S233898

IN THE

SUPREME COURT OF CALIFORNIA

T.H., A MINOR, ET AL.,

Plaintiffs and Appellants,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,

Defendant and Respondent.

SUPREME COURT
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Review of a decision of the Court of Appeal,
Fourth Appellate District, Division One
Case No. D067839

Answer to Petition for Review

Benjamin I. Siminou, Esq.
Kevin F. Quinn, Esq.
THORSNES BARTOLOTTA MCGUIRE LLP
2550 Fifth Avenue, 11th Floor
San Diego, California 92103
Tel: (619) 236-9363
Fax: (619) 236-9653

Attorneys for Plaintiffs and Appellants
T.H., a Minor, et al.

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San Diego, California 92103
Tel: (619) 236-9363
Fax: (619) 236-9653

Attorneys for Plaintiffs and Appellants
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case arose when Plaintiffs' mother, while pregnant with Plaintiffs, was prescribed Brethine, an FDA-approved asthma drug, for the "off-label" purpose of preventing her from going into preterm labor.

Unknown to both Plaintiffs' mother and her physician was that numerous studies had shown that Brethine was likely to cause fetal brain damage when administered to pregnant women.

That conclusion did not gain widespread adherence until 2011 when the FDA demanded that Brethine manufacturers issue warnings to obstetricians noting that it posed risks to fetal health.

But that now well-established conclusion did not come as a surprise to Novartis Pharmaceutical Corporation ("Novartis"), which held the brand rights to Brethine from the mid-1990s through December 2001. During that time, Novartis watched as Brethine's popularity as an asthma drug declined, but it's popularity as a "tocolytic"—i.e., a drug for managing preterm labor—soared. In that capacity, Novartis monitored scientific data and, by the fall of 2001, realized that the drug was dangerous when used as a tocolytic.

With that realization, Novartis made a business decision: Cognizant that continuing to market Brethine without a warning regarding the hazard it posed to fetal health would expose it to ongoing tort liability, but also aware that adding such a warning would cause Brethine's popularity as a tocolytic—and, thus, value—to plummet, Novartis chose instead to sell the brand

rights to aaiPharma in December 2001 for $26.6 million without first adding a necessary warning to Brethine's label regarding hazards to fetal health.

Of course, Novartis did so knowing that, because Brethine's market value was tied to its popularity as a tocolytic, no such warning was likely to ever appear on Brethine's label. As such, Novartis also knew that doctors would continue prescribing Brethine as a tocolytic indefinitely, with the predictable result that thousands of children would suffer severe birth defects.

Plaintiffs, fraternal twins, are two such children who, in view of the above, brought misrepresentation claims against Novartis. The Court of Appeal, applying fundamental principles of California tort law, wisely concluded that their claims may proceed.

Novartis now seeks review from this Court based on exaggerated claims that the Court of Appeal's opinion creates a split of published authority and will have bad policy implications for the State of California.

But as discussed below, the Court of Appeal's decision was grounded in long-standing and fundamental principles of California tort law, namely the rule that those who cause misinformation to be disseminated to the public are liable for the consequences of foreseeable reliance on that information. Moreover, numerous policy interests militate heavily in favor of assigning liability to drug companies who, like Novartis, shirk their duties to ensure accurate drug labels in the pursuit of profit.

POINTS & AUTHORITIES

I. Plaintiffs' injuries were a foreseeable consequence of Novartis's failure to fulfill a duty of care.

Novartis's petition focuses exclusively on law and policy, to the total exclusion of any fact-based analysis of the Court of Appeal's opinion. But the facts are essential to putting the Court of Appeal's decision in proper context, without which the sound logic behind it may be lost under hyperbolic sound bites calculated to deceive this Court into believing that an opinion reflecting the unremarkable application of long-settled tort principles is a direct threat to the orderly administration of tort law in California, the state's economy, and even public safety.

But as a dispassionate reading of the Court of Appeal's opinion reveals, rather than reflect some aberrant result, the Court of Appeal's opinion was grounded in the essential facts that have formed the core of tort liability—both here and elsewhere—for decades: Novartis breached a duty of care imposed by law, and Plaintiffs' injuries were a direct and foreseeable consequence of that breach.

A. Novartis had a duty to update Brethine's label to warn of potential hazards that were not adequately addressed by the existing label.

There is no dispute that, until December 2001, Novartis had a duty under federal law to "ensur[e] that its warnings remain adequate as long as the drug is on the market." (*Wyeth v. Levine* (2009) 555 U.S. 555, 568.) In particular, Novartis had a duty to update Brethine's warning label "as soon as there is reasonable evidence of an association of a serious hazard with a

drug; a causal relationship need not have been proved." (21 C.F.R. § 201.80(e); see also *id.* § 201.57(c)(6) [same].)

Thus, up until Novartis sold the Brethine brand rights to aaiPharma in December 2001, Novartis had a duty to update Brethine's warning label regarding potential hazards that were not adequately addressed in the existing label.

B. Prior to 2001, there were at least a dozen studies showing that Brethine posed risks to fetal health.

As Plaintiffs alleged, beginning in 1979 and running through the fall of 2001, at least a *dozen* studies from respected institutions raised legitimate evidence-backed concerns that Brethine was dangerous to the fetal brain when administered to pregnant women. (See AA 023—AA035.)

This evidence included a 2001 study in which German researchers determined that drugs like Brethine "are known to produce specific maternal and fetal side effects" with a particular disruptive effect on "a very sensitive period of brain development." (AA 033–034, ¶¶ 52–53.) It also included an October 2001 study from Duke University which confirmed that Brethine's active ingredient is dangerous to the fetal brain, concluding that "prenatal Terbutaline exposure elicits changes in regulators of [central nervous system] cell differentiation, leading to subsequent postnatal abnormalities in the development of neuronal projections, neurotransmitter utilization, and the expression of neural receptors." (AA 035, ¶ 54.)

In short, by the fall of 2001, there was certainly "reasonable evidence" that Brethine posed a "serious hazard" to fetal health when administered to pregnant women.

C. Novartis was aware of data that Brethine posed risks to fetal health.

Having established that, (1) up until December 2001, Novartis had a legal duty to update Brethine's label when there was "reasonable evidence" of a potential hazard, and (2) that there was "reasonable evidence" by December 2001 that Brethine posed a hazard to fetal health when administered to pregnant women, the next question is whether Novartis was aware of that data. There is ample reason to believe Novartis did.

First, federal law required Novartis to "promptly review all adverse drug experience information obtained or otherwise received by the applicant from any source, foreign or domestic, including information derived from commercial marketing experience, postmarketing clinical investigations, postmarketing epidemiological/surveillance studies, reports in the scientific literature, and unpublished scientific papers." (21 C.F.R. § 314.80(b) (emphasis added).) To that end, federal law required Novartis to "develop written procedures for the surveillance, receipt, [and] evaluation ... of postmarketing adverse drug experiences." (*Ibid.*; see also AA 041, ¶ 73.) This is sufficient to charge Novartis with constructive notice of the evidence that Brethine posed a risk to fetal health. (See, e.g., *Nelson v. Superior Court* (2001) 89 Cal.App.4th 565, 574.)

Plaintiffs also alleged a basis to infer that Novartis had actual knowledge of that data when they noted that, in October 1999, the Director of the FDA Center for Drug Evaluation and Research, issued a letter to Novartis in which she cited the aforementioned studies and noted that "numerous articles from the medical literature" had discussed the "side effects and toxocities" associated with tocolytic use of Brethine, findings which she characterized as "highly consistent." (AA 031–032, ¶ 48.)

D. Novartis failed to update the label to warn that Brethine may pose risks to fetal health.

At all times relevant to the complaint, the label that Novartis left on file with the FDA only mentioned possible side effects to the *mother* when Brethine was used for management of preterm labor. (AA 46–49.) There was absolutely no indication that the drug posed a risk to fetal health. (*Ibid.*)

Thus, in light of the data showing a link between prenatal exposure to Brethine's active ingredient, terbutaline sulfate, and serious birth defects, Novartis had a duty under federal law to update Brethine's label with such a warning.

But Novartis never did. Instead, Novartis responded to the rising tide of scientific data showing a link between its drug and birth defects by selling Brethine's brand rights to aaiPharma for $26.6 million in December 2001. This seemingly allowed Novartis to capitalize on Brethine's market value as a drug for managing preterm labor without incurring ongoing tort exposure for marketing a mislabeled drug. While doing so might have made

financial sense, it constituted a breach of Novartis's duties under federal law.

E. Novartis's failure to update the label before it sold the Brethine brand rights was a substantial factor in Plaintiffs' eventual exposure to Brethine.

An omission is the legal cause of injuries if the injuries would not have occurred had the omission been replaced by conduct in conformity with the alleged tortfeasor's duty of care. (See, e.g., *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778–779.) This thus begs the question: Would Plaintiffs avoided exposure to Brethine had Novartis fulfilled its obligation to update Brethine's label?

That question is the product of two underlying questions: First, had Novartis fulfilled its obligation to update Brethine's label prior to divesting the drug in December 2001, would that warning have remained in effect in 2007 when Plaintiffs were exposed to Brethine? And if so, would that warning have prevented Plaintiffs' exposure?

The answer to the first question is an unequivocal "yes."

As a threshold matter, federal law requires a purchaser of a drug's brand rights to use the label that the prior manufacturer left on file with the FDA. (See 21 U.S.C. § 355; 21 C.F.R. § 314.105(b).) When aaiPharma purchased the Brethine brand rights from Novartis, it therefore had no choice but to adopt Novartis's label.

Moreover, federal drug law creates a one-way ratchet in which a manufacturer can unilaterally *add* warnings to an existing label, but cannot remove or water-down existing

warnings without first obtaining the express consent of the FDA. (See *Wyeth v. Levine* (2009) 555 U.S. 555, 568 [holding "that if a manufacturer is changing a label to 'add or strengthen a contraindication, warning, precaution, or adverse reaction ... that is intended to increase the safe use of the drug product,' ... it need not wait for FDA approval"]; 21 C.F.R. § 314.70(c)(6)(iii)(A)–(C) [giving manufacturers the unilateral ability "to add or strengthen a contraindication, warning, [or] precaution ... that is intended to increase the safe use of the product"].) Thus, had Novartis added a warning to the Brethine label regarding risks to fetal health, aaiPharma (and anyone to whom aaiPharma sold the Brethine brand rights) would have been stuck with that warning on their labels, too.

Relatedly, federal regulations require manufacturers of *generic* drugs to adopt, verbatim, the operative warning label used by the brand-name manufacturer. (*See* 21 U.S.C. § 355(j)(2)(A)(v) ["[T]he labeling proposed for the [generic] drug [must be] the same as the labeling approved for the [approved brand-name] drug."]; *PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604, 613 (*Mensing*) ["[T]he warning labels of a brand-name drug and its generic copy must always be the same—thus, generic drug manufacturers have an ongoing federal duty of 'sameness.'"].)

Taking all of the above together, it becomes clear that, had Novartis added a warning regarding hazards to fetal health to the Brethine label before it sold the Brethine brand rights to aaiPharma, all subsequent Brethine manufacturers of Brethine—

brand-name or generic—would have had to use the same label with the same warning indefinitely.

That brings leads to the second of the two causation-related questions: Would a warning on the Brethine label regarding risks to fetal health have prevented Plaintiffs' exposure to Brethine?

Again, the answer is "yes." Plaintiffs alleged that, had a warning regarding risks to fetal health been present on the Brethine label, their mother's physician would not have prescribed (and Plaintiffs' mother would not have agreed to take) Brethine for management of preterm labor, whether brand-name or generic. (AA 049.)[1]

F. Plaintiffs' eventual exposure to Brethine was a foreseeable consequence of Novartis's failure to update Brethine's label.

Having established that (1) up until December 2001, Novartis had a legal duty to update Brethine's label when there was "reasonable evidence" of a potential hazard; (2) that there was "reasonable evidence" by December 2001 that Brethine posed a hazard to fetal health; (3) that Novartis knew or should have known about that data; (4) that Novartis breached its legal duty

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[1] It is worth noting here that under federal law, a "label" includes not only the fine print on a bottle or box containing the medication, but also includes the material inside the container ("package insert"), any marketing materials, and the *Physician's Desk Reference*, which is an exhaustive compendium of labels from drugs on the market which physicians consult in order to educate themselves regarding pertinent drug information. (See, e.g., 21 U.S.C. § 321(m); 21 C.F.R. § 202.1(*l*)(2); *Mensing, supra*, 564 U.S. at 614–615.) Federal law requires that all such materials mirror content of the approved "label" on file with the FDA. (E.g., 21 C.F.R. § 201.100(d).)

by failing to update Brethine's label; and (5) that there was a causal nexus between Novartis's failure to update Brethine's label and Plaintiffs' exposure to Brethine, the final question is whether it was foreseeable to Novartis that its failure to update the label would cause doctors to continue prescribing Brethine for management of preterm labor years after it sold the brand rights to the drug.

