

[J-52A-2014]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA : 84 MAP 2011

v.

:
: Appeal from the decision of the
: Commonwealth Court (Opinion re Post-
: Trial Motions of the Commonwealth and
: Johnson & Johnson) dated 8/31/11 at No.
: 212 MD 2004

TAP PHARMACEUTICAL PRODUCTS, :
INC.; ABBOTT LABORATORIES; :
ASTRAZENECA PLC; ASTRAZENECA, :
HOLDINGS, INC.; ASTRAZENECA :
PHARMACEUTICALS LP; :
ASTRAZENECA LP; BAYER AG; BAYER :
CORPORATION; SMITHKLINE :
BEECHAM CORPORATION D/B/A :
GLAXOSMITHKLINE; PFIZER, INC.; :
PHARMACIA CORPORATION; :
JOHNSON & JOHNSON; ALZA :
CORPORATION; CENTROCOR, INC.; :
ETHICON, INC.; JANSSEN :
PHARMACEUTICAL PRODUCTS, L.P.; :
MCNEIL-PPC, INC.; ORTHO BIOTECH, :
INC.; ORTHO BIOTECH PRODUCTS; :
L.P.; ORTHO-MCNEIL :
PHARMACEUTICAL, INC.; AMGEN INC.; :
IMMUNEX CORPORATION; BRISTOL- :
MYERS SQUIBB COMPANY; BAXTER :
INTERNATIONAL INC.; BAXTER :
HEALTHCARE CORPORATION; :
IMMUNO-U.S., INC.; AVENTIS :
PHARMACEUTICALS, INC.; AVENTIS :
BEHRING, L.L.C.; HOECHST MARION :
ROUSSEL, INC., BOEHRINGER :
INGELHEIM CORPORATION; :
BOEHRINGER INGELHEIM :
PHARMACEUTICALS, INC.; BEN VENUE :
LABORATORIES; BEDFORD :
LABORATORIES; ROXANE :

LABORATORIES; SCHERING-PLOUGH :
CORPORATION; WARRICK :
PHARMACEUTICALS CORPORATION; :
SCHERING SALES CORPORATION; :
DEY, INC. :

DONNA A. BOSWELL, ESQ., ANN M. :
VICKERY, ESQ., AND JOSEPH A. :
YOUNG, ESQ., :

Intervenors :

APPEAL OF: JOHNSON & JOHNSON, :
ALZA CORPORATION, CENTOCOR, :
INC., ETHICON, INC., JANSSEN :
PHARMACEUTICAL PRODUCTS, L.P., :
MCNEIL-PPC, INC., ORTHO BIOTECH, :
INC., ORTHO BIOTECH PRODUCTS, :
L.P., AND ORTHO-MCNEIL :
PHARMACEUTICAL, INC. :
(COLLECTIVELY, THE "JOHNSON & :
JOHNSON DEFENDANTS") :

ORDER

PER CURIAM

DECIDED: June 16, 2014

AND NOW, this 16th day of June, 2014, the Order of the Commonwealth Court is VACATED, and the matter is remanded per the terms of Mr. Justice Baer's responsive opinion in Commonwealth v. TAP Pharm. Prods., Inc., J-20B-2013, ___ A.3d ___ (Pa. June 16, 2014).¹

¹ The vacation here, as in the noted case involving a different pharmaceutical company, rests on the Commonwealth's failure, by any measure, to offer a rational accounting for the billion dollars in rebate monies which Commonwealth agencies received from drug manufacturers which it haled into court.
(continued...)

Mr. Justice Stevens did not participate in the consideration or decision of this case.

Mr. Justice Baer files a concurring statement in which Madame Justice Todd and Mr. Justice McCaffery join.

(...continued)

In the present case, we recognize that the testimony of the Commonwealth's damages expert, Frederick R. Warren-Boulton, PhD, was more extensive than it was in the earlier case as it concerned the rebate question. Nevertheless, such testimony was based upon an "overhead shifting" theory which the economist conceded could not be proved and was only theoretical. See N.T., November 3, 2010, at 2430-31. The Commonwealth obviously could not satisfy its burden of proof via theories unsupported by evidence. Cf. Lower Makefield Twp. v. Lands of Dalgewicz, 67 A.3d 772, 776 n.5 (Pa. 2013) (explaining that an expert's conclusions must be grounded upon salient record-based facts). Outside the unproven "overhead shifted" theory, Mr. Warren-Boulton conceded as follows in an interchange with counsel:

Q. [W]ould you agree that these rebates lower the net cost of each drug that is dispensed and reimbursed by DPW and PACE?

A. Holding constant other payments by DPW and PACE, of course, yes. . . .

N.T., November 3, 2010, at 2435.