UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Rebecca A. Small and
Lawrence W. Small,

Plaintiffs,

v.

Amgen, Inc., Pfizer, Inc.,
and Wyeth, Inc.,

Defendants.

Civ. No. 2:12-476-PAM-MRM

ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. For the following reasons, the Motion is granted.

BACKGROUND

Defendants manufacture, design, distribute, sell, and/or supply Enbrel, a prescription drug commonly used to treat rheumatoid arthritis. Plaintiff Rebecca Small suffers from rheumatoid arthritis and started taking Enbrel to treat her condition in October 2002. In August 2008, Mrs. Small was diagnosed with a perforated bowel from a diverticulitis infection. She was hospitalized, underwent several surgeries, and continues to receive treatment for the infections. Mrs. Small and her husband filed this lawsuit in 2012, alleging that Enbrel caused her infections.

Plaintiffs' Fourth Amended Complaint raised claims for strict liability/design defect (Count I), strict liability/failure to warn (Count II), breach of express warranty

(Count III), negligence (Count IV), and loss of consortium (Count V[1]). In March 2014, the Honorable John E. Steele granted in part and denied in part Defendants' motion to dismiss. Judge Steele dismissed the negligence claim to the extent it asserted a negligent-failure-to-test or -inspect claim and to the extent it asserted a negligence per se claim, but otherwise denied the motion. (Order (Docket No. 66) at 15.) In December 2014, Defendants filed a motion for summary judgment. Judge Steele ruled that Plaintiffs' failure-to-warn claims were precluded by Florida's learned intermediary doctrine, and entered judgment on Count II in its entirety and on Count IV to the extent it raised a claim for negligent failure to warn. (Order (Docket No. 97) at 28.) After summary judgment, Defendants filed another motion, this time for judgment on the pleadings, seeking dismissal of Plaintiffs' strict liability design-defect and negligent manufacture/design claims. The Court denied the motion on January 25, 2016. (Mem. & Order (Docket No. 150) at 5.) Therefore, the claims remaining are strict liability/design defect (Count I), breach of express warranty (Count III), negligence as to manufacture and design (Count IV), and loss of consortium (Count V).

Throughout the three and a half years between the beginning of this lawsuit and Defendants' motion for judgment on the pleadings, the parties engaged in very little discovery, partly because discovery was stayed pending the multiple dispositive motions. In December 2015, once the parties began to engage in discovery, several disputes arose. (See Docket Nos. 126, 127, 129.) In September 2016, Magistrate Judge McCoy granted

[1] The Fourth Amended Complaint mistitles the loss-of-consortium claim as Count VI without listing a Count V. For purposes of clarity, the Court refers to the loss-of-consortium claim as Count V.

in part and denied in part the parties' discovery motions in a very thorough order that set out the discovery parameters in this case. (Order (Docket No. 174).) The parties then filed multiple discovery-related motions in response to Judge McCoy's order, including several objections, motions for sanctions, and motions for reconsideration. Magistrate Judge McCoy and the Court denied all of these motions and objections and noted the parties' dilatory tactics throughout the discovery process.

On February 8, 2017, Defendants filed a motion to strike Plaintiff's expert disclosures. Defendants challenged Plaintiffs' designation of five of Mrs. Small's treating physicians as non-retained experts, because Plaintiffs failed to include a summary of the facts and opinions to which the treating physicians were expected to testify. Defendants also indicated that Plaintiffs had not spoken with the treating physicians about whether any of them intended to or would be willing to opine on causation before designating them as experts. In fact, each treating physician confirmed in writing that they would not offer an opinion on causation. (Defs.' Mot. (Docket No. 214-3) Ex. C.) Based on this information, Judge McCoy granted Defendants' motion and struck Plaintiffs' expert disclosures. (Order (Docket No. 217).)

In this Motion for Summary Judgment, Defendants argue that, without an expert to testify about causation, Plaintiffs' claims fail as matter of law.

DISCUSSION

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears "the initial responsibility of

informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotations omitted). Where the moving party makes such a showing, the burden shifts to the nonmoving party, who must demonstrate the existence of specific facts in the record that create a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials and must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Although causation is an issue generally left to the jury, expert testimony is required to establish causation in cases that involve complex technical, medical, or scientific issues that fall beyond the scope of a layperson's knowledge. Jacob v. Korean Air Lines Co., 606 F. App'x 478, 481 (11th Cir. 2015); see also Guinn v. AstraZeneca Pharm. LP, 602 F.3d 1245, 1256 (11th Cir. 2010) (affirming summary judgment because plaintiff did not have an expert to testify about causation after the district court excluded plaintiff's only expert under Daubert).

Inexplicably, Plaintiffs—during the almost five years of this litigation—did not retain an expert to testify either that Enbrel can generally cause a diverticulitis infection or that Enbrel specifically caused Mrs. Small's diverticulitis infection. Instead, Plaintiffs planned to rely on the testimony of Mrs. Small's treating physicians. But, again

inexplicably, Plaintiffs failed to contact these physicians to confirm their willingness to serve as experts and to give an expert opinion on causation. And, in fact, the treating physicians confirmed in writing that they would not offer an opinion on causation. Magistrate Judge McCoy therefore properly struck Plaintiffs' expert disclosures. Simply put, without an expert to testify that Enbrel can generally cause a diverticulitis infection and that Enbrel caused Mrs. Small's diverticulitis infection, Plaintiffs cannot establish causation. Because causation permeates throughout each of Plaintiffs' remaining claims, Plaintiffs claims fail as a matter of law.

Although the majority of Plaintiffs' opposition memorandum blames Magistrate Judge McCoy and the Court for Plaintiffs' own discovery shortcomings, Plaintiffs argue that, even without expert testimony, Mrs. Small's medical records and Enbrel's warning label provide sufficient causation evidence to preclude summary judgment. They are wrong.

Plaintiffs first argue that there is sufficient evidence to prove general causation because Enbrel's label contains a warning that Enbrel may cause infections. But merely because Enbrel's label warns of infections does not prove to a reasonable degree of medical certainty that Enbrel can cause a diverticulitis infection like the one Mrs. Small had. Indeed, the only experts retained in this litigation both testified at their depositions that it cannot. (Weitz Decl. (Docket No. 218-1) at 15; Beart Decl. (Docket No. 218-3) at 10.)

Plaintiffs next argue that there is sufficient evidence to prove causation because Mrs. Small's treating physicians decided not to prescribe Enbrel after her surgery and

recommended that she avoid it. But a physician's decision regarding what medication to prescribe or not prescribe to their patient is based on any number of reasons, and evidence of such a decision does not establish causation. In other words, correlation does not imply causation.

CONCLUSION

During the four and a half years of this litigation Plaintiffs did not retain a medical expert to testify about causation. Without an expert to testify about causation, Plaintiffs' claims fail as a matter of law. Accordingly, **IT IS HEREBY ORDERED that** Defendants' Motion for Summary Judgment (Docket No. 218) is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: *March 22, 2017*

S/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge