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SHANON CHITWOOD, Plaintiff, vs. ETHICON, INC., ETHICON WOMEN'S HEALTH AND UROLOGY, a Division of Ethicon, Inc., GYNECARE, JOHNSON & JOHNSON, BOSTON SCIENTIFIC CORPORATION, AND JOHN DOES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO. BER-L-15866-14 MASTER CASE NO. BER-L-11575-14 Civil Acton Gynecare Litigation, Case No. 291 **ORDER GRANTING LEAVE TO FILE FIRST AMENDED COMPLAINT PURSUANT TO RULE 4:9-1**

THIS MATTER, having been opened to the Court by The D'Onofrio Firm, LLC, attorneys for Plaintiff, seeking an Order granting Plaintiff leave to file a First Amended Complaint pursuant to Rule 4:9-1, and the Court having considered all papers in support of such application, as well as any papers submitted in opposition, hereby:

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Leave to File a First Amended Complaint is and hereby shall be granted; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff shall file the First Amended Complaint within ten (10) days of the date of this Order; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff shall serve a copy of this Order on all parties within seven (7) days of the date of this Order.

Denied for the reasons set forth in the Rider.

Honorable Brian R. Martinotti

[✓] Opposed
[ ] Unopposed

RIDER TO ORDER

Before this Court is Plaintiff Shannon Chitwood's ("Chitwood" or "Plaintiff") Motion to File a First Amended Short Form Complaint and Jury Demand. This Motion is OPPOSED by Defendants Ethicon, Inc., et al. ("Ethicon" or "Defendants")

I.

ARGUMENTS

Plaintiff's Motion to Amend Complaint

Plaintiff, a Tennessee resident, submits a Certification of Counsel in support of her Motion to Amend her Complaint to add her son, Wesley Chitwood ("Wesley"), as a named plaintiff. (Certification of Heather K. D'Onofrio ("D'Onofrio Cert."). Plaintiff originally filed her Complaint on or about June 4, 2014. (D'Onofrio Cert., ¶ 2). The original Complaint named Chitwood as the sole plaintiff. (D'Onofrio Cert., ¶ 2). After filing the Complaint, Plaintiff's counsel learned that Wesley has suffered injuries related to the allegations in the Complaint, including, but not limited to, loss of parental consortium and emotional distress. (D'Onofrio Cert., ¶ 3). Thus, Plaintiff seeks to amend her Complaint to add Wesley's claims for loss of parental consortium and emotional distress.

Defendant's Opposition to Plaintiff's Motion to Amend Complaint

Defendants oppose Plaintiff's Motion on three grounds: (1) neither Plaintiff's home state of Tennessee nor New Jersey recognizes loss of parental consortium as a cause of action in personal injury actions; (2) Plaintiff's son cannot meet the standard necessary to sustain an emotional distress claim under either state's law; and (3) even if this Court were inclined to

allow Plaintiff to amend her Complaint, doing so would cause Defendants to suffer undue prejudice.

1. Defendants' Argument that New Jersey and Tennessee Do Not Allow Claims for Loss of Parental Consortium in Personal Injury Cases

Defendants cite New Jersey and Tennessee case law that explicitly precludes a claim for loss of parental consortium. See Riley v. Keenan, 406 N.J. Super. 281, 296 (App. Div. 2009) ("Suffice it to say, New Jersey does not recognize such a cause of action [as loss of parental consortium]."); Taylor v. Beard, 104 S.W.3d 507, 511-12 (Tenn. 2003) (declining to adopt a common law cause of action for loss of parental consortium in personal injury cases). Thus, even if Plaintiff's son has suffered a loss of parental consortium as a result of Defendants' actions, he cannot bring such a claim in this lawsuit.

2. Defendants' Argument that Plaintiff's Son Cannot Meet the Standard Necessary for an Emotional Distress Claim

Pursuant to Case Management Order No. 3, Plaintiff's Proposed Amended Complaint adopts and incorporates by reference all allegations in Plaintiff's Master Long Form Complaint. (See Amended Complaint, ¶ 2, Certification of Douglas G. Hart ("Hart Cert.") Ex. C; see also Case Management Order No. 3, ¶ 4, Hart Cert. Ex. D). The Master Long Form Complaint does not include a cause of action for intentional infliction of emotional distress, but it does allege Defendants' actions caused negligent infliction of emotional distress ("NIED"). (See Master Long Form Complaint and Jury Demand, ¶¶ 110-113, Hart Cert. Ex. E). Defendants acknowledge that both New Jersey and Tennessee recognize claims for NIED, but they argue Plaintiff's allegations are insufficient to sustain a claim in either state.

