

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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WILMINGTON, DELAWARE 19801-3733
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May 9, 2012

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In Re: Asbestos Litigation

**Michael Galliher and his wife,
Darcel Galliher
C.A. No. 10C-10-315 ASB**

Dear Counsel:

The court believes it might be useful to summarize some of the rulings made on May 7, 2012.

A. Background

Plaintiff is the widow and administratrix of the late Michael Galliher. She claims her husband was exposed at his place of employment in Ohio to toxins contained in talc mined and processed by defendant R. T. Vanderbilt in upstate New York. According to Plaintiff, her late husband contracted mesothelioma as a result. Defendant raises a number of defenses. Most

notably, it contends that the talc in its New York mine does not contain minerals known to cause mesothelioma or, if so, they are well below acceptable levels. It also contends, among other things, that there is insufficient evidence that Mr. Galliher was exposed to its talc, as opposed to talc from some other manufacturer.

B. The experts

The dispute here arises from Plaintiff's late identification of an expert and Defendant's response. In order to understand the dispute, it is necessary to go back in time to June 19, 2011 when Plaintiffs timely submitted the report of a pathologist, Jerrold Abraham, M.D., who identified certain minerals in Mr. Galliher's lung tissue. Defendant deposed Dr. Abraham on January 10, 2012.

In the meantime, on December 5, 2011, the parties reached an agreement to extend the expert report deadline. In this agreement, Plaintiff agreed to withdraw her opposition to two commissions sought by Defendant and also agreed to the late submission of a case-specific report by Defendant's pathology and causation expert, Dr. Victor Roggli. In exchange, Defendant agreed to a late submission of an expert report by Mr. Sean Fitzgerald, a geologist retained by Plaintiff. Mr. Fitzgerald's report lies at the center of this controversy.

Before considering Mr. Fitzgerald's report, it is necessary to peel yet another layer off the onion. Prior to obtaining a report from Mr. Fitzgerald, Plaintiff obtained a report from Mark Rigler, Ph.D., a senior consultant at

MAS. Dr. Rigler used a sophisticated technique to examine Mr. Galliher's lung tissue and found additional minerals not revealed in Dr. Abraham's test. Specifically, Dr. Rigler found anthophyllite asbestos, tremolite asbestos, transitional anthophyllite/talc fibers and fibrous talc in Mr. Galliher's lung tissue. Dr. Rigler's report was forwarded to Mr. Fitzgerald and presumably reviewed by him. Notably, Dr. Rigler was never mentioned in the December 5 email agreement to mutually extend the expert deadline.

Mr. Fitzgerald performed an analysis of Mr. Galliher's lung tissue similar to that undertaken by Dr. Rigler. Importantly, Mr. Fitzgerald found that the mineral assemblage in Defendant's New York mine "well matches that seen in Mr. Galliher's lung tissue." If believed by the jury, Mr. Fitzgerald's testimony could rebut Defendant's product identification defense as well as its contention its talc does not contain minerals capable of causing mesothelioma.

*C. Defendant's lack of objection to the
timing of the Fitzgerald report*

Initially, Defendant had no objection to the timing of the Fitzgerald report. Indeed, Defendant deposed Mr. Fitzgerald on January 17, 2012, and its only objection to Mr. Fitzgerald in the Pretrial Order was a *Daubert* objection. Importantly, Defendant never filed a motion in limine seeking to exclude Mr. Fitzgerald because of timing issues. Rather, the Rigler report was the focus of Defendant's attention. Defendant filed a motion in limine to exclude Dr. Rigler's testimony and also objected in the Pretrial Order to Plaintiff's listing of Dr. Rigler as a witness.

D. The pretrial conference

The pretrial conference was scheduled for Wednesday, May 2 with the trial scheduled to begin the following Monday. Unfortunately, the proposed pretrial order listed hundreds of exhibits with objections to virtually all of them. The court told counsel they needed to reduce the number of exhibits to a reasonable number, and rescheduled the pretrial conference for Friday, May 4 -- the last business day before the trial.

Defendant raised for the first time its objection to the timing of the Fitzgerald report by way of an oral motion, at the May 4 conference. After much back-and-forth, the court ruled that Dr. Rigler could not render any opinion testimony because his report was untimely. However, it declined to exclude Mr. Fitzgerald's report on the basis of timeliness.

On Monday morning the jury was selected and sworn. In order to allow the court and counsel time to resolve the remaining pretrial issues, the jury was sent home and told it to report the next day. After the jury departed, the court heard additional oral arguments on the Fitzgerald issue and, following a lunch break, it advised the parties that trial was continued until July 16, 2012 and that Defendant's out-of-state counsel was sanctioned \$5000. The court stated the reasons for its decision on the record. This letter is to repeat, and perhaps expand upon, those reasons.

E. The court's ruling

The Fitzgerald testimony is central to this case. Prior to his report, Plaintiff had little evidence linking decedent's injury to Defendant's talc. Her

evidence in this regard primarily consisted of testimony that bags of R. T. Vanderbilt talc were seen at Mr. Galliher's work place. The testimony of Mr. Fitzgerald that the minerals found in Mr. Galliher's lungs match those at Defendant's talc mine, if believed, could turn a relatively weak case into a strong one.

Defendant tacitly acknowledges the importance of the Fitzgerald testimony and argues, with considerable fervor and logic, that it will be unfairly prejudiced if Mr. Fitzgerald is permitted to testify because it does not have time to develop rebuttal expert testimony. It is not difficult to envision the likely result if Plaintiff introduces testimony that minerals found inside Mr. Galliher's lung came from Defendant's mine and Defendant has nothing to rebut that.

In short, the court is faced with the following dilemma: if it grants Defendant's motion, it is almost assuring a defense verdict; on the other hand, if it denies the motion, it is almost assuring a Plaintiff's verdict. Neither is a desirable result. The court, therefore, opted to delay the trial so as to allow the admission of this critical testimony and also allow Defendant an opportunity to develop evidence to rebut it.

The necessity of granting a continuance after the jury was impaneled and the resultant unnecessary costs leads to the question of sanctions. Plaintiff has some culpability in this matter because she did not provide Mr. Fitzgerald's report until after the expert deadline, albeit with Defendant's consent. The court notes that plaintiff, her son and grandson travelled from

out of state to attend trial, presumably at significant personal expense. Moreover, Plaintiff may incur additional unnecessary expense in the form of fees for late cancellation from her experts. The court concluded, in light of Plaintiff's lesser culpability, that the delay in Plaintiff's day in court and the expenses attendant to that delay were a sufficient sanction.

Defendant, however, is another story. It knew, or should have known, no later than Mr. Fitzgerald's deposition on January 17, 2012 that his testimony could cause problems for it at trial. Yet, Defendant's out-of-state counsel elected to do nothing to bring this to the court's attention until literally the eve of trial. Even then, counsel did not present a written motion, but rather made an oral application with little or no notice to Plaintiff. When asked why this occurred, out-of-state defense counsel explained he was limited to five motions *in limine*. The court has examined the motions *in limine* filed by Defendant and finds that, with one possible exception, their importance pales in comparison with the central dispute about the Fitzgerald testimony. The court therefore does not accept the explanation offered by counsel.

The court finds that the decision to withhold the timeliness objection to Fitzgerald's decision was a strategic one most likely made by Thomas Radcliffe, Defendant's out-of-state counsel. Mr. Radcliffe is therefore sanctioned \$5000, which sanction is not to be recouped from Defendant or its insurance carrier. No sanction is imposed on Mssrs. Skiles or Naylor or on Swartz Campbell, LLC.

Finally, a word to any member of the Asbestos Bar who may read this is appropriate. The scope of this ruling is limited to the peculiar facts now before the court. Practitioners should not assume that late identification of experts will be routinely excused in future cases. Indeed, the court views this case as a rare exception to the rule that late-identified experts will be precluded.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary
pc: Loreto P. Rufo, Esquire, Hockessin, Delaware