

2001

Jeanne Schaerrer v. Professional Compounding  
Centers of America, Inc., Stewart Koeven, R. PH.,  
Jeffrey W. Johnson, M.D., American Home  
Products Corp., A.H. Robins Company, INC., and  
Wyeth-Ayerst Laboratories Company, Inc., : Brief  
of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JEANNE SCHAERRER,

Plaintiff and  
Appellant,

v.

PROFESSIONAL COMPOUNDING  
CENTERS OF AMERICA, INC.,  
STEWART'S PLAZA PHARMACY,  
INC., STEWART KOEVEN, R.PH.,  
JEFFREY W. JOHNSON, M.D.,  
AMERICAN HOME PRODUCTS  
CORP., A.H. ROBINS COMPANY,  
INC., AND WYETH-AYERST  
LABORATORIES COMPANY, INC.,

Defendants and  
Appellees.

Utah Supreme Court No. 20010471-SC

**BRIEF OF THE APPELLANT**

Appeal from the Fourth Judicial  
District Court, Utah County,  
Judge James R. Taylor

Utah R. App. P. 29 Priority: 15

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## **STATEMENT OF JURISDICTION**

Jurisdiction is proper in this Court pursuant to Utah Code Ann. Section 78-2-(3)(j).

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Utah Liability Reform Act (Utah Code Ann. 78-27-37 et seq.) abrogated the doctrine of implied indemnity and whether the trial court erred in finding that defendants/appellees Stewart's were entitled to indemnity , rather than permitting plaintiff/appellant Schaerrer to have a jury allocate fault among the parties pursuant to the Act.

Standard of Review: The trial court ruling as to whether the Liability Reform Act applies to the facts of this case is a question of law to be reviewed to *de novo*. Slisze v. Stanley-Bostitch, 979 P.2d 317, 319 (Utah 1999).

Issue preserved in trial court: Record at 1095-97; 1175, pg. 20:9-23:1.

2. If the doctrine of implied indemnity survived enactment of the Liability Reform Act, whether the Court erred in granting summary judgment, based upon its finding that Stewart's was entitled to indemnification from PCCA as a matter of law for damages caused to plaintiff by the drug Fenfluramine.

Standard of Review: The trial court's ruling on a grant of summary judgment is reviewed for correctness. Gerbich v. Numed, Inc., 977 P.2d 1205, 1207 (Utah 1999).

Issue preserved in trial court: Record at 1097-99; 1175, pg. 18:4-19:11, 1144-46.



**STATUTE WHOSE INTERPRETATION IS CENTRAL TO THIS APPEAL**

Utah Code Ann. 78-27-37 to 78-27-42 (set forth in full in Addendum

No. 1).

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE.**

This is a products liability action for damages suffered by plaintiff and appellant Jeanne Schaerrer (“Schaerrer”) for injuries caused by her ingestion of the diet drug Fenfluramine, which she took in combination with Phentermine (a combination commonly known as “fen-phen”). Schaerrer alleges that, as a result of her ingestion of fenfluramine, she suffered severe heart damage requiring open-heart surgery to repair two of her heart valves. The defendants named in Schaerrer’s lawsuit were:

A. American Home Products Corporation, A.H. Robbins Company, Inc. and Wyeth-Ayerst Laboratories, Inc. (collectively the “AHP Defendants”). The AHP Defendants manufactured, marketed and sold fenfluramine in the form of 20 mg Pondimin tablets. Schaerrer ingested Pondimin, and alleges that this drug caused or contributed to her injuries;

B. Appellees Stewart Koeven, R.P.H. and Stewart’s Plaza Pharmacy (collectively referred to as “Stewart’s”). Stewart’s created, marketed and sold a combination fenfluramine-phentermine capsule. Schaerrer ingested Stewart’s combination capsule, and alleges that this product caused or contributed to her injuries;

C. Jeffrey Johnson, M.D., the doctor who prescribed fenfluramine and phentermine to Schaerrer; and

D. Professional Compounding Centers of America, Inc. (“PCCA”). PCCA was a pharmaceutical and pharmacy supply wholesaler, which supplied the raw

fenfluramine powder used by Stewart's in creating the combination fenfluramine – phentermine capsule.

Schaerrer's claims against all defendants, other than Stewart's, have been settled or otherwise dismissed.

## **II. COURSE OF THE PROCEEDINGS.**

Schaerrer's complaint was filed on December 10, 1998, against the defendants identified above. (Record at 31.) Schaerrer settled her claims against PCCA, and PCCA was dismissed with prejudice from this action on February 22, 2000. (Record at 509.) (Pertinent provisions of the PCCA Settlement Agreement and Release are set forth below.) On August 21, 2000, Dr. Johnson's unopposed motion for summary judgment was granted, and he was dismissed from the case. (Record at 988.) In September 2000, Schaerrer settled her claims against the AHP Defendants, and agreed to dismiss those Defendants with prejudice. On May 15, 2000, Stewart's filed its first of two motions for summary judgment, contending that it was a non-manufacturing retail seller of prescription drugs and therefore not subject to strict liability. Schaerrer countered that Stewart's activities with respect to the manufacture, marketing and sale of one-a-day fen-phen capsules made Stewart's a manufacturer subject to strict liability, and precluded it from asserting the immunity to strict products liability claims normally available to retail pharmacists. On September 1, 2000, the trial court denied Stewart's motion, finding that there was evidence from which the jury could find that Stewart's acted as a manufacturer by creating and marketing a product not otherwise available, thus

subjecting it to strict liability. (Record at 1003-08; see also, Addendum, No. 2.) On October 18, 2000, on Stewart's motion the trial court reconsidered its September 1, 2000 Order and granted "partial summary judgment" to Stewart's, precluding plaintiff from putting on evidence that the combination of fenfluramine and phentermine by Stewart's into a single capsule created a more serious risk of harm than using the drugs separately. (Record at 1057-58.) Stewart's brought a second motion for summary judgment, contending that it was, as a matter of law, entitled to indemnification by PCCA and that, pursuant to Schaerrer's settlement with PCCA, her claims should be dismissed. This motion was granted by the court on January 25, 2001. (Record at 1175). The trial court entered its Findings of Fact, Conclusions of Law and Judgment dismissing Schaerrer's claims against Stewart's on April 30, 2001. (Record at 1154-61; see also Addendum, No. 3.) This appeal followed.

### **III. STATEMENT OF FACTS.**

As of June 1995, Jeanne Schaerrer was in good health with no chronic health problems, other than being overweight. (Record at 869, pg. 14:24-15:2, pg. 16:15-24.) In June 1995, she had a discussion with defendant Jeffery Johnson, M.D. about using medication to help her lose weight. (*Id.*) Thereafter, Fenfluramine and Phentermine were prescribed to Schaerrer by Dr. Johnson, and ingested by Schaerrer during the period from June 1995 through June 1997. (Record at 776-817.)

