IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Nicholas Murray,	:	
Plaintiff,	:	
	:	**APRIL TERM, 2013**
v.	:	
	:	**No. 1990**
Janssen Pharmaceuticals, Inc.	:	
Johnson & Johnson,	:	**Control Nos. 15113405**
Janssen Research & Development,	:	**15112736**
LLC, et al.	:	**15121493**
Defendants,	:	

ORDER

And Now this 10th day of March, 2016, the Post Trial motions of the Defendant, Janssen Pharmaceuticals, Inc., Johnson & Johnson, and Janssen Research & Development, (hereinafter referred to as "Defendant") seeking JNOV is Denied. Defendant's Motion for Remittitur is Granted. Judgment is entered in favor of the Plaintiff, Nicholas Murray, and against Defendant in the amount of $680,000.00. Plaintiff's Motion for Delay of Damages is Denied.

BY THE COURT:

Murray Vs Janssen Pharm-ORDOP
13040199000256

Hon. Victor J. DiNubile, Jr. J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Nicholas Murray,	:	
Plaintiff,	:	
	:	**APRIL TERM, 2013**
v.	:	
	:	**No. 1990**
Janssen Pharmaceuticals, Inc.	:	
Johnson & Johnson,	:	**Control Nos. 15113405**
Janssen Research & Development,	:	**15112736**
LLC, et al.	:	**15121493**
Defendants,	:	

OPINION

This Opinion arises from the Court's rulings on Post Trial motions filed by each party and an entry of judgment on a remitted jury verdict in favor of Plaintiff, Nicholas Murray, and against the Defendant, Janssen Pharmaceuticals, Inc., and Janssen Research & Developments, LLC, wholly owned companies of Johnson & Johnson (hereinafter referred to as "Defendant" or "Janssen"). Defendant's motion for judgment notwithstanding the verdict (JNOV) is denied. Defendant's motion for remittitur,[1] however, is granted and accordingly the jury's verdict of $1,750,000 is reduced to $680,000. Plaintiff's petition for delay damages is denied. Judgment is entered in favor of Plaintiff in the amount of the remitted sum of $680,000.

Plaintiff instituted suit against Janssen on the grounds that the drug manufacturer was negligent in failing to warn physicians and health care prescribers of the risk of "gynecomastia" (male breast growth) arising from the use of its drug Risperdal.[2] Janssen argued at trial that it

---

[1] The term remittitur used in this decision means molding by reducing the verdict in accordance with the Maryland cap on non-economic damages pursuant to Md. Code Ann., Cts. & Jud. Proc. § 11-108.
[2] Risperdal is the trade name for the generic drug risperidone.

was not negligent. It asserted that it complied with the requests of the Food and Drug Administration (FDA) by supplying all available information about the risks of the drug during the time it sought approval for the use of Risperdal for irritability arising from autism in children and adolescents. In addition, Janssen maintained that Plaintiff did not suffer from gynecomastia, and that even if he did that it was not caused by its drug Risperdal. The jury found otherwise. The defendant raises certain issues in Post Trial motions requesting JNOV which this Court respectfully believes are without merit. The defendant's motion for remittitur, however, is granted. Plaintiff's Petition for delay damages is denied. These issues will be discussed *ad seriatim* after a brief statement of the facts.

Plaintiff, who is now twenty-one years old, was administered Risperdal by several of his treating pediatricians, namely, Mark Langfitt, M.D., and Arvoranee Pinit, M.D., beginning in April of 2003 and terminating at the request of Plaintiff's mother on or about February of 2008. This drug was recommended by psychologist Richard Greenbaum, Ph.D., whom Dr. Langfitt had consulted because Plaintiff had difficulty sleeping, most probably arising from what Defendant's expert, pediatric psychiatrist, Nadine Schwartz, termed "autism spectrum disorder." The drug was prescribed for Plaintiff "off-label." It was not approved for pediatric use by the FDA until 2006, and then only for use with "irritability arising from autism."

