STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
CIVIL DIVISION
CAUSE NO. 49D12-0601-CT-2187

KIMBERLY K. SHORT, Individually and as Special Administratrix of the Estate of JAMES K. SHORT, deceased,

Plaintiff,

vs.

ELI LILLY AND COMPANY, SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, PAR PHARMACEUTICAL COMPANIES, INC., ANONYMOUS PHYSICIAN, and ANONYMOUS HOSPITAL,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
ON ELI LILLY AND COMPANY'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court for hearing on February 3, 2009, on Defendant Eli Lilly and Company's ("Lilly") motion for summary judgment on Plaintiff's Prozac®-related claims. Plaintiff appeared by counsel Kathy A. Lee. Lilly appeared by counsel Christopher P. Gramling and Jan M. Carroll.

Plaintiff alleges that her husband, Dr. James Short, committed suicide after being treated with Lilly's prescription antidepressant Prozac® and other prescription medications. In its brief and designation of evidence on its motion for summary judgment ("Lilly's Motion"), Lilly set forth evidence negating essential elements of Plaintiff's claims and establishing that James Short did not ingest brand-name Prozac® manufactured by Lilly, but rather that he used only generic fluoxetine provided by Par Pharmaceutical and Barr Pharmaceuticals Inc. Plaintiff failed to timely file response to the motion for summary judgment. In addition, at the hearing on

Lilly's Motion, Plaintiff's counsel conceded she has no evidence that James Short used Prozac® manufactured by Lilly. The Court having considered Lilly's Motion, brief and designation of evidence, and the parties' arguments, and otherwise being duly advised, the Court hereby grants Lilly's summary judgment motion and ENTERS the following Findings of Fact, Conclusions of Law and Order for judgment in favor of Lilly and against Plaintiff on her Prozac®-related claims.

FINDINGS OF UNCONTESTED FACT

1. Plaintiff has not timely designated any disputed issues of material fact and has not contested any of the facts designated by Lilly in support of its summary judgment motion.

2. This case arises out of the suicide of Dr. James Short. Dr. Short, a local physician who had been diagnosed with depression and bipolar disorder, committed suicide on January 26, 2004, by a self-inflicted gunshot wound. *See* Plaintiff's Complaint for Damages, ¶¶ 19, 22-32, and 43.

3. Following his suicide, his widow, Kimberly Short, brought this action asserting professional malpractice claims against a physician and a hospital that treated James Short, and asserting product liability claims against several pharmaceutical companies that were alleged to have manufactured various FDA-approved prescription medications that he allegedly had been taking. Plaintiff brought claims against Lilly based on James Short's alleged use of Prozac® and Zyprexa®. *See* Plaintiff's Complaint for Damages.

4. Prozac® is Lilly's brand name for the drug fluoxetine. *See* Eli Lilly and Company's Responses to Plaintiff's First Set of Interrogatories Responses Nos. 4, 5, and 6, attached as Exhibit 2 to Lilly's Motion.

5. The undisputed evidence designated by Lilly establishes James Short did not use brand-name Prozac® manufactured by Lilly and that he used only generic fluoxetine that was supplied by companies other than Lilly.

6. James Short was first prescribed fluoxetine on November 5, 2003, by Dr. Goddard. *See* Goddard Medical Record dated 11/5/03.

7. This prescription was filled on November 6, 2003, with generic fluoxetine manufactured by Barr Pharmaceuticals Inc. *See* Deposition of Kimberly Short ("Short Dep."), at 307:20-24; 375:2-14.

8. Decedent's prescription for fluoxetine was renewed by Anonymous Physician on December 22, 2003. *See* Anonymous Hospital Record dated 12/22/03, attached as Exhibit 6 to Lilly's Motion.

9. This renewed prescription was filled on December 22, 2003, with generic fluoxetine manufactured by Par Pharmaceutical. *See* CVS Pharmacy Record dated 12/22/03; Short Dep. at 307:15-308:1; 388:15-389:2.

10. Decedent's prescription for fluoxetine was again renewed by Anonymous Physician on January 13, 2004. *See* Anonymous Hospital Record dated 1/13/04. That prescription for fluoxetine was never filled. *See* Short Dep., at 308:22-309:8; 391:4-17.

11. Decedent committed suicide on January 26, 2004, without having received any further prescriptions for fluoxetine and without having ingested brand-name Prozac® manufactured by Lilly.

12. James Short did not have any conversations with, or receive any statements from, any representative of Lilly about Prozac® prior to or in connection with his prescription for fluoxetine. *See* Short Dep., at 373:4-7; 410:18-25; 412:1-6.

13. On May 17, 2007, Lilly and Defendants Par Pharmaceutical, Inc., and GlaxoSmithKline filed their motion to stay the action during the pendency of the proceedings before the Medical Review Panel on Plaintiff's claim against Anonymous Physician and Anonymous Hospital. On May 25, 2007, Plaintiff filed her response to the motion for stay, and asked the Court to "stay this matter against Defendants" until the malpractice action was resolved before the Department of Insurance "with the exception that discovery in this Lawsuit be carried on against Defendants." The Court entered the stay Order, adopting Plaintiff's language that the matter be stayed against Defendants except for discovery. Nothing in the Order precluded the Defendants from proceeding with any aspect of this case.

14. On July 2, 2007, when the attorneys appeared before Judge Gary Miller he clarified that the stay applies to the Court setting any discovery cut-off dates until further advised and that discovery against the defendants is to proceed.

15. Lilly filed its motion for summary judgment on October 14, 2008. Pursuant to Trial Rule 56, Plaintiff's response to Lilly's Motion was due November 13, 2008.

16. On October 31, 2008, Plaintiff filed an unopposed request for a 45-day enlargement of time to respond to Lilly's Motion.

17. The Court granted this request and extended Plaintiff's response deadline from November 13, 2008, to December 29, 2008.

18. On November 3, 2008, the Court scheduled a hearing on Lilly's Motion for December 15, 2008.

19. On December 9, 2008, Plaintiff filed an unopposed request to continue the hearing scheduled for December 15, 2008.

20. On December 12, 2008, the Court granted Plaintiff's request and rescheduled the hearing for February 3, 2009.

21. Plaintiff did not file any response or designate any evidence in response to Lilly's Motion by the December 29, 2008, deadline.

22. Plaintiff did not file any response or designate any evidence in response to Lilly's Motion prior to the February 3, 2009, hearing on Lilly's Motion.

23. At the February 3, 2009, hearing, Plaintiff sought leave to submit portions of Anonymous Physician's deposition testimony as evidence in opposition to Lilly's Motion.

24. Plaintiff conceded at the February 3, 2009, hearing that she did not have any evidence that James Short used brand-name Prozac® manufactured by Lilly.

CONCLUSIONS OF LAW

Summary Judgment Standard

1. "The purpose of summary judgment is to terminate litigation when there is no factual dispute and the moving party is entitled to judgment as a matter of law." *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003) (quoting *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 N.E.2d 78, 82 (Ind. Ct. App. 1996), *transfer denied*. A defendant should not be forced to bear the expense and risk of trial in "defense of a claim which is supported solely by speculation or mere possibility." *Brannon v. Wilson*, 733 N.E.2d 1000, 1001-02 (Ind. Ct. App. 2000), *trans. denied*.

2. Under Indiana law, a defendant is entitled to summary judgment when it demonstrates that the undisputed facts negate at least one element of the plaintiff's claim. *Anderson v. Four Seasons Equestrian Center*, 852 N.E. 2d 576, 580 (Ind. Ct. App. 2006) (affirming summary judgment for defendant), *trans. denied*, 860 N.E.2d 599 (Ind. 2006).

3. A products liability defendant is entitled to summary judgment if the plaintiff fails to designate evidence on a necessary element of the plaintiff's case, such as the identity of the manufacturer of the product to which the plaintiff was exposed and a causal relationship between the plaintiff's injury and the defendant's product. *See Asbestos Corp. v. Akaiwa*, 872 N.E. 2d 1095, 1098 (Ind. Ct. App. 2007) (granting summary judgment for defendant where plaintiff "presented no evidence to establish a genuine issue of material fact as to whether he was exposed to or inhaled asbestos dust from the [manufacturer's] products…").

4. A plaintiff cannot establish liability based on speculation or conjecture. *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000) ("an inference is not reasonable and cannot create a genuine issue when it rests on no more than speculation and conjecture").

Failure to File a Respond to Summary Judgment Motion

5. Under Indiana law, when a nonmovant fails to respond to a motion for summary judgment before the response deadline, by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider the nonmovant's filings after the stipulated deadline. *See HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008).

6. A party may not wait until the summary judgment hearing to oppose the motion. *Seufert v. RWB Med. Income Properties I Ltd. P'ship*, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995).

7. If the non-moving party fails to properly respond or designate evidence before the response deadline as required by T.R. 56, and the moving party has shown that it is

entitled to summary judgment, summary judgment must be entered against the non-moving party. *Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. App. Ct. 1998).

8. The Plaintiff failed to timely file any response or designate any evidence in opposition to Lilly's Motion before the December 29, 2008, deadline.

9. Plaintiff attempted to oppose Lilly's motion for the first time at the February 3, 2009, hearing when she sought leave to submit excerpts from the deposition testimony of Anonymous Physician as evidence.

10. Under Indiana law, the Court lacks discretion to consider Plaintiff's untimely designation of evidence in response to Lilly's Motion. S*ee HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008) (stating that the "bright line" rule in Indiana is that trial courts lack discretion to permit a nonmovant who has not responded before the response deadline to thereafter designate evidence); *see also Thayer v. Gohil*, 740 N.E.2d 1266, 1268 (Ind. Ct. App. 2001) (holding that where there has been no timely response or designation of materials in opposition to a summary judgment motion, the trial court has no discretion to consider untimely-filed materials), *trans. denied.*

11. Plaintiff's counsel attempted to explain Plaintiff's failure to timely respond to Lilly's Motion by stating that she thought the case was stayed. As noted above, the stay Order does not prevent any Defendant from filing a motion for summary judgment. Such a claim is also not consistent with Plaintiff's request for an extension of time to respond to Lilly's Motion and subsequent request for a continuance of the hearing on Lilly's Motion.

12. In addition, under Indiana law a party may not rely on a stay when that party is on notice of a summary judgment hearing date. *Brown v. Banta*, 682 N.E.2d 582, 585

(Ind. Ct. App.1997). A court's act of setting a hearing operates as a lifting of the stay with respect to the issue briefed in that motion. *Id.*

13. In this case, Plaintiff was put on notice by the Court's December 12, 2008; Order that the summary judgment hearing was scheduled for February 3, 2009. In fact, Plaintiff had asked the Court to reschedule the hearing.

14. Plaintiff's attempt to designate evidence in opposition to Lilly's summary judgment motion at the February 3, 2009, hearing is not timely. *Seufert* at 1073 (Ind. Ct. App. 1995) (nonmovant must offer evidence in opposition before the summary judgment hearing). Accordingly, the Court strikes Plaintiff's proffered evidence and will not consider it in ruling on Lilly's Motion. *Id.*

15. Because Plaintiff failed to respond to Lilly's motion, or to designate evidence in a timely fashion as required by Trial Rule 56, Lilly is entitled to summary judgment on all of Plaintiff's Prozac®-related claims. *See Brown v. Banta*, 682 N.E.2d 582, 585 (Ind. Ct. App. 1997) (affirming summary judgment for defendant where plaintiff failed to offer a timely response).

16. The Court accepts, and bases its Conclusions of Law on the uncontested material facts set forth by Lilly.

Lilly Is Entitled to Summary Judgment on All of Plaintiff's Prozac®-Related Claims Because James Short Did Not Use Prozac® Manufactured by Lilly

17. While Plaintiff's failure to respond to Lilly's motion is sufficient to warrant granting Lilly's Motion for summary judgment, the Court also concludes that Lilly's Motion should be granted because it is undisputed that James Short did not use brand-name Prozac® manufactured by Lilly.

18. Plaintiff's Prozac®-related claims against Lilly are all based on the allegation that James Short used Prozac® manufactured by Lilly.

19. The Indiana Products Liability Act ("IPLA") "governs all actions that are (1) brought by a user or consumer; (2) against a manufacturer or seller; . . . (3) for physical harm caused by a product *regardless of the substantive legal theory or theories upon which the action is brought*." Ind. Code § 34-20-1-1 et seq. (2008) (emphasis added); *see also U-Haul Int'l, Inc. v. Nulls Machine & Mfg. Shop*, 736 N.E.2d 271, 281 (Ind. Ct. App. 2000) (holding that the IPLA subsumes negligence and strict liability claims in personal injury cases); *Ryan v. Philip Morris*, 2006 WL 449207, *2 (N.D. Ind. Feb. 22, 2006) (finding plaintiff's common law negligence and fraud claims barred by the IPLA).

