NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

CONNIE J. BARTON	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
WYETH PHARMACEUTICALS, INC.,	:	
WYETH, INC., WYETH-AYERST	:	
PHARMACEUTICALS, INC.,	:	
WYETH-AYERST INTERNATIONAL, INC.,	:	
WYETH PHARMACEUTICALS, AND	:	
WYETH LABORATORIES, INC.,	:	No. 694 EDA 2010
	:	
Appellants	:	

Appeal from the Judgment Entered January 29, 2010,
in the Court of Common Pleas of Philadelphia County
Civil Division at No. April Term, 2004, No. 06301

CONNIE J. BARTON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WYETH PHARMACEUTICALS, INC.,	:	
WYETH, INC., WYETH-AYERST	:	
PHARMACEUTICALS, INC.,	:	
WYETH-AYERST INTERNATIONAL, INC.,	:	No. 695 EDA 2010
WYETH PHARMACEUTICALS AND	:	
WYETH LABORATORIES, INC.	:	

Appeal from the Judgment Entered January 29, 2010,
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BEFORE: FORD ELLIOTT, P.J.E., McEWEN, P.J.E.,* AND PLATT, J.**

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JANUARY 3, 2012**

Connie J. Barton ("Barton") and Wyeth Pharmaceuticals, Inc., ***et al.***, (collectively "Wyeth") cross-appeal from the order of January 29, 2010, entering judgment for Barton in the amount of $10,614,271.85. Barton sued after being diagnosed with breast cancer in 2002, alleging that Prempro, manufactured by Wyeth, was the cause of her breast cancer. Prempro is a hormone replacement therapy ("HRT") drug combining estrogen with progestin and is designed to alleviate symptoms of menopause. Barton alleged that Wyeth knew or should have known that Prempro substantially increased the risk of contracting breast cancer and failed to warn prescribing physicians of this risk.

Following a jury trial, Barton was awarded compensatory damages of $3,746,344.97 and punitive damages of $75 million. The trial court granted Barton's request for delay damages in the amount of $1,248,409.42. The trial court also granted Wyeth's motion for remittitur and reduced the punitive award to $5,619,517.46 (1½ times compensatory damages). Otherwise, post-trial motions were denied, and these timely appeals followed.

* P.J.E. McEwen did not participate in the consideration of this decision.

** Retired Senior Judge assigned to the Superior Court.

The trial court has aptly summarized the evidence adduced at trial as follows:

> I) Case Specific Facts:
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> In 1997, Plaintiff, Connie Barton, went to her doctor, Dr. James Swingler complaining of severe hot flashes. Ms. Barton was going through menopause at the time and Dr. Swingler believed Ms. Barton would benefit from Hormone Replacement Therapy. He decided to prescribe Defendant's 1995 drug, Prempro. Prempro is a naturally-produced, synthetically-packaged combination of two chemicals, estrogen and progestin. The combination is colloquially known as "E+P".
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> Dr. Swingler prescribed Prempro until 2002 due, in part, to Defendant's representations that the drug had small adverse affects [sic] and large benefits. These purported benefits included: heart protection, skin and hair benefits, bone loss prevention, and Alzheimer's prevention. At trial, Dr. Swingler testified that he still prescribes Prempro for menopausal women. Yet, after considering the new HRT developments (discussed below), he uses smaller doses, prescribes it for a short period of time, and does not prescribe it for any reason save menopausal symptoms. He no longer prescribes Prempro to post-menopausal women. See PX20826. Dr. Swingler's testimony was also borne out in his individualized prescribing data that showed a significant drop in the number of Prempro prescriptions written after 2002.
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> In 2002, Ms. Barton was diagnosed with breast cancer. As a result, Dr. Swingler stopped prescribing Prempro to Ms. Barton. In June 2002, Ms. Barton underwent a modified left breast mastectomy and reconstructive surgery. Ms. Barton's medical bills were $96,344.97. The record reveals a significant amount of past, present, and future suffering due to the breast cancer. In addition, there was testimony by Plaintiff's expert that Ms. Barton had a ten (10)

percent chance of this cancer recurring in her body. The expert explained that once cancer was initiated in one part of the body, the same cancerous cells could reappear in other areas including the breasts and lymph nodes.

II) Hormone Replacement Therapy

The history of Hormone Replacement Therapy and specifically, the estrogen plus progestin relationship, extends as far back as 1942. The concept behind HRT is founded on data suggesting that when a woman reaches the end of her childbearing years, the amount of naturally-produced hormones in her system begins to decline. This hormone decline has been linked to some of the less-pleasant "side-effects" of menopause. Doctors found that by supplementing the declining natural hormones with manufactured[Footnote 3] hormones, some of the symptoms could be lessened. Therefore, drug companies began working on delivery methods for synthetic hormones.

Initially, the hormones were prescribed separately. Wyeth used the trade name, "Premarin" to market its estrogen treatment. Another company, Upjohn, Inc., sold "Provera" as a means to replace a woman's natural progesterone with the synthetic "progestin". In the 1970s, the medical community began combining estrogen and progestin. The combination of estrogen and progestin was thought to reduce the heightened risk of endometrial cancer that occurred when estrogen was taken alone. This prescribing combination of estrogen and progestin, because it was not yet present in a single drug, was never approved by the Federal Drug Administration ("FDA").

In 1995, Wyeth released Prempro as the first drug to combine estrogen and progestin in one pill. With the introduction of Prempro, so began a new era in HRT marketing where women would be enticed by generous benefits and encouraged to take hormones "for the rest of their lives".

> Each woman has different naturally occurring levels of hormones in their body. Studies have suggested that the relative drop in hormones is directly connected to menopausal symptoms. Therefore, the onset, severity, and length of menopausal symptoms vary depending on the woman.
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> The majority of women experience the worst symptoms in the first twelve months after their last period. Therefore, doctors generally stop prescribing HRT after one year and are instructed to use the smallest dosage of HRT medication to treat the menopausal symptoms. Yet, after the marketing "revolution" that heralded the arrival of Prempro, this instruction was countervailed by the marketing materials of Wyeth. Since its introduction, Wyeth has marketed Prempro as a drug that can treat nearly all of the unpleasant and serious side effects of aging.
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> The logic behind such a marketing strategy and its keynote suggestion is clear. Namely, there is a drop in hormones because a woman begins to age. Menopausal symptoms occur because of the drop in hormones. HRT replaces the hormones that cause the menopausal symptoms. Instead of simply masking the symptoms, HRT makes the symptoms chemically disappear. Therefore, as marketing reasoning goes, the hormones must make other symptoms attached to aging, specifically female symptoms such as bone strength and hair loss (known as "off-label benefits"), also chemically disappear or lessen. Such reasoning, without scientific backing or FDA approval, was touted by Wyeth during the period that Ms. Barton took Prempro.
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> As explained below, the Women's Health Initiative Study ("WHI") laid bare Wyeth's claims about off-label benefits.

III) The Breast Cancer Risk

During the 1970s, while the medical community first began [] combining estrogen and progestin[,] Wyeth first received "red flags" about a possible connection between breast cancer and estrogen. These "red flags" appeared after the FDA forced Wyeth to place an endometrial cancer "boxed warning"[Footnote 4] on its estrogen replacement drug, Premarin. The endometrial cancer caused by Premarin was found, through various studies and FDA reports, to be a type of hormone-receptive cancer. However, there were no studies conducted to determine if HRT caused hormone-receptive cancer in the breast. N.T. AM October 2, 2009, pp. 47-49.

As early as 1976, questions about HRT therapy and hormone receptive breast cancer began to appear. In respect to their sensitivity to hormones, the breasts are only slightly behind the endometrium. Id. Therefore, the medical community began conducting its own studies to determine if the breasts could be put at risk of cancer by the ingestion of exogenous estrogen. Id. at 51-54.

In 1976, Dr. Robert Hoover of the National Cancer Institute at the National Institute[s] of Health ("NIH") wrote to Wyeth expressing concern about the results of his recent study. His study found that the relative breast cancer risk[Footnote 5] of synthetic estrogen use was 2.0. Dr. Hoover brought this data to the attention of Wyeth via a letter and to the medical community via publication in the New England Journal of Medicine. Id. at 55-59. Wyeth's reaction to the study was an attempt to, "mitigate the possible adverse effects."

During the years leading up to 1995, more independent studies began linking manufactured estrogen use to an increased relative risk of breast cancer. However, the prevailing view in the medical community was that, by combining prescriptions of

estrogen and progestin, the risk of breast cancer and endometrial cancer could be reduced to an acceptable level to treat patients for short-term relief of menopausal symptoms.

In 1989, a small study by Dr. Leif Bergkvist suggested that the combination of estrogen and progestin did not reduce the risk of breast cancer. Instead, Dr. Bergkvist's data concluded that E+P may actually increase the risk of breast cancer to a relative risk of 4.4. N.T. AM October 2, 2009, pp. 83-85. Wyeth instructed its sales people not to discuss this study, and, if pressed, to respond with facts about the drug. N.T. AM October 6, 2009, pp. 57-58.

Still, Wyeth did not conduct any testing to discover the relative risk of taking E+P and the development of hormone-receptive breast cancer. Instead, Wyeth adopted a policy of "dismiss and distract".

At the 1990 meeting of the Society for Epidemiologic Research, Dr. Graham Colditz presented the results of his study suggesting a relative risk of 1.35 in current users of E+P. Also in 1990, the International Agency for Research on Cancer ("IARC") issued a statement explaining that it would begin a study aimed at evaluating HRT's possible breast cancer risks.

In 1990, the FDA denied approval for the predecessor to Prempro, Prempak. As explained by one of Wyeth's own memos, Prempak would have simply been a combined packaging of the E+P components that make up Prempro. However, the FDA, citing lack of appropriate studies and data, denied approval.

In 1993, Eastern Cooperative Oncology[Footnote 6] Group ("ECOG") informed Wyeth that it would begin a study of HRT's potential breast cancer risks.

In 1995, Wyeth received approval from the FDA to begin selling the E+P combination drug, Prempro. The warning on the label was markedly similar to the label for Premarin. The label explained there were studies that suggested synthetic estrogen use, for over ten years, caused a "moderately increased risk of breast cancer". Yet, the label went on to cite a relative risk "range" of 1.3 to 2.0. There was no mention of studies or risks associated with exogenous estrogen and progestin. N.T. AM October 2, 2009, pp. 60-68.

During the approval process for Prempro, the FDA asked Wyeth to conduct additional "level four" studies to determine the breast cancer risk of E+P. FDA documents explained a dearth of testing regarding E+P and breast cancer. Wyeth[,] fearful the result of level four testing would be "embarrassing" and citing the already underway WHI study, replied that it did not believe additional testing was required. N.T. AM October 2, 2009, pp. 70-72. As explained by Dr. Parisian, the FDA could not force Wyeth to conduct additional studies. In the end, Wyeth never conducted a single study charting the risk of cancer and Prempro.

In 1996, Dr. Steven Cummings, in an NIH-sponsored study, concluded that "the risk of breast cancer associated with hormone therapy may have been 'substantially underestimated.'" N.T. AM October 2, 2009, p.84.

In 1999, the Prempro label was modified to include two caveats to the breast cancer risk. First, the label stated that the addition of progestin to estrogen created an "unknown"[,] but moderately reported, risk of breast cancer. Second, the label described a clinical study that, comparing the general population to those taking E+P, showed no increase of breast cancer incidence.

In 2000, beset with data and articles about a possible increased breast cancer risk as a result of E+P HRT, Wyeth hired Dr. John Eden to sign his

name on an article that would address, "why progestins may not be responsible for the incidence of breast cancer in hormone replacement therapy (HRT) users."

In 2002, the WHI study concluded. The study, more fully described below, stopped three (3) years ahead of the planned date because the reported number of breast cancer cases exceeded the previously determined level of acceptable relative risk. Simply, too many of the participants were diagnosed with breast cancer above the levels expected in the general population.

Whether or not the abovementioned studies and developments leading up to 2002 should have been considered "red flags" is a question of fact for the jury. Perhaps the "red flags" should have put Wyeth on notice: to conduct its own study on breast cancer, change its label, or simply change its recommendation to doctors. Regardless, they are evidence that a breast cancer risk was known or reasonably knowable to Wyeth before Ms. Barton began taking Prempro and before the WHI study.

Additionally, the language on the label may have been adequate to warn prescribers of the risk of breast cancer or it may have understated the risks that were known or knowable during the period from 1997 to 2002 (when Ms. Barton took the drug). Certainly, there are different interpretations of warnings that include language of moderately increased risks, unknown risk, relative risk spans of .7 (or 70%), and no greater incidence of cancer.

IV) The Women's Health Initiative ("WHI") Study

The FDA approved Prempro in 1995 for use in treating menopausal symptoms. At the same time, the FDA requested additional studies from Wyeth about the risks of the combination of estrogen and progestin. The FDA disapproved of off-label promotion, so it requested studies that would provide scientific data for Prempro's actively

promoted off-label benefits. N.T. PM October 1, 2009, 111-119. From 1995 to 2002, the FDA consistently hounded Wyeth about the validity of the off-label claims. In response to such requests for data, Wyeth only conducted tests aimed at verifying the off-label benefits of Prempro and shied away from testing about risks.

Although Wyeth was not able to produce data that supported the off-label benefits, it continued to market Prempro as a drug that could provide "heart, brain, and skin benefits". Wyeth aimed its marketing campaign at prescribing doctors and the general public. Not surprisingly, the sales of Prempro rose each year from 1995 until 2002. Eventually, Prempro: was annually prescribed to over six (6) million American wom[e]n, was the top-selling prescription drug, and had over two (2) billion dollars in annual sales.

Wyeth's very successful marketing campaign was based on the theory that the "off-label" benefits of Prempro were such that doctors could continue to prescribe the drug even after the patient reached the end of her menopausal years. Many doctors continued to prescribe Prempro to post-menopausal women because the on-label risks of breast cancer appeared insignificant next to the generous off-label benefits. Long-term, high-dose use, though not recommended on the label or approved by the FDA, became common practice. N.T. AM October 20, 2009, p. 44-52.

During Prempro's astonishing rise to near-total market dominance, Wyeth did not conduct a single study assessing the risks associated with the combination of E+P. At trial, Wyeth, though spending over $150 million a year to market Prempro, suggested that such a study was "too expensive", "too burdensome", "impossible", and "already underway". N.T. PM October 2, 2009, pp. 55-57. Wyeth pointed to the WHI study to prove that it was adequately testing Prempro.

> In 1991, the NIH began the WHI study with the goal of studying the "off label" benefits of E+P and the risks associated with long-term use of E+P.
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> In 2002, after eleven (11) years of study, the Women's Health Initiative ("WHI") Study was terminated and its conclusions were made public. Quite simply, the WHI found that the relative risk of breast cancer was heightened. Both Plaintiff and Defendant provided experts who fought over the "true" relative risk borne out by the WHI. Wyeth's experts explained that the WHI data demonstrated that the relative risk was only 1.24 for five (5) years of E+P use. Plaintiff's experts' interpretation of the data concluded that the relative risk of 5 years of use was estimated at "2.0 to 4.0" or "3.56". Neither sides [sic] dispute that the WHI study also found no cardiac, skin, brain, or bone benefits. In actuality, the WHI found that long-term use was detrimental [to] the brain, heart, and bones. N.T. P.M. October 2, 2009, pp. 77-79.[1]
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> Disregarding, for a moment, the actual numbers produced by the WHI, this Court must address the attention given to the results of the study.
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> Due to the WHI study, Prempro underwent a number of label changes. Today, the label: explains the risk of breast cancer in a "black box", cites the definite WHI conclusion of an increased risk of breast cancer, warns against prescribing for heart and brain benefits, and recommends that prescribers use the lowest possible dose for the shortest possible time. In addition, scientific journals have published a number of peer-reviewed articles devoted to understanding of the risks and benefits of HRT.

[1] Wyeth disputes this factual finding, stating that the WHI confirmed HRT helps to prevent osteoporosis, and Prempro is FDA-approved for the prevention of osteoporosis. (Wyeth's brief at 14 n.15.)

Prempro is still prescribed to a good number of American women. However, there was a steep drop in the number of prescriptions after the WHI results.

V) Wyeth's Willful Conduct

After explaining the timeline behind the surfacing of the increased breast cancer risk brought on by E+P ingestion, this Court will briefly outline Defendant's responses to each of the "red flags". All of Wyeth's conduct surrounding the "red flags" relates to the failure to warn claim because it has a nexus to Wyeth's knowledge of known or reasonably knowable risks. This Court believes that sufficient conduct and knowledge to support the claim of negligence is rather obvious from the facts listed above. Therefore, this Court will use this section to highlight some of Wyeth's conduct that may have been used during the jury's determination that Wyeth was willful and wanton in its promotion of Prempro and its "distract and dismiss" campaign.

During the last decade of the twentieth century, Wyeth's campaign reached its full hilt. Beginning in 1990, Wyeth continually attempted to silence critics of E+P, even stifle requests for further information, and "contain" information about breast cancer risks. N.T. AM October 20, 2009, pp. 47-60.

In 1990, Wyeth arrived at Dr. Colditz's presentation to the Society of Epidemiologic research with promotional material, prepared talking points, and a team of professionals to unobtrusively counterbalance "potential negative news." N.T. AM October 6, 2009, pp. 60-62. Strikingly, Wyeth did not arrive with data, pledges to research, or even a plan to shift the promotional direction of its HRT team. Wyeth greeted a proposed increased relative risk with scientifically unsupported benefits.

Also in 1990, Wyeth took internal action that recognized the importance of the IARC's proposed study and attempted to preempt negative results. Wyeth's Associate Director of Regulatory Affairs,

Justin Victoria, decided that the corporation should "ensure that IARC does not develop a position on a definitive relationship between breast cancer and estrogen replacement therapy . . . ." Id. at 63-66. Again, Wyeth was not concerned with the breast cancer relative risk or even the results of the proposed study. Instead, Wyeth purposefully kept a level of uncertainty in the medical community's understanding of the breast cancer risk. This Court wonders how a doctor can make an informed decision that accurately evaluate[s] a patient's needs when the supplier desires the doctor to have a less-than-clear understanding of the risks and benefits of a drug.

Throughout 1990 and 1991, Wyeth met with the FDA to discuss the need for E+P testing. However, Wyeth took no action. N.T. AM October 2, 2009, pp. 86-88. The denial of Prempak (E+P in-one-package) led to a renewal of estrogen-only (Premarin) marketing. The draft of a magazine [article] designed to promote Premarin met with a strong rebuke from the FDA. The FDA wrote that the campaign "internationally [sic] misleads the reader".

Wyeth continued its pattern of distract and dismiss by denying ECOG's 1993 request for Premarin pills to conduct its planned breast cancer and HRT study. N.T. PM October 2, 2009, pp. 11-14. Also, the corporation conditioned a British scientist's request for Wyeth's patients' mammograms on the agreement that the scientist would not review any links between HRT and breast cancer. Additionally, Wyeth released the mammograms only after the researcher conceded "the absolute right to comment on the content, emphasis, and conclusions" to Wyeth's Premarin's committee. If the conclusions were unacceptable to Wyeth, the researcher agreed to "accept the view of the Premarin Study Review Committee."

During trial, Wyeth maintained that it always denied requests for independent studies using its drugs. N.T. PM October 2, 2009, pp. 11-14. Wyeth

also maintained that it did not have enough funding to develop its own studies that researched the risks associated with its drugs. Both the abovementioned studies would have required little or no cash outlay from Wyeth. Yet, Wyeth still did what it could to prevent studies from examining the HRT's risk of breast cancer and refused to conduct its own studies. N.T. AM October 15, 2009, pp. 53-73.

In addition to denying ECOG's request and forcing an independent researcher to agree to whatever revisions Wyeth requested, a Wyeth executive appeared to adamantly refuse a suggestion that Wyeth should take advantage of the assistance of a noted oncologist for a Wyeth HRT meeting. A handwritten response to the suggestion reads, "[n]o way having an oncologist chair this [meeting/HRT work group]. NO NO NO & NO." N.T. AM October 2, 2009, 68-74. The jury was never presented with a reason as to why an oncologist would be so adamantly rejected by Wyeth.

Wyeth's reaction to Dr. Cumming's 1996 NIH study was also less than sterling. The "Cummings" data was released on the cusp of a meeting of the American Society of Clinical Oncology. Notes from Wyeth executives that refer to the meeting include: "Overshadow Cummings Data", "discuss another convention", "keep US press busy", and "dismiss/distract". Also, Wyeth's task force planned to: "shift attention to other cancers such as colon cancer", pick at Dr. Cumming's methodology, and convince others that the study was "just one more paper". N.T. AM October 2, 2009, 83-99.

During trial, Wyeth argued that the jury should not give any weight to the notes written by task force members and the decisions of its scientific executives. Wyeth argued that there was no evidence that the notes correspond to actual actions and that such notes were made by mere marketing executives. This Court cannot know what weight, if any, the jury allotted to Wyeth's "dismiss/distract" campaign or its "Myth's [sic] and Misconceptions"

CME. N.T. AM October 5, 2009, 103-109[.] However, it believes that such information is essential to understanding the years immediately surrounding the 1995 approval of Prempro and the scientific action, or inaction, of Wyeth.

In the preceding section, this Court explained that the introduction of Prempro caused a significant shift in HRT marketing. At trial, Plaintiff produced evidence of the extreme measures that Wyeth began in order to promote Prempro. Wyeth's CEO, Mr. Essen, in delivering a speech to the sales representatives, declared a "revolution" in marketing in which there would be "no limits to the marketing of [Prempro]." N.T. AM October 5, 2009, pp. 52-54. Mr. Essen declared there would be a, "world in which the vast majority of women would begin taking HRT, and we know that means Prempro, at menopause and continue on it for the rest of their lives." Id. at p. 52 lns. 22-25. This promotion of Prempro beyond menopause was not approved by the FDA, nor was taking Prempro for non-menopausal symptoms proven to have any benefit. Regardless, Wyeth, as part of a grand strategy to promote Prempro and overshadow critical data, actively advertised off-label benefits. See AM October 20, 2009, pp. 35-68.

Wyeth's decision to continue its "dismiss/distract" and "Breast Cancer Containment" campaigns into 2000 was also considered by the jury. Id. at 51-55. Dr. Eden's article, "Breast Cancer and Progestins" marked a new phase in Wyeth's marketing of E+P. According to testimony, the article, although signed and credited solely to Dr. Eden, was actually written by a technical writing company. The article was published in the Journal of Obstetrics and Gynecology and it avidly suggested that there was little or no link between E+P and breast cancer. The final product bore no indication that Wyeth had commissioned, designed and edited the article. Hence, the jury was allowed to hear testimony regarding the willful practice of drug companies "ghostwriting" articles and distributing

them directly to doctors. N.T. PM October 16, 2009, pp. 16-30. N.T. October 19, 2009, pp. 51-54.

At trial, both sides attempted to use Wyeth's response to the WHI study as a means of forwarding their view of the evidence. After the results of [the] WHI study were published, Wyeth distributed "Dear Doctor" letters that discussed the risk of breast cancer and explained the lack of any brain, bone, skin, or heart benefits. Wyeth also changed its label to reflect the WHI study.

Plaintiff presented experts that interpreted Wyeth's distribution of "Dear Doctor" letters as a means to protect itself from litigation and FDA action. Defendant categorized its letters as an example of its concern for patient-safety and its continual policy of diligent distributing of information to prescribers.

Plaintiff's expert, Dr. Parisian explained that Prempro's label change was mandated by the FDA and, inferentially, not an action taken solely because of Wyeth's good motive. Defendant initially attempted to claim that the label change was a subsequent remedial action that should be excluded. Failing in that argument, it highlighted the accuracy of the label and explained that the differences between the pre-WHI and post-WHI label were so minimal that there could be no willful or wanton conduct.

The jury, upon consideration of the "conduct" evidence described above (and perhaps other evidence that this Court failed to mention, to include the credibility of the Defendant's agents, employees, or executives), found that Wyeth's conduct in: labeling, testing, marketing, and distributing Prempro, was willful and wanton.

[Footnote 3] The hormones are not actually "synthetic" or "manufactured". Rather, they are equine hormones that have been extracted,

> coagulated, and intensified in pill form. However, this Court finds such language cumbersome at best. Therefore, it will use "natural" to designate the hormones that a patient's body produces. Hormones taken from outside sources will be "manufactured", "ingested", "synthetic", or "exogenous".
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> [Footnote 4] A boxed warning is defined as "an alert to medical practitioners about potentially serious adverse drug reactions, contraindications, or other special problems with a given drug, contained in a ruled box at a site specified within the label format by the FDA." PDR Medical Dictionary 2145 (3d ed. 2006). Throughout this case, both parties refer to a "boxed warning" by the colloquial term "a black box warning". This refers to the color of the box and, presumably, explains the weight that doctors, drug companies, and the FDA give to such a warning.
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> [Footnote 5] Relative risk, as opposed to absolute risk, is a comparison between the different risk levels of different groups. For example, if there are 75% more people cont[r]acting a disease than in the control (or "placebo") group, one calculates a relative risk of the non-control group as 1.75. A relative risk of 1.0 means that there are no more people contracting the disease, or, in other terms, that there is no increased risk. Neither figure reflects the "absolute risk" or the likelihood that any person in a group would contract the disease. This case will mainly focus on relative risk, but there is much debate among the experts about the weight that one should give relative risk calculations.
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> [Footnote 6] Oncology is the branch of medicine dealing with the study and treatment of tumors or cancer.

Trial court opinion, 1/29/10 at 5-18.

We will address Wyeth's claims on appeal first. The parties agree that as Barton is a resident of Illinois and was diagnosed with breast cancer in

Illinois, the substantive law of Illinois applies. (Barton's brief at 1 n.1; Wyeth's brief at 1 n.1.) Wyeth has raised the following issues for this court's review:

> 1. Did the trial court commit reversible error by admitting extensive, prejudicial evidence of marketing and other conduct by Wyeth that had no connection to the decision by [Barton]'s physician to prescribe Prempro to her, based on a theory of presumed reliance that has been rejected by the Illinois and Pennsylvania Supreme Courts and this Court?
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> 2. In this prescription drug case, was Wyeth entitled to JNOV on [Barton]'s punitive damages claim under Illinois' strict punitive damages standards, given (a) the FDA's review and approval of the drug, of the sufficiency of the testing for that drug, and of the drug's label warning of the breast cancer risk, (b) the extensive testing and study of the drug by Wyeth and independent researchers, and (c) the absence any of [sic] evidence that Wyeth misled or withheld information from the FDA?
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> 3. Was Wyeth entitled to JNOV on [Barton]'s punitive damages claim under federal due process principles where (a) there was a reasonable disagreement in the scientific and medical communities about the risk of breast cancer from the medication at issue, and (b) Wyeth, which had complied fully with FDA procedures and regulations, reasonably believed that its conduct was lawful and proper?
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> 4. Is Wyeth entitled to a new trial on all issues because the trial court refused to instruct the jury that [Barton] had to prove that her injury was proximately caused by an inadequacy in Wyeth's Prempro warning?

> 5. Is Wyeth entitled to a new trial on all issues because the trial court improperly instructed the jury as to punitive damages liability, including by refusing to instruct that the jury could not impose punitive damages on Wyeth for alleged harm to non-parties?
>
> 6. Should the testimony of [Barton]'s expert, Dr. Cheryl Blume, have been excluded where Dr. Blume was not qualified to opine as to the adequacy of Wyeth's drug label, and her testimony as to the "reasonableness" of Wyeth's conduct lacked any objective standard and was improperly speculative?

Wyeth's brief at 2-3.

In its first issue on appeal, Wyeth argues that the trial court should not have admitted evidence of its marketing practices. According to Wyeth, there was no evidence that Dr. Swingler relied on marketing for off-label use in making the decision to prescribe Prempro to Barton. Wyeth contends that such evidence including ghostwritten articles, lavish gifts to doctors, and illegally promoting Prempro for unapproved uses was highly prejudicial and irrelevant.

> Admission of evidence is within the sound discretion of the trial court and a trial court's rulings on the admission of evidence will not be overturned absent an abuse of discretion or misapplication of law. ***Stumpf v. Nye***, 950 A.2d 1032, 1035–1036 (Pa.Super.2008). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." ***Stumpf***, 950 A.2d at 1036.

Schuenemann v. Dreemz, LLC, ___ A.3d ___, 2011 WL 5282609 at *4 (Pa.Super. Nov. 4, 2011).

> "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. For evidence to be admissible, it must be competent and relevant. Evidence is competent if it is material to the issue to be determined at trial. Evidence is relevant if it tends to prove or disprove a material fact." ***American Future Systems, Inc. v. BBB***, 872 A.2d 1202, 1212 (Pa.Super.2005). ***See*** Pa.R.E., Rule 401 (["]"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") "Relevant evidence is admissible if its probative value outweighs its prejudicial impact. The trial court's rulings regarding the relevancy of evidence will not be overturned absent an abuse of discretion." ***American Future Systems, Inc.***, 872 A.2d at 1212. "A party suffers prejudice when the trial court's error could have affected the verdict." ***Gaudio v. Ford Motor Co.***, 976 A.2d 524, 535 (Pa.Super.2009).

Id.

Here, the marketing materials promoting off-label benefits of Prempro were relevant and admissible to show Wyeth's impact on the standard of care. As the trial court states, when writing a prescription for a patient, a physician must weigh the benefits against the risks. (Trial court opinion, 1/29/10 at 47.) If the potential benefits are overstated or the risks unknown, this compromises a physician's ability to care for his patient. While Dr. Swingler was unable to pinpoint the source of his belief that

Prempro had substantial off-label benefits including for the heart and brain, it likely originated from Wyeth's marketing efforts including its practice of polluting the scientific literature with ghostwritten articles. The marketing materials were admissible to provide circumstantial evidence of the source of Dr. Swingler's belief that Prempro had off-label benefits. (***Id.***)

The trial court relied on ***Proctor v. Davis***, 682 N.E.2d 1203 (Ill.App. 1997), ***appeal denied***, 175 Ill.2d 553, 689 N.E.2d 1146 (1997), which discussed evidence of defendant Upjohn's actions of aggressively promoting and advertising off-label use of its product, Depo-Medrol (an aqueous corticosteroid suspension) despite evidence known to Upjohn of its risks. The plaintiff in ***Proctor*** suffered permanent blindness when Depo-Medrol was injected into his eye, a use that was not approved by the FDA. The court in ***Proctor*** stated that Upjohn could not rely on prescribing physicians as "learned intermediaries" where they were not adequately warned:

> A drug company cannot absolve itself from the duty to warn by pointing to the unauthorized use of its drug by physicians with whom it has not shared its knowledge of dangerous side effects and injury. Violation of its duty to warn is even more egregious in this case since, as the evidence heard by the jury demonstrated, Upjohn encouraged and participated in disseminating misleading information concerning the use of its drug to the "learned intermediaries," through financial support, technical assistance, and abundant supplies of the drug during the period when Upjohn was receiving adverse information concerning this use of the drug. Ironically, some of these very reports became part of the literature which was supposed to inform the "learned

> intermediaries" about application of the drug intraocularly.

Id. at 1214.

> Although it is assumed that physicians will keep abreast of current medical literature, here, part of the flawed literature was generated by Upjohn. Upjohn even sought to "plant the seed" in doctors' minds about contributing to the literature, and thereby help to mislead the specialized ophthalmic community as to the potential harmful effects attendant to the intraocular injection of a drug which could be impossible to remove.

Id. at 1215.

Wyeth argues that this is akin to a "fraud-on-the-market" theory of recovery which has been rejected in most common-law tort cases. In other words, ordinarily, the plaintiff must prove that he or she individually relied on the defendant's fraudulent misrepresentations to his/her detriment, not just that a fraud was perpetrated on the community generally. It is not enough to show simply that the defendant is a bad actor. Specifically, Wyeth points to ***DeBouse v. Bayer***, 235 Ill.2d 544, 922 N.E.2d 309 (2009), as rejecting a theory of presumed reliance and implicitly overruling ***Proctor***.

