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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AC 17-0694

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Consolidated Cases

Cause No. AC 17-0694

PLAINTIFF'S MOTION IN LIMINE
RE: CARD'S FINANCES AND
RELATIONSHIP WITH ATTORNEYS
AND BRIEF IN SUPPORT

Applicable to
Hutt v. Maryland Casualty Co. et al.,
DDV-18-0175

Comes now Plaintiff, in accordance with the Court's scheduling order, and respectfully submits his motion *in limine* to prevent Defendant Maryland Casualty Company ("MCC") from argument, suggestion, examination, testimony or evidence regarding, any financial or other alleged improper relationship between Plaintiff's attorneys and Libby's CARD¹ Clinic or CARD Foundation, or regarding the finances of CARD Clinic or CARD Foundation.

The issues raised in this motion *in limine* are intended to be broadly applicable to all the parties before the Asbestos Claims Court. They are therefore appropriate for resolution here, rather than in the District Court at the trial of just this Plaintiff's claims.

¹ Center for Asbestos Related Disease.

INTRODUCTION

The CARD Clinic is a 501(c)(3) organization established in response to the nation's only EPA-declared Public Health Emergency. *See* CARD Clinic website, <http://www.libbyasbestos.org>; *see also* U.S. EPA, *Determination and Findings of Public Health Emergency for Libby Asbestos Site in Lincoln County, Montana*, June 17, 2009 (submitted as Exhibit 1 to Plaintiff's Brief in Support of Motion to Quash Subpoenas on CARD Clinic & CARD Foundation, filed May 25, 2018). Initially established as a department of Libby's St. John's Lutheran Hospital in 2000 to assist the asbestos screening work of the ATSDR,² CARD separated from the hospital and became a stand-alone entity in 2003. *See* CARD website. Its mission expanded from screening and medical treatment to also include research and outreach with community support services. *Id.* CARD continues to operate today as a primarily grant-funded clinic with over two dozen employees, with the mission of patient screening and care, and a secondary goal of assisting research from around the country. *Id.* It currently follows approximately 5,000 patients.

In 2008, similar to numerous hospitals throughout Montana, a separate non-profit foundation was created to support the CARD Clinic. *See* CARD Foundation website, <http://www.donatecardfoundation.org>. The CARD Foundation's mission is to:

1. Raise support to fund the healthcare, research, and outreach needs of CARD.
2. Continue to host the BIG SKY BASH concert event . . .
3. Fund and grow an endowment.
4. Create partnerships with other local and national healthcare and research foundations.

Id. Both the CARD Clinic and CARD Foundation are operated by volunteer community boards of directors. Together, they serve a critical medical and social services role in Lincoln County, a rural community with an undisputed history of tragic asbestos contamination and illness.

² Agency for Toxic Substances and Disease Registry.

This Court is well aware that the majority of claimants before this Court have been seen at and continue to treat with the CARD Clinic. The Court is equally aware that almost all of these claimants are represented by this law firm (“MHSL”) or the Kovacich Snipes law firm (“KS”).

MCC has repeatedly raised as an issue the fact that MHSL and one of its founding partners donated money to the CARD Foundation. MCC has repeatedly raised as an issue that MHSL and its attorneys have an alleged special relationship with the CARD Clinic. Despite this Court allowing MCC and its fellow Libby Defendants considerable latitude in their attempts to insinuate from the facts improper conduct by MHSL (and more broadly against all persons associated with CARD), MCC chose not to comply with the Court ordered deadline to file a motion to disqualify MHSL or KS. Nevertheless, there is concern that MCC will still try to introduce into the trial of this matter evidence regarding CARD and/or MHSL when it is irrelevant, immaterial, and/or unfairly prejudicial.

The parties and this Court (together with the Eighth Judicial District Court, before whom trial proceedings will occur) are preparing to try the asbestos-related injury cases of one individual Plaintiff, Ralph Hutt. Plaintiff does not intend to call either Dr. Black or other CARD staff as witnesses at trial to prove his case in chief. Dr. Black’s credibility will not be in issue in this case. In the absence of an issue of witness credibility, bias or interest evidence addressing his alleged relationship to the attorneys must be constrained. (Similarly, Plaintiff has disclosed no witnesses or doctors from Mount Sinai.)

Any effort by MCC to introduce evidence regarding CARD and CARD’s finances is irrelevant, prejudicial, and ultimately improper pursuant to well established principles of Montana law, as are any effort to introduce evidence against Plaintiff’s counsel and its relationship, financial or otherwise, with CARD. As set forth herein, Plaintiff seeks an order *in limine* to preclude such argument or evidence by MCC.

APPLICABLE STANDARDS

A motion *in limine* is a “procedural device[] to obtain an early and preliminary ruling on the admissibility of evidence.” *Speaks v. Mazda Motor Corp.*, 118 F.Supp.3d 1212, 1217 (D. Mont. 2015); *see also Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 11, 294 Mont. 444, 981 P.2d 275 (“A motion *in limine* is a request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy.”). Its purpose is “to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial.” *Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59. The Montana Supreme Court further recognizes that counsel may want to avoid objecting to improper arguments in front of the jury, as such objections only underscore the inappropriate points made by opposing counsel. *See State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391 (citing *Cooper*, ¶ 38). It has “historically encouraged the filing of motions *in limine* for precisely this reason.” *Id.*

This Court has recognized its need to “sit on motions that affect broad categories of plaintiffs, or defendants, or whose resolution will be important for trial or settlement purposes.” Asbestos Claims Court Hearing, January 31, 2018, 84:19-22.

ARGUMENT

I. Evidence regarding CARD finances or any relationship with attorneys is not relevant and should therefore be excluded.

Plaintiff has brought claims against MCC based on his exposure to asbestos-contaminated dust. He now has serious asbestos-related disease, marked by substantial lung impairment and both interstitial and pleural injury. Plaintiff has the burden of proving the elements of his claims. This includes establishing specifically the existence and severity of the asbestos injury that he alleges, and MCC’s role in causing such injury. Plaintiff will prove his medical condition and its cause through the testimony of his treating physician in Oregon, and through the testimony of an expert pulmonologist from Yale and a radiologist from

Pennsylvania. While there are records from one visit at the CARD clinic, NO CARD clinic doctor or staff member will be a witness at trial.

Montana Rules of Evidence Rule 401 provides:

Relevant evidence means 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. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

“Evidence which is not relevant is not admissible.” M.R. Evid. 402.

Of course, a witness’s bias, interest and credibility are always relevant. *See* § 26-1-302, MCA. In the absence of a witness, there is no relevance to the evidence about CARD Clinic financial arrangements or transactions with attorneys.

Similarly, no evidence of attorneys’ donations, funding of a study, CARD finances, or any relationship or transactions between CARD and attorneys is relevant to the issues in this case. CARD’s finances and any attorney relationships do not bear upon the existence of any element of the Plaintiff’s claims or any element of the defenses. However, since Plaintiff will prove the existence and cause of the asbestos-related injuries that he alleges without relying upon CARD witnesses, no potential evidence *bearing upon the credibility of witnesses from CARD* is relevant, and therefore it is inadmissible.

- A. Plaintiff’s initial diagnosis from CARD is not sufficient basis to create a relevant issue of CARD’s credibility.

Plaintiff bears the burden to prove his alleged asbestos-related medical condition. That burden does not inherently demand that he present evidence of particular records or treatment from CARD. For example, while MCC has made well known its dispute over CARD’s initial diagnoses of Libby Claimants,⁴ Plaintiff Ralph Hutt was **not** first diagnosed at the CARD Clinic.

⁴ MCC’s and other Defendants’ dispute is that cases should not be filed and placed on a deferred docket on the strength of the initial diagnosis under CARD/SINAI methodology for reading lamellar pleural thickening. The Court’s Deferred Docket procedure necessarily means that any

Nor does any evidence in his case include a CARD diagnosis.

Instead, Plaintiff's burden and evidence relates to his current condition. As a matter of both fact and law, there is simply no issue in controversy related to this Plaintiff's initial diagnosis.⁶ Accordingly, broad allegations about donations from Plaintiff's attorneys or any alleged special relationship with CARD has no relevance in this Plaintiff's case.

B. A plaintiff having been treated at CARD is not a sufficient basis to create a relevant issue of CARD's credibility.

Medical providers and experts may have reviewed CARD medical records. That does not make CARD personnel's credibility a proper cross-examination subject. Rule 401, M.R. Evid., identifies "evidence bearing upon the credibility of a witness"⁷ as potentially relevant evidence. Likewise, § 26-1-302(3), MCA, separately provides that a party may employ evidence regarding "bias of the witness" when attempting to challenge the testimony of a witness. There is no basis for a party to employ evidence of bias in attacking the truth or credibility of a medical record.

Any attempt by MCC to bootstrap into a witness bias/credibility issue by reason of the existence of CARD records must fail for four reasons. First, there is no authority for extending the witness credibility provisions of § 26-1-302, MCA, to documents. Second, before a document's "credibility" could be in issue in this case, the Plaintiff would have to introduce the record or introduce expert testimony that is based on the record. In this case, neither foundational prerequisite will be met. Third, many, if not most documents do not contain information that is subjective. In contrast to a medical opinion, diagnosis, or report constituting an interpretation of a radiological image, the objective image itself cannot raise an issue of

plaintiffs' claims that advance on the Active Docket will depend on threshold medical evidence that goes beyond the CARD's initial diagnosis of mild or normal disease.

⁶ The only relevance that an initial diagnosis might have in this case is to MCC's statute of limitations defense.

⁷ Emphasis is added. Hereinafter, all emphasis is added unless otherwise noted.

credibility.

Fourth, as discussed in more detail below, a collateral foray into an attorney's contributions to the CARD Foundation would be a prejudicial distraction that is not warranted under Rule 403, M.R. Evid. Specifically, the real and only purpose of evidence of transactions involving CARD and Plaintiff's counsel is to direct the jury's attention to the inflammatory inference that there is alleged impropriety of donations in the context of evidence that CARD personnel apprised a handful of patients regarding the short list of attorneys that are handling Libby asbestos cases. See *Palmer by Diacon v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 124, 861 P.2d 895, 916 ("Implications of unethical or illegal behavior are inherently prejudicial."). The jury is not equipped to evaluate that propriety issue. It is not germane to the core issues of the case, and has no significant probative value with respect to an objective document. The circumstances that demonstrate the propriety of the donations would require days of testimony; it is precisely the type of mini-trial that Rule 403 is designed to avoid.

Until and unless Plaintiff introduces a CARD record or opinion testimony which is based upon a CARD record there is no relevance to any attorney-CARD transactions. MCC should not be allowed to attack a witness, who is not part of CARD, simply because that witness may have reviewed (though not based any opinion on) a medical record from CARD. If MCC wishes to introduce evidence of credibility or bias of a non-CARD witness pursuant to M.R. Evid., Rule 401 or § 26-1-302(3), MCA, it is properly limited to the evidence that bears upon that witness's credibility. CARD's finances or CARD's relationship with attorneys would not be among that permissible evidence of any non-CARD witness.

C. MCC cannot call CARD witnesses for the sole purpose of generating an attack on the overall credibility and bias of CARD.

Rule 402, M.R. Evid., prevents the admission of evidence that is not relevant. Evidence of credibility or bias becomes relevant only after a witness introduces evidence that is recognized

as relevant by the rules and the facts of this case. There is simply no justification or grounds to allow a party to create a collateral credibility issue and introduce evidence regarding the bias of a witness that has not first been properly put before the Court. Accordingly, MCC cannot manufacture a platform for its ulterior purposes by itself calling upon and attacking the credibility of its “own” straw man CARD witness.

With respect to the underlying propriety of MCC calling a CARD witness, it is important to note that MCC has failed to disclose any expert opinions or facts that MCC intends to offer through them. Testimony that any potential CARD witness might offer must therefore be limited to the history of and records regarding their treatment of Plaintiff. Also, under Rule 403, M.R. Evid., MCC cannot simply call a potential CARD witness for the primary purpose of immediately challenging their credibility with the goal of distracting the jury to the question of the propriety of transactions involving CARD and Plaintiff’s attorneys. To place credibility in issue, the witnesses would first need to testify to facts that MCC intends to dispute, in part through a challenge to their credibility with respect to those facts.⁸ When testifying as MCC’s own defense witnesses, no such evidence can properly be admitted.

II. Even if CARD’s credibility is deemed relevant regarding medical evidence in Plaintiff’s case, the evidence at issue in this motion should be excluded pursuant to M. R. Evid. Rule 403.

Montana Rules of Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, there can be no doubt that the “evidence” on which MCC would rely is highly charged and carries the danger of **unfair prejudice** and **misleading the jury**. This Court

⁸ Evidence of donations to the CARD Foundation or any alleged relationship with CARD Clinic providers has no bearing on a CARD Clinic witness’s “character for truthfulness.” *See* M.R. Evid. 608.

oversaw a hearing in September where the sensitivity of accusations regarding this issue was on full display. In front of a jury, not only would this evidence be grossly and unfairly prejudicial to this Plaintiff, it would carry great risk of confusion. Issues like ‘referral’ that have a technical meaning within the context of professional conduct would no doubt be interpreted disparately and wrongly by jurors without the necessary background and experience. This is one of the primary reasons why MCC is likely still to pursue its attack, and equally why Rule 403 exists: prejudicial evidence like this has the capacity to be very powerful. Unfortunately, MCC would seek to employ that power unfairly to tilt the jury and these proceedings away from the real issues in fairly litigating Plaintiff’s claims.

As stated above, this is a case involving a former W.R. Grace worker who developed severe asbestos disease from exposures suffered long before the CARD Clinic was in existence. It does not involve the diagnoses made years later by the CARD Clinic.

The only way that this Plaintiff can be afforded his right to a fair trial in which his medical condition is assessed by the jury is by an *in limine* order that prevents MCC from arguing such prejudicial evidence. Even assuming *arguendo* it was relevant to some claim or defense, its minimal probative value is substantially outweighed by the dangers of prejudicing and misleading the jury, and should be excluded under Rule 403, M.R. Evid.

Finally, this evidence would inject unnecessary evidence and lead to substantial delay. As demonstrated in part by the prior proceedings before this Court, a virtual mini-trial would be required to defend against the breadth of MCC’s allegations. The Court has denied MCC’s desire for additional discovery into the matter, and the fact remains that there is no evidence to support MCC’s desire to connect charitable donations made by MHSL or one of its founding attorneys to the CARD Foundation with the CARD Clinic’s diagnostic practices or any allegedly related motivations. Moreover, there is absolutely no legal or ethical rule prohibiting the

donations that were made or prohibiting the CARD Clinic from apprising some patients (upon their request) of the CARD Clinic's knowledge of what attorneys were handling Libby asbestos cases.

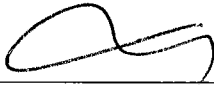
This motion *in limine* is further necessary to mark a clear line regarding the argument, evidence, and conduct that MCC cannot engage.

CONCLUSION

For all of the foregoing reasons, Plaintiff requests that his motion *in limine* to prevent MCC from arguing on the basis of, including any cross examination, or submitting testimony or evidence regarding, any financial or other alleged improper relationship between Plaintiff's attorneys and Libby's CARD Clinic or CARD Foundation, or regarding the finances of CARD or CARD Foundation.

DATED this 9th day of November 2018.

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CERTIFICATE OF SERVICE

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