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Only the Westlaw citation is currently available.

Superior Court of Pennsylvania.
Lois **EISER**, Administratrix of the Estate of William M. **Eiser** and Lois **Eiser**, Individually, Appellant,
v.
BROWN & WILLIAMSON **TOBACCO** CORPORATION and the **Tobacco** Institute, Appellees.

No. 191 EDA 2004.
Filed Jan. 19, 2006.

**Background:** Smoker and wife brought action against **tobacco** corporation and **tobacco** institute alleging numerous causes of action after smoker was diagnosed with lung cancer. The Court of Common Pleas, Philadelphia County, granted nonsuit or directed verdict on several of smoker's claims, and entered jury verdict in favor of **tobacco** corporation and institute on remaining claims. After smoker's death, smoker's wife brought appeal.

**Holdings:** The Superior Court held that:
( 1) compulsory nonsuit of smoker's claims of negligent representation, strict liability, breach of warranty, and concert of action was warranted, and
(2) exclusion of expert and fact witness testimony offered by smoker was warranted.

Affirmed.

West Headnotes

**[1 Appeal and Error 30 ⚿1079**

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases

Decedent's wife, who was also executrix of decedent's estate, waived for appellate review all but two issues raised against tobacco entities, when she failed to set forth issues raised on appeal in a concise manner, hindering the trial court's ability to discuss all raised issues, and thus hampering appellate review of all but the two issues meaningfully addressed by the trial court. Pa.R.A.P.1925(b).

**[2] Pretrial Procedure 307A ⚿206**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak206 k. Effect. Most Cited Cases

Videotaped deposition from smoker who contracted terminal lung cancer, which deposition explained that smoker had seen print advertisements stating that his brand of cigarettes tested lowest in tar and nicotine before and after smoker had switched to smoking such brand exclusively, did not present sufficient evidence to defeat compulsory nonsuit of smoker's claims of negligent representation and strict liability against tobacco corporation; deposition failed to show that smoker's cancer was result of justifiable reliance on any alleged misrepresentation, advertisements did not claim that brand of cigarettes reduced the risks of contracting cancer, and smoker was warned of such cancer risks.

**[3] Sales 343 ⚿261(6)**

343 Sales
343VI Warranties
343k259 Making and Requisites of Express Warranty
343k261 Statements Constituting Warranty
343k261(6) k. Statements as to kind, quality, condition, or value. Most Cited Cases

**Sales 343 ⚿284(4)**

343 Sales
343VI Warranties
343k281 Breach

343k284 Warranty of Quality, Fitness, or Condition

343k284(4) k. Fitness for purpose intended. Most Cited Cases

Evidence of print advertisements stating that the brand of cigarettes chosen by smoker who contracted terminal lung cancer tested lowest in tar and nicotine was insufficient to defeat compulsory nonsuit of smoker's claims of breach of warranty against tobacco corporation; the advertisements did not expressly warrant that smoker's brand of cigarettes was a safe alternative to other brands or that smoking such brand would reduce the risk of cancer, and there was no evidence that cigarettes were below commercial standards or unfit for their intended purpose as required for breach of an implied warranty. 13 Pa.C.S.A. § 2313(a).

**[4] Conspiracy 91 ⚿2**

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k1 Nature and Elements in General
91k2 k. Combination. Most Cited Cases

Smoker who contracted terminal lung cancer failed to establish what person, if any, acted in concert with the alleged wrongdoer to cause the smoker's harm, as required to establish a concert of action claim against tobacco corporation, and therefore, compulsory nonsuit and dismissal of such claim was warranted.

**[5] Evidence 157 ⚿512**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due care and proper conduct in general. Most Cited Cases

Portions of expert testimony sought to be admitted in action against tobacco corporation by smoker who contracted terminal lung cancer, which testimony concerned general information on addiction, youth smoking, and the timing of public knowledge of smoking hazards, was irrelevant to smoker's action, which instead concerned whether tobacco corporation harmed the smoker through misinformation or misconduct, and therefore, exclusion of such testimony was warranted. Rules of Evid., Rules 401, 40342 Pa.C.S.A.

**[6] Evidence 157 ⚿505**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k505 k. Matters of opinion or facts. Most Cited Cases

**Pretrial Procedure 307A ⚿45**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts taken as established or denial precluded; preclusion of evidence or witness. Most Cited Cases

Expert testimony of former **tobacco** company employee offered in action against **tobacco** corporation brought by smoker who contracted terminal lung cancer, which testimony sought to show that **tobacco** company approved a deceptive advertising campaign for smoker's brand of cigarette, concerned a question for the jury as to whether the advertising campaign was deceptive and was also essentially factual in nature, and therefore, exclusion of witness was warranted; additionally, witness had not been identified as a fact witness.

**[7] Pretrial Procedure 307A ⚿45**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts taken as established or denial precluded; preclusion of evidence or witness. Most Cited Cases

**Trial 388 ⇐56**

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative evidence in general. Most Cited Cases

Limitation of testimony from proposed witness, in action against tobacco corporation brought by smoker who contracted terminal lung cancer, which witness was presented as a fact witness and which was also presented to offer expert rebuttal testimony regarding nicotine delivery methods, was warranted; tobacco corporation was prejudiced by inability to depose witness as a fact witness, corporation had earlier been assured that witness was unavailable as an expert witness, and evidence regarding nicotine delivery was cumulative of evidence already presented. Rules of Evid. 401, 403, 4003.5(b), 4003.5(c), 42 Pa.C.S.A.

Appeal from the Judgment Entered January 8, 2004 In the Court of Common Pleas of Philadelphia County Civil, March Term, 1999, No. 4367.

Before: MUSMANNO, GANTMAN, and TAMILIA, JJ.

MEMORANDUM:

***1** Appellant, Lois Elser, as Administratrix of the estate of William M. **Eiser** and individually, appeals from the judgment entered on a jury verdict in the Philadelphia County Court of Common Pleas in favor of Appellees, Brown & Williamson **Tobacco** Corporation ("B & W"), and The **Tobacco** Institute. We affirm.

The relevant facts and procedural history of this appeal are as follows. Appellant's decedent, William M. **Eiser**, began smoking cigarettes in 1959, at the age of 14. In 1964, the United States Surgeon General issued the first government warning that smoking cigarettes posed potential health hazards. Subsequently, B & W began producing and advertising Carlton cigarettes as a low-tar and low-nicotine alternative to other brands. The decedent began smoking Carlton cigarettes in 1973. Each pack of Carlton contained the Surgeon General's warning that smoking is dangerous.[FN1] The decedent smoked Carlton cigarettes exclusively from 1973 until 1998, when he was diagnosed with lung cancer.

> FN1. In 1966, Congress enacted legislation requiring cigarette manufacturers to place caution labels on all cigarette packs and advertisements, stating smoking may be hazardous. In 1970, Congress enacted legislation requiring warning labels on all cigarette packs and advertisements, stating smoking is dangerous.

The decedent and his wife filed suit against B & W and ten other defendants in March 1999. The only cigarette manufacturers named as defendants were B & W and its predecessor, American Tobacco Company, the manufacturers of Carlton cigarettes.[FN2] The complaint alleged numerous causes of action, including fraud, negligent misrepresentation, strict liability under Section 402B of the Restatement (Second) of Torts ("402B liability"), breach of implied warranty, breach of express warranty, design defect, failure to warn under Section 402A of the Restatement (Second) of Torts, civil conspiracy, concert of action, violation of consumer protection laws, and loss of consortium. The decedent passed away in December 1999, during the pendency of the litigation.

> FN2. Although the decedent had smoked a variety of brands prior to switching to Carlton in 1973, the suit named none of the manufacturers of those other brands as a defendant.

Prior to trial, the court granted Appellees' motion *in limine* to preclude the proposed expert testimony of K. Michael Cummings, Ph .D., regarding the alleged efforts of cigarette manufacturers to "hook" young smokers. The court precluded this

testimony, because it was undisputed Appellant began smoking Carlton cigarettes as an adult. The court permitted Dr. Cummings to testify as an expert in the areas of epidemiology and smoking cessation, but declined to qualify him as an expert in **tobacco** Industry "history." Moreover, the court did not permit Dr. Cummings to offer an opinion regarding how the **tobacco** industry's marketing and advertising practices allegedly undermined public health.

After the court declined to qualify Dr. Cummings as an expert **tobacco** industry historian, Appellant sought to present Dr. Louis Kyriakoudes to testify in that capacity. The court precluded Dr. Kyriakoudes as an expert witness, because Appellant identified him after the discovery deadline. The court also "precluded Dr. Louis Kyriakoudes because [Appellant] intended to introduce through Dr. Kyriakoudes the testimony the Court had ruled Dr. Cummings could not give." (Trial Court Opinion, filed 2/1/05, at 9).

***2** One week prior to the discovery deadline, Appellant identified Mr. James Bogie, a former employee of American Tobacco Company, as an expert witness. The court granted Appellees' Motion *in limine* to preclude Mr. Bogie from testifying as an expert because his proposed testimony regarding his employer's advertising techniques was merely factual. The court further precluded Mr. Bogie from testifying as a fact witness because Appellant had not identified him in that capacity.

In her answers to interrogatories, Appellant identified Dr. Jeffrey Wigand as an expert witness in the design and manufacture of cigarettes. Before trial, but after the discovery deadline had passed, Appellant informed the court Dr. Wigand could not attend trial due to a medical condition. The court permitted Appellant to substitute Dr. William Farone as an expert in the design and manufacture of cigarettes. In that capacity, Dr. Farone testified regarding the "freebase gas" aspects of the Carlton cigarette design, which permitted powerful, instantaneous nicotine delivery *via* gas particles too small to be trapped by a filter.

On the eve of trial, Appellant sought to produce Dr. Wigand as a fact witness. The court precluded Dr. Wigand from testifying as a fact witness, because Appellant had failed to identify him as a potential fact witness during the applicable discovery period. During trial, Appellant sought to produce Dr. Wigand as an expert witness to rebut Appellees' expert testimony that Carlton cigarette filter pads trapped virtually all nicotine particles produced by burning. The court also denied the request because Dr. Farone had already testified to the "freebase gas" aspects of the Carlton nicotine delivery design during Appellant's case-in-chief.

