



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. MICHAEL HUNTER, ATTORNEY GENERAL, OKLAHOMA,)
STATE OF OKLAHOMA,)
CLEVELAND COUNTY)
OKLAHOMA,)
S.S.)

Plaintiff,

Case No. CJ-2017-816

Honorable Thad Balkman

v.

PURDUE PHARMA L.P., et al,)
in the office of the)
Defendant)
Court Clerk MARILYN WILLIAMS)
To Be Heard by The Honorable William C. HANSBERRY, Special Discovery Master

FILED
MAR 06 2019

PURDUE'S MOTION TO RE-OPEN THE EXPERT DEPOSITION
OF DR. ART VAN ZEE AND FOR FEES AND COSTS

Purdue respectfully requests that this Court reopen the deposition of Dr. Art Van Zee, an expert retained by the State, for the purpose of answering questions, and related follow-up [REDACTED]

[REDACTED]. Dr. Van Zee's expert disclosure expressly states that he is relying on his personal experiences as a practicing doctor to form the basis of his expert opinions. [REDACTED]

[REDACTED]

[REDACTED]. Accordingly, Dr. Van Zee's deposition should be reopened and the State should be required to pay Defendants' added fees and costs.

[REDACTED]

[REDACTED]. Ex. A (Van Zee Tr.) at 52:23-53:1. The State has retained Dr. Van Zee to opine that Purdue's marketing "played a big role in the development of the [opioid] problem," among other opinions. Ex. B (Van Zee Disclosure) at 6. The State's expert disclosure for Dr. Van Zee states

that he will rely on “[h]is personal experience with the OxyContin problem and the history of the OxyContin problem” and “his early communications with Purdue Pharma.” *Id.* at 1. Roughly half of his expert disclosure is dedicated to providing the purported “Background of Dr. Van Zee’s Personal Experience with the OxyContin Problem” and describing “Dr. Van Zee’s Early Communications with Purdue Pharma.” *Id.* at 1-4. The disclosure indicates that Dr. Van Zee will testify that he “started to see in his region increasing abuse and addiction” to opioids in 1999 that affected his patients and others in his community. *Id.* at 1-2. Caring for addicted patients purportedly led him to embark on a “quest to learn more about pain and addiction issues.” *Id.* at 2. Dr. Van Zee also intends to testify about personal conversations he purportedly had with Purdue representatives. *Id.* at 3-4. Dr. Van Zee’s disclosure further states that he will offer the personal observation that he “never saw any substantial changes in the marketing or promotion of OxyContin.” *Id.* at 3. The testimony he intends to offer cannot be separated from his “personal experience” with opioids and his “early communications with Purdue Pharma,” which serve as the basis for his testimony. *Id.* at 1-4.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]. Ex. A at 105:4-16.

- [REDACTED]
[REDACTED]. Ex. A at 105:25-106:12; 106:13-107:16.
- [REDACTED]
[REDACTED]. Ex. A at 149:4-150:7.
- [REDACTED]
Ex. A at 105:17-24.
- [REDACTED]
[REDACTED]. Ex. A at 156:8-160:2.

[REDACTED]
[REDACTED]
[REDACTED] See, e.g., Ex. A at 156:12-13; 159:9-17. [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED].

In Oklahoma, counsel may *only* instruct a witness not to answer a question in a deposition under narrow circumstances, which are clearly defined by statute, but none of which are present here:

Any objection to evidence during a deposition shall be stated concisely and in a nonargumentative and nonsuggestive manner. A party may instruct a deponent not to answer *only* when necessary to preserve a privilege or work product protection, to enforce a limitation on evidence directed by the court, to present a motion under paragraph 2 of this subsection,¹ or to move for a protective order....

¹ The motion referred to in this clause is a motion to “limit the scope and manner of the taking of the deposition” based on a finding that that deposition is being conducted “in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the party[.]” 12 OK Stat § 12-3230(E)(2). No such motion was made, nor could it have been made.

