THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2007-CP-42-1438

STATE OF SOUTH CAROLINA

ex. rel. Alan Wilson in his capacity as Attorney General of the State of South Carolina,

Respondent,

v.

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. f/k/a Janssen Pharmaceutica, Inc. and/or Janssen, L.P. and Johnson & Johnson, Inc.,

Defendants,

of which ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. is

Appellant.

RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING

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INTRODUCTION

Despite the Court's reduction of the State's penalty award against Janssen by nearly sixty percent, Janssen's Petition for Rehearing ("Petition") insists that the Court must have "overlooked" or "misapprehended" a multitude of issues in its February 25, 2015 opinion. However, there was no such oversight in the Court's decision. As shown below, what Janssen's Petition truly seeks is to retry the case for a second time in this Court, which is improper. For example, Janssen continues to assert that the trial court should have instructed the jury on the State's South Carolina Unfair Trade Practices Act ("SCUTPA") claim based upon Federal Trade Commission Act ("FTCA") interpretations and policy statements—which this Court rightly found to be, at most, persuasive authority. Then, Janssen asks the Court to reevaluate the record evidence in light of its proffered, and now repeatedly rejected, FTCA-based jury instructions. The Court already considered and soundly rejected those contentions. Further, as to the FTCA and other contexts referenced in the Petition, Janssen maintains prior arguments about evidentiary and other rulings that the Court found procedurally barred in the first instance, arguments that are now disallowed in a petition for rehearing. In short, Janssen hopes to avoid the $136 million penalty that is fully justified by the Court's opinion by rehashing points of contention already considered and ruled on by the Court, rather than identifying any particular points that were genuinely overlooked or misapprehended. The awarded penalty fits the jury's and this Court's findings that Janssen engaged in lies and deception in marketing Risperdal in South Carolina over many years.

SUMMARY OF THE ARGUMENT

The Court should deny Janssen's Petition because it fails to identify any issues that the Court overlooked or misapprehended. Preliminarily, the State objects to Janssen's attempt (at 3 n.1) to sweep into its Petition—but not specifically address—every appellate argument it made in earlier briefing and proceedings before this Court. *See* Rule 221(a), SCACR (a petition for rehearing "shall state with *particularity* the points supposed to have been overlooked or misapprehended by the court") (emphasis added).

With regard to the substance of Janssen's Petition, ***first***, the Court did not overlook or misapprehend S.C. Code Ann. § 39-5-20(b) and the guidance of FTCA interpretations, contrary to Janssen's contention. (*See* Pet. § IV.A.) Instead, the Court directly addressed the statute and interpreted it as rendering FTCA guidance as persuasive, nonbinding authority in this SCUTPA matter. Therefore, the Court found the trial court had not abused its discretion by instructing the jurors based upon binding South Carolina case law. The Court, thus, should also refuse Janssen's invitation to reweigh the record evidence under Janssen's proffered jury instructions, as Janssen insists the Court should do.

Second, as this Court correctly held, Janssen was procedurally barred from arguing that SCUTPA's regulated activity exemption prohibited the State's labeling claim. Neither of the passing references identified from Janssen's Final Brief point to areas of the Record on Appeal that identify any specific trial court rulings claimed to constitute error. Even if this Court were to look beyond Janssen's procedural failure, which it should not do, the Court was plainly aware of the limitations period it had

imposed when it held that Janssen was not entitled to avail itself of this SCUTPA provision because a manufacturer bears responsibility for the content of its label at all times.

Third, the Court's labeling holding does not require a new trial. Like the regulated activity claim, Janssen failed to preserve this issue. It neither preserved for appeal, nor properly argued on appeal, that the verdict form should have indicated whether the jury based its verdict on conduct that occurred before January 24, 2004. Janssen also misunderstands the statute of limitations and the concept of continuous accrual of the SCUTPA cause of action. The Court expressly held that a new trial on this issue was unnecessary given the continuing nature of the accrual of labeling violations.

Fourth, the Court did not overlook or misapprehend any issues relative to its recalculation of the appropriate penalty amount on the State's labeling claim. There is no indication in the Court's opinion that, in deciding a fair penalty in light of its statute of limitations ruling, it overlooked or misapprehended Janssen's argument, particularly because Janssen never argued that the number of sample boxes (derived from Janssen's own documentation) was inaccurate.

