

1997

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### Recommended Citation

Wendy K. Davis *Eighth Circuit Denies Jaw Implant Recipients Relief from Dow Chemical*, 9 Loy. Consumer L. Rev. 335 (1997).  
Available at: <http://lawcommons.luc.edu/lclr/vol9/iss4/13>

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independent economic value and Morlife took reasonable efforts to keep the list secret. The court further held that Burlingame misappropriated the customer list when it used the list to solicit former Morlife customers. Furthermore, the court upheld the trial court's award of injunctive and monetary relief.

### **Concurring Opinion Questioned Factual Conclusions and Injunctive Relief**

Judge Haerle concurred with the majority decision but expressed reservations about the trial court's

factual conclusions and injunctive awards. He stated that Perry only took a collection of customer business cards, not a "customer list" or information from the computer files on restricted access. Haerle further noted that other former employees in *American Paper and Packaging Products Inc. v. Kirgan*, 228 Cal. Rptr. 518 (Cal. Ct. App. 1986) had done "similar things" without incurring liability under the UTSA. Judge Haerle also challenged the trial court's finding that all of the customers who transferred their business from Morlife to Burlingame had been solicited by Defendants when only three of the

four former Morlife customers testified that they were solicited. However, he conceded that the appellate court is to defer to the trier of fact.

In questioning the permanent duration of the primary injunctive relief, Judge Haerle agreed with the *Kirgan* court that an injunction should only last as long "as is necessary to eliminate the commercial advantage that a person would obtain through misappropriation." He suggested that the appropriate time period was satisfied with the initial injunction of the lower court which eliminated any advantage Burlingame had enjoyed.

## ***Eighth Circuit Denies Jaw Implant Recipients Relief From Dow Chemical***

by Wendy K. Davis

In *Temporomandibular Joint Implant Recipients v. Dow Chemical Co.*, 113 F.3d 1484 (8th Cir. 1997), the Eighth Circuit Court of Appeals affirmed the trial court's grant of summary judgment in favor of Defendant, Dow Chemical Company ("Dow Chemical") and against Plaintiffs, recipients of silicone-based temporomandibular joint ("TMJ") implants manufactured by Dow Corning, a subsidiary of Dow Chemical. Plaintiffs sought damages from Dow Chemical, a parent corporation of Dow Corning. The Eighth Circuit held that: (1) the

district court did not grant summary judgment prematurely; (2) Dow Chemical's preliminary silicone testing and trademark agreements with Dow Corning did not constitute an "undertaking" for purposes of triggering Dow Chemical's duty of reasonable care to Plaintiffs; (3) Dow Chemical did not "aid and abet" Dow Corning's allegedly tortious activities; and (4) Dow Chemical was not liable for fraudulent concealment, fraudulent misrepresentation, or conspiracy regarding Dow Corning and the TMJ implants.

### **Plaintiffs Allegedly Injured by Jaw Implants Sue in Product Liability**

The TMJ connects the upper and lower jaws. Plaintiffs received TMJ implants, which are surgically inserted prosthetic devices made in part of silicone that replace dysfunctional TMJs. Plaintiffs claimed that their TMJ implants "deteriorated" after they were implanted, which caused, among other things, "surrounding jaw bond disintegration, serious autoimmune responses, and severe head and neck pain." Plaintiffs sought damages for their

injuries on the theories of corporate control and direct liability.

Various Plaintiffs sued both Dow Chemical and Corning, Inc. ("Corning"), which each own fifty percent of Dow Corning. The Judicial Panel on Multi-District Litigation consolidated the cases during the pre-trial phase. Dow Corning was in bankruptcy, and therefore, did not appear in the case. Plaintiffs' claim against Dow Corning was transferred to the bankruptcy court with jurisdiction over Dow Corning's case. The district court ordered summary judgment in favor of Dow Chemical and Corning in all of the consolidated cases. Plaintiffs appealed. Corning was not a party to the appeal because Plaintiffs appealed only the direct liability claims, of which Corning was not a party. The Eighth Circuit affirmed.

### **Dow Chemical Involved in Early Silicone Testing**

From 1943 into the 1970s, Dow Chemical performed several toxicology tests on several different silicone compounds. None of these tests studied whether any of the silicones were safe for use in medical implants. Three scientists employed by Dow Chemical published two papers, one in 1948 and the other in 1950, both generally discussing the toxicity of silicones and certain compounds specifically. The 1948 paper pointed out hazards "associated with certain silicone compounds."

