IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAYNE A. WIGGINS	:	CIVIL ACTION
	:	
v.	:	
	:	
BOSTON SCIENTIFIC CORPORATION	:	NO. 97-7543

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J. April 8, 1999

Presently before this Court are the Plaintiff Wayne A. Wiggins's Motion for Correction, Clarification, Reconsideration, and alternatively, Certification for Appeal (Docket No. 24), the Defendant Boston Scientific Corporation's response thereto (Docket No. 27), and Defendant's Motion for Summary Judgment (Docket No. 26), and Plaintiff's response thereto (Docket No. 28). For the foregoing reasons, the Plaintiff's Motion is **DENIED** and Defendant's Motion is **GRANTED**.

I. BACKGROUND

This is a products liability case. On December 15, 1997, Wayne A. Wiggins ("Plaintiff" or "Wiggins") filed the instant suit against Boston Scientific Corporation ("Boston Scientific" or "Defendant") alleging negligence and strict product liability pursuant to the Restatement (Second) Torts, § 402(a). Wiggins alleges that Boston Scientific is strictly liable to him for

allowing a guide-wire to break and remain in his heart during a routine medical procedure.

Viewed in the light most favorable to the Plaintiff, the facts are as follows. Wiggins underwent a cardiac catherization which uncovered a blocked large obtuse marginal vessel on his heart. In response, the treating cardiologist, Frank C. McGeehin, III, M.D., performed angioplasty and a stenting procedure using a guide-wire manufactured and distributed by Boston Scientific and its subsidiaries. The procedure itself was successful. However, at the conclusion of the procedure, upon withdrawal of the guide-wire, it fractured and remained inside the heart. Dr. McGeehin decided not to remove the guide-wire.

On November 23, 1998, the Defendant filed four motions in limine seeking to preclude the Plaintiff from offering: (1) evidence of possible future consequences of the present injury; (2) expert testimony concerning possible future consequences; (3) evidence of his anxiety concerning his present injury and the prospect of its future consequences; and (4) evidence of product liability. On January 7, 1999, this Court rendered an opinion granting all four of the Defendant's motions in limine holding that Plaintiff has not suffered a "compensable injury." The motions currently before the Court have resulted from that decision.

On January 8, 1999, the Plaintiff filed a motion requesting this Court to reconsider its January 7, 1999 Memorandum

and Order. Moreover, the Defendant alleges that the January 7, 1999 Memorandum contains three factual misstatements. The Plaintiff also requests, if it denies his motion for reconsideration, that this Court either, sua sponte, grant summary judgment pursuant to Federal Rule of Civil Procedure 56, or certify the matter pursuant to 28 U.S.C. § 1292(b). The Defendant filed its response thereto on January 19, 1999. The Defendant also filed a motion for summary judgment on January 19, 1999. The Plaintiff filed his response thereto on January 25, 1999. The Court now considers the parties' motions.

II. DISCUSSION

A. Motion for Reconsideration

1. Standard

It is unsettled among the courts how to treat motions to reconsider:

> The [United States] Supreme Court has noted that "[s]uch a motion is not recognized by any of the Federal Rules of Civil Procedure. The Third Circuit has sometimes ruled on such motions under Federal Rule of Civil Procedure 59(e) and at other times under Rule 60(b). A motion to reconsider may, therefore, be treated as a Rule 59(e) motion for amendment of judgment or a Rule 60(b) motion for relief from judgment or order.

Broadcast Music, Inc. v. La Trattoria E., Inc., No. CIV.A. 95-1784, 1995 WL 552881, at *1 (E.D. Pa. Sept. 15, 1995). In this case, the Court will treat the instant motion for reconsideration as a motion

pursuant to Rule 59(e), rather than as a motion pursuant to Rule 60(b).

Federal Rule of Civil Procedure 59(e) provides in relevant part that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Generally, a motion for reconsideration will only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993) (citing Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992)), aff'd in part, rev'd in part, 57 F.3d 270 (3d Cir. 1995); McDowell Oil Serv., Inc. v. Interstate Fire & Cas. Co., 817 F. Supp. 538, 541 (M.D. Pa. 1993). Furthermore,

> "With regard to the third ground,... any litigant considering bringing a motion to reconsider based upon that ground should evaluate whether what may seem to be a clear error of law is in fact simply a disagreement between the Court and the litigant." Motions for reconsideration should not relitigate issues already resolved by the court and should not be used "to put forward additional arguments which [the movant] could have made but neglected to make before judgment."

