

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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JOE MILLER, IV, ET AL, : CIVIL ACTION
PLAINTIFFS, : NO. 2:99-01861-18
VS. : CHARLESTON, SOUTH CAROLINA
ASENSIO & COMPANY, ET AL, : WEDNESDAY, MARCH 20, 2002
DEFENDANTS. : 11:14 A.M.
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**TRANSCRIPT OF EXCERPTS OF TRIAL - TESTIMONY OF
MANUEL P. ASENSIO AND ROBERT W. PEARCE, JR.
BEFORE THE HONORABLE DAVID C. NORTON
UNITED STATES DISTRICT JUDGE, AND A JURY.**

APPEARANCES:

FOR THE PLAINTIFFS: STRADLEY, RONON, STEVENS & YOUNG LLP
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED BY COMPUTER AIDED TRANSCRIPTION.

LAVON E. MCNAUGHTON, RPR RMR RDR OFFICIAL COURT REPORTER

1 TESTIMONY, SIR, THAT YOU TALK TO DOCTORS?

2 A. YES.

3 Q. BUT THE ONLY DOCTOR THAT YOU CAN REMEMBER THE NAME OF
4 IS JUDY STONE?

5 A. CORRECT.

6 Q. NOW, JUDY STONE, WHEN SHE PRACTICED MEDICINE, SHE
7 WASN'T A PEDIATRICIAN, WAS SHE?

8 A. NO. THIS WAS NOT A LARGE MEDICAL CONCERN TO US. WE
9 WERE LOOKING AT A MARKET FOR A MEDICAL DEVICE. IT WAS A
10 SIMPLE COMMON MEDICAL DEVICE. BILIRUBIN ITSELF IS NOT A
11 GREAT RISK. MOST BABIES THAT ARE FULL -- THAT ARE BORN FULL
12 TERM, FULL TERM HEALTHY BABIES DON'T HAVE A PROBLEM WITH
13 BILIRUBIN, AND IF THEY DO, IT'S NOT A MAJOR PROBLEM TO
14 DIAGNOSE IT OR TREAT IT. IT'S NOT A VERY COMPLEX MEDICAL
15 ISSUE, CERTAINLY NOT FROM OUR POINT OF VIEW WHERE WE'RE
16 LOOKING AT THE VALUATION OF A PRODUCT THAT IS TRADING AT 170
17 MILLION DOLLARS, AND THERE ARE OTHERS THAT ARE OUT THERE THAT
18 ARE AVAILABLE FOR MUCH LESS THAT DOCTORS ARE TELLING US WORK
19 BETTER.

20 Q. THOSE DOCTORS WOULD BE JUDY STONE AND THE OTHERS WHOSE
21 NAMES YOU DON'T RECALL?

22 A. CORRECT.

23 Q. JUDY STONE ALSO WAS NOT A NEONATAL DOCTOR, CORRECT,
24 WHEN SHE PRACTICED?

25 A. YES.

1 Q. HER SPECIALTY WAS BREAST CANCER, RIGHT, SIR?

2 A. CORRECT.

3 Q. AND AT THE TIME YOU SPOKE TO HER ABOUT CCSI, DR. STONE
4 WASN'T A PRACTICING DOCTOR AT ALL, WAS SHE?

5 A. NO, THAT'S CORRECT.

6 Q. IN FACT, SHE WAS A STOCK ANALYST, WASN'T SHE?

7 A. SHE WAS A SHORT SELLER OF A HEDGE FUND, SHORTED
8 CHROMATICS COLOR SCIENCES STOCK.

9 Q. SHE WAS A SHORT SELLER FOR ONE OF YOUR CUSTOMERS,
10 WASN'T SHE?

11 A. YES. THERE WERE NO ISSUES OF FACT CONCERNING THE
12 MEDICINE NOR THE TREATMENT NOR THE DIAGNOSIS OF BILIRUBIN
13 THAT WERE CONTROVERSIAL.

