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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 105923/2006

JACOBSON, BARRY

VS.

MCNEIL CONSUMER & SPECIALTY

SEQUENCE NUMBER : 012

AMEND

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/9/09

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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BARRY JACOBSON and MARGARET NICHOLS, Individually and as Administrators of the Estate of JESSE NICHOLS JACOBSON,

Plaintiff,

-against-

MCNEIL CONSUMER & SPECIALTY PHARMACEUTICALS, a Division of MCNEIL-PPC, INC., JOHNSON & JOHNSON, INC., G.D. SEARLE & CO., PHARMACIA CORP., PHARMACIA & UPJOHN COMPANY, PFIZER, INC., JOHN DOE CORP. NOS. 1-5, JOHN & JANE DOE, M.D., NOS 1-20, AND JOHN & JANE DOE HEALTHCARE PROVIDERS 1-20,

Defendant.

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Decision/Order
Index No.: 105923/06
Seq. No. : 012

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m [amend] w/PON affid in support, exhs	1
Pfizer's n/x-mot [prot. ord] w/ JJO affirm, exhs	2
McNeil's EMF affirm in opp, exhs	3
Pltf's reply affirm (KMJ)	4
Transcript 11/6/08	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is a wrongful death and survival action. Plaintiff now moves for leave to amend the complaint to assert a new theory of liability, to wit, that a pharmaceutical known as Dilantin caused and/or contributed to the death of the deceased, Jesse Nichols Jacobson ("Jesse"). CPLR § 3025 (b). Defendants G.D. Searle LLC, Pharmacia Corp., Pharmacia & Upjohn Company LLC, and Pfizer, Inc. (collectively herein referred to as the "Pfizer Defendants") oppose the motion and cross-move for a protective order striking

plaintiffs' document requests seeking discovery related to Dilantin. Defendants McNeil Consumer & Specialty Pharmaceuticals, a Division of McNeil-PPC, Inc. and Johnson & Johnson, Inc (collectively herein referred to as the "McNeil Defendants")[1] also oppose plaintiffs' motion.

The following facts are alleged in the current complaint.[2] On March 31, 2004, Jesse, the ten-year-old daughter of plaintiffs Margaret Nichols and Barry Jacobson, was diagnosed with a large cerebellar posterior fossa tumor with hydrocephalus. On that same day, she was admitted to the PICU of TISCH Hospital in New York City and underwent a resection of her posterior fossa tumor. Jesse was treated post-operatively with a number of drugs, including Vancomycin, Dilantin, morphine, codeine and Tylenol. Plaintiffs allege that Jesse "did not experience or develop any rashes or mucocutaneous lesions during the entirety of her nearly one month hospitalization" after the surgery.

On April 26, 2004, Jesse was transferred in stable condition to Rusk Hopsital for Rehabilitative Medicine. There she engaged in physical, occupational and speech therapy. At that time, she was being treated with the following medications: Colace, Dilantin, Pepcid, Decadron, Tylenol and Proventil. On April 28, 2004, Jesse developed a fever and pneumonia and was treated with Vancomycin and Cefepime. Her condition continued to improve, and on April 29, 2004, the Dilantin was reduced to sub-therapeutic levels and on April 30, 2004, all antibiotics were discontinued.

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[1] Although the McNeil Defendants claim that they have been incorrectly named in the caption, no formal motion to amend the caption has ever been made. In any event, this error, if any, does not impact the court's decision on this motion.

[2] The present complaint is the First Amended Complaint. Plaintiffs are now seeking to interpose a Second Amended Complaint.

However, on May 5, 2004, Jesse developed an infection and was started on Flagyl. On May 6, 2004, she developed a fever and was given ibuprofen. Later that day, Jesse developed "a rash with spiking fevers" and the Flagyl and Dilantin were discontinued. That same day, Jesse was transferred back to TISCH for management of the rash and fever. The rash continued to develop through May 7, 2004 and blistering occurred. Based on the complaint, physicians diagnosed Jesse as having developed "a slow, progressive [Stevens Johnson Syndrome ("SJS")] secondary to Flagyl", according to the complaint. A skin biopsy performed on May 12, 2004 revealed findings consistent with toxic epidermal necrolysis ("TEN"). Jesse was then transferred to Cornell Medical Center burn unit in New York City that same day. Her condition continued to deteriorate and on June 2, 2004, Jesse passed away as a result of the TEN.

