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Teva Can't Get Justices To Nix Suit Alleging Drug-Cancer Link

By **Rachel Graf**

Law360 (March 19, 2018, 3:41 PM EDT) -- The U.S. Supreme Court on Monday refused to hear Teva Pharmaceuticals USA Inc.'s challenge to the revival of allegations the drugmaker and GlaxoSmithKline LLC's inflammatory bowel disease medication, when taken with other drugs, increased the risk of a rare cancer that killed the plaintiffs' son.

The Ninth Circuit in June reversed Teva's summary judgment win and **remanded** Stephen and Lisa Wendell's case to the lower court after finding it erred in excluding testimony from the Wendells' medical experts. Teva countered in its certiorari petition that the appeals court wrongly found the medical experts were experienced enough to not have to prove their testimony was based on the application of "reliable principles and methods." In declining the petition Monday, the Supreme Court provided no explanation about its decision.

"We are pleased that the Supreme Court rejected Teva's bid to overturn the Ninth Circuit's decision and look forward to continuing to litigate this case on behalf of Maxx Wendell's family," the family's counsel Matthew W.H. Wessler of Gupta Wessler PLLC said by email.

Counsel for Teva did not respond Monday to a request for comment.

Stephen and Lisa Wendell had brought negligence and strict liability claims against the drugmakers in California state court in July 2009. The case was removed to federal court later that year.

They alleged the companies' IBD medication, Purinethol, combined with other drugs caused Maxx, the Wendells' son, to develop hepatosplenic T-cell lymphoma, a rare and aggressive cancer that ultimately led to his death at 21. GSK had transferred its rights to Purinethol to Teva in 2003 as part of a settlement of patent litigation. The Wendells alleged Teva and GSK did not adequately warn about the risk of developing HSTCL.

The district court granted GSK's bid for summary judgment in 2012 and Teva's two years later because the Wendells' causation experts, Dr. Andrei Shustov and Dr. Dennis Weisenburger, did not meet the Daubert standard of reliability.

On reviewing the decision, a three-judge Ninth Circuit panel found that the lower court inappropriately required the experts' opinions to rely on animal or epidemiological studies, which the panel said may not always be possible to conduct.

But Teva argued in its petition to the Supreme Court that trial courts, rather than appellate courts, should make the bulk of the decisions about whether to exclude testimony and that the Ninth Circuit did not grant the lower court the proper amount of deference.

"The role of appellate courts is cabined: they can reverse expert-admissibility decisions only for an

abuse of discretion, with deference to the trial court being the 'hallmark' of this standard of review," Teva said.

The drugmaker added that the appellate court was inappropriately influenced by the experts' credentials rather than how the experts applied certain methodologies to this particular case.

The Wendells are represented by Matthew W.H. Wessler and Rachel Bloomekatz of Gupta Wessler PLLC and Esther Berezofsky and Michael Quirk of Berezofsky Law Group LLC.

Teva is represented by Jeffrey Francis Peck and Linda E. Maichl of Ulmer & Berne LLP and William M. Jay and Jaime A. Santos of Goodwin Procter LLP.

The case is Teva Pharmaceuticals USA Inc. v. Wendell, case number 17-747, in the Supreme Court of the United States.

--Additional reporting by Melissa Daniels. Editing by Edrienne Su.
