



1 (In open court outside the presence of the jury.)

2 (Proceedings had not herein transcribed.)

3 THE COURT: All right. Well, defendant -- here's  
4 my ruling: Defendant proposes that plaintiff must prove by a  
5 reasonably certain standard that either Stony Island  
6 and/or -- that Stony Island and/or Marshfield Plaza would  
7 open, and that if that burden is met, the burden of proving  
8 the amount of lost profits is by a preponderance standard.

9 I see nothing in the case law supporting such  
10 differing burdens of proof. Also, I see nothing that defines  
11 reasonably certain as a higher -- or a different burden of  
12 proof than preponderance. And the word "certainty," even  
13 reasonable certainty, can misleadingly lead the jury to  
14 require more of the plaintiff than is required under the law.

15 Damages can't be speculative, and the jury is  
16 instructed at Pages 28 and 29 of that that compensatory  
17 damages must be based on evidence and not guesswork. They  
18 are instructed on Page 30 that there must be a reasonable  
19 basis for estimating the amount of lost profits. And if  
20 there is no reasonable basis for estimating the amount of  
21 loss, they cannot award damages in the form of lost profits.  
22 They are told it cannot be based on hope or a guess.

23 The Seventh Circuit Pattern Instruction 11.4.3 for  
24 lost profits in a patent context uses the words "reasonable  
25 probability." That was issued in 2010.

1 Reasonable probability takes out the word  
2 "certainty," which implies a burden greater than the law  
3 requires. The *TAS v. Cummins* case interpreted Illinois law,  
4 but we must look to federal law under Section 1981.

5 Even *MindGames* -- even the *MindGames* case  
6 discussion of new business -- of the new business rule  
7 regarding lost profits and its use of the words "reasonable  
8 certainty" is in discussing the language from certain state  
9 court cases across the country. *MindGames* itself actually  
10 dealt with Arkansas law.

11 In the end, the Court in *MindGames* analyzed the  
12 appropriateness of the damages under the lens of excessive  
13 speculativeness or under speculation.

14 In a more recent Seventh Circuit case than  
15 *MindGames* and *TAS* was *Parvati v. City of Oak Forest*, 709 F.3d  
16 678 (2013), which we mentioned in our summary judgement  
17 ruling, which was a Section 1981 case. The Court said the  
18 general standard governing proof of damages, even in a lost  
19 profits case involving a new business -- the Court referred  
20 to the new business -- referred to that as a business  
21 strangled in the cradle. And the Court said, Plaintiff must  
22 make a reasonable estimate of its damages as distinct from  
23 relying on hope and a guess. Nothing about reasonable  
24 certainty is said in that case.

25 I'll note in a different context, the Seventh

1 Circuit criticized even the language of reasonable  
2 probability in the context of whether the jurisdictional  
3 minimum of \$75,000 in a diversity case has been met.

4 In fact, the phrase "reasonable probability that  
5 jurisdiction exists" was, as the Court said, banished from  
6 our lexicon.

7 Obviously it's a different context, but the  
8 rationale of why it was banished was because of the confusion  
9 caused by comparing reasonably probable with a preponderance  
10 standard. As the Court in that case said, "All legal phrases  
11 have some potential for misuse, which must be tolerated when  
12 there is no good alternative," but there was a very good  
13 alternative to reasonable probability: the preponderance  
14 standard.

15 Recognizing that's a different case, I still find  
16 in this case that reasonable certainty is not called for;  
17 it's a preponderance standard. And even using the words  
18 "reasonably probable," which were suggested by the plaintiff,  
19 is inappropriate. So we're going to give that instruction as  
20 I gave it to you yesterday, which takes out the words  
21 "reasonable certainty" and "reasonable probability."  
22 You'll -- it will be prepared as I edited it yesterday.

23 And the proper standard for damages whether it  
24 is -- whether Marshfield and Stony Island would open, and if  
25 they opened, if one or both opened, what the type or burden

1 of proof is as to the amount of damages is a preponderance  
2 standard for both, both issues. That will be the ruling.

3 Is there any objection to that by plaintiff?

4 MR. CARUSO: No objection.

5 THE COURT: Any objection by defendant?

6 MR. FARKAS: Yes, your Honor. We maintain the  
7 objection and prefer the wording of the instruction as  
8 submitted by defendant that includes the reasonable certainty  
9 language.

10 THE COURT: Very good. Your objection is noted and  
11 preserved for the record.

12 MR. FARKAS: Thank you.

13 THE COURT: Okay. Any questions about that  
14 instruction then?

15 MR. VALENZI: No, Judge, I think we understand.

16 THE COURT: Okay. Anything else we need to discuss  
17 on instructions or any other issue?

18 MR. CARUSO: Not by plaintiff.

19 MR. VALENZI: Should -- I will say, Judge, should  
20 we send one more final version?

21 THE COURT: Yes, make that edit, send a final  
22 version which incorporates Mr. Schechtman's changes, send  
23 them all in red line, but in a way where we can remove the  
24 red line. And then we'll -- I may reorder these instructions  
25 somewhat and we'll make copies of them tonight. And we'll

1 make copies for the jury. I think that's going to be easier,  
2 because if I have to flip through them and change the order,  
3 it does you no good to staple them and unstaple them.

4 If we have problems copying, you'll get an e-mail  
5 with the correct order and we'll ask probably the plaintiffs  
6 to make those copies; but if not, we'll handle it from our  
7 end.

8 All right. So nothing else from plaintiff.

9 Mr. Farkas, Mr. Schechtman, anything else?

10 MR. SCHECHTMAN: No.

11 MR. FARKAS: No, your Honor.

12 (Proceedings had not herein transcribed.)

13 (Excerpt concluded at 4:37 p.m.)

14 C E R T I F I C A T E

15 I certify that the foregoing is a correct transcript of  
16 the excerpt of proceedings in the above-entitled matter.

17  
18 /s/ Amy M. Spee  
19 AMY M. SPEE, CSR, RPR, CRR  
Contract Court Reporter

June 15th, 2016

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