

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

ELIZABETH and JOE COLEMAN,	:	TRIAL DIVISION - CIVIL
	:	
Plaintiffs	:	JUNE TERM, 2004
	:	NO. 3179
VS.	:	
	:	
WYETH PHARMACEUTICALS, INC., et al.	:	
	:	Superior Court Docket No.
Defendants	:	2678 EDA 2007

OPINION

Tereshko, J.

Procedural History

Plaintiffs, Elizabeth and Joe Coleman (“Plaintiffs”), appeal this Court’s order granting summary judgment in favor of Defendants Wyeth¹ and Pharmacia & Upjohn Company, pursuant to the expiration of the statute of limitations and dismissing with prejudice Plaintiffs’ claims. For the following reasons, this Court’s order should be affirmed.²

Plaintiffs instituted the within Hormone Replacement Therapy Mass Tort action by Short Form Complaint filed on June 28, 2004. Plaintiffs alleged that Plaintiff Elizabeth Coleman (“Coleman”) was diagnosed with infiltrating ductal carcinoma in her

¹ Defendants Wyeth Pharmaceuticals, Inc., Wyeth-Ayerst Pharmaceuticals, Inc., Wyeth Ayerst International, Inc., Wyeth Laboratories, Inc., and Wyeth Pharmaceuticals will be collectively addressed as “Wyeth”.

² This Court adopts its “Findings and Order” dated and docketed September 24, 2007, in its entirety, as its Opinion in this matter, as it adequately addresses the majority of issues raised in Plaintiff’s 1925(b) Statement. See Findings and Order, attached hereto as Exhibit A. This supplemental Opinion, therefore, will address in more detail only the issue of fraudulent concealment which Plaintiffs raised for the first time in their Motion for Reconsideration and again in their 1925(b) Statement.

right breast as a result of her ingestion of Defendants' hormone replacement therapy (HRT) drugs, Premarin, Provera and Prempro. *See* Plaintiffs' Short Form Complaint, ¶¶ 2-4.

On February 20, 2007, Defendant Wyeth filed its Motion for Summary Judgment asserting that the two-year statute of limitations had expired at the time Plaintiffs filed their action and that the action must therefore be dismissed. On February 21, 2007, Defendant Pharmacia & Upjohn joined Wyeth's motion. Plaintiffs filed their response to Defendants' motion on March 9, 2007. On March 29, 2007, Defendants filed a reply to Plaintiffs' response and thereafter filed a Supplemental Reply on May 25, 2007. The Court heard oral argument on Defendants' motion on June 14, 2007 and the matter was taken under advisement. Also on June 14, 2007, Defendants filed a Supplemental Memorandum in further support of its motion.

On September 24, 2007, following consideration of the parties' motions, the responses and replies thereto, and oral argument, this Court granted summary judgment based upon the expiration of the statute of limitations and dismissed Plaintiffs' claims. *See* Findings and Order, attached hereto as Exhibit A.

Plaintiffs moved for reconsideration of this Court's order on October 4, 2007 and Defendants responded on October 12, 2007. Said motion was denied by operation of law on October 24, 2007. *See* 42 Pa.C.S. § 5505; Pa.R.A.P. 1701(b)(3).

On October 9, 2007, Plaintiffs timely filed their appeal and on November 8, 2007, filed their 1925(b) Statement of Matters, in response to this Court's order. Plaintiffs raise, *inter alia*, the following for our review³:

(5) The trial court erred in finding that the statute of limitations was not tolled under the doctrine of fraudulent concealment.

See Plaintiffs' Statement of Matters Complained of on Appeal, 11/8/07.

Discussion

Plaintiffs argue here that the doctrine of fraudulent concealment tolled the statute of limitations on their claim and therefore, dismissal of their action by this Court was error.⁴ Plaintiffs' claims are unfounded.

"The doctrine of fraudulent concealment is an exception to the requirement that a complaining party must file suit within the statutory period." *Lazarski v. Archdiocese*, 926 A.2d 459, 465 (Pa. Super. 2007) (citing *Kingston Coal Co. v. Felton Mining Co.*, 690 A.2d 284, 291 (Pa. Super. 1997)). "The doctrine is based on a theory of estoppel, and provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts." *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850,860 (Pa. 2005) (citing *Deemer v. Weaver*, 324 Pa. 85, 187 A. 215 (Pa. 1936)). "[I]n order for fraudulent

³ As noted previously, Plaintiffs remaining issues, Nos. 1-4 and No. 6 are fully discussed in this Court's Findings and Order of September 24, 2007, attached hereto at Exhibit A. The remainder of this opinion will specifically address issue No. 5, denoted above.

⁴ Defendants argue that Plaintiffs have in fact waived this issue, having raised it for the first time in their Motion for Reconsideration. *See* Defendants' Brief in Response to Plaintiffs' Motion for Reconsideration. Although our search for binding authority in this area has failed to provide clear guidance, we have found persuasive authority for not finding waiver in a procedurally similar situation. *See McGlaughlin v. Gettysburg Hosp.*, 63 Pa. D. & C.4th 504, n.6 (Adams 2003) (court considered issue of constitutional challenge despite being raised for the first time in a motion for reconsideration, finding "there is no requirement that grounds for a petition for reconsideration be raised during . . . the pretrial period.") (citations omitted); *See also, Harahan v. AC&S, Inc.*, 816 A.2d 296, 301 (Pa. Super. 2003) ("Since a motion for reconsideration is not procedurally required before appealing a grant of summary judgment, no waiver issue can attach when such a motion is filed."). Accordingly, we will address the issue.

concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiffs justifiably relied.” *Lazarski*, 926 A.2d at 465. “The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence.” *Id.* at 860 (citing *Molineux v. Reed*, 516 Pa. 398, 532 A.2d 792, 794 (Pa. 1987)). “[I]t is for the court to determine whether an estoppel results from established facts.” *Id.* Further, as with the discovery rule, the standard of reasonable diligence applies to the running of the statute of limitations when tolling takes place under the doctrine of fraudulent concealment. *See id.* at 861. “Thus, . . . a statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of [her] injury and its cause.” *Id.*

Plaintiffs argue that Defendants’ “fraudulent concealment of the true risks versus benefits of Prempro prevented Mrs. Coleman from reasonably ascertaining the cause of her breast cancer” and “lulled plaintiff . . . into believing that Prempro could not possibly have caused or promoted her breast cancer.” *See* Plaintiffs’ Motion for Reconsideration, p. 3. The record refutes Plaintiffs’ claims.

Plaintiffs’ Motion for Reconsideration argues at length how Coleman’s physicians relied on information provided by Defendants to determine whether HRT caused breast cancer and how Defendants’ alleged marketing strategies misrepresented the risks and benefits of the drug to help strengthen sales. Yet, despite Plaintiffs’ lengthy argument, they have failed to provide “clear, precise and convincing evidence” that Coleman justifiably relied upon any affirmative independent act of concealment by Defendants or how any of Defendants’ alleged marketing strategies prevented her from reasonably

ascertaining the cause of her breast cancer as required under Pennsylvania law. *See Lazarski, supra.*

As was discussed in this Court's Finding and Order, Pennsylvania law does not require that Coleman know of a definitive association between her injury and hormone therapy to trigger the statute of limitations. *See Findings and Order, p. 16.* In cases of fraudulent concealment, as with application of the discovery rule, the statute of limitations begins to run when the injured party knows or reasonably should know of his injury and its cause. *See Fine* 870 A.2d at 861. There is no dispute that Coleman knew she was injured in October 2000, when she was diagnosed with breast cancer. Thus, Coleman argues that Defendants' actions prevented her from discovering the cause of breast cancer. Plaintiffs' claim is without support in the record.

Despite Plaintiffs argument that Defendants' marketing campaign was designed to obscure the risks of HRT drugs, the record establishes that her prescribing physicians, Drs. Jackson and Greathouse were still well aware of an associated risk of breast cancer with the use of HRT. *See Findings and Order, pp. 2-3, 8, 12-14.* Both doctors testified that they routinely informed patients of the associated risks of using HRT, including an increased risk of breast cancer. *See id.* It is obvious that notwithstanding Defendants' alleged attempted to minimize the risk of breast cancer associated with HRT, doctors in the field were still able to apprise themselves of the available medical studies showing an increased risk of breast cancer with HRT use and communicate those risks to their patients, including Mrs. Coleman.

In addition, as was discussed at length in this Court's Finding and Order, there was ample information regarding the risk of breast cancer associated with HRT use

contained in the drug package inserts, in the medical literature and in the media, to place Plaintiffs on notice of the correlation, both before and after Coleman's diagnosis of breast cancer. In fact, Coleman's own doctors discussed with her the risks of breast cancer associated with HRT when they prescribed her medication. Plaintiff herself testified that she read the package insert that came with her medication monthly and looked for any side effects. *See* Dep. of Elizabeth Coleman, p. 22. It is undisputed that the HRT package inserts reported that some studies showed an increased risk of breast cancer with a relative risk of 2.0 or higher for women who took HRT (a risk significantly higher than the relative risk of 1.24 reported by the Women's Health Initiative Study (WHI) upon which Plaintiffs relied to file their suit). *See* Findings and Order, pp. 9, 18. Moreover, beginning as early as 1997, articles linking breast cancer to HRT use appeared in the popular press. Thus, despite Plaintiffs' argument that Defendants' actions obfuscated the available literature, it is apparent that sufficient information linking HRT and breast cancer was available to Plaintiffs had they chosen to investigate the cause of her breast cancer as required. *See Fine, supra.*

Here, as with the application of the discovery rule, once diagnosed with breast cancer, Coleman is charged with the use of reasonable diligence to determine the cause of her injury. It is well documented that Coleman never once, following her diagnosis of breast cancer, inquired of her doctors (or anyone else) whether her HRT medication could have caused her cancer. Even after being told by Dr. Greathouse and Dr. Smith, her surgeon, to stop taking all HRT medication, Coleman failed to perform any investigation into the possible causes of her cancer. *See* Findings and Order, p. 12, 15-16. Thus,

Plaintiffs failure to use reasonable diligence to determine the cause of her injury fails to toll the statute in her action.

Finally, the disingenuous nature of Plaintiffs' argument is evident in their failure to raise the issue of fraudulent concealment in their original response to Defendants' Motion for Summary Judgment, despite the following sentence found on page two of Defendants' Motion:

“Absent evidence of fraudulent concealment, there is no recognized exception to the two-year statute of limitations for personal injury actions that tolls the running of the statutory period beyond the date on which the plaintiff first learned that the same injury she sustained has been linked to the defendant’s product.”

See Defendant's Motion for Summary Judgment, p. 2 (emphasis supplied).

Because Plaintiffs have not asserted that the evidence presented in support of their claim of fraudulent concealment was recently discovered, this Court presumes Plaintiffs possessed such evidence at the time they filed their initial response to summary judgment. Thus, had Plaintiffs truly believed that Defendants concealed relevant information and “lulled plaintiff . . . into believing that Prempro could not possibly have caused or promoted her breast cancer” this Court has no recourse but to believe they would have argued that point in response to the motion and at oral argument rather than waiting to raise it for the first time in a motion for reconsideration.

For the foregoing reasons and those discussed in this Court's Findings and Order, attached hereto, this Court's Order should be AFFIRMED.

BY THE COURT:

3/7/2008
DATE

ALLAN L. TERESHKO, J.