

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RENE JUNK, as Parent and Next Best
Friend of T.J., a minor,

Plaintiff,

vs.

TERMINIX INTERNATIONAL
COMPANY LIMITED PARTNERSHIP;
THE DOW CHEMICAL COMPANY;
DOW AGROSCIENCES, LLC; and
JIM BRENEMAN, an individual,

Defendants.

No. 4:05-cv-0608-JAJ

ORDER

This matter comes before the Court pursuant to a Motion to Reconsider Negligence Claim Against Terminix filed by Rene Junk, as Parent and Next Best Friend of T.J., a minor (“Junk”), on November 4, 2008. [Dkt. 366]. Terminix International Company Limited Partnership (“Terminix”) filed a response to Junk’s motion on November 21, 2008. [Dkt. 375]. On November 26, 2008, Junk filed a reply. [Dkt. 378]. For the reasons set out below, Junk’s motion is denied.

I. BACKGROUND

In February of 1992, Plaintiff Rene Junk became pregnant with her first child. During Rene Junk’s pregnancy, Terminix applied the pesticide Dursban L.O. (“Dursban”) to cracks and crevices in the interior of the Junk home to treat spider infestation. Defendants The Dow Chemical Company and Dow AgroSciences LLC’s (collectively “Dow AgroSciences”) produced Dursban. Dursban contains the organophosphate chlorpyrifos. Following Tyler Junk’s birth on August 28, 1992, Terminix continued to regularly apply Dursban to the Junk home. The last application of Dursban to the Junk home occurred on September 15, 1994.

On June 25, 1992, doctors discovered a chorioangioma, or a large tumor, in Tyler Junk's umbilical cord. Throughout her pregnancy, Rene Junk suffered a number of symptoms, including nausea, vomiting, diarrhea, and skin rash. On August 25, 1992, three days prior to Tyler Junk's birth, doctors discovered that he suffered from an enlarged heart and tachycardia, or a rapid heart rate. On August 28, 1992, Rene Junk gave birth to Tyler Junk. Tyler Junk suffered from tachycardia and had an enlarged heart and liver at the time of birth. The birth was approximately two months premature. Following the birth of her son, Rene Junk was diagnosed with pulmonary edema.

Throughout the first months of his life, Tyler Junk suffered from fussiness, loss of appetite, difficulty with breathing, and a runny nose. From the time that Tyler Junk was approximately six months old, Rene Junk observed that he appeared to exhibit symptoms of developmental delay. Tyler Junk was later diagnosed with cerebral palsy, and currently suffers from significant developmental delay.

On October 3, 2005, Rene Junk, on behalf of her minor son, filed a lawsuit against Dow AgroSciences, Terminix, and other defendants in Iowa state court. [Dkt. 1]. Junk alleged that her son suffered physical, neurological, and psychological injuries as a result of exposure to chlorpyrifos, which is contained in Dursban. Junk alleged that Terminix employees negligently applied Dursban to the Junk home. On November 4, 2005, Defendants filed a notice removing the lawsuit to the United States District Court for the Southern District of Iowa. [Dkt. 1].

On November 3, 2008, this Court granted summary judgment in favor of Dow AgroSciences and Terminix on all claims due to Junk's inability to meet her burden of proof regarding causation. [Dkt. 363]. This Court's grant of summary judgment constituted a final order because it fully disposed of all claims among all parties. In the instant motion, Junk moves the Court to reconsider its grant of summary judgment in favor of Terminix on the negligence claim. Junk presents three arguments in her motion. First, Junk contends

that Dr. Cynthia M. Bearer, M.D., possesses a reliable medical basis, independent of the exposure analysis by Dr. Richard D. Fenske, Ph.D., to “rule in” chlorpyrifos exposure as a plausible cause of Tyler Junk’s injuries. Second, Junk argues that the testimony of Dow AgroSciences’ expert witness Dr. Ruth Nass, M.D., coupled with the testimony of Dr. Bearer, is sufficient to meet her burden of proof regarding causation. Third, Junk argues that the testimony of Stoy Hedges, Terminix’s manager of technical pest control, demonstrates that Terminix was negligent in applying Dursban to the Junk home.

II. ANALYSIS

“A ‘motion for reconsideration’ is not described in the Federal Rules of Civil Procedure, but such a motion is typically construed as a Rule 59(e) motion to alter or amend the judgment or as a Rule 60(b) motion for relief from judgment.” Auto Services Co., Inc. v. KPMG, LLP, 537 F.3d 853, 855 (8th Cir. 2008) (citation omitted). Junk failed to identify any rule as the operative authority for her motion. However, when the motion is made in response to a final order, the Eighth Circuit Court of Appeals has held that Rule 59(e) applies. See Schoffstall v. Henderson, 223 F.3d 818, 827 (8th Cir. 2000) (citing Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)). “District courts enjoy broad discretion in ruling on [Rule 59(e)] motions.” Capitol Indemnity Corp. v. Russellville Steel Co., Inc., 367 F.3d 831, 834 (8th Cir. 2004) (citation omitted).

Rule 59(e) “was adopted to clarify a district court’s power to correct its own mistakes in the time period immediately following entry of judgment.” Innovative Home Health Care, Inc., v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) (citation omitted). “Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence.” Id. (internal quotation marks and citation omitted). “Rule 59(e) motions are not available to ‘introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to judgment.’” Miller v. Baker Implement Co., 439 F.3d 407, 414 (8th Cir.

2006) (citation omitted). “A case in which a timely Rule 59(e) motion has been filed lacks finality because the motion tolls the time limitation for appeal in order to provide the trial court with jurisdiction to resolve the motion. This ‘tolling process’ encourages ‘both correctness and finality.’” Innovative Home Health Care, Inc., 141 F.3d at 1286 (citations omitted).

Admissibility of Dr. Bearer’s Specific Causation Opinion. Junk contends the Court erred by concluding that, without Dr. Fenske’s exposure analysis, Dr. Bearer lacked a “scientifically valid” basis to “rule in” chlorpyrifos exposure as a plausible cause of Tyler Junk’s injuries in her differential diagnosis. A medical opinion based on a proper differential diagnosis conducted by a qualified expert is presumptively admissible under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). See Bland v. Verizon Wireless, L.L.C., 538 F.3d 893,897 (8th Cir. 2008) (citation omitted). However, a differential diagnosis is admissible only when the expert properly “rules in” the plausible causes of a plaintiff’s alleged injury and properly “rules out” the least plausible causes of injury. See Glastetter v. Novartis Pharmaceuticals Corp., 252 F.3d 986, 989 (8th Cir. 2001). Each step of the expert’s analysis must be supported by “good grounds” and be based on “scientifically valid decisions.” Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 267 (2nd Cir. 2002) (citation omitted); Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007) (citation omitted). “[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert’s testimony inadmissible.” Amorgianos, 303 F.3d at 267 (citation omitted) (emphasis removed).

A medical opinion based on a differential diagnosis is inadmissible when the expert lacks a proper basis for “ruling in” the cause of a plaintiff’s injury. See Bland, 538 F.3d at 897; Glastetter, 252 F.3d at 990. As in Bland and Glastetter, the Court finds Dr. Bearer’s opinion is inadmissible because she lacked a proper basis to “rule in” chlorpyrifos exposure as a plausible cause of Tyler Junk’s injury. Junk argues that Dr. Bearer testified

that she did not rely on Dr. Fenske's exposure analysis to conclude that Tyler Junk was exposed to a level of chlorpyrifos capable of causing the type of injuries he suffered. Testimony to that effect by Dr. Bearer does exist in the record.¹ However, Dr. Bearer testified she is not an expert in exposure analysis and it is her practice to rely on an exposure assessment like that performed by Dr. Fenske in her clinical practice. [Dr. Bearer Depo. pp. 168; 16, 104-05]. She testified that she relied on Dr. Fenske's analysis in her differential diagnosis because she claimed it demonstrated the threshold exposure for chlorpyrifos and estimated Rene and Tyler Junks' exposures. [Dr. Bearer Depo., p. 59-60]. Dr. Bearer clearly relied on Dr. Fenske's report for information and calculations she did not perform herself in "ruling in" chlorpyrifos exposure as a plausible cause of Tyler Junk's injuries. As a result, the inadmissibility of Dr. Fenske's report detracts from the reliability of Dr. Bearer's differential diagnosis.

Junk contends that even without Dr. Fenske's report, Dr. Bearer had a sufficient independent basis to "rule in" chlorpyrifos exposure as a plausible cause of Tyler Junk's injuries. Junk bore the burden to demonstrate by the preponderance of the evidence that

¹ Junk cites the following excerpt from Dr. Bearer's January 23, 2008, deposition.

Q: The last item in your file is the preliminary report of Dr. Fenske dated January 16, 2008, which is Exhibit 75, correct?

A: Yes.

Q: Of course you didn't have Dr. Fenske's report when you issued your two reports, Exhibits 70 and 71; is that right?

A: Yes.

Q: When did you receive Dr. Fenske's report?

A: This morning.

Q: You received it from plaintiff's counsel?

A: Yes.

[Dr. Bearer Depo., pp. 58-59].

the methodology underlying Dr. Bearer's opinion is scientifically valid. Dr. Bearer testified that prior to receiving Dr. Fenske's report, she assumed Rene Junk's exposure to chlorpyrifos while pregnant with Tyler was significant. [Dr. Bearer Depo., p. 60]. She testified she assumed Tyler Junk's in utero exposure to chlorpyrifos was significant. [Dr. Bearer Depo., p. 61]. Dr. Bearer testified these assumptions were based on the number of times the house was sprayed and Rene Junk's symptoms as chronicled and correlated by Dr. Mohamed Abou-Donia. [Dr. Bearer Depo., pp. 60-61]. She testified she did not know the quantity of chlorpyrifos that was applied to the Junk home, nor the method of application to the home. [Dr. Bearer Depo., p. 121]. The evidence in the record does not support a finding that Dr. Bearer used a scientifically valid methodology to determine Tyler Junk was exposed to quantities of chlorpyrifos capable of causing his injury. For that reason, her expert medical opinion that chlorpyrifos exposure caused Tyler Junk's injury is inadmissible under Daubert.

Prematurity as the Cause of Tyler Junk's Injuries. In her motion for reconsideration, Junk submits a theory of causation wholly different from the theory of causation she previously submitted to the Court. Junk argues that chlorpyrifos exposure caused Tyler Junk to be born prematurely, and that the premature birth caused Tyler Junk's resultant injury. Junk contends Dr. Bearer testified that premature birth can result from in utero exposure to chlorpyrifos. Furthermore, Junk contends that Dr. Ruth Nass, Dow AgroSciences expert witness, testified that the type of injury suffered by Tyler Junk is a primary risk factor of premature birth.

Prior to the November 4, 2008, Junk did not contend that Tyler Junk's injuries were caused by premature birth. In fact, Dr. Bearer considered prematurity as a possible cause of Tyler Junk's injury and ruled it out in her differential diagnosis. Prior to November 4, 2008, Junk contended that Tyler Junk suffered neurological harm due to in utero exposure to chlorpyrifos. In the time period prior to the grant of summary judgment, Junk had

ample opportunity to advance the theory that prematurity caused Tyler Junk's injuries. Dr. Nass was disclosed as an expert witness for Dow AgroSciences in January 7, 2008. The Eighth Circuit Court of Appeals has "repeatedly held that Rule 59(e) motions are not proper vehicles for raising new arguments." Capitol Indemnity Corp. v. Russellville Steel Co., Inc., 367 F.3d 831, 834 (8th Cir. 2004) (citation omitted). Accordingly, the Court will not permit Junk to use a motion for reconsideration to present new arguments that were available prior to the entry of summary judgment.

Testimony of Stoy Hedges. Stoy Hedges is a manager of technical services pest control for Terminix. [Hedges Depo., p. 4]. In a deposition conducted on October 30, 2008, he testified that at the time the Junk home was treated with Dursban, Terminix maintained a "sensitive situations" policy that applied to pregnant women, infants, and other vulnerable individuals. [Hedges Depo., p. 18-26]. Hedges testified that the policy instructed application personnel to minimize a pregnant woman's exposure to pesticides and encourage her to consult with a doctor for advice. [Hedges Depo., p. 23-24]. Junk contends Hedges' deposition testimony regarding the "sensitive situations" policy constitutes "new evidence" that demonstrates Terminix personnel acted negligently in applying Dursban to the Junk home during Rene Junk's pregnancy.

In granting summary judgment in favor of Terminix and Dow AgroSciences on all claims, the Court determined Junk lacked sufficient evidence to create a genuine issue of material fact regarding causation. "In order to recover on a claim of negligence, the plaintiff must establish that the defendant's conduct was a proximate cause of the plaintiff's injury or damage." Hasselman v. Hasselman, 596 N.W.2d 541, 545 (Iowa 1999) (citations omitted). "The element of proximate cause has two components: (1) 'the defendant's conduct must have in fact caused the plaintiff's damages,' and (2) '[t]he policy of the law must require the defendant to be legally responsible for the injury.'" Hasselman, 596 N.W.2d at 545. Without Dr. Bearer's expert medical opinion that exposure to

chlorpyrifos caused Tyler Junk's injuries, Junk has insufficient evidence to create a genuine issue of material fact regarding the first prong of proximate cause. Hedges testimony does not address the causation element of Junk's negligence claim. Accordingly, Hedges testimony does not affect the Court's determination that insufficient evidence exists on the issue of causation.

III. CONCLUSION

The evidence and arguments presented by Junk in her motion are insufficient to warrant the Court's reconsideration of her negligence claim against Terminix.

Upon the foregoing,

IT IS ORDERED that Junk's Motion to Reconsider Negligence Claim Against Terminix [Dkt. 366] is denied.

DATED this 22nd day of December, 2008.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA