In the Superior Court of Pennsylvania

No. 2838 EDA 2008

NANCY COCHRAN,
Appellant,

v.

WYETH, INC.

REPLY BRIEF FOR APPELLANT

On Appeal from the Judgment of the
Court of Common Pleas of Philadelphia County, Pennsylvania,
Civil Trial Division, August Term 2004, No. 275

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Linda C. Love
Michael L. Williams
Williams Love O'Leary & Powers, P.C.
9755 S.W. Barnes Road
Suite 450
Portland, OR 97225–6681
(503) 946–5412

Counsel for Plaintiff/Appellant

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I. INTRODUCTION

This case presents a straightforward yet unresolved question of Pennsylvania law: Where the plaintiff in a prescription drug failure–to–warn case demonstrates that she was injured as the result of ingesting the defendant's medication (a point undisputed on summary judgment) and that her physician would not have prescribed the medication had the defendant adequately warned the physician of all of the medication's significant actual risks (a point likewise undisputed on summary judgment), may a reasonable jury find that the defendant's failure to warn was a proximate cause of the plaintiff's injury if the inadequate warning pertained to a harm different from the harm that the plaintiff suffered?

In this case, the trial judge ruled as a matter of law on summary judgment that unless the defendant specifically failed to warn fully and adequately about the particular harm from which the plaintiff suffered, the plaintiff cannot establish that the defendant's failure to warn proximately caused the plaintiff's injuries, even though had the defendant provided adequate warnings the plaintiff would never have been prescribed the medication.

Wyeth's Brief for Appellee correctly notes that this appeal thus presents a question of law concerning the limits of proximate cause. Sometimes a defendant's act or omission may be a cause–in–fact of harm that befalls a plaintiff, but due to the large number of intervening steps in the causative process, or the presence of one or more superseding causes, a court may properly conclude that the defendant's act or omission was not the proximate cause of the plaintiff's injuries.

Here, by contrast, it is undisputed that a prescription drug manufacturer has the duty to provide physicians with adequate warnings about all of a prescription drug's materially harmful side–effects so that the doctor can decide whether to prescribe the medication to his or her patients. *See Demmler* v. *SmithKline Beecham Corp.*, 671 A.2d 1151, 1154 (Pa. Super. Ct. 1996) (noting that a physician's task involves "weighing the benefits of any medication against its potential dangers"). The very purpose of that requirement, of course, is to safeguard the health and well–being of patients such as the plaintiff here, Nancy Cochran. In this case, the inadequate warnings pertained to the very medication that Ms. Cochran's doctor prescribed for her. And that same doctor testified that had Wyeth's warnings disclosed the actual risks of ingesting that medication, he would not have prescribed the medication for Ms. Cochran's use.

Accordingly, this is not a case where there is some lengthy and tenuous causative chain, or where superseding causes have intervened, to excuse the defendant's act or omission from being the proximate cause of the plaintiff's injuries. Rather, this is a case where the defendant had a duty to warn about the risks of a particular drug. The duty to warn was for the direct benefit of a class of patients who might be prescribed the medication, and the plaintiff was a member of that class of patients. Here, (1) the defendant breached its duty to warn, (2) as a result of which the plaintiff was prescribed the defendant's medication, and (3) as a result of ingesting that medication the plaintiff was injured. Those three steps are the exact three elements a plaintiff must prove to prevail in a prescription drug

negligent failure–to–warn lawsuit against a drug manufacturer. *See Demmler*, 671 A.2d at 1155 (quoting *Mazur* v. *Merck & Co.*, 742 F. Supp. 239, 262 (E.D. Pa. 1990)). There are no extraneous or unnecessary steps in the causative chain that would allow a court to say that proof of proximate cause in this case is too tenuous or remote. *See also Simon* v. *Wyeth Pharmaceuticals, Inc.*, 2009 PA Super 263, at ¶30, 2009 WL 5154031, at *9 (Pa. Super. Ct. Dec. 31, 2009) (describing a plaintiff's proximate cause burden in a prescription drug failure–to–warn suit).

