**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

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| THERESA COLLINS, Individually And as the Surviving Spouse and Personal Representative of the ESTATE OF BRUCE COLLINS, | ) | |
| Plaintiff, | ) | |
| | ) | C.A. No. 06C-03-339 BEN |
| v. | ) | |
| ASHLAND INC., *et al.,* | ) | |
| Defendants. | ) | |

Submitted: April 21, 2011
Decided: October 21, 2011

*Upon Benjamin Moore & Company and The Sherwin-Williams Company's Motion to Exclude Plaintiff's Causation Experts and Motion for Summary Judgment*: **GRANTED**

Ian Connor Bifferato, Esq. and David W. deBruin, Esq. of Bifferato LLC, 800 N. King Street, Plaza Level, Wilmington, DE 19801; OF COUNSEL: William A. Kohlburn, Esq. (Argued) and Jennifer Hightower, Esq. of Simmons Browder Gianaris Angelides & Barnerd LLC, One Court Street, Alton, IL 62002, Attorneys for Plaintiffs.

Katharine L. Mayer, Esq. (Argued) and Daniel M. Silver, Esq., McCarter & English, LLP, Renaissance Centre, 405 N. King Street, 8th Floor, Wilmington, DE 19801, Attorneys for Defendant Benjamin Moore & Co.

William R. Adams, Esq. and James R. Miller, Esq. of Dickie, McCamey & Chilcote, P.C., 300 Delaware Avenue, Suite 1630, Wilmington, DE 19801, Attorneys for Defendant, The Sherwin-Williams Company.

**Jurden, J.**

## I. INTRODUCTION

Before the Court is Benjamin Moore & Company and The Sherwin-Williams Company's (collectively "Defendants"), Motion to Exclude Plaintiffs' Causation Experts and Motion for Summary Judgment. The lawsuit giving rise to this Motion was filed on March 31, 2006. Bruce Collins' ("Mr. Collins") surviving spouse, Theresa Collins ("Plaintiff"), individually and on behalf of her husband's estate, claims that Mr. Collins contracted Acute Myelogenous Leukemia ("AML") as a proximate result of his exposure to products containing benzene manufactured by Defendants. Defendants argue that Plaintiff's causation experts cannot withstand the *Daubert* standard for admissibility of expert testimony, and that because Plaintiff's expert testimony must be excluded, Defendants are entitled judgment as a matter of law.[1] For the reasons that follow, Defendants' Motion is **GRANTED**.

## II. FACTS AND PROCEDURAL HISTORY

Mr. Collins worked as a painter at Rosing Paints for nine months in 1984,[2] and at Specialty Finishes LLC from 1984 to 2005.[3] Plaintiff claims that during Mr. Collins' painting career he was exposed to benzene fumes and products containing benzene manufactured by Defendants. Mr. Collins' only exposure to

[1] Plaintiff concedes that if her causation experts are excluded from testifying, summary judgment should be granted in Defendants' favor; *See* Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment ("Plf.'s Opp. Brf.") at p. 3 (Trans. ID. 36489821) ("[S]ummary judgment would be an inevitable consequence of completely excluding [Plaintiff's] causation experts").
[2] Sec. Am. Comp. at 6, ¶5(c), (Trans. ID. 11925277).
[3] *Id.* at p. 2, ¶4(a).

the Defendants' products occured while working for Rosing Paints in 1984.[4] Mr. Collins passed away on July 10, 2006, as a result of complications due to AML. Plaintiff claims that Mr. Collins contracted AML as a proximate result of his exposure to Benzene containing products manufactured by Defendants.

At trial, Plaintiff intends to introduce the testimony of Dr. Lawrence R. Zukerberg and Dr. Harry A. Milman in order to establish that the Defendants' products proximately caused Mr. Collins' AML. Dr. Milman, a consultant and expert on Toxicology, Carcinogenesis, Pharmacology, Pharmacy Standard of Care, and Science Communication, holds a doctorate in Pharmacology, and has worked for the United States Environmental Protection Agency as a Senior Science Advisor and Senior Toxicologist.[5] Dr. Milman opines that throughout Mr. Collins' twenty-one year career as a painter,[6] he was routinely exposed by inhalation, skin contact and ingestion to benzene present in paint.[7] Dr. Milman further opines that Mr. Collins suffered from AML proximately caused by his exposure in the workplace to benzene present in paint and paint products.[8]

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[4] *See Collins v. Ashland, Inc.*, 2010 WL 5834798, at *n.3 (Del. Super. Jan. 26, 2010) ("Mr. Collins' employment at Rosing [Paints] is the only time period at issue with respect to Benjamin Moore."); *Collins v. Ashland, Inc.*, 2010 WL 6194110, at *n.5 (Del. Super. Jan. 26, 2010) ("[T]his Court noted that Hood would only be permitted to testify about the nine-month period at Rosing Paints which Mr. Collins was allegedly exposed to Sherwin–Williams products.").

[5] *See Curriculum Vitae* Dr. Milman ("Milman CV"), Exhibit A to Plaintiff's Answering Brief in Opposition to Defendants' Motion to Exclude Plaintiff's Causation Experts (Trans. ID. 36489821).

[6] Dr. Milman in no way limits his opinion based on the nine-month time frame in which Mr. Collins was exposed to the moving Defendants' products.

[7] *See* Dr. Milman's Report ("Milman Report"), Exhibit B to Plaintiff's Answering Brief in Opposition to Defendants' Motion to Exclude Plaintiff's Causation Experts (Trans. ID. 36489821).

[8] *Id.*

Dr. Zukerberg is an associate pathologist at Massachusetts General Hospital, where he "reviews specimens and microscopic sections of surgically resected specimens and provide[s] diagnoses on each specimen, grading on every malignant neoplasm and staging on every tumor resection."[9] Dr. Zukerberg opines "to a reasonable degree of medical certainty that Mr. Collins worked in an environment that exposed him to toxic substances that caused his [AML]."[10] In order to make his diagnosis, Dr. Zukerberg reviewed Mr. Collins' medical records, Dr. Milman's benzene exposure report, the relevant scientific literature, and reports on leukemia causes.[11] Dr. Zukerberg opines that Mr. Collins was regularly exposed to toxins, including benzene, for his entire twenty-one year career.[12] Further, Dr. Zukerberg opines that Mr. Collins had no other known risk factor for developing AML.[13] Dr. Zukerberg cites "numerous studies" which evaluate occupational exposure to benzene and the increased occurrence of AML.[14] Finally, Dr. Zukerberg opines, "to a reasonable degree of medical certainty, that Mr. Collins worked in an environment that exposed him to toxic substances that caused his acute myeloid leukemia."[15]

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[9] *See Curriculum Vitae* Dr. Zukerberg ("Zukerberg CV"), Exhibit C to Plaintiff's Answering Brief in Opposition to Defendants' Motion to Exclude Plaintiff's Causation Experts (Trans. ID. 36489821).
[10] *See* Dr. Zukerberg's Report ("Zukerberg Report"), Exhibit D to Plaintiff's Answering Brief in Opposition to Defendants' Motion to Exclude Plaintiff's Causation Experts (Trans. ID. 36489821).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*; Similar to Dr. Milman, Dr. Zukerberg did not confine his opinion to the time frame in which Mr. Collins was exposed to the Defendants' products.

## III. THE PARTIES' CONTENTIONS

Defendants assert that Plaintiff's causation experts cannot withstand a *Daubert* challenge.[16] Specifically, Defendants argue that because Dr. Milman and Dr. Zukerberg premise their causation opinions on Mr. Collins' entire twenty-one year painting career, and do not address the specific relevant time frame – the nine-month period in which Mr. Collins was exposed to the Defendants' products – their opinions ignore the basic fundamental facts of the case, and thus, are inadmissible.[17] Further, Defendants assert that it would be highly prejudicial to allow Dr. Milman and Dr. Zukerberg to testify concerning Mr. Collins' entire painting career when he was only exposed to the Defendant's products for nine months.[18] Next, Defendants contend that Dr. Milman and Dr. Zukerberg utilize a flawed "differential diagnosis" in order to conclude that Mr. Collins' AML was causally related to exposure to benzene contained within the Defendants' products. Defendants argue that because the Plaintiff's experts fail to exclude other potential causes of Mr. Collins' AML, including obesity, smoking, genetic predisposition and an idiopathic cause, their opinions are not predicated on sufficiently reliable methodology.[19] Defendants argue that Dr. Milman's exposure and causation opinion is not the product of a reliable scientific process because he provides no

