JONES WALKER

E*ZINES
June 2008 Vol. 89

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NAME BRAND DRUG MANUFACTURER OWES NO DUTY TO CONSUMER OF GENERIC EQUIVALENT

***Stanley v. Wyeth, Inc.*, Nos. 2007-CA-2080, 2007-CA-2081, (La. App. 1st Cir. May 2, 2008), 2008 WL 1930154.**

Stephanie Arculeer Stanley suffered from a non-life-threatening heart condition for which her doctor prescribed Cordarone. Cordarone is a brand name for the drug amiodarone that Wyeth Pharmaceuticals, Inc. ("Wyeth") manufactures and sells. When Stanley filled this prescription, the pharmacist filled it with a generic version of amiodarone, made by Sandoz, Inc. Stanley took this generic drug as prescribed, and subsequently developed severe liver complications, an alleged side effect of the drug. Following two liver transplants, Stanley passed away.

Although Stanley never took Wyeth's brand name drug Cordarone, the Stanley family filed suit against Wyeth. Since Stanley never took the drug, the Stanley family did not have a claim under the Louisiana Products Liability Act, but rather asserted a claim of negligent misrepresentation against Wyeth. Subsequently, Wyeth filed an exception of no cause of action, arguing it owed no duty to the plaintiffs. The trial court granted Wyeth's exception and dismissed the Stanley family's claims.

On appeal, the Louisiana First Circuit Court of Appeal affirmed the trial court judgment dismissing the Stanley family's claims. The initial inquiry in a negligent misrepresentation claim is whether, as a matter of law, a duty is owed to this particular plaintiff to protect him from this particular harm. In Louisiana, a drug manufacturer generally has no duty to warn the consumer directly of any risks or contraindications associated with its product; the duty of warning is owed to the physician under the learned intermediary doctrine. In this case, the initial inquiry was whether a manufacturer had a duty to an individual who neither ingested the product nor himself relied upon the manufacturer's representations.

In affirming the trial court's decision, Judge Downing relied on decisions of other jurisdictions because this was a question of first impression. The Court, following the Pennsylvania case *Colaciccio v. Apotex*, 4532 F. Supp. 2d 514 (E.D. Pa. 2006), held that a name brand drug manufacturer owes no legal duty to the consumer of a generic equivalent of its drug. The Court held that it would be unreasonable to require a manufacturer to expect that a consumer would rely on the information it provided while actually ingesting another company's drug. Accordingly, the Court affirmed the trial

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court's dismissal of the Stanley family's claims against Wyeth since Wyeth owed no legal duty to Stanley.

– *Sara C. Valentine*

PLAINTIFFS CAN'T PROVE THAT INADEQUATE WARNING ON ANTI-DEPRESSANT CAUSED SUICIDE

***Eschete v. Roy*, 2008 WL 1924121 (E.D. La. Apr. 29, 2008)**

Justin Eschete was treated at River Oaks Hospital in November 2004 after it was discovered that he was diverting Demerol from a hospital where he worked. At River Oaks, he came under the care of Dr. Kennison Roy. Eschete was tested for suicidal tendencies and suicidal risks, and results were negative. Dr. Roy diagnosed Eschete with depression and prescribed Cymbalta, which Eschete took during his five-day stay at River Oaks. Upon discharge, Eschete was given another 30-day prescription for Cymbalta, which he had filled. Shortly thereafter, Eschete was admitted to Red River Treatment Center and began a 21-day treatment program, during which he took Cymbalta on a daily basis. Approximately 19 days after his discharge from Red River, Eschete committed suicide.

Eschete's surviving spouse and children filed suit against Eli Lilly & Company ("Lilly"), alleging that Eschete's suicide was caused by Cymbalta. Specifically, plaintiffs alleged that Lilly failed to adequately warn of an alleged link between Cymbalta and suicide and that Cymbalta was unreasonably dangerous under the Louisiana Products Liability Act. Plaintiffs also alleged that Cymbalta was defectively designed.

Lilly filed a motion for summary judgment on two grounds. First, Lilly argued that plaintiffs could not prove causation as a matter of law because there was no evidence that Eschete was taking Cymbalta at the time of his death. The court did not grant summary judgment on this issue, finding that there was circumstantial evidence supporting both parties on this issue.

Lilly also argued that plaintiffs could not establish their burden of inadequate warning. Specifically, Lilly argued that plaintiffs could not prove that the manufacturer failed to warn the physician of the risk and that the failure to warn was both a cause in fact and the proximate cause of the injury. Plaintiffs argued that the learned intermediary doctrine did not apply because the Federal Drug Administration specifically required direct warnings of suicidal tendencies be made to patients and that there was no evidence of such warnings. Plaintiffs also asserted that the warning given to the physicians was inadequate because it did not list either suicide or attempted suicide as a side effect.

The court found that the learned intermediary doctrine applied and granted summary judgment to Lilly. The court cited *Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 265 (5th Cir. 2002), which noted that the learned intermediary doctrine "discharges a drug manufacturer's duty to consumers by reasonably informing prescribing physicians of the dangers of harm from a drug. A two prong test is employed

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in which the plaintiff must show: (1) that the defendants failed to warn (or inadequately warned) the physician of a risk associated with the product that was not otherwise known to the physician and (2) that this failure to warn the physician was both a cause in fact and the proximate cause of the plaintiff's injury." Causation would be established only if the plaintiff could prove that "a proper warning would have changed the decision of the treating physician, *i.e.*, that but for the inadequate warning, the treating physician would not have used or prescribed the product."

The court found a recent ruling by the Fifth Circuit directly on point. In *Ackerman v. Wyeth Pharmaceuticals*, 2008 WL 1821379 (5th Cir. Apr. 24, 2008), the Fifth Circuit affirmed summary judgment in favor of a drug manufacturer, "finding that even if there was an issue of fact concerning the accuracy of the label, the decedent's psychiatrist testified unequivocally that he would have prescribed the drug even if the warning had been stronger." Here, like *Ackerman*, the prescribing physician, Dr. Roy, testified that "even if a different warning had been supplied, he would not have changed his decision to prescribe the drug" and that the current package insert, which was not in place at the time of his treatment of Eschete, would not have changed his decision. As in *Ackerman*, the court found that this testimony defeated plaintiffs' inadequate warning claim. The court also noted that, contrary to plaintiff's assertions, the package insert available in November 2004 included suicide information. Accordingly, the court granted summary judgment in favor of Lilly.

– *Amy W. Truett*

DAMAGED CROPS AND ALTERNATIVE DESIGN EVIDENCE KEEPS HERBICIDE DEFECT CLAIM ALIVE

***Dawson Farms, LLC v. BASF Corp.*, 2008 WL 2048241 (W.D. La. May 13, 2008)**

Dawson Farms, LLC filed suit against BASF Corp. for damage to its crops as a result of using a BASF manufactured herbicide called Outlook. During the 2005 growing season, Dawson treated its sweet potatoes with Outlook. Dawson alleged that Outlook caused severe damage to its crops by producing stunted and malformed sweet potatoes. Dawson also claimed that the damage from Outlook was more severe than that which would have been expected with Dual, another herbicide BASF previously manufactured for sweet potato crops but stopped once Outlook was marketed for sweet potatoes.

This suit was filed in the United States District Court for the Western District of Louisiana, Monroe Division, before Judge Robert G. James. Dawson brought claims against BASF for redhibition, breach of contract, negligence, and negligent misrepresentation. Dawson also alleged that BASF was liable under the Louisiana Unfair Trade Practices Act and the Louisiana Products Liability Act. BASF moved for summary judgment on all claims.

Judge James granted BASF's motion as to the negligence, negligent representation, and Louisiana Unfair Trade Practices Act claims but denied summary judgment for Dawson's redhibition, breach of warranty, and Louisiana Products Liability Act claims.

As it relates to product design, Dawson argued that Outlook was unreasonably dangerous in design under the Louisiana Products Liability Act. Judge James held that Dawson presented evidence creating genuine issues of fact on the likelihood and gravity of damages from Outlook's design. Dawson also presented evidence that there was a reasonable alternative design for a sweet potato herbicide. Specifically, Dawson had expert testimony demonstrating that the Dual herbicide previously manufactured by BASF is a herbicide in the same chemical family as Outlook, but with an alternative design that makes it a safer sweet potato herbicide.

In reaching his decision, Judge James observed that to avoid summary judgment on a defective design claim, a plaintiff must usually present evidence regarding the burden on the manufacturer of adopting an alternative design. However, a finder of fact can assess the burden on the manufacturer of adopting the alternative design when, as here, the alternative design and allegedly defective design are both actually made by the same manufacturer. Dawson's evidence suggested that the cost of adopting the alternative design was negligible because BASF already manufactured a product with the alternative design. As a result, Judge James concluded that a reasonable juror could decide from these facts that BASF, with little cost, could simply continue to market Dual, a product that it was already making in 2005.

Judge James' decision to deny summary judgment for BASF as to Dawson's products liability claim was based heavily on BASF's role in manufacturing the herbicide at issue in the case and an alternative herbicide which had previously been used on sweet potato crops. This, along with Dawson's combination of evidence on the extent of crop damages and a safer alternative design was sufficient to create a genuine issue of material fact as to whether BASF violated the Louisiana Products Liability Act.

– *Michael B. DePetrillo*

CLOTHES DRYER FIRE PRODUCTS LIABILITY AND REDHIBITION CLAIMS SURVIVE

***Wells v. General Electric Co.*, 2008 WL 2026112 (W.D. La. May 8, 2008)**

In 2006, Arelee Wells purchased a clothes dryer manufactured by General Electric Company ("GE"). On December 9, 2006, the dryer failed, causing a fire which damaged Ms. Wells' home and personal property. Wells believed the fire resulted from a defect in the dryer. Wells filed suit against GE.

Wells' petition contained the headings "Manufacturer's Products Liability: Negligence" and "Manufacturer's Product Liability; Strict Liability," and references throughout to "negligent design," "negligent manufacturing," and "strict liability." It also contained specific references to the LPLA and redhibition, including allegations that the dryer design and manufacture was defective and unreasonably dangerous. The LPLA provides for the exclusive theories of liability for manufacturers for damages caused by their products. These exclusive theories of recovery are: (1) defect in the construction or

composition; (2) defect in design; (3) inadequate warning; or (4) failure to comply with an express warranty.

GE filed a motion to dismiss all of plaintiff's claims falling outside of these exclusive theories of recovery. GE argued that Wells' repeated use of the word negligence was an attempt to assert independent cause of action for negligence.

Judge Hicks determined that Wells had pleaded enough facts for their claims under the LPLA and for redhibition to survive GE's motion to dismiss. The Court found Wells' mere use of the word "negligence" in the pleading did not indicate an intent to assert negligence as an independent cause of action. Despite the repeated use of the word, Wells also made repeated and specific references to the LPLA and redhibition. Accordingly, the Court denied the motion in part, allowing Wells' LPLA and redhibition claims and granted the motion in part, dismissing any other causes of action.

– *Wade B. Hammett*

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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