

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3604

Summary Calendar

TROY LYNN MARK,

Plaintiff-Appellant,

versus

SCHERING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-4813-G-4)

(March 16, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

Troy Lynn Mark allegedly used Gyne-Lotrimin in the form of suppositories and tablets, products of the Schering Corporation which she received from her doctor, to cure a suspected vaginal yeast infection. The next day she suffered severe blistering that ultimately caused permanent scarring on her face, chest, neck, and

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

back. She identifies her illness as Stevens-Johnson Syndrome and Gyne-Lotrimin as its cause.

Mark filed suit against Schering in federal district court under diversity jurisdiction. Schering responded with a motion for summary judgment, which Mark failed to answer in a timely manner. The district court therefore granted Schering's motion as unopposed. Mark moved to vacate or reconsider the district court's order, which the court treated as a motion to set aside a default judgment. See Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279-80 (5th Cir. 1985) (treating motion to set aside summary judgment as motion to set aside default judgment).

The court relied on the standard set forth in Hibernia in assessing Mark's motion. The court considered whether Schering would suffer prejudice if the court's judgment were set aside, whether Mark stated a meritorious claim, and whether Mark acted culpably in responding to Schering's motion in an untimely manner. See id. The district court concluded that Mark's claim lacked merit and denied her motion.

To recover under Louisiana products liability law, Mark must prove among other things that Gyne-Lotrimin was the proximate cause of her injuries. La. Rev. Stat. Ann. § 9:2800.54 (West 1994). Schering offered the testimony of physicians who treated Mark in support of its claim that Gyne-Lotrimin did not cause the blistering. Two of the physicians concluded that Gyne-Lotrimin did not cause Mark to develop Stevens-Johnson Syndrome and identified

Mark's herpes virus as the likely culprit. None of the physicians blamed Gyne-Lotrimin for Mark's illness.

In response, Mark offered excerpts from two medical treatises that note various adverse effects Gyne-Lotrimin may produce. The district court found that the treatises were inadmissible hearsay. Because Mark provided no other evidence to prove causation, the court denied her motion to vacate or reconsider. Mark argues on appeal that the treatises constituted admissible evidence and, in the alternative, that a party need not present evidence in admissible form to defeat summary judgment.

II.

We review the district court's decision to deny Mark's motion under Federal Rule of Civil Procedure 60(b) for abuse of discretion. Harrison v. Byrd, 765 F.2d 501, 503 (5th Cir. 1985).

The Supreme Court's opinion in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), recognized that a party bearing the burden of proof must go beyond the pleadings to defeat a motion of summary judgment, and must "by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. at 324 (citation and internal quotation marks omitted). Mark argues that the treatises are admissible evidence and that, if they are not, expert authentication or judicial notice would have rendered them admissible. She claims that the Supreme Court's decision in Celotex allowed her to use evidence that is not in admissible form to defeat summary judgment. See id. We need not

pass judgment on Mark's reading of Celotex because her arguments overlook a fatal flaw in her evidence.

Mark presents warnings in two medical treatises to prove that Gyne-Lotrimin caused her to develop Stevens-Johnson Syndrome. One treatise describes the adverse effects of Gyne-Lotrimin Vaginal Tablets and Gyne-Lotrimin Vaginal Cream, respectively, as follows:

Mild burning occurred in [some] patients while other complaints, such as skin rash, itching, vulval irritation, lower abdominal cramps and bloating, slight cramping, slight urinary frequency, and burning or irritation in sexual partner, occurred rarely.

Vaginal burning occurred in one patient; erythema, irritation and burning in another; intercurrent cystitis was reported in a third.

Another treatise lists the effects of Lotrimin, a drug apparently related to Gyne-Lotrimin, as: "erythema, stinging, blistering, peeling, edema, pruritus, urticaria, burning, and general irritation of the skin." The medical treatises do not suggest that Gyne-Lotrimin can cause a woman to develop Stevens-Johnson Syndrome. Neither do they suggest use of the drug caused Mark to suffer from the illness.

In contrast, Schering offers the statements of two of Mark's treating physicians that Gyne-Lotrimin was not the cause of her Stevens-Johnson Syndrome. The doctors' depositions suggest that Mark began to suffer from the syndrome prior to taking the Gyne-Lotrimin. According to the doctors, the most likely explanation of Mark's medical difficulties is that both the discomfort that caused a doctor to prescribe Gyne-Lotrimin and the later outbreak of Stevens-Johnson Syndrome stemmed from viral herpes, a disease from

which Mark suffered. One of the doctors' depositions concludes that the symptoms the Gyne-Lotrimin was prescribed to cure marked the onset of the syndrome. The depositions support the conclusion that herpes, not Gyne-Lotrimin, produced Mark's disfigurement.

To prevail, Mark must establish that Gyne-Lotrimin caused her injuries. Vague warnings about itching, burning, and irritation in medical treatises do not establish proximate cause. Mark's interpretation of the treatises as supporting her case cannot controvert the opinions of her treating physicians that Gyne-Lotrimin does not cause women, and did not cause Mark, to develop Stevens-Johnson Syndrome. See Vidrine v. Enger, 752 F.2d 107, 110 (5th Cir. 1984) (holding allegations of medical malpractice by plaintiff, contradicted by expert opinion, insufficient to defeat summary judgment). A plaintiff's ungrounded speculation about matters uniquely within the realm of knowledge of medical experts cannot by itself defeat summary judgment. See id.

As a result, we need not decide whether the treatises Mark offers are admissible as evidence. Whether or not a court could consider the statements in the treatises, they do not go far enough.

We AFFIRM.