

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PAOLI RAILROAD YARD : MASTER DOCKET
PCB LITIGATION : NO. 86-2229

THIS DOCUMENT RELATES TO: :
: :
Narcise v. SEPTA, et al., : No. 87-1190
Williams v. SEPTA, et al., : No. 87-1258
Stanbach v. SEPTA, et al., : No. 87-3227

MEMORANDUM

ROBERT F. KELLY, J.

SEPTEMBER 6, 2000

The only pending motion remaining in the above-captioned cases, Defendants' Motion for Summary Judgment, is now ripe for decision.¹ Plaintiffs were workers at the Paoli Railroad Yard. Plaintiffs filed this action alleging that they have suffered from a variety of severe and unusual illnesses as a result of their exposure to polychlorinated biphenyls ("PCBs"), used in the transformers of train cars which these Plaintiffs

¹ On March 7, 2000, this Court denied reconsideration of the decision to exclude the expert testimony of Plaintiffs' sole medical causation expert, Janette Sherman, M.D. See In Re Paoli R.R. Yard PCB Litig., Nos. 86-2229, 87-1190, 87-1258, 87-3227, 2000 WL 274262 (E.D. Pa. March 7, 2000). However, Plaintiffs' Motion for Reconsideration regarding the expert opinion of Dr. Ian C. T. Nisbet, Ph.D., was granted in accordance with the Third Circuit's reversal of the exclusion of the vast majority of his testimony in the related residential cases. Because Dr. Nisbet's opinions in these worker cases do not materially differ from his opinions in the residential cases, the parties, with some limited exceptions, did not dispute that he should be permitted to testify regarding exposure. Id. at *9. More recently, Plaintiffs' Motion to Submit Updated Expert Reports was denied by Order, dated May 10, 2000.

serviced and maintained in the Paoli Railroad Yard. The Complaints in these cases seek monetary damages and medical monitoring from the railroad defendants that employed Plaintiffs based on claims arising under state tort law and the Federal Employers Liability Act ("FELA").² Since the filing of Defendants' summary judgment motion, the last of the railroad defendants, SEPTA, has settled with Plaintiffs.³ As a result, no FELA claims remain in these cases. Plaintiffs' tort claims against the remaining defendants - Solutia, Inc. (f/k/a Monsanto, defendant in all three cases) and General Electric (defendant in Narcise and Williams) - are governed by Pennsylvania common law, just like the claims of the residential plaintiffs, which have already been adjudicated.⁴ For the following reasons, Defendants' Motion for Summary Judgment will be granted.

I. STANDARD OF REVIEW

² Andre Williams is the only living worker plaintiff; therefore, he is the only plaintiff pursuing a claim for medical monitoring.

³ That settlement was effected as part of a class settlement approved by the Court of Common Pleas for Chester County, Pennsylvania.

⁴ Westinghouse Electric Corp. (now known as CBS, Inc.) was a party to this litigation solely as a defendant on SEPTA's third-party claims, which have been mooted and/or abandoned as a result of SEPTA's settlement with Plaintiffs. The City of Philadelphia nominally remains as a defendant in the Narcise and Williams actions, but Plaintiffs have settled with the City as part of a classwide settlement that is awaiting approval by the Chester County Court of Common Pleas.

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, reveal no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." Wragg v. Comcast Metrophone, 18 F. Supp.2d 524, 526 (E.D. Pa. 1998)(citing Fed R. Civ. P. 56(c)). In deciding a motion for summary judgment, all facts, and reasonable inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. Id. at 527; Clark v. Commonwealth of Pennsylvania, 885 F. Supp. 694, 707 (E.D. Pa. 1995).

To obtain summary judgment relief, the moving party has the initial burden of identifying evidence that shows an absence of a genuine issue of material fact. Coregis Ins. Co. v. Wheeler, 24 F. Supp.2d 475, 477 (E.D. Pa. 1998). The non-moving party then must go beyond the mere allegations of the pleadings, and, from the evidence of record, designate specific facts showing that there is a genuine disputed issue for trial.⁵ Stickney v. Muhlenberg College TIAA-CREF Retirement Plan, 896 F. Supp. 412, 417 (E.D. Pa. 1995); see also Coregis, 24 F. Supp.2d at 477. In deciding whether an issue is genuine, "the court's

⁵ "[A] dispute over those facts that might affect the outcome of the suit under the governing substantive law, i.e., the material facts, will preclude the entry of summary judgment." Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995); see also Mertig v. Milliken & Michaels of Delaware, Inc., 923 F. Supp. 636, 642 (D. Del. 1996).

function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." Orsatti, 71 F.3d at 482. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

II. DISCUSSION

Plaintiffs are pursuing five types of claims against the three remaining defendants: (1) negligence; (2) strict liability, including failure to warn and defective design; (3) fraud, including fraudulent concealment; (4) infliction of severe emotional distress (negligent and intentional)⁶; and (5) punitive damages.⁷ In addition, Helen Narcise has a loss of consortium claim.

As this Court has previously observed, "[p]roof of

⁶ Plaintiffs' emotional distress claims are barred as a matter of law. Defendants correctly argue that the Third Circuit, in In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) ("Paoli II"), cert. denied, 513 U.S. 1190 (1995), found that, under Pennsylvania law, plaintiffs in toxic tort cases have no cause of action for risk or fear of future injuries. Id. at 785 n.51.

⁷ Plaintiffs contend that only the first two types of claims require expert proof of disease causation.

causation is a necessary element in a products liability action as well as in a negligence action." Burton v. Danek Medical, No. Civ. A. 95-5565, 1999 WL 118020, *2 (E.D. Pa. Mar. 1, 1999). Accordingly, a defendant cannot be held liable on a theory of negligence, strict product liability, or misrepresentation unless a causal relationship is established between the defendant's product and the plaintiff's injury. Id.

Under Pennsylvania law, unequivocal medical testimony is necessary to establish the causal connection in cases where there is no obvious causal relationship between the accident and the injury.⁸ Niklaus v. Vivadent, Inc., 767 F. Supp. 94, 96 (M.D. Pa. 1991), aff'd, 986 F.2d 1409 (3d Cir. 1993).

"[S]uch testimony is needed to establish that the injury in question did, with a reasonably degree of medical certainty, stem from the [complained of] act." . . . [U]nder some rare circumstances, Pennsylvania law may allow a personal injury case in which there is no obvious causal relationship to be submitted to a jury on the basis of causation testimony presented by a qualified expert other than a medical doctor.

Expert medical testimony on causation requires the witness to offer expert medical testimony on the injury itself and the relationship between the injury and the alleged cause. Consequently, an expert offered by plaintiffs on the issue of causation in this case must be an expert in

⁸ "An obvious causal relationship exists when the injury is either an 'immediate and direct' or the 'natural and probable' result of the complained of act. The injury and the act must be so closely connected that a lay person could diagnose the causal connection." Niklaus, 767 F. Supp. at 96.

diagnosing, and in determining the cause of,
[the] injuries [at issue].

Id. (citations omitted). The instant matter clearly falls in the category of cases requiring expert medical testimony.

Accordingly, the issue raised by Defendants is whether the expert testimony offered by Plaintiffs is sufficient to establish a genuine issue of material fact with regard to the issue of causation.

A. Causation

Defendants argue that this Court's exclusion of Dr. Sherman's testimony leaves these Plaintiffs without any individualized proof of medical causation. In response, Plaintiffs submit that the record evidence that the Paoli workers were exposed to PCBs, combined with Dr. Nisbet's and Dr. Melvyn Kopstein's expert testimony is sufficient to establish a likelihood that the cancers of Mr. Narcise and Stanbach, and the illnesses of Mr. Williams, were caused by PCBs. (Pls.' Supplemental Mem. at 22.) However, Defendants point out that neither Dr. Kopstein nor Dr. Nisbet can fill this causation gap. Defendants explain that Dr. Kopstein testified only that there was an opportunity for exposure and was never offered by Plaintiffs as an expert on medical causation. As for Dr. Nisbet, Defendants submit that he never offered any opinion as to the PCB exposure of John Narcise and Charles Stanbach or the causes of their alleged injuries. And although Dr. Nisbet did provide a

specific opinion on the exposure of Andre Williams, he did not express an opinion on causation.

Federal Rule of Evidence 702, which governs the admissibility of expert testimony, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under this Rule, the trial judge acts as a "gatekeeper" to ensure that any and all expert testimony or evidence is not only relevant, but also reliable. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993); Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997). Rule 702 has three major requirements: (1) the proffered witness must be an expert; (2) the expert must testify about matters requiring scientific, technical, or specialized knowledge; and (3) the expert's testimony must assist the trier of fact. Kannankeril, 128 F.3d at 806.

