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Supreme Court of California
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No. S273887

In the Supreme Court

of the

State of California

MICHELLE HIMES

Plaintiff-Petitioner,

vs.

SOMATICS, LLC,

Defendant-Opposing Party.

On Request from the US Court of Appeals for the Ninth Circuit
For Answer to Certified Questions of California Law

APPELLANT'S REPLY IN SUPPORT OF HER MOTION FOR JUDICIAL NOTICE

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In full compliance with California Rules of Court 8.252(a) and 8.520(g), as well as Sections 452(f) and 459(a) of the Evidence Code, petitioner Michelle Himes ("Himes") moved for judicial notice of the Canadian Supreme Court's published decision in *Hollis v. Dow Corning Corp.*, 4 SCR 634 (1995) ("*Hollis*"), a true and correct copy of which was submitted contemporaneously to the Court. Himes' request for judicial notice established that the *Hollis* decision, which addressed nearly identical issues currently before this Honorable Court, is appropriate for judicial notice.

Somatics' opposition to the request for judicial notice provides no valid justification as to why judicial notice is not appropriate. While Somatics attempts to advance various reasons why judicial notice is not warranted, construed to its core, it appears Somatics simply does not agree with the ultimate holding in *Hollis.* That is not a basis for denial of the request.

Somatics' *first* argument is that this court is not governed by Canadian law, but *of course* this case is not governed by Canadian law. Himes submitted *Hollis* as one additional example of how other courts applying common law have addressed the issue concerning the interplay between the learned intermediary and its application (if any) to causation. The same way parties freely cite *non-binding cases* from various states across the country and discuss the laws of *other* states and jurisdictions as persuasive authority, Himes, pursuant to Evidence Code Section 452(f) and 459(a), cited *Hollis* as an example of how the Canadian Supreme court has tackled these issues.

Second, Somatics suggests Himes submitted *Hollis* because she was unable to identify any California authority supporting her causation arguments, a contention that is demonstrably false. Himes cited numerous decisions, including prior California Supreme Court decisions, that support her contention that the learned intermediary is only applicable to the issue of duty (and not to causation) (*see* Opening Br. at 29-37); and, even if the learned intermediary doctrine applies to causation, establishing the doctor would have passed on stronger warnings to his patients is more than sufficient to establish proximate cause (see Opening Br. at 44-51). *See Stevens v. Parke, Davis & Co*., 9 Cal. 3d 51, 65 & 69 (1973) (learned intermediary defense applies "***if***" manufacturer provided adequate warnings to doctors and further holding "even assuming for the sake of argument that the jury accepted [the doctor's] testimony that he was cognizant of the dangers of the drug, nevertheless his negligence was not, as a matter of law, an intervening cause which exonerated [the drug manufacturer]."); *Hill v. Novartis Pharms. Corp*., 944 F. Supp. 2d 943 (E.D. Cal. 2013) ("[T]he doctrine, 'where it applies at all, applies only if a manufacturer provided adequate warnings to the intermediary.'"); *see also T.H. v. Novartis Pharms. Corp*., 4 Cal.5th 145, 184 (2017) ("we have never allowed a defendant to excuse its own negligence as a matter of law simply by asserting that someone else should have picked up the slack and discharged the duty at issue…Nor have we permitted a negligent actor to evade liability simply because another party may also be liable for a similar

tort.")[1]

Third, Somatics contends Himes has not provided sufficient information concerning Canadian law to warrant judicial notice. In support, Somatics relies on *In re Marriage of Nurie*, 176 Cal. App. 4th 478, 509 (2009). However, in that case, the court of appeal did not take judicial notice of Pakistani laws because the party *had not provided copies* of the Pakistan statutes or cases. Here, Himes *has* provided the full decision of the published Canadian Supreme Court and provided a declaration as to how the decision was obtained from legal online databases that contain foreign, including Canadian, judicial opinions.

Fourth, Somatics argues that no assurances are provided that *Hollis* is still the law in Canada. However, Somatics has not presented any evidence that *Hollis* has been overturned by any subsequent decision. To the extent Somatics seeks to challenge the viability of *Hollis*, it had the opportunity to do so, and the fact it has not found any cases reversing *Hollis*, is further confirmation that *Hollis* remains good law. Moreover, as Somatics has observed, at least one California federal court has cited to and relied upon *Hollis*. Furthermore, several secondary sources (including secondary sources from the defense bar – Defense Research Institute) *cite* to *Hollis* as the law in Canada. *See* CANADA, DRI-PRODLIAB IA, Teresa M. Dufort, DRI

[1] *See also Georges v. Novartis Pharms. Corp.*, 988 F. Supp. 2d 1152, 1158 (C.D. Cal. 2013) (even if learned intermediary applied to causation issue, causation is established if plaintiff demonstrates that physician had he been warned by manufacturer would have relayed warnings to the patient and patient testifies that she would not have consented had she been so adequately warned); *Stanley v. Novartis Pharm. Corp.*, 11 F.Supp.3d 987, 1003 (C.D. Cal. 2014) (same); *Riera v. Somatics, LLC*, 2018 WL 6242154, * 11 (C.D.Cal. Sep. 14, 2018) (same).

PRODUCTS LIABILITY DEFENSES, AS STATE-BY-STATE COMPENDIUM (CANADA) (2013); David S. Morritt et al., *Product Liability in Canada: Principles and Practice North of the Borde*r, 27 WM. MITCHELL L. REV. 177, 179 (2000); Martin Olszynski et. al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENVTL. L. REV. 1, 33 (2017).[2]

Fifth, Somatics gratuitously argues Himes previously misrepresented the record. In support of its scurrilous allegations, Somatics cites to its earlier brief wherein it falsely claimed that, in the lower court, it had challenged whether ECT causes permanent memory loss and provided adequate warnings to Himes' doctor. To the contrary, in the summary judgment proceedings below (and as the record and the district court's order clearly demonstrates) Somatics admitted it was aware of ECT causing permanent memory loss and that it never provided warnings about permanent memory loss to Himes' doctor. *See* 2-ER-37-47 (Undisputed Fact Nos. 24-32, 38-42, 43-47). Given the foregoing undisputed evidence, the district court in the section of its summary judgment order outlining the "undisputed facts" made the following findings of fact:

[2] Himes' counsel's research and shepardizing of *Hollis* has likewise not revealed any subsequent case law that has reversed *Hollis* nor has Somatics identified any authority that has overturned *Hollis*.

> Over the years, Somatics became aware, or should have been aware, of hundreds of complaints and reports of brain injury, permanent retrograde amnesia [and] cognitive impairment…associated with ECT. *Somatics never* investigated these complaints, nor did it submit adverse events to the FDA *or warn physicians and consumers of these risks*"

See 1-ER-4 (emphasis added). After making the above-mentioned finding of fact, the district court in the discussion section of its Order went on to conclude that Somatics "did not provide any warnings to…Dr. Fidaleo concerning the risk of brain injury or permanent memory loss." 1-ER-9. The fact that Somatics now seeks to challenge facts it previously admitted as *undisputed,* and in the process resorts to falsely casting stones at Himes appears to be its own desperate attempt to salvage a sinking ship.[3]

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[3] Somatics further refers to footnote 4 of its answer to the amicus brief to argue it did in fact submit expert testimony that ECT does not cause permanent memory loss, however, its only citation is to the testimony of Himes' treating physician—a physician Somatics failed to warn and, thus, who was unaware of the risk. To suggest this is somehow expert proof that ECT does not cause permanent memory loss—in a case where Somatics admitted it was aware of the risk and failed to warn the physician—is absurd. See 2-ER-37-47

Somatics also claims Himes cited to a Fifth Circuit case, *McNeil v. Wyeth*, 462 F.3d 364 (5th Cir. 2006) (applying Texas law), that purportedly was overturned by the Texas Supreme Court in *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 172 (Tex. 2012). Yet *Centocor* never overturned *McNeil*, and Somatics has not cited any passage from *Centocor* overturning *McNeil*. Indeed, *Centocor* on two occasions cited to and relied upon *McNeil*. If the Supreme Court intended to overturn *McNeil*, it would have said so (which it did not). Moreover, *Centocor* was factually distinguishable from *McNeil* and our case. Specifically, in *Centocor*, the Texas Supreme Court held causation was lacking because (a) the doctor *was already aware of the risk at issue*, *see Centocor*, 372 S.W.3d at 170–71 ("It is undisputed that all of Patricia's medical providers were aware that Patricia could potentially develop lupus-like syndrome as a side effect of Remicade."); and (b) the Texas Supreme Court further held that causation was lacking because the evidence indicated, even when warned of the risks of lupus by her doctor, the plaintiff

Sixth, Somatics contends Himes has not offered the regulatory context for the *Hollis* decision. It is unclear what relevance, if any, the regulatory context of Canada has to *Hollis'* ruling concerning the interplay between the learned intermediary doctrine and causation. Likewise, Somatics' argument that the purported "loser pays" rule in Canada (which it claims is similar to England) somehow distinguishes *Hollis* is non sequitur and irrelevant. To adopt that reasoning, then a California court would never take judicial notice of any English or Canadian laws, yet California law allows for judicial notice of foreign law (including the laws of England and Canada) and this Court has previously taken judicial notice of English cases. *Smiley v. Citibank*, 11 Cal. 4th 138, 145, n.2 (1995) (taking judicial notice of decisions for "English courts").[4]

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continued taking the medication, see *Centocor*, 372 S.W.3d at 172-73 ("Dr. Pop–Moody specifically warned Patricia that she might have SLE or lupus-like syndrome in April 2003, but despite this warning, Patricia chose to continue receiving Remicade treatments and Dr. Pop–Moody continued prescribing them to her. Patricia's actions indicate that, even if Centocor provided a different warning to her doctors, she would likely have continued Remicade treatments for her serious medical condition despite the risk of lupus-like syndrome."). Here, on the other hand, Somatics did not argue (nor establish) that Himes' doctor was aware of the risks of permanent memory loss and brain damage (to the contrary, her doctor testified he was not aware of the risks) and second, unlike *Centocor*, Himes has established that, had she been adequately warned by her doctor, she would not have consented to ECT.

[4] Equally misguided is Somatics' continued argument that the learned intermediary doctrine was somehow created to protect the bottom line of drug companies and prevent pharmaceutical lawsuits. As Himes has articulated in her prior briefs, California law places high regard on ensuring that its citizens are protected from harmful products and ensuring those harmed have a legal remedy, as confirmed by California's adoption of strict products liability even in prescription drug failure to warn cases. *Carlin v. Superior Ct.*, 13 Cal. 4th 1104, 1117 (1996) The goal of California law is to ensure manufacturers adequately warn and, in the case of prescription products,

Seventh, Somatics complains the judicial notice request is improper because of its timing, i.e., it was not cited in Himes' opening or reply briefs. To be clear, Himes came across the *Hollis* decision while permissibly responding to the *six* amicus briefs filed on Somatics' behalf (mostly from organizations to which either Somatics or its lawyers are affiliated). Thus, Himes cited to the *Hollis* decision in response to the amici and concurrently therewith sought judicial notice pursuant to the court rules and the Evidence Code, which permit an appellate court to take judicial notice of foreign laws. *Smiley*, 11 Cal. 4th at 145, n.2; *see also* EVID CODE §§ 452(f) & 459(a). Notably, Somatics itself cited to approximately a dozen *new* cases in its response to the amicus briefs (including some new out-of-state cases), which were not cited in its answering brief. Thus, the fact that the *Hollis* decision was only discovered and cited by Himes in responding to the amicus briefs, is not a bar to it being judicially noticed.

Lastly, Somatics argues: "Canadian supreme court decisions are published in English (as well as French), but that doesn't make them any more applicable here than a decision from China, Saudi Arabia, or Guatemala." See Somatics' Opp. Br. at 2. *First*, casting aside the insular foundation of Somatics' contention, California law permits judicial notice of *all* foreign law, not just laws passed by English speaking countries. EVID. CODE §452(f). *Second*, Himes cited *Hollis* for the persuasive *reasoning* of the

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provide adequate warnings to doctors. The doctrine/defense was never intended to shield negligent manufacturers who failed to provide warnings to doctors and who kept doctors (and patients) in the dark concerning the risks associated with their products.

Canadian Supreme Court which, three decades earlier, tackled some of the same (indeed nearly identical) issues pending before this Court concerning the interplay of the learned intermediary doctrine and causation. The *reasoning* of the Canadian Supreme Court is worthy of consideration in the same way the reasoning of the myriad other out-of-state cases and jurists the parties have cited in their various briefs are worthy. The law in many respects is a study in history and humanities—we look to the past and those who walked before us and who faced similar issues, to see if we can learn from or adopt any of their teachings. *See e.g., Gordon v. Just. Ct.*, 12 Cal. 3d 323, 334 (1974) ("The principle we announce today is not a novel one. It dates back at least to 1215 and the Magna Carta."*); Jehl v. S. Pac.* Co., 66 Cal. 2d 821(1967) (reviewing the history of jury trials including examining how English courts handled jury trials at the time of the American Revolution); *RSL Funding, LLC v. Alford*, 239 Cal. App. 4th 741, 746 (2015); ("'Where, as here, there is no California case directly on point, foreign decisions involving similar statutes and similar factual situations are of great value to the California courts.'…Although such authorities are persuasive rather than mandatory precedent, we agree *with their reasoning* and conclusions.") (emphasis added, internal citations omitted).[5]

Moreover, the validity of the legal *reasoning* a prior jurist adopts, or the *ideas* that a prior generation implemented are not, as Somatics obtusely suggests, constrained by international borders, or graded by the ethnicity

[5] Indeed, in *Hollis*, the Canadian Supreme Court in discussing the learned intermediary doctrine cited to several U.S. decisions, including *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966)

or language of the jurist. This case, when stripped to its core, concerns the issue of *individual freedom*[6] – i.e., do we construe our products liability laws to ensure that the *informed consent* of the patient is protected and included as part of the causation inquiry as Himes advocates; or will we have a legal landscape wherein the ultimate consent of the patient is completely discarded from the inquiry as Somatics advocates. Concepts of individual freedom and human rights are not concepts unique to the English-speaking world and are not confined to geographical boundaries. As one legal commentator observed:

> [H]uman rights are not the monopoly of a given civilisation - as it is frequently thought - and that they are indeed more universal than they are so often perceived. Indeed, human rights find their roots in the superior principles of what has been referred to as natural law which, depending on the civilisations where they take shape, may be based on god, providence, conscience, moral, reason, etc. What matters is not their designation, whether they should be called natural rights, rights of Man, or, since World War II, human rights. Nevertheless, regardless of their corresponding civilisation those superior principles have a common denominator, that is their philosophical grounds are laid on the essence of human dignity, pre-dating the sophistication of political organisations.

See Hirad Abtahi, *Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation As A Challenge to the Athenian Democracy's*

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[6] *See e.g., United States v. Charters*, 829 F.2d 479, 490-91 (4th Cir. 1987) ("The right to be free of undesired physical touching traces its origins to the English common law of the middle thirteenth century" …[¶]…"The right to be free of unwanted physical invasions has been recognized as an integral part of the individual's constitutional freedoms, whether termed a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights.")

Perceived Monopoly on Human Rights, 36 DENV. J. INT'L L. & POL'Y 55, 59 (2007). Our current laws and importantly the principles that form the core of our current laws and beliefs trace their origins to the philosophers of Europe, who in turn looked to philosophers who predated them from earlier times and other continents. Himes cited to the Canadian Supreme Court's decision (*Hollis*) for its cogent *reasoning* concerning the interplay of the learned intermediary doctrine and causation. Had she found similar persuasive reasonings by jurists or legal scholars from any other corner of the globe applicable to the issues at hand, she would not have hesitated to cite them. After all, *ideas* and the persuasiveness of a jurist or scholars' *reasoning* transcend both time and geography.

In the same manner the parties have asked this Honorable Court to consider the reasoning of various out-of-state courts, none of which are binding, Himes likewise asks that the Court grant her request for Judicial Notice and similarly consider the detailed sensible legal reasoning of the Canadian Supreme Court decision in *Hollis* concerning the interplay of the learned intermediary doctrine and causation.

Dated: January 16, 2023

Respectfully submitted,

/s/ Bijan Esfandiari

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