

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  
Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JEANNE SCHAERRER,

Appellant,

vs.

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

Appellees and Cross-Appellants.

---

Supreme Court Case No. 20010471-SC

**BRIEF OF THE APPELLEE/CROSS  
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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Stewart Koeven*

**FILED**  
UTAH SUPREME COURT

APR 26 2002

PAT BARTHOLOMEW  
CLERK OF THE COURT

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## **JURISDICTION**

The jurisdiction of the Utah Supreme Court is based on Utah Code Ann. § 78-2-2(3)(j)(2001).

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

Stewart's disagrees with the statement of issues set forth in Schaerrer's Brief, and also disagrees with the standard of review asserted by Schaerrer as being applicable to Schaerrer's issue no. 1. Therefore, pursuant to Rule 24(b)(1), Utah R. App. P., Stewart's submits a separate statement of issues.

### **ISSUE PRESENTED BY SCHAERRER'S APPEAL**

1. Did the trial court correctly determine that if a defendant is subject to strict product liability only as a result of being in the chain of distribution of a product, then that defendant is entitled to indemnification from upstream suppliers of the defective product?

Standard of Review: "A grant of summary judgment is reviewed for correctness." *Gerbich v. Newmed, Inc.*, 977 P.2d 1205, 1207 (Utah 1999).

### **ISSUE PRESENTED BY STEWART'S CROSS-APPEAL**

1. Did the trial court correctly determine that Stewart's was not entitled to immunity from claims of strict product liability?

Standard of Review: The trial court's legal conclusions are afforded no deference, and are reviewed for correctness. *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).



Issue Preserved: Stewart's Cross-Appeal was preserved in its Notice of Cross-Appeal which identified the ruling of the trial court dated September 1, 2000, denying summary judgment. (Notice of Cross Appeal, *Record at* 1170; Trial Court's Ruling Denying Summary Judgment, *Record at* 1008, Addendum ("Add.") tab 1.)

**CONSTITUTIONAL PROVISIONS, STATUTES, ETC., DETERMINATIVE OF APPEAL**

None.

**STATEMENT OF THE CASE**

**I. NATURE OF THE CASE.**

Plaintiff Jeannie Schaerrer asserted that she was entitled to recover damages for injuries resulting from an allegedly defective drug – fenfluramine. While Schaerrer's Complaint alleges many causes of action against defendant Stewart's, following discovery it was clear that the only claim supported by evidence was a strict product liability claim based upon Stewart's sale (pursuant to a valid prescription) of the drug fenfluramine to Schaerrer. (See Memorandum Decision of Judge James Taylor dated October 18, 2000, *at Record* 1058 and attached at Add. tab 2; and Add. tab 3, Findings of Fact No. 2.)

**II. COURSE OF PROCEEDINGS**

Schaerrer's appeal and Stewart's cross-appeal relate to three motions and three rulings of the trial court. First, Stewart's moved for summary judgment on or about May 12, 2000. (*Record at* 594.) The court denied Stewart's motion for summary judgment and it is that denial that forms the basis of Stewart's Cross-Appeal. (*Record at*

1008, Add. tab 1.) Second, following the denial of Stewart's motion for summary judgment, the court reconsidered its ruling and granted Stewart's partial summary judgment. (Add. tab 2.) That ruling is not the subject of an appeal, but it unequivocally establishes certain facts hereinafter identified as important to an understanding of this case.

Third, on November 29, 2000, Stewart's filed another Motion for Summary Judgment, based in part on the findings of the court with respect to Stewart's first motion for summary judgment. This time, the motion was granted. The court issued findings of fact, conclusions of law and entered final judgment in Stewart's favor. (*Record at 1153-1161, Add. tab 3.*) This appeal followed.

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

In the summer of 1995, Jeanne Schaerrer began taking the drugs phentermine and fenfluramine to lose weight. The drugs were prescribed by her physician, Dr. Jeffrey Johnson (a defendant) and purchased from Woolsey Pharmacy (not a defendant). (*Record at 644-660, Dr. Johnson's records; Record at 619, 642, Woosley Pharmacy records.*) On November 2, 1996, Schaerrer, for the first time, presented to Stewart's Plaza Pharmacy a prescription written by Dr. Johnson. The prescription called for 15 capsules, with each capsule to contain 20 milligrams of the drug phentermine and 60 milligrams of the drug fenfluramine, to be taken once daily. (*Record at 617, Dr. Johnson's actual prescription; Record at 703, Deposition testimony of Schaerrer.*) The prescription written by Dr. Johnson was filled by Stewart Koeven, a pharmacist and

proprietor of Stewart's Plaza Pharmacy (hereinafter collectively "Stewart's") by combining the drug fenfluramine, purchased by Stewart's from defendant PCCA, and the drug phentermine, purchased by Stewart's from several sources, in a single capsule. (*Record at 693*, Deposition testimony of Stewart Koeven.)

Over the next six months, concluding on June 16, 1997, Dr. Johnson wrote four additional prescriptions for Jeanne Schaerrer to receive additional amounts of phentermine and fenfluramine combined into a single capsule. (*Record at 616-613*, Dr. Johnson prescriptions.) Each prescriptions was filled by Stewart Koeven by combining fenfluramine purchased from PCCA, with phentermine purchased from a variety of sources. (*Record at 693*, Deposition testimony of Stewart Koeven.) Sometime before mid-July of 1997, Mrs. Schaerrer ceased taking fenfluramine. (*Record at 699*, Deposition of Jeanne Schaerrer.)

Stewart's did not make or create either drug. Rather, Stewart's merely combined the already manufactured drugs in a single capsule. (*Id.*) The unchallenged ruling of the trial court establishes that combining the drugs did not render either drug more dangerous than if taken separately. In fact, Schaerrer conceded this point. (Add. tab 2; Add. tab 3, finding of fact no. 2.) The injuries of the plaintiff cannot be attributed to combining the drugs. (*Id.*)

On or about February 8, 1999, Stewart's filed a Cross-Claim against co-defendant PCCA, from whom Stewart's acquired all of the fenfluramine that was purchased from Stewart's by Schaerrer. The Cross-Claim asserted a right of common-

law indemnification against PCCA based upon the well-established traditional concept that all entities in the chain of distribution of an allegedly defective product may obtain indemnification from those up the chain of distribution, ending ultimately with the product manufacturer.<sup>1</sup> In its Finding of Fact dated April 30, 2001, the court found that Stewart's Cross-Claim against defendant PCCA sought common-law indemnification: "in the event that the fenfluramine supplied by PCCA to Stewart's was determined to be defective." (Add. tab 3, ¶ 7 of the court's Findings of Fact.) This fact does not appear to be disputed by Schaerrer.

On or about January 19, 2000, Schaerrer entered a Release and Settlement Agreement with defendant PCCA. In pertinent part, the Release provided that not only was PCCA released from all claims, but that Schaerrer also waived her right to recover from any party that could obtain indemnification from PCCA for liability arising from her claims. (Add. tab 3, Findings of Fact, 6, 7, and 8.)

On April 30, 2001, the court granted Stewart's second Motion for Summary Judgment. The court found that as a matter of law: if Schaerrer recovered on her only remaining claim – that of strict product liability – against Stewart's, then Stewart's would be able to obtain indemnity from PCCA for all such liability. Rather than requiring all of the parties to go to the time and expense of a trial and subsequent action between

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<sup>1</sup> For reasons unknown to Stewart's, Stewart's Answer and Cross-Claim, which should appear in the record at p. 71, is gone. In its place there is a handwritten note created by Carma B. Smith, clerk deputy of the Fourth Judicial District Court, stating that the Answer and Cross-Claim are gone, but offering no explanation. (*Record at p. 71.*)

Stewart's and PCCA regarding the right of indemnity, the court concluded that even if Schaerrer prevailed, she would have to waive her right to recovery based upon the unambiguous language of the Release she executed with PCCA. If Schaerrer prevailed against Stewart's, PCCA's obligation to indemnify Stewart's would be triggered, and once triggered, Schaerrer was required by the Release to waive her right to recover from Stewart's. (Add. tab 3, pp. 5-7 of the court's Conclusions of Law.)

