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. 81** **This Order relates to all cases.**

NOTICE: THIS ORDER CONTAINS AN IMPORTANT DEADLINE FOR ALL PLAINTIFFS.

Lead Plaintiffs' counsel advised the Court in an on-the-record telephone conference of January 22, 2016, that, if the Court's ruling excluding the expert testimony of Dr. Elizabeth Murphy (CMO 55, Dkt. No. 1283) is correctly decided, then none of the cases now pending in the MDL will be able to survive summary judgment on the issue of specific causation. On January 25, 2016, this Court issued CMO 65, giving notice to all Plaintiffs of this fact and ordering that any Plaintiff who "asserts that her case can survive summary judgment on specific causation if even the Court's Ruling in CMO 55 is upheld on appeal" must "provide notice to the Court within 15 days" of the order. (CMO 65, Dkt. No. 1352). No Plaintiff responded to this order of the Court.[1]

Now that Defendant has moved for summary judgment against all Plaintiffs on this ground, Plaintiffs assert for the first time that it may be possible that some unidentified Plaintiffs

[1] Certain cases in the MDL have been stayed until the Court rules on pending motions to remand. Plaintiffs in some of these cases filed a notice that they were not taking action in response to CMO 65 because those particular cases were stayed. (*See* Dkt. No. 1373).

may be able to survive summary judgment based on some unidentified circumstantial, non-expert evidence of specific causation. (*See* Dkt. No. 1586). However, at the summary judgment stage, Plaintiffs must produce more than mere speculation and conjecture. *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)

It is undisputed that substantive tort law for all states requires Plaintiffs to prove causation as an element of their claims. As Plaintiffs have repeatedly explained in briefing, (*see, e.g.,* Dkt. No. 1053), plaintiffs in pharmaceutical personal injury cases generally establish causation by expert testimony in two phases. Plaintiffs offer, as they did in this MDL, expert testimony on general causation, whether a substance of capable of causing a particular injury or condition, and on specific causation, whether the substance caused the injury of the particular plaintiff at issue. *E.g., Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005). Here, however, the Court excluded much of Plaintiffs' general causation testimony and both of Plaintiffs' specific causation experts in the bellwether cases. (*See* CMO 55, CMO 68, CMO 76). Plaintiffs acknowledge that if the Court's *Daubert* ruling excluding the testimony of Dr. Murphy (a specific causation expert) is correct, then they can put forward no other experts on specific causation that could survive *Daubert*. (*See* Dkt. No. 1586 at 13). Thus, the question is whether any plaintiff in this MDL can survive summary judgment without expert testimony on causation.

While the exact standard varies by state law, many states do allow plaintiffs to prove causation by means other than expert testimony. However, the circumstances where such evidence is sufficient to prove causation are generally limited to circumstances where "general

experience and common sense will enable a lay person to determine the causal relationship." *Byrd v. Delasancha*, 195 S.W.3d 834, 837 (Tex. App. 2006); *see also In re Bausch & Lomb Inc. Contacts Lens Sol. Products Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010) ("Where a medical causal relation issue is not one within the common knowledge of the layman, proximate cause cannot be determined without expert medical testimony."); *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 478 (M.D.N.C. 2006) ("In cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.'").

The parties have, up to this point, litigated this MDL as if they agreed that whether Lipitor can and did cause diabetes, a complicated, progressive and multi-factor disease, is a complicated medical issue requiring expert testimony. However, there may possibly be particular Plaintiffs that assert that the particular circumstances of their case allow for a causal inference without expert testimony. These plaintiffs should have come forward in response to CMO 65. Nevertheless, the Court will provide any such Plaintiffs with an additional opportunity to present evidence in response to Defendant's motion for summary judgment. Therefore,

NOTICE IS HEREBY GIVEN that any Plaintiff who asserts that her case can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal, must file a response to Defendant's motion for summary judgment (Dkt. No. 1564) within fifteen (15) days of the date of this Order. Any such response must specifically identify the particular Plaintiff opposing summary judgment, identify the substantive state law that she

contends applies to her claims, and include all evidence that she asserts precludes the entry of summary judgment in her case. [2]

If any Plaintiff contends that she needs additional case-specific discovery to provide such evidence, she must comply with the requirements of Fed. R. Civ. P. 56(d) and identify the specific facts that are yet to be discovered. Should the claims of any Plaintiff survive summary judgment based on Rule 56(d), the Court will then promptly enter a scheduling order in each such case allowing for appropriate discovery and the filing of dispositive motions after discovery.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

August 3, 2016
Charleston, South Carolina

[2] Any such notice should be filed in the MDL management case, Case No. 2:14-mn-2502, and spread to the appropriate member case.