Plaintiffs have alleged several causes of action in the first amended complaint with respect to both the McNeil Defendants' ibuprofen and the Pfizer Defendants' Flagyl, to wit: defective design, marketing defect, breach of express warranty, breach of implied warranty, negligence, and medical malpractice. Plaintiff now seeks to amend the complaint to assert that Dilantin caused and/or contributed to Jesse's SJS and TEN.[3]

Arguments asserted

Plaintiffs contend that "the interests of justice would be served" by granting the instant motion. Plaintiffs claim that the amendment "is necessary in the pursuit of the truth surrounding Jesse Jacobson's injury and tragic death" and since defendant Pfizer is

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[2] Although plaintiffs have failed to annex a copy of the proposed second amended complaint to their moving papers, plaintiffs have remedied this defect by providing a copy of same with their reply papers.

already a party to this action, "any prejudice to its ability to defend against the allegations concerning Dilantin is minimal at best." Plaintiffs maintain that "Dilantin is a known cause of both SJS and TEN, and Dilantin was suspected as a possible cause for Jesse's fatal reaction."

Plaintiff Margaret Nichols, Ph.D., Jesse's mother, provides an affidavit to the court claiming that her former attorney, who prepared and filed the first amended complaint, did not prosecute this action with all due diligence. Ms. Nichols maintains that she "did not have control over what [her] prior attorneys did and did not do, nor when they did it." Ms. Nichols asks the court to "consider not holding against [her], Barry Jacobson, or the Estate of [her] deceased daughter the fact that [the plaintiffs] were not able to obtain counsel, until August, 2008, that [plaintiffs] believe will commit the extraordinary effort that [the plaintiffs] have learned is required when pursuing a case against some of the largest drug companies in the world."

The defendants each claim that the relief sought by plaintiffs would prejudice them. The Pfizer Defendants argue that the "operational facts, claims and defenses associated with each drug are so distinct from one another that if this court were to conclude that notice of a claim concerning one product comprises notice of claim of the other, it would be tantamount to a denial of due process." The defendants each also contend that plaintiffs' motion should be denied as untimely because the plaintiffs were aware of Dilantin and its potential relevance to this case for at least one year and perhaps longer. The McNeil Defendants have provided to the court several letters sent from their counsel to plaintiffs' counsel wherein counsel for the McNeil Defendants seek to be dismissed from the case because Flagyl and/or Dilantin were the more serious risks to Jesse's

health, rather than ibuprofen. In a letter dated October 17, 2007 from Thomas W. Pullman, Esq., counsel for the McNeil Defendants, and addressed to Bill Zook, Esq., former counsel for plaintiffs, Mr. Pullman writes:

> Nothing in the medical literature supports the notion that ibuprofen may have exacerbated Jesse's SJS once it had begun. Moreover, Jesse was taking a large number of other drugs known to be associated with SJS/TEN, including Dilantin, which was consistently identified as a potential cause in the medical records.

In the affirmation of Eric M. Falkenberry, attorney for the McNeil Defendants, submitted in opposition to the instant motion, the McNeil Defendants seek an award for its attorneys fees, costs and disbursements.

In reply, plaintiffs have submitted the affirmation of Keith M. Jensen, Esq. Attorney Jensen claims that he has "settled nine (9) significant Dilantin induced SJS/TEN cases with Pfizer in the last fourteen (14) months." Attorney Jensen also claims that Pfizer has "a Dilantin-SJS 'settlement program.' " At oral argument, although counsel for the Pfizer Defendants, Santo Borruso, Esq., acknowledged that a "Dilantin Settlement Program" exists, they maintained that the existence and use of such program is irrelevant. As for the program itself, Attorney Borruso stated that "the program works as an early assessment stage of the litigation" and that he did not know whether this case would be "inserted into that program if the motion were granted."

Discussion

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43

NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982). In general, where the proposed amended claim is barred by the applicable statute of limitations, the amendment will not be allowed. Buran v. Coupal, 87 NY2d 173, 181 [1995]. In addition, where there has been an extended delay in moving to amend, the moving party must establish a reasonable excuse for the delay (Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC, 4 AD3d 290 [1st Dept 2004] citing Heller v Louis Provenzano, Inc., 303 AD2d 20 [1st Dept. 2003]).

The statute of limitations ran on plaintiffs' wrongful death claim on June 3, 2006 (EPTL § 5-4.1). Plaintiffs' strict liability and negligence causes of action are subject to a three-year statute of limitations which begins to run on the date of injury (CPLR § 214). At the least, these causes of action must have been commenced by June 3, 2007 in order to be timely. Finally, plaintiffs' breach of warranty claims are subject to a four-year statute of limitations and, therefore, are time-barred (UCC § 2-725 [1]).

