IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Roland P. Moore and **Judy L. Moore**	)	CIVIL ACTION NUMBER
	)	
	)	06C-01-013-JOH
Plaintiffs	)	
v.	)	
	)	
Anesthesia Services, P.A., Christiana Care Health Services, Inc., Delaware Vascular Associates, P.A., Sonya Tuerff, M.D., Matthew Cooper, M.D., Michelle Pesek-McCoy, M.D., United States Surgical Corporation, Tyco Healthcare Group, LP, Ethicon, Inc., Ethicon Products Worldwide, and **Johnson & Johnson Co.**	)	
	)	
Defendants	)	

Submitted: December 21, 2007
Decided: February 15, 2008

MEMORANDUM OPINION

Upon Motions of Defendants Ethicon, Inc., Ethicon Products Worldwide, and United States Surgical Corporation for Summary Judgment - ***DENIED***

Appearances:

Gilbert F. Shelsby, Jr., Esquire, of Shelsby & Leoni, Wilmington, Delaware, attorney for the plaintiffs

John D. Balaguer, Esquire, of White & Williams, Wilmington, Delaware, attorney for Sonya Tuerff, M.D., and Delaware Vascular Associates, P.A.

Robert S. Goldman, Esquire, of Phillips Goldman & Spence, Wilmington, Delaware, and Michael L. Walden, Esquire, of Shook Hardy & Bacon, LLP, Kansas City, Missouri, attorneys for defendants United States Surgical Corporation and Tyco Healthcare Group LLP

David P. Primack, Esquire, of Drinker Biddle and Reath LLP, Wilmington, Delaware, and Kenneth A. Murphy, Esquire, of Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania, attorney for defendants Ethicon, Inc., Ethicon Products Worldwide, and Johnson & Johnson

HERLIHY, J.

Plaintiff Roland P. Moore went to the Christiana Hospital ("Hospital") for a carotid artery endarterectomy. While in a recovery room subsequent to the procedure, the suture broke, causing significant bleeding. A second operation occurred. Moore, during or shortly after this procedure, suffered a major stroke and has apparently suffered significant permanent injuries.

Originally, Moore and his wife sued Christiana Hospital and the surgeon who performed both procedures and others associated with the hospital. Discovery undertaken subsequent to the initial complaint raised a question of whether the suture which broke was defective. That suture was discarded by Hospital staff at the time of the procedures.

After learning of the potential suture defect, the plaintiffs sued the two suture manufacturers who supplied sutures to the Hospital, Ethicon Products Worldwide, and Johnson & Johnson ("Ethicon"), and United States Surgical Corporation ("USSC"). The surgeon believes the suture was Ethicon's but the billing records indicate it was USSC's. Each has moved for summary judgment, basically arguing the loss, i.e., spoliation, of the suture stops this action in its tracks and that the plaintiffs cannot prove the only reason for what happened to the suture was a defective product. While Ethicon argues it briefly, USSC argues at greater length that plaintiffs cannot even identify which of these two manufacturers' product was, in fact, used.

For the reasons stated herein the motions are **DENIED**.

Factual Background

The action giving rise to the summary judgment motions was initially filed by Plaintiff Roland P. Moore and Judy L. Moore ("plaintiffs" or "Moore") in January 2006. The initial Complaint alleged medical malpractice against the Hospital and the surgeon, Dr. Sonya Tuerff ("Dr. Tuerff"). The plaintiffs later amended their Complaint naming Ethicon and USSC alleging two product liability claims, negligence/product liability and breach of the implied warranty of merchantability.

On June 23, 2004, Moore was admitted to Hospital to receive carotid endarterectomy surgery to be performed by Dr. Tuerff. The procedure entailed clamping off a portion of his artery, cleaning out the plaque contained in the artery, and subsequently patching the area and using a very thin 6-0 suture.[1] After the surgery, Dr. Tuerff spoke to Moore and showed him the plaque she removed. He was then transferred to the Post Anesthesia Recovery Unit ("PACU"). At some point after getting there, a nurse noted he was awake, alert, talking, and wanting to go home. A little later, thereafter, a nurse noted that Moore suddenly turned blue and started bleeding from his neck. There is a potentially relevant factual issue in this time period. There is no record or nurse's note that Moore became agitated prior to the nurse seeing him turn blue and bleed. Dr. Tuerff testified, however, he was seen "thrashing" around in the PACU before the bleeding started.