At bottom, this question really boils down to another: Did Novartis have reason to anticipate that subsequent manufacturers might similarly fail to add a warning to the Brethine label regarding potential hazards to fetal health?

Again, the answer is an unequivocal "yes."

As a threshold matter, Novartis knew or should have known that no manufacturer of *generic* Brethine would issue such a warning, because, again, federal regulations required generic manufacturers to adopt, verbatim, the warning label used by the brand-name manufacturer. (*See* 21 U.S.C. § 355(j)(2)(A)(v); *Mensing*, *supra*, 504 U.S. at p. 613.)

Novartis also knew or should have known that any subsequent purchaser of the Brethine brand rights was unlikely to add such a warning for the very same reasons that Novartis itself declined to do so.

To be clear, Novartis's failure to update the label before selling the Brethine brand rights was no oversight. By 2001, the vast majority of Brethine's annual sales figures were attributable to its off-label use for management of preterm labor, *not* for its FDA-approved use as an asthma drug. (AA 040–042, ¶¶ 70–76.)

Thus, by 2001, Brethine's value—both to the consuming public and to any company's looking to buy its brand rights—was tied to its popularity as a tocolytic agent. Obviously, nothing would have presented a bigger threat to that market than a warning that Brethine may cause fetal brain damage. Accordingly, rather than neuter Brethine's market value by updating its label, Novartis chose to sell the Brethine "hot potato" to aaiPharma without first making the requisite changes to the drug's label. And because Brethine's value depended on its popularity as a tocolytic, it should come as little surprise that aaiPharma did not make the requisite changes to Brethine's label either. Indeed, it was not until 2011, when the FDA—citing many of the same studies available to Novartis before December 2001—stepped in and ordered manufacturers to begin warning that Brethine posed risks to fetal health.

Asa result, Novartis knew or should have known that by failing to update Brethine's label before it sold the brand rights, Novartis was setting into motion a chain of events that would inspire physicians to continue prescribing Brethine for management of preterm labor indefinitely, resulting in severe birth defects for thousands of children.

II. Holding Novartis liable under these facts is consistent with fundamental principles of California tort law.

A. Under California law, those who disseminate misinformation to the public are liable for the consequences of foreseeable reliance on those misrepresentations.

Rather than represent a drastic departure from California tort law, holding Novartis liable under those facts was consistent with the long-standing rule in California that those who misrepresent facts are liable for the foreseeable consequences of those misrepresentations.

That intuitive principle was first articulated in the Restatement (Second) of Torts, specifically sections 310 and 311.

Section 310 of that Restatement provides, "An actor who makes a representation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor . . . should realize that it is likely to induce action by the other, or a third person."

Similarly, section 311 provides, "One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . to such third persons as the actor should expect to be put in peril by the action taken."

The principles reflected in sections 310 and 311 of the Restatement surfaced in *Hanberry v. Hearst Corp.* (1969) 276

Cal.App.3d 680, in which a consumer sued the publishers of *Good Housekeeping Magazine* for giving a certain brand of shoes its "seal of approval" when, in fact, the shoes were defective and caused the consumer to slip and fall. Even though the magazine did not make the shoes, the consumer alleged the magazine was nonetheless liable for her injuries for negligently misrepresenting the quality of the shoes to its readership. Citing the section 311 of the Restatement, the court agreed, holding that the magazine had "the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement [were] not unreasonably exposed to the risk of harm." (*Id.* at p. 684.)

