LitigationWatch: BENZENE

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TRACKING CASE NEWS AND DEVELOPMENTS IN BENZENE AND RELATED LITIGATION

IN THIS ISSUE:

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New Study Focuses On Benzene Biomarkers – Will Results Impact Litigation?

By Patrick S. Schoenburg and Ranjan A. Lahiri of Wood, Smith, Henning & Berman LLP

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In September 2007, the University of California announced that it had been awarded a $4.7 million grant from the National Institutes of Health to study the biological effects of exposure to benzene and other substances. In particular, the study will map out adducts – compounds produced by the body when proteins react with chemicals – and their relationship to exposure to benzene found in gasoline, cigarettes and other sources. The study will be conducted by a newly created Center for Exposure Biology at the UC Berkeley campus.

The study of adducts as a biomarker[1] is described by the researchers as a more long-term, stable indicator of exposure than direct measurement of benzene in the blood, which is only useful for determining recent exposures. The researchers will examine both individuals with leukemia and healthy individuals to determine the presence of such adducts.

The purpose of this study is to improve treatment and disease detection. But for attorneys, such studies raise other issues. Specifically, would the development of a widely available medical test that can determine long-term exposure to benzene have a significant impact on toxic tort claims?

Current Means Of Demonstrating Exposure

The federal *Reference Manual On Scientific Evidence* (2nd Ed. 2000) states that there are three ways of demonstrating exposure in the context of toxic tort litigation: (1) mathematical modeling; (2) direct measurements of the medium involved, e.g., air, water, food or soil; and, (3) biological monitoring, such as blood tests or urinalysis. *Id.* at p. 424.

Currently, mathematical modeling is by far the most common means by which plaintiffs demonstrate exposure. However, modeling is only as accurate as the data upon which it is based and is easier to challenge than environmental or biological testing. Air monitoring for the presence of benzene is not widespread and even when it is conducted, the alleged exposure may have taken place many years in the past, making it likely that the data is either no longer available or is without an evidentiary foundation for its introduction in court. In contrast, if biomarkers for long-term exposure to benzene could be identified through a reliable, readily available medical test, they could become an important source of evidence in benzene exposure litigation.

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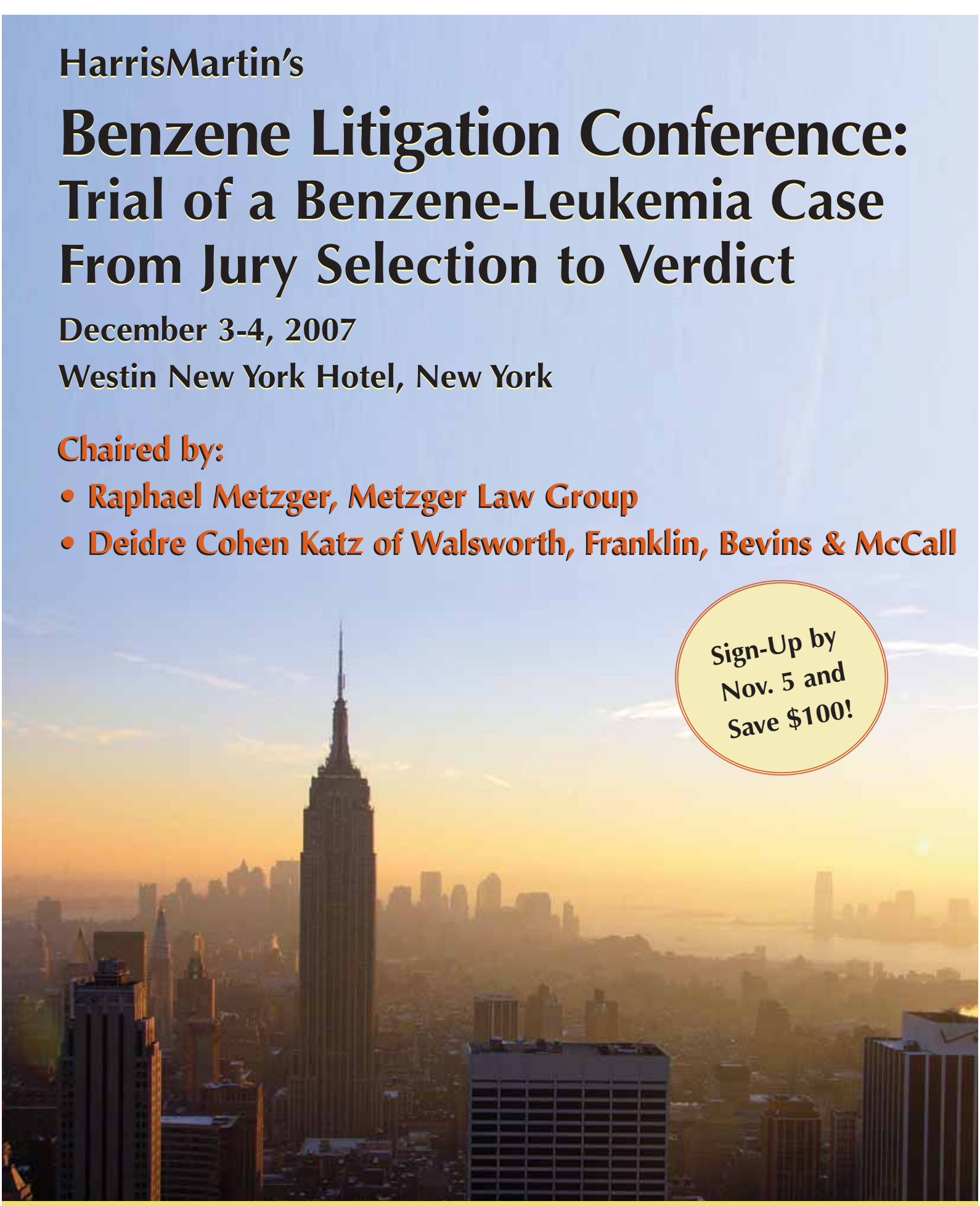

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According to the Agency for Toxic Substances and Disease Registry (ATSDR), a unit of the United States Department of Health and Human Services, medical tests currently exist which demonstrate benzene exposure.[2] These include measuring benzene in both the breath and the blood. However, the ATSDR notes that both tests are only effective when done shortly after exposure.

Metabolites are also recognized by the ATSDR as potential biomarkers of benzene exposure. Following exposure, certain benzene metabolites, specifically S-phenylmercapturic acid, can be identified in urine.[3] Although the ATSDR describes the presence of this metabolite as a sensitive indicator of benzene exposure, it is effective only if testing is done shortly after exposure. It is not an absolute indicator, however, and it does not necessarily reflect the level of exposure because this metabolite may be present in urine due to sources other than benzene.

Evidence of an alleged exposure to an injury-causing substance is an element of the plaintiff's case in all toxic tort litigation. This requirement is reflected in both federal cases following the *Daubert* standard for the admissibility of scientific evidence, *see e.g., Wright v. Willamette Industries* (8th Cir. 1996) 91 F.3d 1105, 1106, as well as state courts which still follow the criteria first set forth in *Frye v. United States* (1923) 293 F. 1013. *See, e.g., Lineaweaver v. Plant Insulation, Co.* (1995) 31 Cal. App. 4th 1409.

Because the current medical tests for benzene exposure are only effective to demonstrate recent contact with benzene, they have rarely played a role in litigation. The latency period for benzene-induced leukemia is normally estimated to be between five and 15 years after the date of first exposure.[4] Accordingly, so-called "benzene leukemia" cases by definition involve chronic exposure. The current short-term tests that directly measure the presence of benzene in the body are of no value in this context.

> Because [biomarker] testing has not been routine or applied to large populations of both healthy and diseased individuals, it has yet to become part of benzene litigation.

As a result of the current lack of an easily identifiable biomarker, benzene litigation often proceeds without any direct evidence that a specific individual has experienced a harmful level of exposure. Instead, plaintiffs often rely on estimates of exposure based on factors such as the presence of benzene-containing products in their workplace, the amount of benzene in such products, the duration and manner in which such products were used, the size of the work area and existing ventilation systems and whether personal protective devices were utilized while the products were handled.

The problem with this approach is that it depends on circumstantial evidence, which is easily challenged. The result is that there is no bright line test for whether a model is sufficiently detailed to be allowed into evidence. This is illustrated by two federal district court decisions. In *Edwards v.Safety-Kleen Corp.* (S.D. Fla. 1999) 61 F.Supp. 2d 1354, the testimony of Dr. Melvyn Kopstein regarding his estimates of the level of benzene exposure experienced by the plaintiff were excluded by the Court because of a lack of certain supporting data and because, in the Court's view, Dr. Kopstein's methodologies were not generally accepted in the relevant scientific community. In contrast, in *Wicker v. Consolidated Rail Corp.* (W.D. Penn. 2005) 371 F.Supp. 2d 702, the Court allowed testimony regarding estimated exposure levels by the same Dr. Kopstein, notwithstanding concerns about a lack of certain supporting data.

Another approach that has been used to try to demonstrate that a given individual has developed leukemia due to benzene exposure is to focus on the resulting genetic abnormalities. The scientific literature recognizes that the loss of all or part of chromosomes 5 and/or 7 have been associated with occupational exposure to benzene or benzene-containing solvents.[5] However, while this pattern of genetic damage is potential evidence of benzene-induced leukemia in a specific individual, it has not been established that benzene exposure is the only cause. Likewise, the value of genetic markers is a constant source of debate in cases that do not involve damage to these specific chromosomes.

The Use Of Biomarkers In Other Toxic Tort Cases

Attempts have been made to use biomarkers as evidence of exposure in other types of toxic tort litigation. For example, in a silicone breast implant case, a plaintiff's causation expert relied, in part, on studies showing biomarkers of silicone exposure in women with implants. However, that opinion was deemed unreliable under *Daubert* because of improper scientific methodology and because the supporting theories had not been tested and were not generally accepted by the scientific community.[6] In cases involving second-hand smoke, courts have relied on scientific evidence regarding biomarkers and the presence of nicotine metabolites in an individual's body.[7] It is widely accepted that there are certain biomarkers that indicate exposure to asbestos.[8] And

the issue of biomarkers has also been addressed in cases involving exposure to mold and other allegedly toxic substances.[9] Benzene biomarkers can be expected to play a similar role in litigation.

The Potential Impact Of Benzene Biomarkers On Litigation

A widely available test that reflected long-term benzene exposure through the presence of adducts could have a potentially significant impact on litigation. While the source of exposure may still be challenged, the fact of exposure would be established. The current study at UC Berkeley will examine both sick and healthy individuals, perhaps determining baselines or expected levels of adducts in the human body.

Prior studies have established that certain adducts are biomarkers of benzene exposure.[10] However, because such testing has not been routine or applied to large populations of both healthy and diseased individuals, it has yet to become part of benzene litigation. To the extent that such testing becomes readily available and is deemed reliable, however, it will have significant evidentiary and strategic consequences.

The existence of a test for a reliable biomarker certainly will act as a screening device, eliminating claims by those whose test results fail to reflect exposure above baseline levels. On the other hand, plaintiffs whose test results reflect significant prior exposure will have objective proof of a *prima facie* element of their claim. Absent evidence of alternative exposures, such plaintiffs will also have a strong argument that their contact with benzene occurred in an occupational setting. Plaintiffs who are not tested will be questioned as to why they refused, with the implication that they are concerned that the results will discredit their claims.

The availability of evidence of a biomarker may also eliminate much of the focus on modeling. If a plaintiff has evidence that they worked with a benzene-containing product and they have biological proof of significant prior exposure, the expensive process of preparing an exposure model may appear to be redundant and unnecessary.

However, even if testing for a benzene biomarker becomes widespread, it will not eliminate all disputes raised by the need to prove exposure in toxic tort litigation. The significance of the presence of adducts or other biomarkers at levels close to the baseline or expected levels will be contested. Some plaintiffs may have alternative exposures, such that those defendants linked to the workplace may be able to argue that the contact with benzene occurred elsewhere. And while plaintiffs with biological proof of exposure who lack such alternative contact with significant levels of benzene may be able to trace their exposure to the occupational setting, there may still be controversy as to what products were present, in what amounts and who was responsible for their development and sale.

Footnotes

[1] A biomarker is defined as a detectable cellular or molecular indicator of exposure, health effects, or susceptibility, which can be used to measure the absorbed, metabolized, or biologically effective dose of a substance, the response to the substance including susceptibility and resistance, idiosyncratic reactions, and other factors or conditions.

Stedman's Medical Dictionary 28th Edition, as quoted on www.webmd.com.

[2] Division of Toxicology and Environmental Medicine Benzene ToxFAQ's, CAS # 71-43-2 (September 2005)

[3] Another study suggests that the presence of t, t-muconic acid in urine is a biomarker of benzene exposure. T. Panev, T. Popov, T. Georgieva, D. Chohadjieva "Assessment of The Correlation Between Exposure to Benzene and Urinary Excretion of T, T-Muconic Acid In Workers From a Petrochemical Plant" *International Archives of Occupational and Environmental Health*, Vol. 75, Supp. 1, pp. 97-100 (July 2002)

[4] ATSDR, *Benzene Toxicity: Physiologic Effects* (available at http://www.atsdr.cdc.gov/HEC/CSEM/benzene/physiologic_effect.html)

[5] W.S. Stillman, M. Varella-Garcia, J.J. Gruntmeir and R.D. Irons "The Benzene Metabolite, Hydroquinone, Induces Dose-Dependent Hypoploidy In A Human Cell Line" *Leukemia*, Vol. 11, pp. 1540-45 (1997)

[6] *Allison v. McGhan Med. Corp.* (11th Cir. 1999) 184 F.3d 1300, 1313. *See also Barrow v. Bristol-Myers Squibb Co.* (M.D. Fla., Oct. 29, 1998, No. 96-689-CIV-ORL-19B) 1998 U.S. Dist. LEXIS 23187, 1-127, judg. entered (M.D. Fla., October 29, 1998) 1998 U.S. Dist. LEXIS 22041 (Plaintiff's expert advocated "the use of biomarkers to determine those persons whose immune systems are activated consistently over a long period of time. Thus, he contends, the presence of auto-antibodies may not mean a person has a systemic or other disease, but it does mean that there is stimulation of the antibody-forming apparatus and the adjuvant effect may be present." However, the court eventually found that plaintiff had failed to carry her burden of proving by a preponderance of the evidence that she had systemic silicone related disease.)

[7] *See Schwab v. Philip Morris USA, Inc.* (D.N.Y. 2006) 449 F. Supp. 2d 992, 1324-1325 (finding that "[e]xtensive research into the relationship between research of biomarkers of nicotine in humans and FTC tar and nicotine yields demonstrates that lower tar cigarettes do not provide a reduction in harm....") *See*

also McIntyre v. Robinson (D. Md. 2000) 126 F. Supp. 2d 394, 398, footnote 6 and 7 (in a case involving occupational exposure to cigarette smoke, plaintiffs produced urine testing that revealed levels of continine, " the most widely accepted biomarker for integrated exposure to both active and passive smoking and ETS by virtue of its longer half-life than nicotine in bodily fluids.")

[8] *See e.g.*, *Quickel v. Lorillard, Inc.* (D.N.J., Mar. 31, 1999, Civ. A. No. 95-5255) 1999 U.S. Dist. LEXIS 23453 ("…as both proposed experts here have agreed, there are objective biomarkers of asbestos-related exposure that show up on the lungs, including asbestosis, bilateral pleural plaques, and pleural thickening.")

[9] *See Geffcken v. D'Andrea* (2006) 137 Cal. App. 4th 1298 (holding that trial court correctly excluded evidence derived from the Immunosciences mycotoxin antibody test and the IBT blood serology test because "'[t]here are currently no validated biomarkers of exposure to specific indoor fungi or their toxins.'") *See* also *Goewey v. United States* (4th Cir., Jan. 30, 1997, No. 95-2257) 1997 U.S. App. LEXIS 1528 (conc. & dis. opn. of Butzner, J) (finding that summary judgment should not have been granted in favor of defendant, in part, because testimony by plaintiff's expert who found biomarkers for toluene in plaintiff raised a triable issue of material fact as to causation).

[10] K. Yeowell-O'Connell, N. Rothman, M.T. Smith, R.B. Hayes, G. Li, S. Waidyanatha, M. Dosemeci, L. Zhang, S. Yin, N. Titenko-Holland and S.M. Rappaport "Hemoglobin and Albumin Adducts Of Benzene Oxide Among Workers Exposed To High Levels Of Benzene" *Carcinogenesis*, Vol. 19, pp. 1565-1571 (1998)

About the Authors

Patrick S. Schoenburg

Patrick Schoenburg has successfully represented his clients at trial, arbitration and in the negotiation of contracts, license agreements and other transactions. He has particular expertise in defending toxic tort and mold exposure cases and has developed innovative strategies for attacking questionable scientific evidence. Patrick's articles have been published by the ABA, HarrisMartin, CEB and Mealey's. He is a co-author of CEB's guidebook for handling mold claims in California. Following graduation from law school at the University of Southern California, where he was a member of the Law Review, Patrick served as a law clerk to the Hon. A. Andrew Hauk of the United States District Court for the Central District of California.

Ranjan A. Lahiri

Ranjan's practice focuses on the areas of environmental law and toxic torts. During law school, he served as Associate Editor for the San Diego Law Review and as a judicial extern for the Hon. Ruben B. Brooks of the U.S. District Court, Southern District of California. Ranjan also participated in the University of San Diego School of Law Environmental Clinic and was awarded the Professor Robert and Dolores Simmons Award for Excellence in Environmental Law Practice, Outstanding Environmental Clinic Intern, 2004. Prior to law school, he received a M.S. in Environmental Management and received the Wiley W. Manuel Award for Pro Bono Legal Services, 1999 and 2000, for his work with the San Diego Volunteer Lawyer Program.

Venue

Texas Appeals Court Finds Venue Improper in Multi-Plaintiff Benzene Lawsuit

BEAUMONT, Texas — A Texas appellate court has reversed a trial court ruling allowing a multi-plaintiff benzene case to proceed, finding that the plaintiffs have not established that each of their claims arose from the same transactions or occurrences. *Crown Central LLC, et al., v. Anderson, et al.,* No. 09-07-308 (Texas 9th Dist. Ct. App.).

In the Oct. 11 opinion, the Ninth District Court of Appeals remanded the lawsuit with instructions to transfer or dismiss the plaintiffs' claims.

Five plaintiffs and their respective spouses, all of whom claim injury as a result of exposure to benzene, filed the complaint. The plaintiffs named DuPont and 71 other defendants in the lawsuit, identifying DuPont as the defendant with a principal office in Orange County, Texas.

The trial court found that the plaintiffs each had independently established proper venue in Orange County, prompting the instant appeal.

In addressing the appeal, the appellate court noted that in order to properly establish venue, the plaintiffs had to prove that the claims arose out of the same transaction, occurrence or series of transactions or occurrences.

"Appellees provided no facts in their petition to support this allegation nor have they provided any affidavit or attachments supporting their allegation that all or a substantial part of the events giving rise to appellees' causes of action occurred in Orange County, Texas," the court opined. "Therefore, Appellees failed to meet their burden to establish venue based on this venue allegation."

The court specifically rejected the plaintiffs' main contention that since DuPont has a principal place of business in Orange County, venue was proper. The defendants had countered this argument by stating that because the complaint names multiple defendants, the claims must arise from the same transactions or occurrences.

The court agreed, stating that the plaintiffs failed to provide *prima facie* proof that their claims arose out of similar circumstances.

Noting that the plaintiffs waived their right to choose the venue when they filed their lawsuit in an improper forum, the court instructed the trial court to transfer the claims to the respective counties of the defendants' choosing.

Specifically, the court found that the claims against Dow Chemical Co., Shell Oil Co. and Shell Chemical LP should be transferred to Harris County and the claims against Berryman Products Inc., should be transferred to Tarrant County because those defendants had presented sufficient evidence that the claims belonged there.

The court further directed the trial court to either establish proper venue as to the claims against the remaining pending defendants or dismiss them.

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Opinion Ref# BEN-0710-03

Scheduling Order

Delaware Coordinated Docket to Move Forward With 5 Cases

WILMINGTON, Del. — After a meeting between both plaintiff's and defendants' liaison counsel and Delaware Judge Joseph R. Slights III, it has been determined that five cases will go forward and be worked up for trial, sources told HarrisMartin. *In re: Benzene Litigation* , NO. 06-C-BEN-1 (Del. Super. Ct., New Castle Cty.).

The meeting took place Sept. 20 in the Delaware Superior Court for New Castle County, where it was also determined that those cases not selected will be stayed.

However, the court said it would allow those defendants not named in the initial five cases, but named in other cases pending in the docket, to participate in hearings on the five selected cases.

Sources said the five cases selected were *Sengelmann* (No. 05C-07-017); *Wallin* (No. 05C-07-029); *Herring*; *Collins*; and either *Terp* or *Mathieson*.

The court also indicated its intent to release a scheduling order outlining deadlines for the cases soon.

The *Daubert* issues previously raised by the plaintiffs will be decided but it is yet unclear as to when and whether the court will require a hearing, briefing or otherwise, sources told HarrisMartin.

Present at the meeting either in person or by phone were Bill Kohburn of Simmons Cooper in Edwardsville, Ill. and Rich Saville of Saville, Evola & Flint in Alton, Ill. for the plaintiffs and Paul Bradley of Maron Marvel Bradley & Anderson in

Wilmington, Del.; James Semple of Morris James in Wilmington, Del.; Donald Reid of Morris, Nichols, Arsht & Tunnell in Wilmington, Del.; and Katherine Mayer of McCarter & English in Wilmington, Del. for the defendants.

Statute of Limitations

Plaintiffs Defend Challenge to Statute of Limitations; Defendants Oppose

BIRMINGHAM, Ala. — A benzene plaintiff who has challenged Alabama's statute of limitations says the issue is ripe for review by the state's high court because the court has yet to address the constitutional issues or prior conflicting opinions listed in her petition. *Griffin v. Troy King, Alabama Attorney General, et al.*, No. 1061214 (Ala. Sup. Ct.).

Brenda Sue Griffin claims in her Sept. 5 reply brief filed in the Alabama Supreme Court that the rejection of a similar plea by another benzene plaintiff earlier this year was issued as a "no opinion affirmance," which has no precedential value.

Griffin filed her petition with the high court on July 25, contending that Alabama's two-year statute of limitations, which begins on the date of last exposure, wrongfully precluded her from bringing a wrongful death action on behalf of her husband, David Wayne Griffin. Griffin contends that her husband's acute myelogenous leukemia and subsequent death were caused by exposure to benzene-containing products.

In September 2003, David Griffin was diagnosed with AML, succumbing to the disease on Feb. 17, 2004. Griffin notes that her husband's death occurred less than two years after his diagnosis and she filed her instant complaint on Feb. 16, 2006, less than two years after his death. A trial court, however, dismissed Griffin's complaint as untimely, prompting the instant petition.

On Aug. 15, the defendants opposed Griffin's petition, claiming that the case is not appropriate for oral argument because the state's statute of limitations is well established and the Alabama Legislature has repeatedly declined the opportunity to adopt a discovery rule.

In support of their argument, the defendants pointed to the high court's January 2007 decision in *Cline v. Ashland Inc.,* in which the court rejected a benzene plaintiff's challenges to the state's statute of limitations.

The defendants argue that the trial court was correct in dismissing Griffin's claims because she is precluded from bringing a wrongful death action since her husband would have been barred from bringing personal injury claims at the time of this death.

Additionally, the defendants claim that Griffin lacks standing to challenge the merits of that rule and even if could challenge the accrual rule, "she has offered nothing in this appeal to justify overturning the prior pronouncements of this Court, which have consistently found that the date of last exposure rule is constitutional."

"Defendants were entitled to dismissal of the claims against them because no wrongful death cause of action was created at the time of decedent's death," the defendants claim. "The statute of limitations expired on plaintiff's decedent's personal injury claim against these defendants before he died."

The defendants contend that the Alabama Supreme Court has had 13 opportunities to overturn the accrual rule outlined in *Garrett v. Raytheon Co., Inc.,* (No. 368 So. 2d 516, 517) and has declined to do so.

"This Court has repeatedly reiterated, also most recently in *Cline*, that the adoption of a discovery accrual rule is for the legislature, not this Court," the defendants said. "For the same reasons that plaintiff's constitutional challenge is due to be rejected, her plea to overturn *Garrett* and its progeny and to adopt a discovery accrual rule must also fail."

However, in her reply brief, Griffin contends that she does maintain the proper standing to challenge the state's accrual rule, contending that since she is the only person authorized by law to bring the wrongful death action, she is the only person who can challenge any provision of law that prohibits her cause of action.

Griffin also challenges the defendants' reliance on *Cline*, saying that such citation violates the Alabama Rules of Appellate Procedure, which prohibits attorneys from citing no-opinion affirmances in their arguments or briefs.

Counsel for Griffin is Robert Leslie Palmer and Gregory Andrews Cade of the Environmental Litigation Group in Birmingham, Ala. Charles T. Brant of Colom & Brant in Atlanta are also counsel for Griffin in the Georgia action.

Counsel for the defendants are George M. Walker, Katie L. Hammett, Joe E. Basenberg and S. Leanna Bankester of Hand Arendall in Mobile, Ala.; Richard Eldon Davis of Cabaniss, Johnston, Gardner, Dumas & O'Neal in Birmingham, Ala.; and Sid J. Trant, Richard H. Monk III and Hallman B. Eady of Bradley, Arant, Rose & White in Birmingham, Ala.

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Griffin Petition Ref# BEN-0708-06

Defense Response Ref# BEN-0710-01
Griffin Reply Ref# BEN-0710-02

Expert Reports/Sufficiency

Arkansas Benzene Parties Disagree on Sufficiency of Pleadings

LITTLE ROCK, Ark. — Plaintiffs in an Arkansas benzene case have opposed a motion to dismiss their claims, while several of the defendants have sought to exclude experts proffered by the plaintiffs who have yet to file their reports. *Johnese, et al. v. Ashland Chemical Inc., et al.*, No. 06-001632 (E.D. Ark.).

On Oct. 18, several defendants filed a motion in the U.S. District Court for the Eastern District of Arkansas to exclude plaintiff experts who did not provide reports, saying that of the eight experts designated by the plaintiffs, only two provided reports by the court's Sept. 10 deadline.

The defendants claim that they have only received reports for Daniel T. Teitelbaum, M.D., and Thomas A. Selders, Ph.D., CIH.

Plaintiffs Wilbert Johnese and Sharon Denise Johnese claim that Wilbert's employment at the Ameron International Facility in Little Rock, Ark., exposed him to benzene-containing products, which ultimately caused him to develop acute myelogenous leukemia (AML).

On Sept. 18, the Johneses responded to Shell Oils' motion to dismiss, saying that their lawsuit sufficiently asserts a claim for which relief can be granted.

The plaintiffs specifically argued that they are entitled to recover from Shell Oil under *res ipsa loquitur* because the doctrine allows for recovery if the defendant owes a duty to the plaintiff and if the events giving rise to the injury would not have occurred in the normal course of proper care.

The plaintiffs say that there is evidence that Shell Oil manufactured and distributed the benzene-containing products that Wilbert Johnese was exposed to and that the defendant owed a duty of reasonable care.

"At the time of sale and/or distribution of these products, the Defendants possessed superior knowledge of the dangerous propensities of the products," the plaintiffs claim. "The Plaintiffs relied on the Defenants' skill, superior knowledge and judgment to furnish a safe product. Defendants' products injured the Plaintiffs."

In a Sept. 24 notice of dismissal, the plaintiffs also voluntarily dismissed Radiator Specialty from the proceedings without prejudice.

Counsel for the plaintiffs are Carlos A. Frenandez, Che D. Williamson and Damon J. Chargois of Chargois & Herron in The Woodlands, Texas; and Mark Kell of Lampin, Kell, Fagras, Linson & Custer in St. Peters, Mo.

The defendants are represented by Sherry P. Bartley, Jeffrey L. Singleton and P. Benjamin Cox of Mitchell, Williams, Selig, Gates & Woodyard in Little Rock, Ark.; James D. Rankin III and Julie DeWoody Greathouse of Perkins & Rankin in Little Rock, Ark.; Larry J. Chilton of Chilton, Yambert, Porter & Young in Chicago; Kathryn A. Pryor of Wright, Lindsey & Jennings in Little Rock, Ark.; Gary M. Draper of Griffin, Rainwater & Draper in Crossett, Ark.; Donald H. Bacon of Friday, Eldredge & Clark in Little Rock, Ark.; Robert E. Gifford of Steptoe & Johnson in Clarksburg, W.Va.; Robert G. Bridewell of Bridewell & Bridewell in Lake Village, Ark.; Gregg R. Brown and Nancy J. Griffin of Germer, Gertz, Beaman & Brown in Austin, Texas; Robert L. Henry of Barber, McCaskill, Jones & Hale in Little Rock, Ark.; Thomas S. Streetman of Streetman, Meeks McMillan PLLC in Crossett, Ark.; Louis C. Woolf of Woolf, McClain, Bright, Allen & Carpenter in Knoxville, Tenn.; George Jay Bequette Jr. of Bequette & Billingsley in Little Rock, Ark.; Andrew C. Schirrmeister III and Jim C. Ezer of Schirrmeister, Diaz-Arrastia Brem, LLP in Houston; Charles Stanton Perry of Haynes & Boone in Houston; and Jim L. Julian of Chisenhall, Nestrud & Julian in Little Rock, Ark.

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Motion to Exclude Ref# BEN-0710-11
Response to Motion to Dismiss
Ref# BEN-0710-12
Radiator Specialty Dismissal
Ref# BEN-0710-13

Motion to Compel

Court Grants Access to Settlement Records in Prior Claims

WINSTON-SALEM, N.C. — A North Carolina federal judge has granted motions to compel, allowing two benzene defendants to seek access to settlement agreements in a previously-filed lawsuit and a workers' compensation claim. *Stromberg, et al. v. Ashland Inc., et al.*, No. 07-332 (M.D. N.C.).

In an Oct. 10 order, Judge Wallace W. Dixon of the U.S. District Court for the Middle District of North Carolina found that information relating to the two prior

settlements was relevant to the plaintiffs' instant claims.

Donald and Holly Ann Stromberg contend that Donald's work at Voith Paper Service in North Carolina as a rigger in the shipping department for nearly 10 years exposed him to a variety of organic solvents, including benzene. The Strombergs say that Donald developed myelofibrosis as a result of the exposure.

Both Ashland Inc. and Thermo Fisher Scientific Inc. filed motions to compel in August. Ashland sought answers to whether a workers' compensation claim had been settled and whether certain medical bills were paid as part of the settlement whereas Thermo Scientific requested information relating to the settlement agreement in a lawsuit filed against Granite Rock Quarry.

The Strombergs' counsel instructed the plaintiffs not to answer questions relating to either settlements, citing confidentiality agreements.

The court first addressed information sought by the defendants relating to the rock quarry lawsuit, noting that even though there was a confidentiality clause in the settlement agreement, it is still discoverable.

The court went on to say that it agreed "with defendants that the settlement agreement in the rock quarry lawsuit may be relevant to Defendants' claims of causation and damages here, given that Plaintiff Donald Stromberg alleged in the rock quarry suit that his personal injuries included contracting cancer because of the defendants' conduct in the that lawsuit."

The court ruled that the defendants could request evidence regarding Stromberg's alleged 1998 cancer diagnosis and noted that this information will most likely be in medical records and not in the settlement agreement.

"Nevertheless, if Defendants can make a showing that the claimed damages in *this* lawsuit were in fact caused, in whole or in part, by conduct off the defendants in the prior rock quarry lawsuit, then the settlement amount may be relevant to the amount of damages which Plaintiff Donald Stromberg may be entitled to recover in this lawsuit," the court found.

The court ordered that in order to protect the confidentiality of the settlement agreement, the agreement will be disclosed under a protective order.

In addressing whether the plaintiffs must produce documents relating to a prior settlement of a workers' compensation claim, the court again found that the information was discoverable. The court noted that workers' compensation benefits may set-off liability of a third-party tortfeasor.

"…I agree with Defendant that both the amount of the settlement as well as the terms of the settlement are discoverable…," the court said.

Counsel for the Strombergs are Cathy A. Williams and Michael Pross of Wallace and Graham in Salisbury, N.C.

Ashland is represented by Clayton M. Custer of Womble, Carlyle, Sandridge & Rice in Greenville, S.C. and Rachel E. Daly of Womble, Carlyle, Sandridge & Rice in Winston-Salem, N.C. Thomas Scientific is represented by M. Lee Cheney and Pankaj K. Shere of Troutman Sanders in Raleigh, N.C.

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Order Ref# BEN-0710-15
Ashland Motion Ref# BEN-0709-22
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Ashland Opposition Ref# BEN-0709-26
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Thermo Scientific Reply Brief
Ref# BEN-0710-14

Expert Disclosures

Arkansas Defendant Seeks Order Compelling Expert Disclosures

TEXARKANA, Ark. — A benzene defendant has asked the U.S. District Court for the Western District of Arkansas to order the plaintiffs to agree to a staggered schedule for disclosure of experts. *Russell, et al. v. Ashland Inc., et al.,* No. 04-4116 (W.D. Ark.).

In an Oct. 9 motion, Unocal seeks to enforce expert disclosure, saying that since the trial of the claims of Arnold Wayne and Pamela Russell were continued, they have not been able to agree on a expert disclosure schedule with the parties.

Trial was originally scheduled for Sept. 17. A scheduling order stipulated that expert disclosures due dates were to be staggered prior to trial, the defendants noted.

When the plaintiffs moved for a continuance, the defendants did not object, but asked that the expert disclosure guidelines remain the same. The court agreed, awarding the continuance, but maintaining the expert disclosure staggered deadlines.

With trial now scheduled for March 24, 2008, Unocal claims that it still has yet to reach an agreement with the plaintiffs on when those new staggered deadlines will be.

"No such commitment has been obtained from Plaintiffs' counsel and it is now critical that the Court enforce the Stipulation in order to allow Defendants adequate time to prepare this case for trial," Unocal says. "To date, Plaintiffs have never disclosed their expert reports."

In a response filed Oct. 12, the plaintiffs contend that since no new deadlines were set when the case was continued, justifying a denial of the motion.

"During the summer, defendant's counsel did ask plaintiffs to consider staggered expert disclosure, and while plaintiffs are not opposed to it, such cannot be on the schedule proposed by defendant. While this schedule is similar to the prior schedule, plaintiffs had opposed that schedule but ultimately relented in order to avoid an impasse," the plaintiffs contend.

Counsel for Unocal is Robert L. Henry III of Barber, McCaskill, Jones & Hale in Little Rock, Ark.

The plaintiffs are represented by Patrick J. Hagert and Thomas K. Neill of Gray, Ritter & Graham in St. Louis, Mo. and Carl Bush of the Bush Law Firm in Fort Smith, Ark.

Documents are Available
Call (800) 496-4319 or
Search www.harrismartin.com
Motion Ref# BEN-0710-17
Response Ref# BEN-0710-19

New Complaint

Massachusetts Refrigeration Technician Files Benzene Lawsuit

BOSTON — A Massachusetts couple has filed a benzene complaint in federal court, contending that more than 30 years of work with benzene and benzene-containing products has caused the development of acute promyelocytic leukemia. *Milward, et al. v. Acuity Specialty Products, et al.,* No. n/a (D. Mass.).

Brian and Linda Milward filed the action on Oct. 14 in the U.S. District Court for the District of Massachusetts, contending that Brian's work as a refrigeration technician required him to work with several toxins and carcinogens, including benzene.

The plaintiffs specifically contend that Brian Milward was exposed to solvents, naptha, toluene, xylene, benzene and the benzene-containing product Liquid Wrench.

"As a direct and proximate result of Brian K. Milward's exposure to benzene, Raffinate, and the other benzene-containing products set forth above, he developed Acute Promyelocytic Leukemia and other blood disorders and disease," the lawsuit says.

In the lawsuit, the Milwards invoke the discovery rule, saying they learned of the nature of the cause of the illness within three years of filing the complaint.

The Milwards assert one cause of action for negligence, claiming that the defendants "owed a duty to users of its products, breached that duty and were negligent and failed to use ordinary care by eliminating benzene in their products."

The plaintiffs are represented by James D. Gotz of Kreindler & Kreindler in Boston.

Document is Available
Call (800) 496-4319 or
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Complaint Ref# BEN-0710-18

Settlement

Parties in Texas Benzene Case Reach Settlement a Month Before Trial

MARSHALL, Texas — Just a month shy of their scheduled trial date, parties in a Texas benzene lawsuit have reached a settlement resolving the claims, according to court documents filed in the U.S. District Court for the Eastern District of Texas. *Wilson, et al. v. Rycoline Products Inc., et al.*, No. 06-286 (E.D. Texas).

In an Oct. 8 report of full settlement, Mediator James W. Knowles informed the court that continued negotiations have resulted in a full settlement with all the parties.

Charles and Laura Wilson contend that Charles Wilson was exposed to benzene while working as a printer and pressman for nearly 30 years. The plaintiffs allege that Charles' myelodysplastic syndrome developed as a result of this exposure.

On Oct. 9, the defendants filed an unopposed motion to stay the proceedings pending final settlement. Ashland Inc. says it reached a settlement with the plaintiffs on Oct. 5 after months of battles relating to document production. The order was granted on Oct. 11.

Just days prior to the settlement notice, Ashland responded to the plaintiffs' motion to exclude testimony of John Spencer, an expert witness proffered by the defendant.

In the response, Ashland refuted the Wilsons' contentions that Spencer, a industrial hygienist, would not have been qualified to testify.

"As an expert in industrial hygiene, Spencer has the relevant knowledge, skill,

experience, training and education to review and evaluate Wilson's potential exposure to benzene from work with solvents," Ashland had claimed.

In August, the plaintiffs had also claimed that Ashland was withholding documents relating to its benzene-containing products. *[See related story in the September 2007 issue of Litigation Watch: Benzene].*

According to a document filed on Sept. 26 outlining the minutes of a recent hearing, the court ordered that the parties meet and confer on a list of documents the plaintiffs identified as outstanding. Those documents, according to the court, were to be produced.

Counsel for Ashland Inc. are Ricky A. Raven, Jonathan B. Shoebotham, Kevin J. Parks and Morgan L. Gaskin of Thompson & Knight in Houston.

The plaintiffs are represented by Collen A. Clark and Keith E. Patton of Schmidt & Clark in Dallas.

Documents are Available
Call (800) 496-4319 or
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Motion to Stay Ref# BEN-0710-05
Mediator Report Ref# BEN-0710-06
Order Ref# BEN-0710-07
Spencer Motion Ref# BEN-0710-09
Spencer Response Ref# BEN-0710-08
Sept. 26 Order Ref# BEN-0710-10

Admissibility

Oral Arguments Held for Admissibility Dispute in Benzene Case

ROCHESTER, N.Y. — A New York appellate court oversaw oral arguments addressing an admissibility dispute in a benzene case on Oct. 16, sources told HarrisMartin. *Nawrocki v. The Coastal Corp., et al.*, No. CA 06-02187 (N.Y. Sup. Ct., App. Div., 4th Jud. Dept.).

The Fourth Department of the Appellate Division of the New York Supreme Court will now decide whether expert testimony proffered by the plaintiff is admissible in light of the recent high court decision in *Parker v. Mobil Corp.* [16 A.D.2d 648, 793 N.Y.S.2d 434, 2d Dept 2005]

In a June 27 reply brief, the defendants reassert their position that the controlling caselaw is that expressed in *Parker,* in which New York's highest court excluded two benzene plaintiff's experts for failure to properly quantify the alleged benzene exposure.

"According to the Court of Appeals, the 'key' to *Parker* and to the instant case is the relationship, if any, between the actual product at issue and the disease the Respondent allegedly sustained," the defendants claim. "With its decision, the *Parker* court rejected the approach advanced by Respondent's expert in this case, to wit, isolating and focusing on the alleged effects of exposure to a component of a defendant's product without analyzing the effects, if any actually exist, of exposure to the product as a whole."

The appeal stems from claims asserted by Michael Nawrocki, who claims that he was exposed to benzene during the course of his work as a part-time groundskeeper at a local school district for three years. Nawrocki also says he was exposed to benzene during 30 years of buying gas to fill lawnmowers for personal use as well. Nawrocki says his development of aplastic anemia was a result of the combined exposures.

Nawrocki named Kurk Fuel Co., Pautler Oil Service and the Coastal Corp. in his lawsuit. The defendants filed *in limine* motions to exclude medical causation testimony proffered by the plaintiff. The trial court denied the motion, prompting the appeal.

In May, the judge overseeing the appeal struck the plaintiff's response brief as untimely. The judge has since allowed the brief, sources said. *See "NY Court Strikes Plaintiff's Brief as Untimely in Medical Causation Dispute" in the May 2007 issue of Litigation Watch: Benzene.*

In their reply, the defendants say that Nawrocki cannot isolate gasoline components to which he alleges exposure.

The defendants also refute Nawrocki's contention that this case should be looked at as a benzene case, as opposed to a gasoline case, because "this case is and always has been about gasoline."

As such, Nawrocki's claims fail because there is "no evidence of a causative link between exposure to gasoline and the development of aplastic anemia," the defendants assert.

The defendants also rejected the plaintiff's contention that because he was exposed to exhaust vapors, his claims are different from those in *Parker*.

"This argument is quite a stretch since any service station employee would have been exposed to the exhaust emissions of cars and trucks that refueled at the service station," the defendants argue. "Yet, [plaintiff's expert] does not cite any scientific study or literature that demonstrates that any gasoline station attendant or any worker exposed to either gasoline vapors or gasoline exhaust emissions has ever developed aplastic anemia as a result of his or her exposure to gasoline, gasoline vapors, or gasoline exhaust during his or her employment."

The brief was filed by Gregory J. Rodriguez of Thorn, Gershon, Tymann & Bonnani in Albany, N.Y., and Louis C. Woolf and Howard E. Jarvis of Woolf,

McClane, Bright, Allen & Carpenter in Knoxville, Tenn.

The plaintiff is represented by Richard G. Berger of Buffalo, N.Y.

Documents Are Available
Call (800) 496-4319 or
Search www.harrismartin.com
Reply Brief Ref# BEN-0707-06
Motion for Extension
Ref# BEN-0705-16
Brief Ref# BEN-0704-07

Admissibility

Miss. High Court Reverses $15.5 Million Verdict in Chemical Injury Case

JACKSON, Miss. — The Mississippi Supreme Court has reversed a $15.5 million verdict in a chemical exposure case, remanding the case for a new trial based on the finding that the trial court erred in allowing testimony of several plaintiff experts. *E.I. Dupont de Nemours and Company v. Strong, et al.,* No. 2006-CA-01005-SCT (Miss. Sup. Ct.).

In the Oct. 18 opinion, from which three of the Supreme Court justices dissented, the majority did, however, decline to extend the "frequency, regularity, proximity" test to toxic exposure cases other than those involving asbestos claims.

Glen and Connie Strong first filed their lawsuit along with 37 other plaintiffs who claimed that their various health problems resulted from exposure to titanium dioxide, which was manufactured at a DuPont plant located near the Strongs' residence. The Strongs were the first of the claims to proceed to trial, after which a jury awarded $14 million in compensatory damages and $1.5 million in loss of consortium damages. DuPont appealed, assessing several assignments of error.

The Supreme Court first rejected DuPont's contention that the trial court wrongfully struck nine of the defendant's witnesses, saying that it had already determined the issue when it ruled on DuPont's emergency petition for interlocutory appeal, which sought reversal of the ruling.

The high court did find, however, that the trial court erred in allowing the affidavits of Strong's treating physicians, Dr. Sergio Giralt and Dr. Donna Weber, several days after trial began.

"The affidavits from Drs. Giralt and Weber, which altered their deposition testimony, clearly were not furnished to DuPont sufficiently in advance of the trial to provide DuPont with a fair opportunity to prepare to meet the affidavits," the court found. "Nor did they provide DuPont notice of their intention to offer the statement and the particulars of the affidavits….The Strongs attemped, several days into trial, to use affidavits to tailor the doctors' deposition testimony, thereby adversely affecting a substantial right of DuPont to have sufficient advance notice of the information contained in the affidavits before trial."

The high court also found that James N. Tarr, the plaintiffs' air modeling expert, did not proffer testimony that was specific to Mississippi, DuPont's plant in Mississippi or DuPont, therefore rendering it improper.

"From Tarr's line of testimony, the jury easily could have been misled into believing that DuPont was guilty of covering up alleged regulatory violations," the court opined.

The court concluded that on remand, the line of questioning aimed at Tarr should be specific to DuPont or DuPont's employees.

The high court also found error with the allowance of testimony from a former DuPont employee who had been injured while working at the plant, in that it was not relevant with regards to the Strongs claims.

"We find that the trial court abused its discretion and erred in allowing this line of testimony concerning [the former employee's] personal, on-the-job injury while he was an employee at the DuPont … plant," the court said. The court did, however, reject the challenges to the employee's testimony that the DuPont plant allegedly violated safety guidelines.

Finally, the court addressed DuPont's contention that the trial court erred in not allowing a jury instruction requiring a finding that Strong was exposed to the dioxin, that the exposure was frequent and regular, and that he was exposed in sufficient proximity to the toxins so that it was more probable than not that the exposure caused his injury.

The trial court rejected the jury instruction, saying the frequency, regularity and proximity test outlined in *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (Miss. 2005), was adopted for asbestos litigation only.

The high court concurred with the trial court's interpretation of *Gorman-Rupp Co.*, stating that "while we find that the trial court properly denied DuPont's jury instruction…, we address this assignment of error to clarify that in *Gorman-Rupp Co.*, this Court did not extend this standard beyond asbestos litigation."

In a dissenting opinion written by Presiding Justice Oliver E. Diaz Jr., and joined in full by Associate Justice James E. Graves Jr. and in part by Associate Justices Michael K. Randolph and Ann H. Lamar, the minority said that "one

would never know from reading the majority the basis of Strong's claims against DuPont."

The minority said that they failed to see how the affidavits entered as evidence after trial began were any different from deposition testimony already before the jury. The dissenting opinion also found no fault with the testimony offered by Tarr.

"From all the evidence, the jury could easily have inferred repeated regulatory violations by DuPont," Justice Diaz wrote. "Tarr's testimony was based on his expertise and his own scientific testing, not 'accusations of *hypothetical* regulatory violations by DuPont.' When considered alongside the voluminous evidence indicating regulatory violations, any error in admitting portions of Tarr's testimony could not have been so prejudicial as to 'adversely affect a substantial right' of DuPont."

"Today's case is yet another example of this Court's willingness to overturn a jury verdict when individuals have been awarded large damages against corporate defendants," the dissenting justice wrote. "In the last two years, this Court has been asked to consider at least eight cases involving large damage awards in favor of individual plaintiffs, and seven of these cases have been reversed….Yet, despite the substantial evidence in this case supporting a jury verdict in favor of the plaintiffs, the majority finds enough 'cumulative error' to warrant a reversal. At some point, we must defer to the finders of fact and stop substituting this Court's judgment for that of the jury."

Counsel for the appellants are John G. Corlew of Watkins & Eager in Jackson, Miss.; Deborah D. Kuchler of Abbott, Simses & Kuchler in New Orleans; and Robert D. Gholson of Gholson, Burson, Entrekin & Orr in Laurel, Miss.

The appellees are represented by Alben N. Hopkins of Hopkins, Barvie & Hopkins in Gulport, Miss.; and Allen M. Stewart, James D. Piel and Stephanie Brooks Lesmes of Allen Stewart, P.C. in Dallas.

Document is Available
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Opinion Ref# BEN-0710-04

Product ID

Paint Company Files Motion For Summary Judgment, Says Product ID Lacking

SEATTLE — A paint company named as a defendant in a Washington case is the latest party to file a motion for summary judgment citing a lack of product identification in the case. *Smith, et al. v. 3M Co., et al.,* No. 06-2-10994-5 KNT (Wash. Super. Ct., King Cty.).

In an Oct. 12 motion filed in the Washington Superior Court for King County, defendant Preservative Paint Co. is seeking dismissal of Lavern Smith's claims, saying that there is no evidence that the decedent was exposed to its products.

LaVern Smith asserted the complaint on behalf of her husband, James Smith, who worked at Boeing as a painter for nearly 30 years. Smith's employment required him to work with benzene-containing products, causing him to develop acute lymphocytic leukemia, the complaint says.

Preservative Paint claims that the scheduling order required the plaintiffs to disclose specific information regarding the identity of benzene-containing products to which exposure is alleged and details on where and when this exposure occurred.

"While plaintiff has disclosed general work history information and Boeing records, this information does not fully comply with the CMO's requirements and does not provide sufficient evidence that Smith was exposed to any benzene-containing products manufactured by Preservative Paint," the motion says. "The mere presence of benzene-containing products at the workplacae is not enough for plaintiff to sustain her claim."

Several other defendants have already asserted summary judgment motions on similar grounds. *See related story in the September 2007 issue of Litigation Watch: Benzene.*

Preservative Paint is represented by Kimberly D. Baker and Vicky L. Strada of Williams, Kastner & Gibbs in Seattle.

The plaintiffs are represented by Charles T. Paglialunga of Paglialunga & Harris in Seattle.

Documents are Available
Call (800) 496-4319 or
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Preservative Paint Motion
Ref# BEN-0710-20

In The

Court of Appeals

Ninth District of Texas at Beaumont

FILED

OCT 11 2007

CAROL ANNE FLORES, CLERK
COURT OF APPEALS
NINTH DISTRICT
Beaumont, Texas

NO. 09-07-308 CV

CROWN CENTRAL LLC, ET AL, Appellants

V.

PATRICIA AND JAMES ANDERSON, ET AL, Appellees

On Appeal from the 128th District Court
Orange County, Texas
Trial Cause No. A060640-C

OPINION

This is an accelerated interlocutory appeal of the trial court's finding that each plaintiff in a multi-plaintiff lawsuit had independently established proper venue in Orange County, Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (Vernon Supp. 2006). We reverse the trial court's order finding that plaintiffs' independently established proper venue in Orange County and remand the cause for the trial court to transfer or dismiss plaintiffs' claims and causes of action in accordance with this opinion.

Five plaintiffs, along with their spouses, sued E.I. du Pont de Nemours and Company, Inc. (hereinafter "DuPont") and seventy-one other defendants in Orange County, Texas, for injuries allegedly suffered as a result of benzene exposure. Plaintiffs identified DuPont as a party defendant in their original petition by pleading that DuPont "is a Delaware corporation doing business in the State of Texas with a principal office in Orange County, Texas. . . ." Plaintiffs pled venue facts alleging that "[v]enue is proper because all or a substantial part of the events giving rise to this cause of action occurred in Orange County, Texas and/or one or more defendants maintain a principal office in Texas in Orange County." Several defendants, but not DuPont, filed motions to transfer venue. After a non-evidentiary hearing, the trial court denied the motions and found that "[e]ach plaintiff in this lawsuit has, independent of every other plaintiff, established proper venue in Orange County, Texas[.]" The moving defendants, appellants,[1] filed this accelerated interlocutory appeal of the trial court's order pursuant to section 15.003 of the Texas Civil Practices & Remedies Code. *See id.*

In a suit with multiple plaintiffs, "each plaintiff must, independently of every other plaintiff, establish proper venue." *Id.* § 15.003(a). Plaintiffs rely upon the general venue

[1] The appellants are defendants Crown Central LLC, Union Carbide Corporation, The Dow Chemical Company, Shell Oil Company, Shell Chemical LP, Chevron U.S.A. Inc., Chevron Phillips Chemical Company LP, Texaco Inc., ConocoPhillips Company, Packaging Service Co., Inc., Solvents & Chemicals, Inc., Lyondell-Citgo Refining LP, Lyondell-Citgo Refining Company, Ltd., Berryman Products, Inc., Curran Paint and Varnish Company, Hess Corporation , Illinois Tool Works Inc., LPS Laboratories, Radiator Specialty Company and Rust-Oleum Corporation.

provisions to establish venue in Orange County, Texas, alleging that venue is proper in the county because all or a substantial part of the events or omissions giving rise to the claim occurred in the county. Plaintiffs also allege Orange County is the county of defendant DuPont's principal office in this state. *See id.* § 15.002(a)(1),(3). As plaintiffs sued multiple defendants, the court would have venue of the other named defendants if all claims or actions of plaintiffs in this suit arise out of the same transaction, occurrence, or series of transactions or occurrences. *Id.* § 15.005.

If a plaintiff in a multi-plaintiff case cannot independently establish venue, that plaintiff's portion of the suit "must be transferred to a county of proper venue or dismissed" unless that plaintiff, independently of every other plaintiff, establishes that:

> (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure;
> (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit;
> (3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending; and
> (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.

Id. § 15.003(a) (1)-(4). However, plaintiffs have not pled or nor do they rely upon any of these factors to support venue in this action.

Section 15.003(b) allows an interlocutory appeal to be taken of a trial court's determination under subsection (a) that a plaintiff did or did not independently establish proper venue, or did or did not establish subsections (a)(1)-(4). *Id.* § 15.003(b)(1)-(2).

Pursuant to section 15.003(c)(1), an appellate court must "determine whether the trial court's order is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard." *Id.* § 15.003(c)(1).

In general, plaintiffs are allowed to choose venue first, and the plaintiff's choice of venue cannot be disturbed as long as the suit is initially filed in a county of proper venue. *KW Constr. v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874, 879 (Tex. App.--Texarkana 2005, pet. denied); *Chiriboga v. State Farm Mut. Auto. Ins. Co.*, 96 S.W.3d 673, 678 (Tex. App.--Austin 2003, no pet.). A trial court must consider all venue facts pled by the plaintiff as true unless they are specifically denied by an adverse party. *See* TEX. R. CIV. P. 87(3)(a). Once an adverse party specifically denies venue facts, the plaintiff must then respond with prima facie proof of that venue fact. *Id.* "Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." *Id.*

Appellants contend the trial court erred in determining each plaintiff established proper venue when the plaintiffs failed to properly plead or present any evidence to support a finding that venue was proper in Orange County, Texas. Appellants assert they specifically denied all of plaintiffs' venue allegations, and that the plaintiffs failed to present prima facie proof that: "(a) all or a substantial part of the events giving rise to this cause of action occurred in Orange County, Texas; (b) each Plaintiff has an independent claim against

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DuPont; or (c) each Plaintiff's claim against DuPont arises out of the same transaction or occurrence as the allegations against these Defendants."

We must first decide if venue can be maintained in Orange County under the general venue provision that all or a substantial part of the events giving rise to plaintiffs' cause of action occurred in Orange County, Texas. Because all but two of the appellants, Packaging Service Co., Inc. and Solvents & Chemicals, Inc., specifically denied this venue fact, the burden shifted to the plaintiffs to present prima facie proof of these venue facts. *See* TEX. R. CIV. P. 87(2)(a), 3(a); *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 260-61 (Tex. 1994). Appellees provided no facts in their petition to support this allegation nor have they provided any affidavit or attachments supporting their allegation that all or a substantial part of the events giving rise to appellees' causes of action occurred in Orange County, Texas. Therefore, Appellees failed to meet their burden to establish venue based on this venue allegation. *See* TEX. R. CIV. P. 87(2)(a), (3)(a). Venue is not proper under section 15.002(a)(1) as to those defendants who specifically denied the venue allegations.

The only other basis appellees alleged for venue in Orange County was that one of the defendants, DuPont, has a principal place of business in Orange County. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(3). Appellees maintain that no appellant sufficiently denied that DuPont maintained a principal office in Orange County, Texas, and therefore, the burden never shifted to appellees to produce prima facie evidence establishing proper venue in Orange County, Texas. While appellees presented an affidavit and attachments in support

of the venue allegation that DuPont maintained a principal office in Orange County, Texas, appellants assert that whether DuPont maintains a principal office in Orange County is not determinative, because plaintiffs have sued multiple defendants in the same lawsuit and the court cannot maintain venue as to all other named defendants unless plaintiffs allege and show by prima facie evidence that their claims arose out of the same transaction, occurrence, or series of transactions or occurrences. TEX. CIV. PRAC. & REM. CODE ANN. § 15.005. Although appellees state in their response to the appellants' motions to transfer venue that their claims arose out of the same transaction, occurrence, or series of transactions or occurrences because the appellees suffer from indivisible injuries, appellees neither pled facts nor offered any prima facie proof supporting this contention. *See id.*; TEX. R. CIV. P. 87(2)(a),(3)(a). Because these venue facts were not pled in plaintiffs' original petition, plaintiffs could not rely upon this as a basis for the court's exercise of venue. The trial court erred in concluding that appellees independently established venue in Orange County. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b)(1), (c)(1).

When a proper motion to transfer has been filed, the burden is on the plaintiff to prove that venue is maintainable in the county where suit is pending. TEX. R. CIV. P. 87(2)(a). If the plaintiff files suit in a county where venue is not proper, the plaintiff then waives the right to choose and the defendant may have the suit transferred to a proper venue. *Wilson*, 886 S.W.2d at 260 (citing *Tieuel v. Southern Pac. Transp. Co.*, 654 S.W.2d 771, 775 (Tex. App.--Houston [14th Dist.] 1983, no writ)). Because appellants Dow Chemical Company, Shell Oil

Company, and Shell Chemical LP, filed proper motions and prima facie evidence to transfer venue to Harris County as a county of proper venue, the trial court must transfer all of appellees' claims and causes of action against these appellants to Harris County. Berryman Products, Inc. properly sought to transfer appellees' claims and causes of action against Berryman to Tarrant County and presented prima facie proof that venue was proper as to Berryman in Tarrant County. The trial court must transfer all of appellees' claims and causes of action against Berryman Products, Inc. to Tarrant County. Although appellees did not independently establish venue in Orange County, Texas, against Crown Central LLC, Union Carbide Corporation, Chevron Phillips Chemical Company LP, Texaco Inc., ConocoPhillips Company, Lyondell-Citgo Refining LP, Lyondell-Citgo Refining Company, Ltd., Curran Paint and Varnish Company, Hess Corporation, Illinois Tool Works Inc., LPS Laboratories, Radiator Specialty Company, and Rust-Oleum Corporation, the record is insufficient to establish a county of proper venue as to these appellants. However, TEX. CIV. PRAC. & REM. CODE § 15.003(a) provides that "[i]f a plaintiff cannot independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff's claims and causes of action, *must* be transferred to a county of proper venue or dismissed, as is appropriate." TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a)(emphasis added). The trial court may direct the parties to make further venue proof to support transfer, or dismiss the claims and causes of

action, as is appropriate.[2] *Id.*; *see also* TEX. R. CIV. P. 87(d). Finally, with regard to Packaging Service Co., Inc. and Solvents & Chemicals, Inc., these appellants failed to specifically deny plaintiffs' venue facts and therefore, those motions to transfer venue were properly denied. We reverse the trial court's order finding that plaintiffs independently established proper venue in Orange County and remand the cause for the trial court to transfer appellees' claims and causes of action or dismiss in accordance with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

CHARLES KREGER
Justice

Submitted on September 20, 2007
Opinion Delivered October 11, 2007

Before Gaultney, Kreger, and Horton, JJ.

[2] We do not imply that evidence shall be re-opened for the plaintiffs to produce further evidence to attempt to independently establish venue in Orange County, Texas, with respect to these remaining appellants.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DONALD A STROMBERG, an individual, and HOLLY ANN STROMBERG, spouse,	)	
Plaintiffs,	)	
v.	)	1:07CV332
ASHLAND, INC. d/b/a ASHLAND CHEMICAL CO., a corporation, and THERMO FISHER SCIENTIFIC, INC., in its own right and as successor-in-interest to FISHER SCIENTIFIC CO., and FISHER SCIENTIFIC INTERNATIONAL, INC.,	)	**ORDER**
Defendants.	)	

This matter is before the court on motions to compel discovery and for sanctions against Plaintiffs (docket nos. 25, 28). In the two separate motions to compel, Defendant Ashland, Inc. and Defendant Thermo Fisher Scientific, Inc. (as successor-in-interest to Fisher Scientific Co. and Fisher Scientific International, Inc. and collectively referred to as "the Thermo Fisher Defendants") seek an order compelling Plaintiff Donald Stromberg to answer certain questions propounded to him during his deposition held on August 2, 2007. Both Defendants seek to recover costs, including costs for the court reporter, cost of the transcript, and reasonable attorney's fees, incurred in resuming the deposition as well as costs incurred, including reasonable attorney's fees, in bringing their respective motions to compel.

BACKGROUND

On April 25, 2007, Plaintiffs Donald Stromberg and Holly Ann Stromberg filed this action against Defendants, alleging personal injury as a result of Donald Stromberg's alleged exposure to various chemicals and hazardous materials while employed at Voith Paper Services ("Voith") in Salisbury within this judicial district. Donald Stromberg was employed by Voith as a rigger in the shipping department from 1993 to 2002. (Compl. ¶ 1.) Defendants Ashland and Thermo Fisher are two separate companies that supplied Voith with certain chemicals during Donald Stromberg's employment with Voith. (*Id.*) Plaintiffs allege that during his employment with Voith, he was exposed to organic solvents, including but not limited to benzene, toluene, and/or other solvents or products that were manufactured, distributed, or placed into the stream of commerce by Defendants. (Compl. ¶ 1.) Plaintiffs allege that Donald Stromberg's exposure to these chemicals caused myelofibrosis and rendered him disabled. (Compl. ¶¶ 2, 16.) Myelofibrosis is a type of cancer in which the bone marrow is replaced by fibrous tissue. Stromberg was diagnosed with myelofibrosis on September 16, 2004. (Compl. ¶ 1.) Plaintiffs bring claims against Defendants for negligence, gross negligence, failure to warn, and loss of consortium. (*See* Compl. ¶ 33.) Plaintiffs seek to recover actual and punitive damages, lost wages, and special damages.

On August 2, 2007, the Thermo Fisher Defendants took the discovery deposition of Donald Stromberg. During the deposition, Defendants asked

Stromberg questions about a prior lawsuit he filed against the operators of a granite rock quarry and an ensuing settlement in that case occurring in 1999. (*See* Stromberg Dep. 309-10.) Plaintiff refused to answer Defendants' questions and Plaintiff's counsel indicated that Plaintiff would not answer questions regarding the lawsuit and settlement. Defendants contend that despite their good faith attempt to resolve the dispute without judicial intervention, Plaintiffs' counsel has refused to allow discovery of the requested information.

As to the second motion to compel, Defendant Ashland contends that during the deposition held on August 2, 2007, Defendant asked Stromberg about a workers' compensation settlement agreement that he entered into with Voith. Plaintiff refused to answer Defendants' questions and Plaintiff's counsel indicated that Plaintiff would not answer questions regarding the workers' compensation action. Defendant Ashland contends that despite its good faith attempt to resolve the dispute without judicial intervention, Plaintiffs' counsel has refused to allow discovery of the requested information. In opposing the motion to compel, Plaintiffs argue that the information sought is not discoverable.

DISCUSSION

Applicable Discovery Rules

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). Federal Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. "[D]iscovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action." *See Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C. 1989). Thus, discovery rules are to be accorded broad and liberal construction. *Id.*

In summary, Defendants seek discovery of information regarding two different actions brought by Plaintiffs, both of which resulted in settlement agreements: (1) a lawsuit involving a rock quarry; and (2) Plaintiff Donald Stromberg's workers' compensation action against his former employer Voith. I will address each action in turn.

The Rock Quarry Lawsuit

On October 19, 1998, Plaintiffs Donald and Holly Stromberg filed an amended complaint against Defendants Terry and Doris Hess ("Hess family") and Balfour

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Quarry, Inc. ("Balfour") in Rowan County Superior Court, Case No. 98 CVS 1698. (*See* Amended Compl., attached as Ex. 1 to Pls.' Reply Brief, docket no. 40.) In the lawsuit, Plaintiffs alleged that the Hess family fraudulently sold them a piece of real property by misrepresenting that they did not intend to operate a quarry on an adjacent piece of real property that the Hess family owned. (*See* Amended Compl. ¶ 44.) After Plaintiffs bought the property, the Hess family sold the adjacent property to Balfour, which began mining operations at the quarry. (*See* Amended Compl. ¶¶ 12-13.) Plaintiffs alleged that Balfour continuously violated federal and state regulations in its mining operation and "caused polluted water and polluted air and fly rock to trespass onto the property of the plaintiffs without their permission." (*See* Amended Compl. ¶ 16.) Additionally, Plaintiffs alleged that Balfour's continuous discharge of air and water pollution and fly rock onto their property caused damage to Plaintiffs' health. (*See* Amended Compl. ¶ 19.)

Plaintiffs alleged the following claims against Balfour: (1) trespass; (2) ultrahazardous activity; (3) nuisance; (4) negligence per se; (5) negligence; and (6) violations of restrictive covenants. Plaintiffs further alleged that, as a result of Balfour's activities, they suffered the following damages:

> These damages include, but are not limited to, lost value to their real property, deteriorating health of the plaintiffs and physical damage to their real and personal property.

(*See* Amended Compl. ¶¶ 22, 26.) During discovery, Plaintiffs responded to Balfour's Interrogatories and Requests for Production of Documents providing details

about their allegations and purported damages. (*See* Responses, attached as Ex. 2 to Pls.' Reply Brief.) Specifically, in Interrogatory No. 5, Plaintiffs were asked to describe the "damage to Plaintiffs' health that Plaintiff contends has occurred as a result of air and water pollution and fly rock onto the Property from Balfour Quarry as alleged [in the amended complaint]." Plaintiff Holly Stromberg responded that her "allergies have increased," that she was being treated by a doctor, and that she had "to stay on decongestants all the time"; that the "stress of the situation has doubled my migraines" and that a doctor had prescribed her pain medication and anti-anxiety medication; and that "silicosis" was a "potential long term problem" based on a statement from one of her doctors. Plaintiff Donald Stromberg responded that he was "recently diagnosed with cancer and is receiving treatment at Duke University." In 1999, the parties reached a settlement in the Balfour lawsuit. As part of the settlement, the parties entered into a confidentiality agreement. Defendants now seek to compel Plaintiffs to provide information regarding the settlement agreement, which Plaintiffs refused to provide during the deposition of Mr. Stromberg in August 2007.

Motion to Compel Discovery Regarding the Rock Quarry Settlement

First, with regard to the motion to compel discovery of the rock quarry settlement, the Thermo Fisher Defendants contend that the settlement is relevant and discoverable under Rule 26. Defendants first contend that they are entitled to conduct discovery and investigate issues relevant to Mr. Stromberg's prior diagnosis

of cancer, the etiology of the cancer, and any relationship it may have with the allegations in this case. Defendants contend that it follows that any amounts of compensation received for the personal injuries alleged as a result of exposures to the quarry pollutants is equally relevant and directly at issue given Plaintiffs' claim for personal injuries (cancer) and resulting monetary damages in this case. Defendants note that Plaintiffs have made a claim for loss of earning capacity, both present and future, as well as a claim of "financial hardship," as a result of Mr. Stromberg's development of cancer. Defendants contend that information and documents regarding the settlement may shed light on information that is relevant to the subject matter in this lawsuit, including Plaintiffs' financial status. Defendants further contend that if, in fact, Mr. Stromberg was compensated for his alleged personal injuries in the Balfour litigation, which included a claim of developing cancer as a result of exposure to water and air pollutants, the settlement may be directly related to issues such as causation and damages in this action.

Defendants also argue that Plaintiffs violated Rule 30 in handling their objection to questioning about the settlement in the deposition. Defendants contend that Plaintiffs and their counsel did not move to terminate or limit the examination pursuant to Rule 30(d)(4), but rather refused to answer the questions propounded by defense counsel and that Plaintiff Donald Stromberg unjustifiably refused to answer the questions propounded because of an alleged confidentiality issue, not to preserve a privilege as contemplated under Rule 30(d)(1). Defendants assert that

they, in good faith before filing this motion to compel, proposed that the settlement amount and supporting documents be produced under a protective order for limited use in this action. Defendants assert that they agreed that any such supporting documents would have either been returned to Plaintiffs or destroyed upon the completion of this action. Plaintiffs' counsel refused, however, based on the position that the settlement amount with Balfour was irrelevant.

In opposition to the motion to compel, Plaintiffs contend that the settlement in the rock quarry lawsuit is not relevant to Plaintiffs' claims here and it is therefore not discoverable. Plaintiffs first argue that they are not claiming "financial hardship." They note, rather, that the complaint alleges damages for permanent injury, past and future pain and suffering, loss of earnings, payment of medical expenses, and loss of consortium. Plaintiffs contend, therefore, that the amount of the settlement in the rock quarry lawsuit is not relevant to the issue of damages in this case. Plaintiffs note that neither Voith, Ashland, nor Thermo Fisher was a party to the rock quarry settlement and they further argue that "[m]ore importantly, the subject matter of the two actions differ greatly and share no similarities whatsoever as to the factual and legal issues to be tried in the instant case." (Pls.' Response Br. 4, docket no. 35.)

I find Defendants' argument to be the more persuasive. First, the mere fact that the settlement agreement may have contained a confidentiality clause does not render it non-discoverable. In a recent case the Western District of North Carolina observed that:

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> a general concern for protecting confidentiality does not equate to privilege . . . information and documents are not shielded from discovery merely because they are confidential. Moreover, this Court has held that in the context of settlement agreements the mere fact that the settling parties agree to maintain the confidentiality of their agreement does not serve to shield the agreement from discovery. Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality.

Cadmus Commc'ns Corp. v. Goldman, No. 3:05cv257, 2006 U.S. Dist. LEXIS 85108, at *9-10 (W.D.N.C. Nov. 17, 2006) (citing *DirecTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684-85 (D. Kan. 2004)). The Fourth Circuit has also observed that "there is an important distinction between privilege and protection of documents, the former operating to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced." *Virmani v. Novant Health, Inc.*, 259 F.3d 284, 288 n.4 (4th Cir. 2001); *see also Media Network, Inc. v. Mullen Adver., Inc.*, No. 05CVS7255, 2006 WL 1066640, at *1 n.1 (N.C. Sup. Ct. Apr. 21, 2006) ("The fact that [the parties to a settlement agreement] agreed to keep the terms of the Settlement Agreement confidential cannot serve as the sole basis for protecting the Agreement from discovery.").

Moreover, I agree with Defendants that the settlement agreement in the rock quarry lawsuit may be relevant to Defendants' claims of causation and damages here, given that Plaintiff Donald Stromberg alleged in the rock quarry lawsuit that his personal injuries included contracting cancer because of the defendants' conduct in that lawsuit. Plaintiff Donald Stromberg worked in the Voith plant from 1993 to 2002

and was allegedly exposed to Defendants' chemicals during that time. Plaintiffs are alleging monetary damages directly resulting from Donald Stromberg's contraction of myelofibrosis in 2004. Plaintiffs allege in this lawsuit that because of Defendants' conduct Donald Stromberg contracted myelofibrosis and (1) has been rendered totally and permanently disabled; (2) has been and will continue to be required to spend money for medicine, medical care, nursing, hospital, and surgical attention, medical appliances, and household care; (3) has suffered loss of earnings and future earning power; (4) has incurred and will continue to incur great pain, suffering, and inconvenience; (5) has suffered and will continue to suffer great nervous and emotional distress; (6) has been and will continue to be limited and precluded from normal activities; and (7) has suffered and will continue to suffer loss of his general health, strength, vitality, and risk of death. (Amended Compl. ¶ 33.) The settlement in the rock quarry lawsuit occurred in 1999. In that lawsuit, Donald Stromberg stated in his discovery responses that in 1998 that he had contracted cancer and was being treated by a doctor. The discovery responses do not indicate whether the type of cancer that Stromberg contracted around 1998 is related to the myelofibrosis that he was diagnosed with in 2004, but Stromberg's employment with Voith clearly overlapped with the time period in which he allegedly contracted cancer for which he sought damages against Balfour in the rock quarry lawsuit. Defendants may obtain evidence during discovery, therefore, regarding Stromberg's alleged diagnosis of cancer in or around 1998 in an attempt to disprove causation in this

lawsuit and to show that Plaintiffs have already been compensated by the rock quarry lawsuit defendants in whole or in part for some of the alleged injuries in this lawsuit. Most likely, this evidence would be provided in Donald Stromberg's medical records and not in the settlement agreement itself. Nevertheless, if Defendants can make a showing that the claimed damages in *this* lawsuit were in fact caused, in whole or in part, by conduct of the defendants in the prior rock quarry lawsuit, then the settlement amount may be relevant to the amount of damages which Plaintiff Donald Stromberg may be entitled to recover in this lawsuit.[1] Therefore, I will grant Defendants' motion to compel Plaintiffs to disclose the terms of Plaintiffs' settlement agreement in the rock quarry lawsuit. To protect the confidentiality of the settlement agreement, however, I will require that the agreement be disclosed under a protective order to prevent the parties from disclosing the settlement information to parties not involved in this lawsuit.

Motion to Compel Discovery Regarding the Settlement of Plaintiff Donald Stromberg's Workers Compensation Claim Against Voith

I next consider Defendant Ashland's motion to compel discovery of Plaintiff Donald Stromberg's workers' compensation settlement agreement with his former employer Voith. During Mr. Stromberg's deposition, Plaintiff disclosed that he had

[1] As to Defendants' argument regarding "financial hardship," it is not clear exactly what is meant by this phrase, and I agree that Plaintiffs have not specifically pled "financial hardship." In any event, the settlement amount in the rock quarry lawsuit may very well become relevant to the issues of causation and damages here, given the allegations regarding cancer in that lawsuit.

settled his workers' compensation claim against Voith. When asked about the settlement amount and the amount paid for medical expenses, Plaintiffs' counsel objected, instructed Mr. Stromberg not to respond, and indicated that Stromberg would not give any testimony regarding the workers' compensation claim with Voith. Defendant Ashland seeks an order from the court compelling Plaintiffs to disclose the terms of the settlement agreement. In opposing the motion to compel, Plaintiffs contend that the information is not discoverable under N.C. GEN. STAT. § 97-10.2 and is not likely to lead to the discovery of admissible evidence. For the following reasons, I do not agree.

Under North Carolina's workers' compensation laws generally, an employer must pay workers' compensation benefits to an employee if that employee suffers a compensable work injury and notifies the employer of his workers' compensation claim. *See* N.C. GEN. STAT. § 97-22. If the employee is injured by a third party, the non-negligent employer must still pay workers' compensation benefits. The employer may, however, claim a subrogation lien on any proceeds the employee wins in a subsequent lawsuit against the third party. *See* N.C. GEN. STAT. § 97-10.2(f)(1). The employer's right to a lien on a recovery from the third-party tortfeasor is "mandatory in nature." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). Furthermore, a third-party tortfeasor may be entitled to a set-off for workers' compensation benefits paid by the plaintiff's employer. The statutory scheme provides that a third-party tortfeasor is not entitled to a

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set-off for workers' compensation benefits paid by the plaintiff's employer unless (1) the third party makes specific allegations against the employer in the pleadings; (2) the employer is served with a copy of the answer; and (3) the employer is given the right to appear and answer the allegations.[2]

Here, Plaintiffs contend that, based on the plain language of section 97-10.2, the only way Defendant Ashland may claim a set-off for workers' compensation benefits paid to Plaintiffs is to establish that Voith was jointly negligent. Plaintiffs contend that Ashland has not alleged any actionable negligence by Voith in its Answer, nor did Ashland serve Voith with the Answer. Plaintiffs contend that since Defendant Ashland has not complied with section 97-10.2(e), the evidence is neither

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[2] More specifically, section 97-10.2(e) states:

> If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer . . . .

N.C. GEN. STAT. § 97-10.2(e).

admissible nor discoverable. Plaintiffs contend, therefore, that "even if the requirements of section 97-10.2(a) are later met, the amount of settlement is not discoverable *at this time*."

Plaintiffs also contend that Defendant did not act in good faith to resolve the issue outside of court. According to Plaintiffs, Defendant never provided a legal reason for production of the settlement amount. Plaintiffs state that in an e-mail dated August 14, 2007, Plaintiffs' counsel explained that the settlement amount was not discoverable under section 97-10.2 and specifically asked opposing counsel to "provide the legal basis for [the] belief that this information is discoverable." Defense counsel did not respond. On August 20, 2007, defense counsel advised Plaintiffs' counsel that Defendant was filing a motion to compel unless Plaintiffs reconsidered their position. The next day, Plaintiffs' counsel again asked for a reason why information related to the workers' compensation settlement was admissible or likely to lead to the discovery of admissible evidence. Rather than responding, Defendant filed the motion to compel. Plaintiffs contend that, having failed to give Plaintiffs' counsel some indication as to the relevancy of the requested information, Defendant should not be awarded sanctions even if the court grants the motion to compel.

In support of the motion to compel, Defendant Ashland contends that the terms of the settlement agreement are relevant because the terms (1) could reveal that Voith admitted negligence; (2) could reveal that Plaintiffs agreed to terms that would be inconsistent with their present claims against Defendants; and (3) would

reveal the amount of Voith's potential lien, which could directly impact settlement negotiations in this case. Defendant further contends that Plaintiff Stromberg's workers' compensation agreement is discoverable even if it is not currently admissible under N.C. GEN. STAT. § 97-10.2(e). Defendant notes that Rule 26(b)(1) makes it clear that "information sought *need not be admissible at the trial* if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Defendant notes further that the deadline for filing amended pleadings is not until November 5, 2007. Defendant contends that it has the right under Rules 26(b)(1) and 30 to gather all the relevant facts before determining whether to amend its Answer to allege that Voith was negligent.

I agree with Defendant that Donald Stromberg's workers' compensation settlement agreement with Voith is clearly discoverable under Rule 26 and Plaintiffs are, therefore, required to disclose this information. Moreover, I reject Plaintiffs' argument that Defendant did not engage in a good faith attempt to resolve the discovery dispute before bringing the motion to compel. Finally, I agree with Defendant that both the amount of the settlement as well as the terms of the settlement agreement are discoverable under Rule 26.[3] Therefore, I will grant

[3] In its brief, Defendant contends that Plaintiffs' response incorrectly focuses only on the request for the *settlement amount* of Plaintiff Stromberg's workers' compensation claims against Voith. Defendant notes that during the deposition Plaintiffs' counsel, however, instructed Plaintiff Donald Stromberg not to answer *anything* about the settlement with Voith and further insisted that her client "is not testifying as to anything related to the settlement of his workers' comp case." (Stromberg Dep. 41.) Defendants also note that during correspondence between Plaintiffs' counsel and defense counsel,

Defendant's motion to compel Plaintiffs to disclose the terms of Plaintiff Donald Stromberg's workers' compensation settlement agreement with Voith. To protect the confidentiality of the settlement agreement, however, I will require that the agreement be disclosed under a protective order to prevent the parties from disclosing the settlement information to parties not involved in this lawsuit.

Rule 37 and Rule 30 Sanctions and Attorney's Fees

Finally, both Defendants request sanctions in the form of attorney's fees incurred in bringing the motion to compel as well as costs incurred in reconvening a deposition with Donald Stromberg to obtain the information regarding the settlement agreements. Rule 37(a)(4)(A) states that the court shall, after giving the opposing party an opportunity to be heard, grant reasonable expenses to the party successful in bringing a motion to compel unless the opposing party's nondisclosure was substantially justified or that other circumstances make an award of expenses unjust. I find that Plaintiffs' nondisclosure was not substantially justified; therefore, Defendants are entitled under Rule 37 to reasonable expenses, including attorney's fees, in bringing their respective motions to compel.

Defendants have also requested sanctions against Plaintiffs for failing to comply with Rule 30 regarding objections made during a deposition. Rule 30(d)(1)

Plaintiffs' counsel again stated that the "settlement agreement and amount . . . [are] protected and are not discoverable. . . . Mr. Stromberg's settlement amount or terms are [not] relevant or discoverable at this time. (*See* Pls.' Response, Ex. A.)

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of the Federal Rules of Civil Procedure provides that:

> Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer *only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).*

FED. R. CIV. P. 30(d)(1) (emphasis added). Thus, under the plain language of Rule 30(d)(1), a deponent not relying on a claim of evidentiary privilege must answer deposition questions or affirmatively act under Rule 30(d) to move or limit the examination. *See Alexander v. Cannon Mills Co.*, 112 F.R.D. 404, 405 (M.D.N.C. 1986) ("The rule in this Circuit with respect to deposition proceedings is clear–deposition questions *must* be answered, even if objection is made, unless a claim of evidentiary privilege is raised.") (emphasis added) (citing *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977)).[4] Finally, under Rule 30(d)(3), "[i]If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof."

I find that Plaintiffs' counsel clearly violated the plain language of Rule 30(d)(1) in instructing the deponent Donald Stromberg not to answer questions about his workers' compensation settlement agreement with Voith or about Plaintiffs'

[4] The current language of Rule 30(d)(1) was not in effect at the time of the *Ralston Purina* decision. The current language was added as part of the 1993 amendments.

settlement agreement in the rock quarry lawsuit. Counsel neither relied on a claim of evidentiary privilege nor acted under Rule 30(d) to move or limit the examination; thus, the instruction was improper. Moreover, an instruction not to answer based on an assertion of lack of relevancy is improper. *See Alexander*, 112 F.R.D. at 406 (noting that even if the questions asked during a deposition were not relevant, "they should have been answered, subject to objection, or the deponents should have moved to terminate the examination"); *see also Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (observing that under the plain language of Rule 30(d)(1), "[i]t is inappropriate to instruct a witness not to answer a question on the basis of relevance"). As sanctions for Plaintiffs' failure to comply with Rule 30, Defendants seek to recover the costs of reconvening the deposition of Donald Stromberg to obtain the requested information. I find that Defendants should first attempt to obtain the information they are seeking through interrogatories and requests for production of documents. Plaintiffs' counsel shall pay the reasonable costs, including attorney's fees, incurred in preparing these discovery requests. If Plaintiffs do not adequately disclose information regarding the workers' compensation settlement agreement and the rock quarry lawsuit settlement agreement through these methods of discovery, then Defendants shall have the right to reconvene the deposition of Donald Stromberg, and Plaintiffs' counsel shall be required to pay the associated costs, including costs for the court reporter, cost of the transcript, and reasonable attorney's fees, incurred in resuming the deposition.

CONCLUSION

For the foregoing reasons, Defendants' respective motions to compel (docket nos. 25, 28) are **GRANTED**. Plaintiffs are ordered to disclose to Defendants the terms of the settlement agreement in Donald Stromberg's workers' compensation action against Voith and the settlement agreement in the rock quarry lawsuit. Defendants should first attempt to obtain the information regarding the settlement agreements through interrogatories and requests for production of documents. Plaintiffs' counsel shall pay the reasonable costs, including attorney's fees, incurred in preparing these discovery requests. If, through answers to written discovery, Plaintiffs do not adequately disclose information regarding the settlement agreements to Defendants' and the court's satisfaction, then Defendants shall have the right to reconvene the deposition of Donald Stromberg and Plaintiffs' counsel shall be required to pay the associated costs, including costs for the court reporter, cost of the transcript, and reasonable attorney's fees, incurred in resuming the deposition. This is an entirely fair result, given that Plaintiffs' counsel clearly violated Rule 30 during the deposition of Donald Stromberg, and this court has the discretion to enter sanctions against counsel for doing so. *See* FED. R. CIV. P. 30(d)(3).

Finally, to protect Plaintiffs' concerns regarding confidentiality, the court will direct the parties to submit an agreed-upon protective order addressing (1) the disclosure of the settlement agreements to non-parties and (2) the use of the information outside of this lawsuit. The court will afford a period of time until

October 19, 2007, for counsel to confer and attempt to agree upon a protective order. If the parties are unable to reach an agreement by that date, the court will allow Plaintiffs a period of time until October 26, 2007, to move for a protective order and will allow Defendants until November 2, 2007, to file a response.

I further find that Defendants may recover the costs incurred, including reasonable attorney's fees, in bringing the respective motions to compel. No later than October 19, 2007, Defendants must submit affidavits of attorney's fees incurred in bringing their respective motions to compel. Plaintiffs must respond no later than October 26, 2007, if they chose to contest the amount sought.

IT IS SO ORDERED.

Wallace W. Dixon
United States Magistrate Judge

October 10, 2007

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.

BRIAN K. MILWARD and LINDA J. MILWARD,

Plaintiffs,

- vs -

ACUITY SPECIALTY PRODUCTS GROUP, INC.; AGS COMPANY; ARISTECH CHEMICAL CORPORATION; BERRYMAN PRODUCTS, INC.; BOSTICK, INC.; BOYLE-MIDWAY, INC.; THE CLOROX COMPANY; CRC INDUSTRIES, INC.; HENKEL CORPORATION; LA-CO INDUSTRIES, INC./MARKAL; LPS INDUSTRIES, INC.; NCH CORPORATION, CHEMSEARCH DIVISION; NICUS CORPORATION; NU-CALGON WHOLESALER, INC.; RADIATOR SPECIALTY COMPANY; RUST-O-LEUM CORPORATION; SHERWINWILLIAMS COMPANY; THE STECOCORPORATION; SUNNYSIDE CORPORATION; SUNOCO, INC.; UNITED STATES STEEL CORPORATION; USX CORPORATION; WD-40 COMPANY; and ZEP MANUFACTURING COMPANY,

Defendants.

COMPLAINT

and

JURY DEMAND

PARTIES, JURISIDICTION AND VENUE

1. Plaintiffs Brian K. Milward and his wife, Linda J. Milward ("Plaintiffs") are residents of Saugus, Essex County, Massachusetts.

2. Defendant ACUITY SPECIALTY PRODUCTS GROUP, INC., Individually, and d/b/a ZEP MANUFACTURING COMPANY, and f/k/a THE ZEP GROUP, INC. is a Delaware corporation, with its principal place of business in Atlanta, Georgia. During the relevant period of time, this Defendant conducted business in Massachusetts.

3. Defendant AGS COMPANY is a Michigan limited partnership, with its principal place of business in Muskegon Heights, Michigan. All partners of the company reside in the state of Michigan. During the relevant period of time, this Defendant conducted business in Massachusetts.

4. Defendant ARISTECH CHEMICAL CORPORATION, individually and as successor in interest to USS Chemicals Division of United States Steel Corporation, is a Delaware corporation, with its principal place of business in Philadelphia, Pennsylvania. During the relevant period of time, this Defendant conducted business in Massachusetts.

5. Defendant BERRYMAN PRODUCTS, INC. is a Texas corporation, with its principal place of business in Arlington, Texas. During the relevant period of time, this Defendant conducted business in Massachusetts.

6. Defendant BOSTICK, INC., Individually, and f/k/a BOSTICK FINDLEY, INC. is a Delaware corporation, with its principal place of business in Wauwatosa, Wisconsin. During the relevant period of time, this Defendant conducted business in Massachusetts.

7. Defendant BOYLE-MIDWAY, INC. is a Delaware corporation, with its principal place of business in Wayne, New Jersey. During the relevant period of time, this Defendant conducted business in Massachusetts.

8. Defendant THE CLOROX COMPANY is a California corporation, with its principal place of business in Oakland, California. During the relevant period of time, this Defendant conducted business in Massachusetts.

9. Defendant CRC INDUSTRIES, INC., Individually, and as successor in interest to CRC CHEMICALS, INC. is a Pennsylvania corporation, with its principal place of business in Warminster, Pennsylvania. During the relevant period of time, this Defendant conducted business in Massachusetts.

10. Defendant HENKEL CORPORATION, Individually, and as successor by merger to HENKEL LOCTITE CORPORATION, and as successor in interest to LOCTITE CORPORATION is a Delaware corporation, with its principal place of business in Gulph Mills, Pennsylvania. During the relevant period of time, this Defendant conducted business in Massachusetts.

11. Defendant LA-CO INDUSTRIES, INC./MARKAL is an Illinois corporation, with its principal place of business in Elk Grove Village, Illinois. During the relevant period of time, this Defendant conducted business in Massachusetts.

12. Defendant LPS INDUSTRIES, INC. is a New Jersey corporation, with its principal place of business in Newark, New Jersey. During the relevant period of time, this Defendant conducted business in Massachusetts.

13. Defendant NCH CORPORATION, CHEMSEARCH DIVISION, is a Delaware corporation with its principal place of business in Irving, Texas. During the relevant period of time, this Defendant conducted business in Massachusetts.

14. Defendant NICUS CORPORATION, Individually, and f/k/a VIRGINIA KMP CORPORATION is a Texas corporation, with its principal place of business in Dallas, Texas. During the relevant period of time, this Defendant conducted business in Massachusetts.

15. Defendant NU-CALGON WHOLESALER, INC., is a Missouri corporation with its principal place of business in St. Louis, Missouri. During the relevant period of time, this Defendant conducted business in Massachusetts.

16. Defendant RADIATOR SPECIALTY COMPANY is a North Carolina corporation, with its principal place of business in Charlotte, North Carolina. During the relevant period of time, this Defendant conducted business in Massachusetts.

17. Defendant RUST-O-LEUM CORPORATION is an Illinois corporation, with its principal place of business in Vernon Hills, Illinois. During the relevant period of time, this Defendant conducted business in Massachusetts.

18. Defendant SHERWIN WILLIAMS COMPANY, Individually, and as successor in interest to MARTIN SENOUR PAINT COMPANY a/k/a SENOUR PAINT COMPANY, is an Ohio corporation, with its principal place of business in Cleveland, Ohio. During the relevant period of time, this Defendant conducted business in Massachusetts.

19. Defendant THE STECO CORPORATION is an Arkansas corporation, with its principal place of business in Little Rock, Arkansas. During the relevant period of time, this Defendant conducted business in Massachusetts.

20. Defendant SUNNYSIDE CORPORATION is an Illinois corporation, with its principal place of business in Wheeling, Illinois. During the relevant period of time, this Defendant conducted business in Massachusetts.

21. Defendant SUNOCO, INC., individually and as successor in interest to USS Chemicals Division of United States Steel Corporation is a Delaware corporation, with its principal place of business in Wilmington, Delaware. During the relevant period of time, this Defendant conducted business in Massachusetts.

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22. Defendant, UNITED STATES STEEL CORPORATION, individually, f/k/a United States Steel LLC, and f/k/a USX Corporation, is a Delaware corporation, with its principal place of business in Pittsburgh, Pennsylvania. During the relevant period of time, this Defendant conducted business in Massachusetts.

23. Defendant USX CORPORATION, individually, f/k/a U.S. Steel Company, f/k/a United States Steel Corporation and as a subsidiary of Marathon Oil Company, is a Delaware corporation, with its principal place of business in Pittsburgh, Pennsylvania. During the relevant period of time, this Defendant conducted business in Massachusetts.

24. Defendant WD-40 COMPANY is a California corporation, with its principal place of business in San Diego, California. During the relevant period of time, this Defendant conducted business in Massachusetts.

25. Defendant ZEP MANUFACTURING COMPANY is a Georgia corporation, with its principal place of business in Atlanta, Georgia. During the relevant period of time, this Defendant conducted business in Massachusetts.

26. All of the foregoing defendants are herein after collectively referred to as "DEFENDANTS".

27. This Court has jurisdiction over the lawsuit pursuant to 28 U.S.C. §1332(a)(1) because the Plaintiffs and Defendants are citizens of different states, and the amount in controversy exceeds $75,000, excluding interests and costs.

28. Venue is proper pursuant to 28 U.S.C. §1391(b)(2) because a substantial part of the acts and omissions occurred in this judicial district including, but not limited to, Plaintiffs' use of Defendants' benzene-containing products and the resulting toxic exposures, occurred in large part in the District of Massachusetts. Additionally, Plaintiffs reside in the District of Massachusetts.

GENERAL ALLEGATIONS

29. During the period from approximately 1973 to the present, Plaintiff Brian K. Milward worked for various employers as a refrigeration technician in the Boston, Massachusetts area, working as assigned to jobs at different work sites in Massachusetts and surrounding states.

30. During this employment as a refrigeration technician, Mr. Milward was exposed to toxins and carcinogens, including but not limited to solvents, naptha, toluene, xylene, benzene, benzene-containing products, Liquid Wrench, petroleum distillates, and/or other carcinogens supplied and/or manufactured by Defendants. Mr. Milward's exposures to these solvents and chemicals were a legal cause of his development of cancer, namely Acute Promyelocytic Leukemia, and other injuries.

31. In addition to the toxins and carcinogens described above to which Brian K. Milward was exposed during the course of his employment, Mr. Milward also was exposed to products manufactured and/or sold by Defendants which included benzene as an ingredient or contaminant (hereinafter "benzene-containing products") during the course of performing repairs and other work to vehicles owned by him and others, and during the performance of work and maintenance on his home. Moreover, Mr. Milward was exposed to benzene and benzene-containing products, including Raffinate that were manufactured and/or sold by Defendants Radiator Specialty Company and United States Steel Corporation the "Raffinate Defendants".

32. Brian K. Milward was exposed to dangerous levels of benzene, solvents, naptha, toluene, xylene and petroleum distillates by working with and being exposed to the aforesaid products manufactured or sold by DEFENDANTS.

33. As a direct and proximate result of Brian K. Milward's exposure to benzene, Raffinate, and the other benzene-containing products set forth above, he developed Acute Promyelocytic Leukemia and other blood disorders and diseases.

34. Brian K. Milward was diagnosed with Acute Promyelocytic Leukemia on or about October 21, 2004.

DISCOVERY RULE

35. Plaintiffs hereby plead and invoke the "discovery rule." Plaintiffs will show that after reasonably exercising due diligence, they did not learn the nature of the cause of the subject injuries or that such injuries were chemically-related until less than three years prior to the filing of the Plaintiffs' causes of action herein.

COUNT I
Claim of Plaintiffs against Defendants for Personal Injuries Predicated on NEGLIGENCE
(All Defendants)

36. Plaintiffs incorporate herein each allegation set forth above.

37. Defendants manufactured and/or sold benzene-containing products, including those set forth hereinabove. Defendants owed a duty to users of its products, breached that duty, and were negligent and failed to use ordinary care by eliminating the benzene in their products.

38. Defendants Radiator Specialty Company, United States Steel Corporation, Aristech Chemical Company, Sunoco, Inc., and USX Corporation (hereinafter sometimes collectively referred to as the "Raffinate Defendants") manufactured and/or sold Raffinate, a constituent of Liquid Wrench, which contained benzene.

39. The Raffinate Defendants owed a duty to users of its products, breached that duty, and were negligent and failed to use ordinary care by eliminating the benzene contained in LIQUID WRENCH and in the constituent Raffinate.

40. Moreover, Defendants owed a duty to users of its products, breached that duty, and were negligent and failed to use reasonable care, in that they failed to adequately warn of the presence of benzene in those products and failed to adequately warn of the harm associated with exposure to benzene.

41. The Raffinate Defendants owed a duty to users of its products, breached that duty, and was negligent and failed to use reasonable care, in that they failed to adequately warn of the presence of benzene in the products which contained Raffinate, and failed to adequately warn of the harm associated with exposure to benzene.

42. As a direct and proximate result of the negligence of the Defendants and the Raffinate Defendants, Brian K. Milward used Defendants' and the Raffinate Defendants' benzene-containing products, and Liquid Wrench which contained Raffinate, was exposed to dangerous levels of benzene, developed Acute Promyelocytic Leukemia and other blood disorders and diseases, and thereby suffered and incurred severe and permanent injury. Brian K. Milward sustained damages, including past and future medical expenses, past and future pain and suffering, past and future mental anguish and disfigurement, past and future earnings loss and all other applicable damages.

43. As a direct and proximate result of Defendants' and the Raffinate Defendants' negligence, Brian K. Milward's wife, Linda J. Milward, has suffered and will continue to suffer the loss of the society, consortium, companionship, love, affection, support and care of her husband.

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44. As a direct and proximate result of Defendants' and the Raffinate Defendants' aforementioned conduct, Plaintiffs have suffered damages in excess of $75,000, excluding interest and costs.

45. WHEREFORE, Plaintiffs Brian K. Milward and Linda J. Milward pray judgment against all Defendants herein in a fair and reasonable amount, together with costs herein expended, and for any further relief this Court deems just and proper.

DAMAGES

46. As a direct and proximate result of Defendant's conduct, Plaintiffs suffered the injuries and damages as set forth hereinabove in excess of $75,000, excluding interests and costs.

JURY DEMAND

47. **PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL COUNTS.**

PRAYER

48. For all these reasons, Plaintiffs ask for judgment against all Defendants herein for all actual damages, pre-judgment and post-judgment interest, costs of suit, and all such other and further relief to which Plaintiffs may show themselves to be justly entitled.

BRIAN K. MILWARD and LINDA J. MILWARD
Plaintiffs
By their attorneys

/s/ James D. Gotz
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KENT, WA

The Honorable Mary Yu
Hearing Date: November 9, 2007
Hearing Time: 9:00 AM

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LAVERN SMITH, individually and as wrongful death beneficiary of, and as the Representative of the ESTATE OF JAMES SMITH.

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

NO. 06-2-10994-5 KNT

DEFENDANT PRESERVATIVE PAINT COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT DISMISSAL

I. RELIEF REQUESTED

Defendant Preservative Paint Company ("Preservative Paint") seeks dismissal of plaintiff's claims against Preservative Paint under CR 56 because plaintiff has no admissible evidence that the decedent was exposed to or harmed by benzene-containing products manufactured, distributed or sold by Preservative Paint, or that any such exposure was a substantial factor in contributing to his illness.

Plaintiff has failed to fully comply with the requirements of the Case Management Order ("CMO") that requires plaintiff to disclose to each defendant no later than March 9, 2007 specific information about the identity of the benzene-containing products to which Smith allegedly was exposed, where and when the alleged exposure took place, and the circumstances of the alleged exposure. While plaintiff has disclosed general work history information and

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Boeing records, this information does not fully comply with the CMO's requirements and does not provide sufficient evidence that Smith was exposed to any benzene-containing products manufactured by Preservative Paint. The mere presence of benzene-containing products at the workplace is not enough for plaintiff to sustain her claim. In addition or in the alternative, plaintiff's non-compliance with the CMO necessitates dismissal of plaintiff's complaint against Preservative Paint pursuant to Civil Rules 37 and 41.

II. STATEMENT OF FACTS

Preservative Paint filed a *Motion for Summary Judgment* on May 11, 2007. Preservative Paint incorporates and relies upon its prior motion, exhibits and reply, and references the prior exhibits by the letter previously assigned to each exhibit. New exhibits attached to this motion will be designated by number.

A. Background Facts.

On March 30, 2006, this lawsuit was filed against 24 defendants. Declaration of Arissa Peterson ("Decl. Peterson"), Ex. A. Plaintiff Lavern Smith is the widow of James Smith and brings this action alleging that the decedent James Smith contracted a form of leukemia as a result of exposure to various benzene-containing products containing greater than 0.01 percent benzene by weight to which he was exposed while working for Boeing at various locations in Washington state during the period of 1972 to 2000. *Id.* at ¶¶ 3.1-3.2. Plaintiff alleged negligence, gross negligence, strict liability for design defects, marketing defects, misrepresentation and breach of warranty.

B. Entry of Case Management Order.

On January 23, 2007, this Court entered a Preliminary Case Management Order. Decl. Peterson, Ex. B. Defendants sought entry of the CMO because plaintiff's complaint failed to specify the products to which Smith was allegedly exposed and failed to provide information about the circumstances of Smith's alleged exposure to any such product. The Court held that

> This case will proceed more efficiently if plaintiff is required as to each defendant it seeks to keep in this lawsuit to disclose specific information about the identity of the chemical products to which Smith allegedly was exposed, where and when the alleged exposure took place, and the circumstances of the alleged exposure. The case now has been pending over nine months. The court does find it necessary to order the plaintiff to make such disclosures so that the parties and the court have a better understanding of the claims in this case.

Decl. Peterson, Ex. B at p. 3, ¶ 3.

Therefore, pursuant to the CMO plaintiff was ordered no later than March 9, 2007 to provide to each named defendant the following:

- Each job site and activity where plaintiff contends Smith was exposed to benzene-containing products, and the nature of the work he was doing at the times of such exposure;
- Identification by product name, or in a manner otherwise sufficient to allow defendants to identify the product, for each product plaintiff contends caused Smith's illness and death for which damages are sought in this lawsuit; the approximate dates, location, frequency and circumstances of Smith's exposure, including specifically what Smith was doing at the time that caused him to be exposed to the product and what the product was being used for at the time;
- Identification of any persons with personal knowledge of the information provided pursuant to this order;
- Specific identification of all documents relating to Smith's exposure to any product disclosed pursuant to this order; and
- Disclosure of any other verifiable evidence that Smith was exposed to benzene-containing products manufactured by each defendant while he was employed by Boeing.

See id.

C. There Is No Evidence of Smith's Exposure to Any Preservative Paint Product.

Plaintiff filed an initial disclosure of product identification, exposure information, documents and fact witnesses on January 18, 2007, and supplemented this disclosure on March 9, 2007. Decl. Peterson, Exs. C-D. Plaintiff moved unsuccessfully for an extension of time to comply with the CMO nor moved to vacate or modify the CMO. Therefore, plaintiff has provided all available information.[1] Plaintiff relies almost entirely on Material Safety Data Sheets (MSDSs) produced by Boeing that identify Preservative Paint as the manufacturer of certain products. Plaintiff has not identified what, if any, products listed in these MSDSs were actually used by the decedent – let alone the date, location, frequency and circumstances of alleged use. Plaintiff's alleged exposure evidence is limited to broad and unspecified records, including employment records, chemical product list, material safety data sheets and hazcom books produced by the Boeing Company. Decl. Peterson, Ex. E (Plaintiff's Responses to Defendant Preservative Paint Company's First Interrogatories and Requests for Production, dated March 2, 2007).

The only pertinent deposition plaintiff has taken in this matter is of Ken Culliton, a retired painter from Boeing who was a co-worker of the decedent. Mr. Culliton was deposed on February 15, 2007 by plaintiff. Decl. Peterson, Ex. F. Culliton is a retired painter from Boeing where he worked from 1969 until his retirement in 2002. Decl. Peterson, Ex. F (Culliton Dep.) at 8:16-19. He spent most of his career working out of Plant 2 near Boeing field and was a co-worker to Smith during the last 10 years of his career. Id. at 9:3-8. Culliton was a maintenance painter with the primary duty of painting stripes on Boeing parking lots, roads and walkways, and painting buildings. Id. at 11:9-16. Smith was a facilities painter,

[1] To the extent Plaintiff has not produced all available evidence, dismissal is warranted for failure to comply with the CMO.

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with a primary duty of painting equipment, parts and vehicles, primarily painting new equipment and parts. Id. at 11:17-21; 12:13-17.

An MSDS sheet for each product used by the painters was kept in a notebook available for review. Id. at 250:16-251:3. Culliton testified that they only got MSDSs for products that were ordered for use by a particular department. Id. at 277:11-19. But having an MSDS for a product only meant that the product was on site, not how much or how little of the product was used, if at all. Id. at 279:11-15. When a product was no longer at the premises, the MSDS was supposed to be deleted from the book but that did not always happen. Id. at 286:20-287:3.

Safety was an important aspect of Boeing's operations. Painters were required to attend regular safety meetings conducted by their supervisors. Decl. Peterson, Ex. F at 202:7-18. A chart was also displayed which identified the proper respirator to be worn while using each product. Id. at 203:17-24. The chart identified the proper type of canister to work in connection with each respirator. Id.

Preservative Paint filed a motion for summary judgment seeking dismissal based on lack of product identification as well as lack of causation. On June 30, 2007, the court granted partial summary judgment dismissing all of plaintiff's claims other than those under the Washington Product Liability Act, and denied Preservative Paint's summary judgment motion to dismiss the remaining claims without prejudice to allow plaintiff to conduct limited discovery on the sole issue of causation. Ex. 2. Plaintiff served a set of requests for production on Preservative Paint. After an agreement to narrow the discovery requests to fit within the court's order, Preservative Paint worked to locate responsive documents. As Preservative Paint required additional time to prepare discovery responses and was unable to respond to the requests for production within 30 days from service, Preservative Paint's counsel and counsel for plaintiff agreed to extend the date for responding to the discovery requests to August 20, 2007. Ex. 3. In addition, an agreement was reached to extend the period during which plaintiff

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could conduct discovery to September 28, 2007. Ex. 3. Finally, Preservative Paint agreed not to renote its motion for summary judgment to a date sooner than September 28, 2007. Ex. 3. The parties also agreed to a protective order to limit the use and dissemination of Preservative Paint documents, which was entered by the court on September 26, 2007. Ex. 4. Preservative Paint's answers to discovery (Ex. 1) were served on August 20, 2007, and the responsive documents were served on August 28, 2007. Ex. 5. Plaintiff has conducted no additional discovery nor are any discovery responses outstanding.

Preservative Paint seeks dismissal of all claims against it for Smith's alleged exposure to products made by Preservative Paint. Plaintiff has failed to meet her burden to establish Mr. Smith's exposure to any Preservative Paint product, was a substantial factor in the cause of his leukemia, hence dismissal is appropriate.

During the initial discovery conducted to secure copies of any MSDS maintained by Boeing, a large number of MSDSs for Preservative Paint products were produced. Mr. Culliton was asked about the MSDSs produced by Boeing and was only able to identify a limited number of Preservative Paint products used by Mr. Smith. Mr. Culliton was often not asked and did not provide any testimony about the components of the Preservative Paint products. Plaintiffs served requests for production seeking documents relating to 78 named Preservative Paint products that contained 0.01% benzene content. Ex. 1, p. 5-6. In response to the discovery Preservative Paint responded as follows:

> Of the Preservative Paint products requested by plaintiff, only the following contain trace benzene greater than 0.01%:
>
> 15-10 TT-S-190F LACQUER SEALER
> 15-100 LACQUER THINNER RM #495
> 15-73E4 LACQUER PRIMER RED OXIDE
> 17-080 LACQUER GLOSS MASSTONE BASE
> 17-580 LACQUER GLOSS WHITE & TINTS
> 28-54E4 PRIMER ZINC CHROMATE RED OXIDE
> 33-202E4 TRAFFIC BLACK ALKYD

> 33-500 TRAFFIC WHITE CHLORINATED
> 33-582E4 TRAFFIC WHITE ALKYD
> 33-600 TRAFFIC YELLOW CHLORINATED
> 43-080 LUXLITE MASSTONE BASE
> 43-580 LUXLITE WHITE & LIGHT TINTS
> 7-2526 VINYL BLUE STRIP COATING
> 7-2600 VINYL CONGOR BLUE
> 7-36440 NON-SKID/NON AGGREGATED
> 20-36 ALUMINUM IND. HEAT RESISTANT
> 20-96 PRIMER OVERLAY

The discovery to date provides no information on the volume, frequency, setting or dates of the use of any of these products. Mr. Culliton, is the only witness deposed to date with knowledge of paint products used at Boeing during his 10 year occasional overlap of working environments with Mr. Smith. Mr. Culliton did not testify about Mr. Smith's use of the following six products:

> 33-600 TRAFFIC YELLOW CHLORINATED
> 7-2526 VINYL BLUE STRIP COATING
> 7-2600 VINYL CONGOR BLUE
> 7-36440 NON-SKID/NON AGGREGATED
> 20-36 ALUMINUM IND. HEAT RESISTANT
> 20-96 PRIMER OVERLAY

As to those six products, Preservative Paint seeks a partial summary judgment dismissing all claims as those six products were identified, nor is there evidence that the products were causally related to Mr. Smith's leukemia.

As to the remaining 11 products that were identified as containing greater than 0.01% benzene, Mr. Culliton was unable to provide the detailed information required in the case management order. He did not identify a specific date, project, volume of paint used, or area in which the paint was applied, including whether it was enclosed or outdoors. Mr. Culliton indicated that for all of the products listed that Mr. Smith wore a respirator during use of the product, hence reducing any alleged exposure even further.

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Preservative Paint moves for dismissal for lack of compliance with the case management order and lack of any expert testimony based on supportable facts that Mr. Smith's use of any of the remaining 11 products was a substantial factor in the development of his leukemia.

III. STATEMENT OF ISSUES

1. Should this Court dismiss plaintiff's claims against Preservative Paint because plaintiff cannot demonstrate that the alleged damages were proximately caused by exposure to any benzene-containing product manufactured, distributed or sold by Preservative Paint?

2. Should this Court dismiss plaintiff's claims under CR 37(b)(2) and CR 41(b) for failure to comply with the Court's Case Management Order?

IV. EVIDENCE RELIED UPON

This motion is based upon the pleadings and records on file, and the Declaration of Kimberly D. Baker with exhibits attached thereto.

V. LEGAL ARGUMENT

A. Summary Judgment Standard.

Summary judgment is appropriate if it appears in the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The purpose of summary judgment is to avoid unnecessary trials where insufficient evidence exists. Pelton v. Tri-State Mem'l Hosp. Inc, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992) (citing Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). A party may seek summary judgment in two ways. See Guile v. Ballard Commty. Hosp., 70 Wn. App. 18, 21, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993). First, a party may set out material facts and demonstrate that there is no genuine issue as to those facts. Id. Summary judgment is appropriate if, after reviewing all facts in a light most favorable to the nonmoving party, the court concludes that there is no issue of fact and the moving party is

entitled to judgment as a matter of law. CR 56; see Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. See Guile, 70 Wn. App. at 21. If the non-moving party fails to meet its burden under either of these two methods, the moving party is entitled to judgment as a matter of law.

B. Plaintiff Has No Evidence That Smith Was Exposed to Any Preservative Paint Benzene-Containing Product.

In any products liability suit, a plaintiff must prove that the defendant manufactured or distributed the product or products alleged to have caused the injury in order to recover. RCW 7.72.030. A manufacturer may be found liable if (1) a manufacturer's product (2) that was not reasonably safe as designed (3) caused harm to the plaintiff. Pagnotta v. Beall Trailers of Oregon, 99 Wn. App. 28, 36, 991 P.2d 728 (2000) (applying RCW 7.72.030(1)). Therefore, it is elementary that in order for plaintiff to sustain a claim against Preservative Paint, she must identify the product causing the injury and the manufacturer of the product and then establish a reasonable connection between the injury and the product identified. See Lockwood v. AC&S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987) ("In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury."). Washington law requires more than a mere showing that benzene-containing products were at the work place, somewhere, at some time. Lockwood, supra; Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993).

Plaintiff cannot and has not met this burden. While she identifies Preservative Paint products generally, plaintiff has offered insufficient evidence that Smith was actually exposed to many of these products. Culliton worked in the same department as Smith but they only occasionally worked side-by-side on the same jobs. Culliton and Smith did not personally

order the products by specific manufacturer but only by the type of product. Preservative Paint's discovery responses identify products that contain greater than 0.01% benzene. However, only some of those products have been identified as being used by Mr. Smith. Without this evidence of exposure to each product, plaintiff's case against Preservative Paint should not proceed.

C. The Plaintiff Cannot Meet Her Burden of Proof at Trial on Causation.

Plaintiff must establish that a Preservative Paint product was a substantial factor in causing Smith's illness. For the case to move forward against a manufacturer, some witness, at a minimum, must identify the manufacturer's product at plaintiff's work site at a time when plaintiff was there. There are no reported decisions involving benzene exposure in Washington. The application of case law involving asbestos exposure is instructive on the standards the court should apply in determining whether Plaintiff has met her burden on causation.

In Lockwood, the court held that, in order to create a triable issue of fact on the issue of causation in an asbestos case, the plaintiff must offer evidence capable of supporting a reasonable inference that respirable dust from the defendant's product was present at the plaintiff's work site, while the plaintiff was present. Lockwood, 109 Wn.2d at 248. See also Van Hout, 121 Wn.2d 697. Because mere presence of a product on a job site creates nothing more than the mere possibility of causation, the court held that there must be sufficient evidence of the circumstances of the product's usage in proximity to plaintiff to support an inference that the product was a substantial factor in causing the asbestos-related disease.[2]

Lockwood identified several factors a court must consider when evaluating whether sufficient evidence of causation exists, including: (1) plaintiff's proximity to the allegedly

[2] In order to defeat summary judgment, evidence must "rise above speculation, conjecture, or mere possibility." Attwood v. Albertson's Food Centers, Inc., 92 Wn. App. 326, 331, 966 P.2d 351 (1998).

harmful product when the claimed exposure occurred and the expanse of the work site where the allegedly harmful product was used; (2) the extent of time the plaintiff was exposed to the product; and (3) the type of products in which the plaintiff was exposed and the ways in which the products were handled and used. See Berry v. Saberhagen Holdings, Inc., 103 Wn. App. 312, 324, 14 P.3d 789 (2000) (citing Lockwood, 109 Wn.2d at 248).

The approach taken in Lockwood has also been followed in numerous jurisdictions throughout the country.[3] See Dumin v. Owens-Corning Fiberglas Corp., 28 Cal. App. 4th 650, 653-54, 3 Cal Rptr. 702 (1994) (circumstantial evidence must be of sufficient weight to support a reasonable inference of causation.); Eckenrod v. GAF Corp., 375 Pa. Super. 187, 544 A.2d 50 (1988) (to support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked); Sholtis v. American Cyanamid Co., 238 N.J. Super. 8, 28-29, 568 A.2d 1196 (App. Div. 1989) (adopting "well-reasoned" frequency, regularity and proximity test of causation in asbestos litigation); O'Connor v. Raymark Industries, Inc., 401 Mass. 586, 588, 518 N.E.2d 510 (1988) (approving jury instruction that proof of causation requires "evidence of some exposure . . . on a regular basis over some period of time where [the worker] was actually working with the product himself or in proximity to where others who were working with the product"); Zimmer v. Celotex Corp., 192 Ill. App. 3d 1088, 1091, 549 N.E.2d 881 (1989) ("plaintiff must show that a particular defendant's product was used at the job site and that plaintiff was in proximity to that product at the time it was being used").

Plaintiff cannot demonstrate that she is able to meet her burden of proof under either Lockwood or similar cases. Plaintiff cannot demonstrate that any benzene-containing products manufactured by Preservative Paint were a substantial contributing factor in bringing about

[3] Copies of non-Washington cases are attached as Ex. G to the accompanying Declaration of Arissa Peterson.

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Smith's illness. There is no evidence to demonstrate the frequency, regularity, volume of use, and proximity of any of Preservative Paint products to Smith's alleged exposure. Moreover, Smith always wore a respirator when using paint products in the scope of his work. This would have reduced any exposure. For these reasons, the Court should dismiss plaintiff's claims of negligence against Preservative Paint. Even if Smith worked around products distributed by Preservative Paint, there is no competent evidence that the work involved contact with any benzene-containing materials for which Preservative Paint is responsible.

D. Alternatively, Plaintiff's Complaint Should Be Dismissed Under Rule 37(b)(2) and Rule 41(b) Because She Failed to Comply with the Court's CMO.

If a party fails to obey a court's order, the court may make such orders in regard to the failure as are just, including dismissal of the action. CR 37(b)(2). A defendant may move for dismissal of an action or any claim against it under Rule 41(b) if plaintiff fails to comply with a court order. Rules 37(b) and 41(b) apply to such remedies as dismissal, default and the exclusion of testimony. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006).

Plaintiff is without reasonable excuse as to her failure to comply with the court's CMO. Dismissal is an appropriate sanction to prevent substantial prejudice to Preservative Paint. Rhinehart v. KIRO, Inc., 44 Wn. App. 707, 723 P.2d 22 (1986) rev. denied, 108 Wn.2d 1008, appeal dismissed, 484 U.S. 805, 108 S. Ct. 51, 98 L. Ed. 2d 16 (1987).

Plaintiff failed to comply with the Court's CMO by not disclosing "specific information about the identity of the chemical products to which Smith allegedly was exposed, where and when the alleged exposure took place, and the circumstances of the alleged exposure." Peterson Decl., Ex. B. The deposition of Ken Culliton does not cure the insufficiency of plaintiff's exposure evidence. Culliton only occasionally worked side-by-side with Smith. Therefore, he has little personal knowledge of Smith's alleged exposure to benzene-containing products manufactured by Preservative Paint.

VI. CONCLUSION

Preservative Paint asks this Court to grant summary judgment and dismiss plaintiff's claims of independent negligence with prejudice.

A proposed form of order is submitted herewith.

DATED this 12th day of October, 2007.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
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TRACKING CASES AND RESEARCH IN EMERGING BENZENE AND RELATED LITIGATION

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