

prevail on summary judgment by showing the absence of facts in the record to support an element of plaintiff's claim. *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). The State responded to these arguments in its brief filed on March 7, 2008. AstraZeneca now replies.

ARGUMENT

PLAINTIFF HAS FAILED TO PROFFER EVIDENCE ON EACH ELEMENT OF A § 100.18 CLAIM AGAINST ASTRAZENECA.

1. The Causation Requirement for Damages Under § 100.18(11).

In its response, the State repeatedly asserts that it does not have to prove causation and proffers no such evidence. This is incorrect because AstraZeneca's cross-motion is directed at the State's claims in Counts I and II. There the State specifically seeks to recover "pecuniary losses pursuant to Wis. Stat. § 100.18(11)(d)." (Second Amended Compl. ¶¶ 82(c), (d), 86(c), (d).)²

Both Counts invoke § 100.18(11)(d), which permits the Court, incident to an injunctive action, to award damages to those who prove "pecuniary loss suffered because of" the injunctive defendant's conduct. The language of § 100.18(11)(d) is identical to the language of § 100.18(11)(b)(2), which permits any "person" "suffering pecuniary loss because of" the defendant's conduct to sue for damages. The Wisconsin courts have construed this "because of" language to require those seeking damages to prove causation. See *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶¶ 35-37, 301 Wis. 2d 109, 732 N.W.2d 792 ("proving causation in the context of § 100.18(1) requires a showing of material inducement"

² It was not necessary to address what facts the State would have to show on the record to obtain injunctive relief to stop the publication of allegedly false "statements," as the State did not so seek in its moving papers.

and that “the test is whether [plaintiff] would have acted in [the misrepresentation’s] absence”); *St. Paul Mercury Ins. Co. v. Viking Corp.*, No. 04-C-1124, 2007 U.S. Dist. LEXIS 3142 (E.D. Wis. Jan. 12, 2007) (same); *Tim Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 70, 416 N.W.2d 670 (Ct. App. 1987) (“We interpret sec. 100.18(11)(b)(2) as requiring some proof beyond the content of the advertisement itself to establish that the plaintiff was in fact damaged by it.”).

Simply put, where the State seeks damages under Wis. Stat. § 100.18(1)(d), as here, it must prove causation. In order to establish causation the State must show it would have acted differently. In response to the cross-motion, the State merely argued that it need not prove causation, and did not proffer any such evidence.

Nearly four years ago the State filed this action crying fraud and asserting that it had reimbursed too much for drugs. The State did not proffer evidence that it acted differently since filing the suit, or that it would have acted differently if, prior to filing the suit, it had been in possession of the “true” pricing information, so there is no evidence in the record on the causation element of the State’s claim for damages. The absence of any evidence of causation alone requires that summary judgment be granted to AstraZeneca. *See Transportation Ins. Co.*, 179 Wis. 2d at 291. But AstraZeneca also proffered evidence affirmatively showing that the State had not acted differently; the record evidence affirmatively shows that the State and Wisconsin Medicaid have not acted differently and therefore the State cannot claim that, had it known about the alleged “falsity,” would have reimbursed differently. The State does not dispute the facts AstraZeneca provided, showing that, in the past four years, Wisconsin Medicaid has not reduced reimbursement to providers but in fact has increased reimbursements to providers. (See Plaintiff’s Response to Defendants’ Joint Additional Proposed Undisputed Facts (“Response to DAPUF”) filed with Plaintiff’s Response ¶¶ 176, 183, 191; see also Plaintiff’s

Responses to AstraZeneca’s Supplemental Proposed Undisputed Facts (“Response to AZPUF”) filed with Plaintiff’s Response ¶¶ 115-17.) The State raises an unexplained “inadmissibility” objection to one of these proposed facts, presumptively on relevance grounds. The evidence that the State increased reimbursements to providers is clearly relevant to show lack of causation. Similarly, the State does not dispute the facts that Wisconsin Medicaid did not alter its contract with EDS, still receives and has EDS use the same data, is satisfied with that contract, and has not sued EDS or FDB. (*See* Response to DAPUF ¶¶ 214-217; Response to AZPUF ¶ 117.) Again, the State raises an unexplained “inadmissibility” objection, presumptively on relevance. The evidence that the State did not alter any of its contracts with EDS is clearly relevant to show lack of causation. The undisputed factual record is that nothing has changed; the State and Wisconsin Medicaid did not act differently.