Schaerrer obtained Fenfluramine from two different sources, each implicating different defendants. Initially, she had prescriptions filled at Woolsey's

Pharmacy (not a party to this action). (Record at 776-799.) The Fenfluramine product supplied to Schaerrer by Woolsey's Pharmacy was in the form of 20 milligram Pondimin (Fenfluramine) tablets manufactured by the AHP Defendants. (Id.) Generic Phentermine was supplied to Schaerrer by Woolsey's Pharmacy in a separate capsule (id.). The manufacturers of the generic phentermine capsules supplied by Woolsey's are not parties to this action. Schaerrer was instructed by Dr. Johnson to take one Pondimin tablet three times per day and to take one phentermine capsule once per day. (Record at 816, 866, pg. 71:25-72:10.)

In October 1996, Schaerrer heard from a friend who was employed at a physician's office (not Dr. Johnson) about a "one-a-day fen-phen capsule" available from Stewart's. (Record at 701-703.) Schaerrer consulted with Dr. Johnson, who had never heard of one-a-day fen-phen. (Record at 854, pg. 51:1-52:22.) Nevertheless, Dr. Johnson prescribed Stewart's compounded fen-phen capsules to Schaerrer at her request. (Id.) Dr. Johnson testified that he never did any research or independent investigation regarding the safety and efficacy of Stewart's one-a-day fen-phen capsules. (Record at 853-854, pg. 52:22-53:14.) Dr. Johnson testified that he assumed that Stewart's had determined the safety of the one-a-day capsule as compared with the Pondimin product. (Id.) Schaerrer filled prescriptions at Stewart's for one-a-day fen-phen on five separate occasions between November 1996 and June 1997. (Record at 611.) In early 1997, Schaerrer began experiencing symptoms of dizziness, nausea and chest pain. (Record at 863-65.) A few months later, following evaluation by her doctors it was found that she had suffered severe heart valve damage, requiring open heart

surgery to repair two heart valves. (Record at 859-62.)

In May of 1996, Stewart Koeven invented one-a-day fen-phen capsules, by combining raw Fenfluramine powder obtained from PCCA, Phentermine powder from capsules manufactured by other pharmaceutical manufacturers, Methylcellulose (a purported time released agent) and Lactose (a filler). (Record at 687, 692-693.) Koeven testified that he developed the product to be taken once daily, to combat what he saw as patients' lack of compliance with the typically prescribed regimen of fenfluramine three times a day. (Record at 680, 687-692.) Stewart Koeven performed no testing as to the safety and efficacy of his product, and as far as he knew, no one had ever prepared or tested such a product as of May 1996. (Id., also see Record at 846-51.) Prior to preparing the one-a-day fen-phen capsules, Koeven never consulted any physicians nor conducted any research regarding the safety or efficacy of his new product. (Id.) Before receiving a single prescription for compounded fen-phen, Koeven prepared "office use capsules" which he supplied to local physicians for experimental use on their patients. (Id.)

There is expert testimony in this matter on the subject of pharmacy practice and procedure, provided by Bruce Woolley, PhD. Dr. Woolley's testimony is uncontroverted. Dr. Woolley testified regarding Stewart's actions with respect to one-a-day fen-phen, and testified unequivocally that Koeven's actions were not those of a compounding pharmacist but rather were the actions of a pharmaceutical manufacturer researching and conducting a clinical trial of an experimental drug. (Record at 824-830.)

The foregoing facts were among the evidence considered by the trial court

in its decision denying Stewart's first summary judgment motion. The Court summarized its findings of fact as follows:

The Defendant pharmacist combined the prescribed fenfluramine with other substances: phentermine, which was prescribed, and a filler and a time-release agent which were not. The combination of these drugs into a single "one a day" capsule was the idea of the Defendant and was marketed by him to patients of local physicians by word of mouth. The court must assume, and Defendants concede that in considering this motion, defendants acted as a manufacturer. [footnote omitted] Defendants provided no warnings to the Plaintiff's physician about potential side effects, etc. for this new drug combination. . . . (Record at 1007; see also Addendum No. 2.)

Based upon the evidence, the Court determined that the jury could find that Koeven acted not as a pharmacist, but as a manufacturer by "creating and marketing a product not otherwise available." (Record at 1004.)

Stewart's second motion for summary judgment contended that Stewart's is entitled, as a matter of law, to indemnification by PCCA, and that given the terms of Schaerrer's settlement agreement with PCCA, Schaerrer has waived her right to recover damages from any party obtaining indemnification from PCCA. The relevant provision in Schaerrer's settlement agreement with PCCA is set forth below in full:

In exchange for the consideration paid to Plaintiff and as part of the Release granted to PCCA, Plaintiff specifically agrees that she will not seek to recover from PCCA any damages attributable to PCCA's proportionate share of fault, if any, which may be determined under the applicable provisions of the Utah Liability Reform Act, Utah Code Ann. § 78-27, et seq. In addition, Plaintiff agrees that, to the extent that any party to the lawsuit or any other tortfeasor, person, or entity obtains a final judgment against PCCA for contribution or indemnity for damage arising from the subject of this Lawsuit, Plaintiff waives her right to recover from said party, tortfeasor, person, or entity any damages up to and including the total amount of the judgment against PCCA for indemnity. Plaintiff further agrees subject to approval of the

court, that PCCA need not participate further in defense of itself in this action, even for the purpose of having fault and/or indemnity determined. (Record at 1090; see also *Addendum No. 3*)

The trial court ruled that Stewart's was entitled to indemnification as a matter of law from PCCA, and entered a judgment of dismissal with prejudice of Schaerrer's claims against Stewart's on that basis.



## **SUMMARY OF ARGUMENT**

The primary issue in this appeal is a determination of the proper method for allocating fault among joint tortfeasors under Utah Law. Utah's Liability Reform Act (Utah Code Ann. 78-27-37, et seq.) ("the Act") was enacted for the express purpose of insuring that a party is not held liable to an extent greater than its degree of fault. The trial court's ruling granting summary judgment was a determination that the common law doctrine of implied indemnity, rather than the Act, was the proper method for allocating fault in this case. However, because implied indemnity is, like the Act, a device for reallocation of damages according to degree of fault, the Act rendered the doctrine of implied indemnity redundant. Implied indemnity previously had been expressly recognized by Utah's Comparative Fault Act, which was repealed and replaced by the Liability Reform Act in 1986. The Liability Reform Act eliminated the express recognition of indemnity claims, and made that doctrine unnecessary. The trial court erred in granting summary judgment based upon implied indemnity, because the Act places the apportionment of liability within the province of the trier of fact.

Even assuming the doctrine of implied indemnity survives and is applicable after enactment of the Liability Reform Act, the trial court's ruling granting summary judgment was error under the circumstances of this case. Stewart's is a pharmaceutical manufacturer subject to strict liability for marketing and selling a defective drug without adequate warnings. It is not entitled to indemnification under the cases relied upon the trial court, which require the manufacturer of a product to indemnify a "passive" retailer

or seller of that product in a products liability case. Under the facts of this case, as explicitly recognized in the trial court's previous order denying summary judgment, there is evidence in this case from which Stewart's can be found to have been acting as a pharmaceutical manufacturer, and not merely a passive retailer passing along a defective product. Moreover, the authorities cited by the trial court in support of its ruling are inapplicable to this case involving strict products liability claims against a pharmaceutical manufacturer. The trial court erred in ruling that Stewart's was entitled to indemnification by PCCA as a matter of law.

## **ARGUMENT**

### **I. UTAH’S LIABILITY REFORM ACT REPLACED THE COMMON LAW DOCTRINE OF IMPLIED INDEMNITY AS THE METHOD BY WHICH LIABILITY IS ALLOCATED AMONG JOINT TORTFEASORS**

Utah’s Liability Reform Act (Utah Code Ann. §§ 78-27-37 *et. seq.*)

(hereinafter referred to as “the Act”) was enacted in 1986. At the same time, the Utah Legislature repealed the Comparative Negligence Act. As argued below, this change in the law replaced a system that used principles of joint and several liability, contribution and indemnity to allocate liability among the parties with a statutory scheme giving the trier of fact the responsibility for making that allocation.

#### **A. Implied Indemnity Is A Method Of Allocating Liability According To Degree Of Fault**

An examination of the theoretical underpinnings of the doctrine of implied indemnity is useful to understanding how the Liability Reform Act replaced implied indemnity. At common law (and indeed under the repealed Utah Comparative Negligence Act), multiple tortfeasors were jointly and severally liable. One of several tortfeasors could thereby be held liable for all of a plaintiff’s damages, regardless of his own proportion of the fault. The concepts of contribution and indemnity developed as ways for jointly and severally liable defendants to recover from one another by shifting liability according to relative fault. See *e.g.*, Restatement (3rd) of Torts, Apportionment of Liability, § 10, comment e, §§ 22-23 (2000).

Contribution is a method by which one tortfeasor may bring a separate action for recovery from other joint tortfeasors, if the former has been required to pay

damages to a plaintiff in an amount greater than his proportion of fault. Restatement (3rd) of Torts, Apportionment of Liability, § 23 (2000). Implied indemnity is a related but distinct doctrine which requires full reimbursement of one tortfeasor by a joint tortfeasor, where the former has satisfied a common liability. Id., at § 22. The right to indemnity may arise by statute, by contract, or may be implied at law. Implied indemnity was generally available to defendants who were only vicariously liable, or who were not independently culpable for the harm caused to plaintiff. Id. Utah courts have recognized that implied indemnity arose from equitable principles of restitution, which provide: “A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other . . .” Restatement of Restitution, § 96 (1937), cited by Hanover, Ltd. v. Cessna Aircraft Corporation, 758 P.2d 443, 445 (Utah Ct. App. 1988).

Traditionally, implied indemnity and contribution were distinct concepts, in that indemnity permitted full reimbursement from a co-tortfeasor while contribution involved some apportionment of damages. However, Utah courts have recognized the “important, common foundation” of these doctrines: “they attempt to ensure that parties are not held unfairly liable to an extent greater than their degree of fault.” National Services Industries, Inc. v. B.W. Norton Manufacturing Company, Inc., 937 P.2d 551, 554 (Utah Ct. App. 1997). Under a system of joint and several liability, a joint tortfeasor’s only opportunity for a fair distribution of loss was through a contribution or indemnity action. In Utah this changed with the 1986 enactment of the Liability Reform Act.

**B. The Liability Reform Act Eliminated The Need For Contribution And Implied Indemnity Actions.**

The question of whether implied indemnity survived enactment of the Act should first be examined by comparing that Act with the previous statutory scheme. In 1986, the Utah Legislature repealed the Comparative Negligence Act, (Utah Code Ann. § 78-27-37 to § 78-27-43), and replaced it with the Liability Reform Act, (Utah Code Ann. § 78-27-37 to § 78-27-43, as reenacted). Stephens v. Henderson, 741 P.2d 952, 953 (Utah 1987). The repealed Comparative Negligence Act expressly recognized the doctrines of joint and several liability and implied indemnity as defining, in part, the allocation of liability among a plaintiff and several defendants. The former section 78-27-41 provided, “Nothing in this Act shall affect (1) the common law liability of the several joint tortfeasors to have judgment recovered, and payment made, from them individually by the injured person for the whole injury, (2) any right of indemnity which may exist under present law... [Emphasis added]”

The entire statutory scheme for allocating liability among joint tortfeasors contained in the Comparative Negligence Act was repealed and replaced by the Liability Reform Act. The Liability Reform Act contains no provision like former § 78-27-41(2), which expressly recognized existing rights of indemnity. The reason for this is clear: claims of implied indemnity are no longer necessary under a scheme based on the central tenet that “[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant . . .” Utah Code Ann. § 78-27-38(3). In another words, use of implied indemnity to ameliorate the harsh

result of joint and several liability by redistributing loss according to fault is no longer necessary under a system that, by its very terms, prevents any party from being held liable for more than its proportionate share of fault. The Utah Legislature's repeal of former section § 78-27-41(2), and failure to recognize any right of implied indemnity in enacting the Liability Reform Act, strongly suggests that implied indemnity is now unnecessary, if not completely eliminated.<sup>1</sup>

The Utah legislature, by enacting the Liability Reform Act and eliminating joint and several liability, embraced the "important common foundation" of contribution and implied indemnity. This foundation is incorporated in the Act which declares in unambiguous terms that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant . . ." Utah Code Ann. 78-27-38(3). Instead of the prior system in which joint tortfeasors were jointly and severally liable and which required contribution or implied indemnity claims to redistribute the loss, the Act provides for the distribution of loss according to the relative culpability of potentially responsible parties in a single action. This is accomplished by requiring the trier of fact to allocate proportion of fault to any person who contributed to

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<sup>1</sup> In a pre-Liability Reform Act decision, the Tenth Circuit analyzed whether common law indemnity survived enactment of Utah's (now-repealed) Comparative Negligence Act. That court found that a clear majority of other jurisdictions held that adoption of a comparative negligence scheme "effectively abrogates the theory of indemnity based upon the active/passive negligence dichotomy." Gomez v. American Electric Power Service Corp. 726 F.2d 649, 652 (10th Cir. 1984). While that court stated its belief that the Utah Supreme Court might follow the majority rule, it found that common law indemnity survived in Utah only because of the express exception in the Comparative Negligence Act. *Id.* Of course, this express exception has now been repealed, supporting Schaerrer's position that implied indemnity has been abrogated in Utah.

the injury. “In determining the proportional fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury . . .” [emphasis added].” § 78-27-38 (4)(a), Utah Code Ann.<sup>2</sup> Therefore, the Act eliminated joint and several liability in Utah, and expressly banned contribution suits, Utah Code Ann. § 78-27-40(2). While the Act does not expressly eliminate the doctrine of implied indemnity, both the statutory history and the goals of the Act make clear that implied indemnity, as asserted in this action, is made redundant by the Act.

A recent Utah Court of Appeals decision explained why contribution suits are no longer necessary under the Liability Reform Act, and suggests the same with respect to implied indemnity. In this regard, the court stated, “with the abrogation of joint and several liability, there remains no need for suits to redistribute loss among joint tortfeasors because no party will in any case be liable for more than its degree of fault in the underlying tort action.” National Service Industries, 937 P.2d at 555. While not faced with the question directly, the court explained why implied indemnity actions were also no longer necessary under the Act, citing to the Restatement of Torts: “In a state following comparative contribution, or contribution according to the comparative fault of the parties, contribution may tend to merge with indemnity, and the technical distinctions

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<sup>2</sup> Similarly, § 78-27-39 (1) provides that “the trial court may, and when requested by any party shall direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action, including a person immune from suit who contributed to alleged injury.”

of indemnity may become less important... The eventual outcome is likely to be a single remedy based on comparative fault.” Id., citing Restatement (Second) of Torts, § 886A, Comment 1.

The court also recognized that “any other rule that gives one tortious actor a right of indemnity from another tortious actor, may be held inapplicable after the principle of comparative fault has been adopted.” Id., citing Prosser & Keeton on Torts, § 51 at pg. 343. The court pointed out that while the Act expressly prohibits separate actions for contribution, it “must then also prohibit any action separate from the underlying tort action that seeks to redistribute fault based on degree of fault.” Id. This follows from the dictates of the Act, that allocation of fault should be performed by the trier of fact in the underlying tort action. It is an express requirement under the Act that the trier of fact take each tortfeasor's culpability into consideration. (Id. at 555, fn. 2.) The National Services Industries court’s discussion, though not dispositive, clearly calls into question the continued viability of implied indemnity claims, inasmuch as they are simply another means of redistributing liability based upon relative degrees of fault.

In short, the Liability Reform Act assigns to the trier of fact the duty of allocating fault among the parties. Because the trial court’s ruling granting summary judgment prevents the trier of fact from weighing all of the evidence and allocating proportionate fault among the parties, the ruling was error.

**C. To The Extent The Trial Court Found That The Liability Reform Act Does Not Apply To Strict Products Liability Actions, The Court Erred**

In its Findings of Fact and Conclusions of Law, the trial court rejected the



argument that the Utah Liability Reform Act eliminated indemnification in the context of this strict liability claim. (Record at 1156; see also Addendum No. 3) The Findings of Fact and Conclusions of Law do not elaborate on this ruling. It appears from the trial court's comments at the hearing on the underlying motion that it had difficulty harmonizing the doctrine of implied indemnity with the Liability Reform Act's comparative fault provisions, yet the court ultimately decided that indemnification was proper. "I am not satisfied that indemnification is totally abrogated. I am not sure what it is, because I don't know whether it's been directly and squarely addressed since the enactment of the comparative fault statute. But I am satisfied that the fundamental purposes would be satisfied in this case by granting the defendant's motion on his cross-claim [for indemnification]." (Record at 1175, pg. 23:25-24:6) In addition, the trial court repeatedly suggested at the hearing that it was unsure of the applicability of the Act's comparative fault provisions to strict liability claims. For example, the court asked "How can the comparative negligence statute import strict liability and then in the same breath tell me to apportion negligence if I must instruct the jury that every person who has strict liability is 100 percent. It makes no sense." (Record at 1175, pg. 11:20-24.) The court also admitted that it was "really troubled by the application of comparative fault to strict liability cases. It seems to me to be an irresolvable issue." Id. at 21:12-14.

The Liability Reform Act expressly applies to strict liability claims, including strict products liability. Utah Code Ann. § 78-27-37(2). This Court has previously held that comparative fault principles apply in strict products liability actions. Mulherin v Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). While the Mulherin

decision was rendered before enactment of the Liability Reform Act, a more recent decision of this Court confirms the plain language of the Act by holding that the comparative fault provisions of the Act apply even in the strict liability context.

Robinson v. Bistryski, 923 P.2d 1376, 1380 (Utah 1996). In the Robinson case, this Court held that the Act's comparative fault provisions apply to Utah's strict liability dog bite statute. That decision also points out that in a strict liability case, the plaintiff may be relieved of putting on evidence of a strictly liable defendant's culpable conduct for purposes of establishing liability, but also recognizes the necessity of introducing such evidence for the purposes of apportioning fault for the allocation of damages. Id. at 1381-82. *Whatever the reason for the trial court's refusing to permit allocation of fault consistent with the Liability Reform Act, and instead finding that Stewart's is entitled to implied indemnity as a matter of law, this ruling was error.*

**II. EVEN IF IMPLIED INDEMNITY WAS NOT ABROGATED BY THE ACT, STEWART'S IS NOT ENTITLED TO INDEMNIFICATION BY PCCA UNDER THE FACTS OF THIS CASE**

Even if the doctrine of implied indemnity is still viable following the enactment of the Act, Stewart's has not established that it is entitled to indemnification from PCCA under the facts of this case. The court's ruling granting summary judgment on this point was error. First, given the trial court's order denying Stewart's first motion for summary judgment, Stewart's liability in this action, if any, will be that of a pharmaceutical manufacturer. This prevents Stewart's from obtaining indemnity under the facts of this case. Second, the case law cited by the court in support of its decision

involved factually distinct circumstances. Moreover, the Hanover decision relied on by the trial court held that a party's right to indemnity should not be determined on summary judgment, rather it requires findings of the trier of fact. Finally, the court committed error in its finding that plaintiff was required to present evidence that Stewart's actions made fenfluramine more dangerous.

**A. As A Pharmaceutical Manufacturer, Stewart's Is Not Entitled To Indemnification From PCCA**

In its earlier motion for summary judgment,<sup>3</sup> Stewart's maintained that it was not subject to strict liability, because of the pharmacist's exception to strict liability. After briefing and argument, the trial court rejected this position, holding that there "is evidence in this case from which a jury could find that [Stewart's] stepped from behind the pharmacist's counter and became a manufacturer by creating and marketing a product not otherwise available." (Record at 1004; see also, Addendum No. 2). It is necessary, then, to evaluate the state of products liability law in Utah as it relates to manufacturers of prescription drugs. In Grundberg v. The Upjohn Co., 813 P.2d 89 (Utah 1991), this Court adopted the "unavoidably unsafe products" exception to strict products liability as set forth in Comment k to Section 402A of the Restatement (Second) of Torts. Id. at 92. By adopting Comment k, the Grundberg Court held that design defect claims are unavailable with respect to prescription drugs. In other words, sellers of prescription drugs are not subject to strict liability if their products are "properly prepared and

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<sup>3</sup> The denial of this motion by the trial court is the subject of Stewart's cross-appeal, which will be addressed in Schaerrer's Reply brief.

marketed and proper warning is given.” Id. However, the Court also expressly recognized that when suing manufacturers of prescription drugs, “plaintiffs may still recover under a strict liability claim by demonstrating that the product was unreasonably dangerous due to an inadequate warning, a manufacturing flaw, mismarketing or misrepresenting information to the FDA.” Id.; see also 813 P.2d at 97, n. 8.

Accordingly, plaintiff may establish that Stewart's is strictly liable in this case by presenting evidence regarding his failure to warn of the risks of the one-a-day fen-phen capsule, as well as his mismarketing of the product. This evidence, by its very nature, takes Stewart's out of the role of the passive retailer and distinguishes this case from the circumstances under which Stewart's may have been entitled to indemnification from PCCA, as discussed below.

**B. Authority Cited By The Trial Court In Finding Indemnification Is Inapplicable To This Case**

One of the trial court's conclusions of law is that “in Utah, each entity in the chain of distribution of a defective product is entitled to obtain indemnification from those supplying the defective product, provided the indemnitee did not alter or modify the product in such a way as to increase its dangerous qualities or to introduce the defect.” (Record at 1156; see also, Addendum No. 3.) The court cites Hanover Ltd. v. Cessna, 758 P.2d 443, 445-446 (Utah App. 1988); National Service Industries v. Norton, supra, and a 1985 Florida decision, Rowland Truck v. Everwear, 468 So.2d 393 (Fla. 1985), in support of this proposition.

The Hanover case does not stand for the proposition quoted above. The

decision in Hanover discussed the doctrine of implied indemnity in the context of strict products liability actions by pointing out the difference in culpability between passive suppliers, distributors and retailers as compared to the manufacturer of a product. In the Hanover case, the manufacturer was Cessna Aircraft Company. The retailer seller seeking indemnity was an authorized Cessna airplane dealer. The court's recognition of the concept of implied indemnity<sup>4</sup> was premised upon the same public policy supporting strict products liability, *i.e.*, "to place the loss caused by a defective product on those who create the risk and reap the profit by placing a product in the stream of commerce." Id., citing Liberty Mutual Ins. Co. v. Williams, 330 N.E.2d 857, 860 (1975). Under strict products liability, of course, even "passive" retailers may be held liable for selling a defective product. As the court recognized, the concept of implied indemnity prevents the passive retailer from being held derivatively or vicariously liable for the wrongful act of the manufacturer. Hanover, 758 P.2d at 446. The Hanover decision is replete with references to "active" vs. "passive" wrongdoing, ultimately holding that the applicability of implied indemnity turns on this distinction. Id., at 447-48. Importantly, the Hanover court also held that the trial court's grant of summary judgment, ruling that the airplane dealer was entitled to indemnification, was premature. Id. at 450. The court held that the trier of fact must determine, among other things, whether the retailer was in fact "simply

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<sup>4</sup> The Hanover decision does not mention the Liability Reform Act, but it appears that the underlying injury and subsequent lawsuit predated the Reform Act. (The underlying case is identified as a Third District court case, Salt Lake County Civil No. C82-4799, suggesting that the underlying action was initiated in 1982.) The Liability Reform Act's elimination of joint and several liability and implied indemnity is not applicable to injuries occurring prior to its effective dates, *i.e.*, April 28, 1986. Stephens v. Henderson, 741 P.2d 952 (Utah 1987).

an innocent, passive link in the chain of commerce before it can be determined that [it] should be indemnified . . ." Id. For this reason alone, the trial court's motion granting summary judgment to Stewart's should be reversed.<sup>5</sup>

The facts of this case simply do not support application of a rule requiring an active manufacturer to indemnify a passive retailer. Based upon the evidence, Stewart's can in no way be characterized as a "passive" retailer entitled to indemnification from PCCA, the wholesaler which supplied bulk fenfluramine to Stewart's. The evidence of this case, as set forth in the Statement of Facts, shows that Stewart's obtained raw materials from PCCA and created its own product, the one-a-day fen-phen capsule. It created samples and provided them, unsolicited, to local doctors to "try out" on their patients. The record contains undisputed expert evidence that Stewart's activities were those of a pharmaceutical manufacturer, and the trial court previously found that Stewart's is subject to strict liability because of his role as a manufacturer, not as a passive retailer who happened to be in the chain of distribution. In order to establish strict liability against Stewart's as a manufacturer, plaintiffs will put on evidence relating to Stewart's activities in developing its fen-phen capsule, its efforts to market that pill, and its failure to adequately test or to warn doctors of the risk of using the medication. These are not the activities of a passive retailer entitled to indemnification by another who has manufactured the product. Under Hanover, it is the potential indemnitee's

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<sup>5</sup> The National Services case does not support the trial court's conclusion of law that "each entity in the claim of distribution . . . is entitled to . . . indemnification." That case simply discussed the history of the doctrine of implied indemnity, and cited Hanover as an example of implied indemnity. Finally, the Florida case cited by the trial court in support of its ruling, Rowland Truck Equipment, Inc., is not controlling on this Court.

actual wrongdoing, or lack of it, that determine its right to indemnity. In this case, there is evidence of Stewart's actual wrongful conduct, e.g., in failing to properly warn of the risks of its product which, are central to plaintiff's claims. Under these circumstances, Stewart's is simply not entitled to indemnification; at a minimum, this is an issue for the trier of fact.

**C. Plaintiff Is Not Required To Put On Evidence Of Increased Risk Created By Stewart's Actions**

The trial court's conclusions of law are based in part upon its conclusion that "no evidence has been submitted to the court to establish that Stewart's in any way altered or increased the danger of the fenfluramine supplied to it by PCCA before it was consumed by the plaintiff." (Record at 1156.) It is clear from the court's written conclusions of law, as well as its ruling at the hearing on this motion, that the purported lack of evidence regarding Stewart's alteration or increasing the danger of the fenfluramine is central to the trial court's order granting summary judgment. (Record at 1175, p. 23:15-24:10.) As an initial matter, the presence or absence of such evidence is not determinative of plaintiff's ability to establish a strict liability claim against Stewart's, as discussed above, and the issue was not before the trial court in any event.

Moreover, the trial court's conclusion misstates the evidence which would be necessary to a determination on Stewart's right to indemnification, assuming the Hanover decision applied. There is ample evidence of Stewart's own conduct, other than altering or increasing the danger of the drug, which was before the trial court and which Schaerrer should be permitted to present to a jury. This evidence would clearly deprive

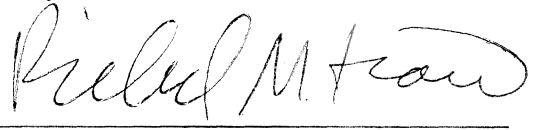
Stewart's of the right of indemnity, if the Hanover decision is found to be the controlling legal standard.

### **CONCLUSION**

For the foregoing reasons, plaintiff and appellant Jeanne Schaerrer respectfully requests that this Court reverse the trial court's April 30, 2001 order and judgment granting Stewart's motion for summary judgment and dismissing Schaerrer's complaint against Stewart's, and remand this case for further proceedings, including trial.

Dated: February 8, 2002

Respectfully Submitted,

By: 

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## **ADDENDUM**

Tab 1

## **UTAH LIABILITY REFORM ACT**

### **78-27-37 Definitions:**

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

(3) "Person immune from suit" means:

(a) an employer immune from suit under Title 34A, Chapter 3, Workers' Compensation Act, or Chapter 3a, Utah Occupational Disease Act; and

(b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30, Governmental Immunity Act.

(4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

### **78-27-38 Comparative Negligence:**

(1) The fault of a person seeking recovery shall not along bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action, including a person immune from suit who contributed to the alleged injury. In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant any may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

**78-27-39 Separate Special Verdicts On Total Damages And Proportion of Fault:**

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known to the parties to the action, including a person immune from suit who contributed to the alleged injury.

(2) (a) If the combined percentage or proportion of fault attributed to all person immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties in proportion to the percentage or proportion of fault initially attributed to each party by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.

(b) If the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2) (a).

(c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

(ii) The jury may be advised that fault attributed to person immune from suit may reduce the award of the person seeking recovery.

(3) A person immune from suit may not be held liable, based on the allocation of fault, in this or any other action.

**78-27-40 Amount of Liability Limited To Proportion of Fault - - No Contribution:**

(1) Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

(3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recovery damages resulting from the allocation of fault under Section 78-27-38.

**78-27-41 Joinder of Defendants:**

(1) A person seeking recovery, or any defendant who is a party to the litigation, may joint as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a person immune from suit who may have caused or contributed to the injury or damage from which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and a defendant. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are

sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section 78-27-38.

(4) A party seeking to allocate fault shall identify in its answer those persons then known to that party who may be at fault and shall identify within a reasonable time any additional persons later discovered to have been at fault.

**78-27-42 Release To One Defendant Does Not Discharge Other Defendants:**

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

Tab 2



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IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

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JEANNE SCHAERRER, :  
  
Petitioner : ORDER DENYING SUMMARY  
JUDGMENT :  
  
vs. : Date: September 1, 2000  
  
PROFESSIONAL COMPOUNDING : Case Number: 980406564  
CENTERS OF AMERICA, INC., et al, :  
Respondents : Division V: Judge James R. Taylor  
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This matter comes before the Court on Defendant Stewart's Plaza Pharmacy and Stewart Koeven's (Defendant Stewart) motion for summary judgment. The Utah Supreme Court has given the court the following guidelines for making a ruling of summary judgment:

If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the [non-moving] party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing summary judgment. Wilkinson v. Union Pac. R.R. Co., 975 P.2d 464, 465 (Utah 1998) quoting Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

Additionally, the Utah Rules of Civil Procedure contain this rule for making a ruling of summary judgment:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Utah R. Civ. P. 56(c).

The court will now recite the facts and inferences that it relies on according to the

aforementioned guidelines to make its decision to deny summary judgment for Defendants Stewart Koeven, and Stewart's Plaza Pharmacy. The Defendant pharmacist combined the prescribed fenfluramine with other substances: phentermine, which was prescribed, and a filler and a time-release agent which were not. Combination of these drugs into a single "one a day" capsule was the idea of the Defendant and was marketed by him to patients of local physicians by word of mouth. The court must assume, and Defendants concede that in considering this motion, defendants acted as a manufacturer.<sup>1</sup> Defendants provided no warnings to the Plaintiff's physician about potential side effects, etc., for this new drug combination. Defendants could not have known without testing whether the fenfluramine would be released over a period of time as intended.<sup>2</sup> For the purposes of this motion it is assumed that sufficient evidence is available to establish a causative link between the fenfluramine ingested by the Plaintiff and her physical ailment.

The Plaintiff argues that because the Defendant pharmacist "manufactured" a new product, he is strictly liable to the Defendant for any harm as if he had originally manufactured the fenfluramine itself. The Defendant counters that since there is no evidence that the drug in capsulated combination with other ingredients caused any harm that would not have occurred from ingestion in the fashion expected by the primary supplier of fenfluramine, the general exclusion of pharmacists from theories of strict liability applicable to a manufacturer of the drug should apply in this case. The earliest case that the court can find that exempts a pharmacist from

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<sup>1</sup> See quotation of Statutory definition and discussion *infra*.

<sup>2</sup> See uncontroverted testimony of Dr. Wooley at page 12 of Plaintiff's Memo in Opposition to Summary Judgment.

strict liability is McLeod v. W. S. Merrell Co., 174 So2d 736 (Fla 1965). The original claim was one of implied warranty of fitness, but the Florida Supreme Court recognized that the action was also based on the concept of strict liability.<sup>3</sup> The court noted that comment k<sup>4</sup> of § 402A of the Restatement 2d of Torts provides for an exception to strict liability for pharmacists under these same conditions. The court also noted that applying strict liability to pharmacists would result in their becoming insurers of the safety of drugs manufactured by others.<sup>5</sup> The Restatement of the Law Third, Torts–Product Liability § 6 (e) and comment h also recognize the pharmacy exception, noting a couple of exceptions:

- (e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:
  - (1) at the time of sale or other distribution the drug or medical device contains

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<sup>3</sup> McLeod at 739.

<sup>4</sup> The court recognizes that courts have interpreted this comment in different ways. Here is the text of the comment:

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

<sup>5</sup> McLeod at 739.

a manufacturing defect as defined in § 2(a); or  
(2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

h. Liability of retail seller of prescription drugs and medical devices for defective designs and defects due to inadequate instructions or warnings. The rule governing most products imposes liability on wholesalers and retailers for selling a defectively designed product, or one without adequate instructions or warnings, even though they have exercised reasonable care in marketing the product. See § 1, Comment e, and § 2, Comment o. Courts have refused to apply this general rule to nonmanufacturing retail sellers of prescription drugs and medical devices and, instead, have adopted the rule stated in Subsection (e). That rule subjects retailers to liability only if the product contains a manufacturing defect or if the retailer fails to exercise reasonable care in connection with distribution of the drug or medical device. In so limiting the liability of intermediary parties, courts have held that they should be permitted to rely on the special expertise of manufacturers, prescribing and treating health-care providers, and governmental regulatory agencies. They have also emphasized the needs of medical patients to have ready access to prescription drugs at reasonable prices.

The Coyle case also cites the following cases as refusing to apply strict liability to pharmacists: Raynor v. Richardson-Merrell, Inc., 643 F.Supp. 238 (D.D.C.1986); Ramirez v. Richardson-Merrell, Inc., 628 F.Supp. 85 (E.D. Pa.1985); Murphy v. E.R. Squibb & Sons, 40 Cal.3d 672, 221 Cal.Rptr. 447, 710 P.2d 247 (1985); Ullman v. Grant, 114 Misc.2d 220, 450 N.Y.S.2d 955 (1982); Batiste v. American Home Products Corp., 32 N.C.App. 1, 231 S.E.2d 269 (1977); Bichler v. Willing, 58 A.D.2d 331, 397 N.Y.S.2d 57 (1977).<sup>6</sup>

The Plaintiff argues that because the pharmacist stepped out of the traditional role of receiving and filling prescriptions he becomes strictly liable for harm that might result from the noxious substance. The burden of strict liability and the duty to warn of defects is placed upon manufacturers to encourage careful testing, research and warnings that precede or accompany the

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<sup>6</sup> Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383 (PA 1991) at 1387-1388.

product into the marketplace.<sup>7</sup> The Pharmacist in this case wants the best of both worlds. He wants the economic profit from making a desirable product available for sale but wants to avoid the testing, research, and warning responsibility that generally attach to the introduction of a new product. The court cannot distinguish between the Defendant Stewart as a manufacturer and other named defendants, who are acknowledged manufacturers but who are not the manufacturers of the original fenfluramine powder. These other manufacturers merely purchased fenfluramine powder and put it into a pill or capsule form. They cannot escape liability under the doctrine of strict liability for manufacturers of defective or dangerous products and neither should Defendants Stewart if he acted as a manufacturer.

No regulated or controlled substance is intended to be sold without an intervening physician's prescription. Nevertheless, a manufacturer may still be strictly liable for a dangerous or defective product. There simply is no good reason not to apply the same standards to this Defendant. There is evidence in this case from which a jury could find that he stepped from behind the pharmacist's counter and became a manufacturer by creating and marketing a product not otherwise available. The Utah Code gives this definition of manufacturing, which appears to encompass what Defendant Stewart did:

(22) "Manufacture":

(a) means the production, preparation, propagation, compounding, conversion, or processing of a prescription drug or a device, either directly or indirectly . . . and includes any packaging or repackaging of a substance or labeling or relabeling of its container; {U.C.A. 58-17a-102 (22). Definitions.}

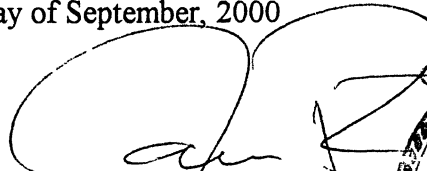
Something in the product appears to have had negative physical consequences. The pharmacist

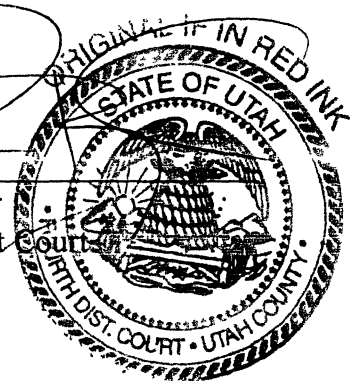
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<sup>7</sup> For example see Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383 (PA 1991) at 1387, which states that strict liability provides an incentive to safety.

exception to the doctrines of strict liability and a manufacturer's duty to warn does not apply in this case. The motion for summary judgment is denied.

Dated this 1<sup>st</sup> day of September, 2000

  
Judge James R. Taylor  
Fourth Judicial District Court

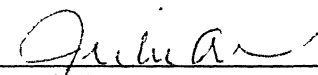


Copies of this Order mailed to:

Counsel for the Petitioner:

Counsel for the Respondent:

Mailed this 1 day of Sept, 2000, postage pre-paid as noted above.

  
Court Clerk

### Tab 3

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah

5-1-2001 *at* Deputy

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

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JEANNE SCHAERRER,

Plaintiff,

vs.

PROFESSIONAL COMPOUNDING  
CENTERS OF AMERICA, INC.,  
STEWART'S PLAZA PHARMACY, INC.,  
STEWART KOEVEN, R.PH., JEFFREY W.  
JOHNSON, M.D., AMERICAN HOME  
PRODUCTS CORP., A.H. ROBINS  
COMPANY, INCORPORATED, WYETH-  
AYERST LABORATORIES COMPANY,  
INC.,

Defendants.

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND JUDGMENT**  
(Proposed)

Case No. 980406564

Judge James Taylor

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On or about November 29, 2000, defendants Stewart's Plaza Pharmacy and Stewart Koeven (hereinafter "Stewart's"), by and through their counsel of record, Michael P. Zaccchio, RICHARDS, BRANDT, MILLER & NELSON, submitted to the court a Motion for Summary Judgment, supported by a Memorandum of Points and Authorities, along with certain exhibits.



Thereafter, plaintiff, by and through her counsel of record, Richard M.. Franco, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, and Charles F. Abbott, ABBOTT & WALKER, submitted a Memorandum in Opposition to Stewart's Motion for Summary Judgment and Stewart's, by and through counsel, submitted a Reply Memorandum. On Thursday, January 25, 2001, the court heard oral argument from Mr. Zaccheo on behalf of Stewart's, and Mr. Franco, on behalf of the plaintiff, regarding Stewart's Motion for Summary Judgment. After consideration of the parties' memoranda, oral argument, and applicable Utah law, the court enters the following Findings of Fact, Conclusions of Law, and Judgment pursuant to Rules 52, and 56, Utah Rules of Civil Procedure, and Rule 4-504, Utah Rules of Judicial Administration.

### **FINDINGS OF FACTS**

Based upon the pleadings, the evidence submitted to the court by the parties, the admissions of counsel, and the court's prior findings, the court hereby finds that the following facts are uncontroverted and that no material issue of fact remains regarding the following:

1. The plaintiff Jeanne Schaerrer on several occasions purchased the drug fenfluramine from defendant Stewart's. All of the fenfluramine supplied to Jeanne Schaerrer by Stewart's was purchased by Stewart's from defendant Professional Compounding Centers of America ("PCCA").
2. Stewart's combined the fenfluramine purchased from PCCA, with the drug phentermine and a time-release agent to create a one-a-day "phen-fen" capsule. It was in the form

of this capsule that Stewart's supplied fenfluramine to Jeanne Schaerrer. No evidence has been submitted to the court which would support an inference that the combining of fenfluramine, phentermine and a time-release agent in a single capsule altered or affected the fenfluramine in any way. No evidence has been submitted to the court that would support an inference that Stewart's altered, in any way material to this action, the fenfluramine that was purchased from PCCA and was ultimately consumed by the plaintiff. The fenfluramine supplied by Stewart's was in no way more dangerous or more likely to cause injury to the plaintiff than was fenfluramine supplied to the plaintiff by, for example, defendant American Home Products, which was not combined in a single capsule with phentermine or any other substance. This finding was also made by the court in connection with an earlier motion for summary judgment submitted by Stewart's and is reflected in the court's rulings of September 1, 2000, and October 18, 2000, denying Stewart's Motion for Summary Judgment and granting partial summary judgment, respectively. The court's Order of September 1, 2000, and the court's Order of October 18, 2000, are both incorporated into these findings and conclusions as if fully set forth.

3. Plaintiff has alleged in her Complaint that she sustained injury as a result of having ingested the drug fenfluramine and that Stewart's is liable based upon theories of negligence and strict products liability. Based upon the court's ruling of October 18, 2000, plaintiff's only remaining cause of action against Stewart's is based upon strict product liability.

4. In this case, in order to recover based upon the theory of strict product liability, the jury would have to conclude that Stewart's was a manufacturer with regard to the fenfluramine supplied to the plaintiff. For purposes of these findings of fact, conclusions of law and judgment, the court has assumed that the jury would indeed conclude that Stewart's was a manufacturer. As a manufacturer, Stewart's would be liable for a defect, if any, in the drug fenfluramine which it supplied to the plaintiff.

5. For purposes of this motion, the court has assumed that the plaintiff would be able to meet her burden to establish that the drug fenfluramine was defective as that term is defined under Utah law for purposes of strict product liability.

6. On or about January 19, 2000, the plaintiff executed a Release and Settlement Agreement with defendant PCCA. In pertinent part, the Release provided as follows:

### III.

#### **PLAINTIFF'S AGREEMENT AND WAIVER AS TO CLAIMS AGAINST PCCA FOR CONTRIBUTION AND INDEMNITY**

#### **(READ CAREFULLY)**

In exchange for the consideration paid to Plaintiff and as part of the Release granted to PCCA, Plaintiff specifically agrees that she will not seek to recover from PCCA any damages attributable to PCCA's proportionate share of fault, if any, which may be determined under the applicable provisions of the Utah Liability Reform Act, Utah Code Ann. § 78-27, *et seq.* In addition, Plaintiff agrees that, to the extent that any party to the lawsuit or any other tortfeasor, person, or entity obtains a final judgment against PCCA for contribution or indemnity for damage arising from the subject of this Lawsuit, Plaintiff waives her right to recover from said party,

tortfeasor, person, or entity any damages up to and including the total amount of the judgment against PCCA for indemnity. Plaintiff further agrees subject to approval of the court, that PCCA need not participate further in defense of itself in this action, even for the purpose of having fault and/or indemnity determined.

7. On or about February 8, 1999, Stewart's filed a Cross-Claim against defendant PCCA. The Cross-Claim asserted that Stewart's had a right of common-law indemnification against PCCA in the event that the fenfluramine supplied by PCCA to Stewart's was determined to be defective. After plaintiff settled with PCCA, plaintiff's claims against PCCA were, by stipulation, dismissed by the court. The Cross-Claim of Stewart's against PCCA was not dismissed.

8. Neither in her Memorandum in Opposition to Stewart's Motion for Summary Judgment, nor at oral argument, did plaintiff contest the validity of the provision of the PCCA Release which is quoted herein. No evidence was submitted to the court to suggest that the terms of the PCCA Release should not be enforced according to the ordinary meaning of its plain and unambiguous terms.

### **CONCLUSIONS OF LAW**

The court hereby adopts the following conclusions of law:

1. The court hereby incorporates all conclusions of law set forth in the court's Orders of September 1, 2000, denying Stewart's Motion for Summary Judgment, and October 18, 2000, granting partial summary judgment to Stewart's.

2. The pertinent provision of the PCCA Release is unambiguous and enforceable according to its plain terms. Pursuant to the terms of the Release, plaintiff agreed to waive any right to recovery from any party that obtained a judgment of indemnification against PCCA. Therefore, if Stewart's is entitled in this matter to indemnification from PCCA for damages awarded to the plaintiff, then plaintiff has agreed to waive her right to recover from Stewart's.

3. In Utah, each entity in the chain of distribution of a defective product is entitled to obtain indemnification from those supplying the defective product, provided the indemnitee did not alter or modify the product in such a way as to increase its dangerous qualities or to introduce the defect.<sup>1</sup> Resolving every reasonable inference in plaintiff's favor, no evidence has been submitted to the court to establish that Stewart's in any way altered or increased the danger of the fenfluramine supplied to it by PCCA before it was consumed by the plaintiff. The court finds that as a matter of law Stewart's would be entitled to indemnification from PCCA for any defect in the drug fenfluramine which was consumed by the plaintiff.

4. The court rejects plaintiff's argument that the enactment of the Utah Liability Reform Act, Utah Code Annotated § 78-27-37, 38 (1999) eliminated indemnification as it applies in this case to PCCA and Stewart's in the context of a strict product liability claim.

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<sup>1</sup>See *Hanover Ltd. v. Cissna*, 758 P.2d 443, 445-446 (Utah App. 1988); *National Serv. Indus. V. D.W. Norton*, 937 P.2d 551 (Utah App. 1997). This also appears to be the law in the majority of the states. *Hanover*, 758 P.2d at 446; *Roland Truck v. Everwear*, 468 So.2d 393 (Fla. 1985).

5. Having determined that Stewart's is entitled as a matter of law to judgment against PCCA for indemnity for damages awarded to Jeanne Schaerrer as a result of her remaining strict product liability claims, the court further finds that pursuant to the terms of the PCCA Release, plaintiff would inevitably be required to waive her right to recover from Stewart's any damages arising from a defect in the drug fenfluramine. The court determines that requiring Stewart's and the plaintiff to conduct a long and expensive trial would be wasteful and inefficient and would inevitably, if the plaintiff succeeded in obtaining a favorable verdict, result in plaintiff waiving her right to recover from Stewart's. Therefore, the court grants summary judgment in Stewart's favor, dismissing plaintiff's only remaining claim, that of strict product liability, with prejudice and on the merits, each party to bear their own costs and attorneys' fees.

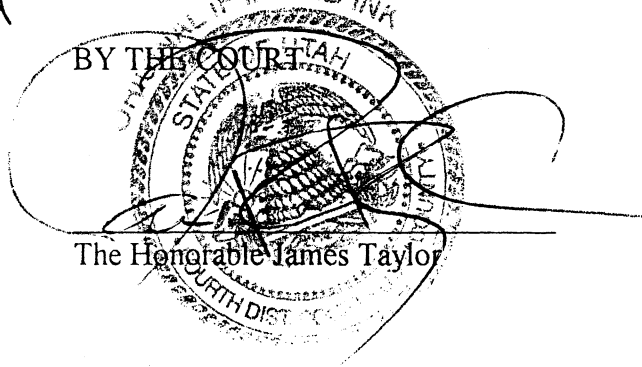
#### **ORDER AND JUDGMENT**

Having considered the arguments of the parties, and having entered findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Stewart's Motion for Summary Judgment filed on or about November 29, 2000, is granted, and plaintiff's

Complaint against Stewart's is dismissed, with prejudice and on the merits, each party to bear their own costs and attorneys' fees.

DATED this 30 day of April, 2001



APPROVED AS TO FORM

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP,

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Richard M. Franco  
Attorneys Plaintiff Jeanne Schaerrer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 1<sup>st</sup> day of February, 2001, to the following:

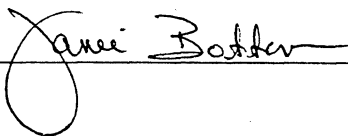
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