

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Jan Dorfman

v.

Rite-Aid of New Hampshire, Inc.

No. 07-C-0141

ORDERS

Bench trial held (4/28/08-4/30/08). Subsequent to review, the Court renders the following determination(s).

By way of background, the Plaintiff brought the instant action alleging negligence and strict product liability. At trial, the Court heard testimony from the Plaintiff. In addition, in lieu of live testimony, the parties also submitted the deposition testimony of Johan Valentijn, James Bernat, M.D., and Geoffrey E. Star, M.D.

On September 27, 2004, while working as a park ranger for the State of New Hampshire, the Plaintiff slipped on a bar of soap while checking a public shower, fell, and hit his head. The Plaintiff testified that the Littleton Regional Hospital diagnosed a concussion and advised the Plaintiff to see his primary care physician. The Plaintiff immediately started having migraine headaches and vision problems, and he could not get a full sleep cycle. In addition, the Plaintiff cannot drive faster than fifty miles per hour, and he sometimes pulls over to the side of the road due to blurry vision. At the advice of his primary care physician, the Plaintiff went to the Littleton Regional Hospital Occupational Health Department and saw an advanced registered nurse

- 2 -

practitioner named Christopher Polich. When the Plaintiff's symptoms did not resolve, Mr. Polich advised the Plaintiff to see Dr. Starr, who is a neurologist.

The Plaintiff saw Dr. Starr on October 22, 2004. The Plaintiff informed Dr. Starr of his migraine headaches and vision problems, as well as his inability to get a full sleep cycle. The Plaintiff also informed Dr. Starr that he had been taking Valium. Instead of prescribing more Valium, Dr. Starr prescribed Ambien. Dr. Starr testified that he informed the Plaintiff that Ambien is a sleep aid to be taken at night, and Dr. Starr's notes regarding this exam state, "I would like [the Plaintiff] to try Ambien 10 mg PO q.p.m., and hopefully this will improve his sleep cycle...." Def.'s Ex. 5 at 3. However, the Plaintiff testified that Dr. Starr did not tell him that Ambien is a sleep aid to be taken at night. Rather, the Plaintiff testified that he had been taking Valium to help him relax and that he thought Ambien would likewise help him relax.

Later that day, the Plaintiff went to the Right-Aid in Littleton, New Hampshire to get his Ambien prescription filled. The label on the prescription bottle says to "take 1 tablet in the afternoon" and that Ambien may cause drowsiness. Pl.'s Ex. 4. It is undisputed that the label on the prescription bottle should have instructed the Plaintiff to take one tablet in the evening. Upon returning home, the Plaintiff took one tablet and went to bed approximately three to four hours later. In addition, the Plaintiff took a half tablet each day for the next four days and fell asleep approximately three to four hours later. The Plaintiff testified that after taking Ambien, he felt relaxed and ready for bed.

The Plaintiff also testified that his symptoms began to improve and that he began to think about new business opportunities. Specifically, one of the Plaintiff's longtime business acquaintances, Mr. Valentijn, contacted the Plaintiff regarding a business opportunity in Morocco.

- 3 -

The Plaintiff and Mr. Valentijn agreed that the Plaintiff would begin to work at the end of January 2005 at an annual salary of \$110,000.

On January 2, 2005, the Plaintiff needed to run some errands. He left Littleton, New Hampshire around noon and drove to the Vintage Fret Shop in Ashland, New Hampshire. The Plaintiff made a purchase at the Vintage Fret Shop at 2:27 PM and before leaving, requested some water and took one tablet of Ambien. The Plaintiff then proceeded to the Borders in Concord, New Hampshire, where he made a purchase at 2:54 PM. The Plaintiff then proceeded back to Littleton, New Hampshire. However, the Plaintiff testified that he began to feel "woozy," "impaired," or "weak" at mile 100. The Plaintiff also testified that he began to pull over to the side of the road at mile 103 and that he remembers going down an incline and hitting his head. The next thing the Plaintiff remembers is someone knocking on his window.

The Plaintiff was transported to the Littleton Regional Hospital, where a CT scan of the Plaintiff's head was performed. An Emergency Department Report indicates that the Plaintiff suffered a whiplash injury but does not indicate a head injury. The Emergency Department Report also indicates that the Plaintiff was taking the following medications: Ambien, Metoprolol, Lovastatin, and Aspirin. The Court notes that Dr. Starr testified that Metoprolol can cause drowsiness or dizziness.

Within a few days of the accident, the Plaintiff saw Dr. Starr. Dr. Starr's notes regarding this exam state:

Mr. Dorfman tends to continuously indicate that he is quite upset about the fact that his prescription bottle was labeled as saying that the Ambien should be taken in the afternoon.... I asked Mr. Dorfman if he was not aware that Ambien was in fact a sleeping pill and he admitted knowledge to the fact that it was but told me that he had taken half of an Ambien before numerous times and it just relaxed him, it did not put him completely to sleep, so he felt it may be safe to take it, not necessarily at bedtime.