Prior to trial, Appellant withdrew her claim alleging failure to warn. At trial, after Appellant presented her case-in-chief, Appellees moved for nonsuit on a number of claims. The trial court entered compulsory nonsuit on all claims against the non-manufacturer defendants. The court also entered compulsory nonsuit on Appellant's negligent misrepresentation, 402B liability, breach of express and implied warranty, and concert of action claims against B & W and American Tobacco Company. At the close of all evidence, the court granted Appellees' motion for a directed verdict on Appellant's claims of statutory consumer protection violations. Appellant's remaining claims went to the jury, which found for Appellees. On December 16, 2003, the trial court denied Appellant's post-trial motions for a new trial, removal of nonsuit, and judgment notwithstanding the verdict ("JNOV"). On January 8, 2004, the court entered judgment on the verdict.

Appellant filed a timely notice of appeal on January 9, 2004. The court directed Appellant to file a concise statement of matters complained of on appeal. Appellant filed a concise statement setting forth close to thirty separate issues, some containing sub-issues. The trial court filed an opinion suggesting Appellant's plethora of claims impeded the court's ability to prepare an opinion addressing the issues; and, thus, Appellant's issues should be

waived on appeal. Nevertheless, the court prepared an opinion discussing to some extent each of Appellant's numerous issues.

***3** On appeal, Appellant presents the following issues for our review:

> WHETHER THE [TRIAL] COURT ERRED BY GRANTING NONSUIT OR DIRECTED VERDICT ON CERTAIN COUNTS EVEN THOUGH THE RECORD CONTAINED PROOF ESTABLISHING EVERY ELEMENT OF EACH DISMISSED CAUSE OF ACTION?
>
> WHETHER THE [TRIAL] COURT ERRED BY PRECLUDING ALL OR PART OF THE TESTIMONY OF FIVE PLAINTIFF'S WITNESSES?
>
> WHETHER THE [TRIAL] COURT ERRED IN ALLOWING DEFENDANTS TO ARGUE AT TRIAL THAT CARLTON CIGARETTES ARE SAFER THAN OTHER CIGARETTES AFTER DEFENDANTS HAD ALREADY JUDICIALLY ADMITTED OTHERWISE AND THERE WAS NO COMPETENT SCIENTIFIC EVIDENCE TO SUPPORT SUCH ARGUMENTS?
>
> WHETHER THE TRIAL COURT ERRED IN BARRING PLAINTIFF FROM DEPOSING TWO PARTY DEFENDANTS AND FROM CONDUCTING OTHER NECESSARY DISCOVERY?
>
> WHETHER THE TRIAL COURT ERRED IN EXCLUDING ALL EVIDENCE PERTAINING TO DEFENDANTS' SALESMAN, WHO MISREPRESENTED THE HEALTH BENEFITS OF CARLTON CIGARETTES TO THE PLAINTIFF'S DECEDENT?
>
> WHETHER THE TRIAL COURT ERRED IN EXCLUDING FTC FINDINGS OF FACT AND RESEARCH THAT DEFENDANTS' CARLTON ADVERTISEMENTS CONTAINED MISREPRESENTATIONS THAT DECEIVED CONSUMERS?
>
> WHETHER THE TRIAL COURT ERRED IN RULINGS WHICH HELD MUCH OF PLAINTIFF'S EVIDENCE PREEMPTED SINCE SUCH HOLDINGS WERE CONTRARY TO ESTABLISHED FEDERAL AND PENNSYLVANIA LAW?
>
> WHETHER NUMEROUS OTHER RULINGS BY THE TRIAL COURT ESTABLISHED A PATTERN OF BIAS AND ABUSES OF DISCRETION JUSTIFYING REVERSAL AND REMAND?

(Appellants' Brief at xii).

[1] Prior to undertaking an analysis of the numerous issues set forth in Appellant's brief, we first determine whether Appellant has properly preserved any of her issues for appellate review. In *Kanter v. Epstein*, 866 A.2d 394 (Pa.Super.2004), *appeal denied*, 584 Pa. 678, 880 A.2d 1239 (2005), the appellants filed a fifteen page Rule 1925(b) statement containing more than fifty issues. The Superior Court held the appellants' "voluminous" Rule 1925(b) statement failed to "properly identify the issues that [the appellants] actually intended to raise before the Superior Court[.]" *Id.* at 401. This Court recognized the trial court prepared a lengthy opinion which touched upon the issues raised. Nevertheless, this Court noted the trial court was "unable to provide a comprehensive analysis of the issues it did address due to the preposterous number of issues identified by the [appellants]." *Id.* This Court determined the appellants' "failure to set forth the issues that they sought to raise on appeal in a concise manner impeded the trial court's ability to prepare an opinion addressing the issues that [the appellants] sought to raise before this Court, thereby frustrating this Court's ability to engage in a meaningful and effective appellate review process." *Id.* Given the trial court's necessarily cursory review of the myriad claims of error, this Court determined the appellants had "failed to preserve any of their issues for appellate review." *Id.* "By raising an outrageous number of issues, the [appellants] have deliberately circumvented the meaning and

purpose of Rule 1925(b) and have thereby effectively precluded appellate review of [all] the issues they now seek to raise." *Id.*

