Appeal No. 2010AP232-AC **Cir. Ct. No. 2004CV1709**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE 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.

FILED

MAY 25, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 (2009-10)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

Wisconsin has sued over thirty major drug manufacturers, including Pharmacia Corporation, alleging that they have caused First DataBank to publish false and inflated average wholesale prices (AWPs) in violation of WIS. STAT. §§ 100.18 and 49.49, thereby causing Wisconsin to overpay pharmacies for Medicaid reimbursements. The defendant-appellant-cross-respondent in this case, Pharmacia, is only the first of the drug companies to go to trial. We certify because of this case's far-reaching impact and the large sums of money at stake. There are many issues in this case, but this certification focuses on three:

1. Was the State entitled to a jury trial under WIS. STAT. §§ 100.18 and 49.49?

2. Was the jury required to speculate in determining damages?

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

3. Was the trial court within its authority to reduce the number of WIS. STAT. § 49.49(4m)(a)2. violations found by the jury?

BACKGROUND

This case deals with the complex relationship between drug companies and the State when deciding how to reimburse pharmacies through the Wisconsin Medicaid program. In order to receive federal Medicaid funds, the State must show the federal government plans for reimbursing pharmacists for drugs dispensed to Medicaid recipients. A formula for reimbursement is usually set by the legislature and approved by the governor as part of the biennial budget process. One component of the formula for brand drugs and some generic drugs is AWP, which the State receives from First DataBank.

The parties disagree as to where First DataBank gets its numbers. Pharmacia presented evidence that First DataBank independently sets AWP, but the State presented evidence that Pharmacia itself "suggests" AWPs which are then published by First DataBank for Pharmacia's drugs. The State alleges that Pharmacia violated WIS. STAT. §§ 100.18 and 49.49, which both have to do with making misleading statements, by causing First DataBank to publish inflated AWPs.

The record indicates that some state officials have known for a long time, based on office of inspector general (OIG) reports, that AWPs provided by First DataBank were actually higher than the average price pharmacists pay for drugs. However, the record also indicates that those studies were vigorously contested by the pharmacy lobby and other sources each time they were presented to the legislature. Thus, it is difficult to determine what was actually "known" by the legislature when it decided on a reimbursement formula. Based on its decision

to set the formula at AWP minus a percentage, however, one can infer that the legislature knew that AWP was inflated to some degree.

The case eventually went to trial by jury over the objection of Pharmacia, who argued that the State did not have a right to a trial by jury for its claims. The jury found that Pharmacia had violated both WIS. STAT. §§ 100.18 and 49.49. It awarded damages totaling $9,000,000. The jury also found that there were a total of 1,440,000 § 49.49(4m)(a)2. violations.

The State filed a postverdict motion for forfeiture damages based on the jury's finding of 1,440,000 WIS. STAT. § 49.49(4m)(a)2. violations. Pharmacia then filed a motion to change the jury's answer to the question about the number of violations. The trial court reduced the number of violations based on the theory that, as a matter of law, the jury's number was too high. It pointed out that the State's closing argument had encouraged jurors to fill in the number based on its expert's testimony as to how many claims were filed and reimbursed, when in fact the question was how many false statements Pharmacia made or caused to be made. In the trial court's words, "rather than focus on the **culpable conduct** of the defendant, the State argued that the jury should fill in a number that, in fact, measured something different, i.e. the **consequences** of the culpable conduct."

Ultimately, the trial court found that 4578 violations were supported by the record and that each violation merited a $1000 forfeiture—or a $4,578,000 total forfeiture award. Pharmacia appeals several aspects of the judgment, and the State cross-appeals the trial court's reduction of the jury's finding on the number of forfeitures.

DISCUSSION

Right to Jury Trial

The State was allowed to try its case to a jury on both the WIS. STAT. §§ 100.18 and 49.49 claims. The applicable test for determining a party's right to a jury trial was outlined in ***Village Food & Liquor Mart v. H&S Petroleum, Inc.***, 2002 WI 92, ¶16, 254 Wis. 2d 478, 647 N.W.2d 177. A party has a constitutional right to have a statutory claim tried to a jury when "(1) the cause of action created by the statute existed, was known, or recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848; and (2) the action was recognized as at law in 1848." ***Village Food***, 254 Wis. 2d 478, ¶16. The trial court found that § 100.18 is akin to common law "cheating" and that § 49.49 is akin to common law "fraud."

The parties focus their appellate arguments on whether WIS. STAT. §§ 100.18 and 49.49 meet the first prong of the ***Village Food*** test, i.e., whether they are similar enough to a common law cause of action to merit a trial by jury. The question as it relates to § 100.18 is particularly interesting because in ***State v. Ameritech Corp.***, 185 Wis. 2d 686, 698, 517 N.W.2d 705 (Ct. App. 1994), *aff'd by an equally divided court,* 193 Wis. 2d 150, 532 N.W.2d 449 (1995), we explicitly found that there was no right to a trial by jury for § 100.18 claims. However, we did so based on a test that ***Village Food*** expressly found to be too narrow. *See* ***Village Food***, 254 Wis. 2d 478, ¶11. The ***Ameritech*** court had held that a party has a constitutional right to a trial by jury with regards to statutory claims when (1) the statute *codifies* an action known to the common law in 1848 and (2) the action was regarded as at law in 1848. ***Ameritech***, 185 Wis. 2d at 690.

Pharmacia contends that the ***Ameritech*** holding as it relates to the right to a jury trial in WIS. STAT. § 100.18 cases is controlling. However, since ***Village Food*** held that the ***Ameritech*** test used to answer the § 100.18 question was too narrow, the State argues that ***Ameritech*** is no longer controlling on that issue either. *See* ***Village Food***, 254 Wis. 2d 478, ¶16. The ***Village Food*** analysis is helpful—it held that WIS. STAT. § 100.30 (1999-2000), or the Unfair Sales Act, was sufficiently similar in "nature" to common law public trade offenses as to afford the right to a trial by jury. ***Village Food***, 254 Wis. 2d 478, ¶¶27-28. Based in part on that analysis, the trial court found that § 100.18, the Deceptive Trade Practices Act, is analogous to common law "cheating"[2]—in that both are "aimed at protecting the public from the misrepresentations of merchants engaged in trade."

Since ***Village Food***, however, a handful of other cases have addressed the test to be used. In the most recent, ***Harvot v. Solo Cup Co.***, 2009 WI 85, ¶¶72-78, 320 Wis. 2d 1, 768 N.W.2d 176, the court walked through cases decided since ***Village Food*** and concluded that the ***Village Food*** test had been applied narrowly and that there is a right to a jury trial in cases where the current statute is an essential counterpart with a "similar purpose" to the 1848 claim.

So, for the WIS. STAT. § 100.18 claim, we are left with the ***Ameritech*** holding that there is no right to a jury trial under § 100.18, which is called into question because it is based on a test that ***Village Food*** abrogated as

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[2] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 156 (19th ed. 1836), *available at* http://books.google.com/books?id=LFJDAAAAcAAJ (last visited May 16, 2011), states that "[c]heating is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man."

too narrow. Because of that, § 100.18 could arguably fall into the category of statutes that would pass the ***Village Food*** test but fail the ***Ameritech*** test. The trial court found that it did fall into that category. However, since ***Village Food***, that category has become even smaller because of ***Harvot***'s analysis that the ***Village Food*** test has been narrowly applied. *See* ***Harvot***, 320 Wis. 2d 1, ¶¶74-78.

As to WIS. STAT. § 49.49, which prohibits material false statements and misrepresentations in the context of medical assistance claims, *see* § 49.49(4m)(a), Pharmacia asserts that it is too dissimilar from common law fraud to pass the ***Village Food*** test. Specifically, it points out that there is no requirement to find harm under § 49.49(4m)(a), which it argues is an essential element of common law fraud.[3] In support of that argument, Pharmacia cites to ***State v. Schweda***, 2007 WI 100, ¶42, 303 Wis. 2d 353, 736 N.W.2d 49, for the proposition that a statutory cause of action is essentially a counterpart to an 1848 common law cause of action if it has the same elements as the 1848 cause of action.

The State argues that ***Schweda*** cannot be interpreted to mean that the elements must match every time because ***Village Food*** explicitly rejected the idea that a current statute must be a codification of the common law cause of action for the right to a jury trial to apply. *See* ***Village Food***, 254 Wis. 2d 478, ¶11. As a

[3] Pharmacia lists the elements of common law fraud as (1) a misrepresentation of fact, (2) that was untrue, (3) made by the defendant knowing the representation was untrue or recklessly without caring whether it was true or false, (4) with intent to deceive and induce the plaintiff to act upon it to the plaintiff's pecuniary damage, and (5) that was believed and justifiably relied on by the plaintiff. *See* WIS JI—CIVIL 2401; *see also* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205.

result, the State argues that a mere difference in elements is not dispositive in determining whether there is a right to a jury trial.

Interestingly, in ***Schweda***, the supreme court specifically highlighted the significance of harm as an essential element of a common law nuisance action. It found that because harm was not an element of the modern environmental regulation statutes being analyzed, "the two [were] not sufficiently analogous to pass the first prong of the ***Village Food*** test." However, it does not necessarily follow that the element of "harm" plays the same role in common law fraud as the court found it did in common law nuisance. In fact, the trial court in this case found that both common law fraud and WIS. STAT. § 49.49 require "scienter, intent to induce reliance and (where money remedies are sought) actual harm." *See* § 49.49(1)(c) ("If any person is convicted … the state shall have a cause of action for relief … in an amount 3 times the amount of actual damages ….").

Pharmacia also likens this case to ***Harvot***, which addressed the right to a trial by jury in Wisconsin Family Medical Leave Act (WFMLA) cases. ***Harvot*** pointed out that the WFMLA is, at its core, a type of social legislation that did not exist in 1848. Pharmacia contends that because WIS. STAT. § 49.49 specifically deals with Medicaid fraud, ***Harvot***'s social legislation reasoning applies. The State responds—and the trial court agreed—that unlike the WFMLA analyzed in ***Harvot***, in § 49.49, Medicaid is merely the context in which the fraud happens. Therefore, it argues, the ***Harvot*** court's reasoning does not apply to this case.

Jury Speculation

The second issue we certify deals with whether the jury was required to speculate when determining damages. This issue is based on the process by

which Medicaid reimbursement prices are set. As previously noted, Medicaid reimbursement formulas are generally part of the biennial budget approved by the legislature and signed by the governor. As a result, each time the legislature considers lowering the formula for reimbursement, a political tug-of-war ensues between the State agency overseeing Medicaid and the pharmacy lobbyists. Pharmacia contends that because the Medicaid reimbursement formula is set as part of the legislative process, there is no way to know what the legislature and governor would have done with a more accurate AWP estimate.

A jury's damage award will be sustained so long as it is supported by credible evidence. ***Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.***, 151 Wis. 2d 431, 442, 444 N.W.2d 743 (Ct. App. 1989). Evidence must demonstrate that the party was injured in some way and establish sufficient data from which a jury could properly estimate amount of damages. ***Id.*** Generally, though, uncertainty in damages which prevents recovery is uncertainty as to *fact* of damage and not to its amount. ***Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.***, 166 Wis. 2d 105, 125, 479 N.W.2d 557 (Ct. App. 1991) (citing ***Cutler Cranberry Co., Inc. v. Oakdale Elec. Co-op.***, 78 Wis. 2d 222, 234, 254 N.W.2d 234 (1977)). That rule is applied where, from the nature of the case, the extent of injury and amount of damage are not capable of exact and accurate proof. ***Id.***

Since the standard of review is so deferential to the jury verdict, we will focus this section on the evidence used by the State to prove damages. First, the State presented some evidence that when the Department of Health and Family Services (DHFS) found out about inflated AWPs, it was able to reduce the reimbursement amount for those drugs. Carrie Gray, a Wisconsin Medicaid employee who works to handle claims from pharmacies, testified that in 2000, when it was discovered that some 400 drugs had inflated AWPs (47 of which were

Pharmacia drugs), she worked with First DataBank to get the right numbers such that the State was no longer reimbursing at the inflated rate. Using this evidence, the State argues that it has already proven to the jury "that DHFS would have used true Pharmacia AWPs to reimburse at actual acquisition cost, not that the legislature would have changed the reimbursement rate. It was *Pharmacia* that tried to prove that … the legislature would have reacted by increasing the reimbursement rate to at least AWP + 7%."

Pharmacia emphasizes evidence that the legislature knew that AWP was inflated based on OIG studies presented by the DHFS during biennial budget debates. It argues that because the legislature knew of those studies and chose not to reduce reimbursement as much as they suggested, the legislature must have intended to give pharmacies some profit in the formula for reimbursement. However, the State points out that even though the legislature was aware of some studies showing that the AWP was high, it was also subjected to intense lobbying efforts and shown at least one study contradicting those studies. So, while the legislature knew that reported AWP *might* be high, it had no way to know by how much because of conflicting information.

The State also presented evidence that the legislature would have been obligated to reduce the reimbursement amounts if accurate AWP was known. Deirdre Duzor, an employee of the Medicaid Bureau, testified that the center for medicare and medicaid services (CMS) must evaluate and approve state plans to "assure that state Medicaid programs paid for drugs in a way that was consistent with [federal regulation]." Duzor also testified as to her understanding that federal regulations require a state to reimburse based on an Estimated Acquisition Cost

(EAC) plus a reasonable dispensing fee.[4] She acknowledged, though, that reimbursement would also have to be adequate to ensure Medicaid patients had access to pharmacies.

The State argues that because of federal regulations, if accurate AWP were available, the legislature would have to use it. State officials testified that their understanding of the regulation was that states would be required to use accurate AWP, if available, to limit possible reimbursement. The jury was instructed that it could assume that the legislature would act in accordance with the law absent evidence to the contrary.

Judicial Reduction of Forfeitures

As part of the special verdict, the jury was asked how many times Pharmacia violated WIS. STAT. § 49.49(4m)(a)2., which states that "[n]o person, in connection with medical assistance, may … knowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment." The jury answered that question with the exact number requested by the State—1,440,000. The State had based that number on

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[4] The regulation actually requires the State to pay the lesser of an EAC plus a reasonable dispensing fee or the pharmacy's "usual and customary charge." 42 C.F.R. § 447.512(b) states:

> (b) Other drugs. The agency payments for brand name drugs … and drugs other than multiple source drugs for which a specific limit has been established must not exceed, in the aggregate, payments levels that the agency has determined by applying the lower of the—.
>
> > (1) EAC plus reasonable dispensing fees established by the agency; or
> >
> > (2) Providers' usual and customary charges to the general public.

its expert's testimony as to the number of reimbursement claims made by pharmacies and reimbursed using AWP during the applicable time period. In other words, the jury found a violation for every time AWP was used to determine the amount of reimbursement for a particular claim by a Medicaid recipient, rather than for every time Pharmacia suggested or set an AWP.

After the verdict, the trial court lowered the number of forfeitures from 1,440,000 to 4578, stating that the jury's number was not supported by the record because the expert testimony on which it was based essentially counted the wrong thing. The trial court reasoned that Pharmacia should logically be punished for every time it "ma[de] or cause[d] to be made a false statement," WIS. STAT. § 49.49(4m)(a)2., rather than every time a false statement was used by the State for reimbursement.[5] Resolution of this issue lies in the interpretation of § 49.49(4m)(a)2. If the trial court's interpretation is correct, then the jury's number was incorrect as a matter of law, as well as unsupported by the evidence, and the trial court was correct to reduce the jury's answer. *See* WIS. STAT. § 805.14(5)(b) & (c). However, it was not necessarily appropriate to then insert another number based on a theory that was never argued to the jury.[6]

Forfeitures are penal in nature and must be strictly construed. *See* ***Capt. Soma Boat Line, Inc. v. City of Wis. Dells***, 56 Wis. 2d 838, 845, 203

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[5] The trial court also found that under ***State v. Williams***, 179 Wis. 2d 80, 87-88, 505 N.W.2d 468 (Ct. App. 1993), in order to show materiality, the State had to prove that each false statement proven resulted in an overpayment and lowered the number further on that basis. We do not discuss that issue in detail in this certification.

[6] The trial court supported its decision to replace the jury's number with its own by citing to ***Reyes v. Greatway Ins. Co***., 220 Wis. 2d 285, 301-02, 582 N.W.2d 480 (Ct. App. 1998), where the court of appeals reduced an excessive jury damages award to "the amount supported by the credible evidence."

N.W.2d 369 (1973) ("[P]enal statutes are to be strictly construed."). WISCONSIN STAT. § 49.49(4m)(b) provides for forfeitures against those who violate § 49.49(4m)(a)2., stating that they "may be required to forfeit not less than $100 nor more than $15,000 for each statement, representation, concealment or failure." According to the State, "[E]very claim from a pharmacy generated a statement about the relevant drug's AWP as part of the algorithm that determined the amount of reimbursement." Since the State presented evidence that these claims were made 1,440,000 times in the relevant time period, and since the jury found in the State's favor on that issue, the State argues that the verdict must be upheld.

Pharmacia argues that "the plain language of [WIS. STAT. § 49.49(4m)] requires that the focus of the forfeiture analysis be on the acts of the defendant, not on subsequent acts by others." It cites to ***State v. Menard, Inc.***, 121 Wis. 2d 199, 358 N.W.2d 813 (Ct. App. 1984), which analyzed forfeitures in the context of illegal price comparison advertising. The ***Menard*** court held that each publication of an ad bought by Menard, Inc., constituted a separate forfeiture under a regulation prohibiting the ads. ***Id.*** at 202-03. Pharmacia acknowledges, however, that ***Menard*** did not address the issue of whether each newspaper sold constituted a separate forfeiture because that interpretation of the regulation was not argued.[7]

As persuasive authority, Pharmacia cites to ***United States v. Bornstein***, 423 U.S. 303 (1976), which addressed forfeitures in the context of the

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[7] As the State points out, the issue in ***State v. Menard, Inc.***, 121 Wis. 2d 199, 358 N.W.2d 813 (Ct. App. 1984), was whether there should be a separate forfeiture for each publication of an ad. The trial court counted each ad as one violation regardless of the number of publications. ***Id***. at 201. The court of appeals reversed "[b]ecause each publication of an advertisement must comply with [the regulation]." ***Id.***

federal False Claims Act (FCA), 31 U.S.C. § 3729(a). In ***Bornstein***, a subcontractor sent three separately invoiced shipments of falsely labeled radio kit components to a general contractor, who then billed the government in thirty-five separate invoices. ***Bornstein***, 423 U.S. at 307. The State sued the subcontractor and sought a forfeiture for each of the thirty-five invoices from the general contractor. ***Id.*** at 308. The United States Supreme Court held that the government could only recover based on the three invoices prepared by the subcontractor. ***Id.*** at 311-13.

The State responds that ***Bornstein*** is distinguishable from this case because the FCA, while similar to WIS. STAT. § 49.49(4m) in some respects, "does not impose a forfeiture 'for each statement' as does § 49.49(4m)(b)…." It also says this case is more like ***United States v. Ehrlich***, 643 F.2d 634 (9th Cir. 1981), another FCA case, where the Ninth Circuit affirmed a separate penalty for each inflated voucher a contractor caused a mortgagee to submit. The ***Ehrlich*** court distinguished that case from ***Bornstein*** on the basis that the contractor in ***Ehrlich*** knew that mortgagees would submit the vouchers each month, whereas the ***Bornstein*** general contractor's submission of multiple invoices was unrelated to the subcontractor's conduct. ***Ehrlich***, 643 F.2d at 637-38.

The ***Ehrlich*** court stated:

> [Language in ***Bornstein***] strongly suggests that, if a person knowingly causes a specific number of false claims to be filed, he is liable for an equal number of forfeitures. In the absence of such knowledge, using the number of claims to determine the number of forfeitures would be arbitrary. Where such knowledge is present, however, it is consistent with the purposes of the Act to impose forfeitures based on the number of claims.

Ehrlich, 643 F.2d at 638. This case seems to lie somewhere in between ***Ehrlich*** and ***Bornstein***—the precise number and frequency of inflated Medicaid payments based on AWP would be unknown to Pharmacia, but it is quite foreseeable that multiple claims would be made based on a single AWP submission. However, neither of those cases analyzed WIS. STAT. § 49.49, so their applicability to this case is limited. And they do not answer the question whether the trial court could replace the jury's number with its own once it determined that the jury's answer was incorrect as a matter of law and unsupported by the evidence.

CONCLUSION

This is a case that began in 2004. It is now 2011 and Pharmacia is the first defendant to reach the appellate stage of the process. The issues we here certify will determine the law of the case for the multiple remaining defendants. Because of that, the parties, their attorneys, and the public deserve timely and definitive resolution of these issues and all others brought by the parties. That can only come from this state's highest court.