

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

BRIAN W. ALLEN, as Administrator
of the Estate of REBECCA ANN ALLEN,
deceased,

Civil Action No. 01-C-224
Judge Rowe

Plaintiff,

v.

PURDUE PHARMA, L.P.
THE PURDUE FREDERICK COMPANY,
PURDUE PHARMACEUTICALS, L.P.,
THE P.F. LABORATORIES, INC.
PRA HOLDINGS, INC.,
ABBOTT LABORATORIES,
ABBOTT LABORATORIES, INC.,
DEBRA SAMS, D.O.,
JOHN DOES,

Defendant

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes before this court pursuant to the motion of summary judgment by Defendant Purdue Pharma, L.P. (hereafter "Defendant"). Defendant filed the motion and a memorandum in support of the motion on June 7, 2002, Plaintiff filed a motion in opposition to Defendant's motion for summary judgment on July 17, 2002 and Defendant filed a reply memorandum in further support of its motion for summary judgment on July 24, 2002. All discovery has been completed.

Defendant asserts that summary judgment should be ordered in favor of Defendant because it is undisputed that Rebecca Allen's death was the result of the illegal and immoral act on the part of the Plaintiff or decedent of crushing the OxyContin® tablets and injecting them into

Mrs. Allen's veins and such act bars Plaintiff from recovery.

Plaintiff's motion in opposition to Defendant's motion for summary judgment asserts that the evidence before the Court is sufficient for a reasonable jury to find for the Plaintiff. Plaintiff asserts that there is still a genuine issue of material fact that bars summary judgment, that issue being whether the highly addictive quality of OxyContin® caused Mrs. Allen to inject the OxyContin® tablets into her veins, causing her death.

I. Summary Judgment Standard

Under our Rule 56(c) of the West Virginia Rules of Civil Procedure, a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On a motion for summary judgment, the question to be decided is whether there is a genuine issue of fact, not how that issue should be determined. If there is no genuine issue of fact as to any material fact, summary judgment should be granted. But where there is a genuine issue as to material fact, summary judgment must be denied. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact. Any doubt as to the existence of such issue is to be resolved in favor of the nonmoving party. Syllabus point 6, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

As to "genuine issues", syllabus point 5 of *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995) provides:

Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one

that has the capacity to sway the outcome of the litigation under the applicable law.

“Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syllabus point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). In other words, the party opposing summary judgment must satisfy the burden of proof by offering evidence sufficient for a reasonable jury to find in the nonmoving party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer “some ‘concrete evidence from which a reasonable...[finder of fact] could return a verdict in...[her] favor’ or other ‘significant probative evidence tending to support the complaint.’” *Wriston v. Raleigh County Emergency Services Authority*, 205 W.Va. 409, 421, 518 S.E.2d 650, 662 (1999) (citations omitted).

II. Factual Background

Plaintiff alleges that Defendant negligently manufactured and aggressively promoted and sold OxyContin® to pharmacies and physicians in West Virginia and that, unbeknownst to those residents of West Virginia, including Plaintiff, but known to the manufacturer, OxyContin® contained opioids that were unreasonably dangerous causing drug dependence and other related damages. Plaintiff further alleges that Mrs. Allen took OxyContin® and, as a direct and proximate cause therefrom suffered addiction to the drug and other related damages, which resulted in her death.

Defendant contends that the Plaintiff and Mrs. Allen’s illegal and immoral acts were the supervening and proximate cause of Mrs. Allen’s death. Therefore, Defendant contends that

Plaintiff is barred from recovery because of Plaintiff and Mrs. Allen's illegal and immoral acts and the fact that Plaintiff has failed to prove that Defendant's actions or omissions were the proximate cause of Mrs. Allen's death.

III. Analysis

Defendant's motion should be granted because a rational trier of fact could not be persuaded that Defendant's actions or omissions were the proximate cause of Mrs. Allen's death. In other words, the Court finds that there is no triable issue of fact because, as a matter of law, Purdue Pharma's actions or omissions were not the proximate cause of Mrs. Allen's death. The Court finds that the actions of the Plaintiff and Mrs. Allen were the proximate cause of Mrs. Allen's death. Therefore, Plaintiff is barred from recovery as a result of his illegal and immoral acts and those of Mrs. Allen.