Under the first requirement, the witness must be qualified as an expert. See Paoli II, 35 F.3d at 741. An expert can be qualified by a broad range of knowledge, skills, training, education, or experience. In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 855 (3d Cir. 1990) ("Paoli I"), cert. denied, 499 U.S. 961 (1991). A witness who does not possess sufficient

knowledge of the subject matter is not qualified to offer an expert opinion. Surace v. Caterpillar, Inc., 111 F.3d 1039, 1056 (3d Cir. 1997).

In the instant action, Plaintiffs have now taken the unique position of offering Drs. Nisbet and Kopstein, experts who have been previously identified by Plaintiffs for purposes of providing evidence of Plaintiffs' exposure to Defendants' PCBs, as medical causation experts.⁹ Federal courts that have applied the Third Circuit Paoli standards in the face of deciding whether similarly proffered experts are qualified to opine on the medical cause of a plaintiff's injury have ruled in favor of precluding such testimony.

For example, in Poust v. Huntleigh Healthcare, 998 F. Supp. 478 (D.N.J. 1998), the court held that Robert Benowitz, an engineer proffered by the plaintiff as an expert, was qualified to provide an opinion as to alleged defects in the design of a

⁹ It is worth noting that neither Dr. Nisbet nor Dr. Kopstein are medical doctors, yet both are now being proffered by Plaintiffs to establish the likelihood that the cancers of Mr. Narcise and Stanbach, and the illnesses of Mr. Williams were caused by PCBs. While this Court recognizes that this does not per se preclude Drs. Nisbet or Kopstein from testifying about causation of these diseases in humans, see Paoli I, 916 F.2d at 856, Drs. Nisbet and Kopstein do not have any general expertise regarding disease causation in humans. Such lack of expertise in human disease has been taken into consideration by other federal judges in this circuit when examining the reliability of expert opinions and in determining "fit" under the Daubert standard. See, e.g., In re: Diet Drugs Prods. Liab. Litig., No. MDL 1203, 2000 WL 962545, *5 (E.D. Pa. June 28, 2000).

pneumatic compression device that was used during the plaintiff's back surgery, but found that he was not qualified to opine on medical causation. In that case, the court reviewed Mr. Benowitz's background and found that his areas of expertise included (1) hospital and health safety, and (2) medical devices - use, safety and design. In addition, Mr. Benowitz served as a safety consultant, a position in which he investigated electro-mechanical equipment incidents, conducted medical safety testing and provided consulting services to healthcare institutions. Based on the above, the New Jersey federal court found that Benowitz was qualified to provide an opinion on the subject of the alleged defects in the design of the medical device; however, the court also determined that the expert had no experience, education, or training which would qualify him to render an opinion as to the medical cause of the plaintiff's injuries. Id. at 492-93.

Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991), is also instructive. In Gentry, homeowners brought suit alleging that a developer and mortgage lender conspired with Gloucester Township, which owned land leased as a landfill, to promote the fraudulent sale of the property, despite the defendants' knowledge of the landfill's toxic nature. Plaintiffs' had proffered the expert testimony of toxicologist Dr. Brubaker, who opined that the plaintiffs' injuries could have

been caused by exposure to the toxic chemicals present in the landfill. Brubaker, however, was not a medical doctor and he did not examine the plaintiffs. As a result, the district court concluded that the plaintiffs had not produced a medically qualified expert to testify about causation and excluded Brubaker's testimony. Genty v. Township of Gloucester, 736 F. Supp. 1322 (D.N.J. 1990).

On appeal, the Third Circuit found that the district court's exclusion of Brubaker because he did not possess a medical degree was improper, but affirmed the district court's holding on other grounds. In doing so, our federal appellate court reasoned as follows:

[A]ccording to the record, the plaintiffs offered no evidence as to how Brubaker would connect the toxic chemicals at the GEMS landfill to these plaintiffs' alleged injuries. He did not physically examine the plaintiffs and their symptoms. Brubaker may have been qualified as a toxicologist to identify poisons generally and offer treatment for exposure to poisons, but there is no evidence in this record that would connect the presence of poisons to the plaintiffs' particular grievances.

