

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY  
IN THE COURT OF COMMON PLEAS**

<b>MARY AND THOMAS DANIEL,</b> <b>Appellants</b>	:	<b>TRIAL DIVISION-CIVIL</b>
<b>V.</b>	:	<b>JUNE TERM, 2004</b>
<b>WYETH PHARMACEUTICALS,</b> <b>Appellee</b>	:	<b>NO. 2368</b>
	:	<b>Superior Court Docket No.</b>
	:	<b>2626 EDA 2007</b>

**OPINION**

**PROCEDURAL HISTORY**

Plaintiff Mary Daniel appeals from the September 25, 2007 Order granting Defendant Wyeth’s Motion for Post Trial Relief, vacating the judgment for compensatory damages and ordering a new trial.

**FACTUAL BACKGROUND**

In December 1999, Plaintiff Mary Daniel (hereinafter “Daniel”) complained to her gynecologist, Dr. John Haggard, about menopausal symptoms that had persisted since 1995. (Wyeth’s Motion for Summary Judgment based on the Learned Intermediary Doctrine Control #104060, pg. 2). Dr. Haggard prescribed the hormone therapy medication Prempro to Daniel with instructions to take one pill every other day. (Wyeth’s Motion for Summary Judgment #104060, pg. 2). Prempro, a hormone replacement therapy drug combining estrogen and progestin, is produced by the Defendant Wyeth Pharmaceutical, Inc. (“Wyeth”). (Plaintiff’s Response to Motion for Summary Judgment Control #055081, pg. 3).

Daniel took Prempro as prescribed for eighteen (18) months until she was diagnosed with breast cancer in August 2001, for which she had a surgical biopsy to remove a cancerous lump. (Wyeth's Motion for Summary Judgment Control #104059, pg. 3, 6; N.T. dated 1/12/07, pgs.63-67). A second surgery was also performed to remove any additional cancer tumor from Daniel's lymph nodes and to ensure that it had not metastasized to other parts of her body. (N.T. dated 1/12/07, pgs. 67-70). Sometime after the biopsy, but before the second surgery, Daniel was directed to discontinue using Prempro. (Wyeth's Motion for Summary Judgment Control #104059, pg. 6, Exhibit C, pg. 170). Rather than consulting her physicians as to the cause of her breast cancer, Daniel assumed that the use of Prempro to be the source of her cancer. (Wyeth's Motion for Summary Judgment Control #104059, pg. 7).

On June 22, 2004, Daniel filed suit against Wyeth alleging they were negligent in failing to warn Daniel of the risk of breast cancer associated with using Prempro. (Wyeth's Motion for Summary Judgment Control #104060, pg. 2). In preparation for trial, Wyeth deposed Daniel's causational expert Dr. Lester Layfield. Dr. Layfield is a board certified pathologist, who Daniel planned to offer to testify at trial as to the causal link between Prempro and Daniel's breast cancer. (Plaintiff's Response in Opposition to Wyeth's Supplemental Motion #055081, pg. 4). Dr. Layfield was asked, at the request of Daniel's counsel, to perform a KI67 test. (N.T. dated 1/12/07, pg. 74). This test required Dr. Layfield to examine the cancer from the surgical biopsy and the second surgery to determine if the proliferation of the cancer dropped after Daniel had stopped taking Prempro. (Id.). Dr. Layfield testified at a deposition regarding the results of his test.

In the deposition, Dr. Layfield opined that the combination of estrogen and progestin in Prempro had caused Daniel's premalignant lesions to proliferate (ie. grow). (Plaintiff's Response in Opposition to Wyeth's Supplemental Motion Control #055081, pg. 4). Further, Dr. Layfield stated that the combination of estrogen and progestin was "indeed a substantial factor in the development of the breast carcinoma as it was present in the biopsy specimen." (Plaintiff's Response in Opposition to Wyeth's Supplemental Motion Control #055081, pg. 4, Exhibit A at pg. 97).

