

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WANDA SMITH,)	
)	
Plaintiff)	
)	
v.)	Case No. 2:03cv00147
)	<u>REPORT AND</u>
GENERAL MOTORS CORPORATION,)	<u>RECOMMENDATION</u>
)	
Defendant)	
)	

The plaintiff, Wanda Smith, (“Smith”), has filed suit against General Motors Corporation, (“GM”), seeking damages for personal injuries she alleges that she suffered as a result of a defective seat belt safety restraint system in a 2001 Chevrolet Cavalier. Smith's complaint includes claims for negligent design, negligent manufacture, failure to warn and breach of warranty. (Docket Item No. 1.) This matter is before the court on the following pretrial motions filed by GM: Motion For Summary Judgment, (Docket Item No. 32), Motion In Limine To Exclude Various Irrelevant Evidence, (Docket Item No. 34), Motion In Limine To Limit Plaintiff's Expert To The Opinions Disclosed In His Rule 26(a)(2)(B) Report, (Docket Item No. 36), Motion In Limine To Exclude The Medical Causation Opinion Testimony Of Plaintiff's Surgeon Robert H. Blanton, M.D., (Docket Item No. 38), Motion In Limine To Exclude The Testimony Of Plaintiff's Expert Witness Charles Benedict, (Docket Item No. 40), and Motion In Limine To Exclude The Medical Injury Causation Opinion Testimony Of Plaintiff's Nephrologist Douglass W. Green, M.D., (Docket Item No. 43). The court's jurisdiction is based upon diversity of citizenship. *See* 28

U.S.C.A. § 1332 (West 1993 & Supp. 2004). These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C.A. § 636(b)(1)(B).

Smith's counsel has filed memoranda in opposition to each of GM's motions, except for one -- GM's Motion In Limine To Limit Plaintiff's Expert To The Opinions Disclosed In His Rule 26(a)(2)(B) Report, (Docket Item No. 36). Since no response in opposition to this motion has been filed, the undersigned will assume that this motion is unopposed by Smith and will recommend that this motion be granted as unopposed.

The undersigned has reviewed GM's motions and Smith's responses in opposition to each of these motions. In addition, counsel for both parties appeared before the undersigned and presented oral argument on these motions on March 14, 2005. Thus, these matters are ripe for decision and the undersigned now submits the following report and recommended disposition.

I. Facts

Many of the facts surrounding Smith's accident and the injuries she sustained in the accident are not disputed. On Friday, April 26, 2002, Smith was the right front seat passenger in her 2001 Chevrolet Cavalier driven by her husband, James Smith, when the Smiths were involved in a multiple-vehicle, multiple-impact crash in Mountain City, Tennessee. While traveling approximately 40 miles per hour, Smith's Cavalier, which was manufactured by GM, collided with a Ford Grenada. That impact drove the Cavalier to its right and directly into the front of an 8,000-pound Ford truck.

It is undisputed that there were two impacts during the collision and that the Cavalier's passenger side airbag deployed during the first impact. It also is undisputed that the second collision involved an "under-ride" component, meaning that the front end of Smith's Cavalier was forced downward and the rear upward, vertically.

Immediately after the crash, Smith went to Johnson County Health Center and, later that day, to Bristol Regional Medical Center Emergency Room. She was discharged home from both facilities. The following Monday, Smith returned to Bristol Regional Medical Center complaining of pain. At that time, it was discovered that Smith had a tear to her mesentery.¹ Smith then had surgery to repair the tear and to remove a 14-centimeter section of her small bowel, which was damaged as a result of the tear to her mesentery. During surgery, Smith suffered respiratory failure and required mechanical ventilation. Smith also suffered acute kidney failure as a result of dehydration brought on by the bowel injury.

In her complaint, Smith alleges that she was injured when her seatbelt "did not properly restrain [her] during the collision." She further alleges that the seatbelt was defective for its failure "to remain on and restrain [her] pelvic area during the collision...." Smith, through her own deposition testimony, has presented evidence that she was properly wearing the seatbelt at the time of the collision. In particular, Smith has testified that, at the time of the accident, she was wearing the torso belt properly over the top of her right shoulder and the lap belt across her hips just below

¹The mesentery is "a double layer of peritoneum attached to the abdominal wall and enclosing in its fold a portion or all of the abdominal viscera, conveying to it its vessels and nerves." STEDMAN'S MEDICAL DICTIONARY at 1096 (27th ed. 2000).

her navel. (Docket Item No. 48, Attachment No. 1, ("Smith Deposition"), at 67, 71, 76-77.)

The two primary issues presented to the court through GM's various pending motions is whether Smith has presented sufficient competent evidence of a defect in the seatbelt and sufficient competent evidence that this alleged defect in the seatbelt caused the injuries for which she seeks recovery.²

The parties have provided the court with affidavits and deposition testimony of a number of proffered expert witnesses for review in consideration of GM's motions. Particularly relevant to these motions, are the deposition testimony of Smith's treating surgeon, Dr. Robert H. Blanton, M.D., her treating nephrologist, Dr. Douglass Greene, M.D., plaintiff's engineering expert Charles E. Benedict, Ph.D., and defense expert Dr. Robert Banks, M.D., Ph.D., who is a physician, as well as an accident reconstructionist.

In response to GM's motions, Smith's counsel has filed an affidavit from Benedict, along with numerous exhibits to this affidavit. According to Benedict, the seatbelt restraining Smith at the time of this accident was defective and unreasonably dangerous. In his Rule 26 expert report provided to GM's counsel, Benedict opined:

The restraint system for the right front occupant is inherently defective and unreasonably dangerous because the retractor failed to lock

²While Smith also sustained injuries to one of her ankles and both of her knees in this accident, it appears that Smith's claims in this case are based solely on her internal injuries, which she claims were caused by an alleged defect in the Cavalier's seatbelt restraint system.

up properly and allowed the webbing to spool out which allowed Ms. Smith to submerge under the lap belt.

(Docket Item No. 33, Attachment No. 11, ("Benedict Report"), at 3.) Benedict is of the opinion that the seatbelt improperly "spooled out" immediately after the first impact and "overrode [Smith's] abdominal area and up into the top part of her abdomen and into the lower rib area which is the location of the mesentery. " (Docket Item No. 52, Attachment Nos. 3, 4 and 5, ("Benedict Deposition"), at 93.) Benedict is further of the opinion that alternative, safer designs for the seatbelt system included the use of a "pre-tensioner," a device designed to take slack or looseness out of a belt upon collision or an "all belts to seats," ("ABTS"), system in which the seatbelts attach to the seat itself rather than the vehicle body. (Benedict Report at 3.)

It is important to note that Smith's counsel do not offer Benedict as being qualified to render medical opinions. Furthermore, Benedict, himself stated in his affidavit that "I am not offering any medical opinions...." (Docket Item No. 51, Attachment No. 1, ("Benedict Affidavit"), at 20.)

The medical evidence regarding the causation of Smith's injuries includes the opinions of Smith's treating physicians, Drs. Green and Blanton, as well as the opinions of the defense expert Dr. Banks. According to Dr. Green, Smith's injuries were "consistent" with other cases of seatbelt injuries he has encountered during his medical practice. (Docket Item No. 48, Attachment No. 11, ("Green Deposition"), at 28-29.) Dr. Green also has testified that it was his opinion to a reasonable degree of medical certainty that Smith's injury was a "seat belt type injury." (Green Deposition at 29.) Dr. Blanton testified that hollow organ injuries, such as the injury suffered by

Smith, are "the most common kind of injury you see from a seat belt injury." (Docket Item No. 48, Attachment No. 12, ("Blanton Deposition"), at 13.)

The parties agree that pictures of Smith taken after the accident show three separate "bands" of bruising or contusions on her abdomen. These have been referred to by the parties and various witnesses as an upper band, a middle band and a lower or inferior band. Neither Dr. Green nor Dr. Blanton has offered any opinion as to whether Smith's internal injuries were caused by the specific trauma which caused any particular one of these bands of contusions or whether Smith's internal injuries were caused by the first or second impact.

