unclear whether either Dr. Gardner or plaintiff was ever made aware of this number.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993). The parties agree that the law of the state of Ohio applies in this diversity action as plaintiff was prescribed and ingested Redux in Ohio. See, e.g., Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990). Wyeth asserts that plaintiff's strict liability design defect and negligence counts both are barred by her

primary assumption of the risk of developing PPH from taking Redux.

Both parties agree that Ohio law is less than a model of clarity with respect to the assumption of risk defense. "[D]espite this confusion, Ohio continues to recognize the term and its accompanying variations." Gallagher v. Cleveland Browns Football Co., 659 N.E.2d 1232, 1236 (Ohio 1996). In Gallagher, the Supreme Court of Ohio reaffirmed the distinction between (1) primary assumption of risk and (2) implied or secondary assumption of risk.¹ See id. at 1236-37.

Secondary or implied assumption of risk is premised on the theory that a plaintiff who understands the risk of a known harm yet nevertheless chooses to subject himself to it, has tacitly consented to the risk of the harm that results. That defense, however, has been merged into the doctrine of contributory negligence under the state's comparative negligence statute and generally serves to reduce recovery and does not constitute a total bar to a claim. See Anderson v. Ceccardi, 451 N.E.2d 780, 783-84 (Ohio 1983).

Wyeth asserts here only the defense of primary assumption of risk. If applicable, it serves as a complete bar to recovery in a negligence action because it means that

1. Adding to the confusion is yet another variation on the theme known as express assumption of risk. That doctrine, which is inapplicable here, arises when "a person expressly contracts with another not to sue for any future injuries that may be caused by that person's negligence." Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983).

defendant owed no duty to the plaintiff. Gallagher, 659 N.E.2d at 1236-37. Because the defense precludes a plaintiff from establishing the necessary elements of a negligence cause of action as a matter of law, it is an "issue especially amenable to resolution pursuant to a motion for summary judgment." Id. at 1238.

The origin of the primary assumption of risk doctrine in Ohio is largely credited to Cincinnati Baseball Club Co. v. Eno, 147 N.E. 86 (Ohio 1925), where a spectator at a baseball game was injured when a ball struck him in the stands. Interestingly, in Eno, the Supreme Court of Ohio held the doctrine was inapplicable because the plaintiff had been injured by a ball hit by a player who was practicing very near the stands before the game. Id. at 87. The court suggested, however, that the primary assumption of risk defense would have applied had the plaintiff been struck by a ball during the normal course of the game. Id. The Gallagher court read this result in Eno to mean that "only those risks directly associated with the activity in question are within the scope of primary assumption of risk, so that no jury question would arise when an injury resulting from such a direct risk is at issue, meaning that no duty was owed by the defendant to protect the plaintiff from that specific risk." 659 N.E.2d at 1237.

While the parties do not dispute that primary assumption of risk may serve as a complete defense against claims of negligence, they vigorously disagree on whether the doctrine

applies to this negligence claim arising from plaintiff's consumption of defendant's prescription diet-drug pills. As the Ohio Supreme Court held in Gallagher, a "defendant who asserts [the primary assumption of risk] defense asserts that no duty whatsoever is owed to the plaintiff." 659 N.E.2d at 1236. This means, a court of appeals subsequently explained, that a "plaintiff's conduct is immaterial in establishing primary assumption of risk because the focus must remain on the lack of duty owed by the defendant." Gehri v. Capital Racing Club, Inc., No. 96-10-1307, 1997 WL 324175, at *4 (Ohio Ct. App. 10th Dist. June 12, 1997). While not directly addressed by the Ohio Supreme Court in the years since Gallagher, the majority of Ohio's various intermediate courts of appeals have held that the focus is on whether defendant owed a duty to plaintiff and not on plaintiff's conduct. See, e.g., Konesky v. Wood County Agric. Soc., 844 N.E.2d 408, 411 (Ohio Ct. App. 6th Dist. 2005); Brewster v. Fowler, No. 99-T-0091, 2000 WL 1566528, at *3 (Ohio Ct. App. 11th Dist. Oct. 13, 2000); Gehri, 1997 WL 324175; Gum v. Cleveland Elec. Illuminating Co., No. 70833, 1997 WL 67753, at *4 (Ohio Ct. App. 8th Dist. Feb. 13, 1997).²

2. While it is true, as defendant argues, that Siglow v. Smart, 539 N.E.2d 636, 640 (Ohio Ct. App. 9th Dist. 1987), applied a "reasonable" primary assumption of risk defense that looked at the conduct of the plaintiff, we feel bound to follow the Ohio Supreme Court's unequivocal statements that the primary assumption of risk defense is simply the recognition that defendant owed plaintiff no duty. See, e.g., Gallagher, 659 N.E.2d at 1236; Anderson, 451 N.E.2d at 784.

Thus, plaintiff's individual decision to ingest Redux after being warned about the risk of PPH by Dr. Gardner has no bearing on the application of the primary assumption of risk doctrine on plaintiff's negligence claim. The issue is whether Wyeth owed plaintiff a duty. Here, Wyeth conceded at oral argument that it did in fact owe plaintiff some duty. Whatever the merits of defendant's argument that it fulfilled that duty by warning Dr. Gardner of the risk of PPH, the defense of primary assumption of risk does not apply.

The defense of primary assumption of risk defense only applies to "inherently dangerous" activities. See, e.g., Holmes v. Health & Tennis Corp. of Am., 659 N.E.2d 812, 813 (Ohio Ct. App. 1st Dist. 1995). The activity undertaken must involve "such obvious and unavoidable risks that no duty of care is said to attach." Gum, 1997 WL 67753, at *4. Wyeth has pointed to no case under Ohio law where the primary assumption of risk doctrine has been applied to a claim of negligence based on the consumption of a prescription drug. Nevertheless, Wyeth contends the law is unsettled and that the court should follow the lead of Siglow and examine the reasonableness of plaintiff's decision. "Where a question of state law is unsettled, we must predict the [Ohio] Supreme Court's resolution of the issue, giving consideration to applicable decisions of the intermediate appellate state courts." Franklin Prescriptions, Inc. v. New York Times Co., 424 F.3d 226, 341 (3d Cir. 2005). The cases where courts in Ohio have applied the primary assumption of risk

doctrine have involved patently obvious dangers inherent to particular activities. These include breaking a hand in the ensuing conflict after rushing to the aid of a neighbor fending off a home intruder in Siglow, getting cut while using a table saw in Brewster, or crashing a motorcycle while driving intoxicated in Cole v. Broomsticks, Inc., 669 N.E.2d 253 (Ohio Ct. App. 1st Dist. 1995). Again, no case has included the consumption of FDA-approved prescription drugs in this list of hazardous and otherwise dangerous activities. In the face of the Ohio Supreme Court's admonition in Gallagher that a "trial court must proceed with caution when contemplating whether primary assumption of risk completely bars a plaintiff's recovery," we predict that that court would not extend the bar of primary assumption of risk to the case at hand. See Gallagher, 659 N.E.2d at 1237.

We find as a matter of law that because Wyeth owed plaintiff a duty, the primary assumption of risk doctrine cannot bar plaintiff's negligence claim in this matter. Accordingly, the motion for summary judgment on plaintiff's negligence claim must be denied and the cross-motion of plaintiff for an order striking Wyeth's assumption of risk defense must be granted for the negligence claim. Wyeth is barred from asserting primary assumption of risk as a defense to plaintiff's negligence claim.

In addition, Wyeth argues that plaintiff's strict liability claim for design defect is also barred because plaintiff primarily assumed the risk of ingesting Redux. Though

it is considered an outgrowth of negligence law, products liability law in Ohio has "consistently been regarded as complimentary, but distinct." Bowling v. Heil, 511 N.E.2d 373, 375 (Ohio 1987). Nevertheless, it appears Wyeth conflates the defense of "primary assumption of risk" in a negligence action with the defense of "assumption of risk" in a strict product liability action. While implied assumption of risk merged with the defense of contributory negligence for claims based on theories of negligence, as the court found in Anderson, the assumption of risk defense can serve as a complete bar to recovery against certain claims in strict product liability. The Ohio Supreme Court, in two cases decided on the same day, made clear that these two assumption of risk defenses are distinct.

First, in Bowling v. Heil, the court held that principles of comparative negligence and fault have no application to products liability cases based on strict liability. 511 N.E.2d at 380. However, the court was clear that "an otherwise strictly liable defendant has a complete defense if the plaintiff voluntarily and knowingly assumed the risk occasioned by the defect." Id. at 377. In Onderko v. Richmond Mfg. Co., the companion case to Bowling, the court further explained that "[v]oluntary and unreasonable assumption of a known risk posed by a product constitutes an absolute bar to recovery in a products liability action based upon strict liability." 511 N.E.2d 388, 391 (Ohio 1987).

In Carrel v. Allied Prods. Corp., the Ohio Supreme Court found that the defense of assumption of risk to a product liability action based on strict liability requires that defendant "establish that the plaintiff knew of the condition, that the condition was patently dangerous, and that the plaintiff voluntarily exposed himself or herself to the condition." 677 N.E.2d 795, 800 (Ohio 1997). In contrast to the primary assumption of risk defense to a negligence action, which presents only a question of law, "[o]rdinarily, assumption of the risk is a question of fact, to be resolved by the factfinder" on claims of strict products liability. Id. In the case before us, summary judgment would be inappropriate if a "reasonable jury could determine that [plaintiff] did not appreciate or voluntarily encounter the risk associated with" taking Redux. Id. at 801.

The undisputed record before us on this point is lean. There is no dispute that plaintiff was given some warning by Dr. Gardner about the potential of developing PPH as a result of taking Redux and that she was aware of the seriousness of the disease. The record shows, however, that she was told only that there was "a risk." Risks associated with medication are intrinsically different than other product risks encountered in daily life in that they are not readily apparent. For example, Bowling involved a wrongful death action where the deceased was crushed to death by a faulty dump truck bed. 511 N.E.2d at 374. The risks inherent in putting one's body underneath a raised

truck bed are simply different than taking a pill each day, even if the ultimate consequences may be just as deadly.

On the record before the court, we think the question of whether plaintiff's strict liability claim for design defect is barred by her assumption of the risk is a question of fact for a jury. Summary judgment on this fact-specific question is generally disfavored in Ohio. Carrel, 677 N.E.2d at 800. We cannot say without more that the consumption of Redux was a "patently dangerous" activity as the defense requires. In addition, from the record before us, we think that there is at least the possibility that a "reasonable jury could determine that [plaintiff] did not appreciate or voluntarily encounter the risk associated with" taking Redux. Id. at 801.

Accordingly, the motion for summary judgment on plaintiff's strict liability claim for design defect must be denied. In addition, the cross-motion of plaintiff for an order striking Wyeth's assumption of risk defense on the strict liability claim for design defect must be also be denied.

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ORDER

AND NOW, this 21st day of April, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Wyeth for summary judgment based on plaintiff's assumption of risk is DENIED; and

(2) the cross-motion of plaintiff Judith Mingus for an order striking Wyeth's assumption of risk defense is GRANTED in part. Wyeth is barred from asserting primary assumption of risk as a defense to plaintiff's negligence claim.

BY THE COURT:

/s/ Harvey Bartle III

C.J.