

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALABAMA OB/GYN SPECIALISTS, PC,))	
)	
Plaintiff,))	
)	
vs.))	No. 02-2608-V
)	
CYNOSURE, INC., HEALTH))	
COMMUNICATION, INC., and))	
THOMAS STOVALL,))	
)	
Defendants.))	

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This lawsuit arises out of the purchase by the plaintiff, the Alabama OB/GYN Specialists, P.C., of a laser to be used in its obstetrical-gynecological practice for the removal of hair. Alabama OB/GYN sued the defendants, Cynosure, Inc., Health Communication, Inc. (HCI), and Dr. Thomas Stovall, alleging negligent, reckless, and intentional misrepresentation (Counts One through Three), suppression (Count Four), deceit (Count Five), and breach of contract (Count Six) in connection with the purchase of the laser. Specifically, Alabama OB/GYN claims that the defendants misrepresented and/or withheld, suppressed or concealed information about (1) the benefits and costs of the laser; (2) whether the laser was "cutting edge" technology and would be for five years; and (3) whether malpractice insurance was available to cover the

use of the laser. Now before the court are the motions of all three defendants for summary judgment on each and every claim. The parties have consented to the trial of this matter before the United States Magistrate Judge. For the reasons that follow, the defendants' motions are granted in part and denied in part.

UNDISPUTED FACTS

The following facts are undisputed. Dr. Francois M. Blaudeau is the president and sole shareholder of the plaintiff company, Alabama OB/GYN Specialists, P.C., a solo physician practice in obstetrics and gynecology in Birmingham, Alabama. Dr. Blaudeau is a practicing obstetrician/gynecologist, but he also has a law degree.

The defendant Cynosure manufactures and sells various types of laser hair removal devices. In 1998, Cynosure entered into an agreement with the co-defendant HCI, pursuant to which HCI agreed to help Cynosure market its laser hair removal equipment to obstetricians and gynecologists. The co-defendant, Dr. Tom Stovall, one of the owners of HCI, is a professor of gynecological surgery at the University of Tennessee in Memphis. He had previously purchased a Cynosure laser for use in his obstetrics and gynecology practice in Memphis, Tennessee. Dr. Stovall, HCI, and Cynosure organized several free information seminars on the Cynosure laser.

In February or March 1999, Dr. Blaudeau received an invitation to attend one of the free presentations in March of 1999 in Memphis, Tennessee, which he did. At the presentation, Dr. Stovall spoke about Cynosure's Apogee 40 laser. The presentation also included hair removal demonstrations on patients, information on Cynosure's marketing program, and financial projections.

At the presentation, Dr. Blaudeau asked Dr. Stovall if there were medical malpractice issues having to do with laser hair removal. In response, Dr. Stovall stated that he was unaware of any problems having to do with medical insurance coverage for laser hair removal, that his experience in Tennessee was that there was no medical malpractice issue, and that he did not believe that there was an issue anywhere else. Dr. Blaudeau did not tell Dr. Stovall the name of his medical malpractice carrier.

Dr. Blaudeau purchased an Apogee 40 laser that day. Dr. Blaudeau had purchased medical equipment for his practice before. Prior to signing the lease/purchase contract for the laser, Dr. Blaudeau did not contact his medical malpractice insurance carrier. Dr. Blaudeau is insured by Mutual Assurance. Following his return to Birmingham, Dr. Blaudeau notified Mutual Assurance about the purchase of the laser hair removal device for use in his obstetrics and gynecology practice at his office. On its face, the Mutual Assurance medical malpractice policy in place at the time Dr.

Blaudeau purchased the laser appeared to cover laser hair removal surgery. After Dr. Blaudeau notified Mutual Assurance of the purchase of the hair removal laser, Mutual Assurance, on July 1, 1999, executed an endorsement to Dr. Blaudeau's policy excluding coverage for laser hair removal procedures. When Dr. Blaudeau advised Cynosure that Mutual Assurance would not cover his operation of the laser hair removal device in his obstetrics and gynecology practice, Cynosure referred Dr. Blaudeau to a company that would. Dr. Blaudeau did not want to change malpractice insurance carriers for a number of reasons, and he therefore never contacted the alternate malpractice carrier.

Dr. Blaudeau also claims that Cynosure assured the physicians attending the seminar in Memphis that the Apogee 40 laser was "cutting edge" technology and that it would remain "cutting edge" technology throughout the five-year lease/purchase term. Several months after Dr. Blaudeau purchased the Apogee 40 laser, Cynosure placed another laser on the market. Dr. Blaudeau does not think the Apogee 40 laser is still current technology, but Dr. Blaudeau is not a laser expert.

Birmingham charges a municipal tax of approximately \$400.00 per month on the lease of equipment and the state of Alabama charges a one-time or annual equipment tax. Dr. Blaudeau has paid the equipment tax on other purchases of equipment since at least

1991. At the seminar in Memphis, Tennessee, the subject of taxes never came up. Dr. Blaudeau "probably" would have gone ahead with the purchase of the laser, even if he had been informed about the equipment tax.

ANALYSIS

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "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." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). *Accord Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by demonstrating to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some

metaphysical doubt as to the material facts." *Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993). When a summary judgment motion has been properly made and supported, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In deciding a motion for summary judgment, "this court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-52). The evidence, all facts, and any inferences that permissibly may be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the

jury could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252.

B. Choice of Law

Because jurisdiction is based on diversity, the court, as a preliminary matter, must decide which state's substantive law applies. To determine which law applies, this court applies the choice of law rules of the forum state. Cynosure asserts that the substantive law of the state of Tennessee should apply because the events giving rise to the lawsuit occurred at a sales seminar in Memphis, Tennessee. Neither the plaintiff nor the co-defendants specifically address the issue but all have relied on Tennessee law in their written submissions to the court. In the absence of any information to the contrary, the court will therefore apply the substantive law of Tennessee.

C. Negligent, Reckless, and Intentional Misrepresentation Claims
(Counts One, Two, and Three)

____ Under Tennessee law, in order to recover for negligent misrepresentation, the plaintiff must show that the defendants supplied false information for the guidance of the other in their business transactions; that the plaintiff justifiably relied on the information; and that the defendants failed to exercise reasonable care or competence in obtaining or communicating the information. *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997). ____

Reckless and intentional misrepresentation both fall within the definition of fraudulent misrepresentation under Tennessee law. In order to show that a fraudulent misrepresentation has occurred under Tennessee law, the plaintiff must prove that the defendants knowingly or recklessly made a misrepresentation relating to an existing or past fact; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damages as a result. *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 237 (Tenn. Ct. App. 1998); *Hill v. John Banks Buick, Inc.*, 875 S.W.2d 667, 670 (Tenn. Ct. App. 1993). *Accord Tschira v. Willingham*, 135 F.3d 1077, 1086 (6th Cir. 1998) (applying Tennessee law). Such a claim may also be proven by showing "the concealment or nondisclosure of a known fact when there is a duty to disclose." *Justice v. Anderson Co.*, 955 S.W.2d 613, 616 (Tenn. Ct. App. 1997).

1. Costs and Benefits

The plaintiff's cost-benefit complaint arises from Cynosure's failure to account for tax payments and malpractice premiums in its financial projections. It is undisputed that the defendants presented financial projections about the Apogee 40. It is also undisputed that none of the defendants ever advised Dr. Blaudeau about a monthly municipal tax in Birmingham or a one-time state tax. However, the plaintiff has adduced no evidence indicating the defendants' affirmative statements regarding financial projections

were false. Dr. Blaudeau understood the defendants' financial projections were general numbers, compiled from data on different geographic regions, and not guarantees of income. (Blaudeau Dep. at 234-235, 238.) In the absence of any affirmative statements about the tax costs, Alabama OB/GYN cannot prove any claim for misrepresentation based on the costs and benefits of the laser device. At best, this claim could be categorized as one of suppression or deceit, analyzed below. Therefore, summary judgment is appropriate as to all defendants on misrepresentation claims relating to costs and benefits of the laser as alleged in Counts One through Three.

2. "Cutting Edge" Technology

As the basis for its motion for summary judgment on the misrepresentation claims relating to "cutting edge" technology, Cynosure argues that there is no evidence in the present record to show that its representation that the Apogee 40 laser was "cutting edge" technology was false. Dr. Stovall and HCI argue the same and add that there is no factual support for any allegation that Dr. Stovall or HCI made a knowing misrepresentation, because neither was privy to technology standards in the laser industry. Alabama OB/GYN contends, in response, that a genuine issue of material fact exists as to whether the "cutting edge" assurance amounts to fraud.

Tennessee courts are silent about when, if ever, a claim that technology is "cutting edge" or "state of the art" crosses a line between puffery and misrepresentation. They are also silent about the level of customer reliance that makes such a statement actionable. Other jurisdictions offer some guidance, however.

The Sixth Circuit considered similar allegations in *Robins Printing Co. v. Crosfield Electronics, Inc.*, No. 92-2446, 1994 U.S. App. LEXIS 16188 (6th Cir. 1994) (unpublished opinion). In that case, the buyer purchased a printer that the seller represented as "state of the art." The Sixth Circuit discussed at some length the lower court's finding that the buyer had not relied on the statement. The buyer had, the court noted, "extensively researched the market" for the equipment, attended trade shows, visited the seller's business headquarters, and "seriously considered" the products of three competitors. Under these circumstances, the Sixth Circuit held, the district court did not err in finding no actionable misrepresentation.

Whether reliance is reasonable is generally a question of fact for the jury to decide. See *Nichols v. A.B. Colemans, Inc.*, 652 S.W.2d 907, 908 (Tenn. App. 1983) (finding error by the trial judge in withdrawing question of reasonable reliance from the jury in a fraud case); *Marine Midland Bank, N.A. v. GMAC*, No. 03A01-9502-CV-00060, 1995 WL 417047 at *7 (Tenn. Ct. App. July 17, 1995) (holding

that reasonable reliance is a question of fact for the jury to decide). Whether a buyer performs an independent investigation of the produce is one factor to consider in determining if reliance was reasonable. *Atkins v. Kirkpatrick*, 823 S.W.2d 543, 552 (Tenn. Ct. App. 1991).

In the instant case, it is undisputed that Dr. Blaudeau had not researched the product:

Q: Before you went to this [Cynosure] meeting, did you have a judgment as to whether offering hair removal to your patients was a good fit with your practice?

A: No. I didn't have any information on laser hair removal. I hadn't shopped around, for, you know, a laser machine, I really didn't know anything.

Q: Okay. Did you do any homework on laser hair removal before you went to this meeting?

A: No.

(Blaudeau Dep. at 21-22.) Accordingly, in the instant case there exists a genuine issue over whether the plaintiff relied on the "cutting edge" statement.

There is also a genuine issue over whether the "cutting edge" representations were false. Courts have held that claims such as "state of the art" are mere puffery and non-actionable when presented in a sales setting. See, e.g., *Robins Printing*, 1994 U.S. App. LEXIS 16188 (concurrently applying Michigan and New Jersey Law); *Winnsboro v. NCR, Inc.*, No. 3:91-0070-17, 1991 U.S.

Dist. LEXIS 6021 (Dist. S.C. 1991) (unpublished opinion) (applying South Carolina law). However, they are not invariably puffery. For example, in *Schwartz v. Electronic Data Systems, Inc.*, 913 F.2d 279 (6th Cir. 1990), an engineer sued over his new employer's alleged failure to provide a promised "state of the art" training program. The holding implied that "state of the art" created subjective expectations, although the claim was dismissed on grounds that "the entire [training] program was presented as a new approach that was subject to revisions." *Schwartz*, 913 F.2d at 285-86. In the context of the Lanham Act, "advertising statements placed in an ad knowing or intending that they are of the type that will affect the consumer's judgment, are not puffery, but rather constitute actionable representations" *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1115 (Dist. N.J. 1987) (quoting *U-Haul Int'l Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1253 (Dist. Ariz. 1981)).

Emerging technologies may become "'obsolete' in the retail sense, despite the fact that they function no differently than they did on the day they were 'cutting-edge'." *In re Number Nine Visual Tech. Corp. Secs. Litig.*, 51 F. Supp. 2d 1, 5 at n4 (Dist. Mass. 1999) (discussing computer graphics cards). In this case, deposition testimony reveals that Cynosure sells another hair removal laser, one with digital rather than analog controls.

(Pl.'s Mem. of Law in Resp. to Def. Cynosure, Inc.'s Mot. for Summ. J. at 14-15 (quoting Cho Dep. at 87-89).) However, there is also testimony indicating the Apogee 40 and the other laser are both "state of the art," because improvements in the actual laser technology are distinguishable from improvements in "bells and whistles," e.g., control technology. (See Cho Dep. at 94-96.)

The court finds persuasive Dr. Stovall and HCI's arguments that they did not know the laser industry's state of the art. Dr. Blaudeau testified, in his deposition, that Dr. Stovall represented the laser as "cutting edge." (Blaudeau Dep. at 49.) Neither Dr. Stovall nor HCI, however, are laser manufacturers or retailers. Dr. Stovall is not an engineer but a medical doctor who uses the laser in his practice. He could not reasonably know the laser industry's state of the art. No reasonable jury could find intentional misrepresentation on these facts; Dr. Stovall's misrepresentation, if any, would at best be negligent rather than intentional or reckless. Summary judgment is therefore appropriate as to the intentional misrepresentation claims against Dr. Stovall and HCI, but not as to whether Dr. Stovall and HCI were negligent in relaying this claim to potential purchasers.

Summary judgment on the plaintiff's claim against Cynosure for misrepresentations relating to "cutting edge" technology is not appropriate. The evidence presents sufficient disagreement to

require submission to a jury as to whether Cynosure's Apogee 40 laser was "cutting edge" technology at the time the plaintiff purchased it.

Accordingly, the motion for summary judgment is denied for claims against Dr. Stovall and HCI for negligent misrepresentation as set forth in Count One of the complaint, and on claims against Cynosure for both negligent and intentional misrepresentations alleged in Counts One through Three.

3. Malpractice Insurance

Alabama OB/GYN's final claim for misrepresentation involves statements by the defendants relating to the availability of malpractice insurance for the operation of a laser hair removal device in an obstetrics and gynecology practice. All the parties support their respective positions by relying on the deposition of Dr. Blaudeau. Alabama OB/GYN relies on the affidavits of Chuck Carr, James Purdy, and Sherry Purdy as well.

Dr. Blaudeau testified that he asked Chuck Carr, a Cynosure salesman, "Are you sure there is not a medical malpractice issue with my carrier, which is Mutual Assurance . . . ?" (Blaudeau Dep. at 119). Chuck Carr confirms in his affidavit that he "was unaware that there was a medical malpractice issue in the State of Alabama who wanted [sic] to do laser hair removal in their office." (Carr Aff. at ¶ 7.) Dr. Stovall made a similar representation, but

without being apprised of Dr. Blaudeau's carrier. (Blaudeau Aff. at ¶¶ 5-6; Blaudeau Dep. at 45-48.)

Under the circumstances, the court finds that no reasonable jury could find that any defendant negligently or intentionally misrepresented the availability of malpractice insurance for the Apogee 40. First, the plaintiff adduces no evidence indicating that the defendants' statements actually were false at the time they were made. When Dr. Blaudeau purchased the laser, the policy appeared to cover laser hair removal. (Blaudeau Dep. at 108.) Mutual Assurance itself did not know whether there were any insurance issues surrounding the procedure. Its definite refusal to cover laser hair removal emerged only after Mutual Assurance completed an internal underwriting process on the coverage. (See Blaudeau Dep. at 102-103.) Cynosure knew other medical malpractice carriers offered coverage for the laser treatment; Dr. Blaudeau was unwilling to change his carrier. (Blaudeau Dep. at 172.)

In addition, the reasonableness of Dr. Blaudeau's reliance on the defendants' statements is questionable. It does appear the defendants presented a "hard sell" and offered a discount to those who purchased an Apogee 40 that day. (See Purdy Aff. at ¶ 7; Blaudeau Aff. at Ex. 1 (Cynosure quotation form, noting discounts applicable only to purchases "at course").) As a medical doctor with a law degree, however, Dr. Blaudeau was an educated purchaser.