Risperdal was approved by the FDA for schizophrenia in adults in the 1990s but was used off-label for pediatric patients until it was finally approved by the FDA in 2006. Although the drug is effective in treating certain mental health disorders, it has the propensity to create a hormonal imbalance in patients by increasing the levels of the hormone prolactin. This increase in prolactin levels can lead to what is termed hyperprolactinemia. In turn, this condition can lead to the development of breast tissue in males, termed gynecomastia.

It was undisputed that Janssen knew and was concerned about the fact that Risperdal could, by raising prolactin levels, lead to gynecomastia. They undertook studies to determine the relationship between hyperprolactinemia and gynecomastia prior to and during the time period Plaintiff consumed the drug. Plaintiff's counsel asserted that Janssen both knew about and encouraged the off-label use of Risperdal for children and adolescents, but failed to notify physicians, health care providers, or the FDA of the significant risk of gynecomastia that Janssen's own studies revealed. Plaintiff's counsel pointed to a 2003 study commissioned and published by Defendant, referred to at trial as the "Findling article" after the name of its lead author, which addressed long-term Risperidone treatment in children and adolescents. The final published version of the article concluded that there was no significant correlation between high prolactin levels and gynecomastia after taking Risperdal. Certain draft articles, however, referenced studies showing that during 8-12 weeks of use there was a high correlation between side effects and higher than normal prolactin levels. These studies showed that 7.8 % of the children tested who suffered prolactin related side effects, including gynecomastia, had higher than normal prolactin levels as opposed to 2.9 % of those with normal levels. This study did not appear in the final published article. It was argued at trial that the 8-12 week study should have been included in the article and the failure to do so indicated that Defendant knew of a significant risk but failed to inform the public. In addition, the plaintiff presented a pooled study comprised of five separate studies undertaken by Defendant. One of these studies was an international study termed "INT-41", which showed that after one year of use 24 out of 504, or 4.8 %, of patients on Risperdal suffered from gynecomastia.

Plaintiff's counsel, through its expert, David M. Kessler, M.D., also cited other studies indicating that Defendant knew that there was a significant risk of gynecomastia in male children

and adolescents but failed to warn healthcare providers. Dr. Kessler asserted that the data submitted to the FDA was done so by Janssen in such a fashion as to diminish the risk of gynecomastia.

Dr. Kessler also argued that the information contained in the Rispersal label vastly understated the risk. Two labels were at issue: one from 2002 and another from 2006. The 2002 label stated that there were insufficient studies concerning the effects of the use of Risperdal in children and adolescents. This label provided that gynecomastia was a "rare" side effect, which is defined by the FDA as something that occurs in 1 in every 1,000 cases. The label also stated that Risperdal did not increase prolactin any greater than other antipsychotic drugs in its class. Dr. Kessler argued that the risk was actually much greater than this, and he alleged that Defendant knew much more about the risk of gynecomastia arising from the use of Risperdal than what was contained in the label. As a result of the Findling draft and the INT-41 study in particular, Dr. Kessler testified that Defendant knew that its drug Risperdal increased prolactin levels greater than other drugs in its class and this in turn lead to a greater risk of gynecomastia in children and adolescents. By contrast the 2006 label, which represented the FDA's approval of the use of Risperdal for children and adolescents suffering from irritability from autism, contained the admonition that Risperdal actually increased the prolactin levels greater than other drugs in its class. The 2006 label also provided that the reported rate of gynecomastia was 2.3 % arising from the 1885 participants in the eighteen studies submitted to the FDA by the defendant. Dr. Kessler concluded that Janssen knew about this information contained in the 2006 label well before and during the time Plaintiff took the drug. Consequently he concluded that the defendant was negligent in failing to adequately advise physicians/health care providers of the significant risk of gynecomastia arising from the use of Risperdal.

The defense vigorously contested every aspect of Plaintiff's negligence claim. Defendant denied that there was any significant risk of gynecomastia from the use of Risperdal. It presented testimony from Danielle Coppola, M.D., who had been employed at Janssen since 2005 and who had worked with safety issues involving Risperdal. She opined that when taking into consideration the time period in which the subjects of the studies were on the drug the risk of gynecomastia was minimal. Janssen further denied that the studies cited by Plaintiff indicated that Janssen knew or had reason to know that the risk of gynecomastia was any greater than rare (as indicated in the 2002 label) during the time period plaintiff took the drug. Defendant maintained that the omitted prolactin study contained in the Findling draft and the INT-41 study did not tell the full story. The Findling draft, in what was termed "Table 21", contained data showing high prolactin levels only at 8-12 weeks of use. Janssen asserted that this data was not included in the final article because it merely showed high prolactin levels over this short period of time. Other studies show that prolactin levels usually rise after initial use of the drug and then diminish over time, and thus this one study involving an 8-12 week time period was irrelevant and insignificant when compared to the overall use of the drug. In addition, the INT-41 study was only one of five contained in the pooled studies. It was also only one of eighteen studies sponsored by Janssen. Analyzing all the studies, and considering the fact that gynecomastia occurs frequently during puberty without the use of Risperdal, the defendant argued that they had reasonably concluded that gynecomastia was not a significant risk. They alleged that the contents of the 2006 label were the result of a culmination of additional studies and did not reflect what was known when Plaintiff was first prescribed the drug. The defendant further argued that a risk/benefit analysis indicated that the benefit from the use of Risperdal clearly

outweighed any risk of gynecomastia. Despite the defendant's contentions the jury, by a vote of eleven to one, decided the issue of negligence in favor of the plaintiff.

Causation was hotly contested as well. On this issue of causation, the jury found in favor of the plaintiff by a vote of ten to two. Plaintiff's major witness was Francesco DeLuca, M.D., a pediatric endocrinologist who examined Plaintiff's breasts. He concluded that Plaintiff suffered from gynecomastia. Critical to this diagnosis was what Dr. DeLuca discovered when he palpated Plaintiff's chest. Dr. DeLuca explained that breast tissue is firm whereas fat tissue is soft; he found Plaintiff's breast tissue to be firm. He supported his conclusion with various photos of Plaintiff that were taken during the time period in Plaintiff took the drug. Dr. DeLuca also cited to Plaintiff's school, medical, and pharmacy records. He also ruled out other possible causes. In addition, a mammogram performed in November, 2015, found firm, dense tissue "suggesting gynecomastia." In consideration of the time period in which Plaintiff ingested the drug, Dr. DeLuca concluded that Mr. Murray's gynecomastia was caused by Risperdal.

Defendant's expert Alan Rogol, M.D., an academic pediatric endocrinologist, concluded otherwise. He asserted that any relationship between Risperdal and gynecomastia is rare. He pointed out that Plaintiff's medical records showed that his pediatricians never diagnosed gynecomastia, nor marked any abnormality of the chest. The jury, however, accepted the assertions of the plaintiff. It came to the reasonable conclusion that Mr. Murray suffered from gynecomastia which was caused by Risperdal, and awarded him the sum of $1,750,000 for the permanent deformity and embarrassment and humiliation arising from this condition.

Defendant seeks a JNOV on the following grounds:

Sufficiency of the Evidence As To Causation

Janssen's attorneys argue that there was insufficient evidence presented as to whether the plaintiff had gynecomastia and, if he did, that it was caused by Risperdal. The facts outlined herein belie this contention. The disputed facts created a jury question which were resolved against the defendant. ***Dorsey v. Continental Associates***, 591 A.2d 716, 718 (Pa. Super. 1991), ***Moure v. Raeuchle***, 604 A.2d 1003, 1007 (Pa. 1992).

JNOV Issues Arising From Plaintiff's Negligence Claim

Notwithstanding the argument as to causation pertaining to gynecomastia, the defense makes three arguments for JNOV involving the sufficiency of the evidence presented as to the proof of negligence. Firstly, Defendant maintains that under the "learned intermediary doctrine", which extends the drug manufacturer's duty to warn only to the treating physicians and not to the patient, Defendant is absolved from liability. Defendant's counsel argue that the treating physicians knew of the risk of gynecomastia and made the informed decision to prescribe the drug to the plaintiff, as evidenced by the fact that they would have prescribed this drug today for a similar patient. Secondly, the defendant argues that as a matter of law Dr. Kessler's testimony was insufficient to establish negligence, particularly during the time period after the issuance of 2006 label by the FDA approving the drug for autism in children and adolescents. Thirdly, Defendant argues that there can be no liability for off-label use of the drug. This Court respectfully disagrees.

Sufficiency of the Evidence/Treating Physicians Would Not Have Changed Their Respective Prescribing Decisions

Counsel for Defendant begins this argument by stating that Maryland law, the domicile of Plaintiff, applies. Under Maryland law the learned intermediary doctrine provides that drug manufacturers need only warn the prescribing physician and not the patient directly. In this Court's opinion, Maryland law does not differ from Pennsylvania law on this issue; the learned intermediary doctrine applies. Plaintiff's counsel argues that Maryland has not adopted the learned intermediary doctrine, but this issue is moot because the application of the doctrine did not affect the scope of the duty in this case. The trial court recognized this duty by advising the jury several times during the trial and finally in its charge that the duty technically extends only to the physician/health care providers. The Court however, did correctly state to the jury that if the manufacturer negligently fails to advise the physician/health care providers of a known risk it would be liable to the general public. For example, if the physician prescribes the drug to a party, not knowing of a certain risk because the manufacturer was negligent by failure to inform and the user suffers from a condition stemming from the risk, there is clear liability on the part of the manufacturer. Liability exists even though the duty did not technically extend to the user. Regardless of whether the duty is to the healthcare providers or directly to the general public, it is of no importance because Plaintiff presented ample evidence that this duty was breached.

The defense then goes on to assert that the Court's admonition was not sufficient to prevent a JNOV because Dr. Langfitt and Dr. Pinit would have prescribed the drug even if they knew of the higher risk of gynecomastia. Defendant points to testimony from Dr. Langfitt and Dr. Pinit, who stated that they stood by their medical decision to prescribe the drug. This Court, however, views the testimony differently; their testimony on this point was not clear-cut. The

pediatricians' testimony, coupled with that of Dr. Greenbaum, the psychologist who recommended the use of the drug for Plaintiff to Dr. Langfitt, was such as to create a jury question as to whether they would have prescribed Risperdal in any event. Dr. Greenbaum testified that although he was familiar with gynecomastia he was not aware in April of 2003 when he recommended the drug that there was a significant relationship between its use and gynecomastia. He further testified that if had known about this relationship he would have discussed it with the parents first before recommending its use. Dr. Langfitt stated that he knew when he prescribed Risperdal to the plaintiff that it was "off-label." As early as 2000, he did not associate Risperdal with gynecomastia. He believed that gynecomastia was rare, as stated on the pre-2006 label. Although he testified that he did a risk/benefit analysis before prescribing the drug to the plaintiff, if he had known the risk was not rare he would have discussed the issue of prescribing Risperdal to the parents. Dr. Pinit testified basically in a similar fashion. She stated that in 2003 she knew Risperdal was associated with increased weight; she did not, however, know that Risperdal could raise prolactin levels. She could not recall whether Risperdal could cause gynecomastia nor whether it was rare. She stated that she would have wanted to know these facts and would have discussed them with the parents. After analyzing all of the testimony of these individuals involved in prescribing the drug to Plaintiff, the issue of whether they would have nevertheless recommended or prescribed Risperdal was not clear. Another factual aspect that the jury could have considered was Plaintiff's mother's unequivocal testimony that she was never warned of the risk of female breast development and that she would have sought an alternative for her son if she had known of this significant risk. All of these factors created a jury question on these issues. The jury's verdict answered this question in favor of the plaintiff.

Consequently, the defendant's JNOV claim based on this reasoning must fail. ***See Dorsey*** and ***Maury***, supra.