Compton, 834 F. Supp. at 755 (quotations and citations omitted).

2. Analysis

In the instant motion, the Plaintiff does not allege that

there has been any change in controlling law or that there is any newly discovered evidence. Moreover, Plaintiff does not assert that the Court must act to prevent manifest injustice. Plaintiff can only succeed, therefore, on the third ground for reconsideration, to "correct a clear error of law" resulting from its earlier order on Defendant's motions in limine. Walker v. Spiller, No. CIV.A97-6720, 1998 WL 306540, at *2 (E.D.Pa. Jun. 9, 1998) (citing Smith, 155 F.R.D. at 96-97). Although Plaintiff does not state precisely that this Court's previous rulings were a clear error of law, it is the premise of each of his arguments. (See Pl.'s Mot. 5-9.) The Court will address Plaintiff's arguments as they relate to each of motion in limine.

a. Evidence Concerning Future Harm From Physical Injury

In Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (1996), the Pennsylvania Supreme Court held that asymptomatic pleural thickening, i.e., unaccompanied by disabling consequences or physical impairment, is not a compensable injury. Id., 674 A.2d at 236. The Pennsylvania Supreme Court explained that:

> We conclude ... that the natural extension of Marinari [v. Asbestos Corp., Ltd., 417 Pa.Super. 440, 612 A.2d 1021 (1992)], is to preclude an action for asymptomatic pleural thickening since Appellants are permitted to commence an action when the symptoms and physical impairment actually develop. The diagnosis of asymptomatic pleural thickening has no statute of limitations ramifications regarding a claim alleging a nonmalignant physiological impairment. A plaintiff is

> also permitted to file a subsequent suit if and when cancer develops.

Id.

In its January 7, 1999 Memorandum, this Court noted that the Simmons progeny "abolishes claims for increased risk and fear of cancer where cancer is not present, thus eliminating the recovery of damages based on a speculative future event, the possible occurrence of cancer." Wiggins v. Boston Scientific Corp., Civ.A. No.97-7543, 1999 WL 94615, *2 (E.D. Pa. Jan.7, 1999). Consequently, this Court held that "a claim for enhanced risk of heart failure and fear of heart failure due to the existence of a foreign object in a vessel of the heart is not actionable if no symptoms have yet developed." Id. As in Simmons, this Court explained that Wiggins could bring his suit when a compensable, actionable injury developed. Id. at *4.

In the instant motion, Plaintiff reiterates the same arguments that he made in response to the motion in limine. Plaintiff argues that this case is distinguishable from the Simmons progeny in that "Wiggins already 'has cancer,' [but] is simply asymptomatic." (Pl.'s Mot. 5.) This argument is unpersuasive.

As in Simmons, Wiggins has been diagnosed with a condition that is unaccompanied by discernible physical symptoms or functional impairment. Simmons was diagnosed with "asymptomatic" pleural thickening (the formation of calcified tissue on the pleura, the membranes surrounding the lungs), whereas Wiggins has

been diagnosed with a thrombegenic (clot producing) condition that is “asymptiomatic.” Simmons saw a specialist, who informed him that pleural thickening due to his asbestos exposure increased his risk of contracting cancer and mesothelioma. Wiggins has been told that his thrombegenic condition caused by the guidewire increases his chances of having heart failure or a stroke. This Court finds that Wiggins’s condition is analogous to Simmons, and thus Wiggins does not yet have any damage.

This Court also finds instruction from the Third Circuit in Angus v. Shirley, 989 F.2d 142 (3d Cir. 1993). In Angus, the Third Circuit determined that a plaintiff who had a defective valve implanted in her heart, but which had not yet malfunctioned, did not suffer from a direct physical injury. Id. at 147. While the valve had not yet malfunctioned, Angus learned that it was at significant risk and could cause her death. Id. Similarly, Wiggins has not suffered from a compensable physical injury even though his chances of heart failure or a stroke have been increased by the presence of the guide-wire.

