

FILED
26 MAR 2010 02:47 pm
Civil Administration
N. MONTE

IN THE
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

JOANNE BRANHAM, Individually and as the Administratrix of :
the Estate of FRANKLIN DELANO BRANHAM : May Term 2006,
v. : No. 3590
ROHM AND HAAS COMPANY, *et al.* :

ORDER

AND NOW, this __ day of _____, 2010, upon consideration of the Motion of Defendants Rohm and Haas Company, Rohm and Haas Chemicals LLC, and Morton International, Inc. to Enforce the Case Management Order and to Preclude Plaintiff from Collaterally Attacking Epidemiology Studies, and any response thereto, it is hereby ORDERED that Defendants' Motion is GRANTED.

BY THE COURT:

Tereshko, J.

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JOANNE BRANHAM, Individually and as the Administratrix of :
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**MOTION OF DEFENDANTS ROHM AND HAAS COMPANY, ROHM AND HAAS
CHEMICALS LLC, AND MORTON INTERNATIONAL, INC. TO ENFORCE THE
CASE MANAGEMENT ORDER AND TO PRECLUDE PLAINTIFF FROM
COLLATERALLY ATTACKING EPIDEMIOLOGY STUDIES**

Plaintiff has subpoenaed a non-party, The Dow Chemical Company, seeking discovery on epidemiology issues almost a year after the close of the expert record and more than seven months after the close of discovery. Accordingly, defendants Rohm and Haas Company, Rohm and Haas Chemicals LLC, and Morton International, Inc. (collectively, "Rohm and Haas"), by and through their attorneys, move to enforce this Court's May 8, 2009 Revised

Case Management Order and to preclude plaintiff from collaterally attacking epidemiology studies. Rohm and Haas understands that Dow is moving separately to quash the subpoena, and this motion should be considered together with that of Dow and in support of Dow's motion to quash. In support of this motion, Rohm and Haas states as follows:

The Expert Reports in This Case.

1. Plaintiff filed her complaint in May 2006.
2. On November 6, 2008, plaintiff served her expert reports. *See* 11/6/08 Ltr. from A. Freiwald to D. Suplee (attached as Ex. 1).
3. Among the experts plaintiff proffered to support her theory that vinyl chloride caused her husband's brain tumor are Dr. Gary Ginsberg, who opines on toxicology issues, and Dr. Richard Neugebauer, who opines on purported epidemiological analyses he performed regarding brain cancer cases in McCullom Lake Village. *See* Ginsberg Report (attached as Ex. 2); Neugebauer Report (excerpts attached as Ex. 3).
4. In his report, Dr. Ginsberg discusses epidemiological studies of cohorts of workers in North America and Europe who were exposed to vinyl chloride, including a study of the North American worker cohort by a team led by Dr. Kenneth Mundt, *Historical Cohort Study of 10, 109 Men in the North American Vinyl Chloride Industry, 1942-1972*, 57 OCCUP. ENVIRON. MED. 774 (2000). *See generally* Ginsberg Rep. at 19-21.

5. Dr. Neugebauer did not survey epidemiological literature in his report, but he relied on the Mundt study, stating that it was an “illustrative example” of a study design on which his own purported “cohort study” was “modeled directly.” Neugebauer Rep. at 23.

6. Rohm and Haas served its expert reports on March 16, 2009. *See* 3/16/09 Ltr. from D. Suplee to A. Freiwald (attached as Ex. 4).

7. Among Rohm and Haas’s experts are Dr. Patricia Buffler, who opines on Dr. Neugebauer’s analysis, Dr. Peter Valberg, who opines on Dr. Ginsberg’s analysis, and Dr. Henry Friedman, who opines as to whether Mr. Branham’s brain tumor was caused by vinyl chloride. *See* Buffler Report (excerpts attached as Ex. 5); Valberg Report (Ex. 6); Friedman Report (Ex. 7).

8. Like plaintiff’s experts, Drs. Buffler, Valberg, and Friedman rely on Dr. Mundt’s study. *See, e.g.*, Buffler Rep. Ex. B at 1-3; Valberg Rep. at 20; Friedman Rep. at 10.

Discovery About Epidemiology Issues.

9. The subpoena to Dow that is at issue here seeks information regarding cases of brain cancer and epidemiological research about such cases, including information about cancer at plants owned or managed by Dow and communications with a trade association about such data. *See* 3/3/10 Subpoena to Dow (attached as Ex. 8).

10. Previously, in 2008, plaintiff served a subpoena on Dow that sought, among other things, documents regarding epidemiology issues. The subpoena requested the production of documents regarding communications between Dow and organizations and

researchers related to vinyl chloride as well as “[a]ll documents relating to any in-house research, study or investigation Dow has engaged in relating to the carcinogenicity or potential carcinogenicity of vinyl chloride.” *See* 9/5/08 Subpoena to Dow (attached as Ex. 9).

11. Dow is headquartered in Michigan, and plaintiff’s subpoena was quashed as to these topics by a Michigan court. *See* 10/7/08 Order (attached as Ex. 10).

12. The court found, among other things, that it was improper to seek expert discovery from Dow and that plaintiff could more appropriately seek the requested information from alternative sources such as the American Chemistry Council itself. *See* 9/26/08 Tr. at 50 (attached as Ex. 11).

13. On plaintiff’s appeal, the Michigan Court of Appeals affirmed. *See* 3/16/10 Op. in No. 288476 (attached as Ex. 12).

14. The appellate court rejected plaintiff’s contention that she was “not seeking to conscript Dow as her expert, but instead merely seeks studies Dow may have conducted” as “a distinction without a difference,” since Dow, as a non-party to the litigation, was “being asked for information relating to cancer risks in general, rather than to the individual circumstances causing the death of plaintiff’s decedent.” Ex. 12 at 5.

15. Plaintiff also sought discovery about epidemiology studies from other non-parties. She served seventeen other non-party subpoenas regarding epidemiology issues, including three subpoenas directed to Dr. Mundt and his firm, Environ. *See* 8/10/07 Subpoena to

Kenneth A. Mundt, Ph.D. at Environ (attached as Ex. 13); 4/9/07 Subpoena to Environ (attached as Ex. 14); 3/19/07 Subpoena to Linda Dell, Manager, Environ (attached as Ex. 15).

16. Dr. Mundt and Environ produced 2,975 pages of documents in response to these subpoenas. Plaintiff never sought to depose Dr. Mundt or anyone else from Environ.

17. Plaintiff's other subpoenas on this topic were addressed to an array of companies, organizations, and experts. *See* 3/19/07 Subpoena to Richard Lewis, M.D., MPH (attached as Ex. 16); 3/19/07 Subpoena to Grzegorz Rempala, Ph.D. (University of Louisville) (attached as Ex. 17); 4/9/07 Subpoena to Grzegorz Rempala, Ph.D. (University of Louisville) (attached as Ex. 18); 4/9/07 Subpoena to University of Louisville (attached as Ex. 19); 4/17/07 Subpoena to Atlantic Legal Foundation (attached as Ex. 20); 4/17/07 Subpoena to American Chemistry Council (attached as Ex. 21); 8/6/07 Subpoena to American Chemistry Council (attached as Ex. 22); 8/6/07 Subpoena to Dr. Otto Wong (Applied Health Sciences) (attached as Ex. 23); 8/6/07 Subpoena to FMC Corp. (attached as Ex. 24); 8/6/07 Subpoena to Georgia Gulf Corp. (f/k/a Conoco Vista) (attached as Ex. 25); 8/6/07 Subpoena to Monsanto Co. (attached as Ex. 26); 8/6/07 Subpoena to Poly One Corp. (attached as Ex. 27); 8/6/07 Subpoena to University of Louisville (attached as Ex. 28); 7/29/09 Subpoena to American Chemistry Council (attached as Ex. 29).

18. Plaintiff received responses and/or documents from Monsanto, the University of Louisville (covering the subpoenas to the university as well as to Drs. Lewis and Rempala), the Atlantic Legal Foundation, and Applied Health Sciences/Dr. Wong. Plaintiff never sought to depose any of the subpoenaed parties.

The Discovery Deadline.

19. On April 20, 2009, the parties jointly wrote to this Court to memorialize their agreement that “in the interest of bringing the lengthy discovery process in these cases to a close, the discovery deadline in all cases should be set for June 12” with “certain limited exceptions” separately agreed to by the parties. *See* 4/20/09 Ltr. from R. Wellington to Hon. Allan L. Tereshko (attached as Ex. 30).

20. The Court then entered a case management order adopting the proposed June 12, 2009 discovery deadline. *See* 5/8/09 Revised Case Mgmt. Order (attached as Ex. 31).

21. Regarding third-party discovery, the parties separately agreed only that: (a) “[t]he parties shall be permitted to continue to seek third-party discovery from local, state or federal agencies;” and (b) “[t]he parties shall be permitted to continue to seek third-party discovery from plaintiffs’ medical providers.” *See* 4/20/09 Ltr. from J. Battle to A. Freiwald (attached as Ex. 32).

Litigation of Expert Issues.

22. Meanwhile, Rohm and Haas moved to exclude plaintiff’s experts who opined on issues related to causation. Plaintiff filed her opposition to that motion on June 15, 2009, three days after the close of discovery.

23. In that opposition, plaintiff asserts that she had “obtained evidence” that “14 individuals” “were not counted by Mundt” in his North American worker cohort study and

criticizes Dr. Valberg for relying on that study. *See* Pl.’s Opp’n to RH Causation Mot. at 69-71 (excerpts attached as Ex. 33).

24. As support for her assertion, plaintiff attached a collection of unauthenticated documents about workers and cancer. *Id.* at Ex. EE.

25. Plaintiff also attached supplemental affidavits from Drs. Ginsberg and Neugebauer to her brief. However, neither Dr. Ginsberg nor Dr. Neugebauer supported, or even mentioned, plaintiff’s assertions regarding the Mundt study. *Id.* at Ex. M. (Ginsberg Aff.) and Ex. FF (Neugebauer Aff.).

26. In his affidavit, Dr. Neugebauer continued to expressly rely on the Mundt study, citing it as support for his statements regarding the “standard practice for epidemiologists” and regarding cohort study design. Neugebauer Aff. ¶¶ 13, 21, 23.

27. After considering the extensive briefing on plaintiff’s causation experts’ opinions and hearing lengthy argument about two of those experts (Dr. Neugebauer and Dr. Sydney Finkelstein), the Court denied Rohm and Haas’s motion on November 18, 2009.

28. At no point during this process did plaintiff suggest that she needed (or planned to take) additional discovery regarding epidemiology issues. Plaintiff did not file a petition for extraordinary relief seeking an extension of the discovery deadline.

29. Plaintiff said only that she planned to use the unauthenticated documents regarding workers supposedly “missed” by Dr. Mundt to cross-examine Rohm and Haas’s experts. *See* Pl.’s Opp’n to RH Causation Mot. at 70-71.

Plaintiff's New Subpoena to Dow.

30. On February 12, 2010, after this Court had issued its pretrial order setting a trial date of June 7, 2010, plaintiff's counsel sent counsel for Dow and Rohm and Haas a copy of the subpoena that forms the basis for this motion and stated that plaintiff "intend[s] to use the testimony at trial in the Branham case." *See* 2/12/10 Ltr. from A. Freiwald to H. Klein (attached as Ex. 34).

31. The subpoena was served on March 3, 2010. It tells Dow to name a corporate designee "to appear for a video trial deposition" on May 13, 2010, and says that "[t]he witness should be prepared to testify on the subjects outlined in the attachment to the subpoena." *See* Ex. 8.

32. The attachment to the subpoena lists the following seven topics about which the witness is to testify and produce documents:

a. "Epidemiology studies of Dow's Freeport, Texas [plant] and whether brain cancer cases identified among workers at that facility were ever included in Dr. Mundt's industry-wide cohort analysis published in 2000. These epidemiology studies include, but may not be limited to the Dow-commissioned studies published in March 1979 and in 1994."

b. "Communications between Dow and the Chemical Manufacturer's Association (CMA) during the 1970s, 1980s and 1990s regarding brain cancer cases among vinyl chloride workers at the Freeport facility."

c. “Communications between Dow and Dr. Ken Mundt regarding cases of brain cancer at the Freeport facility.”

d. “Epidemiology studies of the Union Carbide (now Dow) plant in Texas City, Texas and whether brain cancer cases identified among workers at that facility were ever included in Dr. Mundt’s industry-wide cohort analysis published in 2000. These epidemiology studies include, but may not be limited to the 1983 Austin study and the 1984 Mundt study.”

e. “Communications between Union Carbide and/or Dow and Dr. Ken Mundt regarding cases of brain cancer at the Texas City facility.”

f. “Dr. Torkelson’s involvement as chairman of the CMA’s Vinyl Chloride Research Committee and commissioning of epidemiology research into brain cancers among vinyl chloride workers.”

33. Plaintiff’s subpoena to Dow is directed to one goal: obtaining support for plaintiff’s unfounded assertion that the epidemiology study published in 2000 by Dr. Mundt is suspect because it supposedly did not include in its database certain individuals that plaintiff, without any expert support, says should have been counted. *See* Pl.’s Opp’n to RH Causation Mot. at 70.

34. As explained in Rohm and Haas’s memorandum of law, which is incorporated here by reference, plaintiff’s current subpoena is an improper attempt to reopen the expert record and discovery on the eve of trial in violation of this Court’s case management

order, under which all parties had served their expert reports by March 16, 2009 and discovery closed on June 12, 2009.

35. The fact that plaintiff says she seeks to take a “trial deposition,” rather than a discovery deposition, does not change this analysis. The Pennsylvania Rules of Civil Procedure make no distinction between depositions taken for discovery and trial purposes. *See* Pa. R. Civ. P. 4001(c), 4001(d), 4020(a)(3). Pennsylvania courts have recognized this, consistently holding that the discovery rules make no distinction between discovery depositions and trial depositions. *See, e.g., Hansel v. DeArmitt*, 71 Pa. D. & C. 4th 199, 202 (C.P. Dauphin Cty. 2004); *Flum v. Lichtenfeld*, 39 Pa. D. & C. 3d 49, 53 (C.P. Chester Cty. 1982); *Strasser v. Pa. Spool & Equip. Co.*, 9 Pa. D. & C. 2d 714, 716 (C.P. Lehigh Cty. 1956).

36. Plaintiff’s proposed deposition of a Dow witness is also improper because Pennsylvania law does not permit the jury to hear the type of collateral attack on a published epidemiological study that plaintiff seeks to mount here. *See Blum v. Merrell Dow Pharms., Inc.*, 705 A.2d 1314 (Pa. Super. 1997), *aff’d*, 564 Pa. 3, 764 A.2d 1 (2000).

37. In addition, even if a designee from Dow could theoretically offer opinions on the topics plaintiff seeks to inquire about, plaintiff’s proposed deposition violates the rule that a witness cannot be compelled to give expert testimony against his or her will. *See, e.g., Jistarri v. Nappi*, 378 Pa. Super. 583, 597, 549 A.2d 210, 217 (1988).

WHEREFORE, for the reasons set forth herein and in Rohm and Haas's memorandum of law, which is incorporated here by reference, Rohm and Haas requests that the Court grant its motion to enforce the case management order and to preclude plaintiff from collaterally attacking epidemiology studies.

Respectfully submitted,

/s/ Samuel W. Silver

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Dated: March 26, 2010

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**MEMORANDUM OF LAW OF DEFENDANTS ROHM AND HAAS COMPANY, ROHM
AND HAAS CHEMICALS LLC, AND MORTON INTERNATIONAL, INC. IN
SUPPORT OF THEIR MOTION TO ENFORCE THE CASE MANAGEMENT ORDER
AND TO PRECLUDE PLAINTIFF FROM COLLATERALLY ATTACKING
EPIDEMIOLOGY STUDIES**

Almost a year after the expert record in this case closed and more than seven months after the close of discovery, plaintiff has served a non-party, The Dow Chemical Company, with a subpoena that calls for a corporate designee's deposition testimony and production of documents regarding epidemiology. By this eleventh-hour subpoena, plaintiff seeks to force a witness from Dow to give testimony that she hopes will support her improper attacks on pub-

lished, peer-reviewed epidemiological studies that her own experts have relied upon in rendering their opinions. Plaintiff's service of this subpoena on the eve of trial is in clear violation of this Court's case management order, and her collateral attacks on the epidemiological studies are impermissible under Pennsylvania law. Accordingly, plaintiff's attempt to reopen the expert record should not be allowed.

I. MATTER BEFORE THE COURT

Plaintiff has subpoenaed Dow on epidemiology issues almost a year after the close of the expert record and more than seven months after the discovery deadline set forth in this Court's May 8, 2009 Revised Case Management Order. By this motion, Rohm and Haas asks that the Court enforce that order and preclude plaintiff from engaging in impermissible collateral attacks on published, peer-reviewed epidemiology studies. Rohm and Haas understands that Dow is moving separately to quash the subpoena, and this motion should be considered together with that of Dow and in support of Dow's motion to quash.

II. STATEMENT OF QUESTIONS INVOLVED

1. Should the Court enforce its May 8, 2009 Revised Case Management Order and preclude plaintiff from taking additional discovery more than seven months after the discovery cut-off set forth in that order?

Suggested Answer: Yes

2. Should the Court preclude plaintiff from engaging in collateral attacks on published, peer-reviewed epidemiological studies that are impermissible under Pennsylvania law?

Suggested Answer: Yes

III. FACTUAL BACKGROUND

The expert reports in this case. Plaintiff filed her complaint in May 2006. Two and a half years later, on November 6, 2008, she served her expert reports. *See* 11/6/08 Ltr., A. Freiwald to D. Suplee (Ex. 1). Among the experts she proffered to support her theory that vinyl chloride caused her husband's brain tumor are Dr. Gary Ginsberg, who opines on toxicology issues, and Dr. Richard Neugebauer, who opines on purported epidemiological analyses he performed regarding brain cancer cases in McCullom Lake Village. *See* Ginsberg Report (Ex. 2); Neugebauer Report (Ex. 3). In his report, Dr. Ginsberg discusses epidemiological studies of cohorts of workers in North America and Europe who were exposed to vinyl chloride, including a study of the North American worker cohort by a team led by Dr. Kenneth Mundt, *Historical Cohort Study of 10,109 Men in the North American Vinyl Chloride Industry, 1942-72*, 57 OCCUP. ENVIRON. MED. 774 (2000). *See generally* Ginsberg Rep. at 19-21. Dr. Ginsberg states:

The so called North American and European studies are the most influential out of the set of VC worker studies because these two across-continent studies pooled large numbers of workers from many different plants. Further, there was substantial follow-up so that they were updated to reflect the new statistics on worker mortality as they emerged from these populations.

Id. at 19. Although Dr. Neugebauer did not survey epidemiological literature in his report, he too relied on Dr. Mundt's study — stating that it was an “illustrative example” of a study design on which his own purported “cohort study” was “modeled directly.” Neugebauer Rep. at 23.

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