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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Anthony Canning, Plaintiff, vs. Medtronic Incorporated, et al., Defendants.	No. CV-19-04565-PHX-SPL **ORDER**

Before the Court is Defendant Medtronic Incorporated's ("Defendant")[1] Motion to Strike (Doc. 126) and Motion for Summary Judgment (Doc. 127). In the Motion to Strike, Defendant seeks to preclude the manufacture defect opinions of Plaintiff's expert, Dr. Carl Adams. In the Motion for Summary Judgment, Defendant requests summary judgment in its favor as to all Plaintiff's claims. Both motions are fully briefed and ready for review. (Docs. 126, 136 & 142; Docs. 127, 134 & 141). Having reviewed the parties' briefing, the Court rules as follows.

I. BACKGROUND

This is a products liability case arising from the use of a medical stapler gun during a surgical procedure performed on Plaintiff. (Doc. 13 at 2). The procedure—a robotic total gastrectomy during which Plaintiff's stomach was surgically removed—took place on

[1] Defendant submits that it was incorrectly named in this suit as Medtronic Incorporated. Defendant asserts that its correct name is Covidien Holding Inc. The Court will refer to Defendant as "Defendant" throughout this Order to minimize any confusion.

December 14, 2017 at Mayo Clinic Hospital ("Mayo") in Phoenix, Arizona. (*Id.*). The stapler was an EEAXL2535 model stapler[2] (a single-use device) that was designed and manufactured by Defendant. (*Id.*). After Plaintiff's stomach was removed, the Mayo surgeons inserted the stapler into Plaintiff's esophagus to create an "anastomosis"[3] between his esophagus and his intestinal tract. (*Id.* at 3). The surgeons fired the stapler, but it failed to deploy staples. (*Id.*). As a result, Plaintiff's esophagus was torn, and the anastomosis had to be completed by hand. (*Id.* at 4). Plaintiff suffered extended stays in the ICU, in the hospital, and in rehabilitation. (*Id.*). His pain was continuous and magnified by any attempts to swallow or breathe, and he will continue to suffer deterioration in his ability to intake adequate nutrition. (*Id.*).

Following the surgery, the stapler was sent back to Defendant for inspection. (*Id.* at 3). Defendant inspected the stapler and found that it had been fired, and that it contained no staples. (*Id.*). Defendant installed staples, fired the stapler, and reported that it functioned properly. (*Id.*). Plaintiff now alleges that the stapler was delivered by Defendant to Mayo without staples, and that it was therefore defective. (*Id.*).

On May 24, 2019, Plaintiff filed a Complaint against Defendant in the Superior Court of the State of Arizona. (Doc. 1-3 at 8). On June 26, 2019, Defendant removed the case to this Court. (Doc. 1 at 1). On July 23, 2019, Plaintiff filed an Amended Complaint containing two counts. (Doc. 13). Count I ("Negligence") can be distilled to three claims: negligent design, negligent manufacture, and negligent failure to warn. (*Id.* at 5). Count II ("Strict Liability/Breach of Implied Warranty/Defect of Manufacture and Design") can also be narrowed to three claims: strict-liability design defect, strict-liability manufacture defect, and breach of implied warranty. (*Id.*).

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[2] In their Joint Rule 26(f) Case Management Report, the parties more specifically identified the stapler as a DST Series™ EEA™ XL 25mm Single Use Stapler with 3.5 staples (reorder code EEAXL2535). (Doc. 20 at 2).

[3] Plaintiff explains that an anastomosis "is a surgically created connection between two structures that are not normally connected." (Doc. 137 at 3, n.3).

II. LEGAL STANDARDS

A. Expert Testimony

Federal Rule of Evidence ("FRE") 702 permits parties to file motions to exclude to ensure relevance and reliability of expert testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–53 (1999). FRE 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Rule imposes on the trial courts a gatekeeping obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). "Whether the expert is appropriately qualified, whether her testimony is relevant, and whether her testimony is reliable are all distinct inquiries under Rule 702." *Contreras v. Brown*, No. CV-17-08217-PHX-JAT, 2019 WL 2080143, at *1 (D. Ariz. May 10, 2019).

The proponent of the expert evidence has the burden of proving the expert's testimony is admissible under Rule 702 and the *Daubert* standard. *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 989 (D. Ariz. 2000). "When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony." *Id.* When the expert does not meet the threshold, the Court may prevent her from providing testimony. *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) ("Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.").

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B. Summary Judgment Standard

A court must 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those facts "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party moving for summary judgment bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material. *Anderson*, 477 U.S. at 250. In other words, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts," and, instead, must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

When considering a motion for summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must view the factual record and draw all reasonable inferences in the nonmovant's favor. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

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III. DISCUSSION

In the Motion to Strike (Doc. 126), Defendant requests that this Court strike Dr. Adams' manufacture defect opinion. In the Motion for Summary Judgment (Doc. 127), Defendant requests summary judgment as to all of Plaintiff's claims. The Court will address each motion in turn.

A. Defendant's Motion to Strike Dr. Adams'

Dr. Adams concludes that Plaintiff's injuries were the result of a defective stapler that failed to deliver a staple load and did not cut the tissue properly. (Doc. 137-3 at 5). Dr. Adams asserts that the stapler was missing staples altogether and that the stapler's failure was "the only major factor" that contributed to Plaintiff's injuries. (*Id.* at 3, 4). Defendant now argues that Dr. Adams' manufacture defect opinion should be excluded because (i) Dr. Adams is not qualified to offer such a defect opinion and (ii) the opinion is speculative and unreliable. (Doc. 126 at 4).

There does not appear to be much in dispute with respect to Defendant's Motion to Strike because Plaintiff does not directly respond to Defendant's arguments. Specifically, Plaintiff does not respond by contending that Dr. Adams is qualified to offer a defect opinion or even that his defect opinion is reliable. (*See generally* Doc. 136). The Court views Plaintiff's failure to respond to these arguments as concessions that Dr. Adams is unqualified to offer a defect opinion and that his defect opinion is speculative and unreliable.[4] *See Panaccione v. Aldonex Inc.*, No. CV-19-04483-PHX-DLR, 2021 WL

[4] Setting aside Plaintiff's concession, the Court finds Defendant's arguments well-taken on their merits. FRE 702 requires an expert witness to be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Here, Dr. Adams has no apparent qualifications to opine as to whether the stapler was defective. He has no experience with the design or manufacture of medical devices, let alone with the stapler at issue. (Doc. 126-1 at 31). He has never researched, disassembled, or studied the stapler himself, and he has not reviewed testing files, engineering documents, or other literature on the stapler. (*Id.* at 24–25, 28–31). Unsurprisingly, Dr. Adams was not even asked by Plaintiff to provide a defect opinion; according to his report, he was asked "to review the

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