UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAMELA A. AHMED,	)	
	)	
Plaintiff,	)	Case No. 1:22-cv-00190-KD-N
	)	
v.	)	Judge: Kristi K. DuBose
	)	
JOHNSON & JOHNSON HEALTHCARE SYSTEMS, INC.; et al.,	)	
	)	
Defendants.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Federal Rule of Civil Procedure 50(a), defendant respectfully renews its motion for judgment as a matter of law on plaintiff's claim for implied warranty of merchantability: the only cause of action that proceeded to trial. Plaintiff's presentation at trial failed to satisfy her burden of proving this claim for the following reasons.

First, plaintiff failed to offer sufficient evidence that her hip replacement system was unmerchantable—i.e., that it was not commercially fit for the ordinary purpose for which it was used. This is so because the undisputed proof demonstrated that the Pinnacle Altrx hip implant system at issue far exceeds the average quality prescribed by Alabama's merchantability standard. Most notably, plaintiff's implanting surgeon, Dr. Engerson, told the jury that he still uses the Pinnacle device, that it is the "current latest [and] greatest" and constitutes the "state of the art"—all of which explain why the identical replacement liner that Dr. Engerson used in Ms. Ahmed's revision surgery has worked without any complications. Defense expert, Dr.

Barrington, provided very similar testimony, highlighting the fact that he has implanted roughly 2,500 Pinnacle polyethylene devices without a single known failure.[1]

Plaintiffs' so-called expert on merchantability, Mr. Richard T. Edwards, did not dispute any of this evidence; rather, he ***agreed*** that the device's high survivability rate is "excellent" and "very good." Although he speculated that the locking mechanism in the hip implant was inadequate because it was supposedly too deformable and that the anti-rotation tab was defective, this testimony cannot compensate for the undisputed evidence just discussed. This is so because Mr. Edwards expressly conceded that he could not say that a differently designed or manufactured liner would not have failed in Ms. Ahmed's case. Ultimately, Mr. Edwards' testimony confirms that this is an isolated case of product failure due to the plaintiff's unique and very challenging anatomy, which does not suffice to establish commercial unmerchantability under Alabama law.

Second, plaintiff also failed to present sufficient evidence that any breach of the implied warranty of merchantability caused her harm, separately entitling defendant to judgment as a matter of law. While the Court previously held that Mr. Edwards' testimony that impingement would not have caused dissociation with a stronger locking mechanism "ties the specific design defect … to the damages for which [she] seek[s] recovery" (ECF 76 at 38), plaintiff's trial proof now definitively precludes a jury finding such a causal relationship. As noted above, Mr. Edwards conceded that he does not know whether a differently designed or manufactured implant, even those with allegedly stronger locking mechanisms, would have prevented Ms. Ahmed's dissociation. Further, he conceded that he did not even consider, let alone rule out, any

[1] Because Drs. Barrington and Crowninshield testified earlier today, defendant does yet have the record cites to their testimony. Upon receiving the official transcript of today's proceedings, defendant will expeditiously amend this brief with accompanying cites to these witnesses' testimony.

of the equally, if not more, plausible alternative causes of the implant's failure and plaintiff's harm—i.e., Ms. Ahmed's extremely degenerative spine and corresponding abnormal forces placed on the device from the moment of implant, as well as the excessively anteverted positioning of the cup. By contrast, Dr. Engerson and defendant's experts ***did*** consider these other potential factors and told the jury that the failure of the device was more likely caused by them than some purported problem with the Altrx liner.

Third, defendant respectfully reasserts its arguments that plaintiff's implied warranty claim is either subsumed by the AEMLD or barred by the privity requirement of Alabama's Commercial Code. While the Court ruled at summary judgment that plaintiff's implied warranty claim could proceed under the U.C.C. based on a theory of commercial fitness, plaintiff's trial presentation focused on purported "defects" regarding the Pinnacle device's locking mechanism and anti-rotational tabs, which clearly implicate product safety and fall within the ambit of the AEMLD. Alternatively, if the Court declines to revisit that prior ruling, defendant urges it to dismiss plaintiff's implied warranty claim because there is no privity of contract between plaintiff and DePuy. *See McPherson v. General Motors Corp*., No. 07-205-KD-C, 2007 WL 9717657, at *6 (S.D. Ala. Nov. 28, 2007) (DuBose, J.) (citing *Ex Parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999)). Defendant appreciates that the Court rejected this argument orally in light of Ala. Code § 7-2-318 and certain district court decisions that have disregarded *Ex Parte General Motors* as mere dicta. However, because the statement in *Ex Parte General Motors* has not been overruled, defendant respectfully submits that it reflects the present state of the law and should therefore be followed under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Finally, defendant also reasserts its argument that the lack of expert evidence on medical causation in this case separately entitled it to judgment as a matter of law, because regardless of how plaintiff's