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[1] Def. Ethicon's Resp., Ex. A, Depo. of Dr. Tuerff.

Moore lost consciousness and had to be re-intubated. Dr. Tuerff performed a second surgical procedure. During it, she observed a large hematoma. Plaintiffs claim this was caused by a failure of the suture and patch used in the first procedure. When Dr. Tuerff was deposed, she described the salient events in this way:

> (Plaintiffs' Counsel) Did you tell Mr. Moore or his family why the patch failed in his case?
>
> * * * * *
>
> Witness: I had a conversation with the family after the first surgery and told them that he was fine. Everything looked fine. We had done the surgery without any problems and he was actually quite calm and when I left him.
>
> After the second procedure, I talked to the family and I explained to them that there had been a rupture of the suture, that I had though it was due to, you know, his activity - - I'm not sure exactly why it happened - - and that we repaired the suture.
>
> I had been told that the patient became very agitated when he was in the recovery room, as soon as he got there, was complaining.
>
> He wanted to go have a cigarette. He was cursing. He was very disruptive to the staff. They attempted to calm him down.
>
> And then when they said, okay, we'll move him to the stretcher, that he became very agitated and then all of a sudden his neck started to bleed. He had difficulty with breathing.
>
> I told the family that, you know, he was lucky, in my opinion, to still be alive.
>
> (Plaintiffs' Counsel) When you said to the family that there had been a rupture of the suture, did it tear from the anastomosis site?

Witness: No.

(Plaintiffs' Counsel) Okay.

Witness: Oh, excuse me. The anastomosis site?

(Plaintiffs' Counsel) Right.

Witness: Yes, it was along the anastomosis site.

(Plaintiffs' Counsel) In other words - - I just want to make sure I'm clear.

When you said that there was a rupture of the suture, the suture itself that you put in - - the sutures themselves - - did not tear; is that correct?

Witness: No. The sutures broke. The suture itself broke. It did not tear through the tissue. It did not tear through the patch. The suture ruptured, broke.

(Plaintiffs' Counsel) So the suture which you had put in on both sides was still in tissue and it actually ruptured, broken in half?

Witness: Well, I don't know about in half, but it was completely fractured. I mean - - do you mean at what point was it?[2]

When asked about the surgery, the suture, and the suturing process Dr. Tuerff described them as follows:

Witness: But this suture has to be very fine in order to not tear the tissue that it's sewing, but it can't be so fine that it doesn't hold, so it's always a judgment of how fine of a suture or how thick of a suture to use.

This is a standard suture that we used. I mean, every single person I have ever worked with on a carotid has used this type of suture for the anastomosis.

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[2] Dr. Tuerff deposition dated May 22, 2006.

But it's part of my job for vascular surgery to look at the suture and inspect it when the scrub tech or the nurse hands it to me.

I have to make sure that there's no knot in it, make sure that both needles are there because there's two needles, one at each end. And if there's only one needle when they give it to you, you have to start all over.

And you have to make sure that there's no obvious damage, because from putting it in the package, it comes curled up and wrapped in the package.

They take it out. They put it on the needle holder for you, then you get it. I have magnifying glasses. I look at it, inspect it for what I can grossly see is a damaged area, and then I can start sewing with it.

And the whole time, I'm observing it while I'm sewing to make sure that there's no technical problems. I mean, I have to put the suture in, perfect position, tie the knots down.

A lot of times, those sutures will break when you're tying knots from excessive tension or just a damage in the area.

You try to be consistent and do the same thing that you were taught every day. And some of the time, there are knots in the sutures. Some of the time, they do fracture.

Have I seen it happen I recovery room? No, but I never had a patient act agitated and start moving around within, you know, an hour of having surgery either. Most patients don't do that.

(Plaintiffs' Counsel) Are you blaming the rupture of the sutures on Mr. Moore?

