

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

McKENZIE-WILLAMETTE HOSPITAL, an
Oregon nonprofit corporation,

Plaintiff,

v.

PEACEHEALTH , a Washington State
nonprofit corporation,

Defendant.

Civil No. 02-6032-HA

OPINION AND ORDER

Anne M. Talcott
Becky A. Johnson
Kelly Terrill Hagan
William B. Crow
Nancy M. Erfle
Thomas M. Triplett
Schwabe Williamson & Wyatt
1211 S.W. Fifth Avenue, Suite 1900
Portland, Oregon 97205
Vicki L. Smith

Lane Powell Spears Lubersky, L.L.P.
601 S.W. Second Avenue, Suite 2100
Portland, Oregon 97204-3158

Laurence E. Thorp
Thorp Purdy Jewett Urness & Wilkinson P.C.
1011 Harlow Road, Suite 300
Springfield, Oregon 97477

Win Calkins
Calkins & Calkins
101 E. 14th Avenue
Eugene, Oregon 97401
Attorneys for Plaintiff

Jeffrey M. Edelson
Peter Glade
Markowitz Herbold Glade & Mehlhaf
1211 S.W. Fifth Avenue, Suite 3000
Portland, Oregon 97204

James H. Sneed
Linda M. Holleran
McDermott Will & Emery
600 Thirteenth Street, NW
Washington, D.C. 2005

Saralisa C. Brau
McDermott Will & Emery, New York
50 Rockefeller Plaza
New York, New York 10020
Attorneys for Defendants.

HAGGERTY, Chief Judge:

This court recently denied defendant's Motion for a New Trial. Next at issue is defendant's Renewed Motion for a Directed Verdict. For the following reasons, this motion is denied.

As noted in the previous ruling, after three days' deliberations the jury in this action concluded in part that plaintiff MacKenzie-Willamette proved a relevant product and geographic market, and that defendant PeaceHealth did not enter into an unlawful exclusive dealing agreement, did not monopolize the provision of health care and did not harm market-wide competition in the relevant market, and did not enter into a conspiracy to monopolize. The jury also found, however, that defendant attempted to monopolize the provision of health care and harmed market-wide competition in the relevant market, unlawfully discriminated in price of services, and unlawfully interfered with plaintiff's prospective relations with others. The jury determined that plaintiff was entitled to a damages award of \$5.4 million for each of these three claims, as well as punitive damages of \$9.2 million as a result of defendant's interference with plaintiff's prospective relations with others. After this verdict defendant renewed its Motion for a Judgment as a Matter of Law (JMOL).

STANDARDS

Pursuant to Fed. R. Civ. P. 50(a), a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue" As this court did, a court may reserve its decision on the legal issues presented until after a jury renders its verdict and the motion is renewed. Fed. R. Civ. P. 50(b). At that point, the trial court can set aside the jury verdict and grant judgment as a matter of law "only if . . . there can be but one reasonable

conclusion as to the verdict." *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001). The evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of that party. *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987). A JMOL is improper if reasonable minds could differ over the verdict. *Id.*

Judgment as a matter of law should not be granted unless: (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such overwhelming evidence in favor of the movant that reasonable and fair-minded persons could not issue a verdict against the movant. *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 145 (2nd Cir. 2001).

The court "may not make credibility determinations or weigh the evidence" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (citations omitted); *see also Wilson v. United States*, 645 F.2d 728, 729 (9th Cir. 1981) ("The trial judge does not act as factfinder."). After giving credence to the evidence favoring the non-movant, as well as all uncontradicted and unimpeached evidence favoring the moving party, the court asks whether a fair-minded jury could return a verdict for the non-movant on the evidence presented. The mere existence of a scintilla of evidence in support of the non-movant's position is insufficient. There must be evidence on which the jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *see also Lucas v. Bechtel Corp.*, 800 F.2d 839, 850 (9th Cir. 1986). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is

possible to draw two inconsistent conclusions from the evidence." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) (citation omitted). "[I]f reasonable minds could differ over the verdict," the Rule 50 motion must be denied. *Venegas*, 831 F.2d at 1517.

However, awarding a JMOL is proper if the evidence, construed in the light most favorable to the non-moving party, compels a conclusion contrary to the jury's verdict. *Rivero v. City & County of San Francisco*, 316 F.3d 857, 863 (9th Cir. 2002). Although the court should review the record as a whole, it must disregard evidence favorable to the moving party that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001).

Pursuant to a JMOL motions, evidence presented in an antitrust case should be closely scrutinized to avoid "the danger of improper antitrust condemnations." *The Jeanery Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988).

BACKGROUND

As noted in the Opinion denying defendant's Motion for a New Trial, only a brief summary of this litigation is necessary. Plaintiff McKenzie-Willamette Hospital is a 114-bed community hospital in Springfield, Oregon. Defendant PeaceHealth is a nonprofit healthcare organization headquartered in Bellevue, Washington. Defendant operates hospitals in Lane County that compete with plaintiff by providing general acute hospital care.

After the trial and the jury's determination that defendant attempted to monopolize the provision of health care and harmed market-wide competition in the relevant market,

unlawfully discriminated in price of services, and unlawfully interfered with plaintiff's prospective relations with others, defendant renewed a motion for a judgment as a matter of law. Defendant argues that:

- defendant is entitled to a JMOL on plaintiff's attempted monopolization claim;
- defendant is entitled to a JMOL on plaintiff's price discrimination claim; and
- defendant is entitled to a JMOL on plaintiff's claim for intentional interference with a prospective business relationship and there is insufficient evidence to support an award of punitive damages on this claim.

These assertions are addressed and analyzed in turn below.

1. Plaintiff's Attempted Monopolization Claim

Defendant first asserts that plaintiff failed to present sufficient evidence to support its claim against defendant for attempted monopolization. To prove attempted monopolization, plaintiff was required to show: (1) that defendant engaged in predatory or anti-competitive conduct with (2) a specific intent to achieve monopoly power in a relevant market; (3) that there was a dangerous probability that defendant would achieve monopoly power in the relevant market; and (4) that plaintiff was injured in its business or property by defendant's predatory or exclusionary conduct. Defendant argues that there was inadequate evidence regarding predatory or exclusionary conduct and that direct evidence of specific intent was lacking, as were any grounds for inferring such intent. Defendant also contends that there was no dangerous probability that defendant would achieve monopoly power because plaintiff failed to prove a relevant market, and that plaintiff failed to prove that defendant's conduct harmed market-wide competition or inflicted an injury upon plaintiff.

A. Evidence regarding predatory or exclusionary conduct

Defendant fills nearly twenty-four pages of briefing attempting to refute or discount the evidence presented at trial regarding plaintiff's allegations of defendant's predatory conduct. At trial and in support of its previous summary judgment motion, defendant presented a zealous defense of its conduct at issue, and defendant does so again in support of this motion. It is plainly a close question. However, the court is prohibited from weighing or evaluating the relative merits of the evidence presented. As noted above, the court instead is compelled to deny a JMOL motion unless there is a complete absence of evidence supporting the verdict or there is such overwhelming evidence in favor of the movant that no reasonable and fair-minded person could issue a verdict against the movant. Despite defendant's persistence and persuasion regarding its version of the evidence in this regard, this court cannot conclude from the record, after viewing the evidence in a light favorable to plaintiff and drawing all reasonable inferences in favor of plaintiff, that a fair-minded jury could not find in favor of plaintiff.

The parties first dispute whether the evidence regarding defendant's preferred provider agreements could be fairly construed by a jury as an element of predatory or exclusionary conduct. At trial plaintiff presented explicit testimony that it was "excluded" from the "preferred provider product" prior to 2002. Tr. 10/09/03; 64: 2-12. The jury was told that this meant that many residents of Lane County would not enjoy coverage and would be fully responsible for medical bills if they elected to go to plaintiff's hospital. *Id.* at 64:13-18. Detailed testimony regarding plaintiff's repeated negotiations in attempting to enter the preferred provider panel over several years was presented, *id.* at pp. 75-88, and the jury was

told that plaintiff was never allowed to become a participant during those years. *Id.* at 86:2-4. Defendant presented strong contradictory evidence that suggested that plaintiff was not ultimately foreclosed from the preferred provider panel. Nevertheless, the court concludes that there was adequate, relevant evidence presented to support plaintiff's contentions that defendant negotiated with Regence to secure defendant's Sacred Heart Hospital as the sole preferred provider of acute care hospital services in the Eugene-Springfield area, and in exchange for this exclusivity, tertiary cardiovascular and neonatal services are provided at unreasonably and unfairly low rates. The jury rejected plaintiff's exclusive dealing claim, but nevertheless was properly permitted to consider this evidence as one factor in determining whether plaintiff proved predatory conduct, along with specific intent, when prosecuting its attempted monopolization claim.

Additional evidence was presented to the jury that could have served as a partial basis for finding that defendant engaged in predatory conduct. Toward this end, the jury was instructed that it could consider evidence that suggested the presence of exclusive dealing, physician arrangements, pricing, and restrictive covenants. Such evidence was introduced to the jury – as was evidence to the contrary. Evidence was presented suggesting that defendant drove the Regence HMO product from Lane County, and that there were relevant pricing discrepancies that may have been discriminatory.

Defendant argues strenuously that its pricing policies were not anti-competitive nor unreasonable. The parties agreed that defendant priced maternity services below total cost in seven health plans over three years. Agreed Facts Para. 95. There was evidence that defendant priced non-tertiary services below average variable and average total cost. The jury

heard evidence of five "very, very narrowly defined instances of predation," Tr. 10/22/03 p.m., 42:4-7, and also heard evidence and saw exhibits suggesting that defendant may have manipulated pricing to eliminate HMO plans and enhance its own preferred provider plans. Pl. Exs. 90, 72; Tr. 10/15/03 a.m., 84:2-18. This evidence, though disputed, constitutes adequate, substantial evidence that supports the jury's verdict.

Defendant's efforts to diminish the significance of its pricing fails to refute that substantial evidence supporting the jury's verdict was, in fact, presented. Although the jury was instructed that prices set above average variable cost are presumed to be lawful, the jury was permitted to conclude otherwise in light of the evidence presented regarding that the below cost prices were set in a particularly competitive service line, during a critical time period, and with a potentially significant impact upon the market. The jury also heard evidence suggesting that defendant exploited its monopoly in tertiary services by bundling strategic discounts for these services to obtain competitive advantages.

Defendant renews objections to this court's reference to *LePage's, Inc. v. 3M*, 324 F.3d 141, 151 (3rd Cir. 2003), which this court relied upon in part to construct jury instructions and to hold in the summary judgment ruling that a monopolist's bundling of products to reward buyers with discounts for purchasing multiple products could reasonably be viewed as improper. "The principal anticompetitive effect of bundled rebates . . . is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *Id.* at 155. The specific teaching in *LePage's* relied upon by this court is that even if federal case law holds that an entity's pricing may be legal if the prices do not fall

below its costs, this principle is inapplicable to "a monopolist with its unconstrained market power." *Id.* at 151. The jury heard expert testimony opining that defendant is a monopolist in a relevant market regarding the provision of tertiary services. Tr. 10/17/03 a.m., pp.46-49.

Defendant's arguments and authorities for repudiating the court's specific reliance on *LePage's* have been reviewed and are rejected. The decisions cited by defendant are distinguishable. For example, in *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328 (1990) ("*ARCO*"), the Supreme Court acknowledged that low prices can benefit consumers regardless of how the prices are set, as long as they are above a predatory level. But the Court did not address nor in any way pre-empt the reasoning in *LePage's* that this court relied upon regarding bundled discounts by a monopolist. The Court in *ARCO* concluded that the plaintiff could not demonstrate antitrust injury as a horizontal competitor of retail outlets participating in a vertical price maintenance scheme between the outlets and *ARCO*. *Id.* at 336.

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), the Supreme Court addressed a case involving a "tying arrangement," so labeled because the users of the hospital's operating rooms (the tying product) were also compelled to purchase the hospital's chosen anesthesia service (the tied product). *Id.* at 8. The Court reversed the Court of Appeals' conclusion that the tying arrangement complained of was illegal "per se." *Id.*

Accordingly, the guidance derived from *Jefferson Parish* regarding plaintiff's bundling claims is not as dispositive or far-reaching as defendant proposes. Nor does the decision diminish the portion of *LePage's* upon which this court has relied. Defendant's other cited authorities are similarly unavailing. This court concludes that substantial evidence was

presented that supported conclusions that defendant was a monopolist, discounts were bundled to enhance defendant's preferred provider status, and substantial market foreclosure resulted after or contemporaneously with the offer of bundled discounts.

Moreover, plaintiff's expert, Dr. Whitelaw, provided testimony regarding possible predatory conduct: defendant's hospital acquisitions; defendant's employment practices regarding up to one-third of the physicians in Lane County; defendant's ownership and control of medically-related businesses in the region; and defendant's decision to locate a new facility near plaintiff. Other evidence suggested that defendant may have utilized restrictive covenants to preclude doctors from working in the area or to prevent the development of competing medical facilities.

Defendant provides a painstaking analysis of this evidence in an attempt to refute or discount it. However, this court is not permitted to engage in further evaluation of the merits of this evidence, or the relative merits of defendant's contrary evidence. The task at hand is to determine whether there was substantial evidence – that is, adequate, relevant evidence that was sufficient to support the jury's conclusion, even though it was also possible to draw different conclusions. From this perspective, the court is compelled to conclude that sufficient substantial evidence was presented that supported the jury's conclusions regarding possible predatory or exclusionary conduct on the part of defendant.

B. Evidence of specific intent

Defendant also contends that plaintiff failed to present adequate evidence of defendant's alleged specific intent to monopolize the relevant market. The jury was instructed that plaintiff was required to show that defendant "acted with the specific intent of acquiring

the power to control prices or to exclude or destroy competition," and that a mere intent to compete vigorously is insufficient. Defendant argues that plaintiff failed to offer either direct or circumstantial evidence of the intent required for plaintiff's attempt to monopolize claim.

While plaintiff presented no direct evidence of defendant's intent to destroy competition, there was adequate, substantial evidence from which the jury could properly find the requisite specific intent. Viewing the evidence in a light favorable to plaintiff, the jury heard evidence that: defendant employed and restricted up to one-third of the physicians in Lane County; defendant acquired hospitals and exercised control over certain real estate to discourage competition and the construction of facilities that might compete; possibly bundled discounts in a way as to enhance foreclosure in the market; manipulated pricing to discourage insurers from treating plaintiff favorably; and exercised ownership and control over ancillary medical services in the market to obtain more patient referrals. Defendant's assault on this evidence as being refutable and less persuasive as grounds for inferring specific intent to monopolize than as grounds for concluding that defendant engaged in vigorous competition is forcefully presented but ultimately misplaced as a challenge to the relative merits of the competing evidence that was put before the jury. This court concludes that the evidence presented to the jury was substantial and adequately supports an inference that defendant harbored the specific intent to monopolize.

C. Relevant market

Defendant next contends that because plaintiff failed to prove a relevant market, it could not have adequately established that defendant had a dangerous probability of success in obtaining monopoly power. The jury was asked explicitly whether plaintiff proved a properly

defined relevant geographic market. The jury answered in the affirmative in its verdict. This court has examined the evidence presented regarding market definitions. Dr. Whitelaw identified three specific product markets at issue: two concerning tertiary hospital services (neonatal and cardiovascular) and one he described as "nontertiary acute care services." Tr. 10/17/03 a.m., 39:3-8. Counsel and Dr. Whitelaw then examined a series of maps that identified the relevant geographical markets – and the available hospitals between San Francisco and Portland – associated with those products. Tr. 10/17/03 a.m., pp. 39-47. Dr. Whitelaw's opinions were supported with illustrations of hospital distributions, *id.* at pp.41-42, and a cogent factual explanation of why he concluded that Lane County was the relevant geographic market for acute hospital care. *Id.* at 43:1-14. He proceeded to discuss why he thought defendant was able to manifest monopolistic power within the market definitions he proffered. *Id.* at pp. 44-47, 49-50.

Defendant disagreed with this testimony and presented conflicting evidence and theories to the jury through its own expert and evidence presentation. The jury found in favor of plaintiff on these issues. After reviewing the testimony and evidence presented at trial concerning market definitions, this court concludes that sufficient, substantial evidence was presented – that is, adequate, relevant evidence that was sufficient to support the jury's conclusion.

D. Harm to market-wide competition and injury to plaintiff

A claim for attempt to monopolize requires an "antitrust injury." Such an injury requires a plaintiff to show that conduct by defendant injured plaintiff, and that the harm flowed from conduct that was antithetical to market-wide competition. *See Pool Water Prods.*

v. Olin Corp., 258 F.3d 1024, 1036 (9th Cir. 2001). Defendant argues that plaintiff failed to present evidence showing market-wide harm to competition flowing from defendant's conduct. Defendant reiterates arguments it made in support of its summary judgment motion that posit that because plaintiff's profitability fluctuated greatly over recent years, and defendant's conduct has been unchanged for five to fifteen years, plaintiff cannot establish a meaningful connection between its difficulties and any alleged antitrust violations committed by defendant. Defendant suggests again that plaintiff's financial woes are due to its own mismanagement.

The jury's conclusions to the contrary are supported by substantial evidence. Dr. Whitelaw testified that in his expert opinion, defendant's monopoly power harmed the competition and plaintiff. Tr. 10/17/03, pp.49-67. Dr. Whitelaw explained that this harm arose from a variety of sources: defendant's hospital acquisitions; defendant's employment of and control over one-third of the physicians in Lane County; defendant's ownership of medically related businesses in the region; and defendant's decision to locate a new facility near plaintiff. Dr. Whitelaw also testified that defendant's monopoly power harmed competition by limiting choices for insurers in the market and adversely affecting pricing in the market. Although defendant disputed this testimony, and presented contrary expert testimony and evidence, there was ample, substantial evidence supporting the submission of these issues to the jury, and also supporting the conclusions that the jury arrived upon pertaining to them.

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2. Plaintiff's Price Discrimination Claim

Plaintiff asserted a claim under Oregon's Anti-Price Discrimination Law, O.R.S. 640.040. The jury found in favor of plaintiff on this claim. Defendant argues that plaintiff failed to adequately prove predatory pricing, and therefore cannot establish the element of harm to competition. Defendant asserts that because this Oregon statute is modeled from the federal Robinson-Patman price discrimination law, to succeed on such a claim requires plaintiff to prove predatory pricing or below-cost pricing with a dangerous probability of recoupment. *See Pool Water Prods.*, 258 F.3d at 1034-36.

This argument is rejected because this court concludes, as discussed above, that plaintiff presented adequate, substantial evidence of predatory pricing. Moreover, even if such evidence were determined to be lacking, this court disagrees with defendant's characterizations of the required elements of this state claim.