claim is styled, it involves a complex medical device and even more complicated series of anatomical facts that are clearly outside the ken of lay jurors.

BACKGROUND

In support of her case-in-chief, plaintiff presented the testimony of her implanting surgeon, Dr. Todd Engerson, and a retained expert engineer, Mr. Richard Edwards. Plaintiff's implanting surgeon, Dr. Engerson, who has over 25 years of experience with hip replacement systems (Trial Tr. 6/4/2024 249:1-17), testified that he still uses the Pinnacle cup and the Altrx polyethylene liner at issue to this day. (*Id.* 333:19-24.) Dr. Engerson also made clear that the Pinnacle system is his preferred implant (*id.* 253:10-18, 255:4-5) and that it has "good track records." (*Id*. 326:13-17.) Indeed, he testified that he considers the Altrx polyethylene the "current latest [and] greatest," (*id.* 254:21-255:3) and that he does not believe there is a "superior product on the market," (*id.* 332:8-18), and he described the ceramic-on-polyethylene system used for Ms. Ahmed as "state of the art." (*id.* 429:6-14.) This testimony was reinforced by defense expert, Dr. Barrington, who told the jury that he has used the Pinnacle device for 20 years (implanting roughly 2,500 polyethylene ones without even a single known failure), and that it continues to be a state of the art implant.

As Dr. Engerson explained, Ms. Ahmed suffers from an "extremely degenerative spine" (*id.* 259:3-6), leading him to describe her as "an orthopedic disaster" (*id.* 331:16-18). To address these unique characteristics, Dr. Engerson performed a specific kind of hip replacement surgery that he might not have performed for a less challenging patient. In particular, he employed a "posterior lateral approach" to try to avoid a posterior dislocation due to Ms. Ahmed's unique medical history. (*Id.* 279:16-280:3, 282:8-13.) But, as Dr. Engerson stressed, such a "large operation" had "big risks including possible need for revision, infection, possibly pain" and he explained that it would not "fix her back problem." (*Id.* 261:13-22, 262:1-12.) The

accompanying instructions for use ("IFU") and surgical technique similarly warned that "component positioning" is critical "in relation to short- and long-term outcomes during total hip arthroplasty" and that "[s]ub-optimal component positioning may lead to edge loading, dislocation, increased wear and polyethylene fracture." (*See* Trial Exs. 90 & 93.)

While Dr. Engerson's approach was initially unsuccessful, he explained that the hip implant failed "because of abnormal forces that were being put on it," which had nothing to do with the nature of the device. (*Id.* 313:12-15.) Specifically, Dr. Engerson testified that the product failed due to femoral neck impingement, which began to occur "from the time [it was] put in." (*Id.* 291:8-17, 328:25-329:8.) Dr. Engerson further testified that Ms. Ahmed's cup was "excessively anteverted" prior to failure, meaning the cup was in a sub-optimal position, which resulted in the early and forceful impingent that caused the implant's failure. (*Id.* 319:18-25, 328:20-24.) This testimony was echoed by defense expert, Dr. Crowninshield. And beyond the surgical technique employed in this case, defense expert, Dr. Barrington, explained that Ms. Ahmed's challenging anatomy led to severe flattening of her normal pelvic tilt while standing which, in turn, led to impingement of the femoral neck of the liner and early failure.

Plaintiff's engineering expert, Mr. Edwards—whose experience with hip implants is confined to work done with unknown manufactures in the 1980's— largely agreed with this evidence, explicitly recognizing that the device is considered "state of the art" and that the Pinnacle survivability rate at 15 years is "***very good. All the doctors says so.***" (Trial Tr. 6/4/2024 at 429:6-14; 430:9-13 (emphasis added); *see also id.* 421:24-422:3 (agreeing that an article he relied on concluded "Pinnacle acetabular system has been used since 2003 with excellent long-term survivorship"); *see also id.* 411:7-15 (addressing limited experience with hip implants).) He nonetheless testified that the anti-rotations must be made "stronger" or "bigger"

or the design must have "more of them." (*Id.* 406:13-16.) According to Mr. Edwards, the device was "too deformable to work with a locking mechanism that was built for multiple materials." (*Id.* 408:9-11.)[2] However, he "could not say that a different design would have prevented or lessened the deformation of the liner caused by the impingement." (*Id.* 427:12-15; *see also id.* 428:14-18 (admitting he has no ability to say that "any other designs on the market for a ceramic polyethylene total hip device like the Pinnacle system at issue" "would have survived the forces exerted on Ms. Ahmed's device").) Moreover, Mr. Edwards did not even consider—much less rule out—other potential causes of the Pinnacle's failure, including Ms. Ahmed's severely deformed spinal anatomy or the excessive anteversion of the cup. (*See id.* 416:7-417:11 (acknowledging he did not consider whether component positioning may have caused the device's failure and had no idea whether positioning was correct, but rather relied on Dr. Engerson's testimony on it); *id.* 418:5-14 (agreeing he did not consider or rule out that "Ms. Ahmed's severely deformed spinal anatomy was the primary cause" of the device's failure).)

ARGUMENT

A motion for judgment as a matter of law should be granted where, as here, "a party has been fully heard on [the] issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Showan v. Pressdee*, 922 F.3d 1211, 1221 (11th Cir. 2019) (quoting Fed. R. Civ. Pro. 50(a)) (alterations in original). In other words, a Rule 50(a) motion is properly granted "if the facts and inferences point so overwhelmingly in favor of one party that reasonable people could not arrive at a

[2] Mr. Edwards appeared to opine (for the first time in this case) that the device is too soft given it is treated with Vitamin E so it can "go into the body and not harm the body." (*Id.* 364:10-23, 365:12-15, 403:13-16, 408:14-16.) However, Mr. Edwards conceded this was ***beneficial*** to patients, approved by the FDA, standard and "consistent with practices in the last ten, 20 years" and can only "maybe make [plastic] change its strength." (*Id.* 364:10-23.)

contrary verdict." *Elrod v. Dolgencorp, LLC*, No. CA 15-00307-C, 2017 WL 532949, at *1 (S.D. Ala. Feb. 9, 2017) (granting defendants' Rule 50(a) motion in a slip-and-fall case), *aff'd*, 711 F. App'x 581 (11th Cir. 2017).

To succeed on a claim for breach of the implied warranty of merchantability, plaintiff must show by a preponderance of the evidence that (1) defendant was regularly in the business of selling Pinnacle hip replacement systems; (2) defendant supplied the product for use in Ms. Ahmed's hip surgery; (3) the Pinnacle hip replacement system was not merchantable; and (4) the unmerchantable nature of the product caused Ms. Ahmed's injuries. *See* 2 Ala. Pattern Jury Instr. Civ. 32.21 (3d ed.). As explained below, plaintiff has failed to prove several of these independent elements.

I. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE THAT THE DEVICE WAS UNMERCHANTABLE.

Defendant is entitled to judgment as a matter of law because plaintiff failed to prove that the Pinnacle implant was unmerchantable. Merchantable products "[a]re fit for the ordinary purposes for which such goods are used[.]" Ala. Code. § 7-2-314(c); *see also* 2 Ala. Pattern Jury Instr. Civ. 32.21 (3d ed.). This standard does not require perfection; rather, Alabama law merely demands quality "a little above the level of mediocrity." *See, e.g.*, *Wetzel v. Bingman Labs., Inc.*, 104 So. 2d 452, 453 (1958) (merchantability "connotes a quality of inherent soundness sometimes described as a little above the level of mediocrity, sometimes as being of a middling grade, and in other cases as of being of average suitability to the market"); *Terrell v. R&A Mfg. Partners, Ltd.*, 835 So. 2d 216, 229 (Ala. Civ. App. 2002) (finding trailer was merchantable despite not being "in perfect condition" and the owner "had a problem with the brackets, the side lights, the ABS, and the alignment [and] problems related to the installation of the dual controls

he requested").[3] Moreover, "the scope of a[n implied] warranty may be discerned from the available warnings" as well as "instructions that mitigate[] against the attendant risks associated with the products." *Darnell v. Yamaha Motor Corp., USA*, 476 F. Supp. 3d 1170, 1181 (N.D. Ala. 2020) ("The risk of falling off the personal watercraft in this case has no bearing on its merchantability, given the warnings and instructions that accompanied the product.").

Defendant is entitled to a directed verdict under this standard because the evidence proves that the Pinnacle implant did not just meet this minimal standard; it far surpassed it. Most fundamentally, plaintiff's own surgeon testified that he not only still uses the Pinnacle device, including the Altrx liner in question, but also that he considers it to be "***superior***" to other devices on the market and is "the current latest [and] greatest"—i.e., the "state of the art." (Trial Tr. 6/4/24 254:18-255:5; *see also, e.g.*, *id.* 253:10-14 (uses "[p]retty must just DePuy" products), 255:4-5 (Ms. Ahmed's device is what he "generally use[s]"); 332:8-14 ("I don't see the need to change" given the device is the "superior product on the market"); *id.* 429:6-14 (Dr. Engerson testifying the device is "state-of-the-art").) Similarly, defense expert, Dr. Barrington, testified that he has used the Pinnacle device for 20 years (implanting roughly 2,500 of them without even a single known failure), and that it continues to be a state of the art implant. And both Drs. Engerson and Crowninshield testified that the failure of Ms. Ahmed's implant was the result of the "abnormal forces that were being put on it" and the "excessively anteverted" placement of

[3] States with virtually identical implied warranty of merchantability statutes are in accord. *See, e.g.*, *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1099 (11th Cir. 1983) ("The tests of merchantability are standards of minimal quality" under Florida law and noting defendant's copiers "were not required to be the best copiers on the market or equal to similar or competing copiers"); *Se. Laborers Health & Welfare Fund v. Bayer Corp.*, 444 F. App'x 401, 410-11 (11th Cir. 2011) (implied warranty of merchantability "does not imply absolute perfection" under New Jersey law); *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1326 (5th Cir. Unit A Mar. 1981) ("'Merchantable' is not a synonym for perfect" under Texas law) (citation omitted).

the cup—which DePuy expressly warned could lead to dislocation, the precise failure here. (*Id.* 313:12-15,320:19-321:1, 329:3-8; 319:18-25, 328:20-24.)

Plaintiff's so-called "expert" on merchantability, Mr. Edwards, agreed with this testimony. In particular, he recognized that the Pinnacle device has "excellent long-term survivorship" (*id.* 421:24-422:3) and that the Pinnacle survivability rate at 15 years is "***very good. All the doctors says so.***" (*Id.* 430:9-13 (emphasis added).) While Mr. Edwards nonetheless contended that the locking mechanism in the Pinnacle hip was inadequate, that the product is too deformable (perhaps due to Vitamin E treatment) and that the tabs could be made stronger, bigger, or the device could simply have more of them, none of this suffices to establish unmerchantability.

First, Mr. Edwards' testimony that the polyethylene liner was too deformable due to Vitamin E treatment is procedurally improper and substantively insufficient. As an initial matter, Mr. Edwards did not disclose such an opinion in his report, and the Court should have sustained defendant's objection to its admission at trial.[4] *See, e.g.*, *Access for Disabled, Inc. v. T.S. Margate Co.*, No. 08-60483-CIV, 2008 WL 2761284, at *1 (S.D. Fla. July 15, 2008) ("Plaintiffs will be prohibited from eliciting from their expert at trial any opinion or testimony not previously disclosed in their expert report."). But even if Mr. Edwards had properly disclosed this opinion, his claim cannot possibly show that the Pinnacle implant was not commercially fit because he expressly conceded that the use of Vitamin E was ***beneficial*** to

[4] Mr. Edwards did not mention Vitamin E in his report but mentioned Vitamin E twice at his deposition. He first stated at his deposition that he "heard" Vitamin E was an additive but had no idea "what the specific ingredients are that go into making" the polyethylene. (Edwards Dep. 119:10-15.) He then later speculated Vitamin E as an oil could indicate "too much plasticizer, too much antioxidant" but made clear the mechanical properties of the liner would have to be investigated. (*Id.* 195:13-15.) This was insufficient to disclose an opinion that Vitamin E is the source of the liner being too deformable and therefore unmerchantable.

patients; it was approved by the FDA; it is standard and "consistent with practices in the last ten, 20 years[.]" (*Id.* 364:10-23.) This testimony reinforces that the product qualifies as "state of the art" and easily satisfies Alabama's merchantability standard.

Second, there is no evidence that a stronger mechanism or more/bigger/stronger tabs was the prevailing standard in the industry. Mr. Edwards expressly disclaimed knowing whether such attributes would have withstood the extreme impingement forces to which Ms. Ahmed's hip implant was exposed as a result of her abnormal anatomy. (*See id.* at 427:12-15, 428:14-18.). And Ms. Ahmed's current liner, which employs the same exact design as the one being challenged by Mr. Edwards, has performed without complication. (*See id.* 294:3-7; *see also* Design Rationale at 8 (Trial Ex. 92).) Accordingly, Mr. Edwards' speculative challenge to the Pinnacle locking mechanism and tab design clearly does not change the undisputed fact that the Pinnacle implant qualified as "state of the art," is the "current latest [and] greatest," and is therefore merchantable under any construction of the Commercial Code. *See Harwell v. American Medical Systems, Inc.* 803 F. Supp. 1287, 1298, 1302 (M.D. Tenn. 1992) (plaintiff's engineer could not establish that prosthetic penile implant was unmerchantable based on testimony that "leak could have been prevented if the reservoir had been constructed of polyurethane instead of silicon-elastomer" because the device represented the "state of the art at the time" of implant and there was no evidence that "such a substitution was known to prevent leakage").

This is all the more true because there is no evidence that the type of purported locking mechanism or tab-related hip implant failure impacted a significant number of individuals. *See Griggs v. Combe, Inc.*, 456 So. 2d 790, 793 (Ala. 1984) (holding that a "product must adversely affect at least some significant number of persons before a question of 'merchantability' arises").

To the contrary, as discussed above, Mr. Edwards conceded that the survivability rate of the Pinnacle device is "excellent" and "very good. All the doctors says so." (Trial Tr. 6/4/2024 421:24-422:3, 430:9-13.) While Mr. Edwards claimed that Ms. Ahmed's failure was not unique (*see id.* 383:5-384:2), his only basis was isolated case reports, which the Eleventh Circuit has cautioned can "only raise questions; they do not answer them" given they are anecdotal information, nothing more." *McClain v. Metabolife Int'l., Inc.,* 401 F.3d 1233, 1253-54 (11th Cir. 2005). And although Mr. Edwards speculated there may be roughly 11,000 revisions due to liner dissociations a year, these estimates were not limited to the Pinnacle device at issue, let alone the purported locking mechanism/tab-related design that plaintiff claims renders the product unmerchantable. (*See* Trial Tr. 6/4/2024 381:4-13.) Thus, the record establishes that Ms. Ahmed's hip implant is, at most, an isolated instance of product failure that cannot support a jury verdict on the question of merchantability. *See Pearl v. Mad Engine, Inc.*, No. 7:12–cv–2850–TMP, 2015 WL 5179517, at *5-7 (N.D. Ala. Sep. 4, 2015) (holding that a "warranty claim does not apply to an isolated case of product failure" and in turn determining there was no evidence that t-shirt was "commercially unsuitable" where defendant "had successfully sold millions of similar t-shirts without any complaint").[5]

