

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION**

**No. 7:08-CV-00130-FL**

VICTOR BROWN and )  
MARTHA BROWN, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
NOVARTIS PHARMACEUTICALS )  
CORPORATION, )  
 )  
Defendant. )

**MEMORANDUM  
AND RECOMMENDATION**

This matter is currently before the Court on Defendant’s Motion to Apply New Jersey Law to the Issue of Punitive Damages [DE-46]. The motion is currently ripe for review, and Judge Flanagan has referred it to the undersigned magistrate judge for memorandum and recommendation.

**STATEMENT OF THE CASE**

Plaintiff Victor Brown (“Mr. Brown”), together with his wife Martha Brown (collectively “Plaintiffs” or “the Browns”) filed the Amended Complaint [DE-1] giving rise to this lawsuit in the Middle District of Tennessee on December 5, 2007. In this complaint, Plaintiffs asserted claims premised upon strict liability and negligence against Defendant Novartis Pharmaceuticals Corporation (“Defendant” or “Novartis”), the manufacturer and marketer of FDA-approved drugs Aredia® and Zometa®. Mr. Brown, who suffered from multiple myeloma, was prescribed and received infusions of Aredia® and Zometa® in order to prevent skeletal-related events such

as pathologic fractures associated with multiple myeloma and alleges that, as a result of his use of these drugs, he developed osteonecrosis of the jaw.

The action was transferred to this Court [DE-9] on August 5, 2008, transferred back to the Middle District of Tennessee [DE-13] on September 24, 2008 as part of a multidistrict litigation action, and then returned again to this Court [DE-14] on December 17, 2010. The case is currently set for trial to commence on February 21, 2012.

Defendant filed the instant Motion to Apply New Jersey Law to the Issue of Punitive Damages [DE-46] on June 3, 2011. Plaintiffs responded [DE-48] on June 24, 2011, and Defendant replied [DE-60] on July 7, 2011. Plaintiffs have subsequently filed two Notices of Supplemental Authority [DE-80 & 96], and Defendant has also filed two such Notices [DE-87 & 93].

### **DISCUSSION**

The Browns are residents of North Carolina, and Mr. Brown was prescribed and received all of his infusions of Aredia® and Zometa® in North Carolina. Novartis is a Delaware corporation with its principal place of business in New Jersey. The parties agree that North Carolina law, as the law of the place of injury, applies as to the issues of liability and compensatory damages in the instant action. However, they disagree as to which state's law should govern the availability and/or imposition of punitive damages. As a result, Defendant has filed a motion requesting that the Court apply New Jersey law to the issue of punitive damages, while Plaintiffs, on the other hand, argue in response that North Carolina law should apply. The parties agree that the distinction is material due to the fact that, under New Jersey law, punitive damages have historically not been available against the manufacturer of an FDA-approved drug, while such damages may be available under North Carolina law in some circumstances.

In making this determination, the parties agree that Tennessee's choice of law rules shall govern because the instant action was initially filed in the Middle District of Tennessee. *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990). Tennessee courts apply the "most significant relationship" test of the Restatement (Second) of Conflicts of Law to determine which state's law applies. *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992). The relevant sections of the Restatement state as follows:

§ 145. The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
  - (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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 6. Choice-Of-Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (a) the needs of the interstate and international systems,
  - (b) the relevant policies of the forum,
  - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  - (d) the protection of justified expectations,
  - (e) the basic policies underlying the particular field of law,
  - (f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 145, 6 (1971). The Restatement and Tennessee choice of law jurisprudence allow for *depechage*, the application of different state's laws to different issues in a case. *Aguirre Cruz v. Ford Motor Co.*, 435 F. Supp. 2d 701, 704 (W.D. Tenn. 2006). Accordingly, the Court will analyze the parties' respective arguments using this framework, and the fact that North Carolina law applies to the issues of liability and compensatory damages shall not affect the Court's decision as to which state's law applies to the issue of punitive damages.<sup>1</sup>

Pursuant to the most significant relationship test, Defendant argues that the Court should apply New Jersey law to the issue of punitive damages because New Jersey, as the state where Defendant's principal place of business is located, has the most significant interest in determining whether such damages should be awarded. To that end, Defendant contends that the alleged wrongful conduct giving rise to Plaintiffs' punitive damages claim is corporate conduct centered at Defendant's headquarters in New Jersey and that, therefore, any contacts between North Carolina and the events giving rise to potential punitive damages are merely fortuitous. Furthermore, Defendant asserts that applying New Jersey law to the issue of punitive damages would not undermine Plaintiffs' expectation of compensation because punitive damages are intended to regulate the conduct of defendants, not to compensate individual plaintiffs. In support of its argument, Defendant also points out that every court to have considered this issue in an Aredia® and Zometa® case has ruled that New Jersey law applies to the issue of punitive damages.

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<sup>1</sup> Though Plaintiffs do briefly argue that *depechage* should not be applied in this case, the Court agrees with Defendant's observation that they have cited no authority that would lead to such a result and, accordingly, declines to deviate from the clearly established prior application of the practice under Tennessee choice of law rules.

In response, Plaintiffs argue that the Court should apply North Carolina law to the issue of punitive damages because the most significant relationship test requires courts to apply the law of the place of injury unless another state has a *stronger* interest in the controversy, and that Defendant has failed to demonstrate that New Jersey has a stronger interest than North Carolina. In support of this position, Plaintiffs contend that Defendant has incorrectly asserted that other courts have considered the issue, that applying North Carolina law would advance North Carolina policy goals, that New Jersey's contacts with the instant action are minimal at best, and that Defendant's conduct in North Carolina, the location of the parties, and the relationship of the parties all weigh in favor of applying North Carolina law.

The Court finds that Plaintiffs are correct that the Restatement's most significant relationship test dictates that the law of the place of injury—here, North Carolina—shall govern unless Defendant shows that another state—here, New Jersey—has a stronger interest in the outcome of the controversy insofar as punitive damages are concerned. However, contrary to Plaintiffs' assertions, the Court finds that Defendant *has* in fact shown that New Jersey has such an interest and that, therefore, New Jersey law should govern the availability and/or imposition of punitive damages in the instant action.

The Court finds an order issued in the Western District of North Carolina in *Talley v. Novartis Pharm. Corp.*, a case arising out of the same multidistrict litigation as the instant action, to be highly instructive. *See* No. 3:08-CV-361-GCM, 2011 WL 2559974 (W.D.N.C. Jun. 28, 2011) (Mullen, J). In *Talley*, under substantially similar circumstances, the court granted the defendant's motion to preclude the plaintiff's claim for punitive damages based on a finding that New Jersey law, and not North Carolina law, applied to the issue of punitive damages. In so finding, the *Talley* court reasoned that:

“[t]he Plaintiff has a reasonable expectation, as a North Carolina citizen who suffered alleged injury in North Carolina, to be compensated under North Carolina law. Punitive damages, however, are not intended to compensate the Plaintiff, but to punish the Defendant. . . . [A]s the *Deutsch* court pointed out, ‘for purposes of choice of law analysis, the *relevant* contacts are those that relate to the alleged conduct giving rise to their claims for punitive damages.’ The record demonstrates that the corporate decisions regarding labeling and packaging, occurred in New Jersey[,] . . . [and] the additional factors listed in the Restatement § 6 also support application of New Jersey law.”

*Talley*, 2011 WL 2559974, at \*4 (citation omitted). The *Talley* court also found instructive and relied in part upon the other two similar cases cited by Defendant: *Deutsch v. Novartis Pharm. Corp.*, 723 F. Supp. 2d 521 (E.D.N.Y. 2010) and *Meng v. Novartis Pharm. Corp.*, 2009 WL 4623715 (N.J. Super. Ct. Law Div. Nov. 23, 2009).

