THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

RECEIVED
APR 20 2015
S.C. Supreme Court

Case No. 2007-CP-42-1438
Appellate Case No. 2012-206987

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 whom Ortho-McNeil-Janssen Pharmaceuticals, Inc. is.....Appellant.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules, the South Carolina Chamber of Commerce (the "Chamber") conditionally files this brief as *amicus curiae* in support of the petition for rehearing currently pending in this matter. The practical effect of this Court's opinion is an announcement to the business community that SCUTPA's legislatively-mandated tether to the Federal Trade Commission Act ("FTC Act") has been severed. By sanctioning the trial court's refusal to apply federal interpretations of undefined SCUTPA terms, this Court overlooked or

misapprehended the General Assembly's intent for the SCUTPA analysis. As outlined below, the Court's opinion grants South Carolina courts license to define "unfair" and "deceptive" more broadly than federal interpretations require and, in the case of Attorney General suits, to consider conduct without context.

First, the Chamber shares Janssen's concern that when challenged conduct under SCUTPA is not viewed through the lens of federal interpretations, SCUTPA will expose defendants to liability for actions that fall short of what the General Assembly intended to proscribe.[1] While the Court is correct that the Chamber seeks clarity regarding the bounds of SCUTPA, it does not benefit businesses to define SCUTPA-prohibited conduct with standards less precise than those applied to its federal counterpart. Providing clarity aligned with the General Assembly's intent for SCUTPA is crucial to the State's reputation as a favorable business climate.[2] South Carolina business interests are

---

[1] The Court's opinion misapprehends the Chamber's reference to "subjective, intangible standards" by suggesting that the Chamber implied "that South Carolina stands alone in arbitrarily singling-out Janssen for what amounts to nothing more than an aggressive marketing strategy." (Op. No. 27502 at 70). The Chamber's concern about the lack of defined standards delivered to the jury in this case bears no relationship to the federal litigation referenced in the Court's opinion. Indeed, that is the Chamber's concern: The jury engaged in a moralistic evaluation of Janssen's character untethered to the facts of this case because the trial court failed to provide clear parameters for its analysis.

[2] A simple search on www.google.com reveals the impact. One commentator characterized "[t]he Wilson case in South Carolina" as "decidedly bad news, maybe even a candidate for our 2015 Ten Worst," and questioned: "Well, how about a nine-figure civil penalty for 'deceptive' conduct when the state neither alleged nor proved that a single person was deceived or that the conduct had any adverse impact on anyone? We call that a problem . . . ." Steven Boranian, *An Atypical View of Causation and Harm*, Drug and Device Law (March 20, 2015)(available at http://druganddevicelaw.blogspot.com/2015/03/an-atypical-view-of-causation-and-harm.html (last visited April 17, 2015). Another article observed "the decision may set a dangerous precedent because the court . . . . imposed enormous penalties without evidence of harm." Anthony Vale and Francis X. Lane, *The Palmetto Put-down Endangers Drug Cos. Nationwide*, Law360, Appellate, Consumer Protection, Health,

threatened if SCUTPA swells to "the 800-pound gorilla of business litigation." Michael C. Gilleran, *The Rise of Unfair and Deceptive Trade Practice Act Claims*, American Bar Association, Section of Litigation, Business Torts (October 17, 2011)(available at http://apps.americanbar.org/litigation/committees/businesstorts /articles/fall2011-unfair-deceptive-trade-practice-act-claims.html)(last visited April 16, 2015).

Second, the Court's opinion overlooks or misapprehends the significance of FTC Act standards in the determination of unlawful conduct under SCUTPA. Although the opinion recognized that the "legislature intended the courts to be guided by federal interpretations of those terms," it relegates those federal interpretations to the role of "persuasive but not binding authority." (Op. No. 27502 at 53). The language of SCUTPA does not comport with such a demotion, because it directs that the construction of "unfair or deceptive acts or practices" in violation of SCUTPA "***will be guided*** by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." S.C. Code Ann. § 39-5-20(b)(emphasis added). A Senate Resolution introduced on April 16, 2015 squarely addresses this issue, resolving "[t]he General Assembly did not and does not intend that federal interpretations of the term 'unfair' under the South Carolina Unfair Trade Practices Act are merely 'persuasive;' rather, such federal interpretations of the term 'unfair' are plainly mandatory under the language of

---

Life Sciences and Product Liability Sections (March 12, 2015)(http://www.law360.com/articles/629050/the-palmetto-put-down-endangers-drug-cos-nationwide;http://www.pepperlaw.com/publications_article.aspx?ArticleKey=3160) (last visited April 17, 2015).

the statute, quoted above." (S. 678, 121st Session (2015-2016), attached hereto as "Ex. 1" and available at http://www.scstatehouse.gov/sess121_2015-2016/bills/678.htm).[3]

If not binding, South Carolina courts may selectively disregard federal interpretations when evaluating SCUTPA claims and expand SCUTPA's reach beyond legislative intent. *See also Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986) ("Because the federal act prescribes a public interest requirement as a condition to enforcement, ***our act, to comport with the legislature's intent, must be construed*** to contain a public interest requirement also." (emphasis added)). The jury's imposition of liability in this case was far from "guided" by FTC Act standards; it was not informed by federal interpretations at all.

Third, this Court's opinion as written creates the "wide chasm between the federal and state definitions of 'unfair'" previously undiscerned. (Op. No. 27502 at 53-54). The Court's opinion found no error in the trial court's refusal to charge § 45(n) of the FTC Act in part because it "view[ed] this assignment of error as closely aligned with Janssen's view that an Attorney General directed action will not lie in the absence of an actual loss or damage, a view which we reject." (Op. No. 27502 at 53). If left to stand as written, the opinion implies the existence of a conflict between "unfair" conduct challenged in a SCUTPA Attorney General suit and "unfair" conduct actionable under the FTC Act. 15

[3] The Resolution was introduced "[t]o express the intent of the Senate that the General Assembly intended that S.C. Code Ann. Section 39-5-20(b) (1985) requires that the Federal Trade Commission Act definition of 'unfair' be charged to the jury on the meaning of 'unfair' in the South Carolina Unfair Trade Practices Act." (Ex. 1).

U.S.C. § 45(n) (2012).[4] SCUTPA's directive that courts "will be guided" by federal interpretations does not accommodate this dichotomy.

Finally, the Court's opinion overlooks or misapprehends statutory language defining all SCUTPA enforcement actions within the framework of an impact analysis. The Court of Appeals highlighted this language in *Noack*,

> The legislature's intent to limit the application of the UTPA to only those unfair or deceptive acts or practices in the conduct of trade or commerce that affect the public interest is made even more clear when one considers the language used by Section 39-5-10 in defining the terms "trade" and "commerce," particularly, the language "and shall include any trade or commerce directly or indirectly ***affecting the people of this State***." This language reflects the legislature's intent that an unfair or deceptive act or practice in the conduct of any trade or commerce ***injuriously affect*** "the people of this State," *i.e.*, the public interest, before it can be actionable under the UTPA.

290 S.C. at 478, 351 S.E.2d at 349 (emphasis added). Consistent with this language, South Carolina law has inextricably intertwined the impact analysis with the very definition of what is prohibited under SCUTPA: "Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts *and the impact of the transaction on the marketplace*." *Wright v. Craft*, 372 S.C. 1, 26-27, 640 S.E.2d 486, 500 (Ct. App. 2006)(emphasis added)(citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000)).

The opinion equates the impact analysis with an injury-in-fact requirement, discounting it as "absurd" in an Attorney General initiated SCUTPA action. (Op. No.

[4] Moreover, as noted in Janssen's petition for rehearing, the federal standards "do not require enforcement authorities to prove actual injury or actual deception." (Pet. at 10 n.5).

27502 at 46).[5] But eliminating the context of the challenged conduct permits the fact-finder to view that conduct in theory rather than in practice. The State had the burden of proving Janssen's statements had a "tendency to deceive," and federal standards instruct that those statements should have been viewed from the perspective of the audience to whom they were directed. *See* FTC Policy Statement on Deception, 2 Fed. Trade Comm'n App. D-2 (Oct. 14, 1983). The federal interpretations do not require proof of an injury-in-fact; they permit the jury to evaluate impact by considering the operative statements in context. The jury was deprived of that interpretive lens in this case, and it found liability despite evidence which "tended to support Janssen's thesis that its deceptive conduct had no effect on the community of prescribing physicians." (Op. No. 27502 at 50). At the least, a new trial is warranted to correct this departure and recalibrate the role of federal interpretations in the SCUTPA analysis.

This case puts South Carolina on the map for an unprecedented civil penalty that labels conduct "unfair" and "deceptive" despite a "community of prescribing physicians . . . well aware of the Risperdal risks," (Op. No. 27502 at 58 n.22), and "little evidence of actual harm" to South Carolina citizens, (Op. No. 27502 at 53). Not one South Carolina physician or patient was called as a witness at trial by the State, and no evidence that South Carolina physicians wrote unwarranted Risperdal prescriptions was proffered. Yet, the jury was permitted to consider this evidence without measuring it against the federal interpretations of "unfair" and "deceptive" – interpretations that the General Assembly

[5] Although the Court's opinion notes that "[i]n any event, Janssen's deceptive conduct had an adverse impact on the citizens of South Carolina, for Janssen maintained its superior market share," (Op. No. 27502 at 46), Janssen's petition suggests that "undisputed record evidence demonstrate[es] the contrary," (Pet. at 11). Regardless, the opinion resoundingly rejects the analysis of adverse impact in an Attorney General directed claim.

selected to guide the jury's analysis. Under these circumstances, the Chamber urges this Court to adopt Janssen's position on rehearing.

Respectfully submitted,

GALLIVAN WHITE & BOYD, P.A.

By: _____

Gray T. Culbreath, Esquire
Laura W. Jordan, Esquire
P.O. Box 7368
Columbia, SC 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

Attorneys for *Amicus Curiae* South Carolina Chamber of Commerce

EXHIBIT 1

A SENATE RESOLUTION

TO EXPRESS THE INTENT OF THE SENATE THAT THE GENERAL ASSEMBLY INTENDED THAT S.C. CODE ANN. § 39-5-20(b) (1985) REQUIRES THAT THE FEDERAL TRADE COMMISSION ACT DEFINITION OF "UNFAIR" BE CHARGED TO THE JURY ON THE MEANING OF "UNFAIR" IN THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

Whereas, the South Carolina Supreme Court recently issued ~~the~~ an opinion in the case of 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 Pharmaceutical, Inc., and/or Janssen, L.P., and Johnson & Johnson, Inc., Defendants, Opinion No. 27502, February 25, 2015;

Whereas, in this decision, the Court affirmed more than $136 million in statutory penalties against Janssen based on the contents of one of its medicine's drug labels and because of a letter Janssen disseminated to South Carolina physicians, while at the same time, the Court found that no one has suffered any injury in fact or that there was even a likelihood of harm as a result of the drug labels or the letters to physicians.

Whereas, the Court in its majority opinion held, among other things, that the General Assembly did not intend S.C. Code Ann. § 39--5-20(b) (1985) to require that the Federal Trade Commission Act definition of "unfair" be charged to the jury on the meaning of "unfair" in the South Carolina Unfair Trade Practices Act.

Whereas, the Court recognized in its majority opinion that the South Carolina Unfair Trade Practices Act was "[m]odeled after the language of the Federal Trade Commission Act."

Whereas, the Court further provided in its majority opinion that the South Carolina Unfair Trade Practices Act "does not define the terms 'unfair' and 'deceptive'; rather, the legislature intended the courts to be guided by federal interpretations of those terms."

Whereas, the Court provided in its majority opinion that "[a]lthough SCUTPA refers to the FTCA for guidance, we find that the language of section 39-5-20(b) of the South Carolina Code reveals that federal interpretations are persuasive but not binding authority."

Whereas, the Court stated in its majority opinion that "[o]ur appellate courts have amassed a strong and consistent body of case law defining 'unfair' under SCUTPA. In the absence of a legislative response, it would be inappropriate for this Court to depart from settled South Carolina precedent."

Whereas, the Court in its majority opinion thus declined to hold that the definition of the term "unfair" should be consistent with the FTCA definition of the term, namely that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2012).

