

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

CHARLES BOWMAN : CIVIL ACTION  
 :  
 v. :  
 :  
 AMERICAN MEDICAL SYSTEMS, INC. : NO. 96-7871

**MEMORANDUM AND FINAL JUDGMENT**

HUTTON, J.

October 7, 1998

Presently before the Court are the Motions for Judgment on the Pleadings and for Stay Arbitration by Defendant American Medical Systems, Inc. (Docket No. 5), Plaintiff Charles Bowman's Response thereto (Docket No. 6) and Defendant's Reply thereto (Docket No. 9). For the foregoing reasons, the Defendant's Motion for Judgment on the Pleadings is **GRANTED**.<sup>1</sup>

**I. BACKGROUND**

This is a products liability case. The instant action arises from the implantation of a Dynaflex self contained Penile Prosthesis (the "Prosthesis") designed and manufactured by American Medical Systems, Inc. ("AMS" or "Defendant") in the Plaintiff Charles Bowman. AMS, a Minnesota corporation doing business in the Commonwealth of Pennsylvania and supplying products for use in the Commonwealth, manufactures, tests,

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<sup>1</sup> As discussed more fully below, Defendant's Motion for Stay Arbitration is denied as moot. See infra Part II.D.

promotes, advertises and supplies medical devices including the Dynaflex self contained Penile Prosthesis. Pl.'s Am. Compl. at ¶¶ 2, 5. Charles Bowman, a resident of Philadelphia, Pennsylvania suffers from male penile impotence. Id. at ¶¶ 1, 6. As a consequence of his impotency, on June 6, 1994, the Plaintiff underwent surgery to have the Prosthesis implanted in him. Id. at ¶ 6. Bowman asserts that his physician, Dr. Jerry Cates, performed the procedure at Episcopal Hospital. Id. at ¶ 7. The Plaintiff alleges that sometime in March of 1995, the Prosthesis "failed and ceased to function normally" and "was broken on the right side." Id. at ¶¶ 8, 9. On June 5, 1995, the Plaintiff underwent surgery to remove and replace the prosthesis. Pl.'s Am. Compl. ¶ 16.

According to Bowman, he requested that Dr. Cates preserve the removed Prosthesis for testing. Id. at ¶ 17. More specifically, the Plaintiff asserts that "on or about April 5, 1995," Plaintiff's counsel wrote a letter to Dr. Cates asking that the Prosthesis be preserved after removal so that "it can be examined by appropriate engineers to determine the cause of it breaking." Id. Dr. Cates nevertheless spoliated the removed Prosthesis before any examination could be performed. Pl.'s Answer ¶ 11. Dr. Cates is now dead. Id. at ¶ 12.

On May 31, 1996, Bowman filed his complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania. On

November 26, 1996, AMS removed this case to the United States District Court for the Eastern District of Pennsylvania. The Plaintiff filed an Amended Complaint on August 16, 1997, alleging claims of strict liability (Count I), breach of warranty (Count II), and negligence (Count III) against Defendant AMS and spoliation of evidence (Count IV) against Episcopal Hospital and Richard L. Morris, executor of the estate of Jerry Cates, M.D., deceased. On April 3, 1998, AMS filed the instant motion, seeking to dismiss Counts I through III of the Plaintiff's complaint under Federal Rule of Civil Procedure 12(c), and for stay of arbitration pending decision on the motion for judgment on the pleadings. For the foregoing reasons, the Defendant's motions are granted in part and denied in part.

## **II. DISCUSSION**

### **A. Standard of Review Under Rule 12(c)**

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D.Pa. 1995), aff'd, 91 F.3d 125 (3d Cir.) (table), cert. denied, 117 S. Ct. 435 (1996); Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D.Pa. 1993). Consequently, judgment under Rule 12(c) will only be granted where the moving party has clearly established that no

material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Regalbuto, 937 F. Supp. at 377 (citing Inst. for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991)). Additionally, the district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Regalbuto, 937 F. Supp. at 377 (citing Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)).

