NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

JOANNE THOMAS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF RYAN SWINDLE, DECEASED Appellant v. SMITH KLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2461 EDA 2012

Appeal from the Order Entered July 19, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 003527 Sept. Term 2007

BEFORE: BOWES, J., OTT, J., and STRASSBURGER, J.*

CONCURRING MEMORANDUM BY STRASSBURGER, J.**FILED NOVEMBER 27, 2013**

I respectfully disagree with the Majority's conclusion that fraudulent concealment, under these circumstances, required GSK to direct a specific act toward Thomas; however, I concur because Thomas has waived this issue for appeal. Additionally, I conclude that there were genuine issues of material fact regarding the gestational age of the fetus; however, due to the dispositive nature of the statute of limitations argument, I respectfully concur on that basis as well.

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* Retired Senior Judge assigned to the Superior Court.

On appeal, Thomas raises a very salient point regarding the effect the learned intermediary doctrine should have with respect to fraudulent concealment in pharmaceutical cases. However, Thomas raises this issue for the first time in her appellate brief; therefore she has waived it for the purposes of appeal.[1]

Nonetheless, I offer the following analysis. In pharmaceutical failure to warn cases, the "learned intermediary" doctrine is generally applied.

> First adopted by the Supreme Court in ***Incollingo v. Ewing***, 444 Pa. 263, 282 A.2d 206 (1971), [the learned intermediary] doctrine provides that a manufacturer of a prescription drug must direct warnings to the prescribing physician, but not to the patient. In ***Makripodis v. Merrell-Dow Pharmaceuticals, Inc.***, 361 Pa.Super. 589, 596, 523 A.2d 374, 378 (1987), a panel of this court explained the learned intermediary doctrine and the policies that underlie it as follows:
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> > It is clear that the manufacturer of a prescription drug known to be dangerous for its intended use, has "a duty to exercise reasonable care to inform those for whose use the article [was] supplied of the facts which make [the product] likely to be dangerous." ***Incollingo v. Ewing***, ***supra***, 444 Pa. at 285 n. 8, 282 A.2d at 220 n. 8. **However, the warnings which are required to be given by the manufacturer must be directed to the physician, not the patient-consumer.** This is so because it is the duty of the prescribing physician to be fully aware of (1) the characteristics of the drug he is prescribing, (2) the amount of the drug which can be safely administered, and (3) the different

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[1] GSK argues to this Court that the issue is waived. ***See*** GSK's Brief at 23, n.4 ("[A]rgument regarding the learned intermediary doctrine fails for the additional reason that she did not preserve this issue for appeal.").

> medications the patient is taking. It is also the duty of the prescribing physician to advise the patient of any dangers or side effects associated with the use of the drug as well as how and when to take the drug. The warnings which must accompany such drugs are directed to the physician rather than to the patient-consumer as "[i]t is for the prescribing physician to use his independent medical judgment, taking into account the data supplied to him from the manufacturer, other medical literature, and any other sources available to him, and weighing that knowledge against the personal medical history of his patient, whether to prescribe a given drug." ***Leibowitz v. Ortho Pharmaceutical Corporation***, supra, 224 Pa.Super. [418] at 431, 307 A.2d [449] at 457 [(1973)]. Thus, in an action against a drug manufacturer based upon inadequate warnings, the issue to be determined is whether the warning, if any, that was given to the prescribing physicians was proper and adequate. ***See***: ***Baldino v. Castagna***, ***supra***, 505 Pa. [239] at 244-45, 478 A.2d [807] at 810 [(1984)].

Taurino v. Ellen, 397 Pa. Super. 50, 52-53 (1990)

Thus, it is inconsistent to require a patient to be in direct contact with a pharmaceutical company for the purposes of fraudulent concealment, when the pharmaceutical company, by law, owes no duty directly to a patient. Therefore, the reasonable approach for pharmaceutical cases, where fraudulent concealment is raised as an exception to the statute of limitations, is to determine what specific acts were directed to the patient's doctor. Here, a doctor would have found out in December of 2005 that Paxil was changed from a category C drug to a category D drug. Accordingly, any lawsuit could not have been filed until December of 2005, and the two year

statute of limitations should begin from that time.[2] However, since Thomas has waived this issue, I must concur with the majority.

Even though I am constrained to concur that the trial court did not err in granting summary judgment with respect to the statute of limitations issue, I do want to address Thomas' question with regard to whether there was a genuine issue of material fact as to the viability of the fetus.

Assuming, *arguendo*, the trial court correctly concluded that Pennsylvania law requires a fetus to reach 23 weeks gestation to be viable,[3] I conclude there is a genuine issue of material fact about whether the fetus in this case was more than 23 weeks gestation.

Our summary judgment standard requires a trial court to view the facts in the light most favorable to Thomas as the non-moving party. The trial court acknowledges there are "inconsistent documents regarding clinical

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[2] Thomas filed her praecipe for writ of summons within the two year period.

[3] The trial court and GSK rely on the 1992 decision of ***McCaskill v. Philadelphia Hous. Auth.***, 615 A.2d 382 (Pa. Super. 1992), which stated the following:

> The United States Supreme Court recently held that viability now occurs at 23 or 24 weeks of gestation. ***Planned Parenthood v. Casey***, 505 U.S. 833, ----, 112 S.Ct. 2791, 2810-11, 120 L.Ed.2d 674 (1992). ***See also Webster v. Reproductive Health Services***, 492 U.S. 490, 515, 109 S.Ct. 3040, 3055, 106 L.Ed.2d 410, 434 (1989). The legal conclusion that viability occurs at 23-24 weeks is well supported in the medical literature.

Id. at 384.

estimates of fetal gestational age at abortion." Trial Court Opinion, 11/9/2012, at 7. Notably, a pediatric cardiologist performed an echocardiogram of the fetus on April 23, 2001, and estimated the gestational age to be 22 and ½ weeks. The abortion occurred on April 26, 2001; thus, a fact-finder could reasonably conclude that the fetus reached 23 weeks' gestation at that point.[4] Accordingly, the trial court erred in granting summary judgment on this basis. However, as this error does not change the result of this case, I concur.

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[4] We recognize that there is also evidence to the contrary; specifically, a certificate of fetal death that states the age of gestation at the time of Thomas' abortion was 21 and ½ weeks. However, that discrepancy is properly resolved by the fact-finder.