20. Plaintiff alleges that James Short's use of Prozac® manufactured by Lilly caused him to commit suicide. Her substantive theories for recovery – strict liability, negligence, and misrepresentation – all seek recovery for physical harm allegedly caused by a product.

21. Accordingly, all of Plaintiff's claims against Lilly are governed by the IPLA.

22. The IPLA expressly limits liability to manufacturers or sellers of the alleged injury-causing product. Ind. Code § 34-20-2-2 et seq.; *see also* Ind. Code § 34-6-2-115 (defining a "product liability action" for purposes of Indiana Code § 34-20, as an action that is "brought against a manufacturer or seller of a product" and is "for or on account of physical harm").

23. Under the IPLA, a "manufacturer" is defined as a "person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a

component part of a product before the sale of the product to a user or consumer." Ind. Code § 34-6-2-77 (2008).

24. Under the IPLA, a "seller" is defined as a "person engaged in the business of selling or leasing a product for resale, use, or consumption." Ind. Code § 34-6-2-136 (2008).

25. In a products liability action under Indiana law, whether based on strict liability or negligence, the plaintiff must identify the manufacturer of the product and demonstrate a causal relationship between the injury and the manufacturer's product. *See Asbestos Corp. v. Akaiwa,* 872 N.E. 2d 1095, 1098 (Ind. Ct. App. 2007) (granting summary judgment for defendant because plaintiff presented no evidence to establish a genuine issue of material fact as to his exposure to any product made by defendant); *see also U-Haul Int'l, Inc. v. Nulls Machine & Mfg. Shop*, 736 N.E.2d 271, 281 (Ind. Ct. App. 2000) (holding that a causal link between plaintiff's injury and defendant's product is "an essential element not only of a claim of strict liability, but also a claim sounding in negligence" and affirming summary judgment because plaintiff "failed to demonstrate a material issue of fact on the question of proximate cause.").

26. Lilly has designated evidence establishing that it did not manufacture or sell the generic brand fluoxetine used by James Short. Thus, it negates an essential element of Plaintiff's Prozac®-related claims. The undisputed evidence shows that the fluoxetine James Short allegedly used was provided by Par Pharmaceutical and Barr Pharmaceuticals Inc.

27. Accordingly, Lilly is not a "manufacturer" or "seller" as those terms are defined by the IPLA and, therefore, Lilly is not liable to Plaintiff under the IPLA.

28. Since the IPLA "provides the sole and exclusive remedy for personal injuries allegedly caused by a product" in Indiana, Lilly is entitled to summary judgment on all

of Plaintiff's claims against Lilly related to Prozac®. *Stegemoller v. A C and S, Inc.* 767 N.E.2d 974, 976 (Ind. 2002).

Lilly is Entitled to Summary Judgment on Plaintiff's Misrepresentation Claim Because James Short Did Not Receive or Rely on Any Statement from Lilly

29. The Plaintiff's misrepresentation claims are also governed by the IPLA. Thus, Lilly is entitled to judgment on this claim as well because James Short did not use Prozac® manufactured by Lilly. Lilly is also entitled to summary judgment on that claim because James Short did not receive or rely on any statement from Lilly.

30. Under Indiana law, a claim for intentional misrepresentation consists of the following elements: (1) the defendant made a material misrepresentation of a past or existing fact, (2) the material misrepresentation was false, (3) the misrepresentation was made with knowledge or reckless ignorance of the falsity, (4) the plaintiff relied upon the misrepresentation; and (5) that reliance proximately caused plaintiff's injury. *Eve v. Sandoz Pharm. Corp.*, 2001 U.S. Dist. LEXIS 4531, 85-88 (S.D. Ind. Mar. 7, 2001).

31. In Indiana, a plaintiff is entitled to rely only on a defendant's statement or representation that was directed to the plaintiff. *Id.* (granting summary judgment for defendant on fraud claim and holding that "since plaintiffs have not demonstrated that [defendants] made any misrepresentations to them personally, their fraud claim fails") (citations omitted); *see also Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 155 (Ind. Ct. App. 2005) (affirming summary judgment for defendant on fraud claim because defendant had demonstrated that it had no contact with, and made no representations to, plaintiff).