14 Q. LET'S JUST TAKE THIS ISSUE, SIR. IF A NEONATOLOGIST
15 CAME INTO THIS COURTROOM AND SAID THAT THE BLOOD TEST IS
16 PAINFUL FOR THE BABY, YOUR TESTIMONY WOULD BE THAT THAT
17 NEONATOLOGIST WOULD BE WRONG?

18 A. NO, IT'S HIS OPINION. HE CAN HAVE IT. I'M SURE IT'S
19 TRUE, BUT, UNFORTUNATELY, CHROMATICS COLOR SCIENCES HAS
20 NOTHING TO DO WITH THE SOLUTION OF THAT PROBLEM, AND THERE IS
21 NO VALUE IN THIS PRODUCT --

22 Q. SIR --

23 A. -- TO CREATE, TO FIX THAT PROBLEM, IF THERE WAS A
24 PROBLEM.

25 CHROMATICS COLOR SCIENCES INTERNATIONAL WAS NOT

1 LET'S START WITH YOUR OWN TRAINING.

2 YOU HAVE NO FORMAL TRAINING AT ALL IN MEDICINE, DO
3 YOU, SIR?

4 A. NO.

5 Q. YOU DIDN'T GO TO MEDICAL SCHOOL?

6 A. NO.

7 Q. UNDERGRADUATE, YOU DIDN'T STUDY PREMED?

8 A. NO.

9 Q. YOU HAVE NEVER HAD A COURSE IN BIOLOGY OR CHEMISTRY?

10 A. PROBABLY NORMAL COLLEGE COURSES. I HAVE NO PARTICULAR
11 INTEREST IN BIOLOGY OR CHEMISTRY.

12 Q. WHEN YOU ISSUED YOUR REPORT, SIR, YOU HAD NEVER SEEN AN
13 INFANT BEING TREATED FOR JAUNDICE; ISN'T THAT TRUE?

14 A. BEING TREATED OR BEING DIAGNOSED?

15 Q. EITHER ONE?

16 A. DIAGNOSED, I DON'T REMEMBER. PROBABLY NOT.

17 Q. YOU HAD NEVER SEEN AN INFANT HAVING BLOOD DRAWN TO
18 MEASURE BILIRUBIN?

19 A. PROBABLY NOT.

20 Q. IN FACT, YOU HAD NEVER SEEN AN INFANT WITH JAUNDICE,
21 HAD YOU?

22 A. NEVER EVEN TALKED TO THE COMPANY. WE HAVE A POLICY NOT
23 TO TALK TO THE COMPANY.

24 IF YOU NEED AN EXPLANATION FROM THE COMPANY, THEN
25 PERHAPS THE SPREAD BETWEEN WHAT WE'RE HEARING AND WHAT THE

1 COMPANY IS HEARING REQUIRES SOME EXPLANATION.

2 WHEN WE HEAR THINGS THAT ARE SO OPPOSED TO THE
3 COMPANY, THAT'S WHEN WE BECOME INTERESTED, SO WE HAVE NO NEED
4 TO TALK TO THE COMPANY.

5 Q. LET'S TALK ABOUT ALL THE OTHER COLOR MEASUREMENT
6 DEVICES THAT ARE BETTER THAN THE TLC. YOU NEVER HAD ANY OF
7 THOSE OTHER PRODUCTS TESTED, DID YOU, SIR?

8 A. THERE IS NO NEED TO TEST THEM. THEY WEREN'T SELLING.

9 EVEN THE BEST, THE TWO BEST WERE NOT SELLING. IT'S
10 A VERY SMALL MARKET. FOUR YEARS LATER, THE VERY, VERY, VERY
11 BEST, WHICH IS A VERY SOPHISTICATED PRODUCT, RUN BY A
12 LEGITIMATE GROUP OF DOCTORS AND PROFESSIONAL MANAGERS IS ONLY
13 SELLING ABOUT 150,000 DOLLARS A QUARTER. AND THAT COMPANY
14 WHICH IS A VERY REAL COMPANY, IS ONLY WORTH 50,000,000
15 DOLLARS IN THE MARKET. SO WE HAD THIS THING AT 170 WITH ALL
16 THE QUESTION MARKS.

