

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

IN RE: CATALYST LITIGATION

Master Docket No.

SX-05-CV-799

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

JOHN BULLY,

Plaintiff

v.

HESS OIL VIRGIN ISLANDS CORP., et al.,

Defendants

Individual Docket No.

SX-05-CV-812

ALEXANDER EMILE,

Plaintiff

v.

HESS OIL VIRGIN ISLANDS CORP., et al.,

Defendants

Individual Docket No.

SX-05-CV-806

JULIEN McSWEEN,

Plaintiff

v.

HESS OIL VIRGIN ISLANDS CORP., et al.,

Defendants

Individual Docket No.

SX-05-CV-847

RICHARD MAXWELL,

Plaintiff

v.

HESS OIL VIRGIN ISLANDS CORP., et al.,

Defendants

Individual Docket No.

SX-05-CV-846

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiffs' Motion *In Limine* to Exclude or Limit Trial Testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo, filed on June 9, 2010. On June 18, 2010, Defendant Hess Corporation (hereinafter "Hess") and Hess Oil Virgin Islands Corp.'s (hereinafter "HOVIC") filed an Opposition to Plaintiffs' Motion *In Limine* to Exclude or Limit Trial Testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo. On June 24, 2010, Plaintiffs filed a Reply to Defendants' Opposition.

FACTS

Plaintiffs filed this action against Defendant HOVIC and Defendant Hess,¹ alleging that they developed mixed dust pneumoconiosis as a result of occupational exposure to catalyst at Defendant HOVIC's refinery on St. Croix, U.S. Virgin Islands. Plaintiffs allege that Defendants possessed and/or exercised control over the work site and assert claims for negligence/premises liability and supplying chattel dangerous for intended use.

DISCUSSION

Plaintiffs move *in limine* for the Court to exclude or limit trial testimony from Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo.

Dr. Andre Galiber

Plaintiffs assert that Dr. Andre Galiber is not a treating physician. Dr. Andre Galiber is a radiologist retained by Defendants for this matter. He has never physically examined any of the Plaintiffs nor received any medical or health history on Plaintiffs. Based on Dr. Andre Galiber's deposition, Plaintiffs indicate that Dr. Andre Galiber will likely be testifying to his medical

¹ Plaintiffs also filed this action against other defendants but Plaintiffs have reached a settlement with these defendants out of court.

opinions regarding his readings of Plaintiffs' chest x-rays. Plaintiffs argue that such testimony requires specialized knowledge outside the understanding of the jury.

Defendants assert that Dr. Andre Galiber is a treating physician of Plaintiffs. Dr. Andre Galiber is a radiologist who had x-rayed Plaintiffs at various times in conjunction with their work and other referrals, as well as for both Defendants and Plaintiffs' counsels in this matter. Defendants argue that there are many x-rays taken prior to the commencement of this matter, all depicting normal lungs of Plaintiffs.² See Defendants' Opposition to Plaintiffs' Motion *In Limine* at 13. Defendants point out that their expert witness, Dr. I. Allan Feingold, will be the one providing the expert testimony in this matter, not Dr. Andre Galiber. Accordingly, Defendants contends that Dr. Andre Galiber have treated Plaintiffs and thereby, should be permitted to testify as Plaintiffs' treating physicians.

Dr. Dante Galiber

Plaintiffs assert that Dr. Dante Galiber is not a treating physician. Dr. Dante Galiber is a cardiologist who examined Plaintiff Richard Maxwell once as Industrial Maintenance Corp.'s (hereinafter, "IMC") consulting physician and diagnosed him with No. 1 mild to moderate hypertension. Dr. Dante Galiber recommended the drug Hyzaar to Plaintiff Richard Maxwell but did not recall whether he wrote a prescription. See Dr. Dante Galiber's Deposition Transcript at 35. Moreover, Plaintiffs point out that Dr. Dante Galiber admitted during his deposition that he was unaware of Plaintiff Richard Maxwell's anemia and diabetes at the time he examined and diagnosed Plaintiff Richard Maxwell with hypertension. *Id.* at 30:8-30:15.

Defendants assert that Dr. Dante Galiber is a treating physician of Plaintiff Richard Maxwell. Dr. Dante Galiber saw Plaintiff Richard Maxwell on November 28, 2001, before the

² The only abnormality was when Plaintiff Alexander Emile had bacterial pneumonia on April 10, 1992, which is irrelevant to this matter. See Defendants' Opposition to Plaintiffs' Motion *In Limine* at 13.

commencement of this matter. *See* Dr. Dante Galiber's Deposition Transcript at 9. At that time, Dr. Dante Galiber diagnosed Plaintiff Richard Maxwell with hypertension and a thickened heart with a higher likelihood of having heart disease, heart attacks, premature death and kidney dysfunction. *Id.* at 16 and 29. Dr. Dante Galiber recommended the drug Hyzaar to Plaintiff Richard Maxwell. *Id.* at 35. Dr. Dante Galiber also reviewed Plaintiff Richard Maxwell's blood tests and EKG taken during Plaintiff Richard Maxwell's emergency room admission in July 2005 and found him to suffer from anemia and diabetes. *Id.* at 16-21. Moreover, Dr. Dante Galiber referred Plaintiff Richard Maxwell to Dr. Andre Galiber for an x-ray. *Id.* at 9. The x-rays revealed normal lungs and that "he was not suffering from pulmonary edema or from any lung problems or heart problems from a radiological standpoint." *Id.* at 10-11. Accordingly, Defendants argue that "[i]t is undeniable that [Dr.] Dante Galiber was in fact treating and examining the Plaintiff [Richard Maxwell] for his hypertension, which treatment involved a review of x-rays and complete medical history available to him." *See* Defendants' Opposition to Plaintiffs' Motion *In Limine* at 9.

Dr. Alejandro Cebedo

Plaintiffs assert that Dr. Alejandro Cebedo is not a treating physician. Dr. Alejandro Cebedo is a consulting physician hired by IMC to examine IMC's employees annually to ensure their ability to continue working. In his capacity as IMC's consulting doctor, Dr. Alejandro Cebedo examined Plaintiff Julien McSween³ between October 1987 and June 1999 and Plaintiff Alexander Emile⁴ between January 1990 and December 1993. Plaintiffs point out that Dr. Alejandro Cebedo admitted in his deposition that he would "always advise the employee to seek

³ *See* Dr. Alejandro Cebedo Deposition Transcript at 10:3-10:10 and 36:5-36:6.

⁴ *See* Dr. Alejandro Cebedo Deposition Transcript at 41:25, 42:1-42:2 and 51:7-51:8..

their own doctor's services" in the event he found something abnormal. *See* Dr. Alejandro Cebedo Deposition Transcript at 47:21.

Defendants assert that Dr. Alejandro Cebedo is a treating physician of Plaintiff Julien McSween and Plaintiff Alexander Emile. Defendants argue that Dr. [Alejandro] Cebedo's examinations are a crucial part of the preventive treatment offered by Plaintiff Julien McSween and Plaintiff Alexander Emile's employer, IMC. *See* Defendants' Opposition at 10. In his deposition, Dr. Alejandro Cebedo confirmed that he treated Plaintiff Julien McSween "way back to 1987" and that October 19, 1987 was the first time "he had any contact with Julien McSween as a patient." *See* Dr. Alejandro Cebedo Deposition Transcript at 7. Dr. Alejandro Cebedo saw Plaintiff Alexander Emile on numerous occasions between 1990 and 1993. *See* Dr. Alejandro Cebedo Deposition Transcript at 41-48. Despite not prescribing medications and referring them to their primary physicians for specific abnormalities, Defendants claim that Dr. Alejandro Cebedo is still one of Plaintiffs' treating physicians – "he was engaged in Plaintiffs' treatment through preventive medicine." *See* Defendants' Opposition at 10. Furthermore, Defendants point out that Dr. Alejandro Cebedo's examinations of Plaintiff Julien McSween and Plaintiff Alexander Emile periodically involved chest x-rays. Defendants claim that none of the x-rays ordered by Dr. Alejandro Cebedo were ordered by Defendants in preparation for this trial; rather, the x-rays were all part of the preventive health maintenance of Plaintiff Julien McSween or Plaintiff Alexander Emile's specific problems. *See* Dr. Alejandro Cebedo Deposition Transcript at 33 and 51-53. Accordingly, Defendants argue that Dr. Alejandro Cebedo should not be "prevented from testifying about all of the conditions that [he] observed and which [he] considered in the examination, treatment and diagnosis of the Plaintiffs." *See* Defendants' Opposition to Plaintiffs' Motion *In Limine* at 13.

Expert Witness v. Lay Witness

Defendants seek to call Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo. Plaintiffs argue that, despite Defendants' designation of Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo as lay witnesses, these doctors will still be testifying to their expert opinions. Plaintiffs further argue that Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo is prohibited from testifying as expert witnesses because Defendants did not produce a signed expert report prepared by each doctor regarding Plaintiffs, as required by Fed. R. Civ. P. 26(a)(1)⁵ and (2)⁶. Plaintiffs cite to Fed. R. Civ. P. 37(c)(1), which provides: "If a party fails to

⁵ Relevant parts of Fed. R. Civ. P. 26(a)(1):

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information along with the subjects of that information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy or a description by category and location of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

⁶ Relevant parts of Fed. R. Civ. P. 26(a)(2):

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Therefore, Plaintiffs argue that Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo should not be allowed to testify at trial.

Plaintiffs also contend that Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo are not Plaintiffs’ treating physicians. Fed. R. Evid. 701 permits opinion testimony by lay witnesses, but such testimony is limited. “If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Plaintiffs further cite to *Redland Soccer Club, Inc. v. Department of the Army of U.S.*, where the Third Circuit stated that “the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson... the law requires that expert medical testimony be employed.” 55 F. d 827, 852 (3d Cir. 1995). Accordingly, Plaintiffs assert that these doctors’ testimony regarding medical opinions or inferences will be outside of the

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- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
 - (ii) the data or other information considered by the witness in forming them;
 - (iii) any exhibits that will be used to summarize or support them;
 - (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;
 - (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
 - (vi) a statement of the compensation to be paid for the study and testimony in the case.
- (C) Time to Disclose Expert Testimony.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
 - (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.
- (D) Supplementing the Disclosure.** The parties must supplement these disclosures when required under Rule 26(e).

reasoning of an average juror's everyday life. Plaintiffs argue that, despite being labeled as a fact witness and not as an expert witness, Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo will still be testifying to their expert opinions. Therefore, Plaintiffs request the Court to exclude Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo from trial.

Assuming *arguendo* that the Court finds Dr. Andre Galiber, Dr. Dante Galiber or Dr. Alejandro Cebedo to be one or more Plaintiff's treating physician, Plaintiffs request the Court to limit the doctors' testimony to what they learned or knew during the course of the respective Plaintiff's treatment. In *Martin v. Sears, Roebuck & Co.*, the Third Circuit allowed treating physicians to testify without filing a written report for opinion testimony that was known or discovered during the examination and care of patient, not in anticipation of litigation. 2007 WL 2782263, at *5 (M.D.Pa., 2007). Additionally, Plaintiffs further requests the Court to exclude Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo from giving any opinions based on any hypothetical question that includes information not learned during the course of treatment of Plaintiffs.

Defendants argue that compliance with Fed. R. Civ. P. 26 is irrelevant here because Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo are not testifying as expert witnesses. Defendants emphasizes that these doctors are being called as Plaintiffs' treating physicians and therefore, their opinions based upon their personal observations and diagnoses should not be excluded at trial. Defendants cite to *Sutherland v. Hyannis Air Services, Inc.*, where the court quoted the Explanatory Notes to Rule 26.3 of the Virgin Islands' Local Rules of Civil Procedure, "[O]ther witnesses who may also be qualified to give expert testimony, e.g. treating physicians, are treated by the federal and local rules as ordinary witnesses whose evidence is fully discoverable." 2008 WL 5377889, *1 (D.V.I., 2008). Defendants point out that all of the reports, notations and opinions that Dr. Andre Galiber, Dr. Dante Galiber and Dr.

Alejandro Cebedo will be testifying to were made contemporaneously with their treatment of Plaintiffs. In summary, Defendants argue that there is no requirement that Plaintiffs' treating physicians need to be identified as experts and comply with Fed. R. Civ. P. 26 when their testimony will relate to their treatment of Plaintiffs. Therefore, Defendants request the Court to deny Plaintiffs' Motion *In Limine* to exclude Dr. Andre Galiber, Dr. Dante Galiber and Dr Alejandro Cebedo from trial.

In Plaintiffs' Reply to Defendants' Opposition, Plaintiffs cited to *Black & Decker Disability Plan v. Nord*, where the United States Supreme Court outlined the difference between treating physicians and consulting physicians in an ERISA suit.⁷ *Nord*, 538 U.S. 822, 833 (2003).

The Court will grant in part and deny in part Plaintiffs' Motion *In Limine* to Exclude or Limit Trial Testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo. Under 5 V.I.C. § 833 the witness is required to have personal knowledge or experience, training or education on the subject matter of such testimony.⁸ The Court does not find Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo to be Plaintiffs' treating physicians per se. However, Dr. Dante Galiber and Dr. Alejandro Cebedo can testify as fact witnesses to what they

⁷ The Court notes that while Plaintiffs observed that the United States Supreme Court distinguished between treating physicians and consulting physicians in *Nord*, Plaintiffs failed to include that the Supreme Court also stated the following:

"[But] the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an 'incentive' to make a finding of 'not disabled,' so a treating physician, in a close case, may favor a finding of 'disabled.'" *Nord*, 538 U.S. 822, 833 (2003).

⁸ 5 V.I.C. § 833. Prerequisites of knowledge and experience.

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

perceived of each Plaintiff, so long as it is not based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702.⁹

In *Hadley v. Pfizer Inc.*, where the Third Circuit stated:

“Courts are divided on whether to consider treating physicians as fact witnesses or as experts. Several courts have held that treating physicians are always expert witnesses who must be disclosed under [Fed. R. Civ. P.] 26(a)(2)(A). Other courts, including district courts in this Circuit, have held ‘that treating physicians so disclosed may testify as to facts within their knowledge, as opposed to offering expert testimony.’

The Court agrees that a treating physician may testify as a fact witness at trial, pursuant to [Fed. R. Evid.] 701, so long as the treating physician’s testimony is ‘not based on scientific, technical, or other specialized knowledge within the scope of [Fed. R. Evid. 702].’” *Internal citations omitted.* 2009 WL 1597952, at *4 (E.D. Pa. 2009) (*citing Frederick v. Hanna*, 2007 U.S. Dist. LEXIS 18626, at *19 (W.D. Pa. 2007)).

In regards to Dr. Andre Galiber, aside from taking x-rays of Plaintiffs, there is no evidence that Dr. Andre Galiber physically examined any of the Plaintiffs. If Dr. Andre Galiber provides testimony in regards to these x-rays, it would be based on scientific, technical or other specialized knowledge. Furthermore, as Defendants admitted in the Opposition, these x-rays were provided to their expert witness, Dr. I. Allan Feingold, who is a B reader and a specialist and will be the one providing expert testimony in this matter. Accordingly, the Court finds that Dr. Andre Galiber cannot testify as a fact witness because he did not personally examine Plaintiffs.

In regards to Dr. Dante Galiber and Dr. Alejandro Cebedo, Dr. Dante Galiber can testify to what he learned during his examination of Plaintiff Richard Maxwell and Dr. Alejandro

⁹ Fed. R. Evid. 702 provides,

“If *scientific, technical, or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Emphasis added.*

Cebedo can testify to what he learned during his examination of Plaintiff Julien McSween and Plaintiff Alexander Emile. Nevertheless, Dr. Dante Galiber and Dr. Alejandro Cebedo's testimonies should not be based on scientific, technical or other specialized knowledge within the scope of Fed. R. Evid. 702.

CONCLUSION

The Court finds that (1) Dr. Andre Galiber cannot testify at trial because he did not physically examine any of the Plaintiffs; (2) Dr. Dante Galiber can testify to what he learned during his examination of Plaintiff Richard Maxwell; and (3) Dr. Alejandro Cebedo can testify to what he learned during his examination of Plaintiff Julien McSween and Plaintiff Alexander Emile. Accordingly, the Court will grant in part and deny in part Plaintiffs' Motion *In Limine* to Exclude or Limit Trial Testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo.

DONE and so ORDERED this 8th day of July, 2010.

ATTEST:

Veneta Harvey-Velazquez
Clerk of the Court

By: Harlene Jumbal
Deputy Clerk
Court Supv.

Dated: 7/8/10

Harold W. L. Willocks
HAROLD W. L. WILLOCKS
Judge of the Superior Court