In *Garcia v. Superior Court* (1990) 50 Cal.3d 728 (*Garcia*), this Court formally adopted section 311 of the Restatement into the canon of California tort law. In that case, a parole officer dissuaded a parolee's prior victim from taking precautions by reassuring her that the parolee would "not come looking for her" after he was released from prison. The assurance turned out to be inaccurate; shortly after his release, the parolee kidnapped and shot his prior victim. (*Id.* at pp. 731–733.) Because it was foreseeable that a member of the public might rely on the reassurances of a parole officer in refraining from taking preventative measures upon the release of a parolee, this Court—citing *Hanberry* and section 311 of the Restatement—held that, once the parole officer elected to speak, he bore a duty to provide accurate information and could be held accountable for harm

caused by the inaccuracy of that information. (*Garcia, supra,* 50 Cal.3d at pp.735–736.)

And in *Randi W. v. Munroc Joint Unified School Dist.* (1997) 4 Cal.4th 1066, this Court formally adopted section 310 of the Restatement. In *Randi W.*, a student molested by a teacher sued the teacher's former school district for issuing a letter of recommendation which neglected to disclose the fact that the teacher had been terminated by that district for molesting students. Because it was foreseeable to the former school district that the new school might hire the teacher in the absence of that information, this Court—citing Restatement sections 310 and 311—held that the former school district owed the child victim a duty of due care. (*Randi W., supra,* 14 Cal.4th at pp. 1070, 1077, 1081.)

And finally, in *Conte v. Wyeth* (2008) 168 Cal.App.4th 89, the Court of Appeal relied on the foregoing authorities to hold that a plaintiff injured by a generic drug could sue a brand-name drug manufacturer of that same drug for tortious misrepresentation. Central to *Conte*'s holding was the fact that federal drug law, by requiring generic drug manufacturers to copy the label used by brand-name manufacturers, made it imminently foreseeable to a brand-name manufacturer that the content of its warning label would be relied upon by a physician in choosing whether or not to prescribe even a generic form of that drug.

These authorities all stand for the sensible proposition that when a tortfeasor disseminates misinformation to the public, he

or she is liable for the foreseeable consequences of those misrepresentations.

B. The Court of Appeal's opinion in this case does not contradict this Court's opinion in *O'Neil*, nor does it create a split of lower-court authority.

Of the many assertions in Novartis's petition, none is more pointed than Novartis's claim that the Court of Appeal's opinion contradicts settled California law. In particular, Novartis argues that the Court of Appeal's decision contradicts this Court's recent decision in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 (*O'Neil*), and is at odds with *Cadlo v. Owens–Illinois, Inc.* (2004) 125 Cal.App.4th 513 (*Cadlo*). But as discussed below, there is no disharmony between the Court of Appeal's opinion in this case and the decisions in *O'Neil* and *Cadlo*.

1. *O'Neil* does *not* hold that a company can never be liable for injuries caused by another company's product.

Novartis argues that, by assigning liability to one company for injuries caused by another company's product, the Court of Appeal's decision in this case directly conflicts with this Court's decision in *O'Neil*.

In *O'Neil*, a former Navy officer acquired mesothelioma from asbestos exposure while working aboard a ship. Among other defendants, the plaintiff sued Crane Co., the manufacturer of the steam valves used in the ship on which he served. The plaintiff contended that his injuries were caused by asbestos-laden insulation and gaskets that were paired with Crane Co.'s steam valves when the ship was constructed.

In rejecting the plaintiffs' claims against Crane Co., this Court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of those products." (*O'Neil, supra*, 53 Cal.4th at p. 342.)

Because the Court of Appeal's opinion in this case holds Novartis liable for injuries caused by Brethine tablets manufactured by another company—and because neither of the two exceptions identified in that passage from *O'Neil* seem to apply—Novartis contends that the Court of Appeal's opinion runs afoul of *O'Neil*.

But that is an overly simplistic reading of *O'Neil* that divorces the decision from the highly specific context of that case.

As a threshold matter, the *O'Neil* court's general statements that the manufacturer of one product cannot be held liable for failing to warn about hazards in another company's product was in reference to *strict products liability, not* tort law in general. (*E.g.*, *O'Neil, supra*, 53 Cal.4th at p. 348, 361 ["From the outset, strict products liability in California has always been premised on harm caused by deficiencies in the defendant's own product."].)

And while Novartis will surely remind this Court that *O'Neil* dealt with negligence claims *in addition to* strict-liability claims, the *O'Neil* Court's conclusion that Crane Co. was not negligent was *not* predicated on the bare fact that the plaintiff's