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Panel won't revive birth control suit

Suit was dismissed for neglect due to lawyers doing 'mostly nothing'

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A federal appeals court has declined to revive a lawsuit filed by lawyers who admit they did "mostly nothing" on behalf of their client for more than a year.

In a per curiam opinion Friday, the 7th U.S. Circuit Court of Appeals held the trial judge acted within bounds when he dismissed a suit alleging Jennifer Dzik suffered a blood clot as a result of taking the birth control pill Yasmin.

Dzik's attorneys — including Marvin B. Berke of Berke, Berke & Berke in Chattanooga, Tenn. — "simply ignored" a discovery request for 15 months, a panel of the court wrote.

The attorneys, it wrote, then failed to comply with a case management order requiring them to tell Yasmin's manufacturer whether they wanted to continue to try to negotiate a settlement.

The manufacturer, Bayer Corp., e-mailed the attorneys seven weeks after the case management order was issued, the panel wrote.

The e-mail, it wrote, told Dzik's attorneys they were required to comply with the discovery requirements set out in the case

management order for suits that were not the subject of negotiations.

But the attorneys did not respond to the e-mail, the panel wrote.

Instead, it wrote, the attorneys did not act until U.S. District Judge David R. Herndon of the Southern District of Illinois dismissed Dzik's suit with prejudice four months later.

The day after Herndon dismissed the suit, Dzik's attorneys filed a motion asking him to set aside his order, the panel wrote.

The panel upheld Herndon's decisions to dismiss the suit and to deny the request to reverse the dismissal.

The various excuses the attorneys made — including that their neglect was excusable and that the case should have been placed on the negotiation track — do not justify reviving the suit, the panel held.

The most likely explanation for the attorneys' failure to keep on top of the case, the panel wrote, is that it simply "slipped through the cracks."

Berke, who argued the case before the 7th Circuit, could not be reached for comment.

Kaspar J. Stoffelmayr of Bartlit Beck Herman Palenchar & Scott LLP argued the case on behalf of Bayer.

In a statement, Bayer said it is pleased the 7th Circuit ruled in favor of Herndon's dismissal of Dzik's suit as well as the judge's

disposal of other suits "that plaintiffs' counsel were unwilling to pursue and that lacked evidence to support the claims."

"As part of our long-standing commitment to women's health, Bayer believes that it is important that women have access to a wide range of safe and effective birth control options," the statement says.

Thousands of women across the country filed suits alleging they suffered serious side effects as a result of taking the oral contraceptives Yasmin or Yaz.

Dzik maintains she suffered a deep-vein blood clot from taking Yasmin.

The Judicial Panel on Multidistrict Litigation consolidated the suits for pretrial proceedings.

After Bayer noted Dzik had not filled a prescription for Yasmin in the 10 months before she suffered the clot, Berke suggested her doctor had given her samples of the pill.

Bayer sought medical records or an affidavit from Dzik's doctor to support that suggestion.

But neither Berke nor another lawyer from his firm working on the case, Megan C. England, responded to the request.

Herndon later issued the case management order setting a negotiation track for cases that possibly could be settled and a second track for other cases.

Bayer settled some cases with no admission of liability. Many other cases were dismissed on the

merits or because the plaintiffs failed to pursue them.

Herndon dismissed Dzik's suit in January 2016.

England has since left the Berke law firm. Another lawyer with the firm, Charles A. Flynn, joined Berke in the motion to set aside the dismissal.

In its opinion, the 7th Circuit panel rejected the notion that the attorneys' failure to respond to the motion to dismiss was excusable because Berke and wife were traveling to celebrate their 50th wedding anniversary when the motion was filed.

"By focusing on the three weeks during which they ignored Bayer's motion to dismiss," the panel wrote, "Berke and Flynn gloss over their failure to do *anything* to advance Dzik's case over the previous [18] months, including not providing discovery."

The panel also rejected the contention that Dzik's lawyers had communicated with the Bayer defense team in the three months before the suit was dismissed.

That contention directly contradicts the denial by Bayer's lawyers that Dzik's attorneys did not contact them, the panel wrote.

The panel also noted Dzik's attorneys did not name who at the firm contacted Bayer.

That failure "is a red flag," the panel wrote.

Panel members were Judges William J. Bauer, Joel M. Flaum and Michael S. Kanne. *Jennifer Dzik v. Bayer Corp., et al.*, No. 16-1333.