Sufficiency of the Evidence/Dr. Kessler's Testimony was Insufficient to Prove Negligence

Dr. Kessler' testimony was clear-cut, as outlined earlier in this opinion. He maintained *inter alia* that through the omitted Findling study, as well as the INT-41 study, that the defendant knew that the risk of gynecomastia was much greater than what was contained in the pre-2006 label. It clearly created a jury issue, which was resolved in favor of the plaintiff and JNOV is clearly inappropriate. ***See Dorsey*** and ***Moure***, supra.

The defense also argues that the 2006 label approving Risperdal for use for children and adolescents for autism was adequate because it stated that Risperdal increased prolactin levels greater than other antipsychotic drugs in its class and no longer stated that the risk of gynecomastia was "rare." As a result, Defendant argues that there could be no negligence post the 2006 label. This argument neglects the obvious. Plaintiff took the drug from 2003-2008, and therefore even assuming Defendant's argument is correct, it does not overcome the fact that Dr. Kessler's testimony clearly established negligence during the three year period prior to 2006. In any event, Dr. Kessler testified that Janssen never informed the FDA of the Findling draft dealing with high prolactin levels and that it was its duty to do so. He further opined that Defendant's conduct was additionally negligent by failing to emphasize to physicians and healthcare providers of the significance of the risk of gynecomastia, which in his opinion was greater than the 2.3 % as contained in the label. This portion of Dr. Kessler's testimony, as all of his testimony, must be viewed in a light most favorable to the plaintiff. In doing so, Dr.

Kessler's post-2006 opinions concerning Defendant's negligence were certainly ample enough for the jury to accept.

Sufficiency of the Evidence/No Duty to Warn for Off-Label Use-Preemption

The defense makes a third argument for JNOV on the grounds that since the drug was used off-label Janssen cannot be liable for failure to warn. The case of ***Robak v. Abbott Labs***, 797 F.Sup. 475 (D.Md. 1992) is cited to support this contention. This case is clearly inapposite. ***Robak*** seemed to deal with a *non-foreseeable* use of the drug by the prescribing physician. Here, the defendant clearly knew that the drug was extensively used off-label to treat children and adolescents. In fact, it was Janssen who initiated studies to determine the relationship between high prolactin levels and gynecomastia arising from use of Risperdal. They did so because they wanted to have the drug approved by the FDA for children and adolescents. How can the defense now say, under these circumstances, that they cannot be held liable if they negligently failed to warn of the risk of gynecomastia merely because it was prescribed to the plaintiff off-label?

The defense interweaves this off-label use argument with the Federal preemption doctrine. It is argued that since Risperdal was used off-label Federal law precludes the plaintiff's state law negligence claim asserted in this case. ***Wyeth v. Levine***, 129 S.Ct. 1187, 1197-1198 (2009), has held to the contrary. Original manufacturers cannot assert that they are immune from state causes of action merely because they complied with FDA requirements. The duty rests with the manufacturers, who bear the responsibility for the content of their labels, to inform physicians/healthcare providers of all significant risks which they know or have reason to know. Failure to do so opens the manufacturers to state tort claims, thereby precluding Federal

preemption. Defendant seems to maintain that since, at least prior to 2006, the FDA had required no warnings pertaining to the prescribing of Risperdal for children and adolescents, Federal preemption applies barring recovery. ***Wyeth*** holds otherwise. The facts presented by Plaintiff, and accepted by the jury, were that Defendant knew of the drug's off-label use, encouraged it, and sought FDA approval. All the while, it negligently failed to advise physicians/healthcare providers as to the relationship between high prolactin levels and gynecomastia resulting from the consumption of Risperdal. Under these circumstances, Janssen's JNOV claim must fail.

Liability of Johnson & Jonhson and Janssen Research and Development, LLC

Plaintiff's counsel argue that two of the defendant entities, namely, Johnson & Johnson and Janssen Research and Development, LLC, should be absolved from liability due to failure of proof. This Court's disagrees. Initially, these companies appeared in the promotional materials and internal communications that were admitted into evidence. No specific objection was ever made at trial to the effect that these documents did not pertain to a particular defendant entity. In addition, the Court's instruction to the jury throughout the trial, as well as during its charge, referred to all three entities as "Janssen." The questions to be answered by the jury on the verdict sheet referred to Janssen as well. No request was ever made to distinguish the companies for liability purposes. It also appeared from the trial that all three companies were inextricably interwoven. Consequently, this assertion must fail.