The defense expert, Dr. Banks, has testified that he could not determine whether Smith's injury to her ankle occurred in the first or second impact. (Docket Item Nos. 59 and 60, ("Banks Deposition"), at 40-41.) Dr. Banks also has stated that Smith's knees were likely injured in both impacts. (Banks Deposition at 41.) Dr. Banks has testified that these bands of bruising, and, in particular, the location of the upper band of bruising, is consistent with the torso belt being improperly placed under Smith's right arm rather than over her shoulder. (Banks Deposition at 104.) He based this opinion on the fact that, after the accident, Smith had no abrasions on her shoulder or her arm, but did have an abrasion leading up underneath her right breast and the fact that the upper band of contusions extended into the area below Smith's right armpit. (Banks Deposition at 104-05.)

Dr. Banks also has testified that, in his opinion, the upper and lower bands of bruising on Smith's abdomen were caused respectively by the torso and the lap belts

in the first impact. (Banks Deposition at 43.) Dr. Banks further testified that he believed that additional contusions in the area of the lower band and the middle band of contusions were caused by the second impact. (Banks Deposition at 44.) In particular, Dr. Banks has testified that it was his opinion that the middle band of contusions was caused by "the torso belt which was placed under her arm relocated itself down into the area of that middle band and was in place at the area of the middle band when the second impact occurred." (Banks Deposition at 45.) Dr. Banks also has testified that, in his opinion, the lap belt could not have caused the middle band of contusions on Smith because the pattern of the lap belt did not match the pattern of the middle contusion. (Banks Deposition at 108.) Dr. Banks stated that "[t]he orientation of the [lap] belt is completely different from the orientation of the middle bruise." (Banks Deposition at 109.)

Dr. Banks also testified that he believed that the tear to Smith mesentery was caused by the blow that caused the middle band of contusions in the second impact when "the forward abdominal wall was squeezed back against the spine and a segment of [the] bowel was trapped and the mesentery was trapped between the forward abdominal wall and the seat belt and the ... spine causing the injury." (Banks Deposition at 49-50.) Dr. Banks further testified that it was his opinion that the injuries sustained by Smith were inconsistent with a submarining type event. (Banks Deposition at 110.) Dr. Banks also testified that, in his opinion, the injuries Smith sustained would not have happened if Smith had placed the torso belt over her shoulder as opposed to under her arm. (Banks Deposition at 111.) Dr. Banks further testified that, in his opinion, the injury to Smith's mesenteric artery would not have

occurred if the torso belt had been properly placed over her shoulder as opposed to under her arm. (Banks Deposition at 112.)

II. Analysis

GM has moved for summary judgment based on a number of arguments. First, GM argues that Smith's claims are time-barred. Second, GM argues that Smith has failed to rebut the presumption that the Cavalier was not defective or unreasonably dangerous. Third, GM argues that Smith cannot prove that the seatbelt at issue was defective. Fourth, GM argues that Smith cannot prove that the alleged defective seatbelt was the proximate cause of her injuries. I will first address GM's argument that Smith's claims are time-barred. I will next address GM's argument that Smith cannot prove that the alleged defective seatbelt was the proximate cause of her injuries because my finding on this issue precludes the necessity of addressing the other issues raised.

With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. Therefore, in reviewing GM's motion for summary judgment in this case, the court must view the facts and inferences in the light most favorable to Smith. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 233 (6th Cir. 1996). Moreover, Rule 56(c) requires a court to enter summary judgment against a nonmoving party who fails to make a showing sufficient to establish the existence of an essential element of that party's claim. *See Celotex*, 477 U.S. at 322.

There is no dispute in fact as to the date of the accident at issue or the date on which Smith filed suit. As stated above, Smith, a Virginia resident, was involved in the automobile accident at issue in this case in Tennessee on April 26, 2002. Smith thereafter filed this case against GM in this court on December 8, 2003, based on the court's diversity jurisdiction. *See* 28 U.S.C.A. § 1332 (West 1993 & Supp. 2004). It is well-settled that federal courts sitting in diversity, as here, must apply the choice of law provisions of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97 (1941). Here, Virginia is the forum state. It further is well-settled in Virginia that the law of the place of the wrong or injury, in this case Tennessee, controls substantive issues, while the law of the forum, Virginia, controls procedural issues. *See Jones v. R.S. Jones & Assoc., Inc.*, 431 S.E.2d 33, 34 (Va. 1993). Thus,

the question is whether the statute of limitations is considered substantive or procedural.

In *Commonwealth of Virginia v. Owens-Corning Fiberglas Corp.*, 385 S.E.2d 865, 867 (Va. 1989), the Supreme Court of Virginia distinguished among three types of statutes of limitations. The first is procedural or “pure” statutes of limitation, which are defined as serving merely to time restrict the assertion of a remedy. *See Owens-Corning*, 385 S.E.2d at 867. These statutes of limitation furnish an affirmative defense and are waived if not pleaded. *See Owens-Corning*, 385 S.E.2d at 867. The second type is substantive or “special” statutes of limitation, which ordinarily are contained in statutes that create a new right and become elements of that newly created right, restricting its availability. *See Owens-Corning*, 385 S.E.2d at 867. Compliance with such a statute is a condition precedent to the maintenance of a claim. *See Owens-Corning*, 385 S.E.2d at 867. The third type of statute of limitation is a statute of repose. *See Owens-Corning*, 385 S.E.3d at 867. The time limitation for such statutes begins to run from some legislatively selected point in time unrelated to the accrual of any cause or right of action, whether accrued or yet to accrue. *See Owens-Corning*, 385 S.E.2d at 867. The parties do not contend that a statute of repose applies here. Thus, it must be determined whether the statute of limitations at issue here is a "pure" statute of limitations or a "special" statute of limitations.

GM argues that the Tennessee Products Liability Act, (“TPLA”), Tennessee Code Annotated § 29-28-101 *et seq.*, contains a one-year limitations period applicable to all products liability actions, and that this one-year limitations period is, therefore, a "special" substantive statute of limitations and should be applied to bar this case,

which was filed on December 8, 2003, nearly one year and eight months after the accident on April 26, 2002. *See* TENN. CODE ANN. § 29-28-101 *et seq.* (Michie 2000 Repl. Vol.), Conversely, Smith argues that the TPLA does not contain its own statute of limitations nor does it create the right to pursue such an action. Thus, Smith contends that the Tennessee statute of limitations is procedural and, therefore, this court should apply the two-year Virginia statute of limitations for personal injury actions, found at Virginia Code Annotated § 8.01-243 (Michie 2000 Repl. Vol.).³ For the following reasons, I agree with Smith's argument and find that her claims against GM are not time-barred.

GM argues that the TPLA contains a specific statute of limitation and is, therefore, substantive and must be applied in this case. According to Tennessee Code Annotated § 29-28-103(a), part of the TPLA, “[a]ny action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by § ... 28-3-104. ...” Moreover, Tennessee Code Annotated § 28-3-104, the general limitations provision for personal injury actions, provides as follows:

- (a) The following actions shall be commenced within one (1) year after the cause of action accrued:
 - (1) Actions for libel, for *injuries to the person*, false imprisonment, malicious prosecution, breach of marriage promise; ...

(emphasis added). Thus, it is clear that the TPLA itself does not contain a statute of limitations provision. Instead, it merely cross-references the Tennessee general limitations provision for personal injury actions.

³VA. CODE ANN. § 8.01-243 provides a two-year statute of limitations period for every action for personal injuries, whatever the theory or recovery.

Smith relies on *Sherley v. Lotz*, 104 S.E.2d 795, 797 (Va. 1958), a wrongful death case in which the Supreme Court of Virginia concluded that the law of the forum, Virginia, applied because the applicable statute of limitations under the law of Tennessee, where the accident occurred, was a “general statute of limitation.” Likewise, Smith further notes that in *Jones*, 431 S.E.2d at 36 (citing *Davis v. Mills*, 194 U.S. 451, 454 (1904)), the Supreme Court of Virginia reaffirmed *Sherley*, noting that “[i]n our opinion, the Tennessee [wrongful death] statute lacked the specificity that [the U.S. Supreme Court] propounds as the test for ‘saying that [a limitation provision] qualified [a newly created] right.’”

That is precisely the case here. The TPLA refers to the Tennessee general statute of limitations provision for personal injury. That being the case, I agree with Smith in finding that the TPLA does not contain a specific "substantive" statute of limitations period and, therefore, that the two-year Virginia statute of limitation on claims for personal injuries should be applied in this case. Since the accident at issue in this case occurred on April 26, 2002, and Smith filed her complaint on December 8, 2003, I find that her action was timely filed, and I will recommend that the court deny GM's motion to enter judgment in its favor on this basis.

I will next address GM's argument that summary judgment should be entered in its favor based on Smith's failure to produce competent evidence that the alleged defective seatbelt was the proximate cause of her injuries. To prevail in a products liability case under Tennessee law, a plaintiff not only must show that a product was defective or unreasonably dangerous, but a plaintiff also must offer proof to establish

that the defect or unreasonably dangerous condition was the cause of plaintiff's claimed injury. *See King v. Danek Med., Inc.*, 37 S.W.3d 429, 435 (Tenn. Ct. App. 2000).

Proximate cause, of course, is a concept that was developed in the law of negligence. Its first requirement is that the defendant's act or, in [a] products liability case, the defect in the product, be a cause in fact of the injury. This means simply that the circumstances must be such that the injury would not have occurred but for the defect....

Wyatt v. Winnebago Indus., Inc., 566 S.W.2d 276, 280 (Tenn. Ct. App. 1977) (citations omitted).

Smith accurately argues that, under Tennessee law, the issue of proximate cause of an injury is a question for the jury, unless the determinative facts are undisputed. *See McGinniss v. Brown*, 204 S.W.2d 334, 335 (Tenn. Ct. App. 1947). In a case such as this one, where Smith suffered complex internal injuries, Tennessee law requires a plaintiff to produce expert medical testimony to establish the causal connection between the alleged defect and the plaintiff's injuries. *See King*, 37 S.W.3d at 450 (citing *Driggers v. Sofamor, S.N.C.*, 44 F. Supp. 2d 760, 764-65 (M.D.N.C. 1998) ("...where the injury is complicated, ... expert medical testimony on the issue of causation must be provided to support a jury award")). Furthermore, to the extent that a plaintiff seeks damages for bodily injuries, Tennessee law requires a plaintiff to prove causation to a "reasonable medical certainty." *Md. Cas. Co. v. Young*, 362 S.W.2d 241, 243 (1962). Also, while the Tennessee courts have interpreted proof by a reasonable medical certainty to require only that a plaintiff's injuries more likely than not were caused by a particular cause, a plaintiff's proof may not be speculative

or conjectural. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1201 (6th Cir. 1988). In this case, I find that Smith has failed to produce any expert medical testimony establishing that the injuries she suffered were a result of the defect she alleges. Therefore, I recommend that summary judgment be entered in favor of GM on this issue.

It is important to note that in reaching this recommended ruling, I also am recommending that the court deny GM's motions in limine to exclude the medical causation opinion testimony of Smith's treating physicians, Drs. Blanton and Green, (Docket Item Nos. 38 and 43), but grant GM's motion in limine to limit the testimony of Smith's expert witness Benedict only insofar as he attempts to offer an opinion as to medical causation, (Docket Item No. 40). As noted above, Smith's counsel do not offer Benedict as being qualified to render medical opinions, and Benedict, himself, stated, "I am not offering any medical opinions...." (Benedict Affidavit at 20.)

I recommend that the court deny GM's motions in limine to exclude the medical causation opinion testimony of Smith's treating physicians, Drs. Blanton and Green, based in part on my finding that these physicians do not offer any opinion that Smith's injuries were caused by the alleged defect in the Cavalier's seatbelt system. According to Dr. Green, Smith's injuries were "consistent" with other cases of seatbelt injuries he has encountered during his medical practice. (Green Deposition at 28-29.) Dr. Green also has testified that it was his opinion to a reasonable degree of medical certainty that Smith's injury to her mesentery was a "seat belt type injury." (Green Deposition at 29.) Dr. Blanton testified that hollow organ injuries, such as the injury

suffered by Smith, are "the most common kind of injury you see from a seat belt injury." (Blanton Deposition at 13.)

"[W]hether there is sufficient evidence to create a jury issue of those essential substantive elements of the action, as defined by state law, is controlled by federal rules." *Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982) (citations omitted). Furthermore, "[t]he evidence must be fact-specific and not merely speculative. '[I]n order to qualify on causation, the opinion testimony of the medical expert may not be stated in general terms but must be stated in terms of a "reasonable degree of medical certainty.'" *Driggers*, 44 F. Supp. 2d at 765 (quoting *Fitzgerald*, 679 F.2d at 350).

