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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 RESPONSE (Consolidated) TO MCC'S MOTIONS IN LIMINE ON EXPERTS CROWLEY, REDLICH, SPEAR AND MORRISON Applicable to *Hutt v. Maryland Casualty Co. et al.*, DDV-18-0175

Comes now the Plaintiff and responds to Maryland Casualty Company's ("MCC's") several "Motions In Limine" with respect to four of Plaintiff's expert witnesses. **These are motions that do not have application beyond the Hutt case and may be deferred to the trial court's ruling.**

INTRODUCTION

MCC seeks, by way of a motion *in limine,* a limitation on several aspects of expert witness evidence. The argument below addresses each contention.

ARGUMENT

A. The Montana Rules of Evidence permit wide latitude in expert opinions that will assist the trier of fact to understand the evidence or to determine a fact in issue.

The Montana Supreme Court has explained, in a ruling reversing a trial court's grant of

a defendant's motion *in limine*, that the central issue is one of relevance:

> As a general rule, all relevant evidence is admissible. Rule 402, M.R.Evid. Relevant evidence is defined 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." Rule 401, M.R.Evid. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury... [11] Rule 403, M.R.E.

Kissackv. Butte Convalescent Center, 1999 MT 322, Irl 1,992 P.2d 1271.

Under Rule 702, M.R.Evid., the value of expert testimony arises where "scientific, technical, or other **specialized knowledge will assist the trier of fact to understand the evidence** or to determine a fact in issue."

Montana's standard for admissibility of expert testimony is not as strict as in federal court:

> Montana has not adopted any of the recent versions of Federal Rule of Evidence (F.R.Evid.) 702, which sets the standard for the *210 admission of expert testimony in many jurisdictions. As currently written, both F.R. Evid. 702 and M. R. Evid. 702 state that a witness who is "qualified as an expert" may testify if her "knowledge will help the trier of fact to understand the evidence or determine a fact in issue." F.R. Evid. 702(a); M. R. Evid. 702. **That is where the Montana rule stops**. F.R. Evid. 702, however, further conditions admission on whether, "(b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods **609 to the facts of the case." F.R. Evid. 702(b–d).

McClue v. Safeco Ins. Co. of Illinois, 2015 MT 222, ¶ 19, 380 Mont. 204, 209–10, 354 P.3d 604, 608–09 (emphasis added).

In Montana, the focus is on whether the testimony (a) will "assist" the jury, members of which lack the "qualified" expert's specialized knowledge (M. R. Evid. 702), and (b) whether there is at least minimal reliability - the strength of which is for the jury to weigh:

> Questions concerning expert testimony's reliability are threefold under Rule 702, M.R.Evid.: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts. First, the district court determines whether the expert field is reliable. Second, the

> district court determines whether the witness is qualified as an expert in that reliable field. If the court deems the expert qualified, the testimony based on the results from that field is admissible—**shaky as that evidence may be**. Third, the question whether that qualified expert reliably applied the principles of that reliable field to the facts of the case is **not a question for the trial court** to resolve. Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

State v. Clifford, 2005 MT 219, ¶ 28, 328 Mont. 300, 306–07, 121 P.3d 489, 494–95(emphasis added).

Under Rule 703 M.R.E., an expert may rely on information that is not otherwise admissible into evidence:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence**.

Moreover, an expert may address the "ultimate issue to be decided by the trier of fact." Rule 704 M.R.E.

Under Montana law, expert testimony must be permitted "to establish the standard of care unless the conduct complained of is readily ascertainable by a lay person." *Weaver v. State*, 2013 MT 247,142,371 Mont. 476,310 P.3d 495, (brackets omitted); quoting *Brooldns v.Mote*, 2012 MT 283,163, 367 Mont. 193,292 P.3d 347.

Finally, an attorney as expert witness may not tell the jury what law applies to defendant's conduct, as that is the exclusive province of the Court. In contrast, an attorney expert witness is allowed to testify to an insurer's relationship to insured and to how an insurer should evaluate facts and approach such concerns as the claim of its insured:

> We find no abuse of discretion in allowing attorneys to appear as expert witnesses for the purpose of stating their opinion on an insurer's duty to evaluate the facts, on what constitutes a reasonable evaluation of the facts, or on and how an insurer should have approached the negotiations with the plaintiff.

Safeco Ins. Co. v. Ellinghouse, 223 Mont. 239, 251, 725 P.2d 217, 224–25 (1986)(emphasis added).

B. **Dr. Redlich's use of the "Lee Index" when formulating her opinions on life expectancy does not disqualify her opinion.**

MCC seeks vaguely-articulated limitation on Dr. Redlich's testimony regarding Ralph Hutt's life expectancy as well a corresponding limitation on "life care" expert testimony to the extent it relies on Dr. Redlich's opinion on life expectancy. While MCC may challenge Dr. Redlich's methodology on cross examination, that challenge goes to the weight of the evidence.

The false premise of MCC's motion regarding Dr. Redlich (and, by extension, life care expert Crowley) is that Dr. Redlich misused the "Lee Index" (a) when evaluating Ralph Hutt's life expectancy and (b) when opining to the prognosis that Hutt will likely die of asbestos disease. With respect to life expectancy, MCC asks this Court to assume that the only basis for the doctor's life expectancy opinion is the "Lee Index," and then argues that because that index is not specific to asbestos disease, Dr. Redlich's methodology is inherently false. With respect to asbestosis role in Hutt's prognosis, MCC provides no explanation of how it contends that Dr. Redlich's use of the "Lee Index" relates in any way to her opinions regarding the progression of Hutt's asbestos disease or her opinion that that disease will be the cause of his death.

Asbestosis manifests with significant variability among patients depending on the type of asbestos, the duration and quantity of exposure, and each patient's unique response thereto. Based on her evaluation of objective signs and symptoms, including the CT scans, and deteriorating pulmonary function, Dr. Redlich will opine that Hutt's asbestos disease is severe, that it is progressing, and that it will cause his death. These opinions have nothing to do with the "Lee Index."

Dr. Redlich will explain that, when evaluating life expectancy, it is necessary to take into consideration multiple factors of health condition, age and environmental and lifestyle factors.

Obviously, these factors cannot be ignored. Dr. Redlich has testified to nothing more remarkable than that, in reaching her opinion of life expectancy (i.e. including asbestos disease and other relevant factors) she has "used" the Lee Index because of its utility to a clinician's evaluation of the variety of factors that are in play in Mr. Hutt's condition. Redlich deposition p.75 ("taking these indices and putting them in a format that is useful for clinicians to use. ... I used this."). By appropriately applying this clinical tool to her assessment of life expectancy, Dr. Redlich has employed the strength of the underlying data supporting the index to evaluate factors affecting life expectancy both which arise from non-asbestos factors.[1] She certainly has also factored in his asbestos- related disabilities and impairments. With respect to the latter, Dr. Redlich's report specifically states that "the risk posed to Mr. Hutt by his asbestos related disease exceeds that of the rest of his other medical conditions."

MCC is entitled to cross examine Dr. Redlich with questions directed at whether she properly "used" the "Lee Index" clinical tool. Indeed, MCC can cross examine Dr. Redlich with its own inputs/results using the Lee Index. The success or failure of MCC's cross examination contentions will go to the weight of the expert's opinion evidence. They certainly do not serve as a basis to exclude her professional judgment as a pulmonologist of Ralph Hutt's life expectancy.

C. **The need for travel to CARD for evaluations of the progression of his disease and the costs associated with medical supplies are adequately foundationed.**

MCC contends that "there is no support for [life care expert] Crowley's assumption that Hutt will require regular visits to CARD." Again, MCC can advance this contention when cross examining the expert witness, and the efficacy of that cross examination will go to the weight of the expert testimony.

Of course there is no absolute "need" for Hutt to travel to the CARD clinic, though that is where the vast majority of patients with disease from the Libby amphibole go, and it therefore

[1] e.g. smoking history - Redlich deposition p.76, line 3

has corresponding unique expertise. Nor is there any absolute "need" for a hypoxic patient to use supplementary oxygen so as to be able to do routine activities in the home. Life care expert Crowley developed her opinions and bases therefore in consultation with Dr. Redlich with respect to "medical treatment going forward" and "what [Hutt] might need." Dr. Redlich deposition pp.32-33. Such consultation is the appropriate means for a life care plan expert to evaluate the assumptions of a life care plan, and ample "foundation and support" for her opinions. Any challenge to any part of those assumptions goes to the weight of the expert opinion.

Similarly, life care expert Crowley's opinions on medical equipment and supplies is appropriately based upon a pulmonologist's opinions and consultations regarding the progression of the disease and needed care, together with Crowley's own extensive experience with patients with asbestosis. While MCC is entitled to cross examine both Dr. Redlich and Ms. Crowley, no grounds for excluding the expert testimony arises because Ms. Crowley did exactly what she is supposed to do: consult with a medical expert to confirm the assumptions of the life care plan.

D. Respected expert Dr. Spear is qualified to testify on Industrial hygiene without a CIH certification, and his testimony is all necessary and permissible.

1. Dr. Spear is amply qualified to give expert testimony.

The legal standard for qualification to testify as an expert is that there is a reliable "field" of expertise, and that the witness is qualified "by knowledge, skill, experience, training, **or** education." While the rule lists multiple ways to qualify, among them there is no mention of "certification" by a self-authorized organizational body. MCC contends Dr. Spear (who holds a Ph.D. in environmental health, has taught industrial hygiene at Montana Tech, and has extensive experience with asbestos and specifically the health concerns of exposure to Libby asbestos) is not qualified simply because he is not "certified" by the ABIH. While such certification is not required, Dr. Spear's professional attainment actually far exceeds ABIH certification procedure,

as he has completed the much more rigorous requirements of a doctoral program in environmental health.

Dr. Spear has been recognized as an expert in numerous cases[2] and even has been named as an expert witness by MCC.[3] MCC's grounds for exclusion borders on the absurd. Its rational for exclusion, taken to its extreme, would disqualify Albert Einstein from testifying even to Newtonian physics because he didn't graduate from high school.

2. Industrial Hygiene standards are at issue in this case because MCC undertook to provide industrial hygiene services at Grace's Libby operation.

After having just argued that there is a single industrial hygiene field (certified by the ABIH), MCC's second argument is that, because it is an insurance company, it is subject to different industrial hygiene standards, with respect to which Dr. Spear's testimony cannot assist the jury.

A key issue in the case is whether MCC's advice, recommendations and safety program conformed to the requirements of industrial hygiene. The foundation for Dr. Spear's testimony regarding this issue is that MCC undertook and performed industrial hygiene services addressed to the asbestos dust hazard to workers at Libby. In its Rule 30(b)(6) deposition testimony, MCC testified to numerous documents establishing this foundation. MCE020 ("**the dust problem** has been referred to [MCC's] Engineering Division and they in conjunction with [MCC's] Medical Division are **presently formulating a program for control and prevention**."); MCE022 p.1,

[2] See, e.g. *Nelson v. Cenex*, 2008 Mont. Dist. LEXIS 444 ("Dr. Spear has a Ph.D. in environmental health and is a professor at Montana Tech. He has worked extensively in the field of asbestos. He is a fellow of the National Institute of Occupational Safety and Health, and is a member of the American Industrial Hygiene Association. He has appeared as an expert witness over a period of fifteen years and has given testimony in more than fifty cases for all types of parties. Dr. Spear has been accepted in both state and Montana federal district courts as an expert on the issue of asbestos."); see also *Atchley v. Louisiana Pacific Corp.,* 2015 MTWCC 3at p. 20 ("This Court finds Dr. Spear's testimony far more persuasive than Sheriff's. At the outset, Dr. Spear has stronger educational credentials and specific expertise regarding the asbestos contamination in the Libby area."); *Warner v. Albertson's Inc.,* No. 00CV00043, 2001 WL 36114799, at *1 (D. Mont. Apr. 4, 2001)("denying motion in limine to exclude expert testimony of witnesses, Terry Spear")

[3] September 14, 2018, expert witness disclosure by MCC.

par.3 ("we [MCC] are particularly interested at this time in the **industrial hygiene** portion of that program"); MCE081 (MCC advising Grace that it "will be prepared to plan for the future operations in this area and that your employees in this operation can be assured freedom from Asbestosis by close observation of the **Industrial Hygiene Practices** which are established"); MCE073 p.2 top paragraph (MCC advising Grace that the 5 mppcf dust exposure level it recommended was "intended for use in the field of **industrial hygiene** and should be interpreted and applied only by persons trained in this field" and explaining, at p.3 paragraph numbered 5, "this is the evaluation upon which [MCC safety representative] Mr. Walker has made his [5mppcf] recommendation."); MCE036 at pp. 25-26 (Libby Safety Program drafted by MCC is directed at "maximum personal protection to the employees" using "standards of the American Congress of **Industrial Hygienists … industry accepted standards, latest equipment, procedures and research.**"

Since one issue in this case is whether MCC's advice, recommendations and Safety Program design conformed to the standards for the "industrial hygiene" services it expressly undertook to perform, Dr. Spear's testimony will "assist" the jury's understanding and evaluation of MCC's conduct. M.R.Evid. 702.

3. The **risk** of mesothelioma and cancer are essential to evaluating whether MCC met the standard of reasonable care when performing its professional services, and the need for and content of necessary warnings.

Two key determinations for the jury are (1) whether MCC exercised reasonable care when performing industrial hygiene, engineering and "Safety Program" services, and (2) whether MCC failed to provide the necessary warnings to workers. MCC contends that the risk to workers of mesothelioma and cancer are not relevant to these issues.

The ABIH definition of industrial hygiene's definition of "industrial hygiene" states:

> Health and safety hazards cover a wide range of chemical, physical, biological and ergonomic stressors. Those dedicated to anticipating, recognizing, evaluating and controlling those hazards are known as Industrial Hygienists.

At the heart of the industrial hygiene concern, therefore, is the risk from exposures to "hazards." Similarly, the engineering services MCC undertook to perform were directed at the risks of occupational exposures to asbestos dust at Grace's Libby facility and, specifically, MCC's goal to "satisfactorily engineer this risk" (MCE048 at p.2),. Likewise, MCC's draft of the worker Safety Program (MCE036, pp.25-26) states an objective of "maximum personal protection" from the risks posed by the workplace dust.

When evaluating whether MCC met the standard of reasonable care, the question is whether MCC met the industrial hygiene, engineering and worker training requirements attendant to the risk at the Libby workplace presented by the asbestos dust. That risk includes all foreseeable consequences, including the risk of asbestosis, lung cancer and mesothelioma.

In contrast, the separate question of causation - i.e. what injuries were caused by MCC's negligence – asks what form of asbestos disease was actually caused to Hutt. There being no contention that MCC's negligence caused Hutt to suffer mesothelioma or cancer (although causing an increased probability that he may in the future), mesothelioma is not significantly at issue in the causation question. That does not, however, eliminate mesothelioma from among the extraordinary risks which dictate the actions required to meet the standard of reasonable care.

The second key determination for the jury is what warnings to workers were necessary. In its October 29, 2018, Rule 30(b)(6) deposition (p.182) MCC admitted that the following statement of the purpose of warnings applied to accepted industrial hygiene practices in the 1960s:

> The purpose [of warnings] is to provide people adequate information about hazards so that they can make informed decisions on how to avoid getting themselves or others hurt.

MCC went on to admit that, in addition to apprising workers of the presence of asbestos, the high concentration of asbestos in the dust, the excessive exposures to asbestos in the Libby workplace, and the high incidence of lung impairment among Libby workers, a warning would have helped workers by informing them of the deadly consequences that could result, so that the workers could properly assess the nature and degree of the risk:

> 7 Q. Would it have been helpful for them to know
> 8 that beyond merely being a nuisance dust, there were
> 9 serious consequences to exposure from the toxic asbestos
> 10 in the dust that could disable or kill them after they
> 11 retire?
> 12 A. Yes.

October 29, 2018, Rule 30(b)(6) deposition of MCC (Shoup) p.186 (emphasis added).

Upon this admitted foundation, Dr. Spear will testify that the content of a warning must adequately apprise workers of the degree and consequences of the asbestos dust hazard, including a warning that reflects the fact that even minimal exposure to asbestos presents an increased risk of lung **cancer and mesothelioma**. The reason, of course, is that knowledge of great risk and potential fatal consequences prepares the worker to protect himself – the consequence and result being that the worker thereby has the opportunity to immediately respond, hopefully in time to prevent any disease, including mesothelioma. A worker doesn't need to prove that he will get mesothelioma in order to be entitled to be a warning that he faces that risk.

Given MCC's admissions of its undertakings and performance of services directed at risks to workers from the asbestos exposures at the Grace mill, evidence of what risks needed to be addressed and warned of will clearly "assist" the jury in determining whether MCC met its duties.

4. Dr. Spear is entitled to rely on and testify regarding studies and standards that are relevant to the cause of Hutt's asbestos disease.

MCC asserts that, when evaluating its conduct leading up to and including Hutt's exposures in 1968-69, it is not appropriate to hold it accountable to standards that evolved thereafter. Plaintiff agrees. Dr. Spear's testimony with respect to the knowledge and standards of care applicable to Hutt's claim are to be directed to those that were known or existed through November, 1969.

Dr. Spear will also testify, however, to considerations that experts look to when determining the cause of injury. Specifically, whether or not MCC (or anyone) knew or could have known them in the 1960s, the facts of the toxicity of Libby asbestos, including current knowledge of the levels necessary to cause Hutt's disease and the EPA's recent "Libby Amphibole" toxicity standard, are admissible so long as MCC continues to contest causation.

5. Dr. Spear will not testify to matters directed at community exposures.

The expert disclosure for Dr. Spear discusses take-home and community exposures. After the disclosure was filed, the testimony of Plaintiff established that he had only minimal community exposures which Dr. Redlich has opined were not significant. As a result, Hutt has now formally withdrawn any claim for damages arising from community exposures. Unless MCC re-inserts a community exposure issue into this case, Dr. Spear will not be testifying in this case[4] to community exposure matters.

[4] In reality, the Bankruptcy Court has placed and MCC has sought **no limitation** on Hutt or any Grace employee's claim with respect to exposures away from work other than that Hutt's claim must arise by reason of its provision of workers' compensation insurance related services at the Grace facility (e.g. damages caused by a failure to give a warning to workers of the asbestos hazard of vermiculite). With respect to other cases, Plaintiff's strongly disagree that a Grace worker, or for that matter any plaintiff, is precluded from bringing claims against MCC that (a) are independent of Grace's conduct, (b) are independent of the insurance relationship **or** (c) if arising from insurance, arise from MCC conduct with respect to workers' compensation insurance. These matters are expected to be resolved by the Bankruptcy Court in pending proceedings.

E. Attorney Morrison may testify to the nature of the relationship between a workers' compensation insurer and a worker, as well as the reasonable expectations that arise from that relationship; Morrison will not testify to legal duties or to ultimate opinions of whether MCC actions with respect to Grace workers was appropriate.

An attorney may have expertise in a number of matters, including what the law is. An attorney may not **testify**, however to what duties the law imposes or what constitutes a breach thereof because those legal questions are the exclusive province of the trial court judge.

In view of this limitation, an attorney can give the benefit of specialized knowledge in matters other than the law itself such as the standard of care of legal professionals or specialized knowledge attendant to his professional fields of practice.

In the instant matter, in addition to being a lawyer, John Morrison is, or has served as an academic who teaches insurance, an insurance professional, and as Montana's Commissioner of Insurance. As a result, he has extensive specialized knowledge and expertise that can "assist" the jury in evaluating (a) the role of insurance in society, (b) the nature of the relationship between a workers' compensation insurer and a worker, (c) the expectations that are recognized in the insurance industry to arise from that relationship, (d) the knowledge of insurers with respect to such expectations, and (e) insurance industry practices that reflect that relationship and those expectations.

There are two significant limits Plaintiff has placed on the scope of the offered testimony. First, Mr. Morrison is not asked to give testimony on the law. He will not testify to any legal duty. He will not testify to whether any legal duty was breached. He will not, for example, testify that there is implied duty of good faith, or that dishonesty on the part of an insurer constitutes a breach of that legal duty. Indeed, the expert disclosure states that, "I do not render opinions here regarding legal duties that are imposed on an insurer by statute or common law."

Rather, Mr. Morrison's testimony will be strictly limited to matters that assist the jury in understanding the factual context and circumstances of insured –insurer relations and industry practices so that, once instructed by the Court on applicable law (e.g. the legal duty of "good faith"), the jury has a sufficiently informed understanding of those circumstances to evaluate MCC's conduct as an insurer. The distinction is that, regardless of legal duties, the insurance relationship itself places each party in such a position that, as a matter of practice and fact, they are mutually dependent on the honesty of the other.

Second, Mr. Morrison will **not** attempt to apply his opinions to reach his view of the propriety of MCC's conduct. Specifically, while it is permissible to give opinions that embrace the ultimate jury question,[5] he will not be asked to do so.

The testimony of Mr. Morrison is quite short. It consists of 11 succinct and fully disclosed opinions, from which his testimony will not stray, and each of which steers well clear of any opinion on the law.

MCC argues that Morrison should not be permitted to explain the insurance relationship and, in particular, the "special" characteristics of that relationship. Specifically, Morrison will explain from the perspective of the industry and expectations of the parties that insurance often addresses a non-profit concern of protection from fortuitous loss, circumstances of vulnerability, and an exceptional bilateral dependence on the honesty since matters essential to the insurance are often wholly within the control of one side to the relationship (e.g. an insured's knowledge of a preexisting condition or a pending liability claim). MCC apparently contends that these special characteristics are imposed by law. They are not. These characteristics and conditions arise from, and are inherent in, the nature of the relationship and would exist if there were no law at all addressing the legal duties of insurers and insureds.

[5] Rule 705, M.R.Evid. ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the jury.")

Next, MCC argues that Morrison will opine on "the actions" of MCC. On the contrary, only one opinion (No.11) speaks to anything other than the propositions and practices that apply generally to all insurers and nsurance relationships. Moreover, opinion 11 does not purport to make a determination of fact; it merely explains that if certain things happened, they would be inconsistent with the expectations known to insurers which the first 10 opinions have described. The 11th opinion would constitute an opinion that embraces an ultimate issue only if MCC admits the factual predicate. (Even upon such admission, the opinion would not be objectionable under Rule 704.) Without such admission by MCC, the opinion allows the jury to make its own determination of whether the predicate facts are true. Indeed, Morrison will give no opinion or inference as to whether any factual contentions with respect to MCC's conduct are true.

CONCLUSION

MCC's motions regarding expert testimony should be denied. Plaintiff's experts will not offer any testimony (a) regarding community exposures or (b) stating the law of Montana applicable to this case. In all other respects, MCC's motions are devoid of merit.

DATED this 23d day of November, 2018.

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Dated: 11-23-2018