

**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.

**Individual Docket No.**

**SX-05-CV-812**

**HESS OIL VIRGIN ISLANDS CORP., et al.,**

Defendants

**ALEXANDER EMILE,**

Plaintiff

v.

**Individual Docket No.**

**SX-05-CV-806**

**HESS OIL VIRGIN ISLANDS CORP., et al.,**

Defendants

**JULIEN McSWEEN,**

Plaintiff

v.

**Individual Docket No.**

**SX-05-CV-847**

**HESS OIL VIRGIN ISLANDS CORP., et al.,**

Defendants

**RICHARD MAXWELL,**

Plaintiff

v.

**Individual Docket No.**

**SX-05-CV-846**

**HESS OIL VIRGIN ISLANDS CORP., et al.,**

Defendants

### MEMORANDUM OPINION

**THIS MATTER** came before the Court on Defendant Hess Corporation (hereinafter “Hess”) and Hess Oil Virgin Islands Corp.’s (hereinafter “HOVIC”) Motion to Reconsider the Court’s Order regarding the trial testimony from Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo, filed on July 12, 2010. On July 13, 2010, Plaintiffs filed an Opposition to Defendants’ Motion to Reconsider.

### FACTS

Plaintiffs filed this action against Defendant HOVIC and Defendant Hess,<sup>1</sup> 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

Defendants’ Motion for Consideration was made pursuant to Local Rule of Civil Procedure 7.3, which provides:

A party may file a motion asking the Court to reconsider its order or decision... A motion to reconsider shall be based on:

1. intervening change in controlling law;
2. availability of new evidence, or;
3. the need to correct clear error or prevent manifest injustice.

Defendants brought this Motion for Reconsideration on the basis of the need to correct clear error and prevent manifest injustice. With this Motion to Reconsider, the Court was under the incorrect assumption that Dr. Andre Galiber had examined the Plaintiffs personally.

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

Dr. Andre Galiber

Defendants contend that Dr. Andre Galiber should be allowed to testify to his radiological findings as a treating physician for each of these Plaintiffs. Plaintiffs argue that Dr. Andre Galiber is not a treating physician for Plaintiffs because he never performed a physical examination on any of the Plaintiffs.

The Court directs Defendants' attention to Defendants' Motion *In Limine* to Exclude Trial Testimony from Dr. Richard Bernstein and Deposition Testimony of Non-Party and Non-Corporate Witnesses (hereinafter, "Defendants' Motion *In Limine* to Exclude Dr. Richard Bernstein"). In their Motion *In Limine* to Exclude Dr. Richard Bernstein, Defendants argued that,

"By labeling [Dr. Bernstein] a fact witness instead of an expert witness, they have not cured the problem. Plaintiffs likely will attempt to have Dr. Bernstein, who is not a treating physician of any of the plaintiffs in this matter, testify regarding his interpretation of Mr. Emile's x-ray as a B-reader. Undoubtedly such testimony will involve matters beyond the understanding of an average juror and therefore, such testimony, although designated as fact testimony, will be expert testimony. See Defendants' Motion *In Limine* to Exclude Dr. Richard Bernstein at 3.

Defendants further argued that Dr. Richard Bernstein is prohibited from testifying as an expert witness because Plaintiffs did not produce a signed expert report prepared by Dr. Richard Bernstein as required by Fed. R. Civ. P. 26(a). See *Id.* at 8. Defendants noted that according to Fed. R. Civ. P. 37(c)(1), "If a party fails to 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." See *Id.* Additionally, in Defendants Joint Reply to Plaintiffs' Opposition to their Motion *In Limine* to Exclude Dr. Richard Bernstein, Defendants further emphasized that Dr. Richard Bernstein cannot testify as a fact witness because he did not treat any of the Plaintiffs in this matter and Dr. Richard Bernstein cannot testify as an expert witness because of Plaintiffs'

failure to comply with Fed. R. Civ. P. 26. The Court had agreed with Defendants and granted its Motion *In Limine* to Exclude Dr. Richard Bernstein.

