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VIA MESSENGER

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Court of Appeals
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53701

Re: *State of Wisconsin v. Abbott Laboratories, et al.*
Appeal No.: 10-AP-232
Dane County Case No. 04-CV-1709

Dear Court:

This letter brief is submitted pursuant to this Court's August 1, 2012 Order, directing the parties to answer two questions: (a) whether separation of powers and political question issues were resolved by the Supreme Court's decision of June 22, 2012; and (b) what other issues remain for this Court to address on Pharmacia's appeal and the State's cross-appeal.

The separation of powers and political question issues remain for resolution by this Court because they were neither certified to nor addressed by the Supreme Court. In accepting the certification, the Supreme Court expressly limited "its review to the three issues identified . . . [for] certification[.]" *See* June 15, 2011 Order, at 1. The Supreme Court's decision specifically stated that its review was limited to the certified issues, and did not include the issue of separation of powers or "Pharmacia's claim that the proceedings below constituted an inappropriate invasion by the judicial branch into the exclusive province of the legislative and executive branches," which the Court noted "has not been certified, so we do not address it here." *See State v. Abbott Labs.*, 2012 WI 62, ¶¶ 1, n.2; 81, n.24; 341 Wis. 2d 510, 816 N.W.2d 145 (explaining that it was only answering the certified question which did not require it to "delve into the politicization of the process as a free-standing

issue"). While the Supreme Court recognized the "interrelationship of the certified and uncertified issues," it expressly "caution[ed] the parties and the court of appeals not to take this opinion as bearing on the proper resolution of the uncertified issues upon remand, as those are not before us." *See id.* at ¶ 17, n.11.

As discussed further below, the history of the certification, and the Supreme Court's decision itself, make clear that the decision neither resolved nor placed a "judicial cast" on the issues of separation of powers or political question, or any of the other issues pending before this Court.

In response to this Court's second question, Pharmacia will list the remaining issues on appeal.

I. THRESHOLD ISSUES OF CONSTITUTIONALITY, JUSTICIABILITY AND LIABILITY REMAIN IN THIS CASE.

A. This Court Did Not Certify to the Supreme Court, and the Supreme Court Expressly Did Not Consider, Whether this Case Violates the Constitutionally Required Separation of Powers and/or Presents Non-Justiciable Political Questions.

This litigation, in which claims are asserted against virtually the entire pharmaceutical industry, involves the method by which the Wisconsin legislature directed the state Medicaid program to reimburse pharmacists for dispensing prescription drugs to Medicaid participants. The State obtained a jury verdict against Pharmacia for damages and a court award for forfeitures on the theory that certain published figures used in calculating reimbursement and called "Average Wholesale Prices" ("AWPs") were not actual prices. According to the State, the legislature's lack of knowledge of what pharmacists actually paid for drugs gives rise to claims against drug manufacturers under Wis. Stat. §§ 100.18 and 49.49.

Pharmacia appealed to this Court the final judgment in favor of the State, which was entered after a jury trial and post-trial filings. Fundamental liability issues, including whether the State could assert claims based on the legislature's Medicaid appropriations in previous biennial budgets were raised on appeal. These included Pharmacia's argument that claims relating to legislative appropriations are barred by the constitutionally required separation of powers between the legislative and judicial branches and present non-justiciable political questions. The issues raised before this Court also included Pharmacia's assertion that the State's theory of fraud is not actionable as a matter of law because it is undisputed that the legislature was aware that published "AWPs" did not represent actual drug prices and, therefore, was neither deceived nor relying on AWPs as being actual prices. Moreover, Pharmacia appeals on a number of other grounds concerning evidentiary issues, jury instructions, the calculation of damages based on the verdict form, and the trial court's award of attorneys' fees and costs.

On May 25, 2011, this Court certified three issues to the Supreme Court: (1) whether the State had a constitutional right to a jury trial; (2) whether the jury was required to speculate in determining damages; and (3) whether the trial court was within its authority to reduce the number of statutory violations found by the jury. On May 31, 2011, Pharmacia asked the Supreme Court to broaden its review and also consider "additional, fundamental issues that...may be dispositive of not only the case against Pharmacia but also against the remaining pharmaceutical company defendants," including whether the State's claims were barred by the separation of powers and/or political question doctrines. *See* Position of Appellant-Cross-Respondent Pharmacia Corporation Concerning Certification, at 1. On June 15, 2011, the Supreme Court expressly declined to consider these additional arguments, stating that "in this instance, the court will limit its review to the three issues

identified in the certification[.]" June 15, 2011 Order, at 1. Thus, in addition to whether the State was entitled to a jury trial and whether the trial court was empowered to reduce the number of statutory violations found by the jury, the Supreme Court limited its review of damages to whether evidence had been presented at trial in support of the State's claimed damages. In rejecting Pharmacia's request for expanded review, the Supreme Court affirmatively declined to address whether the State had the ability to pursue such damages in the first instance.

Thus, the question before the Supreme Court relating to damages was limited to whether the record contained sufficient evidence that "demonstrate[d] that the party was injured in some way and establish[ed] sufficient data from which a jury could properly estimate [the] amount of damages." May 25, 2011 Certification, at 9. In affirming the trial court, the Supreme Court applied the traditional evidentiary standard as framed by this Court's statement of the issue in the certification: "we search the record for credible evidence to support the award, and view that evidence in the light most favorable to the jury's determination." *Abbott Labs.*, 2012 WI 62 at ¶ 26. The Supreme Court made clear that "our inquiry asks only whether the record contains credible evidence, viewed in the light most favorable to the jury's determination, to support the damages awarded." *Id.* at ¶ 69. In doing so, the Supreme Court emphasized that it was <u>not</u> addressing any issue other than the three certified issues, *id.* at ¶¶ 17, n.11; 81, n.24, and cautioned this Court not to take its opinion as bearing on uncertified issues, including whether the State could pursue its claims in the first instance, *id.*

The Supreme Court's decision makes clear that fundamental issues of whether the State could pursue its claims at all have yet to be addressed and either will need to be resolved by this Court or themselves certified to the Supreme Court. In short, the Court determined that <u>if</u> the State can pursue its claims against Pharmacia then the award is sufficiently supported by the evidence.

The Court did not address whether the State could pursue its claims in light of the separation of powers and/or the political question doctrine, which Pharmacia contends bar a finding of what the legislature would have done vis-à-vis setting Medicaid reimbursement. Were this Court to consider the Supreme Court's decision as "driving" its analysis on non-certified issues, *see* August 1, 2012 Order, at 4, it would be acting directly contrary to the Supreme Court's directions on remand.

B. The Supreme Court's Decision that Damages Were Not Speculative Does Not Affect this Court's Threshold Analysis of Whether the State Could Pursue These Claims.

The Court's August 1, 2012 Order asks whether the Supreme Court's extensive discussion of the evidence that was presented at trial and its conclusion that the jury was not required to speculate impermissibly about the State's damages, necessarily means that the State presented valid, justiciable claims in the first instance. However, in expressly limiting its review to the certified issue of the sufficiency of the evidence for damages while reserving consideration of the questions impacting liability, the Supreme Court opted first to engage in the more straightforward analysis of the non-constitutional and potentially dispositive issue concerning sufficiency of the evidence before grappling with the significant constitutional issues presented here. In doing so, the Supreme Court followed the well-established practice of first addressing non-constitutional issues before turning to issues of constitutional import. *See, e.g., Ziegler Co., Inc. v. Rexnord, Inc.*, 139 Wis. 2d 593, 612, 407 N.W.2d 873 (1987) (declining to reach constitutional issue where, on remand, lower court may decide the case on statutory grounds); *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) ("This court does not normally decide constitutional questions if the case can be resolved on other grounds."). Where, as here, several potentially dispositive questions on liability that do not implicate constitutional issues were not certified and remain to be considered by

this Court, it is understandable why the Supreme Court took pains not to address the separation of powers and political question issues.

Appellate analysis of whether the jury was required to speculate is restricted to a consideration of the record to determine if the State had offered evidence in support of its claimed damages. *Abbott Labs.*, 2012 WI 62 at ¶¶ 60-81; *see also Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 134-35, 403 N.W.2d 747 (1987); *Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.*, 151 Wis. 2d 431, 442, 444 N.W.2d 743 (Ct. App. 1989). Such a review is deferential to the jury's conclusion. *See Abbott Labs.*, 2012 WI 62 at ¶¶ 69, 71.

In contrast, appellate analysis of whether a claim is barred by the separation of powers or presents non-justiciable political questions involves pure issues of law and is conducted without any deference to the proceedings below. *See, e.g., Mitchell v. Wisconsin Dept. of Revenue*, 132 Wis. 2d 335, 338, 392 N.W.2d 469 (Ct. App. 1986) (courts will not hear arguments that "raise[] political questions traditionally regarded as beyond the scope of judicial power."). To resolve both the separation of powers and political question issues a court must determine whether a claim can be pursued. *See, e.g., State v. Jensen*, 2004 WI App 89, ¶¶ 41, 48, 272 Wis. 2d 707, 681 N.W.2d 230, *aff'd* 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56; *Japan Whaling Ass'n v. Amer. Cetacean Soc.*, 478 U.S. 221, 229-30 (1986). Although the Supreme Court considered whether sufficient evidence <u>had been presented</u> in support of the State's claim of damages, it did not consider whether such evidence <u>could be presented</u> or such a claim <u>could be asserted</u>.

In considering the separation of powers, this Court will look to the Wisconsin Constitution. Article VIII, § 2 of the Wisconsin Constitution empowers the legislature—not the judiciary—to make decisions regarding state spending. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 540, 576

N.W.2d 245 (1998). Judicial actions may not, consistent with the Constitution, second-guess legislative budgetary decisions. *Id.* at 541-42. For this reason, as explained in *Cudahy Junior Chamber of Commerce v. Quirk*, 41 Wis. 2d 698, 705, 165 N.W.2d 116 (1969), the judicial branch may not determine whether the presentations of facts made by the two sides to a public debate were accurate or whether they were "false, misleading and misrepresented." The State's whole theory in this case is that the debate about proper Medicaid reimbursement was skewed by the fact that the legislature did not know actual drug prices. The Supreme Court left to this Court the determination of whether such a theory is judicially cognizable. *See, e.g., Abbott Labs.,* 2012 WI at ¶¶ 1, n.2; 81, n.24 (explaining that it was not "delv[ing] into the politicization of the process as a free-standing issue").

This Court's constitutional analysis will not involve the evidence presented at trial or reviewed by the Supreme Court. Instead, it will involve a consideration of the Wisconsin Constitution, legal precedent, and the State's admissions that its damages claim is based on the theory that the legislature would have resolved the competing policy issues in favor of lower reimbursement. Such analysis is wholly independent of whether the State offered evidence at trial to support its damages theory, and that was the only issue relating to the role of the legislature that the Supreme Court considered.

Separately, the Supreme Court did not consider whether the State's claims, as presented to the jury, were justiciable under the political question doctrine. *See Baker v. Carr*, 369 U.S. 186 (1962). "The political question doctrine is invoked by courts declining to address issues better left resolved by other branches of government." *Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶ 17, 261 Wis. 2d 598, 660 N.W.2d 705 (citing *Vincent v. Voight*, 2000 WI 93, ¶ 192, 236 Wis.

2d 588, 614 N.W.2d 388 (Sykes J., concurring in part, dissenting in part)). The doctrine states that "[t]he judiciary should not be drawn into deciding issues that are essentially political in nature, exclusively committed by the constitution to another branch of government and not susceptible to judicial management or resolution." *Id.* A case presents a non-justiciable political question if it involves a textually demonstrable constitutional commitment of the issue to the legislature or if it involves the sort of policy determinations that legislatures make. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (citing *Baker*, 369 U.S. at 217). Here, the State's claims of what the legislature would have done differently presented a non-justiciable political question.[1]

In its August 1, 2012 Order, this Court asked whether the Supreme Court's conclusion that there was sufficient evidence that the legislature would have altered reimbursement impacted the viability of the separation of powers issue. *See* August 1, 2012 Order, at 4. Pharmacia recognizes that this Court's analysis of justiciability will require it to consider some evidence already considered by the Supreme Court. For example, this Court will review evidence relating to the legislative process on which the State's claims were based. The Court also will consider whether the use of opinion testimony as to what the legislature would have done, and charging the jury with predicting how the political debate over Medicaid reimbursement would have been resolved, impermissibly encroached upon the legislature's role. However, while the Supreme Court's opinion discussed some of this evidence, the Supreme Court specifically indicated that its discussion of the evidence does not place a "judicial cast" on this case. *See, e.g., Abbott Labs.*, 2012 WI at ¶¶ 1, n.2; 17, n.11; 81, n.24. Nowhere did the Supreme Court foreclose the notion that the State's case was predicated on political choices because the Supreme Court consciously and expressly avoided considering whether the

[1] The trial court never addressed the political question issue and merely stated that it had equity jurisdiction to consider cases under Wis. Stat. § 100.18.

State's case was predicated on political choices. *See id.* Although the Supreme Court concluded that the State had offered sufficient evidence to show the damages claim was not speculative, the Court expressly did not address whether this case "constituted an inappropriate invasion by the judicial branch into the exclusive province of the legislative and executive branches" because that issue "is pending in the court of appeals." *Id.* at ¶ 81, n.24.

The crux of this case is whether, after the Wisconsin legislature has weighed competing positions and policy considerations in a political debate, and enacted a budgetary appropriation that it believes represents the correct compromise of those competing interests, the State can then bring a civil lawsuit premised on the notion that the legislature would or should have made different budgetary decisions. Pharmacia submits that this claim substitutes litigation for legislation and that to permit the verdict to stand—or to permit the cases to proceed against the remaining defendants—would fly in the face of the Wisconsin Constitution and U.S. Supreme Court and Wisconsin Supreme Court precedent. The issue has not been resolved by any court and was not "implicitly" resolved by the Supreme Court's decision on the issue of whether there was sufficient evidence in the record to support the jury's damages award – an issue distinct from and far less significant than the issue of whether the State's claims violate the separation of powers or raise a non-justiciable political question.

II. ISSUES REMAINING FOR THIS COURT TO ADDRESS

Pharmacia raised the following questions that remain unresolved:

1. Whether the State's claims violate the constitutionally required separation of powers and present non-justiciable political questions;

2. Whether the State's Deceptive Practices Act claim, Wis. Stat. § 100.18, should have been dismissed as a matter of law;
3. Whether the State's claim under Wisconsin's Medicaid Fraud Statute, Wis. Stat. §49.49(4m), should have been dismissed as a matter of law;
4. Whether the jury should have been permitted to consider whether and to what extent the State failed to mitigate its claimed damages;
5. Whether the trial court awarded duplicative damages;
6. Whether evidentiary errors warrant a new trial; and
7. Whether the trial court erred in its award of attorneys' fees and costs.

The State has appealed the trial court's discretionary decisions with respect to the calculation of the amount of each forfeiture and with respect to the scope of injunctive relief. Both issues remain to be addressed.

Very truly yours,

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cc: Counsel of Record by LNFS

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