[16] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
[17] Defendants' Opening Brief in Support of Their Motion to Exclude Plaintiff's Causation Experts and for Summary Judgment in Favor of Defendants ("Def.'s Mot. to Exclude") at p. 11-2 (Trans. ID. 35365402). *See Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010).
[18] *Id.* at p. 14.
[19] *Id.* at p. 15.

specific dose quantification.[20] Finally, Defendants assert that because Dr. Zukerberg ignores contrary references related to the causal connection between benzene exposure and AML, and relies on Dr. Milman's flawed opinion to diagnose Mr. Collins, his testimony is inadmissible.[21]

Plaintiff argues that her experts have not overlooked the fundamental facts of the case by considering Mr. Collins' entire twenty-one year painting career, as opposed to limiting their opinions to Mr. Collins' period of exposure to the Defendants' products. Plaintiff contends that this case is not an example of experts relying on "false or inaccurate information . . . but with too much information."[22] Next, Plaintiff asserts that Dr. Milman and Dr. Zukerberg did in fact perform a proper differential diagnosis because: (1) Dr. Zukerberg "explained the possibility of obesity as a risk factor for AML is neither well-established nor significant;" (2) Mr. Collins never smoked, and thus, smoking could not have caused his AML; and (3) Mr. Collins did not have a significant family history of cancer related diseases, and thus, genetic predisposition was not a likely cause of his AML. Finally, Plaintiff argues that Delaware law does not require her experts to numerically quantify the dose of benzene or perform a dose-reconstruction calculation with respect to the extent of Mr. Collins' benzene exposure.[23]

[20] *Id.* at p. 16-8.
[21] *Id.* at p. 19-21.
[22] Plf.'s Opp. Brf. at p. 17 (Trans. ID. 36489821).
[23] *Id.* at p. 14-5.

## IV. STANDARD OF REVIEW

When considering a motion for summary judgment, the Court must examine the record to determine whether genuine issues of material fact remain for trial.[24] "If, after viewing the record in a light most favorable to the non-moving party, the Court finds that there are no genuine issues of material fact, and the party is entitled to judgment as a matter of law, summary judgment will be granted."[25] But where the record reflects that a material fact is in dispute, or judgment as a matter of law is not appropriate, the Court will not grant summary judgment.[26] However, "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[27]

## DISCUSSION

As a threshold matter, it should be noted that "the proponent of the proffered expert testimony bears the burden of establishing the relevance, reliability, and admissibility by a preponderance of the evidence."[28] It is the Court's role to act as "gatekeeper" with respect to the admissibility of expert testimony at trial. The trial judge has the duty to "ensure that the scientific testimony is not only relevant but

[24] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[25] *Sanders v. State Farm Mut. Auto. Ins.*, 2003 WL 22092725, at *1 (Del. Super. 2003) (citing *Oliver B. Cannon & Sons, Inc.*, 312 A.2d at 325).
[26] *Id*. (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).
[27] *Scaife v. Astrazeneca LP*, 2009 WL 1610575, at *20 (Del. Super. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).
[28] *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. 2000).

reliable."[29] In exercising this gatekeeping function, the Court is required to utilize a set of so-called "*Daubert* non-exclusive factors" when considering whether expert testimony should be admitted. These aforementioned factors include: (1) whether the technique or scientific knowledge has been tested or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the control standards for the technique's operation; and (4) whether the technique has gained general acceptance.[30]

In addition to the *Daubert* criteria, the Delaware Rules of Evidence have significant import with respect to the admissibility of expert testimony at trial. In determining whether an expert opinion is admissible, the Court must consider whether: (1) the expert witness is qualified;[31] (2) the evidence is otherwise admissible, relevant, and reliable;[32] (3) the bases for the opinion are those reasonably relied upon by experts in the field;[33] (4) the specialized knowledge being offered will assist the trier of fact to understand the evidence or determine a

[29] *In re Asbestos Litigation*, 911 A.2d 1176, 1198 (Del Super. 2006) (citing *Minner*, 791 A.2d at 843).
[30] *See Daubert*, 509 U.S. 579 (1993); Delaware has explicitly adopted *Daubert*, *see M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).
[31] Delaware Rule of Evidence ("D.R.E.") 702.
[32] D.R.E. 401 and 402.
[33] D.R.E. 703.

fact in issue;[34] and (5) the evidence does not create unfair prejudice, confuse the issues, or mislead the jury.[35]

With respect to the instant Motion, the Defendants do not take issue with the Plaintiff's experts' opinions that benzene *generally* causes AML.[36] Rather, Defendants argue that the Plaintiff's experts cannot reliably testify as to *specific* causation; that, specifically, the Defendants' products proximately caused Mr. Collins' AML. Defendants claim that because Mr. Collins was only exposed to the Defendants' products for nine months, and the Plaintiff's experts rely on Mr. Collins' entire career in concluding that benzene caused his AML, the experts' opinions are based on flawed information, and thus, their testimony is unreliable.[37]

Plaintiff's experts will testify that Mr. Collins' exposure to benzene throughout his entire painting career caused his AML, and have not limited their causation opinions in any way to the nine-month period Mr. Collins worked at Rosing Paints.[38] Neither Dr. Milman nor Dr. Zukerberg distinguish Mr. Collins' exposure while working for Rosing Paints – the time period he was exposed to the

[34] D.R.E. 702.
[35] D.R.E. 403.
[36] At oral argument, Defendants expressly stated, "we're not attacking the general causation in this case." Motion to Dismiss Hearing Transcript ("H'rg Tran.") at 44 (April 21, 2011); *see* H'rg Tran. at 11-2, (Plaintiffs Counsel: "AML – benzene is an established, recognized, accepted cause of AML. This is not one of those situations where general causation is being challenged, where there is a question as to whether or not the toxin in question is capable of causing the disease in question. That is well established and not challenged here."). Defendants did not submit alternative expert witness reports or studies which conclude that benzene does not cause AML.

[37] *See* Def.'s Mot. to Exclude at p. 11-2.
[38] *See* Plf.'s Opp. Brf. at p. 4-5 ("The primary focus of [Dr. Milman's] testimony will be how decedent was exposed to benzene from the various products used throughout his career as a painter.").

Defendants' products – and the rest of Mr. Collins' career as a painter.[39] This failure to link Mr. Collins' disease to the Defendants' products and the time period in which he was in fact exposed to these products is a fundamental flaw in Plaintiff's experts' methodology that undermines the reliability of their conclusions, at least with respect to the moving Defendants. As discussed below, because the Plaintiff's experts do not make a *prima facie* showing of a causal nexus between exposure to the Defendants' products and Mr. Collins' disease, the issue cannot be presented to a jury.[40]

Under Delaware law, "establishing proximate cause requires a plaintiff to prove that but for the tortious conduct of the defendant, the injury which the plaintiff has suffered would not have occurred."[41] There can, however, be more than one proximate cause of an injury.[42] In a toxic tort action against multiple defendants, "the liability of a particular defendant is not dependent upon a showing that the defendant's cause was the exclusive cause of the plaintiff's injuries."[43] But before a proximate cause determination can be posed to the jury, the plaintiff is required to establish a *prima facie* case that exposure to a particular defendant's toxic products proximately caused the plaintiff's disease.[44] Where a finding of proximate cause is not within the common knowledge of a lay person, such as

[39] *See* Milman Report and Zukerberg Report.
[40] *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund, et. al.*, 596 A.2d 1372, 1375 (Del. 1991).
[41] *Id.* (citations omitted); *see In re Asbestos Litigation*, 911 A.2d at 1208.
[42] *Id.*; *see Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991).
[43] *Id.*
[44] *Id.* at 1375.

matters involving the pathology of cancer, the causal nexus between exposure and the disease must be established through expert medical testimony.[45] The plaintiff's expert medical witness must be able to state in terms of reasonable medical probability "that there was a causal relationship between the *defendant's* product and the plaintiff's physical injury."[46]

Both the Delaware Rules of Evidence and *Daubert* require that a "proffered expert opinion be the product of reliable principles and methods reliably applied to the facts of each case."[47] "Acordingly, the 'helpfulness' standard requires that evidence have 'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.' *Daubert* characterized this requirement as one of 'fit.'"[48] The "pertinent inquiry" in the case *sub judice* is whether the time period during which Mr. Collins was exposed to the Defendants' products was sufficient to establish a causal nexus between the exposure and Mr. Collins' AML. Plaintiff's expert opinions are deficient because they do not state that the decedent's nine-month period of exposure while at Rosing Paints proximately caused his AML. Plaintiff's counsel admitted at oral argument:

> I have to tell your Honor, the answer to the question of would my medical expert be willing to attribute exposure to benzene over a nine-month career as opposed to a 20-year career as a painter, would he be willing to say that, if we were limited in that regard, that that was

[45] *Id.* at 1376.
[46] *Id.* at 1377 (emphasis added).
[47] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 797 (Del. 2006) (internal quotation marks omitted).
[48] *In re Asbestos Litigation*, 911 A.2d at 1199 (citing *Daubert*, 509 U.S. at 591-92).

> caused – that the AML was caused by benzene, I don't know the answer to that question. . . . And I would have to be honest and say that, if we were limited to nine months of benzene exposure as opposed to nine months of product ID, this *very well could be a situation where we just don't have enough overall exposure to suggest the connection to benzene*.[49]

The problem is not that the Plaintiff's experts' science is unsound or the methodology flawed, it is that the principles and methods used by the Plaintiff's experts have not "reliably [been] applied to the facts of [this] case."[50]

The Court is not holding that a particular dose or quantification of exposure is required in order to present specific causation to the jury. But the Plaintiff's experts must be able to provide expert opinions to a reasonable degree of medical probability that but for Mr. Collins' exposure to the Defendants' products during his nine-month employment with Rosing Paints, he would not have developed AML. Without such expert medical testimony Plaintiff cannot make a *prima facie* showing of proximate causation, and thus, the claim should not be presented to the jury.[51]

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[49] H'rg Tran. at 22 (emphasis added). The Court notes that Plaintiff appears to make a "substantial factor" proximate cause argument concerning Mr. Collins' AML. While some jurisdictions recognize this proximate cause standard, Delaware does not. As noted above, Delaware law uses a "but for" proximate cause standard. *Culver*, 588 A.2d at 1098. Because the parties have litigated this case as though Delaware products liability law applies, the Court will apply Delaware law. Thus, Delaware's "but for" standard remains in affect.

[50] *See Perry*, 996 A.2d at 1270. ("If an expert's proposed testimony is not based upon 'sufficient facts or data,' the expert must be disqualified.") While the Plaintiff's expert did not rely on inaccurate information, they did not tailor their opinions to the pertinent inquiry at issue in this case, *i.e.*, whether it was the Defendants' products, and not the other benzene contaminated products Plaintiff may have been exposed to, which caused his disease. *See Bowen*, 906 A.2d at 797.

[51] *Money*, 596 A.2d at 1375.

## CONCLUSION

After considering the facts in the light most favorable to Plaintiff, the Court finds that there are no genuine issues of material fact in dispute with respect to causation and that the moving Defendants are entitled to a judgment as a matter of law. Therefore, Defendants' Motion for Summary Judgment is **GRANTED.**

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge

**cc: Prothonotary**