In 1967, one of the scientists involved in the above mentioned papers attended a meeting held at Dow Corning "discussing the toxicology of various Dow Corning

products," including dental materials. Though some participants in the meeting discussed the possibility of developing a permanent tooth implant, Plaintiffs provided no evidence that a Dow Chemical employee participated in the discussion, or that any meeting participants discussed TMJ implants. In 1968, Dow Corning formed its own toxicology department located on Dow Chemical's premises and hired a former Dow Chemical employee to head the department. The laboratory moved into a Dow Corning building in 1971.

In 1975, Dow Corning and Dow Chemical signed standard trademark licensing agreements, which gave Dow Corning the use of certain Dow Chemical trademarks and trade names. Dow Chemical retained the right to inspect Dow Corning's products bearing the trademarks or trade names in order to protect the integrity of those trademarks and trade names.

### **Plaintiffs Claimed Vicarious and Direct Liability**

In the present case, Plaintiffs argued that the court should pierce Dow Corning's corporate veil and permit the Plaintiffs to sue Dow Corning's owners — Dow Chemical and Corning — for Dow Corning's torts under a corporate control theory. Alternatively, Plaintiffs argued that Dow Corning was the joint venture of Dow Chemical and Corning, so Plaintiffs could sue Dow Chemical and Corning directly for Dow Corning's torts.

However, the court rejected both of Plaintiffs' arguments. It refused to

pierce Dow Corning's corporate veil; therefore, neither Dow Chemical nor Corning were liable for the torts of Dow Corning. Additionally, the court found that Dow Corning was not a joint venture of Dow Chemical and Corning. Thus, Plaintiffs could sue neither Dow Chemical nor Corning directly for Dow Corning's torts.

In addition, Plaintiffs also claimed that Dow Chemical was directly liable under several theories. The district court found no genuine issue of material fact as to any of those theories and awarded summary judgment to Dow Chemical. On appeal, Plaintiffs argued that the district court's grant of summary judgment was premature, and that "there are genuine issues of material fact which preclude a grant of summary judgment on their claims of negligent performance of an undertaking, aiding and abetting tortious conduct, fraudulent concealment and misrepresentation, and conspiracy."

Further, Plaintiffs argued that the district court in this case prematurely granted summary judgment because it improperly relied on the factual findings of another case, *In re Breast Implants*, 837 F. Supp. 1128, 1142 (N.D. Ala. 1993). *In re Breast Implants* was a breast implant case brought by silicone breast implant recipients and had legal and factual issues similar to the present case. Because of the similarity of the issues in the two cases, the district court told Plaintiffs in the present case to coordinate Plaintiffs' discovery requests with the discovery process in *In re Breast Implants* and to use the information that Dow Chemical had produced in that case.

In 1993, the court in the breast implant case granted Dow Chemical interlocutory summary judgment. Dow Chemical then sought summary judgment in the present case and relied on the court's reasoning and holding in *In re Breast Implants*.

On March 31, 1995, the district court in this case granted Dow Chemical's summary judgment motion, but did not enter final judgment. A month later, the court in *In re Breast Implants* vacated its summary judgment order on plaintiffs' claim for direct liability, finding that evidence produced after the court had entered its summary judgment order was sufficient to find Dow Chemical liable to the plaintiffs for negligence. Specifically, the *In re Breast Implants* court found that based on this new evidence, a jury could find that Dow Chemical was liable to the recipients of the breast implants for a negligent undertaking because of its silicone testing. Based on this vacated summary judgment order, Plaintiffs moved to vacate the district court's summary judgment order in the present case. The court, however, denied Plaintiffs motion and entered final judgment in favor of Dow Chemical.

On appeal, Plaintiffs in the present case argued that the district court abused its discretion by denying Plaintiffs' motion to vacate. Plaintiffs argued that they should not have had to rely on the discovery in the breast implant case when the court in that case later vacated its summary judgment order. Further, Plaintiffs argued that because the district court in the present case required Plaintiffs to rely on the discovery from the breast implant

case, Dow Chemical did not have to disclose its role in developing and researching TMJ silicon and did not have to explain the differences between breast implant and TMJ silicones. Therefore, Plaintiffs argued, the district court should not have granted summary judgment without allowing Plaintiffs further discovery.

The Eighth Circuit rejected the Plaintiffs' timing argument, noting that the district court did not need to wait until all discovery was complete to enter summary judgment, but only needed to wait until "the nonmovant has had adequate time for discovery." The court noted that Plaintiffs did not ask the district court to delay a decision on the summary judgment motion until more discovery was completed, as they could under Federal Rule 56(f). Indeed, Plaintiffs expressly disavowed any desire to invoke Federal Rule 56(f) in oral argument before the district court. Notably, Dow Chemical wrote a letter to the district court, a copy of which was sent to Plaintiffs' counsel, clearly expressing its "desire to have [P]laintiffs file a Rule 56(f) motion." In the view of the court, "Plaintiffs made a conscious gamble that their case as presented was sufficient to avoid summary judgment and cannot now complain of inadequate discovery."

