IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA CERVICAL COLLAR	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
JEROME GROUP, INC.	:	
D/B/A JEROME MEDICAL	:	NO. 00-2515

MEMORANDUM AND ORDER

HUTTON, J. January 30, 2002

Presently before the Court are Defendant's Motion for Summary Judgment (Docket No. 56), Plaintiff's Response thereto (Docket No. 60), Defendants' Reply Memorandum in Further Support of its Motion for Summary Judgment (Docket No. 63), and Plaintiff's Sur-Reply thereto (Docket No. 64).

I. BACKGROUND

Plaintiff's Complaint makes the following claims: Count I) Lanham Trademark Act/False Advertising/Unfair Competition/Misuse of Trademarks; Count II) Commercial Disparagement; and Count III) Negligence.

The factual allegations on which the Plaintiff bases its Complaint are as follows. Philadelphia Cervical Collar ("PCC") is a manufacturer of cervical collars and has been involved in the field of cervical immobilization since 1971. Jerome Group, Inc. ("Jerome") is a former customer of PCC which terminated its

relationship with PCC and entered the marketplace as a competitor of PCC in the early 1990's. PCC discovered in approximately November of 1999 that Jerome was distributing in the marketplace an article entitled “Efficacy of Five Orthoses in Restricting Cervical Motion: A Comparison Study” written by Vance Askins, M.D. and Frank J. Eismont, M.D. which appeared in the June 1997 edition of Spine Magazine (the “Article”). Jerome distributed the Article to customers and potential customers both in and out of Philadelphia County. The Article purported to compare two cervical collars manufactured by Jerome (the Miami J and NecLoc collars) with a cervical collar that was allegedly manufactured by PCC. The Article also evaluated the Aspen Collar manufactured by International Health Care Devices and the Stiffneck Collar manufactured by Laerdal Corporation.

PCC further alleges in its Complaint that the cervical collar depicted in the Article as a “Philadelphia” collar and allegedly compared to Jerome’s collars was not a “Philadelphia” collar. The Article asserted that the two Jerome collars were superior to the other three collars, including the alleged “Philadelphia” collar. Jerome provided the collars identified in the article to Vance Askins, M.D. and Frank J. Eismont, M.D. for use in the Article. Plaintiff also alleges that Jerome provided financial assistance and other support to the Authors, the University of Miami, and the Jackson Memorial Medical Center in connection with the article.

PCC alleges that Jerome negligently, maliciously, deliberately, and fraudulently distributed reprints of the inaccurate Article, because Jerome knew or should have known that the collars tested were not true "Philadelphia" collars. PCC claims that, as a result of Jerome's distribution of the alleged misleading Article, PCC has suffered substantial damage to its reputation, loss of past, present and future customers, and loss of profits.

II. LEGAL STANDARD

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is 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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden "may

be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. See Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

To determine whether summary judgment is appropriate, the Court must determine whether any genuine issue of material fact exists. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. If the evidence favoring the nonmoving party is "merely colorable," "not significantly probative," or amounts to only a "scintilla," summary judgment may be granted. See id. at 249-50, 252; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) ("When the moving party has carried its

burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)). Of course, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Big Apple BMW, 974 F.2d at 1363. Thus, the Court's inquiry at the summary judgment stage is only the "threshold inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

III. DISCUSSION

Defendant Jerome's Motion for Summary Judgment is premised upon the assertion that PCC has failed to produce evidence to meet its burden of proving certain critical facts necessary to support PCC's claim. Specifically, Defendant argues the following grounds in its Motion For Summary Judgment: 1) The Plaintiff has failed to produce sufficient evidence of each element of its Lanham Act claim, specifically, whether the published study was actually

false, whether the study was deceptive, and whether Jerome's distribution of the Article caused actual damages to the Plaintiff; 2) Plaintiff has failed to produce evidence of malice for its commercial disparagement claim; 3) Plaintiff has failed to produce sufficient evidence of Jerome's state of mind in Plaintiff's claims for Jerome's profits, attorney's fees, and corrective advertising; and 4) There is no cause of action for negligence available in a product disparagement case. Plaintiff PCC asserts both that it has produced sufficient evidence of each of its claims, and that factual disputes exist which should preclude summary judgment.

1. Plaintiff PCC has Produced Sufficient Evidence On Its Lanham Act Claim to Withstand Summary Judgment

In its Motion for Summary Judgment, the Defendant claims that the Plaintiff has failed to provide sufficient evidence to support its claim that the Defendant violated the Lanham Act. Specifically, the Defendant claims that there is no genuine issue of material fact as to whether the published study was actually false, whether the results of the study are deceptive, and whether Defendant Jerome's distribution of copies of the study caused actual damages to the Plaintiff. This Court does not agree with the Defendant's assertion.

The Court of Appeals for the Third Circuit has interpreted Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), to require a plaintiff to show that: 1) the defendant has made false or

misleading statements as to his or her or another's product or services; 2) there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) the deception is material in that it is likely to influence purchasing decisions; 4) that the advertised goods traveled in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales and loss of good will. See U.S. Healthcare Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922-23 (3d Cir.), cert. denied, 498 U.S. 816, 111 S.Ct. 58, 112 L.Ed.2d 33 (1990) (citing Max Daetwyler Corp. v. Input Graphics, Inc., 545 F.Supp. 165, 171 (E.D.Pa. 1982)) (citations omitted).

The Defendant's first claim is that the Plaintiff is proceeding upon mere speculation that Dr. Askins had participants in the study wear knock-offs of the Philadelphia collar. The Defendant cites to Askins' deposition testimony that he does not know whether the collars he tested were genuine or not. See Askins Dep. at 38. The Defendant infers from this testimony that the Plaintiff is proceeding upon mere speculation that knock-off collars may have been used and that the possibilities are, at best, evenly balanced. The Defendant cites to the Third Circuit's decision in Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69, 75 (3d Cir. 1996), which stated that when a matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. Id.

The record in this case, however, reflects more evidence and factual disputes than the Defendant represents. In its Answer to the Plaintiff's Complaint, the Defendant admits that the "Philadelphia" collar that was pictured in the article in dispute was not a "Philadelphia" collar and was not manufactured by PCC. See Def.'s Ans. To Pl.'s Compl. at ¶10, 11. Moreover, Askins testified that the purported Philadelphia collar that appeared in the picture came from the same batch of collars that were used in the study itself. See Askins Dep. at 26-27. Askins further testified that the purported Philadelphia collar that appeared in the picture included in the article was kept in a large box along with the other collars used in the study, which were all kept together. Id. Askins deposition, while unclear, seems to further indicate that both genuine and knock-off collars were used in conducting his study. Id. at 78. It is apparent, therefore, that a genuine issue of fact exists as to the falsity of the Article.

The Defendant next claims that there is no genuine issue of material fact as to whether the results of the study are deceptive. In support of this claim, the Defendant cites to the deposition testimony of Dr. Askins, where Askins states that, regarding the Philadelphia collar, the results of the study in dispute were the same, and in some respects better, than previous studies involving the Philadelphia collar. Id. at 38-39. The Defendant concludes from this testimony that, because the Philadelphia collars are

viewed in an equal or better light in the instant study as compared to prior studies, then the article cannot be viewed as deceptive.

Other than pointing to this single statement made by Dr. Askins, the Defendant has not argued any other grounds, nor cited to any case law, that would enable this Court to rule as a matter of law that the article was not deceptive. Moreover, the Plaintiff is prepared to offer testimony of undisclosed sponsorship and participation by the Defendant in the disputed study and the resulting article. See Kowalski Dep. at 112-113, 119, 120-123; letter dated October 10, 1995 from Kowalski to the Univ. of Miami, attached to Pl.'s Resp. as Exh. I; letter dated July 18, 1994 attached to Pl.'s Resp. as Exh. L and M; Askins Dep. at 68-69. The Plaintiff claims, and this Court agrees, that this undisclosed sponsorship and participation in the article by the Defendant, along with the evidence that knock-off collars may have been used in the study, is sufficient evidence to submit to a jury on the issue of deception.

The Defendant's final argument regarding Plaintiff's Lanham Act claim, and which also applies to its commercial disparagement claim, is that there is no genuine issue of material fact as to whether Jerome's distribution of the study caused actual damages to the Plaintiff. The Defendant cites to the deposition testimony of Salvatore Calabrese, President of PCC, which the Defendant interpreted as a representation that the Plaintiff has no direct knowledge of any lost customers or lost or decreased sales

resulting from Jerome's distribution of the study. See Calabrese Dep. at 33-34, 55, 117-18, 177-78. However, the deposition excerpts cited by the Defendant merely demonstrate that PCC does not maintain information on specific end users, because PCC sells directly to distributors. Id. at 33, 55. In fact, Calabrese's deposition reflects that he is aware of three specific distributors who indicated that they would purchase fewer cervical collars from PCC as a result of Dr. Askins' study. Id. at 177.

The Plaintiff also points out that a major customer of both Jerome and PCC testified that he stopped buying Philadelphia collars and purchased Jerome collars as a result of the article. See Escobar dep. at 13-14. Moreover, this same customer testified that, subsequent to the distribution of the article, the price of the Jerome collar increased while the price of the Philadelphia collar decreased. Id. at 14. PCC also provided answers to interrogatories which assert that over seventy customers purchased a smaller volume of Philadelphia collars as a result of the article. See Pl.'s Supp. Resp. to Def.'s Int., at No. 2. Finally, the Record in the instant case includes an expert report by Glenn Newman, C.P.A., M.B.A., which concludes that PCC suffered actual damages resulting from Jerome's distribution of the article, and also conducts an estimated calculation of damages. See Newman Report on Monetary Recovery, attached to Pl.'s Resp. as Exh. S. Therefore, based on the above analysis, there are genuine issues of material fact with regard to each element of the Plaintiff's Lanham

Act claim. Accordingly, summary judgment is denied with respect to this claim.

2. Plaintiff has Produced Sufficient Evidence of Malice To Withstand Summary Judgment on Its Commercial Disparagement Claim

In its Motion, the Defendant raises a choice of law issue in arguing that New Jersey law should apply to this case. The Plaintiff claims that the choice of law discussion is irrelevant because the elements of commercial disparagement under Pennsylvania and New Jersey law are essentially identical. While this Court does not now rule on the choice of law issue, we will analyze the Plaintiff's claim under New Jersey law for purposes of this Motion only because, even if the Defendant is correct that New Jersey law applies, summary judgment is still not warranted on the commercial disparagement claim.

Under New Jersey law, a claim for commercial disparagement requires a plaintiff to prove 1) publication 2) of a false statement concerning plaintiff's product 3) with malice 4) causing pecuniary harm. See System Operations, Inc. v. Scientific Games Development Corp., 555 F.2d 1131, 1140 (3d Cir. 1977).

As was discussed above in the Lanham Act analysis, this Court finds that the Plaintiff has demonstrated a genuine issue of material fact as to falseness, actual damages, and causation, which precludes the granting of summary judgment based on these elements of Plaintiff's commercial disparagement claim. The Defendant, in

its Motion, has focused on the malice requirement of the commercial disparagement claim.

In support of its argument, the Defendant cites to the case of System Operations, Inc. v. Scientific Games Development Corp., 555 F.2d 1131 (3d Cir. 1977), which held that malice was an element in an action for product disparagement. The Plaintiff, citing to the cases of Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125 (1986) and Container Mnfg., Inc. v. Ciba-Geigy Corp., 870 F.Supp. 1225 (D.N.J. 1994), counters that subsequent decisions in the New Jersey courts have not followed this rule. This Court need not address whether malice is currently an element of commercial disparagement under New Jersey law because, even if malice is a required element, the Plaintiff has pointed to sufficient circumstantial evidence of malice to withstand summary judgement.

Actual malice requires proof that the Defendant published the statement at issue knowing of its falsity or with reckless disregard for its truth; reckless disregard is proven only upon sufficient evidence "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." See Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 465 A.2d 953, 963 (N.J. Super. 1983). Thus, the Court must determine whether the Plaintiff has presented evidence establishing a genuine issue that the Defendant published the statement knowing of its falsity or with a reckless disregard as to its truthfulness. Id.

The Defendant claims that, although the Plaintiff alleged the existence of malice in its Complaint, no evidence of malice exists in this case. Specifically, Defendant claims that evidence of Jerome's funding of the Study, Jerome's use of the Study to influence customers, and Jerome's distribution of the original Study after it subsequently redesigned its collars, is not sufficient evidence of malice to withstand a motion for summary judgment. We disagree.

The relevant test is not "whether a reasonably prudent man would have published, or would have investigated before publishing," but "whether the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). Even where a defendant denies entertaining such serious doubts, such a denial is insufficient where circumstantial facts could support an inference that the defendant harbored doubts as to the truth of the publication. See Dairy Stores, 104 N.J at 150.

The Plaintiff has offered evidence of the circumstances surrounding the publication and dissemination of the Article, including, but not limited to, evidence of Jerome's funding of and participation in the Study, Jerome's use of the Study to influence customers, and Jerome's distribution of the original Study after it subsequently redesigned its collars. Therefore, this Court cannot say, as a matter of law, that no reasonable juror could find that the Defendant harbored doubts as to the truth of the publication.

3. Plaintiff has Produced Sufficient Evidence of Jerome's State of Mind in Plaintiff's Claims for Jerome's Profits, Attorney's Fee and Corrective Advertising

The Defendant argues that the Plaintiff's claims for Jerome's profits and for attorney's fees under the Lanham Act must be dismissed because there is no evidence of the necessary scienter to award such damages. Specifically, damages based upon a defendant's profits, as well as attorney's fees, must be based on evidence that the defendant willfully violated the Lanham Act. See Securacomm Consulting, Inc. v. Securacom, Inc., 166 F.3d 182, 189-90 (3d Cir. 1999). Moreover, Defendant cites the case of A&H Sportswear v. Victoria Secret Stores, 967 F.Supp. 1457, 1478 (E.D.Pa. 1997), to support its argument that damages for corrective advertising require a showing of wanton misconduct by the Defendant.

In A&H Sportswear, however, the court denied the plaintiff's request for corrective advertising damages because the defendant both did not act with wanton and reckless disregard, and because damages had not been established with reasonable certainty. See A&H Sportswear, 967 F.Supp. 1457, 1478 (1997), vacated on other grounds, 166 F.3d 197 (3d Cir. 1999). It is not clear, therefore, whether wanton and reckless disregard is required for a plaintiff to recover corrective advertising damages. However, this issue is essentially moot for purposes of the instant Motion because, as was discussed above, the Plaintiff has produced sufficient evidence on

the issue of malice and reckless disregard to withstand summary judgment.

4. There is No Cause of Action for Negligence Available In a Product Disparagement Case

The Defendant argues that the Plaintiff's negligence claim fails to state a viable claim for relief under New Jersey law. The Defendant cites to Dairy Stores, Inc., which held that a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of product disparagement by labeling its action as one for negligence. See Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 465 A.2d 953, 961 (N.J. Super. 1983). The implicit holding of Dairy Stores is that a product disparagement action precludes a related action for negligence.

The Plaintiff apparently concedes, for purposes of this Motion, that New Jersey law applies to this case. The Plaintiff has cited only one case, from the New Jersey Supreme Court, to refute Defendant's claim that the negligence action is barred. The Plaintiff cites to Turf Lawnmower Repair Inc. v. Bergen Record Corp., 655 A.2d 417, 428 (N.J. 1995), which held that the negligence standard applies to a defamation claim when a qualified privilege exists. As the Defendant points out, the case cited by the Plaintiff is inapplicable to the instant case because it deals solely with a defamation claim. The Dairy Stores decision cited by the Defendant deals specifically with product disparagement claims,

and uses clear language in holding that product disparagement claims may not be accompanied by a separate action for negligence. See Dairy Stores, Inc., 465 A.2d at 961. Accordingly, the Plaintiff's negligence action is dismissed as a matter of law.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA CERVICAL COLLAR	:	CIVIL ACTION
	:	
v.	:	
	:	
JEROME GROUP, INC.	:	
D/B/A JEROME MEDICAL	:	NO. 00-2515

O R D E R

AND NOW, this 30TH day of January, 2002, upon consideration of Defendant Jerome Group, Inc.'s Motion for Summary Judgment (Docket No. 56), Plaintiff Philadelphia Cervical Collar's Response (Docket No. 60), Defendant's Reply (Docket No. 63), and Plaintiff's Sur-Reply (Docket No. 64), IT IS HEREBY ORDERED that:

(1) Defendant's Motion for Summary Judgment on Plaintiff's Lanham Act claim is **DENIED**;

(2) Defendant's Motion for Summary Judgment on Plaintiff's commercial disparagement claim is **DENIED;** and

(3) Defendant's Motion for Summary Judgment on Plaintiff's negligence claim is **GRANTED.**

BY THE COURT:

_____

HERBERT J. HUTTON, J.