

Zundel, CA No. 22-0285. Ruling on United Minerals and Properties, Inc., d/b/a Cimbar Performance Minerals' (Cimbar) Motion to Compel Results of Tissue Digestion Performed at the Request of Boston Medical Products, Inc. (BMP).

Cimbar seeks to compel former defendant BMP to produce the results of a tissue digestion study regarding Plaintiff Bryce Zundel's tissue that was performed at the direction of Dr. Ronald Dobson, BMP's expert. Both BMP, and later, Cimbar were provided with tissue from St. Mark's Hospital removed from Mr. Zundel just prior to his first talc pleurodesis procedure in 2014. Cimbar had requested that BMP agree to co-retention of BMP's expert, but no formal agreement to do so was ever reached. Apparently, Cimbar's counsel learned from BMP's counsel that Dr. Dodson had identified a type of asbestos, Libby amphibole asbestos ("LAA") in the one-third portion of Mr. Zundel's tissue specimens provided to BMP, although BMP in its opposition to the motion to compel contends that it has never shared actual test results and the details surrounding the testing process. In any event, BMP refused to share the report after the case against it was dismissed with prejudice, and advised Cimbar that there was no tissue left from BMP's share of the specimen.

LAA is claimed to be a type of asbestos associated with vermiculite that was mined near Libby Montana and used as a soil additive for farming and in residential insulation. The Plaintiffs maintain and Mr. Zundel has testified that he was not aware of any other circumstances where he was exposed to asbestos other than during the talc pleurodesis procedure, but he has also testified that he lived and worked on a farm until approximately age 17 and performed occasional residential remodel work.

BMP has opposed the motion to compel claiming opinion work product of a consulting expert. Such work product may only be disclosed upon a showing of exceptional circumstances. See *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 915 (2009); Mass. R. Civ. P. 26(b)(4)(B). Plaintiffs too oppose the motion to compel relying in part on the assertion of work product. They, however, have no standing as Dr. Dobson was not their expert. Nevertheless, at least one court has noted that "[s]uch exceptional circumstances might exist where the settling party's expert has a unique expertise which may not be readily available to other non-settling parties, or where the settling party's expert participated in tests which cannot be replicated by new experts." *Wolt v. Sherwood*, 828 F.Supp. 1562, 1568 n.18 (D. Utah 1993) (emphasis added).

The opposing parties also argue the absence of exceptional circumstances because Cimbar had access to tissue from the same specimen. While that is accurate, it is not the same tissue, and the tissue tested by Dr. Dobson is unavailable due to destructive testing. Cimbar's testing of its share of the specimen did not reveal the presence of LAA.

The testing results from BMP's expert would only be potentially relevant if Plaintiffs argue at trial that Mr. Zundel had no known asbestos exposure prior to the pleurodesis procedure. It is assumed that they would not relinquish that argument, but if they wish to do so, disclosure of the Dobson material should be denied.

The Special Master concludes that exceptional circumstances are present here, and that production of limited parts of Dr. Dobson's report should be produced to Cimbar to minimize the

intrusion into the work product of BMP's consulting expert. Accordingly, BMP may redact those portions of the report contains the mental impressions, conclusions, and opinions of Dr. Dobson. Accordingly, it is hereby **ORDERED** that the motion to compel is **Allowed, in part**, and BMP shall be permitted to redacted report to the extent that it discloses, as characterized by Cimbar, only "factual assertion, i.e. what was tested and by what means." This ruling does not suggest any determination on the ultimate admissibility of the disclosed material at trial. Nor, shall the production of the redacted report provide a basis to delay the trial, given the serious prejudice to Mr. Zundel, whose case has exigent status. Given that the trial is scheduled to commence on August 19, 2024, production of the redacted report shall be made no later than August 2, 2024.

While the parties have the right to seek review of the Special Master's Ruling per PTO-9, if such is sought, it must be done promptly so as to not delay the commencement of trial.

Hon. Kenneth J. Fishman (Ret.)

Special Master, SMAL