Defendant Didn't Buy The Love

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Like many, we enjoy a good Beatles reference – and while this might not be a particularly good one – we can still imagine defense lawyers humming a few bars of "Can't Buy Me Love" after reading the most recent decision from the Trasylol MDL. There are many good aspects to the summary judgment ruling in Shaw v. Bayer Corp., 2011 U.S. Dist. LEXIS 57057 (S.D. Fla. May 23, 2011) – which we may well cover in future posts – but today we highlight plaintiff's failed attempt to overcome the learned intermediary defense by arguing financially-generated bias. So, "Yesterday" the topic was anger, but today we get to report about the law "Getting Better."

In Shaw, the patient received Trasylol during heart bypass surgery and later died from respiratory failure. The plaintiff blamed the Trasylol, while the treating physicians blamed the decedent's "Long and Winding [trip down tobacco] Road" and COPD. Shaw, 2011 U.S. Dist. LEXIS 57057 at *4. The decedent's heart surgeon not only testified that Trasylol was unrelated to the death, he also testified that (1) he prescribed Trasylol based on his routine and experience with the drug; (2) he considered the particular circumstances of the patient and the surgery in making his prescribing decision; and (3) he would still use Trasylol today if it were available for bypass surgeries – even after considering the information that plaintiff claimed was wrongfully withheld. Id. at *4, *17-18. This testimony set the stage for the defendant's summary judgment motion based on lack of proximate cause, that is, that no deficiency in the defendant's warning caused the doctor to do anything different.

To prove her failure to warn claim (under Alabama law), plaintiff had to demonstrate that an adequate warning would have been read and heeded by the prescribing surgeon and that the injury would have been avoided. Id. at *12. Since the plaintiff couldn't shake the surgeon's testimony – which essentially took the Trasylol warning out of the picture – she tried to shake the surgeon himself.

Plaintiff argued that the learned intermediary doctrine shouldn't apply because the surgeon was "biased" as he had been a consultant for the defendant and had once been paid to attend a conference. Id. at *11. Does that fact create a factual issue? Not by itself.

The court held that the mere existence of a consulting agreement did not give rise to a permissible inference of bias. Rather, the evidence showed that the surgeon "considered the particular circumstances" of the patient's case and made "a practice of staying educated about the risks of a drug." Id. at *16-17. At the same time, there was "no record evidence indicating that [the surgeon] read the warning that Plaintiff claims was inadequate, or that it played any role in prescribing decision." Id. at 17. (Yes, there is something contradictory about those two thoughts, and both undermine the plaintiff's case.) The plaintiff offered no evidence that the surgeon's choice to prescribe Trasylol "was not an informed one, or that he did not exercise individualized medical judgment in making that decision," id. at *15 – the heart of the learned

intermediary doctrine. In other words, a plaintiff can't "Get Back" from the learned intermediary rule just by trashing his/her prescribing doctor.

This was not a unique argument by plaintiff, and fortunately it was not a unique decision by the court. In fact, except in the case of an alleged express admission, see Rosa v. Medtronic MiniMed, Inc., 2008 WL 1990892 (D.P.R. May 6, 2008) (summary judgment denied where defendant expressly described treating physician as its "representative"), plaintiffs have been unsuccessful in ousting the learned intermediary rule by challenging physician independence in courts "Here, There and Everywhere":

Eck v. Parke, Davis & Co., 256 F.3d 1013, 1024 (10th Cir. 2001) (that the prescriber also conducted research for pharmaceutical companies created no material credibility issue on applicability of learned intermediary rule).

Talley v. Danek Medical, Inc., 179 F.3d 154, 164 (4th Cir. 1999) (learned intermediary rule applies although prescribing prescriber was the defendant's paid consultant and owned stock in defendant; there was "no evidence" that these arrangements "interfered with [the physician's independent medical judgment in treating [plaintiff]").

Tracy v. Merrell Dow Pharmaceuticals, Inc., 569 N.E.2d 875, 879 (Ohio 1991) (the prescriber's treatment of plaintiff under a manufacturer's research protocol and receipt of a per patient payment from the manufacturer did not affect physician's independence).

Blatt v. Hamilton, 1986 WL 2925, at *3 (Ohio App. March 6, 1986) (prescriber does not become manufacturer's "agent" through the receipt of free samples).

Trimble v. Eli Lilly & Co., 2010 WL 348276, at *11 (E.D.N.Y. Jan. 22, 2010) (prescriber's receipt of hundreds of thousands of dollars from defendant and other drug manufacturers for research and speaking did not avoid learned intermediary rule).

Miller v. Pfizer, Inc., 196 F. Supp.2d 1095, 1129 n.108 (D. Kan. 2002), *aff'd* 356 F.3d 1326 (10th Cir. 2004) (prescriber's unrelated research for pharmaceutical companies did not prevent operation of learned intermediary rule).

Little v. Depuy Motech, Inc., 2000 WL 1519962, at *9 (S.D. Cal. June 13, 2000) (that the prescriber was also an investigator in defendant manufacturer's clinical trial did not prevent application of learned intermediary rule).

Baker v. Smith & Nephew Richards, Inc., 1999 WL 811334, at *24 (Tex. Dist. June 7, 1999), *aff'd mem.*, 2000 WL 991697 (Tex. App. July 20, 2000) (prescriber's receipt of honoraria and fees from manufacturer did not affect his independence for learned intermediary rule purposes).

It is worth noting however, that the facts in Shaw did not particularly "Help" the plaintiff's bias argument. The treating surgeon's temporary consulting agreement with defendant was only for $500 and attendance at one medical conference during which Trasylol was discussed along with other drugs. That hardly seems worthy of mention, let alone of serving as the basis for asking the court to disregard the deep-rooted learned intermediary doctrine (although the numbers in Tracy were even less). We're certainly not suggesting that if the argument were based on a more financially robust relationship it would have prevailed (see Trimble) – here

the doctor's testimony was simply too strong. But "Tomorrow Never Knows" – with more money and/or a closer relationship at issue, coupled with more equivocal doctor testimony, a win by plaintiffs (or at least a harder look by the courts) is not outside the realm of possibility. See Talley, 179 F.3d 154, 163-164. For now though, we can just "Let It Be."