

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

WAYNE A. WIGGINS : CIVIL ACTION
 :
 v. :
 :
 BOSTON SCIENTIFIC CORPORATION : NO. 97-7543

MEMORANDUM AND ORDER

HUTTON, J.

January 7, 1999

Presently before this Court are the Defendant Boston Scientific Corporation's Motions in Limine Regarding the following: Any Testimony Concerning Plaintiff's Alleged Physical Damage (Docket No. 17), Plaintiff's Expert Report on Causation and Damage (Docket No. 18), Any Evidence Concerning Plaintiff's Alleged Emotional Damage (Docket No. 19), and Evidence Concerning Product Liability (Docket No. 20); and the Plaintiff's Answer to the Motions in Limine of the Defendant (Docket No. 23). For the foregoing reasons, the Defendant's Motions are **GRANTED**.

I. BACKGROUND

This is a products liability case. On November 19, 1997, Wayne A. Wiggins ("Plaintiff" or "Wiggins") underwent a cardiac catheterization which uncovered a blocked large obtuse marginal vessel on his heart. In response, the treating cardiologist, Frank C. McGeehin, III, M.D., performed angioplasty and a stenting procedure using a guide-wire manufactured and distributed by Boston

Scientific Corporation ("Defendant" or "Boston Scientific") and its subsidiaries. The procedure itself was successful. However, at the conclusion of the procedure, upon withdrawal of the guide-wire, it fractured and remained inside the heart. Dr. McGeehin decided not to remove the guide-wire.

On December 15, 1997, the Plaintiff filed the instant suit alleging negligence and strict product liability pursuant to the Restatement (Second) Torts, § 402(a). Wiggins alleges that Boston Scientific is strictly liable to him for allowing the guide-wire to break and remain in his heart during a routine procedure. Wiggins further alleges that as a result of the guide-wire breaking and remaining in his heart, there is present injury involving a foreign body trapped in a heart vessel, which is thrombogenic (clot producing) and to a reasonable medical certainty will likely cause the vessel to occlude (clot).

The Plaintiff concedes, however, that he has suffered no current symptoms as a result of the guide-wire remaining in his heart. In addition to seeking "an award of the expenses made necessary by the in-patient hospitalization which resulted from the failed catherization,"¹ the Plaintiff is seeking compensation for

¹This request is directly in conflict with Plaintiff's representation in his complaint that "the proximal portion of this obtuse marginal vessel was successfully 'stented' and the superior ramus of the obtuse marginal vessel was successfully dilated with angioplasty." (See Pl.'s Complaint ¶ 9.) Moreover, Plaintiff has presented no evidence of additional expenses incurred in the catherization procedure due to the fracture of the guide-wire.

"possible future effects" of this event. Specifically, the Plaintiff is requesting future damages as follows: (1) lost future earning capacity related to the possible disability which could result from the medical consequences of this episode; and (2) recovery of anticipated future pain and suffering as well as past suffering related to fears about his future.

In his pretrial memorandum, the Plaintiff indicated that he would use at trial the following evidence: medical expert to testify as to causation and damages, mechanical engineer to testify concerning products liability and Plaintiff's testimony alleging he suffers from emotional distress and anxiety about his future. On November 23, 1998, the Defendant filed the present motions seeking to preclude the use of such evidence. On December 5, 1998, the Plaintiff filed his response in opposition to the Defendant's motions.

II. DISCUSSION

A. Defendant's Motions in Limine

1. Evidence Concerning Future Harm From Physical Injury

In its first Motion in Limine, the Defendant seeks to preclude "any and all evidence concerning future harm from physical injury." (Def.'s Mot. in Lim. Regarding Any Testimony Concerning Plaintiff's Alleged Physical Damage at 7.) The Defendant argues that for the Plaintiff to recover under a product liability claim, he must demonstrate physical harm of the human body. The Defendant

also asserts that the Plaintiff may not maintain a tort action for negligence absent an identifiable compensable injury.

The report of Dr. McGeehin, Plaintiff's expert, provides as follows:

Due to the foreign body (wire tip) in that vessel, this is a thrombogenic problem which, to a reasonable medical certainty, will likely cause that artery to close, and a possible myocardial infarction to occur.