Both parties concur that federal interpretations of the Robinson-Patman Act can be persuasive authorities for construing the state statute at issue. *See Yamaha Store Bend, Inc. v. Yamaha Motor Corp.*, 310 Or. 333, 338 n.6 (1990); *see also Redmond Ready-Mix, Inc. v. Coats*, 582 P.2d 1340, 1346 (Or. 1978) (the Anti-Price Discrimination Law, enacted in 1937, was modeled after the Robinson-Patman amendment, adopted in 1936, to the Clayton Act, and federal cases interpreting the federal statutes are persuasive in interpreting the Oregon statute). However, the Oregon Supreme Court in *Redmond* acknowledged that much of the federal law "on this subject is in a recognized state of confusion, partly as the result of conflicting decisions by the federal courts," and that in interpreting an Oregon statute, the court was free

"to adopt what we consider to be the 'better' law as stated by the courts and by recognized legal writers on this subject." *Redmond*, 582 P.2d at 1346.

Clearer guidance than this has not been forthcoming since the *Redmond* decision. Accordingly, defendant's attempt to declare that "federal precedent governs McKenzie's right to recover under Or. Rev. Stat. § 646.040" and that an alleged failure to prove predatory pricing "precludes as a matter of law any inference of harm to competition or tendency to create a monopoly as required" under the state statute, Defendant's Memorandum in Support at 44, is unpersuasive.

Instead, the *Redmond* decision establishes that to successfully litigate a claim under this statute, a plaintiff must establish a discrimination in price between different purchasers of commodities, and also that the effect of such discrimination may be (1) to substantially lessen competition or (2) to tend to create a monopoly in any line of commerce, or (3) to injure, destroy, or prevent competition, either with any person who grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *Redmond*, 582 P.2d at 1346 (citation and quotation omitted). The Oregon Supreme Court went on to hold that merely showing price discrimination was insufficient. *Id.* at 1347. A plaintiff "must also prove that the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition between plaintiff and defendants." *Id.* (citation and quotation marks omitted).

The court examined the evidence for "predatory intent," and whether the price discrimination resulted in a substantial impairment of competition. *Id.* at 1350. When the evidence of predatory intent was found to be insufficient, the court turned to the impairment of

competition: "The issue to be decided is the effect of defendant's price discrimination on competition. In deciding that issue we believe it proper to give at least primary consideration to the effect upon competition in the market area in which the price discrimination was practiced." *Id.* at 1352.

This court concludes that the evidence presented at trial regarding defendant's monopoly or near-monopoly power, defendant's pricing and strategy of bundling discounts, and the effects in the relevant market of that pricing constitute adequate substantial evidence that supports the jury's verdict regarding plaintiff's price discrimination claim.

3. Evidence Supporting a Claim for Interference with a Prospective Business Relationship

Finally, defendant challenges the jury's conclusion that defendant committed tortious interference of plaintiff's prospective relations with others. Defendant asserts that plaintiff failed to present sufficient evidence that defendant violated the antitrust laws, as the claim requires, and failed in other ways to present substantial evidence to support the jury's finding in this regard. Defendant also asserts that punitive damages are unwarranted and that judgment as a matter of law should be entered in favor of defendant on the punitive damages claim.

Defendant asserted in argument supporting its summary judgment motion that plaintiff was compelled to elect between recovering the remedies provided under state law for compensatory and punitive damages, or recovering its antitrust remedies. This court agreed, relying upon applicable case authority. *See, e.g., Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 218 (3rd Cir. 1992).

Plaintiff now elects to receive the antitrust remedy provided by the jury's verdict. Accordingly, this portion of defendant's JMOL motion is denied as moot. In the event that subsequent litigation results in changes to the verdict or in its partial or full vacation, plaintiff would be permitted to withdraw its remedies election and would be compelled to more fully brief the question of whether punitive damages are warranted under the circumstances of this case.

CONCLUSION

For the reasons provided, defendant's Renewed Motion for Judgment as a Matter of Law (Doc. # 240) is denied.

IT IS SO ORDERED.

Dated this 13 day of October, 2004.

/s/Ancer L.Haggerty
Ancer L. Haggerty
United States District Judge