It was not until May 25, 1995, after the court had ruled on the summary judgment motion but before it issued final judgment, that Plaintiffs asked the court to delay issuing a final ruling until Plaintiffs' counsel received certain documents from the Food and Drug Administration. The court found that although

that request may have preserved the Plaintiffs' timing argument on appeal, it did not require the district court to wait to issue final judgment. In addition, the court found that those documents were irrelevant to the Plaintiffs' case against Dow Chemical and relevant only to the Plaintiffs' claims against Dow Corning. According to the court, the documents would have done nothing to strengthen the connection between Dow Chemical and Dow Corning, the central issue in the case against Dow Chemical.

There being "thousands of different silicone, each with varying characteristics," the court found that Plaintiffs should not have been surprised by the need to conduct discovery to determine and examine the properties of the particular type of silicone used in the TMJ implants.

Further, the court found that Plaintiffs had "mischaracterize[d]" Dow Chemical's argument and "unduly minimize[d] the role of the district court." The court described Dow Chemical's strategy in using the earlier favorable breast implant ruling as analogizing the two cases as part of a larger body of evidence presented to the district court. This use of the earlier case, the court stated, "does not estop Dow Chemical from pointing out distinctions between the breast implant case and the present case" when the *In re Breast Implants* court reversed itself. Further, the court noted that the district court did not rely heavily on the breast implant case in granting summary judgment.

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## The Court Rejected Plaintiffs' Direct Liability Claims

The court found that no genuine issues of material fact existed as to any of the Plaintiffs' direct liability theories against Dow Chemical. First, the court rejected Plaintiffs' negligent performance of an undertaking claim. The court found that Dow Chemical assumed no duty with respect to the TMJ implants, either through its trademark agreements with Dow Corning or its general silicone testing for Dow Corning. After finding no duty, the court did not address the other elements of negligent performance of an undertaking.

Second, the court rejected Plaintiffs' claim that Dow Chemical aided and abetted Dow Corning's allegedly tortious conduct. For purposes of its aiding and abetting discussion, the court assumed Dow Corning's culpability. Plaintiffs failed to show that Dow Chemical knew of the hazards of the TMJ implants or that it knew it was assisting its subsidiary in a wrongful act. Plaintiffs were only able to show that some employees left jobs at one company to work at the other, and Dow Chemical subsidiaries sold some silicone products -- evidence that the court found insufficient to show "dissemination" of knowledge of the hazards of the TMJ implants

to Dow Chemical. The court found that Dow Chemical's early general toxicology tests on silicone compounds for Dow Corning were insignificant in comparison with the amount of research Dow Corning conducted to develop the TMJ implants. Plaintiffs produced no evidence that Dow Corning was "heavily dependent" on Dow Chemical in developing the implants, or that Dow Chemical knew Dow Corning was working on the project. Further, the court found that Dow Chemical's general desire to support a subsidiary's endeavors, without more specific support of the TMJ project, was not enough to support an aiding and abetting case against Dow Chemical.

Likewise, the court rejected the Plaintiffs' fraudulent concealment and fraudulent misrepresentation claims against Dow Chemical. Fraudulent concealment required, *inter alia*, that the defendant conceal a material fact or remain silent "in the face of a duty to speak." Plaintiffs argue that Dow Chemical had a duty to speak about the hazards of silicone implants because it "published two articles asserting the inertness of silicone and subsequently learned that certain silicone polymers were not inert."

The court found that Dow Chemical had no duty to Plaintiffs for two reasons. First, Dow Chemical had no duty to warn Plaintiffs

because it had no relationship with Plaintiffs. Further, the court noted that the articles did not state that "all silicones are inert," but instead merely asserted that "silicones as a class are inert."

Second, Plaintiffs did not supply the court with any evidence of active concealment. Thus, the court found that Plaintiffs failed to show that Dow Chemical concealed anything. Therefore, the court did not address the other elements of fraudulent concealment. Likewise, the court rejected Plaintiffs' fraudulent misrepresentation claim against Dow Chemical because Plaintiffs failed to show that Dow Chemical made any false representations.

Last, the court found that Plaintiffs did not present "evidence sufficient to create a genuine issue of material fact" as to whether Dow Chemical conspired with Dow Corning to conceal and misrepresent dangers of implanted silicone. The court found that the Plaintiffs' evidence was merely speculation, without evidence, "of a broader conspiracy encompassing all silicone products." Accordingly, the court rejected the last of the Plaintiffs' claims and affirmed the trial court's grant of summary judgment in favor of Defendants.