Remittitur Pursuant to Maryland Law

Because Plaintiff is domiciled in the state of Maryland, the law of Maryland controls the damage issue in this case. Maryland imposes a cap on the amount of "noneconomic damages" available to a plaintiff in a personal injury case, and this cap is applicable in the instant matter. Pursuant to **Md. Code Ann., Cts. & Jud. Proc. § 11-108** the maximum allowable award available to Plaintiff is $680,000.[3] Therefore, the jury's original verdict of $1,750,000 is reduced to this amount.

Plaintiff's counsel asserts that Maryland law does not apply in the instant matter, and therefore the Maryland's cap on damages should not operate to reduce his award. Two arguments are advanced in support of this position, but neither is persuasive. First, it is asserted that the Maryland cap is part of the procedural and not substantive law of that state. If this were true, the cap would not be applicable because Pennsylvania as the forum state must apply its own procedural law. ***Commonwealth v. Sanchez***, 716 A.2d 1221, 575-576 (Pa. 1998). In support of the contention that the Maryland cap is procedural in nature, Plaintiff's counsel point to the fact that the Act imposing the cap is found in the procedural rules section of the Maryland law and not under general statutes. Nonetheless, this Court cannot agree that any rule or statute pertaining to recovery of damages in a tort case is merely procedural in nature. The issue of damages and any limitation on its award is clearly substantive. Substantive law is "the portion of the law which creates the rights and duties of the parties to a judicial proceeding..." ***Wilson v.***

[3] The Maryland Act provides that pain and suffering awards cannot exceed $500,000 for causes of actions arising on or after October 1, 1994, with an additional $15,000 to be added to the cap each year beginning on October 1, 1995, depending on when the cause of action arises. Plaintiff began taking the drug in 2003; it is assumed for purposes of calculation that the cause of action arose at this time. The verdict was rendered in November, 2015. Therefore, the sum of $180,000 (15,000 times twelve years) is added to the $500,000 base amount, totaling $680,000.

Transport Ins. Co., 889 A.2d 563, 571 (Pa. Super. 2005) ***(citing Ferraro v. McCarthy-Pascuzzo***, 777 A.2d 1128, 1137 (Pa. Super. 2001). The very heart of a tort action is the damages which stem from its commission. Damages and the issues arising from them are far removed from any procedural rules that may be promulgated. The fact that the rule of law limiting damages is found in a particular section of the Maryland code is of no moment. While not binding on this Court, it should be noted that Maryland's highest court has determined that the cap is part of the substantive and not procedural law of Maryland. ***See Erie Ins. Exchange v. Heffernan***, 925 A.2d 636, 653 (Md. 2007)

The second argument that the full award should stand by application of Pennsylvania law, although not without logic, cannot be accepted either. It is argued that even if the Maryland cap is regarded as substantive, it was nonetheless meant to apply only to suits brought in Maryland. Plaintiff argues that the cap was enacted to protect from excessive verdicts defendants doing business within the state of Maryland and the insurance companies who them, and to lower liability insurance premiums within the state. With these facts in mind, it is further argued that Pennsylvania therefore would have no interest in limiting damages in this case where the suit involved a non-resident plaintiff and a defendant corporation domiciled (principal place of business) outside of Pennsylvania. The purpose of the cap, Plaintiff asserts, was not to affect the parties in this litigation. This Court respectfully disagrees with this analysis. Although it is conceded that this position has considerable merit, it cannot overcome the wording of the law itself and the basic Pennsylvania conflict of law principles which govern this case. First of all, there is absolutely no wording contained in the Maryland statute confining its application to only those suits brought within the state of Maryland. Secondly, and most importantly, it is clear in applying Pennsylvania rules as to the choice of law analysis that Plaintiff's argument must fail.

