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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2001-CA-000388-MR
AND 2001-CA-000976-MR

DAWN R. GALEENER — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 92-CI-00484

BAXTER HEALTHCARE CORPORATION — APPELLEE

OPINION

REVERSING AND REMANDING IN 2001-CA-000388-MR,

VACATING IN 2001-CA-000976-MR

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

DYCHE, JUDGE: In this products liability/personal injury case, Dawn Galeener appeals a summary judgment of the McCracken Circuit Court dismissing her complaint as barred by the one-year statute of limitation under KRS 413.040.

Galeener had a breast augmentation on February 2, 1983, when she was nineteen years of age. Her surgeon, Dr. William G. Wheeler, II, implanted Heyer-Shulte silicone breast prostheses

into Galeener's left and right breasts at Western Baptist Hospital in Paducah, Kentucky.

Approximately six to seven months after the augmentation, Galeener returned to Dr. Wheeler with complaints of pain and hardness in her left breast. Between 1983 and late 1986 Galeener had four capsulotomies[1] performed on her left breast by Dr. Wheeler.

In 1986 Galeener developed enlarged lymph nodes in her left axilla, pain in her left breast, and a mass on her left side which prompted Dr. Wheeler to perform a left excisional biopsy on February 25, 1987. While performing the biopsy Dr. Wheeler discovered that the left implant had ruptured; he therefore removed and replaced the Heyer-Shulte implant with a Dow Corning implant. Galeener was assured by Dr. Wheeler that the rupture was a freak accident and she should not be concerned further.

On April 20, 1987, Dr. Wheeler wrote Heyer-Schulte Corporation on behalf of Galeener, inquiring whether the corporation would reimburse her for the new left implant. Dr. Wheeler added a note at the end of his letter calling attention to the fact that gel leaks were becoming more common in the Heyer-Shulte prosthesis. There is no evidence that Heyer-Schulte responded to Dr. Wheeler's letter.

A second biopsy was performed on the left breast when another mass was discovered on November 9, 1987. Dr. Wheeler assured Galeener that the migrating silicone in her body was not

[1] A capsulotomy is performed by squeezing the breast with the hands to soften and stretch out the capsule or tissue that has formed around the implant.

a cause for concern beyond the necessity of removing a lump or enlarged lymph node. Between 1988 and 1989 Galeener had two more capsulotomies performed on her left side. Dr. Wheeler testified in his deposition that in 1987 he did not suspect problems with the remaining right implant.

On February 6, 1990, during an office visit Dr. Wheeler found a fair amount of adenopathy[2] in the left axilla; generalized adenopathy in the right axilla, groins, and in both cervical areas; and one enlarged lymph node in the left cervical area in Galeener. According to Dr. Wheeler's testimony, he did not relate the generalized adenopathy to the implants. One month later, on April 5, Galeener was prescribed a course of antibiotics after Dr. Wheeler's partner noted a palpable node on the left side of her neck.

On May 27, 1991, Galeener met with Dr. Wheeler, who again assured her that her symptoms did not indicate that "anything major or dangerous [was] going on." Dr. Wheeler believed that the remaining silicone from the ruptured left implant had "finally accumulated" and that there was "encapsulation bilaterally." As a result of the meeting it was decided that both the left and right implant be removed and replaced. Since Dr. Wheeler did not believe the right implant had ruptured, he did not discuss the possibility of such with Galeener at any time before June 5, 1991.

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[2] Adenopathy is the enlargement of the glands, predominantly occurring in the lymphatic glands.

On June 5, 1991, both the right and left implants were removed and replaced; it was at this time that the rupture of the right implant was discovered.

Galeener filed her complaint on June 5, 1992, against Baxter Healthcare Corporation who, through merger, had become responsible for Heyer-Shulte's liabilities. On July 16, 1993, Galeener saw Dr. Khouri who found that her breasts were tender and that she had multiple hard, large, and palpable axillary lymph nodes bilaterally. After Galeener's systemic symptoms had not improved, Dr. Khouri removed the right implant and performed reconstructive surgery on the right breast on November 29, 1994, and again on April 4, 1995, for the left breast.

Galeener joined the class action MDL 926 Silicone Gel Breast Implants Products Liability Litigation shortly after she filed her complaint. On April 1, 1994, the presiding judge over the class action, Judge Pointer, ordered a tolling of the statute of limitations for the plaintiffs involved in the class action. The tolling began on January 24, 1992, and was ordered to continue for each plaintiff until that plaintiff chose to opt out. Galeener chose to opt out on June 15, 1994.

Appellee, Baxter Healthcare Corporation, filed a motion for summary judgment on January 8, 2001, arguing that Galeener's action was barred by the one-year statute of limitations. Baxter contended that the statute of limitations began to run on February 25, 1987, when the rupture of the left implant was discovered because the implants were to be considered as a set, and therefore the action had to be filed no later than February

25, 1988. Galeener responded to the motion arguing that the statute of limitations began to run when the rupture of the right breast was discovered on June 5, 1991. Following a hearing, Baxter's motion was granted on February 1, 2001, by the McCracken Circuit Court. On April 18, 2001, the trial court granted Baxter's amended Bill of Costs in the amount of $7,716.21.

We have considered appellee's argument that breast implants are to be considered as a set; under the facts of the present action, where each implant had a different lot number and were of different sizes, breast implants are not a set. Galeener had no reason to believe or even suspect problems with her right breast since she had no adverse symptoms with the right implant and her physician continually assured her that she had nothing to be concerned about.

The discovery rule contained in KRS 413.140(2) states that a cause of action shall be deemed to accrue when the injury is discovered, or should have been discovered, using reasonable care. This rule originated with underground trespass actions in *Falls Branch Coal Co. v. Proctor Coal Co.*, 203 Ky. 307, 262 S.W. 300 (1924); was applied to medical malpractice in *Tomlinson v. Siehl*, Ky., 459 S.W.2d 166 (1970); and has been extended to products liability by *Louisville Trust Co. v. Johns-Manville Products Corp.*, Ky., 580 S.W.2d 497 (1979).

In *Louisville Trust* the Supreme Court of Kentucky extended the discovery rule "to tort actions for injury from latent disease caused by exposure to a harmful substance whether

the action be based on negligence or on a products liability theory." *Id.* at 501. The court also held that the cause of action will accrue when the plaintiff discovers, or should have discovered using reasonable diligence, that he has been injured and that his injury may have been caused by the defendant's conduct.

Galeener discovered that she was injured by Baxter's conduct in 1987 when she learned that the left implant had ruptured. According to the discovery rule, as applied to products liability actions, her cause of action for the left implant rupture and all harm to that point accrued on February 25, 1987, and expired one-year later on February 25, 1988.

Galeener again discovered that she was injured by Baxter's conduct on June 5, 1991, when she learned that the right implant had ruptured. She filed her complaint, on June 5, 1992, within the one-year statute of limitations and her cause of action for the right breast is therefore not barred.

Galeener experienced systemic symptoms between her left implant removal and her right implant removal. It is unknown when the right implant ruptured. Therefore it is unknown whether Galeener's remaining symptoms were from the silicone that had leaked from the left implant or from new leaks in the right implant.

We accordingly reverse and remand to the trial court for further proceedings consistent with this opinion. Having ruled thus, we vacate the order granting appellee's Bill of Costs, in order No. 2001-CA-000976-MR.

EMBERTON, CHIEF JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

MILLER, JUDGE, DISSENTING. I am of the opinion this action is barred by limitations. I would affirm the decision of the Circuit Court.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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