

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
BRYAN D. GARRUTO
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

MEMORANDUM OF DECISION ON MOTION

TO: Alan H. Sklarsky, Esq.
Beth S. Block, Esq.
Richard Godshall, Esq.

FILED

SEP 01 2006

~~BRYAN D. GARRUTO, J.S.C.~~

RE: Smith v. Novartis, et al.
Docket # MID-L-9872-02

NATURE OF MOTION: Motion for Declaratory Judgment; Motions for Summary Judgment; Motion to Dismiss.

Having carefully reviewed the moving papers, I have made the following determination:

This matter comes to the Court on motions for declaratory judgment **and** summary judgment from defendant J.B. Laboratories; a motion **for** summary judgment from defendant Steritek; and a motion to dismiss from defendant Eric Kuhrts.

Phenylpropanolamine ("PPA") was first synthesized in the early 1900s. As a sympathomimetic drug, PPA mimics aspects of the sympathetic **nervous** system. By the 1970s, PPA was widely used in over-the-counter ("OTC") and prescription cough and cold and appetite suppressant products. Widespread litigation arose out of the use of these products **when** it was alleged that use of products containing PPA caused strokes.

This case arose out of a situation in which Plaintiff, Roger Smith, [hereinafter 'Smith', or 'Plaintiff'] alleges that he suffered a stroke on October 13, 1999 as a result of taking the drug Acutrim. Plaintiff filed this action on November 11, 2002, approximately 3 years and 1 month after suffering his stroke.

Plaintiff was an Alabama resident at the time of the incident. A disputed fact is whether or not Plaintiff ingested the product in Alabama exclusively or whether he

first ingested **the product during a business trip to Philadelphia.**

Defendant Heritage purchased the Acutrim trademark from Novartis¹ and **distributed** the product. Although not admitted in this motion or its opposition, Heritage is currently involved in **bankruptcy** proceedings. It should be noted **that Heritage never filed an Answer to the Complaint.**

Defendant JB Labs is a contract-manufacturer [**Michigan-based** company], meaning that it manufactures **already existing** products in accordance with the specifications with which it is provided. JB Labs, however, **apparently exclusively** manufactured the product for Heritage. This was the procedure that was followed **with the Acutrim product.**

JB Labs was **supplied** with the time-release formula for the product by Eric Kuhrts, inventor of the formula, who is also a **shareholder and employee** of co-defendant Hauser-Kuhrts, Inc. Eric Kuhrts also **provided** JB Labs with **further** technical support in synthesizing **the product.** JB Labs then shipped the Acutrim **in bulk,** at the direction of **Heritage,** to an **outside** firm, Steritek, **for packaging and labeling.** Steritek is a **New Jersey** company.

The FDA notified JB Labs by letter in 2000 that PPA was not recognized as safe and effective for over-the-counter sale and that the product should **be** voluntarily withdrawn from **the** market. Litigation followed. The **causes of action** that are included in the instant Plaintiff's complaint **include:** negligence, products liability, and breach of **expressed and implied** warranty.

At this time, JB Labs has moved **both** for a **declaratory** judgment finding that the **Alabama** statute of limitations applies **in this** matter, and for summary judgment on the basis **that** the Alabama **statute** of limitations has run. Steritek moves for summary judgment based on the statute of limitations grounds, and on *the* grounds that they cannot **be** considered a 'manufacturer' of **the** offending **product,** under New Jersey products liability law. Finally, Eric **Kuhrts** has moved to **be** dismissed from this case on the **basis** that all of his actions in connection **with this situation were** undertaken as an employee of 'Hauser-Kuhrts' Inc.

¹Novartis, a corporation based out of **New Jersey** was an original defendant in **this** case, and has **since** been dismissed.

Choice of Law: Statute of Limitations

To **determine** which law **applies** in a **multi-state** dispute, a court employs a flexible governmental interest analysis to determine which state has **the greatest interest** in **governing the specific** issue that arises in the underlying litigation. Int'l Union of Op. Eng. v. Merck, 384 N.J. Super. 275, 293 (App. Div. 2006).

