NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARY AND DEAN PETTIT, INDIVIDUALLY AND DEAN PETTIT AS THE ADMINISTRATOR OF THE ESTATE OF DANIELLE PETTIT, A DECEASED MINOR Appellants v. GLAXOSMITHKLINE, LLC, FORMERLY SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE AND JOHN DOES 1-50	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 850 EDA 2012

Appeal from the Order Dated January 30, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2007, No. 3553

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

MEMORANDUM BY STRASSBURGER, J. Filed: March 4, 2013

Mary and Dean Pettit, individually, and Dean Pettit as the administrator of the estate of Danielle Pettit, a deceased minor (the Pettits), appeal from the order of January 30, 2012 granting summary judgment against them and in favor of Appellees, GlaxoSmithKline, LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline and John Does 1-50

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* Retired Senior Judge assigned to the Superior Court.

(GSK), in this action. Upon review, we affirm, albeit for reasons different than those of the trial court.[1]

On July 12, 1997, Mary gave birth to Danielle, who was shortly thereafter diagnosed with a congenital heart defect known as hypoplastic left heart syndrome. Danielle suffered a stroke the day after having surgery for this condition when she was eight months old. Danielle died in July 2007.

Subsequently, the Pettits learned that Danielle's heart condition may have been caused by Mary having taken Paxil[2] during her pregnancy; thus, on November 19, 2007, the Pettits filed a short-form complaint against GSK in conformity with the Paxil Pregnancy Mass Tort Program in the Court of Common Pleas of Philadelphia County.[3] The complaint asserted that Mary's ingestion of Paxil during the first trimester of her pregnancy caused Danielle to be born with the congenital heart defect that led to her death. The

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[1] "As an appellate court, we may uphold a decision of the trial court if there is any proper basis for the result reached; thus we are not constrained to affirm on the grounds relied upon by the trial court." ***In re Estate of Strahsmeier***, 54 A.3d 359, 364 n. 17 (Pa. Super. 2012), *reargument denied* (Nov. 8, 2012) (citing ***Nationwide Mut. Ins. Co. v. Fleming***, 924 A.2d 1259, 1269 (Pa. Super. 2007).

[2] Paxil is an antidepressant medication manufactured by GSK.

[3] It is undisputed that the Pettits are Ohio residents and all events surrounding this lawsuit occurred in Ohio, but the lawsuit was filed in Pennsylvania. "[The Pettits] originally opposed applying Ohio law but later conceded the same." Trial Court Opinion, 6/12/2012, at 4. Accordingly, the trial court assessed the Pettits' claims under Ohio law and we will review the substantive issues similarly.

complaint set forth numerous causes of action, and relevant to this appeal, the Pettits asserted that 1) GSK was negligent in failing to warn her prescribing physician properly of this harmful side effect, 2) negligent misrepresentation, and 3) design defect.

On February 7, 2011, GSK filed a motion for summary judgment asserting that under Ohio law, it was entitled to summary judgment for several reasons. First, summary judgment would be proper because the Pettits have failed to establish proximate cause. Specifically, GSK asserted that the Pettits did not produce evidence that Mary actually took Paxil and even if Mary did take Paxil the claim would fail under the learned intermediary doctrine. GSK also asserted that the design defect and negligent misrepresentation claims have been preempted by the Ohio Products Liability Act (OPLA), Ohio Rev. Code Ann. §§ 2307.71 - 2307.801 (West 2007). Furthermore, even if the claims were not preempted by OPLA, the design defect claim would not survive summary judgment because the Pettits' did not produce evidence of a feasible alternative design and the negligent misrepresentation claim would fail because the Pettits' did not produce evidence of a false statement by GSK. After briefing and argument, in an order dated January 27, 2012 and filed on January 30, 2012, the trial court granted summary judgment in favor of GSK. The Pettits filed a timely notice of appeal. Both the Pettits and the trial court complied with Pa.R.A.P. 1925.

On appeal, the Pettits present the following issue for our review:

> In a pharmaceutical products liability action, in which the trial court rejected the testimony of [Mary], her husband, and her sister that she ingested the drug, and also rejected other testimony that supported [the Pettits'] claim that she had received the drug before and during her pregnancy, did the trial court err by:
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> 1. Rendering credibility determinations and concluding, as a result of those determinations, that the evidence warranted the entry of summary judgment;
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> 2. Concluding that the matter was barred under Ohio law by the learned intermediary doctrine[;]and,
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> 3. Failing to properly address [the Pettits'] claims of negligent misrepresentation and design defect?

The Pettits' Brief at 3.

We set forth our well-settled scope and standard of review.

> Our scope of review of an order granting summary judgment is plenary. [W]e apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view 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. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered.
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> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of her cause of action. Summary judgment is proper 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. Thus, a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts

> to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review, we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate court may disturb the trial court's order only upon an error of law or an abuse of discretion.
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> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.

Lineberger v. Wyeth, 894 A.2d 141, 145-46 (Pa. Super. 2006) (internal citations and quotations omitted).

We first consider whether the trial court erred as a matter of law in concluding that Mary had not taken Paxil during her pregnancy. The Pettits' Brief at 13-22. In support of its conclusion, the trial court offered the following analysis.

> Other than Mary's own testimony, supported by her husband, there is no other evidence she took Paxil before, during or after her pregnancy. There is absolutely no documentary evidence - no doctor, hospital, pharmacy or medical record of any kind - which indicates Mary took Paxil.
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> Mary testified she first received Paxil from her family doctor, George Huntress, beginning September 1996. She claims Dr. Huntress gave her additional samples again in October and November 1996. Although she conceived approximately November 7, 1996, Mary testified she took Paxil until November 13, 1996 when her obstetrician confirmed same. Dr. Huntress no longer practices medicine, nor recalls treating Mary (he did not even recognize her photograph). Moreover, there are no available medical records showing he treated her at all let alone prescribing Paxil.

> However, other contemporaneous medical records, including emergency room visits, indicate she took various other medications such as Ibuprofen, Bactrim, Motrin, Terazol and Flagyl. There is also evidence Mary's obstetrician, Dr. Rick Visci, prescribed Zoloft which she took from approximately November 1995 until March 1996 and again after her pregnancy. He never prescribed Paxil.

Trial Court Opinion, 6/12/2012, at 5-6.

While the trial court certainly makes a case for why a jury might not believe that Mary ever took Paxil at all, let alone during her pregnancy, such conclusions do not comport with the applicable standard for summary judgment. It is well-settled that "in considering [a motion for summary judgment], a lower court must thoroughly examine the whole record to determine whether there is a genuine issue as to any material fact, **with all doubts as to the existence of a genuine issue resolved against the moving party**." ***Coleman v. Wyeth Pharmaceuticals, Inc.***, 6 A.3d 502, 509 (Pa. Super. 2010) (emphasis added). Furthermore, "credibility of evidence is not a proper consideration at the summary judgment stage because the trial court may not summarily enter judgment when the evidence depends on oral testimony." ***Gutteridge v. A.P. Green Services, Inc.***, 804 A.2d 643, 652 (Pa. Super. 2002).

> Summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Only when the facts are so clear that reasonable minds cannot differ may a trial court properly enter summary judgment.

Moody v. Allegheny Valley Land Trust, 930 A.2d 505, 511 (Pa. Super. 2007) *aff'd*, 976 A.2d 484 (Pa. 2009).

In this case, Mary testified in her deposition that Dr. Huntress gave her a two-and-a-half month supply of Paxil in sample packaging, which she took from September through November 1996. N.T., 5/18/2010, at 18-21. Dean testified in his deposition that Mary took Paxil in the two to two-and-a-half months leading up to her pregnancy with Danielle. N.T., 5/19/2010, at 149. This testimony is sufficient to create a genuine issue of material fact requiring a jury to decide whether Mary actually took Paxil.[4] Accordingly, the trial court erred in concluding otherwise and improperly granted summary judgment on this basis.

However, our inquiry does not end there. To survive summary judgment in a pharmaceutical failure to warn case, the Pettits also have to

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[4] We further note that while Mary may not have ever told anyone that she took Paxil at any time prior to the filing of this lawsuit, she never stated that she did not take Paxil. For example, GSK points to the fact that when Mary was admitted to the emergency room in September 1996, she listed ibuprofen as her only medication. GSK's Brief at 17. GSK also notes that Mary's story changed between the inception of the lawsuit and her deposition as to who prescribed her Paxil, when the Paxil was prescribed, and how she got the Paxil (through prescription or samples). ***Id***. at 21-24. However, for the purposes of summary judgment, so long as Mary did not say that she was not taking Paxil, such inconsistencies do not create a conflict in the testimony such that a jury would have to speculate. It is well-settled that "[a] jury is not permitted … to speculate or guess; conjecture, guess or suspicion do not amount to proof." ***Lanni v. Pennsylvania R. Co.***, 88 A.2d 887, 889 (Pa. 1952).

show proximate causation. To that end, GSK asserts that the Pettits waived any claim regarding the issue of proximate causation, and even if they did not waive the issue, the claim still fails because Dr. Huntress testified that he could not recall ever reading the Paxil labeling. GSK's Brief at 28-38.

First, we consider GSK's contention that the Pettits have waived this issue on appeal. GSK's Brief at 28-30. GSK correctly observes that the Pettits' concise statement is devoid of any reference to this issue. "Generally, issues omitted from a [concise] statement are waived on appeal." ***Commonwealth v. Bowen***, 55 A.3d 1254, 1265 n.4 (Pa. Super. 2012). The basis of this rule stems from the fact that "[w]hen an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." ***In re Estate of Daubert***, 757 A.2d 962, 963 (Pa. Super. 2000). In ***Daubert***, we also observed that "[a]n issue not identified for review in a Rule 1925(b) statement is waived whether or not the lower court actually addresses the issue in an opinion." ***Id***. (citing ***Commonwealth v. Steadley***, 748 A.2d 707 (Pa. Super. 2000)).

In this case, the Pettits complied with the trial court order and filed a timely concise statement raising one issue, which read as follows:

> The trial court, in granting [GSK's] Motion for Summary Judgment, erred by:
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> a. Concluding that there was no evidence to demonstrate that [Mary] had taken Paxil during her pregnancy; and,

b. In ruling upon the motion, improperly evaluated the credibility of witnesses.

Statement of Matters Complained of on Appeal, 3/12/2012, at 1-2.

The trial court filed an opinion which addressed the issues raised by the Pettits and an additional issue, namely proximate causation and the learned intermediary doctrine. That issue had been raised, briefed, and argued in GSK's motion for summary judgment and the Pettits' responses thereto. Even though the trial court addressed the issue of the proximate causation and the learned intermediary doctrine in its opinion as an alternative basis for summary judgment, and our analysis would not be impeded, we are constrained to conclude that the Pettits' failure to include this issue in its concise statement prevents our review. Accordingly, we affirm the order granting summary judgment in favor of GSK.

Finally, we turn to the Pettits' third issue regarding the negligent misrepresentation and design defect claims under the OPLA. Once again, GSK contends these issues are waived because they were not raised in the Pettits' concise statement. GSK's Brief at 28. Based on the foregoing analysis, we are constrained to agree. Thus, the Pettits' are not entitled to relief on these issues.

Order affirmed.

Judge Lazarus Concurs in the Result.

Judge Ott Concurs in the Result.