#### **B. Plaintiff's Claims**

In Count I of his amended complaint, Bowman alleges that AMS is strictly liable to him for allowing the Prosthesis to leave its custody and control containing defects, which rendered it unsafe, unreasonably dangerous and prone to early failure. Pl.'s Am. Compl. at ¶ 21. Bowman further alleges that as a result of the Prosthesis failing prematurely, he suffered injuries and damages. Id. Pennsylvania has adopted § 402A of the Restatement (Second) of Torts, imposing strict liability on the manufacturers and sellers of defective products. See Griggs v. BIC Corp., 981 F.2d 1429, 1431 (3d Cir.1992); Webb v. Zern, 422 Pa. 424, 220 A.2d 853, 854 (Pa. 1966). To sustain a strict product liability claim a plaintiff must prove that the product was defective, that the defect existed at the time the product

left the defendant's control and that the defect in the product proximately caused plaintiff's injuries. Griggs, 981 F.2d at 1432 (citing Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893, 898 (Pa. 1975)); Walton v. Avco Corp., 530 Pa. 568, 575 (Pa. 1991); Roselli v. Gen. Elec. Corp., 410 Pa.Super. 223, 228 (Pa. Super. Ct. 1991).

Count II of Bowman's amended complaint alleges that AMS expressly and impliedly warranted that the prosthesis "would be fit for its reasonable and intended use and would not contain defects in design or manufacture which made it unsafe." Pl.'s Am. Compl. at ¶ 24-25. To establish a breach of an implied warranty of merchantability or a warranty of fitness for a particular purpose, a plaintiff must show that the product as purchased from the defendant was defective. See Bardaji v. Flexible Flyer Co., No. CIV.A.95-0521, 1995 WL 568483, \*2 (E.D.Pa. Sep. 25, 1995) (citing Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992); Stratos v. Super Sagless Corp., No. CIV.A.93-6712, 1994 WL 709375, \*8 (E.D.Pa. Dec. 21, 1994).

In Count III of his amended complaint, Bowman alleges that AMS was negligent in failing to properly manufacture, inspect, design and test the Prosthesis and that such negligence caused the Prosthesis to fail. Pl.'s Am. Compl. at ¶ 28. To sustain a product liability claim based on negligence, a

plaintiff must prove that the product was defective, that the defect proximately caused an injury and that defendant failed to exercise due care in designing, manufacturing or supplying it. McKenna v. E.I. DuPont DeNemours and Co., No. CIV.A. 87-2233, 1988 WL 71271, \*2 (E.D.Pa. Jun. 30, 1988); Von Scoy v. Powermatic, 810 F. Supp. 131, 135 (M.D.Pa. 1992).

Defendant correctly contends that the key piece of evidence in this case, the Prosthesis, has been completely destroyed. Contrary to defendant's assertion, however, the absence of any physical evidence does not necessarily foreclose the Plaintiff's claim. A plaintiff may prove a defect through circumstantial evidence of a malfunction. Rogers v. Johnson & Johnson Prods., Inc., 523 Pa. 176, 181 (Pa. 1989); Surowiec v. Gen. Motors Corp., 448 Pa. Super. 510, 513-14 (Pa. Super. Ct. 1996).

### **C. Spoliation of Evidence**

In the instant case, it is undisputed that the Prosthesis is lost. Thus, the Defendant argues that as Plaintiff's destruction of the Prosthesis denied it the opportunity to conduct its own investigation as to the cause of the failure of the Prosthesis, it is entitled to judgment on the pleadings as a sanction for the spoliation of evidence. A party which reasonably anticipates litigation has an affirmative duty

to preserve relevant evidence. Baliotis v. McNeil, 870 F.Supp. 1285, 1290 (M.D.Pa. 1994). Where evidence is destroyed, sanctions may be appropriate, including the outright dismissal of claims, the exclusion of countervailing evidence, or a jury instruction on the "spoliation inference." This inference permits the jury to assume that "the destroyed evidence would have been unfavorable to the position of the offending party." Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994). The appropriate sanction will depend on the facts and circumstances of the case. Id. at 81.

