UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MARY NUERNBERG

VERSUS

NOVARTIS CORP., ET AL

CIVIL ACTION

NO. 01-0864-JJB-DLD

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on a motion for summary judgment (doc. 32) filed by defendants, Novartis Corp., et al ("Novartis"). Plaintiff, Mary Nuernberg ("Nuernberg"), has filed an opposition (doc. 39). Novartis has filed a reply brief (doc. 41). There is no need for oral argument. Subject matter jurisdiction is based upon diversity of citizenship, 28 U.S.C. §1332.

Procedural History

Plaintiff Nuernberg brings this lawsuit claiming that she suffered a stroke within 72 hours of ingesting a drug manufactured by defendants, Novartis. Plaintiff alleges that the medication she used and ingested contained phenylpropanolamine (PPA), a substance she alleges caused her to have the stroke. Furthermore, plaintiff contends that defendants knew or should have known that dangerous risks were associated with the use of products containing PPA. Plaintiff alleges that defendants failed to adequately warn her of the hazards associated with the use of the medication.

Defendants argue that plaintiff has not satisfied her burden of showing that she used a PPA-containing product manufactured by defendants; therefore, there is no genuine issue of material fact. Defendants contend that for this reason they are entitled to summary judgment as a matter of law.

Summary judgment is appropriate when the pleadings, answers to interrogatories, admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. **See** Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When the burden at trial rests on the non-movant, as it does here, the movant need only demonstrate that the record lacks sufficient evidentiary support for the non-movant's case. **See Id.** The movant may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to the non-movant's case. **See Id.**

Although this court considers the evidence in the light most favorable to the non-movant, the non-movant may not merely rest on allegations set forth in the pleadings. Instead, the non-movant must show that there is a genuine issue for trial. **See** Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Conclusory allegations and unsubstantiated assertions will not satisfy the non-movant's burden. If, once the non-movant has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-movant, summary judgment will be granted. **See** Celotex Corp., 477 U.S. at 322; **see also** Fed. Rule Civ. P. 56(c).

Background Facts

Plaintiff was hospitalized with a subarachnoid hemorrhage on December 14, 1992. She alleges that her stroke was caused by PPA, an ingredient in some cold and cough medications. Plaintiff claims that she used a cold and cough medication, Triaminic, manufactured by defendants, within 72 hours prior to her stroke, and she believes that the Triaminic contained PPA. Defendants sold multiple formulations of Triaminic, some that contained PPA and others that did not. Plaintiff stated under oath in her "Plaintiff Fact Sheet" (PFS) that the medication she used prior to her stroke was a purple liquid. Plaintiff again stated under oath in her deposition taken by plaintiff's counsel that her best guess recollection was that the Triaminic product she used was a purple liquid. However, plaintiff testified that she could not recall the name of the Triaminic product she had ingested. Other than plaintiff's initial dose, she only took the product at night because of its drowsy side effects. In 1992, defendants manufactured and sold only one Triaminic product that was a purple liquid, "Triaminic Nite Light." Triaminic Nite Light did not contain PPA.

Defendants' Argument

Defendants argue that once they, the moving party, meet their burden of identifying portions of the record that they believe demonstrate the absence of a genuine issue of material fact, then the burden shifts to the opposing, nonmoving party to demonstrate the existence of a genuine issue for trial. **See** *Taita Chem. Co.v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001). The nonmoving

party "must come forward with specific facts showing that there is a genuine issue for trial." (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986)).

More specifically, defendants contend that to survive summary judgment, the plaintiff bears the burden of presenting affirmative evidence that she ingested a PPA-containing product manufactured by defendants. **See** *Cooper v. Borden, Inc.*, 709 So.2d 878, 881 (La. App. 1998). Furthermore, defendants argue that the plaintiff must prove "that the defendant's product contained a deleterious substance." 709 So.2d 878, 881 (La. App. 1998). Defendants contend that *Hicks v. Pfizer*, 368 F. Supp. 2d (E.D. Tex. 2005), illustrates this burden since the court in *Hicks* granted summary judgment where the plaintiff failed to present affirmative evidence linking the defendant to the vaccine that allegedly caused a tumor.

