**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: JANUARY 3, 2019)**

***IN RE: DAVOL/C.R. BARD HERNIA MESH MULTI-CASE MANAGEMENT*** **Coordination No. 2017–02**

| | | |
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| **MICHAEL DUANE NOURSE and CLARA GAIL NOURSE,** ***Plaintiffs,*** | : | |
| **v.** | : | **C.A. No. PC–2017–3501** |
| **DAVOL INC. and C. R. BARD INC.,** ***Defendants.*** | : | |

**DECISION**

**GIBNEY, P.J.** Defendants Davol Inc. and C. R. Bard Inc. (collectively Defendants) move to dismiss the Complaint of Michael Duane Nourse (Michael Nourse or Plaintiff) and Clara Gail Nourse (Consortium Plaintiff) (collectively Plaintiffs) arguing that Plaintiffs' Complaint is barred by Ohio's applicable statute of repose. Plaintiffs object arguing the Complaint is governed by Rhode Island law, under which the action is timely. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

**I**

**Facts and Travel**

On July 28, 2017, Plaintiffs filed a Complaint in Rhode Island alleging Michael Nourse was severely and permanently injured by a 3DMax Mesh (3DMax), a medical device designed, manufactured, and distributed by Defendants. Plaintiff was surgically implanted with the 3DMax on September 15, 2005, during a medical procedure to repair a bilateral inguinal hernia.

The 3DMax was explanted on March 30, 2016, resulting in physical and mental injuries to the Plaintiff. Plaintiffs are residents of Ohio, Davol Inc. is a Rhode Island corporation, and C. R. Bard Inc. is incorporated in the State of New Jersey.

On August 17, 2017, Defendants moved to dismiss the Complaint, arguing Plaintiffs' claims are barred by Ohio's applicable statute of repose. Ohio R.C. § 2305.10(C)(1). Specifically, § 2305.10(C)(1) bars product liability claims "against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser." Defendants argue that under Rhode Island's choice of law principles, Ohio law governs the Complaint as Michael Nourse's surgeries took place in Ohio and Plaintiffs are Ohio residents. Plaintiffs filed the Complaint more than ten years after Michael Nourse's 3DMax implant surgery (the date at which Defendants argue the product was "delivered" to Plaintiff). Therefore, Defendants argue Plaintiffs' claims are barred by the statute of repose.

Plaintiffs object, arguing their claims are timely. Citing this Court's previous application of Rhode Island law to factual circumstances similar to the within Complaint,[1] Plaintiffs argue Rhode Island is the proper choice of law and that Ohio's statute of repose is, therefore, inapplicable. Plaintiffs further argue that even if this Court applied Ohio law, their claims survive under two exceptions to the statute of repose: one for actions involving fraud, and the other for actions alleging product liability involving medical devices. Ohio R.C. §§ 2305.10(C)(2) and 2305.10(C)(7)(a).

[1] *See Ingram v. Davol, Inc.*, in which this Court applied Rhode Island's "interest-weighing" analysis to determine that Rhode Island law applied to a complaint filed by an out-of-state Plaintiff who was injured by a hernia mesh product designed, manufactured, and distributed by Bard and Davol. No. PC 07-4701, 2011 WL 496532 (R.I. Super. Feb. 09, 2011).

## II

## Standard of Review

It is well-settled that the sole function of a motion to dismiss is to test the sufficiency of the complaint. *Ryan v. State, Dep't of Transp.*, 420 A.2d 841, 842 (R.I. 1980); *Dutson v. Nationwide Mut. Ins. Co.*, 119 R.I. 801, 803-04, 383 A.2d 597, 599 (1978). '"When ruling on a Rule 12(b)(6) motion, the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor."' *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000) (quoting *R.I. Affiliate, Am. Civ. Liberties Union, Inc. v. Bernasconi*, 557 A.2d 1232 (R.I. 1989)). A motion to dismiss "may not be granted unless it 'appears beyond a reasonable doubt that a plaintiff would not be entitled to any relief under any conceivable set of facts which might be proven in support of his claims.'" *City of Warwick v. Aptt*, 497 A.2d 721, 723 (R.I. 1985) (quoting *Ryan*, 420 A.2d at 843).

## III

## Analysis

Plaintiffs and Defendants disagree as to whether Rhode Island or Ohio is the proper choice of law. If Ohio law applies, this Court must determine whether the ten-year statute of repose bars Plaintiffs' Complaint. Sec. 2305.10(C)(1). If Rhode Island law is applicable, this Court must deny Defendant's motion to dismiss as the comparable statute of repose enacted by the Rhode Island legislature has been found unconstitutional by the Supreme Court. *See Kennedy v. Cumberland Eng'g Co., Inc.*, 471 A.2d 195, 201 (R.I. 1984) (holding that G.L. 1956 § 9-1-13(b), which sets forth a statute of repose that bars products liability actions brought more than ten years from the date of purchase of the product, is inconsistent with art. I, sec. 5 of the Rhode Island Constitution).

