

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

FRANCES HENRY,  
Appellant  
v.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

WYETH PHARMACEUTICALS, WYETH  
PHARMACEUTICALS, INC., WYETH, INC.  
A/K/A AMERICAN HOME PRODUCTS  
CORP., AND WYETH LABORATORIES

No. 3399 EDA 2010

Appeal from the Judgment Entered January 12, 2011  
In the Court of Common Pleas of Philadelphia County  
Civil Division at No(s): No. 00875 July Term 2004

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY STRASSBURGER, J.

Filed: February 22, 2013

Frances Henry (Henry), appeals from the judgment entered against her and in favor of Appellees, Wyeth Pharmaceuticals, Wyeth Pharmaceuticals, Inc., Wyeth, Inc. a/k/a American Home Products Corp., and Wyeth Laboratories (collectively "Wyeth"), in this negligence action.<sup>1</sup> Upon review, we affirm.

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> This case was tried together with the case of *Buxton v. Wyeth*, 00202 July Term 2004. The verdict was the same in both cases; however, the appeal in that case, docketed at 3374 EDA 2010, was discontinued

This case involves Prempro, a drug used for hormone replacement therapy for women, which was manufactured and distributed by Wyeth. Henry took Prempro from 1995 through May 2003 to combat the side effects of menopause. In May 2003, she discovered a lump in her breast, and was subsequently diagnosed with breast cancer. On July 8, 2004, Henry filed a complaint against Wyeth asserting that her use of Prempro promoted the growth of her breast cancer, and Wyeth was negligent in failing to warn her properly of this harmful side effect.

The matter was tried before a jury in a reverse bifurcated trial, with Phase I on the issues of medical causation and compensatory damages. On August 24, 2010, the jury returned a verdict in favor of Wyeth in Phase I on the issue of causation. Henry filed timely post-trial motions asking for a new trial and/or judgment notwithstanding the verdict. The post-trial motions were denied, and Henry filed a timely notice of appeal. Both Henry and the trial court complied with Pa.R.A.P. 1925.

On appeal, Henry presents two issues for our review, which we have renumbered for ease of disposition:

[1.] Whether the trial court committed reversible legal error by holding that [Henry] had waived her objection set forth [below] even though she specifically objected to the "development ... of breast cancer" question, did not withdraw the objection, and instead after the court ruled against her requested that "if you are going to do that," the "breast cancer" question be worded in a different way.

[2.] Where [Henry] tried her personal injury negligence claim on the theory that Wyeth's hormone replacement drug, Prempro,

caused her personal injury and damages by fueling or promoting the growth of pre-existing abnormal cells in her body into invasive breast cancer, whether the trial court committed reversible legal error by rejecting [Henry's] proposed factual causation question for the verdict form that the jury must determine whether Prempro was a "factual cause ***in bringing about harm,***" as set forth in Pa. SSJI Civ. 3.15, and directing the jury instead to answer whether Prempro was a "factual cause ***in the development of [Henry's] breast cancer,***" thereby suggesting that Prempro must have initiated rather than promoted her cancer.

Henry's Brief at 3 (emphases in original).

Before we review whether the verdict slip itself was proper, we must consider whether counsel made a timely objection. Where counsel does not object to language on the verdict slip, the issue is waived on appeal. ***Commonwealth v. duPont***, 730 A.2d 970, 984 (Pa. Super. 1999).

Instantly, Henry proposed the jury answer yes or no to the following question: "Wyeth's drug Prempro was a factual cause in bringing about the harm to [Henry]." Wyeth's Objections to Plaintiffs' Proposed Jury Instructions and Verdict Form, 8/16/2010, at 13. Wyeth objected to this language in writing and suggested instead the trial court read the following:

"Did [Henry] prove that her ingestion of Prempro caused her breast cancer?"

***Id.*** Prior to the jury being charged, the language on the verdict slip was discussed.

[Attorney for Henry]: We just tracked 3.15 with bringing factual cause bringing about the harm, the exact language from the pattern jury instruction.

[Attorney for Wyeth]: And, Your Honor, our objection is just changing the word "harm" to "breast cancer developing," was it

a factual cause in the development of Mrs. Buxton's and Mrs. Henry's breast cancer?

The Court: Well, that's what we're here, causing harm. You know, harm.

[Attorney for Wyeth]: Well, Your Honor, our view is that in the verdict form itself, I mean it's one thing for the instructions to talk about harm in the context of overall instructions that the Court is giving, but if the Court does not make it clear in the verdict form that the harm that they're talking about is breast cancer, and we don't have any objection if the Court were to say about bringing about harm that is breast cancer. We just believe we need to clarify this.

N.T., 8/16/2010, Afternoon Session, at 134-35.

The parties continued to argue about whether the proper terminology was bringing about "harm" or bringing about "breast cancer." *Id.* at 135-138. The trial court then proposed the following: "I'm going to say, did the plaintiffs develop their breast cancer caused by their use of Prempro?" *Id.* at 138. Counsel for Henry then proposed, "Judge, we would ask if you are going to do that, that you say was Wyeth's drug Prempro a factual cause in the development of Mrs. Henry's breast cancer?" *Id.* at 139. The trial court agreed and the verdict slip contained essentially that language: "Was Wyeth's drug Prempro a factual cause in the development of Plaintiff Mrs. Henry's breast cancer?" Jury Verdict Form - Mrs. Henry, 8/18/2010.

Based on the foregoing, it is clear that Henry never objected to the use of the word "development." "In this jurisdiction ... one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to

remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter." *Summers v. Summers*, 35 A.3d 786, 790 (Pa. Super. 2012), reargument denied (Mar. 9, 2012). Because the trial court did not have an opportunity to correct this alleged error, Henry has waived it for the purposes of appellate review.

Even if Henry had not waived this objection, we would still conclude that she is not entitled to a new trial. "[W]hen analyzing a decision by a trial court to grant or deny a new trial, the proper standard of review, ultimately, is whether the trial court abused its discretion." *Huber v. Etkin*, -- A.3d --, 2012 WL 5897730 (Pa. Super. Nov. 26, 2012).

Henry argues that the trial court erred as a matter of law in replacing the words "bringing about harm" with the language "developing breast cancer." Henry's Brief at 15. Specifically, Henry contends that this was a fundamental error "because it misled or confused the jury" as to the issue of causation. *Id.* at 16-17. We disagree.

First, we note that the jury was instructed using the same language on the issue of causation.

In this case the plaintiffs have the burden of proving the following claims: one, whether Wyeth's drug Prempro was a factual cause of bringing about the development of plaintiffs' breast cancer; and the extent of damages caused by Wyeth's drug Prempro.

N.T., 8/17/2010, Afternoon Session, 60. Furthermore, there is no allegation that the jury was improperly instructed on issues of causation. "A reviewing

court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental.” *Jeter v. Owens-Corning Fiberglas Corp*, 716 A.2d 633, 635 (Pa. Super. 1998). “In reviewing a trial court's charge to the jury, we must not take the challenged words or passage out of context of the whole of the charge, but must look to the charge in its entirety.” *Id.* Thus, Henry’s suggestion that somehow the word “development” misled or confused the jury as to the entire issue of causation is untenable. We also point out that Henry repeatedly used the same terminology throughout her opening statement. **See** N.T., 7/27/2010, at 38 (“Hormone-dependent cancer is the kind of cancer that requires hormones to **develop**.... 70 to 80% of all breast cancers depend on hormones to **develop** and grow.”); N.T., 7/27/2010, at 48 (“And what these doctors will tell you, what is much more likely than not, what is much more probable than not, is that E+P was the primary source of the hormones driving the **development** and growth of these cancers in these women.”) (emphases added). Thus, it is disingenuous to say now that such terminology confused or misled the jury. Accordingly, even had Henry preserved this issue, she would not be entitled to relief.

Judgment affirmed.