32. James Short did not have any conversations with, or receive any statements from, any representative of Lilly about Prozac® prior to or in connection with his prescription for generic fluoxetine. *See* Short Dep. at 373:4-7; 410:18-25; 412:1-6.

33. Accordingly, there was no statement by Lilly regarding Prozac® manufactured by Lilly or fluoxetine manufactured and sold by other entities that James Short received or relied on. In the absence of any such statement and reliance, Plaintiff's misrepresentation claim fails as a matter of law. *See, e.g., Bilimoria Computer Sys.*, 829 N.E.2d at 155 ("AOL did not make a representation to Bilimoria upon which Bilimoria was entitled to rely.").

34. Since James Short did not have any conversations with, or receive any statements from, any representative of Lilly about Prozac® prior to or in connection with his prescription for generic fluoxetine, there is no reliance on any statement from Lilly. *Id.*

35. Accordingly, under Indiana law, Plaintiff's misrepresentation claim fails as a matter of law because James Short did not receive or rely on any statement from Lilly. *Parks v. Danek Med., Inc.* 1999 WL 1129706 at *8 (N.D. Ind., 1999) (a plaintiff "must show *personal* reliance on an alleged concealment or misrepresentation to assert a fraud claim.") (emphasis in original).

The Original Designer Theory of Liability Adopted by the California Court Of Appeals in *Conte v. Wyeth* Is Inconsistent with Indiana Law

36. Under binding Indiana law, Lilly is entitled to summary judgment. The Court will address Plaintiff's argument at the February 3, 2009, hearing that an "original designer" theory of liability that was adopted by the California Court of Appeals in *Conte v Wyeth Inc.*, 168 Cal. App. 4th 89 (Cal. Ct. App. 2008), could impose a duty on Lilly in this case.

37. In *Conte*, the California Court of Appeals allowed a plaintiff to pursue negligent misrepresentation claims against a brand-name pharmaceutical manufacturer despite the fact that the plaintiff had not used that manufacturer's product but had instead used a generic equivalent manufactured by another entity.

38. Despite the clear requirements for product liability claims under Indiana law, Plaintiff urged this Court for the first time at the summary judgment hearing to hold that the Prozac®-related claims against Lilly are not precluded even though James Short did not use Prozac® manufactured by Lilly.

39. This Court declines Plaintiff's invitation to deviate from well-settled principles of Indiana law and adopt *Conte's* "original designer" theory of liability. *Conte* is fundamentally inconsistent with well-settled Indiana law and the most basic tenets of products liability law. *Conte* is also contrary to the overwhelming weight of authority which has unanimously rejected such an expansive theory of liability.

Conte Is Inconsistent With Indiana Law

40. This case, which was filed in Indiana by an Indiana plaintiff based on events that happened in Indiana, is governed by Indiana law. No party has argued that the Court should apply any law other than Indiana law.

41. *Conte* was based on the California Court of Appeals' interpretation of California common law.

42. Indiana law differs from California law in important and material ways that require the rejection of *Conte's* holding in a case governed by Indiana law.

43. One major difference between Indiana and California law is the source from which product liability claims are derived in each state.

44. Plaintiff's Complaint includes claims for strict liability, negligence, and misrepresentation.[1] Regardless of the labels Plaintiff uses, all of her claims seek recovery for physical harm allegedly caused by a product and, therefore, are all governed by the IPLA. Ind. Code § 34-20-1-1 et seq. (2008) (emphasis added); *see also U-Haul Int'l, Inc. v. Nulls Machine & Mfg. Shop*, 736 N.E.2d 271, 281 (Ind. Ct. App. 2000) (holding that the IPLA subsumes negligence and strict liability claims in personal injury cases); *Ryan v. Philip Morris*, 2006 WL 449207, *2 (N.D. Ind. Feb. 22, 2006) (finding plaintiff's common law negligence and fraud claims barred by the IPLA).

