UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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| In re: BAYCOL PRODUCTS LITIGATION | MDL No. 1431 (MJD) |

This Document also relates to:

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| Betty Weber v. Bayer Corporation et al., | Case No. 02-4820 |
| John Patterson v. Bayer Corporation et al., | Case No. 02-4821 |

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Christopher A. Seeger, Michael L. Rosenberg, James A. O'Brien and Set A. Katz, Seeger Weiss LLP, Charles A. Mathis, Jr. Mathis & Adams, P.C. and Herman, Mathis, Casey, Kitchens & Gerel, LLP, and Richard Kornblum Orlando & Kopelman, P.C. for and on behalf of Plaintiffs.

Peter W. Sipkins, Dorsey & Whitney, Philip S. Beck, Adam L. Hoeflich and Tarek Ismail, Bartlit Beck Herman Palenchar & Scott, Susan A. Weber and Sara J. Gourley, Sidley Austin Brown & Wood, Gene S. Schaerr and Frank R. Volpe, Sidley Austin Brown & Wood LLP, Richard K. Dandrea, Eckert Seamens Cherin & Mellot, LLC for and on behalf of Bayer Corporation and Bayer AG.

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This matter is before the Court upon the motions of Plaintiffs Betty Weber and John Patterson for remand. Bayer Corporation ("Bayer") opposes the motions, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.

Background

1. Plaintiff Betty Weber

Plaintiff Betty Weber is a citizen of the state of Georgia. She was prescribed Baycol in January 2000, and thereafter ingested Baycol from January 2000 through May 16, 2000. Complaint ¶ 2. She was also prescribed Lopid, and ingested this drug concomitantly with Baycol from April 14, 2000 to May 16, 2000. Id.

In her Complaint, she alleges that "shortly after April 14, 2000, Ms. Weber began experiencing generalized weakness, extreme soreness and pain in her muscles, shortness of breath, dark urine and low grade fever. . . " Id. ¶ 19. She further alleges that "[o]n or about May 16, 2000, after approximately four weeks of combination Baycol and Lopid therapy, Ms. Weber sought medical attention at Tanner Medical Center, where the doctors diagnosed her with myositis and rhabdomyolysis, a potentially fatal condition characterized by the breakdown of skeletal muscle." Id. 20.

In addition to claims of product liability asserted against Bayer Corporation, Bayer AG and GlaxoSmithKline, Plaintiff has asserted claims against her physician, Dr. Michael Poss, and against his employer Professional Park Medical Services, PC in her Complaint filed on May 15, 2002. As Dr. Poss is also a citizen of the state of Georgia, and Professional Park Medical Services PC is a Georgia corporation, their inclusion in this lawsuit destroys diversity jurisdiction.

Bayer timely filed a notice of removal with the United States District Court, Northern District of Georgia, asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In its removal petition, Bayer asserts that Plaintiff failed to state a cause of action against her physician, Dr. Poss and Professional Park Medical Services, PC.

2. Plaintiff John Patterson

Plaintiff John Patterson is also a citizen of the state of Georgia. In March 1999, he alleges that his physician, Dr. Kenneth Hardigan, gave him a prescription for Lopid. Complaint ¶ 18. Thereafter, Mr. Patterson was prescribed Baycol, which he ingested

concomitantly with Lopid, on or about March 7, 2000. Id. 19. He alleges that "on or about May 17, 2000, he began experiencing generalized malaise, leg pain, dark urine, muscle pain and progressive weakness in his muscles and lower extremities". Id. ¶ 20.

On May 22, 2002, Plaintiff filed this Complaint, asserting product liability claims against Bayer Corporation, Bayer AG, GlaxoSmithKline. In addition, Plaintiff asserts claims against his physician, Dr. Hardigan, Savannah Cardiology, PC, Dr. Hardigan's employer and against his pharmacist, Mitchell Weitmen, Quick RX Drugs, Inc. and Weitmen Pharmacy, Inc. (hereinafter the Medical Defendants and Pharmacy Defendants). The Medical and Pharmacy Defendants are either citizens of Georgia, or Georgia corporations. Therefore, their inclusion in this lawsuit destroys diversity jurisdiction.

Bayer timely filed a notice of removal with the United States District Court, Northern District of Georgia, asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In its removal petition, Bayer asserts that Plaintiff failed to state a cause of action against the non-diverse Medical and Pharmacy Defendants.

Standard

Remand to state court is proper if the district court lacks subject matter jurisdiction over the asserted claims. 28 U.S.C. § 1447(c). In reviewing a motion to remand, the court must resolve all doubts in favor of remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. In re Business Men's Assurance Co. of America, 992 F.2d

181, 183 (8th Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3rd Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

1. Fraudulent Joinder

"Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendant." Wiles v. Capitol Indemnity Corporation, 280 F.3d 868, 870 (8th Cir. 2001). The burden is on the removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant or that there has been outright fraud in the pleading of jurisdictional facts. Parnas v. General Motors Corporation, 879 F. Supp. 91, 92 (E.D. Mo. 1995). In deciding this issue, the Court may consider the pleadings and supporting affidavits. Id.

A. Statute of Limitations

In both the Weber and Patterson actions, Bayer argues that, as revealed on the face of both Complaints, the Plaintiffs' medical malpractice claims are time-barred.

By statute, a medical malpractice action involves "any claim for damages resulting from the death of or injury to any person arising out of: 1)Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services . . ." O.C.G.A. § 9-3-70(1). Claims against a pharmacist in dispensing medication upon a doctor's prescription constitutes an "action for medical malpractice." Robinson v. Williamson, 537 S.E.2d 159, 161 (Ga. Ct. App. 2000). The statute of limitations for medical malpractice claims is two years and begins to run on the date the "injury or death arising from a negligent or wrongful act or

omission occurred." O.C.G.A. § 9-3-71(a). The fact that a plaintiff does not know the medical cause of the suffering does not affect the application of the statute of limitations when the facts show that the injury manifested itself on an earlier date. Crawford v. Spencer, 457 S.E.2d 711, 448 (Ga. Ct. App. 1995). "[Even a] subjective belief that symptoms were due to some other cause unrelated to the alleged negligence does not change the point at which the injury occurred." Id. See also, Witherspoon v. Aranas, 562 S.E.2d 853, 858 (Ga. Ct. App. 2002).

In the Weber case, Plaintiff alleges that "shortly after April 14, 2000" she began to experience the symptoms of rhabdomyolysis. Complaint ¶ 19. Bayer argues that "shortly after April 14, 2000", read together with the allegations that she began taking Baycol and Lopid concomitantly on or about April 14, 2000 and that she sought treatment on or about May 16, 2000, means that Plaintiff's symptoms were manifested days or weeks prior to May 16, 2000. The applicable statute of limitations would thus have run by the time the Complaint was filed on May 15, 2002.

In the Patterson case, Plaintiff alleges that "on or about May 17, 2000", he began to suffer from the symptoms of rhabdomyolysis. More than two years later, however, on May 22, 2002, he filed this action. Bayer thus argues that Plaintiff Patterson's claims against his medical providers are also time-barred.

Plaintiffs first argue that on a motion to remand, a statute of limitations argument is not a proper consideration in determining whether the medical providers were fraudulently joined. The standard applied in the Eighth Circuit is whether there exists "no reasonable basis in fact and law supporting a claim against the resident defendant."

Wiles, 280 F.3d at 871. Thus, where the facts as alleged in the Complaint clearly show that a claim is time-barred, that no question of fact concerning application of the statute of limitations exists, a Court may properly consider a statute of limitations defense in determining fraudulent joinder. Under similar standards, courts in other jurisdictions have addressed statute of limitation issues in determining fraudulent joinder. See eg., Ritchey v. Upjohn Drug Company, 139 F.3d 1313, 1320 (9th Cir. 1998); LeBlang Motors, Ltd v. Subaru of America, 148 F.3d 680, 692 (7th Cir. 1998); Kohl v. American Home Products Corp., 78 F.Supp.2d 885, 897 (W.D. Ark. 1999); Bain v. Honeywell International, Inc., 167 F.Supp.2d 932, 937 (E.D. Texas 2001); Peters v. Metropolitan Life Ins. Co., 164 F.Supp.2d 830, 838-839 (S.D. Miss. 2001).

Plaintiffs argue, however, that there are fact issues as to the date of the onset of symptoms in both the Weber and Patterson cases. By pleading that the symptoms first occurred "on or about" a certain date, Plaintiffs argue that the Court should interpret the Complaint expansively, allowing that the symptoms first occurred approximately or within a reasonable amount of time of the date specified. In support, Plaintiffs cite to a number of cases from jurisdictions other than Georgia that have held that courts interpret "on or about" as an event occurring within a reasonable time to the date specified. Many of these cases, however, do not apply an expansive interpretation of "on or about" in the context of a limitations period. See eg. DeMarion Janitorial Services, Inc. v. Univ. Dev. Corp., 625 F.Supp. 1353, 1357 (N.D. Miss. 1985)(interpreting contractual language); United States v. Duke, 940 F.2d 1113, 1119 (8th Cir. 1991)(finding that government need not prove crime charged on a specific date, so long

as it occurred within a reasonable amount of time of the date specified); Mireles Jr. v. State of Texas, 771 S.W.2d 569, 570 (Tex. Ct. App. 1989)(criminal case).

Another case relied on by Plaintiffs is Childs v. State of California 144 Ca. App.3d 155, 160-162 (Ca. Ct. App. 1st Dist. 1983). Plaintiffs cite to this case for the proposition that use of the language "on or about" fails to provide the requisite certainty for resolution of a statute of limitations issue on demurrer. In Childs, the court noted:

> Our survey of the cases addressing the issue persuades us that use of the term "on or about" when pleading dates constitutes a proper pleading only where the date specifically alleged is well within the applicable time constraint and where the actual date on which the subject event occurred is within close proximity to the alleged date.

Childs, 144 Cal. App.3d 155, 160 (listing cases). Although the date specified in the complaint fell one day out of the statute of limitations, the court found that a fact issue was created between the allegations in the complaint and the notice attached to the complaint. In both the Weber and Patterson cases at issue here, the dates specified in the Complaints fall outside the statute of limitations, and no fact issue is created through affidavit or other document. Childs thus lends little support to Plaintiffs, as it is fact specific, and supports the analysis that although "on or about" allows room for interpretation, the date specified nonetheless must fall within the limitations period.

Finally, Plaintiffs cite to Lewis v. Merrill, 365 P.2d 1052 (Or. 1961). That case, however, is limited to its facts, which involve a determination of whether a counter-claim is time-barred, when such claim was clearly not time-barred when the original complaint was filed. Lewis, 365 P.2d at 1053 ("We are, therefore, called upon to determine whether, in these circumstances, the statute of limitations should be held to

have run against the counterclaim.")

No Georgia opinion specifically addresses the proper scope of "on or about" in the context of statutes of limitation. Bayer cites to Dunn v. Towle, 317 S.E.2d 266 (Ga. Ct. App. 1984), in an attempt to show that Georgia courts would most likely adopt a narrow interpretation of "on or about." Id, at 267. See also Ivester v. Southern Ry. Co., 6 S.E.2d 214, 216 (Ga. Ct. App. 1939)(allegation that husband died on or about September 8, 1935, sufficient to start the limitations period running on September 8, 1935). While these cases may support Bayer's position, the fact remains that no Georgia court has yet addressed the proper scope of "on or about" in the context of statutes of limitation. Because the dates specified in the Weber and Patterson complaints fall close to the dates falling within the applicable statutes of limitation, whether or not the Plaintiffs' claims against the Medical and Pharmacy Defendants are time-barred should be determined in state court.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Weber's and Patterson's motions for remand are GRANTED. Weber v. Bayer et al., Civil No. 02-4820 and Patterson v. Bayer et al., Civil No. 02-4821 shall be remanded to the State Court of Fulton County, Georgia.

Date: 2003

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Michael J. Davis
United States District Court