Pennsylvania choice of law principles places great emphasis on the relationship of the state to the litigation. ***See In re Estate of Agostini***, 457 A.2d 861, 871 (Pa. Super. 1983). Applying this principle, Maryland clearly has the most significant contacts to the issues arising from this litigation. The plaintiff was and still is a resident of Maryland. Risperdal was recommended and proscribed by health care providers located in Maryland. Plaintiff purchased and ingested the drug in Maryland and was injured and treated there as well. Under these circumstances, Maryland has a much greater relationship to this case than Pennsylvania. The latter is merely the forum state where Plaintiff chose to sue. To hold otherwise would result in a circumvention of Maryland law. The plaintiff whose domiciled state has a restriction on pain and suffering awards could sue Defendant here or any other state with no such restrictions. The law of the state with the most significant ties then would be ignored. This is exactly the situation which would occur here if the Court would apply Pennsylvania damage law to this case.

Plaintiff further asserts, in support of its argument to apply Pennsylvania law to this case, that this Court already has done so by applying Pennsylvania law to the negligence issues. Therefore, it is argued that it would be inconsistent not to do so as to the damage issue as well. There is no inconsistency here. The trial court in accordance with the forum state's conflict of laws principles applied Pennsylvania law to the negligent failure to warn claim; but did so only because there was no conflict between the law of the two states. If there had been, then this Court would have been obligated to apply Maryland law. It is therefore not inconsistent for the Court to apply Maryland law to the limitation of damage issue, since there exists a clear conflict. For the foregoing reasons, the Court respectfully rejects the argument of Plaintiff's counsel.

Plaintiff's Petition for Delay Damages

Plaintiff's motion for delay damages must be denied as untimely filed. Pennsylvania Rules of Civil Procedure Rule 238(c) provides that such a motion must be filed within ten days after verdict or notice of decision. An attempted filing occurred on November 24, 2015, well over ten days after the rendering the jury's verdict of November 9, 2015.

Defendant timely filed Post Trial motions on November 19, 2015. On November 24, 2015, Plaintiff's counsel, in an attempt to circumvent Rule 238, filed a cross-motion for delay damages accompanying their reply to Defendant's Post Trial motions.[4] There is nothing in the Rules that allows a late filing for delay damages to be incorporated into a reply to Post Trial motions. Rule 227.1 permits the adverse party against whom motions were filed to answer these motions. Rule 227.1(c) also allows for the answering party to file its own Post Trial motion within ten days of the filing of the first Post Trial motion. This Rule 227.1, however, does not grant a right to file for delay damages under it for two reasons. First, Rule 238 specifically requires a motion for delay damages to be filed within ten days of verdict or decision. A ruling to the contrary would be directly contra to Rule 238. Second, the wording of Rule 227.1(c) limits the replying party to substantive post trial issues. A motion for Post Trial relief may not be filed to proceedings which do not constitute a trial. ***See* Note under Rule 227.1(c)**. An example of a proper motion permitted under this rule is as follows. Take a situation where Plaintiff has won a negligence verdict in which the gross sum awarded was $100,000. The jury also found the plaintiff 50% contributorily negligent. The trial judge then accordingly molds the verdict to $50,000. The defense timely files a motion on the tenth day seeking JNOV/new trial. The plaintiff then properly files its own Post Trial motion attacking the jury's finding of

[4] Defendant countered with a Motion to Strike Plaintiff's Cross-Motion. In light of this Court's ruling denying delay damages, the Motion to Strike is moot.

comparative negligence, requesting JNOV and a restoration of the full award of $100,000. This motion by the plaintiff would be considered timely filed under the Rule as long as it was done within ten days of Defendant's Post Trial motion filing. It is a proper Post Trial motion because it deals with what took place at the trial itself. Here Plaintiff tried to use a reply to assert delay damages under the guise of Post Trial motions. This attempt is improper. Rule 227 cannot be used as a vehicle to circumvent a late delay damage filing. Consequently, Plaintiff's motion for delay damages is denied. Judgment is entered accordingly.

BY THE COURT:

March 10, 2016

Hon. Victor J. DiNubile, Jr. J.