

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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

MEMORANDUM BY OTT, J.:

FILED NOVEMBER 27, 2013

Joanne Thomas, individually and as parent and natural guardian of Ryan Swindle, deceased ("Thomas"), brings this appeal from the order, entered on July 19, 2012, in the Court of Common Pleas of Philadelphia County, that granted the motion for summary judgment filed by Smithkline Beecham Corporation d/b/a/GlaxoSmithKline ("GSK"), and entered summary judgment in favor of GSK. This appeal arises from a wrongful death/survival action filed by Thomas against GSK, alleging that the death of her son, Ryan Swindle, was caused by her ingestion of a prescription drug, Paxil, during her pregnancy. Thomas raises two questions: (1) "Is there a disputed

* Retired Senior Judge assigned to the Superior Court.

issue of fact with regard to fetal viability that precludes summary judgment on the wrongful death claims?"; (2) "Did the trial court err when it ruled as a matter of law that fraudulent concealment can consist only of misrepresentations directed to a specific plaintiff?" Brief of Thomas at 4. Based upon the following, we affirm.

The trial court summarized the facts in the light most favorable to Thomas¹ as follows:

Plaintiff, JoAnne Thomas, instituted this action by Writ of Summons on September 25, 2007. On November 27, 2007, Plaintiff filed a Short-Form Complaint. Plaintiff was allegedly taking a 40mg dose of Paxil (Paroxetine) throughout her pregnancy with Ryan Swindle in 2001. See Defendant's Motion, 3/22/12, p. 3. At the time, Paxil was classified as a Category C drug by the FDA Drug Use In Pregnancy Ratings. See "Understanding Antidepressant Medications," U.S. Food and Drug Administration: Consumer Health Info, January 9, 2009, available at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm095980.htm> (last visited Oct. 12, 2012). In December 2005, the FDA reclassified Paxil from a pregnancy risk Category of C to D. *Id.* See also, U.S. Food and Drug Administration, *FDA Advising of Risk of Birth Defects With Paxil Agency Requiring Updated Product Labeling, December 8, 2005*, available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncement/P/2005/ucm108427.htm> (last visited Oct. 12, 2012). "With a Category C drug, fetal risk cannot be ruled out. With a Category D drug, positive evidence of fetal risks exists. FDA chooses a medicine's letter category based on what is known about the medicine when used in pregnant women and animals." *Id.*

¹ "The trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party." **Lange v. Burd**, 800 A.2d 336, 338 (Pa. Super. 2002) (citation omitted), *appeal denied*, 818 A.2d 504 (Pa. 2003).

In Plaintiff's last echocardiogram performed on April 23, 2001, the pediatric cardiologist estimated fetal gestational age to be 22½ weeks, and notified her of baby's congenital heart defects. See Plaintiff's Response, Exhibit 1, Fetal Echocardiogram Report (4/23/01). What caused said fetal abnormalities was unknown and the doctor suggested a following up in 5-6 weeks. *Id.* On April 26, 2001, 3 days later, Plaintiff voluntarily chose a therapeutic abortion. See Defendant's Motion, Exhibit 2, Fetal Death Certificate. The fetal death certificate estimated gestational age to be 21½ weeks. *Id.*

On March 8, 2007, nearly six years later, while Plaintiff was studying for her nursing boards, she contacted a consumer line on GSK's website and spoke with a customer service representative who incorrectly told her Paxil was a "Category C" drug. See Defendant's Reply, Exhibit 2, Amended Pregnancy Fact Sheet (12/9/10). With further investigation, Plaintiff discovered Paxil had moved from a Category C to D drug. See "*Understanding Antidepressant Medications*," U.S. Food and Drug Administration: *Consumer Health Info.* (2009). The representative later confirmed Paxil had been relabeled a Category D drug. See Plaintiff's Response, Exhibit 2, Affidavit of JoAnne Thomas (4/20/12). Plaintiff then filed her Short Form Complaint November 27, 2007, alleging her Paxil ingestion during pregnancy caused her son, Ryan Swindle's wrongful death. Defendant's Motion, Exhibit 1, Short Form Complaint, ¶6 (11/27/07).

On March 22, 2012, GSK moved for summary judgment. GSK argued Plaintiff's claims should be dismissed for two fundamental reasons. First, Plaintiff cannot bring a wrongful death or survival action because her fetus was not viable at her therapeutic abortion.¹ See Defendant's Motion, p. 2.

