

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

PATRICK WHITE,)
)
Plaintiff,)
)
v.)

C.A. No. N10C-04-061 CLS

APP PHARMACEUTICALS, LLC;)
BAXTER HEALTHCARE)
CORPORATION; CARDINAL)
HEALTH, INC.; HOSPIRA INC.;)
JOHN DOE CORPORTIONS 2 through)
75 (a Fictitious name representing one)
or more corporations, companies,)
entities or persons engaged in the)
business of manufacturing, supplying,)
and/or distributing heparin products)
which were administered to PATRICK)
WHITE and RICHARD ROE (a)
fictitious name representing one or more)
legal entities who stand in the shoes of)
the defendants including the John Doe)
defendants, either as successor in)
interest, alter ego or by other equitable)
doctrine which makes them responsible)
for the defendants' liability,)
)
Defendants.)

Date Submitted: January 6, 2011

Date Decided: April 7, 2011

On Defendant APP Pharmaceuticals, LLC's Motion to Dismiss Plaintiff's First Amended Complaint, On Defendant Hospira, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, On Defendant Baxter Healthcare Corporation's Motion to Dismiss Plaintiff's First Amended Complaint, and On Defendant Cardinal Health 110, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint.

GRANTED in part and DENIED in part.

ORDER

Frederick B. Rosner, Esq., Brian L. Arban, Esq., 1000 N. West St., Suite 1200, Wilmington, DE 19801; Daniel R. Lapinski, Esq., Philip A. Tortoreti, Esq., Lynne M. Kizis, Esq., 90 Woodbridge Center Drive, Woodbridge, NJ 07095; Frances Tomes, Esq., 150 B Tices Lane, East Brunswick, NJ 08816; Neal Lewis, Esq., 9487 West State St., Orland, IN 46776. Attorneys for Plaintiff.

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Philip A. Rovner, Esq., Jonathan A. Choa, Esq., P.O. Box 951, Wilmington, DE 19899; Richard L. Berkman, Esq., R. David Walk, Jr., Esq., 2929 Arch St., Philadelphia, PA 19104. Attorneys for Defendant Baxter Healthcare Corporation.

Scott, J.

Introduction

Defendants APP Pharmaceuticals, LLC, Hospira, Inc., Cardinal Health 110, LLC, and Baxter Healthcare Corporation have each filed a motion to dismiss the Plaintiff's first amended complaint pursuant to Super. Ct. Civ. R. 8, 9, and 12. Since each motion essentially raises the same issues, with only a few additional arguments, they are decided simultaneously. This Court has reviewed the parties' submissions. For the reasons that follow the motions to dismiss the first amended complaint are granted in part and denied in part.

Defendant APP Pharmaceuticals, LLC filed a motion to dismiss Plaintiff's initial complaint. Since Plaintiff amended his initial complaint and Defendant APP Pharmaceuticals, LLC filed a motion to dismiss the first amended complaint, the motion to dismiss Plaintiff's initial complaint is MOOT.

Background

Plaintiff Patrick White ("Plaintiff" or "White") filed this products liability action against Defendants APP Pharmaceuticals, LLC ("APP"), Hospira, Inc. ("Hospira"), Baxter Healthcare Corporation ("Baxter"), and Cardinal Health 110, Inc.¹ ("Cardinal Health") (collectively "Defendants") for injuries he suffered as a result of receiving heparin. Allegedly, Defendants APP, Hospira and Baxter are manufacturers of heparin. Defendant Cardinal Health, along with the other

¹ Plaintiff improperly named Cardinal Health 110, Inc. as defendant Cardinal Health, Inc.

defendants, is alleged to have supplied, distributed, marketed and sold heparin in Delaware.

Plaintiff is a citizen of this state, residing in Newark. Defendant APP is a Delaware corporation with its principal place of business located in Schaumburg, IL. Defendant Hospira is a Delaware corporation with its principal place of business in Lake Forest, IL. Defendant Baxter is a Delaware corporation with its principal place of business in Deerfield, IL. Defendant Cardinal Health is an Ohio corporation with its principal place of business in Dublin, OH.

On or around March 26, 2008, Plaintiff was admitted to Christiana Hospital in Newark after being diagnosed with constrictive pericarditis. Plaintiff was administered heparin as part of his treatment. Heparin is a prescription blood thinner, in a class of medications called anticoagulants. It is used to prevent the formation of blood clots and to prevent extension of already existing blood clots. It is used to treat certain blood vessel, heart and lung conditions, and used during various surgeries and kidney dialysis. Plaintiff received heparin in doses of 5,000 units/ml, 100 units/ml, 25,000 units/250 ml, 1,000 units/ml, and 10 units/ml. Since Heparin has a short half-life it must be administered continuously, either intravenously or subcutaneously, approximately every hour.

Heparin-induced thrombocytopenia (“HIT”) is a side effect of heparin. HIT develops from a patient’s reaction to the heparin, causing an accumulation of

heparin antibodies. HIT attacks platelets in the blood, and sometimes the lining of blood vessels. It causes, rather than treats, blood clots.

After receiving heparin, Plaintiff's platelet counts decreased from 171 to 48 and HIT antibodies were found in his blood. Plaintiff was subsequently diagnosed as suffering from HIT. As a result, Plaintiff developed multiple blood clots, multiple thrombi, deep vein thrombosis, gangrenous limbs, bilateral ischemic limbs, and necrotic extremities. Plaintiff underwent bilateral amputation of both his feet on or around June 13, 2008 and a partial amputation of his hand on or around June 18, 2008.

Plaintiff alleges the Defendants manufactured, created, designed, tested, labeled, sterilized, packaged, supplied, marketed, sold, advertised, and otherwise distributed heparin during the time he was administered the drug. Plaintiff further alleges the Defendants knew or had reason to know of the increased risk of HIT associated with heparin prior to his receiving it. In his first amended complaint Plaintiff raises claims of strict liability for failure to warn, strict liability in the design defect, negligence, breach of implied warranty, breach of express warranty, negligent misrepresentation, and fraud by concealment.

Standard of Review

Superior Court Civil Rule 12(b)(6) allows a defendant to file a motion to dismiss for "failure to state a claim upon which relief can be granted." All the

facts pled in the complaint are accepted as true.² The motion will be granted “only where it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief.”³ “Conclusory allegations will not be accepted as true without specific supporting factual allegations.”⁴

Discussion

Counts I and II: Strict Liability/Failure to Warn and Strict Liability/Design Defect

Since Delaware does not recognize a strict liability cause of action in a products liability suit when the product is sold, the first two claims of the first amended complaint are dismissed. In *Cline*, the Delaware Supreme Court held the Uniform Commercial Code (“UCC”) preempts the field of sales and does not allow for the doctrine of strict liability when the product is sold.⁵ The remedies for the sale of products in products liability cases are confined to sales warranty law, with no remedy outside the UCC.⁶ In his first amended complaint, Plaintiff alleges strict liability based on the Defendants’ sale of heparin. Since a strict liability cause of action cannot be brought for the sale of heparin, the Defendants’ motions to dismiss the two strict liability claims are granted.

² *Highland Capital Management, L.P. v. T.C. Group, LLC*, 2006 WL 2128677, *2 (Del. Super. Ct.) (citing *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff’d*, 297 A.2d 37 (Del. 1972)).

³ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, A.2d 967, 968 (Del. 1978)).

⁴ *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995) (citations omitted).

⁵ *Cline v. Prowler Industries of Maryland, Inc.*, 418 A.2d 968, 978 (Del. 1980).

⁶ *Id.* at 979.

Count III: Negligence and Punitive Damages

A. Negligence

The Defendants' motions to dismiss Plaintiff's claim of negligence are denied since it satisfies the particularity requirements of Super. Ct. Civ. R. 9(b). Even though negligence must be pled with particularity, the complaint does not need to prove proximate cause "because [plaintiff] need not prove [his] case at this stage of litigation."⁷ Additionally, "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally."⁸

Plaintiff's negligence claim is sufficiently pled because it alleges a duty, the breaching party, the breaching act, and the injured party.⁹ In *Anderson*, the complaint was not dismissed because it identified the duty as an obligation to warn, the breaching party as the supplier defendants, named at the outset of the complaint, the breaching act as a failure to warn, and plaintiffs as the injured parties. Just like *Anderson*, Plaintiff alleges there was a duty to properly disclose the potentially dangerous side effects of heparin, naming the suppliers, the Defendants,¹⁰ as the breaching parties, the breaching act as the failure to properly disclose the warnings, and lists himself as the injured party. Despite the fact that

⁷ *Anderson v. Airco, Inc.*, 2004 WL 1551484, *5 (Del. Super.).

⁸ Super. Ct. Civ. R. 9.

⁹ *Anderson*, 2004 WL 1551484, at *5.

¹⁰ While it is true that Plaintiff refers to the Defendants collectively in each allegation of his first amended complaint, he does make it clear that each Defendant may be responsible for his injuries.

Plaintiff does not indicate which Defendant supplied the several doses of heparin he was administered, he has put the Defendants on notice as to the time and place he received the heparin. Since the claim is pled with sufficient particularity, the Defendants' motions to dismiss the negligence claim are denied.

B. Punitive Damages

Plaintiff's claim of punitive damages is not dismissed. Punitive damages may be appropriate in a products liability case alleging mere negligence.¹¹

Punitive damages are permitted when the defendants conduct is reprehensible, even though it may be unintentional.¹² In products liability cases "the imposition of punitive damage claims [is] limited to the persistent distribution of an inherently dangerous product with knowledge of its injury causing effect among the consuming public."¹³ In this case, Plaintiff is alleging that heparin is an inherently dangerous product, that each Defendant had knowledge of the potentially dangerous side effect known as HIT, and nevertheless continued to sell it. Therefore, the Defendants' motions to dismiss the punitive damages claim are denied.

¹¹*Greenlee v. Imperial Homes Corp.*, 1994 WL 465556, *9 (Del. Super.) (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 527 (Del. 1987)).

¹² *Id.*

¹³ *Id.*

Count IV: Breach of Implied Warranty

Plaintiff has sufficiently pled his breach of warranty claim so it will not be dismissed. Pleading a breach of the implied warranties of merchantability and fitness for a particular purpose only need to contain “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled.”¹⁴

“The pleading need not set out in detail the facts upon which it is based as long as it gives the other party fair notice of what the claim is and the grounds upon which it rests.”¹⁵ The details for each claim may be obtained through discovery.¹⁶ At trial or possibly a motion for summary judgment, Plaintiff will need to prove the Defendants’ were each on notice of the injuries suffered by Plaintiff in order to prevail on his warranty claims.¹⁷ However, there is no case law to indicate Plaintiff needs to allege in his complaint that the Defendants were on notice of his injuries.¹⁸ The Defendants’ motions to dismiss based on the Plaintiff’s failure to

¹⁴ Super. Ct. Civ. R. 8.

¹⁵ *Delle Donne & Associates, LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1252 (Del. 2004) (citation omitted). Defendant Baxter argues every element of every claim must be pled and cites a Chancery Court opinion, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1168 (Del. Ch. 2002), for support. However, the *Delle Donne* case is a Delaware Supreme Court decided after *Omnicare* that provides for a more liberal approach to pleading.

¹⁶ *Id.*

¹⁷ *Cline*, 418 A.2d at 977.

¹⁸ Defendant Hospira argues Plaintiff needed to allege it was put on notice of Plaintiff’s injuries within a reasonable amount of time, in accord with *Cline*. *Cline* was an appeal from a judgment n.o.v. or a new trial after a jury returned a verdict for the defendants; it was not decided on a motion to dismiss the complaint. Since there is no case law to indicate the Plaintiff needed to

allege each Defendant was on notice of his injuries is unsupported by case law and is denied. The claim satisfies the short and plain statement requirement and is not dismissed.

A. Implied Warranty of Merchantability

Plaintiff's claim that Defendants' breached the implied warranty of merchantability will not be dismissed. "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."¹⁹ In order for a good to be merchantable it must "conform to the promises or affirmations of fact made on the container or label if any."²⁰ However, the implied warranty of merchantability may be disclaimed by doing so explicitly and if disclaimed in writing, it must be conspicuous.²¹ The warranty "extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."²²

Plaintiff has pled the warranty of merchantability sufficient to withstand a motion to dismiss. Plaintiff alleges that each Defendant is a merchant who, as a drug manufacturer and distributor, deals in goods of that kind. None of the

allege that in the complaint and the warranty claims do not need to be pled with specificity in accord with Super. Ct. Civ. R. 9(b), the warranty claims should not be dismissed on that basis.

¹⁹ 6 Del. C. § 2-314.

²⁰ *Id.*

²¹ 6 Del. C. § 2-316(2).

²² 6 Del. C. § 2-318.

Defendants allege the implied warranty of merchantability was disclaimed.

Reading the first amended complaint in its entirety, he has pled that as a patient it would be reasonable for him to use heparin as prescribed by his doctors at Christiana Hospital, satisfying the requirement that any potential warranty would apply to him. Plaintiff has stated enough in his complaint to survive a motion to dismiss the implied warranty of merchantability since he provided a short and plain statement of his claim, which would entitle him to relief. This claim is not dismissed.

B. Implied Warranty of Fitness for a Particular Purpose

The Defendants' motions to dismiss the implied warranty of fitness for a particular purpose claim are denied. "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is[,] unless excluded or modified under the next section[,] an implied warranty that the goods shall be fit for such purpose."²³ A disclaimer of the warranty of fitness for a particular purpose is sufficient if the language states there are no warranties beyond the description provided.²⁴ This warranty also

²³ 6 Del. C. § 2-315.

²⁴ 6 Del. C. § 2-316(2).

“extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.”²⁵

Plaintiff has pled with sufficiency his implied warranty of fitness for a particular purpose claim. In his short and plain statement for relief, he states that the doctors at Christiana Hospital relied upon the Defendants’ representation of heparin before administering the drug to him. Plaintiff alleges that he would not have been given the drug if the doctors at the hospital knew of its potential side effects. Plaintiff alleges heparin is distributed as a blood thinner to treat and prevent blood clots, which is the reason he was given the drug. He also alleges heparin contained no warnings of potentially dangerous side effects. By doing so, Plaintiff has alleged the Defendants’ each implied that heparin was fit for a particular purpose, to treat and prevent blood clots. Therefore, Plaintiff’s claim is not dismissed.

Count V: Breach of Express Warranty

Plaintiff’s claim of breach of an express warranty contained a short and plain statement and is not dismissed. Just like pleading an implied warranty, pleading an express warranty only has to be “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the

²⁵ 6 Del. C. § 2-318.

relief to which the party deems itself entitled.”²⁶ The purpose of the pleading is to put the party on notice of the claim and the grounds for relief; the details of the claim are to be obtained through discovery.²⁷

The Defendants’ may have created express warranties when they sold heparin. Express warranties are created by the seller as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.²⁸

The seller does not need to use formal words to create an express warranty, such as “warrant” or “guarantee,” but it must be something more than the seller’s opinion.²⁹ An express warranty may be disclaimed, but the “[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; [and] . . . negation or limitation is inoperative to the extent that such construction is unreasonable.”³⁰ Just like implied warranties, an express warranty

²⁶ Super. Ct. Civ. R. 8.

²⁷ *Delle Donne & Associates, LLP*, 840 A.2d at 1252.

²⁸ 6 *Del. C.* § 2-313.

²⁹ *Id.*

³⁰ *Id.*

“extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.”³¹

Plaintiff has sufficiently pled his claim of breach of an express warranty. In his short and plain statement Plaintiff alleges the doctors prescribing him heparin were unaware of the potentially dangerous side effects because the Defendants’ each warranted the products to be safe and effective for its intended use as a blood thinner. Plaintiff alleges that no warnings were included with the heparin packaging or communicated to the doctors at Christiana Hospital, where he received the drug. As a result of the allegations, Plaintiff has sufficiently pled his claim of breach of an express warranty.

Count VI: Negligent Misrepresentation

This Court lacks subject matter jurisdiction over the negligent misrepresentation claim so it is dismissed.³² The Court of Chancery has exclusive, not concurrent, jurisdiction over a claim alleging negligent misrepresentation.³³ However, Plaintiff has the ability to transfer the cause of action to the Court of Chancery pursuant to 10 *Del. C.* § 1902. Accordingly, the Defendants’ motions to dismiss the claim for lack of subject matter jurisdiction of this Court are granted.

³¹ 6 *Del. C.* § 2-318.

³² In his complaint, Plaintiff sought punitive damages for both his negligence and negligent misrepresentation claims. In Defendant Baxter’s motion to dismiss, it raises the issue of whether punitive damages are appropriate. Since this Court lacks jurisdiction over the negligent misrepresentation claim, that issue is not addressed. It is only addressed in the negligence claim.

³³ *Mark Fox Group, Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, *5 (Del. Ch.). See also, *Atwell v. RHIS, Inc.*, 2006 WL 2686532, *2 (Del. Super.).

Count VII: Fraud by Concealment

Plaintiff has pled fraud with the requisite particularity in accord with Super. Ct. Civ. R. 9(b). Plaintiff alleges the Defendants' committed fraud by concealing material facts, *i.e.*, that HIT could result from receiving heparin. A claim based on fraud must allege:

- (1) a false representation, usually one of fact, made by the defendant;
- (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
- (3) an intent to induce the plaintiff to act or to refrain from acting;
- (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation;
- and (5) damage to the plaintiff as a result of such reliance.³⁴

While the rule permits the Defendants' state of mind to be averred generally, to allege the Defendants knew or should have known of the potentially dangerous side effects is insufficient.³⁵ Where the complaint does not at least allege the "time, place and contents of the false representations . . ." and what was gained from the false representations, it will fail for lack of particularity.³⁶

Plaintiff's claim of fraud by concealment is not dismissed, even though he did not sufficiently plead the scienter of the Defendants. The Plaintiff only avers the Defendants knew or should have known of the potentially dangerous side effects to heparin, which is insufficient for a fraud claim. He has alleged the

³⁴ *Castetter v. Delaware Dept. of Labor*, 2002 WL 819244, *3 (Del. Super.) (citations omitted).

³⁵ *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Technologies Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (citations omitted).

³⁶ *Id.* at *3 (citing *Browne v. Robb*, 583 A.2d 949, 956 (Del.1990)).

Defendants' withheld a material fact, *i.e.*, the dangerous side effects of heparin, that it was intended for use by patients who needed a blood thinner, that the doctors' prescribing it as a blood thinner relied on the Defendants' alleged misrepresentations, and that he suffered permanent injuries as a result of the withheld information. Plaintiff has not pled all the elements of fraud with particularity; however, Plaintiff did not need to allege every element of fraud.

Plaintiff alleged the time, place, and contents of the false representations, which is sufficient to withstand a motion to dismiss a fraud claim. In his first amended complaint Plaintiff stated he was admitted to Christiana Hospital on March 26, 2008 and was administered heparin at that time. He is not alleging the Defendants' made false representations, but rather they failed to disclose a potentially dangerous side effect of heparin. Plaintiff alleges the Defendants had a duty to disclose the facts related to heparin use and the potential for injury, a duty to disclose the need for careful monitoring after administration of the drug, and the need for a patient's heparin history prior to receiving it to prevent injury. Plaintiff alleges that the physicians administering the drug to him were unaware of the potential side effects and had they known, they would not have administered the drug to him the way it was administered. As a result of the allegedly concealed side effects Plaintiff has suffered permanent injuries. Plaintiff has satisfied the

minimal standard for pleading fraud in accord with Super. Ct. Civ. R. 9(b) as interpreted by *Metro Commc'n Corp. BVI*.

Conclusion

Based on the forgoing, Defendants' motions to dismiss Plaintiff's first amended complaint are **GRANTED in part and DENIED in part**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.