The plaintiffs state in their brief that Brubaker's opinion "would have been based on individual plaintiff observations reporting the presence of odors in and around plaintiffs' residences." He thus would have relied, not on firsthand observations, but merely on the reports of the plaintiffs. He obviously had not conducted the personal physical investigation necessary to form an expert opinion that toxins in the landfill caused the plaintiffs' symptoms. Indeed, the plaintiffs concede that Brubaker could not

have testified to a reasonable certainty as to such causation with the following statement in their brief: "Dr. Brubaker would have proffered testimony that exposure via inhalation to these emanating odors consisting of the alleged volatile organic chemicals and other toxic substances may account for the frequent and severe health problems suffered by the plaintiffs." (emphasis added).

Genty, 937 F.2d at 917-18. The Third Circuit went on to distinguish its earlier Paoli I opinion in which it reversed this Court's exclusion of testimony by another toxicologist, Dr. Deborah Barsotti, Ph.D., who, unlike Drs. Kopstein and Nisbet, offered expert opinions on both exposure and causation. Id. As in Genty, the instant matter is significantly different from Paoli I in that Dr. Barsotti proposed to establish a causal relationship between exposure to PCBs and the plaintiffs illnesses by using the results of tests of the plaintiffs' blood as well as comparison with the medical and clinical records of the plaintiffs. 916 F.2d at 839. No such personal examination or study of the worker plaintiffs was performed by Dr. Kopstein or Dr. Nisbet in the cases at hand.

Despite the above, Plaintiffs note that Dr. Nisbet is competent to testify on causation by stating that certain adverse effects seen in the Plaintiffs are consistent with those shown to have been caused by PCBs in epidemiological and animal studies. (Pls.' Supplemental Mem. at 22 n.14.) Defendants reply that Dr. Nisbet's testimony does not adequately support causation for the

following reasons: Dr. Nisbet has never opined that any of the specific medical conditions of Plaintiffs were caused by exposure to PCBs; none of the medical conditions Dr. Nisbet "associates" with exposure to PCBs exists in any of these worker plaintiffs; at most, Dr. Nisbet stated that Plaintiff Andre Williams was at "elevated risk" of unspecified "adverse health effects"; and Dr. Nisbet conceded that he cannot link any specific dosage of PCBs to any type of cancer. (Defs.' Reply Mem. in Supp. of Worker Pls.' Cases at 8) (citing Pls.' Ex. J, Report of Ian C. T. Nisbet, Ph.D.).

Recently, however, Plaintiffs filed a supplemental memorandum advising this Court that Dr. Nisbet's testimony would include the following: (1) that exposure to PCBs increases the frequency of cancer in humans, (2) that small levels of PCBs have lead to elevated levels of enzymes associated with liver damage, (3) that there are a number of reports of occupational complaints involving skin irritation resulting from direct contact with PCB fluids with no measures of the extent or duration of that exposure, and (4) that PCB exposure creates an expectation of elevated lipids at almost any level. In addition to Dr. Nisbet's proposed testimony, Plaintiffs are prepared to present Dr. Kopstein's description of the opportunities Plaintiffs had for being exposed to PCBs while working at the Paoli Railroad Yard, and lay testimony that would purportedly prove that these

"opportunities" or potential exposures were, in fact, real exposure. Plaintiffs submit that such evidence coupled with cross-examination of defense experts establish a sufficient foundation from which this Court should deny Defendants' summary judgment motion.

Plaintiffs' position goes against the very teachings of Third Circuit case law, much of which came about as a result of this litigation. Indeed, following Paoli I and Paoli II, "[c]ourts have insisted time and time again that an expert may not give opinion testimony to a jury regarding specific causation if the expert has not engaged in the process of differential diagnosis -- that is, the process of eliminating other possible diagnoses." Rutigliano v. Valley Bus. Forms, 929 F. Supp. 779, 786 (D.N.J. 1996), aff'd, 118 F.3d 1577 (3d Cir. 1997); see also Diaz v. Johnson Matthey, Inc., 893 F. Supp. 358, 376 (D.N.J. 1995) (rejecting expert testimony that work place exposure to platinum salts caused plaintiff to contract asthma based on doctor's inability to negate other possible causes).

This Court has already declined to reconsider the admissibility of Plaintiffs' original causation expert, Dr. Sherman, based on her inability to explain why alternative possible causes pointed to by Defendants were not the sole cause of Plaintiffs' illnesses. 2000 WL 274262 at *4-7. Now, Plaintiffs urge this Court to accept the non-specific medical

causation testimony of Drs. Nisbet and Kopstein, neither of which has performed the necessary differential diagnoses in these cases. That being the case, this Court finds that Plaintiffs have failed to provide sufficient evidence of causation in these cases, without which summary judgment must be granted.¹⁰ See Mazur v. Merck & Co., 742 F. Supp. 239, 265 (E.D. Pa. 1990) (doctors' opinions that possible link existed between measles vaccine and child's illness was not enough to support expert testimony).

B. Medical Monitoring

In order to establish his medical monitoring claim, Plaintiff Andre Williams is required to show the following:

(1) Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant, (2) As a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease, (3) That increased risk makes periodic diagnostic medical examinations reasonably necessary, and (4) Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Paoli II, 35 F.3d at 787; see also O'Brien v. Sofamor, No. CIV.

¹⁰ Summary judgment is also required on Helen Narcise's loss of consortium claim. Like Plaintiffs' claims for punitive damages, it is derivative and viable only as long as the underlying cause of action is viable. See Hepps v. General American Life Ins., No. CIV. A. 95-5508, 1998 WL 564497, *7 (E.D. Pa. Sept. 2, 1998); Harrell v. Fibreboard Corp., Civ. A. Nos. 85-4604, 85-5655, 85-6873, 86-2118, 86-2304, 86-3112, 1989 WL 145810, at *4 & 12 (E.D. Pa. Nov. 27, 1989).

A. 96-8015, 1999 WL 239414, *6 (E.D. Pa. March 30, 1999); Heller v. Shaw Indus., No. Civ. A. 95-7657, 1997 WL 535163, *21 (E.D. Pa. Aug. 18, 1997), aff'd, 167 F.3d 146 (3d Cir. 1999).

As noted above, this Court recently denied Plaintiffs' Motion for Reconsideration of this Court's Order excluding the testimony of Dr. Jannette Sherman. 2000 WL 274262. Now, in light of this Court's rejection of Dr. Sherman's testimony and protocol, Mr. Williams states that he would accept the medical monitoring program described as appropriate for railroad workers exposed to PCBs by one of defendants' experts, Dr. Kenneth Chase. Even assuming Plaintiff Williams could propose a different medical monitoring program at this point in time, Plaintiff's inability to provide reliable, individualized expert testimony predicated on the significance and extent of his exposure to chemicals, the toxicity of chemicals, the seriousness of the diseases for which Plaintiff is at risk, the relative increase in the chance of onset of disease, and the value of early diagnosis, is fatal to his medical monitoring claim. Defendants have made the arguments and supplied the evidentiary materials that the Third Circuit found lacking in Paoli II.¹¹ 35 F.3d at 790, 794

¹¹ Following the Third Circuit's holding in Paoli II with respect to Dr. Sherman's medical monitoring opinion, Defendants not only submitted evidence showing the necessity of analyzing the concepts of "specificity" and "sensitivity" in deciding whether particular screening tests are needed, but how Dr. Sherman failed to determine whether the components of her protocol were likely to be accurate in detecting the conditions

n.59. Thus, the record before this Court now demonstrates that summary judgment is proper on Mr. Williams medical monitoring claim under Pennsylvania law.¹² See In re TMI Litig., 199 F.3d 158, 159 (3d Cir. 2000) (district court need not provide a plaintiff with an open-ended and never-ending opportunity to meet a Daubert challenge until plaintiff "gets it right" nor should a plaintiff be given the opportunity to meet a Daubert challenge with an expert's submission that is based on new methodology), cert. denied, ___ U.S. ___, 120 S. Ct. 2238 (2000).

Based on the above, Defendants' Motion for Summary Judgment shall be granted. An Order will follow.

that she believed may be caused by Plaintiffs' exposure. Thus, Defendants established that Dr. Sherman was not able to properly compare the risks and benefits of medical monitoring. 2000 WL 274262 at *7-9.

¹² The need for diagnostic examinations must be supported by the testimony of competent medical experts. See Friends For All Children v. Lockheed Aircraft Corp., 746 F.2d 816, 826 n.15 (D.C. Cir. 1984) (noting that need for diagnostic examinations must be supported by competent medical expert testimony); Theer v. Philip Carey Co., 628 A.2d 724, 732-33 (N.J. 1993) (exposure to toxic chemicals may sustain a claim for medical surveillance damages when supported by reliable expert testimony).

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ORDER

AND NOW, this 6th day of September, 2000, upon consideration of Defendants' Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that Defendants' Motion is GRANTED.

BY THE COURT:

ROBERT F. KELLY, J.