

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

JUDITH SOKOLOSKI AND	:	IN THE SUPERIOR COURT OF
JOSEPH SOKOLOSKI,	:	PENNSYLVANIA
Appellants	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1887 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 80

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HARRIET SANKO AND	:	IN THE SUPERIOR COURT OF
RICHARD G. SANKO, SR.,	:	PENNSYLVANIA
Appellants	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1888 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. August Term, 1999 No. 4331

=====

BERNADETTE R. ROCK	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1889 EDA 2002

**FILED MAY 19, 2004**

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County



In the Court of Common Pleas of Philadelphia County  
Civil at No. 278 September Term, 1999

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KATHLEEN SCHULTZ AND	:	IN THE SUPERIOR COURT OF
JOHN SCULTZ,	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1893 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. 2299 June Term, 1999

=====

JOSEPHINE MABULA HUCKABAY AND	:	IN THE SUPERIOR COURT OF
JAMES D. HUCKABAY,	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1894 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. December Term, 1999 No. 3789

=====

SHARON D. FARRER McLEOD AND	:	IN THE SUPERIOR COURT OF
JOSEPH M. McLEOD,	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1895 EDA 2002

Appeal from the Order Entered November 14, 2001

In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 627

=====

KATHLEEN GERSTLAUER AND	:	IN THE SUPERIOR COURT OF
JOHN GERSTLAUER	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1896 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 96

=====

TRACY SOKOLOSKI	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1897 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 38

=====

DANIELLE M. McNAMEE,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1898 EDA 2002

Appeal from the Order Entered November 14, 2001

In the Court of Common Pleas of Philadelphia County  
Civil at No. June Term, 1999 No. 3241

=====

DIANE K. GARRETT AND	:	IN THE SUPERIOR COURT OF
GARY W. GARRETT	:	
	:	PENNSYLVANIA
Appellants	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1899 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. June Term, 1999 No. 3442

=====

AMY FRIEND AND OWEN FRIEND,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellants	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1900 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. March Term, 2000 No. 3478

=====

DANA ANN DeCARO,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1901 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. April Term, 1999 No. 365

=====

SHARON DALY,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1902 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 90

=====

BRENDA SUZANNE CLINK,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1903 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. September Term, 1999 No. 1413

=====

PETER CHRISTIE,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1904 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. July Term, 1999 No. 375

=====

ROBERT J. CAMPBELL AND	:	IN THE SUPERIOR COURT OF
ANITA B. CAMPBELL,	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1905 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. June Term, 1999 No. 1827

=====

MARILYN R. BROWN,	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1906 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. December Term, 1999 No. 3312

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DONNA CHRONISTER AND,	:	IN THE SUPERIOR COURT OF
GEORGE CHRONISTER,	:	PENNSYLVANIA
Appellants	:	
v.	:	
	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	

Appellees : No. 1907 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. August Term, 1998 No. 3202

=====

DEBORAH GLEASON AND	:	IN THE SUPERIOR COURT OF
MILE GLEASON,	:	PENNSYLVANIA
Appellants	:	
v.	:	
LES LABORATOIRES SERVIER AND	:	
SERVIER AMERIQUE,	:	
Appellees	:	No. 1908 EDA 2002

Appeal from the Order Entered November 14, 2001  
In the Court of Common Pleas of Philadelphia County  
Civil at No. 1087, September Term, 1999

BEFORE: STEVENS, MONTEMURO\*, and KELLY, JJ.

MEMORANDUM: **FILED MAY 19, 2004.**

Plaintiffs/Appellants ("the Sokoloskis") file this consolidated appeal *nunc pro tunc* from the order entered by the Court of Common Pleas of Philadelphia County granting summary judgment in favor of Defendants/Appellees Les Laboratoires Servier and Servier Amerique ("LLS") in twenty-three personal injury actions stemming from use of the Phentermine-Fenfluramine ("Phen-Fen") drug combination therapy for obesity. We affirm.

\*Retired Justice Assigned to the Superior Court.

Appellee LLS is a French company that manufactured the bulk powdered ingredients from which the finished diet drugs phentermine,<sup>1</sup> fenfluramine,<sup>2</sup> and dexfenfluramine<sup>3</sup> (used as a substitute for phentermine in the therapy) were made. Specifically, LLS licensed the use of, and sold, these powdered ingredients to various American companies who were eventually acquired by American Home Products Corporation (“AHP”). AHP converted the powdered ingredients into a final product and, in the mid 1990’s obtained from the FDA the exclusive right to sell the Phen-Fen drugs in the United States.

A 1997 Mayo Clinic study reported, however, that a statistically significant percentage of Phen-Fen users experienced valvular heart disease or regurgitation, and primary pulmonary hypertension from ingesting the drugs. The study thus prompted the FDA to order AHP to withdraw the Phen-Fen drugs from U.S. commercial shelves. A FDA/AHP joint public announcement of the reasons behind the commercial withdrawal was followed by a wave of federal and state wrongful death and injury claims filed by Phen-Fen users and/or their representatives. The Sokoloskis and

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<sup>1</sup> The present action does not involve the use of phentermine.

<sup>2</sup> Sold as “Pondimin” in the U.S. market.

<sup>3</sup> Sold as “Redux” in the U.S. market.

the twenty-two other plaintiffs appealing herein filed their actions as part of the mass tort litigation in Philadelphia.

The Honorable Allen L. Tereshko of the Court of Common Pleas of Philadelphia County supervised the Mass Tort Program comprising all the Phen-Fen cases against AHP. His opinion supporting his order to grant summary judgment in the twenty-three cases herein consolidated aptly describes the Phen-Fen litigation history, with emphasis on how plaintiffs' motion for class action certification identified a single manufacturer, distributor, and promoter of the Phen-Fen drugs, namely, AHP:

An avalanche of litigation soon followed in state and federal courts. All the federal litigation was consolidated for pre-trial purposes in the Eastern District of Pennsylvania, under the Multi District Litigation Rules (MDL). Because of the overlap of the state federal cases, as well as of state and federal litigators, pre-trial discovery and settlement negotiations were conducted as an ongoing joint exercise.

During the discovery and settlement processes, on October 12, 1999, a Class Action Complaint was filed as ***Brown v. American Home Products Corporation***. It is instructive to read Judge Bechtle's language in understanding the significance of this Class Action Complaint.

"The ***Brown*** Complaint was filed as a vehicle for combining the claims of class members asserted in pending federal and state diet drug litigation throughout the country into a single complaint to facilitate class action treatment of those claims for settlement purposes. The Settlement Agreement was reached with respect to a class consisting of all persons in the United States who ingested Pondimin and Redux and their associated claimants."

***In re Diet Drugs. Brown v. American Home Products Corp.***, 2000 WL 1222042 (E.D.Pa.).

The foregoing takes on significance because of what was required to establish and certify this class.

In *In re Diet Drugs. Brown v. AHP*, Judge Bechtle had before him the Joint Motion of the Class Representatives and the sole Defendant, American Home Products, for an Order certifying and approving the Nationwide Settlement Class embodied in the Settlement Agreement entered into between the parties on November 19, 1999.

In order to arrive at the point where approval of such Motion would be proper, [the prospective Class had to show that they satisfied class requirements of “commonality”]....

In Class counsel’s Proposed Findings of Fact and Conclusions of Law...it was represented that, “Diet Drugs themselves were essentially a single product, marketed by a single major manufacturer....” (Referring to AHP).

In *In re Diet Drugs. Brown v. AHP*, under the commonality requirements, Judge Bechtle adopted the following facts proposed by Plaintiffs [in finding commonality]:

“Here, there exist several common issues to the class to support a finding of predominance and cohesiveness. With regard to common questions of fact, the diet drugs at issue here are essentially a single product—in that Pondimin and Redux are chemically related [and] marketed by a single major manufacturer—AHP.” *Id.* at \*41.

“In addition, plaintiff’s [sic] claims in this litigation all stem from allegations involving a common course of conduct followed by AHP (internal citations omitted). Plaintiff’s negligence and failure to warn claims will revolve around AHP’s conduct and knowledge in developing and marketing Pondimin and Redux. Although there are some individual differences among class members, the common class-wide focus on AHP’s knowledge and conduct predominate such that judicial efficiency will be improved through the class mechanism...” *Id.*

\* \* \*

"...[T]he instant class involves a single manufacturer defendant—AHP." *Id.*

Here, it is thus clear that Plaintiffs, for the purpose of obtaining class action certification and national settlement approval, advanced the position in the national diet drug litigation that AHP was the only manufacturer, distributor and promoter of the diet drugs in question. Further, it is likewise clear that the Trial Court in that litigation, vested with the authority as the Coordinating Court under the Federal Rules for Multi District Litigation, entered as a conclusion of law the position advanced by Plaintiff regarding AHP's status as the sole manufacturer, distributor, and promoter.

Trial Court Opinion dated 1/9/03 at 3-5.

Based on this record, the trial court found that the plaintiffs' successful class assertion that AHP was solely responsible for Phen-Fen injuries judicially estopped the Sokoloskis and other plaintiffs from also proceeding against a different defendant, LLS. The court granted LLS's Motion for Summary Judgment and dismissed the twenty-three cases against LLS. After the restoration of the Sokoloskis' direct appeal rights *nunc pro tunc*,<sup>4</sup> this present timely appeal was filed.

We need address only the first issue raised by the Sokoloskis, as it is dispositive:

**I. DOES JUDICIAL ESTOPPEL BAR THESE SUITS?**

Brief for Appellants at 5.

Because this is an appeal from the grant of a motion for summary judgment, our standard of review is well settled. Summary judgment may

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<sup>4</sup> We assume, *arguendo*, that the Sokoloskis have not waived their direct appellate rights.

be granted only in the clearest of cases where the record shows that there are no genuine issues of material fact and also demonstrates that the moving party is entitled to judgment as a matter of law. **Thompson v. Anderson**, 632 A.2d 1349 (Pa. Super. 1993). In reviewing the entry of summary judgment, we will not overturn that decision unless there has been an error of law or a clear abuse of discretion. **Id.**

As a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained. **Trowbridge v. The Scranton Artificial Limb Company**, 560 Pa. 640, 747 A.2d 862 (2000).<sup>5</sup> "Federal courts have long applied this principle of estoppel where litigants 'play fast and loose' with the courts by switching legal positions to suit their own ends." **Trowbridge**, 560 Pa. at 644-45, 747 A.2d at 865 (citations omitted). The purpose of judicial estoppel, therefore, is to "uphold the integrity of the courts by 'preventing parties from abusing the judicial process by changing positions as the moment requires.'" **Trowbridge**, 560 Pa. at 645, 747 A.2d at 865 (quoting **Gross v. City of Pittsburgh**, 686 A.2d 864, 867 (Pa. Cmwlth. 1996)). It follows, then, that, unlike collateral estoppel or *res judicata*, judicial estoppel does not depend on relationships between parties,

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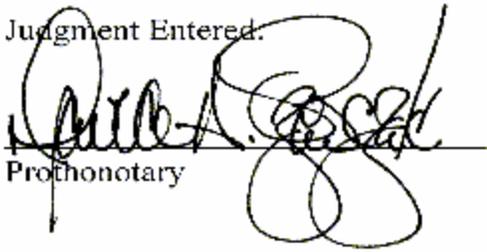
<sup>5</sup> **See In re: Adoption of S.A.J.**, \_\_\_ Pa. \_\_\_, 838 A.2d 616, 620 n.3 (2003) for an apparent split in authority on whether successful maintenance of the prior inconsistent position is necessary to implicate judicial estoppel. Because we find that Appellants' class successfully maintained a prior inconsistent position that AHP was the party exclusively responsible for Phen-Fen related injuries, we need not address this issue.

but rather on the relationship of one party to one or more tribunals. ***Sunbeam Corp. v. Liberty Mutual Insurance Co.***, 566 Pa. 494, 781 A.2d 1189 (2001).

Review of the record shows no error with the trial court's application of judicial estoppel to dismiss this case. The class of plaintiffs to which Appellants here belong has already prevailed upon the federal district court that AHP was the sole manufacturer, distributor, and promoter of the commercial drugs in the Phen-Fen therapy responsible for the complained of injuries. Indeed, as shown *supra*, the federal court accepted the class's assertion regarding AHP and relied on it to grant the class's motion for certification and, in turn, to approve the proposed settlement between the class and AHP. The Sokoloskis cannot now, after having successfully pressed the position of AHP's singular responsibility for Phen-Fen injuries, adopt a theory squarely at odds with their previous position to advance another claim against an additional defendant. Where there is no apparent reason to justify accepting this contradictory position now before us, and where abuse of judicial process would attend entertaining the present claim, we find the present suit was properly dismissed under the theory of judicial estoppel.

For the foregoing reasons, we affirm.

Judgment Entered.

A handwritten signature in black ink, appearing to be "William A. [unclear]", written over a horizontal line. The signature is stylized and cursive.

Prothonotary

Date: \_\_\_\_\_