Defendants also look to *Holden v. Blue Streak*, No. CIV.A. 88-2216, 1988 WL 135374 (E.D. La. 1988), for instruction. In *Holden*, the court held that the plaintiff did not meet his burden of linking the defendant to the allegedly defective product; therefore, the court granted the defendant's motion for summary judgment. Likewise, the defendants here argue that the plaintiff has failed to meet her burden; plaintiff alleges that she used a purple liquid Triaminic product prior to her stroke, but the unrebutted affidavit of Henry Weidmuller establishes that defendants did not manufacture a purple liquid Triaminic product that contained PPA.

Plaintiff's Argument

Plaintiff argues that she ingested Triaminic within 72 hours prior to her stroke and that she has identified Triaminic DM Cough Relief, which contains PPA, as the product that she used. Therefore, plaintiff contends that her identification of the product that she used supports the finding that there is a genuine issue of material fact. Plaintiff further contends that the federal rules do not require her to provide affirmative evidence showing that she ingested a PPA-containing product manufactured by defendants prior to her stroke in order to survive summary judgment.

Plaintiff urges that she has satisfied the standards set forth by defendants. (**See** *Taita Chem. Co. v. Westlake Styrene Corp.*. 246 F.3d 377, 385 (5th Cir. 2001); *Hicks v. Pfizer*, 368 F. Supp. 2d 628 (E.D. Tex. 2005); *Cooper v. Borden, Inc.*, 709 So.2d 878, 881 (La. App. 1998)). Plaintiff contends that she has provided affirmative evidence in the form of her affidavit in which she provides testimony identifying Triaminic DM as the PPA-containing product that she ingested. Here, plaintiff distinguishes her case from *Holden v. Blue Streak*, No. CIV.A. 88-2216, 1988 WL 135374 (E.D. La. Dec.9, 1988), which is cited as authority by defendants. Plaintiff urges that *Holden* is inapplicable here because, unlike *Holden*, she has identified Triaminic DM, manufactured by defendants, as the PPA-containing product that she ingested.

Defendants' Reply

Defendants now contend that plaintiff's counsel attempts to create a genuine issue of material fact by having plaintiff submit an affidavit in which she suddenly claims to recall identifying information about defendants' Triaminic product that she ingested. Defendants argue that plaintiff's sudden recollection, aided by a "curiously selective" picture array of products, all of which contained PPA, contradicts repeated sworn statements made by plaintiff under oath during fact discovery. Defendants contend that this same plaintiff law firm, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A. ("Levin, Papantonio"), has very recently been admonished for attempting to revise a plaintiff's sworn testimony and discovery responses to create otherwise lacking evidence of product information in another PPA case. **See** *In re Phenylpropanolamine Liab. Litig., Delaughter v. Bayer Corp.*, MDL No. 1407, Order Granting Defendant's Motion to Dismiss (August 16, 2005). In *Delaughter*, the court admonished plaintiff's counsel for "deliberate supplying of misinformation" that classified as "attorney misconduct, if not [an] ethical violation" and granted defendant's motion to dismiss. **See id.** at 4-5. Defendants here likewise urge that plaintiff's "sham" affidavit be disregarded and that summary judgment be granted in favor of defendants.

Defendants urge four arguments for the disregard of plaintiff's affidavit. First, defendants contend that this circuit does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn

testimony. **See** *S.W.S.Erectors, Inc. v. Infax, Inc.* 72 F.3d 489 (5th Cir. 1996). Second, defendants argue that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by [submitting an affidavit] contradicting his or her previous sworn statement." *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999). Third, defendants urge the court to consider the Eastern District's ruling in *Guzzler Manufacturing, Inc. v. Global Remediation, Inc.* in which it rejected a party's "attempts to create an issue of fact based only on a self-serving, conclusory and uncorroborated affidavit." No. Civ.A.02-3059, 2004 WL 179194 (E.D. La. 2004). Finally, defendants argue that assertions made in the affidavit "are to be given no weight, for they contradict [plaintiff's] earlier depositions, serving only as sham affidavits to stave off summary judgment." *Williams v. Simmons Co.*, 185 F. Supp. 2d 665, 680 (N.D. Tex. 2001).

Defendants argue that plaintiff stated under oath in her PFS that the Triaminic product she took was a "purple liquid," and that she was unable to specify which Triaminic product she took or otherwise describe the product or packaging. **See** Plaintiff's Fact Sheet submitted by Mary Nuernberg, Document 34. Defendants contend that plaintiff does not dispute defendants' showing that the only purple liquid Triaminic on the market in 1992 was Nite Light, which did not contain PPA.

Defendants further argue that in plaintiff's deposition she repeatedly testified that she could not identify by name or description the type of Triaminic she allegedly used before her stroke. Plaintiff testified specifically that she did not remember the

name of the Triaminic she used. **See** Deposition of Mary Nuernberg at 269:1-8. Plaintiff testified that she did not remember what the label looked like or the color of the box that the bottle came in. **Id**. at 267:14-16 and 269:9-11. Defendants contend that the only identifying information that the plaintiff was able to provide with some certainty about the Triaminic product that she used was that it was a "purple liquid." **Id**. at 271:6-14.

Defendants argue that plaintiff's counsel, without regard to plaintiff's sworn deposition testimony and the PFS, and without any explanation, now submits an affidavit in which plaintiff suddenly identifies Triaminic DM Cough Relief as the product she ingested. Defendants contend that the plaintiff identified Triaminic DM Cough Relief from a picture sheet of Triaminic products that *did not include a picture of the only Triaminic purple liquid formulation, Triaminic Nite Light*. Defendants argue that every Triaminic product pictured on the sheet that plaintiff's counsel provided to plaintiff contained PPA. **See** 1992 Physicians' Desk Reference for Nonprescription Drugs. Defendants contend that plaintiff's counsel "loaded the deck" so that plaintiff could not help but "identify" a PPA-containing product.

Defendants contend that plaintiff's counsel engaged in a similar practice in other PPA litigation. Defendants contend that in the *Delaughter* case, as here, the plaintiff testified at his initial deposition that he was unable to describe the medication he had taken prior to his event. The Levin, Papantonio firm had the plaintiff submit an errata sheet that substantively changed his deposition answer to

provide formerly missing product information. **See** *Delaughter* Order at 5. The MDL court concluded in *Delaughter* that the appropriate action for counsel's "egregious abuse of the discovery process" **Id**. at 3-4, was dismissal of the plaintiff's claim. Defendants contend that, as in *Delaughter*, plaintiff's counsel's misconduct should not be permitted in this case and, for this reason, the sham affidavit should be disregarded. Defendants argue that without the sham affidavit, plaintiff cannot produce any evidence that she ingested a PPA-containing product manufactured by defendants. Thus, defendants urge that summary judgment is appropriate.

Defendants argue that plaintiff's affidavit should also be rejected because any "correction" to plaintiff's sworn evidence regarding product identification is untimely. Defendants point out that according to the MDL court's case management orders, plaintiff was obligated to provide complete fact discovery, including any necessary corrections or deficiencies in her PFS, before her case was remanded to this Court. **See** CMO 17 (Case not ripe for remand until "all identified deficiencies" in PFS have been corrected and fact discovery completed); CMO 10 (case "shall not be considered for remand until this Court has determined that the discovery obligations of the plaintiff have been completed").

Conclusion

Plaintiff has stated twice under oath that, to the best of her knowledge, the medication she ingested was a purple liquid formulation of Triaminic. She has likewise testified under oath that she cannot recall any other identifying

characteristics of the medication such as the color of the box or the packaging. The only purple liquid formulation of Triaminic manufactured by defendants at the time of plaintiff's stroke did not contain PPA, the substance plaintiff contends caused her stroke. Plaintiff's later identification of Triaminic DM Cough and Cold as the product she took contradicts her previous sworn testimony. Plaintiff's affidavit does not create a genuine issue of fact.[1]

Rule 11 Violation and Sanctions

A federal court has the inherent power to sanction conduct which abuses the judicial process. **See** *Chambers v. NASCO, Inc.*, 501 U.S. 32. Using an affidavit that contradicts earlier deposition testimony may constitute a violation of Rule 11 and may subject a party to Rule 11 sanctions. **See** Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures 205 (Richard G. Johnson ed., American Bar Association 2004). The defendants here do not ask for sanctions. However, the court may raise the issue of sanctions sua sponte. In concluding that a show cause order should be issued herein, the court has reviewed the following cases.