Plaintiff argues that the court should nonetheless permit the proposed amendments pursuant to the CPLR § 203 (f) relation back doctrine set forth in Buran v. Coupal, *supra*. Under this doctrine, a claim in an amended pleading, which is otherwise time-barred, is deemed to have been interposed at the same time as the claims contained in the original pleading, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved

pursuant to the amended pleading" (CPLR § 203 [f]). "The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the Statute of Limitations has expired." Spaulding v. Mt. Vernon Hosp., 283 AD2d 634 [2d Dept 2001].

The court appreciates the seriousness of this case and the tragic circumstances of Jesse's death. However, on this motion, plaintiffs have failed to meet their burden to warrant the amendment sought. The original and First Amended Complaint did not give the defendants notice of the transactions and occurrences underlying the Dilantin-based claims. In particular, there is no allegation which claims that Dilantin caused Jesse's serious condition. Plaintiffs did allege in the complaint that Jesse was taking Dilantin for several weeks prior to her onset of SJS/TEN. Yet many drugs are identified in the complaint, and only two of those drugs, Flagyl and Ibuprofen, are identified as the alleged cause of Jesse's SJS and TEN. The allegations concerning Jesse taking Dilantin could not reasonably have apprised the Pfizer Defendants of the need to defend against a claim that Dilantin may have cause and/or contributed to Jesse's SJS/TEN. Plaintiffs' counsel, Keith M. Jensen, Esq., even admits in his affirmation that "this case was prosecuted on theories that solely or primarily focused on Flagyl and/or Motrin [ibuprofen]." The fact that plaintiffs' new attorneys would like to now "focus on Dilantin" as the cause of Jesse's SJS/TEN is not a basis to grant plaintiffs' motion.

Moreover, Ms. Nichols' argument that failure to assert Dilantin-based claims was her prior attorney's fault is rejected as a basis for relief in this case. Claims between plaintiffs and their former attorney should be raised in another forum. Although Ms. Nichols claims that she had no control over her attorney's legal and procedural decisions

in this case, granting this motion is not the proper remedy for this complaint. Such claim is not and should not be reached on this motion.

Plaintiffs have also failed to demonstrate a reasonable excuse for failing to move to amend the complaint timely, given the length of time that the proposed theory of liability was known to plaintiffs prior to their making of the motion (see i.e. Falvo v. Leonelli 274 AD2d 896 [3d Dept 2000]). Attorney Jensen admits that the medical records indicate that "Dilantin was suspected as a possible cause for Jessse's fatal reaction." Plaintiffs' have provided to the court two documents, each entitled NYU Medical Center Interdisciplinary Patient Care Notes bearing Jesse's name, the fist dated May 6, 2004 and the second dated May 8, 2004. The former document states: "Drug eruption most likely 2nd to Dilantin vs. Flagyl"; the latter document states: "SJS likely to Dilantin vs. Flagyl."

Additionally, the McNeil Defendants advised plaintiffs' former attorney in as early as October 2007 that Dilantin was a potential cause of Jesse's SJS/TEN. At that time, the statute of limitation on at least plaintiffs' breach of warranty claims had not yet run and if plaintiffs had made a motion to amend, they would not have needed to rely upon the relation back doctrine.

Accordingly, the court denies the instant motion to amend the First Amended Complaint, because the proposed claims are time-barred. Consequently, plaintiffs' collateral application to compel the Pfizer Defendants to respond to discovery requests arising from these claims must be denied as well. The court's decision, therefore, renders the Pfizer Defendants' motion for a protective order concerning discoverable materials related to Dilantin moot. Therefore, the cross-motion is also denied.

The McNeil Defendants "request" for an award for its attorneys fees, costs and

disbursements is denied. First, the McNeil Defendants failed to make a proper cross-motion, and therefore failed to give notice to the parties in this action as to the relief they seek. Even if the court were to overlook this procedural error, the legal arguments and positions advanced by plaintiffs are frivolous within the meaning of 22 NYCRR 130-1.1.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion and the Pfizer Defendant's cross-motion is denied in its entirety; and it is further

ORDERED that there be a status conference scheduled in this case before Part 10 at 60 Centre Street, Room 232 on March 5, 2009 at 9:30 a.m.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
February 9, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.