The **first step** in applying the governmental interest test is to determine whether there is **an actual conflict between** the laws of the states involved. Id. If a conflict exists regarding a pertinent issue, the second step is to **identify** the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties. Id. It is the qualitative, not the quantitative, nature of a state's contacts that ultimately determines whether **its** law should apply. Id. A court will usually apply a particular state's law when doing so will advance the policies that the law was intended to promote. Id. If the state's contacts with the litigation are **not related** to the policies underlying its law, then that state does not **possess** an interest in having **its** law apply.

With respect to tort **claims**, the law of the state which has **the** most significant relationship to the occurrence and the parties under certain principles should apply. Rowe v. Hoffmann-La Roche, 383 N.J. Super. 442, 455 (App. Div. 2006). The five key factors in determining which state's law **should apply** have been summarized as: (1) the interests **of** interstate comity; (2) the interests of the parties; (3) the interests **underlying** the field of tort **law**; (4) the interests of judicial administration; and (5) **the** competing interests of the states. Id.

The initial focus should be on what policies the legislature or court intended to protect by having the law apply to wholly domestic concerns, and then, whether these concerns will **be** furthered in **applying** the law to the multi-state **situation**. Id. Of those five factors, the most important is the competing interests of the states. Id.

As to interstate comity, a court must determine whether application of a competing state's law would frustrate the policies of other interested states. Id. When a court determines the interests underlying tort law generally, it must consider the degree to which deterrence and compensation, the fundamental goals of tort law, would be furthered by the application of a state's local law. Because every tort rule, to some extent, is designed both to deter and to compensate, it is necessary to evaluate on a case-by-case basis the relative weight of those underlying purposes with respect to a specific rule. Id.

The place where a product manufactured in New Jersey ultimately comes to rest and causes injury is a matter of pure fortuity. Id. at 456. Although place of injury is a significant factor in many tort actions, it does not warrant undue weight in product liability cases as to choice of law. Id.

In this matter, the State of Alabama has an interest in protecting domestic manufacturers from stale suits, as well as an interest in compensating its domiciliaries for injuries caused by tortious conduct. New Jersey has a strong interest in encouraging the manufacture and distribution of safe products for the public, and conversely, in deterring the manufacture and distribution of unsafe products within the state. See Rowe v. Hoffman-La Roche, Inc., 383 N.J. Super. 442, 458 (App. Div. 2006); see also Gantes v. Kason Corp., 145 N.J. 478, 490 (1996).² The Court finds that Alabama's above stated interests are not frustrated by applying New Jersey's statute of limitations rules because there are no Alabama corporations involved in the present matter, and preserving Smith's claim here actually serves Alabama's interest in having their injured domiciliaries be redressed. Application of New Jersey's statute of limitations rules also furthers the interests of New Jersey as stated above.

² In Gantes, the New Jersey Supreme Court applied New Jersey law in a situation similar that found here, where a foreign plaintiff was injured in a foreign state by a product that may or may not have been manufactured in New Jersey. Gantes 145 N.J. at 503, (the dissent recognized that there was considerable evidence that the product in question was actually manufactured in New York).

JB Labs contended at oral argument **that** a significant factor in this analysis is that none of the tortious conduct occurred in New Jersey. The Court rejects this contention **since** the product in **question** was at least packaged and labeled in New **Jersey**, and indeed was directed to New Jersey by JB Labs, **but** even assuming that this were not the case, certainly at **least** a portion of JB Labs' tortious conduct, if any, took place in Michigan. Michigan, like New Jersey, employs **the discovery** rule, hence there is no conflict **between** Michigan and New Jersey on the statute of limitations issue, and thus it would be appropriate for New Jersey to use its own statute of limitations rules. Considering the issue on a 'party by party' basis, New Jersey's statute of limitations rules can be **applied** to defendant Steritek as well, since all of Steritek's actions took place in New Jersey.

In any event, **Alabama's** interests clearly fall in line behind both New Jersey, and Michigan on the statute of limitations issue. As such, the defendants' motion for declaratory judgment finding that the Alabama statute of limitations should apply is denied. It also follows that the motions for **summary** judgment **based on** application of Alabama's statute of limitations are likewise denied.

New Jersey Products Liability Law

N.J.S.A. 2A:58C-8 states, in relevant part, that 'Manufacturer' means (1) any **person** who **designs, formulates, produces, creates, makes, packages, labels or constructs** any product or component of **a product**; (2) a product seller with respect to a given product **to the extent** the product seller designs, formulates, produces, creates, makes, *packages, labels* or **constructs** the product before its sale. (**emphasis added**).

N.J.S.A. 2A:58C-8 also defines a 'product seller' as any person who, **in** the course of a business conducted for that purpose: **sells; distributes; leases; installs; prepares or assembles** a manufacturer's product according to the manufacturer's plan, intention, design, specifications or **formulations; blends; packages; labels; markets; repairs; maintains** or otherwise is involved in placing a product in the line of commerce. (**emphasis added**).

The distinction between manufacturer and seller is significant, because, according to the statute, a product seller may escape liability unless they exercised 'some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect', or if they **knew** or should have known of the defect, or created **the** defect. See N.J.S.A. 2A:58C-9; see also New Jersey Products Liability & Toxic Torts Law, 2006, Dreier, Keefe, & Katz, 2 : - 1 pg. 331. Not surprisingly, Steritek asserts that it is a product seller, and did not exert the required 'significant control' to hold them liable.

In this case, the Court finds that Steritek was indeed a 'product seller', because they distributed the product as recognized at oral argument, and **packaged** and labeled the product according to Heritage's specifications. The Court further finds that Steritek failed to exert the requisite control relative to the alleged **defect**, which would prevent them from utilizing the 2A:58c-9 escape provision.

Therefore, Steritek's motion for summary judgment is granted on the grounds that they are a product **seller** within the meaning of N.J.S.A. 2A:58C-9, have identified JB Labs as the manufacturer of the product, and failed to exert significant control over the manufacture of the product to hold them strictly liable, and that there is no evidence to suggest that Steritek knew or should have known of the product's defect. However, **Steritek** will be dismissed from this case without prejudice, should JB Labs cease to be viable.

Motion to Dismiss

Defendant Eric **Kuhrts** moves to **be dismissed** from the case, on the basis that all of his relevant actions were undertaken strictly as an employee of co-defendant Hauser-Kuhrts, Inc. Hauser-Kuhrts is a corporation with three shareholders, **and** multiple employees, and has answered in this case. **However**, simply because a defendant may have been employed by co-defendant Hauser-Kuhrts, Inc., at the time of his alleged negligence or wrongdoing, it does not automatically follow that such a defendant must be

dismissed from the case. By way of **example**, in a situation where a **commercial** vehicle **is** involved in a motor vehicle accident, the driver of the commercial vehicle is not automatically absolved of liability by virtue of being employed by the owner of the vehicle at the time of the accident. Similarly, here the issue is whether this defendant, was negligent, or otherwise wrongful **in** the performance of his duties. The answer to this question **is** not clear at this point, and accordingly the application must **be denied**.

DATE OF DECISION:

9/1/06



HON. BRYAN D. GARRUTO, J.S.C.

ORDER ATTACHED: X

WILLIAMS CUKER **BEREZOFSKY**

By: KEVIN HAVERTY, ESQ.

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Attorneys for the Plaintiffs

FILED

SEP 01 2006

BRYAN D. GARRUTO, J.S.C.

ROGER D. SMITH and MARTHA KING :
SMITH, h/w,

Plaintiffs,

v.