## A

## Applicable Law

Rhode Island has adopted an "interest-weighing" approach to address questions of choice of law in which courts must determine "which state 'bears the most significant relationship to the event and the parties.'" *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004) (citing *Najarian v. Nat'l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001)). A court must have a rational basis for applying its own law, as required by the full faith and credit, due process, and equal protection clauses the federal constitution. *Woodward v. Stewart*, 104 R.I. 290, 296, 243 A.2d 917, 921 (1968).

In making a choice of law determination, Rhode Island courts weigh multiple policy considerations including "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law." *Najarian*, 768 A.2d at 1255. In a tort case, a court must additionally weigh points of contact including '"(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."' *Id.* (quoting *Brown v. Church of Holy Name of Jesus*, 105 R.I. 322, 326–27, 252 A.2d 176, 179 (1969)); *see also* Restatement (Second) of *Conflict of Laws* § 145(2) (1971). The Supreme Court has recognized that the most important factor in a tort action is the place where the injury occurred. *Taylor*, 840 A.2d at 1128 (citing *Najarian*, 768 A.2d at 1255) (internal citation omitted). However, this factor is not determinative particularly in the products liability context. *See, e.g.*, *Harodite*

*Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 528 (R.I. 2011) (holding that Rhode Island had a superior interest in the case despite the out-of-state place of injury).

To determine the proper law to apply, the Court first turns to the relevant points of contact in the Complaint. First, the Plaintiff's injury occurred in Ohio, the location of both the implant and the explant of the 3DMax. The Court is mindful that '"in an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship."' *Najarian*, 768 A.2d at 1255 (quoting *Blais v. Aetna Cas. & Sur. Co.*, 526 A.2d 854, 856 (R.I. 1987)) (internal citation omitted); *but see Oyola v. Burgos*, 864 A.2d 624, 628 (R.I. 2005) (holding choice of law questions are issue-specific and the place of injury is not determinative). On the other hand, the conduct causing the injury occurred in Rhode Island because Davol, the manufacturer and designer of the 3DMax, was a Rhode Island corporation. *Najarian*, 768 A.2d at 1255; *see also La Plante v. Am. Honda Motor Co., Inc.*, 27 F.3d 731, 741 (1st Cir. 1994) (holding that in a products liability action, the conduct causing the plaintiff's injury took place where the product was designed and its warnings were created) (applying Rhode Island choice-of-law principles).

The remaining points of contact are neutral with regard to Ohio or Rhode Island law. "[T]he domicil, residence, nationality, place of incorporation and place of business of the parties," favor neither party as Plaintiffs are domiciled in Ohio, while Defendants Davol and Bard are incorporated in Rhode Island and New Jersey, respectively. *Najarian*, 768 A.2d at 1255. Likewise, the place where the parties' relationship is centered has no bearing on this analysis as no arms' length relationship existed between the Plaintiffs and either of the Defendants. *See, e.g.*, *La Plante*, 27 F.3d at 741 (explaining that "there being no 'relationship'

between the parties in the ordinary sense of the word, this factor is unhelpful in making a choice-of-law determination" in the products liability context) (citing *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 142 n.5 (5th Cir. 1991)).

While relevant points of contact in this tort action do not strongly support the application of Ohio over Rhode Island law, policy considerations significantly favor Rhode Island. First, predictability of result favors Rhode Island as Plaintiffs filed this action in Rhode Island, and this Court has consistently applied Rhode Island law to similar cases against Defendants. *See, e.g.*, *Ingram*, 2011 WL 496532, at *2; *Smith v. Davol Inc.*, No. PC-08-8307, 2016 WL 7041131, at *3 (R.I. Super. Nov. 28, 2016). Moreover, the Court acknowledges that the judicial task is simplified through the application of Rhode Island law to comparable products liability cases against Davol and Bard. *See id.*

The next two factors, including "maintenance of interstate order" and "advancement of the forum's governmental interests," require the Court to identify policies underlying each state's law and consider how each state's purpose is furthered through the application of its respective policies. *Najarian*, 768 A.2d at 1255 (citing *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1351(R.I. 1986)); *see also La Plante*, 27 F.3d at 741. While Ohio has adopted a ten-year statute of repose for products liability actions, in order to protect defendants from "unreasonable exposure to liability," the Rhode Island Supreme Court has found that this approach limits the constitutional right of every person "to have his [or her] day in court to show whether he [or she] is entitled to relief." *Jones v. Walker Mfg. Co.*, No. 97301, 2012 WL 1142889, at *1 ¶ 5 (Ohio Ct. App. Apr. 5, 2012); *Kennedy*, 471 A.2d at 201. Contrasting these two stances, the Court finds that Rhode Island has a more significant interest in protecting individuals who are injured

by products produced in the state, particularly considering the fact that injured parties before this Court in previous actions have not been barred from recovery. *Ingram*, 2011 WL 496532, at *1.

Finally, application of a "better rule of law" favors Rhode Island as the Supreme Court has held that the ten year limit to personal injury claims arising from products liability is unconstitutional. *Kennedy*, 471 A.2d at 198-99. Therefore, limiting Plaintiffs' recovery would be against the application of a better rule of law. *See, e.g., Harodite*, 24 A.3d at 534-35 (affirming the trial court's application of Rhode Island's statute of limitations, and expressing 'complete accord' with the trial court's characterization of Rhode Island's lengthier statute as the 'better rule of law'); *see also* § 3 Owen & Davis on Products Liability § 24:6, *Modern approaches governing tort actions—"Better rule of law" approach* (4th ed. 2018 update) (explaining courts may use their discretion to select the more progressive approach when presented with choice of law questions).

Having examined all relevant policy considerations and points of contact, the Court finds that while both Ohio and Rhode Island have an interest in this case, the more significant interest lies with Rhode Island. *Taylor*, 840 A.2d at 1128-29. Therefore, Rhode Island law applies to this action. *Id*. As Rhode Island's ten-year statute of repose for actions arising from products liability has been found unconstitutional, Plaintiffs' action is timely. *Kennedy*, 471 A.2d at 200-01.

**B**

**Statute of Repose**

Even if this Court were to apply Ohio law, two exceptions to the ten-year statute of repose raised by Plaintiffs provide reasonable doubt as to the applicability of the statute of repose. Specifically, Plaintiffs point to § 2305.10(C)(2), which sets forth an exception for

manufacturers or suppliers allegedly engaged in fraud, and § 2305.10(C)(7)(a)(ii), which sets forth an exception for actions involving medical devices.

In contrast to "a statute of limitations, which 'bars a right of action unless the action is filed within a specified period after an injury occurs [,] . . . a 'statute of repose' terminates any right of action after a specific time has elapsed.'" *Theta Props. v. Ronci Realty Co., Inc.*, 814 A.2d 907, 913 (R.I. 2003) (quoting *Salazar v. Machine Works, Inc.*, 665 A.2d 567, 568 (R.I. 1995)).

The statute of repose at issue states, in relevant part:

> "*no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser* or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product." Sec. 2305.10(C)(1) (emphasis added).

As grounds to deny Defendants' motion to dismiss, Plaintiffs first cite an exception to this ten-year statute of repose for actions in which "the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product." Ohio R.C. § 2305.10(C)(2). In the Complaint, Plaintiffs make multiple allegations of fraud including, *inter alia*, "Defendants were . . . aware of the defects in the . . . 3DMax and chose . . . not to issue a recall of [the product]," (Pls.' Compl. ¶ 23) "Defendants manipulated, altered, skewed, slanted, misrepresented, and/or falsified . . . clinical studies," (Pls.' Compl. ¶ 24) and "Defendants provided . . . misleading information to physicians in order to increase the number of physicians using the 3DMax for the purpose of increasing their sales." (Pls.' Compl. ¶ 31.) Viewing these allegations in the light most favorable to the Plaintiffs, this Court could not say beyond a

reasonable doubt that Plaintiffs' claims are barred by the statute of repose. *McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005).

Plaintiffs likewise cite § 2305.10(C)(7)(a), an additional exception to § 2305.10(C)(1) which states:

> "[the statute of repose] does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:
>
> (i) The action is for bodily injury.
>
> (ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.[2]
>
> (iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section." Sec. 2305.10(C)(7)(a).

In compliance with the above, Plaintiffs maintain that their claims are for bodily injury, that the 3DMax is a medical device as described in § 2305.10(B)(1), and that Michael Nourse's injuries resulted from exposure to the 3DMax during the ten year period following his initial exposure to the device. Resolving any doubts in Plaintiffs' favor, this Court would agree. *Estate of Sherman*, 747 A.2d at 473. Accordingly, even if this Court applied Ohio law, the ten-year statute of repose for product liability actions set forth in § 2305.10(C)(1) would not be appropriate grounds for dismissal of Plaintiffs' Complaint.

[2] Among products listed in § 2305.10(B)(1) are "ethical medical devices," defined in Ohio R.C. § 2307.71 as "a medical device that is prescribed, dispensed, or implanted by a physician or any other person who is legally authorized to prescribe, dispense, or implant a medical device and that is regulated under the 'Federal Food, Drug, and Cosmetic Act.'" Sec. 2307.71(A)(5).

## IV

## Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is denied. The Court finds that Rhode Island is the proper choice of law, and that claims herein are therefore not subject to Ohio's ten-year statute of repose for product liability actions. Sec. 2305.10(C)(1). Further, even if this Court were to apply Ohio law, the Court finds the Ohio statute of repose would not provide adequate grounds to dismiss the above-entitled action under the exceptions set forth in §§ 2305.10(C)(2) and 2305.10(C)(7)(a).

Prevailing counsel shall present the appropriate order for entry.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | Michael Duane Nourse and Clara Gail Nourse v. Davol Inc. and C. R. Bard Inc. |
| **CASE NO:** | PC-2017-3501 |
| **COURT:** | Providence Superior Court |
| **DATE DECISION FILED:** | January 3, 2019 |
| **JUSTICE/MAGISTRATE:** | Gibney, P.J. |
| **ATTORNEYS:** | |
| For Plaintiff: | Jonathan D. Orent, Esq. |
| For Defendant | Mark Nugent, Esq.<br>Thomas M. Robinson, Esq. |