Here, the Court agrees with Defendant that Plaintiffs have essentially disregarded the *Deutsch* and *Meng* decisions and raised the same arguments which were ultimately rejected by the *Talley* court. Furthermore, Plaintiffs have conceded that the *Talley* court, which had not yet ruled on the defendant’s motion at the time the instant motion was filed, was considering the same question currently at issue in the instant action. *See* Pls.’ Resp. at 3 [DE-48]. Plaintiffs have given the Court no reason to deviate from the well-reasoned order issued in our sister district to the west under substantially similar circumstances. The Court further finds that the additional factors listed in the Restatement § 6 also support application of New Jersey law in the instant matter, in particular (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; and (f) certainty, predictability, and uniformity of result. Accordingly, the undersigned recommends that Defendant’s motion to apply New Jersey law to the issue of punitive damages be granted and that, as a result, the applicable law of New Jersey regarding the availability and/or imposition of punitive damages in this case be applied.

Should the undersigned's recommendation ultimately be adopted as this Court's order, the Court notes that a potential issue may exist with regard to Plaintiffs' pursuit of punitive damages under New Jersey law. At a discovery hearing conducted in this matter by the undersigned on May 6, 2011, Plaintiffs represented to the Court and opposing counsel that they did not intend to pursue punitive damages if the Court should rule that New Jersey law applied, apparently based on the parties' then-shared position that punitive damages were not available against the manufacturer of an FDA-approved drug in New Jersey.<sup>2</sup> However, since that time, a subsequently decided case, *Forman v. Novartis Pharm. Corp.*, 2011 WL 2559386 (E.D.N.Y. Jun. 27, 2011), has raised at least some question regarding the availability of punitive damages under New Jersey law. The Court is unaware as to whether Plaintiffs have retracted their concession, but does note that they have submitted *Forman* to the Court as subsequently decided authority in support of their opposition to the instant motion.<sup>3</sup> However, neither party has briefed the issue of whether punitive damages would be available in this case under New Jersey law in light of *Forman*, and, accordingly, that issue is not presently before the Court and is not addressed in the instant memorandum and recommendation.

### **CONCLUSION**

For the foregoing reasons, it is **RECOMMENDED** that Defendant's Motion to Apply New Jersey Law to the Issue of Punitive Damages [DE-46] be **GRANTED**.

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<sup>2</sup> See Tr. of Disc. Hr'g at 28 [DE-38]:

MR. CHERNACK: I was going to say, well, our—we're—well, we'd also be briefing New Jersey if that were the ruling. Unless you're conceding there'll be no punitives available under New Jersey law.

MR. GERMANY: No, no. We'll concede on New Jersey, then. That won't be an issue.

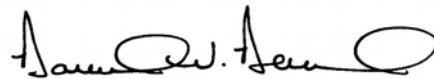
MR. CHERNACK: You will, you will concede?

MR. GERMANY: If, if she says New Jersey applies, we're not going to ask for punitive damages.

<sup>3</sup> The plaintiff in *Talley* also had initially conceded that she would not pursue punitive damages if New Jersey law applied but then attempted to raise *Forman* as subsequently decided authority. However, in *Talley*, the issue was raised in the form of a motion for reconsideration, subsequent to the court's initial decision on the issue of punitive damages, and the court declined to reconsider its prior ruling. Accordingly, the *Talley* court's disposition of the question is not instructive here. See *Talley*, 2011 WL 3515858 (W.D.N.C. Aug. 11, 2011).

The Clerk shall send a copy of this Memorandum and Recommendation to counsel for the respective parties, who shall have fourteen (14) days from the date of receipt to file written objections. Failure to file timely written objections shall bar an aggrieved party from receiving a de novo review by the District Court on an issue covered in the Memorandum and, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions not objected to, and accepted by, the District Court.

This the 16<sup>th</sup> day of December, 2011.

A handwritten signature in black ink, appearing to read "David W. Daniel". The signature is written in a cursive style with a large, looped initial "D".

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DAVID W. DANIEL  
United States Magistrate Judge