Witness: I am blaming it on the situation that caused increased pressure to the suture.

(Plaintiffs' Counsel) Are you blaming Mr. Moore for that? Is that your position?

Witness: I think his actions contributed to the suture fracturing, yes.

(Plaintiffs' Counsel) I will go back to the rupture of the sutures. You said that you inspected the sutures before you put them in --

Witness: Yes.

(Plaintiffs' Counsel) -- is that correct?

And when you did, did you notice anything unusual or abnormal about the sutures?

Witness: (Witness shakes head.) If I would have, I would have gotten a new suture.

(Plaintiffs' Counsel) Is it your contention that the suture in this case was somehow improperly manufactured or was defective?

Witness: I'm not sure what caused the weakness to occur at that particular location, during this particular time, but I inspect it to the best of my ability, which is a routine for that I do in all of may cases that I do anastomosis on, and I didn't see any obvious defect.

Could there have been a defect in the suture? Could it have been stretched at some point during the manufacturing, the packaging, or even when the nurse took it out to cause a weakened spot that, when there was extra pressure, to cause it to break?

There must have been. I can't otherwise explain why it would have fractured.

(Plaintiffs' Counsel) So there had to have been some weakness in the suture material itself for that to have caused a fracture in this circumstance?

Witness: I think so.

(Plaintiffs' Counsel) In terms of who handles the suture material before the procedure and before you put the suture material in obviously, you inspect it and you touch it; is that correct?

Witness: Yes.[3]

Following the second surgery, Moore suffered a severe stroke. Plaintiffs seeks to recover for "serious permanent medical conditions, including but not limited to paralysis, loss of mental capacity and loss of bodily functions"[4] allegedly suffered after the surgeries. Hospital personnel discarded the suture used in the endarterectomy performed on Moore. Both Ethicon and USSC sutures were being used for surgeries at the Hospital at the time of Mr. Moore's procedure. In her deposition, Dr. Tuerff stated that she thought the suture "felt" like one manufactured by Ethicon. The billing records from Moore's surgery, however, indicate that a USSC's suture was used.

Applicable Standard

In order for a party to be entitled to summary judgement, that party has the burden of showing that there are no genuine issue of material facts and he or she is entitled to judgement as a matter of law.[5] When considering a motion for summary judgement, a court is required to examine the present record, all pleadings, affidavits and discovery.[6] The court must view the evidence in the light most favorable to the non-moving party.[7]

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[3] *Id.* pp 27 - 31.

[4] *Id.* at ¶ 25.

[5] *Grasso v. First USA Bank*, 713 A.2d 304, 307 (Del. Super. 1998).

[6] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973).

[7] *Pierce v. International Ins. Co. of Ill.*, 671 A2d 1361, 1363 (Del. 1996).

If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[8] The motion for summary judgement will be denied if the Court finds any genuine issues of material fact.[9]

Discussion

Both defendants argue that the Hospital's discard of the suture in questions means, under the doctrine of spoliation, plaintiffs' action against them must be dismissed. Delaware has long recognized the general rule that where a litigant intentionally or recklessly destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case.[10] Both defendants cite *Burris v. Kay Bee Stores*[11] as authority for the proposition summary judgment is a remedy in a spoliation case. There are two reasons to cast doubt on that argument. The first is that the Court in *Burris*, while referring to the alternative of awarding summary judgment, did not use that vehicle to dismiss a case in which there had been spoliation.[12] It used, instead, the inference approach long recognized in Delaware.

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[8] *Kysor Industrial Corp. V. Margaux*, 674 A.2d 889, 894 (Del. Super. 1996).

[9] *Hoechst Celanese Corp. v. Certain Underwriters of Lloyd's of London*, 673 A.2d 164, 170 (Del. 1996).

[10] *Collins v. Throckmerton*, 425 A.2d 146, 150 (Del. 1980); *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1248 (Del. Super. 1998); *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006).

[11] 1999 WL 1240863 (Del. Super.).

[12] Accord *Joseph v. Jamesway Corp.*, 93C-12-182, Herlihy, J. (Del. Super. 1997). In that case, too, this Court - and judge - declined to adopt a *per se* rule of dismissal where the product evidence had been lost.

