IP 03-1674-C T/K Eli Lilly v Viking Corporation
Judge John D. Tinder Signed on 02/07/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| ELI LILLY & COMPANY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | 1:03-cv-1674-JDT-TAB |
| | ) | |
| THE VIKING CORPORATION, | ) | |
| | ) | |
| Defendant. | ) | |

**ENTRY ON PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT (DKT. NOS. 17, 22); PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT (DKT. NO. 37); PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S ORDER (DKT. NO. 42); AND DEFENDANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTED AFFIDAVIT (DKT. NO. 41)**[1]

Plaintiff Eli Lilly & Company ("Lilly") alleges that on April 4, 2001, a sprinkler designed and manufactured by Defendant The Viking Corporation ("Viking") failed and discharged in a Lilly warehouse where finished pharmaceutical products were stored. The failure purportedly caused a significant amount of non-sterile water to come into contact with Lilly drugs. According to Lilly, under Federal Drug Administration (FDA) regulations the contaminated products could not be sold.

This action is presently before the court on several motions by Lilly and one

[1] This Entry is a matter of public record and may be made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

motion by Viking. Specifically, Lilly moves for partial summary judgment on the issues of prejudgment interest (Dkt. No. 17) and the appropriate measure of damages (Dkt. No. 22). Viking's response to those motions contained and relied upon the affidavit of Vincent A. Thomas, which Lilly now moves to strike (Dkt. No. 37). Along with its response to the motion to strike, Viking petitions this court for leave to supplement Mr. Thomas' prior affidavit. In addition, Lilly objects to the Magistrate Judge's Order of January 12, 2005 (Dkt. No. 39), denying Lilly's motion for a protective order. The court heard oral argument on February 3, 2005, and now finds as follows:

## I. MOTION TO STRIKE AFFIDAVIT OF VINCENT A. THOMAS; MOTION FOR LEAVE TO SUPPLEMENT AFFIDAVIT OF VINCENT A. THOMAS

First, a couple of collateral issues will be addressed. In the end, their resolution has no effect on the outcome of the summary judgment matters. On October 29, 2004, Lilly filed two separate motions for partial summary judgment. Viking's response contained and relied upon the affidavit of Vincent A. Thomas, an expert witness on damages-related information. Lilly moves to strike Thomas' affidavit. Viking opposes the motion to strike, and in addition filed a supplemented affidavit sworn to by Thomas. Before turning to those issues, however, the court wishes to note that Local Rule 56.1(f) provides as follows:

> Collateral motions in the summary judgment process, such as motions to strike, are disfavored. Any dispute regarding the admissibility or effect of evidence should be addressed in the briefs.

Lilly's motion to strike Thomas' affidavit was filed on the same day as its summary

judgment reply brief, and should have been included therein. The court will presume that Plaintiff's counsel understood the word "should" in Local Rule 56.1 to mean the permissive "may," and so no negative consequences will result. The court would prefer that lawyers interpret this portion of the local rule to mean "must, in the absence of a good reason to file a stand-alone motion challenging evidence." Nonetheless, the motion to strike will be addressed.

According to the Federal Rule of Civil Procedure, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Furthermore, "[w]hen a motion for summary judgment is made and supported as provided in this rule . . . the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id*. In the context of expert witnesses, "[f]or an expert report to create a genuine issue of fact, it must provide not merely the conclusions, but the basis for the conclusions." *Vollmert v. Wis. Dep't of Transp*., 197 F.3d 293, 298 (7th Cir. 1999). "'An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process,' and his 'naked opinion' does not preclude summary judgment." *Weigel v. Target Stores*, 122 F.3d 461, 469 (7th Cir. 1997) (quoting *American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1464 (7th Cir. 1996) (Posner, C.J., dissenting)). With that standard in mind, the court finds that Thomas' affidavit accompanying Viking's response brief must be stricken.

The bulk of Thomas' affidavit addresses his opinion that, given the nature of the

pharmaceutical business, an award of damages based on the fair market value of destroyed pharmaceutical products would overcompensate the manufacture of those products. (Thomas Aff. ¶¶ 5-10.) Thomas' statements in this regard are nothing but conclusions. Thomas presented "no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected." *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989). Without an indication of the factual support underlying his conclusions, Thomas' statements cannot be weighed or evaluated. Furthermore, Thomas does not state whether he reviewed any materials related to the underlying case in preparing his conclusions, and, oddly, Viking never even attached his curriculum vitae. In essence, what Thomas provided was his legal rather than his economic or financial opinion. For that reason, Lilly's motion to strike Thomas' affidavit will be **GRANTED**.

Viking correctly states that Rule 56(e) does "permit affidavits to be supplemented or opposed by . . . further affidavits." The court has "great discretion" in determining the proper application of Rule 56(e). *Maldonado v. U.S. Bank*, 186 F.3d 759, 769 (7th Cir. 1999). In this case, the court must conclude that the failings of Thomas' first affidavit cannot now be remedied by Viking's inclusion of a supplemented affidavit. Viking notes that the first Thomas affidavit was filed along with its response brief on December 16, 2004. Viking is also correct that its expert report on damages was not due until January 19, 2005. Based on that deadline, Viking claims that Thomas' report providing the factual basis for his damages opinion was "not available" when its response brief was filed in December 2004. What Viking fails to account for is that Thomas is *its* expert

witness. Viking filed an unopposed motion for an extension of time to file its response briefs on November 16, 2004. Nowhere in that motion does Viking indicate that it needs more time to secure Thomas' expert report for the purposes of its response. Viking needed the information contained in Thomas' report for his affidavit to be legally sufficient, and thus should have secured it prior to the response deadline. If that information was unavailable by that deadline, then such information should have been communicated in the motion for an extension of time. Lilly should not be penalized for Viking's inability to secure the necessary materials from its own expert witness prior to the relevant deadline. The summary judgment briefing schedule remains independent of the expert witness disclosure schedule–any problems associated with the interrelation of the two schedules should have been addressed prior to this stage of the litigation. Simply put, Viking's supplemented affidavit is too late. Accordingly, Viking's motion for leave to supplement Thomas' affidavit is **DENIED**.

## II. MOTIONS FOR PARTIAL SUMMARY JUDGMENT

### A. Legal Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light most reasonably favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).

As already noted, Lilly seeks partial summary judgment on the questions of prejudgment interest and the measure of damages. At first blush, summary judgment may appear to be an inappropriate vehicle for the resolution of particular legal issues, as opposed to claims. Generally, damages-related issues such as the ones Lilly seeks to resolve could be addressed through a motion in limine before trial. Federal Rule 56(a), however, does allow for "summary judgment in the party's favor upon all *or any part thereof* (emphasis added)." In addition, under Rule 56(d) the court may, after conducting a hearing, issue an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy." According to one prominent treatise, "[i]n many ways, the hearing called for by Rule 56(d) actually may serve as a pretrial conference. Certain issues may be determined, and thereby foreclosed from consideration at trial; by implication, the remaining issues are deemed to be in controversy and to be left for adjudication at trial." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1529 (2d ed. 1990). As such, a motion for partial summary judgment is a useful pretrial tool that "streamline[s] the litigation process by narrowing the triable

issues." *Republic Tobacco, L.P. v. North Atl. Trading Co., Inc.*, 254 F. Supp. 2d 985, 997 n.13 (N.D. Ill. 2002) (citations omitted). A pretrial order under Rule 56(d) is not a final judgment, and thus is generally not appealable. *Id*. (citations omitted). In keeping with Rule 56's goal of expediting litigation, and after reading Rules 56(a) and 56(d) in conjunction, the court finds that the issues of prejudgment interest and the appropriate measure of damages can be addressed through Lilly's motions for partial summary judgment.

**B. Measure of Damages**

Because this action invokes the court's diversity jurisdiction, both sides agree that Indiana law governs the measure of damages and issue of prejudgment interest. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Under Indiana law, "damages are awarded to fairly and adequately compensate an injured party for her loss, and the proper measure of damages must be flexible enough to fit the circumstances. *Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000) (citations omitted). The pharmaceutical products alleged to have been destroyed by the Viking sprinkler are pieces of property. The basic measure of damages for total destruction of property in Indiana courts is the fair market value of the property at the time of the loss. *Ridenour v. Furness*, 546 N.E.2d 322, 325 (Ind. Ct. App. 1989); *Bottoms v. B & M Coal Corp*., 405 N.E.2d 82, 93 (Ind. Ct. App. 1980). "Fair market value" is said to be the price at which a willing seller would sell the items to a willing buyer. *Campins v. Capels*, 461 N.E.2d 712, 719 (Ind. Ct. App. 1984) (citation omitted). The Seventh Circuit, applying Indiana law, has determined that

> the market that determines the measure of a recovery by a person whose goods have been taken, destroyed or detained is that to which he would have to resort in order to replace the subject matter. Thus the consumer can recover the retail price; the retail dealer, the wholesale price. *The manufacturer, who does not buy in a market, receives his selling price*.

*Simmons, Inc. v. Pinkerton's, Inc*., 762 F.2d 591, 606 (7th Cir. 1985) (quoting *Restatement (Second) of Torts* § 911 cmt. d (emphasis added)).

Viking essentially concedes that, as a general rule, fair market value is the appropriate measure of damages for destroyed property. Lilly's assertion that Viking wishes to limit damages to the costs of manufacturing the pharmaceuticals sweeps too broadly. Rather, Viking argues that a rigid application of the fair market value measure of damages in this case would overcompensate Lilly. It is true that Indiana courts abhor a windfall, and "[w]hile an aggrieved party must be compensated, he should not be placed in any better position." *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 597 (Ind. Ct. App. 1993) (citations omitted). This is why "the proper measure of damages must be flexible enough to fit all circumstances." *Id*. (citations omitted). Viking contends that evidence of the cost of manufacturing, along with evidence of a host of other factors, demonstrates something about the nature of the pharmaceutical business that indicates an award based on the pharmaceuticals' selling price would place Lilly in a better position than it was before the injury. Thus, according to Viking, evidence of the cost of manufacturing, lost sales, excess inventory, costs of research and development, and Lilly's profit margin all can have an impact on the damages calculus. In sum, therefore, Viking claims that an award of damages based solely on Lilly's selling price for the

destroyed drugs would be fundamentally unfair, without at least considering additional factors.

In evaluating both sides' arguments, the issue becomes even more complicated by the interrelation of Lilly's motion for partial summary judgment and its request for a protective order limiting discovery. How the court rules on the summary judgment motions will directly affect the protective order by shaping the contours of what damages-related information becomes relevant and thus discoverable.[2] As stated above, it is clear that fair market value is generally the proper measure of damages in this type of case. However, what is not as clear is how that determination plays out at this point in the litigation. Lilly seems to want the court to declare that damages should be calculated by multiplying the drugs' sale prices by the number of drugs destroyed to arrive at a clear figure, and to limit Viking's discovery possibilities to those two pieces of information. Notably, Lilly has failed to attach a single affidavit or other piece of evidence detailing the extent of the damage to its products or their selling prices. Lilly's position may turn out to be the correct one. On the other hand, such a rigid approach may ignore the Indiana courts' goal of avoiding overcompensation. Viking is correct in stating that it has a right to discover information pertinent to mitigation of damages. Lilly offers to the court that it could not mitigate given certain FDA regulations on contaminated drugs (again, without even attaching the relevant documentary evidence, nor even citing the particular FDA rule). True, Lilly is probably correct that the damaged

[2] It should be noted that at oral argument, Lilly unequivocally announced its withdrawal of the loss of sales, profits and/or income damages claims from its complaint.

drugs could not be resold. But that representation does not foreclose all discovery on the issue.

Furthermore, there may be something unique about Lilly's profit margin in this case that would make the sale price of the drugs an inappropriate measuring stick for damages. Based on the evidence submitted by Lilly so far in the context of its motion for summary judgment, the court simply has no way of knowing. But that does not necessarily mean Viking is foreclosed form making inquiries into Lilly's profit margin. Lilly essentially conceded at oral argument that it could potentially receive a windfall if the fair market value is applied in this case through the multiplication of the number of damaged drugs by their sale price, but argues that the *Simmons* case allows for such a result through its interpretation of Indiana law. The court does not believe *Simmons* extends as far as Lilly would like. *Simmons* never expressly addressed the issue of overcompensation, and the court feels as though it cannot simply ignore Indiana case law regarding the need for flexibility in awarding damage and the abhorrence of windfalls.[3] No case cited by Lilly holds that fair market value must be the measure of damages even if it would place the injured party in a better position than it was in before the injury, and this court will not do so here. Thus, discovery ought to be allowed to assess the contours of the appropriate measure of damages in this particular case.

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[3] Moreover, the procedural posture of *Simmons* precludes it from being a determinative guidepost here. *Simmons* is a retrospective assessment of the correct measure of damages after the evidence was submitted to the trier of fact. The instant case is at the threshold discovery stage. After appropriate investigation, fair market value may, or may not, be the only appropriate measure of damages. But absent discovery, Lilly's premise cannot be fairly tested. Viking should not be deprived of that opportunity.

Thus, at this state of the litigation, Lilly's motion for partial summary judgment on the measure of damages will be **DENIED**. The court finds that there is a genuine issue of material of fact in dispute as to whether a measure of damages premised on the destroyed pharmaceuticals' selling price would overcompensate Lilly.

In light of this ruling, the Magistrate Judge's order on Lilly's request for a protective order will be **AFFIRMED**. However, the court will direct the parties to attempt to reach a mutually satisfactory agreement as to what of the information requested by Viking may properly be deemed trade secret information or irrelevant and thus non-discoverable. In other words, the court asks the parties to come together and agree on the proper contours of a protective order now that Lilly's partial summary judgment motions have been resolved. If the parties cannot agree on the appropriate scope of Lilly's requested protective order, Lilly may once again petition the Magistrate Judge to rule on the matter in light of the court's views expressed herein. If the Magistrate Judge is forced to revisit Lilly's request for a protective order, and after any additional discovery is or is not allowed, the parties may find it useful to provide additional briefing on the issue of how damages should be calculated in this case, including a discussion of whether damages based solely on the damaged products' sale price would overcompensate Lilly. Such briefing seems most appropriate in the context of motions in limine, or perhaps in conjunction with requested jury instructions.

### C. Prejudgment Interest

Both sides agree that Indiana law governs the issue of prejudgment interest. The Indiana Code permits an award of prejudgment interest as part of the judgment in a civil action arising out of tortious conduct. Ind. Code. §§ 34-51-4-1 *et seq*. The Code sets forth specific procedural steps that must be taken before prejudgment interest can or will be awarded, but does not address the circumstances under which prejudgment interest should be awarded–that determination is left to the common law. Under Indiana common law, prejudgment interest is appropriate when "the injury and consequent damages are complete" and can be "ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value. . . ." *New York, C. & St. L. Ry. Co. v. Roper*, 96 N.E. 468, 472 (Ind. 1911).

The court has no doubt that Lilly would likely be entitled to an award of prejudgment interest following a jury verdict in its favor. The type of injury in this case is not continuing, and appears to be ascertainable as of a particular time. However, Lilly's motion for partial summary judgment on this point is premature. Lilly has failed to attach a single piece of evidence relating to damages in this case, and this matter should be addressed at a later date. Lilly is more than welcome to ask for a jury instruction on prejudgment interest, or, if Lilly prevails at trial, it may ask the court at the time of entry of judgment for an award of prejudgment interest.[4] In sum, Lilly has not produced the

[4] It appears that each of the cases cited by Lilly involved a determination and award of prejudgment interest *following* entry of judgment–by trying to resolve these issues through summary judgment, Lilly is putting the cart before the horse.

evidence necessary to determine how and under what circumstances prejudgment interest should be awarded in this case. Given the court's ruling on Lilly's damages motion, there may be additional discoverable information that will better enable Viking to begin settlement negotiations. Until then, the court cannot conclude that a failure to declare as a matter of law that Lilly is entitled to prejudgment interest is contrary to public policy. Lilly's motion for partial summary judgment on prejudgment interest is **DENIED** as being premature.

## III. PROTECTIVE ORDER

For the reasons noted in Section II.B of this Entry, the court will **AFFIRM** the Magistrate Judge's order denying Lilly's request for a protective order in light of this court's resolution of Lilly's motion for partial summary judgment on the measure of damages. As noted, this does not preclude Lilly from seeking another protective order if reasonable efforts to agree upon a modified protective order in light of this entry are unsuccessful. The parties are directed to attempt to reach an agreement as to whether a protective order can be fashioned that is mutually satisfactory to both sides. If they cannot so agree, Lilly may again file a request for protective order before the Magistrate Judge.

## IV. CONCLUSION

Based on the foregoing, Lilly's motion to strike the affidavit of Vincent A. Thomas (Dkt. No. 37) is **GRANTED**. Viking's motion for leave to supplement the affidavit of Vincent A. Thomas (Dkt. No. 41) is **DENIED**.

Lilly's motion for partial summary judgment on the measure of damages (Dkt. No. 22) is **DENIED**. Lilly's motion for partial summary judgment on prejudgment interest (Dkt. No. 17) is **DENIED**.

The Magistrate Judge's order of January 12, 2005, denying Lilly's motion for a protective order (Dkt. No. 39) is **AFFIRMED**.

ALL OF WHICH IS ORDERED this 7th day of February 2005.

John Daniel Tinder, Judge
United States District Court

**Copies to:**

Magistrate Judge Timothy A. Baker

Daniel David Trachtman
Wooden & Mclaughlin LLP
dtrachtman@woodmaclaw.com

Matthew Mark Adolay
Wooden & Mclaughlin LLP
madolay@woodmaclaw.com

Matthew W. Melton
Norris Choplin & Schroeder LLP
mmelton@ncs-law.com

Peter A. Schroeder
Norris Choplin & Schroeder LLP
pschroeder@ncs-law.com

Tammy Jo Meyer
Lewis & Wagner
tmeyer@lewiswagner.com

Richard K. Shoultz
Lewis & Wagner
rshoultz@lewiswagner.com