On January 3, 2007, the case proceeded to trial before the late Judge Myrna Field. (See Docket, pg. 66). At trial, Dr. Layfield was scheduled to appear as a live witness, but did not appear. Counsel for Daniel offered no explanation for Dr. Layfield's absence from trial. In lieu of testifying live, Dr. Layfield's deposition testimony was read to the jury and Dr. Elizabeth Naftalis, a breast surgeon, testified live as Daniel's causation expert. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 5, 9). Dr. Naftalis stated that she relied on Dr. Layfield's pathology report when she testified that Daniel's breast cancer was caused by ingesting the combination of estrogen and progestin found in Prempro. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 9; N.T. date 1/12/07 pg. 75). Thereafter, a jury verdict awarded \$1,000,000 to Daniel and \$500,000 to her husband, Thomas Daniel. (See Docket, pg. 66). Subsequently, Judge Field awarded an additional \$181,560 in delay damages for a total award of \$1,681,650 in favor of Daniel. (See Docket, pg. 68).

Additionally, the jury found Wyeth's conduct was sufficient to award punitive damages to Mr. and Mrs. Daniel. (N.T. dated, January 29, 2007, pg.27). On January 30, 2007, after completion of the liability phase of trial, Wyeth filed a Motion for Judgment

Notwithstanding the Verdict (JNOV) on punitive damages. (See Docket). Judge Field heard oral argument on the JNOV and granted the motion. (Opinion, J. Field, April 16, 2007, pg. 2). After Daniel indicated their intention to appeal the JNOV, Judge Field decided to conduct a brief jury trial on punitive damages with the same jury so that the Superior Court would not have to remand the case to the trial Court for a re-trial if the Superior Court reversed her ruling on JNOV. (Id.). The jury returned a punitive damages award against Wyeth. Daniel then filed their appeal from Judge Field's granting of the JNOV on punitive damages. (Id.).

On May 14, 2007, Wyeth filed a Supplemental Motion for Post-Trial Relief claiming a fraud on the court based on after-discovered evidence of Dr. Layfield's subsequent deposition testimony in *Zandi v. Wyeth, et al.* (See Docket, pg. 68).

The basis of this supplemental post-trial motion was that in April 2007, Dr. Layfield was deposed in *Zandi v. Wyeth, et al.*,<sup>1</sup> another hormone therapy case in which he testified that the reason he did not appear as a live witness in the *Daniel* case was because he changed his opinion about what caused Daniel's breast cancer. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 4). At the *Zandi* deposition, Dr. Layfield testified that the eighteen (18) month duration of Prempro use was too short a time period to be the cause of Daniel's breast cancer and it was more likely that she already had a late stage lesion when she began taking Prempro. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 4-5).

Since Dr. Layfield was not a live witness in the *Daniel* trial, his original deposition was read into evidence without advising the jury, the Court or opposing

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<sup>1</sup> *Zandi v. Wyeth, et al.* was a hormone therapy case that was pending in the state courts of Minnesota. *Zandi v. Wyeth*, No. 27 CV06-6744, Hennepin County, Minnesota District Court, Fourth Judicial District.

counsel of Dr. Layfield's changed testimony given in the *Zandi* deposition. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 6). As a result of *Zandi* testimony, Dr. Layfield no longer retained the opinion that Daniel had a "pre-malignant lesion that was not obligated to progress to cancer, but when induced to proliferate by the hormone replacement therapy, did indeed proliferate..." (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 6). Dr. Layfield recanted his original expert opinion and could not say with a reasonable degree of medical certainty that Daniel's breast cancer was caused by the hormone therapy because of the short duration of Prempro use. (Wyeth's Supplemental Motion for Post-Trial Relief Control #055081, pg. 7).

In Daniel's response to Wyeth's request for post-trial relief, plaintiff's counsel alleged that Dr. Layfield never recanted his deposition testimony in the *Daniel* case and his testimony in the *Zandi* deposition never changed his opinion of Daniel's pathology report. (Plaintiff's Response to Motion for Post-Trial Relief Control #055081, Exhibit A). Daniel's response further alleged that Dr. Naftalis, not Dr. Layfield, was the Plaintiff's main causation expert. (Plaintiff's Response in Opposition Control #055081, pg. 4).

On August 24, 2007, this Court issued its Findings and Order granting Wyeth's Motion for Post Trial Relief which granted a new trial and vacated the May 16, 2007 Order entering judgment in favor of Plaintiff Daniel. (See Findings and Order, Exhibit A). On October 5, 2007, Daniel filed her Notice of Appeal and issued her Statement of Matters pursuant to Rule 1925(b). (See Docket).

