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CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

KRISTAN PHILLIPS by his Guardian PHILIP HIGGINS and ELSA PHILLIPS, Plaintiffs, v. VELSICOL CHEMICAL CORPORATION, Defendant.	)	Docket No. 93-CV-140-J

MEMORANDUM DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ISSUE OF PRODUCT IDENTIFICATION

This matter is before the court on defendant Velsicol's Renewed Motion for Summary Judgment Regarding Product Identification and Statute of Limitations.

The court having considered all papers and pleadings filed herein, including the Renewed Motion, plaintiffs's Response, defendant's Reply, the memoranda, all affidavits, exhibits, depositions, and other attachments, having heard argument of counsel and being fully advised, the court does render its decision as follows.

BACKGROUND

In 1987, Kristan Phillips was a timpanist with the Hong Kong Philharmonic Orchestra. On June 21, 1987, Mr. Phillips was

280

participating in the orchestra's rehearsal when pesticides were applied in the building. On May 10, 1993, Mr. Phillips by his Guardian and his wife Elsa Phillips filed the complaint in this case. The complaint alleges as follows: Velsicol "was and is the sole manufacturer of a toxic insecticide and pesticide . . . known as Chlordane," that "on or about June 21, 1987, [Mr.] Phillips was participating in a rehearsal of the orchestra in the Hong Kong Academy of Performing Arts Building which is located in Hong Kong," that ". . . [d]uring the rehearsal, Phillips was subjected to toxic Chlordane poisoning from products manufactured by Velsicol" and that "Phillips was injured as a direct and proximate result of the application of the defective and unreasonably dangerous Chlordane . . . "

The complaint sought recovery of compensatory damages against Velsicol under a variety of theories, including strict products liability (First Claim), negligence (Second Claim), breach of warranty (Third Claim), fraud (Fourth Claim) and loss of consortium (sought by plaintiff Elsa Phillips)(Fifth claim). The Complaint also sought punitive damages.

SUMMARY JUDGMENT STANDARDS

This court will grant summary judgment where, viewing the record in the light most favorable to the party opposing summary judgment, it shows "that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A 'material' fact is one 'that might affect the outcome of the suit under the governing law.'" *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994) quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And "a 'genuine' issue is one where 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* The court views the evidence in the light most favorable to the nonmoving party. *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 113 S.Ct. 635 (1992). "The moving party bears the initial burden of showing that there is an absence of any issues of material fact. If the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. To sustain this burden, the non-moving party cannot rest on the mere allegations in the pleadings." *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1036 (10th Cir. 1993)(internal quotations omitted).

If the evidence supporting plaintiffs's claims is insufficient for a jury to return a verdict for plaintiffs, or is merely colorable or not significantly probative, then the

defendant is entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

It is undisputed that a pest control company named Exclusive Environmental Services was spraying pesticides in the Hong Kong Academy of Performing Arts on June 21, 1987, and the orchestra's rehearsal was interrupted as a result. At issue in this case is whether the substance Exclusive Environmental Products sprayed in the Academy on June 21, 1987, contained defendant's product Chlordane. Plaintiffs contend that Mr. Phillips's alleged inhalation and dermal exposure to Chlordane at the Academy on June 21, 1987 caused his alleged mental, physical and psychological deficits. Defendant Velsicol contends that its product Chlordane was not used in the Academy and moves for summary judgment contending that plaintiffs have failed to establish product identification, an essential element of their complaint against Velsicol.

FACTS ESTABLISHED BY DEFENDANT

In support of its Motion for Summary Judgment on Product Identification defendant has established the following facts:

Brian J. Harper was the Managing Director of Exclusive in 1987. In his deposition Mr. Harper testified as follows: Exclusive never purchased Chlordane or a chemical known as

"HOD"[1]. Exclusive used only diazinon for general insect control. Exclusive used a product called Dieldrin for one job to treat for termites. Exclusive kept its pesticides in a locked store room called a "go down." The substance sprayed at the Academy on June 21, 1987, was contained in the storeroom in drums labeled in Cantonese and English. Mr. Harper participated in Exclusive's internal investigation of the events of June 21, 1987. As a result of that investigation, Exclusive's position is that diazinon had been applied on that date.

Mr. Lo Kwok Wing is a pest operator for Exclusive. His trial deposition contains the following testimony: On June 21, 1987, Exclusive sent Mr. Lo and five other persons to the Hong Kong Academy of Performing Arts to treat the building for general pest control--cockroaches, fleas, and flies. Mr. Lo and the others used hand-held pumps and misters. They had used the same equipment the day before. Following company practice, Mr. Lo personally cleaned out the equipment after it was used the day before. Mr. Lo received the chemical used in the Academy from his supervisor the morning of June 21st. Mr. Lo did not enter

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[1]Plaintiffs allege that HOD was a widely used termiticide in Hong Kong in 1987. Plaintiffs also allege that HOD sometimes contained Chlordane. These allegations are discussed in this court's Order Granting Defendant's Motion in Limine To Exclude Testimony of Plaintiffs' Witness, Danny Ledoux, Concerning Alleged Use of Chlordane in Hong Kong.

the store room and does not know what chemicals were stored in the drums. Mr. Lo did not see the drums from which the substance was taken to be given to him and did not see the labels, if any, on those drums. Neither Mr. Lo nor his supervisor reads English.

The product to be sprayed was transported to the Academy in a single unlabeled plastic container. Mr. Lo believes that it was the same product he had been using for several years and the same product he had used the day before. The product had a characteristic tea-like color before it was diluted. Mr. Lo had opportunity to see the color because he personally mixed the product.

On one or two occasions in the past Mr. Lo had worked with a crew treating buildings for termites. Mr. Lo stated that from his own personal knowledge Exclusive's termite-treating crew used a green powder that was never mixed with liquid. He testified that the powder used to treat termites was not transported to or used in the Academy on June 21. Mr. Lo states that as of 1987 he had never heard of products called HOD or Chlordane.

Although plaintiffs contend that Chlordane was available in Hong Kong and could have been purchased by Exclusive Environmental Services, they have not submitted any evidence in the form of affidavits, deposition testimony, invoices, purchase orders or other documents that raises a genuine issue of material

fact to show Exclusive purchased or used Chlordane.

CIRCUMSTANTIAL EVIDENCE PROFFERED BY PLAINTIFFS

Plaintiffs contend that the evidence of the application of chlordane is circumstantial in this case. In opposition to defendant's Motion for Summary Judgment, plaintiffs offer the following allegations and contentions as summarized in their Additional Memorandum Re: Defendant's Motion for Summary Judgment on Product ID and Memorandum in Support of Motion in Limine:

> [1.] Findings, five years after the exposure, that Mr. Phillips has elevated levels of chlordane components in his blood. In view of Mr. Phillips's places of residence and of the fact that he had no known prior symptom producing exposure to chlordane, experts retained by Plaintiffs believe that his exposure at the time of the incident produced this abnormal finding.
>
> [2.] Findings, seven years after the exposure, that Mr. Phillips has elevated levels of chlordane component in his fat. In view of Mr. Phillips's places of residence and of the fact that he had no known prior symptom producing exposure to chlordane, experts retained by Plaintiffs believe that his exposure at the time of the incident produced this abnormal finding which caused injury.
>
> [3.] Findings, five years after the exposure, that the musical instruments being used by Mr. Phillips, and the containers in which they were placed, had positive findings for chlordane, and none which are significant for any other pesticide. The pattern of these findings on the instruments and their containers is highly suggestive that the instruments were contaminated at the time of

the incident.

> [4.] Double-blind challenge tests which confirmed Mr. Phillips prior exposure-sensitivity to a toxic dose of chlordane.
>
> [5.] Mr. Phillips's history of exposure and clinical symptoms are more consistent with chlordane exposure than with exposure to organophosphate.[2]
>
> [6.] The diagnostic tests and studies performed of Mr. Phillips and his symptom patterns are, in the opinion of Plaintiffs's experts, indicative of chlordane poisoning.
>
> [7.] Chlordane was available for use in Hong Kong and was utilized by the pest control industry during the time period in question.
>
> [8.] Five separate highly competent expert witnesses, with extensive chlordane experience, have weighted the foregoing evidence and have concluded, to a reasonable degree of scientific probability, that Mr. Phillips was exposed to chlordane at the time of the incident and that this exposure was a cause of his injuries.

Id. at 2-4.

Plaintiffs's contentions one and two, above, refer to blood and adipose tissue tests performed by Accu-Chem Laboratories. By separate order this court has granted defendant's Motion in Limine to Exclude Evidence Regarding Chlorinated Pesticide Screening Tests Performed by Accu-Chem Laboratories under the analysis set forth in the *Daubert v. Merrell Dow Pharmaceuticals,*

[2] Diazinon is an organophosphate.

Inc., 113 S.Ct. 2786 (1993).

Plaintiffs's contention three, above, refers to tests of Mr. Phillips's belongings or artifacts performed by Toxicology International, Inc. In its Order Granting Defendant's Motion in Limine to Exclude Evidence Relating to Mr. Phillips's Two Pairs of Shoes and Musical Equipment the court stated:

> [The evidence] is not relevant because it is so speculative and inconclusive that it does not have a tendency to make the existence of any fact that is of consequence to the determination of this action, more probable or less probable. Second, even if it would have some slight relevance, its probative value is substantially outweighed by the danger of confusion of the issues.

Plaintiffs's contention four, above, relates to "double-blind" tests performed by Dr. William James Rea, M.D. Dr. Rea testified in his deposition that he exposed Mr. Phillips to a combination of Chlorine and phenol which Dr. Rea regarded as a "surrogate" for Chlordane. According to Dr. Rea, Mr. Phillips's reaction to this combination shows that he had prior exposure to chlordane.

Even if plaintiffs had demonstrated that the use of chlorine and phenol as a "surrogate" for exposure to chlordane was based on evidence that was admissible under the standards set forth in *Daubert*, Dr. Rea does not state the alleged previous exposure to Chlordane occurred at the Academy on June 21, 1987. Thus, Dr.

Rea's testimony does not raise an issue of fact regarding product identification.

Plaintiffs's contention five, above, discusses the opinion of Dr. Bruce Hayse, who testified in his deposition that his review of the symptoms Mr. Phillips's exhibited after June 21, 1987 are more consistent with symptoms of "chlordane poisoning" than for "diazinon poisoning." Dr. Hayse first saw Mr. Phillips several years after his alleged exposure in 1987. Dr. Hayse has not talked with the doctor that initially diagnosed Mr. Phillips after the June 21, 1987, incident at the Hong Kong Performing Arts Academy.

Dr. Hayse opines that Mr. Phillips's current physical problems were caused by:

> the multiple chemical exposure including exposure to chlordane and heptachlor he suffered on June 21, 1987 in Hong Kong. My opinion is based part upon the reports of the Environmental Health Center-Dallas, Inc., and Toxicology International, which are of a type which would normally and usually be relied upon by experts in my field in forming opinions concerning patients such as Mr. Phillips.

As discussed above, the Toxicology International report referred to by Dr. Hayse has been determined by this court to be not admissible under the *Daubert* standard. The Environmental Health Center-Dallas report is the "double-blind" test performed

by Dr. Rea. As noted previously, that report does not purport to establish that Mr. Phillips was exposed to Chlordane at the Academy on June 21, 1987.

Plaintiffs's contention six, above, refers to the deposition testimony of Dr. Teitelbaum, Dr. Simon and Dr. Rea and Dr. Hayse. This testimony from plaintiffs's experts to the effect that Mr. Phillips's symptoms are "more consistent" with chlordane exposure than exposure to diazinon, does not establish an issue of fact on the question of product identification, especially where plaintiffs's experts do not state the symptoms are definitely caused by Chlordane exposure. For example, Dr. Teitelbaum testified in his deposition that Mr. Phillips's "clinical syndrome" is more consistent with organochlorine than with organophosphate poisoning, but could have included organophosphate poisoning." In his deposition and his designation Dr Teitelbaum opines that both organophosphate pesticides and chlordane are significant causes of the symptoms and problems of Mr. Phillips. . . " The opinions to the effect that Mr. Phillips's present symptoms are more consistent with Chlordane exposure than exposure to diazinon relate to the issue of medical causation, an issue the court need not determine at this time.

In *Renaud v. Martin Marietta Corp.*, 972 F.2d 304, 307 (10th

Cir. 1992), *aff'g* 749 F. Supp. 1545 (D. Colo. 1990), the Tenth Circuit affirmed a grant of summary judgment for a defendant in a toxic tort case, indicating that it is not appropriate to consider medical causation testimony before exposure to a particular defendant's product has been established.

> At best, this circumstantial evidence supported only the conclusion that hydrazine causation was not inconsistent with the etiology of plaintiff's injuries. This, the Court below correctly noted, is "useful only after plaintiffs have met their burden on the exposure issue by some other means."

Id. (citing 749 F. Supp. at 1554).

Plaintiffs's contention seven, above, refers to their proffer of the testimony of Danny Ledoux as expert testimony purporting to establish the use of Chlordane in Hong Kong at the time in question. By separate order the court has granted defendant's motion in limine to exclude Mr. Ledoux's testimony as expert testimony. Although Mr. Ledoux opined that Chlordane was available and used by pest control companies in Hong Kong at the time of the incident in question, his opinion was admittedly based only on hearsay. Plaintiffs have not produced any admissible evidence that supports their allegation that Chlordane was available for use in Hong Kong and was utilized by the pest control industry during the period.

Plaintiff's contention eight, above, refers to the opinions of Dr. Derman, Dr. Teitelbaum, Dr. Rea, Dr. Hayse, and Dr. Simon.

Of these, only Dr. Simon actually opined that Chlordane had been applied in the Academy on June 21, 1987.

In reaching that conclusion, Dr. Simon relies upon the blood and fat tissue tests performed by his laboratory, Accu-Chem, and the bulk-wipe tests of Mr. Phillips's belonging performed by Toxicology International. As previously discussed, those test results have been excluded from evidence as unreliable and irrelevant[3] and not of the type of data upon which an expert would reasonably rely.

Further, even if the test results had been admissible, there is insufficient basis for admission of Dr. Simon's "back calculation" from the level of Chlordane allegedly present in blood and fat tissue in 1991 to exposure on a date certain in 1987. As Dr. Teitelbaum, another of plaintiffs's experts, testified in his deposition, it is not possible to back calculate exposure to a date certain where there is only point of reference, namely only one set of test results. (Teitelbaum deposition at 310-11). Dr. Simon admits that the blood test results did not prove exposure to Chlordane on June 21, 1987. (Dr. Simon's deposition at 244-45).

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[3]For example, because Accu-Chem's laboratory did not follow protocol, the test results are not "relevant under *Daubert's* second prong because improperly applied science cannot assist the trier of fact." *United States v. Davis*, 40 F.3d 1069, 1074 (10th Cir. 1994).

In the *Renaud* case the Tenth Circuit was faced with a similar attempt to extrapolate backwards from a single data point, namely a single water sample taken eleven years after the contamination had allegedly begun.

> In accordance with our holding in *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989), the District Court had an independent duty here to decide whether the single data point supported the admissibility of the conclusions plaintiffs' experts sought to draw therefrom. In so doing, the Court was required by Fed. R. Evid. 104(a) to make a preliminary determination concerning the qualifications of the plaintiffs' proposed witnesses and the admissibility of their testimony. This requirement applies also to experts, since pursuant to Fed. R. Evid. 703, the District Court has the responsibility of evaluating the trustworthiness of the factual basis upon which an expert witness relies and assessing "whether the particular underlying data was of a kind that is reasonably relied on by experts in the particular field in reaching conclusions. . . " Weinstein's Evidence ¶703[03] at 703-16 (1982)(*cited in Head*, 881 F.2d at 944).

Id. at 308.

Thus, in *Renaud* the Tenth Circuit anticipated the Supreme Court's *Daubert* decision holding that the trial court must perform a special role as gatekeeper with respect to expert evidence and opinion. *Daubert*, 113 S.Ct. at 2795. For the reasons already stated in the orders granting defendant's motions in limine to exclude the blood, fat tissue and artifact test results, the tests are not evidence that is scientifically reliable or trustworthy and are not the type of data upon which

experts would ordinarily rely.

Plaintiffs, as proponents of the testimony of Dr. Simon, bear the burden of establishing the testimony's admissibility by a preponderance of proof. *Bradley v. Brown*, 825 F. Supp. 690, 697 (N.D. Ind. 1994)(citing *Daubert*, 113 S.Ct. at 2796 n. 10). The court determines the scientific validity of a methodology such as Dr. Simon's "back calculation" as follows:

> [b]y considering, primarily, whether the proffered testimony: (1) can be and has been empirically tested, (2) has been published and subjected to peer-review, and, finally, (3) has been generally accepted in the relevant technical community.

Id. (citing *Daubert*, 113 S.Ct. at 2796-97).

Under similar circumstances, the Third Circuit has excluded "back calculations" or comparable extrapolations based on the lack of reliability of underlying data in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 774-78 (3rd Cir. 1994). In this case, the tests of the blood, fat tissue and artifacts have been excluded as unreliable for several reasons. As in the *Paoli Railroad* case, the reasons that the evidence was excluded "undermine[d] the data to the extent that it may not reasonably be relied on by experts in the relevant field and would be unhelpful to the jury." *Id.* at 778.

Dr. Simon did not support his methodology of "back calculation" with anything except a study finding that the half-

life of Chlordane was 88 days. (Simon Deposition at 493-94) This 88-day period contradicts Dr. Simon's statement in his affidavit that half-lives for chlordane metabolites and components range up to five years. Extrapolating backwards from this the 88-day half-life, would mean that the concentrate of Chlordane in Mr. Phillips's blood in 1987 was at a fatal level.

There is an insufficient basis to show that Dr. Simon's methodology of "back calculation" or other extrapolation to June 21, 1987, is based on "scientific knowledge" within the meaning of Fed. R. Evid. 702 and *Daubert*.

Having failed to raise an issue of fact on product identification, an essential element of their case, Plaintiffs contend that the application of Hong Kong (English) law to this case "causes major differences in the law which applies to causation, burdens of proof, as well as damages causation, proof and increased risk assessment." Plaintiffs' Response and Objections to Velsicol's Proposed Findings of Fact and Conclusions of Law, at 49. This position is based upon plaintiffs's interpretation of an English case *McGhee v. National Coal Board*, 3 All ER 1008, House of Lords (1972). Under plaintiffs interpretation of *McGhee*, they contend as follows:

> Once a case becomes extremely complex, English law provides once a plaintiff, who cannot show which alternative cause produced his injury, establishes that the defendant's negligence has "materially affected the

risk of damage, the burden shifts to the defendant to show that his negligence was not the cause of damage."

Plaintiffs' Response and Objection at 50 (quoting *McGhee)*.

In *McGhee*, the plaintiff worked as a kiln cleaner at a brickyard. He developed dermatitis as a result of exposure to brick dust on his skin. The case hinged on the fact that the employer had a common law duty to provide showers for his employees but had not provided such showers. Mr. McGhee contended that due to the failure to provide showers he had to bicycle home covered with brick dust which additional exposure caused his dermatitis. Thus, the issue in *McGhee* was whether Mr. McGhee had proven that his prolonged exposure to dust on his skin during the time he had to cycle home resulted in his dermatitis.

McGhee is not applicable to the present case. In *McGhee*, the exposure to brick dust was an admitted fact. This fact alone makes *McGhee* totally inapplicable to this case because in the present case exposure to defendant's product is disputed and plaintiffs have failed to show a prima facie case on exposure.

Although the *McGhee* case involved facts so unique that its value as precedent is extremely limited the opinion was initially misconstrued as amounting a shifting the burden of proof to defendant to disprove causation in certain cases. *See e.g. Clark v. MacLennan*, [1983] 1 All E.R. 416, 427.

However, in the later case, *Wilsher v. Essex Area Health*

Authority, [1986] 3 All E.R. 801, 829, it was made clear that *McGhee* "laid down no new principle of law whatever." In his Judgment Lord Bridge of Harwich stated:

> On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

The law as stated in *Wilsher* has been adopted in Hong Kong. *See Lee Kin-kai v. Ocean Tramping Company Ltd.*, Civ. App. No. 64 of 1989. In the *Kin-kai* case, the Court of Appeal of Hong Kong reviewed a court's resolution of an application under the Employees Compensation Ordinance, the question being whether when the employee fell eight to ten feet and landed hard on his buttocks it caused a head injury and consequent brain injury through the spine. The Court of Appeal cited both *Wilsher* and the *McGhee* cases in reviewing the lower court's decision and found that the lower court had not, as in the *Wilsher* case, misdirected itself as to the onus of proof. *Id.* at 8. Instead, the trial judge in *Kin-kai* had properly directed himself: "The onus of proof is upon the applicant upon the balance of

probabilities." *Id.* at 5.

The Privy Council, in hearing an appeal from the Court of Appeal of Hong Kong has held that even under the doctrine of *res ipsa loquitur*, the burden of proving negligence rests throughout the case on the plaintiff.

> In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.

Ng Chun-Pui v Lee Chuen-tat [1988] 2 HKLR 425.

Thus, the application of Hong Kong law to the motion for summary judgment does not affect plaintiffs's burden of showing a material issue of fact on product identification.

It is essential to plaintiffs's case to establish that Mr. Phillips was exposed to chlordane in the Hong Kong Performing Arts Academy on June 21, 1987. Not one witness or piece of evidence places defendant's product Chlordane in the room at the Hong Kong Academy of Performing Arts with Mr. Phillips on June 21, 1987. Plaintiffs contentions fail to establish a material issue of fact to support their allegation that Chlordane was applied at the Academy on June 21, 1987.

Viewing the evidence in the light most favorable to plaintiffs as the parties opposing summary judgment, there is no evidence from which a reasonable jury could conclude that defendant's product Chlordane was applied in the Academy on June

21, 1987. Accordingly the court must find and conclude that plaintiffs have failed to present sufficient evidence to sustain a verdict on their behalf on the issue of product identification. Accordingly, the court must grant Velsicol's motion for summary judgment and dismiss the complaint.

Because the decision on defendant's motion for summary judgment on product identification is dispositive, the court need not reach the remaining motions, including defendant's motion for summary judgment on medical causation. The court will enter an order denying, without prejudice all of the remaining motions.

DATED this 13th day of October, 1995.

CHIEF UNITED STATES DISTRICT JUDGE