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**SUPREME COURT OF WISCONSIN**

**10-06-2011**

STATE OF WISCONSIN,

**CLERK OF SUPREME COURT  
OF WISCONSIN**

Plaintiff-Respondent-Cross-Appellant,

v.

ABBOTT LABORATORIES, ASTRAZENECA LP,  
ASTRAZENECA PHARMACEUTICALS LP,  
AVENTIS BEHRING, LLC F/K/A ZLB BEHRING, LLC,  
AVENTIS PHARMACEUTICALS, INC., BEN VENUE  
LABORATORIES, INC., BOEHRINGER INGELHEIM  
PHARMACEUTICALS, INC., BOEHRINGER INGELHEIM  
ROXANE, INC., BRISTOL-MYERS SQUIBB CO., DEY, INC.,  
IVAX CORPORATION, IVAX PHARMACEUTICALS, INC.,  
JANSSEN LP F/K/A JANSSEN PHARMACEUTICA  
PRODUCTS, LP, JOHNSON & JOHNSON, INC., MCNEIL-  
PPC, INC., MERCK & CO. F/K/A SCHERING-PLOUGH  
CORPORATION, MERCK SHARP & DOHME CORP. F/K/A  
MERCK & COMPANY, INC., MYLAN  
PHARMACEUTICALS, INC., MYLAN, INC. F/K/A MYLAN  
LABORATORIES, INC., NOVARTIS PHARMACEUTICALS  
CORP., ORTHO BIOTECH PRODUCTS, LP, ORTHO-  
MCNEIL PHARMACEUTICAL, INC., PFIZER INC.,  
ROXANE LABORATORIES, INC., SANDOZ, INC. F/K/A  
GENEVA PHARMACEUTICALS, INC., SICOR, INC. F/K/A  
GENSIA SICOR PHARMACEUTICALS, INC., SMITHKLINE  
BEECHAM CORP. D/B/A GLAXOSMITHKLINE, INC., TAP  
PHARMACEUTICAL PRODUCTS, INC., TEVA  
PHARMACEUTICALS USA, INC., WARRICK  
PHARMACEUTICALS CORPORATION, WATSON  
PHARMA, INC. F/K/A SCHEIN PHARMACEUTICALS, INC.  
AND WATSON PHARMACEUTICALS, INC.,

Defendants,

PHARMACIA CORPORATION,

Defendant-Appellant-Cross-Respondent.

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**COURT OF APPEALS, DISTRICT II  
APPEAL NO. 2010AP000232-AC  
TRIAL COURT NO. 2004CV001709**

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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## **I. THE STATE’S DAMAGES CLAIM IS SPECULATIVE.**

The State concedes that federal law requires Medicaid to pay pharmacists enough to encourage participation in the program (Response Brief (“RB”) at 30), and that the amount necessary to meet this requirement in Wisconsin was “fiercely contested” before the Legislature (RB at 14-15). As the trial court found, “raw politics” drove pharmacy reimbursement in Wisconsin, and “continues to do so to this day.” (A.Ap. at 101.)

The State tried its case on the theory that, if Medicaid employees had actual drug prices, they would have persuaded the Legislature to resolve that contest differently (Appellant’s Brief (“AB”) at 22-24), and the State would have paid pharmacists approximately \$9 million less for dispensing Pharmacia’s products (RB at 18).<sup>1</sup> Permitting a jury to speculate about what legislation would have resulted from an inherently political debate is contrary to law.

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<sup>1</sup> Given that this litigation involves numerous other manufacturers, under the State’s theory, pharmacists would have been paid millions less for dispensing prescriptions of those manufacturers’ drugs as well.

Moreover, the State's theory rests on false premises. The first is that the Legislature would not have allowed pharmacists a profit through the ingredient portion of the reimbursement formula, because federal law requires that profit be provided only through the dispensing fee portion of a pharmacist's payment. However, federal law considers whether payments are sufficient by looking at the aggregate of the ingredient cost and the dispensing fee. (AB at 7.)

Although the State argues that Medicaid employees believed the dispensing fee was "adequate" and a private insurance company paid less to dispense (RB at 17-18, 22), the evidence was clear that it cost far more to dispense a drug to Medicaid patients than the amount of the dispensing fee (A.Ap. at 141-42, 214-15). The Legislature knew that, according to pharmacists, "margins on the product reimbursement are necessary to cover the costs of dispensing medications to [Medicaid] recipients, since the current [Medicaid] dispensing fee is not sufficient to cover such costs." (A.Ap. at 497.)

If the Legislature had chosen to reimburse as the State's damages theory assumes, pharmacists would have lost money for participating in Medicaid. The State never explains why Wisconsin pharmacists would participate in Medicaid under these circumstances. (AB at 3). Indeed, the undisputed evidence was that the federal government would reject a plan that afforded no profit. (A.Ap. at 110-12.) Balancing economy and access is "the classic policy question in terms of reimbursement" (*id.* at 111), and no jury could do anything other than speculate how the Legislature, Governor or federal government would have resolved that question under different circumstances.<sup>2</sup>

The second flawed premise is that Medicaid employees did not have "real" prices. (RB at 20-21.) The State purchased "real" pricing data from First DataBank; the Legislature just chose not to use it for reimbursement. (Cross-Respondent's Brief ("CRB") at 4-5.) Indeed, the State chose in 2000 to stop reimbursing pharmacists at the published "Direct Price" that the State admits

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<sup>2</sup> There are real-world adverse consequences for setting reimbursement too low: limited and reduced quality services, increased costs due to patients having to travel to a pharmacist or obtain alternative medical services, and the decrease in economic activity and jobs. (*See, e.g.*, A.Ap. at 126-27, 424-27.)

was “the manufacturer’s price to the pharmacy.” (A.Ap. at 389, 393.)

The third flawed premise is that Medicaid employees “had the power to use, and would have used,” actual prices to set reimbursement. (RB at 19.) But the record shows—and the State argued to the jury—that it was the Legislature that set reimbursement. (A.Ap. at 237, 281-87, 303-05, 430, 458-59.)

The State’s own liability expert acknowledged that, even if it had been given different information, the Legislature still would have had to determine how much to pay pharmacists in the context of the political debate that was the focus of the trial. (A.Ap. at 226-28). The State’s damages theory improperly required the jury to predict how this political debate would have come out, and assign a precise dollar value to it. Consequently, the verdict cannot be sustained.

**A. THE STATE CANNOT AVOID THE LEGISLATURE’S ROLE IN SETTING MEDICAID REIMBURSEMENT.**

Each budgetary cycle, the Legislature and Governor considered the potential consequences of under-compensating pharmacists. (A.Ap. at 120-21, 126-27, 214-17, 396, 409-10,

422-27.) The State's claim at trial (AB at 22-24) and before this Court (RB at 15-16, 22-34), rests on conjecture about whether and how the resulting legislation would have been different if based on different drug pricing information. Although the State contends that no profit should have been paid through EAC, there is no evidence that the Legislature would not have increased one side of the payment (dispensing fee) to offset some or all of any reduction to the other side of the same payment (ingredient cost), or that the Legislature would have reduced the Medicaid drug reimbursement appropriation at all.

The State tries to avoid the Legislature's role (and the way it tried this case) in several ways. First, it suggests that DHS had the authority to set reimbursement. (RB at 19-23, 29.) This is contrary to the State's admissions to the trial court (A.Ap. at 470-72, 491), evidence at trial (A.Ap. at 211-22, 237, 281-87, 389-421, 430, 493-505; A.Ap. at 523-32, attached), and arguments to the jury (A.Ap. at 303-05, 458-59).

Second, the State claims the Legislature could not have "deliberately" set EAC at more than actual prices. (RB at 26-32.)

However, the Legislature did so: it was told that it was providing pharmacists with a profit through EAC. (A.Ap. at 214-15, 389-90, 409.)

Third, the State contends the Legislature's knowledge cannot be considered. (RB at 23-24.) Budget bills are laws, *see, e.g., County of Jefferson v. Renz*, 231 Wis. 2d 293, 312-13, 603 N.W.2d 541 (1999), and the information provided to the Legislature is legislative history for those laws, *Juneau County v. Courthouse Employees, Local 1312*, 221 Wis. 2d 630, 643-44, 585 N.W.2d 587 (1998).

Fourth, the State claims the Legislature acted on the basis of "conflicting information." (RB at 24-25.) Clearly, legislative actions rarely result from uncontested data. And, while the Legislature may not have known the exact amount of the profit (*id.*), there was no "conflicting information" about the fact that pharmacists profited on EAC (A.Ap. at 214-15, 389-90, 409).

Finally, the State artificially limits the Legislature's budgetary decisions to EAC by contending that the dispensing fee was "adequate." (RB at 22.) The dispensing fee (which was \$4.38

during the relevant time period) was less than the cost to dispense, which was estimated to be between \$6.60 and \$9.50. (A.Ap. at 120-21, 141-42, 214-15, 420-21.) The State's insistence that the Legislature would have reimbursed at acquisition cost and maintained the amount of the dispensing fee (RB at 22), is speculation and ignores that the adequacy of payments is measured "in the aggregate." (AB at 7-8.) Indeed, CMS recently approved two state plans permitting, for the first time, reimbursement on surveyed acquisition costs. In both plans, the states increased their dispensing fees to between \$9.68 and \$14.01. (A.Ap. at 533-38, attached).<sup>3</sup>

**B. THE ARGUMENT THAT "LOWER AWP'S MEAN LOWER PAYMENTS" IS INCONSISTENT WITH BOTH FEDERAL LAW AND THE LEGISLATURE'S UNDERSTANDING OF THE MEANING OF AWP.**

The State argues that, if "true" or "actual" AWP's had been fed into the reimbursement formulas, the formulas would have calculated lower payments. (RB at 19.) That is correct as a matter of arithmetic, but does not give rise to a cognizable damages claim. If AWP's had been actual prices, the legislatively-set reimbursement

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<sup>3</sup> The Court may take judicial notice of this fact. Wis. Stat. § 902.01 (2011).

formulas (EAC = AWP minus x%) (e.g., A.Ap. at 510), would have reimbursed at below actual prices. Combined with a dispensing fee that was below the cost to dispense, this would violate 42 U.S.C. § 1396a(a)(30)(A) (2011) and 42 C.F.R. § 447.204 (2011), which require payments to be sufficient to encourage provider participation. (AB at 7.) Thus, the State's damages theory, which purports to be based on § 447.502 (RB at 5-6), would result in the violation of that and other legal requirements (AB at 7).

Moreover, the State's argument ignores that Medicaid had actual prices (CRB at 4-5), and that the Legislature chose to reimburse based on AWP's knowing that they were not actual prices (AB at 18-20; A.Ap. at 389-90, 395). As the trial court found, the Legislature and Governor "knowingly sacrificed more accurate reimbursement formulas" for reasons of "raw politics." (A.Ap. at 101.)

**C. THE STATE CANNOT PROVE THE FACT OF DAMAGES WITH REASONABLE CERTAINTY.**

Damages are "designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which [it] would

have occupied had no tort been committed.” RESTATEMENT  
(SECOND) OF TORTS, § 903 cmt. a (2011).

The State contends that Pharmacia is speculating about the Legislature’s intent (RB at 22-34) and suggests that there “must” be damages if the statutes at issue were violated (*id.* at 34). The State’s opinion that it asserts “important” claims (RB at 34) does not relieve it from the burden to prove its damages. *AstraZeneca LP v. Alabama*, 41 So.3d 15 (Ala. 2009) (overturning jury verdicts against drug manufacturers based on claims of allegedly inflated Medicaid reimbursement). It was the State’s burden to prove that the Legislature actually would have paid pharmacists less if the Legislature had different information. *See, e.g., Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977). The State failed to do so.

**D. THE STATE’S ARGUMENT THAT “LOWER AWP’S RESULT IN LOWER REIMBURSEMENT” DOES NOT SAVE ITS DAMAGES CLAIM.**

The State asks this Court to accept that it proved damages, because on one occasion in 2000, First DataBank lowered a few AWP’s by an unspecified amount for an unspecified time period and

those AWP's were used in the legislatively-set formulas. (RB at 16, 21.) The February 16, 2000 document on which the State relies does not say that AWP's were lowered to actual prices or by how much AWP's were lowered. (Supp.Ap. at 121-38.)<sup>4</sup> Although the document included an explanation of those matters (Supp.Ap. at 121-22), the State did not include the explanation in its trial exhibit (Supp.Ap. at 121-38).<sup>5</sup> The document made clear that the changes concerned only a "limited number of medications" and that the "price of most drugs [would] be unaffected." (Supp.Ap. at 122.) In fact, DHS never mentioned the "corrected AWP's" to the Legislature in its 2000 budget paper (A.Ap. at 402-05), but rather reiterated what it previously had told the Legislature about AWP's exceeding actual prices (*compare* A.Ap. at 402 *with* 389) by roughly 18.3% (*compare* A.Ap. at 403 *with* 390), and the "corrected AWP's" were only in effect until November 17, 2000. (A.Ap. at 539, attached.)<sup>6</sup>

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<sup>4</sup> The State also relies on DX908 (RB at 16), which was not submitted to the jury. It, therefore, cannot support the jury's verdict.

<sup>5</sup> Nor did the witness on whom the State relies testify that AWP's were reduced to actual prices. (Supp.Ap. at 244-45.)

<sup>6</sup> The Court can take judicial notice of this fact and Medicaid's failure to use the "revised" AWP's. (A.Ap. at 540-42, attached.)

Further, the “corrected AWP” were not used to eliminate profit to pharmacists (RB at 16, 21), because Medicaid set reimbursement for the drugs at higher than those “corrected” AWP. (*see also* A.Ap.at 540-42, attached.)

The State also claims it would have used “actual prices” to set reimbursement for generic drugs. (RB at 21-22.) The State **did** use actual prices, and marked them up by 15-25%. (AB at 13-14.) The State cannot show it was harmed because it obtained its own actual prices rather than using those published by First DataBank. (AB at 24.)

**E. THE LOWER BURDEN FOR PROVING THE AMOUNT OF DAMAGES IS UNAVAILABLE FOR THE STATE’S DAMAGES THEORY.**

The proposition that the amount of damages need not be proven with certainty (RB at 18-19), does not apply to the State’s theory, because a plaintiff that claims that it incurred a specific amount of damages must prove that amount with certainty. *See, e.g., Plywood Oshkosh, Inc. v. Van’s Realty & Const. of Appleton, Inc.*, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977); *see also* 22 AM JUR. 2D, *Damages*, § 333 (2011) (“When damages can be measured

precisely, precise proof must be given.”). The State does not explain why an exception to this rule should be made in this case. (RB at 18-19 *citing Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.*, 166 Wis. 2d 105, 125, 479 N.W.2d 557 (Ct. App. 1991).)

## **II. THE STATE HAD NO RIGHT TO A JURY TRIAL FOR ITS TWO STATUTORY CLAIMS.**

*State v. Ameritech Corp.*, 185 Wis. 2d 686, 698, 517 N.W.2d 705 (Ct. App. 1994), *aff'd*, 193 Wis. 2d 150, 532 N.W.2d 449 (1995), held that there was no common law counterpart for a § 100.18 enforcement claim. Such a claim is equitable. *See* Wis. Stat. § 100.18(11)(a) (2011) (enforcement action may be pursued “in any court having **equity** jurisdiction” (emphasis supplied)).

There is no common law counterpart to the State’s § 100.18 damages claim or claim under § 49.49. Section 100.18 is not the counterpart to “cheating” (RB at 44-46), because cheating included, as an essential element, that “common prudence cannot guard against” (AB at 40), and reasonable reliance is not an element of a § 100.18 claim, *Novell v. Migliaccio*, 2008 WI 44, ¶45, 309 Wis. 2d 132, 749 N.W.2d 544. When, absent reasonable reliance, a plaintiff has no claim for “cheating,” but does have a claim under § 100.18,

the two claims are not counterparts. *See, e.g., State v. Schweda*, 2007 WI 100, ¶¶35-36, 303 Wis. 2d 353, 736 N.W.2d 49. The same is true for § 49.49, which does not speak of reasonable reliance. The State cites *Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 2002 WI 92, ¶11, 254 Wis. 2d 478, 647 N.W.2d 177 (RB at 38), but this Court has made clear that *Schweda* narrowed the holding of *Village Food*. *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶¶74, 77, 320 Wis. 2d 1, 768 N.W.2d 176. Pursuant to the “narrower” test, there is no common law counterpart to § 100.18 or § 49.49. (AB at 38-44.)

There also is no common law counterpart to § 49.49 because of the difference in the statute’s purpose from a common law claim. Even a cursory review of the statute the State claims was for “public assistance” (Supp.Ap. at 336-37) shows it is not remotely comparable to Wisconsin’s medical assistance law.

The State’s argument that its claim under § 49.49(6) was a legal claim for damages is incorrect. (RB at 42-44.) First, the statute states the remedy is to be awarded by “the court,” not a jury. Second, the same sentence that authorizes monetary relief authorizes recovery of “expenses of prosecution,” not something that

would be presented to a jury. Third, the statute's language and legislative history makes clear it was enacted to provide for restitution. (AB at 46-47.)

Finally, the State's forfeiture claim under § 49.49(4m) is not a counterpart to a common law claim existing at statehood. (AB at 45-46.)<sup>7</sup> The State's assertion that forfeitures are now recognized at law (RB at 42) cannot avoid that *in personam* forfeitures had no common law counterpart (AB at 45-46). The State cites *Tull v. United States*, 481 U.S. 412 (1987) (RB at 42), but that decision did not consider whether *in personam* forfeitures were recognized at common law. Six years after *Tull*, the United States Supreme Court considered the issue in *Austin v. United States*, 509 U.S. 602 (1993), and held that they had not been so recognized, *id.* at 611-13.

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<sup>7</sup> Pharmacia did not waive its argument that *in personam* forfeitures were not recognized at common law in 1848. (RB at 41-42.) *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded by statute*, Wis. Stat. § 895.52 (2011), *on other grounds* (new factual issues may not be raised on appeal, new legal questions may).

### III. THE TRIAL JUDGE COULD NOT SUPPLY AN ANSWER TO VERDICT QUESTION NO. 5.

A trial court cannot take action on a verdict more than 90 days from verdict. (AB at 49.) *Gegan v. Backwinkel*, 141 Wis. 2d 893, 898, 417 N.W.2d 44 (Ct. App. 1987).<sup>8</sup> That rule is particularly important where, as here, the trial court **itself** characterized the evidence as not meeting the applicable burden of proof. (A.Ap. at 94.)

The State cites to *Reyes v. Greatway Insurance Co.*, 220 Wis. 2d 285, 582 N.W.2d 480 (Ct. App. 1998). (RB at 49.) *Reyes*, however, addressed only whether trial courts could ever supply an answer to a verdict question; it did not address whether trial courts could supply an answer more than 90 days after verdict. (AB at 48-49.) While, in this case, the trial court properly vacated the jury's answer within the statutory deadline, it could not supply a new answer after the deadline.

The State contends that, because Pharmacia objected to a jury trial, it should not object to the trial court then deciding a

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<sup>8</sup> There is nothing "absurd" about the fact that a trial court may not continue to act after that period (RB at 50), where, as here, a party fails to prove a claim consistent with Wisconsin law.

substantive claim. (RB at 53.) No Wisconsin precedent holds that a defendant's objection to an improper jury trial is mooted because a judge decides a special verdict question after the jury trial.

Finally, the State dismisses the United States Supreme Court's decision in *Chiarella v. United States*, 445 U.S. 222, 236 (1980) that prosecutors may not obtain affirmance on a theory not argued to the jury. (RB at 54-55). This was a penal proceeding and the trial court imposed a multi-million dollar penalty based on a theory never argued to the jury. *Chiarella* is squarely on point.

### **CONCLUSION**

Because no damages claim can be based on the Legislature's budgetary choices and because the trial court could not determine the forfeiture claim, the judgment should be vacated.

Dated this 6<sup>th</sup> day of October, 2011.

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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), WIS. STATS., for a brief and appendix produced with a proportional serif font. The length of this brief is 2,689 words.

Dated this 6<sup>th</sup> day of October, 2011.

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**CERTIFICATION**

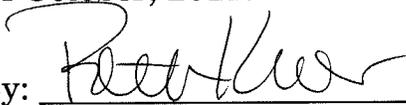
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12) WIS. STATS. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6<sup>th</sup> day of October, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 6, 2011, I personally caused three copies of the Appellant's Reply Brief and Appendix to be sent by e-mail and mailed by first-class postage prepaid mail to:

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