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# JUDGE AS DOCTOR AND LEGISLATOR:
## A CASE STUDY IN THE CONSEQUENCES OF BROADER PUBLIC NUISANCE LIABILITY

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# JUDGE AS DOCTOR AND LEGISLATOR:
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### INTRODUCTION

A trial judge in Oklahoma wants to control what type of medication your doctor can prescribe to treat your pain. It does not matter if the pain medication is approved by the Food and Drug Administration (FDA). Nor does it matter if your doctor believes that you need the medication to control your pain. This Oklahoma trial judge (without any medical training) thinks he knows better how to treat your pain.

This is the practical effect of a trial court judgment in Cleveland County, Oklahoma. In that case, the judge ruled that Johnson & Johnson should pay nearly half a billion dollars in damages to the state (and in fees to its private contingent-fee lawyers) for the "public nuisance" of manufacturing a lawful prescription drug.[1] The trial court ruled that Johnson & Johnson was responsible for the opioid-drug epidemic in Oklahoma because it sponsored speakers at medical conferences, helped professionals publish articles in medical journals, and partnered with academic groups to sponsor seminars. The company in fact manufactured and sold less than one percent of all opioid prescription drugs sold in Oklahoma. But the trial court

[1] *State of Oklahoma v. Johnson & Johnson*, Judgment after Non-Jury Trial, Aug. 26, 2019 (hereafter Verdict).

 

ruled that the company's "unbranded marketing" efforts (talking to medical professionals about the efficacy of prescription opioids) were responsible for the entire opioid addiction and overdose problem in Oklahoma. It did not matter if the drugs were purchased illegally, used against the doctor's orders, or whether the individual taking the drugs engaged in doctor shopping to find someone who would prescribe more of the drug. It did not matter that Johnson & Johnson prescribed no drugs itself—only the patient's doctor can do that. Nonetheless, the trial court ruled that this one company was solely responsible for the opioid problem in Oklahoma. Something is wrong with this picture.

This WORKING PAPER will not assess whether Johnson & Johnson should have developed and sold pain-relieving drugs. That is a question for the FDA. Instead, this paper examines the use of an obscure legal theory—public nuisance—to allow courts and plaintiffs' lawyers to make public policy outside of the legislative process. A legal theory that the courts developed to remedy harm to public property or large numbers of property owners is being increasingly used to place local trial judges in charge of public policy on everything from climate change to gun violence. Of course, the trial judge cannot enact public policy. But the judge can issue multi-million-dollar verdicts. Those verdicts will do little to cure a problem. They will, however, make the plaintiffs' lawyers who brought these cases rich. The paper further argues that the Oklahoma court applied this legal theory in a manner that violates the First

 

Amendment. The court's order punished protected speech and deters others from speaking on this issue.

This paper begins by reviewing the Oklahoma decision. The next section will look at the tort of public nuisance and the problems and injuries it is meant to address. The third section will argue that Oklahoma case does not fit the mode of a traditional public nuisance case. Instead, as used in the Oklahoma case, public nuisance theory is deployed to circumvent the legislative process to enact public policy for the entire nation by a single state trial court judge. Finally, the paper will note how the Oklahoma decision treads on the First Amendment guaranty of freedom of speech.

## I. THE VERDICT

The trial court decision starts with a number of findings of fact. The judge decided that Johnson & Johnson not only sold its own brand of prescription opioid pain reliever, but also provided other pharmaceutical companies the API (active pharmaceutical ingredient) to make opioid pain relievers. Verdict ¶ 6-15. Although the verdict does not discuss the importance of this factual finding, it may be that the court believed that this fact provided a basis for assigning all of the blame to Johnson & Johnson although the company sold less than one percent of the prescription

opioids in the state.[2]

After finding that Johnson & Johnson, through subsidiaries, sold the raw materials for manufacture of prescription pain relievers, the court turned its attention to the company's efforts to communicate with the medical profession over the need to better treat pain. This communication, according to the court, included both branded and "unbranded marketing." Verdict ¶ 18-25. "Unbranded marketing" included literature funded by Johnson & Johnson in medical journals and publications, and financial support of patient advocacy groups. Verdict ¶ 19, 25, 36-39. Other "unbranded marketing" activities the court cited includes dinners and presentations where doctors spoke to other doctors and partnering with third-party advocacy groups or academic groups to hold seminars, symposiums, and conferences. Verdict ¶ 35-39.

The messages in these "unbranded marketing" efforts, according to the court, included "heightening awareness of the under treatment of pain." Verdict ¶ 20. Another message that the court apparently faulted was the company's claim that patients who asked for higher doses were not necessarily addicted but were suffering from undertreatment of pain indicating a need to prescribe more opioids. Verdict ¶ 22. The court also faulted the company's efforts to "influence a wide range of governmental agencies of the benefits of prescription opioids." Verdict ¶ 25.

[2] Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, Aug. 26, 2018.

The court ruled that the company used "misleading" and "deceptive" messages in its marketing—but the only place in the verdict where the court identified something misleading or false was in the distribution of "visual aids citing the Allan, Simpson and Milligan studies" (funded by Johnson & Johnson), use of DAWN data (data relied on for comparison between opioid products), and representations as to low abuse rates. Verdict ¶ 31, 32. The court noted that these studies were "later described as false and misleading by the FDA." Verdict ¶ 32. These items were part of the branded marketing by Johnson & Johnson sales representatives who met with doctors in the state. Verdict ¶ 35, 49-50. Although these visual aids and one other item were the only marketing pieces that the verdict identified as false, the court later concluded that the company's "opioid marketing, in its multitude of forms [including lobbying government agencies and funding patient pain advocacy groups, and sponsoring articles in medical journals], was false, deceptive and misleading." Verdict ¶ 44.

The public nuisance, according to the court, was in this branded and unbranded marketing. Verdict Conclusions of Law ¶ 10-11. The court rejected any requirement that the challenged conduct relate to the use of property or that it injure another's use of property (the traditional grounds for a public nuisance). Verdict Conclusions of Law ¶ 2. Instead, the court held that "false and misleading marketing" was itself a "public nuisance" under Oklahoma law. Verdict Conclusions

 

of Law ¶ 10-11.

This ruling appears to be a radical departure from prior Oklahoma decisions—both in its rejection of the requirement that the nuisance relate to the use of property and in its failure to find "unlawful" conduct as the basis for finding a nuisance. The decision also demonstrates why litigation is a particular bad forum for the making of public policy. Both of these points are discussed in the next section. Finally, the decision imposes penalties on speech protected by the First Amendment. The final section of this paper addresses this constitutional problem with the verdict.

## II. WHAT IS A PUBLIC NUISANCE?

The Oklahoma trial court ruled that something Johnson & Johnson did was a "public nuisance." What does that mean? When somebody is injured, they can bring a civil action—usually for an intentional tort (the defendant purposefully injured the plaintiff) or for negligence (the defendant breached his duty of care causing an injury to the plaintiff or the plaintiff's property). Nuisance is a type of civil action where an individual sues for injury to his property or injury to the use and enjoyment of his property.[3] An example of a private nuisance action might be your next-door neighbor deciding to start a commercial hog farm, invading your property with the noise the noise and aroma of that activity.

[3] Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 7, 9 (2011).

A *public* nuisance, by contrast, is a civil claim that was created by the courts nearly a thousand years ago to stop interference with public property (or, at the time the action was created, the king's property).[4] Courts later expanded the theory to protect "public rights" to use the roads or be free of pollution. Schwartz, et al., *id*. The distinction between a public nuisance and a regular civil action is that the public nuisance does not protect personal rights. Rather, it is designed to stop an interference with rights held by the public generally. Merrill at 7-8. An individual suffering an injury to personal rights would sue for damages and would have to prove that the defendant acted intentionally or negligently. *See id*. at 15. Public nuisances, however, do not support a claim for damages, but are a tool for the court to order the defendant to "abate" the condition causing harm to the public. *Id*. at 7; Schwartz, et al. at 7. That could mean an injunction against blocking the road or an order to clean up a polluted river, for instance. Because the claim for public nuisance was limited to an interference with an interest held in common by the public, it was an action that was only brought by a public official, such as the attorney general or district attorney. Merrill at 12. Originally, public nuisance was based on a criminal statute defined by the legislature. *Id*. That is, for conduct or a condition to be a public nuisance, it also had to be a crime. *Id*.

[4] Victor E. Schwartz, Phil Goldberg, and Corey Schaecher, *Game Over? Why Recent Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L.REV. 629, 632 (2010).

All of this changed in the early 1970s when environmental advocates convinced the American Law Institute to redefine "public nuisance" as any "unreasonable interference" with right held in common by members of the public, dropping the requirement that the conduct or condition violated the criminal law. *Id*. at 5.[5] This change invited the courts to define what was a right held in common by the public and what constituted an unreasonable interference. The legislature was taken out of the process of defining what constituted a public nuisance. Rather than looking to whether a statute or ordinance was violated, now the courts will be the ones to decide what conduct or conditions constitute a public nuisance. This sea change still did not provide for the award of money damages, like in a negligence action, but here is where the creativity of private attorneys comes into play.

Private attorneys, acting on behalf of public agencies, sometimes in league with the attorney general, started filing legal actions calling for the payment of millions or even billions of dollars for the alleged public harms of tobacco use, gun violence, global climate change, and, in the Oklahoma case, use of prescription opioids.[6] These legal actions did not call for the "abatement" of the claimed public nuisance by ceasing particular conduct or by cleaning up a condition. Instead, they

[5] Oklahoma, by statute, has retained the requirement that the conduct be unlawful for it to be a public nuisance. Oklahoma Code, Title 50, § 1. The trial court, however, appears to have ignored that requirement.

[6] Merrill at 6; Schwartz at 658; Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 Mo. ENVTL. L. & POL'Y REV. 1, 2 (2010).

sought money for the public agency to use to "remediate" the public nuisance. Thus, in the case of the global climate change cases, an Alaskan village sought money to move the village to higher ground and coastal cities like Baltimore sought funds to protect against a predicted rise in sea levels.[7] Generally unknown to the public on whose behalf the state files these lawsuits, however, is that the state hands over a significant portion of the "remediation" award to the private attorneys as legal fees.[8] In the Oklahoma case, the court set the cost of abatement as nearly one-half-billion dollars, an amount the court arrived at by adding up the annual cost for a laundry list of government programs. Oklahoma, though, will have $90 million less to spend on remediation—the amount the state is paying its private attorneys. Verdict, Conclusions of Law ¶ 62. This means that the abatement that the trial court thought was required will not actually happen, even if the award is upheld on appeal. A significant portion of the money the company was ordered to pay would instead go to the private attorneys behind the litigation.

Under this modern twist to the ancient public action for public nuisance, private attorneys seeking large attorneys'-fee awards are the ones driving the selection and prosecution of cases rather than public officials. Cases are selected

[7] *Native Village of Kivalina v. Exxon Mobile Corp*., 696 F.3d 849, 853 (2012); *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1535-36 (2021).

[8] Daniel Fisher, *Private Lawyers Stand to Make $90 Million as Judge Hits Johnson & Johnson with $572M Opioid Ruling*, Legal Newsline, Aug. 26, 2019.

based on the possibility of large fee awards for the private attorneys rather than protection of the public. And public nuisance suits empower judges to make public policy decisions.

Trial judges, however, are not equipped for such a role. They are trained to decide facts using a particular procedure designed for cases and controversies and to apply a statute or prior court decision to those facts. Trial judges cannot conduct the same type of a hearing as a legislative committee or an investigation like an expert administrative agency. They are limited to the witnesses that the parties can bring into the courtroom during the time of the trial. Further, trial judges have no expertise in scientific, medical, economic, or other specialized areas that this new theory of public nuisance requires. The expertise of the trial judge is on legal matters. Finally, the trial judge is not a representative of all the people of the state. The judge was not chosen to represent the people in making the types of trade-offs required when setting public policy. For instance, environmental concerns are important, but what cost should be imposed on the entire state to achieve particular environmental goals?

All these problems are featured in the Oklahoma trial court verdict against Johnson & Johnson. The court usurped the proper function of democratically elected representatives, attempted to decide the medical question of when opioids should be prescribed for pain (and in what dosage), and what a pharmaceutical company can

and cannot say about a patient's experience of pain.

## III. THE OKLAHOMA VERDICT DEMONSTRATES WHY PUBLIC NUISANCE IS A BAD TOOL FOR MAKING PUBLIC POLICY

The Oklahoma verdict is a case study in why public policy should not be made through public nuisance legal actions. First, the verdict is difficult to understand. There are significant factual findings regarding Johnson & Johnson's ownership of subsidiaries that manufacture opioid APIs for other pharmaceutical companies. Verdict ¶ 6-15. Included in these findings are details about those subsidiaries developing a poppy variety in 1994 for the purpose of supplying opioid APIs to the pharmaceutical industry. Verdict ¶ 11. Although the fact findings on these activities take up a significant portion of the judgment, the court does not cite to any of them as the basis for finding that Johnson & Johnson created a public nuisance. Nor could the court have done so. Oklahoma trial courts have no jurisdiction to regulate the manufacture of pharmaceutical APIs outside of the state and they certainly have no jurisdiction to regulate outside of the country. *See Gibbons v. Ogden*, 22 U.S. 1, 200-01 (1824). The trial court's findings on these issues, while irrelevant to the ultimate ruling, do seem to demonstrate the court's disagreement with the FDA's approval of prescription opioid pain relievers.

This is precisely the type of result one can expect from an open-ended public nuisance law that allows the county trial judge to create his or her own public policy. Trial court judges, no matter how well trained in the law, are simply not equipped to

make pharmaceutical-industry regulatory policy. Nor are these judges empowered to overrule the policies enacted by Congress. Public nuisance claims, and the trial lawyers that bring them seeking millions of dollars in legal fees, invite just such an action.

After the extensive factual findings on Johnson & Johnson subsidiaries' involvement in the manufacture of opioid APIs, the trial court finally settled on its theory of liability. The court concluded that the company "engaged in false and misleading marketing of both their drugs and opioids generally; and [that] this conduct constitutes a public nuisance." Verdict, Conclusions of Law ¶ 11.

The court's conclusion poses three problems. First, Oklahoma law requires the conduct on which the public nuisance is predicated to be unlawful. Oklahoma Code, Title 50, § 1. The decision does not identify any Oklahoma law that the pharmaceutical company is alleged to have violated. Second, the decision imposes liability based on the marketing of Johnson & Johnson's branded prescription opioid pain reliever, but the court assigns blame to the sales representatives from Johnson & Johnson for the *entirety* of Oklahoma's problems with opioids (including importation and consumption of illegal drugs like fentanyl and illegal use of prescription medication sold by other pharmaceutical companies).[9] However, the sales team for Johnson & Johnson does not appear to have been very successful.

[9] *See* The Medication-Assisted Therapy Expansion Project, Facts and Figures ("Oklahoma … ranks first in the Nation for consumption of *nonmedical* pain relievers." (emphasis added)).

Johnson & Johnson accounted for less than one percent of total opioid prescriptions in Oklahoma (and in the United States).[10] This leads to the third problem: The court-imposed liability for the pharmaceutical company's "marketing of … opioids generally." Verdict, Conclusions of Law ¶ 10-11. This is what the verdict elsewhere referred to as unbranded marketing. Verdict ¶ 19-24. Aside from the First Amendment problems with regulating speech that this paper addresses in the next section, the opinion faulted the "unbranded" marketing for being "deceptive" or "misleading"—not false. *See* Verdict, Conclusions of Law ¶ 7. That means that the court took it up on itself to make scientific and medical value judgments.

Turning to the first problem, the trial court failed to identify an Oklahoma law that Johnson & Johnson's unbranded marketing violated. As an Oklahoma appellate court noted in *Nuncio v. Rock Knoll Townhome Vill., Inc*.: "For an act or omission to be a nuisance in Oklahoma, it must be unlawful." 2016 OK Civ App 83 ¶ 8. The text of the statute defining public nuisances is clear on unlawfulness. Section 1 of Title 50 of the Oklahoma Code defines a nuisance as "*unlawfully* doing an act, or omitting to perform a duty which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others." The trial court ruled that "false and misleading marketing … qualifies as the kind of act or omission capable of sustaining liability under Oklahoma's nuisance law." Verdict, Conclusions of Law ¶ 6. But the

[10] Hoffman, *supra* note 2.

court does not explain what Oklahoma law the company's "act" or "omission" violated.

The trial court cited to a 1921 Oklahoma Supreme Court decision, *Epps v. Ellison*, as support for its conclusion that the national, unbranded marketing could subject the company to liability for a public nuisance under Oklahoma law. *Id*. However, *Epps* involved a complaint that the neighboring property owner installed a "cotton oil mill and cotton gin" that caused "loud offensive noises" and polluted the air on the neighboring property with dust, lint, and exhaust fumes. 1921 OK 279 (1921). *Epps* is in the line of cases holding that a nuisance "arises from an unreasonable, unwarranted, or unlawful use of property lawfully possessed" that causes injury to another.[11] But this case does not involve the use of property "lawfully possessed." It involves sponsoring articles in medical journals, participating in medical conferences, supporting patient advocacy organizations, and sponsoring presentations to doctors. Verdict ¶ 19, 25, 36-39.

The trial court attempted to fit this case into the line of cases noted by the Oklahoma Supreme Court in *Briscoe* by finding that the pharmaceutical company's sales representatives were "trained in their homes" and used state roads to travel to doctors' offices to deliver their sales pitches. Verdict, Conclusions of Law ¶ 7. Yet

[11] *Briscoe v. Harper Oil Co.*, 1985 OK 43 (1985); *see Fairlawn Cemetery Ass'n v. First Presbyterian Church, U. S. A. of Oklahoma City*, 1972 OK 66 (1972) ("A nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another.").

none of this involves a use of property lawfully possessed by Johnson & Johnson "in a manner to cause injury to the property of another" and none of it relates to the "unbranded" marketing at issue. Activity in the sales representatives' homes did not cause the problems. Thus, because the "unbranded marketing" was not unlawful and did not involve the use of property lawfully possessed by Johnson & Johnson, the conduct cited by the trial court does not meet the requirements of a public nuisance under Oklahoma law.

Second, the actions of Johnson & Johnson's sales representatives cannot be the cause of all of Oklahoma's opioid problems. If the sales representative who visited the doctors to urge those doctors to prescribe Johnson & Johnson's brand of prescription opioid pain relievers made false statements, those sales representatives were remarkably *unsuccessful* in their efforts. As previously noted, Johnson & Johnson's market share of the prescription opioid sales in Oklahoma was less than one percent. With such a minuscule market share, this one pharmaceutical company cannot have been responsible for all of Oklahoma's problems from opioids (legal and illegal) based on pitches from the sales representatives.

The third problem with the trial court's legal conclusion is that "misleading" unbranded marketing could form the basis for liability. Aside from the First Amendment problem, which is addressed in the next section, the court was not clear on what specific pieces of unbranded marketing to which it was referring and what

the court found misleading or deceptive about those communications. Recall that the court listed activities such as sponsoring articles in medical journals (we do not know if that means that the company paid the author for the time it took to write the article or if they paid the journal for the publication), supporting patient advocacy groups, providing information to regulatory agencies, sponsoring medical conferences and/or speakers at those conference, and printing brochures with information on opioids and the treatment of pain. Verdict ¶ 35-39, 44. While some activity may have taken place in Oklahoma, much of it appears to be focused on a national audience.

The messages cited by the court (although not explicitly labeled as misleading or deceptive) included the claim that pain was undertreated, that "opioids could be used safely for chronic non-terminal pain," and that patients who requested higher doses or refills before the existing prescription ran out "were not actually suffering from addiction, but from the undertreatment of pain." Verdict ¶ 20, 22, 57. Although not explicit in the verdict, we assume that these are the types of "unbranded marketing" that the court found "deceptive" or "misleading."

Finding these claims "misleading" or "deceptive" can be reasonable conclusions for a trial court operating under the rules of evidence and the special procedures that bind trial courts. It is also a demonstration of why "public nuisance" law is ill-suited for these types of determinations. What the trial court will see is

limited to the evidence and experts that the attorneys are able to bring into an Oklahoma trial court. The court does not have the ability to call in all the experts or to form scientific advisory boards to sift through all the available medical evidence. Nor does the court weigh the potential harm to patients from a restriction on prescription medication against the benefits the state and its plaintiffs' lawyers claim.

Assuming the statements listed above are the ones that the court found misleading, the court's conclusions are far from undisputed. In 2019, the United States Department of Health & Human Services published the Final Report of the Pain Management Best Practices Inter-Agency Task Force (Final Report).[12] That report acknowledged that "the experience of pain has been recognized as a national public health problem with profound physical, emotional, and societal costs." Final Report at 1. The report further noted that in the 1990s "pain experts recognized that inadequate assessment and treatment of pain had become a public health issue." *Id*. at 11. Does this mean that the trial court was wrong in its apparent conclusion that it was false to assert that pain was undertreated? No, but it does show that the trial court's view of the medical issue diverges from the view of the expert panel formed by HHS. The question is really who is in the best position to be making these determinations.

[12] https://www.hhs.gov/ash/advisory-committees/pain/reports/index.html.

The trial court also seemed to dispute that prescription "opioids could be used safely for chronic non-terminal pain." Verdict ¶ 57. The HHS report notes that opioids are an effective short-term treatment for chronic and acute pain. Final Report at 1. Further, the task force noted that some doctors' misunderstanding of the Center for Disease Control's 2016 guidelines for opioid prescriptions caused them to abandon patients or to force their patients to reduce the dosage of prescription pain medication, sometimes leaving those patients to suffer continued acute pain. *Id*. at 3.

Finally, the trial court apparently found deceptive the message that patients who requested higher doses or refills before the existing prescription ran out "were not actually suffering from addiction, but from the undertreatment of pain." Verdict ¶ 22. Yet, the Centers for Disease Control and Prevention noted that one of the potential side-effects of prescription opioid pain relievers is "tolerance," meaning that patients might need to take more of the pain medication to gain the same benefits they received from the initial dose.[13] Thus, according to the CDC, a patient requesting a higher dosage is not necessarily showing signs of addiction. It may be that the patient has built up a tolerance to the medication and needs a larger dose to keep the pain under control.

[13] Centers for Disease Control and Prevention, Opioids.

Resolving who is correct on the science and medicine between the Oklahoma trial court or the doctors and scientists at federal regulatory agencies is beyond the scope of this paper. The fact that there is a split between regulatory experts and the state trial court does underline the main thesis of this paper that state-law public nuisance actions are not the way to formulate public policy. Beyond the public policy problem with the trial court making scientific and medical value judgments about the content of medical journals is the problem of the First Amendment. The trial judge had no authority to regulate the speech activities that it labeled "unbranded marketing."

## IV. THE OKLAHOMA DECISION'S FIRST AMENDMENT PROBLEMS

The Oklahoma trial court did not find Johnson & Johnson liable for selling prescription opioids—that was perfectly legal and, in any event, is an FDA-regulated activity. Nor did the court base liability on Johnson & Johnson owning subsidiaries that produced the API that other pharmaceutical companies needed to make their own prescription opioid drugs. Again, that activity was legal and FDA-regulated. Instead, the trial court based its liability decision on what the company said and on what others said with the company's sponsorship. Imposing liability for what one says raises serious First Amendment concerns.

The trial court attempted to avoid the First Amendment problem by characterizing all the speech, included the unbranded marketing, as "commercial

speech." Verdict, Conclusions of Law ¶ 15. If the speech at issue is not "commercial speech," the government must demonstrate that the restriction on that speech "advances a compelling state interest and show that the means chosen to accomplish that interest restricts the least amount of speech possible while achieving that interest." *Harris v. Quinn*, 573 U.S. 616, 648 (2014). Under current Supreme Court precedent, commercial speech receives slightly less protection than noncommercial speech, and commercial speech that is false or misleading receives no protection at all. *See Bolger v. Youngs Drug Prod. Corp*., 463 U.S. 60, 65 (1983). This regime of treating commercial speech differently than other forms of speech, however, is something about which several justices have raised questions in recent years.[14] Even if the Court maintains this dual approach to speech, the Oklahoma verdict errs when it refers to all of the speech on which it based liability as "commercial speech."

The Supreme Court initially defined commercial speech as "speech that does no more than propose a commercial transaction." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) The Court reformulated the definition slightly in the decision that gave birth to the "*Central Hudson* test," describing commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric*

[14] *See Thompson v. W. States Med. Ctr*., 535 U.S. 357, 367-68 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

*Corp. v. Public Service Comm'n*, 447 U.S. 557, 561 (1980).

When the Johnson & Johnson's representatives visited doctors, they were urging the doctors to prescribe the company's drugs. This type of speech fits squarely into the Court's definition of commercial speech. And the Oklahoma court did find that the sales representatives used materials that the FDA found to be false and misleading. Under current commercial speech doctrine, therefore, that speech (using the false and misleading materials) could be sanctioned or even banned by the state.

But those sales representatives' efforts only resulted in less than a one percent market share for Johnson & Johnson in Oklahoma prescription opioids. Not enough to find the company liable for all the opioid related problems (legal and illegal) in the state. Thus, the court did not rely on these sales calls for its verdict holding Johnson & Johnson liable.

The court turned to the broader category of "unbranded" marketing—that is, speech on patients' experience of pain, the efficacy of prescription opioid drugs to treat that pain, and what the signs of addiction may or may not be. Verdict ¶ 18-25, 36-39. This "unbranded marketing" took the form of sponsored articles in medical journals, sponsorship of conferences and speakers, and the financial support of patient-advocacy groups. *Id*. The court also faulted Johnson & Johnson for its advocacy in front of governmental agencies. Verdict ¶ 25. It is unclear whether the

court believed that research sponsorship, support of third parties, and petitioning the government constituted "commercial speech." Economic motive alone cannot transform protected speech into commercial speech. *Bolger*, 463 U.S. at 67 ("Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech"). Otherwise, government could regulate every word spoken by a lobbyist or commercial advocacy group as commercial speech.) The question the court glossed over is whether this "unbranded marketing" falls within the definition of "commercial speech." It does not.

The Oklahoma trial court attempted to circumvent this legal problem by combining all the speech in all its different formats, branded and unbranded, and then ruling that all the speech was "clearly commercial in nature." Verdict, Conclusions of Law ¶ 15. Such a ruling sweeps far too broadly. While the case can be made that communications by the Johnson & Johnson sales representatives were commercial speech and that at least some of that speech was false and misleading, that cannot account for the harm in Oklahoma. The court would have to find that these sales representative were singularly successful in convincing doctors to prescribe pain relieving medication containing opioids, while at the same they were singularly unsuccessful in convincing doctors to prescribe Johnson & Johnson's branded product. Thus, the court must have relied on its factual findings related to

unbranded marketing. The court identified none of that unbranded marketing as false or misleading, however.

More significantly, that unbranded marketing cannot be described as commercial speech. If the speech at issue, such as an article in a medical journal, does not even mention a particular product (which is the hallmark of "unbranded marketing") it is not speech that proposes a commercial transaction. The old saying that "if it bleeds, it leads," dictated how newspapers would choose stories for page one in order to boost sales.[15] In a similar manner, CNN admitted that it placed a chyron on the screen showing Covid-19 infections and deaths solely because it attracted and retained viewers.[16] In both instances, a decision as to content is being made for an economic motivation. Under the trial court's view, news reports that are chosen to boost ratings are nothing more than commercial speech and subject to censorship if some state trial court judge deems the report misleading.

The Oklahoma trial court made a point of labeling the unbranded marketing (which included articles in medical journals and sponsoring speakers at medical symposia) as "deceptive" and "misleading." Verdict ¶ 44. Does this mean that this noncommercial speech is not protected by the Constitution? If that were the case,

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[15] Deborah Serani Psy.D., *If it Bleeds it Leads: Understanding the Fear-Based Media*, PSYCHOLOGY TODAY (June 7, 2011).

[16] *Project Veritas: CNN Insider Admits they Hyped COVID Death Toll, It's 'Gangbusters for Ratings'*, Real Clear Politics (Apr. 14, 2021).

most campaign speeches and political ads would be subject to censorship. Should a county trial court judge have censorship authority over the content of scientific and medical journals? As discussed above, when it comes to issues of public policy, medicine, or science, a courtroom is the worst place to make decisions. Courts have a limited focus both in the type of evidence they will consider and how they are allowed to make decisions.

A thought experiment helps to illustrate this point. In March of 2020, Dr. Anthony Fauci appeared on *60 Minutes* and said that face masks would *not* help prevent the spread of Covid-19.[17] His express message was "people should not walk around wearing masks." He later admitted that he intentionally downplayed the merits of mask-wearing.[18] He justified this deception by saying that masks were in short supply and that he wanted to save the masks for health care workers. He later told Americans that they should wear two masks to avoid infection.[19]

Assuming that his second statement was truthful—that wearing a mask could keep you from getting infected and could prevent the spread of that infection to

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[17] https://www.youtube.com/watch?v=p6pEcgDmEUk.

[18] Katherine Ross, *Why Weren't We Wearing Masks from the Beginning? Dr. Fauci Explains*, The Street, June 12, 2020 ("Well, the reason for that is that we were concerned the public health community, and many people were saying this, were concerned that it was at a time when personal protective equipment, including the N95 masks and the surgical masks, were in very short supply. And we wanted to make sure that the people namely, the health care workers, who were brave enough to put themselves in a harm way, to take care of people who you know were infected with the coronavirus and the danger of them getting infected.").

[19] *Fauci Said it is 'Common Sense' to Wear Two Masks to Stop the Spread of Covid-19*, MSN Business Insider, Jan. 25, 2021.

others, then tens of thousands of Americans may have been infected with Covid-19 because of his statement on *60 Minutes*. Some died. Even after he reversed course and said that masks were not only helpful, but necessary, his changing pronouncements on the subject led some to distrust the mask mandates or other government health orders meant to slow the spread of the flu.

Should Dr. Fauci be held liable for those deaths? He believed that he had a good reason for his deception. How would a court weigh that rationale? There is nothing in the Constitution that helps to guide a trial court judge to decide whose life is more important. Yet under the Oklahoma verdict, a trial judge could hale Dr. Fauci into court and hold him liable for all of those who became sick and those who died because he told them not to wear a mask. Under the Oklahoma trial court decision, Dr. Fauci was a public nuisance (though because of his status as a government official, one of the many privilege doctrines that the courts have created to protect government officials likely relieve him of liability).

The point here is that the First Amendment intentionally creates some "breathing space" that keeps courts from trying to police whether a statement is truthful, deceptive, or misleading. This keeps trial courts from judging the content of articles in medical journals or speeches at a medical conference. The Constitution does not permit a court to sanction a company or individual for donating to a patient advocacy group. And the Constitution certainly does not permit a state trial judge to

censure what can and cannot be said to a government agency on an issue of public importance. The Oklahoma verdict overstepped the proper role of government (in regulating speech) and the proper role of trial courts (by making medical policy).

## CONCLUSION

Public nuisance is a popular choice for state and local governmental officials to at least appear to address a public policy problem outside of the legislative process. Over the past three decades, public officials have launched lawsuits to purportedly address global climate change, tobacco use, and gun violence. Following the example of the Oklahoma Attorney General, the Washington Attorney General launched his own public nuisance lawsuit against Johnson & Johnson over that state's opioid addiction and overdose problems.[20] But these lawsuits can do nothing to cure the specific problems they purport to address. Litigation is a useful tool for forcing an opposing party to pay money damages—and perhaps that is all that these lawsuits are about. The Oklahoma trial court's verdict ordering Johnson & Johnson to pay nearly one-half-a-billion dollars in damages[21] is a powerful incentive for others to try to grab a piece of the action for themselves—especially when the trial attorneys are

[20] AG Ferguson Sues Opioid Manufacturer Johnson & Johnson Over State's Opioid Epidemic, Washington State Attorney General News Release, Jan. 2, 2020).

[21] When filing its brief in opposition to Johnson & Johnson's appeal to the Oklahoma Supreme Court, the state argued that the $465 million the trial court ordered the defendant to pay was inadequate. The state is now demanding *$9.3 billion* to cover the entire anticipated costs of abating the harms of opioids in Oklahoma. Associated Press, *Oklahoma Seeks $9.3 Billion from Johnson & Johnson over Opioid Crisis*, Dec. 9, 2020.

in line for a significant portion of the damages. This is not what the tort of public nuisance was designed to accomplish.

The Oklahoma trial court's decision represents a radical and unjustified expansion of the law of public nuisance. Public nuisance is a public action developed to address encroachment on to public land or an interference with public rights. It is not a tool for making public policy or determining the scientific accuracy of articles in medical journals. Public nuisance was certainly not designed to regulate speech.

The Oklahoma Supreme Court may well (and should) overturn the trial court's decision on appeal.[22] However, the trial court decision has opened the door to further abuse of the litigation system. Litigation is designed to remedy particular wrongs. It is not meant to be a tool for enactment of public policy—that is what legislatures are for.

[22] Oklahoma has chosen not to join a $26 billion multi-state settlement of opioid litigation with Johnson & Johnson and three drug-distribution businesses. Nate Raymond and Tom Hals, *Six U.S. States Do Not Join $26 Bln Opioid Settlement with Distributors, J&J*, Reuters, Aug. 24, 2021.