Plaintiff’s reliance on Martin v. Johns-Mansville Corp., 469 A.2d 655 (Pa. Super. 1993) is misplaced. In Martin, the Pennsylvania Superior Court allowed the plaintiff to present evidence of his increased risk of future harm (the development of bronchogenic carcinoma) because plaintiff manifested a physically discernable injury, "chronic obstructive lung disease with

asbestosis." Id. at 659. In this case, Wiggins does not have a discernable physical injury. Plaintiff refers to his condition as "asymptomatic," and admits that the future is "uncertain" depending on "what will happen to the clots." (Pl.'s Mot. 5.) It was not a manifest error of law, therefore, to preclude the Plaintiff from offering evidence regarding his increased risk of future harm.

b. Plaintiff's Expert Report on Causation and Damage

Relying on the rationale for precluding Plaintiff from offering evidence regarding his increased risk of future harm, this Court has held that "Plaintiff is precluded from introducing evidence that the fractured guide-wire may cause future damage; for example, may cause an artery to close or may cause a myocardial infarction to occur." Wiggins, 1999 WL 94615, at *2. In the instant motion, Plaintiff argues that this Court erred because "there are current damages, and those current damages may inspire future consequences." (Pl.'s Mot. 6.) As this Court stated above, however, Plaintiff does not suffer from a discernable physical injury. Moreover, Plaintiff's expert, Frank C. McGeehin, III, M.D. ("Dr. McGeehin"), opined that this condition "to a reasonable medical certainty, will likely cause that artery to close, and a possible myocardial infarction to occur." Wiggins, 1999 WL 94615, at *2. Such testimony has been found to be too speculative. In Simmons, the Court noted that:

> [t]he injury in an enhanced risk claim is the anticipated harm itself ... [This] is inherently speculative because courts are forced to anticipate the probability of future injury.

Simmons, 674 A.2d at 239 n.11 (quoting In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 850-51 (3d Cir. 1990)). Accordingly, this Court did not commit a manifest error of law in precluding Plaintiff's expert's testimony.

c. Evidence Concerning Plaintiff's Alleged Emotional Damage

It is the general rule in Pennsylvania that no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress is possible unless they are accompanied by physical injury or physical impact. Simmons, 674 A.2d at 238 (citing Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966)). Plaintiff argues that this Court erred in precluding any evidence in support of his emotional damage because "there is current impact; a current injury." (Pl.'s Mot. 7.) This Court must disagree.

In Simmons, the Pennsylvania Supreme Court refused to find that the pleural thickening establishes a sufficient "impact" to warrant recovery for mental anguish. Simmons, 674 A.2d at 238. The Court explained that:

> Those cases which base recovery upon an "impact" rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to a close family member.

Simmons, 674 A.2d at 238 (citing Niederman v. Brodsky, 436 Pa. 401,

261 A.2d 84 (1970); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979)). As in Simmons, "[t]the instant circumstances are not analogous since we have held that no physical injury to any party has been established." Simmons, 674 A.2d at 238.

Moreover, as this Court has previously noted, the Court of Appeals faced a situation analogous to the present case in Angus v. Shirley, 989 F.2d 142 (3d Cir. 1993). In Angus, a plaintiff alleged intentional infliction of emotional distress against the manufacturer of a valve implanted in her heart. The valve had not malfunctioned, however, she learned that it was at significant risk and could cause her death. Id. at 147. As a result, she claimed to have suffered severe mental anguish, with resulting "physical ailments" such as sleep disturbances, panic attacks, breathing difficulties, headaches, and insomnia. Id. at 144. The Angus court affirmed the dismissal of the action on unrelated grounds." Id. at 148. Nonetheless, the Court in Angus noted that the plaintiff had not suffered from a direct physical injury and thus could not state a cause of action for intentional infliction of emotional distress. Id. at 147. Similarly, Wiggins has not suffered from a compensable physical injury. Although the guide-wire was not intended to remain in Wiggins, he currently suffers no objective and identifiable injury. Thus, this Court did not commit a manifest error of law in precluding Wiggins from introducing evidence in support of his alleged emotional damage claim.

d. Evidence Concerning Product Liability

To sustain a strict product liability claim a plaintiff must prove that the product was defective, that the defect existed at the time the product left the defendant's control and that the defect in the product proximately caused plaintiff's injuries. Griggs v. BIC Corp., 981 F.2d 1429, 1432 (3d Cir. 1992) (citing Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893, 898 (1975)). Based on its finding that Wiggins has not yet suffered any compensable injuries, the Court found that Plaintiff could not establish a prima facie case of products liability. Wiggins, 1999 WL 94615, at *4. Consequently, this Court precluded Plaintiff "from proceeding on a product liability cause of action." Id. In his motion, Plaintiff merely repeats his earlier arguments that "there is current injury." (Pl.'s Mot. 8.) Because Plaintiff's argument has been thoroughly resolved, this Court will not reconsider its earlier order precluding Plaintiff from proceeding on his products liability action against the Defendant. Thus, Plaintiff's Motion for Reconsideration is denied.