Ultimately he was in the best position to know the extent of his Mutual Assurance coverage. He has not alleged that any defendant prevented him from verifying coverage with Medical Assurance before purchasing the Apogee 40. Accordingly, there is no evidence to support the claim that his reliance on the defendants' representations was justified. Summary judgment is appropriate as to all defendants for misrepresentation claims arising out of statements regarding medical malpractice coverage as alleged in Counts One through Three.

D. Suppression and Deceit Claims (Counts Four and Five)

Suppression and deceit are both variations of negligence and fraudulent misrepresentation, based on the failure of a party to disclose material facts if he is under a duty to the other party to exercise reasonable care to disclose the matter in question. *Macon County Livestock Market, Inc. v. Kentucky State Bank, Inc.*, 724 S.W.2d 343, 349 (Tenn. Ct. App. 1986) (quoting *Domestic Sewing Machine Company v. Jackson*, 83 Tenn. 418, 424-25 (1885)). "Tennessee law recognizes only three circumstances giving rise to a duty to speak: (1) where a definite fiduciary duty existed between the parties; (2) when a party to a contract expressly reposed a trust or confidence in the other party; and (3) where the contract or transaction was intrinsically fiduciary" *Morgan v. Brush*

Wellman, Inc., 165 F. Supp. 2d 704, 721-22 (E.D. Tenn. 2001) (citing *Macon County*, 724 S.W.2d 343).

None of these relationships appear in this case. All transactions between plaintiff and the defendants occurred at arm's length. Alabama OB/GYN has alleged no facts indicating the fiduciary or confidential relationship that is prerequisite to any duty to disclose. Accordingly, the defendants' motions for summary judgment are granted as to these claims in Counts Four and Five.

E. Breach of Contract (Count Six)

Finally, Alabama OB/GYN claims the defendants breached express and implied contract terms by failing to provide a product that was "cutting edge" technology covered under the plaintiff's malpractice plan. "[T]he basic elements of a breach of contract case under Tennessee law must include (1) the existence of a contract, (2) breach of the contract, and (3) damages which flow from the breach." *Life Care Ctrs. of Am. v. Charles Town Assocs. L.P.*, 79 F.3d 496, 514 (6th Cir. 1996) (interpreting Tennessee law). A copy of the contract is in evidence, in the form of a Cynosure purchase order dated February 22, 1999. (Blaudeau Dep. at Ex. 1.) In pertinent part, it promises delivery of an Apogee 40 laser with on-site installation, a one-year warranty on equipment, and an accessory package. (*Id.*) The contract is fully integrated, with Cynosure's

warranty limited to repair or replacement of defective parts and materials. (*Id.*)

Nowhere has the plaintiff alleged that Cynosure failed to provide the laser that was promised in this contract. To the contrary, Dr. Blaudeau testified that "the laser technology work[ed] okay," and that he thought patients were "generally pleased with it." (Blaudeau Dep. at 170.) Therefore, no reasonable jury could find that Cynosure breached its promise to provide an Apogee 40 laser to the plaintiff. The representations that allegedly induced the plaintiff to enter into the contract, to the extent they are actionable, are discussed above.

Defendants HCI and Dr. Stovall entered into no contract with the plaintiff for the sale of an Apogee 40. The product was supplied by defendant Cynosure. (See purchase orders at Blaudeau Dep., Exs. 1 and 2.) Accordingly, summary judgment on the breach of contract claim is appropriate as to defendants HCI and Dr. Stovall.

Summary judgment is therefore granted as to all defendants on the breach of contract claims in Count Six.

CONCLUSION

For the foregoing reasons, the court grants the defendants' motions for summary judgment on the following claims: (1) intentional or negligent misrepresentation claims arising from

statements about the Apogee 40's costs and benefits; (2) intentional or negligent misrepresentation claims arising from statements about malpractice insurance coverage; (3) suppression and deceit claims arising from the foregoing; and (4) all breach of contract claims. Summary judgment is also granted on claims against defendants Dr. Stovall and HCI for intentional misrepresentation that the Apogee 40 was "cutting edge" technology. Summary judgment is denied on the claims that Dr. Stovall, HCI and Cynosure made negligent misrepresentations on the "state of the art" issue, as well as whether Cynosure intentionally misrepresented that the Apogee 40 was "cutting edge" technology.

IT IS SO ORDERED this 7th day of February, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE