Sometimes, The Law Doesn't Matter

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We talk about a lot of law on this blog, but sometimes, we have to admit, the law doesn't matter, and cases are decided simply on the basis of good lawyering and bad witnesses. Exactly this happened in Zundel v. Johnson & Johnson, No. A-3984-08T1, slip op. (N.J. Super App. Div. Aug. 5, 2011) (unpublished). In Zundel, the jury – and then the appellate court – found for the defense because, essentially, the other side's witnesses were exposed as liars.

Zundel involved bad injuries, no doubt about it. Stevens-Johnson syndrome – especially the worst kind, toxic epidural necrosis – basically makes your skin fall off, as if burnt. Zundel, slip op. at 4-5. The other side has created a cottage industry taking what are essentially rare idiosyncratic reactions (id. at 5 – TEN incidence is at most one in a million) to almost any drug (and maybe other foreign substances as well) and turning them into failure to warn cases. In order to avoid the learned intermediary rule, among other reasons, the other side prefers to target over-the-counter products in SJS/TEN cases.

That has its advantages, but there are disadvantages also. Disinterested doctors are more likely to be credible witnesses than plaintiffs and their family members, who testify with dollar signs in their eyes. That's what happened in Zundel.

Once the unfortunate minor plaintiff suffered (and we on the defense side don't use the word "suffered" lightly) from SJS/TEN, the family, with legal assistance, went looking for some medication to target. Motrin was the target of choice.

One slight little problem cropped up as the case proceeded, however.

It turned out that the plaintiffs' aim was bad - really bad. How bad? Well, the minor plaintiff didn't start taking Motrin **until** after already exhibiting the first symptoms of SJS/TEN:

> "The record shows that [minor plaintiff] was afflicted with TEN on January 5, 1998, when she was first examined by [treating physician] and **before** she was given Children's Motrin by her mother."

Slip op. at 12 (emphasis added).

Oops. It's hard to establish causation, even in New Jersey, if the disease began before any exposure to the defendant's drug.

It was scramble time on the plaintiffs' side.

And scramble they did: digging up the minor plaintiff's grandmother (we'll call her "Gram"), who – eight years after the fact – was conveniently willing to testify that, oh yeah, I gave the minor plaintiff Motrin, too, and that was before SJS/TEN showed up. Slip op. at 7-8.

That's when the fun began, and when the law ceased to matter very much.

Gram testified that she happened to give the Motrin without the parents knowing about it:

> "[Gram] testified that she "went to the medicine cabinet and [] saw Children's Motrin." After reading the label on the box for dosage instructions [and presumably nothing else], she "yelled over the balcony to [mom] that I was going to give [minor plaintiff] . . . Cold Formula3 Children's Motrin and [everybody at the party] were all talking and music and everything. I just assumed [mom] heard me."

Slip op. at 8 (footnote omitted). Yeah, right. Turns out that this type of Motrin wasn't even on the market back then. Id. at 8 n.3.

Gram also testified, but "not . . . with absolute certainty," that she did this again a few days later. Id. Gram was evidently quite willing to drug her grandbaby when the parents weren't looking.

The jury didn't believe a word of it, and neither did the appellate court. Here's why:

- "[Minor plaintiff's] medical records do not mention anyone giving her Children's Motrin in [the time period Gram testified about]. This is highly significant because the [treating physicians] urgently sought any information of this nature from family members, including [Gram], when [minor plaintiff] was first admitted to that hospital." Slip op. at 15.
- The only supposed "corroboration" for Gram's story was "inadmissible . . . hearsay" that one doctor supposedly heard from another doctor who had since died. Id. at 15-16.

The deceased doctor's written records did not document the information supposedly conveyed. Id. at 16.

- "[Plaintiff mom] did not discover [Gram's] role in this case until October 2006" – eight years after the fact. Id.
- Gram's providential testimony appeared only after the timing problem threatened plaintiffs' case. "[Gram] testified that when [plaintiff mom] called her about this, [Gram] told her: 'Don't you remember that I gave [minor plaintiff] the Children's Motrin [earlier?]' Plaintiffs thereafter filed an amended complaint and amended interrogatories, and [plaintiff mom] gave another deposition, imparting this new information." Id. at 16-17.
- Mom and Gram tried to blame the court for the eight-year gap. "[T]hey both responded in a manner that suggested they were legally prevented from doing so. This was not the case." Id. at 17. There was no "gag order" or "other legal bar" during Gram's eight years of silence. Id.
- Gram couldn't keep her story straight. "At her deposition, [Gram] testified that she had given [minor plaintiff] one dose; at trial, she testified that she probably gave her two doses." Id.

Zundel thus carries a lesson (beyond those implicated by Ethical Rule 3.3(a)(3)) – that we on this blog shouldn't take everything we do here too seriously. The law in all its wonders is great as far as it goes. But sometimes, perhaps more often than our posts make it appear, cases turn on the original and still most basic function of a jury trial: determining who's telling the truth.