IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TRUDY CROOKSHANK	)	
	)	CA No. 05C-08-281
Plaintiff,	)	
	)	
v.	)	
	)	
BAYER HEALTHCARE PHARMACEUTICALS,	)	
	)	
	)	
Defendant.	)	

Submitted: February 4, 2009
Decided: May 22, 2009

Upon Consideration of
Defendant's Motion for Summary Judgment: Granted

MEMORANDUM OPINION

Trudy Burns Crookshank, *pro se.*

Paul Bradley, Esquire, of Maron, Marvel, Bradley & Anderson, P.A., Wilmington, Delaware.

Michael Lisak and Michael Wasicko, Esquires of Goodell, Dezries, Leech & Dann, LLP, *pro hac vice*, Baltimore, Maryland.

Scott, J.

This is a products liability action brought by plaintiff who is *pro se*. Plaintiff alleges a number of ailments as a result of taking the prescription medication Avelox. Avelox is manufactured by defendant. Presently pending before the Court are three motions by defendant for summary judgment. In the time between their initial filing and this decision, plaintiff filed a number of discovery motions and advised the Court that she was actively seeking representation. As such, the Court felt it necessary to delay making a decision on the motion, but at this point, sufficient time has passed and the Court fears prejudice to defendants if decision is delayed any further. For the reasons that follow, the Court finds summary judgment in favor of defendant is warranted.

The case scheduling order, signed on May 8th 2007, indicates that plaintiff's expert deadline was June 29, 2007.[1] Defendant's deadline was July 30, 2007.[2] The discovery deadline was August 31, 2007.[3]

On July 17, 2007, this Court granted plaintiff's request for an extension of time, until August 31, 2007, to identify her expert.[4] While plaintiff did not file anything additional by the August 31, 2007 deadline with the Court, she advised the Court, on August 27th, that she contacted

[1] D.I. 26.
[2] *Id.*
[3] *Id.*
[4] D.I. 31.

counsel and that her medical records had been sent to an expert for review. Plaintiff attached a brief note from Dr. James Dahlgren, her expert.

The Court held a status conference on September 17, 2007.[5] Plaintiff did not appear.[6] Nevertheless, the Court again extended the deadline by which plaintiff was to identify her expert to September 28, 2007.[7] At oral argument on defendant's motion for summary judgment, plaintiff indicated that she was having difficultly securing representation. Thus the Court granted plaintiff additional time to produce her expert report. Plaintiff was given until January 31, 2008.

In the meantime, plaintiff filed a motion to compel supplemental responses to her second set of interrogatories.[8] The Court heard oral argument on that matter December 11, 2007. At that time, the Court directed defendant to clarify several responses to plaintiff's interrogatories. One week later, defendant filed notice of service of their clarification.[9]

Thereafter, plaintiff attached documents marked confidential to correspondence addressed to defendant's counsel.[10] Defense counsel sought

[5] D.I. 36.
[6] *Id.*
[7] *Id.*
[8] D.I. 55.
[9] D.I. 58.
[10] D.I. 65.

the return of those documents.[11] Judge Brady entered an order directing plaintiff to return the documents at issue. Plaintiff has asked the Court to vacate this Order on the basis that defense counsel was aware that she had the documents and were careless in maintaining them.[12]

Presently before the Court are (1) plaintiff's second motion to compel additional discovery responses, (2) plaintiff's motion to vacate Judge Brady's Order and, (3) Defendant's Motions for Summary Judgment.

Plaintiff's Motion to Compel[13]

The Court has reviewed defendant's supplement, filed in response to this Court's order, and finds that the response is complete. Plaintiff's motion to compel is denied.

