UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

IN RE: DARVOCET, DARVON AND PROPOXYPHENE PRODUCTS LIABILITY LITIGATION	)	Master File No. 2: 11-md-2226-DCR MDL Docket No. 2226
Buch, et al. v. Xanodyne Pharm., Inc., et al.,	)	Civil Action No. 2: 11-324-DCR

*** *** *** ***

MEMORANDUM ORDER GRANTING DEFENDANT ELI LILLY AND COMPANY'S MOTION FOR SUMMARY JUDGMENT

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On March 7, 2012, this Court granted Eli Lilly and Company's ("Lilly") master motion to dismiss the claims asserted against it in several cases. [MDL Record No. 1402] Dismissal was based on the plaintiffs' failure to properly identify Lilly as the entity that marketed, sold, or manufactured the propoxyphene products the plaintiffs claimed to have ingested. Lilly has since filed a motion for summary judgment on the claims asserted against it by Plaintiffs Beverly Smith and Eva McCrary.[1] [MDL Record No. 2645] Lilly contends that it is entitled to judgment because Smith and McCrary have failed to produce evidence that they ingested a product manufactured, sold, or otherwise supplied by Lilly. For the reasons explained below, the Court will grant Lilly's motion.

1 Lilly also asked the Court to enter a show cause order for these plaintiffs. Because the Court finds that summary judgment is appropriate, the alternate relief will be denied.

I.

A federal district court, sitting in diversity, must apply "the law, including the choice of law rules, of the forum state." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003); *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In an MDL proceeding, "the forum state is typically the state in which the action was initially filed before being transferred to the MDL court." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La. 2006). The above-captioned action was filed in the United States District Court for the Southern District of Texas. [*See* Civil Action No. 2: 11-324, Record No. 1] Thus, the Court must "determine which state's law applies by applying the choice of law rules of [Texas]." *Volkswagen Grp. of Am., Inc. v. Peter J. McNulty Law Firm*, 692 F.3d 4, 14 (1st Cir. 2012). And "Texas courts require that the law of the forum with the 'most significant relationship' to the litigation be applied." *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 425 (5th Cir. 2001).

The Amended Complaint states that McCrary is a "resident and citizen of Texas" and Smith is a "resident and citizen of Georgia." [Record No. 27 ¶¶ 7, 15] In their response to Lilly's motion, the plaintiffs do not contend that the law of any other states should apply to their claims. [*See* MDL Record No. 2696.] Accordingly, the Court will apply Texas law to McCrary's claims and Georgia law to Smith's claims.

II.

Summary judgment is appropriate when "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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The party moving

for summary judgment bears the burden of showing conclusively that no genuine issue of material fact exists. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008). Once the moving party has met its burden of production, the party opposing summary judgment must "'do more than simply show that there is some metaphysical doubt as to the material facts.'" *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 483 (6th Cir. 2008) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). Instead, the nonmoving party must present "significant probative evidence" of a genuine dispute in order to defeat the motion for summary judgment. *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002). In deciding whether to grant summary judgment, the Court views all the facts and inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

Lilly argues that it is entitled to summary judgment because neither McCrary nor Smith has demonstrated the ingestion of a propoxyphene product manufactured, sold, or distributed by Lilly. In their Amended Complaint, both plaintiffs allege that they ingested propoxyphene products manufactured by Lilly. [Record No. 27 ¶¶ 7, 15] However, Lilly has presented evidence demonstrating that McCrary and Smith have since represented that they intend to "pursue only the claims that relate to generic drugs." [MDL Record No. 2645-2, p. 3] Nevertheless, counsel for McCrary and Smith indicate that they will seek to hold Lilly liable for the injuries "arising out of their taking of generic drugs." [*Id.*, p. 14] The plaintiffs do not dispute the existence or content of these communications.

It is a general principle of products-liability law in Texas and Georgia that a plaintiff must allege sufficient facts to allow the reasonable inference that the injury-causing product was sold,

manufactured, or distributed by the defendant. [*See* MDL Record No. 1402, p. 5 n.5.] McCrary and Smith do not dispute that they have failed to allege or establish the ingestion of a Lilly product. Instead, they incorporate by reference arguments already rejected by the Court. [MDL Record No. 2696; *see* MDL Record Nos. 908, 914]

The Court has previously found unpersuasive the plaintiffs' argument that a brand-name manufacturer may be held liable under a misrepresentation theory of liability to a plaintiff who ingested generic propoxyphene. [*See* MDL Record Nos. 1274, 1402.] The prevailing rule regarding misrepresentation claims against brand-name manufacturers has its origins in *Foster v. American Home Products Corp.*, 29 F.3d 165 (4th Cir. 1994), which rejected "the contention that a name brand manufacturer's statements regarding its drug can serve as the basis for liability for injuries caused by another manufacturer's drug." *Id.* at 170. The majority of courts that have addressed similar claims have followed the Fourth Circuit's lead. Notably, federal district courts in Texas have repeatedly found that "the Texas Supreme Court would conclude that a brand-name manufacturer does not owe a duty to warn users of the risks related to another manufacturer's product." *Finnicum v. Wyeth, Inc.*, 708 F. Supp. 2d 616, 621 (E.D. Tex. 2010); *see also Burke v. Wyeth, Inc.*, No. G-09-82, 2009 WL 3698480, at *2-3 (S.D. Tex. Oct. 29, 2009). And there can be no recovery under Georgia law, "[u]nless the manufacturer's defective product can be shown to be the proximate cause of the injuries . . ." *Hoffman v. AC&S, Inc.*, 548 S.E.2d 379, 382 (Ga. Ct. App. 2001) ("To survive summary judgment, [the plaintiff] clearly needed to present evidence that she was exposed to defendants' products.").

Lilly has sufficiently established that there is no genuine dispute concerning the only material fact that determines the viability of the plaintiffs' misrepresentation claims: the identity of the propoxyphene product ingested by McCrary and Smith. In the absence of any binding authority expanding the liability of brand-name manufacturers, Lilly cannot be held liable to a plaintiff who consumed another manufacturer's product. Therefore, the plaintiffs' misrepresentation claims fail as a matter of law.

III.

For the reasons discussed above, and explained in detail in the Memorandum Opinions and Orders entered on March 5, 2012 and March 7, 2012 [MDL Record Nos. 1274, 1402], Lilly is entitled to summary judgment on the claims asserted against it by Plaintiffs Eva McCrary and Beverly Smith. Accordingly, it is hereby

ORDERED as follows:

1. Defendant Eli Lilly and Company's Motion for Summary Judgment [MDL Record No. 2645] is **GRANTED**, insofar as Lilly seeks summary judgment. Lilly's alternative request for the entry of a show cause order is **DENIED** as moot.

2. The claims asserted by Plaintiffs Eva McCrary and Beverly Smith against Defendant Eli Lilly and Company in the above-captioned case are **DISMISSED**, with prejudice.

This 29th day of July, 2013.

Signed By:
Danny C. Reeves DCR
United States District Judge