Where several factors could have caused an injury, a plaintiff "must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

Driggers, 44 F. Supp. 2d at 765 (quoting *Fitzgerald*, 679 F.2d at 348 (quoting Prosser, Torts, 245 (3d ed. 1964))).

"To ... take the question of causation to the jury, non-movant's evidence 'must indicate a reasonable scientific probability that the stated cause produced the stated result....' When 'evidence raises a mere conjecture, surmise and speculation as to [causation],' it is insufficient to present a question of causation to the jury."

Driggers, 44 F. Supp. 2d at 765 (quoting *Hinson v. Nat'l Starch & Chem. Corp.*, 392 S.E.2d 657, 659 (N.C. Ct. App. 1990)).

To say, such as is the case here, that an injury is "consistent" with a cause is to say no more than it is "possible" that this was a cause of the injury. Such evidence is insufficient to present a question of causation to a jury. Furthermore, it also would be insufficient under the facts and Smith's theory of this case if her treating physicians had stated to a reasonable degree of medical certainty that her injuries were caused by the Cavalier's seatbelt. It is undisputed that Smith was subjected to two separate impacts in this automobile accident. According to Smith's own evidence, the Cavalier's seatbelt functioned properly in the first impact, but malfunctioned in the second impact. Since Tennessee law requires Smith to prove that her injuries were caused by the defect alleged, Smith would have to prove that her injuries were sustained in the second impact. Neither Dr. Green nor Dr. Blanton has offered any opinion as to whether Smith's internal injuries were caused by the first or second impact.

I am not persuaded by Smith's argument that the defense expert, Dr. Banks, has provided evidence of medical causation which makes the entry of summary judgment inappropriate. While Dr. Banks has offered expert medical testimony that the injury to Smith's mesentery occurred in the second impact, his testimony in no way provides evidence that this injury was caused by the defect alleged by Smith. In fact, Dr. Banks's testimony is to the contrary. In particular, Dr. Banks has testified that, in his opinion, the Cavalier's lap belt could not have caused the middle band of contusions on Smith because the pattern of the lap belt did not match the pattern of the middle

contusion. (Banks Deposition at 108.) Dr. Banks stated that "the orientation of the [lap] belt is completely different from the orientation of the middle bruise." (Banks Deposition at 109.) Dr. Banks further testified that it was his opinion that the injuries sustained by Smith were inconsistent with a submarining type event. (Banks Deposition at 110.) Dr. Banks also testified that, in his opinion, the injuries Smith sustained would not have occurred if she had placed the torso belt over her shoulder as opposed to under her arm. (Banks Deposition at 111.) Dr. Banks further testified that, in his opinion, the injury to Smith's mesenteric artery would not have occurred if the torso belt had been properly placed over her shoulder as opposed to under her arm. (Banks Deposition at 112.)

Therefore, based on the above-stated reasons, I will recommend that the court find that there is no genuine issue of material fact and grant summary judgment in GM's favor as a matter of law based on Smith's failure to produce expert medical evidence that her injuries were caused by the defect alleged. Based on this ruling, it is not necessary to address the remaining issues raised by GM in its motion for summary judgment, nor is it necessary to address GM's remaining motions in limine.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned now submits the following formal findings, conclusions and recommendations:

1. The court should apply Virginia's two-year statute of limitations for personal injury claims in this case;
2. Smith's claims are not time-barred; and
3. No genuine issues of material fact exist, and the court should grant summary judgment in GM's favor as a matter of law based on Smith's failure to produce expert medical evidence that her injuries were caused by the defect alleged in this case.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, the undersigned recommends that the court deny GM's motions in limine to exclude the expert opinions of Smith's treating physicians, (Docket Item Nos. 38 and 43), grant GM's motion to limit Benedict to the opinions disclosed in his Rule 26(a)(2)(B) report, (Docket Item No. 36), grant GM's motion in limine to exclude the expert opinions of Benedict only insofar as to exclude any opinions as to medical causation, (Docket Item No. 40), and grant GM's motion for summary judgment, (Docket Item 32). The undersigned further recommends that, should the court grant summary judgment in GM's favor, the court should deny GM's remaining motions in limine as being moot.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence to recommit the matter to the magistrate [judge] with instructions.

Failure to file written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record.

Dated: March 24, 2005.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE