IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG** **CASE MANAGEMENT ORDER NO. 75** **This Order relates to:** *Hempstead v. Pfizer, Inc.*, 2:14-cv-1879

Plaintiff's Motion to Reconsider CMO 55 (Dkt. No. 1317)

In CMO 55, the Court excluded Dr. Murphy's opinion that Lipitor caused, or was a substantial contributing factor of, Ms. Hempstead's Type 2 diabetes. (Dkt. No. 1283). Plaintiff has filed a motion for the Court to reconsider its rulings in CMO 55, (Dkt. No. 1317), and Defendant has filed a response. (Dkt. No. 1372). For the reasons stated below, the motion to reconsider is DENIED.

A. Legal Standard

Under Rule 54(b), "[a]n interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469-70 (4th Cir. 1991). District courts in the Fourth Circuit look to the standards governing Rule 59 motions for guidance in analyzing an motion to reconsider an interlocutory order, though courts are not necessarily bound by the strictures of Rule 59(e). *See, e.g., Superior Bank, F.S.B. v. Tandem Nat'l Mortg., Inc.*, 197 F. Supp. 2d 298, 332 (D.Md. 2000); *R.E. Goodson Constr. Co., Inc. v. Int'l Paper Co.*, No. 4:02-cv-4184, 2006 WL 1677136 at *1 (D.S.C. June 14, 2006). A district court has the discretion to grant a Rule 59(e) motion in narrow

circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (internal quotations omitted). Motions to reconsider may not be used to make arguments that could have been made before the court issued its ruling. *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002). Nor are such motions opportunities to rehash issues already ruled upon because a litigant is displeased with the result. *Tran v. Tran*, 166 F. Supp. 2d 793, 798 (S.D.N.Y. 2001); *see also United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) ("Mere disagreement does not support a Rule 59(e) motion.").

Here, Plaintiffs argue that CMO 55 was clearly erroneous and manifestly unjust. (Dkt. No. 1317 at 1). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Dugger*, 485 F.3d 236, 239 (4th Cir. 2007) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) ("[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.") (internal quotations omitted). "Manifest injustice occurs where the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 126 F. Supp. 3d 611, 632 (D.S.C. 2015) (internal quotations omitted).

B. Discussion

In CMO 55, the Court found that while Dr. Murphy purported to use a five-part test, her opinion was only based on "(1) the fact that Lipitor increases the risk of diabetes (general

causation) and (2) that Ms. Hempstead developed diabetes after taking Lipitor." (Dkt. No. 1283 at 11). The Court explained that neither Dr. Murphy nor counsel could point to a single piece of evidence, specific to Ms. Hempstead, that supported Dr. Murphy's opinion other than a temporal relationship. (*Id.* at 13-14). The Court held that while there are circumstances where temporal proximity is particularly compelling, such circumstances are not present here. (*Id.* at 21-22).

The Court also noted that while Dr. Murphy discussed other risk factors, she never provided any explanation as to why these other risk factors, alone or in combination, were not sufficient to cause diabetes independent of Lipitor exposure. (*Id.* at 16-20, 25-27). Under Fourth Circuit law, for an expert to reliably apply the differential diagnosis methodology, she must provide such an explanation. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001) ("[I]f an expert . . . fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony."); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) ("A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation. . . .The alternative causes suggested by a defendant affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony . . . ***unless the expert can offer no explanation for why she has concluded an alternative cause offered by the opposing party was not the sole cause***.") (emphasis added).

Plaintiff argues that the Court was mistaken in its finding that Dr. Murphy failed to support her opinion with any evidence other than a temporal relationship and general causation evidence. (Dkt. No. 1317 at 3-4, 11). However, Plaintiff has still failed to point to any

additional evidence that Dr. Murphy used to support her opinion with regard to Ms. Hempstead. (*See id.*).

With regard to other risk factors, Plaintiff asserts two contradictory positions in briefing. First, she claims that "Dr. Murphy first 'ruled in' Lipitor . . . and then, 'ruled out' each of the other possible risk factors for diabetes (*e.g.*, BMI, adult weight gain, age hypertension family history, and metabolic syndrome)." (*Id.* at 6). This is plainly not true. As Plaintiff admits later in her brief, Dr. Murphy specifically did not rule out "age, family history, hypertension and weight/BMI." (*Id.* at 9; Dkt. No. 1275-2 at 185, 186). She also did not consider or rule out adult weight gain. (Dkt. No. 1275-2 at 249).

Plaintiff then argues that "[t]he Court overlooks that Dr. Murphy did not need to entirely rule out each of the other factors." (Dkt. No. 1317 at 6). However, Court explicitly stated in CMO 55 that "[u]nder Fourth Circuit law, an expert need not rule out every possible alternative cause of a disease in a differential diagnosis." (Dkt. No. 1283 at 26). As the Court explained in CMO 55, the primary problem with Dr. Murphy's methodology is that while she readily acknowledges that Ms. Hempstead has multiple other risk factors that substantially contributed to her diabetes and that some of these risk factors carry risks that exceed the risk of developing diabetes associated with Lipitor, she fails to offer ***any*** analysis or explanation for why other risk factors are not solely to blame, i.e., why Lipitor is also a substantial contributing factor. (Dkt. No. 1283 at 19-20, 26-27). The Court also held that Dr. Murphy did not even apply her own stated methodology, as she never made any attempt to answer the fifth and crucial question in her methodology: "[h]ow likely is it that Lipitor caused new onset diabetes in this individual at this time?" (Dkt. No. 1283 at 19).

Next, Plaintiff argues that the facts of the Seroquel cases cited by the Court are distinguishable from the facts here. (Dkt. No. 1317 at 10-11). In CMO 55, the Court explicitly stated that "[e]ven though the plaintiff's risk factors in *Haller* are more extreme than Ms. Hempstead's, the court's conclusions are still instructive." (Dkt. No. 1283 at 25). While the two Seroquel cases discussed by the Court in CMO 55 can technically be distinguished on particular facts, the reasoning of these opinions is sound and instructive. The Court was not in error to rely on them.

Finally, Plaintiff argues that the Court improperly made a credibility determination, choosing to believe Defendant's experts rather than Plaintiff's expert. (Dkt. No. 1317 at 4). Plaintiff makes no further explanation and provides no citation for this claim. (*See id.*). The Court did not consider Defendant's experts or their opinions in assessing Dr. Murphy's opinion. CMO 55 does not mention these experts or discuss any opinions other than Dr. Murphy's. CMO 55 focuses on Dr. Murphy's opinion, her methodology, and the facts and data (or lack thereof) that she uses to support her opinion.

C. Conclusion

The Courts findings and rulings with regard to Dr. Murphy were neither clearly erroneous nor manifestly unjust. Therefore, Motion for Reconsideration of CMO 55 (Dkt. No. 1317) is **DENIED**.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

May 6, 2016
Charleston, South Carolina