Because the State offered no evidence on causation, which is an element of the State’s claims for damages under Counts I and II, AstraZeneca is entitled to summary judgment on its cross-motion dismissing those claims.³

2. The “In the State” Requirement of § 100.18.

Section 100.18 requires that the “statement” at issue be made “in this state” in order to be actionable. In its response, the State does not contend that AstraZeneca made any “statement” “in” Wisconsin, nor does the State dispute any of the facts set forth by AstraZeneca on this issue.

³ AstraZeneca notes that unrelated to causation, the State has improperly objected to some of AstraZeneca’s Supplemental Proposed Undisputed Facts. The State claims, for example, that certain proposed facts are “not based on admissible evidence” (without stating why the evidence is supposedly inadmissible) (*see* AZPUF ¶¶ 92, 103-08, 119, 120), that certain statements that are clearly “facts” are supposedly “disputed inferences” (*see* AZPUF ¶¶ 90, 93, 95, 102, 103, 108, 109, 110), or that certain facts are disputed by contrary evidence (which is not sufficient to create a material dispute) (*see* AZPUF ¶¶ 93, 95, 103.) AstraZeneca joins in the arguments made in Defendants’ Reply in Support of Their Joint Cross-Motion for Summary Judgment regarding these and other inappropriate objections.

Instead, the State argues that included within the ambit of actionable statements under § 100.18 are those a defendant “cause[s], directly or indirectly, to be made . . . in this state,” implying that AstraZeneca was ignoring the statute. But the State does not proffer evidence of a statement that AstraZeneca supposedly caused some person to make “in” Wisconsin.

The State’s inability to identify any statement made in Wisconsin sufficient to dispute AstraZeneca’s factual assertions is understandable in view of the record. If AstraZeneca, a Delaware corporation located in Delaware, sent anything to FDB, it would have gone from Wilmington, Delaware to California where FDB is located. The State does not dispute the pertinent fact that if anything was sent from AstraZeneca to FDB such information was transmitted from AstraZeneca in Wilmington, Delaware to FDB in California. (*See* Response to AZPUF ¶¶ 111-12.)⁴ The State similarly does not dispute that, under FDB’s contract with EDS, located in Texas, FDB made data bases available to EDS from FDB’s servers located in San Bruno, California. (*See* Response to AZPUF ¶ 113.) Wisconsin Medicaid contracted with EDS, located in Plano, Texas, to process its Medicaid reimbursements to providers. (*Id.* ¶ 114.) The State does not dispute that the computations were conducted by EDS at an EDS data center in Plano, Texas. (*See* Response to DAPUF ¶¶ 201-206; *see also* Response to AZPUF ¶¶ 111-114.) Nothing happened in Wisconsin.

The State attempts only to belittle AstraZeneca’s argument and evidentiary basis (*see* State’s Response at 54.) The State does not, however, offer any evidence or attempt to establish that AstraZeneca made a statement in Wisconsin or caused, directly or indirectly, someone else

⁴ Plaintiff’s only objection to AstraZeneca’s proposed facts at ¶¶ 111-112 relate to whether or not Mr. Hyde testified that AstraZeneca sent “suggested” WACs and AWP’s to FDB.

to make AstraZeneca’s statement (or any statement) in the state of Wisconsin.⁵ The State does not dispute that the text of § 100.18 and decisional law require proof of a statement in this state. The State does not dispute the facts AstraZeneca proffered. The State does not proffer evidence that AstraZeneca made, or caused someone to make, a statement in the state of Wisconsin. AstraZeneca is entitled to summary judgment on Counts I and II of its cross-motion.

3. The “Statement” Requirement of § 100.18.

AstraZeneca showed that the State did not identify a statement by AstraZeneca about any of the subject drugs made between June 15, 2001, before which date the statute of limitations has run, and January 2002, after which date the State concedes AstraZeneca did not make statements about AWP. AstraZeneca also showed that there was intervention by others before anything AstraZeneca “said” was, to continue the metaphor, “heard” by Wisconsin Medicaid.

In response, the State proffered no evidence of an AstraZeneca statement and does not proffer evidence to connect the dots. Instead, without disputing AstraZeneca’s factual assertions, the State just argues that AstraZeneca reported “AWPs” to pricing compendia.