17 Q. THAT'S THE MINOLTA PRODUCT YOU ARE REFERRING TO, SIR?

18 A. NO.

19 Q. SPECTRX?

20 A. YES.

21 Q. SPECTRX IS NOT APPROVED BY THE FDA FOR USE WITH INFANTS
22 OF EVERY WEIGHT, SIZE, GESTATION PERIOD, ET CETERA, IS IT,
23 SIR?

24 A. I DISAGREE WITH THAT OPINION, BUT, MORE IMPORTANTLY, I
25 DON'T THINK THAT THIS DEVICE ISN'T EITHER. AND ON TOP OF

1 THAT, I'M NOT SURE WHAT IMPACT THAT HAS ON THE SALES. THIS
2 MARKET IS SMALL. THAT COMPANY IS SMALL. THERE ARE OTHERS
3 THAT ARE SMALL, BUT THERE ARE HUNDREDS OF NONINVASIVE METHODS
4 FOR MEASURING BILIRUBIN, HUNDREDS.

5 Q. BUT THERE IS ONLY ONE APPROVED BY THE FDA THAT WORKS ON
6 ALL RACES; ISN'T THAT TRUE, SIR?

7 A. NO, I DON'T BELIEVE SO. THERE IS ONLY ONE THAT BECAME
8 THE SUBJECT OF A FRAUDULENT PROMOTION, WHICH YOU SEEM TO BE
9 VERY, VERY ADAMANT ABOUT TRYING TO CREATE INTO A VALUABLE
10 PRODUCT. IT'S NOT SELLING. IT NEVER SOLD, AND YOU HEARD
11 HERE TESTIMONY OF WHY IT DIDN'T SELL, EXTRAORDINARY TESTIMONY
12 BY THE PRESIDENT OF THE COMPANY THAT CLAIMED TO HAVE BEEN
13 LEGITIMATELY SELLING THIS PRODUCT AND SEEKING A MANUFACTURING
14 DISTRIBUTOR IN 1998. IN THE FACE OF THAT, WHICH YOU HEARD
15 AND I HEARD, HOW CAN YOU QUESTION WHETHER OR NOT THAT PRODUCT
16 WAS LEGITIMATE?

17 Q. SIR, YOU ARE NOT TELLING US THAT YOU KNOW MORE ABOUT
18 NONINVASIVE BILIRUBIN DEVICES THAN SOMEBODY LIKE DR. HOLZMAN,
19 ARE YOU?

20 A. IT'S INTERESTING THAT DR. HOLZMAN WAS NOT INVOLVED WITH
21 THE DEVELOPMENT OF THIS NEW PRODUCT AND IS CONTINUING TO MAKE
22 POSITIVE STATEMENTS ABOUT THE PRODUCT THAT HAS BEEN
23 DISCREDITED.

24 IT'S INTERESTING THAT HE GOT HIS WARRANTS AND
25 STOPPED HIS NINE-YEAR STUDY SHORT OF ANY CONCLUSION AT THE

1 SAME TIME THAT THE FDA GAVE THIS EASILY OBTAINABLE
2 EQUIVALENCY OPINION. VERY TELLING ABOUT DR. HOLZMAN. I
3 THINK THOSE TWO FACTS ARE THE MOST MATERIAL IN MY MIND, BUT,
4 QUITE FRANKLY, HIS REPORT JUST IS ABOUT -- IS TITLED A WAY OF
5 ESTIMATING BILIRUBIN -- ESTIMATING. YOU NEED TOTAL AND
6 INDIRECT. THAT'S WHAT WE UNDERSTOOD.

7 Q. FINISHED?

8 A. YES.

9 Q. YOU'RE NOT HERE TO TESTIFY, ARE YOU, SIR, THAT YOU KNOW
10 MORE ABOUT NONINVASIVE BILIRUBIN MEASURING DEVICES THAN
11 SOMEBODY LIKE DR. HOLZMAN, ARE YOU?

12 A. ABSOLUTELY NOT.

13 Q. THANK YOU.

14 THESE OTHER PRODUCTS YOU REFER TO, SIR, YOU NEVER
15 SAW OR HAD ANYBODY ON YOUR STAFF SEE ANY OF THEM BEING USED
16 ON INFANTS, DID YOU?

17 A. NO.

18 Q. IN FACT, YOU NEVER SAW ANY OF THEM AT ALL, USED OR NOT
19 USED?

20 A. I MYSELF SPENT A GREAT DEAL OF TIME WITH A NUMBER OF
21 TECHNICIANS THAT ACTUALLY TALKED TO ME ABOUT HOW THESE THINGS
22 ARE DONE. I DIDN'T NEED TO GO, BECAUSE I UNDERSTOOD THE
23 PROCESS. MORE IMPORTANTLY, I UNDERSTAND THE COSTS. BECAUSE
24 THEY WERE SAYING THAT THEY CAN PRICE A DISPOSABLE AT A
25 CERTAIN PRICE. THE PRICE, IN MY OPINION, THE PRICE AT WHICH

1 THEY WERE CLAIMING THEY WERE GOING TO SELL THE DISPOSABLE WAS
2 GOING TO EAT INTO THE PROFITS THAT THE HOSPITALS WERE MAKING
3 BY THE BLOOD TEST, WHICH WAS A SERIOUS CONCERN TO THE
4 HOSPITAL. THEY HAVE VERY LIMITED REVENUE STREAM, AND THEY
5 HAVE TO PROTECT EVERYTHING THEY CAN GET.

6 IN ADDITION TO THAT, THE PROCESS OF EXTRACTING THE
7 BLOOD AND TAKING IT TO THE BLOOD TEST DIDN'T SEEM TO ME THAT
8 CUMBERSOME. THE MANAGEMENT OF CHROMATICS COLOR SCIENCES
9 INTERNATIONAL HAVE A DIFFERENT OPINION. THEY BELIEVE THAT
10 TAKING A LITTLE BIT OF BLOOD OUT, PUTTING IT WITH A BUNCH OF
11 OTHER BLOOD AND SENDING IT TO THE LAB IS DIFFICULT. THAT'S
12 NOT WHAT I HEARD ON THE PHONE.

13 Q. ON THE PHONE WITH WHO, SIR?

14 A. ON THE PHONE WITH PEOPLE THAT I DON'T REMEMBER I SPOKE
15 TO, BUT THAT I SPOKE TO.

16 Q. SO THIS LONG LIST OF PEOPLE, YOU CAN'T GIVE US A SINGLE
17 NAME, RIGHT?

18 A. THERE WASN'T A LONG LIST OF PEOPLE.

19 Q. OH, IT WAS JUST A FEW?

20 A. JUST A FEW.

21 Q. YOU DON'T REMEMBER THEIR NAMES EITHER?

22 A. THE DESCRIPTION OF THE PROCESS WAS WHAT I REMEMBER,
23 THAT'S WHAT WAS MATERIAL TO ME. BUT EVEN THAT DESCRIPTION OF
24 THE PROCESS VERSUS WHAT I WAS HEARING FROM CHROMATICS COLOR
25 SCIENCES INTERNATIONAL, AGAIN, IS JUST ONE MINUTE AREA THAT

1 HELPED US FORMULATE OUR OPINION.

2 Q. LET'S CONTINUE WITH WHAT YOU DID AND WHAT YOU FOUND
3 OUT, SIR, WHAT YOU KNEW WHEN YOU PUBLISHED THESE PUBLIC
4 REPORTS.

5 YOU NEVER SAW THE CCSI PRODUCT, DID YOU?

6 A. I SAW IT IN PRODUCT CATALOGS.

7 Q. BUT YOU NEVER SAW THE PRODUCT ITSELF BEING USED, RIGHT?

8 A. NO.

9 Q. IN FACT, THE FIRST TIME YOU EVER SAW THE PRODUCT WAS
10 WHEN YOU SAT AT THAT TABLE YESTERDAY AND WATCHED DARBY
11 MACFARLANE DEMONSTRATE IT; ISN'T THAT TRUE?

12 A. YES.

13 Q. NEVER TALKED TO DARBY MACFARLANE, DID YOU, SIR?

14 A. I TESTIFIED, WE HAVE A POLICY NOT TO SPEAK TO ANY AGENT
15 OR OFFICER OR DIRECTOR OF THE COMPANIES WHICH WE HAVE
16 NEGATIVE OPINIONS ABOUT PUBLICLY, OR WHICH WE INTEND TO HAVE
17 NEGATIVE OPINIONS ABOUT PUBLICLY. EVEN MICRO CAP FRAUD.

18 Q. YOU DIDN'T TALK TO DR. HOLZMAN, DID YOU?

19 A. NO, THERE WAS NO REASON TO. HE HAD HIS ABSTRACT OUT,
20 AND WE KNEW ALL ABOUT HIM.

21 Q. YOU DIDN'T TALK TO ANY DOCTOR WHO PARTICIPATED IN THE
22 CLINICAL TRIALS ON THE CCSI PRODUCT, DID YOU?

23 A. FROM WHAT I KNEW, THERE WERE ONLY FOUR IN TWO SPOTS,
24 BUT, PLEASE, WE DID NOT HAVE ANY CONTACT WITH ANYONE THAT WAS
25 AN OFFICER, DIRECTOR, OR AGENT OF CHROMATICS COLOR SCIENCES.

1 Q. IT'S BROADER THAN THAT, SIR, ISN'T IT? YOU DIDN'T TALK
2 TO A SINGLE NEONATOLOGIST OR PEDIATRICIAN OR DOCTOR WHO HAD
3 EVER USED THE COLORMATE TLC, DID YOU?

4 A. CORRECT.

5 Q. SO, ALL OF THESE PEOPLE YOU TALKED TO, THEY HAD NEVER
6 EVEN TRIED THE DEVICE, RIGHT?

7 A. THE PROMOTION THAT CHROMATICS COLOR SCIENCES
8 INTERNATIONAL WAS BUILDING, INCLUDING THAT OF THE DOCTORS
9 THAT WERE INTERESTED IN PROMOTING THIS PRODUCT, WAS READILY
10 AVAILABLE IN THE PUBLIC. THAT WAS WHAT WAS MAKING THE STOCK
11 WORTH 170,000,000. THAT WAS NO SECRET.

12 Q. SIR, YOU HAVE SAID UNDER OATH IN THIS CASE THAT DARBY
13 MACFARLANE IS A CROOK, HAVEN'T YOU?

14 A. IT'S MY OPINION THAT THAT -- SHE OBTAINED MONEY IN THE
15 FORM OF SALARY THAT CAME FROM THIS MARKET, AND THAT SHE KNEW
16 THAT THE REPRESENTATIONS THAT SHE WAS MAKING WERE AFFECTING
17 THAT MARKET. SO, IN MY OPINION, I CERTAINLY WOULD NOT FEEL
18 COMFORTABLE WITH BEING IN CHARGE OF A PUBLIC COMPANY THAT WAS
19 DISSEMINATING INFORMATION THAT WAS SO QUESTIONABLE, AND WITH
20 KNOWLEDGE THAT THAT INFORMATION WAS GOING TO AFFECT
21 POSITIVELY THE STOCK PRICE AND ITS VOLUME, AND THEN RECEIVED
22 PERSONAL GAIN FROM IT. I JUST WOULDN'T DO THAT. I WOULDN'T
23 FEEL COMFORTABLE SUING SOMEONE FOR THEIR OPINION EITHER.

24 Q. IS THAT A YES?

25 A. YES, I DO BELIEVE THAT SHE IS LESS HONEST THAN ANYONE