### **SUMMARY OF ARGUMENT**

#### **Summary of Argument Applicable to Schaerrer's Appeal.**

The findings of fact made by the trial court on April 30, 2001 should be entirely accepted by this Court because there has been no appropriate challenge to such findings. Schaerrer has not identified a challenge to such findings in her brief, and in any event, has failed to meet the marshaling of evidence requirement to make such a challenge.

These findings of fact, along with the trial court's unchallenged earlier findings when granting partial summary judgment to Stewart's, establish the correctness of the court's eventual ruling granting complete summary judgment to Stewart's. Where plaintiff concedes that a defendant's conduct did not materially alter a product claimed to be effective, then that defendant is entitled to indemnification from those who supplied the product to the defendant. This well established principle was not altered by the Utah Liability Reform Act.

## **Summary of Argument Regarding Stewart's Cross-Appeal**

Traditionally, pharmacists have been considered immune from claims of strict product liability when they fill a valid prescription for a drug, and the pharmacist does not alter the drug in any material way. Stewart's raised this immunity to Schaerrer's claims. The trial court rejected this argument based upon the chance that a jury could conclude that Stewart's was a "manufacturer" and not a "pharmacist" because Stewart's combined phentermine with fenfluramine in a single capsule. Stewart's contends that the trial court exalted form over substance. While Stewart's activities combining fenfluramine and phentermine in a capsule might be considered by a jury to be consistent with the activities of a manufacturer, those activities have nothing to do with this case. There is no evidence that the combining of phentermine and fenfluramine altered the fenfluramine consumed by Jeanne Schaerrer in any way. There is no evidence that Stewart's "manufacturing" activities caused injury. It was Stewart's role as pharmacist (a seller of drugs prescribed by physicians) that formed the basis of Schaerrer's claims and as a pharmacist, Stewart's is immune from Schaerrer's claims.

### **ARGUMENT**

#### **POINT I**

##### **THE COURT'S FINDINGS OF FACT ARE UNCHALLENGED.**

The trial court's findings of fact (Add. tab 3) should be accepted by this Court as controlling for this appeal. Schaerrer has not identified a challenge to such findings of fact in her brief, and has made no effort to marshal the evidence that would

support the findings of fact. In the absence of appropriate marshaling of the evidence, the trial court's findings of fact should be accepted as controlling by this Court. *Hales Sand & Gravel v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992); *Christensen v. Monns*, 812 P.2d 69, 72 (Utah 1991); Rule 24(a)(9), **Utah R.App.P.** The trial court's findings in its memorandum decision of October 18, 2000 should also be accepted as controlling because those findings are not the subject of Schaerrer's appeal. (*Record at* 1163, 1164, Schaerrer's Notice of Appeal.)

Each of the trial court's findings of fact are significant. For example, the trial court found that Stewart's had asserted an effective claim against PCCA for strict product liability common-law indemnification, and that the validity of the Release executed by plaintiff, including the provision relied upon by the court to grant summary judgment to Stewart's, was unchallenged. The trial court found that: "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." (Add. tab 3, ¶ 8, Findings of Fact.) According to those plain terms, if Stewart's is entitled to indemnification from PCCA, Schaerrer waived her right to recover from Stewart's. This point is established and uncontested. Further, the court found that Stewart's so-called "manufacturing" activities did not cause Schaerrer's injuries and Schaerrer conceded this point. (Add. tab 2; tab 3, Finding of Fact no. 2.)