J.B. LABORATORLES, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY

DOCKET NO. MID-L-009872-02 MT
Case Code No. 264

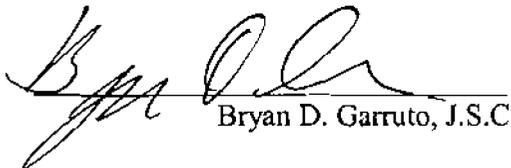
Civil Action

ORDER

THIS MATTER, having **been opened** to the court upon the **application** of **Billet & Connor**, attorneys for defendant J.B. Laboratories, for an Order **declaring** that the **law** of Alabama apply to this case and the court having considered the submissions and arguments of counsel **and** other **good cause appearing**;

IT IS on this 1st day of September, 2006 ORDERED that defendant J.B. Laboratories motion for **declaratory relief applying the law of** Alabama be **and the same is hereby DENIED; and**

IT **IS** FURTHER ORDERED that a copy of **this Order** shall be served on all **parties** within **seven (7) days** of the **date** of **this Order**.


Bryan D. Garruto, J.S.C.

#1686

FILED

SEP 01 2006

DAVID D. GARRUTO, J.S.C.

Our File No. 29.0C7210
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ROGER D. SMITH AND MARTHA KING
SMITH, H/W,

Plaintiffs,

v.

ALZA CORPORATION, including but
not limited to, J.B.
LABORATORIES, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. MID-L-9872-02 MT
Case Code 264

Civil Action

**ORDER GRANTING SUMMARY
JUDGMENT ON BEHALF OF
DEFENDANT, STERITEK, INC.**

THIS MATTER having been brought before the Court by Beth S. Block, Esq., of Callan Koster Brady & Brennan, attorneys for defendant, **Steritek, Inc.**, on a Cross-Motion for Summary Judgment, and the Court, having considered the moving papers, responsive papers, and having heard oral argument of counsel, and for good cause shown;

IT IS on this 1st day of September, 2006

ORDERED that the Cross-Motion for Summary Judgment: on behalf of defendant, **Steritek, Inc.**, is **GRANTED**; and it is

FURTHER ORDERED that all claims and cross-claims against defendant, **Steritek, Inc.**, are hereby dismissed, with ^{out} prejudice, and it is

FURTHER ORDERED that defendant, **Steritek, Inc.**, shall serve a copy of this order within 7 days of receipt of same.


Hon. Bryan D. Garruto

WILLIAMS CUKER BEREZOFSKY
By: KEVIN HAVERTY, ESQ.
Woodland Falls Corporate Center
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(856) 667-0500
Attorneys for the Plaintiffs

FILED

SEP 01 2006

BRYAN D. GARRUTO, J.S.C.

ROGER D. SMITH and MARTHA KING :
SMITH, h/w,

Plaintiffs,

v.

J.B. LABORATORIES, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY

DOCKET NO. MID-L-009872-02 MT
Case Code No. 264

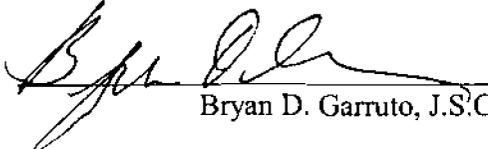
Civil Action

ORDER

THIS MATTER, having been opened to the court upon the application of Billet & Connor, attorneys for defendant J.B. Laboratories, for an Order granting summary judgment in its favor and the court having considered the submissions and arguments of counsel and other good cause appearing;

IT IS on this 1st day of September, 2006 ORDERED that defendant J.B. Laboratories motion for summary judgment be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within seven (7) days of the date of this Order.


Bryan D. Garruto, J.S.C.

WILLIAMS CUKER BEREZOFSKY

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Attorneys for the Plaintiffs

FILED

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BRYAN D. GARRUTO, J.S.C.

ROGER D. SMITH and MARTHA KING :
SMITH, h/w,

Plaintiffs,

v.

J.B. LABORATORIES, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY

DOCKET NO. MID-L-009872-02 MT
Cnsc Code No. 264

Civil Action

ORDER

THIS MATTER, having been opened to the court upon the application of Theodore Sliwinski, Esq. attorney for defendant Eric Kurhts, for an Order dismissing plaintiffs' Complaint against Kurhts and the court having considered the submissions and arguments of counsel and other good cause appearing;

IT IS on this 1st day of September, 2006 ORDERED that defendant Kurhts' motion to dismiss be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within seven (7) days of the date of this Order.


Bryan D. Garruto, J.S.C.