***4** Instantly, Appellant filed a fifteen page Rule 1925(b) statement containing some thirty issues. The trial court prepared a lengthy opinion in response. The opinion discusses in some depth why the court entered various compulsory nonsuits, and why it limited or precluded certain expert testimony. The remainder of the opinion is, through no fault of the trial court, cursory in nature. Accordingly, we conclude Appellant has preserved her issue challenging the trial court's refusal to remove the compulsory nonsuits, as well as her issue challenging the court's limitation or preclusion of certain expert testimony. However, Appellant has failed to preserve the remainder of the issues she purports to raise on appeal. *See id.* Given the trial court's necessarily cursory discussion, our meaningful review of Appellant's issues three through eight is hampered. *Id.* Appellant has circumvented the meaning and purpose of Rule 1925(b) and has thereby waived all but her first two claims raised on appeal. *Id.*

In her first issue, Appellant contends she presented sufficient evidence of negligent misrepresentation, 402B liability, breach of express and implied warranty, and concert of action to defeat Appellees' motions for compulsory nonsuit. Specifically, Appellant asserts the elements of fraud and negligent misrepresentation are identical, except that fraud requires knowing or reckless misrepresentation, while negligent misrepresentation merely requires lack of reasonable care. Appellant also argues the elements of fraud and 402B liability are identical, except 402B liability does not require any showing of intent. Instead, Section 402B imposes strict liability for harm resulting from a consumer's justifiable reliance on even innocent misrepresentations contained on a product label or in an advertisement. Because the court permitted the jury to consider Appellant's cause of action for fraud, Appellant insists the court should have permitted the jury to consider her 402B liability and negligent misrepresentation claims as well, in the nature of "lesser included" torts.

Appellant further alleges B & W, through its advertising, expressly represented that Carlton cigarettes contained only $1/10^{th}$ the tar and nicotine of other cigarettes, as determined by the FTC testing method. Appellant argues B & W's internal testing showed this statistic was inaccurate, and Appellees knew Carlton smokers would draw far more nicotine and tar than the levels advertised.[FN3] According to Appellant, B & W therefore breached an express warranty regarding the levels of tar and nicotine in its product. Additionally, Appellant insists Appellees breached an implied warranty that Carlton cigarettes were a safer alternative to other brands of cigarettes.

> FN3. The FTC testing method employs a machine to measure the amount of tar and nicotine delivered through precise, identical, evenly-spaced draws on a lit cigarette. Under this method, Carlton "soft pack" cigarettes produce only 1 mg. tar and .1 mg. nicotine per cigarette. According to Appellant, actual smokers generally compensate by taking more forceful and frequent draws on a lit cigarette than those taken by the FTC test machine. Thus, the amount of tar and nicotine delivered to most actual Carlton smokers is greater than the amount measured by the FTC test machine.

Appellant additionally asserts the court should have permitted the jury to consider her concert of action claim. Specifically, Appellant argues the tort of civil conspiracy has a "higher standard of proof" than the tort of concert of action, making "concert of action easier to prove than conspiracy." (Appellant's Brief at 35). Because the court permitted the jury to determine her civil conspiracy claim, Appellant submits the court should have permitted the jury to determine her concert of action claim as well. Appellant concludes the court erred in granting Appellees' motions for nonsuit for negligent

misrepresentation, 402B liability, breach of express and implied warranty, and concert of action. After careful review, we disagree.

***5** Our standard of review is as follows:

> An order denying a motion to remove a compulsory nonsuit will be reversed on appeal only for an abuse of discretion or error of law. A trial court's entry of compulsory nonsuit is proper where the plaintiff has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action, and it is the duty of the trial court to make a determination prior to submissions of the case to a jury. In making this determination the plaintiff must be given the benefit of every fact and all reasonable inferences arising from the evidence and all conflicts in evidence must be resolved in plaintiff's favor.

*Alfonsi v. Huntington Hosp., Inc.*, 798 A.2d 216, 218 (Pa.Super.2002). Negligent misrepresentation has four essential elements. *Gibbs v. Ernst*, 538 Pa. 193, 210, 647 A.2d 882, 889 (1994). The elements necessary to establish negligent misrepresentation are:

> (1) a misrepresentation of a material fact; (2), the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the misrepresentation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

*Id.* "[N]egligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words." *Id.*[FN4]

> FN4. Intentional misrepresentation has six essential elements. "The elements of fraud or intentional misrepresentation, are (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Presbyterian Medical Center v. Budd*, 832 A.2d 1066, 1072 (Pa.Super.2003) (citing *Gibbs, supra* at 207, 647 A.2d at 889).

Further, Pennsylvania has adopted Section 402B of the Restatement (Second) of Torts. *Klages v. General Ordnance Equipment Corp.*, 240 Pa.Super. 356, 367 A.2d 304 (Pa.Super.1976). This Court has stated:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

*Id.* at 307–08 (quoting Restatement (Second) of Torts § 402B). Misrepresentation under Section 402B, like fraud, requires a showing that the plaintiff's justifiable reliance on a misrepresentation was the proximate cause of his physical harm. *Id.* at 312 (citing Restatement (Second) of Torts § 402B, comment j).

Additionally, to establish breach of an express warranty, a plaintiff must show the defendant made an express representation, the product did not perform as warranted, and caused injury. 13 Pa.C .S. § 2313(a). This Court has noted:

> Given that express warranties are specifically negotiated (rather than automatically implied by

law), it follows that to create an express warranty, the seller must expressly communicate the terms of the warranty to the buyer in such a manner that the buyer understands those terms and accepts them.

