

FILED

08/03/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 8, 2022 Session

ERROLL SHERROD v. SMITH & NEPHEW INC.

**Appeal from the Circuit Court for Shelby County
No. CT-002471-18 Mary L. Wagner, Judge**

No. W2021-00935-COA-R3-CV

This products-liability case is dismissed with prejudice on the parties' joint stipulation of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

John Timothy Edwards, Memphis, Tennessee, Alex C. Davis and Jasper D. Ward, IV, Louisville, Kentucky, for the appellant, Erroll Sherrod.

Glen G. Reid, Jr., F. Mark Vorder-Bruegge, Jr., Matthew M. Lubozynski, Meghan M. Cox, Memphis, Tennessee, and Douglas J. Moore, New Orleans, Louisiana, for the appellee, Smith & Nephew, Inc.

MEMORANDUM OPINION¹

Appellant Erroll Sherrod filed suit in Circuit Court for Shelby County (“trial court”), asserting various state-law tort claims arising from injuries he allegedly sustained following total-hip-arthroplasty procedures performed in 2008 (right hip) and 2009 (left

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION”, shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

hip). Appellant alleged that his injuries were caused by a combination of hip-implant-device components manufactured by Appellee Smith & Nephew, Inc. The primary component used in both of Appellant's procedures was the metal Birmingham-Hip-Resurfacing ("BHR") acetabular cup, a Class-III medical device that received approval from the United States Food and Drug Administration in 2006.

On May 5, 2021, Appellee moved for summary judgment on the grounds that Appellant's claims were subject to the express preemption provision of the Medical Device Amendments, 21 U.S.C. § 360k(a) ("Section 360k(a)"). In Appellants' hip replacements, the BHR acetabular cup was used in combination with other components in an "off-label" manner. As such, the question of law was whether federal preemption applied to Appellant's device and, if so, whether the Tennessee Products Liability Act imposes liability that is not consistent with federal requirements governing the device. On August 10, 2021, the trial court entered an order granting Appellee's motion and dismissing the action on its finding that the express preemption provision of section 360k(a) draws no distinction between "on-label" use and the type of "off-label" use that occurred in Appellant's case. Appellant filed a timely appeal to this Court.

After the appeal was filed, the parties engaged in settlement discussions. On Appellant's motions, this Court entered orders on June 21, 2022, December 12, 2022, and May 19, 2023 staying the proceedings pending the outcome of the parties' settlement efforts. On July 27, 2023, the parties filed a joint Tennessee Rule of Appellate Procedure 15 stipulation of dismissal, wherein they agreed that "this matter may be dismissed all matters in controversy having been resolved."

The parties' stipulation is well taken, and the appeal is dismissed with prejudice. Costs of the appeal are assessed to the Appellant, Erroll Sherrod, for which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE