No. 2006-1212

In the Supreme Court of Ohio

CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE NO. 3:06CV40010

MELISA ARBINO,
Petitioner,
v.
JOHNSON & JOHNSON, et al.,
Respondents.

RESPONDENTS JOHNSON & JOHNSON, ORTHO-McNEIL PHARMACEUTICAL, INC., AND JOHNSON & JOHNSON PHARMACEUTICAL RESEARCH AND DEVELOPMENT, LLC'S OPPOSITION TO PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

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Respondents Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc., and Johnson & Johnson Pharmaceutical Research and Development, LLC's (collectively "Respondents") oppose Petitioner's Motion to Supplement (the "Motion") a non-existent record. This case is before this Court on questions certified by the United States District Court for the Northern District of Ohio (the "District Court") that address facial constitutional challenges by Petitioner to three statutes.[1] Those questions were accepted without a request for the District Court's record; there is nothing for Petitioner to "supplement."

No rule of this Court authorizes Petitioner's Motion. Petitioner cites Supreme Court Practice Rule V(6) (Pet.'s Mot. to Supp. at 1), but Rule V governs the record on *appeals* — not certified question cases. Rule V is based on the premise that the court of appeals must transmit the entire record once this Court accepts an appeal, and permits parties to file a motion to supplement the record if an item necessary to resolution of the appeal is missing. S.Ct.Prac.R. V(3)(B), (6). No rule imposes a similar obligation to transmit the record in *certified question* cases, or permits parties to such cases to file a motion to supplement the record. See S.Ct.Prac.R. XVIII(4).

Instead of requiring transmission of the record, Supreme Court Practice Rule XVIII(4) vests this Court with discretion to determine whether the record is necessary to answer the certified questions. See S.Ct.Prac.R. XVIII(4) (stating that this Court "*may* request that copies of all or any portion of the record before the certifying court")

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[1] The three statutes are a non-economic damage cap (R.C. 2315.18), collateral source statute (R.C. 2315.20), and punitive damages cap (R.C. 2315.21).

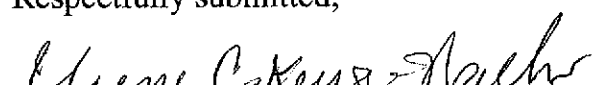
(emphasis added). Notably absent from Rule XVIII is any provision that permits parties to file a motion to supplement the record as determined by this Court. Id. In this case, this Court correctly proceeded on the assumption that the record was unnecessary to resolve Petitioner's facial constitutional challenges and did not request all or any portion of the District Court's record. Petitioner's Motion to "supplement" a record that is not, and need not be, before this Court, should be denied.

Even if Petitioner's Motion were permitted under this Court's rules, however, it should be denied. Petitioner's proposed "supplement" consists of a premature motion for partial summary judgment and exhibits; in light of ongoing discovery, the District Court stayed briefing and ordered that Respondents need not respond until March 14, 2008. (Pet.'s Mot. to Supp. at Exh. B.) Respondents will respond to Petitioner's partial summary judgment motion in due course.

For now, it is sufficient to note that the partial summary judgment motion seeks a ruling on certain defenses asserted by Respondents in the MDL, and expresses Petitioner's position based on exhibits she selected, which she presents out-of-context. The validity of Respondents' defenses to liability in the MDL is wholly irrelevant to the certified questions pending before this Court. Facial constitutional challenges do not depend on the facts of a particular case; they require the petitioner to establish that there is no set of facts under which the statute would be valid. E.g., *Harrold v. Collier* (2005), 107 Ohio St.3d 44, at ¶ 37. Petitioner's partial summary judgment motion and exhibits do not purport to address that issue.

For all of the above reasons, Respondents respectfully request that this Court deny Petitioner's Motion to Supplement the Record.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Respondents Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc., and Johnson & Johnson Pharmaceutical Research and Development, LLC's Opposition to Petitioner's Motion to Supplement the Record** has been served this 19th day of December, 2007, by U.S. Mail, postage prepaid, upon the following:

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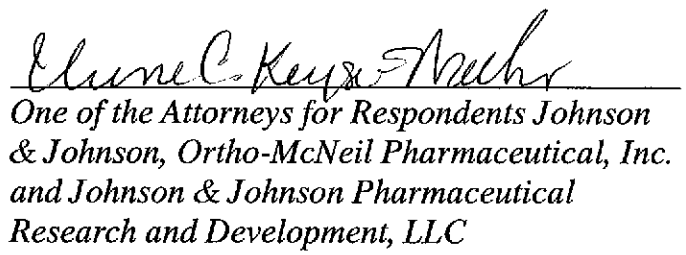

One of the Attorneys for Respondents Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc. and Johnson & Johnson Pharmaceutical Research and Development, LLC

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