IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

(1) PURDUE PHARMA L.P.;
(2) PURDUE PHARMA, INC.;
(3) THE PURDUE FREDERICK COMPANY;
(4) TEVA PHARMACEUTICALS USA, INC.;
(5) CEPHALON, INC.;
(6) JOHNSON & JOHNSON;
(7) JANSSEN PHARMACEUTICALS, INC.;
(8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;
(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;
(11) WATSON LABORATORIES, INC.;
(12) ACTAVIS LLC; and
(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,

Defendants.

For Judge Balkman's Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED
APR 26 2019

In the office of the
Court Clerk MARILYN WILLIAMS

TEVA DEFENDANTS' AND ACTAVIS DEFENDANTS' MOTION IN LIMINE #8 TO EXCLUDE LAY WITNESS TESTIMONY THAT IS NOT BASED ON PERSONAL KNOWLEDGE

Teva Pharmaceuticals USA, Inc. ("Teva USA"), Cephalon, Inc. ("Cephalon"), Watson Laboratories, Inc. ("Watson"), Actavis LLC ("Actavis LLC"), and Actavis Pharma, Inc. ("Actavis Pharma")[1] move this Court to preclude the State from referring to or otherwise offering at trial (whether through direct or cross-examination) and from presenting in any

[1] Cephalon and Teva USA are referred to as the "Teva Defendants." Watson, Actavis, LLC, and Actavis Pharma are referred to as the "Actavis Defendants."

manner (whether in opening statements, questions to witnesses or experts, objections, closing arguments, or otherwise) testimony from lay witnesses that is not based on personal knowledge or that otherwise requires expert qualifications. This includes, but is not limited to, the following:

1. Lay testimony regarding drug treatment procedures and costs; and
2. Lay testimony including statistics regarding opioids.

ARGUMENT AND AUTHORITIES

Personal knowledge is the foundation of fact witness testimony. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." 12 O.S. § 2602. As a general rule, lay witness testimony "is admissible if predicated upon concrete facts within their own observation and recollection[,] that is facts perceived from their own senses, *as distinguished* from their opinions or conclusions drawn from such facts." *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 847-48 (10th Cir. 1979) (emphasis added).

The rules of evidence do "not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *Randolph*, 590 F.2d at 846. That said, when, "as a matter of practical necessity, events which [lay witnesses] have personally observed cannot otherwise be fully presented to the court," *id.*, lay witnesses may testify to "opinions or inferences which are: 1. Rationally based on the perception of the witness; and 2. Helpful to a clear understanding of his testimony or the determination of a fact in issue." 12 O.S. § 2701. This perception ***still*** must come from personal knowledge and experience. *McClure v. Group K Enters., Inc.*, 1999 OK CIV APP 29, ¶ 13, 977 P.2d 1148, 1151 (lay opinion testimony admissible because it "was based on [the witness's] own observations of Plaintiff's location" when tort occurred).

If an individual is called as a fact witness, he or she may testify only as to facts gained through personal knowledge and experience, regardless of whether the witness has professional expertise in some field. *See McCoy v. Black*, 1997 OK CIV APP 78, ¶ 9, 949 P.2d 689, 693. Testimony based on anything other than facts learned personally is expert testimony, which is subject to expert rules. *Id.* at ¶ 10; Haydock & Herr, *Discovery Practice*, § 5.04 (noting that a witness who is not designated as an expert witness should not be permitted to testify as one because "the opposing party [would be] denied the opportunity to disqualify expert testimony, obtain rebuttal experts, and hold additional depositions.").

The evidence rule requiring personal knowledge also "prevent[s a witness] from testifying to the subject matter of [a] hearsay statement, as he has no personal knowledge of it." Fed. R. Evid. 602 advisory committee notes (interpreting federal equivalent to 12 O.S. § 2602). If a "witness merely has personal knowledge of an out-of-court statement offered to prove the fact asserted in that statement—but not the underlying fact—then his or her testimony must comply with the hearsay rule." *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014).

A. <u>The Court Should Prohibit the State from Eliciting Testimony From Fact Witnesses Regarding Drug Treatment Programs Of Which They Do Not Have Personal Knowledge.</u>

In discovery, the State has elicited testimony from lay witnesses regarding the steps and costs involved in drug treatment programs. Fact witnesses who have no personal experience with such programs should not be allowed to testify on that topic. Not only would they lack the personal knowledge 12 O.S. § 2602 requires, but also any such testimony necessarily would rely on hearsay and should be excluded on that basis as well. To the extent a witness may have some personal experience with drug treatment programs, his or her testimony should be limited to matters within that experience.

B. The Court Should Prohibit The State From Eliciting Testimony Regarding Statistics That Were Not Compiled By The Witness.

The State will likely try to use its witnesses to usher in statistics regarding opioid use, despite the fact that the witnesses played no role in compiling the statistics. If a witness testifies regarding statistics he or she did not prepare, the witness cannot be cross-examined on key points that directly impact the reliability of the statistics, including the types of data considered and the methods and procedures used to gather and analyze it. *See Jordan v. Yum Brands, Inc.*, 2014 WL 12613311, at *2 (E.D. Pa. Mar. 14, 2014) (excluding references to statistics where statistics were general, expansive, and undefined, and plaintiff "apparent[ly] intend[ed] to introduce such bare statistics into evidence without accompanying explanation."). Eliciting testimony from fact witnesses regarding statistics compiled by other people plainly violates both the personal-knowledge requirement and the hearsay rule.

CONCLUSION

Lay witnesses must have personal knowledge regarding the subject of their testimony. Testimony without such knowledge violates witness rules, hearsay rules, relevance rules, and prejudice rules. It should be excluded.

For the foregoing reasons, the Teva Defendants and Actavis Defendants ask that the Court grant this Motion in Limine and instruct the State and all counsel not to mention, refer to, interrogate about, or attempt to convey in any manner, either directly or indirectly, any of these matters, and further instruct the State and all counsel to warn and caution each of their witnesses to follow the same instructions.

Dated April 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 26th day of April 2019, to the following:

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