NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 18, 2022*
Decided March 21, 2022

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-1601

ALAN M. LESCHYSHYN,
Plaintiff-Appellant,

v.

ABBVIE INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 1778

Matthew F. Kennelly,
Judge.

ORDER

Alan Leschyshyn, a federal prisoner, brought claims as part of a multidistrict-litigation proceeding against AbbVie, Inc. and Abbott Laboratories (collectively, "AbbVie") for injuries allegedly caused by their testosterone-replacement-therapy drug,

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

AndroGel. Leschyshyn alleged that his use of AndroGel caused him to develop compulsive behaviors such as gambling and risk-taking, which in turn caused him to participate in financial crimes culminating in a 235-month prison sentence. The district court ruled that Leschyshyn's tort claims were barred by the applicable two-year statute of limitations, and that no theory of tolling could save his claims. We affirm.

Leschyshyn was first prescribed AndroGel in 2006 for low testosterone levels. He soon experienced behavioral changes, including compulsive gambling, risk taking, oversexualization, and overspending. He says he did not realize the extent of the drug's cognitive effects until he was arrested for money-laundering crimes in 2015.

In February 2017, Leschyshyn filed personal-injury lawsuits in federal and state courts. He brought one suit in federal court against AbbVie, alleging that his use of AndroGel triggered harmful compulsive behaviors that resulted in financial ruin and a criminal conviction that he now is serving. On the same day, he also brought a medical-malpractice suit in Arizona state court against the doctor who prescribed him AndroGel without warning him about its potential side effects. In both suits, Leschyshyn contended that, although he had been prescribed the drug in 2006, he qualified for an exception to the statute of limitations for people of unsound mind because the drug impaired his cognition and prevented him from discovering the link between the drug and his behaviors until his 2015 arrest. *See* Ariz. Rev. Stat. Ann. § 12-502 ("If a person ... is at the time the cause of action accrues ... of unsound mind, the period of disability shall not be deemed a portion of the period limited for commencement of the action.").

In the state-court lawsuit, an Arizona court entered summary judgment for the doctor, ruling that the state's two-year statute of limitations for personal injury actions barred Leschyshyn's claims. The court concluded that Leschyshyn had not produced sufficient evidence that he was of unsound mind to toll the limitations period from 2006 to 2015. *See Leschyshyn v. Patel*, No. 1 CA-CV 18-0402, 2019 WL 1276203, at *2 (Ariz. Ct. App. Mar. 25, 2019). As the court explained, Leschyshyn's complex financial fraud scheme reflected an "acute awareness of laws and how to avoid them." *Id.* at *3. The Arizona Supreme Court denied Leschyshyn's petition for review, and the United States Supreme Court denied his petition for a writ of certiorari.

In the federal lawsuit, the district court entered summary judgment for AbbVie on all claims. The court agreed with the state court's statute-of-limitations analysis, adding that Leschyshyn's tolling argument was barred by the doctrine of issue preclusion because he had already litigated this theory fully and unsuccessfully in his

state-court lawsuit. To the extent Leschyshyn could be understood to argue that he qualified for tolling because he did not discover his cognitive impairment until 2015, the court determined that this argument was legally indistinguishable from his "unsound mind" theory that the state court rejected.

On appeal, Leschyshyn challenges the district court's statute-of-limitations analysis and maintains that the statute did not begin to run until 2015, when he discovered that his erratic behavior was caused by his taking AndroGel. Arizona courts follow the discovery rule, under which the statute begins to run when the plaintiff "knows or with reasonable diligence should know the facts underlying the cause." *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998). He says that his delay in discovering the cause of his injury stemmed from the effects of the AndroGel in that it impaired his learning and caused him to disregard risks.

The district court properly rejected this argument on the grounds of issue preclusion. Under Arizona law, issue preclusion bars a plaintiff from relitigating an issue when the plaintiff had a full and fair opportunity to litigate the issue in a prior suit and actually litigated the issue; the court in the prior suit entered final judgment; and resolution of the issue was essential to that judgment. *See Crosby-Garbotz v. Fell in & for Cty. of Pima*, 434 P.3d 143, 146 (Ariz. 2019). As the court appropriately explained, Leschyshyn, despite fully litigating the issue through various levels of the state judicial hierarchy, was unsuccessful in advancing the same "unsound mind" theory in the Arizona state courts. He cannot escape the preclusive effect of the state-court judgment by relabeling his "unsound mind" theory as a discovery-rule theory.

Finally, we note that Leschyshyn also raises arguments on appeal about the merits of his tort action against AbbVie—namely that he should be entitled to a jury trial because no one at AbbVie warned him about AndroGel's potentially harmful side effects. But because we affirm the dismissal of this lawsuit as untimely, we do not reach the merits of his underlying claims.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

March 21, 2022

Before
MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-1601	ALAN M. LESCHYSHYN, Plaintiff - Appellant v. ABBVIE INC. and ABBOTT LABORATORIES INC., Defendants - Appellees
Originating Case Information:	
District Court No: 1:17-cv-01778 Northern District of Illinois, Eastern Division District Judge Matthew F. Kennelly	

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	)	**Case No. 14 C 1748**
	)	**MDL No. 2545**
THIS DOCUMENT RELATES TO *Leschyshyn v. AbbVie Inc.*, No. 17 C 1778	)	

CASE MANAGEMENT ORDER NO. 181
(Order on AbbVie's motion for summary judgment in *Leschyshyn v. AbbVie Inc.*, No. 17 C 1778)

The plaintiffs in this multidistrict litigation (MDL) proceeding allege that they suffered either arterial cardiovascular injuries or injuries related to blood clots in the veins as a result of taking prescription testosterone replacement therapy (TRT) drugs. Plaintiff Alan Leschyshyn is asserting claims in this MDL against defendants AbbVie Inc. and Abbott Laboratories (collectively, AbbVie) for injuries allegedly caused by their TRT drug AndroGel. Although this case is proceeding in the MDL, Leschyshyn alleges that he suffered different kinds of injuries than the other plaintiffs. Specifically, he maintains that using AndroGel caused him to develop memory impairment, hypomania, and "compulsive behaviors such as compulsive gambling or risk taking, sex and overspending." Compl. [1] ¶¶ 5, 11. These behaviors allegedly caused him to become "a co-conspirator in a white collar crime, fraud and money laundering case." *Id.* ¶ 12; *see also* Master Short Form Compl. [12] ¶ 14 (similar). In October 2016, Leschyshyn was sentenced to 235 months in federal prison. He is currently incarcerated.

AbbVie has moved for summary judgment, maintaining that Arizona's two-year statute of limitations for personal injury actions bars Leschyshyn's claims. For the

following reasons, the Court grants AbbVie's motion.

Background

The Court recounts the following facts from the parties' Local Rule 56.1 statements, exhibits, and summary judgment briefing. The facts are undisputed except where otherwise stated.

Leschyshyn is a citizen of Arizona who is incarcerated in a federal correctional institution in Texas. AbbVie Inc. is a Delaware corporation with its principal place of business in Illinois. Abbott Laboratories is an Illinois corporation with its principal place of business in Illinois. The Court has jurisdiction under 28 U.S.C. § 1332, and the parties agree that Arizona law governs Leschyshyn's claims.

Leschyshyn's endocrinologist, Dr. Dineshkumar Patel, first prescribed him AndroGel in May 2006 after confirming that he had low testosterone levels. Dr. Patel's notes from a November 2006 follow-up appointment state that Leschyshyn "complained of feeling irritable and easily agitated." AbbVie Mot. for Summ. J., Ex. 4 (Nov. 2006 Medical Record) [52-4] at 1. Dr. Patel also wrote that Leschyshyn "can experience anxiety if he takes too much testosterone. I have reviewed his long-term side effects and monitoring." *Id.* He made the same observation in notes from a January 2007 appointment, in which Leschyshyn complained that he felt "irritable" and "easy agitation." AbbVie Mot. for Summ. J., Ex. 5 (Jan. 2007 Medical Record) [52-5] at 1. Dr. Patel's notes from a November 2007 appointment state, "I have told [Leschyshyn] that his testosterone level is very high. We need to reduce the AndroGel 1% dose; instead of four depressions [pumps], he should take only three. We will monitor the level in a month. I have reviewed the side effects of taking too much testosterone." AbbVie Mot.

for Summ. J., Ex. 3 (Nov. 2007 Medical Record) [52-3] at 1. Finally, Dr. Patel's notes from an October 2016 appointment state that Leschyshyn was taking "one depression[ ]" of "AndroGel 1.62%" and was not experiencing side effects. AbbVie Mot. for Summ. J., Ex. 7 [52-7] (Oct. 2016 Medical Record) at 1.

Leschyshyn's medical records show that he was also taking the prescription drug Parlodel for elevated prolactin between May 2006 and November 2006, stopped taking it in November 2006, and was taking it again in November 2007. There is no evidence before this Court that Leschyshyn complained to Dr. Patel about impulse control problems, gambling, risk-taking, memory impairment, or hypomania. Nor is there evidence that Dr. Patel monitored Leschyshyn for those symptoms or warned him that AndroGel (or Parlodel, or a combination of the two) can cause them.

For sentencing purposes in his criminal case, Leschyshyn retained a medical expert, Dr. Octavio Choi, to opine on his "mental state during the time period of the alleged offenses" and "whether his medications may have played a role in impairing his behaviors and judgment" during that time. AbbVie Mot. for Summ. J., Ex. 6 (Dr. Choi July 2016 Report) [52-6] at 1. Dr. Choi reviewed Leschyshyn's medical records and statements from friends and family about how his behavior changed while he was on the medications. He also examined Leschyshyn in May 2016. In his expert report, Dr. Choi opined to "a reasonable degree of medical certainty" that Leschyshyn's thoughts and behaviors were severely impaired during the relevant time and that the combination of AndroGel and Parlodel caused the impairments. *Id.* at 2. Citing medical literature that neither side has provided to this Court, Dr. Choi opined that dopamine receptor agonists like Parlodel "have been suspected of causing impulse control disorders since

the year 2000 . . . ." *Id.* at 9. He also opined that testosterone "increases risky decision-making" in three ways: by "activating the amygdala," which decreases "fear of negative consequences"; "inhibiting the prefrontal cortex," which diminishes "cognitive control of impulses"; and "leading to increased dopamine activity in the reward structures in the brain," which enhances "desire for short-term hedonic rewards." *Id.* at 20.

According to Dr. Choi, Leschyshyn's "abnormal thoughts and behaviors did not exist prior to taking Parlodel and AndroGel, started only after" taking those medications, and "ceased after [the] medications were stopped." *Id.* at 23. Dr. Choi also stated that "the time period of [Leschyshyn's] alleged criminal financial activities"—April 1, 2012 to February 18, 2015—"correlate[d] with [his] highest levels of testosterone as measured by" contemporaneous blood tests. *Id.* Dr. Choi acknowledged that one might wonder how Leschyshyn was able to commit complex financial crimes while being "so cognitively impaired by his medications." *Id.* at 34. He opined that Leschyshyn was able to do so because "Parlodel and AndroGel impair cognition in very specific ways that spare overall intelligence." *Id.* (opining that the medications "bias decision-making towards impulsive, short-term goals" and "impair aversive learning" but spare and sometimes enhance "overall cognition").

AbbVie objects that Dr. Choi's opinions are "improper expert testimony" and emphasizes that the Court has not yet ruled on their admissibility. AbbVie Obj. to Leschyshyn L.R. 56.1 Resp. [55] ¶ 13; *see* AbbVie Resp. to Leschyshyn L.R. 56.1 Stat. of Add'l Facts [55] ¶ 2. These objections do not affect the outcome of AbbVie's motion, so the Court does not address them. At the same time, AbbVie affirmatively cites

factual content from Dr. Choi's report. Relying on the report, for instance, AbbVie notes that Leschyshyn began having arguments with his wife and "aggressive verbal outburst[s]" at friends and coworkers in 2006 and 2007. AbbVie L.R. 56.1 Stat. [52] ¶ 18 (quoting Dr. Choi July 2016 Report at 25). Leschyshyn recorded one of the outbursts in 2006 "because it was so unusual." AbbVie L.R. 56.1 Stat. ¶ 18 (quoting Dr. Choi July 2016 Report at 25). AbbVie also highlights the following passage from Dr. Choi's report:

> Leschyshyn first started noticing an increase in impulsivity and risk-taking behaviors around March of 2007, at which time he made a series of financially disadvantageous decisions . . . . Looking back on these decisions, [Leschyshyn] marveled at how although he was aware of the risks at the time, he chose to disregard them . . . .

AbbVie L.R. 56.1 Stat. ¶ 18 (quoting Dr. Choi July 2016 Report at 25). In a personal declaration submitted for the instant case, Leschyshyn contends that he spoke to Dr. Choi "as a historian, in retrospect." Leschyshyn Opp. to Mot. for Summ. J., Ex. 3 (Leschyshyn Decl.) [56] at PageID#:603 ¶ 6. He maintains that he did not recognize the nature of his behavior "in the moment." *Id.*

Leschyshyn filed this lawsuit on February 17, 2017. That same day, he filed a medical malpractice lawsuit against Dr. Patel in the Superior Court of Maricopa County, Arizona. In the Arizona case, Leschyshyn alleged that AndroGel and Parlodel caused the same harmful behaviors at issue here and argued that Dr. Patel prescribed the drugs without warning him about those potential side effects. The Superior Court determined that Arizona's two-year statute of limitations for personal injury actions barred Leschyshyn's claims and granted summary judgment in Dr. Patel's favor. *See Leschyshyn v. Patel*, No. 1 CA-CV 18-0402, 2019 WL 1276203, at *1 (Ariz. Ct. App.

Mar. 25, 2019). According to the Superior Court, Leschyshyn "failed to produce sufficient evidence that he was of unsound mind" for purposes of tolling and "was on notice to investigate whether his alleged injury resulted from malpractice well before the two year statute of limitations expired." *Id.* at *2 (quoting the Superior Court's summary judgment order). The Arizona Court of Appeals affirmed. *See id.* at *1. The Arizona Supreme Court denied Leschyshyn's petition for review, and the United States Supreme Court denied his petition for a writ of certiorari. *See* AbbVie Reply in Supp. of Mot. for Summ. J., Ex. 9 (Arizona Supreme Court Minutes, Sept. 23, 2019) [54-1] at 3; *Leschyshyn v. Patel*, 140 S. Ct. 833 (2020).

Discussion

Summary judgment is appropriate only "if 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). There is a genuine issue of material fact, and summary judgment is precluded, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, a court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See id.* at 255; *see also, e.g.*, *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972 (7th Cir. 2020).

Under Arizona law, actions "[f]or injuries done to the person of another" "shall be commenced and prosecuted within two years after the cause of action accrues . . . ." ARIZ. REV. STAT. ANN. § 12-542(1) (West 2020). "The purpose of the statute of limitations is to 'protect defendants and courts from stale claims where plaintiffs have

slept on their rights.'" *Doe v. Roe*, 191 Ariz. 313, 322, 955 P.2d 951, 960 (1998) (quoting *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995)). "One does not sleep on his or her rights with respect to an unknown cause of action." *Doe*, 191 Ariz. at 322, 955 P.2d at 960. Therefore, Arizona's "discovery rule" provides that "a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause." *Id.* "When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Id.* at 323, 955 P.2d at 961. "A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual," but he "must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Id.*

AbbVie contends that Leschyshyn knew or with reasonable diligence should have known by 2006 that AndroGel allegedly was causing his injuries. AbbVie points to evidence that he began reporting "extreme behavioral changes" to Dr. Patel approximately one month after he started taking AndroGel and continued reporting "erratic behavior" in follow-up appointments "over the years." AbbVie Mot. for Summ. J. (AbbVie Br.) [52] at 6. AbbVie also observes that Dr. Patel discussed AndroGel's side effects with Leschyshyn and adjusted his dosage because of side effects he reported. Finally, AbbVie highlights Leschyshyn's statements to Dr. Choi that he began having unusual "aggressive verbal outbursts" toward his wife, friends, and coworkers in 2006 and 2007. *Id.* AbbVie argues that because Leschyshyn "noticed his behavioral changes within a month of starting AndroGel" and discussed them at that time with Dr. Patel, he had the minimum knowledge required to discover the alleged cause of his

injuries by 2006. *Id.* Accordingly, AbbVie argues, the two-year statute of limitations began to run in 2006, and Leschyshyn's action is time-barred because he filed this lawsuit more than ten years later. AbbVie notes that the Arizona Court of Appeals reached the same conclusion based on "nearly identical evidence." *Id.* at 7.

Leschyshyn responds that he is entitled to tolling of the statute of limitations under Arizona's "unsound mind" exception. Leschyshyn Opp. to Mot. for Summ. J. (Leschyshyn Opp.) [58] at 12 (citing ARIZ. REV. STAT. ANN. § 12-502 (West 2020) (providing that where a person is of "unsound mind" "at the time the cause of action accrues . . . the period of such disability shall not be deemed a portion of the period limited for commencement of the action", and the person "shall have the same time after removal of the disability which is allowed to others")). "[U]nsound mind occurs when the 'person is unable to manage his affairs or to understand his legal rights or liabilities.'" *Doe*, 191 Ariz. at 326, 955 P.2d at 964 (quoting *Allen v. Powell's Int'l, Inc.*, 21 Ariz. App. 269, 270, 518 P.2d 588, 589 (1974)). "[C]onclusory averments such as assertions that one was unable to manage daily affairs or understand legal rights and liabilities" are insufficient; "[t]he plaintiff instead must set forth specific facts—hard evidence—supporting the conclusion of unsound mind." *Doe*, 191 Ariz. at 326, 955 P.2d at 964.

Leschyshyn argues that although he told Dr. Patel in 2006 that he was feeling aggressive and irritable, those side effects did not cause his injuries. Rather, he contends, his injuries resulted from what he calls "second-level behaviors": impaired judgment, impulse control disorder, and hypomania. Leschyshyn Opp. at 1. Citing Dr. Choi's report, Leschyshyn argues that AndroGel conceals the second-level behaviors by

"impair[ing] . . . aversive learning" while sparing overall intelligence. *Id.* at 2, 14-15; *see* Dr. Choi July 2006 Report at 34. Leschyshyn maintains that he was "of unsound mind from 2006 [to] 2015, and therefore could not [have] discovered the concealed wrong/injuries until he was arrested on February 18, 2015 . . . ." Leschyshyn Opp. at 15; *see also id.* at 21 (stating that the arrest "was when the alarm bells went off for him and his wife" (citing Leschyshyn Decl. at PageID:603 ¶ 5)).

Leschyshyn offers what he characterizes as "hard evidence" that he was of unsound mind between 2006 and February 2015. *Doe*, 191 Ariz. at 326, 955 P.2d at 964. First, he cites Dr. Choi's opinion that AndroGel impaired his judgment and caused him to develop impulse control disorders during the relevant time. According to Leschyshyn, Dr. Choi "conclude[d] [he] was of unsound mind." Leschyshyn Opp. at 13. Leschyshyn also outlines "catastrophic events of financial ruin and legal problems" that allegedly show he could not manage his affairs. *Id.* at 14. Between 2006 and 2015, he "left [a] stable job for a high risk" one; "purchased [a] larger, more expensive house"; gambled excessively, overspent, and incurred massive debt; lost his job; was sanctioned by a professional accounting organization; and was charged with financial crimes. *Id.* at 14, 17. Leschyshyn identifies Dr. Choi's opinion that these events—as well as uncontrollable sexual behavior—corresponded with "high and fluctuat[ing]" testosterone levels. *Id.* at 14; *see also id.* at 17-18 (flow chart and table detailing events and testosterone levels). Finally, Leschyshyn cites Dr. Choi's opinion that AndroGel impairs aversive learning and characterizes it as a conclusion that he could not "appreciate his legal rights or liabilities." *Id.* at 14. Leschyshyn argues that his prolonged pattern of "self-destructive behaviors" lends further support to that

conclusion. *Id.*

In addition to cataloging this evidence, Leschyshyn argues that it is much like the evidence in *Doe*, where the court determined that factual issues precluded summary judgment on the plaintiff's claim that she was of "unsound mind" for tolling purposes. *See Doe*, 191 Ariz. at 331, 955 P.2d at 969. *Doe* addressed "how the discovery rule and the tolling provisions of the statute of limitations are to be applied when a plaintiff alleges that her memories of severe childhood sexual abuse were repressed and not recalled until adulthood." *Id.* at 317-18, 955 P.2d at 955-56. Among other things, Leschyshyn contends that Dr. Choi, like the plaintiff's expert in *Doe*, offered fact-based opinions that he was of "unsound mind." He also draws parallels between the *Doe* plaintiff's gradual discovery of repressed memories through therapy and the role that his arrest played in helping him discover that AndroGel allegedly caused his injuries. And he argues that both he and the plaintiff in *Doe* maintained their cognitive abilities yet suffered from long-running psychiatric illnesses that, until treated, prevented them from managing their affairs or understanding their legal rights or liabilities.

As referenced above, Leschyshyn maintains that his arrest sounded "alarm bells" and inspired him to start researching his medications. Leschyshyn Opp. at 20-21. He argues that his claim against AbbVie accrued around February 27, 2015, when he "confronted Dr. Patel" with the research and hired medical experts. *Id.* at 24 (citing Leschyshyn Decl. at PageID:603 ¶ 5). Alternatively, he contends that his claim accrued in July 2016, when Dr. Choi completed his expert report. Leschyshyn argues that he timely asserted his claim because he filed this lawsuit within two years of both events, on February 17, 2017. He contends that, like the plaintiff in *Doe*, he is entitled to

present his tolling evidence to a jury.

AbbVie responds that collateral estoppel, or issue preclusion, prohibits Leschyshyn from advancing his "unsound mind" theory, which he litigated fully and unsuccessfully in his state-court lawsuit against Dr. Patel. AbbVie Reply [54] at 2. The Court agrees. To determine the preclusive effect of a state-court judgment, a federal court relies on the preclusion law of the state where the judgment was entered. *See, e.g.*, *Brokaw v. Weaver*, 305 F.3d 660, 669 (7th Cir. 2002); *Starzenski v. City of Elkhart*, 87 F.3d 872, 877 (7th Cir. 1996). Under Arizona law, the doctrine of issue preclusion "precludes relitigating an issue of fact in a later case when, in a previous case, the same issue was 'actually litigated,' a final judgment was entered, and the party against whom the doctrine is to be invoked had a full and fair opportunity to litigate.'" *Crosby-Garbotz v. Fell in & for Cty. of Pima*, 246 Ariz. 54, 55, 434 P.3d 143, 144 (2019) (quoting *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986)). In addition, resolution of the factual issue must have been "essential to the prior judgment." *Crosby-Garbotz*, 246 Ariz. at 57, 434 P.3d at 146 (quoting *Chaney*, 148 Ariz. at 573, 716 P.2d at 30).

In a case that predates *Crosby-Garbotz*, the Arizona Supreme Court articulated a fifth requirement: "common identity of parties." *Hullett v. Cousin*, 204 Ariz. 292, 298, 63 P.3d 1029, 1035 (2003) (discussing "offensive" issue preclusion). But where, as here, issue preclusion is being asserted defensively in a civil case, that requirement does not apply. *See, e.g., Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, 62 P.3d 966, 968 (Ct. App. 2003) (defensive use of issue preclusion "occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff previously litigated

unsuccessfully against another party. . . . If the first four elements of collateral estoppel are present, Arizona permits defensive, but not offensive use of the doctrine" (citing *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977))); *compare Crosby-Garbotz*, 246 Ariz. at 57, 434 P.3d at 146 ("In criminal cases, we also continue to require mutuality of parties or their privities as an additional element of issue preclusion . . . .").

In his state-court malpractice case, Leschyshyn relied on the same "hard evidence" he offers here to demonstrate that he could not manage his affairs or understand his legal rights or liabilities between 2006 and February 2015. *See, e.g.*, AbbVie Reply, Ex. 10 (Appellant's Opening Br. in *Leschyshyn v. Patel* (Leschyshyn Appellate Br.)) [54-2] at 7-14 (discussing Dr. Choi's report and Leschyshyn's financial losses, professional sanctions, criminal charges, hypersexuality, and corresponding testosterone levels); *id.* at 15, 25 (flow chart and table of evidence describing same). He also advanced nearly identical arguments about the purported similarities between *Doe* and his case. The Superior Court and Court of Appeals agreed that this evidence did not permit a reasonable jury to find that Leschyshyn was of "unsound mind." *Leschyshyn*, 2019 WL 1276203, at *2. "To the contrary," the Court of Appeals stated, Leschyshyn's "complex financial and insurance fraud indicates an acute awareness of laws and how to avoid them." *Id.* at *3. The court also observed that Leschyshyn's experts "did not conclude he was unable to understand his legal rights or liabilities," but rather "merely opined that Leschyshyn had poor impulse control, impaired judgment and reduced mental capacity on the medications." *Id.* Nor was the court persuaded by Leschyshyn's "averments that he did not know his behavior was abnormal," especially

because the record contained statements from his friends and family who recognized that his behavior changed significantly in 2006 and 2007. *Id.* Finally, the court observed that unlike in the plaintiff in *Doe*, Leschyshyn provided no evidence that "he was institutionalized for mental health reasons, experienced suicidal ideation, could not function at work and could not keep employment." *Id.* (citing *Doe*, 191 Ariz. at 327, 955 P.2d at 965). Having determined that Leschyshyn did not commence his lawsuit within two years after his cause of action accrued and that he was not entitled to tolling, the court affirmed the Superior Court's decision granting summary judgment in Dr. Patel's favor. *Leschyshyn*, 2019 WL 1276203, at *4. As noted above, the Arizona Supreme Court and the United States Supreme Court denied Leschyshyn's petitions for further review.

Leschyshyn's appellate brief and the opinion by the Arizona Court of Appeals show that the "unsound mind" issue was "actually litigated, a final judgment was entered, and [Leschyshyn] had a full and fair opportunity to litigate." *Crosby-Garbotz*, 246 Ariz. at 55, 434 P.3d at 144 (internal quotation marks omitted). Furthermore, the issue was "essential" to the state-court judgment in Dr. Patel's favor. *Id.* at 57, 434 P.3d at 146 (internal quotation marks omitted). Had Leschyshyn shown that tolling for "unsound mind" involved a genuinely disputed factual issue, the Court of Appeals could not have granted summary judgment for Dr. Patel on statute-of-limitation grounds. Issue preclusion, therefore, bars Leschyshyn from relitigating the "unsound mind" exception here.

Arguing otherwise, Leschyshyn states that "claim preclusion" requires "identity or privity between parties in the two suits" and observes that AbbVie has no relationship

with Dr. Patel. Leschyshyn Sur-Reply [60] at 2-3 (quoting *Peterson v. Newton*, 232 Ariz. 593, 595, 307 P.3d 1020, 1022 (Ct. App. 2013)).[1] Leschyshyn contends that the Court cannot prohibit him from litigating the "unsound mind" exception because AbbVie has not satisfied every requirement for claim preclusion. This argument is unavailing because it confuses claim preclusion with issue preclusion. As explained above, Arizona law does not require "common identity of the parties" for defensive use of issue preclusion. *Campbell*, 204 Ariz. at 223, 62 P.3d at 968 (citing *Standage*, 114 Ariz. at 484, 562 P.2d at 364). AbbVie is asserting issue preclusion defensively here, so it need not show that it is in privity with Dr. Patel. Leschyshyn cannot escape this conclusion by observing that he is representing himself and asking the Court to read his arguments liberally—particularly because the Court asked him for supplemental briefing on this issue and he discussed only claim preclusion in his response. Leschyshyn is precluded from arguing that he is entitled to tolling for "unsound mind".

This conclusion does not necessarily require entry of summary judgment in AbbVie's favor, because Leschyshyn can be understood as making a standard discovery rule argument in addition to his tolling argument. Leschyshyn emphasizes that there is no evidence he reported "second-level" behaviors to Dr. Patel before February 2015. He argues that this evidentiary deficit supports a conclusion that he did not know AndroGel caused his injuries before that time. Even if a jury reasonably could credit this argument, a claim accrues under Arizona law if a plaintiff exercising

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[1] He also cites the following cases, all of which discuss claim preclusion, not issue preclusion: *Dressler v. Morrison*, 212 Ariz. 279, 282, 130 P.3d 978, 981 (2006); *Murphy v. Bd. of Med. Examiners of State of Ariz.*, 190 Ariz. 441, 449, 949 P.2d 530, 538 (Ct. App. 1997); *Quinn v. Harris*, No. CV-18-08111-PCT-DWL, 2019 WL 3457703, at *3 (D. Ariz. July 31, 2019).

reasonable diligence *should have known* what caused his injury. *See, e.g.*, *Doe*, 191 Ariz. at 322, 955 P.2d at 960. Leschyshyn contends that he could not have known that AndroGel allegedly caused his injuries until his arrest, but this argument, too, falls short.

First, Leschyshyn maintains that he could not have discovered the cause of his injuries until his arrest because AndroGel "impair[ed] [his] aversive learning" and caused him to disregard risks. Leschyshyn Opp. at 2; *see also, e.g.*, *id.* at 3 (arguing that he "was not aware a wrong occurred" because AndroGel "made sure that didn't happen by impairing his ability to notice it"). This argument is completely intertwined with the "unsound mind" theory. Indeed, Leschyshyn advanced the same argument in support of that theory in the Arizona Court of Appeals. *See, e.g.*, Leschyshyn Appellate Br. at 15 (arguing that AndroGel and Parlodel caused "[l]ack of . . . risk aversion after negative outcomes [and] sensitivity to punishment", which in turn caused him to view "abnormal" behavior "as normal"); *Leschyshyn*, 2019 WL 1276203, at *3 (concluding that no jury reasonably could credit Leschyshyn's "averments that he did not know his behavior was abnormal"). Leschyshyn cannot escape the preclusive effect of the state-court judgment by relabeling his "unsound mind" theory as a discovery rule theory.

Second, Leschyshyn appears to argue that AbbVie prevented him from learning the cause of his injury by "failing to list . . . [second-level] behaviors (impaired judgment, impulse control disorder, hypomania) on the [AndroGel] prescription insert as a possible side effect . . . ." Leschyshyn Opp. at 3; *see also id.* at 32 (similar). But Leschyshyn does not elaborate. Even for a *pro se* litigant, this argument is too underdeveloped and therefore is forfeited. *See, e.g.*, *Lundy v. Westwood Heights Apartments, LLC*, 711 F. App'x 356, 357 (7th Cir. 2018) ("We construe pro se filings liberally, but undeveloped or

unsupported contentions are waived.").

Because issue preclusion bars Leschyshyn from litigating his "unsound mind" tolling argument and he fails to advance any viable discovery rule argument, no jury reasonably could find that he filed this lawsuit within Arizona's two-year statute of limitations. Accordingly, the Court grants AbbVie's motion for summary judgment.

Conclusion

For the foregoing reasons, the Court grants AbbVie's motion for summary judgment [dkt. no. 52] and directs the Clerk to enter judgment in favor of defendants and against plaintiff.

MATTHEW F. KENNELLY
United States District Judge

Date: February 8, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Alan Michael Leschyshyn,

Plaintiff(s),

v.

AbbVie Incorporated, et al.,

Defendant(s).

Case No. 17 C 1788
Judge Matthew F. Kennelly

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☑ in favor of defendant(s) AbbVie Incorporated
and against plaintiff(s) Alan Michael Leschyshyn

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☐ decided by Judge Matthew F. Kennelly on a motion.

Date: 2/8/2021

Thomas G. Bruton, Clerk of Court

Melissa Astell , Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	)	**Case No. 14 C 1748**
	)	**MDL No. 2545**
THIS DOCUMENT RELATES TO *Leschyshyn v. AbbVie Inc.*, No. 17 C 1778	)	

CASE MANAGEMENT ORDER NO. 184
(Order on plaintiff's motion for reconsideration in *Leschyshyn v. AbbVie Inc.*, No. 17 C 1778)

Pro se plaintiff Alan Leschyshyn, who filed a personal injury action within this multidistrict litigation (MDL) proceeding, has moved for reconsideration of the Court's order granting summary judgment in favor of Defendants AbbVie Inc. and Abbott Laboratories (collectively, AbbVie). For the following reasons, the Court denies the motion.

Background

In his lawsuit, Leschyshyn alleged that his use of AndroGel—AbbVie's prescription testosterone replacement therapy (TRT) drug—caused him to develop memory impairment, hypomania, and compulsive behaviors such as gambling and risk-taking. These behaviors, he alleged, caused him to participate in financial crimes for which he is now serving a federal prison sentence. Leschyshyn asserted tort claims against AbbVie under Arizona law.

On the same day he filed this lawsuit, Leschyshyn filed a medical malpractice lawsuit in Arizona state court against the physician who prescribed him AndroGel. He alleged that AndroGel (and another drug, Parlodel) caused the same harmful behaviors

at issue here, and argued that the physician prescribed the drugs without warning him about those potential side effects. The Superior Court of Maricopa County, Arizona determined that Arizona's two-year statute of limitations for personal injury actions barred the claims and granted summary judgment in the physician's favor. *See Leschyshyn v. Patel*, No. 1 CA-CV 18-0402, 2019 WL 1276203, at *1 (Ariz. Ct. App. Mar. 25, 2019). The Arizona Court of Appeals affirmed. *See id.* The Arizona Supreme Court denied Leschyshyn's petition for review, and the United States Supreme Court denied his petition for a writ of certiorari.

On February 8, 2021, the Court granted AbbVie's motion for summary judgment in the instant case. AbbVie had argued that, as in the medical malpractice lawsuit, Leschyshyn's claims were time-barred under Arizona's two-year statute of limitations. Leschyshyn responded that he was entitled to tolling of the statute of limitations under Arizona's "unsound mind" exception. *See* ARIZ. REV. STAT. ANN. § 12-502 (West 2020). AbbVie countered that the doctrine of issue preclusion prohibited Leschyshyn from advancing the unsound mind theory because he had fully litigated that theory in the Arizona lawsuit, a final judgment was entered in the lawsuit, and the unsound mind issue was essential to the final judgment. The Court concluded that AbbVie was correct.

The Court observed, however, that Leschyshyn could be understood as making standard discovery rule arguments in addition to his tolling argument. The Court therefore considered the discovery rule arguments and determined that they, too, failed as a matter of law. One of the arguments, the Court explained, was completely intertwined with the unsound mind theory and therefore prohibited under the doctrine of

issue preclusion. The other argument—that AbbVie allegedly prevented Leschyshyn from learning the cause of his injury by failing to warn of the relevant side effects—was underdeveloped and therefore forfeited. Accordingly, the Court granted AbbVie's motion for summary judgment and directed the Clerk to enter judgment in favor of AbbVie and against Leschyshyn. Leschyshyn filed his motion for reconsideration on March 2, 2021.

Discussion

Leschyshyn did not style his motion for reconsideration under any Federal Rule of Civil Procedure. Because he filed the motion within 28 days of the entry of judgment, the Court interprets it as a Rule 59(e) motion. *See* FED. R. CIV. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). A court can grant a Rule 59(e) motion "only where the movant clearly establishes: (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Barrington Music Prods., Inc. v. Music & Arts Ctr.*, 924 F.3d 966, 968 (7th Cir. 2019) (internal quotation marks omitted); *see also, e.g.*, *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008). "Rule 59(e) does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to judgment." *Barrington Music*, 924 F.3d at 968 (internal quotation marks omitted). Leschyshyn has not cleared the high bar necessary to obtain relief under this rule.

First, he challenges the Court's determination that the doctrine of issue preclusion prohibited him from advancing his unsound mind theory. Under Arizona law,

the doctrine of issue preclusion "precludes relitigating an issue of fact in a later case when, in a previous case, the same issue was 'actually litigated, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full and fair opportunity to litigate.'" *Crosby-Garbotz v. Fell in & for Cty. of Pima*, 246 Ariz. 54, 55, 434 P.3d 143, 144 (2019) (quoting *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986)); *see* Order on Mot. for Summ. J., Case Management Order No. 181 (CMO 181) at 11. Leschyshyn argues that the term "previous case" referenced in Arizona's issue preclusion jurisprudence is "vague." Mot. for Reconsideration (Pl. Mot.) [63] at 2. He contends that it does not mean "a case previously decided," but rather a case that was filed at least one day before the "later case". *Id.* at 2-3. Leschyshyn argues that there was no "previous case" here because he filed the instant lawsuit and the medical malpractice lawsuit on the same date. *Id.* But he provides no legal support for his position and therefore does not establish that the Court made a manifest error of law in determining that he was barred from advancing his unsound mind theory.

Next, Leschyshyn contends that the Court erred in concluding that his standard discovery rule arguments failed as a matter of law. He addresses only the failure-to-warn argument. That argument was: AbbVie "failed to list these 2d level of behaviors (impaired judgment, impulse control disorder, hypomania) on the prescription insert as a possible side effect, *in order for Mr. Leschyshyn's doctor & himself to be aware & vigilantly monitor them.*" Leschyshyn Opp. to Mot. for Summ. J. [58] at 3 (emphasis added). In its summary judgment order, the Court quoted the first part of this sentence but omitted the portion that now appears in italics. *See* CMO 181 at 15. The Court did

so because it considered the italicized portion to be inherent in a failure-to-warn argument. To the extent Leschyshyn argues that the omission was an error of fact or law, he is incorrect. The italicized language does not make the failure-to-warn argument any more developed. As for Leschyshyn's references to the lack of evidence that his prescribing physician monitored him for the relevant side effects or warned him that AndroGel can cause them, *see* Pl. Mot. at 2, 4, the Court recognized that there was no such evidence. *See, e.g.*, CMO 181 at 3. Nonetheless, it determined that Leschyshyn's failure-to-warn argument was forfeited as underdeveloped. Leschyshyn makes no coherent argument that the Court's conclusion was an error of fact or law.

In another attempt to revive his failure-to-warn argument, Leschyshyn submits a second report from his medical expert, Dr. Octavio Choi, dated June 27, 2019. *See* Pl. Mot., Ex. 3 [63] at PageID #:682-85. In the report, Dr. Choi opines that AndroGel's label was inadequate to warn a reasonable consumer of the potential risk that it can cause psychiatric side effects like hypomania and impulse control disorder. According to Leschyshyn, Dr. Choi's opinion supports his argument that AbbVie's alleged failure to warn prevented him from timely discovering the cause of his injuries. Regardless of whether Dr. Choi's opinion lends such support, it is not newly discovered evidence. Leschyshyn admits that he had Dr. Choi's second expert report in July 2019, when he filed a certificate of compliance with various MDL case management orders.[1] Leschyshyn could have used Dr. Choi's second report in opposing AbbVie's motion for

[1] Leschyshyn appears to suggest that he filed Dr. Choi's second expert report with the Court at that time, but he did not. Even if he had, it would not affect the Court's analysis because he did not discuss the report in opposing AbbVie's motion for summary judgment.

summary judgment, but he did not. He cannot properly do so now. *See Barrington Music*, 924 F.3d at 968 (Rule 59(e) "does not allow a party to introduce new evidence or advance arguments that could and should have been presented" before the court entered judgment).

Finally, Leschyshyn repeats boilerplate legal principles that he discussed in his opposition to AbbVie's motion for summary judgment. For example, he cites *Doe v. Roe*, 191 Ariz. 313, 324, 955 P.2d 951, 962 (1998), for the proposition that a court should avoid applying the discovery rule rigidly where there is evidence of "repressed memory" or where it is difficult for a plaintiff to detect his injury. The Court addressed these principles, including Leschyshyn's reliance on *Doe*, in the summary judgment order. Leschyshyn does not show that he is entitled to relief under Rule 59(e) by repeating them here.

Conclusion

For the foregoing reasons, the Court denies Leschyshyn's motion for reconsideration [dkt. no. 63]

MATTHEW F. KENNELLY
United States District Judge

Date: March 11, 2021

Appendix C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 20, 2022

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-1601

ALAN M. LESCHYSHYN,
Plaintiff-Appellant,

v.

ABBVIE INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 1778

Matthew F. Kennelly,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc[1] filed by Plaintiff-Appellant on April 1, 2022, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

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[1] Judge Rovner and Judge St. Eve did not participate in the consideration of this matter.