## **POINT II**

### **STEWART'S IS ENTITLED TO INDEMNIFICATION FROM PCCA.**

#### **A. The Limited Nature of Stewart's Liability.**

In this case, the trial court's unchallenged finding is that Stewart's did nothing that caused plaintiff injury **except** sell her fenfluramine. There is no evidence in this case that a breach of the standard of care by Stewart's caused injury. There is no evidence in this case that the combining of fenfluramine with phentermine caused injury. There is no evidence that Stewart's so-called marketing efforts caused Schaerrer's injuries. There is no evidence that Stewart's lack of warnings regarding the one-a-day capsule caused injury. There is no evidence that Stewart's altered in any material way the fenfluramine that it purchased from PCCA. The fenfluramine supplied by Stewart's was in no way more dangerous or more likely to cause injury than was the fenfluramine supplied to plaintiff by anyone else. (Add. tab 3, trial court's Findings of Fact.) The **only** claim that plaintiff had against Stewart's which was supported by evidence was the claim that Stewart's should be strictly liable purely because of Stewart's presence in the chain of distribution of fenfluramine. It is only because the doctrine of strict product liability allows plaintiff to recover from every entity within the chain of distribution that plaintiff has a claim against Stewart's. No other claims were supported by evidence of causation. (Add. tab 3, Findings of Fact, Conclusions of Law and Judgment; and Memorandum Decision Add. tab 2.)



**B. Stewart's is Liable, if at all, Only Because Everyone in the Chain of Distribution Is Jointly Strictly Liable.**

Even though joint and several liability was generally eliminated by the Utah Tort Reform Act in 1986,<sup>2</sup> when a plaintiff asserts a claim of strict product liability, everyone in the chain of distribution of the allegedly defective product is jointly liable with everyone else in the chain of distribution for injuries caused by the product. *See* Restatement (Third) Torts, § 1, and comments b through e; Restatement (Second) Torts, § 402A(1) and comment f.

Historically, the reason that everyone, from the manufacturer who created the defective product, to the retail seller entirely ignorant of the product's defect, was liable for 100 percent of plaintiff's injuries is that the injured party may have no connection or contact with anyone other than the entity from whom the product was purchased and the injured party must rely upon the retail seller for an assurance of safety. *Id.* Sellers are liable for defective products sold "even though [the seller] has exercised all possible care in the preparation and sale of the product." Restatement (Second) Torts, § 402A, comment a. Without this traditional doctrine of joint liability, Jeanne Schaerrer would have no claim against Stewart's in this case. She has no evidence to support any other claim. All of her other claims based upon Stewart's alleged manufacturing activity,

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<sup>2</sup> Joint and several liability was eliminated in Utah with the adoption of the Utah Liability Reform Act, U.C.A. § 78-27-38 (1986); most other states have likewise eliminated joint and several liability and have adopted a comparative responsibility approach of one form or another. *See* Restatement (Third) Torts, § 23 Contribution, Reporter's Note comment e, and the cases collected.

fail because of a lack of causation evidence. No evidence was submitted to the trial court, and none exists, that anything that Stewart's did or didn't do, however that conduct might be characterized, caused Jeanne Schaerrer's injuries except that Stewart's sold fenfluramine to Jeanne Schaerrer.<sup>3</sup>

**C. Upstream Indemnification Is a Necessary Element of Strict Products Liability**

Historically, everyone downstream (assemblers, wholesalers, retailers) from the original producer of a defective product has been entitled to obtain indemnification from everyone upstream. This principle strikes an appropriate balance between providing the injured party with the opportunity for recovery from anyone in the chain of distribution, and still allowing those in the chain of distribution to pass liability up the chain towards entities best able to eliminate defects.<sup>4</sup> The Supreme Court of New Jersey concisely explained this principle in *Promaulayko v. Johns Manville Sales Corp.*, 562 A.2d 202 (N.J. 1989). The court stated:

This approach is consistent also with the principle of focusing on the defective product as it proceeds down the chain of distribution. In general, the effect of requiring the party closest to the original producer to indemnify parties farther down the chain is to shift the risk of loss to the most efficient accident avoider. (citations omitted.) Passing the cost of risk up the distributive chain also fulfills, as a general rule, the goal of distributing the risk to the party best able to bear it.

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<sup>3</sup> Of course, there are exceptions to the principle that liability extends to everyone in the chain of distribution. One of those exceptions would apply if the fact-finder in this case determined that Stewart's is a pharmacist, and not a manufacturer. *Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1387-1388 (Pa. 1991) (and the many cases cited therein).

