SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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DELMAR STEPHENS VS. C.C. MOORE & CO. ENGINEERS

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

DELMAR STEPHENS,

Plaintiff,

vs.

ASBESTOS DEFENDANTS,

Defendants.

Case No. CGC-10-275705

RULINGS ON MOTIONS IN LIMINE

The Court rules as follows on the parties' motions in limine.

Plaintiff's Motions

Background/Ambient Asbestos Exposure

Plaintiff seeks to exclude all evidence of and references to background or ambient asbestos. The motion is DENIED.

It is undisputed that essentially everyone in modern society is exposed to some level of airborne asbestos. As plaintiff points out, this level of exposure "serves as a baseline" from which experts can calculate the "relative risk of disease in individuals" exposed to more than background levels. MiL 3:18-22. It would thus seem that plaintiff himself may want to address background/ambient asbestos.

In any event, the Court believes San Francisco jurors (county residents have America's most advanced degrees per capita) are able to discern the difference between ambient levels of asbestos and levels capable of increasing the risk of asbestos-related disease. On the other hand, defendants in California asbestos cases are known to unnecessarily consume trial time with

theatrics about asbestos having supposedly been the "state rock." As stated in the pre-trial conference, that will not be permitted.

"But For" Proximate Cause

This motion in limine violates the five-page limit established by the Court's May 7, 2014 Asbestos Trial Management Order and is therefore DENIED. Nonetheless, the Court told counsel in the pre-trial conference that it would set out the standards to be followed regarding causation evidence.

The California Supreme Court's decision of *Rutherford v. Owens Illinois, Inc.* (1997) 16 Cal.4th 953 governs causation analysis in asbestos tort cases. California Civil Jury Instruction 435 teaches this aspect of *Rutherford.*

Plaintiff in our case is correct that, at least since *Rutherford,* "'but for' proximate causation" is not the law in California asbestos cases. Plaintiff is also correct that defense experts – particularly those from other states – are prone to opine to the contrary. However, plaintiffs' experts are also prone to render opinions contrary to *Rutherford* – opinions based on a notion that any and all exposures to asbestos are necessarily substantial factors in contributing to the risk of developing asbestos-related cancer.

Rutherford established a two-step process to prove "causation in asbestos-related cancer cases." 16 Cal.4th at 982-83. First, it must be proven that a plaintiff was exposed to a particular defendant or third party's asbestos-containing product. Second, it must be proven to a "reasonable medical probability" that the particular party's product "was a substantial factor in contributing to the aggregate doses of asbestos the plaintiff inhaled or ingested, and hence to the risk of developing asbestos-related cancer." *Id.*

Were it true that any and all asbestos exposures are invariably substantial factors, there would be no need for *Rutherford's* second step, for *any* exposure would qualify. Moreover, the supreme court closely bracketed its core holding in *Rutherford* with two important statements. At page 975, the court addressed the question of "whether the risk of cancer created by a plaintiff's exposure to a particular asbestos-containing product was *significant enough* to be considered a legal cause of the disease." Similarly, at page 977, the court addressed the question of "which exposures to asbestos-containing products contributed *significantly enough* to the total occupational doses to be considered 'substantial factors' in causing the disease." Those questions would not have been asked if each and every exposure to an asbestos-containing product – regardless of number or size – is automatically a substantial factor.

Thus it is appropriate under *Rutherford* to ask whether an exposure to asbestos was sufficient, or significant enough, to be considered a legal cause of the risk of disease. Conversely, it is not appropriate to opine that *every* asbestos exposure is necessarily a legal cause. Nor is it appropriate to ask whether an exposure to asbestos was the but-for cause of plaintiff's harm, or similar questions to the same end.

Improper Voir Dire Questioning

A motion in limine is a motion that seeks to exclude evidence, which this motion does not do. *See People v. Moore* (1991) 53 Cal.3d 152, 188. It is therefore DENIED.

Defense Motions

Joint: Exclude Plaintiff's Claim for Post-Death Household Services

This motion in limine – like several others – is a staple in asbestos litigation. The question is whether a plaintiff can recover damages for services he would have performed for his household – cooking, cleaning, yard work, etc. – in the years after his expected death from asbestos-related disease, but before his average life expectancy.

The authority usually (and here) cited by both sides is a footnote in *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 n.5. Ruling on this motion would be simple if *Overly* held one way or the other. It does not. However, *Overly* does usefully frame the issue: "The justification for awarding this type of damage [lost household services] as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, *will now have to be performed by someone else.*" *Id.* at n.5 (emphasis added).

This is a sticky issue in cases with a surviving spouse (who, in asbestos trials, is almost always a wife). On one hand, household services for decedent's direct personal benefit will no longer have to be performed. For example, his breakfast will not be cooked. On the other hand, the living space a plaintiff formerly occupied will still have to be cleaned if his wife continues to live in it. So, if decedent previously cleaned the house, those services "will now have to be performed by someone else." *Id.* A further question is whether such damages should come in decedent's case or in a wrongful death action by his wife.

Analysis is easier in our case because Mr. Stephens is divorced and does not contend that his household consists of anyone beyond himself. Thus, his household will not continue after his expected death and no services "will now have to be performed by someone else." *Id.* Plaintiff's counsel argues that Stephens likewise "will not need his pension after he dies but he is entitled to recover that." Opp. 4:8-9. However, the pension is something Stephens has already earned by performing work. In contrast, post-death household services will not "have to be performed." *See Overly,* 74 Cal.App.4th at 171 n.5.

Given the facts of this case, defendants' motion to exclude plaintiff's damage claim for loss of household services after his expected death is GRANTED.

Westburne No. 1: Failures to Test/Inspect Products Before Selling

Westburne Supply, Inc. seeks to exclude all evidence and argument that its predecessor had to "investigate, research and/or test for safety" the asbestos-containing products it sold. MiL 1:22-24. Westburne says its predecessor sold plumbing supplies through at least a dozen outlets in Northern California. Plaintiff says the predecessor had a "massive market share." Opp. 1:7. Because the motion is overbroad and the evidence has yet to be seen and heard, this motion is DENIED.

Westburne argues that the CACI jury instructions on strict products liability do not "involve any duty of inspection or testing." MiL 4:9-16. But that is because mere sale of a defective product which is a substantial factor in causing harm may be all that is required – it is "strict liability" after all. Westburne also points to the CACI negligence instructions (MiL 4:17-24), but they explicitly refer to a defendant "inspecting." CACI 1220(1), 1221. Whether Westburne's predecessor used reasonable care in its circumstances is an issue for evidence at trial, after which the jury will be properly instructed.

Westburne No. 2: Defendant Not an Expert

Westburne also moves to exclude evidence and argument that it and its predecessor "are experts or should be held to the standard of experts." MiL 2:3-5. Plaintiff "does not at this time oppose defendant's motion." Opp. 1:19. This was the time to oppose defendant's motion or not. The motion is therefore GRANTED.

Westburne No. 3: Defendant Not a Major Supplier

Westburne seeks to keep plaintiff from referring to its predecessor as a "major supplier" of asbestos-containing products or to sales of products supposedly "unrelated" to plaintiff. Whether a company with at least a dozen outlets in Northern California, and what plaintiff calls a "massive market share," is "major" is in the eye of the beholder. The Court will not attempt to

police counsel's vocabulary. Moreover, if Westburne thinks any products plaintiff refers to are irrelevant, it can point that out at trial. The motion is DENIED.

Westburne No. 4: Limit Dr. Cohen's Testimony

This motion in limine violates the five-page limit established by this Court's May 7, 2014 Asbestos Trial Management Order. It is therefore DENIED.

Joint: To Exclude Dr. Kagan

The Court grants defendants' request for an Evidence Code 402 hearing on whether evidence from Dr. Elliott Kagan will be admitted at trial. That hearing will be held beginning at 9 a.m. on Monday, July 13.

Dated: July 9, 2015

Richard B. Ulmer Jr.
Judge of the Superior Court