45. Product liability claims in Indiana are derived from the IPLA which "governs all actions that are (1) brought by a user or consumer; (2) against a manufacturer or seller; . . . (3) for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought." Ind. Code § 34-20-1-1 et seq. (2008); *see also U-Haul Int'l, Inc. v. Nulls Machine & Mfg. Shop*, 736 N.E.2d 271, 281 (Ind. Ct. App. 2000) (holding that the IPLA subsumes negligence and strict liability claims in personal injury cases); *Ryan v. Philip Morris*, 2006 WL 449207, *2 (N.D. Ind. Feb. 22, 2006) (finding plaintiff's common law negligence and fraud claims barred by the IPLA).

46. The IPLA expressly limits liability to manufacturers or sellers of the alleged injury-causing product. Ind. Code § 34-20-2-2 et seq.; *see also* Ind. Code § 34-6-2-115 (defining a "product liability action" for purposes of Indiana Code § 34-20, as an action that is "brought against a manufacturer or seller of a product" and is "for or on account of physical

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[1] As set forth below, Plaintiff's misrepresentation claim can only be brought as a claim for intentional misrepresentation because Indiana does not recognize the tort of negligent misrepresentation except in the limited context of employee/employer relationships. *Eve v. Sandoz Pharm. Corp.*, 2001 U.S. Dist. LEXIS 4531, 85-88 (S.D. Ind. Mar. 7, 2001). This case does not involve an employer/employee relationship; therefore, Plaintiff cannot assert a negligent misrepresentation claim.

harm"); *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) (applying Indiana law) (holding that because defendant corporation did not sell, produce or otherwise put into the stream of commerce the machine that caused plaintiff's injury, it cannot be liable under the IPLA); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 780 (Ind. 2004) (stating that "actions for strict liability in tort are restricted to *manufacturers* of defective products. Indeed, the [IPLA] states the restriction rather bluntly.") (emphasis in original).

47. The IPLA's limits on liability arise out of a basic tenet of products liability law: that the seller and manufacturer of a product derive economic benefits from the sale of the product and, in the event the product causes injury, these economic benefits provide a justification for holding the seller and manufacturer liable. *See Williams v. REP Corp.*, 302 F.3d 660, 665 (7th Cir. 2002)(applying the IPLA to dismiss product liability claims against a defendant because the product at issue was not sold or manufactured by the defendant but was sold and manufactured by a different company that was owned by the same parent company as the defendant). A defendant that does not sell or manufacturer a product "does not derive economic benefits from the sale, and there is no reason that it should be held accountable for the other corporation's act ... we cannot ignore the language of the Indiana Products Liability Act." *Id.*

48. Consistent with the IPLA, a number of Indiana cases have granted summary judgment where the defendant established that the plaintiff did not use the defendant's product. *See, e.g., Asbestos Corp.*, 872 N.E.2d at 1098 (granting summary judgment for defendant because plaintiff designated no evidence to establish a genuine issue of material fact that plaintiff had been exposed to any product made by defendant); *U-Haul Int'l, Inc. v. Nulls Machine & Mfg. Shop*, 736 N.E.2d 271, 281 (Ind. Ct. App. 2000) (holding that a causal link

between plaintiff's injury and defendant's product is "an essential element not only of a claim of strict liability, but also a claim sounding in negligence" and affirming summary judgment because plaintiff "failed to demonstrate a material issue of fact on the question of proximate cause.").

49. Since the IPLA "provides the sole and exclusive remedy for personal injuries allegedly caused by a product" in Indiana, Lilly is entitled to summary judgment on all of Plaintiff's claims against Lilly related to Prozac®. *Stegemoller v. A C and S, Inc.* 767 N.E.2d 974, 976 (Ind. 2002).

50. Product liability claims in California, however, are derived from common law. *Conte*, 168 Cal. App. 4th at 102 ("Our decision today is rooted in . . . California common law.").

51. California does not have a statute like the IPLA that governs all claims brought for physical harm allegedly caused by a product and that specifically limits liability to manufacturers or sellers of the alleged injury-causing product.

52. Another significant difference between Indiana and California law is the availability in California of a claim for negligent misrepresentation.

53. Indiana does not recognize the tort of negligent misrepresentation except in the limited context of employee/employer relationships. *Eve v. Sandoz Pharm. Corp.*, 2001 U.S. Dist. LEXIS 4531, 85-88 (S.D. Ind. Mar. 7, 2001).