Perhaps recognizing that the trial court's entry of summary judgment on the basis of proximate cause cannot withstand appellate scrutiny, Wyeth's Brief for Appellee also seeks to furnish an alternate basis for affirmance that the trial court neither relied on nor considered. Wyeth's argument in the alternative is waived, however, because Wyeth did not raise it in the trial court until Wyeth's reply brief in support of summary judgment, to which plaintiffs had no right to respond. And, even if not waived, the argument is without merit.

Moreover, Wyeth's argument that various other courts have excluded evidence of the ordinarily fatal PPH injury (the injury Ms. Cochran suffers as a result of having consumed Wyeth's prescription medication) in diet drug heart valve cases based on a balancing test similar to that found in Pennsylvania Rule of Evidence 403 actually favors Ms. Cochran's argument on appeal, because those courts have at least found that the evidence was relevant. *See* Pa. R. Evid. 403 (titled "Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time"). Here, by contrast, the trial court undertook no Rule 403 balancing test,

because it found Ms. Cochran's causation evidence irrelevant as a matter of law. If a Rule 403 balancing test were undertaken, the evidence on which Ms. Cochran relies to prove proximate cause would not be subject to exclusion, as explained below.

For these reasons, explained in more detail herein, this Court should reverse the trial court's entry of summary judgment and remand for further proceedings.

II. ARGUMENT IN REPLY

A. The Trial Court Erred In Granting Summary Judgment In Wyeth's Favor On The Ground That Wyeth's Failure To Warn Fully And Accurately Of The Risks Of Redux Was Not A Proximate Cause Of Ms. Cochran's Injuries

1. Wyeth's appellate brief only serves to illustrate even more starkly the error inherent in the trial court's proximate cause ruling

Before turning to the areas of disagreement that remain between the parties on the issue of proximate cause that is central to the resolution of this appeal, it is useful first to review the many important areas of agreement between the parties.

Wyeth, in its Brief for Appellee, does not dispute that the proximate cause issue presented here is a question of first impression at the appellate level in Pennsylvania. Wyeth's Brief for Appellee also does not dispute that Wyeth had the duty to provide full and accurate warnings about all of the material risks of Redux to physicians who were considering whether to prescribe that drug to patients. Wyeth does not dispute that the purpose of the duty to warn is for the protection of the health and well–being of the physician's patients, so that a physician can weigh

the risks and benefits of a particular medication in deciding whether to prescribe it for his or her patients.

Wyeth also does not take issue with the truthfulness of the deposition testimony under oath of Dr. Athay, Ms. Cochran's prescribing physician, that he would not have prescribed Redux to Ms. Cochran had Wyeth warned him of the medication's actual VHD (valvular heart disease) risk. And, last but not least, Wyeth does not dispute for purposes of the summary judgment inquiry that Ms. Cochran sustained the ordinarily fatal illness known as PPH as a result of having consumed Redux.

As this Court no doubt well understands, the medication Redux posed two risks that are material for purposes of this case. The medication presented a slight risk of the commonly fatal illness known as PPH, which is the illness from which Ms. Cochran suffers. Wyeth is correct that, for purposes of this appeal, Ms. Cochran is not disputing the adequacy of Redux's PPH warning at the time Dr. Athay decided to prescribe Redux to Ms. Cochran. Redux also presented a much greater, and thus much more frequently sustained, risk of VHD, which while not a virtual death sentence such as PPH is nonetheless still a quite serious condition. As described in our Brief for Appellant, the VHD warning that Wyeth provided to physicians when Dr. Athay decided to prescribe Redux to Ms. Cochran greatly understated that medication's actual VHD risk. *See* Brief for Appellant at 5–7. Only later did the federal Food and Drug Administration (FDA) require Wyeth to change the Redux warning label to disclose the medication's actual VHD risk. R.550a. And,

it is Dr. Athay's deposition testimony that, had he known of Redux's actual VHD risk when deciding whether to prescribe Redux to Ms. Cochran, Dr. Athay would not have prescribed Redux to Ms. Cochran. R.588a–93a. Finally, had Ms. Cochran not received the Redux prescription from Dr. Athay, she would not have sustained PPH as the result of having ingested Redux.

In its Brief for Appellee, Wyeth features a lengthy block–quote from the treatise Dan B. Dobbs, "The Law of Torts," in support of Wyeth's assertion that "it is hornbook law that proximate cause cannot be established when the alleged failure to warn relates to an injury the plaintiff does not have." The lengthy quote from that treatise set forth on page 13 of Wyeth's Brief for Appellee states, in full:

> More centrally, the injury suffered must be within the class of injury that the warning requirement was meant to avoid. For example, the plaintiff, if properly warned that asbestos might cause cancer, might have ceased to work around asbestos. A failure to give such a warning could result in liability if the plaintiff did develop cancer as a result of asbestos exposure. But the failure to provide such a warning would not result in liability if the plaintiff, not being warned, kept her job and lost a hand in a job–related machine accident. In that example, failure to warn would be a cause in fact — the plaintiff would have been elsewhere, not working at the machine, if a proper warning had been given — but it is not a proximate legal cause. It is not, in other words, within the risk that a warning was designed to avoid.

Dan B. Dobbs, "The Law of Torts," 1018 (2001).

With all due respect, the above quotation actually supports Ms. Cochran's position on appeal. The example that is discussed in the quotation, where a failure to warn of the risks of asbestos would not be the proximate cause of a hand lost due to a workplace machine, is a textbook example of the limits of proximate cause. The asbestos did not cause the hand injury; rather, the machine did. In Ms. Cochran's

case, by contrast, Wyeth failed to adequately warn of the risks of its medication, Redux; that inadequate warning led Ms. Cochran's physician to prescribe Redux to Ms. Cochran; and Ms. Cochran now suffers from PPH as the direct consequence of having consumed Redux. In the present case, the inadequate warnings pertain to the very item that caused the injury at issue.

Moreover, Professor Dobbs's treatise only would require that "the injury suffered" be "within the *class of injury* that the warning requirement was meant to avoid." Here, the "class of injury" that the requirement to warn fully and accurately of a prescription drug's potential harmful risks most assuredly encompasses any and all injuries that flow from having ingested the medication as the result of a physician's prescription. In short, the example intended to demonstrate what falls outside the limits of proximate cause as set forth in the Dobbs treatise is not analogous to this case, and the facts and circumstances of Ms. Cochran's case fit comfortably within the proximate cause rule announced at the outset and again at the conclusion of the above quotation from the treatise.

Wyeth's Brief for Appellee proceeds to note that in both *Demmler* v. *SmithKline Beecham Corp.*, 671 A.2d 1151 (Pa. Super. Ct. 1996), and *Lineberger* v. *Wyeth*, 894 A.2d 141 (Pa. Super. Ct. 2006), the plaintiffs' failure–to–warn claim involved warnings about the very same injuries that the plaintiffs claimed to have sustained as the result of ingesting the drugs at issue in those cases. Of course, that neither proves nor disproves whether the trial court's proximate cause ruling was correct in this case, because neither of those two cases involved circumstances

similar to this case. Indeed, the trial court's reliance on the *Demmler* decision at page 9 of its Rule 1925(a) opinion and Wyeth's similar reliance on *Demmler* on page 14 of its Brief for Appellee are mistaken, because *Demmler* did not involve a plaintiff's claim that the drug's warning was inadequate because it failed to properly warn about a condition that she did not have. Rather, as the final paragraph of this Court's ruling in *Demmler* makes clear, in that case it was undisputed that the manufacturer's label adequately warned of the risk of the harm that she sustained, but the plaintiff nonetheless contended that the label was inadequate because it failed to advise of an effective antidote to the harmful side–effect. *See Demmler*, 671 A.2d at 1156. This Court's rejection in *Demmler* of the plaintiff's "failure to give notice of an antidote" claim does not and cannot control the outcome here.

In addition to *Demmler*, page 14 of Wyeth's Brief for Appellee cites six other cases from other jurisdictions. Two of those cases — *In re Norplant Contraceptive Prods. Liab. Litig.*, 1997 WL 81094 (E.D. Tex. 1997), and *Grenier* v. *Medical Engineering Corp.*, 99 F. Supp. 2d 759 (W.D. La. 2000) — contain no reasoned analysis of the legal issue presented here.

In another two of the cases — *Mills* v. *United States*, 764 F.2d 373 (5th Cir. 1985), and *Stahl* v. *Novartis Pharmaceuticals Corp.*, 2000 WL 33915848 (E.D. La. 2000) — the plaintiffs lacked any evidence that they would not have taken, or their physicians would not have prescribed, the medications had the warnings been adequate in all material respects. Moreover, when the Fifth Circuit did directly

confront the very issue presented here in *Dartez* v. *Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985), it issued a decision that favors Ms. Cochran's position on appeal, holding that "[w]hether a specific disease has been diagnosed in an individual plaintiff does not determine the scope of defendants' duty to warn. What is significant is whether the warning of the nondisclosed risks could have averted plaintiff's injury, or afforded him the opportunity to make a knowing choice."

And finally, the remaining two cases — *Coursen* v. *A.H. Robins Co.*, 764 F.2d 1329 (9th Cir. 1985), and *In re: Rezulin Prods. Liab Litig.*, 2004 WL 1802960 (S.D.N.Y. 2004) — actually support Ms. Cochran's position on appeal. In *Coursen*, the Ninth Circuit explained that the trial court properly exercised its discretion to exclude the evidence of other harms under the balancing text found in Federal Rule of Evidence 403. But, by definition, Rule 403 only applies to relevant evidence, *see* Fed. R. Evid. 403 (titled "Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time"), and the finding that evidence of other harms or inadequate warnings was relevant is directly contrary to Judge Tereshko's summary judgment ruling here.

Moreover, in the *Rezulin* case, the federal district judge agreed that it would be relevant if physicians had testified that warnings about risks the patients did not suffer would have caused the physicians not to have prescribed the medication. *See* 2004 WL 1802960, at *3–4. However, the trial court went on to hold that the evidence of other inadequate warnings was not admissible in that case because no physicians had testified that they would not have prescribed the medication to their

patients if they had received adequate warnings of those other risks. Here, by contrast, Ms. Cochran's physician has testified that, had Wyeth warned him of the actual VHD risk inherent in Redux, he would not have prescribed Redux to Ms. Cochran. R.588a–93a.

Wyeth's citation on page 16 of its Brief for Appellees to seven decisions (six of which are unpublished and thus found in the Reproduced Record on appeal) discussing whether evidence of the PPH risk of diet drugs would be admissible in a case where the plaintiff claimed to suffer from VHD does nothing to advance Wyeth's argument, because those rulings either apply a Rule 403–style balancing test to decide whether the PPH evidence was admissible or contain no reasoned analysis of the question presented here. At the risk of repeating ourselves, any decision that applies a Rule 403 balancing test is contrary to Judge Tereshko's summary judgment ruling in this case, because such a decision acknowledges that the other risk is indeed relevant evidence. Judge Tereshko, by contrast, held that the evidence of the other risk is inadmissible as a matter of law due to his improperly narrow view of proximate cause, and not under a Rule 403 balancing test.

Finally, the one case that Wyeth cites on page 16 of its Brief for Appellee as holding that evidence of VHD would not be admitted in a PPH case consists of nothing more than a few unadorned pages of a Massachusetts trial court's transcript. And that decision, once again, applies a Rule 403–style balancing test,

which is thus contrary to Judge Tereshko's proximate cause ruling from which Ms. Cochran has appealed.

Although what we have already said above about the cases on which Wyeth relies in its Brief for Appellee provides a more than sufficient basis to reject Wyeth's argument that the trial judge's proximate cause ruling should be affirmed, it may be useful to discuss briefly why a trial court might decide under Rule 403 that evidence of PPH should be excluded in a case where the plaintiff claims to suffer from VHD, while remembering that that scenario is the opposite of the one presented in Ms. Cochran's case (as she suffers from PPH but wishes to establish proximate cause using the inadequacy of Wyeth's VHD warnings for Redux).

In a case where the plaintiff suffers from VHD, the plaintiff should be able to establish the inadequacy of Wyeth's warnings without much difficulty, for the reasons explained in the statement of facts set forth in our Brief for Appellant at pages 5–7. Moreover, while VHD is certainly a serious condition, it is not the virtual death sentence that a diagnosis of PPH represents. *See In re Diet Drugs*, 2000 WL 1222042, at *8–*17 (E.D. Pa. 2000) (describing the health–related consequences of VHD and PPH). Thus, in a VHD case, the plaintiff does not require PPH–related evidence to establish inadequacy of warning, and the likely purpose of the PPH–related evidence is to inflame the jury about a different, extraordinarily serious risk that the diet drug medication carries — a risk that the plaintiff in that case did not manifest. It is thus readily apparent why, in a VHD case, the Rule 403 balancing

test may tilt in favor of excluding PPH–related evidence, even though such evidence is nevertheless relevant.

By contrast, in Ms. Cochran's case, she suffers from the virtual death sentence that a diagnosis of PPH constitutes. Yet, in order to establish that the warning her physician received about the risks of Redux was inadequate, she must rely on that medication's originally inadequate VHD warning. In other words, the relevance of the VHD evidence in her case is very, very high, because without it she cannot prevail on her failure to warn claim. At the same time, the fact that Redux is capable of causing somewhat less serious conditions such as VHD in addition to causing the fatal condition of PPH is unlikely to cause the jury to become more outraged, because Ms. Cochran already suffers from the most serious condition possible. For all of these reasons, in this case the Rule 403 balancing test, when the trial court eventually undertakes it, will favor Ms. Cochran. It remains important to keep in mind, however, that Judge Tereshko has not undertaken any Rule 403 balancing test here. Yet, because the application of that rule is entrusted in the first instance to the wide discretion of the trial judge, *see Commonwealth* v. *Smith*, 808 A.2d 215, 225 (Pa. Super. Ct. 2002), it would not be appropriate for this Court to undertake that balancing test in the first instance on appeal.

To be sure, Wyeth's Brief for Appellee has cited many more diet drug cases than our Brief for Appellant, and Wyeth's Brief for Appellee has cited many more cases in its proximate cause discussion than did our Brief for Appellant. But what Wyeth's Brief for Appellee has failed to offer are any cases as directly on point, or

even in the neighborhood of being on point, as are the cases discussed in detail at pages 20–21 of our Brief for Appellant. What those cases cited in our Brief for Appellant establish are that — (1) where the manufacturer of a product or drug has the duty to provide full and adequate warnings of the product's or drug's risks; (2) where the failure to provide full and adequate warnings causes the product or the drug to be used or prescribed whereas the product or drug would not be prescribed had full and adequate warnings been given; and (3) where the product or drug directly causes injury to the user — a reasonable jury may properly find that the failure to warn was the proximate cause of the injury. Accordingly, this Court should reverse the trial court's entry of summary judgment against Ms. Cochran and remand for further proceedings.

2. Wyeth's argument that Ms. Cochran has failed to prove the inadequacy of Redux's VHD warning is waived and without merit

As this Court is well aware, a reply brief is not the appropriate place for a party to raise an entirely new argument that could have been raised in that party's opening brief. *See*, *e.g.*, *Commonwealth* v. *Basemore*, 560 Pa. 258, 275, 744 A.2d 717, 726–27 (2000) (noting that "[a] reply brief, however, is an inappropriate means for presenting a new and substantively different issue than that addressed in the original brief"). But that is precisely what Wyeth tried to do in its reply brief filed in the trial court in support of Wyeth's summary judgment motion. R.594a–601a. The trial court wisely did not rely on that argument raised by Wyeth in its summary

judgment reply brief as a basis for granting summary judgment in favor of Wyeth, but on appeal Wyeth again seeks to assert that argument, now as an alternate basis for affirmance.

When Wyeth originally moved for summary judgment in this case, its motion asserted nothing more and nothing less than that the PPH warning that accompanied Redux when Dr. Athay decided to prescribe that drug to the plaintiff was adequate, and therefore the plaintiff could not establish proximate cause. R.81a–95a. In fact, Wyeth's original motion for summary judgment filed in the trial court contained no mention of VHD whatsoever. *Id.* In opposing Wyeth's summary judgment motion, Ms. Cochran made the same argument that she is making on appeal — that the VHD warning accompanying Redux was inadequate. R.204a–14a. Wyeth should have known that this would be one of plaintiff's arguments in response to summary judgment given the testimony plaintiff's counsel had elicited from Dr. Athay, Ms. Cochran's prescribing physician, at his deposition. R.588a–93a. Or, Wyeth could have served contention interrogatories on Ms. Cochran to ascertain the basis for her claim that Wyeth's warnings for Redux were inadequate. *See* Pa. R. Civ. P. 4003.1 & 4005.

But, for whatever reason, Wyeth's original summary judgment motion did not seek summary judgment on plaintiff's claim that the Redux warnings were inadequate due to their failure to adequately warn of Redux's VHD risk, R.81a–95a, and therefore it would have been superfluous for plaintiff to have responded to Wyeth's actual summary judgment motion (which merely asserted that Redux's

PPH warning was adequate) with expert testimony establishing that Redux's VHD warning was inadequate. Instead, what plaintiffs produced was the evidence showing that Wyeth had originally concealed Redux's true VHD risk from the FDA and that it was not until much later, long after Dr. Athay began prescribing Redux to Ms. Cochran, that the FDA required Wyeth to change its Redux label to reflect the medication's actual VHD risk. R.548a–51a.

Thus, although it takes great chutzpah for Wyeth to be arguing here that Ms. Cochran has failed to show that Redux's original VHD warning was inadequate when it was the FDA's later appreciation of Redux's true VHD risk that led to the complete withdrawal of these diet drug medication from the marketplace (R.581a–84a), plaintiff does indeed plan to introduce at trial expert testimony establishing that Redux's original VHD warning was inadequate because it failed to warn of the medication's actual VHD risk. However, plaintiff had no obligation to come forward with such evidence in response to a summary judgment motion that was only asserting that Wyeth had properly warned of Redux's PPH risk. R.81a–95a (Wyeth's original summary judgment motion)

If Wyeth had wanted to put plaintiff to the test on this aspect of her claim, Wyeth could have made this aspect of plaintiff's claim the subject of its summary judgment motion. Or, Wyeth could have filed a separate summary judgment motion on this issue. Perhaps the trial court may even allow Wyeth, over the plaintiff's objections, to file a summary judgment motion on this basis following reversal and remand here. But, because Wyeth's original summary judgment motion did not

assert the adequacy of Redux's VHD warning, and because Wyeth did not argue that plaintiff had failed to introduce expert testimony to prove the inadequacy of Redux's VHD warning until Wyeth filed its reply brief (to which plaintiff had no right to respond), Wyeth's argument in this regard is waived.