The issues raised on appeal are summarized as follows:

1. Whether the trial Court erred in granting Defendant's Motion for Judgment Notwithstanding the Verdict on the issue of punitive damages.

2. Whether this Court erred in granting the Defendant's Motion for Post Trial Relief and granting a new trial based on a recanted expert opinion.

#### LEGAL ANALYSIS

In addressing the issue raised by Daniel in her challenge to the granting of Wyeth's Motion for Judgment Notwithstanding the Verdict as to punitive damages, this Court attaches and defers to the Opinion of Judge Field. (Attached as Exhibit B). Judge Field had reviewed the Motion for JNOV and Daniel's response and held oral arguments on this issue. Upon deciding to grant the motion, Judge Field prepared this Opinion in anticipation of an appeal by Daniel. This Court would ask that the appellant Court uphold Judge Field's decision to grant Wyeth's Motion for JNOV based on her Opinion.

Appellant next alleges that the trial Court committed reversible error in granting a new trial based on recanted testimony given by Plaintiff's causation expert Dr. Lester Layfield, which was discovered after trial was held.

A new trial was warranted because the recanted testimony occurred after Dr. Layfield's deposition and prior to trial without disclosure to Wyeth. Dr. Layfield's recanted testimony changed his prior deposition testimony that Daniel's use of Prempro caused her breast cancer and it is likely that this information would have compelled a different result at trial.

Our Superior Court has stated that trial courts have broad discretion to grant or deny a new trial and it will not reverse the trial court's decision unless it amounts to a gross abuse of discretion or an error of law. *Mitchell v. Gravely International, Inc.*, 698

A.2d 618, 619 (Pa. Super. 1987), *Brodowski v. Ryave*, 2005 PA Super 354, 885 A.2d 1045, 1055 (2005), *Freed v. Priore*, 247 Pa. Super. 418, 372 A.2d 895 (1977). An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. *Brodowski*, 885 A.2d at 1055. An abuse of discretion will not be found where an appellate court simply concludes that it would have reached a different result than the trial court. *Id.*

An appellate court may reverse the trial court's decision only if it finds no basis on the record to support the reasons offered by the trial court. *Id.* If support for the decision of the trial court is found in the record, the order must be affirmed.

Where there is an error in the trial of such consequence that it is impossible to determine what influence it had on the jury, the only remedy is a new trial. *Lobalzo v. Varoli*, 409 Pa. 15, 20-21, 185 A.2d 557, 561 (1962).

To secure a new trial on the ground of after-discovered evidence or fraud, "the evidence must have been discovered after the trial and must be such that it could not have been obtained at the trial by reasonable diligence, must not be cumulative or merely impeach credibility, and must be such as would likely compel a different result. . . ." *Lazarus v. Goodman*, 412 Pa. 442, 195 A.2d 90 (1963); *Brannagan et ux. v. Great Atlantic & Pacific Tea Co.*, 352 Pa. 18, 41 A.2d 869 (1945); *Hydro-Flex, Inc. v. Alter Bolt Co., Inc.*, 223 Pa. Superior Ct. 228, 296 A.2d 874 (1972); *Bowie v. Shelton*, 214 Pa. Superior Ct. 107, 251 A.2d 667 (1969).

In the case of *In re Condemnation by Indiana Township of Certain Property*, 107 Pa. Commw. 207; 527 A.2d 1115 (1987). Appellee Indiana Township condemned

property owned by appellant landowners. *Id.* At trial, Appellants' expert real estate appraiser testified that the value of the property was much higher than the amount offered by appellee as condemnation compensation. *Id.* The trial court rendered a verdict in favor of landowners. *Id.* Appellee filed a motion for a new trial on the fact that evidence discovered after trial revealed that landowner's appraiser was not a licensed broker and had perjured himself at trial by testifying that he was a licensed broker. *Id.*

Our Supreme Court expanded the basis for granting of a new trial based on fraud to include cases involving recanted testimony. *Township of Perkiomen v. Mest*, 513 Pa. 598, 522 A.2d 516, 518-519 (1987). In *Township of Perkiomen*, former police officers, filed a mandamus action seeking reinstatement to and back pay for their jobs with a police department that was abolished by a resolution adopted by the local township board. *Id.* The Officers claimed that the resolution was adopted in bad faith. *Id.* Prior to trial a township supervisor gave a pre-trial deposition under oath. *Id.* The supervisor had not been called to testify at trial based on the fact that his testimony offered no support to the police officers's case. *Id.* However, when the police officers petitioned to reopen the case, they submitted an affidavit of the supervisor offering a very different version of the relevant events than that to which he testified at his deposition. *Id.* The Supreme Court found that the trial court properly found that a fraud was perpetrated on the court and issued a new trial. *Id.*

The *Perkiomen* Court relied in part on *Blake v. Marinelli*, 357 Pa. 314, 53 A.2d 550 (1947) which also confirmed that a trial Court is vested with discretion to determine whether a new trial is required when recanted testimony is discovered.

It is well-established that certain credibility determinations are within the sole discretion of the trial court and when the trial court concludes that a perjury has been committed it is within the court's discretion to grant a new trial. *Kvaternik v. Yochim*, 360 Pa. 387, 61 A.2d 815 (1948); *Blake v. Marinelli*, 357 Pa. 314, 53 A.2d 550 (1947); *Candelore v. Glauser*, 291 Pa. 582, 140 A. 525 (1928).

In Dr. Layfield's deposition, he testified that the use of Prempro caused any precancerous lesions that may not have advanced to cancerous lesions, to proliferate into cancer.

Q. Now, do you have knowledge as we sit here to date of what it was that you believe the hormone therapy caused to proliferate?

A. The hormone therapy, to my personal professional opinion, could have and would have -- would have caused proliferation of all the epithelial lesions present at the time the hormonal therapy was initiated and sustained. In other words...

Q. All right, whatever the woman -- whatever the lady already had, it would cause proliferation; is that what you're saying?

A. Right. Which in my professional opinion was a premalignant lesion that was not obligated to progress to cancer, but when induced to proliferate by the hormone replacement therapy, did indeed proliferate, which allowed it to undergo not only additional mutations because it's proliferating cells that are most at risk for having mutations occur, but is always was important for having the premalignant lesions increase in size.

N.T. 1/17/07, p.94,(Daniel's Trial).

During the deposition in the *Zandi* case, he testified that he no longer held that opinion and would not be able to testify linking Daniel's cancer with the use of Prempro as he had done at his earlier deposition in the Daniel's case because of the short duration of time in which she took Prempro.

Q. You were, as you mentioned, involved in the Daniels case. What was the reason you didn't appear live as a witness at that trial?

A. My issue was that there was no more than 18 months between the mammo -- well, actually, the resection of the cancer and her initiation of the hormone therapy, and I was concerned that that was a very short time.

Q. *So in the Daniels case you thought that Ms. Daniels, more likely than not, didn't have cancer related to hormone therapy because her duration of use was so short?*

A. *Let me phrase this correctly. I felt that more likely than not she had at least one of the late-stage lesions, meaning atypical intraductal hyperplasia or ductal carcinoma in situ.*

*And my concern was that if she had ductal carcinoma in situ, which I could not say with a reasonable degree of medical certainty that she didn't have, because it's just 18 months, right, and there was a radiograph that was maybe even a briefer time than that, as I recall, that if she had had, at the time she commenced hormonal therapy, a small invasive cancer, it wouldn't have mattered, in my mind. It would have grown a bit faster, but it would not have affected what had to be done. Okay.*

Q. *She would have had to have the same treatment regardless?*

A. *That was my opinion.*

Q. *Okay. And so you shared with Plaintiff's counsel after your deposition that you were concerned that the duration of use would mean to you that you really couldn't give an opinion that her cancer was caused by hormone therapy?*

A. *To a reasonable degree of medical certainty, that would be correct.*

Q. Yeah, you couldn't say, to a reasonable degree of medical certainty, her cancer was caused by HT?

A. Because of the short duration.

Q. Right. And that's something you shared with --

A. Exclusively the short duration. yes.

Q. You shared that with Plaintiff's counsel after the deposition?

A. Sometime after, yes.

Q. And then they decided not to call you, or did you ask not to be called?

MR. MEADOWS: Objection.

A. I said that all I was comfortable with testifying in her case was that she had a cancer that was well-

differentiated to moderately-differentiated, that it had these Ki-67 values, but I did not feel sufficiently certain that she did not have either preexisting cancer in that short period of time or that she didn't have DCIS as the lesion.

