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.

RESPONSE TO MOTION FOR LEAVE TO SUPPLEMENT THE RECORD ON APPEAL

The Respondent objects to the Appellant's Motion to Supplement the Record on Appeal. The April 28, 2004 letter is already a part of the Record on Appeal, which was prepared by the Appellant. The letter is attached as an exhibit to Defendants' Renewed Motion for a Directed Verdict and Memorandum of Law in Support Thereof. (R. pp. 8948–8951.) In addition, the letter is included as Plaintiff's Exhibit No. 1731. (R. pp. 3758–3761.) Supplementation of the Record is therefore unnecessary. Janssen's

"oversight" with regard to the Record (that it was responsible for preparing) appears to be an improper attempt to submit post-argument briefing to this Court.

If the Court deems that the Appellant should be allowed to supplement the Record, however, the Appellant's argument has not been preserved for appellate review. *See Solley v. Navy Fed. Credit Union*, 397 S.C. 192, 213–14, 723 S.E.2d 597, 608 (Ct. App. 2012). In its motion, the Appellant for the first time raises the issue of the timing of the November 10, 2003 Dear Doctor Letter's dissemination (*see* R. pp. 3762–3763), and argues that its representatives stopped using the Dear Doctor Letter on sales calls after the company received a Warning Letter from the U.S. Food and Drug Administration, (*see* R. pp. 3107–3111.)[1] The Appellant has argued that the trial court over-counted by finding multiple overlapping violations for the same conduct. (*See* Final Br. of Appellant Part VIII.B, at 60–61.) But, in the proceedings below and in its appellate briefs, the Appellant has never challenged the relevant timeframe for the Dear Doctor Letter or offered any evidence that it stopped disseminating the letter before it issued a correction letter in July 2004. (R. pp. 3229–3230.) *See Abraham v. Palmetto Unified Sch. Dist. No. 1*, 343 S.C. 36, 45 n.3, 538 S.E.2d 656, 661 n.3 (2000) (noting that "issues not argued in appellate briefs are deemed abandoned" (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994))); *see also Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A]ppellate courts in this state, like well-behaved children, do not

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[1] The position that Janssen now takes with respect to the April 28, 2004 letter is inconsistent with its earlier stance that the letter should not have been admitted into evidence. For example, in its April 1, 2011 Memorandum in Support of its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, (R. pp. 9036–9106), Janssen argued that the trial court erred in admitting Plaintiff's Exhibit No. 436 and Exhibit No. 1731 "[o]ver Janssen's standing objections," (R. p. 9090 & p. 9091 n.7). *Cf. Durham v. Vinson*, 360 S.C. 639, 654, 602 S.E.2d 760, 767 (2004) (noting that a party may not argue one objection at trial and then argue another ground on appeal (citing *Taylor v. Medenica*, 324 S.C. 200, 212, 479 S.E.2d 35, 41 (1996))).

speak unless spoken to and do not answer questions they are not asked." (alteration in original) (quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991))). Even if the Appellant had raised the timing issue in its appellate briefs, "[i]t is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). Because the Appellant did not challenge the relevant timeframe and obtain a ruling by the trial judge, it failed to preserve the issue. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

In any event, the Respondent presented evidence showing Dear Doctor Letter violations for the relevant time period. (*See* R. p. 2548, R. pp. 2552–2553, R. pp. 2590–2594, R. pp. 2652–2657, R. pp. 5820–5824.) The company's business plan, sales training, and other internal documents emphasized the need to disseminate the Dear Doctor Letter and the message contained therein. (*See* R. pp. 3034–3085, R. pp. 3167–3176.) At the Penalties Hearing, the Respondent presented call note evidence showing dissemination of the Dear Doctor Letter, and the Appellant did not object to that evidence. (*See* R. p. 2562, lines 10–19, R. p. 2570, line 13–p. 2571, line 5, R. p. 2578, line 20–p. 2594, line 11.) The Respondent took the position that a separate and distinct violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 *et seq.* (2012), occurred each time the Dear Doctor Letter was published in South Carolina (R. p. 5820), and the trial court agreed (R. p. 43). In addition, the trial court's penalty order specifically noted "the subtle manner in which the [Dear Doctor] Letter was used to deliver only a 'certain' message to physicians" based on the fact that, unlike the Dear Doctor Letter, "later, when the FDA required that a corrective letter be mailed, the

corrective letter was not placed in the detail person's folios to be shown to the doctors on every visit." (R. p. 36.)

The Respondent also expressly alerted the Appellant to the fact that November 10, 2003 to July 21, 2004 was "the time period relevant to the publication of the 'Dear Doctor' letter." (R. p. 5823.) If the Appellant wished to challenge that time period, it certainly could have done so, and it cannot now raise the issue on appeal. *See generally I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2004) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also . . . prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." (citations omitted)).

Respectfully submitted,

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DATED: April 16, 2013

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Ortho-McNeil-Janssen Pharmaceuticals, Inc., f/k/a Janssen Pharmaceuticals, 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 **Respondent's Response To Motion For Leave To Supplement The Record On Appeal** on Ortho-McNeil-Janssen Pharmaceuticals, Inc., by depositing a copy of same in the United States Mail, postage prepaid, on **April 16, 2013** addressed to their attorney of record, Richardson Plowden & Robinson, P.A., Post Office Drawer 7788, Columbia, South Carolina 29202. I also certify that I have served the same by depositing a copy of same in the United States Mail, postage prepaid, on **April 16, 2013** addressed to the following other counsel of record:

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