

Not Intended for Print Publication

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

HOPE CAMPBELL, ET AL.,)

Plaintiffs,)

v.)

**DPT LABORATORIES, LIMITED,
ET AL.,**)

Defendants.)

Case No. 1:04CV00121

OPINION AND ORDER

By: James P. Jones
Chief United States District Judge

Charles H. Smith, III, and Andrew E. Carpenter, Gentry Locke Rakes & Moore LLP, Roanoke, Virginia, for Plaintiffs; Camilla Lee, Nixon Peabody, LLP, Washington, D.C., for Defendants.

In this wrongful death action brought pursuant to the court's diversity jurisdiction, the administrators of the estate of the deceased, Bertie Helen Dye, contend that her death was caused by a medical product manufactured and sold by the defendant corporations. In their Amended Complaint, the plaintiffs allege that Dye had a cancerous tumor in her thigh. After surgery to remove the tumor, she developed an infection. Her surgeon prescribed Accuzyme®, an ointment used in wound care and debridement (removing infected material). The ointment, it is alleged, damaged Dye's healthy tissue and eventually an artery, which ruptured. According to the plaintiffs, Dye died from blood loss after the rupture.

The plaintiffs allege negligence (Count I), breach of warranty (Count II), and fraud (Count III), and seek punitive and compensatory damages. The defendants have filed a Motion to Dismiss Count III pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that the Amended Complaint does not sufficiently allege fraud as required by Federal Rule of Civil Procedure 9(b). The motion has been briefed and is ripe for decision.¹

Ordinarily under federal pleading practice, it is not necessary to set forth a particular legal theory, but rather a party is required only to make “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); *see also* Charles Alan Wright, *Law of Federal Courts* § 68 (5th ed. 1994). However, when a plaintiff pleads fraud, her claim is subject to Rule 9(b), which requires that the claim be pled with particularity. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999). Rule 9(b) has been construed to mean that the plaintiff must plead with particularity “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” *Id.* at 784 (internal citations

¹ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

omitted). Rule 9(b) does allow conclusory allegations about the defendant's knowledge as to the true facts and as to the defendant's intent to deceive. *Id.* The requirements of Rule 9(b) have been analogized to the goal of a good newspaper lead—who, what, when, where, and how. *See, e.g., Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994).

The purposes of Rule 9(b) are: (1) to ensure that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of; (2) to protect defendants from frivolous suits; (3) to eliminate fraud actions in which all the facts are learned after discovery; and (4) to protect defendants from harm to their goodwill and reputation. *Harrison*, 176 F.3d at 784.

Even if a plaintiff fails to plead the required facts with particularity, the court still “should hesitate to dismiss a complaint . . . if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.” *Id.*

The defendants argue that the plaintiffs have failed to allege fraud with the required specificity. They contend that the plaintiffs have not alleged any specific misrepresentations or pled any specific facts to support the allegation that the defendants' representations were false or misleading.

In the Amended Complaint, the plaintiffs allege that

the defendants intentionally and/or negligently made misrepresentations by word, verbal or written, and/or conduct of material facts to consumers and users and patients, including the plaintiff's decedent, that Accuzyme was reasonably safe for purchase and use on the human body. Such misrepresentations included . . . the presentation of false and misleading data.

(Amend. Compl. ¶ 54 .) More specifically, the plaintiffs allege that Accuzyme “is sold and market[ed] with incorrect and inaccurate representations that [it] can be used without complications other than a transient burning sensation on a small percentage of patients.” (*Id.* at ¶ 20.) These statements were published in marketing materials (*id.*) and “in various media” (*id.* at ¶ 25.)

The plaintiffs claim that Accuzyme could not be used without “interference with the natural healing processes of the human body.” (*Id.*) The plaintiffs further assert that “[t]he defendants knew [or should have known], from prior knowledge and research, from similar incidents and other available information that said representations . . . were false.” (*Id.*) Accuzyme was “known to destroy not only non-viable and necrotic tissue but to destroy viable and living tissue as well with repeated applications.” (*Id.* at ¶ 26.)

The plaintiffs allege that the purpose of the false representations was to induce the “consuming public” to purchase the product. (*Id.* at ¶ 55.) Finally, the plaintiffs

assert that Dye and her doctor relied on these representations, and that Dye's death was the direct and proximate result of that reliance. (*Id.* at ¶¶ 59, 60.)

No easy test has been developed for the application of Rule 9(a) to particular facts. See Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281, 297-98 (2004) (discussing cases). While Rule 9(b) requires specificity, it must be read in conjunction with Rule 8, and in light of common sense. Here, the essence of the plaintiffs' claim is that Accuzyme was represented by its sellers not to harm healthy tissue, that physicians and patients relied on that representation in using the product, and that in spite of that claim, it did harm the decedent's healthy tissue, causing her death. The defendants cannot reasonably contend that they do not have notice of the circumstances of their alleged misrepresentation. In response to the present motion the plaintiffs have produced a copy of the product's package insert, in which it is recited that Accuzyme "is harmless to viable tissue." Indeed, the Web site of one of the defendants confirms the same—Accuzyme is "[h]armless to healthy tissue." Healthpoint, Ltd., *ACCUZYME Ointment*, at <http://www.healthpoint.com/divisions/tm/prodAccuzyme.cfm> (2005).

Under these circumstances, I find it would be pure formalism to require the plaintiffs to replead Count III.

For the foregoing reasons, it is **ORDERED** that the Motion to Dismiss Count III is DENIED.

ENTER: February 8, 2005

/s/ JAMES P. JONES
Chief United States District Judge