UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Debtor.

Case No. 97-CV-00001-DT

HON. DENISE PAGE HOOD

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MEMORANDUM OPINION AND ORDER RE
DOW CHEMICAL'S MOTION FOR CERTIFICATION

I. INTRODUCTION

On April 25, 1995, the Honorable Sam C. Pointer, Jr. entered an Opinion and Order vacating in part its previous entry of summary judgment in favor of Dow Chemical Company. Dow Chemical now files before this Court the instant motion for certification of Judge Pointer's April 25, 1995 order pursuant to 28 U.S.C. § 1292(b).

Dow Chemical seeks from this Court, the United States District Court for the Eastern District of Michigan, certification under 28 U.S.C. § 1292(b) of Judge Pointer's April 25, 1995 Opinion and Order for appeal to the Sixth Circuit Court of Appeals. *In re Silicone Gel Breast Implants Prods. Lia. Litig.*, 887 F.Supp. 1455 (N.D. Ala. 1995). Judge Pointer's April 25, 1995 Opinion and Order was entered in the United States District Court for the Northern District of Alabama in connection with Multidistrict Litigation Panel case number 926 ("MDL-926"). All silicone gel breast implant cases filed in the federal court system were transferred to the Northern District of Alabama for pretrial purposes pursuant to 28 U.S.C. § 1407. The Sixth Circuit subsequently ordered that the cases involving Dow Corning Corporation's parents, Dow Chemical and Corning, Inc., must be transferred to the Eastern District of Michigan. *In re Dow Corning Corp.*, 113 F.3d 565 (6th Cir. 1997). The cases against Dow Chemical before Judge Pointer in the MDL-926 have been transferred to the Eastern District of Michigan.

Dow Chemical argues in its motion that because of subsequent decisions in related implant

cases at both the state and federal court levels since Judge Pointer's April 25, 1995 opinion and order, certification of Judge Pointer's order is required because the order involves a controlling question of law which there is substantial ground for difference of opinion. Plaintiffs have filed a response to Dow Chemical's motion.

II. ANALYSIS

A. Authority to Review Judge Pointer's April 25, 1995 Opinion and Order

Although the parties do not adequately address this issue, the Court must address this issue because it goes to the question of whether the Sixth Circuit will have jurisdiction to review Judge Pointer's April 25, 1995 opinion and order entered in another district court.

The Sixth Circuit's's jurisdiction over an appeal is found in 28 U.S.C. § 1294 which states:

> Except as provided in sections 1292(c), 1292(d) and 1295 of this title [addressing jurisdiction of the Federal Circuit], appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> (1) From a district court of the United States to the court of appeals for the circuit embracing the district; ...

28 U.S.C. § 1294(1). The Sixth Circuit has held that "[w]e have no appellate jurisdiction over decisions of district courts outside the Sixth Circuit." *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991); 28 U.S.C. § 1294.

Dow Chemical cites in a letter dated January 9, 1998 to the Court that this Court may review Judge Pointer's order pursuant to *Astarte Shipping Co. v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985). (*See* Exhibit C to Dow Chemical's Reply) In *Astarte*, the Fifth Circuit appears to have made an exception to the appellate court's jurisdiction under 28 U.S.C. § 1294 for cases transferred into a district by the multidistrict litigation panel. However, the Fifth Circuit's ruling has been noted as a case which stands alone for that proposition. *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954, n. 4 (10th Cir. 1989). The *McGeorge* court reiterated that the orders of a district court made before a transfer are reviewable by the circuit court in the transferor court's circuit. 871 F.2d at 954. "[W]hen an action is transferred, it remains what it was; all further

proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done." *Magnetic Eng'g & Mfg. v. Dings Mfg.,* 178 F.2d 866, 868 (2d Cir. 1950)(L. Hand, J.). "[A] court of appeals in the transferee circuit lacks jurisdiction to review the judgments of district court in the transferor circuit." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (10th Cir. 1991).

Based on the above cited cases and 18 U.S.C. § 1294, a court of appeals does not have jurisdiction to review an order from another district court outside the circuit. There is, however, a limited avenue through which a transferee appellate court may address the merits of another district court's order from another circuit. A court of appeals may review a transferee district court's application of the law of the case under the law of the case doctrine. *Chrysler Credit*, 928 F.2d at 1518; *Moses*, 929 F.2d at 1137. "[T]raditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, ..." *Chrysler Credit*, 928 F.2d at 1516.

