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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Consolidated Cases

Cause No. AC 17-0694

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO ENFORCE
SCHEDULING ORDER

Applicable to:

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

I. Defendant's blatant defiance of this Court's Scheduling Order undermines the purpose of the order and prejudices the Plaintiff.

A. MCC's game of hiding the ball defies the letter and purpose of this Court's scheduling order.

The Scheduling Order in this case requires that expert witness disclosures include all information "called for in Rule 26, M.R.Civ.P."; the Scheduling Order also provides that the scope of testimony for any rebuttal expert will be strictly limited to "true rebuttal" testimony. MCC did not abide by the order.

The reasons and purposes for this Court's scheduling order requirement are manifest:

1. In order to for the Court to manage complex litigation and move cases to trial in expeditious sequence of closely sequenced trial settings, procedures are necessary to assure orderly disclosure of expert opinions.

2. In order for each party to prepare and disclose its rebuttal opinions by the scheduling order deadline, the parties needed know each of the opinions to be offered by the other side's experts as well as all facts and basis for each such opinion.
3. In order for each expert to be prepared for deposition, the expert needed to know what matters are placed in issue by the opposing expert's opinions.
4. In order for the Court to be able to promptly address discovery disputes without the delay of motion practice, expert opinions needed to be filed with the Court.
5. In order to avoid surprise or inability to secure the expert witnesses' time, an orderly procedure is necessary.
6. Due Process depends on an even playing field which cannot exist when one side is adhering to the Court's orders and the other side is not.
7. In order to assure that a party does not evade the intent of timely disclosure by sandbagging on its initial expert disclosures, rebuttal opinions must be limited to "true rebuttal."

If this Court's scheduling orders are to have meaning such that this Court can have effective control over pretrial and discovery procedures, it is necessary to enforce the Scheduling Order's terms and these purposes.

MCC defiantly claims in its response that it "has not deviated from any order of this Court," and that its conduct is therefore distinguishable from the facts in *Smith v. Butte-Silver Bow County*, 276 Mont. 329, 334, 916 P.2d 91, 94 (1996):

Whatever counsel's intent in framing his client's response to a clear court order may have been--whether gamesmanship with the County or disdainful "oneupmanship" with the District Court--the [plaintiff]'s response did not comply with the explicit requirements of the court's clarification order.

This Court need no further argument from the Plaintiff's counsel to evaluate whether MCC has abided by this Court's clear order.

B. Plaintiff is prejudiced by MCC's failure to disclose expert opinions.

MCC contends that there is no prejudice to Plaintiff by reason of its failure to disclose MCC expert witness opinions. On the contrary, Plaintiff has been prejudiced in multiple ways. He has been deprived of the opportunity to prepare and disclose rebuttal expert opinions, the deadline for which has long since passed. When their depositions were taken, Plaintiff's experts were deprived of knowledge of the hidden defense expert contentions. The deadline for discovery has passed such that any opportunity for the Court to compel nonresponsive deposition testimony is now unavailable.

In addition, deadlines have passed for motions based on expert testimony including motions *in limine*. Plaintiff has incurred much expense in reliance on the contents of MCC's expert disclosures. Moreover, Plaintiff's experts are busy professionals, and available time for expert consultation, deposition preparation, and rebuttal opinions has been largely exhausted.

It is precisely the avoidance of these forms of prejudice that underlie the establishment of clear dates for expert opinion and rebuttal opinion disclosures.

The impropriety of MCC's methodology is exemplified in its disclosure of the opinions of Dr. Haber. MCC's entire disclosure statement regarding Dr. Haber is reproduced here **in total**:

Defendant reserves the right to call Dr. Haber to provide medical and methodological rebuttal opinions consistent with opinions offered through testimony at the Asbestos Claims Court hearing on July 14 and 15, 2019, in Kalispell, Montana.

This disclosure utterly fails to identify a single opinion. It does however assure Plaintiff's counsel that this expert will only be used to address the initial diagnosis issues addressed during this Court's July evidentiary hearing. Specifically, upon reading this disclosure, Plaintiff's counsel would know that Dr. Haber would not, in addition, (a) review Hutt's individual medical records, (b) offer opinions on prognosis, or (c) offer opinions on causation.

On November 16, 2018, a full two months after the disclosure deadline, MCC emailed to Plaintiff's counsel (without filing with the Court as directed by the Scheduling Order) a 13 page report detailing extensive opinions regarding Mr. Hutt's experts and medical condition. The disclosure was strategically first made after the deadline for motions *in limine*. Plaintiff's counsel were not only surprised but were affirmatively misled by this gamesmanship. The opinions of Dr. Haber should be excluded except to the extent:

- (a) They are on the subject of what radiological and medical evidence is adequate to support an initial diagnosis of asbestos disease (i.e. the subject matter of the July Court hearing);
- (b) Each opinion was disclosed together with relied upon facts and bases; and
- (c) The opinions are limited to true rebuttal (i.e. allowable only if Plaintiff's expert testifies to when and how there was a radiological or other medical basis to sustain the initial diagnosis of Mr. Hutt's asbestos disease.

MCC's noncompliance continued with the untimely disclosures of Dr. Weill and Dr. Sicilia. For example, Dr. Weill provides opinions regarding Mr. Hutt's PFT's and his long term prognosis. However, these opinions, and the substance therefore, should have either been provided during initial disclosures or during the time necessary for rebuttal. Indeed,

contrary to representation of MCC that these reports could not have been generated until after Dr. Redlich's deposition (Response, p.5), references to the deposition are wholly absent from the materials reviewed by Dr. Weill. (*See* Response, Ex. B, p.3) Rather, Dr. Weill states that he reviewed and considered the Expert Report of Dr. Redlich. Of course, this report was timely served on MCC on September 14, 2018, such that, as directed in this Court's Scheduling Order, MCC's rebuttal opinions would be disclosed in response thereto. Similarly, MCC has very recently (on November 20 –i.e. after the filing of this motion) produced provided an expert disclosure for Dr. Sicilia that identifying new opinions regarding the history of dissemination of asbestos knowledge. However, Plaintiff's experts' testimony is not mentioned in Dr. Sicilia's report and their limited opinions regarding historical industry knowledge is fully disclosed in their September 14 reports.

II. Defendant has no excuse for its failure to comply with this Court's orders.

In an attempt to justify its failures, MCC offers several transparent excuses.

- MCC contends that because it “reserved” a right to supplement it may ignore the disclosure requirements of this Court's order. MCC cites no authority or rationale supporting this excuse.
- MCC contends that, because it has a duty to “supplement” proper discovery responses with later acquired information, it may turn this duty into a right to hide its experts' opinions until after plaintiff's experts have been deposed, discovery has closed, and motion deadlines have passed. There is no authority or rationale for this perversion of the supplementation duty.
- MCC contends its experts needed to “fully comprehend and appreciate the nature and specific opinions,” of Plaintiff's experts before it could disclose its opinions.

While this premise is true for rebuttal opinions, Plaintiff provided extensive expert witness disclosures, and MCC has not identified a single opinion that was not properly disclosed. Second, nothing prevented MCC's experts from disclosing their defense (case-in-chief) opinions based on the facts and medical records. Third, this excuse highlights the reason that MCC's failure (to meet the Court's deadline for disclosing each expert opinion and basis and facts relied on therefore) deprived Plaintiff of a fair opportunity to timely disclose his rebuttal opinions, and deprived Plaintiff's experts of the opportunity to be prepared for defense contentions when they were deposed.

- MCC complains that despite having a medical release form, MCC failed to secure a medical record which Plaintiff's counsel separately located and immediately disclosed.¹ While an expert disclosure can and should be supplemented by any new or changed expert opinions based on newly discovered evidence, MCC identifies no new or different opinion which was dependent on, arises from, or would be changed by the later discovered medical record.

In short, none of the excuses offered by MCC address its failure to comply with the clear requirements of this Court's Scheduling Order.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court enter an order enforcing this Court's Scheduling Order by limiting Defendant's experts' trial testimony to

¹MCC does not and cannot claim Plaintiff withheld evidence. Plaintiff requested medical records from all providers and timely produced to MCC such records immediately upon receipt. The later discovered record is wholly consistent with the other records of Plaintiff's condition.

the statements of actual affirmative opinions and bases disclosed on the disclosure dates set by this Court's March 21, 2018, Scheduling Order. Specifically, and most importantly, Dr. Haber's testimony should be limited to true rebuttal regarding basis for an initial diagnosis which is allowable only if Plaintiff's expert testifies to when and how there was a radiological or other medical basis to sustain the initial diagnosis of Mr. Hutt's asbestos disease. Additionally, Drs. Weill and Sicilia trial testimony should be limited to their initial disclosures and the bases disclosed therein.

Respectfully submitted this 7th day of December, 2018.

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By: /s/ Allan M. McGarvey

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