

STATE OF WISCONSIN,

Plaintiff,

v.

ABBOTT LABORATORIES, *et. al.*,

Defendants.

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Case No.: 04 CV 1709

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION OF DENIAL OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY
&
REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT
OF DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff asks this Court to reconsider its May 20, 2008 decision and order denying Plaintiff's motions for summary judgment but fails to provide any legitimate reason why the Court should do so. Plaintiff's motion entirely ignores the underlying basis for this Court's summary judgment decision: that Plaintiff failed to prove as a matter of law that Defendants' representations were untrue, deceptive or misleading under §100.18. Plaintiff nevertheless argues that *Novell v. Migliaccio* requires reconsideration of that decision. It does not. *Novell* does not address the issue of when a representation is untrue, deceptive or misleading. Rather, it addresses the causation element of a § 100.18 claim.

Instead of addressing the Court's decision and presenting – as it is required to on a motion for reconsideration – newly discovered evidence or establishing a manifest error of law or fact, Plaintiff's motion merely rehashes arguments regarding injunctive relief,

estoppel and reliance, none of which are supported by new fact or argument, or impacted in the least by the recent Supreme Court decision in *Novell*.

Even when Plaintiff invokes *Novell* in its discussion of the causation element, Plaintiff badly misreads the decision, citing it as support for the argument that it need not prove reliance to prevail on its § 100.18 claim. *Novell* contains no such proposition. To the contrary, rather than support Plaintiff's motion for reconsideration, *Novell* supports Defendants' cross-motions for summary judgment by specifically holding that reliance *is* an aspect of the causation element of a § 100.18 claim.

For these reasons, Defendants request that the Court deny Plaintiff's motion for reconsideration and grant Defendants' cross-motions for summary judgment based on *Novell*, case law previously cited in Defendants' supporting memorandum, and the record in this case.

ARGUMENT

I. Plaintiff Fails to Address the Underlying Basis for this Court's Decision in Its Motion for Reconsideration.

Plaintiff spends most of its nine-page motion reasserting its previously made arguments regarding injunctive relief, estoppel, and reliance, but fails to come forward with new evidence or argument, fails to show how *Novell* supports its arguments and fails to establish that this Court made any error of law or fact in its summary judgment decision.¹

To prevail on a § 100.18 claim, Plaintiff must prove three elements: "(1) the defendant made a representation to the public with the intent to induce an obligation; (2) the representation was untrue, deceptive or misleading; and (3) the representation

¹ *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis.2d 397, 416-17, 685 N.W.2d 853, 862, 2004 WI App. 129, ¶ 44 (Wis. Ct. App. 2004) (affirming denial of motion to reconsider that "merely took umbrage with the court's ruling and rehashed old arguments" because it did not present "newly discovered evidence or establish a manifest error of law or fact"), citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

materially induced (caused) a pecuniary loss to the plaintiff.”² In denying Plaintiff’s motions for summary judgment, the Court ruled that Plaintiff failed to prove as a matter of law the second element of its claim – that Defendants made untrue, deceptive or misleading representations.³ The Court found that material questions of fact exist regarding “whether or not actionable misrepresentations occurred and what role, if any, the defendants played in fomenting these representations,”⁴ thus precluding summary judgment in Plaintiff’s favor. Plaintiff does not address this essential aspect of the Court’s ruling and offers no legitimate reason why this Court should revisit its analysis of the second element of § 100.18 and its denial of Plaintiff’s summary judgment motions.⁵

Nor does the *Novell* decision, or Plaintiff’s invocation of that decision, address, let alone undercut in any way this Court’s analysis of that element. *Novell* has nothing to do with a court’s assessment of whether a representation is untrue, deceptive or misleading under § 100.18, and certainly does not call into question this Court’s determination that “context is relevant to this inquiry.”⁶ Rather, *Novell* focused entirely on the third element of § 100.18, addressing the relevance of the reasonableness of a plaintiff’s reliance in an action under § 100.18.

II. Plaintiff’s Arguments Regarding Injunctive Relief and Estoppel Do Not Support Plaintiff’s Motion for Reconsideration and Are Legally and Factually Incorrect.

After failing to articulate a basis for questioning the Court’s analysis of the second element of its § 100.18 claim, Plaintiff attacks the Court’s analysis of the third element –

² *Novell*, 2008 WI 44, ¶ 49.

³ See Decision and Order on Plaintiff’s Motions for Partial Summary Judgment Against Defendants Novartis, AstraZeneca, Sandoz, and Johnson & Johnson (“Decision and Order”) at 7-8 (May 20, 2008) (holding that the State has not proved that published prices for Defendants’ drugs were “misrepresentations” under §100.18(1) or “deceptive” under §100.18(10)(b)).

⁴ *Id.* at 6-7.

⁵ See *Koepsell’s*, 2004 WI App. 29, ¶ 44.

⁶ Decision and Order at 7.

causation – by trying to resuscitate its injunctive relief and estoppel arguments. Neither of these arguments is supported by the *Novell* decision,⁷ nor does *Novell* provide a basis for reconsidering this Court’s decision based on these arguments.

First, Plaintiff repeats its argument that it need not prove causation when seeking injunctive relief. Even if Plaintiff were correct (which it is not), this would not be a basis for reconsidering a decision that turns on Plaintiff’s failure to show that the representations at issue were untrue, deceptive or misleading. Moreover, Plaintiff is simply wrong on this point. Plaintiff continues to ignore that this is not merely an injunction case; Plaintiff is seeking damages. And, as the Supreme Court holds in *Novell*, a claim for damages requires proof of causation – a point even Plaintiff does not seem to dispute.

Second, Plaintiff again ignores the relevance of the overwhelming evidence of its own knowledge regarding AWP. Plaintiff has tried time and again to repackage the evidence Defendants have presented as relevant only to an estoppel defense. However, and as discussed at length in prior briefing,⁸ Defendants are not arguing that “Wisconsin employees” acted negligently or “tacitly approved” Defendants’ pricing,⁹ and that the actions of these employees estop Plaintiff from pursuing its claims. Rather, Defendants contend, and the evidence shows, that the State of Wisconsin, as an entity and in its official

⁷ For example, Plaintiff argues that its injunctive relief argument is supported by *Novell* because *Novell* generally describes the purpose behind the legislature’s enactment of § 100.18. See Plaintiff’s Br. at 3. *Novell*, however, has nothing to do with injunctive relief or government actions under § 100.18. There is simply nothing in *Novell* to tie that decision to Plaintiff’s injunctive relief argument.

⁸ The bulk of Section III of Plaintiff’s Brief is taken almost word-for-word from its previous briefing. See Plaintiff’s Brief In Support of Protective Order Barring Defendants From Requiring Wisconsin To Search Its Electronic Files For What Defendants Call Government Knowledge Documents at 7-10 (Oct. 9, 2007); see also Plaintiff State of Wisconsin’s Reply Brief In Support of Its Motions For Partial Summary Judgment and Response Brief In Opposition to Defendants’ Cross-Motions for Summary Judgment at 47-49 (Mar. 7, 2008).

⁹ Plaintiff’s Supplemental Memorandum on the Relevance of the Recently Decided Supreme Court Case of *Novell v. Migliaccio* and In Support of Motion for Reconsideration of Denial of Plaintiff’s Motion for Summary Judgment On Liability (“Plaintiff’s Br.”) at 6-7 (June 4, 2008).

capacity,¹⁰ was aware that AWP does not represent an actual average of wholesale prices and intentionally formulated its Medicaid reimbursement methodologies with that knowledge in order to fulfill its federally mandated obligation to provide equal access to care to Medicaid recipients and to satisfy its pharmacy lobby.

This evidence shows that Defendants' representations were not untrue, deceptive or misleading. As this Court recognized in its summary judgment decision:

[C]ontext is relevant to the inquiry, as are any mutual understandings between/among the parties to the representations. At the very least, one cannot, on this record, rule out the relevance of context and mutual understanding to these § 100.18 (1) claims. Plaintiff's argument that "[a]n untrue statement is untrue regardless of whether the listener knows it is untrue" . . . begs the question. How is a statement "untrue" in the first place, if the speaker and listener are using terms they mutually understand because they have agreed on their meaning – that is, they have together developed the definitions, either expressly or tacitly, such that they have a common understanding?¹¹

Even if Defendants *were* in fact presenting evidence of the State's knowledge solely in support of an estoppel defense, there is support for that defense.¹² Wisconsin courts have estopped governmental entities from pursuing cases like this one, where those entities were acting in their official capacities¹³ and seeking forfeitures or money damages.¹⁴

¹⁰ Plaintiff's oft-repeated implication that Wisconsin's knowledge was limited to a few employees is a complete mischaracterization of the evidence before the Court. Defendants have submitted numerous official documents attributed to the Department of Health and Family Services, the Legislative Fiscal Bureau and the Governor's Office demonstrating the State's knowledge and conscious decision to reimburse based on AWP on the basis of this knowledge. *See, e.g., DAPUF ¶¶ 9-10, 16, 100-03, 107-15, 137-38, 142, 148, 151, 153-55, 168-69, 177, 180, 190.*

¹¹ Decision and Order at 7.

¹² For a detailed rebuttal of Plaintiff's estoppel argument and a discussion of the cases cited therein, *see* Defendants' Opposition to Plaintiff's Motion for Protective Order Barring Defendants From Requiring Wisconsin to Search Its Electronic Files for What Defendants Call Government Knowledge Documents at 23-25 (Nov. 5, 2007) and Defendants' Joint Response to Plaintiff's Partial Motions for Summary Judgment Against AstraZeneca, Johnson & Johnson, Novartis and Sandoz & Defendants' Joint Cross-Motion for Summary Judgment and Supporting Memorandum at p. 83 n.111 (Jan. 15, 2008).

¹³ *See, e.g., Department of Revenue v. Family Hospital, Inc.*, 105 Wis.2d 250, 255, 313 N.W.2d 828, 830 (Wis. 1980); *Libby, McNeill & Libby v. Wisconsin Department of Taxation*, 260 Wis. 551, 554, 51 N.W.2d 796, 798 (Wis. 1952).

III. *Novell* Supports Defendants' Cross-Motions for Summary Judgment.

When Plaintiff finally raises an argument that *is* influenced by *Novell*, it completely misreads the Supreme Court's opinion. Plaintiff incorrectly states that *Novell* stands for the proposition that “[r]eliance is only available as an affirmative defense and the burden of proof is, hence, on the defendants, not the plaintiff.”¹⁵ The *Novell* decision says nothing of the sort, nor does any case cited in *Novell*.

To the contrary, *Novell* states unequivocally that “[r]eliance *is* an aspect of the third element [of a § 100.18 claim].”¹⁶ Although the Supreme Court ultimately determined that the reasonableness of a plaintiff's reliance is not a required *element* of a § 100.18 claim, it concluded that “the reasonableness of a plaintiff's reliance may be relevant in considering whether the representation materially induced (caused) the plaintiff to sustain a loss.”¹⁷ The Supreme Court also concluded, as defendants have argued in their summary judgment papers, that trial courts are free to make that determination as a matter of law, stating:

[T]here are cases in which a circuit court may determine as a matter of law that a plaintiff's belief of a defendant's representation is unreasonable, and as a result the plaintiff's reliance (which is based on the unreasonable belief) is also unreasonable. The circuit court may determine that the representation did not materially induce the plaintiff's decision to act and that plaintiff would have acted in the absence of the representation.¹⁸

This is one such case. Plaintiff's blithe and unsupported pronouncement that “[c]ausation is a given in this case” notwithstanding,¹⁹ Defendants have provided the Court

¹⁴ *State v. City of Green Bay*, 96 Wis.2d 195, 201-02, 210-11, 291 N.W.2d 508, 511-12, 515-16 (Wis. 1980); *Wisconsin Department of Revenue v. Moebius Printing Company*, 89 Wis.2d 610, 640, 279 N.W.2d 213, 226 (Wis. 1979); *Family Hospital* 105 Wis.2d at 255, 313 N.W.2d at 830; *Libby*, 260 Wis. at 559, 51 N.W.2d at 800.

¹⁵ Plaintiff's Br. at 5.

¹⁶ *Novell*, 2008 WI 44, ¶ 44 (emphasis added).

¹⁷ *Novell*, 2008 WI 44, ¶ 3 (emphasis added).

¹⁸ *Novell*, 2008 WI 44, ¶ 51 (citing Wis. JI-Civil 2418).

¹⁹ Plaintiff's Br. at 6.

with a mountain of uncontroverted *evidence* that Plaintiff did not believe that published AWP's represented actual averages of transaction prices as its lawyers now argue. This evidence shows that Plaintiff intentionally used and retained AWP as part of its reimbursement methodology (and did not use AWP's to set MACs) *because* it knew AWP generally exceeded prices at which pharmacies obtained the products. Plaintiff intentionally adopted this methodology to satisfy the federal equal access mandate and the State's formidable pharmacy lobby. For these very reasons, Plaintiff's own Medicaid officials candidly described this case as [REDACTED]

[REDACTED]²⁰

Plaintiff also has presented *no evidence* that it would have reimbursed providers differently had it known the so-called "truth" about AWP. As set forth in Defendants' prior submissions, the undisputed evidence is that, even after filing its Complaint in this case, Plaintiff has not reduced its reimbursement to providers, has continued to use AWP in reimbursing providers and continues to contract to receive the same (supposedly false) information from FDB. Nor has Plaintiff presented any evidence that Defendants' alleged representations materially induced (caused) it to sustain a loss. Consequently, this is a case that fits the hypothetical raised in *Novell* – a case where Plaintiff's alleged reliance is clearly unreasonable and warrants a finding by the Court that its § 100.18 claim fails as a matter of law.

Conclusion

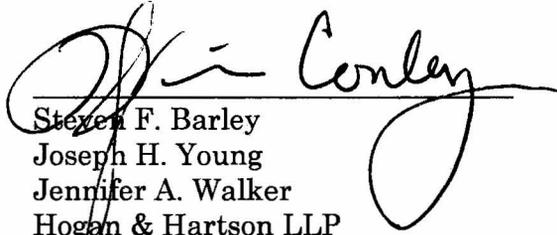
For the foregoing reasons, Defendants request that the Court deny Plaintiff's motion for reconsideration and grant Defendants' cross-motions for summary judgment based on

²⁰ DAPUF ¶ 23.

Novell, case law previously cited in Defendants' supporting memorandum, and the record in this case.

June 11, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William M. Conley", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.



Matthew J. A.