

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

FILED

OCT 03 2017

BB, et al.)
)
 Plaintiff(s),)
) Case No.
 vs.) Division 8
)
 CONSTRUCTION, LLC, et al,)
)
 Defendants.)

ORDER

On September 20, 2017, this cause was called for hearing on Defendant(s) Motions for Partial Summary Judgment. Each Defendant has filed a separate Motion for Partial Summary Judgment and Memorandum in Support thereof. Plaintiff has filed responses to each filing along with memorandums. Reply motions and memorandum were filed on behalf of some Defendants. In addition, each Defendant filed or joined with other Defendant(s) in filing a motion to exclude the testimony of Plaintiff's retained expert witness, Dr. RS. Plaintiff filed a response and some Defendant's filed a reply. The parties appeared by counsel and the matter was argued and submitted.

Upon argument of the parties, the Court's review of the parties' various motions and memoranda, and the Court's analysis of relevant authority, the Court finds, *among other things*, as follows:

**MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE CLAIM THAT
MOLD EXPOSURE CAUSED PLAINTIFFS' MEDICAL CONDITIONS**

1. On September 8, 2017, Defendants Mechanical, LLC and MG filed a motion for partial summary judgment solely on the claim that mold exposure caused the injuries alleged by Plaintiffs'. That motion was joined by all other Defendant's. The thrust of this motion is the assertion that the sole expert designated by Plaintiffs, Dr. RS is not qualified to offer an opinion as to causation and should be excluded as a witness under Section 490.065, RSMo. In addition to the motion(s) for partial summary judgment, on August 28, 2017, Defendants Construction, LLC and RB filed a motion to exclude the testimony of RS. All Defendants joined MG's motion or filed similar motions.

2. In order to rule on the motion(s) for partial summary judgment, the Court must first consider the motion(s) to exclude Dr. RS pursuant to Section 490.065, effective August 28, 2017. The parties disagree on whether the amended statute effective on the date of Defendant's motion being filed applies to the issue or whether the statute only applies prospectively to cases filed after the effective date. The question was recently answered by our Supreme Court. While citing a case from 1891, the court succinctly stated, "This Court has long

held that legislative changes to the rules governing whether particular evidence is or is not admissible are to be applied prospectively to **all trials occurring on or after the effective date of that change.**" State ex rel. Tipler v. Gardner, 506 S.W.3d 922, 925 (Mo. banc 2017) [Emphasis added]. "Like other rules affecting the remedy, [the rules of evidence] must therefore at all times be subject to modification and control by the legislature, and the changes which are enacted may lawfully be made applicable to existing causes of action...." Id.

3. Section 490.065 as amended provides in part:

"2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;"

4. The amendment of Section 490.065 brings Missouri expert witness law ostensibly in line with Federal Rule of Evidence 702 and the well-known standard set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and the many cases that followed. Under Daubert, the Court must focus "solely on principles and methodology, not on the conclusions that they generate." Id. 509 U.S. at 595, 113 S.Ct. 2786. In so doing, "the district court must engage in 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" Id. 509 U.S. at 592-93, 113 S.Ct. 2786. The Supreme Court suggested several factors to be used in making that assessment: "(1) whether the theory or technique can be (or has been) tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) the general acceptance of the methodology." Raynor v. Merrell Pharms. Inc., 104 F.3d 1371, 1375 (D.C.Cir.1997). That list of factors "is 'flexible' and ... neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Nor is it a "definitive checklist" or test. Daubert, 509 U.S. at 593, 113 S.Ct. 2786. The burden is on the proponent of the evidence to show that by a preponderance of the evidence the opinions they seek to present are reliable. Meister v. Med. Eng'g Corp., 267 F.3d 1123, 1127 n. 9 (D.C.Cir.2001).

5. The court has reviewed all of the materials and arguments submitted by each party including the Plaintiff's response in Opposition to Defendants Motion to Exclude the Expert Testimony of RS and the seven (7) exhibits attached thereto. In addition, the Court has reviewed BB's medical records submitted by Defendants

Mechanical, LLC and MG. Having reviewed these records, the Court concludes that Plaintiff's endorsed expert has been unable to cite to a study, article, experiment, test or other valid scientific endeavor that establishes mold or mycotoxins found in Plaintiff's home are a cause of Parkinson disease. None of the studies concluded that mold causes Parkinson disease in human beings.

6. Based upon the oral argument of counsel, it is undisputed between the parties that Dr. RS will be Plaintiff's sole causation witness. All parties agree that Dr. RS will be the only witness to opine that exposure to mold caused Plaintiff's diagnosed Parkinson disease. It is clear that Dr. RS is not a physician and therefore is not qualified to make a medical diagnosis of Plaintiff's condition. The parties agree that Plaintiff's treating neurologist, Dr. C diagnosed Plaintiff with Parkinson disease from an unknown source despite Plaintiff informing him of his belief that it was caused by mold exposure.

7. Having reviewed Dr. RS's CV, his 43 page report on Dr. BB, his retest report on Dr. BB, the 32 pages of mold studies submitted, the mold reports by civil agencies submitted, and the 55 page document entitled "Mold Neurotoxicity and Motor Disorders", such as Parkinson Disease, and the depositions provided, it is apparent that Dr. RS's "professional" opinion (Plaintiff's exhibit 7, page 4) is not based on sufficient scientific knowledge of the toxicity of mold found in Plaintiff's home to be relevant or reliable. During his deposition he admitted that he has no particular expertise with respect to Parkinson disease, that he educated himself on the disease by reading articles on the relationship between Parkinson disease and mold, and he had not performed any previous mold evaluation for Parkinson disease. In addition, his described methodology for reaching his conclusions has not been subjected to peer review or publication nor is there a known rate of error. It would appear his methodology as applied to this case has never been tested.

8. Plaintiff's cite to Bonner v. Technologies, Inc., for the proposition that federal courts, "have already held that Dr. RS is qualified to opine that exposure to certain toxic substances causes Parkinson's." [Plaintiff's response p. 4]. However, this Courts reading of Bonner indicates that Dr. RS testified that as a result of plaintiff's exposure to a specific chemical caused her to suffer permanent organic brain dysfunction manifesting itself in **Parkinsonian physical symptoms**, cognitive impairments and personality disorders. Id. at 931. [Emphasis added]. The degree of supporting literature and methodology he relied upon in this case was not mentioned as to the effects of this particular chemical exposure. Another toxicologist in the same case was precluded from testifying that Plaintiff had Parkinson disease as a result of exposure to the chemical in question.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant(s)' Motion to Exclude Dr. RS pursuant to Section 490.065, RSMo (effective August 28, 2017) is SUSTAINED. The Court concludes that his opinion(s) that mold caused Plaintiffs injuries is not based upon sufficient facts and or data, that his conclusions are not based in reliable scientific principles and methods, or that he reliably applied accepted scientific principle and methods to this case.

The Court now turns to Defendant(s) motion for partial summary judgment solely on the claim that mold exposure caused the injuries alleged by Plaintiffs’.

1. Summary judgment allows a trial court to enter judgment for the moving party where the party demonstrates a right to judgment as a matter of law based on facts about which there is no genuine dispute. ITT Commercial Fin. Corp. v. Mid Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). For purposes of summary judgment, a “genuine issue” exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. Id. at 382. “A ‘genuine issue’ is a dispute that is real, not merely argumentative, imaginary or frivolous.” Id. Summary judgment is proper where the “genuine issues” raised by the non-movant are merely argumentative, frivolous, or imaginary. Id.

2. “A material fact in the context of summary judgment is one from which the right to judgment flows.” Columbia Mut. Ins. Co. v. Heriford, 518 S.W.3d 234, 240 (Mo App. 2017)(quoting Goerlitz v. City of Maryville, 333 S.W.3d 450, 453 (Mo. banc 2011)). Uncontroverted material facts established via Rule 74.04(c) numbered paragraphs and responses are those facts that “demonstrate [the movant’s] right to judgment regardless of other facts or factual disputes.” Pemiscot County Port Authority v. Rail Switching Services, Inc., Case No. SD34570, 2017 WL 1885292, at 3 (Mo. App. S.D. May 9, 2017).

3. Here, Defendant(s) request this Court grant them partial summary judgment on the claim of whether mold exposure caused Plaintiffs health issues. Having ruled that Plaintiff’s expert will not be allowed to testify pursuant to Section 490.065, RSMo, Plaintiff’s negligence claims fail as a matter of law because Plaintiffs do not offer reliable and relevant expert testimony to prove that the mold found in their home caused their health issues.

4. Expert testimony is required in this case to establish causation because the health effects of exposure to mold are a matter beyond the knowledge and experience of the average juror. Without reliable and relevant expert testimony causally linking Plaintiffs’ medical conditions with the discovery of mold, the jury would be left to speculate whether such a causal connection exists.

5. Because the Court finds that the opinions of Plaintiffs’ expert as to specific causation are unreliable and inadmissible, Plaintiffs’ cannot establish the essential causation element of their negligence claims.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant(s)’ Motions for Partial Summary Judgment on the Claim that Mold Exposure Caused Plaintiffs’ Medical Conditions is SUSTAINED.

**DEFENDANT PLUMBING CO., INC.’S MOTION FOR
SUMMARY JUDGMENT**

1. Defendant Plumbing Co., Inc., filed a separate motion for summary judgment regarding the installation of an icemaker in Plaintiffs’ home and the discovery of mold when it was removed.

2. Plaintiff has filed a reply asserting circumstantial evidence exists that Defendant Plumbing Co.'s installation of both the icemaker and showerheads resulted in mold being discovered in proximity to both installation sights as sufficient to show a reasonable inference that Defendant's installation was the cause of the mold.

3. The Court finds that a genuine issue exists as to whether the installation of the icemaker or shower heads caused the resulting mold precluding summary judgment.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant Plumbing Co., Inc.'s Motion for Summary Judgment is DENIED.

**DEFENDANT CONSTRUCTION, LLC AND RB'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNTS IV AND V AND DEFENDANT RB'S
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I-VIII**

1. Defendants Construction, LLC and RB filed a separate motion seeking partial summary judgment on Counts IV and V of the petition and RB individually seeking partial summary judgment on Counts I-VIII.

2. Plaintiffs have conceded that RB cannot be held personally responsible under Count I, VI, and VII, but point to genuine issues of fact at issue on the remaining counts of the petition against Construction and RB individually. This Court agrees.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant, RB's motion for partial summary judgment on Counts I, VI and VII is SUSTAINED. Construction and RB's motion for partial summary judgment is DENIED in all other respects.

SO ORDERED:


DEAN P. WALDEMER
CIRCUIT JUDGE
DIVISION 8
ST. LOUIS COUNTY CIRCUIT COURT

DATED: 10/3/17

CC: Attorneys of record ✓