54. Furthermore, Indiana law does not recognize any cause of action for misrepresentation that is based on representations made to third parties. *Id.* (granting summary judgment for defendant on plaintiff's fraud claim and holding that "since plaintiffs have not demonstrated that [defendants] made any misrepresentations to them personally, their fraud

claim fails") (citations omitted); *see also Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 155 (Ind. Ct. App. 2005) (affirming summary judgment for defendant on plaintiff's fraud claim because defendant had demonstrated that it had no contact with, and made no representations to, plaintiff); *Parks v. Danek Med., Inc.* 1999 WL 1129706 at *8 (N.D. Ind., 1999) ("As Parks has not shown that Indiana has adopted a theory of third party recovery, he must show *personal* reliance on an alleged concealment or misrepresentation to assert a fraud claim.") (emphasis in original); *Koehler v. Wyeth Labs.*, 1987 WL 47831 at *6 (S.D. Ind. 1987) ("Plaintiff thus advances a theory of third party recovery for intentional concealment, but offers no Indiana authority for the proposition that third parties allegedly injured as a result of nondisclosure may recover based on intentional fraud.").

55. *Conte* involved a negligent misrepresentation claim which (unlike in Indiana) is recognized by California law. *Conte*, 168 Cal. App. 4th at 102. That claim was based on representations that the defendant had allegedly made to physicians as opposed to representations allegedly made to the plaintiff. *Id.*

56. Indeed, the California Court of Appeals in *Conte* allowed the plaintiff to pursue only a claim for misrepresentation against Wyeth. *Id.* at 101 (stating that plaintiff would lose if she were "in fact pursuing a cause of action against Wyeth for strict products liability. But she is not.").

57. The *Conte* court specifically held that traditional products liability claims, whether in strict liability or negligence, may not be brought against a defendant that did not sell or manufacture the product at issue. *Id.*

58. Accordingly, *Conte* is inapposite because Plaintiff here did not, and may not, assert a negligent misrepresentation claim under Indiana law, and because Indiana law does

not recognize a cause of action for misrepresentation that is based on alleged representations to third parties.

59. A third significant difference between Indiana and California law that requires the rejection of *Conte* relates to the concept of "duty."

60. In *Conte*, the California Court of Appeals found a duty when there was no relationship between the parties because, under that court's interpretation of California law, duty can be based solely on foreseeability. *Conte*, 168 Cal. App. 4th at 109. The court stated that in California, foreseeability is the principal determinant of duty where the risk created is one of personal injury. *Id.*

61. In contrast, under Indiana law a duty does not arise unless there is a relationship between the parties. *See Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993, 997 (Ind. Ct. App. 2007) (holding that the existence of a duty is a question of law, and depends "on the nature of the relationship, a party's knowledge, and the circumstances surrounding the relationship."). In Indiana, "a duty of reasonable care is not owed to the world at large, but must arise out of a relationship between the parties." *Id.*

62. There is no evidence in this case of any relationship between James Short and Lilly upon which a duty could be based with respect to Plaintiff's Prozac®-related claims.

63. Accordingly, even if Indiana law allowed a negligent misrepresentation claim to be brought outside of the employer/employee relationship, that claim would fail here for lack of duty. *See Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007) (noting that under Indiana law, negligence requires proof of "(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach.").

64. The Indiana Supreme Court has rejected other attempts by plaintiffs to hold one manufacturer liable for damages allegedly caused by another manufacturer's product through the use of "market share" liability. *See City of Gary v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1245 (Ind. 2003).

65. Given the significant differences between Indiana and California law, this Court declines to follow the California Court of Appeals' decision in *Conte v. Wyeth.*

ORDER

The Court hereby GRANTS summary judgment in favor of Lilly on Plaintiff's Prozac®-related claims. There is no genuine issue of material fact in dispute, and Lilly is entitled to judgment on these claims as a matter of law. Lilly is entitled to summary judgment not only because Plaintiff failed to respond to and to timely designate evidence in opposition to Lilly's Motion, but also because Lilly negated essential elements of Plaintiff's claims. Product identification is an essential element of any product liability claim under Indiana law. Lilly has established, and Plaintiff has conceded, that James Short did not use brand-name Prozac® manufactured by Lilly. For the foregoing reasons, Lilly's Motion for Summary Judgment on Plaintiff's Prozac®-Related Claims is GRANTED.

SO ORDERED this 25th day of March, 2009.

Heather A. Welch, Judge
Marion County Superior Court 12

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