NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KELLY ANDERSON, PAYTON ANDERSON AND BRADLEY ANDERSON Appellee v. JANSSEN PHARMACEUTICALS, INC. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2330 EDA 2014

Appeal from the Order July 9, 2014
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 01405 December Term 2011

BEFORE: LAZARUS, J., OTT, J., and STEVENS, P.J.E.*

MEMORANDUM BY LAZARUS, J.: **FILED May 11, 2016**

Janssen Pharmaceuticals, Inc. (Janssen) appeals from the judgment entered in the Court of Common Pleas of Philadelphia County in favor of Kelly Anderson, Payton Anderson, a minor, and Bradley Anderson, following a jury trial. After careful review, we affirm, largely based upon the opinion of the Honorable Ramy Djerassi, dated May 4, 2015.

Kelly Anderson (Kelly) has experienced severe migraine headaches since the age of 10. Kelly was prescribed Topamax for migraine treatment beginning in 2006. Until 2011, Topamax was labeled as a Category C drug, indicating that some birth defects had been detected in animals, but no conclusive evidence showed the drug caused birth defects in humans. Kelly's neurologist, Dr. Veronica Sosa, prescribed Topamax in January 2006

*Former Justice specially assigned to the Superior Court.

and folic acid as a prenatal vitamin because Kelly was trying to conceive. In September 2006, Kelly began seeing Dr. Traci Purath, a neurologist specializing in headaches. Dr. Purath wrote new prescriptions for Kelly for Topamax in April and November 2007. Dr. Purath noted on her chart that Kelly was taking prenatal vitamins because she was trying to get pregnant. Kelly also saw her obstetrician-gynecologist, Dr. Joy Seldera, in April and November 2007. Dr. Seldera's chart noted that Kelly was trying to conceive and was taking Topamax.

Kelly determined that she was pregnant on December 26, 2007. Dr. Seldera and Dr. Sosa both told Kelly to stop taking two other medications she used to treat migraines, Methergine and Lyrica. These two drugs were labeled Category D by the FDA, meaning they were known to cause birth defects in humans. Kelly saw Dr. Purath two days later, on December 28, 2007. Dr. Purath prescribed Topamax to Kelly for the duration of her pregnancy. None of Kelly's doctors warned her that taking Topamax while pregnant would place her baby at risk of developing cleft lip and palate.

Kelly gave birth to her daughter, Payton Anderson, on August 17, 2008. Kelly and her husband, Bradley, learned that Payton had a severe bilateral cleft lip and palate when she was born. Payton has undergone multiple surgeries affecting her jaw, nose, and lips. Payton has experienced hearing loss and speech problems, and she has been bullied because of her speech and appearance.

On December 13, 2011, Kelly and Bradley Anderson, individually and as guardians for Payton, filed a complaint alleging, in part, that Janssen negligently failed to warn her prescribing health care providers of the risks of birth defects associated with the use of Topamax during pregnancy, including cleft lip and palate. Following a fifteen-day trial, the jury returned a verdict for the Andersons on March 7, 2014, awarding $1.5 million to Payton for non-economic damages and $1.5 million to Kelly and Bradley to pay for anticipated healthcare expenses for Payton.

On March 17, 2014, Janssen filed timely post-trial motions, and on March 19, 2014, the Andersons filed an untimely motion for delay damages. The trial court denied the post-trial motions on July 9, 2014, and denied the motion for delay damages on July 15, 2014. Janssen filed a timely notice of appeal and court-ordered statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

On appeal, Janssen raises the following issues for our review:

1. A. Does federal law preempt a state law negligent failure to warn claim based upon the failure to change a prescription drug's pregnancy category set by the U.S. Food and Drug Administration [(FDA)] where federal regulations precluded [Janssen] from changing that designation without the FDA's prior permission and assistance?

   B. Even if (contrary to fact) the FDA's prior permission and assistance had not been required to change the pregnancy category, would federal law still preempt Plaintiffs' claim because there is clear evidence that [the] FDA would have rejected that change at the relevant time?

2. Did the trial court err in allowing a negligent failure to warn claim to proceed against a prescription drug manufacturer

under Wisconsin law when the prescriber of the drug knew, at the time she prescribed it, of the potential risk that formed the basis of the claim?

3. In a negligent failure to warn case governed by Wisconsin law, did the trial court err by refusing to instruct the jury on comparative negligence and by refusing to ask the jury to apportion fault between [Kelly Anderson] and [Janssen], when the record contained evidence that [Kelly Anderson's] conduct was negligent and contributed to the injuries at issue?

4. Did the trial court err in affirming an award of future medical expenses that was more than three times the amount supported by the evidence?

5. Did Janssen waive these issues (and others) by filing a [Rule] 1925(b) Statement that specifically identified each error and the places in the record where each error could be found?

Brief of Appellant, at 4.

We begin by addressing Janssen's assertion that it did not waive all issues raised on appeal. In its Rule 1925(a) opinion, the trial court found waiver based upon Janssen's "failure to comply in good faith with Pennsylvania Rule of Appellate Procedure 1925 by filing a multi-page, multi-paragraph Statement that defies a court order directing that [Janssen] should not file a Statement that is 'redundant, frivolous, or so lengthy as to defeat the purpose of the Rule.'" Trial Court Opinion, 5/4/15, at 10. While we agree that Janssen's Rule 1925(b) statement was not written in a concise manner, we note the complexity of this matter and decline to find waiver because the issues raised are clearly identifiable. Thus, we consider the issues Janssen raises on the merits.

Janssen first contends that federal law preempts the Andersons' negligent failure to warn claim since it could not unilaterally change the pregnancy category of Topamax from C to D. Janssen asserts that it

> was found liable under a state law negligent failure to warn theory because the labeling for its drug, Topamax, did not carry a pregnancy category D designation in late 2007 and early 2008. Janssen argue[s] that [the Andersons'] claim was preempted because (1) federal law precluded Janssen from changing the pregnancy category of Topamax from C to D without prior FDA approval, and, in any event, (2) there was clear evidence that FDA would not have approved a change to the pregnancy category at that time.

Brief of Appellant, at 23.

Janssen correctly points out that the Andersons have asserted that Topamax should have been labeled as a Category D drug at the time Kelly conceived. However, prior to trial, the court issued an order declaring that Janssen did not have the ability to unilaterally change the pregnancy category from C to D, and the jury was instructed as such multiple times during trial. ***See*** N.T. Trial, 2/11/14 p.m., at 48; N.T. Trial, 3/4/14 p.m., at 106-07. Thus, the jury's determination that Janssen is liable for its failure to warn was not predicated upon Janssen failing to change Topamax's pregnancy category from C to D.[1] ***See Ferguson v. Morton***, 84 A.3d 715,

---

[1] Janssen argues that "the lack of pregnancy category D warning in early 2008 was the ***only*** alleged 'failure to warn' that [the Andersons'] presented to the jury as a basis for their claim against Janssen." Brief of Appellant, at 27. However, as the trial court noted, "[t]he issue was not whether Janssen could unilaterally change Topamax's pregnancy category, but rather what steps Janssen *actually* took to make doctors aware of known risks." Trial

(Footnote Continued Next Page)

725 (Pa. Super. 2013) ("Jurors are presumed to obey the court's instructions.").

Moreover, Janssen's argument that "impossibility preemption" precludes the failure to warn claim has already been rejected by this Court in ***Czimmer v. Janssen Pharm., Inc.***, 122 A.3d 1043 (Pa. Super. 2015). In ***Czimmer*** and in the instant case, Janssen makes a nearly identical argument based on ***PLIVA, Inc. v. Mensing***, __ U.S. __, 131 S. Ct. 2567 (2011). In ***Czimmer***, this Court stated that

> reliance on ***PLIVA*** is misguided. ***PLIVA*** involved federal preemption of state-law failure to warn claims brought against generic drug manufacturers, and is not applicable to the instant case involving a brand-name drug manufacturer. . . [W]hile a brand-name manufacturer is responsible for the accuracy and adequacy of its label, a generic manufacturer is responsible for ensuring that its warning label is the same as the brand name's label. . . . "It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers. . . . [D]ifferent federal statutes and regulations may . . . lead to different preemption results." Thus, we conclude that [Janssen's] argument based on ***PLIVA*** is not legally persuasive.

(Footnote Continued) ———————————

Court Opinion, 5/4/15, at 14. Evidence was presented to the jury regarding several methods other than changing the pregnancy category by which Janssen could have issued warnings of Topamax's known birth defect risks. One such method would have been to use the FDA's Changes Being Effected "CBE" procedures, which permit drug manufacturers to update and strengthen warnings and safety information without prior FDA approval. ***See Gurley v. Janssen Pharm., Inc.***, 113 A.3d 283, 289 (Pa. Super. 2015).

Czimmer, ***supra*** at 1051 (quoting ***Gurley v. Janssen Pharm., Inc.***, ***supra*** at 291) (citations omitted).

Janssen's related argument that the FDA would not have approved a change to Topamax's label, relying upon ***Wyeth v. Levine,*** 555 U.S. 555 (2009), has also been rejected by this Court:

> Upon review, we cannot credit [Janssen's] contention that it presented "clear evidence that the FDA would not have approved a change to [Topamax's] label," to warn of increased risk of cleft lip/palate. [Janssen's] proposed change to the P[atient] P[ackage] I[nsert (PPI)] in 2005 involved a warning regarding a minor malformation in the genitalia of some newborns born to mothers taking Topamax; it did not address increased risk of cleft lip/palate. Further, [Janssen's] proposed change in 2005 was to the PPI, directed at patients, and not to the Topamax label, directed at prescribers. Therefore, we conclude that [Janssen] has failed to establish federal preemption of Appellees' state failure to warn claim under ***Wyeth***.

Czimmer, ***supra*** at 1052 (quoting ***Gurley***, ***supra*** at 291-92) (citations and footnote omitted).

For the foregoing reasons, and as Judge Djerassi aptly discusses in his opinion, we conclude that Janssen's preemption arguments based upon ***PLIVA*** and ***Wyeth*** do not merit relief.

In its second issue, Janssen claims that the Andersons' failure to warn claim is precluded because Kelly's prescribing physician knew, at the time she prescribed Topamax, of the potential risk of birth defects as a result of taking the drug during pregnancy. Indeed, Dr. Purath testified that she "could not state that there could not be some birth defects from [Topamax]." N.T. Trial, 2/21/14 p.m., at 42. However, Janssen's argument

that this demonstrates that Dr. Purath was adequately warned regarding the risks is not persuasive.

Dr. Purath's statement acknowledges that she was aware of the *potential* risk of birth defects, which is consistent with the Category C label Topamax had at the relevant time. Janssen's argument fails to differentiate between the non-specific, potential risk that Topamax's Category C label implied and a known risk in which the drug has been scientifically established to cause particular birth defects. As Judge Djerassi's opinion details, the latter category applies in this matter. The evidence presented at trial indicated that Janssen knew of a causal relationship between Topamax and specific birth defects, including cleft palate, but failed to disseminate the information so that Kelly's physicians would be adequately warned.[2]

---

[2] Janssen takes the position that Kelly's physicians would not have allowed her to continue to take Topamax *only if* Topamax were labeled as a Category D drug. However, this argument is unavailing, because the record supports that neither Dr. Purath nor Dr. Seldera would have allowed Kelly to remain on Topamax if they had received an adequate warning through other channels, such as the FDA's CBE procedures or other publications. Dr. Purath testified that if Topamax had been classified as a Category D drug when Kelly conceived, she would not have continued to prescribe it to Kelly, and that medical literature that could have alerted her to evidence of birth defects in humans caused by Topamax did not contain any warnings regarding the risk of cleft palate. Together, this testimony provides the implication that if Dr. Purath had been made aware of the evidence that Topamax causes birth defects in humans (the basis for a Category D classification), she would have treated the drug as she would a Category D drug and would not have prescribed it to Kelly. ***See*** N.T. Trial, 2/21/14 p.m., at 20-21, 25. Dr. Seldera testified to taking a similar approach as Dr. Purath and being highly concerned with the risks a medication poses for pregnant women. ***See*** N.T. Trial, 2/19/14 p.m., at 78-82.

Next, Janssen claims that the trial court erred by refusing to instruct the jury on comparative negligence and by refusing to ask the jury to apportion fault between Kelly and Janssen. According to Janssen, Kelly is at least partially at fault for Payton's birth defects because she decided to continue to take Topamax during her pregnancy. We disagree.

Janssen cites to case law regarding the apportioning of negligence, which provides that

> [o]nly one question must be affirmatively answered by the trial judge before submitting a negligence question to the jury: Is there evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about. . . . [T]he apportionment must include all whose negligence may have contributed to the arising of the cause of action.

Connar v. W. Shore Equip. of Milwaukee, Inc., 227 N.W.2d 660, 662 (Wis. 1975).

Here, Janssen's focus on Kelly's actions as a patient is misplaced, because the cause of action in this matter involves the learned intermediary doctrine. Under the learned intermediary doctrine, the pharmaceutical company's duty to warn flows exclusively to the prescribing physician. ***See Menges v. Depuy Motech, Inc.***, 61 F. Supp. 2d 817, 830 (N.D. Ind. 1999) (applying Wisconsin law, stating that "under the Learned Intermediary Doctrine, manufacturers of prescription medical products have a duty only to warn physicians, rather than patients, of the risks associated with the use of the product"). Thus, the cause of action involves no duty on the patient's part, and Kelly's choice to take Topamax when prescribed could not have

"contributed to the arising of the failure to warn cause of action." ***Connar***, ***supra*** at 662.

Moreover, as Judge Djerassi's opinion thoroughly discusses, a court would apply contributory negligence principles to a patient only in extraordinary circumstances. Wisconsin courts have not done so where the patient followed a doctor's prescription. ***See Brown v. Dibell***, 595 N.W.2d 358, 370 (Wis. 1999) (patient not contributorily negligent for deciding to follow viable but risky treatment). Here, the record indicates that Kelly's doctors would have preferred that she stop taking Topamax. However, the drug's Category C label, without additional warnings, made it appear to be a "viable but risky" treatment. Thus, Dr. Purath continued to prescribe Topamax, and Kelly took the drug as directed in the prescription.[3] Therefore, we find that the trial court did not err in not providing a

---

[3] Janssen argues that Kelly was a non-compliant patient because she did not want to stop taking Topamax. Additionally, Dr. Seldera testified that Kelly was "not very compliant" in the sense that "sometimes we tell her to come in. She doesn't come into the office. If she calls us and complains of anything, we tell her to come in, but she doesn't." N.T. Trial, 2/19/14 p.m., at 124. However, the record reveals that Kelly was primarily a compliant patient, taking her prescriptions as directed. ***See*** N.T. Trial, 2/21/14 p.m., at 26; N.T. Trial 2/24/14 p.m, at 29-34. Kelly's physician chose to continue to prescribe Topamax as a treatment with potential risks, and Kelly took the medication in a compliant manner. Thus, Janssen's argument that Kelly was non-compliant with regard to continuing her Topamax prescription is without merit and fails to demonstrate that she was contributorily negligent in this matter.

comparative negligence instruction to the jury or asking the jury to apportion fault between Kelly and Janssen.

Finally, Janssen asserts that the trial court erred in affirming the jury's award of future medical expenses because the amount was allegedly more than three times the amount supported by the evidence. We find this argument to be without merit.

We note that

> [o]ur standard of review from the denial of a remittitur is circumspect and judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. Furthermore, [t]he decision to grant or deny remittitur is within the sole discretion of the trial court, and proper appellate review dictates this Court reverse such an [o]rder only if the trial court abused its discretion or committed an error of law in evaluating a party's request for remittitur.

Gurley, ***supra*** at 294 (citation omitted).[4]

---

[4] The Andersons argue that Wisconsin law should apply to our consideration of whether remittitur was appropriately denied, and that because Janssen argues the issue based upon Pennsylvania law, the claim should be waived. We note, however, that the Andersons did not raise this issue in their response to Janssen's post-trial motion for remittitur and, in fact, argued the motion using Pennsylvania law. Thus, the Andersons are precluded from raising the issue at this stage of the proceedings. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); ***see also Discount Drug Corp. v. Honeywell Protection Services, Div. of Honeywell, Inc.***, 450 A.2d 49, 50 (Pa. Super. 1982) (where "choice of law is not an issue properly presented for our consideration, we cannot discuss this issue *sua sponte*"). Thus, we rely upon Pennsylvania law in our analysis.

Here, Janssen argues that because the award for Payton's future medical expenses exceeded the amount calculated by the Andersons' damages expert, it must be excessive. In making this argument, Janssen cites to ***Ferrer v. Trustees of Univ. of Pennsylvania***, 825 A.2d 591, 611-12 (Pa. 2002). In ***Ferrer***, our Supreme Court determined that the plaintiff's expert witness effectively established an outside boundary of $2,900,000 for the value of the plaintiff's loss and reduced the award from $5,000,000 to $2,900,000. Upon review of the record, we find that ***Ferrer*** is distinguishable from the instant matter.

Valerie Parisi, RN, testified as the Andersons' damages expert. She calculated a care plan for Payton totaling $447,324, which included various therapies, evaluations, counseling, antibiotics, and procedures. The plan included medical expenses until Payton turned 18, plus some medical care beyond 18. While Parisi indicated that her estimate included those procedures that would be necessary to a "certain degree of likelihood," she also acknowledged that "there may be more procedures even than what's been allocated." Thus, Parisi's estimate does not represent an "outside limit" as was determined to be the case in ***Ferrer***.

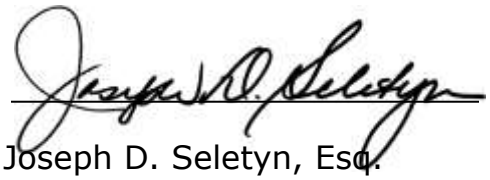
The jury also heard evidence that Payton's oral clefts are severe in nature and have been resistant to repair. This has caused fistulas to develop between the nose and palate that have required additional surgeries. Repeated procedures have been required to repair fistulas on multiple occasions. Payton's particular case has been complication-prone,

which is not specifically addressed in the life care plan Parisi developed for Payton. As the trial court opinion details, Payton's severe clefts, combined with her recurring ear infections, speech problems, and need for at least two major jaw surgeries indicate that the verdict is by no means shocking. ***Gurley***, ***supra***. Thus, the trial court did not abuse its discretion in denying remittitur in this matter.

We affirm based upon Judge Djerassi's opinion filed May 4, 2015, and we direct the parties to attach a copy of the opinions in the event of further proceedings.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/11/2016

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

Kelly Anderson, et al. *Plaintiffs*	:	
	:	**No. 1112-01405**
v.	:	
	:	**2330 EDA 2014**
Janssen Pharmaceuticals, Inc. *Defendant*	:	

DJERASSI, J. **May 4, 2015**

OPINION

Defendant Janssen appeals from a negligent failure-to-warn judgment where the company withheld information from doctors about the risk of Topamax causing cleft lip and palate birth defects when taken by pregnant women. The jury awarded $3,000,000.

I. STATEMENT OF FACTS

Since age ten, Plaintiff-Mother Kelly Anderson ("Mrs. Anderson") has experienced migraine headaches so severe that she was unable to finish high school and has often been unable to work. Her migraines caused vomiting, blurred vision and recurring hospitalizations. Mrs. Anderson has tried many prescription medicines to cope.

Until 2011, the Food and Drug Administration ("FDA") labeled Topamax as a Category C drug, meaning that some birth defects had been detected in animals, but there was no conclusive evidence of birth defects in humans.[1]

[1] In 2006 and 2007, the Topamax label stated the following regarding pregnancy risks:

Pregnancy: Pregnancy Category C – Topiramate has demonstrated selective developmental toxicity, including teratogenicity, in experimental animal studies...There are no studies using Topamax in pregnant women. Topamax should be used during pregnancy only if the potential benefit outweighs the potential risk to the fetus. In post-marketing experience, cases of hypospadias have been reported in male infants exposed in utero to topiramate, with or without other anticonvulsants; however, a causal relationship with topiramate has not been established. *Plaintiffs' Exhibit 4.*

After Mrs. Anderson was hospitalized for a particularly severe migraine in January 2006, Dr. Veronica Sosa, her primary neurologist, prescribed 100 mg of Topamax for migraine treatment and also prescribed folic acid as a prenatal vitamin. At the time, Mrs. Anderson was trying to get pregnant. In September 2006, Mrs. Anderson also began seeing Dr. Traci Purath, a neurologist specializing in headaches, for help controlling her migraines. Dr. Purath noted on Mrs. Anderson's chart that she was on prenatal vitamins because she was trying to conceive. Later, Dr. Purath wrote Mrs. Anderson a new prescription for Topamax on April 4, 2007. On the same day, Mrs. Anderson saw her OB-GYN, Dr. Joy Seldera, whose chart noted Mrs. Anderson was on Topamax and still trying to get pregnant.

Mrs. Anderson saw Dr. Seldera for a pregnancy test on November 8, 2007, and was still on Topamax at the time. The next day, Mrs. Anderson visited Dr. Purath who wrote a new prescription for 100 mg of Topamax twice a day.

Throughout 2006 and 2007, all three of Mrs. Anderson's doctors were aware that Mrs. Anderson was trying to get pregnant while taking Topamax. None of them warned Mrs. Anderson that taking Topamax while pregnant had been shown to cause birth defects in humans including or cleft lip and palate.

Mrs. Anderson discovered that she was pregnant on December 26, 2007. At that time, Dr. Seldera and Dr. Sosa each told Mrs. Anderson that she should stop taking two other medications, Methergine and Lyrica, because they were labelled Category D by the FDA, meaning they were known to cause birth defects in humans. Neither warned Mrs. Anderson that if she continued taking Topamax, she was placing her baby at risk for cleft lip and palate.

Two days later on December 28, 2007, Mrs. Anderson saw Dr. Purath to discuss her pregnancy. Dr. Purath prescribed Topamax to Mrs. Anderson for the duration of her pregnancy.

Mrs. Anderson and her husband, Bradley, learned their daughter, Payton, had a severe bilateral cleft lip and palate when she was born. Ever since her birth on August 17, 2008, Payton has undergone multiple surgeries to try to correct her birth defect which affects her jaw, nose and lips. She has also had procedures involving hearing loss and has speech problems. She has been bullied in school because of her speech and appearance.

II. PROCEDURAL HISTORY

On December 13, 2011, Plaintiffs Kelly and Bradley Anderson, individually and as guardians of Payton, filed a complaint alleging Payton's birth defects were caused by Mrs. Anderson's ingestion of Topamax while pregnant following tortious conduct by the drug manufacturer, Defendant Janssen Pharmaceuticals.

On February 5, 2014, following extensive discovery, the Honorable Arnold L. New denied in part and granted in part Defendant's Motion for Summary Judgment. Judge New dismissed with prejudice Plaintiffs' claims for strict liability design defect, negligent design, fraud, constructive fraud, breach of warranty and punitive damages. Claims of strict liability for failure to warn, negligent failure to warn and gross negligence remained.

Following jury selection and oral argument on motions *in limine*, a jury trial took place over fifteen days from February 10 through March 7, 2014. The jury returned a verdict for Plaintiffs on March 7, 2014. The jury awarded $1.5 million to the minor for non-economic damages and $1.5 million to her parents to cover the child's expected healthcare expenses through age eighteen. At the time of trial, Payton was six years old.

On March 17, 2014, Defendant filed timely post-trial motions, and on March 19, 2014, Plaintiffs filed an untimely motion for delay damages.

This Court denied Defendant's post-trial motions on July 10, 2014 and denied Plaintiffs' motion for delay damages on July 15, 2014.

Defendant then filed a timely notice of appeal from the denial of post-trial motions on July 28, 2014.

This Court filed and sent Defendant a 1925(b) Order on July 31, 2014. Defendant submitted a multi-page, multi-paragraph Rule 1925 statement on August 20, 2014.

III. ISSUES ON APPEAL

Defendant Janssen raises the following under Rule 1925, which is recited verbatim as submitted:

1. This Court erred in failing to rule that federal law preempts the state law negligent failure-to-warn claim tried by Plaintiffs Kelly and Bradley Anderson, individually, and as legal guardians of minor-Plaintiff Payton Anderson (collectively, "Plaintiffs"). Preemption goes to the subject matter jurisdiction of the Court and is fundamentally a question of law that this Court has to resolve and should have resolved without submitting the case to the jury at all. The only claim presented at trial was Janssen's alleged failure to designate, or alleged failure to ask FDA to designate, Topamax as a Category D drug in 2007 and/or 2008. The claim is preempted because the United States Food and Drug Administration ("FDA") has sole authority to determine and designate a drug's pregnancy category and any claim based upon Janssen's alleged failure to unilaterally change or request that FDA change the pregnancy category is preempted as explained in *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011) and related cases on conflict or impossibility preemption. *See* Def.'s Mot. for Post-Trial Relief ("Post-Trial Mot."), Mar. 17, 2014 (Control No. 14032259), at 17-21, ¶¶ 42-48; Def.'s Motion for Compulsory Nonsuit ("Nonsuit Mot."), Feb. 24, 2014 (Control No. 14023370), at 16-23; Def.'s Mot. for Directed Verdict, Feb. 28, 2014 ("Dir. Verdict Mot.") (Control No. 14024047), at 18-25. In addition, the record contains clear evidence that FDA would not have approved a pregnancy category D designation for Topamax prior to Payton's conception in December 2007; therefore, Plaintiffs' claim is preempted as explained in *Wyeth v. Levine*, 555 U.S. 555 (2009) and its progeny. Post-Trial Mot. at 21-25, ¶¶ 49-62; Nonsuit Mot. at 28-38; Dir. Verdict Mot at 29-40. Because Plaintiffs' claim is preempted, the Court erred in ruling that Plaintiffs could present evidence or argument that Janssen could have requested a change in Topamax's pregnancy category, *see* Order, *In re Topamax Litig.*, June Term 2011 No. 2131 (Phila. Ct. Com. Pl. Jan. 24, 2014); Order, *Anderson, et al. v. Janssen Pharm., Inc.*, Dec. Term 2011, No. 1405 (Phila. Ct. Com. Pl. Feb. 7, 2014) (Control No. 13061844), and in denying Defendant's motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict.

2. Alternatively, a new trial is warranted because the Court erred by failing (i) to give proper instructions on federal preemption, and (ii) to include a question on the verdict form whether there was clear evidence that FDA would not have approved Plaintiffs' suggested warnings at the relevant time. Post-Trial Mot. at 55, 58-61, ¶¶ 127-28, 134-39; Def.'s First Am. Proposed Points for Charge ("Pr. Pts. for Charge"), Nos. 37-47, Feb. 28, 2014; Def.'s First. Am. Proposed Verdict Sheet ("Pr. Verdict Sheet"), Interrogatory No. 3, Feb. 28, 2014; Tr. Tran. 55:5-123:15, Feb. 28, 2014 (charge conference and Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 4:6-34:3, Mar. 4, 2014 (a.m.) (Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 123:23-126:6, Mar. 4, 2014 (p.m.) (same). If the Court determined that the evidence created a factual question regarding the adequacy of the record on *Wyeth* preemption, the Court was required to ask the jury to decide whether such clear evidence had been presented. The absence of these jury instructions and this jury interrogatory on preemption prejudiced Defendant and requires a new trial.

3. This Court erred in finding that Plaintiffs' negligent failure-to-warn claim could proceed as a matter of law because the undisputed evidence demonstrated that, at the time Mrs. Anderson was prescribed Topamax in 2007 and 2008, her prescribing physician, Traci Purath, M.D., fully understood the potential risk of birth defects associated with use of Topamax during pregnancy. *See* Post-Trial Mot. at 8-14, ¶¶ 23-35; Dir. Verdict Mot. at 11-29, 40-45; Nonsuit Mot. at 10-28. Dr. Purath obtained this knowledge directly from Topamax's label (including its pregnancy category C designation) and from independent sources. *See* Post-Trial Mot. at 8-14, ¶¶ 23-35 (citing Purath Dep. 7:8-8:22, 10:15-11:5, 11:18-12:6, 12:8-10, 43:2-44:16, 60:16-64:7 86:14-87:20, 171:13-172:4; Def.'s Tr. Exs. 19, 28, 29, 30; Pls.' Tr. Ex. 85; Tr. Tran. 128:5-129:23, Feb. 24, 2014 (p.m.); Tr. Tran. 51:3-13, Mar. 5, 2014). As a result, Plaintiffs cannot establish that the warnings Janssen provided to Dr. Purath at that time were inadequate or that an inadequate warning caused Payton's injuries. The Court thus erred in denying Defendant's motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict.

4. Alternatively, a new trial is warranted because the Court erred in failing to instruct the jury that Janssen cannot be liable for Plaintiffs' alleged negligent failure to warn if the jury determined that Dr. Purath knew, as of December 2007, of the potential for birth defects to occur when Topamax was used during pregnancy, regardless of the source of that knowledge. *See* Post-Trial Mot. at 48-52, ¶¶ 115-22; Pr. Pts. for Charge, No. 26; Pr. Verdict Sheet, Interrogatory No. 1; Tr. Tran. 55:5-123:15, Feb. 28, 2014 (charge conference and Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 4:6-34:3, Mar. 4, 2014 (a.m.) (Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 123:23-126:6, Mar. 4, 2014 (p.m.) (same); Tr. Tran. 9:6-62:14, 62:22-66:21, Mar. 5, 2014 (p.m.) (same). In addition, the Court erred in failing to ask the jury in a verdict question whether Dr. Purath had that knowledge. *Id.*; Pr. Verdict Sheet, Interrogatory No. 1. ("Do you find that Dr. Traci Purath knew, in December 2007, that there was a potential risk of birth defects occurring when a

woman takes Topamax during pregnancy?"). The absence of this instruction and interrogatory prejudiced Defendant and requires a new trial.

5. Plaintiffs' negligent failure-to-warn claim failed as a matter of law because Plaintiffs did not establish the requisite causal connection between the alleged inadequate warning and Payton Anderson's injuries, an essential element of the claim. *See* Post-Trial Mot. at 23-24, 26-44, ¶¶ 55, 63-105; Nonsuit Mot. at 10-28; Dir. Verdict Mot. at 11-29, 40-45. Plaintiffs premised their claim on Janssen's failure to change or failure to request that FDA change Topamax's pregnancy category to D prior to Payton's conception in December 2007, but they failed to prove the necessary links in the causal chain to establish that claim. *See* Post-Trial Mot. at 26-30, ¶¶ 63-70. Plaintiffs failed to show that positive evidence of human fetal risk existed in 2007 and/or that FDA would have in fact changed Topamax's pregnancy category to D upon Janssen's request; indeed, Plaintiffs' own expert teratologist testified that there was no positive evidence of human fetal risk at that time. *See* Post-Trial Mot. at 28-30, ¶¶ 65-70. Plaintiffs also did not establish that *if* FDA had changed Topamax's pregnancy category to D prior to Payton's conception in 2007, Dr. Purath (i) would not have prescribed Topamax to Kelly Anderson at that time, or (ii) that a different prescribing decision would have avoided Payton's injuries. *Id.* at 30-35, ¶¶ 71-81. To the contrary, the evidence at trial showed that Dr. Purath was fully aware of the then-known risks of Topamax and accounted for them in deciding to prescribe Topamax and in warning Kelly Anderson to avoid becoming pregnant while using Topamax. The Court therefore erred in denying Defendant's motions for nonsuit, for directed verdict, andfor judgment notwithstanding the verdict. *See* Post-Trial Mot. at 26-44, ¶¶ 63-105.

6. The Court erred in allowing Plaintiffs' general causation expert, Richard H. Finnell, M.D., to present novel science to the jury that was based upon his personal belief and hypothesis rather than a generally accepted methodology or scientific authority, as required for expert testimony. Post-Trial Mot. at 35-38, ¶¶ 82-93; Def.'s Mot. to Exclude Causation Testimony of Dr. Richard Finnell, Apr. 22, 2013 (Control No. 13042749); Order, Dec. 6, 2013 (denying motion to exclude Dr. Finnell). Dr. Finnell's causation opinion, by his own admission, is not supported in *any* scientific literature or research; has never been studied or published by him or anyone else; has not been substantiated through testing or peer-review; fails to fulfill one of his own stated requirements for determining teratogenicity of a drug; and contradicts his own published literature that concluded that there was inadequate data as of 2007 and 2008 to determine whether Topamax was a human teratogen. Post-Trial Mot. at 23-24, 35-38, ¶¶ 55, 82-93. Because Plaintiffs failed to present competent expert testimony supported by reliable data and analysis on the element of general causation, the Court erred by denying Defendant's motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict. *Id.*

7. Likewise, the Court erred in permitting Plaintiffs' specific causation expert, Jaime Frías, M.D., to present novel science to the jury. *See* Post-Trial Mot. at 39-41, ¶¶ 94-100; Nonsuit Mot. at 42-43; Dir. Verdict Mot. at 43-45. Dr. Frías testified that after

reviewing all of the available evidence in 2008, he published literature asserting that there was insufficient "evidence" to conclude that Topamax was a human teratogen. *See* Post-Trial Mot. at 23-24, 39- 41, ¶¶ 55, 94-100. He also failed to exclude the most common cause of Payton's specific injuries – genetics. *Id.* at 40, ¶ 97. Dr. Frías's testimony, therefore, does not establish specific causation and this matter should not have been submitted to the jury. *See* Post-Trial Mot. at 23- 24, 39-41, ¶¶ 55, 94-100. Because Plaintiffs failed to present competent expert testimony supported by reliable data and analysis on the element of specific causation, the Court erred by denying Defendant's motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict. *Id.*

8. Alternatively, a new trial is warranted because the Court gave erroneous instructions and interrogatories on causation. The Court erred in failing to provide the jury with Janssen's proposed instructions that (i) Plaintiffs had to present expert causation testimony based on reliable data and sound methodologies that eliminated or excluded possible causes of Payton's injuries other than Topamax, and (ii) Plaintiffs had to prove that, if Janssen had provided a different warning to Dr. Purath prior to Payton's conception, Dr. Purath would have made a different prescribing decision for Kelly Anderson that would have prevented Payton's injuries. *See* Post-Trial Mot. at 52-54, ¶¶ 123-26; Pr. Pts. for Charge, Nos. 22-26; Pr. Verdict Sheet, Interrogatory No. 2; Tr. Tran. 55:5-123:15, Feb. 28, 2014 (charge conference and Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 4:6-34:3, Mar. 4, 2014 (a.m.) (Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 123:23-126:6, Mar. 4, 2014 (p.m.) (same); Tr. Tran. 49:6-62:14, 62:22-66:21, Mar. 5, 2014 (p.m.) (same). Instead, the Court provided instructions and interrogatories that were erroneous, incomplete, misleading, and/or inconsistent with the applicable law. The Court's causation charge and interrogatory did not convey to the jury that it would have to find that a different warning would have "prevented Payton's injuries" by causing Dr. Purath to stop prescribing Topamax to Mrs. Anderson prior to Payton's conception in December 2007. *Compare* Tr. Tran. 110:7-11, Mar. 4, 2014 (p.m.) (erroneously instructing Plaintiffs had to show that a different warning "would have prevented Mrs. Anderson from being prescribed Topamax at relevant times during her pregnancy"), Jury Verdict Sheet, Mar. 7, 2014 (asking the jury whether "a more complete warning would have caused Kelly Anderson's doctor to stop the Topamax prescription during pregnancy"), *with* Pr. Pts. for Charge, Nos. 22-26, Pr. Verdict Sheet, Interrogatory No. 2 ("Do you find that Dr. Traci Purath's decision to prescribe Topamax for Kelly Anderson as of December 2007 would have been different and would have prevented Payton Anderson's injuries, if Dr. Purath had received additional warnings of the potential risk of birth defects associated with Topamax use during pregnancy?"). These errors prejudiced Defendant and require a new trial. *See* Post-Trial Mot. at 52-54, ¶¶ 123-26.

9. Plaintiffs' negligent failure-to-warn claim failed as a matter of law because, under Wisconsin law, Mrs. Anderson's own negligent conduct is an intervening cause of Payton's injuries. *See* Post-Trial Mot. at 41-44, ¶¶ 101-05. The undisputed evidence at trial demonstrated that Mrs. Anderson's physicians repeatedly told Mrs. Anderson to stop taking Topamax during her pregnancy with Payton due to the risk of birth

defects, but Mrs. Anderson did not heed or follow that advice. *Id.* (citing Purath Dep. 60:16-64:7, 22:1-24:8, 62:1-72:7; Def.'s Tr. Exs. 19, 28, 29, 30; Pls.' Tr. Ex. 85; Seldera Dep. 109:19-23-110:5; Krismer Dep. 92:17-22; Sosa Dep. 46:6-25, 55:23-56:11)). The Court thus erred by refusing to enter judgment notwithstanding the verdict.

10. Alternatively, a new trial is warranted because the Court erred in refusing to instruct the jury on Mrs. Anderson's comparative negligence and refusing to ask the jury to apportion damages (if any). *See* Post-Trial Mot. at 45-48, ¶¶ 107-114; Pr. Pts. for Charge, No. 27; Pr. Verdict Sheet, Interrogatory Nos. 6-8; Tr. Tran. 55:5-123:15, Feb. 28, 2014 (charge conference and Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 4:6-34:3, Mar. 4, 2014 (a.m.) (Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 123:23- 126:6, Mar. 4, 2014 (p.m.) (same); Tr. Tran. 49:6-62:14, 62:22-66:21, Mar. 5, 2014 (p.m.) (same). At a minimum, the jury should have been afforded the chance to determine (i) whether Mrs. Anderson was negligent by failing to heed her doctors' warnings and instructions and/or by failing to tell the truth to her treating physicians about what her various doctors had said to her regarding Topamax and its risks, (ii) whether her negligent conduct alone caused Payton's injuries, absolving Janssen of any liability, and/or (iii) whether Mrs. Anderson's negligent conduct, at least in part, caused Payton's injuries, requiring the jury to apportion fault and to award damages (if any) accordingly. *See* Post-Trial Mot. at 45-48, ¶¶ 107-114; Pr. Pts. for Charge, No. 27; Pr. Verdict Sheet, Interrogatory Nos. 6-8. The Court's failure to provide jury instructions and jury interrogatories regarding Mrs. Anderson's comparative fault is reversible error under Wisconsin law and requires a new trial.

11. Plaintiffs did not meet their burden of proof because they failed to present (i) any expert testimony on whether the 2007 Topamax label adequately warned Dr. Purath of the alleged risk of birth defects, and (ii) any testimony from a physician/prescriber that Janssen's warnings were inadequate to apprise physicians/prescribers of those risks. *See* Post-Trial Mot. at 14-16, ¶¶ 36-41; Dir. Verdict Mot. at 28-29; Nonsuit Mot. at 26-28. The only expert that purported to testify in this regard was Plaintiffs' regulatory expert Peggy Pence, Ph.D., and her testimony was stricken on this point because she is not a physician or prescriber, and thus cannot say what physicians or prescribers know or do not know about the risks of Topamax. *Id.*; *see* Tr. Tran. 40:15-42:6, 66:19-67:20, Feb. 11, 2014 (a.m.); Tr. Tran. 10:5-14, Feb. 12, 2014 (a.m.). In addition, Dr. Pence did not (and could not) testify at trial as to whether the warnings conveyed to Dr. Purath were adequate, as Dr. Pence did not review the medical records for Payton or the testimony of Dr. Purath and, thus, did not evaluate or opine on how Janssen's warning actually affected Dr. Purath's decision to prescribe Topamax to Mrs. Anderson. *Id.* No other expert for Plaintiffs testified on the alleged inadequacy of Janssen's warnings at the relevant time. In fact, Plaintiffs' other experts, Drs. Finnell and Frías, both published scientific literature in 2008 concluding that the then-available data did not establish the positive evidence of human fetal risk required to support a Category D designation for Topamax. *See* Post-Trial Mot. at 23-24, 26-44, ¶¶ 55, 63-105; Nonsuit Mot. at 10-28; Dir. Verdict Mot. at 11-29, 40-45. Because

Plaintiffs failed to produce any medical expert testimony concerning whether the 2007 Topamax label adequately warned Dr. Purath of the alleged risk of birth defects at issue, Plaintiffs did not meet their burden of proof, and the Court erred in denying Defendant's motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict. *See* Post-Trial Mot. at 14-16, ¶¶ 36-41.

12. Alternatively, a new trial is warranted because the Court's instructions and corresponding verdict sheet on Janssen's duty to warn and Plaintiffs' burden of proof were erroneous. Specifically, the Court failed to instruct that:
    (a) Janssen was only required to give warnings concerning reasonably foreseeable risks of harm of a prescription medication to the prescribing healthcare provider (Dr. Purath) and not to patients or other persons;
    (b) Janssen's duty to warn does not arise until the manufacturer knows or has reason to know of a dangerous condition;
    (c) the allegedly dangerous condition at issue in this case was the potential risk of birth defects associated with Topamax use during pregnancy as of the date of Payton's conception;
    (d) what Janssen knew or had reason to know about the risk of birth defects must be limited to the period before Payton's conception in early December 2007.

    See Post-Trial Mot. at 48-52, ¶¶ 115-22; Pr. Pts. for Charge, Nos. 22-26; Tr. Tran. 55:5-123:15, Feb. 28, 2014 (charge conference and Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 4:6-34:3, Mar. 4, 2014 (a.m.) (Janssen's exceptions to Court's charge and verdict form); Tr. Tran. 123:23-126:6, Mar. 4, 2014 (p.m.) (same); Tr. Tran. 49:6-62:14, 62:22-66:21, Mar. 5, 2014 (p.m.) (same). Instead of providing these instructions, the Court's original charge erroneously instructed the jury to consider what was obvious or potentially discoverable to "users" or "potential users," even though the only relevant question was what was known by Dr. Purath about the potential risk of birth defects associated with Topamax. Pr. Pts. for Charge, Nos. 22-26; Tr. Tran. 105:2-106:1, Mar. 4, 2014 (p.m.). After the jury stated it was confused, the Court then gave a supplemental charge that suggested that the duty to warn ran to all doctors, even though under the learned intermediary doctrine the duty to warn ran only to the prescriber, Dr. Purath. *Id.*; Tr. Tran. 125:3-24, Mar. 4, 2014 (p.m.). Contrary to Janssen's proposed jury interrogatories, the Court failed to ask the jury on the verdict sheet to decide (i) whether Dr. Purath knew, in December 2007, that there was a potential risk of birth defects occurring when a woman takes Topamax during pregnancy, and (ii) whether Plaintiffs proved by a preponderance of the evidence that Janssen negligently failed to warn of the potential risk of birth defects associated with Topamax use during pregnancy, based upon the pregnancy data and information that was available as of December 2007. *See* Post-Trial Mot. at 50-51, ¶ 120; Pr. Verdict Sheet, Interrogatory Nos. 2, 4. Instead, the Court asked the jury whether Janssen negligently failed to warn "Kelly Anderson's doctors during her pregnancy about the risk of birth defects from using Topamax." Jury Verdict Sheet, Mar. 7, 2014. That verdict question erroneously presumed that Janssen had a duty to warn all of the doctors and presumed that the relevant time period for examining the adequacy of Janssen's warnings was any time during Mrs. Anderson's pregnancy (as opposed to prior to Payton's conception in December 2007). *See* Post-Trial Mot. at

50-52, ¶¶ 118-22; Tr. Tran. 125:3-24, Mar. 4, 2014 (p.m.). These errors prejudiced Defendant and require a new trial.

13. The Court erred in refusing to grant Defendant's motion for remittitur. Mr. and Mrs. Anderson were awarded $1,500,000 for "healthcare expenses for the care and needs of Payton Anderson from the time of trial until she reaches eighteen years of age." *See* Jury Verdict Sheet, Mar. 7, 2014. Even according to Plaintiffs' own evidence, those future healthcare expenses amounted to less than $447,324.00. Accordingly, there was no basis for an award in excess of that amount – let alone three times that amount – and the Court erred by refusing to set aside or reduce the verdict to conform to the evidence that was admitted at trial. *See* Post-Trial Mot. at 65-67, ¶¶ 152-57.

A. Waiver

Defendant Janssen has waived all issues on appeal for failure to comply in good faith with Pennsylvania Rule of Appellate Procedure 1925 by filing a multi-page, multi-paragraph Statement that defies a court order directing that Appellant should not file a Statement that is "redundant, frivolous, or so lengthy as to defeat the purpose of the Rule."

Pennsylvania Rule of Appellate Procedure 1925(b)(4) requires that the Statement "concisely identify each ruling or error that the appellant intends to challenge" and shall "not be redundant or provide lengthy explanations as to any error." Failure to comply with Rule 1925(b) may be considered a waiver of all matters complained of on appeal. ***Lineberger v. Wyeth***, 894 A.2d 141, 148 (Pa. Super. 2006); ***see also Tucker v. R.M. Tours***, 939 A.2d 343, 346-47 (Pa. Super. 2007), ***aff'd***, 977 A.2d 1170 (Pa. 2009) (finding that 1925(b) Statement consisting of sixteen pages and seventy-six paragraph statements resulted in waiver of all issues on appeal); ***Jones v. Jones***, 878 A.2d 86, 89 (Pa. Super. 2005) (seven-page 1925(b) Statement that included twenty-nine issues in narrative form resulted in total waiver).

Rule 1925 is a "crucial component of the appellate process, because it allows the trial court to identify and focus on those issues the parties plan to raise on appeal." ***Kanter v. Epstein***, 866 A.2d 394, 400 (Pa. Super. 2004), ***allowance of appeal denied***, 880 A.2d 1239 (Pa.

2005), ***cert. denied sub nom. Spector Gadon & Rosen, P.C. v. Kanter***, 546 U.S. 1092 (2006). The Superior Court has explained Rule 1925 waiver, stating that "when an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." ***Lineberger***, 894 A.2d at 148 (internal citations omitted).

While the number of issues raised in a 1925(b) Statement is not, on its own, a sufficient basis for waiver, the broadness of the Appellant's Statement and its inherent bad faith are egregious. Here, Janssen's 1925(b) Statement is over five pages single-spaced with thirteen paragraphs containing thirty-five argumentative, repetitive, multi-issue claims in narrative form. The Statement is almost verbatim a refiling of Janssen's post-trial motions. Each paragraph of the 1925(b) Statement contains multiple claims and lack of conciseness substantially affected this Court's ability to organize and prepare this Opinion. The unwieldiness of the post-trial motions resulted in a decision to deny the post-trial motions without a memorandum opinion and to file an Order warning Janssen to follow Rule 1925 in its Statement of Matters Complained Of. The Order states as follows:

> And now, this 31st day of July, 2014, it is hereby ORDERED and DECREED pursuant to Pa.R.A.P. 1925(b) that Defendant Janssen Pharmaceuticals, Inc. file in the Court of Common Pleas and serve on the Honorable Ramy I. Djerassi a concise statement of errors complained of on appeal no later than twenty-one (21) days after the date of this Order. **The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues, but should not be redundant, frivolous, or so lengthy as to defeat the purpose of the Rule.** See Pa.R.A.P. 1925(b)(iii), (iv); *see also In re A.B.*, 2013 PA Super 43, 63 A.3d 345, 350; *Com. v. Reeves*, 2006 PA Super 196, 907 A.2d 1, 3. Any issues not properly included in the Statement, timely filed, and concurrently served on the Honorable Ramy I. Djerassi will be deemed waived.

(Emphasis added).

Janssen defied this Order and circumvented the meaning and purpose of Rule 1925(b). Having done so in apparent bad faith, Janssen is precluded from appellate review. ***Kanter***, 866 A.2d at 401.

Though the appeal is waived, we have done our best to reorganize the issues for judicial economy. ***See Kanter***, 866 A.2d at 400 (even if the court correctly guesses the issues raised on appeal and writes a 1925(a) Opinion, the issues may still be waived). The substantive issues are reviewed under Wisconsin law; the procedural ones under Pennsylvania law.

One by one or in their entirety, Janssen's claims do not merit reversal.

B. Federal Preemption Does Not Apply.

Janssen claims state negligent failure to warn cases are preempted by federal law and argues we should have instructed the jury that federal law prevents a drug manufacturer from changing the pregnancy risk category on its label without prior FDA approval.

First, federal law does not preempt a state failure to warn claim. ***Wyeth v. Levine***, 555 U.S. 555, 573 (2009). In ***Wyeth***, the Supreme Court recognized that a "central premise of federal drug regulation" is that "the manufacturer bears the responsibility for the content of its drug label at all times." ***Id.*** At 570-71. Janssen, not the FDA, had the duty to create an "adequate label" and make sure that "its warnings remain adequate while the drug is on the market." ***Id.*** at 573-74. According to ***Wyeth***, drug manufacturers must comply with both state and federal law. One way of doing so, and one not followed by Janssen in this case, is to use the FDA's Changes Being Effected ("CBE") procedures to strengthen drug warnings before a label is actually changed.[2]

[2] The FDA's CBE regulation permits drug manufacturers to unilaterally update and strengthen warnings and safety information in its label without receiving prior FDA approval. 21 C.F.R. § 314.70(c)(6)(iii)(A), (C); *see also Gurley v. Janssen Pharm., Inc.*, 2015 Pa. Super. 49 (2015) *citing Wyeth, supra* at 568.

More generally, this is hardly the first time Janssen or its parent company, Johnson & Johnson, have raised federal preemption since ***Wyeth***. ***See Gurley v. Janssen Pharm., Inc.***, 2015 Pa. Super. 49, 3-5 (rejecting Janssen's federal preemption argument that it could not be liable for negligently failing to warn that Topamax causes cleft lip and palate birth defects when taken during pregnancy); ***see also Maya v. Johnson and Johnson***, 97 A.3d 1203, 1213 (Pa. Super. 2014) (rejecting federal preemption argument that Johnson and Johnson could not be found negligent for failing to add "skin reddening," "rash," and "blisters" to a list of symptoms in the drug's Allergy Alert when they were not required by the FDA).

We hope with this case that Janssen has raised federal preemption for the last time in defense of its brand name drug Topamax in state failure to warn cases.[3]

C. Evidence Was Sufficient To Prove Causation.

Janssen raises several claims regarding Plaintiffs' proof of causation.

1. Dr. Purath's testimony supported factual causation.

Janssen claims that Plaintiffs failed to show prescribing physician, Traci Purath, M.D., would have cancelled Topamax for Mrs. Anderson if Topamax had been labeled Category D by the FDA instead of Category C.

According to her testimony, Topamax warnings actually received by Dr. Purath left her unaware of the full extent of the risk of cleft lip and palate birth defects associated with Topamax use by pregnant women. When she prescribed Topamax to Mrs. Anderson, Dr. Purath knew the drug was Category C, meaning that some birth defects had been reported in animal studies but there was no known birth defect risk of cleft lip and palate in humans. Ultimately, the jury

[3] ***Compare PLIVA v. Mensing***, 113 U.S 2567, 131 S. Ct. 2567, 2582 (2011) (where the Court ruled that brand name drugs like Topamax are held to a higher regulatory standard than generic manufacturers since "federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers," and so "different federal statutes and regulations may...lead to different preemption results").

believed that Janssen failed to disseminate known test findings in humans associating Topamax use by pregnant women with direct risk of birth defects.

Dr. Purath testified that she routinely studied medical periodicals in her professional practice and had seen no reports linking Topamax to birth defects for cleft lip and palate in humans at the time Mrs. Anderson became pregnant. She also testified that she would have read and respected Dear Doctor letters, journal articles and oral or written warnings from Janssen representatives telling her of the birth defect risk associated with Topamax among humans. She testified that no such information was given. Dr. Purath said that if Topamax had contained sufficient warnings about the known risks of birth defects in humans or if the drug had been classified as Category D, she would never have prescribed the medication to Mrs. Anderson. Her testimony was for the jury to believe or disbelieve.

Janssen also claims that factual cause could not be proven by Plaintiffs as a matter of law. They argue that only the FDA has final label authority on how to categorize birth defect risks for pregnant women in its alphabetical labeling system, so Janssen's conduct, even if negligent, could not have caused the ultimate injury. This position was argued at trial but missed the point. The issue was not whether Janssen could unilaterally change Topamax's pregnancy category, but rather what steps Janssen *actually* took to make doctors aware of known risks. In addition to notifying the FDA itself, Janssen had direct ways to convey information to treating physicians, including the CBE process, Dear Doctor letters, or early reporting of known human clinical study results at medical conventions before medical journal publication. These steps were not taken.

D. Jury Instructions And Interrogatories Were Proper.

Janssen raises several claims regarding jury instructions and interrogatories.

A jury charge must be reviewed in its entirety to determine whether it is prejudicial. ***Com. v. Prosdocimo***, 578 A.2d 1273, 1274 (Pa. 1990). A trial court has broad discretion in crafting jury instructions and "may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." ***Id.*** A trial court must only charge on "the law applicable to the factual parameters of a particular case." ***Sehl v. Vista Linen Rental Serv., Inc.***, 763 A.2d 858, 863 (Pa. Super. 2000).

On appeal, the standard of review for a jury charge is whether the trial court committed a clear abuse of discretion or an error of law controlling the outcome of a case. ***Von der Heide v. Com. Dep't of Transp.***, 718 A.2d 286, 288 (Pa. 1998).

1. Jury instructions and interrogatories regarding Dr. Purath's knowledge were correct.

Janssen claims a new trial should be granted on the grounds that our charge did not instruct jurors to find against causation if they believed Dr. Purath knew in December 2007 that Topamax could cause cleft lip and palate birth defects if taken while pregnant. This claim is a mischaracterization of the actual trial issue before the court since this is a products liability action, not medical malpractice.

Specifically, Janssen claims we erred by not giving the following proposed jury instruction:

PROPOSED INSTRUCTION NO. 26
(Knowledge of the Risks)

> Even if you find that, as of December 2007, Janssen failed to provide adequate warnings regarding the risks of Topamax, Janssen is not liable if Traci Purath, M.D. knew of the risks that Plaintiffs contend Janssen failed to include in the Topamax package insert or product label. In such a case, the adequacy of the warning is not a proximate cause of Payton's injury and you must find for Janssen.

Janssen also argues we erred by not including the following interrogatory on the verdict sheet:

> 1. Do you find that Dr. Traci Purath knew, in December 2007, that there was a potential risk of birth defects occurring when a woman takes Topamax during pregnancy?

Dr. Purath testified she knew there was some risk of birth defects if Topamax were taken while pregnant because Topamax was a Category C drug. This, however, is not the relevant issue.

The factual question that mattered was whether Dr. Purath would have prescribed Topamax to Mrs. Anderson after she became pregnant. Answering this directly, Dr. Purath testified she would not have made that prescribing decision if she had a complete warning. Dr. Purath knew that Topamax may carry some risk for pregnant women, but when applying a medical balance on whether to prescribe to Mrs. Anderson, Dr. Purath knew what she had been told---no statistically confirmed risk of birth defects in humans.

The jury found that if Janssen had adequately warned the medical community, Dr. Purath would not have made a different prescribing decision based on more complete knowledge.

2. Jury instructions on negligence, causation, and Plaintiffs' burden of proof were correct.

Having denied a causation instruction specifically addressed to Dr. Purath's testimony, we considered a series of proposed charges that confused negligence and causation concepts in single paragraphs and read in some instances like closing argument rather than jury instructions. Generally, we felt it was better to explain substantive points – negligence, learned intermediary doctrine and causation – as separate teaching concepts in accordance with Wisconsin law.

For convenience, we are including Janssen's proposed jury instructions and those actually delivered:

PROPOSED INSTRUCTION NO. 22
(Negligence)

In this case, Plaintiffs contend that Payton Anderson was injured as a result of Janssen's negligent conduct. Specifically, they allege that Janssen was negligent by providing an inadequate warning for Topamax as of December 2007, when Payton Anderson was conceived. Plaintiffs have the burden of proving this claim. Janssen denies this claim and asserts that its warnings were adequate and that it exercised reasonable care to provide warnings with Topamax.

The two issues for you to decide, in accordance with the law as I give it to you are:

1. *Was Janssen negligent?* "Negligence" is the failure to do something that a reasonably careful and ordinary person would do, or doing something that a reasonably careful person would not do, in light of all the surrounding circumstances established by the evidence in this case.

2. Did Janssen's negligent conduct cause Payton Anderson's birth defect? To establish that Janssen's allegedly negligent failure to provide an adequate warning was the cause of Payton's injuries, Plaintiffs must prove that (a) prior to Payton Anderson's conception, Janssen knew of a potential risk of birth defects occurring when a woman used Topamax during pregnancy and failed to provide a warning of that danger to Mrs. Anderson's prescriber; and (b) that prescriber, Dr. Traci Purath, would have made a different prescribing decision for Kelly Anderson regarding Topamax, if such additional warnings had been provided at that time; and (c) that different prescribing decision would have prevented Payton's Anderson's injuries.

You shall find for Janssen if Plaintiffs failed to prove *any* of the elements above.

PROPOSED INSTRUCTION NO. 24
(Duty of Pharmaceutical Manufacturer)

Pharmaceutical manufacturers are required to give warnings concerning reasonably foreseeable risks of harm of a prescription medication to the prescribing healthcare provider and not to the patients they treat. In other words, there is no duty on the part of a pharmaceutical manufacturer, like Janssen, to give warnings *directly* to patients. This is because the prescribing healthcare provider is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment.

In addition, a manufacturer is not an insurer for its product. A manufacturer's duty to warn does not arise until the manufacturer knows or has reason to know of a dangerous condition. When determining what Janssen knew or had reason to know, you should focus on what was known or knowable in light of the generally recognized and prevailing best scientific knowledge available prior to Payton Anderson's conception. Thus, your consideration of what Janssen knew or had reason to know about the risk of birth defects must be limited to the period before Kelly Anderson conceived Payton on or about December 5, 2007.

You may not hold Janssen liable for any alleged failure to warn Kelly Anderson. Instead, you must decide whether, as of December 2007, Janssen adequately warned Mrs. Anderson's prescribing physician, Dr. Purath, of the potential risk of birth defects occurring when a woman took Topamax during pregnancy. If you find that Janssen adequately warned Dr. Purath of the potential risk of birth defects associated with Topamax use during pregnancy, you must return a verdict in favor of Janssen.

Our jury charge on negligence and the manufacturer's duty:

Specifically, plaintiffs contend that Janssen was negligent by providing an inadequate warning for Topamax. Janssen denies this claim and asserts that its warnings were adequate and that it exercised reasonable care to provide warnings with Topamax...

So now, let me tell you that for purposes of the negligence definition that I'm about to give you, a person is either a corporation or an individual, all right. So in this case, Janssen being a corporation, that's what we're talking about in terms of a person...

A person is negligent when he or she fails to exercise ordinary care, all right. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is, therefore, negligent if the person, without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury to a person, okay. That is negligence.

Now, in this case we are...discussing a particular type of negligence...And that is a negligence involving a duty of a manufacturer, a manufacturer of a drug, to warn, okay. So let me read you now the instruction for that situation. It follows from negligence that I just gave you, but it is a little bit more specific in relation to this case.

A manufacturer of a product has a duty to exercise ordinary care to warn of dangers which the manufacturer knows or should know are associated with

the proper use of the product. This duty exists whether or not the product was properly designed.

Proper use...means a use which is intended by the manufacturer. In addition, a manufacturer has the duty to warn of dangers inherent in the use not intended by the manufacturer if such unintended use is reasonably foreseeable by the manufacturer.

However, a manufacturer does not have a duty to warn about dangers that are known to the user, or are obvious to, or readily discoverable by potential uses, or are so commonly known that it can reasonably be assumed that users will be familiar with them.

Additionally, the manufacturer does not have to warn about dangers associated with unforeseeable misuses of the product, all right. So that is called negligence, duty of the manufacturer to warn...

(N.T. 3/4/14, afternoon, p. 103-106).

Janssen also claims error because we chose our own instructions over the following proposals:

PROPOSED INSTRUCTION NO. 25
(Warning Adequate)

If you find that the package insert or product label Janssen provided with Topamax advised or warned Traci Purath, M.D. of the potential risk of birth defects associated with Topamax use during pregnancy, you must enter a verdict in Janssen's favor.

PROPOSED INSTRUCTION NO. 26
(Knowledge of the Risks)

Even if you find that, as of December 2007, Janssen failed to provide adequate warnings regarding the risks of Topamax, Janssen is not liable if Traci Purath, M.D. knew of the risks that Plaintiffs contend Janssen failed to include in the Topamax package insert or product label. In such a case, the adequacy of the warning is not a proximate cause of Payton's injury and you must find for Janssen.

We charged the jury on causation as follows:

If you have found negligence, then you must consider causation. In this case, as I've just said, there are two tests for causation, and both must be met.

First, this is the – the first one that is applied is one that is always applied to a negligence case. It doesn't matter whether it's a duty to warn case or a case

> involving drug manufacturers. It's applied for any case, any negligence case, and that's the substantial factor test. "Substantial factor test."
>
> The test is whether the defendant's negligence was a substantial factor in causing the result. To be a substantial factor, the negligent conduct has to have such an effect in producing the injury as to lead a reasonable person, you as the fact finder, to regard it as a cause. The word "cause" is to be used by you in the popular sense, okay.
>
> Causation is a fact. The existence of causation may reasonably be inferred from the circumstances. And there may be more than one substantial causative factor in any case. The defendant's negligent conduct need not be the sole or primary factor in causing the injury, all right. So that goes to Question No. 2, all right.
>
> Now, if you find Question No. 1, yes, there was negligence, Question No. 2, yes, there's a substantial factor, then there is a second question about causation, as follows. This second question relates to whether the injury itself -- that will be the birth defect -- would have been prevented by the exercise of ordinary care.
>
> In the case of Defendant Janssen, plaintiff has to show that a more complete warning would have prevented Mrs. Anderson from being prescribed Topamax at relevant times during her pregnancy. I'll read that again. In the case of Defendant Janssen, plaintiff has to show that a more complete warning would have prevented Mrs. Anderson from being prescribed Topamax at relevant times during her pregnancy.

(N.T. 3/4/14, afternoon, p. 108-110).

Together, the instructions we gave on negligence and causation included what Janssen asked for and what was necessary – that Janssen could only be liable if a more complete warning would have prevented Payton Anderson's injury.

Janssen specifically claims we should have included the following points from their Proposed Instructions Nos. 22, 24, 25, and 26: (1) Janssen was only required to warn the prescribing doctor, Dr. Purath; (2) the allegedly dangerous condition was limited to the potential risk of birth defects as of the date of Payton's conception and only if Janssen knew or had reason to know about the risk of birth defects before Payton's conception in early December 2007; and

(3) Janssen's duty to warn comes about only if the drug company knows or has reason to know of a the potential risk.

First, Defendant's assertion that Janssen was only required to warn Dr. Purath is moot, because the jury found she was not warned.

Second, Janssen's claim that their duty to warn Dr. Purath existed only before Payton's conception is wrong, because Plaintiff presented expert testimony of Dr. Jaime Frías that stated January 8, 2008, was the critical date on which fetal development began in the lips and jaw of Mrs. Anderson's baby. This was approximately 35 days after conception.

Third, Janssen's duty to warn arose before January 8, 2008. A month earlier, Dr. Joseph Hulihan became aware of adverse data implicating Topamax in a higher than normal incidence rate of birth defects. Dr. Hulihan was a corporate officer and the Vice President of Scientific Affairs at Janssen. He was also a member of the Scientific Advisory Committee of the North American Epileptic Drug Pregnancy Registry ("Epileptic Pregnancy Registry"). On December 7, 2007, this Committee received a report prepared by researchers for the Epileptic Pregnancy Registry which stated, "[T]opiramate showed a significant increase in the frequency of all malformations in comparison to infants in the external comparison group."

This definitive conclusion followed a report six years earlier, also known to Dr. Hulihan. This report from November 2001 was written by Plaintiffs' witness, Dr. Richard Finnell, an expert in the fields of teratology, medical genetics and embryology. Dr. Finnell had been hired by R.W. Johnson (research arm of Johnson and Johnson, parent company of Janssen) to conduct an independent evaluation of Topamax's safety regarding birth defects for pregnant women. He used then-available Adverse Event Reports ("AER") in topiramate and pregnancy outcomes collected by the Epileptic Pregnancy Registry. In his abstract prepared for potential publication

of his complete study, Dr. Finnell concluded Topamax was a teratogen, or an agent causing birth defects in humans. Johnson and Johnson did not publish Dr. Finnell's 2001 report.

Instead, as developed during Dr. Hulihan's testimony, Dr. Finnell's damaging 2001 conclusions were diluted. After reading the abstract, Dr. Hulihan wrote an email to Janssen scientists who were staffing an in-house Topamax Risk Assessment Group. Dr. Hulihan was a member of the group as well. Referring to language from Dr. Finnell's report, Dr. Hulihan wrote, "[I] think the [following] statement is too strong, may not accurately reflect the information presented and would *recommend deleting*." (N.T. 2/26/14, afternoon, p. 27) (emphasis added). Dr. Finnell's original 2001 conclusions were, in fact, not transmitted to the FDA or to the broader medical community.

The jury viewed the new December 7, 2007, warnings from the Epileptic Pregnancy Registry in the context of this history involving Dr. Finnell. They were not persuaded by Dr. Hulihan's explanation at trial that negative information about Topamax could not be immediately released to avoid giving a "false sense of security or not create a false sense of alarm." (N.T. 2/26/14, morning, p. 77). Had Janssen communicated the information from the December 7, 2007, Epileptic Pregnancy Registry right away, the jury believed Payton's birth defect would have been averted. Testimony by Dr. Frías established that January 8, 2008, was the critical date on which Mrs. Anderson's baby began fetal development of her lips and jaws. Believing Dr. Purath's testimony that she closely followed medical literature and pharmaceutical communications, the jury found she would have stopped Mrs. Anderson's Topamax prescription and warned her to stop taking the drug.

Janssen's breach of its duty to warn came about because the company failed to use available means of direct communication to get the word out to the medical community as soon

as possible. Acceptable ways to do this included sending out written Dear Doctors letters which do not need prior FDA approval. Clearly, then, Janssen's duty to warn arose prior to December 7, 2007.

3. Jury instructions regarding expert witnesses were correct.

Janssen also claims we should have used the following proposed charge regarding expert witnesses:

PROPOSED INSTRUCTION NO. 23
(Burden of Proof in Failure-to-Warn Cases – Expert Testimony Required)

> Cases involving prescription drugs necessarily involve issues relating to scientific data and complex federal regulations. As such, Plaintiffs are required to present expert testimony, based upon acceptable and reliable methodologies and data, as to whether Janssen adequately warned of the risks associated with Topamax. Without such evidence, Plaintiffs cannot meet their burden of proof, and you must enter a verdict for Janssen.

On review we are satisfied that our expert testimony charge was appropriate. (N.T. 3/14/14, 99-101).

4. Interrogatories on causation and Plaintiffs' burden of proof were correct.

Janssen claims error because we declined to add the following interrogatories to the verdict sheet:

> 2. Do you find that Dr. Traci Purath's decision to prescribe Topamax for Kelly Anderson as of December 2007 would have been different and would have prevented Payton Anderson's injuries, if Dr. Purath had received additional warnings of the potential risk of birth defects associated with Topamax use during pregnancy?
>
> 4. Do you find that Plaintiffs proved by a preponderance of the evidence that Janssen negligently failed to warn of the potential risk of birth defects associated with Topamax use during pregnancy, based upon the pregnancy data and information that was available as of December 2007?

Our verdict sheet asked the following:

> 3. Did Plaintiff prove that a more complete warning would have caused Kelly Anderson's doctor to stop the Topamax prescription during pregnancy?

This question goes to the essence of the case and the jury's fact-finding. If the warnings given by Janssen were inadequate, did it matter? Would Dr. Purath have stopped prescribing Topamax to Mrs. Anderson? The jury answered the warnings were inadequate and that the inadequacy of the warnings mattered.

E. Mrs. Anderson Was Not Comparatively Negligent Because She Followed Her Doctor's Instructions.

Janssen claims Mrs. Anderson was comparatively negligent even though she took Topamax as prescribed. Their position is that this alleged negligence was a superseding cause. Alternatively, Janssen claims we erred by denying their request to charge the jury on comparative negligence, because Mrs. Anderson's decision to take Topamax as prescribed was an intervening cause.

Under Wisconsin law, a superseding cause is an intervening force which relieves an actor from liability for harm when the actor's negligence is a substantial factor in producing the harm. ***Stewart v. Wulf***, 271 N.W.2d 79 (Wis. 1978). Whether a plaintiff's action is a superseding cause is a question of law which a court makes if the jury has determined that the defendant's own negligent conduct is a substantial factor in causing the harm. ***U.S. Fidelity & Guaranty v. Franti Ind,***. 241 N.W. 2d 421 (Wis. 1976). If the defendant's conduct is a substantial factor, then the defense of intervening force is unavailing unless the court determines as a matter of law that there are policy reasons which should relieve a negligent actor from liability. ***Ryan v. Cameron***, 71 N.W. 408, 411 (Wis. 1955). Policy reasons adopted by Wisconsin courts are taken from ***Restatement (Second) of Torts, sec. 447*** (1965) and are listed in ***Wulf, infra*** at 86. None of the

policy reasons listed there apply to circumstances in this case where a pregnant woman takes medicine as prescribed.

Regarding the separate issue of comparative negligence under Wisconsin law, the first question is whether there is any "evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about." ***Connar v. W. Shore Equip. of Milwaukee, Inc.***, 227 N.W.2d 660, 662 (Wis. 1975). As this is a failure-to-warn case under the learned intermediary doctrine, any comparative negligence claim would normally include the prescribing doctor, Dr. Purath, but Janssen did not raise such a counterclaim against her.

Even if a comparative negligence charge could focus on Mrs. Anderson alone, Janssen's evidence did not support a comparative negligence charge. Mrs. Anderson testified she took Topamax as prescribed after telling Dr. Purath and her other doctors that she was pregnant. She was counselled by these doctors according to what the doctors knew, and there was no contradiction to these points.

Medical patients under Wisconsin law, as in other jurisdictions, have a duty to exercise ordinary care for their own health and well-being. Implicit in the patient-doctor relationship is a patient's trust that her physician is competent and well-versed in the safety and efficacy of medications the doctor prescribes. Implicit also is the doctor's understanding that her patients follow their directions. ***See, e.g., Brown v. Dibell***, 595 N.W. 2d 358, 370 (Wis. 1999).

Only in extraordinary circumstances would a court apply contributory negligence to a patient. No Wisconsin court has done so when a patient follows a doctor's prescription. ***See Brown***, 595 N.W. 2d at 370. In the context of an informed consent action, ***Brown*** held that a patient is not contributorily negligent for choosing a viable but risky medical treatment when

presented by a doctor.[4] This is common sense, as patients should not be liable for trusting their doctors. Failure-to-warn cases from other jurisdictions agree. Patients are liable for contributory negligence only when they ignore their doctor, fail to report side effects, or otherwise act contrary to prescribing instructions. ***See Robinson v. McNeil Consumer Healthcare***, 615 F.3d 861, 871 (7th Cir. 2010) (patient may be contributory negligent in a failure-to-warn case when patient continued to take medication after rash developed without reporting condition to doctors); ***see also Singer v. Sterling Drug, Inc.***, 461 F.2d 288, 291 (7th Cir. 1972) (patient not contributorily negligent for taking medication as instructed by doctor even when doctor's instructions had patient taking too much medication and causing injury); ***Coffman v. Keene Corp.***, 628 A.2d 710, 7210 (N.J. 1993) (an affirmative defense of comparative or contributory negligence in failure-to-warn case requires a patient to receive a clear warning not to do something but proceeds anyway to expose self to harm); ***Mikkelsen v. Haslam***, 764 P.2d 1384, 1388 (Utah Ct. App. 1988) (request for jury instruction on contributory negligence is properly denied when it "requires a patient to determine whether the doctor is giving the patient correct advice.").

There is no evidence that Kelly Anderson was anything other than a compliant patient. Dr. Purath testified that Mrs. Anderson came to all of her appointments, took her medications as prescribed and reported to her office whenever she was experiencing difficulties with her health. While Mrs. Anderson was on Topamax, she followed her doctor's prescribing instructions and did not experience side effects affecting her own health.

---

[4] ***See also Rasmussen v. Deuster***, 644 N.W.2d 293 (Wis. Ct. App. 2002) (unreported table decision in malpractice case holding that there was no contributory negligence when patient followed doctor's orders and went home, even though patient died as a result); ***Hull v. Medical Associates of Menomonee Falls, Ltd.***, 589 N.W.2d 454 (Wis. Ct. App. 1998) (unpublished table decision holding that patient was contributory negligent for not reporting symptoms to doctor or make follow-up appointment as instructed by doctor); ***Rogers v. Rydlewicz***, 392 N.W.2d 848 (Wis. Ct. App. 1986) (unpublished table decision holding that patient can be contributory negligent for failing to attend follow-up appointment when instructed to keep appointment and condition worsened).

At trial, Mrs. Anderson confirmed the physicians' testimony. She told the jury she had not been advised by any of them that Topamax was known to cause fetal cleft lip and palate if she took it while pregnant. The jury believed her testimony that if she had known that Topamax would cause these birth defects, she would have stopped taking it. Indeed, at the instruction of her doctors, Mrs. Anderson stopped taking both Methergine and Lyrica, two Category D drugs known to cause birth defects. Mrs. Anderson said she did so because her doctors told her these drugs were known to harm fetuses.

Neither JNOV on an intervening cause theory nor a comparative negligence charge were supported. Mrs. Anderson had a difficult choice to make as a patient suffering from chronic severe migraines while pregnant. She did not know of the extent of the risk because Janssen had not communicated what they knew about Topamax to her prescribing and consulting physicians. Janssen had not warned them about the negative results of the Epileptic Pregnancy Register study known to Janssen's Vice President of Scientific Research by December 7, 2007. This study confirmed that Topamax ingestion by pregnant women caused cleft lip and palate. Unaware of this information, Dr. Purath continued to prescribe Topamax even as Mrs. Anderson's baby was forming her lips, jaws and nose *in utero*.

F. Evidentiary Claims

Defendant raises several evidentiary claims.

1. The expert opinion of Richard H. Finnell, Ph.D. was admissible.

Janssen claims that the testimony of Plaintiffs' causation expert, Richard H. Finnell, Ph.D., should have been precluded on grounds that his opinion was based on novel science. This is unsupported by the record. Dr. Finnell was properly qualified as an expert in the fields of teratology, medical genetics and embryology.

Nothing about the methodologies relied upon by Dr. Finnell are novel or unreliable. His education, experience and methodology are sound. He applies generally accepted scientific research practices. Dr. Finnell is a board-certified medical geneticist, embryologist and teratologist. He received his Ph.D. from the University of Oregon in 1980 after studying at the University of British Columbia in Vancouver where he was one of the first researchers studying links between birth defects and first generation anti-epileptic medication Dilantin. He is the Director of Genomic Research at Dell Children's Medical Center in Austin, TX and is a full professor in the Nutritional Sciences and Chemistry department at the University of Texas at Austin. At Dell Children's Medical Center, Dr. Finnell directs the craniofacial clinic where he studies the genetics of patients with birth defects, including cleft lip and palate patients. He is a preeminent researcher testing the relationship between pharmaceutical drugs, genetic mutations and human birth defects.

Dr. Finnell's opinion in this case that Topamax, when taken by pregnant women, causes birth defects including cleft lip and palate was based on multiple sources. These included published articles about Topamax, animal studies, eight human epidemiology studies involving Topamax, AERs, pregnancy registry data, and internal Janssen pharmaceutical documents produced in discovery. He testified that based on the results of the drug's pregnancy registry data alone, women who take Topamax while pregnant were twenty-one times more likely to have a baby with an oral cleft than those not on Topamax.

Dr. Finnell was qualified to give his expert opinion.

2. Causation expert testimony by Dr. Frías was admissible, and the grounds he relied on were scientifically based and clearly explained.

Janssen alleges that JNOV should have been granted because of an alleged failure by Plaintiffs' expert, Jaime Frías, M.D., to establish factual causation linking Topamax and birth

defects. Janssen also claimed Dr. Fries' opinion should have been ruled out because he did not consider genetics as a cause of Payton's cleft lip and palate. Neither claim is accurate.

Dr. Frías published a book chapter in a medical text in 2008 in which he wrote that he did not have enough data at that time to offer an opinion on the teratogenicity of Topamax. In particular, he did not have access to internal Jansen documents that he reviewed nearly six years later during discovery in this case. These documents were not only unknown to Dr. Frías, but were unknown to the entire medical community, including Mrs. Anderson's doctors. After reviewing these, Dr. Frías testified that Mrs. Anderson's ingestion of Topamax while she was pregnant caused her daughter's cleft lip and palate. He also testified that Topamax's teratology was known to Janssen before Mrs. Anderson's baby developed her lips and jaws *in utero*.

Also, contrary to Janssen's claims, transcripts show Dr. Frías twice ruled out genetics as a cause of Payton's cleft lip and palate:

> **MR. MATTHEWS:** [Did you rule out] [g]enetic syndrome?
>
> **DR. FRÍAS:** Yes...
>
> **MR. MATTHEWS:** ...And to a reasonable degree of medical certainty did Topamax cause this birth defect?
>
> **DR. FRÍAS:** Yes.

(N.T. 2/21/14, morning, p. 37).

> **MR. MATTHEWS:** There was a question just a minute ago about genetics. Is this cleft lip and palate that we see, was this caused by genetics?
>
> **DR. FRÍAS:** No. When they say that a proportion of cases are caused by genetics, in reality what happens is that it's genetics in the sense of predisposition or that there are some genetic constitutions that make you more prone to react to some environmental agents...It's not that we have genes that produce the cleft.

(N.T. 2/21/14, morning, p. 65).

3. Dr. Peggy Pence's expert testimony regarding the Topamax label was admissible.

Defendant claims that Plaintiffs' regulatory expert, Peggy Pence, Ph.D., was not qualified to offer expert testimony. The record does not support this.

Dr. Pence has been working in the pharmaceutical industry for over forty years. She earned a doctorate in toxicology with a minor in pharmacology from Indiana University's medical school campus. She is the owner of Symbion Research International, a consulting firm that helps drug companies navigate the FDA regulatory process. Her work includes setting up clinical trials, interacting with FDA officials, and evaluating safety data. Dr. Pence also reviews labeling for FDA compliance and has helped prepare drug labels from inception to final approval.

For her opinion in this case, Dr. Pence reviewed pregnancy reports, FDA records, Janssen's submissions to the FDA, post-approval Pregnancy Registry Data, internal documents and e-mails from Janssen, and discovery depositions. She also reviewed applicable FDA regulations.

It appears that Janssen's complaint with Dr. Pence is her educational background as a Ph.D. rather than an M.D. However, experts with similar education and experience to a physician are qualified to offer an expert opinion on the adequacy of a drug labeling. In ***Daniel v. Wyeth***, 15 A.3d 909, 926 (Pa. Super. 2011), the trial court was affirmed after permitting a Ph.D. in medical pharmacology and toxicology to testify as an expert on drug labeling. The doctor had worked twenty years as an executive with a major pharmaceutical company and oversaw dozens of FDA drug approval applications. ***Id.*** The ***Daniel*** Court concluded the Ph.D. expert witness was more qualified than many medical doctors who "deal very marginally" with labeling issues.

Id. Similarly, Dr. Pence was eminently qualified to testify about the adequacy of Topamax's label.

G. The Jury Award Was Reasonable And Based On Ample Evidence.

Finally, Defendant claims we erred by denying their motion for remittitur of the jury's damage award to the Anderson parents for their child's health expenses through age 18.

A remittitur is appropriate when the award is excessive and unwarranted such that the "verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." ***Haines v. Raven Arms, Inc.***, 640 A.2d 367, 370 (Pa. 1994), ***clarified by Haines v. Raven Arms, Inc.***, 652 A.2d 1280 (Pa. 1995). The decision to grant a remittitur is within the sound discretion of the trial court, but such a decision must be supported with specific facts. *Id.* The fact that a verdict is large does not make it excessive. ***Tindall v. Friedman***, 970 A.2d 1159, 1177 (Pa. Super. 2009).

The jury awarded $1.5 million in damages to Mr. and Mrs. Anderson for "healthcare expenses for the care and needs of Payton Anderson from the time of trial until the time she reaches eighteen years of age." At the time of trial, Payton was six years old. Although Janssen argues this verdict is excessive, the figure is by no means shocking considering the medical and psychological challenges this child faces.

Darrell Henderson, M.D., a plastic and reconstructive surgeon, offered his expert opinion on Payton's expected medical needs. Because Payton's cleft is bilateral, i.e. occurring in the middle of the lip and palate, Dr. Henderson testified that surgical repairs would be "extremely difficult" compared to a cleft affecting only one side of the lip. Surgical repairs performed so far have not been successful. Facial abscesses called fistulas have developed and these can only be fixed through more surgery. Dr. Henderson also testified that children like Payton with cleft lip

and palate defects "almost always have problems with their hearing because the Eustachian tube...frequently doesn't work and they get recurring ear infections."

Dr. Henderson predicted within a reasonable degree of medical certainty that Payton will continue to experience problems with her ears including infections that will require antibiotics. He anticipated speech problems as well. Payton will need at least two major surgeries on her jaws, one between ages eight and ten, and another around age eighteen. Due to her lip and jaw defects, Payton is expected to need substantial dental work because the cleft lip/palate defect has caused missing and deformed teeth around the cleft. Dr. Henderson testified that Payton has benefitted and will continue to benefit from psychological therapy to help cope with bullying and self-esteem issues stemming from her facial appearance and speech.

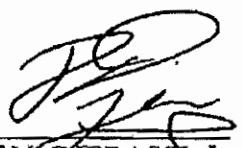
Plaintiffs' life care planner, Valerie Parisi, a registered nurse, also testified, agreeing that Payton will need speech therapy through age eighteen, audiology (hearing) evaluations, intermittent psychological evaluation, vocational counseling and case management supervision. She also testified that Payton will need follow-up facial plastic surgery, more dental procedures and frequent antibiotics due to expected recurrent ear infections.

Based on the evidence, $1.5 million dollars is a reasonable damage award to Payton Anderson's parents who are responsible to pay for her health care expenses through age 18.

IV. CONCLUSION

For all the reasons stated here including waiver, judgment should respectfully be affirmed.

BY THE COURT:



RAMY I. DJERASSI, J.