



And The Defense Wins

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On November 6, 2012, the New Jersey Supreme Court denied plaintiffs' Petition for Certification of Judgment in favor of Novartis Pharmaceuticals Corporation and awarded costs to Novartis. *Bessemmer v. Novartis Pharm. Corp.*, No. A-2069-10T1 (N.J. Nov. 6, 2012). Novartis was represented in *Bessemmer* by [Joe G. Hollingsworth](#), [Katharine R. Latimer](#), [Rebecca A. Womeldorf](#), and [Neil S. Bromberg](#) of **Hollingsworth LLP** in Washington, D.C., and [Beth Rose](#) of **Sills Cummis & Gross P.C.** in Newark, New Jersey.

On October 6, 2010, the trial court entered judgment for Novartis following a defense verdict in the first bellwether trial arising out of the Aredia/Zometa consolidated litigation in New Jersey state court, and the New Jersey Appellate Division affirmed on June 13, 2012. *Bessemmer v. Novartis Pharm. Corp.*, No. A-2069-10T1, 2012 WL 2120777 (N.J. Super. Ct. App. Div. June 13, 2012). In *Bessemmer*, the jury returned, after only two hours of deliberation, a complete defense verdict on plaintiffs' only remaining failure to warn claim by answering "no" to the question: "Did Novartis fail to provide an adequate warning to Mrs. Bessemmer's prescribing physician concerning the risks of jaw problems from Aredia and/or Zometa that Novartis either knew or should have known prior to Mrs. Bessemmer discontinuing use of the drug(s)?"

The plaintiffs unsuccessfully appealed the judgment entered after the jury verdict, arguing that Judge Jessica Mayer's pre trial failure-to-warn rulings and grant of partial summary judgment in Novartis's favor on plaintiff's direct-to-consumer (DTC) advertising claims constituted reversible error. Plaintiffs' appeal focused on two pre trial rulings by Judge Mayer. On April 30, 2010, Judge Mayer held that Novartis had no duty to warn non-prescribing dentists or oral surgeons of the risks of osteonecrosis of the jaw (ONJ) in patients using Aredia and/or Zometa, drugs which are typically prescribed by oncologists and used to treat certain patients with metastatic cancer to bone. See Mem. of Decision at 21-23, *Bessemmer v. Novartis Pharm. Corp.*, No. MID-L-1835-08 (N.J. Super. Ct. April 30, 2010). And on August 20, 2010, Judge Mayer granted partial summary judgment to Novartis on plaintiffs' DTC claims, finding that Novartis did not advertise directly to consumers in such a manner that would deprive it of the learned intermediary defense. See Mem. of Decision at 10-15, *Bessemmer v. Novartis Pharm. Corp.*, No. MID-L-1835-08 (N.J. Super. Ct. Aug. 20, 2010). The New Jersey Appellate Division affirmed judgment for Novartis "substantially on the basis of the well-considered and thorough opinions of Judge Mayer, which are well-supported by the evidence and legal precedent." *Bessemmer*, 2012 WL 2120777. In denying certification, the New Jersey Supreme Court rejected the plaintiffs' argument that New Jersey adopt Restatement

(Third) of Torts Section 6(d) based on the court's holding in *Perez v. Wyeth*, 161 N.J. 1 (1999) and expand a prescription drug manufacturer's duty to warn beyond the prescribing physician, as codified in the New Jersey Products Liability Act, N.J. Stat. Ann. § 2A:58C-1 *et seq.* The Supreme Court also rejected plaintiffs' contention that the *Perez* DTC exception to the learned intermediary doctrine applied, given the facts of this case.

In addition to winning the first bellwether trial in the New Jersey consolidated litigation, Novartis has won three cases arising out of the federal MDL: *Hogan v. Novartis Pharm. Corp.*, 1:06-260-BMC (E.D.N.Y.), *Brodie v. Novartis Pharm. Corp.*, No. 4:10-cv-138-HEA (E.D. Mo. Feb. 1, 2012); and *Kyle v. Novartis Pharm. Corp.*, No. 1:06-cv-35-R (W.D. Ky. Feb. 2, 2012). In a fifth case, *Baldwin v. Novartis Pharm. Corp.*, No. 2:06-cv-4049-MJW (W.D. Mo. Apr. 9, 2012), the jury returned only \$225,000.00 in compensatory damages while rejecting entirely the plaintiff's claim for punitive damages. And in *Brown v. Novartis Pharm. Corp.*, No. 7:08-CV-00130-FL (E.D.N.C.), the lawsuit was abandoned in October by the plaintiff after just two-and-a-half days of trial when plaintiff dismissed all of his claims against Novartis.

In addition to Novartis's trial wins, Novartis has won summary judgment this year or late last year in *Harvey v. Novartis Pharm. Corp.*, No. 2:06-cv-1140-VEH (N.D. Ala. Oct. 4, 2012); *Luttrell v. Novartis Pharm. Corp.*, No. 2:07-cv-03015-TOR (E.D. Wash. Oct. 2, 2012); *Conklin v. Novartis Pharm. Corp.*, No. 9:11-cv-00178-RC (E.D. Tex. Sept. 19, 2012); *Ingram v. Novartis Pharm. Corp.*, ___ F. Supp. 2d ___, 2012 WL 2922716 (W.D. Okla. July 18, 2012); *Parmentier v. Novartis Pharm. Corp.*, No. 1:12-CV-00045 SNLJ, 2012 WL 2324502 (E.D. Mo. June 19, 2012); *Simard v. Novartis Pharm. Corp.*, 3:06-MD-01760 (M.D. Tenn. June 5, 2012); *McDaniel v. Novartis Pharm. Corp.*, No. 2:08-cv-02088, 2012 WL 32608 (W.D. Ark. Jan. 6, 2012); and *Eberhart v. Novartis Pharm. Corp.*, No. 1:08-cv-2542-WSD, 2011 WL 5289372 (N.D. Ga. Oct. 31, 2011).

The Sixth Circuit previously upheld summary judgment dismissals in several cases, including *Simmons v. Novartis Pharm. Corp.*, No. 11-5053, 2012 WL 2016249 (6th Cir. June 5, 2012); *Thomas v. Novartis Pharm. Corp.*, 443 F. App'x 58 (6th Cir. 2011) (affirming dismissal of Thomas, Anderson and Melau cases); *Patterson v. Novartis Pharm. Corp.*, 451 F. App'x 495 (6th Cir. 2011); and *Emerson v. Novartis Pharm. Corp.*, 446 F. App'x 733 (6th Cir. 2011).

More than 100 Aredia and/or Zometa cases have been dismissed pre trial during motions practice or in discovery.

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