B. Motion to Correct Factual Misstatements

Plaintiff alleges that this Court's January 7, 1999, Memorandum contains three factual misstatements. First, Plaintiff contends that this Court, at footnote one, on page one of the

background section of the Memorandum, improperly characterized Plaintiff's request of damages. In the January 7, 1999 Memorandum, the Court stated that the Plaintiff was seeking "an award of the expenses made necessary by the in-patient hospitalization which resulted from the failed catherization." Wiggins, 1999 WL 94615, at *1. The Court noted that:

> This request is directly in conflict with Plaintiff's representation in his complaint that "the proximal portion of this obtuse marginal vessel was successfully 'stented' and the superior ramus of the obtuse marginal vessel was successfully dilated with angioplasty." (See Pl.'s Complaint P 9.) Moreover, Plaintiff has presented no evidence of additional expenses incurred in the catherization procedure due to the fracture of the guide-wire.

Wiggins, 1999 WL 94615, at *1 n.1. Plaintiff asserts that his position is not inconsistent because although the catheterization, which was an outpatient procedure, was successful, the fracture of the guidewire resulted in an inpatient stay. (Pl.'s Mot. 2-3.) Plaintiff contends that "it is the expense associated with the inpatient procedure made necessary by the flawed guidewire which [he] seeks to recover." (Id. 3.) The Court finds that no misstatement was made. Plaintiff's complaint does not delineate, with any specifity, the expenses arising out of the in-patient procedure from the out-patient procedure. Indeed, the Complaint does not indicate that the hospitalization was converted from out-patient to in-patient.

Second, Plaintiff correctly points out that Plaintiff was

not intending to call a mechanical engineer at trial. Rather the mechanical engineer was Defendant's expert. Third, Plaintiff correctly indicates that his expert's report did not utilize the term "silent infarct."[1] None of Plaintiff's three points of "correction," however, have any material impact on this Court's holding. Thus, Plaintiff's request for correction is denied as moot.

C. Motion for Summary Judgment

1. Standard

Summary judgment is appropriate "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." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through

[1]Specifically, the Court stated that "according to the Plaintiff, Dr. McGeehin would testify that the wire "may have caused a 'silent infarct." Wright, 1999 WL 94615, at *2. More importantly, however, the Court properly noted that Dr. McGeehin opined that this condition "to a reasonable medical certainty, will likely cause that artery to close, and a possible myocardial infarction to occur." Wiggins, 1999 WL 94615, at *2. As the Court explained above, this testimony is too speculative.

affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. Analysis

The Defendant asserts that "[s]ince there is no damage, there is no cause of action." (Def.'s Mem. 3.) Plaintiff does not disagree. (Pl.'s Mem. 2.) As this Court has stated above, the Plaintiff has not suffered an actionable, identifiable injury. Accordingly, summary judgment is proper and is granted. See Simmons, 543 Pa. at 236 (finding no cause of action because plaintiff had not suffered a compensable physical injury).

This Court's Final Judgment follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAYNE A. WIGGINS	:	CIVIL ACTION
	:	
v.	:	
	:	
BOSTON SCIENTIFIC CORPORATION	:	NO. 97-7543

FINAL JUDGMENT

AND NOW, this 8th day of April, 1999, upon consideration of the Plaintiff Wayne A. Wiggins's Motion for Correction, Clarification, Reconsideration, and alternatively, Certification for Appeal (Docket No. 24), the Defendant Boston Scientific Corporation's response thereto (Docket No. 27), and Defendant's Motion for Summary Judgment (Docket No. 26), and Plaintiff's response thereto (Docket No. 28), IT IS HEREBY ORDERED that the Plaintiff's Motion is **DENIED** and Defendant's Motion is **GRANTED**. IT IS FURTHER ORDERED that:

(1) Plaintiff's Complaint is **DISMISSED**.

(2) The Clerk **SHALL** mark this case as closed.

BY THE COURT:

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HERBERT J. HUTTON, J.