NIED in New Jersey

New Jersey plaintiffs can recover for NIED in two instances: (1) by demonstrating that the defendant's negligence placed in the plaintiff reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in substantial bodily harm or sickness; or (2) by demonstrating that the plaintiff experienced emotional distress after witnessing injury to another person. See Jablonowska v. Suther, 195 N.J. 91, 104 (2008) (citations omitted). In situations in which the plaintiff witnessed injury to another person, he or she must prove: (1) defendant's negligence caused the death or serious physical injury of another; (2) plaintiff had a marital or intimate, familial relationship with the injured person; (3) plaintiff observed the death or injury at the scene of the accident; and (4) plaintiff suffered severe emotional distress. Portee v. Jaffee, 84 N.J. 88, 101 (1980).

Here, Defendants argue that even if Plaintiff can establish Defendants' negligence, there is no evidence that her son witnessed the injury at the scene at which the injury occurred. Defendants argue that Plaintiff's son did not have the sort of "sensory and contemporaneous observance" of the injury-causing event that the Supreme Court of New Jersey stated is a prerequisite for a NIED claim. Portee, 84 N.J. at 98. Further, Defendants argue that Plaintiff's alleged injuries were not the result of an "accident," but the result of a medical procedure she elected to undergo. As the Portee factors do not apply to Plaintiff's son, he cannot meet the burden for a NIED claim.

NIED in Tennessee

There are four categories of NIED in Tennessee: (1) a "parasitic" claim where a plaintiff seeks to recover for emotional damages in addition to other damages, such as personal injury, medical expenses, or lost wages; (2) a traditional "bystander" claim where a plaintiff witnesses

an accident resulting in serious injury to another; (3) a non-traditional "bystander" claim where a plaintiff observes "serious physical injury at the scene of [an] accident," but does not observe the accident itself; and (4) a "stand-alone" claim in which, in the absence of other damages, a plaintiff seeks to recover for purely emotional damages. See Rogers v. Louisville Land Co., 367 S.W.3d 196, 206-07 & nn.8-10 (Tenn. 2012). Under each of the four categories, the emotional injury must be "serious or severe," meaning "a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Id. at 208 (citation and internal quotation marks omitted). A plaintiff is "unable to cope" when "he or she has suffered significant impairment in his or her daily life resulting from the defendant's extreme and outrageous conduct." Id. at 210.

Here, Defendants argue Plaintiff's son's NIED claim must fail under any of the four categories. A "parasitic" claim must fail, because such a claim seeks "emotional damages that are a . . . consequence of negligent conduct that results in multiple types of damages." Id. at 206 n.10 (citation and internal quotation marks omitted). Defendants argue that Plaintiff's son's NIED claim cannot be parasitic, because Tennessee does not recognize a claim for loss of parental consortium—the claim from which the NIED claim is alleged to arise.

Defendants argue Wesley's NIED claim cannot fit either "bystander" category. First, they assert he did not witness an "injury-causing event" that would have "allow[ed] sensory observation . . . ." Flax v. DaimlerChrysler Corp., 272 S.E.3d 521, 528 (Tenn. 2008). Second, Defendants claim, Plaintiff's son cannot show that he observed Plaintiff's injuries "at the scene of [an] accident." See Rogers, 367 S.W.3d at 206 n.9. Defendants contend Plaintiff's alleged injuries were not the result of an "accident" but a medical procedure. Even if the procedure could be termed an accident, Defendants argue there is no evidence or allegation that Plaintiff's

son had the sort of contemporaneous observation that Tennessee law requires for a NIED bystander claim.

Finally, Defendants argue Wesley's claim cannot meet the requirements for a stand-alone NIED claim. In such cases, a plaintiff must allege (1) a negligence claim and (2) "serious" or "severe" emotional injury. Id. at 206-07 & n.10. Such an injury must be supported by "expert medical or scientific proof." Id. at 207 & n.10. Defendants argue there is no Tennessee authority that establishes medical device manufacturers have a duty of care to non-patient third parties. Thus, they assert Plaintiff's son cannot bring the requisite negligence claim from which his alleged emotional injury stems. Defendants also argue that no court applying Tennessee law has ever permitted a claim for NIED against a medical device manufacturer. See, e.g., Gritzmacher v. Danek Med., Inc., No. 96-3246, 1999 U.S. Dist. LEXIS 6448, *31 (W.D. Tenn. Apr. 19, 1999) (granting summary judgment in favor of manufacturer and holding that plaintiff who was implanted with fixation device did in her spine did not plead facts sufficient to state a claim for either negligence or NIED) (Hart Cert. Ex. F).

