

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

IN RE: DIET DRUGS (Phentermine/
Fenfluramine/Dexfenfluramine) : MDL DOCKET NO. 1203
PRODUCTS LIABILITY LITIGATION :
: :
THIS DOCUMENT RELATES TO: :
----- :
PAULINE BERRY, et al. : CIVIL ACTION NO. 03-20243
v. :
WYETH, et al. :

MEMORANDUM AND PRETRIAL ORDER NO. 3531

Bartle, J.

May 14, 2004

Before the court is the motion of numerous class members to remand to the Circuit Court of Coahoma County Mississippi their claims against: (1) Wyeth¹; (2) in-state physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux for plaintiffs; and (3) Interneuron Pharmaceuticals, Inc. a manufacturer of phentermine products. The state court action was captioned Pauline Berry, et al. v. Wyeth, et al. (Miss. Cir. Ct. Coahoma County, filed Dec. 23, 2002).

Plaintiffs in this action, with the exception of Gai M. Thomas, have exercised their right of intermediate or back-end opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) (Pretrial Order ("PTO") No. 1415), which encompassed persons who

1. Wyeth was previously known as American Home Products Corporation ("AHP").

ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4).² Under the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust.

Plaintiffs filed their complaint in the Circuit Court of Coahoma County, Mississippi on December 23, 2002. Wyeth timely removed this action to the United States District Court for the Northern District of Mississippi, asserting that plaintiffs fraudulently joined the in-state physician defendants in an attempt to defeat federal diversity. Thereafter, plaintiffs moved to remand this action under 28 U.S.C. § 1447(c). The Mississippi federal court deferred ruling on plaintiffs' motion, and the case was then transferred to this court as part of MDL 1203, the mass tort litigation involving the diet drugs known as fen-phen. No federal claims for relief are alleged.

I.

In brief summary, plaintiffs, all of whom are resident citizens of Mississippi, filed suits for injuries sustained as a result of their use of the diet drugs known as Pondimin and/or Redux. The defendant Wyeth, the manufacturer of Pondimin and Redux, and Interneuron Pharmaceuticals Inc. are parties of

2. Wyeth alleges that plaintiff Gai M. Thomas exercised initial opt-out rights. Ms. Thomas' alleged filing of an initial opt-out has no bearing on our decision regarding the motion to remand in this matter as detailed throughout this Order.

diverse citizenship from the plaintiffs. Ten of the twenty-nine defendant physicians who prescribed Pondimin and/or Redux to plaintiffs' are alleged to be citizens of Mississippi. The remaining nineteen physician defendants are citizens of either Arkansas, Missouri, or Tennessee.³

Plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against these non-diverse defendants.⁴ See MISS. CODE ANN. § 15-1-36 (West 2003). Thus, Wyeth argues, plaintiffs' claims against these non-diverse defendants should be disregarded for purposes of determining diversity of citizenship of the parties. Plaintiffs respond that the statute of limitations has not expired because they discovered their injuries less than two years prior to filing their complaint.

II.

This court addressed many of the same issues presented by plaintiffs' motion to remand in PTO No. 3281, in French, et

3. For the purposes of this remand decision, we need not address the issue of whether the out-of-state physician defendants are properly joined in this action.

4. The statute of limitations is not an issue in plaintiffs' claims against Wyeth, which has waived its right to assert the statute of limitations defense in return for the plaintiffs giving up their right to sue Wyeth for "punitive, exemplary, or multiple damages." Settlement Agreement § IV.D.3.c; see PTO No. 2625 and PTO No. 2680.

al. v. Wyeth, et al., CIV. A. No. 03-20353 (E.D. Pa. Feb. 18, 2004), which is also part of the nationwide diet drug litigation. In French, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See PTO No. 3281 at 2-4. Because we examined the same legal issues as they applied to nearly identical facts in French, we need not revisit them here.

As discussed in greater detail in French, plaintiffs' claims against the in-state physicians are time barred because their complaint was clearly filed outside the two year statute of limitations. See MISS. CODE ANN. § 15-1-36. In short, the statute began running, "when the plaintiff[s] should have reasonably known of some negligent conduct, even if the plaintiff[s] did not know with absolute certainty that the conduct was legally negligent." Sarris v. Smith, 782 So. 2d 721, 725 (Miss. 2001). As we found in French, the publicity surrounding the withdrawal of the diet drugs put plaintiffs on inquiry notice of their claims in September, 1997 or, at the very latest by March, 2000, at the height of Wyeth's extensive media campaign.

In light of the massive publicity concerning the health risks associated with the use of diet drugs and the determination by this court after a full hearing that diet drug injuries are not latent, we find that plaintiffs in the exercise of reasonable diligence should have discovered their injuries at the very latest by March, 2000. Thus, they would have needed to file their complaint by March, 2002. Because they did not do so until

December, 2002, their claims against the in-state physicians are clearly time barred.

Plaintiffs' assertions that they had no exposure to the media coverage surrounding the withdrawal of diet drugs are without merit. Despite plaintiffs' argument to the contrary, "[w]here events receive such widespread publicity, plaintiffs may be charged with knowledge of their occurrence," United Klans of Am. v. McGovern, 621 F.2d 152, 154 (5th Cir. 1980). Thus, applying the law articulated in United Klans of Am. we find that the extensive and pervasive media coverage surrounding the withdrawal of diet drugs from the market and the subsequent reports regarding the national settlement would put a reasonable person on notice of their potential claims at the latest in March, 2000, at the height of Wyeth's extensive notice campaign.

Accordingly, for the reasons more fully articulated in French, we find that Wyeth has met its heavy burden of showing that the in-state physician defendants are fraudulently joined. As such, we will deny plaintiffs' motion to remand this action to the Circuit Court of Coahoma County, Mississippi and will dismiss the complaints as to the in-state physician defendants.⁵

5. We are only dismissing the claims against those defendant physicians who are Mississippi citizens and who appear on the MDL 1203 docket.

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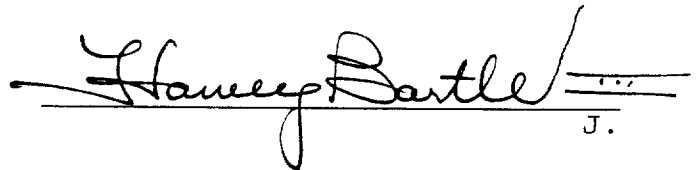
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AND NOW, this 14th day of May, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

- (1) the motion of plaintiffs in Pauline Berry, et al. v. Wyeth, et al., CIV. A. No. 03-20243 (E.D. Pa.) to remand to the Circuit Court of Coahoma County, Mississippi is DENIED; and
- (2) all claims in Berry against defendant Charles F. Brock, Jr. M.D., Richard Nmi Corson, M.D., L.G. Hopkins, M.D., Estate of Barry Sullivan, Patrick McLain, M.D., S.D. Austin, M.D., and Robert F. Cooper, M.D. are DISMISSED.

BY THE COURT:


J.