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[5] This common-sense legal principle is consistent with the blackletter Alabama law that "the failure of a product does not presuppose the existence of a defect." *Townsend v. Gen. Motors Corp.*, 642 So. 2d 411, 415 (Ala. 1994); *see also Hughes v. Stryker Sales Corp.*, No. 08-0655-WS-N, 2010 WL 1961051, at *4-5 (S.D. Ala. May 13, 2010) ("Alabama law is crystal clear that the mere failure of a product does not presuppose the existence of a defect"; "the mere fact that Hughes experienced a "hardware failure" (i.e., the bare fact that her hip prosthesis failed) does not satisfy her burden of affirmatively showing that the product was defective."), *recons. denied*, 2010 WL 2608957 (S.D. Ala. June 28, 2010), *aff'd*, 423 F. App'x 878 (11th Cir. 2011) (per curiam); *Turner v. DaimlerChrysler Corp.*, No. Civ. A. 99-0696-RV-L, 2000 WL 1843601, at *2 (S.D. Ala. Oct. 31, 2000) (acknowledging this principle "is particularly true where, as here, the product and its purported defect is of a "complex and technical nature"). Indeed, courts have applied this in the context of prosthetic hips specifically. *See Harrington v. Biomet, Inc.*, 2008 WL 2329132, at *7 (W.D. Okla. June 3, 2008) (finding prosthetic hip

(cont'd)

In short, plaintiff's theory of breach is little more than a dressed-up version of "[t]he doctrine of res ipsa loquitur" (i.e., because the product failed, it was not commercially fit for its ordinary purpose), which generally is "not applicable in products liability cases." *Brooks v. Colonial Chevrolet-Buick, Inc*., 579 So. 2d 1328, 1333 (Ala. 1991). For these reasons, plaintiff has not offered a sufficient evidentiary basis for the jury to find the Pinnacle Altrx hip system unmerchantable.

II. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE OF CAUSATION

Defendant is separately entitled to judgment as a matter of law because plaintiff has not presented evidence capable of proving that the purported breach of implied warranty caused her damages. *See Bodie v. Purdue Pharma Co.*, 236 F. App'x 511, 522 (11th Cir. 2007) ("plaintiff must prove . . . damages proximately resulting from that breach"). Under Alabama law, causation requires proof that the complained-of injury would not have occurred "***but for"*** the defendant's alleged conduct. *See City of Mobile v. Havard*, 268 So. 2d 805, 810 (Ala. 1972) (emphasis added); *Lingefelt v. International Paper Co.*, 57 So. 3d 118, 122–23 (Ala. Civ. App. 2010) ("Proximate cause is an act that in a natural and continuous sequence . . . produced the injury and without which the injury would not have occurred."). As this Court has recognized (albeit outside the product liability context), such proof must reflect more than mere "*possibilities*" of causation. *See Fuller v. Winn-Dixie Montgomery, LLC*, No. 16-00363-KD-M, 2017 WL 3098104, at *9 (S.D. Ala. July 19, 2017); *see also Looney v. Moore*, No. 2:13–cv–00733–KOB, 2015 WL 4773747, at *4 (N.D. Ala. Aug. 13, 2015) ("To establish proximate

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merchantable despite 11 dislocations within 10 months of being implanted because "Plaintiff has failed to present any evidence beyond the fact of the dislocations that it was not")

cause under Alabama law, a plaintiff must establish that a defendant's acts or omissions 'probably caused, rather than only possibly caused, the plaintiff's injury'") (citation omitted).

While this Court previously ruled at summary judgment that Mr. Edwards' opinion "that impingement would not have caused dissociation had the locking mechanism been stronger" adequately "ties the specific design defect" to her damages (*see* ECF 76 at 38), the trial record now definitively establishes that plaintiff's theory of causation consists of mere "possibilities." Most notably, Mr. Edwards made clear that he did not know whether ***any*** other differently designed or manufactured liner would have withstood the extreme impingement forces to which Ms. Ahmed's hip implant was exposed as a result of her abnormal anatomy. (*See* 6/4/2024 Trial Tr. 427:12-15, 428:14-18.) Nor did Mr. Edwards even consider the far more likely causes of the failure in question, including the component positioning (*see id.* 416:7-417:11) or "Ms. Ahmed's severely deformed spinal anatomy" (*id.* 418:5-14.) *See Hughes*, 2010 WL 1961051, at *5; *accord Porter*, 783 F. Supp. at 1473 (finding plaintiff "failed to demonstrate that his injuries were proximately caused by the separation of the polyethylene liner from the metallic shell" given the supervening actions of the surgeon as well as the fact that "the Plaintiff was unable to disentangle the respective roles that the 1986 surgery, the prior surgeries, the Plaintiff's failure to fully heed the instructions of his physicians to accommodate his disability and myriad common, natural causes of pain played in contributing to his injuries").

By contrast, Ms. Ahmed's own surgeon, Dr. Engerson, ***did*** consider alternative explanations for the failure of the Pinnacle implant and ultimately concluded that it was caused by "abnormal forces that were being put on it" and the "excessively anteverted" nature of the cup's placement—both of which led to femoral neck impingement that began "from the time" the device was implanted in Ms. Ahmed. (*See* 6/4/2024 Trial Tr. 313:12-15, 320:19-321:1,

329:3-8.) Dr. Crowninshield did as well, explaining that the posterior placement of Ms. Ahmed's liner increased the anteversion, caused the failure in this case. And beyond the surgical technique employed in this case, defense expert, Dr. Barrington, explained that Ms. Ahmed's challenging anatomy (e.g., her spinal deformity and stiffness) led to severe flattening of her normal pelvic tilt while standing, which, in turn, led to impingement of the femoral neck of the liner and early failure.

In short, plaintiff has failed to adduce evidence that some infirmity in the Pinnacle device was the "but for" cause of Ms. Ahmed's injuries and judgment as a matter of law is due.

III. PLAINTIFF'S IMPLIED WARRANTY CLAIM FAILS FOR LEGAL REASONS.

Finally, defendant respectfully reasserts its arguments that plaintiff's implied warranty claim is either subsumed by the AEMLD or alternatively barred by the U.C.C.'s requirement of privity. Defendant also reasserts its position that the lack of expert medical causation evidence forecloses plaintiff's claim. Defendants understands that the Court has rejected these arguments but includes them here for preservation purposes.

First, the AEMLD subsumes plaintiff's implied warranty claim because whether a product is "unreasonably dangerous is not a question properly addressed . . . under the U.C.C." *See Yarbrough v. Sears, Roebuck & Co.*, 628 So. 2d 478, 483 (Ala. 1993). In holding otherwise at the summary judgment phase, the Court reasoned that "regardless of a showing of the product's danger, the Alabama Supreme Court has found distinct violations of the implied warranty of merchantability when the plaintiff could not use the product as intended," and "[p]laintiff submits that her implied warranty claim . . . falls into this latter category." (ECF 76, at 43 (citing *Garrison v. Sturm, Ruger & Co*., 322 F. Supp. 3d 1217, 1235 (N.D. Ala. 2018) (in turn citing *Gen. Motors*, 769 So. 2d 903, and *Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991))).) As defendant previously explained, however, the plaintiffs in *General*

Motors and *Volkswagen* did not assert AEMLD claims; rather, they proceeded solely under the U.C.C., rendering those car cases inapposite. *See, e.g.*, *Gen. Motors*, 769 So. 2d at 912-13; *Volkswagen*, 579 So. 2d at 1302 (citation omitted).

Here, by contrast, Ms. Ahmed not only invoked the AEMLD, but she has specifically and solely grounded her implied warranty count in the same product-liability theory as the one that underlay her AEMLD cause of action by specifically "adopt[ing] the facts and allegations" in the preceding paragraphs (Compl. ¶ 27)—all of which asserted that the Pinnacle hip contains a "safety" defect (*id.* ¶ 17; *see also id.* ¶¶ 19, 25). And plaintiff's presentation at trial adhered to that theory of the case. As discussed in Part I, *supra*, Mr. Edwards purported to offer "defect opinions" regarding the allegedly inadequate locking mechanism and anti-rotational tab design that he speculated might have been the reason for Ms. Ahmed's hip failure. (*See, e.g.*, 6/4/2024 Trial Tr. 400:13-14 ("We are going to talk about why you believe this product is defective."); *id.* 406:10-12, 407:20-22 (asking Mr. Edwards how the tabs are "defective").) Because those opinions necessarily challenge the inherent safety of the device, they confirm that Ms. Ahmed's case is an AEMLD case, not a U.C.C. case.

Second, and alternatively, if the AEMLD does not govern plaintiff's implied warranty claim, then the U.C.C. does, and plaintiff should not be allowed to evade the privity requirements of that statute, as recognized by the Alabama Supreme Court in *Ex Parte General Motors*. As this Court explained in *McPherson*, given the Alabama Supreme Court's unequivocal pronouncement in *Ex Parte General Motors*, "[u]nder Alabama law a cause of action for implied warranty will only lie against the seller—the one in privity of contract with the purchaser." *Id.* (granting General Motors summary judgment for lack of privity) (citing *Ex Parte General Motors Corp.*, 769 So. 2d 903, 910 (Ala. 1999) ("[i]f [the plaintiff] had alleged a breach of an

implied warranty as to GM, summary judgment would be proper as to any such claim" because "[u]nder Alabama's version of the Uniform Commercial Code . . . implied warranties are applicable only to [immediate] sellers . . . .")).

While the Court denied this argument orally in light of Ala. Code § 7-2-318 and chose to follow a handful of district courts that have relaxed the privity requirement in personal injury cases, the Alabama Supreme Court has not overruled its prior statement.[6] Accordingly, under basic *Erie* principles, defendant respectfully urges the Court to reconsider its prior oral ruling and follow the approach it took in *McPherson* because "[i]t is up to the Alabama Supreme Court to interpret Alabama law"; federal courts should "defer to that interpretation whether or not it appears to be correct." *See Rose v. General Motors Corp.*, 323 F. Supp. 2d 1244, 1247-48 (N.D. Ala. 2004) ("This conclusion is compelled by the following statement in *Ex Parte General Motors* . . . . It is up to the Alabama Supreme Court to interpret Alabama law, and this court must defer to that interpretation whether or not it appears to be correct."). In short, if the AEMLD does not subsume plaintiff's implied warranty claim, the Court should grant defendant judgment as a matter of law for lack of privity under the U.C.C.

Defendant also respectfully reasserts its argument and incorporates its prior briefing that plaintiff's claim fails for lack of expert medical causation, which is "[a]n essential element of all product liability cases" in this state. *Lowery*, 535 F. Supp. 3d at 1172 (quoting *McCreless v.*

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[6] The only post- *Ex Parte General Motors* decision cited by plaintiff decided by the Alabama Supreme Court ***affirmed*** the grant of summary judgment for a manufacturer of an over-the-counter laxative precisely because there was no privity of contract between the consumer seeking only economic damages and the defendant. *See Rampey v. Novartis Consumer Health, Inc.*, 867 So. 2d 1079, 1089 (Ala. 2003). While plaintiff highlights a statement in *Rampey* that "'§ 7-2-318 abolished privity requirements only in actions involving personal injury'" (ECF 120, at 2 (citation omitted)), that itself was dicta. In short, *Rampey*—which did not even address *Ex Parte General Motors*—did not remotely purport to overrule it.

Glob. Upholstery Co., 500 F. Supp. 2d 1350, 1355 (N.D. Ala. 2007)). This is especially true where, as here, the "interaction between a complex and technical medical device and the unique physiological and medical circumstances of the patient in which it is implanted is a subject on which no ordinary juror could rationally be expected to have knowledge." *Hughes*, 2010 WL 1961051, at *5.

At the summary judgment stage, the Court did not cite any authority to the contrary. Instead, it acknowledged the general principle that "[m]edical expert testimony is essential to prove causation in a case in which the causation issue does not implicate natural inferences that a juror could make through human experience." (ECF No. 76, at 34 (citing *Allison v. McGahn Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999)).) Indeed, neither the Court nor plaintiff has identified a single case involving medical devices in which a plaintiff survived summary judgment absent expert testimony on medical causation. Defendant is not aware of one either, and thus urge the Court to reconsider its prior conclusion. Accordingly, even if Mr. Edwards' ruminations about the purportedly inadequate locking mechanism or anti-rotational tab design raised a factual question about the cause of the hip failure, the dearth of any expert ***medical*** causation evidence tying these characteristics to Ms. Ahmed's revision surgery and corresponding injuries would still entitle defendant to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should grant defendant's motion for judgment as a matter of law on plaintiff's breach of the implied warranty of merchantability claim.

Respectfully submitted this 5th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2024, a copy of the foregoing document was filed in open court.

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