<sup>4</sup> Though Schaerrer voluntarily waived that right in this case.

*Id.* at 206. It is “well settled” that this same principle allows a downstream manufacturer who incorporates, by assembly or otherwise, a defective component part into a finished product to obtain indemnification from the suppliers of the defective component. *See Rowland Truck Equip. Inc. v. Everwear Prod., Inc.*, 468 So.2d 393 (Fla. 1985) wherein the court stated:

The law is well settled that when a manufacturer of a finished product is held strictly liable for damages caused to a third person by a defective component part that was purchased from a supplier and integrated into the finished product, the said manufacturer is entitled to recover indemnity from the party supplying the defective component part, provided the manufacturer was not himself negligent in either creating or failing to discover the defect.

*Id.* at 394; *Jones v. Arrow Chem.*, 680 F.Supp. 338, 340 (D. Mont. 1987); *Coca-Cola Bottling Co. v. Reeves*, 486 So.2d 374, 379 n. 4 (Miss. 1986); *Kicklighter v. Nails By Janai, Inc.*, 616 F.2d 734, 739 (5th Cir. 1980); American Jurisprudence 2d at Vol. 63B, Products Liability, § 1748 (1997).

Therefore, if Schaerrer proved that fenfluramine is defective, then Stewart’s would be entitled to indemnification from PCCA because PCCA supplied to Stewart’s a defective component part; i.e., fenfluramine.

In response to these well established principles, plaintiff raises two arguments.

First, plaintiff argues that upstream indemnification is not available in Utah because the Liability Reform Act “eliminated the need for . . . indemnity.” (Schaerrer’s

Brief beginning at p. 15.) Plaintiff's argument proves too much. Indemnification in the context of a strict product liability claim arose because those farther down the chain of distribution are considered just as liable to the injured party as those up the chain of distribution. Without that concept, plaintiff has no claim against Stewart's. If the Utah Liability Reform Act eliminated this joint chain of distribution liability, there would be no need for indemnification, but there would also be no legal basis for Schaerrer's claim against Stewart's. If, however, joint chain of distribution liability survived the enactment of the Utah Liability Reform Act, then chain of distribution indemnification must also survive the Liability Reform Act. The exact same reasons which led courts to acknowledge chain of distribution indemnification before the elimination of joint and several liability generally, are still just as applicable because the elimination of joint and several liability did not eliminate joint chain of distribution liability. This simple proposition has led courts to uniformly reject the argument Schaerrer is asserting before this Court. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Kent. 2000); *Rotono v. Access Indus. Inc.*, 26 Conn.L.Rptr., 274, 2000 WestLaw 151231 (Conn. 2000); *Horowitz v. Schneider Nat'l, Inc.*, 992 F.2d 279, 280-81 (10th Cir. 1993). This Court should likewise reject Schaerrer's argument.

Furthermore, Schaerrer's suggestion that the jury's ability to apportion fault between Stewart's and PCCA is a substitute for indemnification simply doesn't make sense in light of the underlying principles of strict product liability. Assuming Schaerrer could establish a defect, both PCCA and Stewart's are one hundred percent liable for

plaintiff's injuries because they were both in the chain of distribution. The liability of both PCCA and Stewart's occurs by operation of law and it is, in practical effect, joint and several. The jury, given the available evidence, would have no basis to apportion fault between PCCA and Stewart's. Even if this could somehow be accomplished, whatever percentage of fault was assigned to Stewart's would still trigger PCCA's indemnification obligation.

Schaerrer's second argument is that even if indemnification exists, it should not exist in this case. To support this argument plaintiff now asserts that Stewart's failure to warn of risks of the one-a-day phen-fen capsule or that Stewart's mis-marketing of this product or the fact that Stewart's role wasn't "passive" could support independent claims by Schaerrer against Stewart's. This argument overlooks the fact that Schaerrer conceded and the trial court's unchallenged ruling establishes that Stewart's did nothing to alter the drug in any way. There was absolutely no evidence presented to the trial court that either "failure to warn" or "mis-marketing" of the one-a-day phen-fen capsule caused injury. The trial court indisputably found that the "one-a-day phen-fen capsule" presented no greater risk of injury or harm than taking the drugs separately. Therefore, there can be no causal connection between a failure to warn of the risks of the one-a-day capsule, or mis-marketing of the one-a-day capsule, or other "active" conduct and plaintiff's injuries. There can be no strict liability or other fault without causation. *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 418 (Utah App. 1984); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 906 (Utah App. 1997); *Fitz v. Synthes*, 990 P.2d 391, 393 (Utah 1999). The

record contains no such evidence and therefore, those claims couldn't be submitted to the jury. *Harline v. Barker*, 912 P.2d 433 (Utah 1996).

### **CONCLUSION**

(Schaerrer's Appeal)

Stewart's respectfully urges this court to affirm the trial court's grant of summary judgment as described in the trial court's Findings of Fact, Conclusions of Law and Judgment. (Add. tab 3.)

### **CROSS-APPEAL**

#### **POINT I**

#### **STEWART'S IS IMMUNE FROM SCHAEERRER'S CLAIMS OF STRICT PRODUCT LIABILITY.**

The issue presented by Stewart's Cross-Appeal appears to be a matter of first impression in the United States. Long-standing legal principles are, however, closely analogous.

Traditionally, pharmacists have been considered immune from claims of strict product liability relating to alleged defects in the drugs they provide customers pursuant to prescriptions. *See, Coyle v. Bonnet Lane Pharmacy*, 584 A.2d 1383, 1387-1388 (Pa. 1991). The Pennsylvania Supreme Court thoroughly addressed the underpinnings of the historical immunity afforded pharmacists for alleged defects in prescription drugs. The court noted that pharmacists do not choose which drugs they

supply and therefore, pharmacists should neither be liable for defects in those drugs, nor should pharmacists be required to warn of the drugs' dangers. The role of choosing drugs and supplying information regarding those drugs is more properly served by physicians.

The Pennsylvania Supreme Court stated:

Unlike the marketing system for most other products, the distribution system for prescription drugs is highly restricted. Pharmacists, as suppliers do not freely choose which products they will make available to consumers in any given instance, and patients, as consumers, do not freely choose which products to buy. Physicians exercising sound medical judgment act as intermediaries in the chain of distribution, preempting, as it were, the exercise of discretion by the supplier pharmacist and within limits, by the patient consumer.

*Id.* at 1385. The court also noted that holding pharmacists strictly liable for defects in drugs would not serve the underlying purpose of strict product liability, that of improving the safety of products. The Pennsylvania Court reasoned that regardless of which drug is prescribed, the pharmacist is not:

at liberty to substitute his judgment of the product's safety for the patient for that of the physician. Similarly, as to preventing the circulation of defective products, it would ill-serve the needs of the public to impose a duty on pharmacists under which, to avoid potential liability, they might refuse to fill prescriptions . . . .

*Id.* at 1386. *See, also, Murphy v. E.R. Squid & Sons, Inc.*, 710 P.2d 247, 249 (Calif. 1985); *Leesley v. West*, 518 N.E.2d 758, 761-783 (Ill. App. 1988); *Raynor v. Richards-Merrill, Inc.*, 743 F. Supp. 238, 247 (D. D.C. 1986). Based upon the immunity established in the foregoing authority, Stewart's moved for summary judgment.

The trial court denied Stewart's motion because it identified an issue of fact which precluded summary judgment. The trial court concluded that a jury could find that Stewart's acted not exclusively as a pharmacist, but also acted as a manufacturer by combining phentermine and fenfluramine into a one-a-day product not otherwise available. Stewart's role as a manufacturer, the trial court reasoned, eliminated the pharmacist's immunity. (Add. tab 1.)

Stewart's urges this Court to adopt a rule of law whereby a pharmacist who engages in some manufacturing activity (such as combining phentermine and fenfluramine in one capsule) still faces no strict product liability so long as the pharmacist's manufacturing activities are tangential and do not render the drug(s) any more dangerous than they otherwise would have been, and the drugs are supplied pursuant to a valid prescription by physician. It is undisputed that nothing Stewart's did in its role as a "manufacturer" altered the outcome of this case in any respect. Therefore, while Stewart's may be a "manufacturer" for the limited purpose of creating the one-a-day phen-fen combination capsule, the reasons Stewart's faces strict product liability, if at all, has nothing to do with that manufacturing role. Stewart's faces strict products liability because it was in the chain of distribution of fenfluramine. As is applicable to this case, Stewart's role was no different than any other pharmacist filling a prescription and therefore, the traditional immunity afforded pharmacists from claims of strict product liability should still apply to Stewart's.



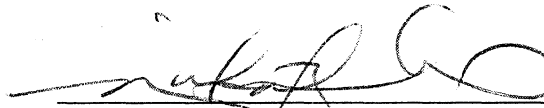
It is fenfluramine which is at the heart of plaintiff's case and with respect to fenfluramine, Stewart's role was simply that of a pharmacist: he purchased fenfluramine from a supplier, and provided it to the plaintiff, without material alteration, pursuant to a valid prescription. As such, he should be entitled to the same immunity afforded to all pharmacists. Schaerrer's right of recovery for strict liability should be limited to the drug manufacturer and wholesale supplier.<sup>5</sup>

### CONCLUSION

Stewart's respectfully requests this Court to reverse the decision of the trial court and to enter judgment in Stewart's favor as a matter of law dismissing plaintiff's strict product liability claims.

Respectfully submitted this 25 day of April, 2002.

RICHARDS, BRANDT, MILLER & NELSON

  
\_\_\_\_\_  
Michael P. Zaccheo  
Attorneys for Appellees/Cross-Appellants  
Stewart's Plaza Pharmacy

---

<sup>5</sup> Of course, if Schaerrer could have established the elements of a negligence claim against Stewart's, she could recover on that basis. No evidence, however, establishes causation.

## **ADDENDUM**

*6724-1368-9C5814.WPD*

Tab 1

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

---

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

---

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

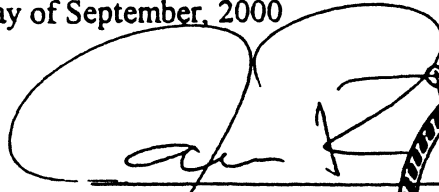
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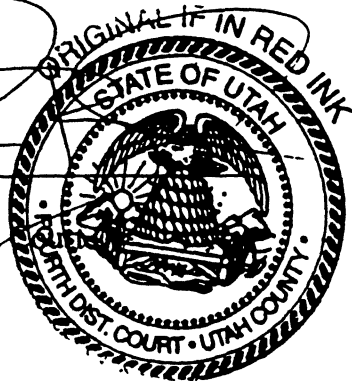
<sup>7</sup> For example see Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383 (PA 1991) at 1387, which states that strict liability provides an incentive to safety.



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

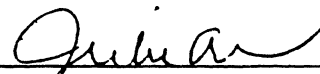


Copies of this Order mailed to:

Counsel for the Petitioner:

Counsel for the Respondent:

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

  
Court Clerk



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**FACSIMILE COVER SHEET**

✓ JB

To: Linda Gray MacDonald – 860-954-7302 ✓  
Jenny Richard – 303-290-0729 ✓

Date: September 15, 2000

File No.: 6724-1368  
Claim No. BKX6181

From: Michael P. Zaccheo

Re: *Schaerrer v. Stewart Plaza Pharmacy*

Pages: Cover + 6

Original to Follow: No

**Message:**

*Ruling from Judge James R. Taylor – Order Denying Summary*

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Tab 2

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

---

Jeanne Schaerrer,	:	
Plaintiff	:	Memorandum Decision
vs.	:	Date: October 18, 2000
Professional Compounding Centers of America, Inc., et. al.	:	Case Number: 980406564
Defendants	:	Division V: Judge James R. Taylor

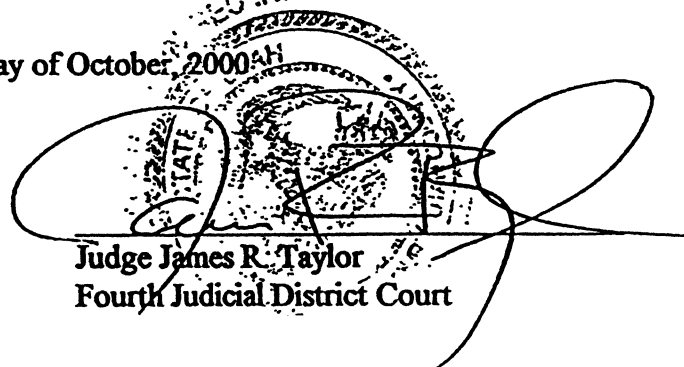
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This matter comes before the Court on the motion of Defendants Stewart Plaza Pharmacy and Stewart Koeven, R.Ph. for reconsideration/clarification.

In the Plaintiff's complaint, paragraph 64 on page 19, she has alleged that combining phentermine, fenfluramine and a time-release agent in a single capsule "caused an even greater risk of unreasonable, dangerous side effects" than taking the drugs separately. During oral arguments it was stipulated that the Plaintiff had or would present no evidence that the combination of the drugs created a greater harm or danger than ingestion of the drugs separately. That position is reaffirmed in the Plaintiff's brief in opposition to this motion on page one: "[t]hrough her counsel, Plaintiff has already stipulated on the record that she will not seek to introduce evidence that Stewart's compounded capsule cause increased risk of injury to her." Based upon that stipulation the Court finds that partial summary judgment, on that limited portion of the complaint is appropriate and should be granted. It is the intent of this Court to preclude by this ruling proof from the Plaintiff that the combination of the various drugs created a more serious risk of harm.

than ingestion of the drugs separately and any resultant damage attributable completely to that increased risk. Counsel for the Defendants is directed to prepare an appropriate order in accordance with Rule 4-504 of the Rules of Judicial Administration.

Dated this 18<sup>th</sup> day of October, 2000.



Judge James R. Taylor  
Fourth Judicial District Court

Copies of this Order mailed to:

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Provo, Utah 84604

Craig N. Hentschel  
Michael H. Walizer  
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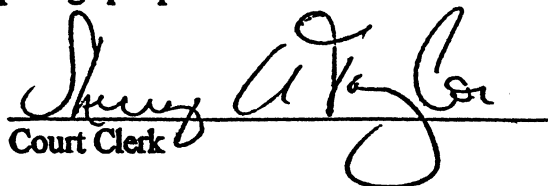
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Court Clerk

Tab 3

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
5-1-2001 at \_\_\_\_\_ Depu

MICHAEL P. ZACCHEO (A4450)  
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Fax No.: (801) 532-5506

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

---

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

---

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. Zaccheo, 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 owns costs and attorneys' fees.

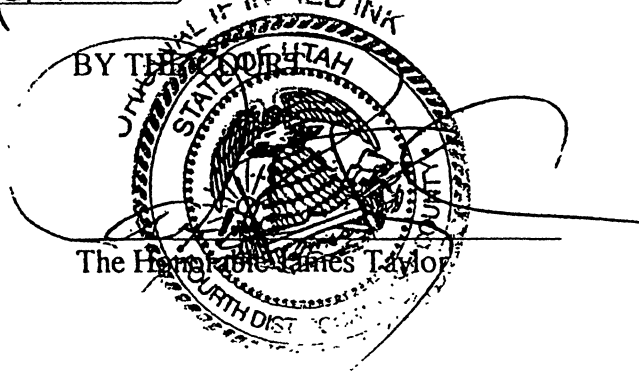
#### **ORDER AND JUDGMENT**

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,

\_\_\_\_\_  
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:

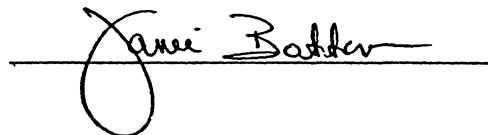
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