This Court further finds that there are no disputed material facts on the issue of what caused Mrs. Allen's death. The facts are undisputed. The intravenous injection of OxyContin® into Mrs. Allen by either herself or her husband caused Mrs. Allen's death. There is simply no evidence to the contrary.

West Virginia recognizes the established legal principle that a plaintiff cannot recover when his own unlawful or immoral act caused the injuries in question. *Gray v. Farley*, 1992 WL 564130, at*2 (S.D. W. Va. Oct. 26, 1992) (“[P]articipation in any immoral or illegal act by plaintiff precludes recovery for injuries sustained as a result of the act.”) (citing *Workman v. Lewis*, 28 S.E.2d 56 (W.Va. 1943)). As the *Gray* court stated, “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. [C]onsent or participation in any immoral or unlawful act by plaintiff precludes recovery for injuries sustained as a result of the act.” *Id.* at *2-3.

This Court finds that the Plaintiff has failed wholly to show that he should be allowed any recovery. There is no evidence of any sort that would support a jury finding that the Defendant's acts or omissions were the proximate cause of Mrs. Allen's death. Therefore, as the Plaintiff and/or Mrs. Allen were the proximate cause of Mrs. Allen's death, Plaintiff is barred from seeking recovery.

The Court further finds that Plaintiff and Mrs. Allen circumvented all safety measures set forth by Defendant in the form of warnings and that the use of OxyContin® in contravention of those safety measures was the proximate cause of Mrs. Allen's death. The undisputed evidence shows that OxyContin® is currently and always has been a Schedule II drug, subject to the strictest regulation available. In fact, OxyContin® can only be prescribed by a physician who is licensed by the Drug Enforcement Agency.

The facts show that Plaintiff and Mrs. Allen willfully and purposefully ignored and circumvented all safety measures put in place by Defendant. Though the various warnings provided by Defendant clearly laid out the possibility that their actions could lead to a fatal overdose, Plaintiff and Mrs. Allen proceeded to crush, liquefy and inject the OxyContin® into Mrs. Allen's veins. The West Virginia rule in such cases is that a "willful, malicious, or criminal act breaks the chain of causation." *Harbaugh v. Coffinbarger*, 543 S.E.2d 338, 345 (W.Va. 2000) (quoting *Yourtree v. Hubbard*, 474 S.E.2d 613, 620 (W.Va. 1996)). Clearly, the Plaintiff and Mrs. Allen acted wilfully and criminally when they circumvented all safety precautions and injected the crushed and liquified OxyContin® into Mrs. Allen's veins.

Finally, the undisputed facts show that Mrs. Allen was already a drug abuser when the OxyContin® was legally prescribed to her. In her sworn affidavit, Barbara Lynn Hiser, Mrs. Allen's friend and former roommate testified to the fact that she had seen Plaintiff inject illicit

drugs into Mrs. Allen's veins before. Plaintiff himself responded to an interrogatory by detailing Mrs. Allen's prior history of drug abuse as follows:

[T]he decedent smoked marijuana as often as she had it; used cocaine intravenously as often as it was available; and used morphine, dulodids [sic], and crack cocaine. Decedent was a drug addict and any attempt to elaborate on each drug transaction would be futile, suffice it to say that decedent used drugs, bought drugs, and sold drugs.

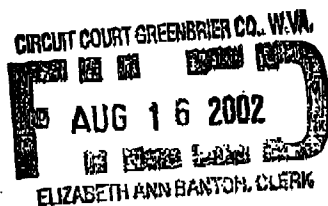
Because it is undisputed that Mrs. Allen was already a drug addict before she was ever given a prescription for OxyContin®, it is clear that there is no causal relationship between the Defendant's acts or omissions and Mrs. Allen's drug addiction and subsequent death.

Defendant's motion for summary judgment should be granted because Plaintiff has failed to prove that there is any genuine issue of material fact to be decided by a jury.

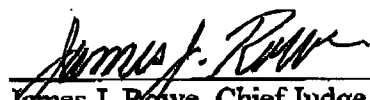
IV. Ruling

For the foregoing reasons, it is **ORDERED** that the motion for summary judgment of Defendant Purdue Pharma is **GRANTED**. It is further **ORDERED** and **ADJUDGED** that one certified copy of this order shall be mailed to the parties by and through their counsel at their respective addresses of record.

All of which is **ORDERED**.



ENTERED this 15th day of August, 2002.


James J. Rowe, Chief Judge
Eleventh Judicial Circuit