Lastly, this Court did not overlook or misapprehend Janssen's arguments relative to the quantification of penalties based on the Dear Doctor Letter. The Court's opinion considered and addressed Janssen's arguments that the trial court had overcounted the violations, and that the record evidence allegedly does not support violations for follow-up sales calls. In fact, by the Court's action of analyzing and reducing the per-violation penalty amount, it is apparent that the Court considered and already rejected those very same arguments.

ARGUMENT

Standard of Review

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 173, 167 S.E. 234, 238 (1933). Rather, its sole purpose "is to aid the Court in deciding correctly a case heard by it," *Arnold*, 168 S.C. at 172, 167 S.E.2d at 238, and it "shall state with *particularity* the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR (emphasis added).

In examining a petition for rehearing, the Court "does not apply the plain error rule," and a party may not, as Janssen attempts to do here, allege arguments that were procedurally barred in the first instance. *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011); *see also Herron*, 395 S.C. at 466, 719 S.E.2d at 643 (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.")).

"It is a rare thing when the Court grants such a petition." *Arnold*, 168 S.C. at 173, 167 S.E. at 238. "Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a rehash of what the losing party has said before,"—

like Janssen's Petition, here—"matters which the Court has already considered well and disposed of." *Id.* (internal quotation marks omitted).

A. The Court Properly Addressed the Issue of "FTC Guidance."

Janssen challenges the Court for purportedly "overlook[ing]" S.C. Code Ann. § 39-5-20(b) and the guidance of federal FTCA interpretations. (Pet. at 9-16.) Far from overlooking the issue, however, the Court expressly recognized § 39-5-20(b)'s direction and interpreted it as rendering federal FTCA interpretations as "persuasive but not binding authority" in this SCUTPA case. (Op. No. 27502 at 53.) As a result, the Court correctly determined that the trial court had not abused its discretion by instructing the jury based on the South Carolina courts' "strong and consistent body of case law defining" actionable conduct under SCUTPA—case law that *bound* the trial court—as opposed to non-binding federal policy statements and legal interpretations. (*Id.*) Although Janssen expends several pages of its Petition (at 7-10) explaining other states' unfair trade practice acts and their supposed incorporation of FTCA interpretations, Janssen is never able to show that the trial court abused its discretion when it instructed the jury ***based upon binding South Carolina case law***, nor that this Court somehow "overlooked or misapprehended" the FTC guidance issue. This Court directly addressed and soundly rejected Janssen's FTC argument.

Janssen next invites the Court to weigh the record evidence under the above-mentioned FTC guidance, again insisting that federal FTCA interpretations are controlling. (Pet. at 10-14, 16.) Here too Janssen's Petition is misguided. It is not enough for Janssen to identify evidence that *may* (arguably) have supported its theory of

the case under nonbinding legal authority.[1] Moreover, Janssen does *not* argue in its Petition that the record evidence was insufficient to support the jury verdict (and, ultimately, this Court's decision) *under the instructions that the jurors actually received*, which this Court upheld. (*See id.* at 16 ("[T]he record in this case does not support the jury's verdict *under the FTC deceptive and unfair practice standards* applicable to the claims here.") (emphasis added).) Thus, Janssen's Petition ignores that "[o]nly when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Thomas v. Atl. Coast Line R.R. Co.*, 221 S.C. 462, 470, 71 S.E.2d 403, 406 (1952). "[W]here, as here, there *is* an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Id.* (emphasis added). And, in any event, the Court should decline Janssen's invitation to reweigh the evidence. "[T]he appellate court's function is exhausted when th[e] evidentiary basis [supporting the verdict] becomes apparent, it

