



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
MIKE HUNTER,)
ATTORNEY GENERAL OF OKLAHOMA,)
)
Plaintiff,)

vs.)

Case No. CJ-2017-816
Judge Thad Balkman

(1) PURDUE PHARMA L.P.;)
(2) PURDUE PHARMA, INC.;)
(3) THE PURDUE FREDERICK COMPANY;)
(4) TEVA PHARMACEUTICALS USA, INC.;)
(5) CEPHALON, INC.;)
(6) JOHNSON & JOHNSON;)
(7) JANSSEN PHARMACEUTICALS, INC.;)
(8) ORTHO-MCNEIL-JANSSEN)
PHARMACEUTICALS, INC., n/k/a)
JANSSEN PHARMACEUTICALS;)
(9) JANSSEN PHARMACEUTICA, INC.,)
n/k/a JANSSEN PHARMACEUTICALS, INC.;)
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,)
f/k/a ACTAVIS, INC., f/k/a WATSON)
PHARMACEUTICALS, INC.;)
(11) WATSON LABORATORIES, INC.;)
(12) ACTAVIS LLC; and)
(13) ACTAVIS PHARMA, INC.,)
f/k/a WATSON PHARMA, INC.,)
)
Defendants.)

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

JUL 01 2019

In the office of the
Court Clerk MARILYN WILLIAMS

THE STATE'S RESPONSE TO DEFENDANTS JANSSEN PHARMACEUTICALS, INC.
AND JOHNSON AND JOHNSON'S MOTION TO STRIKE TESTIMONY OF
DR. ANDREW KOLODNY

Defendants' Motion raises nothing this Court has not already heard when it denied Defendants' prior attempt to exclude Dr. Kolodny's testimony. Now, after having ample opportunity to cross examine Dr. Kolodny over several days, Defendants take the unusual step of seeking to strike Dr. Kolodny's *entire* testimony, including their own cross examination. As with

their other motions filed during the course of this trial, Defendants' current Motion is baseless, a waste of the Court's time, and should be denied.

ARGUMENT

Defendants' prior *Daubert* motion asked the Court to prematurely rule Dr. Kolodny could not testify on relevant facts and opinions squarely within his expertise. There, the State reminded Defendants that, in a bench trial: (1) concerns regarding unreliable expert testimony reaching a jury are moot and (2) the Court could properly decide whether the proffered evidence satisfied 12 O.S. § 2702 during trial. The State set forth Dr. Kolodny's extensive qualifications, which included but were not limited to his studying, researching, writing, advising, and teaching about the pharmaceutical industry's role in fueling the oversupply and over prescription of opioids in this country. And the State showed that Dr. Kolodny is *the* national expert on the opioid crisis. The Court then denied Defendants' motion in its entirety and permitted Dr. Kolodny to testify.

Then at trial, once again over Defendants' objection, the Court ruled that Dr. Kolodny could testify as an expert witness on the topics for which he was presented. As he had done before, Dr. Kolodny then testified at length about many of Defendants' deceptive promotional tactics, including, but not limited to:

- Aggressive efforts by sales reps to break down fears about opioids and build up the myth that they were safe and effective for long-term use;
- Misleading use of studies and journal articles to downplay the risks of opioid use generally and overstate the safety of J&J's drugs specifically;
- The use of front groups and key opinion leaders to promote opioid-friendly messaging and grow the market for opioids as a class of drugs;
- and the exertion of influence on continuing medical education to solidify opioids as a go-to drug for all kinds of pain.

Defendants were afforded ample opportunity to cross-examine Dr. Kolodny. Apparently frustrated at not being able to make any headway in discrediting his testimony, Defendants now contend Dr. Kolodny acted as the State's puppet and seek the extreme remedy of striking his testimony entirely, including their own examination. Defendants' Motion should be denied.

As previously noted, a judge conducting a bench trial maintains considerable leeway in admitting evidence, weighing its persuasive value upon presentation. *Valley View Development, Inc. v. U.S. ex rel. U.S. Army Corps of Engineers*, 721 F. Supp. 2d 1024, 1047 (N.D. Okla. 2010). With regards to expert testimony, rather than striking or excluding such evidence, “[v]igorous cross-examination [and] presentation of contrary evidence,” among other things, are the traditional and appropriate means of attacking an adversary's expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). In fact, when there is a logical basis for an expert's opinion testimony, any perceived weakness in such testimony goes to its weight—not its admissibility—and such testimony should be considered by the trier of fact. *See, e.g., Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987); *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-39 (3d Cir. 1983); *Senn v. Carolina Eastern Inc.*, 111 F. Supp. 2d 1218, 1222 (M.D. Ala. 2000). A trial court should exclude expert opinion testimony *only* if it is so fundamentally unsupported that it cannot help the factfinder. *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).

This Court has now ruled twice to permit Dr. Kolodny to testify as an expert. Dr. Kolodny's testimony has been shown to be beneficial to this Court, as the trier of fact, in determining whether Defendants' conduct constituted a public nuisance in the State of Oklahoma. His testimony is based on solid grounds—much of which has been supplied by Defendants' own documents. Defendants were afforded ample time to cross examine Dr. Kolodny, and as the Court has

repeatedly reminded defense counsel, Defendants will have, and presently are availing themselves of, the opportunity to present their own evidence in rebuttal during their case in chief.

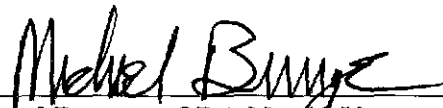
There is no person more qualified to testify on the scope of the opioid crisis in Oklahoma and Defendants' role in causing it. As his testimony demonstrates, Dr. Kolodny has devoted years of his life to researching, writing and lecturing about these issues. He was and continues to be the only person in that courtroom to have both set eyes on Johnson & Johnson's poppy fields in Tasmania and step inside the Pain Care Forum. His expert knowledge of this crisis—what caused it and what can abate it—could not be more pertinent to this case or helpful to this Court. There was nothing improper about his testimony, and the extreme request to strike it *in its entirety* finds no basis in either the record or applicable law.

CONCLUSION

WHEREFORE, the State respectfully requests that the Court deny Defendants' Motion to Strike Testimony of Dr. Andrew Kolodny.

Dated: July 1, 2019

Respectfully submitted,



Michael Burrage, OBA No. 1850

Reggie Whitten, OBA No. 9576

Revel Parrish, OBA No. 30205

WHITTEN BURRAGE

512 N. Broadway Avenue, Suite 300

Oklahoma City, OK 73102

Telephone: (405) 516-7800

Facsimile: (405) 516-7859

Emails: mburrage@whittenburragelaw.com

rwhitten@whittenburragelaw.com

rparrish@whittenburragelaw.com

Mike Hunter, OBA No. 4503

ATTORNEY GENERAL FOR
THE STATE OF OKLAHOMA
Abby Dillsaver, OBA No. 20675
GENERAL COUNSEL TO
THE ATTORNEY GENERAL

Ethan A. Shaner, OBA No. 30916
DEPUTY GENERAL COUNSEL
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-6246
Emails: abby.dillsaver@oag.ok.gov
ethan.shaner@oag.ok.gov

Bradley E. Beckworth, OBA No. 19982
Jeffrey J. Angelovich, OBA No. 19981
Lloyd Nolan "Trey" Duck III, OBA No. 33347
Andrew Pate, *pro hac vice*
Lisa Baldwin, OBA No. 32947
Brooke A. Churchman, OBA No. 31946
Nathan B. Hall, OBA No. 32790
NIX PATTERSON, LLP
512 N. Broadway Avenue, Suite 200
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: bbeckworth@nixlaw.com
jangelovich@npraustin.com
tduck@nixlaw.com
dpate@nixlaw.com
lbaldwin@nixlaw.com
bchurchman@nixlaw.com
nhall@nixlaw.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on July 1, 2019 to:

Benjamin H. Odom
John H. Sparks
Michael Ridgeway
David L. Kinney
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072
odomb@odomsparks.com
sparksj@odomsparks.com
ridgewaym@odomsparks.com
kinneyd@odomsparks.com

Larry D. Ottaway
Amy Sherry Fischer
Andrew M. Bowman
Steven J. Johnson
Jordyn L. Cartmell
Kaitlyn Dunn
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Ave, 12th Floor
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com
andrewbowman@oklahomacounsel.com
stevenjohnson@oklahomacounsel.com
jordyncartmell@oklahomacounsel.com
kaitlyndunn@oklahomacounsel.com

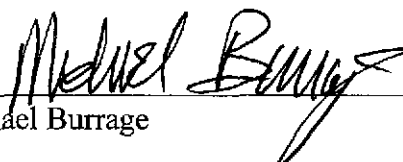
Stephen D. Brody
David Roberts
Emilie Winckel
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
sbrody@omm.com

droberts2@omm.com
ewinckel@omm.com

Jeffrey Allen Barker
Michael Yoder
Amy J. Laurendau
O'MELVENY & MYERS, LLP
610 Newport Center Drive
Newport Beach, CA 92660
jbarker@omm.com
myoder@omm.com
alaurendeau@omm.com

Charles C. Lifland
Jennifer D. Cardelus
Wallace M. Allan
Sabrina H. Strong
Esteban Rodriguez
Houman Ehsan
Justine M. Daniels
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 9007
jdaniels@omm.com
clifland@omm.com
tallan@omm.com
sstrong@omm.com
erodriguez2@omm.com
hehsan@omm.com
jcardelus@omm.com

Amy Riley Lucas
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
alucas@omm.com



Michael Burrage