Section 100.18 requires a plaintiff to prove first that the defendant made a statement. This statutory requirement is critical in this case, because the evidence in the record is that various non-party entities made various unspecified statements to various other entities. The State has not proved, much less connected the dots. First, the State has not proffered any actual AWP statement by AstraZeneca to FDB during the aforementioned time period. Second, what FDB “said” to EDS is absent from the record. The Court might infer from the fact of the FDB-

⁵ The State made a semantic attempt to suggest in its argument that FDB “transmi[tted]” AWP’s “to” Wisconsin Medicaid. (*See* State’s Response at 54.) The State does not (and cannot) point to any such evidence. The evidence is that, by virtue of the FDB—EDS contract, EDS, located in Texas, had access to FDB’s servers in San Bruno, California. (*See* Response to DAPUF ¶ 201.)

EDS contract that FDB made some statements to EDS. However, none is proffered by the State. Third, regardless of what FDB might have “said,” the record is Wisconsin Medicaid only wanted EDS to use FDB’s statements about Blue Book AWP (the only FDB data field Wisconsin Medicaid wanted) in EDS’ computations. (*See* Response to DAPUF ¶¶ 207-08, 230-32.) Again, the State proffers no such statement.⁶

Section 100.18 requires in this case that the State connect the dots with evidence – prove that AstraZeneca’s actual statements to FDB about the drugs at issue were in fact the same statements Wisconsin Medicaid later received from someone else (EDS, perhaps). The State has failed to do so. There is no evidence in the record on this basic requirement of § 100.18, and AstraZeneca is entitled to summary judgment.

* * *

On the last page of its argument, the State advances for the first time the conclusory assertion that the State may invoke issue preclusion against AstraZeneca. *See* State’s Response at 80. Preclusion was raised by Defendant Johnson & Johnson in its cross-motion against the State, and it is appropriate for the State to respond. But the State did not move against AstraZeneca asserting preclusion, nor did AstraZeneca move against the State asserting

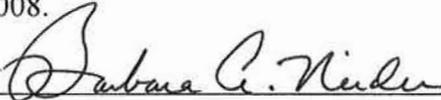
⁶ FDB’s Blue Book AWP field, which Wisconsin Medicaid instructed EDS to use for reimbursement calculations, was not based on statements of AstraZeneca, but rather on surveys of wholesalers, as the FDB executive responsible for the field has explained. (*See* DAPUF ¶ 234). In response to this fact, the State argues that “wholesalers simply adopt the WACs and AWP’s provided to them by the defendants themselves,” citing only deposition testimony of two employees of wholesalers. (State’s Response at 52). These employees, however, one of whom did data entry, had no knowledge of FDB’s Blue Book AWP field, how it was created, or the surveys on which it was based. (*See* D. Lindell Tr., at 11-12, 29-30; T. Sartori Tr., at 19). Neither testified about any statements of AstraZeneca, nor that they ever communicated statements of any manufacturers to FDB. To the extent the State asks the Court to infer that statements of AstraZeneca were made to Wisconsin Medicaid through wholesalers, then through FDB, and then through EDS, the testimony of these employees does not support such a series of wild inferences.

inappropriate to raise new issues for the first time in such a response. Moreover, the State's conclusory argument is without merit for two additional reasons. First, the State does not begin to analyze the elements of claims under the Massachusetts statute (vastly different from claims for damages under § 100.18) and facts necessary to satisfy such elements. Second, the State does not, and cannot, suggest preclusion relieves the State from proving causation, "in the State," or the existence of any "statement" required by the State's claims for damages under § 100.18 in Counts I and II. The State's offhand and generalized preclusion conclusion is no "defense" to AstraZeneca's cross-motion for summary judgment.

Conclusion

For these reasons and the reasons previously stated, the Court should grant summary judgment in favor of AstraZeneca, dismissing Counts I and II of the State's Second Amended Complaint.

Respectfully submitted April 28, 2008.

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CERTIFICATE OF SERVICE

I, BARBARA A. NEIDER, hereby certify that on April 28, 2008, a true and correct copy of the foregoing Reply of AstraZeneca Pharmaceuticals LP and AstraZeneca LP in Support of Cross-Motion for Partial Summary Judgment was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to Lexis/Nexis File & Serve for posting and notification.

/s/ Barbara A. Neider
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