***6** *Goodman v. PPG Industries, Inc.*, 849 A.2d 1239, 1243 (Pa.Super.2004), *affirmed*, 584 Pa. 537, 885 A.2d 982 (2005). Further, an implied warranty of merchantability is a warranty that the goods are fit for the ordinary purposes for which such goods are used. *Moscatiello v. Pittsburgh Contractors Equipment Co.*, 407 Pa.Super. 363, 595 A.2d 1190, 1193 (Pa.Super.1991), *appeal denied*, 529 Pa. 650, 602 A.2d 860 (1992) (citing 13 Pa.C.S.A. § 2314). In contrast to negligent misrepresentation, 402B liability, and express warranties, an implied warranty does not require the seller of a product to make any express statement: "Implied warranties are implied by law to 'protect buyers from loss where goods purchased are below commercial standards or unfit for the buyer's purpose." ' *Goodman, supra* at 1245 (citing *Turney Media Fuel, Inc. v. Toll Bros., Inc.*, 725 A.2d 836, 840 (Pa.Super.1999)).

Additionally, liability under a concert of action theory is grounded in Section 876 of the Restatement (Second) of Torts. *Skipworth by Williams v. Lead Industries Ass'n, Inc.*, 547 Pa. 224, 236, 690 A.2d 169, 174 (1997). This Court has previously stated;

> The theory of liability underlying the cause of action known as "concert of action" is set forth in [Section] 876 of the RESTATEMENT (SECOND) OF TORTS (1977):
>
> > For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
> >
> > (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> >
> > (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance and encouragement to the other to so conduct himself, or
> >
> > (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

*Cummins v. Firestone Tire & Rubber Co.*, 344 Pa.Super. 9, 495 A.2d 963, 969 (Pa.Super.1985) (quoting Restatement (Second) of Torts § 876). A claim of concert of action cannot be established if the plaintiff is unable to identify the wrongdoer or the person who acted in concert with the wrongdoer. *Skipworth, supra*. In determining liability under Section 876, "the factors are the same as those used in determining the existence of legal causation where there has been negligence." *Cummins, supra* at 969 (quoting Restatement (Second) of Torts § 876, comment d). Finally, we note this Court may affirm on any basis. *See Spece v. Erie Ins. Group*, 850 A.2d 679, 683 n. 2 (Pa.Super.2004) (noting Superior Court may affirm trial court by reasoning other than that employed by trial court).

[2] Instantly, the decedent's videotaped deposition was played for the jury at trial. The decedent testified he saw print advertisements in the early 1970s, stating Carlton cigarettes by the FTC method, had repeatedly tested lowest in tar and nicotine among all cigarette brands. The decedent testified he saw the Surgeon General's warning on Carlton advertising and cigarette packs before and after he switched exclusively to Carlton cigarettes in 1973. The decedent admitted Carlton advertising did not state Carlton was a safe alternative to other brands, and he understood Carlton cigarettes were not risk free. Nevertheless, the decedent believed the potential health risks associated with smoking Carlton cigarettes were less than the risks associated with smoking brands containing higher levels of tar and nicotine. Importantly, the decedent testified he began smoking Marlboro cigarettes in 1959 and was a pack-a-day smoker by age 15. He smoked Marlboro cigarettes exclusively until 1969. He then switched to Raleigh cigarettes exclusively for ap-

proximately four years. Thus, the decedent had been a daily smoker for some 13 years before he switched to Carlton cigarettes. The decedent admitted he did not become aware of advertisements claiming Carlton contained only one-tenth the tar and nicotine of other brands until 1979. At that point, the decedent had been a smoker for 20 years and a Carlton cigarette smoker for 6 years.

***7** On these facts, Appellant failed to show the decedent's injury, *i.e.,* contracting terminal lung cancer, was the result of his justifiable reliance on any alleged misrepresentation regarding the safety of Carlton cigarettes. *See Gibbs, supra.* Instead, the evidence showed the decedent was aware of his increased risk of contracting lung cancer throughout his adult life as a smoker, including the significant number of years he smoked cigarettes other than Carlton. Although the decedent switched to Carlton allegedly to reduce potential health consequences, he understood smoking Carlton cigarettes was not risk free and that contracting lung cancer could result in any event. *See id.*

Moreover, it is not disputed that Carlton cigarettes, in fact, tested lowest in tar and nicotine under the FTC method. Regardless of whether the FTC method accurately measured the amount of tar and nicotine delivered to human smokers, Appellees did not advertise that smoking Carlton cigarettes reduced the risk of contracting cancer. In fact, one of the several Surgeon General's warning labels on Carlton cigarettes affirmatively stated smoking causes cancer. Thus, Appellant's proof was insufficient to establish negligent misrepresentation. *Id.* FN5

FN5. Recently, the Illinois Supreme Court similarly ruled a cigarette manufacturer does not defraud consumers by marketing "light" cigarettes. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 2005 WL 3434368 (Ill. Dec 15, 2005). The Illinois Supreme Court held a manufacturer's labeling and advertising of cigarettes as "low tar" or "light" does not improperly mislead consumers about the health consequences of smoking cigarettes. *Id.*

