No. 33211 – State of West Virginia ex rel. Johnson & Johnson Corporation and Janssen Pharmaceutica, Inc. v. The Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, Daniel W. Wilson, M.D., and Estate of Nancy J. Gellner

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Maynard, Justice, concurring:

Suppose Patient John Doe visits his small-town West Virginia doctor. Further suppose he is prescribed a drug by his doctor that causes him serious injury. Suppose that the drug is one that is heavily advertised. Patient Doe then sues his West Virginia doctor and the drug manufacturer for the injury caused by the drug. If this Court were to adopt the learned intermediary doctrine, the West Virginia doctor would remain in the lawsuit, but the drug manufacturer would not remain in the suit and would not be liable for damages if the drug manufacturer could show that it warned the doctor of the risks of injury associated with the drug. Thus, a small-town West Virginia doctor would become solely responsible for the injury to Patient Doe while an out-of-state multi-million dollar drug manufacturer is off the hook. This would be the result if the dissenting Justices had their way in this case. This result simply would be unfair.

One need only look at the massive amounts of direct-to-consumer advertising done by drug manufacturers in this country to understand this truth. Americans cannot watch an hour of television or skim through a magazine without being bombarded by

commercials and advertisements extolling the benefits of Viagra, Vioxx, Prilosec, Claritin, Paxil, Zocor, Celebrex, Flonase, Allegra, Pravachol, Zyrtec, Singulair, Lipitor, Nasonex, Lamisil, and others. The fact is that drug manufacturers spend about four billion dollars annually on direct-to-consumer pharmaceutical advertising.[1] Thanks to these expensive advertising campaigns, we consumers are well educated about the salutary effects of these drugs. There is no reason why we should not be just as educated about their potential risks. In sum, because of direct-to-consumer advertising, drug manufacturers have a ready forum in which to warn health care consumers about the risks of their products. For this reason, they should not be exempt from the general duty to warn that this State places on manufacturers. It is a simple matter of fairness.

When this Court decides medical malpractice cases, the single most important policy issue to consider is the best interests of patients. In other words, what result gives patients the best medicine and promotes the best health care practices. Quite simply, the goal is to help patients. If this Court were to adopt the learned intermediary doctrine, drug manufacturers would have little incentive to carefully warn patients, the ultimate consumers of drugs, about the risks associated with those drugs. This is bad policy. On the other hand, by declining to recognize the learned intermediary doctrine, this Court ensures that drug manufacturers, which developed, promoted, and profited from the drugs, are charged with

[1]Daniel L. Pollock, *Blame Canada (And The Rest Of The World): The Twenty-Year War On Imported Prescription Drugs,* 30 Seton Hall Legis.J. 331, 345 (2006).

carefully warning both patients and doctors about the risks associated with the drugs. As a result, patients are able to make a more informed decision about their medical treatment.

I also find it significant that the learned intermediary doctrine is an exception to our general products liability rule that manufacturers have a duty to warn consumers about the risks of their products. Ultimately, drugs are a product like any other. If a plaintiff sued John Deere after being injured by one of its lawnmowers, no one would accept John Deere's argument that the local John Deere lawnmower dealer alone should be liable since the dealer is a lawnmower expert who had a duty to warn about the product's risks. Similarly, Toyota could not shield itself from a products liability lawsuit by claiming that the Toyota dealer alone, not the Toyota manufacturer, had a duty to warn about risks associated with the vehicle. Neither would the argument of a sprinkler system manufacturer prevail that only the contractor, and not the manufacturer, had a duty to warn that the system may fail during a fire. Finally, the same is true of medical devices such as pacemakers or artificial hips. There is just no good reason to except drug manufacturers from our general products liability duty to warn.

Finally, it has been suggested that the learned intermediary doctrine is so riddled with exceptions, the exceptions would swallow up the rule. If this is so, why should this Court adopt a new rule that would essentially be of no effect? The way I see it, the learned intermediary doctrine is either useless, a doctrine that serves no real purpose, or

harmful to West Virginia doctors and patients. For these reasons, as well as those set forth in the majority opinion, I concur.