Defendants argue they had no duty to protect Plaintiff's son from harm, whether emotional or otherwise. Defendants argue that allowing such a claim would lead to a flood of litigation from parties who were distressed by the alleged post-surgical complications experienced by other persons. Defendants also assert that there is no allegation that Plaintiff's son suffered the sort of "serious" or "severe" emotional distress that is required to sustain a NIED claim under Tennessee law. Thus, Defendants state, there is no factual basis for Wesley's NIED claim.

3. Defendants' Argument that They Would Suffer Undue Prejudice if Plaintiff's Motion is Granted

Defendants argue they will be forced to answer Plaintiff's Amended Complaint, prepare additional discovery requests, and review Plaintiff's responses. These efforts would cost Defendants both time and money, as well as divert their attention from other cases in this litigation.

II.

STANDARD

Rule 4:9-1 states,

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice. A motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

The New Jersey Supreme Court has clarified that Rule 4:9-1 "requires that motions for leave to amend be granted liberally and that the granting of a motion to file an amended complaint always rests in the court's sound discretion." Notte v. Merchants Mutual Insurance Co., 185 N.J. 490, 500-501 (2006). However, the exercise of that discretion requires a two-step process: first, "whether the non-moving party will be prejudiced, and [second,] whether granting the amendment would nonetheless be futile." Ibid. at 501. Although motions for leave to amend are to be determined "without consideration of the ultimate merits of the amendment, ... those determinations must be made in light of the factual situation existing at the time each motion is

made." Ibid. (internal citations omitted). The court is "free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law." Ibid.

III.

DECISION

The Court finds that Plaintiff's newly asserted claims are not sustainable as a matter of law. See ibid. Neither New Jersey nor Tennessee recognizes a claim for loss of parental consortium. See Riley, 406 N.J. Super. at 296 ("Suffice it to say, New Jersey does not recognize such a cause of action [as loss of parental consortium]."); Taylor, 104 S.W.3d at 511-12 (declining to adopt a common law cause of action for loss of parental consortium in personal injury cases). Thus, Plaintiff's Motion is DENIED as to amending her Complaint to add her son's claim for loss of parental consortium.

Even if Plaintiff's son has suffered emotional distress, his claim cannot be sustained under either New Jersey or Tennessee law. Under New Jersey law, Plaintiff's son must prove: (1) defendant's negligence caused the serious physical injury of his mother; (2) he had an intimate, familial relationship with the Plaintiff; (3) he observed Plaintiff's injury at the scene of the accident; and (4) he suffered severe emotional distress. Portee, 84 N.J. at 101. Plaintiff's son cannot satisfy the third prong of the Portee test, namely that he experienced "sensory and contemporaneous observance" of the injury-causing event. Id. at 98. Portee involved a plaintiff mother who witnessed her son's death when he was crushed by a negligently maintained elevator. While Plaintiff's son may have suffered understandable emotional distress over his mother's alleged injuries and pain, that is not the sort of emotional distress contemplated by the Court in Portee. Thus, Plaintiff's Motion is DENIED as to amending her Complaint to add her son's claim for NIED under New Jersey law.

Similarly, Wesley's claim for NIED fails under Tennessee law. Wesley's NIED claim would not fit any of Tennessee's four categories: : (1) a "parasitic" claim where a plaintiff seeks to recover for emotional damages in addition to other damages, such as personal injury, medical expenses, or lost wages; (2) a traditional "bystander" claim where a plaintiff witnesses an accident resulting in serious injury to another; (3) a non-traditional "bystander" claim where a plaintiff observes "serious physical injury at the scene of [an] accident," but does not observe the accident itself; and (4) a "stand-alone" claim in which, in the absence of other damages, a plaintiff seeks to recover for purely emotional damages. See Rogers, 367 S.W.3d at 206-07 & nn.8-10. As Defendants argued, Wesley's claim is not "parasitic," because it does not derive from any other cognizable cause of action under Tennessee law. Plaintiff's son did not witness an accident in which his mother was injured, even if the pelvic mesh implantation surgery can be deemed an "accident." Thus, the first "bystander" category does not apply. Similarly, Plaintiff's son did not observe an injury at the scene of an accident, which would presumably be the operating room under Plaintiff's theory of NIED. Therefore, the second "bystander" category does not apply, either. Finally, the fourth category of a stand-alone claim does not apply. There is no authority supporting a finding that Defendants had a duty to Plaintiff's son. He cannot, therefore, establish the requisite negligence claim to bring a stand-alone NIED claim under Tennessee law.

Wesley's claims for both loss of parental consortium and NIED would represent dramatic departures from New Jersey and Tennessee law. Under the Notte standard, the Court finds that the amendment Plaintiff seeks would be futile. See 185 N.J. at 501. For the foregoing reasons, Plaintiff's Motion is DENIED.