

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 ELI LILLY AND COMPANY,)
)
 Defendant.)
)
 _____)
 Case No. 3AN-06-05630 CI

VOLUME 16
TRANSCRIPT OF PROCEEDINGS
March 24, 2008 - Pages 1 through 13

BEFORE THE HONORABLE MARK RINDNER
Superior Court Judge

1 A-P-P-E-A-R-A-N-C-E-S

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1 PROCEEDINGS
 2 THE COURT: Please be seated.
 3 We're on the record in State of
 4 Alaska versus Eli Lilly and Company, 3AN-06-5630
 5 Civil. Parties and counsel are present. We're
 6 outside the presence of the jury.
 7 I've been advised that one of the
 8 jurors is very sick today and can't make it in.
 9 She believes it's Ms. Mitchell, Juror No. 5. She
 10 advises that this has happened before. She takes
 11 her medication and believes she'll be able to
 12 come in tomorrow. So we'll have to continue the
 13 trial for today and take up tomorrow.
 14 If I thought we were at a point
 15 where we could talk about jury instructions, I
 16 would. I started going over them over the
 17 weekend, and -- some sort of general things, but
 18 I'm not really at a point where -- I don't think
 19 I could talk to them. And I don't know if you're
 20 at a point where you could talk about what I'm
 21 doing. All I can see is that we bring in, when
 22 the rest of the members of the jury are here, is
 23 let them know, send them back home and start
 24 tomorrow.
 25 MR. ALLEN: Yes, sir. I agree.

1 A-P-P-E-A-R-A-N-C-E-S, continued

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1 There's one issue we might as well discuss with
 2 you, if you have a second. They gave us new cuts
 3 yesterday of some other witnesses. Mr. Marcum is
 4 working on it. You want us to get our responses
 5 to you this afternoon?
 6 THE COURT: The sooner you can get
 7 stuff to me, the sooner I can get things done.
 8 What I'm trying to do here is not be in your way
 9 by having rulings that are delayed. I ruled on
 10 and overruled the objections to the Cavazzoni
 11 deposition that the State had made to Lilly's
 12 designation. Lilly has now made one objection,
 13 as I see it, to the State's counterdesignation
 14 and has listed a couple of cuts that they would
 15 like played with the State's -- for completeness
 16 purposes, I'll rule whether I think those are
 17 completeness or not and get those to you as soon
 18 as I can.
 19 I probably should, just for the
 20 record, disclose over the weekend I had arranged
 21 with the State to drop off their objections to
 22 the Cavazzoni deposition at the Cook men's health
 23 club, which I picked up. When I got back to my
 24 office, then, I realized that I couldn't find or
 25 didn't have the original Lilly designations or

1 the deposition, so Judge Christen was around and
2 so in order to avoid my having any contact ex
3 parte, she called Mr. Jamieson, as I understand
4 it, to ask that he drop that off. Unfortunately,
5 despite the best-made efforts, when the document
6 was dropped off at the Cook, Mr. Jamieson called
7 my chambers to let -- I guess to leave a message,
8 but I picked up the phone.

9 So we had a one-minute conversation
10 where he advised me that it was there, and I said
11 thank you and that was the end of it. And I
12 picked it up and went over it and gave you my
13 rulings on that today. I don't believe anything
14 about that requires anything. But if somebody
15 does --

16 MR. ALLEN: Can I come talk to you
17 for a minute about some stuff?

18 (Chuckles.)

19 THE COURT: Other than that, I do
20 hope to have something in the way of jury
21 instructions in -- maybe, actually, at least to
22 give you a -- what I'm going to call it a
23 tentative package. All it is is kind of -- this
24 is what I'm proposing to do. I will say just so
25 that you're on notice of this, Lilly has proposed

1 in their deposition packet a lot of jury
2 instructions that would talk about the FDA, and
3 at least on my initial thinking about it, I am
4 inclined not to give most or all of those
5 instructions. Whatever the FDA does, I'm not
6 sure it relieves Lilly from its obligations based
7 on the allegations made in this case.

8 But I'm going to think that through
9 a little bit more. I also have reviewed the
10 Upjohn case, which I see is a significant case on
11 the warnings instruction and believe that that
12 decision of the Alaska Supreme Court further
13 supports my decision that the warnings claims are
14 not preempted by the FDA.

15 But these are just giving you sort
16 of an advanced heads up. Nobody should take
17 these as warnings because I'm still thinking this
18 through.

19 Other than that, as soon as we get
20 the 11 here, I'm just going to bring them in and
21 let them that know one of their members is sick
22 and send them home.

23 MR. FIBICH: Your Honor, can you
24 give us some sort of idea when you think you may
25 want to have a conference on the jury

1 instructions?

2 THE COURT: We're probably going to
3 have a conference on the jury instructions late
4 Wednesday, going after hours or depending on how
5 we're dealing with evidence and stuff, we may
6 take Thursday morning to deal with jury
7 instructions and either bring the jury in late or
8 not bring the jury in at all. I'm more inclined
9 to probably go late on Wednesday.

10 MR. ALLEN: That would be better
11 for us for many reasons.

12 MR. FIBICH: Your Honor, I have one
13 other issue that I'd like to raise since we have
14 some dead time this morning, and that is that
15 Lilly has indicated that they intend to present
16 by deposition some testimony of Mr. Gilbertson,
17 who now is retired from the State, but was at one
18 point in time the Commissioner of Health and
19 Human Resources.

20 And we're going to raise an
21 irrelevancy objection to all of that testimony.
22 So when you look over their cuts, you might take
23 that into consideration --

24 THE COURT: Well, I don't think I
25 have the cut -- I mean, do I have cuts of

1 anything at this point?

2 MR. LEHNER: No, I think what
3 we've done, Your Honor, is given them our cuts so
4 that they could file any objections and then
5 you've usually looked at them in the context of
6 their objections. These are really -- the three
7 that are outstanding are pretty brief. I don't
8 think any one of them is longer than 10 or 15
9 minutes, so it won't be --

10 THE COURT: You -- if you've given
11 them your cuts, you might as well -- I'm going
12 to wait for your objections but I've got some
13 dead time --

14 MR. LEHNER: We'll send them over
15 right this morning.

16 THE COURT: -- and you can send
17 over this morning new cuts you're going to use, I
18 can at least get a sense of what this is about.
19 Now, obviously, I can't rule on anything until I
20 get the State's objections and so the sooner --

21 MR. FIBICH: I was trying to
22 suggest. We didn't get these until yesterday,
23 Sunday morning, anyway, so --

24 THE COURT: -- but to the extent
25 there's going to be a blanket relevance objection

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1 of Mr. Gilbertson, I'll look that over,
 2 recognizing there may be other objections.
 3 MR. FIBICH: There will be. Thank
 4 you, Your Honor.
 5 MR. LEHNER: We'll send them over
 6 this morning.
 7 THE COURT: Okay. Why don't we
 8 just then go off record. As soon as we've got
 9 our -- the rest of our jurors here I'll bring
 10 them in and explain what happened and we'll send
 11 them home and recess for the day.
 12 We'll be off record.
 13 THE CLERK: Please rise. Superior
 14 Court now stands in recess.
 15 Off record.
 16 (Off record.)
 17 (Jury in.)
 18 THE COURT: We're on the record
 19 again in Eli Lilly -- State versus Eli Lilly and
 20 Company. Parties are present. We've got ten
 21 members of the jury that are present. The reason
 22 that we have only ten, is because Ms. Mitchell
 23 has called in and said that she was sick and is
 24 unable to come in today. She indicated that she
 25 thought she would get medicine and be able to

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1 come in tomorrow.
 2 Ms. Ilutsik had called in and said
 3 she was running late due to the rescheduling of
 4 an appointment, I think, for her child, and so my
 5 staff told her not to come in in light of the
 6 fact that Ms. Mitchell was in. Because we don't
 7 have all 12 of you, if Ms. Mitchell were here, we
 8 would have told Ms. Ilutsik to come in. But
 9 since Ms. Mitchell can't come in, we can't do the
 10 trial today because we don't have all 12 of you.
 11 So I'm going to dismiss you today and have you
 12 come back tomorrow at 8:30.
 13 Before I do dismiss you, again,
 14 I'll remind you, please do not discuss this case
 15 with anyone or let anyone discuss it with you.
 16 Please try to keep an open mind until you've
 17 heard all the evidence in the case. Please do
 18 not read any articles or listen to any other
 19 media or Internet that might be about this case.
 20 So you've got the day off and we'll see you in
 21 the morning.
 22 (Jury out.)
 23 THE COURT: We -- please be seated.
 24 We're outside the presence of the jury.
 25 My understanding is that Lilly will

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1 get me the cuts on the other deposition so that I
 2 can do some work on them today, and the State
 3 will try to get me this afternoon their
 4 objections to those things as well as to their --
 5 the Cavazzoni filings that came in today if
 6 there's anything they want to respond to about
 7 that.
 8 Anything else we need to take up?
 9 Then we'll be in recess and I'll
 10 see everybody tomorrow.
 11 THE CLERK: Please rise. Superior
 12 Court now stands in recess.
 13 Off record.
 14 (Trial adjourned at 8:45 a.m.)
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1 REPORTER'S CERTIFICATE
 2
 3 I, SANDRA M. MIEROP, Certified Realtime
 4 Reporter and Notary Public in and for the State of
 5 Alaska do hereby certify:
 6 That the proceedings were taken before me at
 7 the time and place herein set forth; that the
 8 proceedings were reported stenographically by me
 9 and later transcribed under my direction by computer
 10 transcription; that the foregoing is a true record
 11 of the proceedings taken at that time; and that I am
 12 not a party to, nor do I have any interest in, the
 13 outcome of the action herein contained.
 14 IN WITNESS WHEREOF, I have hereunto subscribed
 15 my hand and affixed my seal this 24th day of March,
 16 2008.
 17
 18
 19
 20 SANDRA M. MIEROP, CRR, CCP
 Notary Public for Alaska
 My commission expires: 9/18/11
 21
 22
 23
 24
 25