

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

SHIRLEY SHEFFER, <i>et al.</i> ,	:	
Plaintiffs,	:	
v.	:	Case No. 3:12-cv-238
NOVARTIS PHARMACEUTICALS	:	JUDGE WALTER H. RICE
CORPORATION,	:	
Defendant.	:	

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DECISION AND ENTRY OVERRULING NOVARTIS  
PHARMACEUTICALS CORPORATION'S MOTION TO STRIKE  
PLAINTIFFS' COUNT III: NONCONFORMANCE WITH  
MANUFACTURER'S REPRESENTATIONS (DOC. # 74); RESERVING  
RULING ON NOVARTIS PHARMACEUTICALS CORPORATION'S  
MOTION TO LIMIT COMPENSATORY (NON-ECONOMIC) DAMAGES  
(DOC. #75); PLAINTIFFS TO FILE SUPPLEMENTAL BRIEFING WITHIN  
TEN DAYS; DEFENDANT TO FILE SUPPLEMENTAL REPLY BRIEF  
WITHIN SEVEN DAYS THEREAFTER

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This matter is currently before the Court on two motions filed by Defendant Novartis Pharmaceuticals Corporation: (1) Motion to Strike Plaintiffs' Count III: Nonconformance with Manufacturer's Representation (Doc. #74); and (2) Motion to Limit Compensatory (Non-Economic) Damages (Doc. #75). The Court construes both motions as motions for partial summary judgment.

## I. Nonconformance with Manufacturer's Representation

Novartis has moved to strike Plaintiffs' claim of Nonconformance with Manufacturer's Representation, set forth in Count III of the Second Amended Complaint. According to Novartis, Plaintiffs cannot show that Novartis made the alleged representations, nor can they show that Shirley Sheffer or her physicians relied on the alleged representations.

Plaintiffs note, however, that this Court has already denied Novartis's motion for summary judgment on this claim, finding that Novartis "wholly failed to satisfy its initial burden of establishing the absence of a genuine issue of material fact with respect to [the] newly asserted bases for Sheffer's claim." Doc. #60, PageID #7785. The Court agrees with Plaintiffs that Novartis should not now be given a "second bite at the apple."

Novartis urges the Court to revisit the issue in light of the recent Order issued in *Dopson-Troutt v. Novartis Pharmaceuticals Corporation*, No. 8:06-cv-1708 (M.D. Fla. April 11, 2014). Doc. #74-1. In that case, the court granted Novartis's Rule 50 motion for judgment as a matter of law on a breach of express warranty claim under Pennsylvania law, finding "no legally sufficient evidentiary basis from which a reasonable jury could find that Novartis created an express warranty that Aredia and Zometa strengthens bones," or that Novartis breached any such warranty. *Id.* at PageID##7998-99. Novartis fails to explain, however, why the same arguments it presented in its Rule 50 motion in *Dopson-Troutt* could not have been earlier advanced in its motion for summary judgment in this case.

In any event, the *Dopson-Troutt* ruling is not binding in this case, nor is it necessarily dispositive of this claim. It may well be that Sheffer's claim, governed by Ohio law, suffers from substantially similar defects. However, given that the Court has already overruled Novartis's motion for summary judgment on this claim, the merits of the claim will have to be determined at trial. The Court therefore **OVERRULES** Novartis's Motion to Strike Plaintiffs' Claim of Nonconformance with Manufacturer's Representation, Doc. #74.

## **II. Limit Compensatory (Non-Economic) Damages**

Pursuant to Ohio Revised Code § 2315.18(B), Novartis has also moved to limit Plaintiffs' compensatory (non-economic) damages. The relevant statute reads as follows:

(B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:

- (1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.
- (2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.

(3) There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following:

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.

Ohio Rev. Code § 2315.18(B).

Novartis argues that because there is no evidence that the exceptions set forth in § 2315.18(B)(3) apply in this case, Plaintiffs' non-economic damages should be limited to the greater of \$250,000 or an amount equal to three times the economic loss, up to a maximum of \$350,000. The statutory cap on damages is lifted only for injuries that are "catastrophic" in nature. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 480 (Ohio 2007). Any physical deformity must be "severe and objective." *Weldon v. Presley*, No. 1:10-cv-1077, 2011 WL 3749469, at \*6 (N.D. Ohio Aug. 9, 2011). Novartis notes that Shirley Sheffer recently testified that her broken jaw has fused, and that she no longer has any exposed bone in her mouth. 5/16/14 Sheffer Dep., Doc. #81-1, PageID##8325-26.

Plaintiffs summarily state that they will offer evidence at trial that Shirley Sheffer's osteonecrosis of the jaw is a "permanent and substantial physical

deformity" within the meaning of § 2315.18 (B)(3)(a). They further ask that they be given an additional ten days to respond, should the Court decide to consider Novartis's motion. Novartis maintains that Plaintiffs have not shown good cause for needing an extension of time.

In the Court's view, resolution of this issue prior to trial will be extremely helpful, and may further settlement discussions. Accordingly, Plaintiffs shall have ten days from the date of this Decision and Entry to present supplemental briefing in support of their claim that Sheffer suffers from a "permanent and substantial physical deformity." Novartis shall then have seven days to file a reply. The Court will RESERVE RULING on Novartis's Motion to Limit Compensatory (Non-Economic) Damages, Doc. #75, until that time.

Date: May 27, 2014

  
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WALTER H. RICE  
UNITED STATES DISTRICT JUDGE