The doctrine of the law of the cases states that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *Moses*, 929 F.2d at 1137. "Because of the possibility of forcing a transferred case into perpetual litigation by playing 'jurisdictional ping-pong,' the law of the case doctrine applies 'with even greater force to transfer decisions than to decisions of substantive law.'" *Moses*, 929 F.2d at 1137, *citing Christian v. Colt,* 486 U.S. 800, 816 (1988). The law of the case doctrine is a rule of judicial comity rather than one of jurisdictional limitation. *Moses,* 929 F.2d at 1137. A transferee court has the power to revisit prior decisions of a coordinate court where the initial decision was "clearly erroneous and would work a manifest injustice." *Moses*, 929 F.2d at 1137, *citing Arizona v. California*, 460 U.S. at 618, no. 8. This Court will revisit Judge Pointer's April 25, 1995 opinion and order to determine whether the decision was "clearly erroneous and would work a manifest injustice."

B. Judge Pointer's April 25, 1995 Opinion and Order

Dow Chemical argues that the Court should certify Judge Pointer's April 25, 1995 Opinion and Order for appeal pursuant to § 1292(b) because of subsequent decisions by various courts around the country. A review of Judge Pointer's April 25, 1995 opinion and order reveals that when it was entered, it was not "clearly erroneous nor would it work a manifest injustice" to Dow Chemical. Judge Pointer analyzed that under the Restatement (Second) of Torts § 324A, the negligent undertaking theory, Dow Chemical may be found to be *directly* liable to the plaintiffs. Judge Pointer did not find that Dow Chemical may be liable under a derivative liability theory. Dow Chemical argues that because the research and testing it performed was not specifically done on breast implants, Dow Chemical did not assume a duty to the plaintiffs and therefore Dow Chemical cannot be held liable for negligent undertaking. Judge Pointer found that Dow Chemical's reading of § 324A is too restrictive. 887 F.Supp. At 1460. Judge Pointer noted that liability can arise when it is reasonably foreseeable that another will be harmed by the failure to exercise reasonable care in performing such an undertaking. *Id.* Judge Pointer found the following:

> Dow Chemical performed tests on breast implant components. Dow Chemical knew that Dow Corning did not have a toxicology lab until the 1970s and was relying on the information it had provided. Eventually Dow Chemical became aware of which silicones were contained in breast implants and aware of possible problems associated with such silicones. Dow Chemical acquired this knowledge no later than Ken Olson's return to Dow Chemical from Dow Corning in 1973. Because of the relationship and proximity of the two companies, their scientific departments, and their research staffs, a jury could determine that Dow Chemical had this knowledge much earlier.
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> The fact that much of the testing plaintiffs refer to occurred prior to the introduction of breast implants does not prevent liability of Dow Chemical with regard to negligent undertaking. The duty is measured in terms of reasonable foreseeability. If Dow Chemical knew that its testing was being relied upon to develop products that would be implanted in humans, Dow Chemical had a duty to use due care in providing reasonably accurate and complete information even if it did not specifically know in which part of the body the products would be implanted.
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> Dow Chemical knew that its research was being used to promote medical uses of silicones and that Dow Corning was using

> silicones for human implantation. Dow Chemical stated in their annual reports that silicones were being used by Dow Corning in implanted devices. In addition, Dow Chemical publicly stated in 1973 that Dow Corning breast implants were "the standard of the industry."
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> * * *
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> Evidence exists upon which a jury could determine that Dow Chemical knew that its research would be and was being used to market additional products for human implantation, that the research would be relied upon by Dow Corning and implant recipients of their physicians, that the research was necessary for the protection of recipients of Dow Corning medical devices, and that harm could result if that research was improperly conducted or reported. A jury could also determine that women and their physicians reasonably relied to their detriment on Dow Chemical's statements regarding breast implants

887 F.Supp. at 1460-1461.

In light of the standard set forth in a Fed.R.Civ.P. Rule 56 motion for summary judgment, this Court finds that Judge Pointer's findings of facts were not clearly erroneous nor would it work a manifest injustice in the litigation.

Dow Chemical's argument that subsequent state and federal courts have issued orders essentially not adopting Judge Pointer's analysis do not create "controlling questions of law" justifying certification of Judge Pointer's orders. By the very nature of a Rule 56 motion, factual considerations must be given and applied to the claim set forth by the plaintiffs. Here, the cases cited by Dow Chemical all go to findings of facts made by those courts. Dow Chemical cites the *TMJ* case where the Eight Circuit found that "the record shows that Dow Chemical never tested the use of silicone in any medical implants." *In re TMJ Implants Prods. Liabl. Litig.,* 113 F.3d, 1484, 1494 (8th Cir. 1997). These are interpretations of facts by different courts. The Court, therefore finds, that the subsequent state and federal cases cited by Dow Chemical do not establish that Judge Pointer's April 25, 1995 opinion and order was clearly erroneous or creates manifest injustice. The Court should deny Dow Chemical's Motion for Certification under 28 U.S.C. § 1292(b).

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Dow Chemical's Motion for Certification under 28 U.S.C. § 1292(b) **(Docket No. 70, filed February 12, 1998)** is DENIED.

/s/
DENISE PAGE HOOD
United States District Judge

DATED: _March 29, 2002___