

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

SHELDON TABB, : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
PHILIP MORRIS, INC., et al., :  
Defendants. : NO. 98-CV-3223

MEMORANDUM ORDER

J.M. KELLY, J.

APRIL 1, 1999

Presently before the Court are two Motions to Compel filed by various defendants in this matter. The Court held a status conference in open court today in which oral argument was heard on many of the issues raised in the Motions to Compel. This document shall serve to memorialize the Court's decision on all matters raised by the Motions to Compel, as well as serve as the scheduling order for this matter.

PRETRIAL PROCEDURES

All counsel at the status conference were provided with a document entitled "Pretrial and Trial Procedures Before Judge James McGirr Kelly." These procedures shall be in force for the remainder of the pendency of this matter.

MOTIONS TO COMPEL

I. Issues Addressed in Court

A. Expert Reports

Plaintiff, Sheldon Tabb ("Tabb"), shall produce his expert report to Defendants on or Before April 8, 1999. Defendants shall Amend their expert reports and serve any amended or

supplemental expert reports on or before May 10, 1999. Expert discovery shall be completed in this matter on or before June 11, 1999. The parties shall endeavor to agree upon the dates for expert depositions. Absent such an agreement between the parties, experts shall be produced for depositions upon ten calendar days notice.

B. Medical Records

Defendants shall provide Tabb with the results of all objective tests performed by Dr. Michaels during his examination of Tabb, on or before April 5, 1999. This shall include, but is not limited to, the results of the "Minnesota" test.

Tabb shall sign a release on or before April 6, 1999, to allow Dr. Michaels to review Dr. Longsdorf's records of treatment for Tabb. This release is to be prepared by Defendants and forwarded to Tabb today. Dr. Longsdorf's records are to be forwarded directly to Dr. Michaels. Dr. Michaels shall review Dr. Longsdorf's records and if he believes that he requires any or all of these records in order to prepare his report, he shall inform Defendants' counsel who may then make an application to the Court for further relief.

Defendants may take the deposition of Dr. Wagenheim. The parties shall endeavor to agree upon the date for this deposition. Absent such an agreement between the parties, Dr. Wagenheim shall be produced for deposition upon ten calendar days notice.

Tabb shall prepare, sign and forward a release to the

Veteran's Administration on or before April 8, 1999. This release shall instruct the Veteran's Administration to forward all records of treatment of Tabb's nervous anxiety to the Court. The Court shall conduct an in camera review of these documents and inform the parties which, if any, of these documents may be relevant to this matter. The Defendants may make an application to the Court that such documents be forwarded to Dr. Michaels under the provisions set forth previously in this Memorandum Order for Dr. Longsdorf's records.

C. Tabb's Diaries and Calendars

Tabb shall produce any calendar or diary that contains records of his treatment for cancer at the deposition of Dr. Wagenheim.

II. Issues Not Addressed in Court

A. Phillip Morris Interrogatories

As an initial issue, Tabb contends that because Defendants have responded to his interrogatories by reference to documents in a depository maintained in Minnesota in conjunction with that state's tobacco litigation, he can respond to interrogatories by referring Defendants to his deposition testimony. The option to produce business records is set forth in Rule 33(d) of the Federal Rules of Civil Procedure. The Court notes that Tabb has not suggested that Defendants are not in compliance with Rule 33(d). The Rules allow both interrogatories, where a party is required to answer fully, conduct a necessary investigation and supplement answers, as well as depositions where a witness'

testimony is discovered. Answering interrogatories by reference to deposition testimony does not achieve the level of disclosure contemplated by the rules. Where Tabb responded merely to refer to deposition testimony, he has until April 20, 1999, to supply a full, written response.

Interrogatory 1. Plaintiff has failed to state a basis for his contentions. A fair reading of this interrogatory requires Plaintiff to identify how he will place his contentions into evidence. He is ordered to do so by April 20, 1999.

Interrogatory 2. The interrogatory requires Plaintiff to state how he will place this contention into evidence. Plaintiff must present a basis for this conclusion by April 20, 1999.

Interrogatory 4. This answer shall be provided by April 20, 1999.

Interrogatory 6. Plaintiff must present a basis for his conclusion by stating how he will place the basis into evidence by April 20, 1999.

Interrogatory 7. This interrogatory asks for Plaintiff's mental state, and as such, his response is responsive to the interrogatory. Any additional supporting evidence that Plaintiff may wish to present at trial must be produced by April 20, 1999.

Interrogatory 11. Tabb must identify what evidence he intends to present and how he intends to admit the evidence by April 20, 1999.

Interrogatory 13. This evidence must be produced by April 8, 1999.

B. Phillip Morris Request for Production

Tabb contends that he has produced all responsive documents. Any additional documents that Plaintiff intends to use at trial must be produced by April 20, 1999.

C. Lorillard Interrogatories

Interrogatory 1. Plaintiff shall amend this response by April 20, 1999 to include any additional evidence that he intends to introduce to prove his contention.

Interrogatory 3. The Court assumes that Defendants intend to present evidence linking Tabb's cancer to sources other than smoking. If Tabb intends to rebut Defendant's theory, he must state what evidence he will use to rebut the theory by April 20, 1999.

Interrogatory 4. Tabb appears to have adequately answered this interrogatory. Of course, if he develops additional information relevant to this interrogatory, he must update his answer.

Interrogatory 5. This interrogatory requires a yes or no answer, which Tabb shall provide by April 20, 1999.

Interrogatory 6. For the medical expenses, all bills must be produced by April 20, 1999. If Tabb intends to present any evidence beyond his own testimony on the other forms of damages that he claims, he must identify that evidence by April 20, 1999.

Interrogatory 7. Without seeing the document or interrogatory response that Tabb refers to, it appears that he

has adequately answered the interrogatory. If there is any additional evidence that he intends to present to support this contention, it must be produced by April 20, 1999.

Interrogatory 8. Plaintiff must identify how he intends to prove this contention by April 20, 1999.

Interrogatory 9. Mr. Tabb has not responded to the question asked by this interrogatory. To the extent that he is proceeding on a design defect theory, he must identify how a defect caused his injury and how he intends to prove this defect. This information must be produced by April 20, 1999.

Interrogatory 10. The Court believes that Tabb has provided a sufficient answer to part a. of this interrogatory. Unless Tabb intends to present expert testimony on warnings, I believe that his response to part b. is sufficient. There has been no suggestion that Tabb is somehow skilled in designing packaging or warnings. The Court believes that Tabb has made a reasonable answer to part c. Plaintiff must answer what he believes would have been an adequate warning and how he would have responded to such a warning for part d.

D. Lorillard Request for Production

If Tabb is contending that he has produced all documents to Defendants, then his response is sufficient. If he is saying that the documents he has are equally available to Defendants, then his response is insufficient. Either way, any responsive documents that he has not produced must be produced by April 20,

1999.

**OTHER SCHEDULING MATTERS**

Dispositive motions shall be filed in accordance with "Pretrial and Trial Procedures Before Judge James McGirr Kelly." Plaintiff's Pretrial Memorandum shall be filed within fifteen days after any dispositive motions are decided. Defendants' Pretrial Memorandums shall be filed within thirty days after any dispositive motions are decided. This matter shall be placed into the trial pool of September 15, 1999.

BY THE COURT:

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JAMES MCGIRR KELLY, J.