The Court finds the Dr. Andre Galiber's circumstances to be identical to Dr. Richard Bernstein. Similar to Dr. Richard Bernstein, Dr. Andre Galiber did not personally take the x-rays of Plaintiffs. According to Dr. Andre Galiber's deposition, a technician was the one who performed the x-rays. *See* Dr. Andre Galiber's Deposition Transcript at 24. Similar to Dr. Richard Bernstein, Dr. Andre Galiber also did not treat any of the Plaintiffs in this matter personally. According to Dr. Andre Galiber's deposition, Dr. Andre Galiber never personally performed a physical examination on any of the Plaintiffs. *See Id.* Similar to Dr. Richard Bernstein, Dr. Andre Galiber is designated as a fact witness but will undoubtedly testify to matters beyond the understanding of an average juror and therefore, such testimony, although designated as fact testimony, will be expert testimony. Fed. R. Evid. 701(a) provides that,

“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.” *Emphasis added.*

The Court had ordered that Dr. Richard Bernstein will not be permitted to testify at trial as fact witness because Dr. Richard Bernstein did not personally take the x-rays of Plaintiffs or personally examine Plaintiffs. Similarly, the Court will not permit Dr. Andre Galiber from testifying at trial as a fact witness because Dr. Andre Galiber did not personally take the x-rays of Plaintiffs or personally examine Plaintiffs.

Moreover, similar to Dr. Richard Bernstein, Dr. Andre Galiber cannot testify as an expert witness because of Defendants failure to comply with Fed. R. Civ. P. 26. Accordingly, the Court will deny Defendants' Motion to Reconsider.

**Dr. Dante Galiber and Dr. Alejandro Cebedo**

Defendants contend that as medical doctors treating Plaintiff Richard Maxwell, Plaintiff Julien McSween and Plaintiff Alexander Emile, “[Dr. Dante Galiber and Dr. Alejandro Cebedo’s] examinations, findings and treatment of these men are based upon the science of medicine and use their specialized knowledge of medicine. While they are not offered to provide opinion as to causation, their testimony must be allowed to include, date of examination, course of examination, patient history, diagnostics and treatment given to these men as patients.” Plaintiffs argue that Dr. Dante Galiber and Dr. Alejandro Cebedo were not Plaintiffs’ treating physician and therefore, should only be allowed to testify to what they learned during their examination of Plaintiff Richard Maxwell, Plaintiff Julien McSween and Plaintiff Alexander Emile.

In the Court’s Order regarding the trial testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo, the Court permitted Dr. Dante Galiber to testify to the extent of what he learned during his examination of Plaintiff Richard Maxwell and Dr. Alejandro Cebedo to testify to the extent of what he learned during his examination of Plaintiff Julien McSween and Plaintiff Alexander Emile,<sup>2</sup> but the Court ordered that Dr. Dante Galiber and Dr. Alejandro Cebedo’s testimonies should not be based on scientific, technical or other specialized

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<sup>2</sup> Relevant parts of the Court’s Order:

Ordered that Plaintiffs’ Motion *In Limine* in regard to Dr. Dante Galiber is Denied. Dr. Dante Galiber is permitted to testify only to the extent of what he learned during his examination of Plaintiff Richard Maxwell and Dr. Dante Galiber’s testimony should not be based on scientific, technical or other specialized knowledge within the scope of Fed. R. Evid. 702. It is further:

Ordered that Plaintiffs’ Motion *In Limine* in regard to Dr. Alejandro Cebedo is Denied. Dr. Alejandro Cebedo is permitted to testify only to the extent of what he learned during his examination of Plaintiff Julien McSween and Plaintiff Alexander Emile and Dr. Alejandro Cebedo’s testimony should not be based on scientific, technical or other specialized knowledge within the scope of Fed. R. Evid. 702.

knowledge within the scope of Fed. R. Evid. 702.<sup>3</sup> Defendants now ask the Court to clarify its Order as to Dr. Dante Galiber and Dr. Alejandro Cebedo.

The Court directs Defendants attention to two of the cases they cited in their Opposition to Plaintiffs' Motion *In Limine* to Exclude or Limit Trial Testimony From Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo. Defendants cited to *Haines v. Davies*, 2009 WL 331433 (M.D.Pa., 2009) and *Jimenez-Sanchez v. Caribbean Resorts, LLC.*, 483 F.Supp.2d 140 (D.Puerto Rico, 2007).

Defendants quoted the *Haines* court:

“Plaintiffs have explained that, as a treating psychologist, Stauffer is in the possession of facts and observations not subject to [Fed. R. Civ. P.] Rule 26(a). Indeed, Defendant concedes that a doctor may testify as a treating physician to the diagnosis of the Plaintiffs as contained in the treatment notes while not testifying as an expert if counsel does not elicit expert opinion testimony. Fed. R. Evid. 701, 2000 *Advisory Committee Note* (“The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case.”); *see also*, *Allen v. Parkland Sch. Dist.*, 230 Fed.Appx. 189 (3d Cir. 2007) (unpublished opinion); *Collins v. Prudential Inv. And Retirement Svcs.*, 119 Fed.Appx. 371 (3d Cir. 2005) (unpublished opinion). Rule 701 provides that a non-expert witness may nonetheless testify to an opinion, provided that the opinion is not ‘based on scientific, technical, or other specialized forms of knowledge within the scope of Rule 702.’ Fed. R. Evid. 701. Thus, to the extent that Stauffer will testify concerning her treating observations and diagnosis, her testimony is allowed, limited to the psychological evaluations of B.H. and P.W. dated July 18, 2006. To the extent that Plaintiffs seek to offer Stauffer as an expert witness on future damages or an additional undiagnosed disorder, Plaintiffs run afoul of Rule 37 of the Federal Rules of Civil Procedure.” *Emphasis added.* 2009 WL 331433, \*4.

Defendants quoted the *Jimenez-Sanchez* court:

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<sup>3</sup> 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.*

“Based on the fact that Plaintiff intends to present Dr. Brennan as a treating physician and not as an expert, stating that Dr. Brennan ‘will testify about the condition of the patient, treatment and findings obtained during his multiple interventions with the patient,’ she is not required to make the disclosures that CR requests. Consequently, the Court finds that the exclusion of Dr. Brennan’s testimony and his medical certificate is not warranted under Fed. R. Civ. P. 26(a)(2)(c). Plaintiff is reminded that as a treating physician, Dr. Brennan’s testimony is limited to his observations and to his opinion if it meets the Rule 701 criteria.” *Emphasis added.* 483 F.Supp.2d at 146.

To clarify the Court’s Order as to Dr. Dante Galiber and Dr. Alejandro Cebedo, Dr. Dante Galiber will be permitted to testify to the conditions and findings that he learned of Plaintiff Richard Maxwell during his examination of Plaintiff Richard Maxwell and Dr. Alejandro Cebedo will be permitted to testify to the conditions and findings that he learned of Plaintiff Julien McSween and Plaintiff Alexander Emile during his examination of Plaintiff Julien McSween and Plaintiff Alexander Emile.

**CONCLUSION**

The Court finds that Defendants failed to demonstrate a basis for reconsideration of its Order regarding the trial testimony from Dr. Andre Galiber, Dr. Dante Galiber and Dr. Alejandro Cebedo. Accordingly, the Court will deny Defendants’ Motion to Reconsider. In regard to Dr. Dante Galiber and Dr. Alejandro Cebedo, they will be permitted to testify at trial as fact witnesses.

**DONE and so ORDERED this 14<sup>th</sup> day of July, 2010.**

**ATTEST:**

Venetia Harvey-Velazquez  
Clerk of the Court

By: Katherine Jurubek  
Deputy Clerk

Dated: 7/14/10

HAROLD W. L. WILLOCKS  
**HAROLD W. L. WILLOCKS**  
**Judge of the Superior Court**