

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

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
: :
THIS DOCUMENT RELATES TO: :
: :

MARY MOON :
: :
v. :
: :
: :
WYETH-AYERST LABORATORIES :
COMPANY, et al. : CIVIL ACTION NO. 98-20536

MEMORANDUM AND PRETRIAL ORDER NO. 2029

AND NOW, TO WIT, this 19th day of June, 2001, presently
before the court are defendant American Home Products
Corporation's motion for summary judgment; plaintiff Mary Moon's
("Plaintiff") response and opposition thereto; and defendants
American Home Products Corp.'s and Wyeth-Ayerst Laboratories
Company's (collectively, "Defendants") reply.¹

¹ Summary judgment shall be granted "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

Plaintiff, a seventy year-old woman from Alabama, sued AHP claiming injuries from her ingestion of the diet drug Redux, which AHP manufactured. Her alleged injuries include chest discomfort, asthma, chronic pain syndrome, hypertension and certain injuries to her heart valves.

Plaintiff's expert reports were required to be served by October 18, 1999. On December 20, 1999, Plaintiff provided two expert reports in support of her claim. In one, Dr. Glenn Robert McDaniel, Jr. opines that Redux was more likely than not the cause of Plaintiff's heart valve problems. (Defs.' Mot. for Summ. J. Ex. 1.) In the other, Dr. Donald H. Marks opines that Plaintiff's use of Redux "is causally related to her heart valve problems." Id. Ex. 2. Further, on April 30, 2001, Plaintiff submitted Dr. Marks' supplemental affidavit in response to Defendants' motion, wherein Dr. Marks opines that "[m]ore likely than not Redux was the cause of Ms. Moon's heart valve problems." (Resp. & Opp'n to Defs.' Mot. for Summ. J., unnumbered Ex. 1 at 3, 48 & 50.)

During a deposition conducted after submission of Dr. McDaniel's report but well before the submission of Dr. Mark's supplemental affidavit, Dr. McDaniel could not testify to a reasonable degree of medical certainty that Plaintiff suffers from the heart conditions that she alleges or that there was a causal connection between her ingestion of Redux and those

conditions. Rather, Dr. McDaniel indicated that Plaintiff's valvular abnormalities could be a naturally occurring phenomenon, a function of Plaintiff's age or a result of other risk factors.

AHP submitted the report of Dr. James O. Finney, Jr., a board certified cardiologist and internist, who based on his experience and examination of, inter alia, Plaintiff herself, the relevant medical literature concerning the alleged link between diet drugs and heart valvulopathy, Plaintiff's deposition and medical records, the deposition of Plaintiff's cardiologist and the reports of Plaintiff's experts, concluded to a reasonable degree of medical certainty that the condition of Plaintiff's heart is typical of women in her age group and unrelated to ingestion of Redux.

For Plaintiff to prevail on any of her claims under Alabama law, she "must establish the existence of a nexus between the action of the defendant and the subsequent injury or damage sustained by the plaintiff." Bell v. Colony Apts. Co., Ltd., 568 So.2d 805, 807 (Ala. 1990). Thus, where the plaintiff's expert cannot testify to a reasonable degree of medical certainty as to the cause of the plaintiff's injuries, summary judgment in favor of the defendant is appropriate. See, e.g., Shanes v. Kaiser, 729 So.2d 319 (Ala. 1999) (affirming directed verdict in defendant's favor where plaintiff's expert could not testify to reasonable degree of medical certainty as to cause of plaintiff's

injuries); Pope v. Elder, 671 So.2d 730 (Ala. 1995) (affirming summary judgment for defendant because plaintiff's expert could not opine as to proximate cause of plaintiff's injury).

In the instant case, summary judgment in Defendants' favor is appropriate because Plaintiff has failed to proffer sufficient evidence of causation to create a genuine issue of material fact.

First, despite the conclusions set forth in his report, Dr. McDaniel has since testified that he cannot conclude to a reasonable degree of medical certainty that Redux caused Plaintiff's injuries. Thus, Dr. McDaniel's testimony cannot support a reasonable inference of causation.

Second, neither Dr. Marks' original report nor his supplemental affidavit can create a genuine issue of material fact because they wholly fail to meet the requirements of Federal Rule of Civil Procedure 26, which requires, inter alia, "a complete statement of all opinions to be expressed and the basis and reasons therefore" and "the data or other information considered by the witness in forming the opinions."² Fed. R. Civ. P. 26(a)(2)(B).

² Aside from failing to meet the requirements of Rule 26(a)(2)(B), Dr. Marks' original report and supplemental affidavit are untimely. The original report was served over two months after the deadline for doing so, and the supplemental affidavit was served over one and a half years after the deadline. See Fed. R. Civ. P. 37(b)(2)(B) (granting district court authority to sanction party's failure to comply with scheduling order by prohibiting party from submitting designated matters into evidence).

Dr. Marks' original report does nothing more than concur with Dr. McDaniel's conclusions, which Dr. McDaniel has since recanted. Dr. Marks devotes the vast majority of the supplemental affidavit to a general discussion of Defendants' conduct in the marketing of diet drugs, an issue that has no relevance to the specific issue of whether Plaintiff can demonstrate that her condition results from ingesting Redux.

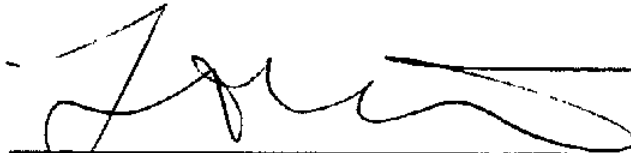
Although the supplemental affidavit expresses numerous conclusions concerning causation of Plaintiff's alleged injuries, Dr. Marks does not disclose the basis and/or reasons for reaching those conclusions. (Resp. & Opp'n to Defs.' Mot. for Summ. J., unnumbered Ex. 1 at 3, 48 & 50.)

Lastly, neither the original report nor the supplemental affidavit sufficiently state Dr. Marks' qualifications to render an opinion concerning the causation of heart conditions by diet drugs. Dr. Marks states that he is a licensed physician and a "consultant in the areas of clinical research and pharmaceutical and medical device regulatory affairs." (Resp. & Opp'n to Defs.' Mot. for Summ. J., unnumbered Ex. 1.) He does not state a basis for expertise in cardiology or any other specialty that might qualify him to opine on the specific issue of whether Plaintiff's alleged heart conditions result from her ingestion of Redux. See Redman v. John D. Brush & Co., 111 F.3d 1174, 1179 (4th Cir. 1997) (stating that party cannot qualify as expert generally by

showing specialized knowledge or training that would qualify him to opine on some other issue); Barrett v. Atlantic Richfield Co., 95 F.3d 375, 382 (5th Cir. 1996) (same); see also 4 Weinstein's Fed. Evid. § 702.06[1] at 702-52 (2000) (noting that court should exclude expert testimony if subject of testimony lies outside witness's area of expertise).

Because Plaintiff has failed to submit any other evidence contradictory to Defendants' evidence on the issue of causation, IT IS ORDERED that:

1. AHP's motion for summary judgment is GRANTED; and
2. Judgment is entered in favor of Defendants and against Plaintiff in the instant civil action.



LOUIS C. BECHTLE, J.

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

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION : MDL DOCKET NO. 1203

THIS DOCUMENT RELATES TO:

BROUSSARD, et al., v.
GATE PHARMACEUTICALS, INC., et al.
Civ. No. 99-20153

GLAZE v. GATE PHARMACEUTICALS,
INC., et al., Civ. No. 98-20728

CHANEY, et al. v. A.H. ROBINS CO.,
INC., et al., Civ. No. 98-20478

WILLIAMS et al. v. A.H. ROBINS CO.,
INC., et al., Civ. No. 98-20478

BOXIE, et al. v. A.H. ROBINS CO.,
INC., et al., Civ. No. 98-20108

HILL, et al. v. AMERICAN HOME
PRODUCTS CORP., et al.
Civ. No. 98-20108

DOROTHY & DONALD LITCHFIELD v.
WYETH AYERST LABORATORIES DIVISION
OF AMERICAN HOME PRODUCTS CORP.,
et al., Civ. No. 00-20022

POWELL v. WYETH AYERST LABORATORIES:
DIVISION OF AMERICAN HOME PRODUCTS
CORP., et al., Civ. No. 00-20958

REYNOLDS v. AMERICAN HOME PRODUCTS
CORP., et al., Civ. No. 00-21013

DIAL, et al. v. WYETH AYERST
LABORATORIES, et al.
Civ. No. 00-20908

VERON v. GATE PHARMACEUTICALS,
INC., et al., Civ. No. 99-20090