Q. (BY MS. MOOS): And so you couldn't give an opinion on cause?

A. That's correct. But that was because of the 18 months, I think, we were dealing with, very different. Because, also, you have to remember that the epidemiological data didn't really show an increase in relative risk for breast cancer until about four years, and she was under that cut point.

Deposition of Layfield, 4/25/07, pp.150-152.

*Zandi v. Wyeth*, No. 27 CV06-6744, Hennepin County, Minnesota District Court, Fourth Judicial District.

It is this Court's belief, that this recanted testimony by Dr. Layfield was discovered after the trial in Daniel, it could not have been obtained by Wyeth at the Daniel trial by reasonable diligence, it does not constitute impeachment testimony and was likely to compel a different result at the Daniel trial; thereby warranting a new trial.

**LAYFIELD'S RECANTED TESTIMONY OCCURRED AFTER TRIAL & COULD NOT BE DISCOVERED AT TRIAL BY REASONABLE DILIGENCE**

The deposition of Dr. Layfield in the Daniel case took place on April 7, 2006. It is at that point that Dr. Layfield testified as to the causal link between Prempro and Daniel's breast cancer. By letter dated December 20, 2006, Plaintiff sent their list of trial witnesses which included Dr. Layfield. (Exhibit E, Wyeth's Motion to Vacate and Withdraw this Court's Order Granting Plaintiff's Petition for Delay Damages and Entering Judgement in Favor of Plaintiffs, pg. 5). The Daniel case proceeded to trial on January 3, 2007 and ended January 29, 2007. The deposition of Dr. Layfield in *Zandi v. Wyeth*, which is where Wyeth first became aware of his recanted Daniel testimony, occurred on April 25, 2007. Given the timeline of events, Wyeth discovered Dr. Layfield's recanted testimony after the Daniel trial because the decision to not present

him as a witness prevented Wyeth from cross-examining him as to his opinions on causation and whether they have changed. Pursuant to the Pa.R.C.P. 4007.4, plaintiff's had a duty to supplement any changes or deviations in Dr. Layfield's original findings that were provided during discovery. Daniel had failed to communicate any changes or deviations to Wyeth prior to trial. Without the benefit of Dr. Layfield's deposition in *Zandi*, Wyeth could not have known of his recanted testimony in Daniel and it could not be obtained despite efforts from Wyeth.

Daniel presents to the Court an affidavit by Dr. Layfield in an attempt to refute that Dr. Layfield committed recanting of his deposition testimony. However, in exercising its discretion and scrutinizing the content of the affidavit, this Court cannot accept the representations of Dr. Layfield as credible.

Pennsylvania law is clear that court may disregard an "affidavit [that]...strains the chords of credibility, [where] it appears to totally contradict his [previous] testimony." *Lucera v. Johns-Manville Corp.*, 512 A.2d 661, 667, 354 Pa. Super. 520 (1986). In *Lucera*, our Superior Court affirmed that the lower court did not abuse its discretion in granting a motion for summary judgment where it disregarded the plaintiff's affidavit because it was not wholly credible. *Id.* In assessing the credibility of Dr. Layfield's affidavit, there are several unanswered issues which raise doubt as to the reliability of this affidavit.

Dr. Layfield's affidavit does not explain why he was unable to appear live at the Daniel trial. (Layfield Deposition, *Zandi v. Wyeth*, pg. 150). The question posed to Dr. Layfield was "what was the reason you didn't appear live as a witness at [the Daniel] trial?" His response was that he did not testify because he was "concern[ed]...there there

was no more than 18 months” of hormone therapy use for Daniel’s breast cancer diagnosis. (Wyeth’s Reply in Support of Supplemental Motion for Post-Trial Relief Based on After-Discovered Evidence of Fraud-on-the-Court, pg. 8, citing Layfield Deposition, pg.150-152).

More importantly, Dr. Layfield also makes no attempt in his affidavit to explain the discrepancy between his testimony in Daniel that hormone therapy was “a substantial contributing factor” in the development of Daniel’s breast cancer, and his statement in the *Zandi* deposition that “[he] couldn’t say, to a reasonable degree of medical certainty, her cancer was caused by HT...[b]ecause of the short duration.” *Id.*

Dr. Layfield does not reconcile his Daniel testimony that it was at most a “possibility” that Daniel already had a late-stage lesion when she started taking hormone therapy to believing it was “more likely than not.” *Id.* He does not reconcile the trial testimony that hormone therapy caused the transformation of a pre-existing, non-malignant lesion to invasive breast cancer with his *Zandi* testimony that, at most, hormone therapy caused an already existing cancerous tumor to “grow[] a bit faster.” *Id.*

Lastly, Dr. Layfield does not attempt to explain his statement in the *Zandi* deposition that he shared these new opinions with Plaintiffs’ counsel “sometime after” the Daniel deposition and that he told them that “all [he] was comfortable with testifying in her case was that she had a cancer that was well-differentiated [and] that it had [specific] Ki-67 values.” *Id.* Although Dr. Layfield confirmed in the *Zandi* deposition that he had informed Plaintiff’s counsel of his revised opinion, he subsequently denies that any conversations took place. *Id.*

For these reasons, the Court cannot accept the representations of Dr. Layfield's affidavit as credible and deny Wyeth's motion for a new trial.

**DR. LAYFIELD'S RECANTED TESTIMONY DOES NOT AMOUNT TO  
IMPEACHMENT TESTIMONY & WOULD LIKELY COMPEL A DIFFERENT  
RESULT**

Daniel argues Dr. Layfield's recanted testimony in the *Zandi* case is cumulative to Dr. Naftalis's opinion at trial and can only be used as impeachment evidence, not for granting a new trial. (Plaintiffs' Response in Opposition to Wyeth's Supplemental Motion for Post-Trial Relief Based on After Discovered Evidence of Fraud on the Court, pg. 17). Daniel's basis for her contention is that Dr. Layfield's testimony regarding the KI67 test results only provided a basis for the ultimate expert conclusion provided by Dr. Naftalis that Prempro caused Daniel's cancer and the recanted testimony could only be used to impeach, not change Dr. Naftalis's opinion. (Plaintiff's Response in Opposition to Wyeth's Supplemental Motion for Post-Trial Relief Based on After Discovered Evidence of Fraud-on-the-Court, pg. 16-17, N.T. dated 1/12/07, pg. 93).

At trial, Dr. Naftalis testified that she was not qualified to opine in the area of pathology, which is Dr. Layfield's area of expertise:

Q: With respect to the pathology, same sort of questions. You didn't do a residency in pathology?

A. No, I didn't.

Q: You're not board certified in pathology?

A. No, I am not.

Q: And again, you don't issue at your hospital, when you practice, you didn't issue pathology reports?

A. No, sir, I did not

Q: You expected a pathologist to read the slide and give you his or her interpretation; is that right?

A. That's Correct.

Q: And you relied on them.

A. Correct. Four.  
(N.T. dated 1/12/07, pg. 19-20).

Through the testimony of Dr. Naftalis, Daniel's counsel elicited testimony explaining how Dr. Layfield was asked, at the request of Daniel's counsel, to perform a KI67 test. (N.T. dated 1/12/07, pg. 74). This test required Dr. Layfield to compare the cancer from the surgical biopsy and the second surgery to determine if the proliferation of the cancer dropped after Daniel had stopped taking Prempro. (Id.). Dr. Layfield's test found that the rate of proliferation had decreased. (Id.). Dr. Layfield's determined, based on these tests, that Prempro caused the proliferation of Daniel's cancer. *supra*. The results of this test and the opinion of Dr. Layfield were used as the foundation of Dr. Naftalis testimony at trial. During trial, plaintiff's counsel points out that Dr. Naftalis relied on Dr. Layfield's reports in rendering her decisions. (N.T. dated 1/12/07, pg. 72-73). Significantly, other than Dr. Layfield's tests and findings, Dr. Naftalis made no independent findings to support her opinion that Prempro caused Daniel's cancer.

Based on her assessment and calculations of Daniel's medical records, Dr. Naftalis found that Daniel did not have a high susceptibility for cancer. (N.T. date 1/12/07, pg. 88-92, 93). Despite the positive assessment, Dr. Naftalis opined that the use of Prempro caused or was a substantial factor in causing Daniel's cancer. (N.T. dated 1/12/07, pg. 93-94). When Dr. Naftalis was then asked to explain how she arrived to her conclusions she answered:

Dr. Naftalis: Well once again, we're reviewing all of the medical records. And based on my training, my research, my experience, knowing that she was a postmenopausal woman and because of her symptoms, knowing that would be means [sic] [s]he intrinsically or endogenously had a low estrogen level, would have had susceptible cells, probably would have died with those susceptible cells

without any consequence. But because she received her estrogen and progesterone therapy, it affected those susceptible cells, turned them into cancer. And she developed breast cancer as a result of that therapy.

(N.T. dated 1/12/07, pg. 95).

Dr. Naftalis never states any other support for her opinion, other than Dr. Layfield's tests and findings. Her mention of the low estrogen levels is of no moment given that she previously testified her thorough assessment revealed that Daniel was not at high risk for cancer.

Dr. Naftalis's testimony in the aforementioned paragraph substantiate this Court's position that her sole basis for concluding that Daniel's cancer was caused by Prempro were the test and initial findings of Dr. Layfield. Dr. Naftalis first testifies that she gave a thorough evaluation of Daniel's medical records and found that she was not a high risk for cancer, which indicates that Dr. Naftalis had no independent findings of risk for cancer. Then, she discusses Dr. Layfield's pathological (KI67) testing of Daniel's cancer, which she is not qualified to do herself, and the results of those tests. Lastly, she opines that it is this test that allowed her to reach her opinion that Prempro caused Daniel's cancer.

Dr. Layfield's recanted testimony in *Zandi*, now presents Daniel with a different opinion regarding the cause of her cancer:

1. That Daniel's KI67 tests are not sufficient evidence to establish that Prempro was the cause of Daniel's cancer due to the short duration that she was taking Prempro.
2. The cancer may have been present before the use of Prempro.
3. Regardless of the use of Prempro, Daniel still would have been required to receive the same treatment for her cancer.

4. Given short duration between her cancer diagnosis and the use of Prempro, Dr. Layfield could no longer opine, within a reasonable degree of medical certainty that the use of Prempro caused Daniel's cancer.

The recanted testimony completely alters the basis for the crux of Dr. Naftalis's opinion: that due to KI67 results, she determined that Prempro was the cause of Daniel's cancer. Without the testing and findings of Dr. Layfield, Dr. Naftalis would have been unable to opine as to the cause of Daniel's cancer. Daniel presented no other causational experts other than Dr. Naftalis, which could provide independent evidence to support causation. The recanted testimony addresses the substantive evidence of Daniel's case – whether Prempro caused her cancer. Therefore, Daniel's argument that the recanted testimony of Dr. Layfield is cumulative and can only act as impeachment evidence of Dr. Naftalis is seriously flawed. The law warrants that Dr. Layfield's recanted testimony be heard by a jury.

The fact that Daniel did not produce Dr. Layfield at trial in light of his recanted testimony underscores Daniel's acknowledgement of the likeliness that this evidence would have affected the outcome of the case.

Dr. Layfield's recanted testimony in *Zandi* completely altered his causation opinion testimony in *Daniel*, yet it was never heard by the jury. The fact that the jury did not have an opportunity to hear the *Zandi* testimony was significant in that it likely would have resulted in a defense verdict because Daniel failed to prove, more likely than not, Prempro caused her cancer. Were a jury to be present with Dr. Layfield's recanted testimony at trial they would hear a very different perspective on the issue of causation and damages: that Dr. Layfield now believes that Daniel may have had cancer prior to taking Prempro and that regardless of the use of Prempro or not, she would have to

receive that same cancer treatment. (Deposition of Layfield, 4/25/07, pp.150-152. *Zandi v. Wyeth.*) With this testimony Daniel, would be confronted with the extreme difficulty of presenting expert testimony proving that Prempro caused Daniel's cancer and that resulted in pain and suffering unrelated to the pain and suffering that she would have suffered because of her preexisting cancer.

If this recanted testimony of Dr. Layfield were presented to a jury in a new trial, it is likely they would reach an entirely different outcome given the sharp contrast in his new causation testimony.

### **CONCLUSION**

Based on the foregoing analysis, this Court respectfully requests that the Order granting Defendant Wyeth's Motion for Post Trial Relief, vacating the judgment for compensatory damages and ordering a new trial be affirmed.

**BY THE COURT:**

**9-24-2008**

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**Date**

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**ALLAN L. TERESHKO, J.**

cc:

Henry F. Reichner, Esq.  
Samuel Abloeser, Esq.