Whereas, by ignoring the directive of the South Carolina Unfair Trade Practices Act to "be guided by the interpretations" of the Federal Trade Commission and the Federal Courts, which interpretations hold that the defendants conduct must be an "act or practice (which) causes or is likely to cause substantial injury to consumers which is not reasonably avoidable", the South Carolina Supreme Court was thus able to award $136 million in a case in which there was no harm or injury in fact nor was the conduct even "likely to cause harm";

Whereas, the South Carolina Unfair Trade Practices Act specifically directs the Court to look to standards adopted by the FTC for guidance. S.C. Code Ann. § 39-5-20(b) ("[T]he courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act . . . .")(emphasis added).

Now, therefore, be it resolved by the Senate:

The General Assembly did not and does not intend that federal interpretations of the term "unfair" under the South Carolina Unfair Trade Practices Act are merely "persuasive;" rather, such federal interpretations of the term "unfair" are plainly mandatory under the language of the statute, quoted above.

The Court should thus have, under the South Carolina Unfair Trade Practices Act, applied the federal interpretations of the term "unfair," and thus should have ruled that the State was required in the matter to prove a tendency to deceive physicians or, for unfairness, a likelihood of substantial injury to consumers that was not reasonably avoidable.

----XX----

Senator L. Martin
Document Name L:\S-JUD\BILLS\L. Martin\JUD0068.JH.DOCX

A SENATE RESOLUTION

TO EXPRESS THE INTENT OF THE SENATE THAT THE GENERAL ASSEMBLY INTENDED THAT S.C. CODE ANN. § 39-5-20(b) (1985) REQUIRES THAT THE FEDERAL TRADE COMMISSION ACT DEFINITION OF "UNFAIR" BE CHARGED TO THE JURY ON THE MEANING OF "UNFAIR" IN THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

Senate: L. Martin
Attorney: Hazzard
Stenographer: Knipp
Date: April 16, 2015
Doc Name: L:\S-JUD\BILLS\L. MARTIN\JUD0068.JH.DOCX

Introduced by Senator L. Martin

TO EXPRESS THE INTENT OF THE SENATE THAT THE GENERAL ASSEMBLY INTENDED THAT S.C. CODE ANN. § 39-5-20(b) (1985) REQUIRES THAT THE FEDERAL TRADE COMMISSION ACT DEFINITION OF "UNFAIR" BE CHARGED TO THE JURY ON THE MEANING OF "UNFAIR" IN THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

RECEIVED
APR 20 2015
S.C. Supreme Court

Case No. 2007-CP-42-1438
Appellate Case No. 2012-206987

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 whom Ortho-McNeil-Janssen Pharmaceuticals, Inc. is.....Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Leave to File Amicus Curiae Brief in Support of Petition for Rehearing and Amicus Curiae Brief in Support of Petition for Rehearing – the South Carolina Chamber of Commerce on the Appellant and Respondent by depositing a copy of same in the United States Mail, postage prepaid, on April 20, 2015, addressed to its attorneys of record as follows:

The Honorable Alan Wilson
Robert Cook
C. Havird Jones, Jr.
Office of Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

Drinker Biddle & Reath, LLP
Edward M. Posner
Chanda A. Miller
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996

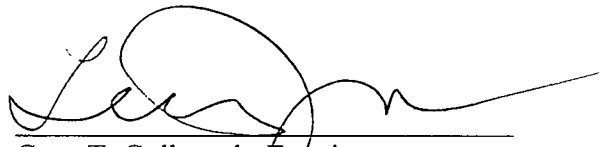
Nelson Mullins Riley & Scarborough, LLP
C. Mitchell Brown
William C. Wood, Jr.
A. Mattison Bogan
Miles E. Coleman
P.O. Box 11070
Columbia, SC 29211

Richardson Plowden & Robinson, P.A.
Steven J. Pugh
Steven W. Hamm
Mason A. Summers
P.O. Drawer 7788
Columbia, SC 29202

John B. White, Jr.
Donald C. Coggins, Jr.
Harrison White Smith & Coggins, PC
178 West Main Street
P.O. Box 3547
Spartanburg, SC 29304

John S. Simmons
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29202

Fletcher V. Trammell
Robert w. Cowan
Elizabeth W. Dwyer
Bailey Peavy Bailey, PLLC
440 Louisiana, Suite 2100
Houston, TX 77002



Gray T. Culbreath, Esquire
Laura W. Jordan, Esquire
Gallivan White & Boyd P.A.
P.O. Box 7368
Columbia, SC 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

Attorneys for *Amicus Curiae* South Carolina Chamber of Commerce