In *In re Phenylpropanolamine Liab. Litig., Delaughter v. Bayer Corp.*, MDL No.

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[1]Additionally, the affidavit was filed in an untimely manner. According to the MDL court's case management order, plaintiff was obligated to provide complete fact discovery, including identification and correction of deficiencies, before her case was remanded to this court. The omission of the product identification prejudiced the defendants since it required them to proceed with incomplete information.

1407, Levin, Papantonio, plaintiff's counsel in the case at bar, used a sworn "Plaintiff Fact Sheet" (PFS) that contradicted previous sworn testimony. The court stated, "defendants do not ask for, and the court will therefore not entertain, the imposition of sanctions for these ethical breaches." *Delaughter* Order at 6. At a deposition, the plaintiffs gave defense counsel a handwritten PFS. The responses supplied on that version of the PFS differed in material ways from the final attorney-produced version that counsel submitted to the defendants, to which plaintiffs' counsel had attached the signature page from the original handwritten version. For example, plaintiffs' counsel (1) changed information regarding dates of ingestion of certain medications (e.g., "May 5, 1997" was changed to "On or about May 10, 1997"); (2) altered whether plaintiffs were aware of expiration dates on the medicine (e.g., several dates "certain" were changed to "Unknown" on the final PFS); and (3) added an allegation- not present on the original handwritten PFS- that plaintiff had ingested an additional medication. *Delaughter* Order at 4. Although the court chose not to exercise its authority to impose sanctions, it clearly regarded the use of the contradictory testimony to be egregious behavior and sanctionable under Rule 11, .

In *Salovarra v. Eckert*, 222 F.3d 19 (2nd Cir. 2000), the plaintiff's affidavit was inconsistent with deposition testimony in a related lawsuit. The district court found that there had been a Rule 11 violation and the Second Circuit Court of Appeals agreed. Plaintiff, a former partner of an investment fund, brought an action against defendant, a former partner under Employee Retirement Income Security Act

(ERISA), alleging that defendant breached his fiduciary duties by working simultaneously for an allegedly competing investment fund. In this case, the plaintiff asserted a claim of detrimental reliance against defendant with respect to the sale of a particular asset. In prior litigation, the plaintiff testified that he did not rely on defendant's counsel with regard to the sale of the particular asset. The district court imposed a Rule 11 sanction against plaintiff and his counsel, jointly and severally, that was equivalent to the defendant's expenses in connection with the second motion for summary judgment. The Court of Appeals, however, vacated the sanctions since there was no evidence that plaintiff's counsel was aware of the conflict between plaintiff's affidavit and his earlier deposition testimony in the other lawsuit.

Finally, in *Margo v. Weiss*, 213 F.3d 55 (2nd Cir. 2000), the plaintiffs, three months after taking plaintiffs' depositions, submitted affidavits, errata sheets, and interrogatories that contradicted their earlier deposition testimony. The court found that the standards of Rule 11 warranted the imposition of sanctions. Plaintiffs, members of a musical group, brought an action against defendants, the copyright holders, seeking a declaratory judgment that the members of the group were the co-authors and co-owners of copyright of a popular song. In earlier depositions, the plaintiffs testified that they had initially learned about a dispute over the ownership of the song in 1992. Contradictorily, in an amended complaint, the plaintiffs claimed to have learned about the dispute in late 1994, rather than in 1992. The defendants

served, but did not file a motion for sanctions under Rule 11 based on plaintiffs' refusal to withdraw their amended complaint. The court found that sanctions were warranted in this matter; however, the court only issued sanctions it deemed to be sufficient in deterring plaintiffs from repeating such conduct. More specifically, the court awarded counsel's motions for fees—a portion of which was assessed against the plaintiffs jointly and severally, and a portion assessed against plaintiffs' counsel, jointly and severally.

Accordingly, the motion by defendants, Novartis Corp., for summary judgment (doc.01-0864-JJB-DLD) is hereby granted, and a show cause order will be issued separately regarding the possible Rule 11 violation in this matter. Baton Rouge, Louisiana, November 9th, 2005.

JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA