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

LEROY J. MORTIMER, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
A.O. SMITH CORP., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:13-04169-ER
Defendants.	:	

O R D E R

AND NOW, this **13th** day of **April, 2015,** it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration (ECF No. 543) is **GRANTED.**[1]

---

[1] On March 10 and 11, 2015, the Court held a Daubert hearing on the motions of Defendant Ford Motor Company ("Ford" or "Ford Motor Company") to preclude two of Plaintiff's experts (Dr. Arthur Frank and Dr. Scott A. Bralow) from testifying at trial in this action. At the beginning of that hearing, upon the objections of - and accompanying oral motion by - Defendant Ford, the Court ruled that Plaintiff's experts would not be permitted to testify about certain materials not specifically identified in their written reports. Those materials included: (1) a 2002 academic medical article by a group of authors, including Dr. Stefano Mattioli, which reports a study concerning the link between asbestos and kidney cancer, entitled "Occupational Risk Factors for Renal Cell Cancer: A Case-Control Study in Northern Italy," published in the Journal of Occupational and Environmental Medicine (hereinafter referred to as the "Mattioli Article"), (2) the transcript of the deposition of Plaintiff Leroy Mortimer (at which Defendant Ford was present), and (3) data concerning asbestos dust levels released from Ford automobile brakes (which was provided to Plaintiff by Ford during discovery in this action).

A. Plaintiff's Arguments

Plaintiff has moved for reconsideration of this Court's ruling at the Daubert hearing, which precluded Plaintiff's experts from testifying as to the above-identified materials. Plaintiff asserts that the Court's ruling was legally erroneous and that the Court should reconsider its ruling in order to prevent manifest injustice. Specifically, Plaintiff asserts that (1) under the Federal Rules of Civil Procedure, experts are permitted to testify beyond the scope of their reports (i.e., nothing prevents such testimony), (2) exclusion of the materials at issue would be reversible error because (a) it is outcome-determinative in the action, and (b) Defendant Ford (i) was not surprised by the materials (or Plaintiff's experts' intention to discuss them at trial), and (ii) will not be prejudiced by Plaintiff's experts being permitted to rely on and discuss those materials in providing their opinions and testimony. In support of his position, Plaintiff relies upon: DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978)(citing Meyers v. Pennypack Woods, 559 F.2d 894 (3d Cir. 1977)); Kelly v. GAF Corp., 115 F.R.D. 257 (E.D. Pa. 1987); McElroy v. Cessna Aircraft Co., 506 F. Supp. 1211 (W.D. Pa. 1981); Fritz v. Consolidated Rail Corp., 1992 WL 96285 (E.D. Pa. Apr. 23, 1992); Bowersfield v. Suzuki Motor Corp., 151 F. Supp. 2d 625 (E.D. Pa. 2001); and Romano v. Atkins, 2004 WL 834711 (E.D. Pa. Apr. 1, 2004).

Plaintiff explained at the hearing that: (1) with respect to the Mattioli Article: (a) Dr. Bralow did in fact rely upon it in formulating his opinion and report, but that he inadvertently misidentified the article in his report (confusing it with another article because of a similar author name: Machinami), listing instead the other article (by Oda and Machinami) instead of the Mattioli article; and (b) Dr. Frank identified and disclosed it, albeit late - and, therefore, by way of supplement - in September of 2014 (after Dr. Frank was deposed by Ford) when it was attached as an exhibit to Plaintiff's sur-reply to Ford's motion to exclude Dr. Frank (with the exhibit being an April 2014 report of Dr. Frank from another asbestos case involving renal cell cancer, which was entitled Musselman); and (2) even if the materials at issue were not timely disclosed (or provided by way of supplement), discussion of the materials by Plaintiff's experts (either at the Daubert hearing or at trial) is warranted as a reply and rebuttal to Defendant's experts' opinions, as the defense experts raise issues that render these materials relevant.

With respect to the deposition transcript of Plaintiff Leroy Mortimer, Plaintiff asserts further that, since Defendant Ford was present at the deposition, it cannot claim surprise or prejudice in hearing Plaintiff's experts testify based upon that deposition testimony. Similarly, Plaintiff contends that because the data regarding asbestos dust emission from Ford's automobile brakes was not only compiled by Ford, but provided to Plaintiff by Ford during this action, Ford cannot claim surprise or prejudice in hearing Plaintiff's experts testify about this information.

For all of these reasons, Plaintiff contends that Defendant Ford cannot claim prejudice or surprise in hearing either expert testify about the Mattioli article or the other materials (either at the Daubert hearing or at trial).

B. Defendant's Arguments

In response, Defendant maintains that, since these materials were not specifically identified in Plaintiff's experts' written reports, the experts should not be permitted to rely upon them because (1) the materials are outside the scope of the expert's reports and, thus, inadmissible - in part because they could not have formed the basis for the experts' opinions, and (2) it would be prejudicial surprise to Defendant Ford if the Court now permits the experts to provide testimony based upon these materials because (a) it did not have a chance to question the experts about the materials (and how their opinions relate to them) at deposition, and (b) it did not have the opportunity to address any issues presented by these materials in its motions to preclude the experts from testifying. Defendant asserts further that (3) Plaintiff's failure to timely identify and disclose (or supplement with) these materials is a violation of Rule 26 of the Federal Rules of Civil Procedure and is not indicative of good faith. In support of its position, Defendant relies upon: Allen v. Parkland Sch. Dist., 230 F. App'x 189, 192 (3d Cir. 2007); Royal Ins. Co. of America v. Latrobe Constr. Co., 2006 WL 39148 (W.D. Pa. Jan. 6, 2006); Belden Technologies, Inc. v. Superior Essex Communicataions LP, 802 F. Supp. 2d 555, 565 n.8 (D. Del. 2011); and U.S. v. 68.94 Acres of Land, 918 F.2d 389, 396 (3d Cir. 1990).

C. Legal Standards

1) Choice of Law (Federal versus State)

The MDL Court has consistently held that issues of admissibility of evidence are matters of procedure that are governed by federal law. See, e.g., Bouchard v. CBS Corp., 2012 WL 5462612, at *1 (E.D. Pa. Oct. 2, 2012) (Robreno, J.). As explained by the Court in Bouchard and other cases:

a. Procedural Issues

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply federal law as interpreted by the U.S. Court of Appeals for the Third Circuit. Id.

b. Exclusion of Evidence

The admissibility - or exclusion - of evidence in a case pending in federal court is a matter of procedure. See Forrest v. Beloit Corp., 424 F.3d 344, 354 (3d Cir. 2005). As such, in this multidistrict litigation, it is governed by federal law, which is, in this case, the Federal Rules of Civil Procedure. Id.; Oil Field Cases, 673 F. Supp. 2d at 362-63.

2) Motion for Reconsideration

A Motion for Reconsideration will be granted when the party seeking reconsideration establishes "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court . . . [issued its previous decision]; or (3) the need to correct a clear error of law or fact or prevent manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999); North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995); United States v. Cabiness, 278 F. Supp. 2d 478, 483-84 (E.D. Pa. 2003) (Robreno, J.) (construing motion alleging legal error as motion for reconsideration under Fed. R. Civ. P. 59(e) and Local Rule 7.1(g)). "Because federal courts have a strong interest in

the finality of judgments, motions for reconsideration should be granted sparingly." Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

3) Exclusion of Expert Testimony

The applicable standard of review to determine whether the district court abused its discretion in excluding testimony for failure to comply with pre-trial notice requirements of Rule 26 of the Federal Rules of Civil Procedure was set forth by the court in DeMarines, 580 F.2d at 1201-02, a case in which the Third Circuit considered a district court's exclusion of expert testimony. DeMarines, in turn, discussed and applied the Third Circuit's previous decision of Meyers v. Pennypack Woods, 559 F.2d 894 (3d Cir. 1977). In Pennypack Woods, the Third Circuit reversed the district court's refusal to admit testimony of a fact witness not named in a pre-trial memoranda on the basis of four factors: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; (4) bad faith or willfulness in failing to comply with the court's order. Id. at 904.

The Third Circuit has factored in other considerations as well, including (5) the ability of the movant to have discovered the evidence earlier, id., (6) the validity of the excuse offered by the party for failing to timely and properly identify a piece of evidence, id., (7) the importance of the proffered evidence, id. at 905; see also Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 720 (3d Cir. 1997) (involving exclusion of expert testimony) and Dudley v. South Jersey Metal Inc., 555 F.2d 96, 99 (3d Cir. 1977) (same); and (8) whether the decision to amend to include additional witness testimony (or other evidence) is a matter of a new strategy or tactic. Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269, 1287 (3d Cir. 1995).

D. Analysis

After reviewing the caselaw cited by the parties and the filings in the docket (including the various articles discussed by Dr. Bralow) in connection with the arguments set forth in Plaintiff's motion for reconsideration, the Court agrees

with Plaintiff that, for the reasons set forth below, Dr. Frank and Dr. Bralow should be permitted to rely on these additional materials in providing testimony - and that a failure to do so would result in injustice to Plaintiff. Consequently, Plaintiff's motion for reconsideration must be granted. Quinteros, 176 F.3d at 677. The Court addresses each of the materials separately:

1) Mattioli Article

a. Reliance by Dr. Frank

Plaintiffs have asserted that Defendant was made aware that Dr. Frank would be relying on the Mattioli Article - if only by way of supplement - in September of 2014, when he filed his surreply to Defendant Ford's motion to preclude Dr. Frank's testimony in this action, including as exhibits Dr. Frank's report and submissions from another asbestos action involving renal cell cancer (Musselman). The Court has reviewed the docket and has confirmed that Plaintiff included the Mattioli Article as an exhibit to its surreply brief. (Pl. Ex. Q, ECF No. 426-7.) Moreover, the filing includes Dr. Frank's report from Musselman which provides substantive discussion of the Mattioli Article. (Pl. Ex. P, ECF No. 426-7.) In its opening sentence, the brief in this action directs Defendant Ford to the parallel issues in the Musselman action, noting explicitly that it was also an asbestos case involving kidney cancer. (Pl. Surreply, ECF No. 426 at 1.) As such, Defendant was aware that Dr. Frank would be relying on the Mattioli Article for approximately six months prior to the Daubert hearing concerning Dr. Frank - and did not seek leave of Court to re-depose Dr. Frank concerning this article. See Pennypack Woods, 559 F.2d at 904-05. There is no dispute that the subject of the study is of direct relevance to the issues presented in this action - and that its nature as medical, scientific evidence regarding the potential cause of Plaintiff's illness renders it of great significance in this action. See id. at 905. Konstantopoulos, 112 F.3d at 720; Dudley, 555 F.2d at 99. Moreover, the Court notes that there is no indication that Plaintiff acted in bad faith in failing to identify this article in the fairly lengthy list of articles upon which Dr. Frank's report states he will base his testimony. See Pennypack Woods, 559 F.2d at 904. Therefore, the Court will permit Dr. Frank to rely upon the Mattioli Article in providing testimony in this action - despite the fact that he failed to timely identify it in his written report, as required by Rule 26. See Fed. R. Civ. P. 26(A)(2).

b. Reliance by Dr. Bralow

In his report, Dr. Bralow cited to only two articles: (1) an article by Mandel and McLaughlin entitled "International Renal Cell Cancer Study Part IV, Occupation," and (2) an article by Oda and Machinami published in the International Journal of Cancer, which he summarized as "suggest[ing] that with regards to the epidemiology of renal cell carcinoma, the big issue is exposure of patients to occupational hazards." (ECF No. 430-1 at 4.) At the hearing, Dr. Bralow explained that he had intended to cite to the Mattioli Article instead of the Oda and Machinami article - but that he confused the two because of similar author names and mistakenly cited Oda and Machinami. The Court has reviewed the two potential Oda and Machinami articles at issue (as two were contained in the same volume of the journal at issue, and were provided by counsel at the hearing) and has confirmed that the description of the Oda and Machinami article set forth in Dr. Bralow's report actually matches the substance of the Mattioli Article - and does not match the substance of either Oda and Machinami article. Specifically, the Mattioli Article addresses the role of occupational exposures in the occurrence of renal cell cancer, while neither of the articles by Oda and Machinami address that issue. As such, the Court accepts Plaintiff's contention that Dr. Bralow intended to cite to Mattioli in his written report and that the failure to due to so was simple oversight - with no indication of bad faith or sudden change of strategy on the part of Dr. Bralow or Plaintiff's counsel. See Pennypack Woods, 559 F.2d at 904; Fashauer, 57 F.3d at 1287.

Moreover, the Court notes that, given that the summary provided by Dr. Bralow of the article at issue did not match the substance of either Oda and Machinami article, Defendant had reason to discover that an error had been made. See Pennypack Woods, 559 F.2d at 904-05. In fact, the parties acknowledged at the hearing that there was correspondence between counsel after Dr. Bralow's deposition discussing the fact that the article had been misidentified. In light of the fact that the Mattioli article was provided by counsel for Plaintiff on September 17, 2014 (albeit somewhat late in the action) in connection with Defendant Ford's motion to preclude Dr. Frank from testifying - and that the title and substance of the article correspond with the description by Dr. Bralow of the article misidentified in his report, Defendant had reason to discover that this was the

article Dr. Bralow intended to cite. Id. Nonetheless, counsel for Defendant Ford never sought leave of Court to re-depose Dr. Bralow - and did not file a motion to compel production of the article. Id. Once again, the Court notes that there is no dispute that the subject of the study is of direct relevance to the issues presented in this action - and that its nature as medical, scientific evidence regarding the potential cause of Plaintiff's illness renders it of great significance in this action. See id. at 905. Konstantopoulos, 112 F.3d at 720; Dudley, 555 F.2d at 99. For these reasons, the Court will permit Dr. Bralow to rely upon the Mattioli Article in providing testimony in this action - despite the fact that he did not identify it in his written report, as required by Rule 26. See Fed. R. Civ. P. 26(A)(2).

2) Plaintiff Leroy Mortimer's Deposition Transcript

The parties do not dispute that Defendant Ford was present at the deposition of Plaintiff Leroy Mortimer. It is common sense that a Plaintiff's case (including his expert testimony) will rely upon a Plaintiff's own deposition testimony. As such, the Court cannot conclude that Defendant Ford would be surprised or prejudiced by either of Plaintiff's experts relying upon Plaintiff's deposition testimony in providing testimony in this action - despite the fact that the experts may not have specifically identified Plaintiff's deposition testimony as a basis for their opinions when preparing their written reports. See Pennypack Woods, 559 F.2d at 904. It is indisputable that Plaintiff's own testimony regarding his exposures to asbestos from Defendant's products is crucial evidence in this action. As such, it would be prejudicial - and contrary to common sense - to preclude Plaintiff's experts from relying on and discussing this evidence in providing their testimony in this case. See id. at 905; Konstantopoulos, 112 F.3d at 720; Dudley, 555 F.2d at 99. Moreover, the Court notes that there is no indication that Plaintiff (or his experts) acted in bad faith in failing to specifically list Plaintiff's deposition testimony as a basis for the experts' opinions. See Pennypack Woods, 559 F.2d at 904. Therefore, the Court will permit Plaintiff's experts to rely upon this evidence in providing testimony in this action.

3) Data Re: Ford Brake Asbestos Dust Levels

The parties do not dispute that Defendant Ford compiled the data at issue regarding the emission of asbestos dust from its brakes, and that it provided this data to Plaintiff during

It is further **ORDERED** that Defendant Ford Motor Co. has until **May 29, 2015** to re-depose Dr. Frank and Dr. Bralow in light of this Order. Following the depositions, Defendant Ford and Plaintiff are **ORDERED** to submit Findings of Fact and Conclusions of Law by **June 22, 2015.**

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

---

the course of discovery in this action. As such, the Court cannot conclude that Defendant Ford would be surprised or prejudiced by either of Plaintiff's experts relying upon this data in this action - despite the fact that the experts may not have specifically identified it as a basis for their opinions when preparing their written reports. See id. at 904. Moreover, it is clear that this data may constitute crucial evidence for establishing causation in this action and for allocating potential liability across defendants. As such, it would be prejudicial to preclude Plaintiff's experts from relying on and discussing this evidence in providing their testimony in this case. See id. at 905; Konstantopoulos, 112 F.3d at 720; Dudley, 555 F.2d at 99. Moreover, the Court notes that there is no indication that Plaintiff (or his experts) acted in bad faith in failing to specifically list this important and Defendant-provided data as a basis for the experts' opinions. See Pennypack Woods, 559 F.2d at 904. Therefore, the Court will permit Plaintiff's experts to rely upon this evidence in providing testimony in this action.

E. Conclusion

Plaintiff's motion for reconsideration is granted, and Plaintiff's experts will be permitted to rely upon all of the materials at issue addressed herein.