

11/28/2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AC 17-0694

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IN THE MONTANA ASBESTOS CLAIMS COURT

IN RE ASBESTOS LITIGATION,

)

Cause No. AC-17-0694

)

Consolidated Cases.

)

Applicable to

)

Hutt v. Maryland Casualty Co. et al.,

)

Eighth Judicial District Court,

)

Cause No. DDV-18-0175

)

)

MCC'S RESPONSE IN OPPOSITION TO

)

PLAINTIFF'S MOTION IN LIMINE RE:

)

CARD'S FINANCES AND

)

RELATIONSHIP WITH ATTORNEYS

Defendant Maryland Casualty Company (“MCC”), n/k/a Zurich American Insurance Company, successor by merger to MCC as of December 31, 2015,¹ by and through its undersigned counsel, hereby submits this Response in Opposition to Plaintiff’s Motion in Limine Re: CARD’s Finances and Relationship with Attorneys. For the reasons explained below, Plaintiff Ralph Hutt’s (“Hutt”) Motion should be denied, as wholesale exclusion of relevant evidence regarding CARD’s credibility is inappropriate at this time.

INTRODUCTION

This Court is aware of the significant role the CARD Clinic and the related CARD Foundation play in the instant litigation. Namely, the CARD Clinic has diagnosed or treated virtually every individual claimant involved in the Libby litigation. In relation to Plaintiff’s Motion for a Deferred Docket, this Court permitted discovery relating to the financial relationship between the CARD Clinic and Plaintiff’s counsel. There is evidence that Plaintiff’s attorneys in this case had contributed more than \$100,000 to the CARD Foundation, the CARD Clinic’s fundraising arm. Evidence was also adduced that the CARD Clinic provided literature to patients directing them to the two plaintiff’s firms involved in this litigation, including the firm representing Hutt in this case. Nevertheless, Hutt has filed a motion *in limine* to exclude “argument, suggestion, examination, testimony or evidence” regarding any relationship between CARD and Plaintiff’s attorneys, or the CARD Clinic or Foundation’s (collectively, “CARD”) finances. Pl.’s Mot. in Limine Re: CARD Finances (“Pl.’s CARD MIL”) at 1.

Despite Hutt’s efforts to prematurely insulate his case from CARD and any related credibility issues, CARD is still a relevant entity that permeates the asbestos litigation before this Court, and this case. At least three of Hutt’s experts rely on records and/or information obtained

¹ For clarity and conformity with this case’s extensive history, Defendant is referred to as “MCC.”

from the CARD Clinic. Moreover, there are innumerable ways through which the credibility of the CARD Clinic could be relevant at trial in this matter, and through which Hutt could solicit evidence of reliance on CARD. Therefore, the wholesale exclusion of evidence that is highly relevant to the CARD's credibility at this juncture is inappropriate and unjustified. For these reasons, Hutt's Motion in Limine regarding CARD's Finances and Relationship with Attorneys should be deferred and denied.

LEGAL STANDARD

"The purpose of a motion in limine is to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial." *City of Missoula v. Asbury*, 265 Mont. 14, 17, 873 P.2d 936, 937 (1994) (quotation omitted). A district court has broad discretion to determine whether or not evidence is relevant and admissible. *Simmons Oil Corp. v. Wells Fargo Bank*, 1998 MT 129, ¶ 19, 289 Mont. 119, 125, 960 P.2d 291, 294. Accordingly, the authority to grant or deny a motion in limine "rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Hulse v. State, Dep't of Justice*, 1998 MT 108, ¶ 15, 289 Mont. 1, 11, 961 P.2d 75, 81 (quoting *City of Helena v. Lewis*, 260 Mont. 421, 425-26, 860 P.2d 698, 700 (1993)).

"Specific objections must be made to portions of testimony deemed inappropriate; broad general objections do not suffice." *State v. Stock*, 2011 MT 131, ¶ 45, 361 Mont. 1, 14, 256 P.3d 899, 908 (quoting *State v. Ankeny*, 2010 MT 224, ¶ 39, 358 Mont. 32, 41, 243 P.3d 391, 398). In order to sufficiently raise a pretrial objection via motion in limine, "the motion must be sufficient specific as to the basis for the objection." *Id.* (quoting *State v. Vukasin*, 2003 MT 230, ¶ 29, 317 Mont. 204, 213, 75 P.3d 1284, 1289).

“The general rule is that when trial is by jury, all questions of fact are to be decided by the jury and all evidence thereon is to be addressed to it.” *Sportco, Inc. v. Thompson*, 247 Mont. 379, 381, 806 P.2d 1039, 1041 (1991). Thus, to the extent Hutt attempts to use this Motion in Limine to resolve factual issues in lieu of a trial before a jury, such attempts are improper. *Id.*

ARGUMENT

I. Evidence Regarding CARD Finances and CARD’s Relationship with Attorneys is Highly Relevant

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.

Mont. R. Evid. 401. “All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.” Mont. R. Evid. 402.

This Court has acknowledged that evidence of financial contributions made by Plaintiff’s counsel to medical witnesses testifying on behalf of a plaintiff is relevant and admissible, as, at a minimum, it goes to the witnesses’ credibility. ACC Order July 26, 2018 at 2; *see also* ACC Transcript September 18, 2018 at 20:9-22; ACC Order Re Defendants’ Motion for Additional Time to Conduct Discovery on Disqualification, September 18, 2018 at 1 (“this area of inquiry directly bears on the credibility of CARD Clinic and CARD Foundation witnesses, as well as perhaps Plaintiffs’ counsel ...”).

Hutt’s representation that he does not intend to call Dr. Black or CARD staff as witnesses does not sufficiently justify the wholesale exclusion of evidence that he seeks. While Dr. Black and CARD staff may not be testifying witnesses, CARD is still a factor and relevant participant in this case, and its methods and credibility will still come into question. As CARD’s testing

methods, records, and opinions derived therefrom will still be at issue in this case, issues affecting CARD's credibility are still highly relevant.

First, CARD methods and records are directly relevant to the date of Hutt's diagnosis. Hutt claims that he first became aware of his asbestos-related disease ("ARD") after he received a letter in the mail from the CARD Clinic, prompting him to have chest x-rays taken in 2002. 9/19/2018 Deposition of Ralph Hutt ("Hutt Dep."), attached hereto as "Exhibit ("Ex.") A" at 26:21-24. However, a CARD office visit note states that Hutt was "diagnosed with asbestos related diseases sometime in the early-to-mid 1990s." CARD Office Visit Note 6/19/2018, attached hereto as "Ex. B." Accordingly, CARD methods and records will be directly relevant to Hutt's initial date of diagnosis.

Second, at least three of Hutt's experts directly rely on information from the CARD Clinic in their recommendations regarding Hutt's pulmonary condition and future medical needs. First, Dr. Carrie Redlich conducted her sole examination of Hutt at the CARD Clinic. *See* Deposition of Dr. Carrie Redlich, attached hereto as "Ex. C" at 38:3-13. She relied on CARD Clinic records in preparing her expert report and forming her medical opinions in this case. *See* Redlich Report, attached hereto as "Ex. D" at 1-2, 5, 8; Ex. C, Redlich Dep. 54:1-18. Dr. Redlich directly relied on pulmonary function testing performed by CARD for her opinions regarding Hutt's pulmonary function. Ex. D, Redlich Report at 5-6, 8.

In turn, Jennifer Crowley,² Hutt's life care planner, relied on Dr. Redlich's report and opinions, and medical records from CARD, in creating her Life Care Plan for Hutt. Crowley Report, attached hereto as "Ex. E" at 1, 3. Crowley relied on CARD's medical records and Dr.

² Jennifer Crowley's deposition was taken on November 20, 2018. The transcript of her deposition is not yet available, but MCC will supplement its Opposition to Plaintiff's CARD MIL with relevant portions of Crowley's transcript when it becomes available.

Redlich's opinions relying on those records for estimated calculations regarding Hutt's future medical care. In addition, Crowley's Life Care Plan for Hutt includes multiple visits to the CARD Clinic in Libby, Montana, despite the fact that Hutt lives in Oregon, where he is regularly seen by a local pulmonologist. *See id.*, Life Care Plan at 23.

Reed Gunlikson, an accountant, relied on the information contained in Crowley's Life Care Plan for his opinions regarding Hutt's future medical costs. Reed Gunlikson Expert Report, attached hereto as "Ex. F" at 1-2. Accordingly, Hutt's assertion that he will not call Dr. Black or a CARD witness to testify at trial by no means insulates his case from issues affecting CARD's credibility or the foundation for Hutt's expert opinions.

Third, it is unclear whether and to what extent Hutt may attempt to refer at trial to the volume of litigation pending in Montana that is related to Libby asbestos. It is MCC's position, as explained in its Motion in Limine Regarding Evidentiary Issues, that any evidence or argument relating to the number of claims Libby plaintiffs have filed should be excluded because reference to such information is irrelevant, improper, and unfairly prejudicial. However, should such evidence or argument be introduced at trial, the credibility of the CARD Clinic, which has accepted donations from Plaintiff's counsel, diagnosed virtually all of the individuals with claims pending in the Asbestos Claims Court, and referred patients to Plaintiff's counsel, would be an appropriate topic for cross-examination.

Finally, the fact that no defendant in the ACC moved to disqualify Plaintiff's counsel on the basis of the financial relationship does not, as Hutt suggests, moot or neutralize the issue, or render the information irrelevant. Declining to file a motion to disqualify Plaintiff's counsel³ has

³ Hutt incorrectly characterizes this as a choice "not to comply with the Court ordered deadline." Pl.'s CARD MIL at 3.

no effect on the relevance of the relationship between CARD and Plaintiff's counsel. These issues are better left to cross-examination of witnesses, not disqualification of counsel.

For these reasons, evidence of CARD's relationship with Plaintiff's counsel and CARD's finances is highly relevant under Montana Rules. Mont. R. Evid. 401, 402.

II. The Probative Value Outweighs Any Prejudicial Effect

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 the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Mont. R. Evid. 403.

For the reasons explained above, evidence relating to CARD's credibility and bias is highly relevant to Hutt's case, which largely relies on expert reports predicated on CARD records and opinions. The Rule 403 balancing test "favors admission." *State v. Ankeny*, 2018 MT 91, ¶ 33, 391 Mont. 176, 191, 417 P.3d 275. In this case, the probative value of the evidence regarding CARD's relationship with Plaintiff's counsel and CARD finances is not substantially outweighed by a risk of prejudice. Indeed, the prejudice that Plaintiff's Counsel seeks to avoid is not "unfair" prejudice; it is based on Plaintiff's counsel's own actions. As evidence of CARD's relationship with Plaintiff's counsel and evidence of CARD's finances is more probative than prejudicial, it should not be excluded under Rule 403.

CONCLUSION

For the foregoing reasons, MCC asks that this Court deny Plaintiff's Motion in Limine re: CARD Finances and Relationship with Attorneys.

Dated: November 28, 2018

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The undersigned does hereby certify that a true copy of the foregoing document was filed via the Montana Courts Electronic Filing system and served upon the following individuals:

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Dated this 28th day of November, 2018.

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