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Court Restores \$28 Mil. Punitives Award in HRT Case

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Pa Superior Court Judge Kate Ford Elliott

The state Superior Court has restored the \$28 million in punitive damages a Philadelphia jury awarded to an Illinois plaintiff who said drugmakers Wyeth and Pharmacia & Upjohn Inc. failed to warn her doctor of the risks of breast cancer from using hormonal drugs.

The trial judge had reduced the punitive damages award to \$1 million.

In a companion opinion, the same Superior Court panel reduced the \$75 million in punitive damages awarded to another Illinois plaintiff who also alleged Wyeth failed to warn prescribing physicians of the substantially increased risk of breast cancer from using estrogen- and progesterone-related hormone-replacement therapy drugs.



Senior Superior Court Judge Stephen J. McEwen Jr.

The trial judge had remitted the punitive damages award in that case to \$5.62 million, but the Superior Court remitted the punitive damages award to \$7.49 million. Wyeth was found 60 percent liable for the plaintiff's injuries and Upjohn was found 40 percent liable for the plaintiff's injuries.

Wyeth and Upjohn are now both subsidiaries of Pfizer. HRT drugs are often prescribed to ease women's menopausal symptoms.

The panel of Superior Court Judge Kate Ford Elliott and Senior Judge William H. Platt said that in the case of *Kendall v. Wyeth* the punitive damages award of \$28 million was in a 4.44:1 ratio to the compensatory damages award of \$6.3 million. Senior Judge Stephen J. McEwen Jr., who heard oral argument in the cases, did not participate in the decisions, according to the two opinions.

"A 4.44:1 ratio between punitive and compensatory damages satisfies due process," Ford Elliott wrote Tuesday for the Superior Court in an unpublished decision.

But the court rejected the punitive damages award of \$75 million in *Barton v. Wyeth*, which in contrast was about 20 times the compensatory damages award of \$3.75 million.

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In a footnote in the *Barton* opinion, Ford Elliott explained that Donna Kendall, unlike Connie J. Barton, had "suffered unusually devastating physical and emotional injuries, including a double mastectomy, serious complications from

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reconstructive surgery, and a 75 percent chance of recurrence" of her breast cancer.

The Superior Court's remittitur of Barton's award results in a 2:1 ratio between punitive and compensatory damages, Ford Elliott said.

The panel applied Illinois law in both cases.

Under Illinois law, punitive damages are reviewed in the context of the "nature and enormity of the wrong, the financial status of the defendant and the defendant's potential liability," Ford Elliott said.

Ford Elliott also opined that "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 percent of Wyeth's overall net worth. 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. 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."

The evidence in support of punitive damages, Ford Elliott said in *Kendall* , included that "Wyeth sought to actively suppress information, instructing its sales representative not to discuss the matter with physicians, and sponsoring ghostwritten articles denying any causative link between Premarin/Prempro and breast cancer. ... Wyeth's overarching concern was profit, with the stated goal of having a majority of women in the world taking its products for the rest of their lives, in spite of the known risks."

The evidence in support of punitive damages regarding Upjohn, Ford Elliott said in *Kendall* , included that "the FDA repeatedly denied Upjohn's applications for approval of Provera in combination with exogenous estrogens, citing a lack of sufficient studies and data. Despite this, Upjohn chose not to study Provera in combination with estrogen but continued to promote the use of Provera in combination with estrogens ... sending advertisements directly to physicians. Although physicians were free to prescribe E+P, it was an off-label use and Upjohn was forbidden from promoting or advertising for it."

Philadelphia Common Pleas Court Senior Judge Norman Ackerman remitted the *Barton* award to \$10.6 million.

Philadelphia Common Pleas Court Senior Judge Victor J. DiNubile Jr. remitted the punitive damages award to \$1 million in *Kendall* .

Wyeth and Upjohn each argued that jurors should have been instructed plaintiffs had the burden of showing their physicians would have made different prescribing decisions based on the drugs' warnings, Ford Elliott said.

But the judge said that, under Illinois law, the learned intermediary doctrine does not apply if a doctor was insufficiently warned.

Howard Bashman, a Willow Grove, Pa., solo practitioner who is appellate counsel for *Kendall* , said one thing that was important about the decision was its rejection of the argument that because the HRT drugs were approved by the federal Food and Drug Administration and had been subject to some study, punitive damages should be rejected as a matter of law.

The state Supreme Court has granted allocatur in *Daniel v. Wyeth* on the question of whether punitive damages should be disallowed under Pennsylvania law when the FDA approved a prescription drug, the drug's warning label and the testing behind the drug.

Bashman is a columnist on appellate litigation for *The Legal* .

Plaintiffs counsel Michael J. Quirk of Williams Cuker Berezofsky in Philadelphia, who is representing Barton, said his co-counsel and he think a higher award was "very well supported by the facts."

Ratios are "cross-checks not starting points" in reviewing punitive damages awards, he added.

Pfizer's Wyeth and Pharmacia & Upjohn subsidiaries, in a statement, said they were "very disappointed" with the court's decisions and are planning to seek review in the state Supreme Court.

"This decision by an intermediate appellate court to change the punitive damages awards is highly unusual and merits close scrutiny by the state's Supreme Court," the statement said. "Accordingly, the company will petition the Pennsylvania Supreme Court to review both decisions in full and will ask the court to reverse them. We are pleased with the Pennsylvania Supreme Court's recent decision in the *Daniel v. Wyeth* case to hear the company's appeal regarding the appropriateness of punitive damages in hormone therapy cases. We note, as well, that another panel of the Superior Court affirmed a decision by the trial court rejecting the appropriateness of punitive damages in an earlier hormone therapy case, a judgment that is now final."

Robert C. Heim of Dechert, counsel for the companies now owned by Pfizer, argued the case in the Superior Court.

Tobias Millrood, of Pogust Braslow & Millrood in Conshohocken, Pa., was lead trial counsel in *Kendall* along with T. Matthew Leckman of Pogust Braslow, and Finkelstein & Partners of New York.

"Unfortunately for Mrs. Kendall, as the court pointed out, her injury was the result of actions that bordered on

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"intentional malice or deceit," Millrood said in an e-mail. "She hopes that this opinion will bring her closer to achieving closure on this dark episode."

Esther Berezofsky of Williams Cuker was local counsel in *Barton* .

Zoe Littlepage of Littlepage Booth in Houston was trial counsel in *Barton* .



Kendall was prescribed Wyeth's Premarin and Upjohn's Provera from 1992 to 1998 and Wyeth's Prempro from 1998 until 2002 when she was diagnosed with breast cancer, Ford Elliott said.

Barton was prescribed Wyeth's Prempro from 1997 to 2002, when she was diagnosed with breast cancer, Ford Elliott said. Barton had to undergo a modified left breast mastectomy and a plaintiff's expert opined she had a 10 percent chance of recurrence of her breast cancer, Ford Elliott said.

Amaris Elliott-Engel can be contacted at 215-557-2354 or aelliott-engel@alm.com. Follow her on Twitter @AmarisTLI.

(Copies of the 46-page opinion in *Barton v. Wyeth*, PICS No. 12-0015, and the 53-page opinion in *Kendall v. Wyeth*, PICS No. 12-0016, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.) •

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