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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 17a0594n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 16-2396, 16-2397

[Filed October 31, 2017]

KATHY JEAN GATZA (16-2396); PAMELA D. SUTHERLAND (16-2397),	)
Plaintiffs-Appellants,	)
v.	)
DCC LITIGATION FACILITY, INCORPORATED,	)
Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: MERRITT, MOORE, and ROGERS, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Plaintiffs-Appellants Kathy Gatza and Pamela Sutherland (together, "Plaintiffs") appeal the district court's denial of their motions to amend the scheduling orders in their cases. Before the expert-disclosure deadlines passed, Plaintiffs did not disclose Dr. Arthur Brawer as an expert witness. For the reasons discussed below, we **AFFIRM** the district court's denial of the motions to amend the scheduling orders. Gatza also appeals the district court's decision to grant Defendant-Appellee DCC Litigation Facility, Inc.'s ("DCC") motion for summary judgment because Wisconsin's statute of limitations bars her claims. We do not address Gatza's argument in this regard because, without an opportunity to amend the scheduling order, Gatza cannot prove causation, and so the limitations issue is moot.

I. BACKGROUND

Dow Corning Corporation ("Dow") was the leading manufacturer of silicone-breast implants. *Lindsey v. O'Brien (In re Dow Corning Corp.)*, 86 F.3d 482, 485 (6th Cir. 1996). Then, in the early 1990s, thousands of implant recipients began to file actions alleging that Dow's silicone-breast implants caused health problems. *Sutherland v. DCC Litig. Facility, Inc. (In re Dow Corning Corp.)*, 778 F.3d 545, 547 (6th Cir. 2015). Eventually, in the Northern District of Alabama, a class-settlement agreement was reached. *Id.* at 547–48. Roughly 440,000 individuals agreed with this settlement, but thousands of individuals opted out. *Lindsey*, 86 F.3d at 485–86.

Because this was "one of the world's largest mass tort litigations," Dow filed for reorganization under the

Bankruptcy Code in the Eastern District of Michigan. *Id.* at 486. Dow's filing stayed all related actions. *Id.* Additionally, the Eastern District of Michigan received all of the actions connected to the bankruptcy proceeding. *Sutherland*, 778 F.3d at 548.

The bankruptcy court authorized an "Amended Joint Plan of Reorganization." *Ezra v. DCC Litig. Facility, Inc.*, 667 F. App'x 538, 538–39 (6th Cir. 2016). Under this plan, a plaintiff could litigate individual claims against DCC, Dow's litigation corporation, or accept payments under the plan. *Id.* at 539. Both Gatza and Sutherland chose to litigate their claims. No. I:05-cv-30276-DPH R. 1 (Notice of Intent to Litigate) (Page ID #1) (Sutherland); No. I:05-cv-30496-DPH R. 1 (Notice of Intent to Litigate) (Page ID #1) (Gatza).

In Gatza's action, the district court examined several relevant motions. First, the district court denied Gatza's request to extend the expert-disclosure deadline. No. I:5-cv-30496 DPH R. 167 (Order at 3–7) (Page ID #6829–33). Next, the district court granted DCC's motion to exclude the opinions of Dr. Pierre Blais, Dr. Jerry Bush, and Dr. Justus Fiechtner. *Id.* at 20 (Page ID #6846). Lastly, the district court granted DCC's renewed motion for summary judgment because, without an expert, Gatza could not prove causation, and also because Wisconsin's statute of limitations bars Gatza's claims. *Id.* at 24, 26 (Page ID #6850, 6852). Gatza now appeals two aspects of the district court's order: its decision (1) to deny Gatza's request to extend the expert-disclosure deadline and (2) to grant DCC's summary-judgment motion on the ground that Wisconsin's statute of limitations bars Gatza's claims. No. 16-2396 Appellant's Br. at 19–21.

The district court examined similar motions in Sutherland's action. I:5-cv-30276-DPH R. 119 (Order) (Page ID #6264). First, Sutherland requested to amend the expert-disclosure deadline, which the district court denied. *Id.* at 8 (Page ID #6271). Next, the district court granted DCC's motion to exclude the testimony of Sutherland's three causation experts, Blais, Bush, and Fiechtner. *Id.* at 21 (Page ID #6284). Lastly, the district court granted DCC's motion for summary judgment because (1) Sutherland could not receive punitive damages and (2) she could not prove causation without expert testimony. *Id.* at 24, 26 (Page ID #6287, 6289). Sutherland appeals only the district court's decision not to amend the expert-disclosure deadline. No. 16-2397 Appellant's Br. at 16.

II. DISCUSSION

Plaintiffs raise two arguments on appeal. First, Plaintiffs assert that they have shown "good cause" to amend the scheduling orders under Federal Rule of Civil Procedure 16(b)(4). Second, they argue that failing to disclose Brawer by the expert-disclosure deadlines is "harmless" under Federal Rule of Civil Procedure 37(c)(1). We consider each of these arguments in turn.

A. Standard of Review

We examine a district court's decision to amend a scheduling order for abuse of discretion. *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 830 (6th Cir. 2005). The same standard applies to reviewing a district court's decision to issue sanctions for failing to disclose a witness. *See Baker Hughes Inc. v. S&S Chem., LLC*, 836 F.3d 554, 560 (6th Cir. 2016).

B. Rule 16(b)(4)

A party must disclose his or her expert witnesses by the scheduling-order deadline. Fed. R. Civ. P. 26(a)(2)(D). If the party cannot meet that deadline, he or she can move to amend the scheduling order. Fed. R. Civ. P. 16(b)(4). When considering a motion to amend, a district court will examine (1) whether the moving party has shown "good cause," *id.*, and (2) whether the modification will cause the opposing party to experience possible prejudice, *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002).

To show good cause, a moving party can demonstrate that he or she diligently attempted to meet the original deadline. *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003). For this issue, there are five factors to consider: "(1) when the moving party learned of the issue that is the subject of discovery; (2) how the discovery would affect the ruling below; (3) the length of the discovery period; (4) whether the moving party was dilatory; and (5) whether the adverse party was responsive to . . . discovery requests." *Bentkowski v. Scene Magazine*, 637 F.3d 689, 696 (6th Cir. 2011) (omission in original) (quoting *Dowling v. Cleveland Clinic Found.*, 593 F.3d 472, 478 (6th Cir. 2010)). The central question among these factors is whether a party acted diligently. *Dowling*, 593 F.3d at 478.

In Gatza's action, the district court did not abuse its discretion by finding that she had not proven "good cause." When examining the facts, the district court focused on Gatza's ability to comply with the expert-disclosure deadline:

> Gatza admits on remand that her former counsel was able to meet the original deadline by timely designating her experts. Gatza therefore cannot meet the *Leary* standard because her counsel was able to meet the original deadline. As to Gatza's citations of articles published after the discovery deadline of 2012, Gatza has not shown that her proposed expert relied on these articles for his conclusion. Gatza has failed to show that Dr. Brawer was not available or identifiable prior to the expert deadline issued by the Court. Gatza has not shown that Dr. Brawer was not a known expert at the time the Court issued its expert deadline.

I:05-cv-30496-DPH R. 167 (Order at 6–7) (Page ID #6832–33). Based on these facts, the district court found that Gatza had not been diligent, *id.*, and Gatza does not argue that these facts are inaccurate, 16-2396 Appellant's Br. at 35–37. Therefore, the district court did not abuse its discretion.[1]

For similar reasons, the district court did not abuse its discretion when it found that Sutherland had not shown "good cause." When applying the law, the district court examined whether Sutherland could have disclosed Brawer as an expert before the deadline:

> Sutherland admits on remand that her former counsel was able to meet the original deadline by timely designating her experts.

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[1] A few days prior to oral argument, Plaintiffs moved that we take judicial notice regarding an article that Brawer published in an October 2017 medical journal. We deny this request because the district court did not have an opportunity to review this article.

> Sutherland cannot meet the *Leary* standard because her former counsel was able to comply with the original deadline. As to Sutherland's citations of articles published after the discovery deadline of 2012, Sutherland has not shown that her proposed expert relied on these articles for his conclusion. Sutherland's proposed expert, Dr. Brawer, has admitted that the case reports as shown in these articles, are not accepted as proof of a cause and effect relationship between exposure to a substance and disease. (Doc. No. 111, Ex. 7, *Brown v. Bristol-Meyers Squibb*, Case No. 93-10917) Sutherland has also failed to show that Dr. Brawer was not available or identifiable prior to the original expert deadline issued by the Court. The Litigation Facility's exhibit to its response shows that Dr. Brawer was designated as an expert at prior breast implant cases as early as 1993. *Id.*; *see also, Tyson v. Minnesota Mining & Manufacturing Co.*, Case No. 55915-2 T.D. (TN Cir. Ct., Shelby Ct., Oct. 18, 1996) Any proposed expert testimony by Dr. Brawer will not be different than his prior testimony in other breast implant cases. Sutherland has not shown that Dr. Brawer was not a known expert at the time the Court issued its original expert deadline.

I:05-cv-30276-DPH R. 119 (Order at 6–7) (Page ID #6269–70). This reasoning demonstrates that the district court did not rely on clearly erroneous findings of fact. Therefore, the district court did not abuse its discretion when it found that Sutherland had not been diligent.

In summary, for both actions, the district court did not abuse its discretion in finding that Plaintiffs did not demonstrate good cause to amend the scheduling order, so we do not need to examine whether an amended scheduling order would prejudice DCC.

C. Rule 37(c)(1)

We have stated "that an argument not raised before the district court is waived on appeal to this Court," and we "rarely" stray from that rule. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008). However, if a case is exceptional or if the application of the rule would create a "plain miscarriage of justice," we might depart from this general rule. *Id.* (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)). Because Plaintiffs raised their argument regarding Rule 37(c)(1) for the first time on appeal and the issue is not novel, we decline to address it. No. I:05-cv-30276-DPH R. 97 (Mot. at 7–12) (Page ID #4801–06) (discussing "good cause" and "prejudice," but not "harmless" or Rule 37(c)(1)); No. I:05-cv-30276-DPH R. 102 (Suppl. Br. at 5–11) (Page ID #4832–38) (same); No. I:05-cv-30496-DHP R. 149 (Mot. at 9–13) (Page ID #6073–77) (same); No. I:05-cv-30496-DHP R. 157 (Reply at 5–10) (Page ID #6480–85) (same).

III. CONCLUSION

We **AFFIRM** the district court's judgments based on its denial of Plaintiffs' motions to amend the scheduling orders because (1) the district court did not abuse its discretion by finding that Plaintiffs have not demonstrated good cause and (2) Plaintiffs forfeited their argument regarding Rule 37(c)(1).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-30496
Honorable Denise Page Hood

[Filed September 29, 2016]

KATHY JEAN GATZA,

Plaintiff,

v.

DCC LITIGATION FACILITY, INC.,

Defendant.

ORDER REGARDING VARIOUS MOTIONS
and
DISMISSING ACTION

I. BACKGROUND[1]

Plaintiff Kathy Gatza opted out of the settlement process before the Settlement Facility-Dow Corning Trust ("SF-DCT") as provided under the Dow Corning Amended Joint Plan of Reorganization ("Plan"). The Effective Date for the confirmed Plan was June 1, 2004. (April 2, 2004 Order Establishing Effective Date, Bankruptcy Case No. 95-20512) Pursuant to the Plan, claimants who choose to litigate their claims must file claims against the DCC Litigation Facility ("Litigation Facility"). (Plan, Art. 5.4, 6.1) After unsuccessful attempts to resolve the matter under the procedures set forth in the Plan, the case was certified to go forward with trial preparation on October 29, 2009. (Doc. No. 51) The Court issued scheduling orders in this matter. On April 2, 2010, Gatza filed a Complaint and the Litigation Facility filed an Answer on May 5, 2010. Discovery was held. Settlement conferences were held under the guidance of the Special Master.

Gatza filed the instant action claiming various illnesses and medical conditions, including: including: Atypical Connective Tissue Disease; Deforming and Pain in Joints; Muscle Pain and Weakness. Gatza claims these conditions were caused by the Surgitek gel-filled silicone elastomer breast implants surgically implanted in 1984, which were replaced by saline implants in 1992 and 1999, and the raw silicone

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[1] The following published opinions provide a detailed history of this bankruptcy action: *In re Dow Corning Corp.,* 255 B.R. 445 (E.D. Mich. 2000), 86 F.3d 482 (6th Cir. 1996), 113 F.3d 565 (6th Cir. 1997), 280 F.3d 648 (6th Cir. 2002), and 456 F.3d 668 (6th Cir. 2006).

materials used to manufacture her implants. (Complaint, Doc. No. 62; Doc. No. 111, Ex. 1, Questionnaire, Pg ID 3279-3282)

Gatza alleges that she suffered Atypical Connective Tissue Disease beginning 60 days after implantation of the silicone breast implants on February 17, 1984. (Complaint, Doc. No. 62, ¶ 3) Gatza testified at her deposition on November 5, 2011 that she began suspecting the implants were the reason for her arthritis and other problems around May or June 1984. (Doc. No. 111, Ex. 2; Gatza Dep., p. 30; Pg ID 3293) Gatza was hospitalized a few months after receiving the implants. (*Id.* at p. 32; Pg ID 3293) Gatza's medical records dated July 16, 1984 noted that Gatza's "rheumatoid arthritis with the major rule being collagen vascular disease, possibly related to her recent mammoplasty." (Doc. No. 111, Ex. 3, Pg ID 3320)

The Litigation Facility previously filed various dispositive motions, including a Motion for Summary Judgment based on the statute of limitations. On March 28, 2013, the Court entered a Judgment and Order dismissing the case based on Michigan's statute of limitations. (Doc. Nos. 129, 130) Gatza appealed the matter and, on July 7, 2015, the Sixth Circuit vacated this Court's judgment, remanding the matter for the Court to consider in the first instance the application of Wisconsin's law on the statute of limitations with respect to the time-bar issue and conduct. (Doc. No. 136) The Mandate issued on July 30, 2015. (Doc. No. 137)

On remand, a briefing schedule was issued as to the filing of various motions. This matter is now before the

Court on various motions filed by the parties. Briefs have been filed and a hearing held on the matter.

II. MOTION FOR ENTRY OF SCHEDULING ORDER, INCLUDING RE-OPENING OF FACT AND EXPERT DISCOVERY AND REQUEST FOR A JURY TRIAL DATE (No. 149)

On remand, Gatza seeks to re-open fact and expert discovery in this matter. Gatza asserts that this matter was "abated" and discovery was suspended in an effort to maintain the status quo pending completion of the appeal process. Gatza claims there are outstanding discovery requests and additional exert discovery required. The Litigation Facility responds that fact and expert discovery have been closed. The Litigation Facility argues that Gatza's new counsel on remand cannot show that good cause exists to allow her to add new expert witnesses.

In her reply brief, Gatza withdrew her request to re-open fact discovery. Gatza seeks to add another expert, Arthur E. Brawer, M.D., P.A., Director, Arthritis and Connective Tissue Disease Section, Monmouth Medical Center, Long Branch, New Jersey. Gatza asserts Dr. Brawer has served as an expert witness regarding whether silicone causes disease and has previously been deemed qualified to testify on such matters under *Daubert.* Although Gatza agrees that the deadline to designate experts has elapsed, Gatza argues that Rule 16 permits district courts to amend pretrial orders to permit additional expert discovery for "good cause." Fed. R. Civ. P. 16(b)(4). Gatza asserts that she previously timely offered the opinions of Dr. Jerry Bush, Dr. Justus Fiechtner and Dr. Pierre Blais. Gatza argues that while the Court has since stricken these

same experts in the related *Ezra*[2] case, Gatza was diligent in complying with the Court's case management orders regarding the designation of expert witnesses. Gatza states that contrary to the defense argument that her request to designate additional expert is an attempt to avoid the consequences of prior counsel's discovery and expert witness strategy, Gatza seeks to add another expert because the science has since evolved.

The Litigation Facility argues that it would be prejudicial and futile to add Dr. Brawer as an expert since he has been excluded in at least two breast implant cases. The Litigation Facility asserts that the articles submitted by Gatza in this motion and in her responses to the Motions to Exclude her previously-designated experts show that there is no new science involved.

On June 21, 2010, the Court entered a Scheduling Order after the parties submitted a joint discovery plan. The fact discovery deadline was January 14, 2011 and expert discovery deadline was September 6, 2011. (Doc. No. 78) The Court further extended the fact discovery deadline to January 20, 2012 and the expert discovery deadline to April 9, 2012. (Doc. No. 100) After the fact discovery deadline, the Court held a status

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[2] *Ezra v. DCC Litigation Facility, Inc.,* Case No. 05-30469 (E.D. Mich.). The Court issued a Judgment and Order granting Defendant's Motions to Exclude Expert Opinions, Granting Renewed Motion for Summary Judgment and Dismissing the Action. (Case No. 05-30469, Doc. Nos. 113, 114). The Sixth Circuit Court of Appeals affirmed and the Mandate issued on September 15, 2016. (Case No. 05-30469, Doc. Nos. 117, 118; Sixth Circuit Case No. 15-2215)

conference in this matter on March 2, 2012 wherein the Court allowed Gatza to file discovery motions, even though the discovery deadline by that time had passed. (Doc. No. 104) Gatza did not seek to add expert witnesses at that time nor at any time prior to the Court's order dismissing the action filed on March 28, 2013.

Rule 16(b) provides that once a schedule has been entered, it can only be modified upon a showing of good cause and by leave of the district judge. Fed. R. Civ. P. 16(b)(4); *Leary v. Daeschner,* 349 F.3d 888, 906 (6th Cir. 2003). To show good cause, the moving party must show that the original deadline could not reasonably have been met despite due diligence and that the opposing party will not suffer prejudice by virtue of the amendment. *Leary,* 349 F.3d at 906 (citing, Fed. R. Civ. P. 16, 1983 advisory committee's notes); *Inge v. Rock Fin. Corp.,* 281 F.3d 613, 625 (6th Cir. 2002). The substitution of new counsel does not justify amending a scheduling order even where former counsel failed to conduct any discovery during the allotted time frame. *Ross v. American Red Cross,* 567 F. App'x 296, 306-07 (6th Cir. Jan. 27, 2014). "[A] party who voluntarily chooses his attorney 'cannot . . . avoid the consequences of the acts or omissions of this freely selected agent.'" *Id.* at 307 (quoting *Link v. Wabash R.R. Co.,* 370 U.S. 626, 633-34 (1962)).

Gatza admits on remand that her former counsel was able to meet the original deadline by timely designating her experts. Gatza therefore cannot meet the *Leary* standard because her counsel was able to meet the original deadline. As to Gatza's citations of articles published after the discovery deadline of 2012,

Gatza has not shown that her proposed expert relied on these articles for his conclusion. Gatza has failed to show that Dr. Brawer was not available or identifiable prior to the expert deadline issued by the Court. Gatza has not shown that Dr. Brawer was not a known expert at the time the Court issued its expert deadline.

As to prejudice, additional litigation expense has been recognized as prejudice, especially if additional experts offered after summary judgment motion has been filed because additional time and resources would be expended to depose new experts. *See Ullman v. Auto-Owners Mut. Ins. Co.*, 2007 WL 1057397, at *4 (S.D. Ohio Apr. 5, 2007); *Waters v. Johnson & Johnson*, 2011 WL 798092, at *5 (S.D. Ohio Feb. 28, 2011). The Litigation Facility has filed various summary judgment motions. Adding new experts would result in further discovery and litigation expenses to the Litigation Facility and further delay in the litigation of the case.

Based on the above, Gatza's Motion to Amend the Scheduling Order to add an expert is denied. The request for additional fact discovery is withdrawn per Gatza's request.

III. LITIGATION FACILITY'S MOTIONS

A. Litigation Facility's Motions to Exclude Expert Opinions

1. Expert Testimony Standard

In federal diversity actions, state law governs substantive issues and federal law governs procedural issues. *Legg v. Chopra,* 286 F.3d 286, 289 (6th Cir. 2002). Rules of evidence are deemed rules of procedure. *Id.* The Federal Rules of Evidence, rather than state

evidentiary laws, apply in federal diversity proceedings. *Id.; Barnes v. Owens-Corning Fiberglass Corp.,* 201 F.3d 815, 829 (6th Cir.2000); *Grossheim v. Freightliner Corp.,* 974 F.2d 745, 754 (6th Cir.1992); *Laney v. Celotex Corp.,* 901 F.2d 1319, 1320 (6th Cir.1990). The federal rules themselves provide that they "apply generally to civil actions and proceedings." Fed. R. Evid. 1101(b). The Sixth Circuit has stated that "[t]he admissibility of expert testimony is a matter of federal, rather than state, procedure." *Brooks v. Am. Broad. Cos.,* 999 F.2d 167, 173 (6th Cir.1993).

Rule 702 of the Rules of Evidence governs the admissibility of expert testimony. The trial court must determine whether an expert meets the requirements under Rule 702: 1) that the witness establish his expertise by reference to knowledge, skill, experience, training or education; 2) the proffered testimony is reliable in that it is based on scientific, technical or other specialized knowledge; and 3) the expert's testimony assists the trier of facts in understanding and disposing of the issues relevant to the case. Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the United States Supreme Court set forth factors to be considered in determining whether to admit expert testimony involving scientific issues. The four factors are: 1) whether a theory or technique can be (and has been) tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error in using a particular and scientific technique and the existence and maintenance of standards controlling the technique's operation; and 4) whether the theory or technique has been generally accepted in the particular scientific field. *Id.* at 593-94. The factors are neither

definitive, nor exhaustive, and may or may not be pertinent to the assessment in any particular case, such as issues involving non-scientific matters . *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The factors will often be appropriate in determining reliability. *Id.* at 152. The trial court has broad latitude to determine whether these factors are reasonable measures of reliability in a particular case. *Id.* at 153.

The trial court, when evaluating evidence proffered under Rule 702, must act as a gatekeeper, ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Pluck v. BP Oil Pipeline, Co.*, 640 F.3d 671, 677 (6th Cir. 2011) (quoting *Daubert,* 509 U.S. at 589). The trial court must consider "whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* (quoting *Daubert,* 509 U.S. at 592-93). Although the trial court's inquiry is flexible, an expert who presents testimony must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.* (quoting *Best v. Lowe's Home Ctrs., Inc.,* 563 F.3d 171, 176-77 (6th Cir. 2009) and *Kuhmo Tire,* 526 U.S. at 152). Exclusion of expert testimony may result in the entry of summary judgment and is reviewed on appeal for abuse of discretion. *Meridia Prods. Liab. Litig. v. Abbott Labs.,* 447 F.3d 861, 868 (6th Cir. 2006).

2. Pierre Blais, Ph.D. (No. 142)

The Litigation Facility seeks to exclude the expert testimony of Pierre Blais, Ph.D. for the same reasons it advanced in the *Ezra* case. The Litigation Facility first argues that although Dr. Blais admits he is not qualified to offer medical causation opinions, he opines

that breast implants have injurious potential and that they degrade and injure. As to Dr. Blais' opinion that the silicone gel has impurities, by-products formed incidental to implant manufacturing processes and possible chemical degradation, he does not opine that there is a nexus between such issues and any harm to Gatza. Finally, the Litigation Facility argues that Dr. Blais does not identify any scientific support for his conclusions and does not specify any methodology that he used to reach his conclusions. The Litigation Facility notes that courts have routinely excluded Dr. Blais' opinions in breast implant litigation.

Gatza's new counsel filed a response, joining in the Consolidated Response to the Litigation Facility's Three Motions to Exclude Expert Opinions filed by the Plaintiffs' Liaison Counsel ("PLC"). Gatza also seeks to add another expert in response to this motion. The PLC argues that Dr. Blais should be allowed to explain the chemical properties of silicone gel breast implants to the jury. The PLC asserts that Dr. Blais' testimony would be relevant to the issues before the jury.

Applying the standard set forth in *Daubert*, the Court finds that Blais cannot be qualified as an expert to testify regarding the general or specific causation of Gatza's illness or disease. As to the first factor–expertise or specialized knowledge, the Court finds that Dr. Blais is specialized in the field related to chemical properties of silicone gel.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Blais can testify to the properties of silicone gel. However, Dr. Blais cannot opine that the silicone gel caused Gatza's diseases since

he admits that he is not a medical doctor. (Blais Dep. at 84, 98) His report discusses the toxicological significance of defects in breast implants, the systemic impact and damages to certain body systems. Courts have held that Blais' opinion on the alleged defect of implants as unreliable. *See Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 991 (D. Ariz. 2000) ("Many other courts have excluded Blais' opinion on the alleged defect of implants finding it unreliable and not accepted in the general scientific community as to systemic injury caused by silicone breast implants."). Based on his own admission that he is not a medical doctor, the Court finds that Dr. Blais cannot testify as to whether the defects of silicone breast implant causes systemic injury. Dr. Blais cannot testify as to whether the chemical in the breast implants caused Gatza's injuries since he would be speculating. As noted above, an expert is not permitted to speculate since Rule 702 requires more than subjective belief or unsupported speculation. *See Rodrigues v. Baxter Healthcare Corp.,* 567 F. App'x 359, 361 (6th Cir. 2014).

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Blais' testimony as to the chemical properties of breast implants would assist the jury, but not as to whether such would cause injuries since such an opinion would be speculative. Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Blais' testimony be allowed as to the chemical properties of breast implants. However, Dr. Blais' testimony is excluded as unreliable as to the cause of Gatza's injuries.

3. Dr. Jerry Bush (No. 143)

The Litigation Facility seeks to exclude the expert opinion testimony by Dr. Jerry Bush raising the same arguments as in *Ezra*: 1) Dr. Bush is not qualified to offer causation opinions in this case; 2) Dr. Bush cites no evidence that Gatza was exposed to silicone gel; 3) Dr. Bush failed to consider contrary scientific evidence endorsed by the medical and scientific community; 4) Dr. Bush made no independent analysis or methodology of Gatza's claims; and, 5) Dr. Bush's opinions are speculative and based on temporal sequence only to prove causation.

The Litigation Facility argues that Dr. Bush does not even have the minimum qualifications required by the Federal Rule of Evidence 702 to offer opinions on the cause of autoimmune diseases. The Litigation Facility asserts that Dr. Bush admits he has no expertise in the fields of immunology, rheumatology, autoimmune diseases or allergic reactions, or epidemiology. (Bush Dep. at 53-54) The Litigation Facility claims that Dr. Bush is a part-time internal medicine doctor who has divided his workload into four roughly equal parts: internal medicine practice; prescribing the synthetic opiate Suboxene to drug users; conducting social security exams and drafting reports; and testifying as a paid expert witness in a wide range of cases, many involving drug and alcohol intoxication issues. (Bush Dep. at 37, 39-41) Dr. Bush has never been retained, testified or designated as an expert regarding the effects of exposure to silicone breast implants or their components or matters relating to autoimmune disease issues. (Bush Dep. at 42, 58-59) Dr. Bush was retained one week before the

March 31, 2011 expert deadline date only after a plaintiff in a companion case located him through Internet searches. The Litigation Facility claims Dr. Bush's report contains no discussion of autoimmune disease, no independent analysis regarding how or why Gatza's conditions constitute autoimmune diseases and no reference to any texts, treatises, or authorities regarding autoimmune diseases. Dr. Bush admits to performing no research on the issues of whether silicones are capable of causing rheumatoid arthritis or any other type of autoimmune disease or symptoms and has not published any papers on the topic. (Bush Dep. at 59)

Gatza joins in the PLC's response to the Litigation Facility's motion, in addition to seeking to name an another expert. As to Dr. Bush, the PLC argues that Dr. Bush's testimony that silicone could cause disease in certain genetically predisposed persons. The PLC further argues that Dr. Bush's opinion is expressed within a reasonable degree of medical certainty that Gatza's injuries and disorders were caused by the silicone breast implants. The PLC claims that Dr. Bush has found in prior cases that he definitively diagnosed patients with autoimmune disease, with silicone breast implants being the cause of the problem. The PLC further claims that Dr. Bush has an extensive 35-year experience as a physician. Although Dr. Bush has conducted no research studies on the issue of silicone and autoimmune disease, the PLC argues asserts there is no such requirement barring Dr. Bush from testifying at trial and that this issue goes to credibility and weight, not admissibility. The PLC further argues that epidemiology is not required to prove causation in the context of silicone implants and disease.

The Litigation Facility replies that Gatza's request to add other experts should not be considered by the Court as argued in its response to Gatza's motion seeking to add experts. The Litigation Facility argues that the PLC's citation of articles which were not mentioned or reviewed by Dr. Bush in his opinion cannot rehabilitate the expert.

Applying the standard set forth in *Daubert*, the Court finds that Dr. Bush cannot be qualified as an expert to testify to the general or specific causation of Gatza's illness or disease. As to the first factor–expertise or specialized knowledge, in his report, Dr. Bush states his specialty in Internal Medicine-Pharmacology-Toxicology. (Doc. No. 143, Ex. 2) He received his medical degree in 1983 and has been in various private practices through the years. (Doc. No. 143, Ex. 2) Other than his deposition testimony that he has diagnosed patients with autoimmune disease, he has not established his knowledge or training as to autoimmune disease, specifically whether breast implants or silicone gel causes such diseases. There is no doubt that Dr. Bush has the knowledge, skill, experience, training and education as to internal medicine, but no specific specialized knowledge as to whether breast implants or silicone gel causes autoimmune diseases. His conclusion that Gatza's autoimmune and related diseases were caused by her silicone breast implants is devoid of any analysis, other than referring to her medical history. Gatza's medical history can be testified to by her treating physicians.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Bush did not identify

in his report how his conclusion that Gatza's autoimmune and related diseases were caused by the silicone breast implants. Dr. Bush did not cite to any theory which has been tested or been subjected to peer review and publication that supports his conclusion, again, other than summarizing Gatza's medical history, which requires no expert to review. (Doc. No. 143, Ex. 4) Dr. Bush does not cite the methodology which he used for his conclusion, such as "differential diagnosis" or "differential etiology." *See Pluck*, 640 F.3d at 678 (An expert opinion's methodology must meet the standard of reliability required in *Daubert*.). There was no causation analysis in Dr. Bush's report, other than a summary of Gatza's medical history.

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Bush's testimony would not assist the jury since there is no causation analysis in the report, other than summarizing Gatza's medical history.

Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Bush's testimony is excluded as unreliable.

4. Dr. Justus Fiechtner (No. 144)

The Litigation Facility submits the same grounds raised in its motion in the *Ezra* case. The Litigation Facility claims that Dr. Justus Fiechtner's qualifications render his opinions unreliable. Other than being a practicing rheumatologist, Dr. Fiechtner has no expertise or publications relating to breast implants or silicone. His one-page report completed within two hours is insufficient, according to the Litigation Facility.

The Litigation Facility argues that Dr. Justus Fiechtner's opinions are contrary to the scientific evidence widely endorsed by the medical and scientific community, that his opinions are based on possibilities, not probabilities, that he merely assumed, without more, that Gatza was exposed to silicone gel manufactured by Dow Corning, that his approach and lack of methodology make his opinions unreliable, and that his genetic-susceptibility hypothesis is mere speculation. The Litigation Facility notes that Dr. Fiechtner is a Fellow with the American College of Rheumatology ("ACR"). When asked at his deposition whether he agrees with the ACR public statement that the scientific research "provide[s] compelling evidence that silicone implants expose patients to no demonstrable additional risk for connective tissue or rheumatic disease," Dr. Fiechtner agreed with the statement. (Fiechtner Dep. at 34) The Litigation Facility asserts that Dr. Fiechtner acknowledged awareness of the peer-reviewed studies finding no association between silicone breast implants and the connective tissue diseases and symptoms studied and agreed that no scientific evidence to show a direct link between silicone and any type of autoimmune disease. (Fiechtner Dep. at 24, 33-34) The Litigation Facility claims that Dr. Fiechtner did not undertake a review and analysis of the various studies in his conclusion before issuing his opinion.

The Litigation Facility claims Dr. Fiechtner's opinion does not meet the reasonable degree of medical certainty or probability test in that he could not admit that Gatza's symptoms were caused by silicone exposure by more than 51 percent. (Fiechtner Dep. at 36-37) The Litigation Facility claims that Dr.

Fiechtner's opinion was based on an "association" between silicone breast implants and autoimmune diseases and symptoms, but not necessarily causation of the diseases and symptoms. (Fiechtner Dep. at 25) The Litigation Facility asserts that Dr. Fiechtner's theory of genetic-susceptibility is mere speculation since he presented no methodology, analysis, data or any general scientific studies regarding this theory.

Gatza joins and incorporates the PLC's response to the Litigation Facility's Motion to Exclude Expert Opinions, in addition to seeking to add another expert. The PLC asserts that Dr. Fiechtner testified at his deposition that "silicone played a role in triggering their diseases specifically in these individuals who probably have genetic predisposition to autoimmune disease." (Fiechtner Dep. at 47) The PLC argues that Dr. Fiechtner relied on specific scientific studies supporting his opinion regarding antibody formulation and in his extensive experience as a doctor and his review of published literature. The PLC claims that Dr. Fiechtner's experience includes as a clinical professor of medicine at Michigan State University and has been Board Certified in internal medicine and rheumatology for 35 years, publishing numerous scientific articles in peer review journals. The PLC argues that although Dr. Fiechtner did not opine that silicone is the only cause of Gatza's disease, he opined that silicone does have a factor to play in individuals with a genetic susceptibility. (Fiechtner Dep. at 36)

Applying the standard set forth in *Daubert*, the Court finds that Dr. Fiechtner cannot be qualified as an expert to testify the general or specific causation of Gatza's illness or disease. As to the first

factor–expertise or specialized knowledge, the Court finds that based on his specialty as a rheumatologist and his experience, currently as a clinical professor at Michigan State University, Dr. Fiechtner has the expertise or specialized knowledge in the area of rheumatology, which is relevant in this case.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Fiechtner's conclusion is that Gatza is "predisposed" to autoimmune disease and that based on this, the silicone gel could have caused such. However, Dr. Fiechtner admitted that his report does not set forth any methodology or any analysis or reasoning. (Fiechtner Dep. at 20) He admits to merely reading the medical records to provide his conclusions. (Fiechtner Dep. at 15-18) Dr. Fiechtner admitted at his deposition that the silicone caused autoimmune disease was not more than 50 percent. An expert attempting to establish proximate cause must state his opinion in terms of probability, meaning more than a 50 percent likelihood. *Davison v. Cole Sewell Corp.,* 231 F. App'x 444, 449 (6th Cir. 2007). Dr. Fiechtner merely testified only to the "association" between silicone breast implants and Gatza's autoimmune diseases and symptoms. (Fiechtner Dep. at 25, 47) An expert is not permitted to speculate since Rule 702 requires more than subjective belief or unsupported speculation. *See Rodrigues,* 567 F. App'x at 361. As to Fiechtner's opinion of genetic propensity for autoimmune disease, Fiechtner did not cite any support for this theory and did not cite any medical authority for such.

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Fiechtner's testimony of genetic predisposition would not assist the jury since he cites no support for this opinion. Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Fiechtner's testimony is excluded as unreliable.

5. Summary

For the reasons set forth above, the Court finds that the expert opinions of Drs. Blais, Bush and Fiechtner are excluded as unreliable under Rule 702 and *Daubert.* The Litigation Facility's Motions to Exclude these three expert opinions are granted. (Doc. Nos. 142, 143, 144)

B. Litigation Facility's Motions for Summary Judgment

The Litigation Facility filed a Renewed Motion for Summary Judgment Based on Plaintiff's Failure to Present Competent Causation Testimony and a Supplemental Brief as to its previously-filed Motion for Summary Judgment based on the Statute of Limitations, applying Wisconsin law as the Sixth Circuit instructed.

1. Standard of Review

Rule 56(a) of the Rules of Civil Procedures provides that the court "shall grant summary judgment 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). The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine

and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

2. Renewed Motion for Summary Judgment (No. 145)

The Litigation Facility moves for summary judgment should the Court grant its motions to exclude all of Gatza's experts on the causation issue. The Litigation Facility raises the same arguments made in the *Ezra* case, which the Court granted. The Litigation Facility argues that none of the experts are able to testify that the Dow Corning breast implant or gel

caused Gatza's injuries. The Litigation Facility asserts Gatza must establish causation, on which she has the burden of proof, and is unable to do so without an expert testifying on whether the breast implant and/or its materials caused her injury.

Gatza joins in the PLC's filed response to this motion which were the same arguments raised in the PLC's response in the *Ezra* case. (Doc. No. 150)

Wisconsin law provides that in a negligence products liability cause of action, a plaintiff must establish duty, breach of duty, injury, and legal causation between a defendant's conduct and a plaintiff's injury. *Collins v. Eli Lilly Co.,* 342 N.W.2d 37, 45 (S.Ct. Wisc. 1984). On whatever theory a plaintiff chooses to proceed in a products liability action, a plaintiff has the burden of establishing causation that the product defect was a cause of plaintiff's injuries or damages. *Thomas v. Mallett,* 701 N.W.2d 523, 563 (S.Ct. Wisc. 2005). If the inference of negligence is only obvious to an expert, then expert testimony is required to establish causation under Wisconsin law. *Johnson v. Mylan, Inc.,* 107 F. Supp. 3d 967, 974 (E.D. Wisc. 2015); *Smoot v. Mazda Motors of Am., Inc.,* 469 F.3d 675, 680 (7th Cir. 2006). A physician's opinion is inadmissible if the opinion is based on an unsupported personal opinion of causation. *Turpin v. Merrell Dow Pharmaceuticals, Inc.,* 959 F.2d 1349, 1360 (6th Cir. 1992).

Generally, in a toxic-tort case, a plaintiff must establish both general and specific causation through proof that the toxic substance is capable of causing, and did cause the plaintiff's alleged injury. *Pluck,* 640 F.3d at 676-77. Both causation inquiries–general and

specific–involve scientific assessments that must be established through the testimony of a medical expert. *Pluck,* 640 F.3d at 677. "Without this testimony, a plaintiff's toxic tort claim will fail." *Id.* (internal quotation and citation omitted). General causation is established by demonstrating, often through a review of scientific and medical literature that exposure to a substance can cause a particular disease, while specific causation is established by demonstrating that a given exposure is the case of an individual's disease. *In re Meridia Prods. Liab. Lit.,* 328 F. Supp. 2d 791, 798 (N.D. Ohio 2004) (citing *Sterling v. Velsicol Chem., Corp.,* 855 F.2d 1188 (6th Cir. 1988)); Federal Judicial Center, Reference Manual on Scientific Evidence 444 (2d ed. 2000). "[E]xpert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience." *Cramer v. Theda Clark Mem. Hosp.,* 172 N.W.2d 427, 428-29 (S. Ct. Wisc. 1969). Expert testimony is required to show causation of an injury where the "medical information is not within the realm of the common knowledge and experience of laymen." *Kelly v. Hartford Cas. Ins. Co.,* 271 N.W.2d 676, 680 (S.Ct. Wisc. 1978).

Because the Court has excluded the expert testimonies of Drs. Bush, Fiechtner and Blais as to whether the breast implant or gel caused Gatza's injuries, summary judgment must be granted in the Litigation Facility's favor since Gatza is unable to present any expert who will testify that Dow Corning silicone cause diseases or other symptoms.

3. Supplemental Brief regarding Statute of Limitations (No. 141)

The Sixth Circuit remanded the matter for this Court to apply Wisconsin's statute of limitations in the first instance. The Litigation Facility has filed a supplemental brief on the statute of limitations issue. Gatza filed a response to the supplemental brief.

Wisconsin law provides that an action to recover damages for injuries to a person, "shall be commenced within 3 years or be barred." Wisc. Stat. 893.54 (was 893.205, amended 1979). A claim accrues "on the date the injury is discovered or with reasonable diligence should be discovered ... whichever occurs first." *Hansen v. A.H. Robins, Inc.,* 715 F.2d 1265, 1267 (7th Cir. 1983)(Applying Wisconsin's "discovery rule.").

Gatza filed her initial complaint in 1992. This Court's previous findings relating to the initial statute of limitations motion were:

> Gatza filed the instant action claiming various illnesses and medical conditions, including: including: Atypical Connective Tissue Disease; Deforming and Pain in Joints; Muscle Pain and Weakness. Gatza claims these conditions were caused by the Surgitek gel-filled silicone elastomer breast implants surgically implanted in 1984, which were replaced by saline implants in 1992 and 1999, and the raw silicone materials used to manufacture her implants. (Complaint, Doc. No. 62; Doc. No. 111, Motion, Ex. 1, Questionnaire, Pg ID 3279-3282)

> Gatza alleges that she suffered Atypical Connective Tissue Disease beginning 60 days after implantation of the silicone breast implants on February 17, 1984. (Complaint, Doc. No. 62, ¶ 3) Gatza testified at her deposition on November 5, 2011 that she began suspecting the implants were the reason for her arthritis and other problems around May or June 1984. (Doc. No. 111, Motion, Ex. 2; Gatza Dep., p. 30; Pg ID 3293) Gatza was hospitalized a few months after receiving the implants. (*Id.* at p. 32; Pg ID 3293) Gatza's medical records dated July 16, 1984 noted that Gatza's "rheumatoid arthritis with the major rule being collagen vascular disease, possibly related to her recent mammoplasty." (Doc. No. 111, Motion, Ex. 3, Pg ID 3320)

(Doc. No. 129, Pg ID 4966-67) Based on these facts, the Court found that Gatza's claim accrued in 1984 where her medical records established that her illness was a result of her implants. (Doc. No. 129, Pg ID 4970) Under Wisconsin law, Gatza "discovered" that her illness was because of her implants based on her July 16, 1984 medical records. Gatza's claim began to accrue on July 16, 1984. Gatza should have filed her cause of action by July 16, 1987, three years later under the Wisconsin statute. Gatza did not file her complaint until 1992. Gatza's claim against the Litigation Facility is time-barred under Wisconsin's statute of limitations.

IV. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Plaintiff's Motion for Entry of Scheduling Order, Including Re-Opening Fact and Expert Discovery and Request for a Jury Trial Date **(#149, 12/4/2015)** is **DENIED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Opinions of Pierre Blais, Ph.D. **(#142, 11/9/2015)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Opinion of Dr. Jerry Bush **(#143, 11/9/2015)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Expert Opinions of Dr. Justus Fiechtner **(#144, 11/9/2015)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Renewed Motion for Summary Judgment Based on Plaintiff's Failure to Present Competent Causation Testimony **(#145, 11/9/2015)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Supplemental Brief re Motion for Summary Judgment Re Statute of Limitations **(#141, 11/9/2015)** is GRANTED.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice.

S/Denise Page Hood
Denise Page Hood
Chief Judge

Dated: September 29, 2016

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[*Certificate of Service/Mailing Omitted in the Printing of this Appendix*]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-30276
Honorable Denise Page Hood

[Filed September 29, 2016]

PAMELA SUTHERLAND,

Plaintiff,

v.

DCC LITIGATION FACILITY, INC.,

Defendant.

ORDER REGARDING VARIOUS MOTIONS
and
DISMISSING ACTION

I. BACKGROUND[1]

Plaintiff Pamela Sutherland opted out of the settlement process before the Settlement Facility-Dow Corning Trust ("SF-DCT") as provided under the Dow Corning Amended Joint Plan of Reorganization ("Plan"). The Effective Date for the confirmed Plan was June 1, 2004. (April 2, 2004 Order Establishing Effective Date, Bankruptcy Case No. 95-20512) Pursuant to the Plan, claimants who choose to litigate their claims must file claims against the DCC Litigation Facility ("Litigation Facility"). (Plan, Art. 5.4, 6.1) After unsuccessful attempts to resolve the matter under the procedures set forth in the Plan, the case was certified to go forward with trial preparation on October 29, 2009. (Doc. No. 20) The Court issued scheduling orders in this matter. On January 6, 2010, Sutherland filed a Complaint and the Litigation Facility filed an Answer on January 19, 2010.

Sutherland filed the instant action claiming various illnesses and medical conditions, including: lupus; atypical connective disease; Reynaud's disease; vomiting; trouble walking; physical, mental and emotional diseases. Sutherland claims that these conditions were caused by the Surgitek gel-filled silicone breast implants implanted in 1988 and explanted in 1992. Sutherland asserts that her illnesses and medical conditions were caused by the

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[1] A detailed history of the Dow Corning bankruptcy action can be found in the following cases: *In re Dow Corning Corp.,* 255 B.R. 445 (E.D. Mich. 2000), 86 F.3d 482 (6th Cir. 1996), 113 F.3d 565 (6th Cir. 1997), 280 F.3d 648 (6th Cir. 2002), and 456 F.3d 668 (6th Cir. 2006).

silicone gel and/or elastomer used by the manufacturer of the Surgitek implants which Surgitek claims was manufactured by Dow Corning. (Comp., Doc. No. 22 and Motion, Doc. No. 66, Ex. 1, Questionnaire, Pg ID 2918-2925) Sutherland's deposition was taken on November 2, 2011. Sutherland testified that she was sick right after she received her implants in June 1988. (Motion, Doc. No. 66, Ex. 2, Sutherland Dep., p. 123; Pg ID 2959) She had many doctor visits between June and August 1988 and was hospitalized in September 1988 because "I was sick with those implants." (Ex. 2; Sutherland Dep., p. 123; Pg ID 2959)

The Litigation Facility previously filed various dispositive motions, including a Motion for Summary Judgment based on the statute of limitations. On March 28, 2013, the Court entered a Judgment and Order dismissing the case based on Michigan's statute of limitations. (Doc. Nos. 79, 80) Sutherland appealed the matter and, on February 20, 2015, the Sixth Circuit reversed this Court's judgment, remanding the matter for "proceedings consistent" with its opinion and to apply North Carolina law. (Doc. No. 84) The Sixth Circuit found that a reasonable jury could conclude that Sutherland did not discover that the silicone was making her sick until 1991 or 1992, when her doctor recommended removing the implants. (Doc. No. 84) The Mandate issued on March 27, 2015. (Doc. No. 87)

On remand, Sutherland filed a Motion to Amend Complaint, which the Court denied on October 16, 2015. (Doc. No. 98) A briefing schedule was issued as to the filing of various motions. This matter is now before the Court on various motions filed by the parties.

Briefs have been filed and a hearing held on the matter.

II. MOTION FOR ENTRY OF SCHEDULING ORDER, INCLUDING RE-OPENING OF FACT AND EXPERT DISCOVERY AND REQUEST FOR A JURY TRIAL DATE (No. 97)

On remand, Sutherland seeks to re-open fact and expert discovery in this matter. Sutherland asserts that this matter was "abated" and discovery was suspended in an effort to maintain the status quo pending completion of the appeal process. Sutherland claims there are outstanding discovery requests and additional expert discovery required. The Litigation Facility responds that fact and expert discovery have been closed. The Litigation Facility argues that Sutherland's new counsel on remand cannot show that good cause exists to allow her to add new expert witnesses.

In a supplemental briefing (Doc. No. 102), Sutherland withdrew her request to re-open fact discovery. Sutherland seeks to add another expert, Arthur E. Brawer, M.D., P.A., Director, Arthritis and Connective Tissue Disease Section, Monmouth Medical Center, Long Branch, New Jersey. Sutherland asserts Dr. Brawer has served as an expert witness regarding whether silicone causes disease and has previously been deemed qualified to testify on such matters under *Daubert*. Although Sutherland agrees that the deadline to designate experts has elapsed, Sutherland argues that Rule 16 permits district courts to amend pretrial orders to permit additional expert discovery for "good cause." Fed. R. Civ. P. 16(b)(4). Sutherland asserts that she previously timely offered the opinions of Dr. Jerry

Bush, Dr. Justus Fiechtner and Dr. Pierre Blais. Sutherland argues that while the Court has since stricken these same experts in the related *Ezra*[2] case, Sutherland was diligent in complying with the Court's case management orders regarding the designation of expert witnesses. Sutherland states that contrary to the defense's argument that her request to designate additional expert is an attempt to avoid the consequences of prior counsel's discovery and expert witness strategy, Sutherland seeks to add another expert because the science has since evolved.

The Litigation Facility argues that it would be prejudicial and futile to add Dr. Brawer as an expert since he has been excluded in at least two breast implant cases. The Litigation Facility asserts that the articles submitted by Sutherland in this motion and in her responses to the Motions to Exclude previously-designated experts show that there is no new science involved.

On April 8, 2010, the Court entered a Scheduling Order after the parties submitted a joint discovery plan. The fact discovery deadline was October 15, 2010 and expert discovery deadline was June 3, 2011. (Doc. No. 27) The Court further extended the fact discovery deadline to January 20, 2012 and the expert discovery

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[2] *Ezra v. DCC Litigation Facility, Inc.,* Case No. 05-30469 (E.D. Mich.). The Court issued a Judgment and Order granting Defendant's Motions to Exclude Expert Opinions, Granting Renewed Motion for Summary Judgment and Dismissing the Action. (Case No. 05-30469, Doc. Nos. 113, 114). The Sixth Circuit Court of Appeals affirmed and the Mandate issued on September 15, 2016. (Case No. 05-30469, Doc. Nos. 117, 118; Sixth Circuit Case No. 15-2215)

deadline to April 9, 2012. (Doc. No. 55) After the fact discovery deadline, the Court held a status conference in this matter on March 2, 2012 wherein the Court allowed Sutherland to file discovery motions, even though the discovery deadline by that time had passed. (Doc. No. 59) Sutherland did not seek to add expert witnesses at that time nor at any time prior to the Court's order dismissing the action filed on April 28, 2013.

Rule 16(b) provides that once a schedule has been entered, it can only be modified upon a showing of good cause and by leave of the district judge. Fed. R. Civ. P. 16(b)(4); *Leary v. Daeschner,* 349 F.3d 888, 906 (6th Cir. 2003). To show good cause, the moving party must show that the original deadline could not reasonably have been met despite due diligence and that the opposing party will not suffer prejudice by virtue of the amendment. *Leary,* 349 F.3d at 906 (citing, Fed. R. Civ. P. 16, 1983 advisory committee's notes); *Inge v. Rock Fin. Corp.,* 281 F.3d 613, 625 (6th Cir. 2002). The substitution of new counsel does not justify amending a scheduling order even where former counsel failed to conduct any discovery during the allotted time frame. *Ross v. American Red Cross,* 567 F. App'x 296, 306-07 (6th Cir. Jan. 27, 2014). "[A] party who voluntarily chooses his attorney 'cannot . . . avoid the consequences of the acts or omissions of this freely selected agent.'" *Id.* at 307 (quoting *Link v. Wabash R.R. Co.,* 370 U.S. 626, 633-34 (1962)).

Sutherland admits on remand that her former counsel was able to meet the original deadline by timely designating her experts. Sutherland cannot meet the *Leary* standard because her former counsel

was able to comply with the original deadline. As to Sutherland's citations of articles published after the discovery deadline of 2012, Sutherland has not shown that her proposed expert relied on these articles for his conclusion. Sutherland's proposed expert, Dr. Brawer, has admitted that the case reports as shown in these articles, are not accepted as proof of a cause and effect relationship between exposure to a substance and disease. (Doc. No. 111, Ex. 7, *Brown v. Bristol-Meyers Squibb*, Case No. 93-10917) Sutherland has also failed to show that Dr. Brawer was not available or identifiable prior to the original expert deadline issued by the Court. The Litigation Facility's exhibit to its response shows that Dr. Brawer was designated as an expert at prior breast implant cases as early as 1993. *Id.; see also, Tyson v. Minnesota Mining & Manufacturing Co.,* Case No. 55915-2 T.D. (TN Cir. Ct., Shelby Ct., Oct. 18, 1996) Any proposed expert testimony by Dr. Brawer will not be different than his prior testimony in other breast implant cases. Sutherland has not shown that Dr. Brawer was not a known expert at the time the Court issued its original expert deadline.

As to prejudice, additional litigation expense has been recognized as prejudice, especially if additional experts are named after a summary judgment motion has been filed since additional time and resources would be expended to depose new experts. *See Ullman v. Auto-Owners Mut. Ins. Co.*, 2007 WL 1057397, at *4 (S.D. Ohio Apr. 5, 2007); *Waters v. Johnson & Johnson*, 2011 WL 798092, at *5 (S.D. Ohio Feb. 28, 2011). The Litigation Facility has filed various summary judgment motions. Adding new experts would result in further

discovery and litigation expenses to the Litigation Facility and further delay the litigation of the case.

Based on the above, Sutherland's Motion to Amend the Scheduling Order to add an expert is denied. The request for additional fact discovery is withdrawn per Sutherland's request.

III. LITIGATION FACILITY'S MOTIONS

A. Litigation Facility's Motions to Exclude Expert Opinions

1. Expert Testimony Standard

In federal diversity actions, state law governs substantive issues and federal law governs procedural issues. *Legg v. Chopra,* 286 F.3d 286, 289 (6th Cir. 2002). Rules of evidence are deemed rules of procedure. *Id.* The Federal Rules of Evidence, rather than state evidentiary laws, apply in federal diversity proceedings. *Id.; Barnes v. Owens-Corning Fiberglass Corp.,* 201 F.3d 815, 829 (6th Cir.2000); *Grossheim v. Freightliner Corp.,* 974 F.2d 745, 754 (6th Cir.1992); *Laney v. Celotex Corp.,* 901 F.2d 1319, 1320 (6th Cir.1990). The federal rules themselves provide that they "apply generally to civil actions and proceedings." Fed. R. Evid. 1101(b); *Legg v. Chopra,* 286 F.3d 286, 289 (6th Cir. 2002). The Sixth Circuit has stated that "[t]he admissibility of expert testimony is a matter of federal, rather than state, procedure." *Brooks v. Am. Broad. Cos.,* 999 F.2d 167, 173 (6th Cir.1993).

Rule 702 of the Rules of Evidence governs the admissibility of expert testimony. The trial court must determine whether an expert meets the requirements under Rule 702: 1) that the witness establish his

expertise by reference to knowledge, skill, experience, training or education; 2) the proffered testimony is reliable in that it is based on scientific, technical or other specialized knowledge; and 3) the expert's testimony assists the trier of facts in understanding and disposing of the issues relevant to the case. Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the United States Supreme Court set forth factors to be considered in determining whether to admit expert testimony involving scientific issues. The four factors are: 1) whether a theory or technique can be (and has been) tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error in using a particular and scientific technique and the existence and maintenance of standards controlling the technique's operation; and 4) whether the theory or technique has been generally accepted in the particular scientific field. *Id.* at 593-94. The factors are neither definitive, nor exhaustive, and may or may not be pertinent to the assessment in any particular case, such as issues involving non-scientific matters . *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The factors will often be appropriate in determining reliability. *Id.* at 152. The trial court has broad latitude to determine whether these factors are reasonable measures of reliability in a particular case. *Id.* at 153.

The trial court, when evaluating evidence proffered under Rule 702, must act as a gatekeeper, ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Pluck v. BP Oil Pipeline, Co.*, 640 F.3d 671, 677 (6th Cir. 2011) (quoting *Daubert,* 509 U.S. at 589). The trial court must consider "whether the reasoning or methodology

underlying the testimony is scientifically valid." *Id.* (quoting *Daubert,* 509 U.S. at 592-93). Although the trial court's inquiry is flexible, an expert who presents testimony must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.* (quoting *Best v. Lowe's Home Ctrs., Inc.,* 563 F.3d 171, 176-77 (6th Cir. 2009) and *Kuhmo Tire,* 526 U.S. at 152). Exclusion of expert testimony may result in the entry of summary judgment and is reviewed on appeal for abuse of discretion. *Meridia Prods. Liab. Litig. v. Abbott Labs.,* 447 F.3d 861, 868 (6th Cir. 2006).

2. Pierre Blais, Ph.D. (No. 106)

The Litigation Facility seeks to exclude the expert testimony of Pierre Blais, Ph.D. for the same reasons it advanced in the *Ezra* case. The Litigation Facility first argues that although Dr. Blais admits he is not qualified to offer medical causation opinions, he opines that breast implants have injurious potential and that they degrade and injure. As to Dr. Blais' opinion that the silicone gel has impurities, by-products formed incidental to implant manufacturing processes and possible chemical degradation, he does not opine that there is a nexus between such issues and any harm to Sutherland. Finally, the Litigation Facility argues that Dr. Blais does not identify any scientific support for his conclusions and does not specify any methodology that he used to reach his conclusions. The Litigation Facility notes that courts have routinely excluded Dr. Blais' opinions in breast implant litigation.

Sutherland's new counsel filed a response, joining in the Consolidated Response to the Litigation Facility's Three Motions to Exclude Expert Opinions filed by the

Plaintiffs' Liaison Counsel ("PLC"). Sutherland also seeks to add another expert in response to this motion. The PLC argues that Dr. Blais should be allowed to explain the chemical properties of silicone gel breast implants to the jury. The PLC asserts that Dr. Blais' testimony would be relevant to the issues before the jury.

Applying the standard set forth in *Daubert*, the Court finds that Blais cannot be qualified as an expert to testify about the general or specific causation of Sutherland's illness or disease. As to the first factor–expertise or specialized knowledge, the Court finds that Dr. Blais is specialized in the field related to chemical properties of silicone gel.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Blais can testify to the properties of silicone gel. However, Dr. Blais cannot opine that the silicone gel caused Sutherland's diseases since he admits that he is not a medical doctor. (Blais Dep. at 84, 98) His report discusses the toxicological significance of defects in breast implants, the systemic impact and damages to certain body systems. Courts have held that Blais' opinion on the alleged defect of implants as unreliable. *See Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 991 (D. Ariz. 2000) ("Many other courts have excluded Blais' opinion on the alleged defect of implants finding it unreliable and not accepted in the general scientific community as to systemic injury caused by silicone breast implants."). Based on his own admission that he is not a medical doctor, the Court finds that he cannot testify as to whether the defects of silicone breast implant causes

systemic injury. Blais cannot testify as to whether the chemical in the breast implants caused Sutherland's injuries since he would be speculating. As noted above, an expert is not permitted to speculate since Rule 702 requires more than subjective belief or unsupported speculation. *See Rodrigues v. Baxter Healthcare Corp.,* 567 F. App'x 359, 361 (6th Cir. 2014).

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Blais' testimony as to the chemical properties of breast implants would assist the jury, but not as to whether silicone would cause injuries since such an opinion would be speculative. Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Blais' testimony be allowed as to the chemical properties of breast implants. However, Dr. Blais' testimony is excluded as unreliable as to whether silicone caused Sutherland's injuries.

3. Dr. Jerry Bush (No. 107)

The Litigation Facility seeks to exclude the expert opinion testimony by Dr. Jerry Bush raising the same arguments as in *Ezra*: 1) Dr. Bush is not qualified to offer causation opinions in this case; 2) Dr. Bush cites no evidence that Sutherland was exposed to silicone gel; 3) Dr. Bush failed to consider contrary scientific evidence endorsed by the medical and scientific community; 4) Dr. Bush made no independent analysis or methodology of Sutherland's claims; and, 5) Dr. Bush's opinions are speculative and based on temporal sequence only to prove causation.

The Litigation Facility argues that Dr. Bush does not even have the minimum qualifications required by

the Federal Rule of Evidence 702 to offer opinions on the cause of autoimmune diseases. The Litigation Facility asserts that Dr. Bush admits he has no expertise in the fields of immunology, rheumatology, autoimmune diseases or allergic reactions, or epidemiology. (Bush Dep. at 53-54) The Litigation Facility claims that Dr. Bush is a part-time internal medicine doctor who has divided his workload into four roughly equal parts: internal medicine practice; prescribing the synthetic opiate Suboxene to drug users; conducting social security exams and drafting reports; and, testifying as a paid expert witness in a wide range of cases, many involving drug and alcohol intoxication issues. (Bush Dep. at 37, 39-41) Dr. Bush has never been retained, testified or designated as an expert regarding the effects of exposure to silicone breast implants or their components or matters relating to autoimmune disease issues. (Bush Dep. at 42, 58-59) Dr. Bush was retained one week before the March 31, 2011 expert deadline date only after a plaintiff in a companion case located him through Internet searches. The Litigation Facility claims Dr. Bush's report contains no discussion of autoimmune disease, no independent analysis regarding how or why Sutherland's conditions constitute autoimmune diseases and no reference to any texts, treatises, or authorities regarding autoimmune diseases. Dr. Bush admits to performing no research on the issues of whether silicones are capable of causing rheumatoid arthritis or any other type of autoimmune disease or symptoms and has not published any papers on the topic. (Bush Dep. at 59)

Sutherland joins in the PLC's response to the Litigation Facility's motion, in addition to seeking to

name an another expert. As to Dr. Bush, the PLC argues that Dr. Bush's testimony that silicone could cause disease in certain genetically predisposed persons. The PLC further argues that Dr. Bush's opinion is expressed within a reasonable degree of medical certainty that Sutherland's injuries and disorders were caused by the silicone breast implants. The PLC claims that Dr. Bush has found in prior cases that he definitively diagnosed patients with autoimmune disease, with silicone breast implants being the cause of the problem. The PLC further claims that Dr. Bush has an extensive 35-year experience as a physician. Although Dr. Bush has conducted no research studies on the issue of silicone and autoimmune disease, the PLC argues asserts there is no such requirement barring Dr. Bush from testifying at trial and that this issue goes to credibility and weight, not admissibility. The PLC further argues that epidemiology is not required to prove causation in the context of silicone implants and disease.

The Litigation Facility replies that Sutherland's request to add other experts should not be considered by the Court as argued in its response to Sutherland's motion seeking to add experts. The Litigation Facility argues that the PLC's citation of articles which were not mentioned or reviewed by Dr. Bush in his opinion cannot rehabilitate the expert.

Applying the standard set forth in *Daubert*, the Court finds that Dr. Bush cannot be qualified as an expert to testify to the general or specific causation of Sutherland's illness or disease. As to the first factor–expertise or specialized knowledge, in his report, Dr. Bush states his specialty is in Internal Medicine-

Pharmacology-Toxicology. (Doc. No. 107, Ex. 2) He received his medical degree in 1983 and has been in various private practices through the years. (Doc. No. 107, Ex. 2) Other than his deposition testimony that he has diagnosed patients with autoimmune disease, he has not established his knowledge or training as to autoimmune disease, specifically whether breast implants or silicone gel causes such diseases. There is no doubt that Dr. Bush has the knowledge, skill, experience, training and education as to internal medicine, but no specific specialized knowledge as to whether breast implants or silicone gel causes autoimmune diseases. His conclusion that Sutherland's autoimmune and related diseases were caused by her silicone breast implants is devoid of any analysis, other than referring to her medical history. Sutherland's medical history can be testified to by her treating physicians.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Bush did not identify in his report how his conclusion that Sutherland's autoimmune and related diseases were caused by the silicone breast implants. Dr. Bush did not cite to any theory which has been tested or been subjected to peer review and publication that supports his conclusion, again, other than summarizing Sutherland's medical history, which requires no expert to review. (Doc. No. 107, Ex. 4) Dr. Bush does not cite the methodology which he used for his conclusion, such as "differential diagnosis" or "differential etiology." *See Pluck*, 640 F.3d at 678 (An expert opinion's methodology must meet the standard of reliability required in *Daubert*.). There was

no causation analysis in Dr. Bush's report, other than a summary of Sutherland's medical history.

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Bush's testimony would not assist the jury since there is no causation analysis in the report, other than summarizing Sutherland's medical history.

Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Bush's testimony is excluded as unreliable.

4. Dr. Justus Fiechtner (No. 108)

The Litigation Facility submits the same grounds raised in its motion in the *Ezra* case. The Litigation Facility claims that Dr. Justus Fiechtner's qualifications render his opinions unreliable. Other than being a practicing rheumatologist, Dr. Fiechtner has no expertise or publications relating to breast implants or silicone. His one-page report completed within two hours is insufficient, according to the Litigation Facility.

The Litigation Facility argues that Dr. Fiechtner's opinions are contrary to the scientific evidence widely endorsed by the medical and scientific community, that his opinions are based on possibilities, not probabilities, that he merely assumed, without more, that Sutherland was exposed to silicone gel manufactured by Dow Corning, that his approach and lack of methodology make his opinions unreliable, and that his genetic-susceptibility hypothesis is mere speculation. The Litigation Facility notes that Dr. Fiechtner is a Fellow with the American College of Rheumatology ("ACR"). When asked at his deposition

whether he agrees with the ACR public statement that the scientific research "provide[s] compelling evidence that silicone implants expose patients to no demonstrable additional risk for connective tissue or rheumatic disease," Dr. Fiechtner agreed with the statement. (Fiechtner Dep. at 34) The Litigation Facility asserts that Dr. Fiechtner acknowledged awareness of the peer-reviewed studies finding no association between silicone breast implants and the connective tissue diseases and symptoms studied and agreed that there is no scientific evidence to show a direct link between silicone and any type of autoimmune disease. (Fiechtner Dep. at 24, 33-34) The Litigation Facility claims that Dr. Fiechtner did not undertake a review and analysis of the various studies in his conclusion before issuing his opinion.

The Litigation Facility claims Dr. Fiechtner's opinion does not meet the reasonable degree of medical certainty or probability test in that he could not admit that Sutherland's symptoms were caused by silicone exposure by more than 51 percent. (Fiechtner Dep. at 36-37) The Litigation Facility claims that Dr. Fiechtner's opinion was based on an "association" between silicone breast implants and autoimmune diseases and symptoms, but not necessarily causation of the diseases and symptoms. (Fiechtner Dep. at 25) The Litigation Facility asserts that Dr. Fiechtner's theory of genetic-susceptibility is mere speculation since he presented no methodology, analysis, data or any general scientific studies regarding this theory.

Sutherland joins and incorporates the PLC's response to the Litigation Facility's Motion to Exclude Expert Opinions, in addition to seeking to add another

expert. The PLC asserts that Dr. Fiechtner testified at his deposition that "silicone played a role in triggering their diseases specifically in these individuals who probably have genetic predisposition to autoimmune disease." (Fiechtner Dep. at 47) The PLC argues that Dr. Fiechtner relied on specific scientific studies supporting his opinion regarding antibody formulation and in his extensive experience as a doctor and his review of published literature. The PLC claims that Dr. Fiechtner is experienced as a clinical professor of medicine at Michigan State University and is Board Certified in internal medicine and rheumatology for 35 years, publishing numerous scientific articles in peer review journals. The PLC argues that although Dr. Fiechtner did not opine that silicone is the only cause of Sutherland's disease, he opined that silicone does have a factor to play in individuals with a genetic susceptibility. (Fiechtner Dep. at 36)

Applying the standard set forth in *Daubert*, the Court finds that Dr. Fiechtner cannot be qualified as an expert to testify to the general or specific causation of Sutherland's illness or disease. As to the first factor–expertise or specialized knowledge, the Court finds that based on his specialty as a rheumatologist and his experience, currently as a clinical professor at Michigan State University, Dr. Fiechtner has the expertise or specialized knowledge in the area of rheumatology, which is relevant in this case.

Regarding the second factor–reliability of the proffered testimony based on scientific, technical or other specialized knowledge, Dr. Fiechtner's conclusion is that Sutherland is "predisposed" to autoimmune disease and that based on this, the silicone gel could

have caused such. However, Dr. Fiechtner admitted that his report does not set forth any methodology or any analysis or reasoning. (Fiechtner Dep. at 20) He admits to merely reading the medical records to provide his conclusions. (Fiechtner Dep. at 15-18) Dr. Fiechtner admitted at his deposition that the silicone caused autoimmune disease was not more than 50 percent. An expert attempting to establish proximate cause must state his opinion in terms of probability, meaning more than 50 percent likelihood. *Davison v. Cole Sewell Corp.,* 231 F. App'x 444, 449 (6th Cir. 2007). Dr. Fiechtner merely testified only to the "association" between silicone breast implants and Sutherland's autoimmune diseases and symptoms. (Fiechtner Dep. at 25, 47) An expert is not permitted to speculate since Rule 702 requires more than subjective belief or unsupported speculation. *See Rodrigues,* 567 F. App'x at 361. As to Fiechtner's opinion of genetic propensity for autoimmune disease, Fiechtner did not cite any support for this theory and did not cite any medical authority for such.

The third factor–whether the expert's testimony assists the trier of facts–the Court finds Dr. Fiechtner's testimony of genetic predisposition would not assist the jury since he cites no support for this opinion. Based on the above analysis under Rule 702 and *Daubert* the Court finds that Dr. Fiechtner's testimony is excluded as unreliable.

5. Summary

For the reasons set forth above, the Court finds that the expert opinions of Drs. Blais, Bush and Fiechtner are excluded as unreliable under Rule 702 and *Daubert.* The Litigation Facility's Motions to Exclude

these three expert opinions are granted. (Doc. Nos. 106, 107, 108)

B. Litigation Facility's Motion for Leave to File Motions for Summary Judgment (#103, 1/15/2016)

The Litigation Facility seeks to file more than one motion for summary judgment as required by E.D. Mich. LR 7.1(b)(2). No opposition was filed to the motion. The Litigation Facility, having previously filed the motions in this case and in other cases, the Court grants the relief requested.

C. Summary Judgment Motions

1. Standard of Review

Rule 56(a) of the Rules of Civil Procedures provides that the court "shall grant summary judgment 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). The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24

(1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

2. Punitive Damages (No. 104)

The Litigation Facility seeks to exclude Sutherland's claims of punitive damages based on the provisions of the Plan. Sutherland responds that North Carolina law applies in this case and no court has ruled that under North Carolina law, Sutherland is not able to pursue and recover punitive damages.

The Plan provides that "Claims for punitive or exemplary damages in connection with Products Liability Claims, whether asserted by Personal Injury Claimants, Physician Claimants, or any other Claimants, shall not be Allowed." (Plan, § 5.11) The Litigation Facility Agreement further provides that "No punitive damages shall be Allowed or paid on any Claim against the Litigation Facility." (LFA, § 7.01(a)) The Case Management Order governing the opt out cases against the Litigation Facility provides, "There will be no recovery for punitive damages against the Facility, Dow Corning or its Shareholders." (Case No. 00-00001, Doc. No. 15, CMO No. 1, § 13) One of Sutherland's current counsel was a member of the

Official Committee of Tort Claimants who negotiated the Plan language and the other documents involved. This Court affirmed the Bankruptcy Court's order overruling any objections to the Plan regarding the disallowance of punitive damages. *In re Dow Corning Corp.,* 255 B.R. 445, 501-02, 508 (E.D. Mich. 2000). Bankruptcy courts have the power to limit or disallow the recovery of punitive damages by claimants, even where state law permits punitive damages. *In re Celotex Corp.,* 204 B.R. 586, 613 (Bankr. M.D. Fla. 1996); *In re Am. Homepatient, Inc.,* 414 F.3d 614, 618, 620 (6th Cir. 2005); *In re Johns-Manville Corp.,* 68 B.R. 618, 627-28 (Bankr. S.D. N.Y. 1986). A claimant is bound by the terms of the confirmed Plan. 11 U.S.C. § 1141(a); *see In re Dow Corning Corp.,* 456 F.3d 668, 676 (6th Cir. 2006).

Sutherland, having chosen to litigate her claims against the Litigation Facility, is bound by the terms of the Plan which disallows punitive damages. As noted above, even if state law permits punitive damages, bankruptcy law applies. Summary judgment on the punitive damages claim in Sutherland's Complaint is granted and such is dismissed.

3. Renewed Motion for Summary Judgment (No. 105)

The Litigation Facility moves for summary judgment should the Court grant its motions to exclude all of Sutherland's experts on the causation issue. The Litigation Facility raises the same arguments made in the *Ezra* case, which the Court granted. The Litigation Facility argues that none of the experts are able to testify that the Dow Corning breast implant or gel caused Sutherland's injuries. The Litigation Facility

asserts Sutherland must establish causation, on which she has the burden of proof. The Litigation Facility argues that she is unable to meet her burden without an expert testifying on whether the breast implant and/or its materials caused her injuries.

Sutherland joins in the PLC's response to this motion filed in the *Gatza*[3] case which were the arguments raised in the PLC's response in the *Ezra* case.

North Carolina law provides that a plaintiff must establish causation, which is a fundamental and necessary element of a *prima facie* product liability case. *Crews v. W.A. Brown & Son, Inc.,* 416 S.E.2d 924, 928 (N.C. Ct. App. 1992) (The elements of a products liability negligence action are: 1) duty; 2) breach; 3) causation; and 4) damages.). "In cases involving complicated medical questions far removed from ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.,* 357 S.E.2d 750, 753 (2003)(internal quotation marks omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id.; Young v. Hickory Bus. Furn.,* 538 S.E.2d 912, 915 (2000). A physician's opinion is inadmissible if the opinion is based on an unsupported personal opinion of causation. *Turpin v. Merrell Dow Pharmaceuticals, Inc.,* 959 F.2d 1349, 1360 (6th Cir. 1992).

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[3] *Gatza v. DCC Litigation Facility, Inc.,* Case No. 05-30496 (E.D. Mich.).

Generally, in a toxic-tort case, a plaintiff must establish both general and specific causation through proof that the toxic substance is capable of causing, and did cause the plaintiff's alleged injury. *Pluck,* 640 F.3d at 676-77. Both causation inquiries–general and specific–involve scientific assessments that must be established through the testimony of a medical expert. *Pluck,* 640 F.3d at 677. "Without this testimony, a plaintiff's toxic tort claim will fail." *Id.* (internal quotation and citation omitted). General causation is established by demonstrating, often through a review of scientific and medical literature that exposure to a substance can cause a particular disease, while specific causation is established by demonstrating that a given exposure is the case of an individual's disease. *In re Meridia Prods. Liab. Lit.,* 328 F. Supp. 2d 791, 798 (N.D. Ohio) (citing *Sterling v. Velsicol Chem., Corp.,* 855 F.2d 1188 (6th Cir. 1988)); Federal Judicial Center, Reference Manual on Scientific Evidence 444 (2d ed. 2000). Summary judgment must be granted where, after a court excludes a plaintiff's proffered medical expert testimony, the plaintiff fails to meet the burden of proof on the causation of an injury. *Doe v. Ortho-Clinical Diagnostics, Inc.,* 440 F. Supp. 2d 465, 478 (M.D.N.C. 2006).

Because the Court has excluded the expert testimonies of Drs. Bush, Fiechtner and Blais as to whether the breast implant or gel caused Sutherland's injuries, summary judgment must be granted in the Litigation Facility's favor since Sutherland is unable to present an expert who will testify that Dow Corning silicone causes diseases or other symptoms.

IV. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Plaintiff's Motion for Entry of Scheduling Order, Including Re-Opening Fact and Expert Discovery and Request for a Jury Trial Date **(#97, 10/15/2015)** is **DENIED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Opinions of Pierre Blais, Ph.D. **(#106, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Opinion of Dr. Jerry Bush **(#107, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion to Exclude Expert Opinions of Dr. Justus Fiechtner **(#108, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion for Leave to File Motions for Summary Judgment **(#103, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Motion for Summary on Plaintiff's Claims for Punitive Damages **(#104, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that the Litigation Facility's Renewed Motion for Summary Judgment Based on Plaintiff's Failure to Present Competent Causation Testimony **(#105, 1/15/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Extension of Time to File Response/Reply to the Litigation Facility's Motion re Punitive Damages **(#110, 2/16/2016)** is **GRANTED**.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice.

S/Denise Page Hood
Denise Page Hood
Chief Judge

Dated: September 29, 2016

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[*Certificate of Service/Mailing Omitted in the Printing of this Appendix*]

APPENDIX D

RULES OF CIVIL PROCEDURE INVOLVED

Fed. R. Civ. P. 16(b):

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order.*

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

Fed. R. Civ. P. 26(2):

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the

party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

Fed. R. Civ. P. 31(c)(1):

(c) **Failure to Disclose, to Supplement an Earlier Response, or to Admit.**

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).