

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
PAM CHOUTEAU, et al.	:	CIVIL ACTION NO. 03-20315
v.	:	
WYETH, INC., et al.	:	
CONSTANCE KIGHT, et al.	:	CIVIL ACTION NO. 03-20201
v.	:	
WYETH, INC., et al.	:	

MEMORANDUM AND PRETRIAL ORDER NO. 3517

Bartle, J.

May 12, 2004

Before the court are the motions of numerous class members in two separate actions to remand to the original Mississippi state courts their actions against Wyeth¹ and the physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux to them. The state court actions were captioned Pam Chouteau, et al. v. Wyeth, et al. (Miss. Cir. Ct. Hinds County, filed Dec. 30, 2002); and Constance Kight, et al. v. Wyeth, et al. (Miss. Cir. Ct. Yazoo County, filed Dec. 27, 2002).² The plaintiffs in these actions are all represented by the same counsel.

1. Wyeth was previously known as American Home Products Corporation ("AHP").

2. Some plaintiffs are derivative claimants suing for loss of consortium.

Plaintiffs in these actions have exercised their right of intermediate or back-end opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) (Pretrial Order ("PTO") No. 1415), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4). Pursuant to the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust.

Plaintiffs originally filed their complaints in Mississippi Circuit courts in December, 2002, more than five years after Pondimin and Redux were withdrawn from the market in September, 1997. Wyeth timely removed these actions to the United States District Court for the Southern District of Mississippi, asserting that plaintiffs fraudulently joined the in-state physician defendants to defeat federal diversity. Thereafter, plaintiffs moved to remand these actions under 28 U.S.C. § 1447(c). The Mississippi court deferred ruling on plaintiffs' motions, and the cases were then transferred to this court as part of MDL 1203, the mass tort litigation involving Wyeth's diet drugs. No federal claims for relief are alleged.

I.

In brief summary, plaintiffs, all of whom are citizens of Mississippi, filed suits for injuries sustained as a result of

their use of Pondimin and/or Redux. The defendant Wyeth, the manufacturer of these diet drugs, is a party of diverse citizenship from the plaintiffs. The defendant physicians who prescribed Pondimin and/or Redux to plaintiffs are alleged to be citizens of Mississippi.

The plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians in these matters were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against them. Plaintiffs respond that the statute of limitations has not expired against the in-state physicians because plaintiffs discovered their injuries less than two years prior to filing their claims.

II.

This court addressed the same issues in PTO No. 3281, in French, et al. v. Wyeth, et al., CIV. A. No. 03-20353 (E.D. Pa. Feb. 18, 2004), which is also part of the nationwide diet drug litigation. In French, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See PTO No. 3281 at 2-4. Because we examined the same legal issues as they applied to nearly identical facts in French, we need not revisit them here.

III.

The key issue in these actions is whether the in-state physician defendants have been fraudulently joined solely for the

purpose of destroying diversity of citizenship and preventing removal. For the same reasons set forth in French, we find "no reasonable basis in fact or colorable ground" supporting plaintiffs' claims against the in-state physician defendants. Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990).

As discussed in greater detail in French, plaintiffs' claims against the in-state physicians are time barred because their complaints were clearly filed outside the two year statute of limitations. See MISS. CODE. ANN. § 15-1-36. In short, the statute began running, "when the plaintiff[s] should have reasonably known of some negligent conduct, even if the plaintiff[s did] not know with absolute certainty that the conduct was legally negligent." Sarris v. Smith, 782 So. 2d 721, 725 (Miss. 2001). As we found in French, the publicity surrounding the withdrawal of diet drugs put plaintiffs on inquiry notice of their claims in September, 1997 or, at the very latest by March, 2000, at the height of Wyeth's extensive media campaign.

In light of the massive publicity concerning the health risks associated with the use of diet drugs and the determination by this court after a full hearing that diet drug injuries are not latent, we find that plaintiffs in the exercise of reasonable diligence should have discovered their injuries at the very latest by March, 2000. Thus, they would have needed to file their complaints by March, 2002. Because they did not file their

complaints until December, 2002, their claims against the in-state physicians are clearly time-barred.

IV.

Plaintiffs also assert that the statute of limitations defense is not applicable to the physician defendants under the Settlement Agreement. We addressed this issue in PTO No. 3391, in Bobbie Amiker, et al., v. Wyeth, et al., CIV. A. No. 03-20343 (E.D. Pa. April 2, 2004). For the same reasons stated in Amiker, the in-state physician defendants retain the benefit of the statute of limitations defense pursuant to § IV.D.3.c of the Settlement Agreement. See PTO No. 3391, at 7-9.

V.

Plaintiffs also argue that their claims against their respective physicians are not time barred because the filing of various class action complaints throughout the country tolled the running of the statute of limitations. We disagree. In support of their position, plaintiffs cite Am. Pipe & Constr. Co. v. Utah, 414 U.S. 556 (1974), which held that the filing of a putative class action tolls the running of the statute of limitations on behalf of putative class members against the defendant until a class motion is denied or plaintiffs opt out of the class. Id. at 561. Here, however, the physician defendants were not defendants in any identified putative class actions. Thus, Am. Pipe & Constr. Co. is inapposite.

VI.

Finally, plaintiffs contend that the court's approval of the Settlement Agreement in PTO No. 1415 tolled the statute of limitations as to the physician defendants. The court is unaware of any language in either of the documents that supports plaintiffs' position in this regard. Thus, there is no basis for tolling the statute of limitations as to these defendants.

VII.

Accordingly, for the reasons more fully articulated in French, we find that this effort to join in-state physician defendants is fraudulent. Because Wyeth has met its heavy burden of establishing fraudulent joinder, we will deny plaintiffs' motions to remand these cases to the Mississippi state courts where they originated.³

3. We are only dismissing the claims against those defendant physicians who appear on the MDL 1203 docket in these actions. The plaintiffs' original complaints filed in the several Mississippi state courts named as defendants additional physicians who are not before this court.

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WYETH, INC., et al.,	:	

PRETRIAL ORDER NO. 3517

AND NOW, this 12th day of May, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiffs in Pam Chouteau, et al. v. Wyeth, et al., CIV. A. No. 03-20315 (E.D. Pa.) to remand to the Circuit Court of Hinds County, Mississippi is DENIED;

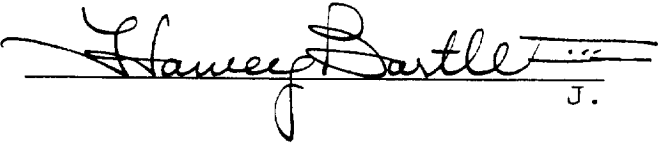
(2) all claims in Chouteau against defendants David Richardson, M.D., Calvin T. Hull, James D. Polk, M.D., Charles Joseph Gruich, M.D., Leland Ray Kendrick, and Lynn Earl Leatherwood, M.D. are DISMISSED;

(3) the motion of plaintiffs in Constance Kight, et al. v. Wyeth, et al., CIV. A. No. 03-20201 (E.D. Pa.) to remand to the Circuit Court of Yazoo County, Mississippi is DENIED; and

(4) all claims against Billy Morris Wansley, M.D., Dr. Margaret Powell, Dr. Walter Rose, Dr. Lynn Earl Leatherwood, Dr. Karen Yaltah Mullen, Dr. Maria Montez Moman, Dr. Roger Mantalvo Bradford, Dr. Charles Joseph Gruich, Dr. Norman Lee Morris, Dr.

Forster Gehring Ruth, Jr., and Dr. Dimitri A. Yanez are
DISMISSED.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lawrence Bartle", is written over a horizontal line. To the right of the signature, the letter "J." is printed below the line.