(Id. at 8.) Dr. McGeehin proposes to testify regarding increased risk of future harm--to a reasonable medical certainty the thrombogenic condition will block the vessel, and could, as a possible future consequence, cause a heart attack. Such testimony is not permissible under Pennsylvania law. The injury in an enhanced risk claim is "inherently speculative," and thus not permissible. See, e.g., Restatement Second of Torts § 402A (requiring plaintiff to prove in a products liability case "physical harm" which § 7 defines as "physical impairment of the human body"); Barnes v. American Tobacco Co., Inc., 161 F.3d 127, 139 (3d Cir. 1998) (making the distinction between medical monitoring which is a compensable injury and a cause of action for increased risk of future harm which is not compensable); Simmons v. Pacor, Inc., 543 Pa. 664 (Pa. Apr. 4, 1996) (denying plaintiffs recovery other than medical monitoring for asymptomatic pleural thickening because inter alia plaintiffs demonstrated no physical injury).

In Simmons, the Pennsylvania Supreme Court held that a plaintiff asserting a non-cancer, asbestos-related claim could not recover for any part of the damages relating to cancer. Simmons, 543 Pa. at 678, 674 A.2d at 239. This holding abolishes claims for increased risk and fear of cancer where cancer is not present, thus eliminating the recovery of damages based on a speculative future event, the possible occurrence of cancer. Id. at 676-77, Similarly, a claim for enhanced risk of heart failure and fear of heart failure due to the existence of a foreign object in a vessel of the heart is not actionable if no symptoms have yet developed. The Plaintiff is therefore precluded from testifying about any increased risk of future harm.

2. Plaintiff's Expert Report on Causation and Damage

In its second Motion in Limine, the Defendant seeks to preclude "plaintiff's expert report [] and plaintiff's expert [] from testifying that the fractured wire may cause plaintiff damage." (Def.'s Mot. in Lim. Regarding Expert Report on Causation and Damage at 4.) According to the Plaintiff, Dr. McGeehin will testify that the wire may have caused a "silent infarct," that is, the death of heart muscle tissue without appreciable symptomology. Plaintiff also asserts that Dr. McGeehin will state that this condition "to a reasonable medical certainty, will likely cause that artery to close, and a possible myocardial infarction to occur." For the reasons stated above, the Plaintiff is precluded

from introducing evidence that the fractured guide-wire may cause future damage; for example, may cause an artery to close or may cause a myocardial infarction to occur. See supra Part II.A.1.

3. Evidence Concerning Plaintiff's Alleged Emotional Damage

In its third Motion in Limine, the Defendant seeks to preclude "any evidence whatsoever in support of his emotional damage claim." (Def.'s Mot. in Lim. Regarding Concerning Plaintiff's Alleged Emotional Damage at 3.) The Defendant argues that for the Plaintiff to recover damages for injury resulting from fright, nervous shock, mental or emotional disturbances or distress unless accompanied by physical injury or physical impact.

A plaintiff cannot prove emotional distress unless physical injury or impact accompanies it. See e.g., Simmons v. Pacor, 674 A.2d 232 (Pa. 1996); Kanub v. Gotwalt, 220 A.2d 646 (Pa. 1966); In re Paoli Railroad PCB Litigation, 706 F. Supp. 358 (E.D. Pa. 1988). In Simmons, the plaintiffs had sued various defendants because of exposure to asbestos while serving in the military or in civilian employment. While each of the plaintiffs had asbestos caused pleural thickening, the functioning of their lungs was not impaired, and none of the plaintiffs was suffering from cancer. Nonetheless, plaintiffs claimed they were entitled to damages because "they have medically significant diseases that will never improve, and may worsen." Id. at 236. Rejecting this argument, the Pennsylvania Supreme Court held that "asymptomatic pleural

thickening is not a compensable injury which gives rise to a cause of action." Id. at 237. The Court observed that the plaintiffs were free to initiate lawsuits "when symptoms and physiological impairment actually develop." Id. In holding as it did, the Court explained, "It is the general rule of this Commonwealth that there can be no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress unless they are accompanied by physical injury or physical impact." Id. at 238.

Plaintiff argues that the rule enumerated by the Pennsylvania Supreme Court in Simmons is not applicable because Wiggins has suffered an injury. Wiggins attempts to distinguish his condition from the condition suffered by the plaintiff in Simmons--plural thickening caused by asbestos. In the instant matter, Plaintiff asserts that the guide-wire is thrombogenic and is currently accumulating clotting blood--although, he admits that his condition is asymptomatic. Plaintiff's argument is not persuasive.