The Third Circuit, in Schmid, set forth a balancing test as to whether sanctions should be appropriate where evidence is lost. Schmid, 13 F.3d. at 81. The Schmid court held that the key considerations in a product liability case in deciding whether to sanction the plaintiff for destruction of the product are: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. Id., at 79. Schmid left open the question of whether the spoliation analysis was "a matter of substantive Pennsylvania products liability law or federal evidentiary law." Id., at 78. The Supreme Court of

Pennsylvania has now removed all doubt by adopting the Schmid spoliation standard as the law of Pennsylvania. See Schroeder v. Commonwealth of Pennsylvania, Dept. of Transp., 710 A.2d 23, 27 (Pa. 1998).

### **1. The Degree of Fault of Plaintiff**

A plaintiff who brings an action alleging an injury as a result of a defective product has a duty to preserve the product for defense inspection. Roselli, 410 Pa.Super. at 228 (affirming grant of summary judgment where fragments of product allegedly defectively manufactured were lost by plaintiff and their attorney); see also Austin v. Nissan Motor Corp., U.S.A., No. CIV.A.95-1464, 1996 WL 117472, (E.D.Pa. Mar. 12, 1996) (plaintiffs, who had retained counsel prior to the spoliation of evidence, were responsible for failure to preserve the allegedly defective seat even though the seat was actually discarded by the garage where it had been sent for repairs).

In his memorandum, the Plaintiff states without elaboration that "[c]learly [he] was not at fault here." This Court must disagree. Bowman must bear some degree of fault in the loss of the Prosthesis. Like plaintiffs in Roselli and Austin, Bowman had legal counsel before spoliation of evidence occurred. The evidence of record shows that the Plaintiff had his counsel instruct Dr. Cates to preserve the evidence.

Nevertheless, Dr. Cates spoliated the Prosthesis upon removing it from Bowman. Now that Dr. Cates is dead, it is impossible to know why he destroyed the removed Prosthesis. Even though no evidence suggests that the Plaintiff acted in bad faith, the evidence was actually discarded by his doctor, and not by Bowman himself, this "in no way relieves [his] responsibility." See Austin, 1996 WL 117472, at \*2.

## **2. The Degree of Prejudice to the Defendant**

In determining the degree of prejudice to a defendant in a products liability case, the Court must consider the legal theory of the Plaintiff. "[T]he court must distinguish a manufacturing defect claim where the plaintiff alleges the particular product causing the injuries was defectively manufactured, a defect not affecting other products of the same model, from a design defect case where the plaintiff claims injuries caused by a defect inherent in the design common to all products of that model." Tripp v. Ford Motor Co., No. CIV.A.95-2661, 1996 WL 377122, at \*3 (E.D.Pa. Jul. 3, 1996). In Schmid, the Third Circuit observed that matters relating to design defects can be determined as well or better by inspecting and testing several products of the same design than by inspecting the product involved in the accident. See Schmid, 13 F.3d at 79-80 (reversing summary judgment based on spoliation of evidence in

design defect action); see also Austin, 1996 WL 117472, at \*3 (denying summary judgment in a design defect action where the entire vehicle, including the allegedly defective driver's seat, had been lost).

The prejudice to a defendant from spoliation of evidence is greater in a manufacturing defect action where the alleged defect is unique to a particular product, and which is also the primary source of evidence. "Under Pennsylvania law, in a case in which plaintiff does not allege a defect in all of the defendant's products, a defendant in a products liability case is entitled to summary judgment when loss or destruction of evidence deprives the defense of the most direct means of countering plaintiff's allegations." Schmid, 13 F.3d at 80 (quoting Lee v. Boyle-Midway Household Prods, Inc., 792 F. Supp. 1001, 1005 (W.D.Pa. 1992)).

