IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
JUDITH MINGUS v. WYETH, et al.	:	CIVIL ACTION NO. 04-23744

MEMORANDUM

Bartle, C.J. April 7, 2006

Plaintiff Judith Mingus filed this action against Wyeth on July 9, 2004. She alleges that she is suffering from primary pulmonary hypertension ("PPH"), an almost always fatal condition, as a result of ingesting Wyeth's diet drug Redux, which was withdrawn from the market in September, 1997. Before the court is the motion of plaintiff for summary judgment "regarding Wyeth's affirmative defense that plaintiff's PPH claim is barred by the statute of limitations." Wyeth has also filed a cross-motion for summary judgment based on the statute of limitations.

This court approved a Nationwide Class Action Settlement involving Wyeth's diet drugs Pondimin and Redux on August 28, 2000. See Pretrial Order ("PTO") No. 1415. Plaintiff is a class member. The Settlement Agreement exempts from the definition of "settled claims" those claims based on PPH and allows a class member with this condition to sue Wyeth in the tort system. See Settlement Agreement § I.53. The Settlement

Agreement, however, contains a special provision related to the statute of limitations for PPH claims. It reads, "For purposes of any statute of limitations or similar time bar, [Wyeth] shall not assert that a Class Member actually had PPH unless and until the condition of the Class Member meets the definition of PPH set forth in Section I.46." Settlement Agreement § VII.B.4.

Section I.46 of the Settlement Agreement defines PPH in relevant part as:

> a. For a diagnosis based on examinations and clinical findings prior to death:
>
> (1)(a) Mean pulmonary artery pressure by cardiac catheterization of $\geq$ 25 mm Hg at rest or $\geq$ 30 mm Hg with exercise with a normal pulmonary artery wedge pressure $\leq$ 15 mm Hg; or
> (b) A peak systolic pulmonary artery pressure of $\geq$ 60 mm Hg at rest measured by Doppler echocardiogram utilizing standard procedures; or
> (c) Administration of Flolan to the patient based on a diagnosis of PPH with cardiac catheterization not done due to increased risk in the face of severe right heart dysfunction; and
>
> (2) Medical records which demonstrate that the following conditions have been excluded by the following results:
> (a) Echocardiogram demonstrating no primary cardiac disease including, but not limited to, shunts, valvular disease (other than tricuspid or pulmonary valvular insufficiency as a result of PPH or trivial, clinically insignificant left-sided valvular regurgitation), and congenital heart disease (other than patent foramen ovale); and
> (b) Left ventricular dysfunction defined as LVEF < 40% defined by MUGA, Echocardiogram or cardiac catheterization; and

> (c) Pulmonary function tests demonstrating the absence of obstructive lung disease (FEV_1/FVC > 50% of predicted) and the absence of greater than mild restrictive lung disease (total lung capacity > 60% of predicted at rest); and
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> (d) Perfusion lung scan ruling out pulmonary embolism; and
>
> (e) If, but only if, the lung scan is indeterminate or high probability, a pulmonary angiogram or a high resolution angio computed tomography scan demonstrating absence of thromboembolic disease; and
>
> (3) Conditions known to cause pulmonary hypertension including connective tissue disease known to be causally related to pulmonary hypertension, toxin induced lung disease known to be causally related to pulmonary hypertension, portal hypertension, significant obstructive sleep apnea, interstitial fibrosis (such as silicosis, asbestosis, and granulomatous disease) defined as greater than mild patchy interstitial lung disease, and familial causes, have been ruled out by a Board-Certified Cardiologist or Board-Certified Pulmonologist as the cause of the person's pulmonary hypertension.

Settlement Agreement § I.46 (footnotes omitted).

It is undisputed that it was not until March 8, 2004 that plaintiff underwent a "pulmonary function test" which demonstrated "the absence of obstructive lung disease (FEV_1/FVC > 50% of predicted) and the absence of greater than mild restrictive lung disease (total lung capacity > 60% of predicted at rest)." See Settlement Agreement § I.46.a.(2)(c). It was not until the results of this test were known that plaintiff had

evidence that she had met all aspects of the definition of PPH as set forth in the Settlement Agreement.

Section VII.B of the Settlement Agreement, as noted above, bars Wyeth from asserting a statute of limitations defense "unless and until the condition of the Class Member meets the definition of PPH set forth in Section I.46." See Settlement Agreement § VII.B.4. Thus, by its terms, § VII.B determines when the cause of action for PPH accrues. Indeed, on Wyeth's motion, this court has dismissed claims for PPH as unripe when a plaintiff has not made a threshold showing that all the conditions under § I.46 have been satisfied. See, e.g., PTO Nos. 2623 (Oct. 8, 2002), 2793 (Mar. 14, 2003), and 2912 (July 2, 2003).

The parties agree that the relevant statute of limitations is two years.[1] See Ohio Rev. Code Ann. § 2305.10; 42 Pa. Cons. Stat. Ann. § 5524(2). Plaintiff brought suit on July 9, 2004. This, of course, was within two years after plaintiff's March 8, 2004 pulmonary function test. Plaintiff argues that her action is timely because the statute of limitations did not begin to run until she had evidence of PPH as

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1. The underlying events in this action took place in Ohio. As a federal court sitting in diversity, we must rely on Pennsylvania's "borrowing statute" to determine the applicable statute of limitations period. See Ross v. Johns-Manville Corp., 766 F.2d 823, 826 (3d Cir. 1985). The statute of limitations "shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim." 42 Pa. Cons. Stat. Ann. § 5521(b). Here, both Ohio and Pennsylvania law specify a two-year statute of limitations.

defined under § I.46 of the Settlement Agreement. Wyeth, counters that plaintiff had actual knowledge of a PPH diagnosis by her physician in December, 2001 and that the clock started to tick at that time. If Wyeth is correct, plaintiff is out of time because she did not initiate this lawsuit for over 2-1/2 years. Wyeth maintains that plaintiff cannot toll the statute of limitations by delaying, as she did here, the pulmonary function test, a matter under her control.

We conclude that implicit in § VII.B of the Settlement Agreement is the requirement that at the very least a plaintiff must act with reasonable diligence under the circumstances to obtain all the examinations and tests in order to determine whether she meets the definition of PPH as written into § I.46 of the Settlement Agreement. Otherwise, a PPH claimant could sit on her rights without limitation by simply delaying a necessary test or examination when she knows or has information that she meets some or all of the other prongs of the PPH definition. Plaintiff's position that she was never under a deadline to pursue a pulmonary function test would be a distorted reading of the Settlement Agreement.

The Settlement Agreement's definition of PPH not only requires that a claimant take a pulmonary function test but also that the test eliminate other possible sources of the claimant's condition. The test must show "the absence of obstructive lung disease (FEV_1/FVC > 50% predicted) and the absence of greater than mild restrictive lung disease (total lung capacity > 60% of

predicted at rest)." See Settlement Agreement § I.46.a.(2)(c). Of course, if the test is taken and the results do not meet the criteria set forth in § I.46, the cause of action does not accrue. However, it does not follow that the failure to undergo a pulmonary function test, and thus the failure to have the necessary test results, will always prevent the running of the statute of limitations. Plaintiff cannot avoid a pulmonary function test in order to prevent the accrual of her cause of action when in the exercise of reasonable diligence such a test should have been undertaken. The failure to be tested for pulmonary function under such circumstances will not stop the clock from running. Any other interpretation of the Settlement Agreement would lead to an absurd result.

The record reflects that plaintiff's physicians first informed her that she was suffering from PPH during her hospitalization in December, 2001. While plaintiff concedes she met part of the Settlement Agreement's definition of PPH at the time of her initial diagnosis in December, 2001, she maintains her claim was not ripe until early 2004. Specifically, she contends that part of the definition under subsection (3) was not satisfied until Dr. Gildea signed a physician's statement and PPH checklist on February 4, 2004 and she had her pulmonary function test on March 8, 2004. According to her pulmonologist Dr. Schilz, plaintiff was too sick even to attempt a pulmonary function test in December, 2001 when she was hospitalized.

Plaintiff had her pulmonary function test and obtained the results confirming PPH, as defined in the Settlement Agreement, on March 8, 2004. If this is the benchmark, plaintiff's action is timely under the relevant two-year statute of limitations since she filed suit on July 9, 2004. The key issue then is whether plaintiff failed to exercise reasonable diligence in not undergoing her pulmonary function test on or before July 9, 2002. There is uncontradicted evidence that plaintiff was unable to take the pulmonary function test in December, 2001 when she was hospitalized. No explanation has been provided by either party as to whether plaintiff's medical condition allowed her to have such a test during the following six months or so up until July 9, 2002. There is simply nothing in the record as to whether she failed to act with reasonable diligence during this time frame. Consequently, in ruling on the pending cross-motions for summary judgment, we must decide which party has the burden of proof on this issue and which party benefits from the absence of evidence.

The burden of proof on the affirmative defense of the statute of limitations rests squarely on the defendant Wyeth. See Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001). Wyeth asserts that in the typical personal injury case, the burden is normally on a plaintiff seeking to utilize a particular jurisdiction's "discovery rule" in tolling the running of a limitations period. See, e.g., Vitalo v. Cabot Corp., 399 F.3d 536, 543 (3d Cir. 2005). While that may be true, the question

before us is unrelated to tolling. Under the Settlement Agreement, this plaintiff's claim for PPH does not accrue and the statute does not begin to run either until she has evidence that she meets the definition of PPH in § I.46 or until in the exercise of reasonable diligence she should have had a pulmonary function test, whichever occurs first. The plaintiff came forward with evidence demonstrating that she did not satisfy all prongs of the PPH definition under § I.46 until March 8, 2004 when her qualifying pulmonary function test was completed. The burden is on Wyeth to show that plaintiff's cause of action accrued at an earlier date, that is, on or before July 9, 2002. Because Wyeth has failed to do so, the motion of plaintiff for summary judgment on the statute of limitations issue will be granted and the cross-motion of Wyeth for summary judgment on this issue will be denied.

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ORDER

AND NOW, this 7th day of April, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiff for summary judgment regarding Wyeth's affirmative defense that plaintiff's PPH claim is barred by the statute of limitations is GRANTED; and

(2) the cross-motion of Wyeth for summary judgment based on the statute of limitations is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
C.J.