In ***DeBouse***, the plaintiff brought a claim under Illinois' Consumer Fraud Act after defendant Bayer's product was withdrawn from the market because it was found to cause rhabdomyolysis, a serious medical condition affecting a patient's muscles. DeBouse did not allege any physical harm from taking the drug; rather, she claimed economic damages, arguing that Bayer was able to sell the drug at inflated prices as a result of its deceptive

omissions regarding potential side effects of the drug. ***Id.*** at 547, 922 N.E.2d at 312. Significantly, DeBouse acknowledged that she saw no advertising for the drug and knew nothing of the drug prior to her doctor's providing her with a prescription. ***Id.*** at 551, 922 N.E.2d at 314.

The court in ***DeBouse*** rejected this "market theory" of causation, holding that the plaintiff had to prove she was actually deceived by Bayer, either directly or indirectly. Discussing other cases involving consumer fraud, the court in ***DeBouse*** held that to maintain an action under the Consumer Fraud Act, the plaintiff must actually have been deceived by a statement or omission that is made by the defendant. "[W]e have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. If there has been no communication with the plaintiff, there have been no statements and no omissions. In such a situation, a plaintiff cannot prove proximate cause." ***Id.*** at 555, 922 N.E.2d at 316. DeBouse's concession that she did not actually rely on any statements by Bayer in purchasing the drug was fatal to her claim. ***Id.***

None of the cases cited in ***DeBouse*** were prescription drug failure-to-warn cases where the plaintiffs suffered actual physical injury. ***DeBouse*** was a claim brought under Illinois' consumer fraud statute and is inapposite to this case. ***DeBouse*** did not even mention ***Proctor***, let alone disapprove it as Wyeth suggests. Wyeth also cites ***Clark v. Pfizer***, 990

A.2d 17 (Pa.Super. 2010), ***appeal denied***, 608 Pa. 658, 13 A.3d 473 (2010), as rejecting a presumption of causation or "fraud-on-the-market" theory. ***Clark*** was a class-action lawsuit alleging that the defendants deliberately and unlawfully promoted Neurontin, a seizure medication, for off-label uses for which the effectiveness had not been scientifically demonstrated, including the treatment of psychiatric disorders, restless leg syndrome and fibromyalgia. ***Id.*** at 21. The defendants allegedly accomplished this goal by, ***inter alia***, sponsoring medical education conferences and soliciting articles for publication in medical journals. ***Id.***

In affirming the trial court's order decertifying the class, this court in ***Clark*** held that the class plaintiffs were not entitled to a presumption of causation. Rather, they would have to prove, doctor-by-doctor, that the defendants' fraudulent misrepresentations or omissions during the off-label marketing scheme caused the doctor to prescribe the medication. ***Id.*** at 27. The plaintiffs' expert's statistical model did not take into account other factors, wholly unrelated to the defendants' alleged fraudulent promotion, that may have led the class members' specific doctors to prescribe Neurontin for off-label indications. ***Id.*** As such, there were individualized questions of law and fact predominating which would preclude class status. The ***Clark*** court noted that generally, the fraud-on-the-market theory has been confined to cases involving securities fraud or artificial price inflation. ***Id.*** at 25 n.4. The theory has been consistently rejected in consumer fraud cases.

Like ***DeBouse***, we find ***Clark*** to be inapposite.[2] This is not a consumer fraud or statutory deceit lawsuit, and the plaintiff is not relying on a market theory of reliance. Evidence of Wyeth's marketing campaign was relevant to show negligent failure to warn. Furthermore, evidence of Wyeth's unlawful marketing of Prempro for unproven off-label benefits was admissible and relevant to show willful and wanton misconduct and the reprehensibility of its actions, which go to the issue of punitive damages. While Dr. Swingler testified that he did not prescribe Prempro to Barton based on any specific marketing by Wyeth and could not remember where he got the information regarding Prempro's purported off-label benefits, certainly his belief that Prempro had cardiovascular, cognitive, and other benefits and that the potential benefits outweighed the risks was rooted, at least indirectly, in Wyeth's active promotion of its product. The trial court did not abuse its discretion in admitting evidence of Wyeth's extensive marketing activities.

In its second issue on appeal, Wyeth claims that the trial court erred in denying its motion for ***judgment non obstante veredicto*** ("JNOV") with respect to punitive damages. Wyeth asserts that imposition of punitive damages in this case violated Illinois law.

> A judgment notwithstanding the verdict is reviewed ***de novo*** and should be granted only when "all of the

[2] We also note that the parties have agreed the substantive law of the State of Illinois controls, as that is Barton's domicile state. Therefore, reliance on ***Clark***, a Pennsylvania decision, is inappropriate.

> evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." ***Pedrick v. Peoria & Eastern R.R. Co.***, 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967); ***York v. Rush-Presbyterian-St.Luke's Medical Center***, 222 Ill.2d 147, 178, 305 Ill.Dec. 43, 854 N.E.2d 635, 652 (2006). The threshold for a judgment notwithstanding the verdict is high, and a motion for such will only be successful when all of the evidence, together with all reasonable inferences considered in favor of the nonmovant, point to a "total failure or lack of evidence" to prove the nonmovant's case. ***York***, 222 Ill.2d at 178, 305 Ill.Dec. 43, 854 N.E.2d at 652. For that reason, a judgment notwithstanding the verdict is improper if "'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.'" ***York***, 222 Ill.2d at 178, 305 Ill.Dec. 43, 854 N.E.2d at 652, ***quoting Pasquale v. Speed Products Engineering***, 166 Ill.2d 337, 351, 211 Ill.Dec. 314, 654 N.E.2d 1365, 1374 (1995).

Bosco v. Janowitz, 903 N.E.2d 756, 764 (Ill.App. 2009).

> Punitive damages "are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future." ***Loitz v. Remington Arms Co.***, 138 Ill.2d 404, 414, 150 Ill.Dec. 510, 563 N.E.2d 397 (1990). Punitive damages may be awarded when the defendant's tortious conduct evinces a high degree of moral culpability, that is, when the tort is "committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." ***Kelsay v. Motorola, Inc.***, 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978). To determine whether punitive damages are appropriate, "the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended

> to cause and the wealth of the defendant." Restatement (Second) of Torts § 908(2) (1979). Because punitive damages are penal in nature, they "are not favored in the law, and the courts must take caution to see that punitive damages are not improperly or unwisely awarded." ***Kelsay***, 74 Ill.2d at 188, 23 Ill.Dec. 559, 384 N.E.2d 353.

Slovinski v. Elliot, 237 Ill.2d 51, 57-58, 927 N.E.2d 1221, 1224-1225 (2010).

Wyeth argues that it complied with FDA mandates including warning labels for its products. However, it is well settled that compliance with industry and governmental safety standards, in and of itself, does not insulate a defendant from punitive damages. ***Daniel v. Wyeth***, 15 A.3d 909, 932 (Pa.Super. 2011), ***appeal granted***, ___ A.3d ___, 2011 WL 6034401 (Pa. Dec. 5, 2011), citing ***Phillips v. Cricket Lighters***, 584 Pa. 179, 191, 883 A.2d 439, 447 (2005). As we stated in ***Daniel***, it was for the jury to decide whether Wyeth performed adequate testing of its product before marketing it for sale, regardless of purported compliance with FDA testing requirements. ***Id. See also Wyeth v. Levine***, 555 U.S. 555, 570-571 (2009) (rejecting a federal preemption argument and stating that "it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market.").

Wyeth contends that there was insufficient evidence for the jury to find willful and wanton misconduct. We disagree. As the trial court states,

> The jury considered Wyeth's "revolution" in marketing a drug that it knew was not sufficiently tested. The jury heard of Wyeth's manipulation of medical literature and its effect on the medical standard of care. The jury pondered over Wyeth's numerous decisions to ignore studies, extinguish dissenting science, and thumb its nose at the FDA. Finally, the jury saw evidence that Wyeth promoted the drug for extensive, non-authorized, wholly fabricated, and even detrimental off-label uses.

Trial court opinion, 1/29/10 at 54.

Clearly, viewing the evidence in the light most favorable to Barton, the non-movant and verdict winner, the trial court did not err in denying Wyeth's motion for JNOV on punitive damages. There was sufficient evidence of gross negligence and willful and wanton misconduct to support imposition of punitive damages under Illinois law.

Wyeth also contends that the jury's award of punitive damages violated federal due process principles. Again, no relief is due. "The due process clause of the fourteenth amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property." ***Blount v. Stroud***, 915 N.E.2d 925, 941 (Ill.App. 2009), ***appeal denied***, 235 Ill.2d 585, 924 N.E.2d 454 (2010), ***cert. denied***, 131 S.Ct. 503 (2010), citing ***State Farm v. Campbell***, 538 U.S. 408, 417 (2003) (***Campbell I***).

"While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." ***Campbell***, 538 U.S. at 416 (citations omitted). "The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" ***Id.*** at 417, quoting ***BMW v. Gore***, 517 U.S. 559, 574 (1996).

In rejecting Wyeth's motion for a new trial on punitive damages, the trial court stated:

> This Court found nothing particularly astonishing with the jury's decision to punish a corporation that, while selling an immensely popular drug, decided to "dismiss and distract" credible medical evidence concluding the drug caused cancer. Dismissing unfavorable data and failing to test its own product might not show a high level of reprehensible conduct. Yet, the "enormity of the wrong" becomes clear through Wyeth's active attempts to skew the medical standard of care with: ghostwritten articles, a bevy of tests designed to lend credence to fictitious benefits, and, perhaps most absurdly, marketing materials that illegally promoted the nonexistent benefits.
>
> Indeed, the evidence showed that, though Wyeth noticed "red flags," it always found ways to make certain that very few other physicians noticed them. Wyeth's constant pressure on the medical community kept Ms. Barton's physician unaware of

> the true breast cancer risk. Also, its marketing ruses contributed to his belief that, because his patients would experience such grand benefits, an "unknown," "low," or "no greater" risk of breast cancer was counterbalanced. Such a determined campaign to keep medical practitioners, on whom so many rely and the Law holds in such high reverence, in the dark, is hard to imagine let alone countenance.

Trial court opinion, 1/29/10 at 57.

The award of punitive damages in this case was not arbitrary and did not violate federal due process. Wyeth was put on notice of the potential for liability when it continued to market and promote Prempro for off-label use despite inadequate testing. Wyeth was warned numerous times of a possible breast cancer link and of the need for further studies and chose to ignore those warnings. Wyeth's claim that the imposition of punitive damages violated its right to due process is without merit.

To the extent Wyeth repeats its argument that it was in compliance with FDA regulations, we have already rejected this argument for the reasons discussed above. The record indicates that Wyeth's conduct in this matter was reprehensible and fully merited the imposition of punitive damages. Wyeth was on notice years prior to Barton's being prescribed HRT drugs that they may cause breast cancer, yet purposefully failed to study the matter further and even discouraged others from doing so. Dr. Swingler testified that his prescribing habits have changed since publication of the WHI data. Today, he only prescribes Prempro in rare circumstances, for the

shortest duration possible and at lower doses, and never for any heart or brain benefit. In 1997, when Dr. Swingler prescribed Prempro to Barton, he prescribed Prempro for long-term use based on his understanding of the risks and benefits. At that time, as reflected on the Prempro label, he was unaware of a significantly increased risk of invasive breast cancer and mistakenly believed that Prempro had long-term off-label benefits besides alleviation of menopausal symptoms including prevention of heart disease and dementia.

Wyeth complains that it did not have actual knowledge of any increased risk of breast cancer. As was stated in ***Proctor***, 682 N.E.2d at 1211-1212:

> If Upjohn did not know what it should have known, it failed in its duty as an expert. It could not fulfill that duty merely by waiting for what it considered sufficient proof of a cause-effect relationship before advising the medical profession with an appropriate alert or warning of the possibility of risk in the use of one of its products.

(Citation omitted.)

And, as we stated in ***Daniel***, on nearly identical facts:

> In sum, sufficient evidence of record exists to support a jury's finding that from the middle 1970s and forward, Wyeth knew or strongly suspected that hormone replacement therapy increased the risk of breast cancer in post-menopausal women but failed and refused to conduct adequate studies. * * * Permitting all available inferences from the evidence in favor of the verdict winner, as our standard of review requires, there was sufficient evidence to permit the jury to conclude that Wyeth's failure to

> perform adequate tests of the risk of breast cancer was intentional, ***i.e.***, because it did not want confirmation of those risks and the resulting loss of sales and profits. Consequently, sufficient evidence of record exists to support a jury's finding that Wyeth had a subjective understanding that its sale of Prempro was placing women at an increased risk of contracting breast cancer, and its failure to test was in conscious disregard of that known risk.

Daniel, 15 A.3d at 932-933. The jury's award of punitive damages in this case did not violate federal due process principles.

Next, Wyeth raises several claims relating to the trial court's jury charge. Wyeth argues that the trial court erred in its instructions to the jury, necessitating a new trial.

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case.
>
> > Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Underwood ex rel. Underwood v. Wind, 954 A.2d 1199, 1204 (Pa.Super. 2008), quoting ***Gorman v. Costello***, 929 A.2d 1208, 1212 (Pa.Super.

2007), in turn citing ***Quinby v. Plumsteadville Family Practice, Inc.***, 589 Pa. 183, 197, 907 A.2d 1061, 1069-1070 (2006).

"A trial court has wide discretion in phrasing jury instructions, and absent an abuse of discretion or an inaccurate statement of law, there is no reversible error." ***Harman ex rel. Harman v. Borah***, 562 Pa. 455, 475, 756 A.2d 1116, 1127 (2000) (citation omitted).

> [T]he suggested standard jury instructions are not binding, even where a party requests a trial judge specifically to use them. "These instructions are guides only and the trial judge is free to deviate from them or ignore them entirely. What is important is whether the charge as a whole provides a sufficient and correct legal basis to guide a jury in its deliberations."

City of Philadelphia v. Duda by Duda, 595 A.2d 206, 211-212 (Pa.Cmwlth. 1991), ***appeal denied***, 532 Pa. 658, 615 A.2d 1314 (1992), quoting ***Mackowick v. Westinghouse Electric Corp.***, 541 A.2d 749, 752 (Pa.Super. 1988) (***en banc***), ***affirmed***, 525 Pa. 52, 575 A.2d 100 (1990).

Wyeth contends that the trial court erred in instructing the jury on causation. Specifically, Wyeth argues that under Illinois law, the trial court should have instructed the jury that Barton was required to prove that an adequate warning would have changed Dr. Swingler's prescribing habits. In addition, Wyeth argues that the jury should have been instructed that it could not find liability unless this alteration in prescription (***e.g.***, lower dose or shorter duration) would have avoided Barton's injury.

> The learned intermediary doctrine provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities, and the physicians, in turn, using their medical judgment, have a duty to convey the warnings to their patients. ***Kirk v. Michael Reese Hospital & Medical Center***, 117 Ill.2d 507, 517, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987); ***Fakhouri v. Taylor***, 248 Ill.App.3d 328, 330, 187 Ill.Dec. 927, 618 N.E.2d 518 (1993). As a result, the doctrine prevents imposing a duty upon drug manufacturers to warn patients directly. ***Kirk***, 117 Ill.2d at 519, 111 Ill.Dec. 944, 513 N.E.2d 387; ***Fakhouri***, 248 Ill.App.3d at 330, 187 Ill.Dec. 927, 618 N.E.2d 518.

DiGiovanni v. Albertson's, Inc., 940 N.E.2d 73, 75 (Ill.App. 2010), ***appeal denied***, 949 N.E.2d 1097, 351 Ill.Dec. 2 (Ill. 2011).

"Some states apply a 'heeding presumption' in learned intermediary cases. In these states, a court 'presumes that warnings, if given, will be heeded and followed and that medical practitioners will act competently.'" ***Giles v. Wyeth***, 500 F.Supp.2d 1063, 1065-1066 (S.D.Ill. 2007), quoting ***Mahr v. G.D. Searle & Co.***, 390 N.E.2d 1214, 1233 (Ill.App. 1979). "The Supreme Court of Illinois has not spoken on this issue clearly. It has, however, held that when a drug company fails to warn doctors sufficiently, doctors 'cannot be considered 'learned intermediaries' and the adequacy of warnings is a question of fact, not law, for the jury to determine.'" ***Id.*** at 1066, quoting ***Hansen v. Baxter Healthcare Corp.***, 198 Ill.2d 420, ___, 764 N.E.2d 35, 43 (2002) (citations omitted) (footnotes omitted). "The trier of fact must judge a warning by whether it sufficiently apprised physicians of

the risks associated with the use of the drug. The absence of an adequate warning makes a qualifying prescription drug unreasonably dangerous." ***Id.*** at 1066-1067 (citations omitted) (footnote omitted).

Therefore, it appears that in Illinois, doctors who receive insufficient warnings cannot be considered learned intermediaries, and a plaintiff is not required to prove what the prescribing physician would have done had he been warned adequately. It is presumed that the physician will act non-negligently if presented with an adequate warning. As such, the trial court did not err in refusing the instruction. Furthermore, there was extensive testimony that had he been adequately warned, Dr. Swingler would have changed his prescribing habits dramatically.[3]

Wyeth also argues that Barton was required to prove that the change in Dr. Swingler's prescribing practices would have avoided the injury. However, as the trial court states, the jury already determined in Phase I of the trial, dealing with the issues of causation and compensatory damages, that Prempro caused Barton's breast cancer. (Trial court opinion, 1/29/10 at 36.)

> Phase I extensively covered the 'lower dose/shorter term' debate and if breast cancer would occur if Ms. Barton took less of the Prempro. Dr. Swingler testified that he prescribed the drug for over four years at a high dose. Because there was no low-

[3] "Dr. Swingler testified that he changed his prescribing habits as a result of WHI and the new label. He now only prescribes to menopausal women and, even then, prescribes lower doses for a shorter duration." (Trial court opinion, 1/29/10 at 36.)

> dose Prempro when Ms. Barton took the drug, [Wyeth] argued that neither lower doses nor higher doses of Prempro cause cancer. At the conclusion of Phase I, the jury decided that Ms. Barton's ingestion of Prempro for the prescribed dose and term caused her breast cancer.

Id. The issue of causation was already decided and Wyeth was not entitled to re-litigate it. (***Id.*** at 37.) The trial court did not err in its jury instructions on causation and the learned intermediary doctrine.

Wyeth also argues that the trial court erred in refusing to instruct the jury that punitive damages could only be imposed to punish Wyeth's conduct toward Barton that caused the injuries at issue, not for alleged harm to non-parties including those outside of Illinois. In fact, the trial court gave such an instruction during the award stage, explicitly instructing the jury that "you are not to punish the defendant for the impact of its alleged misconduct on other persons who may have been injured by Wyeth." (Notes of testimony, 10/26/09 at 26-27; RR at 4832a-4833a.) Wyeth has failed to show how it was prejudiced by the trial court giving the instruction at the award stage rather than the liability stage.

Next, Wyeth argues that the trial court should have granted its request for jury instructions regarding its purported compliance with FDA standards; that there was a genuine dispute within the scientific community about the risk of breast cancer associated with use of HRT drugs; and, that the jury could not consider as evidence of wanton or willful misconduct any information that became available after 2002, when Barton stopped taking

Prempro. (Wyeth's brief at 52-54.) As Barton points out, Wyeth does not cite any legal authority requiring that the jury be instructed on these points of law. (Barton's reply brief at 53.) They really amount to legal argument, and Wyeth was permitted to make these points to the jury. As far as Wyeth's conduct after 2002 when Barton stopped taking Prempro, as the trial court states, such evidence went to the issue of punitive damages/willful and wanton misconduct and was evidence of the feasibility of label changes. (Trial court opinion, 1/29/10 at 43.) The trial court did not err in refusing the requested instructions.

Finally, Wyeth argues that the trial court abused its discretion in permitting the expert testimony of Cheryl Blume, Ph.D. Wyeth argues that the testimony of Dr. Blume should have been excluded. According to Wyeth, Dr. Blume was unqualified to offer testimony regarding Wyeth's standard of care and the adequacy of its drug labeling.

> Rule 702 of the Pennsylvania Rules of Evidence provides no particular rules for the qualification of experts. Instead, pursuant to Rule 702 an expert may be qualified to testify so long as he or she has "scientific, technical or other specialized knowledge beyond that possessed by a layperson" that will in some manner assist the jury in understanding the evidence presented. Whether or not an expert witness is qualified to testify is usually a matter left to the sound discretion of the trial court. ***See***, ***e.g.***, ***Jacobs v. Chatwani***, 922 A.2d 950, 956 (Pa.Super. [2007]), ***appeal denied***, 595 Pa. 708, 938 A.2d 1053 (2007).

Daniel, 15 A.3d at 925-926. We already held in ***Daniel*** that Dr. Blume was qualified to offer testimony regarding the adequacy of Wyeth's warning labels:

> Sufficient evidence of record existed to permit the trial court to find that Dr. Blume qualified as a satisfactory "medical expert," as that term was used in [***Demmler v. SmithKline Beecham Corp.***, 671 A.2d 1151 (Pa.Super. 1996), ***appeal denied***, 546 Pa. 655, 684 A.2d 557 (1996)]. Her testimony disclosed that she had a Bachelors degree in Biology and a Doctoral degree in Medical Pharmacology and Toxicology. Dr. Blume further testified that in her twenty-year career as an executive with a major pharmaceutical company (Mylan Laboratories), she had been responsible for securing FDA approval of over 100 prescription drugs, and that her responsibilities included revising drug labels in light of post-marketing safety signals. Based upon this testimony, the trial court aptly noted that as a "labeling expert," Dr. Blume was arguably "more qualified than a doctor who deals very marginally with these issues."

Id. at 926 (record citations omitted). For the same reasons, we conclude that Dr. Blume was also qualified to render an expert opinion as to the relevant standard of care and the reasonableness of Wyeth's actions. The trial court did not abuse its discretion in admitting Dr. Blume's testimony.

We now turn to Barton's issues on appeal. Barton has raised the following issues for our review, challenging the trial court's grant of remittitur:

> 1. Whether the trial court erred as a matter of law by remitting the jury's punitive damages award of $75 million to $5,619,517.46 based solely on a mathematical ratio between

> punitive and compensatory damages, without considering how the jury's award reflected either:
>
> (a) the "enormous, reprehensible wrong" Wyeth committed in its decades-long, company-wide efforts to suppress, conceal, and dismiss the risk of breast cancer created by the hormone therapy drugs it marketed and sold to millions of women; and
>
> (b) the need to punish and deter this reprehensible conduct in light of Wyeth's vast $19 *billion* wealth and the billions of dollars in profits it made off the sale of these drugs.
>
> 2. Whether the trial court committed further legal error by invading the province of the jury in remitting a punitive damages award by almost $70 million based on the court's own factual determination of "what would be *sufficient* to put drug manufacturers on notice that such outrageous conduct cannot be condoned," when applicable Illinois law (like Pennsylvania law) reserves this determination for the jury.

Barton's brief at 4 (emphasis in original).

As stated above, the jury awarded $75 million in punitive damages, which was remitted to $5,619,517.46. This represented 1.5 times the amount of compensatory damages which were $3,746,344.97.

"[T]his court reviews a ruling on a motion for a remittitur for an abuse of discretion. The underlying question is whether the trial court was correct in ordering the remittitur." ***Leyshon v. Diehl Controls North America, Inc.***, 946 N.E.2d 864, 876 (Ill.App. 2010), ***appeal denied***, 351 Ill.Dec. 3,

949 N.E.2d 1098 (2011), citing ***Slovinski v. Elliot***, 237 Ill.2d 51, 61, 927 N.E.2d 1221 (2010) (additional citation omitted).

> The amount of punitive damages will not be reversed unless it must have been the result of passion, partiality or corruption. As the jury's determination of the amount of punitive damages is predominately a factual issue, the court will not reverse the award unless it is against the manifest weight of the evidence.

Id., citing ***Blount***, ***supra***.

First, we examine the punitive damages award under the Illinois common law standard.

> The relevant circumstances to consider in reviewing a jury award of punitive damages include, but are not limited to, the nature and enormity of the wrong, the financial status of the defendant and the defendant's potential liability. ***Blount***, [915 N.E.2d at 939]. Each case is assessed in light of the specific facts and circumstances involved, and the underlying purpose of a punitive damage award must be satisfied. [***Id.***] As the supreme court recently reiterated: "Punitive damages 'are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future.'" ***Slovinski***, 237 Ill.2d at 57–58, 340 Ill.Dec. 210, 927 N.E.2d 1221, ***quoting Loitz v. Remington Arms Co.***, 138 Ill.2d 404, 414, 150 Ill.Dec. 510, 563 N.E.2d 397 (1990). The court cautioned that, as punitive damages are not favored in the law and are penal in nature, courts must make sure they are not awarded improperly or unwisely. ***Slovinski***, 237 Ill.2d at 58, 340 Ill.Dec. 210, 927 N.E.2d 1221.

Leyshon, 946 N.E.2d at 877. Under Illinois common law, there is no requirement that the amount of punitive damages imposed on a defendant

bear any particular proportion to the size of the plaintiff's compensatory recovery. ***Id.***, citing ***Blount***, ***supra***.

"The financial status of the defendant is important because an amount sufficient to deter one individual may be trivial to another. Essentially, the amount of the punitive damages award should send a clear message loud enough to be heard, but not so loud as to deafen the listener." ***Powers v. Rosine***, 956 N.E.2d 583, 586 (Ill.App. 2011) (citations omitted). Regarding the third factor, potential liability of the defendant, the Illinois appellate courts have commented that "it should be considered in any case where the defendant faces multiple liability for the same or similar wrongs." ***Hazelwood v. Illinois Central Gulf Railroad***, 450 N.E.2d 1199, 1208 (Ill.App. 1983).

> This factor was noted in Comment e of section 908 of the Restatement of Torts:
>
> > Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future. (4 Restatement of Torts (Second), § 908, comment e at 467 (1977).)
>
> As Judge Friendly stated in ***Roginsky v. Richardson-Merrell, Inc.*** (2nd Cir.1967), 378 F.2d 832, 839:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. * * * We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Id. at 1207-1208. "Without this factor in our 'excessiveness equation,' the result may well be a stampede to the courthouse, with the swiftest taking home large awards, the slow returning with nothing but their injuries, and the defendant being trampled into bankruptcy." ***Id.*** at 1208.

Here, Barton emphasized that Wyeth is a pharmaceutical giant with a net worth of over $19 billion. (Trial court opinion, 1/29/10 at 56.) At its height, Prempro generated $2 billion in annual sales and was being prescribed to 6 million women. (***Id.*** at 57.) It is true, as Barton argued in the lower court, that the jury's award of $75 million in punitive damages represents just .39 of 1% of Wyeth's overall net worth. (***Id.*** at 59.) However, it is equally true that due to thousands of lawsuits filed across the country by plaintiffs who allegedly contracted breast cancer as the result of ingesting Wyeth's HRT drugs including Prempro, Wyeth faces an enormous potential liability for its conduct. (***Id.*** at 58.) This factor clearly militates in favor of remittitur. If Wyeth were to face punitive damages in the range of $75 million in every case in which the plaintiff prevails, it would soon be driven into bankruptcy.

Here, the trial court appropriately considered the defendant's conduct in ***Proctor***, where the appellate court remitted punitive damages to twice that of the compensatory damage award, believing that such was sufficient to "send a strong message to pharmaceutical manufacturers of the necessity to warn of the known potential adverse effects of their drugs." ***Proctor***, 682 N.E.2d at 1217.[4] The defendant, Upjohn's, conduct in ***Proctor*** was particularly egregious:

> There was evidence presented here that Upjohn not only knew of the adverse effects of periocular use of Depo-Medrol, but promoted and developed this off-label use through financial and technical assistance to doctors. After those doctors wrote up their case reports with Upjohn's assistance, Upjohn distributed them, thereby helping to create the literature touting the periocular use of Depo-Medrol.

Id. at 1216. There was also evidence that Upjohn knew of Depo-Medrol's dangerous toxicity with subconjunctival use but did not include such a warning on the label or package insert. ***Id.*** at 1212-1214.

Here, the trial court compared the facts with those in ***Proctor*** and concluded that, "unlike the Defendant in Proctor, Wyeth's label divulged some (albeit a confusing and misleading) explanation of the possible risks associated with the drug. Therefore, this Court believes the conduct to be less egregious and, therefore remits the award to a lower ratio (1.5:1)

[4] A jury awarded compensatory damages of a little over $3 million and punitive damages of $124 million, the latter of which the trial court remitted to $35 million. On appeal, the court in ***Proctor*** entered a remittitur of the punitive damages to just over $6 million.

between punitive and compensatory damages." (Trial court opinion, 1/29/10 at 59.)

Under the facts of this case, this court cannot say that the trial court abused its discretion in granting Wyeth's request for remittitur. The original $75 million punitive award was roughly 20 times the compensatory award, a figure which would likely not withstand constitutional scrutiny. ***See Leyshon***, 946 N.E.2d at 883 ("few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process") (citations omitted). We also note that where, as here, compensatory damages are substantial, a lesser ratio may be appropriate. ***Campbell***, 538 U.S. at 425.

That said, we are not persuaded by the trial court's distinction between Upjohn's conduct in ***Proctor*** and that of Wyeth in this case. The trial court observed that, "As did Defendant Upjohn in Proctor, Wyeth distributed ghostwritten materials, tampered with the medical standard of care, and touted the benefits of unverified off-label uses." (Trial court opinion, 1/29/10 at 59.) We wholeheartedly agree with the trial court's initial determination that Wyeth's conduct here is on par with that of Upjohn in ***Proctor***, and we do not find the fact that Wyeth included a "confusing and misleading" warning label on its drug downplaying the possible risks to be a meaningful distinction. We find the trial court's analysis that ***Proctor*** sets an appropriate benchmark and is sufficient to deter similar conduct to be

correct and, therefore, we will enter a remittitur of the punitive damages to $7,492,689.94, representing a 2:1 ratio between punitive and compensatory damages. We determine this ratio, given the facts and circumstances of this case, fully comports with state and federal due process guarantees and is not unduly burdensome or excessive.[5]

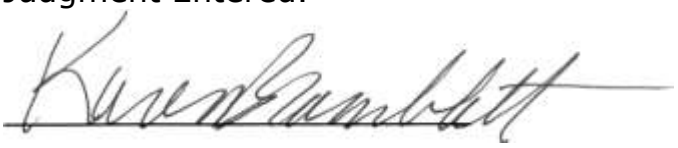
For the foregoing reasons the judgment of the trial court is affirmed in part; vacated in part; and remittitur is entered as noted above.

Affirmed in part; vacated in part; and remittitur entered. Barton's application for leave to submit supplemental authority is denied. Wyeth's

[5] We recognize that in a similar case argued before the same panel, ***Kendall v. Wyeth, et al.***, Nos. 936 EDA 2010, 937 EDA 2010, & 1154 EDA 2010, we reinstated a punitive award with a ratio of 4.44:1, or more than four times compensatory damages. In that case we concluded that the trial court abused its discretion in granting the defendants' motion for remittitur and reducing the amount of punitive damages to only $1 million, measured against compensatory damages of $6.3 million. We emphasized in ***Kendall*** that while perhaps close to the line, single-digit multipliers, particularly in the 4:1 range, can usually survive constitutional scrutiny. ***See Campbell***, 538 U.S. at 425 (citing the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish"). In ***Kendall***, we found that the jury's original punitive damages award of $28 million did not offend federal due process guarantees. It should also be noted that the plaintiff in that case suffered unusually devastating physical and emotional injuries, including a double mastectomy, serious complications from reconstructive surgery, and a 75% chance of recurrence. Indeed, had the trial court in this case elected, in its discretion, to remit damages in an amount greater than a 2:1 ratio, we would have no hesitancy in affirming that judgment; however, we discern no inherent inconsistency between the case ***sub judice*** and ***Kendall***, where the jury's initial award of $75 million in punitive damages here was plainly excessive.

application to stay proceedings pending the decision of the Pennsylvania Supreme Court in ***Daniel***, ***supra***, is denied. Jurisdiction relinquished.

Judgment Entered.



Date: 1/3/2012