



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

- (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.

Case No. CJ-2017-816
Judge Thad Balkman

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

OCT 28 2019

In the office of the
Court Clerk MARILYN WILLIAMS

**AMICUS BRIEF OR IN THE ALTERNATIVE MOTION FOR INTERVENTION
AS A MATTER OF RIGHT PURSUANT TO 12 O.S. 2011, SECTION 2024**

COME NOW, the Honorable J. Kevin Stitt, in his official capacity as Governor of the State of Oklahoma, Charles A. McCall, in his official capacity as Speaker of the Oklahoma House of Representatives, and Greg Treat, in his official capacity as the President Pro Tempore of the Oklahoma State Senate (“Applicants”), all in their capacity

as elected officials representing the people of the State of Oklahoma on whose behalf the Attorney General filed the above entitled suit and request (i) permission of the Court to consider this amicus brief in the above styled cause, or in the alternative (ii) an Order allowing intervention as a matter of right pursuant 12 O.S. 2011, Section 2024.

Applicants have reviewed the Court's August 26, 2019 Judgment After Non-Jury Trial and the Parties' respective interpretations of that order as set forth in briefing to the Court and oral argument heard October 15, 2019. Applicants further understand that the Court has taken the Parties' respective positions under advisement and will issue a forthcoming final judgment. Applicants file this Brief in support of the Court's obligation to oversee Johnson & Johnson's complete abatement of the nuisance found in the Court's August 26, 2019 order.

Johnson & Johnson contends that the Court's order requiring J&J to fund \$572 million for the first year of the State's Abatement Plan is limited to a single year. This argument flies in the face of the Court's findings and Oklahoma law. The Court found that J&J created a public nuisance. The Court found that this nuisance is a menace to Oklahomans. The Court also found that the nuisance is temporary and can be abated. And, the Court found that the State's Abatement Plan is reasonable and necessary. The State's Abatement Plan—which, again, the Court determined was a reasonable and necessary plan for abating the nuisance—is a comprehensive plan which every single State witness testified would take at least 20 years to take effect and which J&J failed to counter with any plan of its own.

Under Oklahoma law, once the Court found that a nuisance exists that can be abated, the Court undertook an inalienable duty to fully abate the nuisance. This duty cannot be waived, and it cannot be done halfway. The law requires the Court to do equity and all of the evidence proved that it would take at least 20 years of full funding under the Abatement Plan to abate the nuisance. Nevertheless, J&J has latched upon a statement by the Court at its August 26th hearing as support for arguing that the Court intends to stop short and not actually abate the nuisance. *See* Hearing Tr. (Aug. 26, 2019), at 6 (“Whether additional programs and funding are needed over an extended period of time, those are determinations to be made by our legislators and policymakers.”).

J&J’s position is wrong for several reasons. First, the Court found as a matter of law that the State of Oklahoma did not cause the nuisance and bears no responsibility or fault for causing it. *Id.* at p. 30, ¶ 21 (“The Court [] finds no act or omission by the State was a direct or proximate cause of public nuisance created by the Defendants.”). Conversely, the Court found that J&J did cause the nuisance. The Court cannot shift responsibility for abating the nuisance from the guilty party to the innocent taxpayers of this State. To do so would be to effectively hold the citizens of the State of Oklahoma liable for paying to remediate harm that the Court already determined someone else caused. Second, under the clear law of equity, the Court cannot stop short of abating the nuisance. Once the Court determined that a nuisance exists that can be abated, and adopted the State’s Abatement Plan, the Court became obligated to use its broad plenary powers to fully abate the nuisance—not just try to abate it for one year and stop. Finally, the Court cannot order the taxpayers or the Oklahoma Legislature to fund anything.

This case involves the Court’s finding of a public nuisance, caused by Defendants’ conduct of a commercial enterprise across every corner of Oklahoma. As stated above, the remedy for this public nuisance is equitable abatement. The plaintiff in this case, the State of Oklahoma, is the party with the necessary infrastructure to carry out the abatement process, with the funding to do so provided by the Defendants—the party the Court rightfully found to have directly caused the nuisance. The Legislature stands ready to appropriate the abatement funds in accordance with the findings of the Court regarding the Abatement Plan, and the Executive Branch is committed to implement the programs and services outlined in the Abatement Plan, again subject to the findings of the Court. Applicants believe that Oklahoma law regarding equity requires the Court, for its part, to retain jurisdiction over the Defendants to, among other things, ensure that Defendants fund the Abatement Plan—which this Court found to be reasonable and necessary—for as many years and months as needed to completely and totally abated the nuisance.

ARGUMENT

This Court presided over this trial and found that Oklahoma is in the throes of an opioid crisis. “Specifically, Defendants caused an opioid crisis that is evidenced by increased rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome in Oklahoma.” Hearing Tr. (Aug. 26, 2019), at 5-6. This Court also found that its devastation is pervasive and unprecedented. As the Court found:

The parties agree that from 1994 to 2006, prescription opioid sales increased fourfold and that from 2011-2015, more than 2,100 Oklahomans died of an unintentional prescription opioid overdose. It was undisputed that in 2015, over 326 million opioid pills were dispensed to Oklahoma residents, enough for every adult to have 110 pills. Oklahoma dispenses the most prescription

fentanyl per capita. In 2017, 4.2% of babies born covered by SoonerCare were born with Neonatal Abstinence Syndrome (also called NAS), a group of conditions caused when a baby withdraws from certain drugs it's exposed to in the womb before birth.

August 26 Order at p. 2, ¶3. Indeed, “[t]he opioid crisis is an imminent danger and menace to Oklahomans.” Hearing Tr. (Aug. 26, 2019), at 5. While the opioid crisis is an inescapable fact of life for each and every Oklahoman, funding its abatement should not be. Rather, the law *requires* that Johnson & Johnson—not the citizens and taxpayers of Oklahoma—shoulder the entire burden of abatement.

The Court’s August 26 Order is clear: Johnson & Johnson created Oklahoma’s opioid crisis and “the appropriate remedy to address the Opioid Crisis is the [equitable] abatement of the nuisance.” *Id.* at p. 30, ¶¶ 20-24. *See also* Hearing Tr. (Aug. 26, 2019), at 6 (“This is a temporary public nuisance that can be abated, and the proper remedy for public nuisance is equitable abatement.”). Further, the Court found that “the contours of the State’s proposed Abatement Plan are reasonable and necessary to abate the public nuisance” *Id.* at p. 30, ¶ 25. And the Court stated that it will retain jurisdiction over the parties and the abatement proceeds in order to implement the Abatement Plan. *Id.* Having made such a finding, the Court rightly accepted the mantle of ordering and overseeing ***complete abatement*** of the nuisance—not partial abatement or a push in the right direction. If this Court’s aim is abatement of the nuisance while holding Johnson & Johnson responsible for that abatement, then the Court should retain jurisdiction over the matter and monitor the abatement accordingly.

Oklahoma nuisance law is clear that a Court retains jurisdiction in an equitable

abatement to oversee and provide complete relief (*i.e.* until the nuisance is abated). *E.g.*, *Crushed Stone v. Moore*, 1962 OK 65, 369 P.2d 811; *Meinders v. Johnson*, 2006 OK CIV APP 35, 134 P.3d 858; *see also Murray v. Speed*, 1915 OK 934, ¶ 9, 153 P. 181 (“A court of equity which has obtained jurisdiction of the controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter, and to avoid multiplicity of suits.”); *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 12 (1970) (“Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”). Those cases show, particularly in the nuisance context, that Oklahoma district courts have the obligation and the power to monitor, evaluate and, if necessary, modify the abatement process until the nuisance is abated. *See Crushed Stone*, 1962 OK 65, ¶¶ 8, 16-17, 369 P.2d at 814, 817; *Meinders v. Johnson*, 2006 OK CIV APP 35, ¶ 12, n.1, 134 P.3d at 861-62, n.1.

Not only must the Court fashion a remedy that does, in fact, abate the nuisance, Johnson and Johnson must pay for it. It is fundamental to equity, common sense, and implicit in the Court’s obligation that the cost of complete abatement must fall on the party held responsible for creating the nuisance. Johnson & Johnson, however, seeks a final judgment that would assign the brunt of the responsibility for abating Oklahoma’s opioid crisis to the Oklahoma legislature and thereby the citizens of Oklahoma. It would be untenable to find nuisance against one party only to then shift the burden of abatement to the citizens of Oklahoma.

Pointing to comments made by the Court in conjunction with its August 26 Order,

Johnson & Johnson argues that the Court intends to transfer the responsibility of prescribing abatement measures and funding to the legislature after one year—a time frame that all interested parties concede will not afford complete abatement of the nuisance. *See* Obj. to Proposed Judgment at 3 (“In pronouncing its judgment, the Court explained that whether ‘additional programs and funding are needed over an extended period of time . . . are determinations to be made by our legislators and policymakers.’” (quoting Hearing Tr. (Aug. 26, 2019), at 6)). While it is unclear what the Court intended by its comment, it is clear to the undersigned that the Court cannot order anything short of full abatement by Johnson & Johnson.

As this Court found, “[T]he public nuisance created by the Defendants has affected and continues to affect at the same time entire Oklahoma communities and neighborhoods, as well as a considerable number of Oklahomans” August 26 Order at p. 30, ¶ 20. The Court went on to hold that the State of Oklahoma bears no responsibility for causing the nuisance. However, if the Court were to accept J&J’s interpretation of the August 26th Order, the effect would be to transfer responsibility for abating the opioid crisis to the legislature (that is, the innocent taxpayers of Oklahoma) after year one and financial responsibility for cleaning up the bulk of the opioid crisis will fall squarely on the shoulders of those affected by it—Oklahoma citizens and taxpayers. Such a result would run counter to the equitable nature of a public nuisance claim, the clear findings of this Court, the statutory provisions under 50 O.S. §§1, *et seq.*, the precedential case law that has been developed over decades, and the Oklahoma Constitution.

Put differently, Johnson & Johnson's proposal to have this Court transfer the responsibility of abatement to the taxpayers of Oklahoma all but renders meaningless the Court's entire Order and the Attorney General's statutory authority to bring a public nuisance action for equitable abatement. This is untenable under the law. It was the *legislature* that passed 50 O.S. §§1, *et seq.* and empowered the Attorney General to seek relief for public nuisances in the courts. It was the *legislature* that codified the courts' equitable power to abate public nuisances in such actions. *See* 50 O.S. §8. Yet, Johnson & Johnson would have this Court force the legislature to accept the mantle of abatement in the Court's place. This circular result would undermine the public nuisance statutes and, thus, the legislature itself.

The power to enforce a complete and truly *equitable* abatement plan lies with this Court alone. The legislature is powerless to compel abatement funding from Johnson & Johnson, and believes it fundamentally unwise and unfair to shoulder the citizens of Oklahoma with this burden. It is not for the legislature to divert Oklahoman's tax dollars, already desperately needed elsewhere, to cover the costs of abating the opioid crisis the Court found Johnson & Johnson caused. Or levy additional taxes. Either way, under Johnson & Johnson's proposal, the State and its citizens would be right back where they started—saddled with the overwhelming costs of a devastating nuisance that Johnson & Johnson caused—despite properly seeking and obtaining relief from the opioid crisis from this Court pursuant to 50 O.S. §§1, *et seq.*

In other words, the judgment Johnson & Johnson seeks would remove responsibility for abating the opioid crisis from the one party expressly found to have caused it (Johnson

& Johnson) and place the onus on the one party expressly found *not* to have caused it (the State). A judgment shifting the costs of abatement procedures to the victims of the nuisance is anathema to the principles of equity. Accordingly, having found that Johnson & Johnson created a nuisance, and that the nuisance is abatable, the undersigned respectfully submit that this Court must order Johnson & Johnson to completely abate the nuisance and retain jurisdiction over that equitable abatement remedy until complete relief is administered.

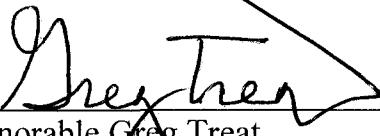
Respectfully Submitted,



Honorable Kevin Stitt
Governor of the State of Oklahoma



Honorable Charles McCall
Speaker of the Oklahoma House of Representatives



Honorable Greg Treat
President Pro Tempore of the Oklahoma State Senate

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on October ____, 2019 to:

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