

**Wyeth's Motion To Vacate Phase I Verdicts And
For A Mistrial**

Filing Date: May 27, 2005

Opposing Counsel:

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VIA HAND DELIVERY

The Honorable Paul P. Panepinto
Court of Common Pleas of Philadelphia County
City Hall, Room 469
Philadelphia, PA 19107

Re: PHEN-FEN LITIGATION
Margie Paul v. Wyeth, et al.
P.C.C.P., November Term, 2002, No. 003723

Elaine Karician v. Wyeth, et al.
P.C.C.P., December Term 2002, No. 001224

Dear Judge Panepinto:

Defendants Wyeth, Inc., Wyeth Pharmaceuticals, Inc., and Wyeth-Ayerst International, Inc. (collectively "Wyeth") hereby move that the two \$100 million Phase I verdicts in this case be vacated, and for a mistrial because the jury was plainly driven by considerations other than the admissible evidence. These nine-figure verdicts, supposedly for compensatory damages, are so utterly divorced from evidence properly in the record that they cannot possibly survive. It would thus be a waste of time and resources to try Phase II before this jury.

These verdicts may well be the largest in Pennsylvania history for purportedly "compensatory" damages for personal injury. Each verdict exceeds by **almost 100 times** any

prior surviving verdict in this Court in a diet drug valve case,¹ and together they exceed by **some twenty times** the **combined total** of all Phase I diet drug verdicts in this Court since last July.

I. THE RECORD

These two plaintiffs are asymptomatic and not disabled. This is undisputed. Neither plaintiff is under any sort of medical restriction on her activities. Trial Tr. (05/23/05 a.m.) at 53:17-54:12 (Paul); (05/23/05 p.m.) at 28:14-17; 38:7-10 (Karician).

Looking at the facts in a light most favorable to plaintiffs, at the time of trial each plaintiff's level of aortic insufficiency was mild to moderate, and Ms. Karician additionally had moderate mitral regurgitation. Trial Tr. (05/17/05 a.m.) at 88:14-89:14 (Dr. Lassetter reviewing Ms. Paul's March 31, 2005 echocardiogram); 118:20-120:9 (Dr. Lassetter reviewing Ms. Karician's February 18, 2005 echocardiogram).

Both plaintiffs are physically active. Ms. Paul bowls once a week. Trial Tr. (05/23/05 a.m.) at 39:22-23. Ms. Karician has summer season park passes and regularly bikes with her family. Trial Tr. (05/23/05 p.m.) at 30:12-17; 30:21-23.

When asked about symptoms, Ms. Karician testified that she feels "fine," and Ms. Paul testified that she feels "okay." Trial Tr. (05/23/05 a.m.) at 35:23-24; (05/23/05 p.m.) at 28:6-10. Ms. Paul testified that she has had "palpitations," and felt "tired." Trial Tr. (05/23/05 a.m.) at 30:2-12; 35:25-36:2. However, no doctor testified, to a reasonable degree of medical certainty, that either of these purported symptoms was caused by valvular heart disease. Indeed, no expert testified that either plaintiff had a single symptom caused by their valve regurgitation.

Neither plaintiff claims any lost wages or reduced earning capacity. Both continue their prior employment. Ms. Karician is a teacher, working full time. Trial Tr. (05/23/05 p.m.) at

¹An outlier verdict did not survive completion of trial. Even including the outlier, the average verdict over ten months of diet drug trials in this Court is about one tenth of one percent of these verdicts.

29:25-30:10. Ms. Paul is a truck driver who works from 35 to 50 hours per week in slow periods to 70 hours a week in peak periods. Trial Tr. (05/23/05 a.m.) at 36:18-24. It is undisputed that their valvular heart disease has not in any way impacted their ability to work.

The plaintiffs' claimed out-of-pocket medical expenses are likewise minimal, consisting of echocardiograms costing a total of a few hundred dollars. See Trial Tr. (05/23/05 p.m.) at 38:16 to 39:20 (Karician echocardiograms cost \$375, \$150, and \$200); Trial Tr. (05/23/05 a.m.) at 53:5-9 (Paul echocardiograms cost \$166, \$264, and \$269). At trial, the most they sought for future medical monitoring was about "\$3,000 a year." Trial Tr. (05/23/05 p.m.) at 92:13.

This case thus was not so much about the plaintiffs' present injuries as about **speculation** over what might happen to them in the future. Plaintiffs' counsel made that clear in closing argument:

[T]he other side is gonna say, well, they can't show you, 'cause based on what he said in opening, they can't tell you that it's more likely than not they're going to have surgery. And he's right. **I can't do that.**

Trial Tr. (5/23/05 p.m.) at 98-99 (emphasis added).

According to plaintiffs' witnesses, the cost of such future surgery, if necessary, ranges from \$41,000 to \$150,000, with an average of \$70,000. Trial Tr. (05/17/05 a.m.) at 144:14-24. Plaintiffs' expert, Dr. Lasseter, however, did not testify that surgery was a certainty for either plaintiff, rather only that they were at some unquantified "increased risk" of needing surgery at some uncertain day in the future. Id. at 141:10-17. But even assuming 100% likelihood of surgery, each plaintiffs' claimed special damages would total at most around \$250,000. These \$100 million verdicts were thus some 400 times plaintiffs' maximum special damages, and can only be based on speculation, anti-corporate animus, or punishment, none of which is a valid legal basis.

These grossly excessive verdicts are, in and of themselves, proof positive that the jury was swayed by passion and prejudice, and disregarded the admitted facts of the case. Even a cursory review of the record shows an obvious explanation for these excessive awards – the repeated efforts of plaintiffs’ counsel to influence the jury with inadmissible (and often outright false) “facts” and to make a naked appeal for what amounted to punitive damages.

- During opening argument, plaintiffs improperly contended that Wyeth was “refusing to accept any responsibility,” and that Wyeth was “a company that did wrong” by “refusing to accept any financial responsibility.” Trial Tr. (05/16/05) at 45:20-23; 61:23-62:5.
- Plaintiffs returned to this theme, unabated, in closing arguments. Plaintiffs’ counsel argued that Wyeth “made a decision that if you injure somebody it’s cheaper to defend it than take responsibility.” Trial Tr. (05/23/05 p.m.) at 94:16-19.

These statements were unjustified by anything in evidence, and precluded by the agreement of these plaintiffs as members of the National Settlement Class. Not only were they improper, they were palpably false. As the Court knows, Wyeth has offered – and these plaintiffs had initially accepted – both medical monitoring and, if necessary, surgery benefits in a \$3.75 billion National Settlement. Yet after plaintiffs’ misleading argument, Wyeth was not permitted to counter by telling the jury about the settlement and plaintiffs’ decisions to opt out of it. See Trial Tr. (05/16/05 a.m.) at 139:18-140:9; 141:7-142:3.

Counsel also engaged in a variety of other improper and inflammatory conduct, all designed to insinuate liability and punitive-related considerations into Phase I:

- Plaintiffs’ counsel repeatedly asked leading questions that assumed prejudicial and inaccurate facts not in evidence, such as “a strategic partnership” plan Wyeth supposedly had with the Mayo Clinic to “fund[it] to the tune of three million dollars a year for studies on diet drugs”; that certain studies were “funded by Wyeth” when in fact they were not. There are numerous other examples of this sort of improper misleading questions designed to inflame the jury. Trial Tr. (05/17/05 p.m.) at 93:6-15; 104:8-12; 107:17-21; 109:17; 126:7-20; 133:14-19; (05/19/05 p.m.) at 71:13-15; 133:14-134:9; 135:3-136:15.

- On several occasions, plaintiffs’ counsel flashed documents (such as a letter concerning supposed review of a study draft by Wyeth lawyers) on the giant screen in front of the jury before defense counsel were allowed to object, and, when objections to documents were sustained, counsel improperly read the document to the witness or made representations about what the document said. Trial Tr. (05/19/05 p.m.) at 74:21-75:20; 76:5-17; 105:3-13; 126:7-20; 127:20-131:12; Trial Tr. (05/20/05 p.m.) at 77:23-78:21.
- Plaintiffs’ counsel asked a Wyeth witness “why Wyeth would spend 80 million dollars on studies once the two drugs had been withdrawn from the market if it wasn’t for litigation.” By the time an objection was sustained, the jury had heard that non-record “fact.” Trial Tr. (05/20/05 p.m.) at 107:11-22.
- In an overt effort to inject liability issues into Phase I – which Wyeth could not properly counter – plaintiffs’ counsel in closing argued that the jury should find against Wyeth because “you don’t know what they did, what they didn’t do. If they tested, if they warned.” Seconds after a sustained objection, counsel made the same improper argument **again**. Trial Tr. (05/23/05 p.m.) at 94:24 to 95:3; 95:14-22.
- Making an equally naked argument for punitive damages, plaintiffs’ counsel argued in closing that Wyeth would not pay a legitimate verdict in this case, but rather would engage plaintiffs in “a long legal battle.” Trial Tr. (05/23/05 p.m.) at 103:11-18.

This misconduct blatantly inserted a punitive element into this case, despite punitive damages being barred by the National Settlement Agreement.² Plaintiffs thus irredeemably tainted this jury, rendering it incapable of reaching a purely **compensatory** verdict on **proper** evidence. The only remedy for that is a mistrial.³

II. THE GROSSLY EXCESSIVE PHASE I VERDICTS SHOULD BE VACATED

However viewed, these nine-figure verdicts “plainly [are] excessive, exorbitant, and beyond what the evidence warrants.” Smalls v. Pittsburgh-Corning Corp., 843 A.2d 410, 414

²Wyeth requested that the jury be instructed: “The parties have agreed, and you are instructed, that you may not award damages to punish Wyeth or to make an example of Wyeth or for any purpose other than to reasonably compensate a plaintiff for proven damages.” The Wyeth Defendants’ Proposed Points for Charge: Phase I #15. The jury was not so instructed.

³Because Phase II has not yet occurred, there is technically no final verdict. Thus Wyeth is not now filing full post-trial motions. A mistrial is the proper procedure for ending a case during trial. Standard Pa. Practice 2d §38:71 (“once the jury is sworn to try the case,” termination of trial “usually takes the form of a motion for a mistrial”).

(Pa. Super.), allocatur denied, 857 A.2d 680 (Pa. 2004). They should promptly be set aside now, as it is “the responsibility of the judiciary to keep pain and suffering awards within reasonable bounds.” Haines v. Raven Arms, 536 Pa. 452, 457, 640 A.2d 367, 370 (1994) (citation and quotation marks omitted). Given the overt invalidity of these Phase I verdicts, any Phase II trial before this jury would be a meaningless exercise.

The courts of this Commonwealth have repeatedly held that a verdict must be set aside where it “was excessive and failed to bear a reasonable relationship to the plaintiff’s pain and suffering. Damages for pain and suffering are compensatory in nature, may not be arbitrary, speculative, or punitive, and must be reasonable.” Haines, 536 Pa. at 458, 640 A.2d at 370. The law does “not permit the fact finder to fix any amount it wishes, however capricious it might be. Certainly the actual injury to plaintiff is a matter for consideration.” Kornfeld v. Atlantic Financial Federal, 856 A.2d 170, 177 (Pa. Super. 2004), allocatur denied, 871 A.2d 192 (Pa. 2005).

In Haines, for example, the plaintiff was shot in the head, suffering “catastrophic injuries.” She underwent seven operations and was left permanently brain damaged. Id. at 454, 640 A.2d at 368. Nevertheless, the Supreme Court affirmed setting aside the \$8 million verdict as excessive. Id. at 458, 640 A.2d at 370. The verdicts here – for plaintiffs who themselves deny having any present disability – are each \$92 million, or **more than twelve times greater**, than the verdict overturned as excessive in Haines.

Whether a verdict is excessive depends upon severity and permanence of injury, whether the injury is objective or subjective, whether the plaintiff can continue to work, the plaintiff’s out-of-pocket expenses; and the plaintiff’s original demand.⁴ E.g., Haines, 536 Pa. at 457, 640 A.2d at 370 (1994); Smalls, 843 A.2d at 415. The facts of this case demonstrate that \$100

⁴The complaints in this case contain no specific dollar demand.

million for each of these plaintiffs is not merely “plainly excessive and exorbitant,” but absolutely inexplicable except as a function of jury “partiality, prejudice, mistake or corruption,” and plaintiffs’ counsel’s transparent argument for punitive damages. Kornfeld, 856 A.2d at 176.

Without question, these twin \$100 million dollar damage awards bear no relationship to any proper evidence. There is no disability, no disfiguration, no evidence that these plaintiffs have ever been in pain, no wage or other economic loss, only minimal actual expense, and only speculation regarding future consequences. No symptoms were linked by any expert to their valvular heart disease. Where, as here, the evidence of record cannot be reconciled with the verdict, the proper relief is to set aside the verdict and retry these cases.⁵ Kornfeld, 856 2d at 177 (vacating award in its entirety because “the enormous verdict in this case did not bear any reasonable relationship to the actual damages suffered”); Smalls, 843 A.2d at 418 (new trial, not remittitur, appropriate given plaintiffs “utter lack of actual damages and inadequate evidence supporting their claims of pain and suffering”);⁶ Foley v. Clark Equipment Co., 361 Pa. Super. 599, 630, 523 A.2d 379, 395 (1987) (new trial appropriate where “the record does not support th[e] grossly excessive verdict”).

Thus, in Hartner v. Home Depot USA, 836 A.2d 924, 931 (Pa. Super. 2003), the court summarily vacated as “contrary to the evidence” a pain and suffering verdict that was 100 times the special damages. Here, the verdicts are some 400 times plaintiffs’ maximum possible past and future special damages

⁵Should the Court order the current trial to continue, Wyeth may, of course, make an alternative motion for remittitur in its post-trial motions.

⁶Smalls, a reverse bifurcated asbestos case, is fairly similar, except that the verdicts here are 40 times more excessive. Smalls involved a minimally injured plaintiff (complaints of shortness of breath upon moderate exertion) with undisputed alternative cause evidence (smoking) being awarded \$2.5 million for a claimed progressive condition. 843 A.2d at 416. The verdict was overturned because it was “plainly. . .excessive, exorbitant, and beyond what the evidence warrants.” Id. at 414.

In sum, each of the verdicts in favor of these two plaintiffs without **any** disability are: more than six times the verdict in Foley; more than twelve times the verdict in Haines; forty times the verdict in Smalls; and some 100 times the verdict in Hartner. The plaintiffs in each of those cases were far more seriously injured than these plaintiffs. Indeed, the verdicts here were so excessive that, while the verdicts were handed down on Tuesday, May 24, the Court ordered them kept under seal by court until today. Plainly, Wyeth is entitled to have these verdicts vacated and the matter retried.

III. THE COURT SHOULD DECLARE A MISTRIAL

The \$100 million verdicts in this case are inexplicable except as a runaway jury – one that utterly disregarded the Court’s instructions because it had been inflamed to award punitive damages by the conduct of plaintiffs’ counsel.

That is clear from both the verdicts themselves and their context. The jury retired at 12:30 p.m., had lunch, and still reached its verdicts by 2:15 p.m. – without asking any questions or asking to review any documents admitted in evidence. Their “deliberations” to reach two \$100 million verdicts thus lasted less than 100 minutes.

The confluence of such an inexplicable verdict and suspicious circumstances allows a court to “infer prejudice” in the absence of some other “satisfactory” explanation. Colosimo v. Pennsylvania Electric Co., 513 Pa. 155, 165, 518 A.2d 1206, 1211 (1986) (inferring juror misconduct). A verdict lacking any relationship to the evidence justifies an inference that that the jury acted improperly. Tabchi v. Duchodni, 56 D. & C.4th 238, 254-55 (C.P. Lehigh Co. 2002) (granting new trial due to assumed juror disregard of damages evidence). The record here fully supports a similar inference.

The size of these verdicts, of course, speaks for itself. Against this record, they cannot be anything other than the product of jury passion and prejudice. As detailed above, that passion

and prejudice was constantly stroked by plaintiffs' counsel's improper comment and misleading questions assuming facts not in evidence. It has long been the law that:

On cross-examination, leading questions can be properly asked a witness but misleading questions cannot be. Setting verbal traps for a witness is not a legitimate branch of the art of cross-examination. . . . No court with due regard for justice would ever permit such an improper question.

DiBona v. Philadelphia Transportation Co., 356 Pa. 204, 208-09, 51 A.2d 768, 770-71 (1947)

(allowing leading questions that “assume[d] a fact that may be in controversy” was reversible error) (following Wigmore). Counsel's misconduct here placed liability – and punitive damages – evidence before the jury in a proceeding intended only to calculate compensatory damages.

Because of this pattern of misconduct, Wyeth moved for a mistrial on May 20, on grounds that plaintiffs were placing improper and prejudicial Phase II and punitive damages evidence before the jury in this proceeding:

You will recall at the beginning of the day counsel began by – plaintiffs' counsel began by reading responses to jury interrogatories on funding of studies. But then Mr. Nabers went extensively into several documents on cross-examination. . . . We argued these at sidebar.

These were collateral issues, and had no relevance to this case. They were punitive damages issues related to suggestions that lawyers were tampering with studies when the documents didn't say that at all.

See 05/20/05 Tr. (“Motion for Mistrial”) at 4:6-19.

Wyeth specifically argued at that time that this sort of “collateral. . . , extremely prejudicial, misleading” evidence had “tainted the jury.” Id. at 5:4-5, 12-13. The Court denied the motion, id. at 7:4-8:16, and thereafter plaintiffs' counsel escalated their improper attack up to and including their closing. That the resulting verdicts exceeded the maximum possible special damages some 400 times demonstrates that Wyeth's assessment was indeed correct.

Quite apart from the general impropriety of counsel's behavior, it must also be remembered that punitive damages are expressly prohibited by the National Settlement

Agreement approved in the federal multidistrict litigation. See NSA §IV.D.4.c (back end opt out plaintiffs “may not seek punitive. . .damages). In language fitting this case like a glove, the Third Circuit recently reiterated that all opt out diet drug cases must be tried in accordance with this limitation:

[W]e agree with the District Court that the state court actions must be tried in accordance with the settlement agreement, particularly the damage limitations. These plaintiffs do not have unfettered causes of action in state courts and conduct that attempts to evade the settlement cannot be permitted. Allowing plaintiffs to defy the punitive damages bar would make a mockery of the agreement and the District Court’s jurisdiction.

In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation, 123 Fed. Appx. 465, 470 (3d Cir. Jan. 25, 2005).

Plaintiffs’ counsel’s actions here are precisely the sort of “attempts to evade the settlement” that the Third Circuit has held “cannot be permitted.” Id. Likewise the awards – \$100 million to plaintiffs under no medical restrictions, without any loss of income, and with only minimal out-of-pocket expenses – are a “mockery.” Id. They are manifestly punitive in nature, in blatant violation of the Settlement Agreement.

A mistrial is “appropriate where the occurrence is so inflammatory and prejudicial so as to preclude a fair trial and to have undoubtedly influenced the jury, distracting the minds of the jurors from the pivotal issue and influencing their verdict.” Harsh v. Petrol, 840 A.2d 404, 432 (Pa. Cmwlth. 2003), allocatur granted, 862 A.2d 581 (Pa. 2004). Remarks by counsel that “referred to facts which were not in evidence,” that “injected issues broader than” those being tried, and that “were calculated to inflame the prejudices of the jury” require a mistrial. Commonwealth v. Green, 417 Pa. Super. 119, 128, 611 A.2d 1294 1298-99 (1992). The wildly excessive verdict in this case demonstrates that the repeated inappropriate conduct of plaintiffs’ counsel accomplished exactly what it was intended to do – inflame the jury against Wyeth and induce it to assess damages based upon emotion rather than the facts of this case.

Plaintiffs' counsel have rung the bell; it cannot now be unring. This jury has already heard the improper "facts" not of record – matters that Wyeth had no opportunity to rebut. Their outrageous verdict more than demonstrates that this jury has made up its mind to punish Wyeth regardless of the evidence. Plaintiffs' counsel have thus tainted this jury to the extent that that they awarded two asymptomatic, non-disabled plaintiffs what may well be the largest personal injury verdicts in the history of the Commonwealth. Wyeth is entitled to a mistrial and to a retrial of Phase I before a jury that has not been incurably inflamed and prejudiced against it.

IV. CONCLUSION

For all of the above reasons, Wyeth requests that its Motion To Vacate Phase I Verdicts And For A Mistrial be granted.

Respectfully submitted,

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Dated: May 27, 2005