No. 30399—*Danny Scott Wilkinson, Administrator of the Estate of Teddi D. Wilkinson v.*** ***W. Rexford Duff, M.D.; Bariatrics, Inc., of West Virginia, et al.***

McGraw, Justice, dissenting:

This is a tragic case in which it appears several factors could have contributed to the untimely passing of the decedent. Dr. Duff argued that had the manufacturer specifically informed him of the hazards of prescribing phentermine to women who had recently given birth, he would have made certain to determine the childbearing status of all his patients before prescribing the drug. He also argues that even if he somehow prescribed the drug to a post-partum woman such as Mrs. Wilkinson, that at a minimum he would have passed on any such written warnings, which then might still have prevented her from taking the drug.

While a doctor must be aware of the latest available information about any drug he or she prescribes, a doctor is not in the business of producing drugs, or testing their safety or efficacy. A pharmaceutical company is in that business, and has the resources to conduct studies and gather research on every drug it produces. Because of the outcome of this case, a jury will not have the opportunity to consider if the manufacturer possessed information about the drug that it should have passed on to practitioners like Dr. Duff.

Often it is the malpractice plaintiff that appears before this Court and asks that a lower court's grant of summary judgment be overturned so that a jury might decide the case. However, in this case, it is Dr. Duff who has had his case against the drug manufacturer foreclosed by summary judgment. Doctors should get the same fair treatment as any other party, and in this case, I believe it would be fair for Dr. Duff to be able to present his case against the manufacturer to a jury.

Therefore, I respectfully dissent.