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Panel Revives Plaintiff Verdict in State's First Precedential HRT Case

The Legal Intelligencer
 By Amaris Elliott-Engel
 January 12, 2010

In Pennsylvania's first precedent-setting decision regarding hormone replacement therapy mass tort litigation, the Superior Court has revived a plaintiff's lawsuit by finding that the plaintiff was entitled to an exception to the two-year statute of limitations because she couldn't have reasonably known of an alleged link between her breast cancer and HRT drugs before the publication of a widely publicized study.

Despite a \$1.5 million verdict in favor of plaintiff Merle Simon, Simon's lawsuit was dismissed because of the judgment notwithstanding the verdict granted by Philadelphia Common Pleas Judge Nitza Quiñones Alejandro.



BOWES: JNOV WRONGLY GRANTED

Superior Court Judges Mary Jane Bowes, Christine L. Donohue and Joan Orié Melvin, who was recently elected to the state Supreme Court, said the trial judge shouldn't have tossed the plaintiff's lawsuit because the suit was filed within two years of the July 9, 2002, publication of the National Institutes of Health's Women's Health Initiative, or WHI, study, which found that the use of hormone drugs estrogen and progestin increase the risk of breast cancer.

"Appellant had no reason even to suspect that there was a link between her use of HRT and breast cancer until the WHI report was released," Bowes wrote in the Dec. 31 *Simon v. Wyeth* opinion. "Under the totality of circumstances, which included the facts that none of her prescribing physicians told her there was a causal link between her HRT and breast cancer, and the product information for Provera [a progesterone hormonal substitute manufactured by Pharmacia & Upjohn Co., now owned by Pfizer] was entirely dismissive of any such connection ... it defies logic, contrary to the trial court's suggestion, that appellant [Simon] should have been aware of the risk of taking HRT through her own due diligence."

The trial judge granted JNOV on the statute of limitations question after finding that Simon reasonably should have known that one of her HRT drugs was a cause of her cancer and that her statute of limitations expired two years after her breast cancer diagnosis, *The Legal* previously reported. Simon is a New Jersey woman who was diagnosed with breast cancer May 21, 2002.

The Superior Court panel also said the trial judge should not have granted judgment notwithstanding the verdict on the issue of proximate causation. The trial judge found that Simon failed to establish proximate causation; the trial judge reasoned Simon failed to prove that a drug label warning of a greater risk of breast cancer to Provera's users would have altered the prescribing practices of Simon's physicians, Bowes said.

Howard J. Bashman, a Willow Grove, Pa., solo practitioner who writes an appellate law column for *The Legal*, argued on behalf of Simon. William Hoffman of Kaye Scholer in Washington, D.C., argued on behalf of Upjohn.

The *Simon* case is one of about 1,500 HRT cases filed in the Philadelphia courts. Plaintiffs' counsel are viewing the *Simon* decision as a promising harbinger for the dozens of other HRT cases that are on appeal. Bowes is a member of another panel that heard oral argument in July over consolidated appeals of cases dismissed via summary judgments on the statute of limitations question.

"It demonstrates there has been remarkably consistent jurisprudence on these issues from the courts of Pennsylvania and the 8th Circuit and the Prempro [federal] MDL [Multidistrict Litigation] and the state courts in New Jersey and Nevada," said Tobi Millrood, plaintiffs' liaison counsel for the HRT program and of Pogust Braslow & Millrood in Conshohocken, Montgomery County.

"All the state courts held the view that the discovery rule applies in all those cases and it's entirely unreasonable for a lay person to know at the time of her diagnosis what the companies themselves and the medical community did not know and that is combination hormone therapy causes breast cancer. Clearly, all the courts indicate that it was not until the WHI that it was reasonable for the injured plaintiffs to know the causes of their breast cancer."

The *Simon* ruling could reinstate 1,000 cases to the docket, said Simon's trial counsel, James A. Morris Jr. of the Morris Law Firm in Austin, Texas.

On the proximate cause issue, the panel resurrected the jury's verdict, finding that the jury reasonably concluded that

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Simon could have been one of her doctors' patients who would not have ingested HRT if Upjohn had adequately warned of the breast cancer risk.

Dr. Kenneth Dollinger, the only one of Simon's three doctors who remembered treating her, denied that there was a controversy in the 1990s concerning whether HRT caused breast cancer, Bowes said. But after the WHI study, Dollinger changed his prescribing practices, including warning patients about the breast cancer risks of HRT even if he still prescribed HRT to those patients, Bowes said. Simon also testified she would not have taken HRT if she had been warned of the increased risk of breast cancer from taking HRT.

"In the case at bar, the jury obviously believed the testimony of appellant's doctors that they would have permitted appellant to decide, based on the cancer risk that the WHI study revealed, whether to accept prescriptions for HRT," Bowes wrote. "The jury also apparently believed appellant's testimony that based on the WHI study findings, she would not have utilized HRT once her doctors communicated the information they presently share with patients regarding breast cancer risk."

Morris said Upjohn took the position that under Pennsylvania's learned intermediary doctrine a plaintiff must show that the plaintiff's prescribing doctor would not have prescribed the drug if the doctor knew then what the doctor knows now. But the court's ruling will let plaintiffs argue that they would have made a different choice about accepting a prescription if their doctors had been provided a different warning and then shared that information with them, Morris said.

Bashman said the *Simon* decision "recognizes the reality of present practices in the field of medicine where patients are often very much involved in determining whether or not they are receiving various medications."

Hoffman did not respond to a request for comment Monday. In an e-mailed statement, Pfizer spokesman Christopher Loder said: "We are disappointed with the Superior Court's ruling as we continue to believe the trial court's ruling in this case was proper, and that the court acted with appropriate discretion in granting our motion for judgment notwithstanding the verdict. We therefore intend to pursue all the legal options available."

"We are pleased that the Superior Court has asked the trial court to consider Pharmacia & Upjohn's motion for a new trial and we look forward to the trial court's consideration of the motion. While we have great sympathy for what Mrs. Simon and her family have been through, we believe Pharmacia & Upjohn acted responsibly with respect to Provera."

The Superior Court directed the trial court to file an opinion within 60 days of the appellate court's decision addressing a motion Upjohn made for a new trial. The trial judge did not address Upjohn's motion for a new trial because she granted the motion for JNOV.

Simon was prescribed Provera, a manufactured form of progestin, which is manufactured by Upjohn Co., and Premarin, a form of estrogen manufactured by Wyeth, from 1992 to 1996, according to appellate briefs. In 1996, Simon was then prescribed Prempro, a Wyeth product that combined estrogen and progestin in one, until her breast cancer diagnosis, the appellate briefs said.

A common pleas jury found in its May 15, 2007, verdict that Upjohn's Provera drug was a cause of Simon's breast cancer. The jury found against Simon's husband Stephen Simon's loss of consortium claim, and the jury found that Wyeth, now also owned by Pfizer, had adequately warned Merle Simon in its product information about the risk of breast cancer from its HRT drugs, according to appellate briefs.

(Copies of the 39-page opinion in Simon v. Wyeth , PICS No. 10-0018, are available from The Legal Intelligencer . Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •

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