In the Superior Court of Pennsylvania

No. 2905 EDA 2008

PATSY LANCE, Administratrix for the Estate of
CATHERINE RUTH LANCE, Deceased,
Appellant,

v.

WYETH, f/k/a
AMERICAN HOME PRODUCTS CORP.

APPELLANT'S ANSWER IN OPPOSITION TO WYETH'S APPLICATION FOR RECONSIDERATION OR REARGUMENT

On Appeal from the Judgment of the
Court of Common Pleas of Philadelphia County, Pennsylvania,
Civil Trial Division, November Term 2006, No. 926

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I. INTRODUCTION

Plaintiff/appellant Patsy Lance, administratrix for the estate of Catherine Ruth Lance, deceased, respectfully files this Answer in opposition to the Application for Panel Reconsideration or *En Banc* Reargument that defendant/appellee Wyeth has filed.

Wyeth seeks reconsideration or reargument on three grounds.

First, Wyeth asserts that plaintiff supposedly failed to preserve for appellate review the issue whether a claim for negligent design defect may be asserted against the manufacturer of a prescription drug.

Second, Wyeth asserts that the panel's decision recognizing that someone injured as the result of ingesting a prescription drug may assert a claim for negligent design defect against the drug's manufacturer is supposedly contrary to two earlier rulings of the Supreme Court of Pennsylvania and an opinion in support of affirmance issued by an evenly divided en banc panel of this Court.

Third and finally, Wyeth asserts for the first time ever in this case both that plaintiff's complaint supposedly fails to allege the elements of a negligent design defect claim and that the manufacturer of a prescription drug supposedly cannot be liable for negligent design defect if another prescription drug manufacturer is alleged to have originally designed the defective medication.

For the reasons explained below, none of the grounds for reconsideration or rehearing that Wyeth advances has any merit. Accordingly, Wyeth's application for reconsideration or reargument should be denied.

II. ANSWER IN OPPOSITION TO WYETH'S APPLICATION FOR RECONSIDERATION OR REARGUMENT

A. As The Three–Judge Panel's Opinion Correctly Recognizes, Plaintiff Has Preserved Her Appellate Challenge To The Trial Court's Grant Of Summary Judgment On Plaintiff's Negligent Design Defect Claim

The panel's opinion recognizes, and Wyeth's application for reconsideration or reargument does not dispute, that plaintiff's complaint sought to assert a claim for negligent design defect against Wyeth. Plaintiff accomplished this by incorporating the negligence count contained in the master long form complaint filed in the underlying Fen–Phen mass tort proceedings pending in the Court of Common Pleas for Philadelphia County. That negligence count included a claim for negligent design defect.

Nevertheless, Wyeth maintains in its application that the panel should have found that plaintiff's challenge to the trial court's entry of summary judgment on plaintiff's negligent design defect claim was waived because plaintiff supposedly: (1) failed to argue against dismissal of her negligent design defect claim in opposing Wyeth's motion for summary judgment; (2) failed to raise the issue in her Rule 1925(b) statement of errors complained of on appeal; and (3) failed to raise the issue with sufficient specificity in her statement of issues in the Brief for Appellant.

This ground for reconsideration or reargument lacks merit, because — as the record on appeal reflects — plaintiff did not waive her appellate challenge to the trial court's entry of summary judgment against plaintiff's negligent design defect

claim. Plaintiff now responds in turn to each of Wyeth's unsubstantiated allegations of waiver.

(1). At pages 10 and 11 of her brief filed in the trial court in opposition to Wyeth's motion for summary judgment, plaintiff made clear that she incorporated from the master long form complaint a claim against Wyeth for negligent design defect. R.134a–35a. Thus, plaintiff expressly noted for the trial court's benefit that she was asserting a negligent design defect claim against Wyeth, and plaintiff argued in her trial court brief in opposition that Wyeth's motion for summary judgment should be denied as to all of plaintiff's claims. Wyeth's assertion that plaintiff waived her negligent design defect claim in opposing Wyeth's motion for summary judgment is accordingly incorrect.

(2). Plaintiff also preserved her appellate challenge to the trial court's entry of summary judgment against plaintiff's negligent design defect claim in the Rule 1925(b) statement that plaintiff filed in the trial court. The second numbered specification of error that plaintiff included in her Rule 1925(b) statement filed in this matter stated, in relevant part:

> 2. The trial court erred or otherwise abused its discretion in granting the Wyeth defendants' Motion for Summary Judgment based on Wyeth's contention that plaintiff, choosing not to pursue a claim of inadequate warning, has no cognizable claim against Wyeth, when no Pennsylvania case requires plaintiffs to prove inadequate warnings as an element of negligence claims against drug manufacturers * * *.

Plaintiff's Rule 1925(b) statement at page 2.

The trial court in this case had ruled (as evidenced by its later Rule 1925(a) opinion) that the only type of negligence claim that Pennsylvania law recognized

against a prescription drug manufacturer was a claim for negligent failure to warn. In the above–quoted specification of error, plaintiff asserted that the other claims of negligence that she had asserted against Wyeth in this case (including plaintiff's claim for negligent design defect) were cognizable under Pennsylvania law.

(3). The panel's opinion in this case quotes the question presented in plaintiff's Brief for Appellant, and thus Wyeth's assertion that the question presented did not fairly encompass plaintiff's challenge to the trial court's grant of summary judgment on plaintiff's negligent design defect claim is simply not credible. Stated plainly, plaintiff's negligent design defect claim is encompassed within plaintiff's assertion that "Wyeth was negligent in bringing Redux to the market," and thus Wyeth is incorrect in contending that the question presented in the Brief for Appellant failed to include plaintiff's negligent design defect claim.

The meritless nature of Wyeth's waiver argument is further evidenced by the fact that Wyeth never argued in its Brief for Appellee that plaintiff's challenge to the entry of summary judgment against her negligent design defect claim was waived, even though that challenge was unquestionably being advanced in plaintiff's opening brief on appeal. If Wyeth's waiver argument actually had merit, Wyeth's counsel would have and should have advanced that argument in Wyeth's Brief for Appellee, instead of waiting until the reconsideration/reargument stage of this proceeding to do so.

For the reasons explained above, Wyeth is incorrect in contending that plaintiff waived her challenge to the trial court's grant of summary judgment

against plaintiff's negligent design defect claim. As a result, Wyeth's application for reconsideration or reargument should be denied.

B. The Panel's Holding That One Who Is Injured As The Result Of Consuming A Prescription Drug Can Sue The Manufacturer For Negligent Design Defect Does Not Conflict With Any Ruling Of This Court Or The Pennsylvania Supreme Court

In its second ground for reconsideration or reargument, Wyeth asserts that the panel's recognition of a claim for negligent design defect against the manufacturer of a prescription drug supposedly conflicts with two rulings of the Supreme Court of Pennsylvania and the opinion in support of affirmance issued by an evenly divided en banc panel of this Court.

Wyeth first asserts that the panel's ruling is somehow contrary to the Supreme Court of Pennsylvania's ruling in *Baldino* v. *Castagna*, 505 Pa. 239, 478 A.2d 807 (1984). *Baldino*, however, did not consider whether a claim for negligent design defect could be brought under Pennsylvania law against the manufacturer of a prescription drug. Rather, the *Baldino* case involved a claim for negligent failure to warn.

The Court's statement in *Baldino* that the manufacturer of a prescription drug "is liable only if he fails to exercise reasonable care to inform those for whose use the article is supplied of the facts which make it likely to be dangerous" was made in the context of the Court's explanation that "a manufacturer of drugs is not strictly liable for unfortunate consequences attending the use of otherwise useful and desirable products which are attended with a known but apparently reasonable

risk." *Id.* at 244, 478 A.2d 810. Understood in this context, the Supreme Court's opinion in *Baldino* merely says that the plaintiff in a failure to warn case must prove negligence because the manufacturer of a prescription drug is not strictly liable for injuries caused by its products.

The Supreme Court's decision in *Baldino* does not purport to limit the types of negligence claims that may be asserted against the manufacturer of a prescription drug as the result of injuries caused by ingesting the manufacturer's products, and thus Wyeth's allegation that the panel's decision conflicts with *Baldino* is without merit.

Wyeth's contention that the panel's ruling is somehow in conflict with the Supreme Court's ruling in *Hahn* v. *Richter*, 543 Pa. 558, 673 A.2d 888 (1996), is likewise without merit. In *Hahn*, the Supreme Court merely held that claims sounding in strict liability cannot be maintained against prescription drug manufacturers for injuries caused by consuming their medications. The panel's opinion in this very case faithfully recognizes and applies that holding. *See* slip op. at 7. The Supreme Court's ruling in *Hahn* did not even purport to decide or restrict what types of negligence claims may be brought against the manufacturer of a prescription drug, and therefore Wyeth's contention that the panel's ruling conflicts with *Hahn* is meritless.

Lastly, Wyeth contends that the panel's ruling is somehow in conflict with the opinion in support of affirmance that an equally divided en banc panel of this Court issued in *Leibowitz* v. *Ortho Pharmaceutical Corp.*, 307 A.2d 449 (Pa. Super.

Ct. 1973) (en banc). What Wyeth's application for reconsideration or reargument improperly fails to acknowledge is that the six–judge en banc panel in *Leibowitz* failed to produce a majority opinion, dividing three–to–three over the proper outcome of the case. Even if the panel's opinion in this case were in conflict with the opinion in support of affirmance in *Leibowitz* — and no such conflict actually exists — any such conflict would be immaterial because the opinion in support of affirmance issued by an evenly divided Court in *Leibowitz* has absolutely no precedential effect. *See In re Griffin*, 690 A.2d 1192, 1201 (Pa. Super. Ct. 1997) (holding that an evenly divided en banc ruling of this Court "has no precedential authority"). Thus, this third and final supposed conflict on which Wyeth relies in seeking reconsideration or reargument is both substantively and procedurally without merit.

For the reasons explained above, the panel's ruling in this case does not conflict with any of the three decisions that Wyeth has identified in its application for reconsideration or reargument. As a result, Wyeth's application should be denied.

C. Wyeth's Newly Asserted Challenges To The Merits Of Plaintiff's Negligent Design Defect Claim Are Not Properly Raised For The First Time At The Reconsideration Or Reargument Stage

The third and final ground on which Wyeth seeks reconsideration or reargument consists of contentions that Wyeth never raised during the previous course of this litigation. Wyeth is now seeking to raise, for the very first time in this

case at the reconsideration or reargument stage, the argument that plaintiff's complaint supposedly does not adequately allege the elements of a negligent design defect claim. Wyeth further asserts, for the very first time in this litigation, that a manufacturer of a dangerous prescription drug cannot be liable for negligent design defect if a different prescription drug manufacturer allegedly was responsible for originally designing the prescription drug in question.

Although plaintiff is confident that neither of Wyeth's two newly raised arguments has merit, it surely is improper for Wyeth to attempt to raise these two merits–related arguments for the first time ever while this case is on appeal at the reconsideration/reargument stage. The contentions that Wyeth is seeking to advance are arguments that should be considered by the trial court in the first instance, if Wyeth has not already irrevocably waived them.

Because the third and final ground for reconsideration or reargument that Wyeth seeks to advance is not properly raised for the very first time in this case at this late stage of appellate proceedings, this Court should deny Wyeth's application for reconsideration or reargument.*

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* Before concluding, plaintiff wishes to note her objection to Wyeth's reliance in seeking reconsideration or reargument on an article that *The Legal Intelligencer* published reporting on the result in this appeal and in two related appeals that were argued in tandem with this case. The presence or absence of press coverage of a ruling is not a basis on which to seek or obtain reconsideration or reargument. And, for the reasons explained above, this case does not otherwise qualify for either reconsideration or reargument.

III. CONCLUSION

For the reasons set forth above, Wyeth's application for reconsideration or reargument should be denied.

Respectfully submitted,

Dated: September 2, 2010

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