And this case presents the second reason for not dropping a steel curtain on plaintiffs' action against Ethicon and USSC. No plaintiff discarded this evidence. A Hospital staff person did. Moore was clearly not in control of or in the position to control the suture nor any decision to keep or discard it. Defendants cite only cases where the inference is utilized against the spoiler not an innocent third party, such as Moore.

Of course, the spoliation issue will arise if there is any Hospital or other related defendant action against either or both of these defendants. But, at the moment, it is not a doctrine to stop the plaintiffs' case now or even an inference to be factored into these motions.

The spoliation issue, however, is not divorced from the greater issue these two defendants raise. That issue derives from the principle that to prove manufacturing negligence from circumstantial evidence (as this case would be), the conclusion of negligence must be the only inference possible from the circumstances.[13]

These two defendants argue that there are other possible inferences besides negligent manufacture, to explain what happened to the suture in this case. Ultimately that may be correct. But there are two barriers present now which prohibit an award of summary judgment. The first is that plaintiffs want to pursue discovery from each of the defendants on matters relating to suture failure. So far the defendants have resisted these efforts.

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[13] *Ciociola v. Delaware Coca-Cola Bottling Co*, 172 A.2d 252, 257 (Del. 1961).

Plaintiffs must be given a reasonable opportunity to pursue that discovery. That alone is sufficient to bar an award of summary judgment at this juncture for either defendant.[14]

The other current impediment to their motions is the testimony of Dr. Tuerff. She offers, at this point, an explanation for the suture failure which is an inference of negligent manufacture. She said the suture "ruptured," that it broke, and that it may have been defective. While she has had prior experience with sutures that broke, she has never had this happen before and never at the post-operative stage. She testified about how she tested it before using it, and so forth. That testimony is enough to show there is a genuine issue of material fact at this stage. At oral argument, however, the Court inferred that her testimony may not be enough to meet plaintiffs' burden at trial to exclude other non-negligent manufacturing causes.

But for these motions at this point, Dr. Tuerff's testimony is sufficient to (1) support the need for further discovery and/or (2) show there is a genuine issue of material fact.

The Court is compelled, of course, to note that Dr. Tuerff may attribute some of the suture or bleeding problems to Moore being agitated. First, there is a significant issue of fact as to whether that was a cause of the bleeding or suture rupture. Second, the agitation may have resulted from the suture failure and subsequent bleeding and not have preceded it. These issues, too, are to be sorted out at a later point.

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[14] *Tew v. Sun Oil Co.*, 407 A.2d 240, 242 (Del. Super. 1979).

USSC argues at greater length an issue to which Ethicon devoted less but joins. It cites deposition testimony from various Hospital personnel that the billing record showing USSC sutures were used is "unreliable." There are flaws in this argument. One is that there is a significant, genuine factual issue concerning the suture's manufacturer. Dr. Tuerff believes it was Ethicon's. By experience, she relies on its feel in this procedure. The billing record, however, specifies a type of suture was used which is only made by USSC.

But USSC has squeezed out of some hospital personnel the possibility that the billing record may be unreliable. In large part, that testimony was in response to hypothetical questioning and not so much the particular bill for Mr. Moore. The record is that a document says the suture was USSC's and a billing clerk testified that, hypothetically, the bill could be inaccurate.

USSC asks this Court on a motion for summary judgment to make an inappropriate credibility determination on a genuine issue of material fact. With that clear cut factual conflict, summary judgment cannot be awarded.[15] Arguably, of course, the billing record contradicts Dr. Tuerff's testimony that the suture was Ethicon's. It, in turn, could have argued that the billing record meant it was now entitled to summary judgment. For the same reasons controlling USSC's argument on this issue, Ethicon cannot now be dismissed.

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[15] *Pullman v. Phoenix Steel Corp.*, 304 A.2d 334, 335 (Del. Super. 1973).

Conclusion

For the reasons stated herein, the summary judgment motions of United States Surgical Corp. and Ethicon Products are **DENIED**.

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J.