12 OK Stat § 12-3230(E)(1) (emphasis added). None of these circumstances are present here.

[REDACTED]

Oklahoma law allows discovery of “facts known and opinions held by experts” by, *inter alia*, “depos[ing] any such expert witnesses subject to the scope of this section,” *i.e.*, Section 3226. 12 OK Stat § 12-3226(B)(4)(a)(2). Here, Dr. Van Zee developed an opinion for trial that is expressly based upon his personal experiences as a practicing physician, according to the State’s expert disclosure. It is black letter law that Purdue is entitled to probe the basis for an expert’s opinion. *See Casady v. State*, 721 P.2d 1342, 1346 (Okla. Crim. App. 1986).

[REDACTED]

[REDACTED]

[REDACTED]. “The primary purpose behind the subsections of [12 OK Stat § 12-3226] . . . is to foster fairness between the parties to the litigation in regard to expert witnesses.” *Heffron v. District Court Oklahoma County*, 77 P.3d 1069, 1079-80 (Okla. 2003).

[REDACTED]. Ex. A at 274:4-9. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

With expert witnesses, as with others, the law recognizes that “[c]ross-examination and presentation of contrary evidence ‘are the *traditional and appropriate* means of attacking shaky but admissible evidence.’” *Howard v. ACI Dist. S.*, 229 P.3d 565, 570 (Okla. Civ. App. 2009) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)) (emphasis added). Vigorous cross-examination is also necessary to explore the bases and reliability of that testimony to test whether such evidence can pass through *Daubert*’s gate. See *Christian v. Gray*, 65 P.3d 591, 600 (Okla. 2003). In *Christian*, the Oklahoma Supreme Court “adopt[ed]” the decisions of the United States Supreme Court in “*Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.” *Id.* The *Christian* court explained that “[d]ecisions about admissibility” of expert evidence “‘hinge on factual issues that can be resolved meaningfully only if a court is adequately informed.’” *Id.* at 610 (citation omitted). “A procedure,” such as an expert deposition, that allows an appropriate “opportunity for cross-examination ... ‘creates a record that allows a judge to rule on admissibility after due consideration.’” *Id.* (citation omitted).

[REDACTED]

[REDACTED]

[REDACTED]. *Frierson v. Hines*, 426 P.2d 362, 364 (Okla. 1967). “Courts generally recognize cross-examination is not a mere privilege, but is an absolute right of the party against whom a witness is called.” *Independent School District No. 1 of Tulsa County*, 572 P.2d 554, 558 (Okla. 1977).

“It is elementary that cross-examination of witnesses is a safeguard to truthfulness and accuracy, and may be used to develop facts favorable to the cross-examiner, or to discredit a witness.” *Id.* The law has long recognized that “[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process.” *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quotation omitted). [REDACTED]

[REDACTED]. For example, Dr. Van Zee’s expert disclosure indicates that he intends to link “Purdue’s massive marketing scheme” to “physician over-prescribing and mis-prescribing” of opioids (Ex. B at 6) [REDACTED]

[REDACTED]

[REDACTED]. See Ex. A at 156:8-160:2. [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED].² The State is, of course, welcome to assert any objection during a deposition that it believes it has a good faith basis to make and such objections can be addressed by the Court at the appropriate time *after* the deposition. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

At minimum, Dr. Van Zee's deposition should be reopened [REDACTED]

[REDACTED]. In

addition, 12 OK Stat § 12-3230(E)(1) states that "[i]f the court finds a person has engaged in conduct which has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof." [REDACTED]

[REDACTED] Purdue respectfully

suggests that this Court should also award Purdue fees and costs in connection with bringing this motion and re-deposing Dr. Van Zee.³ Purdue also suggests that an order saying [REDACTED]

[REDACTED] would also be a valid remedy

² [REDACTED]

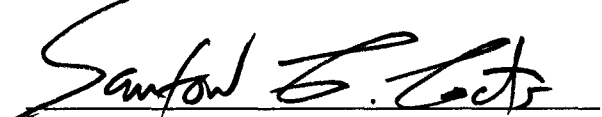
³ It is troubling that the State has repeatedly forced Purdue to seek the Court's assistance with enforcing basic discovery standards. The State is fully aware that this motion should not have been necessary [REDACTED]

[REDACTED]. But the State did not grant Purdue's request to re-open the deposition without requiring a motion. *See* Ex. C. As such, Purdue would respectfully suggest that the State, not Purdue, should bear the cost of this motion.

that would remove the need to re-depose him. The Oklahoma Supreme Court has said that “where a party, in the taking of a deposition, is deprived of the right of cross-examination on account of the fault of the opposite party or his attorney, the testimony in chief should not be admitted.” *Gasko v. Gray*, 507 P.2d 1231, 1234 (Okla. 1972).

Date: March 5, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2019, I caused a true and correct copy of the following:

**PURDUE'S MOTION TO RE-OPEN THE EXPERT DEPOSITION
OF DR. ART VAN ZEE AND FOR FEES AND COSTS**

to be served via email upon the counsel of record listed on the attached Service List.



A handwritten signature in black ink, appearing to read "Eric Wolf Pinker", is written over a horizontal line.

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EXHIBIT A
(SEALED EXHIBIT)

EXHIBIT B

Exhibit V - Art Van Zee, M.D.

A. Dr. Van Zee is expected to testify about the following subject matters, facts, and/or opinions:

- His personal experience with the OxyContin problem and the history of the OxyContin problem.
- His early communications with Purdue Pharma.
- The marketing and promotion of OxyContin.
- What Purdue knew about the potential for OxyContin addiction and abuse, and when they knew it.
- Other contributing factors to the spread of the OxyContin problem.
- The long-term consequences of the OxyContin problem for his region.

B. The summary of the grounds for each opinion is as follows:

- Background of Dr. Van Zee's Personal Experience with the OxyContin Problem

Dr. Van Zee is a primary care general Internist that has practiced in a Federally funded Community Health Center in St. Charles, Virginia—a small Appalachian coal mining town in Southwest Virginia since 1976. He had never had any significant training in pain and addiction medicine during medical school and his Internal Medicine residency at Vanderbilt, and he did not particularly have much interest in it at the time. That changed for Dr. Van Zee beginning in 1999.

In 1999, Dr. Van Zee started to see in his region increasing abuse and addiction related to OxyContin—a controlled release oxycodone preparation marketed by Purdue Pharma, which had come on the market in 1996. Dr. Van Zee began to see increasing numbers of young people who had become addicted to OxyContin, and whose lives were being shattered or lost because

of this. Dr. Van Zee was going in after midnight to the hospital to care for over-dosed young people on ventilators, or seeing them in the office desperate to get help with their problem. Dr. Van Zee spoke on a daily basis to multiple parents and grandparents who were seeing their children and grandchildren being lost to OxyContin addiction and who were asking him for help and advice. Dr. Van Zee had seen many of these young people grow up from infancy—many with bright and promising futures, cutting across all economic strata—and families that he had been involved with for decades. This was soon to be the tip of the iceberg as he became aware of a rapidly escalating tsunami of opioid addiction in the Central Appalachian region.

Dr. Van Zee saw a number of patients personally become addicted to OxyContin. Some of his patients became addicted taking OxyContin exactly as prescribed, others became addicted through abuse of OxyContin—such as by snorting or injecting. The very high potency of the OxyContin pills transformed recreational pill users into opioid addicted individuals—with all the behaviors and consequences that are seen in people affected by an opioid use disorder. At the time, Dr. Van Zee had very little to offer except empathy—as he had no training nor skills to help deal with the problem. This launched Dr. Van Zee on his quest to learn more about pain and addiction issues and to be of what help he could with the problem—which by then had become, in his view, in a region of many problems, the most pressing and tragic problem of the area.

In 2000, Dr. Van Zee became a member of ASAM (American Society of Addiction Medicine)—the largest organization of physicians in the country dedicated to addiction medicine and received much of his education and training through them. Dr. Van Zee was trained in treatment of patients with opioid use disorder—with buprenorphine, more commonly known in the media as Suboxone—and has been a buprenorphine prescriber since 2003. It can be a dramatically effective treatment in many patients, and Dr. Van Zee has seen many lives and

families restored.

At the same time that Dr. Van Zee felt compelled to learn more about treatment, he was mystified and astonished at the way OxyContin was being marketed by Purdue Pharma. In the early years, Dr. Van Zee saw many lives and families being lost to OxyContin—at the same time when physicians were being given OxyContin beach hats or music CDs of swing music—“Get in the Swing with OxyContin”—and were being reassured by sales reps that the risks were small and the benefits considerable for patients given OxyContin. This also got him more interested in Purdue’s marketing and promotion of OxyContin.

- Dr. Van Zee’s Early Communications with Purdue Pharma

By early 2000, OxyContin had become a huge problem in the Appalachian region. In early May, 2000, one of Dr. Van Zee’s partners at Stone Mountain Health Services wrote a letter to Purdue explaining the problem of the growing OxyContin abuse and addiction in the region. He did receive a letter back from Dr. Mayra Ballina, Associate Medical Director, Drug Surveillance at Purdue asking him to fill out some forms providing more information. In September, 2000, along with some colleagues, Dr. Van Zee attended a community meeting at a community college near Tazewell, Virginia that focused on the OxyContin problem in their area. Dr. David Haddox from Purdue had been one of the speakers, and Dr. Van Zee talked with him at some length after the meeting—explaining the problem in the area and asked him to have Purdue look at, and change, some of the marketing tactics they were using. Dr. Van Zee had follow up communications with Dr. Haddox and other Purdue employees, including another in-person meeting.

Dr. Van Zee never saw any substantial changes in the marketing or promotion of OxyContin. As a result, at a March 9, 2001 community meeting at the local high school, where

there were over 800 citizens in attendance, Dr. Van Zee was involved in presenting the national petition to recall OxyContin—until it could be re-formulated to a much less abusable preparation. Around this time, a meeting was arranged at a local hotel in the Spring of 2000. In attendance were David Haddox, Howard Udell—Purdue’s chief attorney, Michael Friedman, Purdue’s CEO, and some Purdue hired public relations people. Also in attendance were Dr. Art Van Zee, Dr. Vince Stravino, Sr. Beth Davies, Greg Stewart, and Sue Ella Kobak. They had a long meeting exploring all dimension of the problem. Toward the end of the meeting, Purdue presented an open letter from David Haddox to be published in the local paper—expressing Purdue’s great concerns about the devastation that prescription drug abuse was having in the county but went on to express the sentiments that the prescription drug abuse problem would not be resolved by simply removing a single drug from the market. The meeting ended abruptly and in disarray—as the Lee County contingent all felt that this had been a setup—more to deal with public relations issues than to genuinely deal with the problem. The following day, the executives had another meeting with local citizens and offered \$100,000 from Purdue to help Lee County with the problem. Eventually, the offer was turned down—with the primary view that the money would not substantially affect the enormous OxyContin problem and would only serve to be a public relations success for Purdue.

- The Marketing and Promotion of OxyContin

With the understanding that science-based evidence did not show any superior efficacy or safety of OxyContin compared to four times daily short-acting oxycodone, in essence, the most heavily financed opioid marketing campaign in the history of the industry—using a much increased sales rep force highly incentivized by a lucrative bonus system, promoting a liberal use of opioids in general and OxyContin in particular for chronic non-cancer pain (there was

very little, if any, evidenced-based medicine to support that at the time), and over-selling the benefits and misrepresenting the risks—proved to be a successful formula for catapulting OxyContin from a 1996 \$44 million sales to a 2001-02 combined sales of \$3 billion. The high availability of OxyContin, a highly addictive drug, paved the ground for the OxyContin tragedy that was rapidly spreading around the country.¹

- What Purdue Knew About the Potential for OxyContin Addiction and Abuse, and When They Knew It

Michael Friedman, CEO of Purdue, testified before Congress on August 28, 2001 that Purdue was not aware of any unusual abuse or diversion of MS Contin in their 17 years of marketing, and the first that they were aware of OxyContin abuse was in early April, 2000 when newspaper reports from Maine came to their attention.² Dr. Paul Goldenheim, Medical Director for Purdue Pharma, testified before a Senate Committee on February 12, 2002 that in the 17 years of marketing of MS Contin, “...there have been no unusual signals throughout the marketing of MSContin that would suggest that this controlled-release dosage form would be particularly attractive to abusers. Purdue had no reason to expect otherwise with OxyContin.”³ There is information and facts available subsequently that would indicate otherwise:

