Zundel v. Amerilure, Inc., et al.
C.A. No. 2281-CV-02145

Orders on Motions in Limine[1]

1. Plaintiffs' No. 2 Re: Dodson Analysis

DENIED.

Plaintiffs' contention that they are prejudiced because they have learned of Dr. Dodson's findings so close to trial is disingenuous. The Court understands that plaintiffs were aware of the results of Dr. Dodson's testing, generally, no later than February, 2024, six months before trial. Yet the plaintiffs not only took no action to obtain Dr. Dodson's report, they actively avoided obtaining it. The Court does not take seriously plaintiffs' claim that they were trying to avoid violating BMP's work product privilege themselves: plaintiffs could have filed a Motion to Compel BMP to turn over the report, as Cimbar did; instead they opposed Cimbar's Motion to Compel, reflecting an interest in keeping the report concealed. Further, plaintiffs unreasonably interpreted the Court's recent order that BMP turn the report over to "counsel for Cimbar" as meaning they were not also entitled to see the report. At the time the order was issued, the Court reasonably presumed that the plaintiffs had already seen the report; if there was any confusion on the plaintiffs' part, they could have readily contacted the Special Master for clarification. If the plaintiffs have been prevented from marshaling evidence to refute Dodson's findings at trial, it is of their own doing.

Further, plaintiffs do not have standing to raise a work product objection to admission of Dodson's findings, as Dodson was not their expert.

As Dodson's findings are hearsay, they may not be raised on Cimbar's direct examination of its experts. The findings may be raised on cross-examination of the plaintiffs' experts as "data not in evidence [that] are independently admissible in evidence …" (Rule 703), as the findings would be admissible if Dr. Dodson were to testify in this case.

As a corollary to this Order, the Court ALLOWS plaintiffs' cross-request that Cimbar produce any written findings of its consultant who tested another part of Mr. Zundel's tissue. As Cimbar states that no "report" was prepared, the Court orders that Cimbar produce whatever record the consultant made to record the results of his/her testing. The record shall be produced no later than close of business on August 14, 2024.

2. Plaintiffs' No. 6 Re: BAP1.

Although it is unclear how (or even if) defendants' experts will reference BAP1, the Court is inclined to preclude such reference, as there is no evidence that plaintiff Zundel has the BAP1 gene and therefore such a reference would be irrelevant.

[1] Motions that were either withdrawn, or resulted in a Stipulation between the parties, are omitted from this Order.

3. Plaintiffs' No. 10 Re: Talc Mines Not at Issue

Plaintiffs seek to preclude reference to articles regarding mesothelioma/mortality rates of workers in mines located in countries other than China, where the mine that provided the talc at issue in this case was sourced, and which do not include mines where mesothelioma rates were much higher.

Cimbar agrees to forego such references if plaintiffs do not reference studies of talc from mines in other countries, as well. Plaintiffs were ambiguous as to whether they were willing to do so.

The Court reserves action on this motion.

4. Cimbar's No. 3 Re: Dr. Rosner

ALLOWED.

Rosner is an expert in the talc industry's knowledge about the hazards of asbestos, and its testing methods for asbestos up through the 1970s. Apparently he was provided material relating to modern-day testing methodologies for purposes of this case, which he reviewed briefly prior to his testimony, and opined that the industry's methods for testing for asbestos have not improved in the last 50 years. He is proffered to testify about the "evolution" of testing methods, and to provide "historical context" for the development of testing methods.

As an initial matter, Rosner does not appear to be sufficiently conversant in methodologies used during the time period relevant to this case (2013-2014) to proffer expert opinion on how far the industry's methods have come (or not come) since the 1970s.

More significantly, the "evolution" of testing methodologies, and Rosner's opinion that they have not evolved much, is not probative of an issue in this case. Cimbar does not dispute that asbestos was a known carcinogen as of 2013-2014; nor is there dispute that the industry was aware that some talc contains asbestos, since Cimbar tested its materials for the mineral. The adequacy of that testing is very much in dispute, but it is Dr. Longo who is proffered to testify on the adequacy of Cimbar's testing, not Rosner. Rather, it appears that Rosner is proffered for the purpose of showing that the talc industry, generally, has resisted advancements in testing methods. As stated above, his qualifications on this topic are questionable, but more significantly, this testimony does not bear sufficient relevancy *to the issue in this case* to justify either the time it will take to present it, or the prejudice it will cause Cimbar.

To the extent plaintiffs are willing to limit Rosner's testimony to the development of testing methods up through the 1970s, the Court fails to see the relevance of such evidence to this case, at all.

5. Cimbar's No. 4 Re: Madigan

ALLOWED.

Dr. Madigan has opined that there are an insufficient number of people who have undergone talc pleurodesis to reliably study whether the procedure is a cause of mesothelioma – a concept he refers to as "a lack of statistical power." He is proffered to refute industry studies that apparently show no connection between the procedure and the disease.

However, in analyzing whether a sufficient number of subjects exist to conduct a reliable study, Madigan excluded all subjects who already suffered from cancer when they underwent the procedure. Apparently, a significant number of patients who undergo the procedure do have a pre-existing cancer. Madigan does not explain why he excluded these subjects, only stating that he consulted with another scientist who agreed that "it made no sense" to include such subjects. The Court infers that Madigan believes that those who already have cancer do not tend to live long enough to be viable study subjects. Cimbar contends that, by excising a large number of study subjects based on the fact of pre-existing cancer, Madigan has artificially created the reduced study pool with which he finds fault.

Madigan has not shown that his method of excluding a certain category of patients is peer-reviewed, generally accepted in the scientific community, or otherwise scientifically sound. It appears to be an artificial construct designed to reach a certain result, and is therefore not reliable. The Court does not deem this to be a matter for cross-examination, but, rather, a matter to be addressed by the Court in its gatekeeper capacity.

6. Cimbar's Nos. 3, 4 and 12 Re: Drs. Brody, Moline, and Abraham

DENIED.

To the extent Cimbar challenges these witnesses because their opinions rely on Dr. Longo's findings, see the ruling on Cimbar's Nos. 5 and 6, below. Cimbar withdrew its objection based on issues raised by the shortened latency period, reserving those arguments for cross-examination. Cimbar's objection regarding cleavage fragments may be addressed on cross-examination.

However, as discussed at the Final Trial Conference, these experts will not be permitted to give cumulative testimony.

7. Cimbar's Nos. 5 and 6 Re: Dr. Longo

DENIED.

Longo's testing methods, while modifying standard methodologies in some ways, have been accepted in the relevant scientific community and in numerous other courts. Moreover, Cimbar does not explain how Longo's modifications might create a false finding of asbestos.

The fact that Longo did not test the precise talc at issue, or the batch where that talc came from, does not render his opinion inadmissible. Longo relies on circumstantial evidence to link the 2016 talc he tested to the 2014 talc that was used – i.e. the talc he tested was sourced from mines in the same area as the subject talc, and testing of these mines showed asbestos at a rate of nearly 100%, during a relevant time period. Longo's inference is not unreasonable, and Cimbar can challenge it on cross-examination.

8. Cimbar's No. 7 Re: Post-Exposure Conduct

DENIED.

Cimbar does not identify any specific evidence it seeks to exclude, and the Court cannot divine from the papers what evidence is at issue; thus the Court cannot determine whether the unidentified evidence is or is not relevant to some issue in this case.

9. Cimbar's No. 16 Re: B1 Talc

Cimbar seeks to preclude reference to its "B1 talc" that was mined in Pakistan. At deposition, Cimbar's corporate representative testified that the talc had tested positive for asbestos, and that to his understanding, the talc was processed and sold for use in plastic products without warning labels.

Plaintiffs seek to introduce this evidence to refute Cimbar's anticipated contention that it has always acted responsibly and in the interests of safety when it comes to asbestos.

Cimbar's contention that the testimony of the corporate representative was inaccurate, because he was not, and could not be expected to be, prepared to answer a question on this topic, can be addressed through Cimbar's questioning of the witness, or presentation of a different witness.

However, the Court cannot determine whether the evidence is merely inadmissible character evidence, or is admissible for some other purpose, until it sees more evidence at trial, and reserves ruling on this motion.

10. Cimbar's Nos. 17, 18, 20 Re: Lewin Reports; Other Diseases; Johnson & Johnson

Rulings on these motions are reserved until the plaintiffs have identified what evidence they intend to submit with respect to these matters, and how such evidence is relevant to this case. Plaintiffs may not reference any matters raised in these motions without receiving a ruling from the Court on Cimbar's objections.

11. Cimbar's No. 19 Re: Interagency Working Group

It is anticipated that Cimbar will challenge the testing methodologies used by Dr. Longo. As such, Longo may reference the IWG's "White Paper" during cross-examination, to the extent the methods suggested in the White Paper were used by Longo to perform the testing in this case.

If Cimbar challenges Longo's testing methods through its own expert, plaintiffs may reference the White Paper on their cross-examination. If Longo's methods differed from those suggested by the White Paper, Cimbar may raise that in response.

12. Cimbar's No. 21 Re: Gordon Article

The Court reserves ruling on this motion to hear argument from counsel. While the Court does not perceive the relevance to this case of the findings that "Cashmere Bouquet" contained asbestos, and that this asbestos was released into the air upon use, it appears that the Gordon article may support the plaintiffs' contention that the methods used by Cimbar to test its talc are not sufficiently powerful to detect trace amounts of talc.

Dated: August 12, 2024

/s/Jackie Cowin
Jackie Cowin
Justice of the Superior Court