For these same reasons, Appellant also failed to establish a claim for 402B liability. *See Klages, supra.* Appellant has not shown the physical harm suffered by the decedent was caused by his justifiable reliance upon any misrepresentation regarding the safety of Carlton cigarettes. *See id.* Instead, the decedent understood smoking Carlton cigarettes was not risk free, and the decedent understood he might contract lung cancer despite his switch to Carlton cigarettes. Appellees did not advertise that smoking Carlton reduced one's risk of contracting cancer. *Id.*

[3] Further, Appellees did not expressly warrant that Carlton cigarettes were a safe alternative to other brands or that smoking Carlton cigarettes reduced the risk of contracting lung cancer. *See Goodman, supra.* Instead, Appellees accurately advertised the fact that Carlton was lowest in tar and nicotine among all cigarette brands tested under the FTC method. Moreover, Appellant failed to present any evidence that Carlton cigarettes were below commercial standards or unfit for their intended purpose. *See Id.*

[4] Finally, Appellant failed to establish what person, if any, acted in concert with the alleged wrongdoer to harm Appellant's decedent. *See Skipworth, supra; Cummins, supra.* Although the trial court granted compulsory nonsuit and dismissed Appellant's claim on the basis Pennsylvania has not formally recognized the "concert of action" doctrine, we affirm on the basis Appellant failed to establish the necessary elements to sustain the cause of action. *See Skipworth, supra; Spece, supra.* The trial court properly granted Appellees' motion for compulsory nonsuit on Appellant's claims of negligent misrepresentation, 402B liability, express and implied warranty, and concert of action. Thus, we dismiss Appellant's first issue on appeal.[FN6] *See Alfonsi, supra.*

FN6. Appellant's discussion of her first is-

sue also contains a single sentence challenging the court's dismissal of her cause of action alleging consumer protection violations. (Appellant's Brief at 31). Appellant has waived this challenge. *See Pittsburgh Const. Co. v. Griffith*, 834 A.2d 572, 584 (Pa.Super.2003), *appeal denied*, 578 Pa. 701, 852 A.2d 313 (2004) (stating issues not properly developed or argued in argument section of appellate brief are waived).

***8** In her second issue, Appellant claims the following five proposed expert witnesses should have been permitted to testify at trial: (1) K. Michael Cummings, Ph.D.; (2) Louis Kyriakoudes, Ph.D.; (3) James Bogie; (4) Thomas Donaldson, Ph.D.; and (5) Jeffrey Wigand, Ph.D. Appellant argues Dr. Cummings was qualified to testify regarding "relevant public health matters, including addiction and youth smoking." (Appellant's Brief at 36). Appellant additionally claims Dr. Cummings was qualified to testify as an expert "historian" in the tobacco industry. Appellant insists Dr. Cummings was qualified to testify regarding "when certain smoking hazards became publicly known" and to the history of "how tobacco industry misinformation and misconduct undermined public health." ( *Id.* at 39).

Moreover, Appellant argues Dr. Kyriakoudes, a "trained historian, was amply qualified" to testify regarding the tobacco industry's history of misinformation and efforts to hook smokers at an early age. (*Id.* at 40). Appellant claims she "had a reasonable excuse for not identifying Dr. Kyriakoudes until six weeks prior to trial [but after the discovery deadline]. When the court restricted Dr. Cummings' testimony, [Appellant] was forced to find someone who shared similar opinions as Dr. Cummings in order to avoid injecting new issues into the case." (Appellant's Brief at 42). Appellant insists Appellees were not prejudiced by the untimely identification of Dr. Kyriakoudes, because Dr. Kyriakoudes' testimony would have been substantially similar to Dr. Cummings' proposed testimony.

Appellant also argues she should have been permitted to present the testimony of James Bogie, a former employee of American Tobacco Company. One week prior to the discovery deadline, Appellant identified Mr. Bogie as an expert witness to testify Appellees knowingly approved a deceptive advertising campaign and that Appellees had Intentionally marketed Carlton as a safer cigarette, despite corporate knowledge to the contrary. The court granted Appellees' motion *in limine* to preclude Mr. Bogie as a witness. The court reasoned Mr. Bogie's proposed testimony was factual in nature, and Appellant had not identified him as a fact witness. Appellant now claims preclusion was too harsh a sanction for her failure to identify Mr. Bogie as a fact witness. Appellant also insists on the admissibility of the proposed testimony of Thomas Donaldson, Ph.D. Appellant did not include this assertion in her Rule 1925(b) statement and offers no argument whatsoever in support of this assertion in her brief.

Appellant further challenges the court's decision precluding Dr. Wigand from testifying as a fact witness. Appellant asserts Appellees had previously deposed Dr. Wigand for eleven days in an unrelated matter in which B & W sued Dr. Wigand for breach of contract and misrepresentation. Thus, Appellant claims Appellees were not prejudiced by her untimely identification of Dr. Wigand as a potential fact witness in the present matter.

***9** Appellant also challenges the court's ruling precluding Dr. Wigand from offering expert rebuttal testimony. Appellant argues Appellees' experts, Drs. Dixon and Appleton, testified to matters outside the scope of their expert reports. Specifically, Appellant claims unfair surprise when Appellees' experts testified that virtually all nicotine produced by Carlton cigarettes is captured by the filter under the FTC test method. Appellant insists, "the only way to ameliorate this unfair surprise was to impeach [the experts'] testimony by presenting rebuttal evidence" that Carlton "actually deliver[ed] more undetectable, potent 'freebase' nicotine to the smoker," via Dr. Wigand's expert testimony.

(Appellant's Brief at 45). Appellant concludes the court's decisions to limit and/or preclude the testimony of her expert witnesses were an abuse of discretion warranting the award of a new trial. We disagree.

Admission of expert testimony is within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion, *Brady v. Ballay, Thornton, Maloney Medical Associates, Inc.*, 704 A.2d 1076 (Pa.Super.1998), *appeal denied*, 555 Pa. 738, 725 A.2d 1217 (1998) (citing *Walsh v. Kubiak*, 443 Pa.Super. 284, 661 A.2d 416 (Pa.Super.1995) (*en banc* ), *appeal denied*, 543 Pa. 716, 672 A.2d 309 (1996)). This Court has stated:

> In Pennsylvania, the standard for qualification of an expert is a liberal one and the test to be applied is whether the witness has a reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight given to that testimony is for the fact-finder to determine. It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required.

*Gunn v. Grossman*, 748 A.2d 1235, 1244 (Pa.Super.2000), *appeal denied*, 564 Pa. 711, 764 A.2d 1070 (2000) (citations and quotation marks omitted). Nevertheless, "experts are subject to the usual rules of relevance in giving their opinions and cannot base them on extraneous irrelevant factors not properly in evidence." *Kozak v. Struth*, 515 Pa. 554, 559, 531 A.2d 420, 422 (1987).

Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. Additionally:

> Pursuant to Rule of Evidence 402, relevant evidence is generally admissible, and irrelevant evidence is inadmissible. Further, relevant evidence may be excluded if its probative value is outweighed by its potential for unfair prejudice, defined as a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.

*Stalsitz v. Allentown Hosp.*, 814 A.2d 766, 779 (Pa.Super.2002), *appeal denied*, 578 Pa. 717, 854 A.2d 968 (2004) (internal citations and quotation marks omitted) (citing Pa.R.E. 402, 403). Moreover, the Pennsylvania Rules of Evidence provide:

> ***10** Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time
>
> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403.

Further, the relevant Pennsylvania Rule of Civil Procedure provides:

> Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material
>
> (b) An expert witness whose identity is not disclosed In compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Pa.R.C.P. 4003.5(b). "Where the expert witness has not been identified pursuant to a local or state discovery rule, 'the presiding court must balance the facts and circumstances of each case to determine the prejudice to each party." ' *Curran v. Stradley, Ronon, Stevens & Young*, 361 Pa.Super. 17, 521 A.2d 451, 456 (Pa.Super.1987). The "basic

considerations" at stake are:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith [or] willfulness in failing to comply with the court's order.

*Feingold v. Southeastern Pennsylvania Transp. Authority*, 512 Pa. 567, 573, 517 A.2d 1270, 1273 (1986).

Moreover, Rule 4003.5 requires that an expert's testimony at trial be limited to the "fair scope" of his pre-trial report:

> To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Pa.R.C.P. 4003.5(c). To resolve whether an expert's testimony is within his report's fair scope:

> [T]he trial court must determine whether the report provides sufficient notice of the expert's theory to enable the opposing party to prepare a rebuttal witness. The trial court must also inquire whether there has been surprise or prejudice to the party which is opposing the proffered testimony of the expert, based upon any alleged deviation between the matters disclosed during discovery, and the testimony of such expert at trial. What constitutes surprise and prejudice, however, depends upon the pre-trial particulars of each case. In addition, fact testimony may include opinion or inferences so long as those opinions or inferences are rationally based on the witness's perceptions and helpful to a clear understanding of his or her testimony. Further, an expert may base his or her opinion on facts learned by listening to testimony at trial. Where an expert's fact/opinion testimony is fair rebuttal to the other party's expert testimony, it cannot be seen as unfairly surprising or prejudicial.

***11** *Foflygen v. Allegheny General Hosp.*, 723 A.2d 705, 709–10 (Pa.Super.1999), *appeal denied*, 559 Pa. 705, 740 A.2d 233 (1999) (internal citations and quotation marks omitted) (emphasis added).

Moreover, in Pennsylvania, experts are not permitted to speak generally to the ultimate issue in the case. *Kozak, supra* at 559, 531 A.2d 420, 531 A.2d at 422. This Court previously explained:

> An expert's opinion as it relates to the cause of an injury comes dangerously close to improper testimonial opinion on the ultimate facts of causation.
>
> > Such expert testimony must be carefully scrutinized because issues of ultimate fact ... are for the jury, not the expert, ... [A]llowing a witness to testify to the ultimate issue, is limited to those instances where the admission will not confuse, mislead, or prejudice the jury.

*Childers v. Power Line Equipment Rentals, Inc.*, 452 Pa.Super. 94, 681 A.2d 201, 210 (Pa.Super.1996), *appeal denied*, 547 Pa. 735, 690 A.2d 236 (1997) (quoting *Kozak, supra* ) (internal citations omitted). We will not reverse a trial court's ruling on the admissibility of testimony to the ultimate issue in a case absent an abuse of discretion and actual prejudice to the complaining party. *Id.* (citing *Swartz v. General Elec. Co.*, 327 Pa.Super. 58, 474 A.2d 1172, 1178 (Pa.Super.1984)). Additionally, issues not included in a court-ordered statement of matters complained of on appeal are waived. *Milicic v. Basketball Marketing Co., Inc.*, 857 A.2d 689 (Pa.Super.2004).

[5] Instantly, Dr. Cummings has a doctoral degree in public health and is an associate professor for the school of public health at SUNY–Albany, and a full professor for the department of social and preventive medicine at SUNY–Buffalo. He directs a smoking control program and performs research at the Roswell Park Cancer Institute. Appellant sought to elicit Dr. Cummings' expert public health opinion regarding addiction and youth smoking. She also wanted Dr. Cummings to testify as to when smoking hazards became publicly known. However, there was no dispute the decedent had become aware of the potential health consequences of smoking as early as 1966, had switched to Carlton cigarettes as an adult, at approximately age 27, and had smoked for almost 40 years. Thus the proffered testimony regarding cigarette addiction generally, youth smoking, and when smoking hazards became publicly known was irrelevant to any fact of consequence with respect to Appellant's cause of action. *See Kozak, supra;* Pa.R.E. 401, *supra*. Moreover, the court did not rule Dr. Cummings' proffered testimony regarding the history of "how tobacco industry misinformation and misconduct undermined public health" would be admissible if proffered by a properly qualified expert "historian." Instead the court ruled the proffered area of inquiry was not a proper subject for expert opinion. Whether Appellees engaged in misinformation and misconduct which harmed the decedent was the ultimate jury question in this case. *See Kozak, supra*. Thus, the court properly qualified Dr. Cummings as an expert in epidemiology and smoking cessation only and appropriately limited his proposed testimony to those areas.[FN7]

FN7. Ultimately, Appellant did not present any testimony from Dr. Cummings.

***12** Similarly, regardless of Dr. Kyriakoudes' qualifications as an expert historian, or the timing of Appellant's identification of him as a "substitute" expert witness for Dr. Cummings, we determine the court properly precluded Dr. Kyriakoudes' testimony regarding the tobacco industry's history of misinformation and efforts to hook smokers at an early age. *See id.;* Pa.R.E. 401, *supra*. The potential perils of youth smoking were not relevant in this case. *Id.* Moreover, whether B & W harmed the decedent through "misinformation" was the ultimate question for the jury. *Id.*

[6] For these same reasons, we determine the court properly precluded the testimony of Mr. Bogie. Whether Appellees' knowingly conducted a "deceptive" advertising campaign was a jury question, not a matter for expert opinion. *Id.* Moreover, the basic considerations at stake in the court's determination to preclude Mr. Bogie as an expert witness properly included the fact Mr. Bogie's proposed testimony was essentially factual in nature. *See Feingold, supra*. Additionally, Appellant failed to identify Mr. Bogie as a fact witness at any time, and Appellees had no opportunity to depose him. *See id.*

Appellant's issue challenging the court's preclusion of Dr. Donaldson is waived, for failing to include it in her Rule 1925(b) statement or offer developed argument on appeal. *See Milicic, supra*.

[7] With respect to the court's rulings regarding Dr. Wigand, we first note Appellees' deposition of him as a party defendant in an unrelated matter involving breach of contract did not require Appellees to probe Dr. Wigand's knowledge of the issues and facts in the present matter. Therefore, the court properly determined Appellees were prejudiced by their inability to depose Dr. Wigand as a fact witness instantly. *See Feingold, supra; Curran, supra*. Additionally, the court properly considered the elements of surprise and bad faith involved in Appellant's request to qualify Dr. Wigand as an expert rebuttal witness, given Appellant's earlier avowal that Dr. Wigand would be unable to appear, due to illness, as a fact witness at trial. *See id.;* Pa.R.C.P. 4003.5.

Moreover, during her case-in-chief, Appellant presented the "freebase gas" aspects of Carlton cigarettes' nicotine delivery system through the ex-

pert testimony of Dr. Farone. Therefore, Appellees' subsequent presentation of expert evidence regarding the amount of nicotine trapped by Carlton filters cannot properly be seen as creating unfair surprise or prejudice. *See Foflygen, supra* . Instead, this defense evidence was itself expert rebuttal to the opinions expressed by Dr. Farone. *See id.* Thus, the court properly precluded Dr. Wigand from later reiterating, in the guise of fair rebuttal, testimony cumulative of that which Appellant had already presented in her case-in-chief. *See generally Commonwealth v. Hughes,* 581 Pa. 274, 334, 865 A.2d 761, 797 (2004) (stating appropriate scope of rebuttal is determined by examining evidence party intends to rebut; it is improper to submit evidence on rebuttal which does not, in fact, rebut opponent's evidence). We determine the court properly limited and/or precluded the testimony of Appellant's expert witnesses, and dismiss Appellant's second issue on appeal. Accordingly, we affirm the judgment.

***13** Judgment affirmed.

Judgment Entered.

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Eiser v. Brown & Williamson Tobacco Corp.
Not Reported in A.2d, 2006 WL 933394 (Pa.Super.)

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