To be clear, Wyeth could have and did properly argue in its reply brief filed in the trial court that the manner in which Ms. Cochran seeks to prove proximate cause here is legally (as opposed to factually) insufficient. And that supposed legal insufficiency, of course, is the ground on which the trial court relied in ruling in Wyeth's favor. What was improper about Wyeth's reply brief filed in the trial court was that Wyeth's original summary judgment motion only challenged the evidentiary basis for a proximate cause argument that Ms. Cochran was not making. Indeed, Wyeth's original summary judgment motion contained no mention of VHD whatsoever. R.81a–95a. After Ms. Cochran pointed out in her response brief that Wyeth's evidentiary challenge pertained exclusively to a proximate cause argument that she was not making, Ms. Cochran did not have the burden to do anything further than to identify what her actual proximate cause argument was. And this, of course, is precisely what she did. R.204a–14a.

Thereafter, when Wyeth, in its reply brief, sought to expand its summary judgment motion to encompass a challenge to the evidentiary basis for Ms. Cochran's actual proximate cause argument, that challenge came too late, because Ms. Cochran had no right to respond to Wyeth's reply brief. It is not Ms. Cochran's argument on appeal that Wyeth *could not* have challenged on summary judgment

the evidentiary basis of Ms. Cochran's actual proximate cause argument; rather, it is Ms. Cochran's argument on appeal that Wyeth *did not properly do so* by waiting until its reply brief filed in the trial court to assert such a challenge.

Wyeth's Brief for Appellee takes issue with the assertion in our Brief for Appellant that Wyeth's summary judgment motion did not dispute that Redux's VHD warning was inadequate when Dr. Athay decided to prescribe Redux to Ms. Cochran. All that we had said in our Brief for Appellant was that Wyeth's original motion for summary judgment (R.81a–95a) did not assert that Redux's VHD warning was adequate when Dr. Athay decided to prescribe Redux to Ms. Cochran. Indeed, even Wyeth's reply brief filed in the trial court did not assert that the original Redux label adequately warned of the medication's VHD risk, but only that Ms. Cochran had failed to present expert testimony showing that the warning was inadequate in that respect, notwithstanding that any such response would have been gratuitous given that Wyeth's original summary judgment motion did not even challenge the actual basis for Ms. Cochran's failure to warn argument.

Perhaps recognizing that Wyeth had waived the argument by failing to raise it until Wyeth's reply brief filed in the trial court, the trial court did not rely on or even make note of this supposed evidentiary deficiency in Ms. Cochran's response to Wyeth's summary judgment motion. And, due to waiver, this Court should likewise reject Wyeth's alternate basis for affirmance.

III. CONCLUSION

For the reasons set forth above and in our opening brief, this Court should reverse the trial court's entry of summary judgment in Wyeth's favor and should remand this case for trial.

Respectfully submitted,

Dated: January 14, 2010

Linda C. Love
Michael L. Williams
Williams Love O'Leary & Powers, P.C.
9755 S.W. Barnes Road
Suite 450
Portland, OR 97225–6681
(503) 946–5412

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by First Class U.S. Mail addressed as follows:

Michael T. Scott, Esquire
Henry F. Reichner, Esquire
Reed Smith, L.L.P.
2500 One Liberty Place
Philadelphia, PA 19103
(215) 851–8100
Counsel for Wyeth, Inc.

George E. McDavid, Esquire
Reed Smith, L.L.P.
136 Main Street, Suite 250
Princeton, NJ 08540
(609) 520-6004
Co–counsel for Wyeth, Inc.

Fredric S. Eisenberg, Esquire
Kenneth M. Rothweiler, Esquire
Eisenberg, Rothweiler, Winkler,
Eisenberg & Jeck, P.C.
1634 Spruce Street
Philadelphia, PA 19103
(215) 546–6636
Co–counsel for plaintiff

Dated: January 14, 2010

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458