- (a) In 1990, JC Crews published an article in CANCER—a mainstream medical journal that documented the widespread abuse (crushing, and injecting) of MS Contin to the extent that it had become the drug of choice in the Cincinnati area—replacing Dilaudid, the perennial favorite opioid of choice.⁴
- (b) In 1996, internal Purdue emails showed that the company knew that MS Contin was being abused. In May of 1996, Richard Sackler & Howard Udell were sent a copy of JC Crews article. In August, 1996, a Purdue scientist “assigned to research MS Contin

abuse emailed his findings to Sackler, Udell, Michael Friedman, Paul Goldenheim, and other Sackler family members including Raymond and Mortimer.”⁵

(c) In 1997, Paul Goldenheim received a copy of the JC Crews’ article that reported “Morphine is readily extracted from MS Contin for street abuse,” and also in 1997, a top Purdue medical officer, Robert Kaiko, told company executives that MS Contin was the “most common source of morphine for drug addicts in New Zealand.” *Id.*

(d) In 1998, a Canadian Medical Association Journal described MS Contin abuse and an “accompanying editorial warned that drug abusers would also seek out the company’s latest time-release drug, OxyContin.” *Id.*

(e) In the Fall of 1997, Mark Alfonso, a senior Purdue marketing official—sent a memo to Michael Friedman and other executives noting that OxyContin abuse was appearing on websites frequented by drug abusers. *Id.*

- Other Contributing Factors to the Spread of the OxyContin Problem

Following Purdue’s massive marketing scheme, physician over-prescribing and mis-prescribing played a big role in the development of the problem. Further, once the knowledge of the addictive and abuse potential of OxyContin was spreading across the country, the economics began to drive it—as manifested by the proliferation of “pain clinics.” At \$1 per milligram street value, a month’s supply of 80 mg BID would bring \$4800/month, \$57,600 per year. The worst of market-place medicine fueled the problem. Florida became infamous for its “pain clinics.” At one time, Broward County had more pain clinics than it had McDonalds.

- Long Term Consequence of the OxyContin Problem in Appalachia

The prescription opioid problem, beginning with OxyContin, has done more damage to individuals, communities, and the region than any other major public health issue. The loss of

lives, the loss of so many that could have made important contributions to their communities and the country, the deep harm to the children growing up in dysfunctional and broken families that will leave a hole in their hearts forever—all have left a legacy that will impact many generations to come.

C. Dr. Van Zee's Compensation

Dr. Van Zee is not seeking compensation for his time spent in expert preparation or for expert testimony.

D. Dr. Van Zee's Qualifications and Publications

For Dr. Van Zee's qualifications and a list of Dr. Van Zee's recent publications please see Exhibit V-1.

E. Dr. Van Zee's Prior Testimony

Dr. Van Zee has not testified as an expert in any litigation in the preceding four (4) years.

¹ Van Zee, A. The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy. *American Journal of Public Health*, Sept, 2008.

² Michael Friedman, testimony-Hearing before the Subcommittee on Oversight & Investigation Of the Committee on Energy & Commerce. House of Representatives. August 28.2001.

³ Dr. Paul Goldenheim, testimony-Hearing of the Committee on Health, Education, Labor, and Pensions. United States Senate. Feb. 12, 2002.

⁴ Crews, JC. Denson DD. Recovery of morphine from a controlled-release preparation---a source Of opioid abuse. *Cancer*. 1990. 66:2642-2644.

⁵ Meier, Barry. *Pain Killer: An Empire of Deceit and the Origin of America's Opioid Epidemic*. 2018. Random House.

EXHIBIT C

From: Hoffman, Nathan
Sent: Tuesday, March 5, 2019 11:14 AM
To: Drew Pate
Cc: Tam, Jonathan; LaFata, Paul; Raphael, Brian; Kelly, Meghan
Subject: Van Zee deposition - improper instructions not to answer

Drew, please let us know by 2 pm CT today if you will agree to reopen the deposition of Dr. Van Zee due to your improper instructions not to answer questions based on the "scope" of Dr. Van Zee's expert disclosure? Research reveals no basis in Oklahoma law for such an instruction. If you do not agree to reopen the deposition, we will file our motion to do so this afternoon. Thanks.

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