The Court of Appeals faced a situation analogous to the present case in Angus v. Shirley, 989 F.2d 142 (3d Cir.1993). There a plaintiff alleged intentional infliction of emotional distress against the manufacturer of a valve implanted in her heart. While her valve had not malfunctioned, she had learned that it was at significant risk and could cause her death. As a result,

she claimed to have suffered severe mental anguish, with resulting "physical ailments" such as sleep disturbances, panic attacks, breathing difficulties, headaches, and insomnia. Id. at 144. The Angus court affirmed the dismissal of the action on unrelated grounds." Id. at 148. Nonetheless, the Court in Angus noted that the plaintiff had not suffered from a direct physical injury and thus could not state a cause of action for intentional infliction of emotional distress. Id. at 147. Similarly, Wiggins has not suffered from a compensable physical injury. Although the guide-wire was not intended to remain in Wiggins, he currently suffers no objective and identifiable injury. Accordingly, the Plaintiff is precluded from introducing evidence of emotional damage.

4. Evidence Concerning Product Liability

In its final Motion in Limine, the Defendant seeks to preclude "plaintiff from proceeding on a product liability cause of action against the defendant." (Def.'s Mot. in Lim. Regarding Concerning Plaintiff's Alleged Emotional Damage at 3.) Pennsylvania substantive law controls this diversity products liability action. 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). As this Court has already determined that Wiggins has not yet suffered any compensable injuries, the Plaintiff can not establish a prima facie case of products liability. Accordingly, the Plaintiff is precluded from introducing any evidence concerning his products liability claim.

B. Statute of Limitations

Plaintiff argues that the statute of limitations required that he go forward now and not at some future time. This Court must disagree. In Pennsylvania, a cause of action to recover damages for injuries to the person caused by the wrongful act or neglect or unlawful violence or negligence of another must be commenced within two years. 42 Pa.C.S. § 5524(2). In Pennsylvania, courts have ameliorated the harsh effect of the statute of limitations by adopting the "discovery rule." When the rule is applied, the statute of limitations does not begin to run until the plaintiff has discovered his injury, or, in the exercise of reasonable diligence, should have discovered his injury. Burnside v. Abbot Laboratories, 351 Pa. Superior Ct. 264, 291, 505

A.2d 973, 987 (1985). Injury occurs "when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable." Ayers v. Morgan, 397 Pa. 282, 290, 154 A.2d 788, 792 (1959).

Such a rule is necessary to prevent the harsh result of the statute running out during a period of time in which a plaintiff has no way of discovering an injury, e.g., the time after an operation during which a foreign object, erroneously left in a patient's operative site, produces no symptoms. Because this Court has determined that Wiggins has not yet suffered an injury that is physically objective and ascertainable, the statute of limitations has not yet begun. Accordingly, the applicable two year statute of limitations will not begin to run until the Plaintiff knows or has reason to know about the existence of an objective and ascertainable injury.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of January, 1999, upon consideration of the Defendant Boston Scientific Corporation's Motions in Limine Regarding the following: Any Testimony Concerning Plaintiff's Alleged Physical Damage (Docket No. 17); Plaintiff's Expert Report on Causation and Damage (Docket No. 18); Any Evidence Concerning Plaintiff's Alleged Emotional Damage (Docket No. 19) and Evidence Concerning Product Liability (Docket No. 20); and the Plaintiff's Answer to the Motions in Limine of the Defendant (Docket No. 23), IT IS HEREBY ORDERED that the Defendant's Motions are **GRANTED**.

IT IS FURTHER ORDERED that:

(1) the Plaintiff SHALL NOT BE ALLOWED to offer Testimony Concerning Plaintiff's Alleged Future Physical Damage;

(2) the Plaintiff SHALL NOT BE ALLOWED to offer Plaintiff's Expert Report on Causation of Future Damage;

(3) the Plaintiff SHALL NOT BE ALLOWED to offer Evidence Concerning Plaintiff's Alleged Emotional Damage; and

(4) the Plaintiff SHALL NOT BE ALLOWED to offer Evidence
Concerning Product Liability.

BY THE COURT:

HERBERT J. HUTTON, J.