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**DANIEL SWOVERLAND vs. GLAXOSMITHKLINE, ET AL**

**No. 3:10cv-914 (SRU)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT**

*2011 U.S. Dist. LEXIS 127753*

**October 5, 2011, Decided**

**CORE TERMS:** warning, doctor, Learned Intermediary Doctrine, manufacturers, consumer, adequacy, matter of law, fact finder, causal link, professional judgment, prescription, medication, warned, ultimate consumer, patient, nonmoving party, issue of material fact, entitled to judgment, adequately disclosed, unavoidably, inadequacy, favorable, incorrect, genuine, unsafe

**COUNSEL:** [\*1] Appearances: FOR THE PLAINTIFF: LAW OFFICES OF JASON L. MCCOY, Vernon, Connecticut, BY: LUCAS M. WATSON, ESQ.

FOR THE DEFENDANTS: KING & SPAULDING, Atlanta, Georgia, BY: GEOFFREY M. DRAKE, ESQ.; DAY PITNEY, Hartford, Connecticut, BY: JAMES E. HENNESSEY, ESQ.; EPSTEIN, BECKER & GREEN, P. C., Stamford, Connecticut, BY: WILLIAM A. RUSKIN, ESQ., VICTORIA M. SLOAN, ESQ.

**JUDGES:** BEFORE: THE HONORABLE STEFAN R. UNDERHILL, United States District Judge.

**OPINION BY:** STEFAN R. UNDERHILL

**OPINION**

**JUDGE'S RULING**

THE COURT: All right. I'm going to go ahead and

rule on the motions for summary judgment at this time. The court is required, when ruling on the motions for summary judgment, to look at the record facts in the light most favorable to the nonmoving party -- here, that's the plaintiff -- draw all reasonable inferences in favor of that party, and decide whether any reasonable fact finder looking at the evidence in that light could rule in favor of the nonmoving party.

The ultimate decision is whether there is an issue, genuine issue of material fact to be tried by the fact finder or whether, instead, there are no genuine issues of material fact and one party is entitled to judgment as a matter of law.

Looking at the evidence in [\*2] the record in the light most favorable to the plaintiff still does not permit a reasonable fact finder to rule in favor of the plaintiff. Here, there is a complete lack of evidence to allow a reasonable jury to rule for the plaintiff and, accordingly, the defendants are entitled to judgment as a matter of law essentially for the following reasons:

This is a claim under the Connecticut Product Liability Act, and to prove such claim, the plaintiff has to prove that the defendant was engaged in the business of selling product, that the product was in a defective condition unreasonably dangerous to the consumer or user, the defect caused the injury for which compensation was sought, and the defect existed at the time of sale and

the product was expected to and did reach the consumer without substantial change in condition.

There are a class of unavoidably unsafe products as to which manufacturers can avoid strict liability if the product is properly prepared and accompanied by proper directions and warnings, and prescription drugs are perhaps the classic unavoidably unsafe product.

So, the question really here is whether the warnings that were provided in connection with the distribution [\*3] and sale of these prescription medications were adequate or not. That's fundamentally the PLA issue here.

Connecticut has adopted what's called the Learned Intermediary Doctrine in the case of *Vitanza v. Upjohn*, 257 Conn 365, 778 A.2d 829. That doctrine essentially holds that because there is, or when there is a traditional physician/patient relationship, because the physician is the decision-maker as to whether a particular drug will be used by the ultimate consumer, it is the adequacy of the warnings to the physician that matter. And here, provided that the warnings to Dr. Erol were adequate, the manufacturers of the drugs can, under the Learned Intermediary Doctrine, avoid liability under the PLA.

So there really are three issues: Whether the Learned Intermediary Doctrine applies or whether there's some exception to that doctrine; whether the warnings provided were adequate, or; whether there's a causal link between any inadequacy and the harm claimed by the plaintiff.

First off, the plaintiff claims that there are two exceptions to the Learned Intermediary Doctrine that apply in this case. First, that the drug was, these drugs were directly advertised to the consumer and, second, that they were [\*4] over-promoted by the manufacturers.

I would note initially that the Connecticut Supreme Court has not adopted any exceptions to the Learned Intermediary Doctrine. Although the court in *Vitanza* acknowledged that there, that other courts had, in fact, adopted certain exceptions and that the law could change over time, the court declined to adopt any exceptions and, therefore, we don't have any clear indication from the Connecticut Supreme Court that any of these exceptions, potentially exceptions, are available under Connecticut law.

Even assuming that they are potentially available, this is not a case in which those exceptions should be

acknowledged, because this is a case that falls clearly within the general and appropriate scope of the Learned Intermediary Doctrine. There was, in fact, as the record is clear, there was, in fact, a traditional physician/patient relationship. The doctor did receive and was aware of the warnings that were provided, and the doctor has testified that he essentially followed, used his professional judgment to follow those warnings when counseling the plaintiff how to use the drugs at issue.

This is not a case in which the ultimate consumer of the drug went [\*5] to a doctor requesting a medication but, rather, the plaintiff went to his doctor with certain medical issues and the doctor, exercising professional judgment, selected the drugs with knowledge of their potentially positive affects as well as their potential negative side effects.

So, I'm not going to acknowledge either the proposed exceptions under the circumstances of this case. I don't believe that the Connecticut Supreme Court has held that that's appropriate and certainly the facts of this case do not suggest that they should be acknowledged or applied here, even if they are potentially available under Connecticut law.

The warnings that were provided to Dr. Erol in my view were adequate. The suggestion that the FDA letter raised a new or higher risk that was not adequately disclosed or warned against in the past, I think is incorrect as a matter of law. The FDA letter did not raise a risk for someone like Mr. Swoverland who was older than the 18 to 24 age group. The warnings that were provided with these drugs were, in fact, adequate. They've been quoted at length in the briefs and the matters about which the plaintiff complains were all, in fact, adequately warned against in the [\*6] materials available to and relied upon by Dr. Erol, the increased risk of suicidality, the risk of use with alcohol, the need to avoid the operation of equipment, including automobiles. Really, any potentially harm to the plaintiff under the facts of this case were adequately disclosed and warned against in the product warnings that were provided along with the products to the doctor and in direct communications to the doctor.

There's nothing to indicate that, even after the fact, Dr. Erol would have done anything differently. He was aware of each of the risks I've already identified. He was also aware obviously that the plaintiff was potentially mixing the drugs at issue and there's nothing to suggest

that the warnings he had about the propensities of these medications were in any way inadequate. Rather, being aware of these warnings, he nevertheless exercised professional judgment and prescribed them to Mr. Swoverland.

In any event, I think there is a break in the causal chain here. Assuming that I'm incorrect about the adequacy of the warnings, there does not seem to be any facts in the record that would support the suggestion that there was a causal link between the lack of warnings [\*7] complained of and the harm that befell the plaintiff.

As I noted earlier, Dr. Erol indicated that knowing what he knows now, he would not change any of the medical advice or prescriptions that he gave to the plaintiff and, accordingly, there has not been any identification of any inadequacy in a warning that led to an adverse result for the plaintiff. So, that causal link, it seems to me, is subsequently broken.

The ruling that I've just been given has been stated as a general matter with respect to both defendants and both

the drugs at issue, and I think that's appropriate because essentially, although there are some minor differences here, essentially the legal analysis and the fact, the material facts are the same with respect to both of the drugs in terms of the adequacy of the warnings, the lack of causation and so forth.

I do not intend to issue a written decision in this case but I would be happy at this time to clarify or further articulate if any counsel would like me to do so.

MR. RUSKIN: No, Your Honor.

MR. WATSON: No, Your Honor.

MR. DRAKE: No, Your Honor. Thank you.

THE COURT: All right. Thank you all. We'll stand in recess.

(Whereupon the above matter was adjourned at 12:05 o'clock, [\*8] p. m.)

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