

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

3 THE COURT: Please be seated.
 4 We're on the record in State of
 5 Alaska versus Eli Lilly and Company, 3AN-06-5630
 6 Civil. Parties and counsel are present. We're
 7 outside the presence of the jury.

8 I've been advised that one of the
 9 jurors is very sick today and can't make it in.
 10 She believes it's Ms. Mitchell, Juror No. 5. She
 11 advises that this has happened before. She takes
 12 her medication and believes she'll be able to
 13 come in tomorrow. So we'll have to continue the
 14 trial for today and take up tomorrow.

15 If I thought we were at a point
 16 where we could talk about jury instructions, I
 17 would. I started going over them over the
 18 weekend, and -- some sort of general things, but
 19 I'm not really at a point where -- I don't think
 20 I could talk to them. And I don't know if you're
 21 at a point where you could talk about what I'm
 22 doing. All I can see is that we bring in, when
 23 the rest of the members of the jury are here, is
 24 let them know, send them back home and start
 25 tomorrow.

MR. ALLEN: Yes, sir. I agree.

1 A-P-P-E-A-R-A-N-C-E-S, continued
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3 For Defendant:

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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 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

