In the Supreme Court of Pennsylvania

No. 63 EAP 2011

MARY DANIEL and THOMAS DANIEL, SR.,
Plaintiffs/Appellees,

v.

WYETH PHARMACEUTICALS, INC., et al.,
Defendants/Appellants.

BRIEF FOR PLAINTIFFS/APPELLEES

On Limited Allowance of Appeal from the Order of the Superior Court of Pennsylvania at No. 2626 EDA 2007, filed April 14, 2011, denying reargument of the Superior Court's judgment of February 7, 2011, reversing the orders entered January 30, 2007, February 2, 2007, and August 24, 2007 in the Court of Common Pleas of Philadelphia County, Pennsylvania at June Term 2004, No. 2368

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

Zoe Littlepage
Littlepage Booth
2043A West Main
Houston, TX 77098
(713) 529–8000

Robert K. Jenner
Janet, Jenner & Suggs, LLC
1777 Reisterstown Road
Suite 165
Baltimore, MD 21208
(410) 653–3200

Counsel for Plaintiffs/Appellees

In the Supreme Court of Pennsylvania

No. 64 EAP 2011

MARY D. and THOMAS DANIEL,
Plaintiffs/Respondents,

v.

WYETH, INC., et al.,
Defendants/Petitioners.

BRIEF FOR PLAINTIFFS/APPELLEES

On Limited Allowance of Appeal from the Order of the Superior Court of Pennsylvania at No. 2690 EDA 2007, filed April 14, 2011, denying reargument of the Superior Court's judgment of February 7, 2011, reversing the orders entered January 30, 2007, February 2, 2007, and August 24, 2007 in the Court of Common Pleas of Philadelphia County, Pennsylvania at June Term 2004, No. 2368

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

Zoe Littlepage
Littlepage Booth
2043A West Main
Houston, TX 77098
(713) 529–8000

Robert K. Jenner
Janet, Jenner & Suggs, LLC
1777 Reisterstown Road
Suite 165
Baltimore, MD 21208
(410) 653–3200

Counsel for Plaintiffs/Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

I. INTRODUCTION

Under Pennsylvania law, as under the law of most states, the purpose of punitive damages is to punish tortfeasors who commit wrongful acts with the specifically proscribed state of mind. In this appeal, Wyeth asks this Court to overturn the jury's finding that Wyeth's wrongful acts in failing to warn of the actual breast cancer risks of the prescription drug Prempro, which resulted in Mary Daniel's breast cancer, constituted reckless or deliberate indifference to a risk that Wyeth knew or should have known and thus satisfied the standard for imposition of punitive damages under Pennsylvania law.

Wyeth's main argument is that the federal Food and Drug Administration's approval of Prempro should prevent Wyeth from being found liable for punitive damages on a negligent failure to warn claim governed by Pennsylvania law. Wyeth's argument must fail. This Court has previously held that compliance with detailed federal safety standards does not preclude an award of punitive damages. Wyeth does not ask this Court to overturn that ruling.

In addition to this case, four other appellate decisions, both federal and state — applying the laws of Arkansas, Illinois (two cases), and Nevada — have ruled that the FDA's approval of Prempro did not preclude awards of punitive damages against Wyeth for having engaged in precisely the same reprehensible conduct with respect to Prempro that is at issue in this case. And numerous other appellate courts have ruled in other contexts, in accordance with this Court's precedent, that compliance with federal safety standards applicable to a product does not immunize the product's manufacturer

from punitive damages. The reason for these rulings is self–evident: FDA approval (or agency approval more generally) is not intended to, and does not, measure the state of mind of the product's manufacturer and thus does not preclude a finding that the manufacturer has exhibited reckless or deliberate indifference to a risk that the manufacturer knew or should have known. Thus, this Court should reaffirm its existing jurisprudence on this subject and hold that FDA approval of a prescription drug does not preclude the imposition of punitive damages against the drug's manufacturer.

Wyeth's other main challenge reargues the evidence that was before the jury on the issue of reckless or deliberate indifference to a risk that Wyeth knew or should have known and the permissible inferences that may be drawn from that evidence. Wyeth argues to this Court, just as Wyeth argued to the jury and to the Superior Court, that Wyeth's conduct could be deemed less culpable than the jury found. But a jury's verdict on the facts must be viewed in the light most favorable to the verdict–winner (here, the plaintiffs), and the inferences drawn from that evidence must likewise be drawn in the light most favorable to the plaintiffs. Under this Court's precedents, a reviewing court must ignore evidence and inferences that are inconsistent with a jury's verdict when considering a motion for judgment notwithstanding the verdict. In repeated contravention of these binding standards of review, Wyeth implores this Court to conduct a *de novo* review of the transcript and exhibits in order to reach a result that is directly contrary to the jury's factual finding that Wyeth's failure to warn of Prempro's actual breast cancer risk evidenced a reckless disregard of a risk that Wyeth knew or should have known.

Five appellate court decisions (including the Superior Court's decision in this case) have reviewed jury findings that Wyeth's failure to warn of Prempro's actual breast cancer risks merited an award of punitive damages under standards equal to or even more strict than Pennsylvania's standards. In each case, the appellate court upheld the jury's finding — based on precisely the same conduct of Wyeth that is at issue in this case — that an award of punitive damages was appropriate.

In sum, the evidence in this case is more than sufficient to uphold the jury's finding that Wyeth recklessly disregarded Prempro's risk of breast cancer. Accordingly, this Court should affirm the Superior Court's reinstatement of the jury's punitive damages award.

II. STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

Wyeth's appeal challenges the Superior Court's reinstatement of a jury's finding that Wyeth's misconduct in failing to warn satisfied Pennsylvania's requirements for an award of punitive damages. As this Court explained in *Birth Center* v. *St. Paul Cos.*, 567 Pa. 386, 397, 787 A.2d 376, 383 (2001), when conducting appellate review of a trial court's ruling on a motion for judgment notwithstanding the verdict, "[w]e view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences."

Earlier, in *Moure* v. *Raeuchle*, 529 Pa. 394, 604 A.2d 1003 (1992), this Court explained:

> [T]he evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.

Id. at 402, 604 A.2d at 1007; *see also Quinby* v. *Plumsteadville Family Practice, Inc.*, 589 Pa. 183, 204, 907 A.2d 1061, 1074 (2006) (same).

With respect to questions of law, this Court's scope of review is plenary and the standard of review is *de novo*. *See Castellani* v. *Scranton Times, L.P.*, 598 Pa. 283, 293, 956 A.2d 937, 943 (2008).

III. COUNTERSTATEMENT OF THE CASE

A. Relevant Procedural History

Plaintiffs Mary and Thomas Daniel filed suit against defendants Wyeth and Wyeth Pharmaceuticals, Inc. alleging that defendants negligently failed to warn of the risk of breast cancer from using Prempro. Prempro is a combination drug containing both estrogen and synthetic progestin ("E+P") that is prescribed to alleviate menopausal symptoms. R.6214a–15a. Due to her ingestion of Prempro, Mary Daniel developed breast cancer that grew so rapidly that it had spread outside of her breast to her lymph nodes by the time it was discovered. R.5590a.

The Daniels asserted that Wyeth negligently failed to warn of the actual breast cancer risks from ingesting Prempro in two ways: (a) Wyeth failed to warn Mary Daniel and her physician about important risks from E+P that Wyeth knew about but did not include in the Prempro warnings; and (b) Wyeth knew there were unanswered questions about E+P's risk of causing breast cancer, but deliberately chose not to conduct studies to investigate and evaluate this risk. Wyeth purposefully ignored a series of red flags arising over a period of two decades suggesting the drug's harmful effects, and even took steps to discredit researchers who raised questions about the breast cancer risks of E+P, while recognizing that the results of studies could prove embarrassing to the company.

The four–week trial of this case was bifurcated. The first phase involved the issues of liability, causation, compensatory damages, and entitlement to punitive damages. On January 29, 2007, after listening to almost four weeks of testimony and reviewing dozens of documents, the jury found Wyeth liable for failing to warn adequately of the risks of Prempro and awarded plaintiffs $1,500,000 in compensatory damages. R.6214a–15a. The jury also found that Wyeth's conduct was "malicious, wanton, willful, or oppressive, or showed reckless indifference to the interests of others," thereby warranting punitive damages. R.6215a.

The next day, January 30, 2007, the Court of Common Pleas (Judge Myrna Field) granted Wyeth's post–trial motion for judgment notwithstanding the verdict on plaintiffs' punitive damages claims (R.3945a) but ordered that the jury continue and deliberate on the appropriate amount of punitive damages in the event the court's entry

of JNOV was later reversed on appeal. The trial's second phase on the amount of punitive damages took place on January 31, 2007. The jury returned a punitive damages verdict that the trial court sealed at Wyeth's request. On February 2, 2007, Judge Field granted Wyeth's motion to strike the punitive damages verdict. R.3967a.

The trial court entered judgment on the compensatory damages verdict, denying a number of Wyeth's post–trial motions seeking judgment as a matter of law and/or a new trial on the issues of liability, causation, and compensatory damages. After plaintiffs noted their appeal to the Superior Court, Judge Field issued an opinion explaining these rulings on April 16, 2007. R.4429a–33a.

On appeal, the Superior Court upheld the jury's verdict in favor of plaintiffs, and against Wyeth, on plaintiffs' negligent failure to warn claim and rejected Wyeth's various challenges to that verdict. The Superior Court panel also unanimously held that the evidence of record, viewed in the light most favorable to plaintiffs as verdict–winners, more than adequately supported the jury's express finding that Wyeth's wrongful conduct merited an award of punitive damages under Pennsylvania law and thus reinstated the jury's punitive damages award.

After the three–judge panel issued its ruling, Wyeth filed an application for reargument en banc. On April 14, 2011, the Superior Court denied Wyeth's application for reargument en banc without any recorded dissent.

Wyeth then filed a petition for allowance of appeal asking this Court to grant review of five separate issues, seeking to challenge both the jury's finding of liability on the underlying failure to warn claim and the jury's award of punitive damages. This

Court granted review of only the first of those five issues, involving the availability of punitive damages in this case under Pennsylvania law. As a result, the jury's finding of liability against Wyeth on plaintiffs' claim for negligent failure to warn is now law of the case and not subject to being reviewed or overturned in this appeal. Moreover, the evidence and inferences on which the jury relied in finding Wyeth liable on plaintiffs' negligent failure to warn claim must likewise be accepted as binding on Wyeth and not subject to reexamination on appeal.

B. Relevant Factual History

After entering menopause, Mary Daniel suffered from hot flashes and vaginal atrophy, two menopausal symptoms that signify of hormone deficiency. R.5623a, 5589a. Unlike the majority of women who transition into menopause with minimal symptoms, Mary Daniel became hormone deficient as confirmed by her development of significant menopausal symptoms. R.5409a. In 1999, her physician, Dr. Haggard, recommended that Mrs. Daniel take Wyeth's drug Prempro. R.5623a. Before starting Prempro, Mary Daniel had a mammogram that was normal and negative for the presence of cancer. R.5408a–09a. Mrs. Daniel ingested Prempro (a combination of estrogen with progestin or E+P) for eighteen months before being diagnosed with "highly" hormone receptor positive invasive breast cancer. R.5411a. This is a particular type of cancer that is "fueled" to develop and grow by hormones. In the absence of such hormone "fuel," this type of cancer either will not develop at all or, if in existence, will stop growing and in many cases shrink in size. R.5953a–54a, 5419a. As a "hormone deficient" woman after

menopause, Mary Daniel no longer produced sufficient natural hormones to develop and grow this type of cancer. The Daniels' medical expert confirmed that but for her exposure to the female hormones in E+P, Mary Daniel would not have developed this hormone dependent invasive breast cancer. R.5418a–19a.

Pathology confirmed the impact of E+P on Mary Daniel's breast cancer. The initial diagnostic biopsy of the cancer was done while Mary Daniel was still taking E+P. Once her doctors knew she had breast cancer, they told Mrs. Daniel to stop taking E+P. R.5416a–17a. A week later, she underwent a second surgery to remove the cancer. The two tissue samples of the cancer were then compared to determine if the growth rate of the cancer had changed solely as a result of her stopping E+P. Amazingly, in just that one week without having E+P to feed the cancer, the growth of Mary Daniel's cancer had slowed from a Ki67 rate of 29% to 7.6%. Ki67 ratings are a "legitimate" way to calculate the proliferation or growth rate of a tumor. R.5414a, 5416a–17a, 5881a. With nothing else changing in that week except the absence of E+P, Mary Daniel's cancer growth rate slowed significantly. R.5419a. Under the influence of E+P, Mary Daniel's cancer had grown so rapidly that she went from a clean mammogram before starting E+P to one that revealed cancer that spread outside her breast tissue to her lymph nodes when it was diagnosed. R.5413a. As a result of being diagnosed with breast cancer, Mary Daniel underwent several surgeries, radiation, chemotherapy, and further drug treatment and suffered severe emotional distress. R.5420a.

Wyeth began selling the first hormone therapy drug product in 1942. This was an estrogen drug called Premarin (E). R.5168a. Provera (P), a synthetic progestin, was

approved for sale in 1959. R.5174a. At the time of both approvals, the Food & Drug Administration did not have authority to require drug companies to establish either the safety or efficacy of drugs before selling them. When the FDA obtained that authority in the 1960s, it "grandfathered" the drugs already on the market. R.5237a. These grandfathered drugs — including E and P — did not go through the same rigorous approval process as drugs approved today. *Id.*

Premarin is derived from the urine of pregnant mares and is the only hormone therapy drug with such an origin. R.5169a. Because of its unique source, to this day Wyeth does not know all the components of the drug. R.5173a. Wyeth has never quantified what is in the drug or determined what is even "biologically active," though it has made billions of dollars in sales from the medication. *Id.* Premarin became the leading estrogen therapy on the market, and Wyeth "made a lot of money on the sales of this product." R.5170a, 5173a.

The use of Premarin changed dramatically in 1975, when the medical community determined that Premarin (E), used alone, was causing an epidemic of endometrial cancer (cancer below the waist). R.5238a–39a, 5173a. As a result of this discovery, sales of E dropped (R. 5173a) until doctors started prescribing an "off–label" (meaning not FDA–approved) combination of E with P (R.6015a, 6895a). While adding P did curtail endometrial cancer, there were clear warning signs or "red flags" quickly raised about whether E+P could cause breast cancer. Despite a number of safety signals, Wyeth never conducted a study to evaluate the breast cancer risk of E+P for women. R.5281a–82a.

In the mid–1990s, the government stepped in and began a much–needed long–term study called the Women's Health Initiative (WHI). Projected to last 15 years, the study was stopped in its tracks after only a few years when the breast cancer rates in the group of women taking E+P crossed the study's pre–determined safety index or stopping point. R.5278a. Once the WHI study's results were released on July 9, 2002, and the world thereafter learned the truth about E+P's risks, E+P sales dropped significantly. R.5179a. Prempro's warnings were changed to reflect the results of the WHI and to provide strong warnings about breast cancer. R.5179a, 5290a–91a. Since the WHI study, Prempro has continuously carried a black box warning for invasive breast cancer, "the strongest warning you can put on a drug." R.5179a. Breast cancer warnings now appear at "the top of the physician package information," the warnings are clear and direct, and doctors are told to prescribe the drug only as second–line treatment if other, safer alternatives fail. *Id.* The post–WHI warnings are dramatically different than those that Mary Daniel or her physician received.

The Daniels asserted at trial that if Wyeth had acted as a responsible drug company, Wyeth could have, and should have, delivered adequate warnings about E+P by providing the information that Wyeth knew and by conducting appropriate breast cancer studies decades earlier that would have revealed what we know today. If Wyeth had acted appropriately, the Prempro label would have contained dramatically different warnings years earlier, and Mary Daniel would never have ingested the drug that caused her breast cancer. Plaintiff's liability expert, Dr. Blume, testified that there were unanswered questions since 1975 about the breast cancer risk of E+P, studies were

needed to provide answers, and those studies "could have [and] should have been done earlier." R.5280a.

The Daniels at trial established that Wyeth maliciously breached its clear and uncontested duties. First, Wyeth breached its FDA–established duties. The FDA has minimum safety standards that a drug company must follow. R.5237a–38a. While the FDA and its expert panels told Wyeth on multiple occasions that human studies were needed for E+P, Wyeth ignored the admonitions. R.6419a–20a, 6422a, 6900a. Had Wyeth done the proper studies, Wyeth could have easily used the resulting information to update and intensify its drug warnings at any time, without even seeking FDA approval first. R.6060a. Federal regulations make clear that a drug company can give new warnings to doctors "before FDA reviews it, because it's a safety concern." R.5290a.

Second, Wyeth violated industry standards. Because the FDA's authority is limited, drug companies and the pharmaceutical industry have also created industry standards and norms. R.5238a. Wyeth acknowledged that it held itself to both industry and internal company standards. Both Wyeth's current president, Dr. Michael Dey, and the Daniels' regulatory expert, Dr. Cheryl Blume, agreed that Wyeth owed the following duties to doctors and patients: (a) to monitor its drugs for safety problems; (b) to review the published literature for risk issues (Wyeth had a department of 150 people whose sole job was to read published medical literature); (c) to follow–up on any new safety issues; (d) to give fair and balanced information to doctors so as to not minimize risks or "lead doctors into thinking a risk isn't very important or significant"; and (e) to

use candor when dealing with doctors. 5175a, 5238a. If a safety issue was uncovered, Wyeth was obliged to update warnings, issue "Dear Doctor" letters, change its website, issue press releases, and even purchase advertising space in newspapers. R.5238a, 5241a, 5290a, 6060a–61a. As detailed below, Wyeth maliciously breached each of these duties.

There were numerous red flags that put Wyeth on notice of unanswered safety questions concerning E+P. Rather than perform studies, Wyeth ignored those signals, hid its head in the sand and chose to do nothing — no studies, no follow–up, no investigation. "When safety signals are seen in the field, or unanswered questions abound," a drug company is responsible "to take the initiative and do studies." R.5369a. After all, Prempro was Wyeth's drug. Wyeth knew far more about its own drug than did the FDA or anyone else. *Id.* Yet Wyeth's corporate executives confirmed that Wyeth never conducted studies to evaluate the breast cancer risk of E+P. R.5280a–81s. Six senior scientists and medical directors for Wyeth testified that "Wyeth did not support any studies designed to assess breast cancer" and that Wyeth itself never did "a breast cancer study that looked to understand this issue of breast cancer and E plus P." *Id.* Using Wyeth's executives' own words, Wyeth's lack of studies meant that doctors were "experimenting" on women for decades as there was insufficient data on E+P even as to the appropriate doses. R.5998a, 6015a.

Safety Signal # 1 — Premarin and the Endometrial Cancer Epidemic

The endometrial cancer epidemic was a powerful safety signal to Wyeth that its hormone drugs could cause cancer in hormone–sensitive tissue. In 1966, a book called

Feminine Forever was published. This bestselling book discussed the symptoms of menopause and the efficacy of estrogen drugs to treat those symptoms. R.5173a. After the book was published, Premarin (E) sales increased each year until 1975. *Id.* In 1975, two different research group studies reported a dramatic increase in endometrial cancer incidence in this country over the preceding decade caused by E alone. R.6390a–98a, 5239a. These two studies cost less than $2000 each. However, when Wyeth was asked to explain to the FDA's advisory committee why it had not undertaken these simple and easy safety studies to identify such a significant risk with its drug, Wyeth had no response. R.5239a–40a, 6398a.

Instead of immediately disseminating this important new risk information to physicians, Wyeth began a "downplay and dismiss" strategy that continued for the next two decades whenever adverse cancer information about hormone therapy was uncovered. Despite the overwhelming scientific evidence to the contrary, Wyeth issued a "Dear Doctor" letter that reassured doctors that it would be "simplistic" to say that Wyeth's drug was causing endometrial cancer. R.6399a, 5240a–41a. This letter outraged the FDA, which immediately called Wyeth in for a meeting. R.6401a–04a. At that meeting, the FDA scolded Wyeth that the letter had "insensed [sic] the FDA at all levels, including the Commissioner of Food and Drugs." R.6401a. The FDA made it clear that it expected Wyeth to formulate "a sound medical and scientific response to this new information," not to issue a letter that "misrepresents the scientific findings as published in the literature." R.6402a. The FDA told Wyeth that it expected a drug company to act more appropriately regarding risk information, especially, as here,

when a company is the leader in the field. *Id.* The FDA concluded that Wyeth was trying to obfuscate the issue. R.5241a–42a, 6403a. The FDA urged the company to remain vigilant for future developments of adverse effects. R.6404a. Wyeth ignored these admonitions for decades to come.

Once the endometrial cancer risk was revealed, doctors and patients stopped using Premarin. Sales of Wyeth's principal drug dropped so dramatically that there was even concern that the company might not survive financially. R.5173a. Sales fell more than 50% from $300 million to $130 million per year. *Id.* The clearest lesson that Wyeth learned was that when the world finds out that a drug causes cancer, sales fall precipitously. Cancer warnings are very bad for sales.

The endometrial cancer crisis put Wyeth squarely on notice in 1975 that hormone drugs could cause cancer in hormone–sensitive organs of a woman's body. R.5238a–39a. Only certain tissues in a woman's body have hormone receptors and are thus susceptible to the presence of hormones. The endometrium and the breast are the two most hormone–sensitive parts of a woman's body. *Id.* Thus, an epidemic of cancer in the endometrium should have been a clear red flag to any reasonable drug company that studies were needed to assess the impact of hormone drugs in the other most hormone sensitive tissue, the breast. R.5238a–39a, 5243a.

After 1975, doctors began prescribing E again, but now with a second drug, progestin (P), added to protect the endometrium. E would alleviate menopausal symptoms while P would prevent endometrial cancer. P provided no actual benefits beyond endometrial protection. R.5242a. The use of E in combination with P resurrected

Wyeth's sales and allowed Wyeth to "regain its legs" financially. R.6548a, 5174a. The Premarin family grew to more than $2 billion a year in sales. R.6548a. E+P was sold in two pills until 1994, when Wyeth brought Prempro (a single combination pill of E+P) to market. While it cost Wyeth less than half a penny to make Prempro (.027 cents), Wyeth sold each pill at 85 cents, producing huge profits. R.5198a, 5584a. Prempro captured 80% of the market for menopause treatment (R.6061a), making Wyeth again the world leader in the hormone therapy field (R.5175a–76a). E+P was a huge money–maker for Wyeth and a franchise that the company had a strong financial motive to protect.

Safety Signal # 2 — Impact of E+P on the breast

In 1976, Wyeth's researchers wrote an internal memo questioning whether E+P could promote a specific type of breast cancer: cancer that was hormone receptor positive. This memorandum noted that "the presence of both estrogen and progesterone receptors in a tumor indicates that the tumor ***can and does*** respond to estrogen." R.6406a (emphasis added). Wyeth's scientists understood that there are different types of breast cancers and that artificial hormones could fuel the growth of hormone receptor positive cancers. R.5243a. Indeed, for hormone positive breast cancers — the type of cancer suffered by Mary Daniel — hormone drugs can act as the key that turns on the engine of cancer growth. Wyeth's memo further noted that the role of progesterone in the etiology of breast cancer "is another area that needs clarification." R.6406a. Wyeth's document concluded that more studies were needed to evaluate the connection between E+P and hormone dependent breast cancer. R.5244a. For almost 30

years before Mary Daniel developed breast cancer, Wyeth knew of the risk but did nothing to study it. R.5247a.

Safety Signal # 3 — Studies needed on E+P

After the endometrial cancer crisis was uncovered, physicians began prescribing E+P to their patients who had not had a hysterectomy. R.5189a, 5811a. Using E+P together quickly became popular even though this use was not approved by the FDA and was thus an "off–label" use. R.5996a. FDA approval would require actual safety and efficacy studies. By 1977, Wyeth acknowledged in an internal memo that, after a review of the published literature, it was clear that for E+P use, "the number of published, well–designed studies [was] small or practically non–existent." R.6895a, 5245a. Rather than follow–up by conducting the clearly needed studies, Wyeth did nothing.

Safety Signal #4 — Permission to perform E+P Studies

In 1983, Wyeth requested permission from the FDA to conduct safety and efficacy studies on E+P. R.6411a–15a. Wyeth's scientists acknowledged that, "before the use of combined therapy becomes established," the risks of this therapy "must be adequately evaluated." R.5246a. The FDA gave Wyeth permission to conduct definitive studies on E+P's effectiveness and safety. *Id.* Despite the green light, Wyeth did nothing.

Safety Signal # 5 — Wyeth understood what kind of E+P study was needed

In 1983, a Wyeth executive attended a National Institutes of Health (NIH) Workshop. This workshop brought together leading experts in the field of hormone

drugs and even included a presentation about how hormone pills impacted hormone receptors in breast cancer. R.5246a–47a. Wyeth's senior physician, Dr. Perdue, summarized the workshop by writing that the NIH experts believed a large, long–term, NIH–type study was needed to answer safety questions about E+P. R.6416a–18a, 5247a. Although Wyeth knew exactly what type and design of study was necessary, Wyeth never actually conducted a breast cancer study looking at E+P and the development of hormone receptor positive breast cancers. R.5247a.

Safety Signal # 6 — Fear of embarrassing results from E+P studies

Also in 1983, Wyeth explained in an internal memo why the company could not risk conducting clinical studies on E+P. The FDA had just advised Wyeth that the agency would not approve use of combination E+P for menopausal symptoms unless Wyeth conducted human studies. R.6419a–20a, 5248a. Wyeth's reaction was that such studies "would be very costly, would take many years, and might in the end not prove successful. In fact, the results of the studies that would be needed could turn out to be **embarrassing**." R.6419a–20a (emphasis added). It is never appropriate for a drug company to refrain from study because the results could be embarrassing. R.5248a. Because of the endometrial cancer crisis, Wyeth was aware that bad study data would mandate updated warnings, and that when those warnings involve cancer, sales plummet. Wyeth did not intend to repeat that experience and be embarrassed again, so Wyeth chose to do nothing.

Safety Signal #7 — FDA's request for studies

In 1985, the FDA again refused Wyeth's request for approval of E+P. The FDA once more said that Wyeth needed to perform clinical studies. R.6422a, 5249a. Despite this request from the FDA, Wyeth continued to do nothing.

Safety Signal # 8 — FDA's Advisory Committee confirmed that studies were needed

In 1990, and again in 1991, an FDA advisory committee (which consisted of panels of experts in a field of medicine) met to discuss hormone therapy drugs and safety issues. Both years, the committee concluded that no well–designed studies on E+P and breast cancer existed. R.9896a. The committee reinforced on both occasions that it could not determine whether E+P increased the risk of breast cancer because there was not enough data available to answer this question. R.9896a, 5830a. Wyeth was aware of the FDA experts' view that studies were needed, but chose instead to do nothing except continue to sell these drugs.

Safety Signal # 9 — Revelation of increased hormone positive breast cancers in older women

In 1990, Drs. Glass and Hoover published an article that showed a 130% increase in hormone positive breast cancers in older women (i.e., menopausal women) in this country since the mid–1970s when E+P use first began. R.5253a. The authors opined that this dramatic increase in this specific type of breast cancer was likely related to hormonal influences. *Id.* Wyeth knew that its own researchers had questioned whether E+P could cause hormone positive breast cancer. But even after Wyeth learned that Drs.

Glass and Hoover had confirmed that the rate of this exact type of breast cancer was rising in lock step with the sales of E+P, Wyeth did nothing to evaluate whether E+P was responsible and provided no clear warnings to doctors.

Safety Signal # 10 — "Corporate policy" not to fund breast cancer studies

When an oncology group approached Wyeth in 1994 asking for funding for an E+P study, Wyeth denied the request. R.5250a–51a. Wyeth refused even to provide drugs for the study. Wyeth's internal documents confirmed that Wyeth refused that request because Wyeth had a "company policy" not to fund breast cancer studies. *Id.*

* * * * *

In response to the string of safety signals described above, Wyeth could have conducted a number of different types of studies to evaluate the breast cancer risk of E+P. R.5251a–52a, 5873a. After all, Wyeth publicly asserted that it was "the only US company with a major research facility devoted exclusively to women's health" and that Wyeth's Women's Health Research Institute was "actively engaged in research that spans the health care needs women face during all phases of their lives." R.6477a, 5176a. Even though Wyeth had an annual research and development budget of $2 billion with $200 million earmarked for women's health studies (R.5197a), Wyeth's own scientists confirmed that Wyeth never did a breast cancer study. In comparison, Wyeth spent over $120 million in one year on marketing, promoting, and advertising its hormone therapy drugs. R.6525a–27a, 5178a, 5197a.

Plaintiffs' evidence at trial showed that Wyeth never used any of its resources or made "any effort" to obtain breast cancer answers. R.5281a–82a. Plaintiffs' evidence

further showed that this was because Wyeth did not want to get bad answers that the company would then have had to tell doctors and patients. In reality, Wyeth could have evaluated the breast cancer risk through a number of different study designs. Most alarming was Wyeth's total lack of effort on this issue.

In fact, the only study conducted by Wyeth to get Prempro approved — a one–year study (the "Pivotal Trial") to assess the impact of E+P on the endometrium — included mammograms and full clinical work–ups. R.5306a. An alarming "cluster" of breast cancers appeared among the small study group of E+P users. R.9578a. The FDA summarized the study results by noting that "five **new** cases of breast cancer **developed**" (R.5828a (emphasis added)) within a year of exposure to E+P — an exposure similar to that of Mary Daniel. In addition, Wyeth's own investigators for this study assessed that one of these new breast cancers was possibly caused by exposure to E+P. R.5861a. Wyeth could have — and should have — followed up on the Pivotal Trial findings, especially so women who used the drug for only a year or so could know of the risk.

Moreover, Wyeth clearly had the resources and ability to conduct a study like the WHI in the 1980s and should have done so. R.5279a. As the NIH did, Wyeth could have hired a coordinating center, like the Fred Hutchinson Cancer Research Center, to run the entire study. R.5852. After all, Wyeth knew in 1983 that a large, long term NIH–type study with three arms was needed to evaluate the risk of E+P. R.6416a–18a, 5247a. In 1983, Wyeth had the FDA's permission to conduct human studies. If Wyeth had started such a study in 1983, it would likely have been shut down early, just as the WHI was,

after an average E+P use of 4.4 years because of breast cancer findings. R.5278a. Thus, by the late 1980s or early 1990s, at the latest, Wyeth would have obtained the same startling risk information that the WHI study later revealed. Prempro would have carried a black box warning about breast cancer before Mary Daniel even reached menopause.

* * * * *

The results of the WHI findings provide strong empirical evidence of the effect earlier studies would have made. As Wyeth's president, Dr. Dey, admitted, the WHI study results "changed the menopause marketplace" and caused Wyeth's sales to plummet. R.5179a. Once doctors and patients knew the truth about these drugs, prescriptions fell precipitously. R.5179a, 6046a. WHI dramatically changed the warnings for Prempro. These new warnings are significantly different than those that Mary Daniel or her physician received.

After the WHI study, Old Prempro (the drug that Mary Daniel took) all but disappeared from the market. In 2003, Wyeth brought a new E+P hormone therapy drug to market that is a low dose, short duration product. R.5182a. Wyeth asked the FDA for permission to call this new drug "Premia" because it was so uniquely different from Prempro in that it involved different doses of both E and P. R.5182a, 5346a. In addition, Wyeth applied for a new patent for Premia, claiming that the product was so novel that it deserved new patent protection. R.5182a. The FDA refused to allow Wyeth to call this product by a new name but allowed Wyeth to instead refer to it as "Low Dose Prempro" and market it with the slogan "Go Low with Prempro." Since 2003,

sales of Old Prempro have largely been replaced by sales of a new drug, Low Dose Prempro. Had the WHI study been performed a decade sooner, Mary Daniel and her doctor would have faced totally different circumstances: *i.e.*, a drug with a black box warning about invasive breast cancer with significant limitations on who should use it and/or the safer Low Dose Prempro.

Studies change warnings. Studies furnish more safety data that can then be provided to doctors and women. Because of Wyeth's refusal to perform these studies, "prescribers and their patients were denied for years the information that finally became available recently." R.5292a. When Mary Daniel took Prempro, the warnings were vague and reassuring including statements such as: "most studies didn't show an issue, did not show a problem with breast cancer"; Wyeth did not "really know what happens with breast cancer risks when you put the E and the P together"; and the overall incidence of breast cancer was not higher than what one would expect in the background or overall population. R.5288a–89a.

Dr. Haggard, Mary Daniel's prescribing physician, summarized this best when he testified that he believed E+P did not have "much of a risk of causing cancer" (R. 763a–64a). Dr. Haggard "wasn't overwhelmed with the specific risk of that medication causing cancer" and the accumulation of risk information provided to him "did not seem to [him] to be a reason not to give the drug." R.5622a. Further, Dr. Haggard was, as expected, reassured that "the majority of studies" had not shown an association with breast cancer. R.5626a. Dr. Haggard believed that the information in the label that the Pivotal Study did not reveal breast cancer incidence among E+P users that was any

higher than that of the general population confirmed "that [the risk] was statistically not of any great significance." *Id.* Because Dr. Haggard was not actually warned of a breast cancer risk, he did not even discuss with Mary Daniel any possible association between E+P and cancer when he prescribed the drug to her. R.5623a.

Dr. Haggard further testified that he leaves to the patient the ultimate decision as to whether he prescribes E+P. Thus, his practice was to discuss with his patients all of the risks and benefits so they can make an informed decision. R.5622a, 25a. If Wyeth had conducted studies in the 1980s and 1990s, accurate risk warnings would have been provided to Dr. Haggard before Mary Daniel started taking Prempro in 1999. And different warnings would have changed Dr. Haggard's prescribing habits. Dr. Haggard testified that the WHI study results provided new information that was "very surprising," "very disturbing to everyone," and "disappointing." The results "changed the conventional wisdom about hormone therapy drugs." R.5627a. Further, Dr. Haggard confirmed that the information contained in the post–WHI Prempro label was "new risk information" to him and the type of information that he would have passed on to his patients, if Wyeth had provided it. R.5628a. Dr. Haggard would have changed his conversation with Mary Daniel, if he had received the type of warnings provided by Wyeth after the WHI study. He would have "emphasized" the risks more. *Id.*

Mary Daniel testified at trial that she also read the warnings that accompanied her Prempro prescriptions. Nothing in those warnings made her believe that taking Prempro would cause her to develop breast cancer. R.5584a. She confirmed that if the drug labeling had contained a black box warning about breast cancer at the time that

she received Prempro, she would not have taken it. *Id.* Mary Daniel testified that even if her physician had recommended Prempro to her, if the warnings for Prempro at that time had been the current, accurate, stronger warnings, she would have rejected a prescription for the drug. R.5597a–98a. Based on all of the evidence, the jury could readily conclude — as the jury in this case in fact did conclude — that Dr. Haggard never would have prescribed Prempro to Mrs. Daniel if Wyeth had furnished an adequate breast cancer warning at the time.

In addition to performing no breast cancer studies, Wyeth did not even pass on to physicians the full risk information that Wyeth knew and appreciated. First, Mary Daniel is, and has always been, a very thin woman. R.5409a, 5580a, 5636a–37a. Unbeknownst to her or her doctor, she was therefore at an increased risk of developing breast cancer from E+P. R.5268a. Even though Wyeth knew that she, and women like her, were at a particularly high risk from these drugs, Wyeth never provided that information to American doctors or women in any label, press release, or document. *Id.*

Since at least 1996, Wyeth knew that thin or lean women who took hormone therapy were at an increased risk for developing breast cancer. As Dr. Blume confirmed, Wyeth knew of this risk and repeatedly discussed it in the company's internal documents. Multiple studies confirmed this particular increased risk for this specific group of women: Cummings, Schairer (reported as Scher) and the Collaborative Group. *Id.* In addition, Wyeth's expert consultants told the company that "leaner women may be at increased risk for breast cancer because they have less circulating estrogen and the addition of E or E plus P makes significant change." R.6505a, 5854a–

55a. Nevertheless, Wyeth never updated its warnings so physicians could properly warn these women that they were at a uniquely increased risk of developing breast cancer if they took E+P. As Dr. Blume opined, this is the type of information that should have been shared with prescribing physicians in the United States, because if a drug company knows that a "risk is not equal across all groups, then I believe the patient has the right to know and I believe her prescriber has a right to know." R.5287a.

Notably, Wyeth *did include* this risk information in labeling for European doctors and women. R.6533a–47a, 5854a. In Europe, Wyeth warned that for E+P users "the increased risk of breast cancer was found mostly for women with a lean or normal body build rather than for obese women." R.6538a, 5854a. Wyeth, however, never provided this warning to American doctors or women. R.5853a. Wyeth's own vice–president, Justin Victoria, agreed that it is never appropriate not to give complete information or to "hide stuff from doctors or women if it's bad about your drug." R.5853a. Yet Wyeth did just that. Mary Daniel and her doctor were entitled to know that she was especially susceptible to this serious side effect so that an appropriate risk/benefit decision could be made. R.5287a. But Wyeth deliberately omitted that information.

Wyeth took other noteworthy steps to make sure that doctors and women did not even hear negative risk information about E+P. Rather than disseminating adverse information to the public, Wyeth stifled dissemination. By way of example:

Dr. Graham Colditz: Wyeth hired Dr. Graham Colditz in the 1980s to research whether adding P to E reduced a woman's risk of breast cancer, as it did for endometrial cancer. R.5857a. When Dr. Colditz's research showed the opposite effect —

that E+P in fact increased this risk — Wyeth never hired Dr. Colditz as a consultant again. Later, when Dr. Colditz was scheduled to present his findings, Wyeth developed a public relations strategy to react to or "counterbalance" his presentation. R.5200a. Instead of embracing its own consultant's findings and encouraging widespread dissemination of this important risk information, Wyeth directed its media liaison and spokespeople attending the meeting to be "prepared but unobtrusive," to "react to any negative messages," and to "counterbalance [any] potential negative news." R.6898a–99a.

Even worse, after Dr. Colditz presented his results about increased breast cancer risk from hormone therapy at a scientific convention, Wyeth's vice–president, Dr. Deitch, called Dr. Colditz (Pa. Super. Ct. Supp. R.1506a–07a, Dep. pp. 809–11)). Dr. Deitch did not telephone Dr. Colditz to see how Wyeth could help him get this important safety information to doctors. Instead, Dr. Deitch called Dr. Colditz to complain that he had not told Wyeth beforehand that he was going to present his data, to inquire why Dr. Colditz was even presenting that type of data at the meeting, and to inform him that his speech had negatively affected Wyeth's stock price. *Id.*

Dr. Malcolm Pike: At a 1989 Wyeth consultant meeting, when Dr. Malcolm Pike, a renowned breast cancer researcher, revealed a study showing that E+P "doubles the risk of breast cancer," rather than tell physicians about this data or issue a press release, Wyeth executives instead discussed that "this would be the last meeting sponsored by Wyeth to which Dr. Pike would be invited." R.6908a.

Dr. Theodore Lippert: In 1999, German researcher Dr. T.H. Lippert reported that "one striking fact that emerges on review of the literature is that almost all the patients in whom an increase in breast cancer had been noted had been treated with products containing Wyeth's estrogen," which is derived from the urine of pregnant mares. R.6978a, 5172a. Wyeth neither told doctors about this finding nor started a study to evaluate the issue. Instead, Wyeth decided to just let "sleeping dogs lie" and hoped that the news media in the United States would not cover the story. R.5172a. Even more disturbing, a Wyeth document reveals that Wyeth took steps to "neutralize" Dr. Lippert and his criticisms about Wyeth's hormone drugs. R.6523a.

IARC task force: The International Agency for Research on Cancer (IARC) is the arm of the World Health Organization charged with identifying cancer–causing agents in the environment. R.5773a. In 1990, Wyeth became aware that the IARC was reviewing whether hormone therapy drugs could cause breast cancer. Rather than join forces with the IARC to get to the bottom of this unanswered safety issue, Wyeth instead created a task force that was "charged" with ensuring "that IARC does not develop a position on a *definitive* relationship between breast cancer and estrogen replacement therapy." R.6427a (emphasis in original), 5858a.

Company policy of not funding breast cancer studies: As explained above, Wyeth repeatedly refused to fund breast cancer studies because it had a "company policy" against funding such studies. With a $2 billion annual research budget, Wyeth had abundant resources to fund any study of any size. R.5197a. But, instead, it spent

over $127 million in marketing and promoting these drugs, and nothing on breast cancer studies. R.5178a.

* * * * *

Based on the evidence summarized above, the jury expressly found during its deliberations at the liability phase of this case that Wyeth's conduct was "malicious, wanton, willful, or oppressive, or showed reckless indifference to the interests of others," thereby warranting punitive damages.

IV. SUMMARY OF THE ARGUMENT

Wyeth argues that the Food and Drug Administration's approval of Prempro requires that the jury's imposition of punitive damages under Pennsylvania law be set aside because such approval shows that the FDA found the testing for E+P to be sufficient. This argument is incorrect both as a matter of Pennsylvania law and as a matter of fact. The jury found that Wyeth negligently failed to warn of Prempro's actual breast cancer risk. FDA approval does not preclude a jury's finding that Wyeth's state of mind demonstrated reckless indifference to Prempro's breast cancer risk. Moreover, as discussed below, the FDA repeatedly and consistently told Wyeth that it had grave concerns about the safety of E+P and more studies were needed.

Second, Wyeth claims that it disclosed everything it knew about the risk of breast cancer and withheld or concealed nothing. Once again, however, Wyeth's self–serving claims run headlong into the evidence. As explained herein, Wyeth knew about the results of Dr. Colditz's study, Dr. Pike's concerns, Dr. Lippert's findings, and that thin

women were at a particularly increased risk from E+P, yet Wyeth chose to not disseminate any of that information to physicians or patients but instead took active steps to dismiss these findings.

Third, Wyeth argues that E+P was extensively tested and studied by Wyeth and independent researchers. But Wyeth's own scientists and medical directors admitted that Wyeth never conducted even a single breast cancer study. And the FDA's panel of experts, when reviewing the worldwide literature on the issue, found insufficient studies to answer the question of the impact of E+P on breast cancer risk. It was not until the WHI study that the world learned the truth. All three of Wyeth's factual assertions that are at the heart of the question presented for review were disputed at trial, and the jury permissibly resolved those disputes in favor of the plaintiffs.

In *Wyeth* v. *Levine*, 555 U.S. 555, 570–71 (2009), the Supreme Court of the United States held 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." In *Levine*, the nation's highest Court ruled that FDA approval of a prescription drug such as Prempro *does not* preempt a state law failure–to–warn claim against the manufacturer of that medication brought by someone who was injured as the result of ingesting the drug.

Wyeth's argument that FDA approval of Prempro should nevertheless foreclose the availability of punitive damages under Pennsylvania law is contrary to this Court's holding in *Phillips* v. *Cricket Lighters*, 584 Pa. 179, 191, 883 A.2d 439, 447 (2005), that

"compliance with [federal] safety standards does not, standing alone, automatically insulate a defendant from punitive damages." Wyeth does not ask this Court to overrule *Phillips*, and thus Wyeth's FDA–approval argument is doomed to defeat. Including this case, there are a total of five appellate court rulings upholding the imposition of punitive damages against Wyeth in Prempro–related negligent failure to warn claims based on precisely the same conduct at issue in this case. In none of those cases, which applied the similar punitive damages common law of a total of four states, has the appellate court concluded that FDA approval prohibited the juries' punitive awards.

The same outcome — rejection of Wyeth's "FDA approval precludes punitive damages" argument — should follow here. In this case, plaintiffs' state law failure to warn claim permissibly held Wyeth to a higher standard of care than the FDA's minimum requirements. The FDA's approval of Prempro is not determinative of Wyeth's state of mind in failing to satisfy the applicable standard of care under Pennsylvania law. Indeed, Wyeth's state of mind is not even something that the FDA approval process is intended to measure.

The record in this case is replete with evidence from which the jury permissibly could and did find that Wyeth's failure to warn of Prempro's actual breast cancer risks at the time when Prempro was prescribed to Mrs. Daniel evidenced Wyeth's deliberate indifference to the risk of breast cancer. Wyeth knew that Prempro posed a breast cancer risk to women. It was Wyeth's repeated refusals and unwillingness to determine the medication's actual breast cancer risk, notwithstanding Wyeth's and the FDA's

awareness that risk needed to be quantified but remained unknown, that allowed the jury to find that Wyeth was deliberately indifferent to that risk. Wyeth put its own profits ahead of the health of the women who were being prescribed Prempro. Due to Wyeth's reckless indifference to the health of women, patients such as Mrs. Daniel developed breast cancer that they would not have developed had Prempro arrived on the market bearing warnings that accurately disclosed the medication's actual breast cancer risks, in accordance with the requirements of Pennsylvania law.

Because FDA approval does not preclude an award of punitive damages against Wyeth as a matter of Pennsylvania law, and because the record in this case is more than sufficient to uphold the jury's finding that Wyeth was recklessly indifferent to Prempro's known breast cancer risk, this Court should affirm the Superior Court's reinstatement of the jury's punitive damages verdict.

V. ARGUMENT

A. Under Pennsylvania Law, FDA Approval Of A Prescription Drug Does Not Preclude A Jury From Finding That The Drug's Manufacturer Was Recklessly Indifferent To A Risk About Which The Manufacturer Knew Or Had Reason To Know

In its Brief for Appellant, Wyeth first contends that the FDA's approval of Prempro necessitates that the jury's imposition of punitive damages under Pennsylvania law be overturned because FDA approval shows that the FDA found the testing for E+P to be sufficient. In actuality, as plaintiffs explain herein, the FDA repeatedly and consistently told Wyeth that it had grave concerns about the safety of

E+P and more studies were needed. The FDA even went so far as to grant only a "conditional approval" for Prempro, approval conditioned on Wyeth agreeing to do a comprehensive study on the breast cancer risk.

Wyeth asserts that merely because it met the FDA's minimum requirements, punitive damages cannot be assessed. But this Court has already held that compliance with federal safety standards does not immunize a manufacturer from the imposition of punitive damages. In *Phillips* v. *Cricket Lighters*, 584 Pa. 179, 883 A.2d 439 (2005), this Court expressly held that "compliance with [federal] safety standards does not, standing alone, automatically insulate a defendant from punitive damages." *Id.* at 191, 883 A.2d at 447. The Superior Court properly relied on this Court's ruling in *Phillips* in rejecting Wyeth's contrary argument on this point. Because this Court's ruling in *Phillips* requires the rejection of Wyeth's argument, and because Wyeth does not argue that *Phillips* should be overruled, this Court should simply reject Wyeth's first ground for reversal.

Instead of asking this Court to overrule *Phillips*, Wyeth relies on a series of law review articles and similar materials to suggest that the FDA's criteria for approving a prescription drug are far more rigorous than the Consumer Product Safety Commission's criteria for approving a disposable cigarette lighter. But Wyeth's invitation to compare those two different safety regimes must fail, because the record in this case does not contain the facts necessary to perform any meaningful comparison. Moreover, a disposable lighter that lacks an adequate child–proofing safety mechanism could, in a very short period of time, kill or seriously injure not only a child but also

that child's entire family, and could even kill or injure the residents on an entire city block, not to mention firefighters and other safety personnel responding to the fire. The point here is merely that one cannot assume that government agencies are more motivated to ascertain and protect against the safety risks of prescription drugs than they are to ascertain and protect against the safety risks of other dangerous products.

This Court's ruling in *Phillips* also requires the rejection of Wyeth's argument that merely because the FDA approval process necessitated that Wyeth give some consideration to Prempro's breast cancer risk, FDA approval thereby negates the ability to demonstrate reckless indifference under Pennsylvania law. In *Phillips*, the Consumer Product Safety Commission's approval process required the manufacturers of disposable lighters to devote attention to the safety risk that improper use by children poses, yet this Court in *Phillips* held that CPSC approval did not by itself preclude the imposition of punitive damages under Pennsylvania law. *See Phillips*, 584 Pa. at 191, 883 A.2d at 447. For the same reasons, FDA approval does not preclude punitive damages in this case.

Wyeth's argument that a state court should prohibit the imposition of punitive damages based on the existence of a federal regulatory mechanism rests on a view of the role of federal law that the Supreme Court of the United States has itself recently rejected. In *Wyeth* v. *Levine*, 555 U.S. 555 (2009), the U.S. Supreme Court held, with regard to the manufacturer of a brand name prescription drug such as Prempro, 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." *Id.* at 570–71. Thus, in *Levine*, the U.S. Supreme Court ruled that the FDA's approval of a prescription drug's warning label does not insulate the manufacturer of an FDA–approved prescription drug from liability on a state law failure to warn claim unless the FDA specifically precluded the manufacturer from giving the very warnings that the plaintiff claims should have been given. Here, instead of rejecting the warnings that the plaintiffs claimed were necessary, the FDA specifically approved a black box breast cancer warning for E+P as soon as the WHI study results were released.

In the aftermath of the U.S. Supreme Court's ruling in *Levine*, Wyeth in this case abandoned its argument that federal law preempted plaintiffs' negligent failure to warn claim. The law review articles and distinguishable cases on which Wyeth relies in making the policy argument that FDA approval should preclude an award of punitive damages issued before the U.S. Supreme Court's ruling in *Levine* and are thus of questionable persuasiveness. It would make no sense to hold that FDA approval of a drug does not preclude a state law failure to warn claim but does categorically preclude an award of punitive damages on such a state law claim. *See Silkwood* v. *Kerr–McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law. As we noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted.").

In *Hutchison ex rel. Hutchison* v. *Luddy*, 582 Pa. 114, 870 A.2d 766 (2005), this Court reversed the Superior Court's categorical rejection of punitive damages on claims for

negligent supervision, holding instead that the availability of punitive damages must be decided on a case–by–case basis depending on the facts of each case. *See id.* at 126, 870 A.2d at 773. In *Hutchinson*, this Court reiterated that "[t]he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." *Id.* at 123, 870 A.2d at 771 (internal quotations omitted).

Thus, under Pennsylvania law (as under the law of most other jurisdictions), punitive damages exist to punish tortfeasors who commit wrongful acts with a specifically proscribed state of mind. By contrast, FDA approval of a prescription drug does not focus on the state of mind of the drug's manufacturer. Rather, the essentially *ex parte* prescription drug approval process seeks to determine whether a medication's benefits exceed the medication's risks as to any class of patients based on information provided to the agency by the drug's manufacturer. In that process, the manufacturer, of course, has a clear conflict of interest arising from its overriding financial interest in obtaining agency approval. It would thus be truly bizarre to hold, as Wyeth urges, that FDA approval — which does not focus on or evaluate the state of mind of a prescription drug's manufacturer — somehow precludes a finding that the manufacturer's failure to quantify and warn about a medication's actual risks did not occur with the proscribed culpable state of mind necessary for imposition of punitive damages.

In language that still rings true today, this Court observed in 1942 in *Henderson* v. *National Drug Co.*, 343 Pa. 601, 23 A.2d 743 (1942), that:

> [W]e are not unmindful that the public interest requires the holding of companies which make and sell drugs and medicines for use in the human body to a high degree of responsibility under both the criminal

> and the civil law for any failure to exercise *vigilance* commensurate with the harm which would be likely to result from relaxing it.

Id. at 610, 23 A.2d at 748. The quotation from *Henderson* that Wyeth obviously favors, to the effect that a prescription drug's manufacturer should not be "mulcted * * * every time some person uses such drugs or medicines for harmful results," was written in the context of rejecting claims asserting strict liability without fault against prescription drug manufacturers. Here, of course, plaintiffs' claim was for negligent failure to warn, which required plaintiffs to establish that Wyeth was at fault, thus rendering inapplicable the language from *Henderson* on which Wyeth relies.

In this case, the jury's finding of liability against Wyeth on plaintiffs' negligent failure to warn claim — a finding that this Court has not granted allowance of appeal to review — establishes at a minimum that the jury concluded that Wyeth could have and should have conducted a WHI–like study to determine Prempro's actual breast cancer risks before seeking final FDA approval so that Prempro's breast cancer warnings would have been adequate from the outset. Thus, the jury's verdict, properly understood, evidences a finding by the jury that Wyeth bears the fault for the FDA's original approval of an inadequate breast cancer warning for Prempro that severely understated the period of time in which a meaningful breast cancer risk manifested itself as the result of consuming Prempro. As a result, Wyeth's argument that affirming the jury's award of punitive damages would be tantamount to holding that the FDA's conduct in approving Prempro was also recklessly indifferent to the breast cancer risk of Prempro lacks merit.

In *Wyeth* v. *Rowatt*, 244 P.3d 765, 779–80 (Nev. 2010), the Supreme Court of Nevada persuasively rejected the very same "FDA approval precludes punitive damages" argument that Wyeth is advancing in this case. Nevada's highest court explained:

> Wyeth argues that because it complied with all FDA requirements for labeling and testing its drugs, the imposition of punitive damages is negated. Wyeth points out that its position on the breast cancer risk reflected the available scientific evidence, which at the time, provided sufficient warning about the breast cancer risk, and at any rate, its drug remains FDA approved and continues to be prescribed. Wyeth urges this court to follow a line of cases that hold that compliance with FDA regulations negates malice such that punitive damages should not be awarded. We decline to do so.
>
> While the cases cited by Wyeth allowed the defendants to avoid punitive damages by complying with federal standards, those cases' holdings are inapplicable to the facts presented in this case. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (holding that compliance with federal and industry standards is "some evidence of due care" and that insufficient evidence was presented to demonstrate that the tire manufacturer failed to warn, as the manufacturer complied with both standards); *Nader v. Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980) (concluding that punitive damages were not warranted when the airline complied with federal standards and such standards were in the public's interest); *Boyette* v. *L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (holding that the adequate warning, which complied with OSHA standards, did not justify an award of punitive damages); *In re Miamisburg Train Derailment*, 132 Ohio App. 3d 571, 725 N.E.2d 738, 752 (1999) (stating that although compliance with industry standards did not negate negligence, such compliance negated the lower court's finding that defendants consciously disregarded the safety of others). **Unlike these cases, Wyeth's conduct was fraught with reprehension and deception, and if this court adopts the policy that Wyeth seeks, potentially every company that complied with federal regulations would be absolved of punitive damages, regardless of the manner in which those requirements were allegedly satisfied.** *See Silkwood v. Kerr–McGee Corp.*, 769 F.2d 1451, 1456–58 (10th Cir. 1985) (upholding punitive damages award despite defendant's compliance with federal nuclear safety regulations); *Gonzales v. Surgidev Corp.*, 120 N.M.

> 133, 899 P.2d 576, 590 (1995) (holding that "compliance with federal regulations does not preclude a finding of recklessness or an award of punitive damages"); *Gryc v. Dayton–Hudson Corp.*, 297 N.W.2d 727, 734–35 (Minn.1980) (determining that compliance with the Flammable Fabrics Act of 1953, while relevant to the issue of punitive damages, does not preclude a punitive damages award as a matter of law).

Id. at 779–80 (emphasis added).

Similarly, in *In re Prempro Products Liability Litigation* (*Scroggin* v. *Wyeth*), 586 F.3d 547 (8th Cir. 2009), the U.S. Court of Appeals for the Eighth Circuit, while recognizing that Prempro was FDA approved (*id.* at 563), nevertheless ruled that sufficient evidence existed for a jury to find Wyeth liable for maliciously failing to warn about Prempro's actual breast cancer risk under Arkansas' "clear and convincing" evidence standard (*id.* at 572–73).

And in this case, the Superior Court rejected Wyeth's FDA approval argument, reasoning as follows:

> In this regard, we also find that the trial court's reliance on Wyeth's compliance with the FDA's testing and labeling requirements was misplaced. In *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439 (2005), our Supreme Court ruled that compliance with industry and governmental safety standards "does not, standing alone, automatically insulate a defendant from punitive damages." *Id.* at 191, 883 A.2d at 447. Moreover, Dr. Blume testified that the FDA's testing and labeling requirements were the "minimum standards" for a drug company, and that nothing prevents drug companies from conducting additional studies if safety concerns arise either before or after FDA approval. N.T. 1/10/07 (MS), at 48–50.

Daniel v. *Wyeth Pharmaceuticals, Inc.*, 15 A.3d 909, 932 (Pa. Super. Ct. 2011).

Most recently, in the course of deciding two cases governed by Illinois law, the Superior Court of Pennsylvania again rejected Wyeth's FDA approval argument in

upholding the availability of punitive damages for Wyeth's negligent failure to warn of Prempro's actual breast cancer risks. *See Kendall* v. *Wyeth, Inc.*, 2012 WL 112609, at *4 (Pa. Super. Ct. 2012); *Barton* v. *Wyeth Pharmaceuticals, Inc.*, 2012 WL 112613, at *13 (Pa. Super. Ct. 2012). Although *Kendall* and *Barton* are non–precedential Superior Court rulings, Wyeth has itself placed these decisions before this Court by means of two separate, recently filed petitions for allowance of appeal asking this Court to either grant review in those cases or to hold those cases pending the resolution of this case. Because Wyeth is arguing that the outcome of this case is relevant to the outcome of *Kendall* and *Barton*, Wyeth should have no objection to this Court's review of the Pennsylvania Superior Court's rulings in *Kendall* and *Barton*, which are both available via Westlaw at the citations supplied above, in the course of deciding this case.

In *O'Gilvie* v. *International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), the Tenth Circuit rejected the defendant's argument that FDA approval of the toxic shock warnings found on tampon packaging should preclude an award of punitive damages on a state law negligent failure to warn claim:

> Playtex argues that the presence of a warning that complied with FDA requirements precludes, as a matter of law, any finding that Playtex exhibited the reckless indifference necessary to support an award of punitive damages. We disagree. As we noted above, compliance with FDA standards is not dispositive under Kansas law if a reasonable manufacturer would have done more. Under these circumstances, compliance with the FDA regulations does not preclude punitive damages when there is evidence sufficient to support a finding of reckless indifference to consumer safety.

Id. at 1446.

As the U.S. Court of Appeals for the Fifth Circuit, applying Florida law, explained in *Dorsey* v. *Honda Motor Co. Ltd.*, 655 F.2d 650 (5th Cir. Unit B Sept. 11, 1981):

> Generally speaking, compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's conduct reasonable. *See* Restatement (Second) of Torts §288C; W. Prosser, Handbook of the Law of Torts § 36 at 203–04 (4th ed. 1971); *Bruce v. Martin–Marietta Corp.*, 544 F.2d 442, 446 (10th Cir. 1976) (Maryland law); *Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975) (North Carolina law); *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1027 (1st Cir. 1973) (New Hampshire law). Honda offers no persuasive reason why compliance will as a matter of law be merely admissible on the issue of whether the defendant's conduct is reasonable but an absolute defense on the issue of whether its conduct is willful, reckless, or outrageous. *See Silkwood v. Kerr–McGee Corp.*, 485 F. Supp. 566, 583–86 (W.D. Okl. 1979) (compliance with federal standards does not prevent awarding punitive damages if the defendant's conduct is reckless); *Gryc v. Dayton–Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

Id. at 656. *See also Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521, 536 (Tenn. 2008) (rejecting argument "that compliance with federal regulations and custom within an industry should bar the recovery of punitive damages" because "[t]o hold otherwise would create an overly inflexible rule that would allow some manufacturers knowingly engaged in reprehensible conduct to escape the imposition of punitive damages"); *General Motors Corp.* v. *Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994) ("nothing * * * precludes an award of punitive damages where, notwithstanding the compliance with applicable safety regulations, there is other evidence showing culpable behavior").

In this case, the jury was presented with Wyeth's arguments and evidence that the FDA's approval of Prempro should cause the jury to conclude that Wyeth did not deliberately or recklessly disregard Prempro's breast cancer risk. The jury considered Wyeth's FDA approval–related evidence and arguments and disagreed, finding instead

that Wyeth's failure to warn of Prempro's actual breast cancer risks constituted, at a minimum, a reckless disregard of those risks.

Wyeth can point to no other judicial decision holding — purely as a matter of state common law — that obtaining FDA approval for Prempro insulates Wyeth from punitive damages on a failure to warn claim. To the contrary, as explained above, the U.S. Court of Appeals for the Eighth Circuit, in *Scroggin*, 586 F.3d at 572–73, held under Arkansas law that Wyeth could be subjected to punitive damages on an inadequate failure to warn claim involving Prempro. Similarly, the Supreme Court of Nevada, in *Rowatt*, 244 P.3d at 779–81, rejected the argument that compliance with FDA standards precluded an award of punitive damages. In that case, the Supreme Court of Nevada upheld a sizeable award of punitive damages against Wyeth in favor of women who suffered breast cancer as the result of ingesting Prempro. And in *Barton* v. *Wyeth* and *Kendall* v. *Wyeth*, the Superior Court of Pennsylvania recently ruled under Illinois law that FDA approval did not immunize Wyeth's conduct in negligently failing to warn of Prempro's actual breast cancer risks from punitive damages.

Additionally, the U.S. Court of Appeals for the Third Circuit, applying Pennsylvania law, has allowed plaintiffs to pursue punitive damages on a negligent failure to warn claim involving an FDA–approved prescription drug. *See Hoffman* v. *Sterling Drug, Inc.*, 485 F.2d 132, 145–46 (3d Cir. 1973).

To be clear, it is not plaintiffs' position that FDA approval is irrelevant to the issue of punitive damages. Such evidence is admissible and can be considered by a jury. Here, Wyeth certainly argued to the jury that the FDA's approval of Prempro should

lead the jury to decide against imposing punitive damages. The jury, however, concluded based on all of the evidence presented at trial that the imposition of punitive damages against Wyeth was appropriate notwithstanding Wyeth's FDA approval argument.

In sum, Wyeth's proposed holding would require this Court to overrule its recent decision in *Phillips*, which Wyeth is not asking this Court to overrule; would cause this Court to issue a decision in disagreement with the rulings of the Third Circuit applying Pennsylvania law, the Eighth Circuit applying Arkansas law, the Supreme Court of Nevada applying Nevada law, and the Superior Court of Pennsylvania applying Illinois law.

Moreover, there is no worse fact pattern for Wyeth's argument — that mere FDA approval equals immunity from punitive damages — than this case. As shown at trial, the FDA had grave concerns about the safety of E+P and repeatedly told Wyeth that more studies were needed. As early as 1983, the FDA refused even to accept an application by Wyeth for an E+P product and informed Wyeth that human studies would be needed to assess whether E+P use was safe. R.6422a, 5249a. On two separate occasions in the 1990s, the FDA selected a panel of experts to review the science on the issue of E+P and breast cancer. Before each Advisory Committee meeting, Wyeth provided an "exhaustive review" of the worldwide science on hormone drugs and breast cancer for the panel's review. R.5831a. After analyzing all of the provided data, the first panel's conclusion was that there was not enough information to answer the question of E+P and breast cancer. R.6426a. Rather than conduct a study to fill the void,

Wyeth did nothing. When the FDA later convened a second expert panel, that group again concluded that "the data are not yet adequate to permit an answer to this question." R.9895a. Once again, Wyeth never started a study. Even the FDA medical officer assigned to review Wyeth's new drug application for Prempro expressed grave concerns about the breast cancer safety of E+P. As Dr. Golden explained, "the true effect of HRT on breast cancer incidence and mortality must be considered the single most important safety issue concerning this class of drugs." R.9530a.

Because of its qualms about E+P's safety, the FDA gave Wyeth only a "conditional approval" for Prempro, an approval conditioned on Wyeth agreeing to conduct a "comprehensive investigation" of the breast cancer risk. R.9621a–23a. The FDA demanded that Wyeth get real and definitive answers about this risk. But Wyeth never did the promised study. Rather, Wyeth got permission from the FDA to rely upon the WHI study instead. Since the WHI study was shut down prematurely due to breast cancer, a comprehensive investigation was never done on E+P. Far from endorsing the safety of E+P, the FDA repeatedly told Wyeth that there was a dearth of science on the topic and studies were desperately needed.

For all of these reasons, this Court should reject Wyeth's argument that FDA approval should preclude the availability of punitive damages as a matter of Pennsylvania law and should affirm the Superior Court's reinstatement of the jury's punitive damages verdict.

B. Wyeth's Argument Concerning Any Supposed Claim For "Negligent Failure To Test" Falls Outside The Question On Which Review Was Granted, Is Barred By Law Of The Case, And Lacks Merit In Any Event

Next, Wyeth seeks to argue that punitive damages were improperly imposed under Pennsylvania law based on a claim of failure to conduct adequate or additional testing. This argument, however, is waived because the question on which review was granted in no way includes or subsumes any argument by Wyeth that: (1) Wyeth was supposedly held liable on a "failure to test" theory; (2) that Pennsylvania law does not recognize a "failure to test" theory; or (3) that therefore punitive damages cannot be predicated on a "failure to test" theory.

This Court granted review, verbatim, of the first question presented in Wyeth's Petition for Allowance of Appeal, adopting the precise language that Wyeth submitted to this Court. Although the wording of Wyeth's question presented is surely objectionable for failing to view the evidence of record in the light most favorable to plaintiffs, the question contains no mention or hint of any argument or assertion that either Wyeth was held liable on a "failure to test" theory or that Pennsylvania law does not recognize a "failure to test" theory as a basis for substantive liability, and therefore punitive damages cannot be imposed on such a claim. Accordingly, Wyeth's argument in this regard is waived and should be rejected.

Even if Wyeth's argument were somehow included in the question presented, which it is not, Wyeth is foreclosed from making any challenge to the basis on which substantive liability was imposed in the trial court because this Court's grant of review is expressly limited to the question of punitive damages. Thus, Wyeth's argument —

that the cause of action on which substantive liability was imposed is non–existent and therefore the award of punitive damages on that claim must be set aside — cannot succeed. Wyeth is prohibited from succeeding on the predicate of that argument (that the claim on which liability was imposed does not exist under Pennsylvania law) given that the propriety of the jury's finding of liability and award of compensatory damages are immune from further consideration under the law of the case doctrine because those issues were not accepted for review (nor were they even raised as grounds for setting aside the jury's liability verdict in Wyeth's Petition for Allowance of Appeal). *See School Dist. of City of Scranton* v. *Dale & Dale Design & Devel., Inc.*, 559 Pa. 398, 404 n.2, 741 A.2d 186, 189 n.2 (1999) ("As our limited grant of allocatur did not include review of the issue of whether Appellant was a general contractor, the lower court's determination in this regard is final."); *see also Commonwealth* v. *Mack*, 568 Pa. 329, 333 n.3, 796 A.2d 967, 970 n.3 (2002) (recognizing, where this Court has issued a limited grant of review, that those rulings of the intermediate appellate court that have not been accepted for review must be accepted as correct).

In the unlikely event that this Court proceeds to consider Wyeth's arguments on the merits, they should be rejected. Wyeth argues that because Pennsylvania law may not recognize a free–standing claim for negligent failure to test against a prescription drug manufacturer, Pennsylvania should not allow the imposition of punitive damages against a prescription drug manufacturer for failing to test to discover the actual harmful risks of a medication. In this case, however, plaintiffs most certainly *did not* prevail on a claim against Wyeth for negligent failure to test. Rather, here plaintiffs

prevailed on a claim against Wyeth for negligent failure to warn, and it is well–established under Pennsylvania law that a prescription drug manufacturer has the obligation to warn not only of harms about which the manufacturer actually knows but also about the harms about which the manufacturer reasonably should have known. This "should have known" aspect of a negligent failure to warn claim recognizes that, even if a plaintiff cannot assert a freestanding "failure to test" claim against the manufacturer of a prescription drug, a manufacturer's tortious failure to test can give rise to liability by means of a claim for negligent failure to warn. *See Lance* v. *Wyeth*, 4 A.3d 160, 167–69 (Pa. Super. Ct. 2010).

In *Leibowitz* v. *Ortho Pharmaceutical Corp.*, 307 A.2d 449 (Pa. Super. Ct. 1973), all six judges who participated in the evenly divided en banc Pa. Superior Court's ruling recognized that a prescription drug manufacturer could not escape liability on a claim for negligent failure to warn by "fail[ing] to conduct tests and research to obtain such information" about "side–effects or dangers in the use of its product." *Id.* at 459. According to the opinion in support of affirmance, "[w]here the particular case is such that there exists proof that the drug company was ignorant of existing facts or derelict in obtaining information readily ascertainable to it, a package insert or label will be considered inadequate, and liability accordingly imposed." *Id.* Similarly, the opinion in support of reversal in *Leibowitz* recognized that "[t]he law required that defendant be bound to act in accordance with not only the knowledge it did actually possess but the knowledge it could have and should have possessed." *Id.* at 464.

The Superior Court, in its ruling in *Lance* in August of 2010, held that Pennsylvania law *does not* recognize a freestanding negligent failure to test claim against the manufacturer of a prescription drug. *See Lance*, 4 A.3d at 168–69. Thus, when the Superior Court issued its ruling in the *Daniel* case on February 7, 2011, the Superior Court's ruling in *Lance* had existed for six months. The Superior Court was well aware of the *Lance* decision when it issued its ruling in this case. Indeed, the Superior Court's ruling in this case affirmatively cites the Superior Court's ruling in *Lance* for the proposition that a plaintiff suing the manufacturer of a prescription drug for personal injury under Pennsylvania law may only pursue claims alleging a manufacturing defect or for negligent failure to warn. *See Daniel*, 15 A.3d at 924 n.13. Thus, the Superior Court's own decision in this case authoritatively disproves Wyeth's contention that the Superior Court upheld an award of punitive damages predicated on a claim for negligent failure to test. Rather, the Superior Court recognized that the plaintiffs' claim in this case was a claim for negligent failure to warn.

Pennsylvania law is clear that a claim for negligent failure to warn incorporates both the obligation that the drug's manufacturer provide proper warnings of what it knows about its drug and the obligation that the manufacturer adequately test to determine the drug's harmful side–effects. In this case, Wyeth had punitive damages imposed against it on a claim for negligent failure to warn, which Pennsylvania law unquestionably recognizes. Thus, in the event that Wyeth's argument in this respect is not waived, the argument should be rejected as unmeritorious.

C. Wyeth's Blatant Effort To Reargue The Evidentiary Record And Attempt To Depict That Record As "Undisputed" So As To Impermissibly Construe The Evidence And The Inferences Therefrom In Favor Of Wyeth As Verdict–Loser Should Be Rejected

Unable to prevail on its arguments that either FDA approval precludes punitive damages or that Wyeth is being punished on a "negligent failure to test" theory, Wyeth devotes the final 20–plus pages of its Brief for Appellant to arguing that the Superior Court failed to review all of the evidence in the record. From that starting point, Wyeth proceeds to argue that once all of the evidence in the record is considered, Wyeth's argument to the jury concerning how the evidence should be interpreted in a manner that would not justify an award of punitive damages is somehow transformed into "undisputed" evidence establishing that the record in this case cannot sustain an award of punitive damages.

One must search far and wide to find a case in which a defendant concedes on appeal that a jury's finding that punitive damages are justified is adequately supported by the record. Rather, as here, it is commonplace for the defendant instead to argue on appeal that if only the evidence had been viewed by the jury in the manner in which the defendant was arguing for at trial, an award of punitive damages cannot be sustained. But to succeed on appeal, Wyeth must do far more than merely declare that plaintiffs' testimony concerning Wyeth's state of mind was presented in part through expert witnesses and should therefore be discounted. Wyeth must also do far more than assert that if only the jury had adopted Wyeth's view of the evidence and the inferences to be

drawn therefrom, the jury and any reviewing court would have to conclude that any award of punitive damages would be unsustainable.

Wyeth's failure to challenge either in this Court or on appeal to the Superior Court the admission of the testimony of plaintiffs' FDA regulatory expert, Dr. Blume, and this Court's refusal to grant review of the Superior Court's affirmance of the jury's verdict finding Wyeth liable on plaintiffs' claim for negligent failure to warn, requires this Court to reject Wyeth's wide–ranging assault on Dr. Blume's testimony as a basis for the jury's imposition of punitive damages. Dr. Blume's testimony, insofar as it permitted the jury to find Wyeth liable on plaintiffs' negligent failure to warn claim, falls outside of the question accepted for review, and thus the propriety of its admission, and the jury's reliance on that testimony, are not subject to challenge in this Court. *See School Dist. of Scranton*, 559 Pa. at 404 n.2, 741 A.2d at 189 n.2. It was that very same testimony from Dr. Blume, which is not subject to challenge by Wyeth in this appeal, that was among the evidence plaintiffs introduced from which the jury could infer that Wyeth's state of mind concerning Prempro's known breast cancer risk amounted to reckless indifference.

Plaintiffs do not have the burden in this appeal to show that a reasonable jury had no alternative but to conclude that Wyeth's misconduct merited punitive damages. Under Pennsylvania law, a finding of liability for punitive damages is governed by the same preponderance of the evidence standard that governs a jury's finding of underlying liability. *See Sprague* v. *Walter*, 656 A.2d 890, 923 (Pa. Super. Ct. 1995) ("The standard of proof for punitive damages in Pennsylvania traditionally has been proof by

a preponderance of the evidence."). Accordingly, Wyeth has to show far more than that a reasonable jury might have decided not to impose punitive damages, or that clear and convincing evidence of punitive damages does not exist.

Rather, Wyeth's actual burden is to show that — when viewing the evidence of record and the inferences to be drawn therefrom in the light most favorable to the plaintiffs as verdict–winners, and rejecting all contrary evidence and inferences — the evidence would not allow a reasonable jury to conclude that Wyeth's state of mind exhibited a reckless or deliberate indifference to quantifying and reporting Prempro's breast cancer risk. *See Birth Center* v. *St. Paul Cos.*, 567 Pa. 386, 397, 787 A.2d 376, 383 (2001) (setting forth the following standard of review for a motion for judgment notwithstanding the verdict: "[w]e view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences.").

The evidence in this record, when viewed in the light most favorable to plaintiffs as verdict–winners, should lead this Court to conclude, as the Superior Court already concluded, that the jury acted well within its broad discretion in finding that Wyeth's wrongful conduct evidenced a deliberate or reckless indifference to Prempro's known breast cancer risk.

The FDA repeatedly and consistently told Wyeth that the FDA had serious safety concerns with E+P, implored Wyeth to perform breast cancer studies, and even ordered Wyeth to strengthen its Prempro label to provide better breast cancer warnings. But the FDA could not force Wyeth to study E+P and could not require Wyeth to adopt the

FDA's updated warnings language. So Wyeth did neither. Wyeth was well aware of the FDA's lack of power and exploited it at every turn to the detriment of public health. Now Wyeth asks this court to grant it immunity for such conduct.

The FDA's lack of authority over E+P stems in part from the age of these products. Combination hormone therapy involves two different and separate drugs (estrogen or E) and (progestin or P). Estrogen was first marketed in 1942 and P in 1969. Sales of both drugs started before the FDA even had authority to review the safety and efficacy and medications. E and P were thus "grandfathered" drugs or products which never went through the rigorous approval process of modern drugs. R.5237a; *see also Daniel*, 15 A.3d at 912 n.1.

In 1975, Wyeth's estrogen drug Premarin (half of the component in Prempro) was shown to cause endometrial cancer. R.5238a–40a. Despite clear science showing a causal link between Wyeth's drug and this female reproductive cancer, Wyeth issued a "Dear Doctor" letter reassuring doctors that it would be "simplistic" to indict Premarin as the culprit. R.5240a, 6399a. This letter incensed the FDA. The Agency immediately called Wyeth's executives in for a meeting. The FDA chastised Wyeth for misrepresenting the state of the science to physicians and ordered Wyeth to be more vigilant about safety issues with its hormone drugs. R.5240a–42a, 6401a–04a. By 1975, Wyeth was well aware that the FDA expected the company to monitor its hormone drugs for cancer potential and to immediately and accurately convey all new safety information to doctors. But Wyeth did neither.

To save its falling estrogen sales, Wyeth immediately started encouraging doctors to use E and P together. The E would provide menopausal symptom relief and the P would protect the woman from E's harmful carcinogenic effects in the womb. Even though the use of E with P to treat menopausal symptoms was not FDA approved, Wyeth encouraged rampant off–label use of the combination. At the same time, Wyeth knew there was little known about the safety of E+P. Wyeth's scientists reported to senior management that for E+P "the number of published, well–designed studies is small or practically non existent." R.5244a–45a, 6895a.

The FDA almost immediately expressed concerns to Wyeth about the breast cancer risk of E+P. In 1983, FDA authorized Wyeth to do a "definitive" study on E+P to evaluate the safety and efficacy of this combination. R.5245a–46a, 6411a–15a. The agency made it clear: the FDA wanted studies on this previously untested combination. But the FDA had no authority or power to order Wyeth to study E+P. And Wyeth refused to conduct such studies. As the Superior Court noted, "Although the FDA granted Wyeth permission to conduct the study, Wyeth never did so." *Daniel*, 15 A.3d at 932. A Wyeth internal memo provides some explanation when it notes that to provide what the FDA wanted "would be very costly, would take many–years, and might in the end not prove successful. In fact, the results of the study that would be needed could turn out to be embarrassing." R.5247a–48a, 6419a–20a. Although Wyeth, in its Brief for Appellant, attempts to provide an alternate, innocuous explanation for this memo's meaning, the jury was not required to accept Wyeth's after–the–fact explanation.

When Wyeth asked the FDA for permission in 1985 to sell a combination product, Wyeth filed only a "paper NDA" or a New Drug Application. A paper NDA contains no new studies and relies solely on previously conducted data from published articles. The FDA refused even to accept this application for filing, reiterating again that actual human data or clinical trials would be necessary. R.5248a–49a, 6422a. But the FDA could do nothing to stop Wyeth from selling E and P for off–label use in the meantime. R.5248a–49a.

On multiple occasions, the FDA convened Advisory Committees to review the scientific data on E+P's safety. Before each committee meeting, Wyeth provided the FDA's expert panel with an "exhaustive review of the world's literature" on hormone therapy and breast cancer. R.5819a, 9043a The FDA experts looked at Wyeth's submissions and confirmed — repeatedly — that there were insufficient studies to answer the breast cancer safety issues with E+P. R.5365a–66a, 9895a. The FDA told Wyeth over and over again that breast cancer studies were needed. The FDA medical officer for Prempro, Dr. Linda Golden even wrote in her review of E+P that "the true effect of HRT on breast cancer incidence and mortality must be considered the single most important safety issue concerning this class of drugs." R.5367a, 9438a.

Yet, six different Wyeth executives and scientific researchers confirmed at trial that Wyeth conducted "not a single study" to address the issue of E+P and breast cancer. R.5280a–81a. After all, Wyeth had a "company policy" to not fund breast cancer studies with E+P. R.5250a–51a. As the Superior Court noted: "The record does not reflect Wyeth, despite acknowledging the existence of unanswered questions regarding

possible links between the use of estrogen (independently or in combination with progestins), undertook any studies on these issues at this time." *Daniel*, 15 A.3d at 931. Instead, "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." *Daniel*, 15 A.3d at 932–33.

In 1994, the FDA seized its only chance at making Wyeth do the right thing. For Prempro, the FDA agreed only to a "conditionally approval" with the requirement that Wyeth do a "comprehensive investigation of the breast cancer risk." R.9621a–22a. This was the FDA's best — and only — real option. To merely deny approval of Prempro due to lack of studies would just allow the continued rampant off–label use. A conditional approval at least theoretically would require Wyeth to finally do a comprehensive breast cancer study. R.5251a. But that too failed. Wyeth never started the promised study. Years later, Wyeth got the FDA to agree that it could use the WHI study to fulfill its commitment. A comprehensive case control study, as ordered by the FDA, was never even started. And when the WHI study stopped prematurely due to breast cancer, the public lost its last chance at a real answer to E+P's risks.

In 2000, at around the time Mrs. Daniel was ingesting Prempro, two new studies were published showing a marked and dramatic increase in breast cancer risk in E+P users. At that time, "the FDA requested that Wyeth change its Prempro label to include stronger statements about the risks of E+P hormone therapy." *Torkie–Tork* v. *Wyeth*, 739 F. Supp. 2d 895, 897–98, 906 (E.D. Va. 2010). Wyeth refused. Instead, Wyeth's lawyer told the FDA that the agency "did not have the power to dictate proposed language for

an applicant labeling without providing a meaningful opportunity for dialogue between the applicant and the agency." *Id.* Although the FDA ordered a stronger label within 90 days, Wyeth never made any change to the Prempro label until after the 2002 WHI study. *Id.* So while Wyeth claims immunity from punitive damages because of its FDA–approval label, from 2000 on the Prempro label was actually "FDA–criticized" not FDA–approved. The FDA had ordered a stronger warning and Wyeth refused to adopt it.

As shown at trial, three independent agencies have separately evaluated the FDA, reviewed its procedures and authority and published comprehensive assessments: The Government Accountability Office (GAO), the Institute of Medicine (IOM) and the Inspector General. R.6046a–47a. These independent reviews confirm that the FDA "lacks authority" to order drug companies to conduct studies, has "little leverage" to even make companies do studies that they commit to conducting and has "no realistic mechanism" to police a drug company's failure to study. R.6047a–48a. As the Institute of Medicine report states, the FDA has "no authority to compel the completion of studies." R.6048a. This is the precise situation in hormone therapy. The FDA gave Prempro only a conditional approval on the requirement that Wyeth do a comprehensive case control study to evaluate the breast cancer risk. Wyeth never conducted such a study — even until today. *Id.*

These independent reviews also confirm that the FDA cannot unilaterally compel label changes. *Id.* As the IOM report confirms: "If safety problems are identified, the FDA can ask the drug company to change the label, but cannot require specific

language to describe the newly identified risks." *Id.* Dr. Sandra Kweder of the FDA begged Congress in 2005 to give the FDA more power, explaining: "we do not have the authority to tell a company this is how your label has to look, this is the language that needs to go into your label, here's where it goes, end of story. We have to negotiate with the company." R.6049a–50a. This lack of power was demonstrated with Prempro where the FDA ordered a stronger breast cancer warning but had no power to stop Wyeth from merely ignoring its admonitions.

The FDA also has no authority to order a drug company to spend its profits on research and safety testing versus marketing or promotion. R.5178a–79a. The FDA cannot even require a company to thoroughly test its product to characterize all of the biologic components. Even though the FDA ordered Wyeth to completely study its drug to understand what is in its estrogen (which, because it is derived from the urine of pregnant horses is not a synthetic product), to this day Wyeth has never obeyed that command. Wyeth's president, Dr. Michael Dey admits that to this day, Wyeth "does not know everything that is in the pill women are taking." R.5173a.

After the WHI study results were released, and the FDA finally had data on the breast cancer risk, the Prempro label was changed dramatically. The updated Prempro label includes a black box warning on breast cancer, strong definitive language about the breast cancer risk including listing breast cancer as a side effect of E+P use, and warns that doctors should not prescribe E+P for unproven (but previously alleged) heart and brain benefits and that the drug should be second line treatment only. R.7903a–47a. Wyeth claims that doctors and patients were always aware of the breast

cancer risk from E+P but have no explanation for why, as soon as the WHI study was stopped prematurely due to breast cancer and the Prempro label changed, sales of E+P plummeted. R.6046a. If the world already knew the truth, why did the world respond so dramatically when it learned the truth about the breast cancer risks and lack of benefits of E+P?

FDA regulations are clear. Since a drug company knows more about its own drugs that anyone else, the drug company is required to amend and update its warnings as soon as it is aware of new safety information. Called a CBE label change, this new stronger information can be provided to doctors even before the FDA reviews and approves it. R.5810a.

If Wyeth had done adequate studies, all of the information currently known about Prempro could have been provided to doctors decades earlier. But even based solely upon what Wyeth knew about Prempro (far less what was knowable), Wyeth deliberately failed to provide adequate warnings. Just a few examples include:

(a) Wyeth appreciated that thin or lean women were at a particularly increased risk of developing breast cancer from E+P. Although Wyeth provided that warning to European doctors, Wyeth never added that warning to its U.S. label so Mrs. Daniel (a thin woman) and her doctor could evaluate that risk. R.5853a–55a. The Nevada Supreme Court noted that "Over the years, Wyeth organized task forces to contain any negative publicity about hormone therapy and breast cancer" and specifically noted that "A 1996 published European study showed that the estrogen–progestin combination increased the breast cancer risk for thin or lean women. Following that study, Wyeth updated its European label warning, but did not update its warning label in the United States." *Rowatt*, 244 P.3d at 772, 784.

(b) Mrs. Daniel had an aunt with breast cancer. Wyeth was aware that women with a family history of breast cancer were at a three–fold increased risk of developing breast cancer if they took E+P. Wyeth decided not to convey that information to doctors or patients. R.5855a, 6428a.

(c) Mrs. Daniel had increased breast density due to her exposure to E+P. Her breast density went up while she used E+P and fell when she stopped the drug. Wyeth was well aware that E+P could increase breast density, a factor that can significantly increase a woman's risk of breast cancer. Once again, Wyeth never included any such information in its warnings to doctors. R.5856a.

(d) Wyeth's Prempro label reassured doctors that the only studies showing any risk from hormone therapy were in women using higher doses or for more than 10 years. In reality, Wyeth's own clinical data showed that women could develop breast cancer after just a year of E+P exposure. The FDA summarized this data as showing that "new" cases of breast cancer "developed" after just one year of E+P use and asked Wyeth to convey that warning to doctors. Wyeth refused to include that information in the Prempro label. R.5860a–61a. Mrs. Daniel and her doctor thus had no idea that short term use of E+P was dangerous even though Wyeth was well aware of this risk. As Dr. Haggard put it best, when he prescribed E+P to Mary Daniel, he did not think there was much of a breast cancer risk with E+P. R.5622a Dr. Haggard was reassured by Wyeth's Prempro Label which stated that "the majority of studies had not shown association" with breast cancer (R.5626a) and he felt that the risk "was statistically not of any great significance" (*id.*). In contrast, the WHI study results provided new information that was "very surprising," "very disturbing to everyone," "disappointing," and that "changed the conventional wisdom about hormone therapy drugs." R.5627a The post–WHI Prempro label contained "new risk information" to Dr. Haggard and the type of information he would have passed on to his patients, if Wyeth had provided it. R.5628a.

Wyeth claims repeatedly in its opening brief that Prempro is still on the market and remains approved by the FDA. But even that statement requires some context. After the WHI study, Wyeth brought a new drug to market, Low Dose Prempro. This

new has substantially lower estrogen and substantially lower progestin and is recommended only as second line treatment for menopausal vaginal issues and osteoporosis. This new drug has a very different warning, including a black box warning for invasive breast cancer. So different is this new drug that Wyeth petitioned the FDA for permission to give this new drug a new name: Premia. R.5182a. Wyeth also filed for patent protection for this new drug, claiming it was materially different from Prempro. The FDA rejected the request for a new name but approved Low Dose Prempro in 2003. Low Dose Prempro is what is sold today. Old Dose Prempro has been essentially removed from the market as very little is utilized. As the Nevada Supreme Court noted, "The Prempro Low, which is available to consumers today, carries the strongest warning possible, and its use is suggested only as a second–line treatment." *Rowatt*, 244 P.3d at 784.

In *Hutchison*, this Court described the state of mind necessary to uphold an award of punitive damages as follows. First, a defendant must have "a subjective appreciation of the risk of harm to which the plaintiff was exposed." *Hutchison*, 582 Pa. at 124, 870 A.2d at 772. And second, "[t]he act, or the failure to act, must be intentional, reckless or malicious." *Id.* at 123, 870 A.2d at 771. Thus, a jury's finding of either deliberate or reckless disregard of a risk that the defendant knew about or should have known about will suffice to permit the award of punitive damages under Pennsylvania law.

Wyeth in its Brief for Appellant expends great effort seeking to persuade this Court that for a risk to constitute a "known risk," a defendant must not merely

consciously appreciate the existence of the risk in question, but the defendant must also consciously appreciate the extent or enormity of the risk. More specifically, Wyeth concedes that it knew at all relevant times that ingesting Prempro gave rise to a breast cancer risk, but Wyeth claims that not until the results of the WHI study became known in 2002 did Wyeth learn that the time in which ingesting Prempro gives rise to a meaningful breast cancer risk is one–half or even less of the time originally suspected.

The evidence of record, as summarized above, showed that Wyeth knew that Prempro posed a breast cancer risk (which by definition is a serious risk) and Wyeth further knew that the extent of that risk (including the period of time that the risk took to manifest itself) had not been adequately studied due to Wyeth's own intransigence and conscious indifference. Based on that evidence, the jury in this case could permissibly find, as the jury in fact did find, that Wyeth acted in reckless or conscious disregard of a known risk in allowing Prempro to receive FDA approval before the medication's actual breast cancer risks were quantified and could therefore be warned about.

In *SHV Coal, Inc.* v. *Continental Grain Co.*, 526 Pa. 489, 587 A.2d 702 (1991), this Court recognized that "[u]nder Pennsylvania law, only the first type of reckless conduct described in comment a to Section 500 [of the Restatement (Second) of Torts], is sufficient to create a jury question on the issue of punitive damages." *Id.* at 495, 587 A.2d at 704–05 (quoting *Martin* v. *Johns–Manville Corp.*, 508 Pa. 154, 171, 494 A.2d 1088, 1097 (1985)). As this Court explained in *Martin*:

> Comment a to Section 500 describes two distinct types of reckless conduct which represent very different mental states: (1) where the "actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;" and (2) where the "actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." The first type of reckless conduct described in Section 500 demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence.

Martin, 508 Pa. at 171, 494 A.2d at 1097.

Thus, the "type of reckless conduct described in comment a to Section 500" for which Pennsylvania law allows the imposition of punitive damages, *see Hutchison*, 582 Pa. at 122–23, 870 A.2d at 771, exists "where the 'actor knows, or has reason to know, * * * of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk.'" *Martin*, 508 Pa. at 171, 494 A.2d at 1097 (quoting Restatement (Second) of Torts §500, comment a).

The jury's verdict in this case in favor of plaintiffs on their negligent failure to warn claim against Wyeth establishes that the jury found that Wyeth "knew or had reason to know" of Prempro's actual breast cancer risk and should have warned of that risk. Wyeth's Brief for Appellant utterly ignores the "had reason to know" aspect of Pennsylvania's established test for the availability of punitive damages. Rather, Wyeth argues that, under Pennsylvania law, Wyeth can: (1) know that Prempro presents a breast cancer risk; (2) know that the breast cancer risk has not yet been adequately studied; (3) know that the breast cancer must be adequately studied in order to provide

the adequate warnings that Pennsylvania law requires; (4) intentionally refuse to conduct such studies; and (5) then avoid any liability for punitive damages by claiming that it did not know Prempro's actual breast cancer risk. Wyeth's argument is reminiscent of the child who kills her parents and then seeks to invoke the leniency of the court because she is now an orphan.

A hypothetical helps illustrate the absurdity of Wyeth's "known risk" argument. Assume that a gang member has decided it would be exhilarating to use a high–powered rifle to fire one armor–piercing bullet into a commuter train heading into Center City Philadelphia one weekday morning after rush hour had subsided. The man was aware that ordinarily the last car of the train he was targeting is unoccupied. Unbeknownst to the man, however, the Philadelphia Flower Show was underway in Center City Philadelphia on the day in question, meaning that far larger crowds were aboard the train than would usually be expected on a typical weekday late morning, and thus on the day in question the last car of the trail was completely full of passengers.

If the man's bullet hits and injures or kills one or more passengers, there can be no doubt that the man's conduct could be found to be deliberately or recklessly indifferent to the known risk of possibly hitting a passenger onboard the train. But under Wyeth's argument, the man would be able to defend by arguing that he did not precisely understand the enormity of the risk because he did not expect the train to be packed with passengers since he was unaware that the Flower Show was underway. In the hypothetical, if Wyeth's argument were accepted, the gang member could avoid

punitive damages merely by claiming that he did not subjectively appreciate the enormity or extent of the known risk.

Similarly, in this case, Wyeth knew that ingesting Prempro carried with it the known risk of breast cancer, and Wyeth further knew that it had failed to undertake the reasonable testing necessary to ascertain whether that risk was large or small or over what period of time the risk manifested itself. When that risk turned out to be significant over a far shorter time than previously understood, Wyeth cannot claim that its own earlier willful, deliberate, or reckless ignorance concerning Prempro's precise breast cancer risk insulated Wyeth from liability for punitive damages.

Importantly, every single appellate court that has reviewed a jury's award of punitive damages against Wyeth in a Prempro breast cancer case has ruled that the evidence of Wyeth's conduct — consisting of precisely the same conduct that is at issue in this case — justified an award of punitive damages when the evidence is viewed in the light most favorable to the plaintiffs.

In *Rowatt*, the Supreme Court of Nevada explained:

> The evidence shows that while the words "breast cancer" appear ten times in the Prempro label, in many instances the term appeared in reassuring statements. For instance, the warning stated that the relationship between progestin and breast cancer is unknown, that the majority of studies show no increase in breast cancer risk, and that the rate of breast cancer that showed up in Wyeth's human study did "not exceed that expected in the general population." To the contrary, the evidence showed that before Prempro was marketed, there was scientific data that confirmed an increased risk in breast cancer with the prolonged use of estrogen plus progestin. Respondents also presented evidence that Wyeth never conducted a human study. Testimony showed that Wyeth spent $200 million each year marketing these drugs, but did not perform

> sufficient drug testing regarding breast cancer and its products to determine whether they were safe to use.
>
> Evidence further demonstrated that Wyeth financed and manipulated scientific studies and sponsored articles that deliberately minimized the risk of breast cancer while promoting other unproven benefits. It also implemented a policy to dismiss scientific studies that showed any link between breast cancer and hormone therapy drugs and to distract the public and medical professionals from the information as well.
>
> Over the years, Wyeth organized task forces to contain any negative publicity about hormone therapy and breast cancer. Wyeth's strategy to undermine scientific studies linking an increased risk of breast cancer to estrogen–progestin hormone therapy included ghostwriting multiple articles. The evidence further showed that Wyeth worked to keep a European study that exposed the unusually high breast cancer risk for thin women confidential. As a result of the study, Wyeth updated its European warnings, but never updated its United States labels. As respondent Scofield is a thin woman, this additional warning would have applied to her. The Prempro Low, which is available to consumers today, carries the strongest warning possible, and its use is suggested only as a second–line treatment for a short duration.
>
> Based on the warning's language and Wyeth's actions, we conclude that a jury could reasonably determine that while Wyeth warned of breast cancer, it also tried to hide any potential harmful consequences of its products. Thus, substantial evidence supports the jury's conclusion that Wyeth acted with malice when it had knowledge of the probable harmful consequences of its wrongful acts and willfully and deliberately failed to act to avoid those consequences such that punitive damages were warranted.

Rowatt, 244 P.3d at 783–84. Thus, the Supreme Court of Nevada upheld the jury's finding under Nevada law that clear and convincing evidence existed to support Wyeth's liability for punitive damages for engaging in the very same conduct that gives rise to liability in this case.

Similarly, in *Scroggin*, the U.S. Court of Appeals for the Eighth Circuit applying Arkansas law, which like Nevada also requires "clear and convincing" proof to uphold an award of punitive damages, ruled that Wyeth's conduct in connection with plaintiff's negligent failure to warn of Prempro's actual breast cancer risk could support an award of punitive damages:

> Although Wyeth's failure to organize one study to allow for adequate evaluation of the breast cancer risk, or its attempts to undermine the results of one adverse publication, may not reflect reckless disregard, a consistent pattern of such conduct might do so. A jury could find that although each study added to the evidence suggesting a risk of breast cancer, Wyeth nevertheless continued to engage in a practice of both inaction and mitigation.
>
> * * * Scroggin's claim also rested on the theory that Wyeth deliberately avoided studying hormone replacement therapy's effect on breast cancer. Moreover, a jury could reasonably construe Wyeth's documents as repeated efforts over many years to undermine information and studies that attempted to show a breast cancer link. A jury reasonably could find that these efforts allowed Wyeth to promote the false understanding that hormone replacement therapy was not linked to breast cancer and then to promote reliance on this understanding. Viewed as a whole, then, the evidence presented could allow a jury to find or infer that Wyeth was guilty of malicious conduct within the meaning of Arkansas law.

Scroggin, 586 F.3d at 572.

The unanimous three–judge panel in this case (a panel that included Retired Justice Fitzgerald, formerly of this Court) explained as follows with respect to plaintiffs' evidence in support of the jury's punitive damages verdict:

> 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. The jury also heard testimony regarding the decrease in

> Wyeth's sales of Premarin in 1975 by more than 50% when the risk of endometrial cancer was revealed, and that before the results of the WHI study were released in 2002, Wyeth maintained an 80% share of the world's market for hormone therapy drugs. N.T., 1/9/07 (AS), at 20; 1/24/07 (AS), at 68. 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. As such, the trial court's grant of Wyeth's JNOV motion was in error.

Daniel, 15 A.3d at 931–33. Similar detailed recitations of Wyeth's wrongful conduct with respect to Prempro's breast cancer risk can be found in the Superior Court's unpublished opinions upholding awards of punitive damages against Wyeth under Illinois law in the *Kendall* and *Barton* cases. *See Kendall* v. *Wyeth, Inc.*, 2012 WL 112609, at *3 (Pa. Super. Ct. 2012) (affirming trial court's denial of Wyeth's motion for judgment notwithstanding the verdict as to punitive damages); *Barton* v. *Wyeth Pharmaceuticals, Inc.*, 2012 WL 112613, at *13–*14 (Pa. Super. Ct. 2012) (same).

Contrary to Wyeth's argument, plaintiffs do not cite the rulings in *Rowatt*, *Scroggin*, *Kendall*, and *Barton* — which affirmed Wyeth's liability for punitive damages in breast cancer Prempro cases involving the same wrongful conduct at issue in this case — to compensate for inadequacies in the record in this case. Rather, the records in all of these cases focused on Wyeth's identical conduct with regard to Prempro's breast cancer risks before the results of the WHI study became public. Understandably, Wyeth would prefer to have this Court focus instead on case law that does not hit so close to

home. However, in addressing whether Wyeth's pre–WHI conduct with regard to Prempro's breast cancer risks was deserving of punitive damages, surely decisions from other courts addressing that precise question are of utmost persuasiveness.

Wyeth invites this Court to become the first appellate court to overturn a jury's finding in a breast cancer negligent failure to warn case involving Prempro that the factual record pertaining to Wyeth's wrongful conduct suffices to allow the imposition of punitive damages. This Court should decline Wyeth's invitation, however, because in order to accomplish that result Wyeth asks this Court to proceed down the path of error by rejecting and ignoring all of the evidence in support of the jury's verdict in plaintiffs' favor in favor of instead relying on only the evidence and inferences from evidence that would favor Wyeth.

Under well–established Pennsylvania law, this Court must ignore the evidence and inferences that would support a verdict in Wyeth's favor on the issue of punitive damages and instead focus exclusively on whether the evidence on which the jury relied, and the inferences in plaintiffs' favor that flow from that evidence, would support a finding under the preponderance standard that Wyeth demonstrated a reckless indifference to Prempro's known breast cancer risk. Moreover, because Wyeth concedes that it knew of Prempro's breast cancer risk (while claiming not to have appreciated the enormity or extent of that risk, due to Wyeth's deliberate decision to remain ignorant), all that this Court must conclude is that the facts of record would allow a reasonable jury to find, as the jury in this case did find, that Wyeth's conduct with regard to that risk amounted to reckless indifference. On this record, for all of the

many reasons explained above, more than sufficient evidence supports the jury's reckless indifference finding.

VI. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Superior Court's reinstatement of the jury's punitive damages verdict.

Respectfully submitted,

Dated: April 19, 2012

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

Zoe Littlepage
Littlepage Booth
2043A West Main
Houston, TX 77098
(713) 529–8000

Robert K. Jenner
Janet, Jenner & Suggs, LLC
1777 Reisterstown Road
Suite 165
Baltimore, MD 21208
(410) 653–3200

Counsel for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy 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:

Robert C. Heim, Esquire
Judy L. Leone, Esquire
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104
(215) 994–2570
Counsel for Wyeth, et al.

Sheila L. Birnbaum, Esquire
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735–3000
Counsel for Wyeth, et al.

Steven Glickstein, Esquire
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836–8000
Counsel for Wyeth, et al.

Neal Kumar Katyal, Esquire
Lindsay D. Breedlove, Esquire
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637–5600
Counsel for amicus Pharmaceutical Research and Manufacturers of America

Mit Spears, Esquire
Melissa B. Kimmel, Esquire
Pharmaceutical Research and Manufacturers
of America
950 F. Street, NW, Suite 300
Washington, DC 20004
(202) 835–3559
Counsel for amicus Pharmaceutical Research and
Manufacturers of America

Robert B. Murphy, Esquire
Dykema Gossett PLLC
1300 I St NW Third Floor West
Washington, DC 20005
(202) 906–8721
Counsel for amicus The Product Liability
Advisory Council

Mark R. Cuker, Esquire
Esther Berezofsky, Esquire
Samuel Abloeser, Esquire
Michael J. Quirk, Esquire
Williams Cuker Berezofsky LLC
1515 Market Street
Suite 1300
Philadelphia, PA 19103
(215) 557–0099

Dated: April 19, 2012

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