Def.'s Ex. 16 at 1. Dr. Starr's notes also state that the Plaintiff seemed to be doing poorly and that "it could be that his mild increased headaches at this point are related to his recent mild trauma sustained and thus this may set him back a few weeks in terms of recovery, but overall I do not feel that this would affect his long-term prognosis." Id. at 2. In addition, Dr. Starr testified that he did not observe an abrasion or sign of head injury, nor does he believe that the Plaintiff suffered a concussion as a result of the car accident. Dr. Starr also testified that he was "not convinced one way or the other if Ambien was responsible" for the car accident. Def.'s Ex. 36 at 78. When asked if he could say as a matter of probability whether Ambien contributed to the car accident, Dr. Star again testified that he was "right in the middle." Id. at 79.

On June 22, 2005, the Plaintiff saw another neurologist, Dr. Bernat. Dr. Bernat testified that, based on the fact that the Plaintiff hit his head and the Plaintiff's subsequent symptoms, he believes that the Plaintiff suffered a concussion as a result of the car accident. Dr. Bernat also believes that Ambien contributed to the car accident.

The Plaintiff testified that his headaches and vision problems, which had improved before the car accident, have since worsened and that he consequently decided to forgo his business opportunity in Morocco. In addition, Dr. Bernat testified that the Plaintiff probably would have made a full recovery from his on-the-job accident absent the car accident and that the car accident was "an important factor leading to the failure of [the Plaintiff's] symptoms to resolve." Pl.'s Ex. 14-A at 38-39. However, on December 26, 2004, less than two weeks before the car accident, a receptionist at the Littleton Regional Hospital Occupational Health Department took a phone message for Mr. Polich from the Plaintiff, which states, "Mr. Dorfman asked me to let [Mr. Polich] know his headaches are still driving him crazy." Def.'s Ex. 10.

"It is axiomatic that in order to prove actionable negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, breached that duty, and that the breach proximately caused the claimed injury." Estate of Joshua T. v. State, 150 N.H. 405, 407 (2003). Moreover, in order to prove strict product liability, a plaintiff must establish that the defendant sold a product in a defective condition, unreasonably dangerous to the user or consumer, and that the product caused injury to the user or consumer. See Buckingham v. R. J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998). Thus, in order to prove negligence or strict product liability, a plaintiff must establish causation and injury. In addition, a plaintiff's contributory fault bars recovery in an action by the plaintiff, to recover damages in tort, if such fault was greater than the defendant's fault. RSA 507:7-d. "The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation." Id.

Here, the parties have stipulated that the Defendant owed a duty to the Plaintiff and that the Defendant breached that duty by mislabeling the Ambien prescription bottle. However, the Plaintiff has not sustained his burden of proving that this breach proximately caused the car accident or any resulting injuries. The Court finds that the Plaintiff had a preexisting medical condition that hinders his ability to drive. The Plaintiff testified that he could not safely drive faster than fifty miles per hour and that he sometimes pulls over to the side of the road. Moreover, the Plaintiff was taking at least three other medications at the time of the car accident: Metoprolol, Lovastatin, and Aspirin. The Court credits Dr. Starr's testimony that at least one of these medications, Metoprolol, can also cause drowsiness or dizziness. As such, the Court is not persuaded that the Plaintiff's preexisting medical condition and/or other medications did not cause the Plaintiff to feel "woozy," "impaired," or "weak." In turn, the Court is not persuaded that the Defendant's failure to properly label the Ambien prescription caused the car accident or

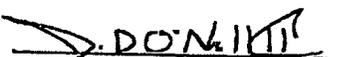
indicate a head injury. Moreover, Dr. Starr, who examined the Plaintiff days after the accident, testified that he does not believe that the Plaintiff suffered a concussion as a result of the car accident. The Court credits this testimony. Based on the foregoing, the Court finds that the Plaintiff has not sustained his burden of proving that his migraine headaches, vision problems, and inability to sleep are attributable to the car accident. Thus, the Court also finds that the Plaintiff's decision to forgo his business opportunity in Morocco is not an injury attributable to the car accident.

Accordingly, judgment is rendered on behalf of the Defendant.

This order constitutes the Court's Findings of Fact and Rulings of Law. Any of the parties' requests for Findings and Rulings not granted herein, either expressly or by necessary implication, are hereby DENIED or determined to be unnecessary for resolution in light of the Court's decision. See Harrington v. Town of Warner, 152 N.H. 74, 85-86 (2005); Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So ORDERED.

Date: 5-15-08


JAMES D. O'NEILL, III
PRESIDING JUSTICE