Plaintiff's Motion to Vacate

Rule 502 of the Delaware Rules of Evidence governs the attorney-client privilege. The party who claims the privilege bears the burden of proof.[14] In this case, the documents at issue were circulated among defense counsel and detail legal analysis of the claims and proceedings. Plaintiff stated that "[defense counsel] graciously gave me copies of my arbitration, as well as deposition transcripts. I found these documents contained in these

[11] *Id.*
[12] D.I. 70.
[13] D.I. 63
[14] *Moyer v. Moyer*, 602 A.2d 68 (Del. 1992).

transcripts, which are in my possession." This statement indicates that these documents were found amongst other documents, which were provided to plaintiff as a courtesy only. Therefore, defense counsel did not intentionally waive the privilege with respect to the documents. Plaintiff's motion to vacate is denied.

Defendant's Motion for Summary Judgment

Plaintiff alleges that, in September 2003, she was treated by her primary care physician for bronchitis.[15] She was given samples of Avelox to treat the condition.[16] Plaintiff alleges that after taking the drug she "suffered tremors in her face, scalp and arms, facial edema, diaphoresis, dizziness, emesis, cyanosis and laryngospasm."[17] Plaintiff also alleges that, after taking Avelox, she was diagnosed with a seizure disorder. Notably, her expert opines as to the seizure disorder and respiratory problems only. Plaintiff alleges that she "currently suffers from a limited life style due to seizure symptoms."[18] She relates the cause of her medical troubles to Avelox ingestion.[19]

The Court may grant summary judgment if it concludes that "the pleadings, depositions, answers to interrogatories, and admissions on file,

[15] Plaintiff's Complaint, ¶ 5.
[16] *Id.*
[17] *Id.* at ¶ 6.
[18] *Id.* at ¶ 9.
[19] *Id.* at ¶ 10.

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 summary judgment as a matter of law."[20] The moving party bears the initial burden of showing that no material issues of fact are present.[21] Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.[22] In considering a motion for summary judgment, the Court must view the record in the light most favorable to the nonmoving party.[23] The Court's decision must be based solely on the record presented and not on all evidence "potentially possible."[24]

"To prevail in a claim for negligence, a plaintiff must establish that: 1) the defendant owed the plaintiff a duty of care; 2) the defendant breached that duty; 3) the plaintiff was injured; and 4) the defendant's breach was the proximate cause of the plaintiff's injury."[25] Discovery has long since closed in this case. The Court and defense counsel have been more than accommodating with regard to plaintiff's request for extensions.

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[20] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[21] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[22] *Id*. at 681.
[23] *Burkhart*, 602 A.2d at 59.
[24] *Rochester v. Katalan*, 320 A.2d 704, 708 (Del. 1974) *citing United States v. Article Consisting of 36 Boxes*, 284 F.Supp. 107 (D. Del. 1968), *aff'd*, 415 F.2d 369 (3d Cir. 1969).
[25] *Campbell v. DiSabatino*, 947 A.2d 1116, 1117 (Del. 2008) citing *New Haverford Partnership v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

Defendant advances three arguments to support its contention that summary judgment should be granted in its favor: (1) the learned intermediary doctrine, (2) lack of proximate cause and, (3) federal preemption. The Court finds that plaintiff has failed to establish evidence of prima facie causation and summary judgment in defendant's favor is warranted. Because the Court finds summary judgment is appropriate on this basis, it will not address the learned intermediary doctrine in depth or federal preemption.

Defendant argues that "without expert witness testimony, Plaintiff cannot sustain her burden of proof as to proximate cause."[26] The report submitted by plaintiff is from Dr. James Dahlgren. It states as follows:

> I have reviewed the medical records for this person [plaintiff] and the medical literature for information on the adverse effects of the drug she took which caused her illness. The medical records indicate that she developed a severe illness including respiratory problems and a seizure disorder after taking a medication, Avelox (Moxifloxacin). Avelox is known to cause these types of toxic reactions. It is my opinion that Ms. Crookshank suffered a serious adverse reaction to the drug, which has resulted in a significant permanent injury.

Defendant challenges the sufficiency of this expert report. While determining proximate cause is ordinarily a jury question, it is necessary for

[26] Defendant's Motion for Summary Judgment ¶ 3.

plaintiff to establish a *prima facie* case.[27] When the issue of proximate causation is outside the scope of lay knowledge, then expert testimony is required to make a *prima facie* case.[28] Rule 56(e) requires a party to demonstrate that the evidence he relies upon in opposition to a motion for summary judgment would be admissible at trial.[29] "In Delaware, before testifying, the expert must 'first identify the facts and data upon which he bases his opinion and his reasons for the opinions.'"[30] "In the context of a motion for summary judgment, an expert must back up his opinion with specific facts."[31] In *Lynch*, the expert provided an affidavit which the Court referred to as "the least satisfactory form of evidentiary material upon which to base a motion for summary judgment."[32] The basis for this conclusion is that the expert witness' demeanor cannot be seen nor is he subject to cross-examination.[33]

The purpose of identifying and providing expert reports is to provide the opposing side with notice of the basis for the opinion, and to allow them

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[27] *Money v. Manville Corp.*, 596 A.2d 1372, 1375 (Del. 1991).
[28] *Id.*
[29] *Lynch v. Athey Products Corp.*, 505 A.2d 42 (Del. Super. 1985).
[30] *Id.* citing D.R.E. 705.
[31] *Id.* citing *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981).
[32] *Id.* citing Wright & Miller, 10A *Federal Practice and Procedure* § 2738.
[33] *Id.*

to respond in kind.[34] "It is not reasonable to require Defendants' counsel to go on a wild goose chase with Plaintiff's experts or to depose Plaintiff's experts without the benefit of having the opinions and the medical or scientific reasoning for those opinions."[35]

The Court concludes that the information submitted by plaintiff from her expert is insufficient. The nature of the injuries alleged in the complaint requires expert testimony to establish causation. In this instance, not even a sworn affidavit has been provided. There are absolutely no specific facts given to support to opinion that plaintiff suffered a "serious adverse reaction to the drug." This report does not supply the medical or scientific reasoning for this opinion and simply states in a conclusory fashion that "Avelox is known to cause these types of toxic reactions. How Dr. Dahlgren reached this conclusion is not disclosed.

The Court notes that even if plaintiff's theory is that is general medical knowledge that Avelox causes such side effects, then defendant is correct that the learned intermediary doctrine applies. The doctrine, recognized in Delaware, "stands for the proposition that the manufacturer of prescription drugs has a duty to warn only physicians of any risks or contraindications associated with that drug. If the physician gets adequate

[34] *Duncan v. O.A. Newton & Sons Co.,* 2006 WL 2329378 (Del. Super.).
[35] *Id.* at *6.

notice of possible complications, the manufacturer has no concomitant duty to warn the consumer."[36] The doctrine places the task of making an informed choice on the physician as the medical expert.[37]

The basis for the rule is that "only health-care providers are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy. The duty then devolves on the health-care provider to supply to the patient such information as is deemed appropriate under the circumstances so that the patient can make an informed choice as to therapy."[38]
The doctrine's application with prescription medication is clear because the patient is "obviously unable to obtain a prescription unless his physician orders it."[39] If plaintiff's theory is that the side effects of Avelox are generally known to physicians, then the learned intermediary doctrine applies and summary judgment in favor of defendant is also appropriate.

Because plaintiff's expert report is deficient and she cannot point to any other information in the record to establish causation, defendant's

[36] *Lacy v. G.D. Searle & Co.,* 1988 WL 67825 *6 (Del. Super.) citing *Brooks v. Medtronic, Inc.,* 750 F.2d 1227, 1231 (4th Cir. 1984) aff'd *Lacy v. G.D. Searle & Co.,* 567 A.2d 398 (Del. 1989).
[37] *Id.* at *6.
[38] Restatement of Torts, 3rd Ed., § 6 comment b.
[39] *Lacy*, 567 A.2d 398.

motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.