¹ Pennsylvania law has held that "no cause of action exists under the law of this Commonwealth which permits recovery under the Wrongful Death and Survival Acts for the loss of a non-viable fetus, nor do we recognize an action in loss of consortium for the parents of a non-viable fetus." See *McCaskill v. Phila. Housing Auth.*, 615 A.2d 382, 383 (Pa. Super. Ct. 1992).

GSK argues as a matter of law there must be either (1) a child born alive; or (2) a viable fetus, capable of an independent existence at death. See *Coveleski v. Bubnis*, 634 A.2d 608, 610 (Pa 1993). Under Pennsylvania law, viability occurs no earlier than 23 weeks gestational age. See *McCaskill v. Phila. Housing Auth.*, 615 A.2d 382, 384 (Pa. Super. Ct. 1992) (following the U.S. Supreme Court's holding in *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), that viability occurs at 23 to 24 weeks). Relying on Plaintiff's fetal death certificate, GSK argued she cannot sustain a wrongful death or survival action because she [was] at 21½ weeks, before viability occurred. See Defendant's Motion, Exhibit 2, Fetal Death Certificate.

Next, GSK argued even if the fetus was viable when aborted, any claim would be barred under Pennsylvania's two year statute of limitations because Plaintiff filed her action November 27, 2007, more than 6 years [after] its death. GSK contends the two-year period commenced on the day Ryan Swindle died, regardless of when survivors knew, or should have known, cause of death. See Defendant's Motion, p. 4.

Plaintiff answered April 23, 2012, arguing at time of death, fetal gestational age was approximately 23 weeks, which is the viability threshold Pennsylvania courts recognize. See Plaintiff's Response, p. 4. Three days before Ryan Swindle died, a pediatric cardiologist estimated fetal gestational age at 22½ weeks. See Plaintiff's Response, Exhibit 1, Fetal Echocardiogram Report (4/23/01). Plaintiff argued if viability threshold is 23 weeks, the echocardiogram report creates a genuine issue of fact as to whether Ryan Swindle was viable when aborted. Plaintiff also argues said statute should be equitably tolled under the doctrine of fraudulent concealment. Plaintiff argued GSK's safety misrepresentations hindered her ability to discover what caused the birth defects prior and subsequent to said abortion. See Plaintiff's Response, p. 5. Plaintiff asserts whether GSK fraudulently concealed pregnancy risks associated with Paxil is a jury question. *Id.*

Defendant replied on April 30, 2012, reiterating Plaintiff cannot bring a wrongful death or survival action because the fetus was not viable as a matter of law. See Defendant's Reply, p. 2. Even if Plaintiff was 22½ weeks pregnant three days before the abortion, her claim she was "approximately" 23 weeks is

simply not enough to establish viability under Pennsylvania's bright-line rule. See Defendant's Reply, Executive Summary. Plaintiff elected to terminate her pregnancy just prior to the critical point when viability occurs. *Id.*

GSK further argued Plaintiff fails to establish fraudulent concealment and largely repeats her overarching "failure to warn claims" rather than establishing evidence that GSK committed "an affirmative, independent act of concealment directed towards Plaintiff upon which she justifiably relied." See Defendant's Reply, p. 3. Plaintiff cannot establish any specific "act" of GSK caused her to relax vigilance or deviate from inquiring. *Id.* The only potentially responsive argument Plaintiff makes is she allegedly called the GSK consumer response center in March 2007. However, the statute had already expired by the time she allegedly called. See Defendant's Reply, p. 4.

Trial Court Opinion, 11/9/2012, at 1-5.

The trial court granted GSK's motion for summary judgment and entered summary judgment in favor of GSK and against Thomas. **See** Order, 7/19/2012. In support of its ruling, the trial court, in its Pa.R.A.P. 1925(a) opinion, explained that Thomas "cannot overcome the critical viability threshold because she cannot prove the fetus actually reached 23 weeks," and that "[e]ven if the fetus was viable, [Thomas's] claims are barred by the applicable two-year statute [of limitations], which commences at death." Trial Court Opinion, *supra*, at 7. Thomas timely filed this appeal.²

² Thomas also timely complied with the order of the trial court to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. In her statement, Thomas framed her arguments as follows: "First, there is a genuine issue of material fact as to whether decedent Ryan Swindle was viable. ..."; "Second, it was error to rule that the statute of limitations bars (Footnote Continued Next Page)

Pennsylvania Rule of Civil Procedure 1035.2, regarding a motion for summary judgment, provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2. Furthermore, the following legal principles guide our review:

On appeal from an order granting a motion for summary judgment, our review is plenary, and we may reverse the order of the trial court only if that court committed an error of law or abused its discretion.

In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party

(Footnote Continued) _____

the Plaintiff's claims. GSK concealed the teratogenic risks of Paxil until December 2005, and GSK's concealment prevented the Plaintiff from adequately investigating the cause of her son's heart defect and subsequent death." Plaintiff-Appellant's Statement Pursuant to Appellate Rule 1925(b), 9/10/2012.

bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Pulli v. Ustin, 24 A.3d 421, 424–425 (Pa. Super. 2011) (citations omitted).

Thomas first claims that there is an issue of material fact regarding fetal viability that precludes summary judgment. Specifically, Thomas argues that the United States Supreme Court decision in **Planned Parenthood v. Casey**, 505 U.S. 833, 860 (1992), “expressly left open the possibility that viability could occur earlier than 23 weeks.” Thomas’s Brief at 10–11. Thomas further contends that this Court’s statement in **McCaskill v. Philadelphia Housing Authority**, 615 A.2d 382 (Pa. Super. 1992), that “the legal conclusion that viability occurs at 23-24 weeks is well supported in the medical literature,”³ is dicta since **McCaskill** involved a 17 week old fetus. In addition, Thomas argues that a jury could infer the fetus was 23 weeks at the time of death since, when an echocardiogram was performed three days prior to death, the pediatric cardiologist estimated the fetal gestational age as 22½ weeks. **Id.** at 11. We decline to reach this issue,

³ **McCaskill**, at 384, citing **Planned Parenthood v. Casey**, 505 U.S. 833, 860 (1992).

however, since the second issue, regarding the fraudulent concealment doctrine, is dispositive.

Here, Pennsylvania's two-year statute of limitations applies to Thomas's wrongful death and survival claims. **See** 42 Pa.C.S. § 5524(2) & (7). Wrongful death and survival actions accrue not at the time the cause of death becomes reasonably known, but at the time of death itself. ***Pastierik v. Duquesne Light Company***, 526 A.2d 323, 326-327 (Pa. 1987). Since the death in this case occurred on April 26, 2001, the statute of limitations would have expired on April 26, 2003. Thomas, however, asserts that Pennsylvania's "fraudulent concealment doctrine" tolled her claims until December, 2005, when GSK changed the warnings for Paxil, and therefore the action she commenced in 2007 is not time-barred.

The doctrine of fraudulent concealment was recently explained by this Court as follows:

The doctrine of fraudulent concealment is an exception to the requirement that a complaining party must file suit within the statutory period. Where, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations. The defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient ... mere mistake, misunderstanding or lack of knowledge is insufficient however, and the burden of proving such fraud or concealment, by evidence which is clear, precise and convincing, is upon the asserting party.

Baselice v. Franciscan Friars Assumption BVM Province, Inc., 879 A.2d 270, 278 (Pa. Super. 2005).

“In order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiff justifiably relied.” ***Id.*** Additionally, it is [plaintiff’s] burden to prove active concealment by clear and convincing evidence. ***Montanya v. McGonegal***, 757 A.2d 947, 951 (Pa. Super. 2000).

Pulli v. Ustin, supra, at 426.

In the present case, on the issue of the statute of limitations, the Honorable Sandra Mazer Moss opined:

Even if the fetus was viable, Plaintiff's claims are barred by the applicable two-year statute, which commences at death. Plaintiff failed to file her complaint until November 27, 2007—more than six years after abortion. See Defendant's Motion, p. 4. The death occurred on April 26, 2001. See Defendant’s Motion, Exhibit 2, Fetal Death Certificate. Thus the statute of limitations would have expired on April 26, 2003.

“There are exceptions that act to toll the running of a statute of limitations. The discovery rule and the doctrine of fraudulent concealment are such exceptions.” See *Fine v. Checcio*, 582 Pa. 253, 266 (Pa. 2005). “The purpose of the discovery rule has been to exclude from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury is reasonably unaware he has been injured, so that he has essentially the same rights as those who have suffered such an injury.” *Id.* at 266-267, citing *Hayward v. Medical Center of Beaver County*, 530 Pa. 320, 608 A.2d 1040, 1043 (Pa. 1992). “Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law.” *Id.* at 268, citing *Pocono International Raceway, Inc. v.*

Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983).

However, Pennsylvania law has held the “discovery rule...[does] not function so as to extend the period for filing wrongful death or survival actions.” See *Molineux v. Reed*, 516 Pa. 398, 402 (Pa. 1987). Here, Plaintiff suffered a clear and immediately apparent injury—her son’s death. Therefore, the statute commenced at death making the discovery rule inapplicable as a matter of law.

“Fraudulent concealment provides a Defendant may not invoke the Statute if, through fraud or concealment, it caused Plaintiff to relax vigilance or deviate from her inquiry.” See *Fine*, 582 Pa. at 271. “The doctrine does not require fraud in the strictest sense encompassing intent to deceive, but rather fraud in the broadest sense, including unintentional deception.” *Id.* at 271. “Mere mistake, misunderstanding or lack of knowledge is insufficient however, and the burden of proving such fraud or concealment, by evidence which is clear, precise and convincing, is upon the asserting party.” See *Baselice v. Friars Assumption BVM Province*, 879 A.2d 270 (Pa. Super. 2005) citing *Kingston Coal Company v. Felton Min. Co., Inc.*, 456 Pa. Super. 270, 690 A.2d 284, 290 (Pa. Super. 1997) (internal quotation marks omitted). “Moreover, in order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiff justifiably relied.” *Id.* “A statute of limitations tolled by fraudulent concealment commences when the injured party knows or reasonably should know her injury and its cause.” See *Fine*, 582 Pa. at 272.

In the instant case, Plaintiff has not shown Defendant concealed information which prevented her from investigating what caused her son’s death. Plaintiff does not allege any concealment beyond those encompassing general failure to warn. Paxil’s public label as a pregnancy Category C drug prior to December 2005 does not constitute an affirmative act. Labeling Paxil a Category C drug was general systematic public conduct and is not an affirmative act directed at this specific Plaintiff. GSK changed Paxil to a Category D drug once additional medical studies were completed. This information was publicly available on GSK and FDA websites, as well as in a “Dear Doctor” letter

sent to prescribing physicians. See GlaxoSmithKline, *Important Prescribing Information, December 2005*, available at <http://www.fda.gov/downloads/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/UCM164864.pdf> (last visited on Oct. 12, 2012). See also U.S. Food and Drug Administration, *FDA Advising of Risk of Birth Defects With Paxil, Agency Requiring Updated Product Labeling, December 8, 2005*, available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2005/ucm108527.htm> (last visited Oct. 12, 2012). Mere mistake or lack of knowledge is insufficient. See *Kingston*, 456 Pa. Super. at 283. Therefore, labeling Paxil a Category C drug prior to December 2005 cannot constitute fraudulent concealment.

Plaintiff's alleged phone call to a GSK customer service representative on March 8, 2007, where she mistakenly learned Paxil was a Category C drug, is irrelevant as the statute expired in 2003. See Plaintiff's Response, Exhibit 2, Affidavit of JoAnne Thomas. Moreover, Plaintiff admitted the representative later corrected said mistake and informed her Paxil was a Category D drug. *Id.* She also admitted prior to calling a click on GSK's website revealed Paxil had been upgraded to Category D. *Id.* Paxil was publicly upgraded from Category C to Category D in December 2005. See U.S. Food and Drug Administration, *FDA Advising of Risk of Birth Defects With Paxil, Agency Requiring Updated Product Labeling, December 8, 2005*, available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2005/ucm108527.htm> (last visited Oct. 12, 2012). The alleged phone call did not take place until March 2007, almost six years after the abortion and 15 months after Paxil was relabeled. See Defendant's Reply, Exhibit 2, Amended Pregnancy Fact Sheet (12/9/10). Plaintiff must use all reasonable diligence to obtain facts and circumstances upon which recovery might be based. See *Pocono International*, 468 A.2d at 471. Plaintiff did not comply. Therefore, the phone call is a nonissue. Finally, Plaintiff has failed to show an independent act of concealment upon which she relied. Thus, the doctrine of fraudulent concealment cannot apply.

... [E]ven if we found viability, Plaintiff's claims are barred by the statute of limitations. She immediately knew her injury, yet took no investigative action until March 2007, almost six years later. Despite Plaintiff's assertions, she has failed to show

any affirmative act of concealment upon which she relied to her detriment. Therefore, Plaintiff has failed to meet her burden under the doctrine of fraudulent concealment and the two-year statute commenced at abortion.

Trial Court Opinion, *supra* at 7–10 (emphasis supplied)(some quotations and citation omitted).

Pennsylvania precedent supports the trial court’s decision. As already mentioned, the plaintiff bears the burden of proof, and must demonstrate fraudulent concealment by “clear, precise, and convincing evidence.” *Pulli v. Ustin, supra*, 24 A.3d at 426 (citation omitted). This Court has emphasized that the alleged act must have caused the plaintiff “to deviate from the right of inquiry” as to the matter upon which he has commenced suit. *Gravinese v. Johns-Manville Corporation*, 471 A.2d 1233, 1238 (Pa. Super. 1984). “In general, this requires that a defendant has done something amounting to an affirmative inducement to plaintiff to [cause him to] delay bringing the action.” *Id.* Therefore, “in order for fraudulent concealment to toll the statute of limitations, the defendant must have committed **some affirmative independent act of concealment upon which the plaintiffs justifiably relied.**” *Kingston Coal Company v. Felton Min. Co., Inc.*, 690 A.2d 284, 291 (Pa. Super. 1997) (citation omitted) (emphasis supplied), *appeal denied*, 700 A.2d 441 (Pa. 1997). **See Mest v. Cabot Corporation**, 449 F.3d 502, 517 (3d Cir. 2006) (no fraudulent concealment where there were no statements directly from defendant to plaintiff); *Cicarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d

548, 557 (3d Cir. 1985) (no fraudulent concealment based on evidence defendant withheld information from the public); ***Speicher v. Dalkon Shield Claimants Trust***, 943 F.Supp. 554, 559 (E.D. Pa. 1996) (applying Pennsylvania law, fraudulent concealment requires act of concealment directed at specific plaintiff rather than general public). ***Compare Urland v. Merrell-Dow Pharmaceuticals, Inc.***, 822 F.2d 1268 (3d Cir. 1987) (defendant's letter to plaintiff denying drug could have caused plaintiff's injuries might amount to fraudulent concealment).⁴

Here, the trial court determined that, since the conduct alleged was a general failure to warn the public that Paxil may be harmful to an unborn child, as opposed to conduct directed specifically toward Thomas, GSK's conduct did not amount to fraudulent concealment. Based on our review, we find no error. The trial court's decision is sound.⁵

⁴ While decisions of the federal court of appeals and district courts are not binding on this Court, we may consider them as persuasive authority. ***Chester Carriers, Inc. v. National Union Fire Ins. Co. of Pittsburgh***, 767 A.2d 555, 560 (Pa. Super. 2001).

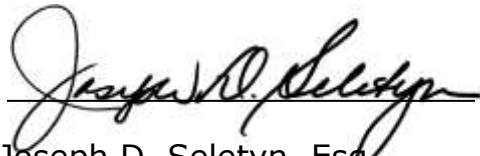
⁵ Thomas also makes the argument that, in pharmaceutical cases, because Pennsylvania's learned intermediary doctrine "presumes that patients receive information about a drug's risks from their physicians, not directly from drug manufacturers," the doctrine of fraudulent concealment should not be limited to misrepresentations specifically made to the patient or decedent's family. Thomas's Brief at 17. This argument, however, was not presented in Thomas's Rule 1925(b) concise statement, and was not addressed by the trial judge in her opinion. Therefore, we will not address it. **See** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement (Footnote Continued Next Page)

The determination of whether statements in question amount to fraudulent concealment is a question for the court rather than the jury. ***Nesbitt v. Erie Coach Co.***, 204 A.2d 473, 477 (Pa. 1964). Because Thomas never alleged any affirmative misrepresentations directed specifically at her, we conclude the trial court properly determined that the fraudulent concealment doctrine did not apply, and that GSK was entitled to summary judgment as a matter of law. **See** Pa.R.C.P. 1035.2(1), ***supra***. Accordingly, we affirm.

Order affirmed.

Strassburger, J., files a concurring memorandum.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/27/2013

(Footnote Continued) _____

and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.”).