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Allocatur Denial May Mean Hundreds of HRT Cases Remain in Phila.

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Pennsylvania Superior Court Judge Correale Stevens

Judge Mary Jane Bowes

The state Supreme Court's denial Thursday of a drug manufacturer's request to hear more than a dozen hormone-replacement therapy tort cases could keep hundreds of cases on the Philadelphia Common Pleas Court's dockets.

When the state Superior Court overturned Philadelphia Common Pleas Court Judge Allan L. Tereshko's grant of summary judgment in favor of Wyeth Pharmaceuticals and Pharmacia & Upjohn in 14 consolidated cases, the intermediate court said it is a question of fact, not a question of law, whether the plaintiffs could have known at the time of their diagnoses with breast cancer that the alleged cause of their cancer was their HRT prescriptions.

Tobi Millrood, plaintiffs' liaison counsel for the HRT program and of Pogust Braslow & Millrood in Conshohocken, Pa., said that his co-counsel and he estimate that 50 to 60 percent of the 1,000 cases left in the Philadelphia HRT mass tort program involved the discovery rule.

The manufacturers of HRT drugs argued that the plaintiffs' two-year statute of limitations ran from the day they were diagnosed with breast cancer, while the plaintiffs argued that an alleged link between HRT drugs and breast cancer was not known prior to the release of the Women's Health Initiative study on July 9, 2002. The study received wide-ranging notoriety because the study was discontinued out of the concern that the study participants taking HRT were showing a higher rate of breast cancer than the control group, among other reasons.

With the Supreme Court's affirmation, the decision by Superior Court President Judge Correale F. Stevens, Judge Mary Jane Bowes and Senior Judge James J. Fitzgerald could become the most cited pharmaceutical negligence case in Pennsylvania, Millrood said.

"It will provide a bedrock principle that the discovery rule is applicable in Pennsylvania and is a question of fact that is left for the jury," Millrood said.

The decision has wider implications in pharmaceutical cases because "many times the cause of an injury is hidden from the physician and plaintiff," Millrood said. "It's not until some kind of significant scientific development or some study or some announcement comes out that the plaintiff can learn the cause. At that point it kicks in the discovery rule."

But Millrood said that he didn't think Pfizer, which now owns both Wyeth and Pharmacia & Upjohn, was holding out hope that the Superior Court was going to be reversed because he said the trial court's opinion was an "outlier" and the Superior Court's opinion was in line with other appellate rulings on how the discovery rule should be applied.

"Given the way the Supreme Court and the appellate courts are interpreting this, we would have been a little surprised if they took up something that didn't have a new wrinkle to it," Millrood said.

Tereshko granted defense motions for summary judgment in all of the cases because, he said in his opinions, there was sufficient public information at the time all of the plaintiffs were diagnosed with breast cancer for the plaintiffs to learn that there was a risk of developing breast cancer from taking HRT drugs. He also said that many of the plaintiffs were on notice of a link between HRT and their cancer because their doctors told them to stop using HRT after their diagnoses.

However, the three-judge Superior Court panel agreed with the plaintiffs' theory, finding that the discovery rule may have tolled their statute of limitations until the release of the WHI study. The court said it is jurors, not judges, who must decide if the plaintiffs made reasonable efforts to discover that the alleged cause of their breast cancer may have stemmed from third-party drugmakers.

Defendant Upjohn made Provera, a synthetic form of the hormone progesterone. Wyeth made Premarin, an estrogen drug, and Prempro, a combination estrogen-synthetic progesterone drug. Both pharmaceutical companies are now subsidiaries of drugmaker Pfizer.

The Supreme Court denied allocatur in the cases of *Coleman v. Wyeth, Medwid v. Wyeth, Weinberger v. Wyeth, Reed v. Wyeth, Taw v. Wyeth, Morales v. Wyeth, Lenzi v. Wyeth, Schirn v. Wyeth, Fleming-Crain v. Wyeth, Honaker v. Wyeth, Hansen v. Wyeth, Blaylock v. Wyeth, Manalo v. Wyeth* and *Hess v. Wyeth.*

Coleman is Pennsylvania's second precedent-setting decision regarding HRT litigation.

"While we are disappointed with the court's decision, it is a procedural ruling and not one on the merits of these 14 consolidated cases," Pfizer's subsidiaries, Wyeth and Pharmacia & Upjohn, said in a statement. "This merely returns the cases to a lower court for further proceeding to determine the merits of the plaintiffs' lawsuits."

Further, the company said that it has a "strong record of success in defending cases," including prevailing on the issue of statute of limitations in a ruling Thursday by a federal court in Mississippi.

Finally, the company said that HRT is an important treatment option for women with menopausal symptoms and that many risk factors are associated with breast cancer.

Robert C. Heim of Dechert is Pfizer's counsel, and the defendant liaison counsel to Philadelphia's HRT mass tort program. •