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[1] Janssen complains (at 12) about the trial court's exclusion of the post-2007 Zyprexa label and this Court's finding that Janssen failed to preserve error regarding the exclusion of such evidence, arguing that the Court's finding "misapprehends what occurred at trial." But Janssen is being less than forthright with the Court. Janssen did not make an offer of proof contemporaneous with the trial court's exclusion of the post-2007 Zyprexa label, but waited until March 21, 2011—the end of trial—to make such a proffer as a "housekeeping" matter. (R. 2321). In fact, on March 15, 2011, after the State rested and during oral argument on Janssen's directed verdict motion, Janssen's counsel confirmed that it did not intend to put such evidence into the record given the Court's prior exclusion. (R. 1369 ("I will not present direct evidence of the Zyprexa or the other label.")). The State also reminded Judge Couch that he had previously excluded such evidence, but Janssen's counsel again did not make a proffer. (R. 2069 ("I've nothing further, Your Honor.")). Finally, on March 18, 2011, in advance of Janssen's medical expert Dr. Newcomer's testimony, also nearing the end of trial, the State's counsel again reminded the Court of its prior ruling with respect to the Zyprexa label, to which Janssen's counsel responded "fair enough" when Judge Couch noted "we'll see how [Dr. Newcomer's testimony] goes." (R. 2311). Janssen did not make an offer of proof during Dr. Newcomer's testimony either.

being immaterial that the court [*or losing party*] might draw a contrary inference or feel that another conclusion is more reasonable." *Thomas*, 221 S.C. at 470, 71 S.E.2d at 406. Here, ample evidence supported the Court's conclusion, based upon the jury's liability finding, that "Janssen engaged in a systematic pattern of deceptive conduct."[2] (Op. No. 27502 at 43; *see id.* at 33-41.)

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[2] Notwithstanding Janssen's claim (at 13 & n.7) that the Court improperly placed "great emphasis" on the April 2004 Warning Letter in its recitation of facts, the Court appropriately concluded "no challenge [to the Warning Letter's admission] [was] preserved for [its] review." (Op. No. 27502 at 45-46 n.12.) Janssen's cursory pretrial objection to the State's opening statement slides, (*see* R. 269-270), was not "sufficiently specific" under South Carolina law. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *accord Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (holding that absent contemporaneous objection at trial, no preservation of issue on appeal). Nor did Janssen sufficiently, specifically, and contemporaneously revisit the trial court's pretrial ruling denying the exclusion of the Warning Letter, as Janssen should have. *Id.*

Turning to the merits of Janssen's argument, it relies exclusively on ***Arkansas*** law in contending that this Court misapprehended applicable burdens of proof under SCUTPA. (*See* Pet. at 8-13 & n.7.) Unlike the South Carolina hearsay exceptions, the Arkansas rule **excludes** numerous public records and reports from Rule 803(8)'s exceptions, including "factual findings resulting from special investigation of a particular complaint, case, or incident[,]" Ark. R. Evid. 803(8)(iv); *see* S.C.R. Evid. 803(8). It was under that **particular** exclusion (absent from the South Carolina rule) and pursuant to interpretative Arkansas case law that the Arkansas Supreme Court in *Ortho-McNeil-Janssen Pharms., Inc. v. Arkansas* found the 2004 Warning Letter "was part of a special investigation of a particular complaint, case, or incident and . . . directly within the parameters of the prohibited hearsay [set forth in Rule] 803(8)(iv)[.]" 432 S.W.3d 563, 575-81 (Ark. 2014). While the Arkansas court also found the Warning Letter "highly prejudicial," that court failed to analyze or address the probative value of the letter versus its prejudicial effect. *Id.* at 579-80. Under South Carolina law, "the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 443 (2009). Accordingly, this Court, like the trial court, appropriately evaluated Janssen's hearsay objection under South Carolina law and considered the Warning Letter's probative value in light of the entire record before it, finding it "relevant to the issue of liability and concomitantly the statute of limitations concerning the labeling claim[.]" (Op. No. 27502 at 46.)

Lastly, the Petition's non sequitur (at 14-16) concerning the Court's mention of Janssen's $2.2 billion settlement of Risperdal-related marketing claims in 2013 may be disregarded. The Court identified the federal settlement and misdemeanor plea as a counter to the implication by amicus curiae the South Carolina Chamber of Commerce that the State *alone* had pursued litigation against Janssen over Risperdal marketing claims. (*Id.* at 70.) The Court correctly observed, however, that "Janssen has been the subject of litigation throughout the country" over deceptive marketing of Risperdal—indeed, suits similar to South Carolina's are *still pending* in Arkansas, Mississippi, and Kentucky. (*Id.*) And, such national litigation obviously includes the federal Department of Justice investigation and settlement. Of course, courts are free "to take judicial notice of subjects and facts of general knowledge . . . ," and Janssen's guilty plea and multibillion dollar settlement were certainly widely publicized in the fall of 2013. *In re Harry C.*, 280 S.C. 308, 310, 313 S.E.2d 287, 288 (1984). Further, the Court wrote nothing about the federal settlement in the context of "defen[ding]" any "improper liability standard" under SCUTPA, as Janssen's Petition falsely claims. (Pet. at 14.)

In sum, the Court correctly ruled that the trial court did not abuse its discretion by declining to adopt Janssen's proposed jury instructions. (Op. No. 27502 at 52-54.)

B. Janssen Failed to Preserve Its Argument that the Regulated Activity Exemption Bars the State's Labeling Claim, and that Argument is Meritless.

Janssen delves into the substance of its argument that SCUTPA's regulated activity exemption bars the State's labeling claim after glossing over Janssen's threshold failure already addressed and noted by this Court: "Janssen . . . failed to preserve this issue for appellate review." (Op. No. 27502 at 54.)

In its Petition, Janssen cursorily argues it preserved this issue on appeal by identifying two areas of its Final Brief void of substantive discussion: a single sentence from its Statement of Issues and a fleeting reference to the denial of its Motion to Alter or Amend. (*See* Pet. at 17 (citing Appellant's Final Br. at 1, 4).) "Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (citing *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); *Welch v. Epstein*, 342 S.C. 279, 288 n.1, 536 S.E.2d 408, 412 n.1 (Ct. App. 2000)).

Neither of the passing references identified from Janssen's Final Brief point to areas of the Record on Appeal that "identify any specific trial court rulings claimed to constitute error." (Op. No. 27502 at 54.) Further, the portions of the Final Brief cited by Janssen fail to reference any "relevant objections and rulings [which] occurred in the transcript." Rule 208(b)(4), SCACR; *see also Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993) ("Broad general statements of issues made by an appellant may be disregarded by this Court.").

Moreover, an examination of the substantive portion of Janssen's Final Brief discussing the regulated activity exemption reveals no instance where Janssen pointed to a specific ruling made in error by the trial court regarding the statute. (*See* Appellant's Final Br. at 17-21 ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief.").) *See also State v. Black*,

319 S.C. 515, 518, 462 S.E.2d 311, 313 n.2 (Ct. App. 1995) (citing *State v. Givens*, 267 S.C. 47, 51, 225 S.E.2d 867, 869 (1976); *Barr v. Barr*, 287 S.C. 13, 14, 336 S.E.2d 481, 482-83 (Ct. App. 1985)).

Therefore, the Court correctly held that this issue was not preserved for appellate review. Aside from Janssen's procedural failures, as the Court has already addressed, Janssen's argument also fails substantively. (*See* Op. No. 27502 at 54-55.) The gravamen of Janssen's argument is that the Court did not determine whether new risks or side effects required a revised label during the limitations period adopted by the Court. (Pet. at 18.) However, the Court, fully aware of the limitations period it had adopted, held as follows:

> *Wyeth* [*v. Levine*, 555 U.S. 555, 570–71 (2009)] makes clear that "a central premise of federal drug regulation [is] that the manufacturer bears responsibility for the content of its label at all times." . . . The very purpose of the "changes being effected" corollary to the FDCA authorizes manufacturers to strengthen the warnings on a label without FDA approval, as long as the manufacturer files a supplemental new drug application. Indeed, the United States Supreme Court in *Wyeth* noted that "Congress enacted the FDCA to bolster consumer protection against harmful products. Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the [FDCA]. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers." Accordingly, Janssen cannot shield itself from liability by claiming that the FDA's approval of its label constituted an express authorization of its labeling decisions.

(Op. No. 27502 at 55 (internal citations omitted).)

Moreover, Janssen again misleads the Court by arguing (at 20) that the "CBE process does not apply" absent newly acquired information about a drug's risks and side effects. The Code of Federal Regulations provision relied upon in *In re Celexa & Lexapro Mktg. Sales Practices Litig.*, 79 F.3d 34 (1st Cir. 2015), cited by Janssen, did not **until 2009** include the requirement that "[c]hanges in the labeling . . . *reflect newly*

acquired information." 21 C.F.R. § 314.70(c)(6)(iii) (2009) (emphasis added). That C.F.R. revision occurred long after the applicable penalties period in this case. In any event, as noted, *Wyeth* demands that Janssen is responsible for the content of Risperdal's label *at all times*. Therefore, the regulated activity exception did not bar the State's labeling claim—even given the Court's narrowing the applicable limitations period.

Thus, Janssen's arguments, which are procedurally barred, are also substantively insupportable.

C. The Court's Labeling Holding Does Not Mandate a New Trial.

Janssen invokes Justice Pleicones's dissent[3] to argue that a new trial is necessary because the Court could not discern whether the jury based its verdict on conduct that occurred before January 24, 2004.

As an initial matter, while Janssen invoked a number of errors regarding the lack of specificity of the verdict form, it failed to preserve this issue for appeal. *See* Rule 208(b)(4), SCACR. (*See* Appellant's Final Br. at 45-46.) Janssen contends that "it is undisputed that Risperdal's labeling was revised to include both diabetes and CVAE warnings *before*" January 24, 2004. (Pet. at 16.) Yet, Janssen never properly raised on appeal, nor did it preserve at trial, the issue of the trial court's supposed error in using a verdict form that did not include findings on which labeling deficiencies violated SCUTPA. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after a

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[3] Janssen agrees with the dissent's argument only to a point, as Janssen plainly rejects Justice Pleicones's argument that the DDL penalty should stand without reduction. (*See* Pet. at 24–26.)

liability verdict had been reached, party failed to preserve any issue relating to the verdict form); *see also* Rule 221(a), SCACR.

Even if Janssen was not procedurally barred from raising this issue, the Court, under a *de novo* review, specifically held that while penalties for the labeling violations could not be awarded for violations occurring before January 24, 2004, this decision did not "mandate[e] reversal and a new trial, given the *continuing nature of the accrual of labeling violations*." (Op. No. 27502 at 58 (emphasis added).) The Court made this decision in light of the dissent's position, which is nearly identical to Janssen's argument.

Janssen's substantive argument, then, is little more than an impermissible attempt to reargue before the Court an issue already clearly addressed and flatly rejected. *Kennedy,* 349 S.C. at 532, 564 S.E.2d at 322. This issue is without merit. (*See* Op. No. 27502 at 59 ("We reject Janssen's position, for Janssen misapprehends the statute of limitations and the concept of continuous accrual of this SCUTPA cause of action.").)

D. The Court's Penalty Calculation Relative to the Labeling Claim Was Not in Error.

In its Penalty Order (R. 27–43), the trial court determined that each publication of the Risperdal label (package insert) constituted a separate violation of SCUTPA, warranting a total penalty of $152,849,700 (R. 42–43). This amount was based on its decision to assess an average penalty of $300 per violation and the trial court's finding that Janssen distributed 509,499 sample boxes in South Carolina until April 23, 2007. In making its determination as to an "appropriate average penalty" per violation, the trial court noted that it was "keenly aware that the issues involving the label vary throughout the period of time from the drug's launch in 1994 through 2007." (R. 33.) The trial court accordingly "made a conscious effort to average the penalty awarded for the labeling

issue" and declined to award the maximum penalty that it could have awarded for Janssen's labeling violations. (*Id.*)

On appeal, Janssen argued that the penalty award with respect to the labeling claim was an abuse of discretion because: (1) the trial court erred by basing its award on the package insert's failure to provide adequate warnings to patients; (2) the record did not support the trial court's apparent conclusion that the package insert deceived or was likely to deceive patients; and (3) the penalty award for the package insert was not tied to the jury's liability verdict. Janssen did not, however, argue that it was error to use its own exhibits to calculate the number of sample boxes distributed, nor did Janssen argue that it was error not to use the State's exhibit to calculate that number. Janssen therefore has not preserved the issue for this Court's review. *See Herron*, 395 S.C. at 465–66, 719 S.E.2d at 642–43.

In any event, Janssen's argument for rehearing on this ground is unfounded. This Court reduced the civil penalty for the labeling claim based on the statute of limitations and its conclusion that an award of $300 per sample box was excessive.[4] This Court also utilized an average to recalculate what it determined to be an appropriate penalty under

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[4] The Court reduced the per-box penalty from $300 to $100. Janssen presumably agrees with that portion of the Court's analysis. However, the State would respectfully contend, as it did in its briefing on appeal, that the trial court's assessment of a $300 per box penalty was not an abuse of discretion. *See, e.g.*, *State ex rel. McLeod v. C & L Corp.*, 280, S.C. 519, 528, 313 S.E. 2d 334, 340 (Ct. App. 1984) ("There was no error of law in imposing a fine within the limits authorized by the Act. Within those limits, the amount of the fine was a matter of the judge's discretion." (citing *State v. Sheppard*, 54 S.C. 178, 32 S.E. 146 (1899)), *abrogated on other grounds by Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001). According to Janssen, the Court should have found that 228,447 boxes were distributed. If this Court were to adopt Janssen's number of occurrences, the State would submit that, using that number, the total penalty award for the labeling violations should rightly be $68,534,100 (at $300 penalty per occurrence).

the circumstances. There is no indication that this Court "overlooked or misapprehended" Janssen's argument in deriving a fair penalty, especially since Janssen never argued that the number of sample boxes was improperly counted. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (citing Rule 221(a), SCACR); *see also* 16 S.C. Jur. Appeal and Error § 147 (2015) ("[A] petition for rehearing will not be granted in order to allow items not previously presented or properly raised by exception on appeal.").

E. The Court's Penalty Calculation Relative to the Presentation of the Dear Doctor Letter Was Not in Error.

The trial court determined that Janssen mailed 7,184 letters and published the letters on 36,372 sales calls. The trial court considered each of these 43,556 publications to be separate violations of SCUTPA and found that the appropriate penalty was $4,000 per violation. There is ample evidence in the record to support the imposition of a SCUTPA penalty for the State's Dear Doctor Letter claim based on the letters distributed by Janssen and follow up sales calls by Janssen representatives. For example, the record contains testimony from Janssen sales representatives and Janssen training materials regarding Janssen's use of the Dear Doctor Letter and its promotion of Risperdal. (R. 778–789, 1155–1156, 3107–3111, 3164, 3247–3248, 3792–3794.)

Additionally, this Court's opinion considered and addressed Janssen's arguments that (1) the trial court over-counted violations; and (2) the record evidence does not support the trial court's finding that there were 36,373 sales calls where the letter was published. Indeed, although the trial court's award of a $4,000 per visit penalty was well within its discretion, *see Wallace v. Timmons*, 237 S.C. 411, 421, 117 S.E.2d 567, 572 (1960), this Court already remitted the penalty to $2,000 per follow-up sales call. Under those circumstances, Janssen has not shown that this Court misunderstood or overlooked

its arguments and rehearing is not warranted on this ground either. *Cf. Hicks v. Hicklin*, 187 S.C. 355, 364, 197 S.E. 390, 393 (1938) ("In the consideration of the issues involved in the cause this Court took into account and gave heed to the matters now presented by the petition for rehearing. These propositions have already been presented to this Court in the printed briefs and in the oral argument. These propositions have been considered by this Court in the preparation of the filed opinion. These points have not been overlooked and have not been misapprehended . . . ."). Indeed, by this Court's very action in analyzing and reducing the per-violation penalty amount, it is apparent that the Court both considered and heeded, at least to some extent, Janssen's position.

CONCLUSION

For all the foregoing reasons, the State of South Carolina *ex rel.* Alan Wilson asks that the Court DENY Appellant's Petition for Rehearing.

Respectfully submitted,

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Date: April 6, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

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ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. f/k/a Janssen Pharmaceutica, Inc. and/or Janssen, L.P. and Johnson & Johnson, Inc.,

Defendants,

of which ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. is

Appellant.

PROOF OF SERVICE

I, the undersigned employee of Simmons Law Firm, L.L.C.., attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleadings herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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