In his amended complaint, the Plaintiff asserts his claim under a "malfunction theory," which is analogous to bringing a case under a manufacturing defect theory. Under the "malfunction theory," Bowman must establish that the Prosthesis was defective at the time it left AMS's control. Taylor v. Sterling Winthrop, Inc., No. CIV.A.93-3701, 1995 WL 590160, \*2 (E.D.Pa. Oct. 5, 1995); Roselli, 410 Pa.Super. at 228. In the instant case, AMS has had no opportunity to inspect the Prosthesis. No measurements, videos or photographs of the

Prosthesis as well as any of its component parts exist. AMS argues that investigation into alternative theories of causation has been foreclosed by the spoliation of evidence. First, AMS does not have the opportunity to determine whether the Prosthesis had suffered damage between the time of manufacture and the time of the implantation procedure. Second, inspection of the Prosthesis might have permitted AMS to determine whether the alleged failure of the Prosthesis was caused by improper implantation of the device. Third, Dr. Cates, the doctor who performed both the procedures to implant and remove the Prosthesis, is now dead. Thus, the Court finds that AMS has been severely prejudiced by the spoliation of the Prosthesis. Compare Harley v. Mikita U.S.A., Inc., No. CIV.A. 94-4981, 1998 WL 156973, at \* 13 (E.D. Pa. Apr. 7, 1998) (finding the degree of prejudice was low where defendant "had ample evidence of the saw's condition" prior to the plaintiff's spoliation of the key evidence).

### **3. Lesser Sanctions; Deterrence**

The courts should "'select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.'" Schmid, 13 F.3d at 79 (citing Jamie S. Gorelick, Steven Marzen and Lawrence Solum, *Destruction of Evidence*, § 3.16, at 117 (1989)). In the instant

case, Dismissal of the Plaintiff's action is the appropriate sanction. It is clear that the first two prongs of Schmid have been satisfied. First, Bowman bears responsibility for spoliation of the Prosthesis, even though Plaintiff's counsel advised Dr. Cates to preserve the removed Prosthesis for future litigation. Second, the degree of prejudice suffered by AMS is prohibitively high given that the entire Prosthesis has been destroyed and no examination of the Prosthesis was ever performed. The prejudice to the Plaintiff due to the destruction of the product is exacerbated even further in the context of the Plaintiff's "malfunction theory." Finally, the third element of the Schmid test also dictates that Bowman's action be dismissed on the pleadings. A lesser sanction such as a jury instruction on the spoliation inference is not appropriate given that the Plaintiff brings his claim under a "malfunction theory," no physical evidence exists and Dr. Cates is now deceased. Without the opportunity to examine the Prosthesis or to question Dr. Cates, the Defendant is unable to prove any secondary causes for the failure of the Prosthesis or present any evidence related to causation. Thus, because any lesser sanction would be inadequate, judgment on the pleadings is warranted for the Defendant on the basis of spoliation of evidence.

The Court recognizes that dismissing Plaintiff's action is a 'drastic' measure, and should be used only as a 'last

resort.'" Austin, 1996 WL 117472, at \*3 (citing Schmid, 13 F.3d at 79). Nonetheless, no sanction other than outright dismissal is appropriate given the culpability of the Plaintiff for the spoliation of the evidence and the impossible task Defendant would face defending against this action as a result of it. For the foregoing reasons, the Court will grant the Defendant's motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

**D. Stay Arbitration**

This Court referred the instant case to arbitration on July 28, 1998. An arbitration hearing was held on that same day and an arbitration award was entered. Accordingly, the Defendant's motion to stay arbitration is denied as moot.

This Court's Final Judgment follows.

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

CHARLES BOWMAN : CIVIL ACTION  
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v. : :  
: :  
AMERICAN MEDICAL SYSTEMS, INC. : NO. 96-7871

**FINAL JUDGMENT**

AND NOW, this 7th day of October, 1998, upon consideration of the Motions for Judgment on the Pleadings and for Stay Arbitration by Defendant American Medical Systems, Inc. (Docket No. 5), Plaintiff Charles Bowman's Response thereto (Docket No. 6) and Defendant's Reply thereto (Docket No. 9), the Defendant's Motion for Judgment on the Pleadings is **GRANTED**.

IT IS FURTHER ORDERED that:

(1) **JUDGMENT** is entered in **FAVOR** of the Defendant and **AGAINST** the Plaintiff; and

(2) Defendant's Motion for Stay Arbitration is denied as moot.

BY THE COURT:

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HERBERT J. HUTTON, J.