Curtis v. Makita, Inc.

United States District Court for the Western District of Washington

April 7, 2008, Decided; April 7, 2008, Filed

CASE NO. C06-1171JLR

Reporter
2008 U.S. Dist. LEXIS 128565 *

LEIF ANDREW CURTIS, Plaintiff, v. MAKITA, INC., Defendant.

Counsel: **[*1]** For Leif Andrew Curtis, Plaintiff: Brandon M Feldman, LEAD ATTORNEY, FELDMAN & LEE (KENT), KENT, WA; Richard C Robinson, LEAD ATTORNEY, LAYMAN LAYMAN & ROBINSON (SEA), SEATTLE, WA.

For Makita Inc, Defendant: Patrick Gaynor Middleton, LEAD ATTORNEY, Kenneth M Roessler, Paul S Smith, III, FORSBERG & UMLAUF (SEA), SEATTLE, WA.

Judges: JAMES L. ROBART, United States District Judge.

Opinion by: JAMES L. ROBART

Opinion

ORDER

Plaintiff Leif Andrew Curtis injured his thumb while using a product manufactured by Defendant Makita U.S.A., Inc. ("Makita").[1] Makita brings the present motion in limine to preclude Mr. Curtis "from presenting any testimony, evidence or argument regarding any potential claim for lost future income or lost future earning capacity" and to preclude "plaintiff, his attorneys, representatives and witnesses from referring to, examining, eliciting testimony from or attempting to convey to the jury in any manner, any reference to any claim for lost future income or lost future earning capacity." (Mot. 1-2.) Makita does not, however, challenge the reliability of Mr. Curtis' evidence of prospective loss. It suggests that the court should preclude such evidence and argument solely because Mr. Curtis does not plan **[*2]** to present expert testimony about the present value of prospective damages, i.e., the rate by which future damages should be discounted. (Mot. 2.) The court DENIES Makita's motion in limine (Dkt. # 38) as it misstates state and federal law.

In this diversity action, Washington law governs whether prospective losses should be discounted to present value. *See* *Chesapeake & Ohio Ry. Co. v. Addie Kelly, 241 U.S. 485, 491, 36 S. Ct. 630, 60 L. Ed. 1117 (1916)*; *see also* *Shaw v. United States, 741 F.2d 1202, 1207 (9th Cir. 1984)* (applying Washington tort standard, as dictated by Federal Tort Claims Act, and federal evidentiary law). The law of the forum, in this case federal law, guides procedural and evidentiary questions such as whether the parties have provided competent evidence about present value to justify a jury instruction concerning the appropriate discount rate. *See* *Miller v. Union Pac. R.R. Co., 900 F.2d 223, 226 (10th Cir. 1990)*; *Alma v. Mfrs. Hanover Trust Co., 684 F.2d 622, 626 (9th Cir. 1982)*. Although Washington law provides that an award for prospective damages should be "discounted to present worth, and with such other adjustments as the facts may require," *Hinzman v. Palmanteer, 81 Wn.2d 327, 501 P.2d 1228, 1234 (Wash. 1972)* (citing *Warner v. McCaughan 77 Wn.2d 178, 460 P.2d 272 (Wash. 1969)*), *dicta disapproved of on other grounds by Wooldridge v. Woolett, 96 Wn.2d 659, 638 P.2d 566, 568-70 (Wash. 1981)*, neither Washington law nor Ninth Circuit authority requires the plaintiff to submit expert testimony about present value or to abstain from presenting evidence of lost future income and earning capacity. In fact, nearly the opposite is true.

[1] Although it is named differently in the caption, Makita refers to itself as "Makita U.S.A., Inc." (Mot. (Dkt. # 38) at 1.)

It is **[*3]** the *defendant's* obligation to present evidence about present value or face the prospect that the jury will *not* be instructed about discounting. *See Alma, 684 F.2d at 626*; *see also* Shaw, 741 F.2d at 1207 (citing *Alma* and noting that all three acceptable methods for determining the proper discount rate require "independent and adequate proof of each factor before inflation and discount rates can be compared"); *Hinzman, 501 P.2d at 1234* (affirming the trial court's decision not to give a present value instruction in the absence of any evidence that would help the jury to determine the proper discount rate); *Snow v. Whitney Fidalgo Seafoods, Inc., 38 Wn. App. 220, 686 P.2d 1090, 1097 (Wash. Ct. App. 1984)* (holding that trial court erred in giving Washington Pattern Jury Instruction WPI § 34.02 to discount the damage award to present cash value because there was no evidence to guide the jurors about the appropriate rate of interest to apply in discounting the award); *Mendelsohn v. Anderson, 26 Wn. App. 933, 614 P.2d 693, 697 (Wash. App. 1980)* (holding that the trial court did not err by refusing to instruct the jury to discount prospective losses to present cash value where there was no evidentiary basis for the proper interest rate and no mathematical formula to apply). In *Alma*, the Ninth Circuit noted:

> The fairest and most reasonable damage award is one which takes into account both the discount and the adjustment for inflation. . . . However, this preference does not **[*4]** relieve either party of the burden of presenting evidence as to the award's computation. Each of the two elements must be independently established by competent evidence.

Alma, 684 F.2d at 626. Where the defendant fails to establish the discount rate, but the plaintiff adequately proves the inflation factor, prospective damages must be adjusted *only* for inflation. *Id.* Where the plaintiff fails to establish an inflation rate, but the defendant adequately proves the discount rate, the sum must be discounted *only* for the present value. *Id.* Where *neither* party provides competent evidence of the inflation rate or the discount rate, prospective damages *must not be adjusted* for either factor. *Id.*

Makita suggests that *Wentz v. T.E. Connolly, Inc., 45 Wn.2d 127, 273 P.2d 485 (Wash. 1954)* and the Washington Pattern Jury Instructions require any plaintiff claiming prospective damages to hire an expert to testify about how to reduce those damages to present value. That assertion is false. First, neither *Wentz* nor the Washington Pattern Jury Instructions speaks to a plaintiff's obligation to produce expert testimony about present value. Second, the usage note for the Washington Pattern Instruction on "Future Economic Damages—Present Cash Value" states that "[t]his instruction should not be **[*5]** given in the absence of evidence of present cash value." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI § 34.02 (5th ed.); *see Snow, 686 P.2d at 1097*. Third, the United States Supreme Court remains agnostic about whether evidence of present value should be introduced by admitting the testimony of expert witnesses or by receiving into evidence standard interest and annuity tables in which present values are calculated at various rates of interest and for various periods covering ordinary life expectancies. *Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 340, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)* (citing *Chesapeake & Ohio Ry. Co., 241 U.S. at 491*); *cf. Mendelsohn, 614 P.2d at 697* (taking judicial notice that inflation diminishes the value of money in an amount approximately equal to that of the discount rate involved in present cash value determinations). Fourth, as noted in *Alma*, it is the defendant who benefits from and faces the burden of producing competent evidence about how prospective damages should be discounted to present value.

The court denies as meritless Makita's motion in limine (Dkt. # 38). In February, the court struck as moot Makita's motion in limine to exclude an expert witness (Dkt. # 36). If Makita's counsel had made a simple phone call to opposing counsel, he would have discovered that Plaintiff did not plan to utilize that witness at all (Dkt. # 33). The court cautions Makita's counsel against **[*6]** wasting judicial resources. Further motions lacking a firm grounding in applicable case law, or not in compliance with the Local Rules, will result in sanctions.

Dated this 7th day of April, 2008.

/s/ James L. Robart

JAMES L. ROBART

United States District Judge

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