Jan. 11, 2019 Order Granting Plaintiff's Motion to Strike

STATE OF SOUTH CAROLINA **COUNTY OF ANDERSON**	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
RITA JOYCE GLENN, Individually and as Personal Representative of the Estate of THOMAS HAROLD GLENN, Plaintiff, **v.** **3M COMPANY,** f/k/a Minnesota Mining and Manufacturing Co., *et al.* Defendants.	)	**C/A No.: 2015-CP-04-01607**

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE NO. 8 TO STRIKE DEFENDANTS' TISSUE DIGESTION AND PRECLUDE ANY EVIDENCE OR TESTIMONY BASED ON DEFENDANTS' TISSUE DIGESTION

Plaintiff filed this motion *in limine* to strike Defendant's tissue digestion and preclude any evidence or testimony based on Defendants' tissue digestion. Because there was no agreed protocol, the tissue was divided without agreement, and was not divided as to provide a mirror image of half of the tissue to the Plaintiff, the Court grants the Plaintiff's Motion to Strike the Defendants' tissue digestion.

INTRODUCTION AND BACKGROUND

Thomas Glenn died February 17, 2015 as a result of his mesothelioma. Plaintiff's pathology from Emory Hospital in Atlanta, GA included approximately 96 slides taken from approximately 15-30 blocks of preserved tissue from procedures during his lifetime. Plaintiff provided the 96 slides of pathology material to every defense counsel that requested them between 2015 and the current date.

For the first time on December 6, 2018, Defense counsel notified counsel for Plaintiff that Defendant's expert intended to digest and destroy certain chosen tissue. On that same day, Plaintiff notified counsel for Defendant that she objected to the tissue digestion.

The next day on December 7, 2018, the Defendants filed a motion to conduct the tissue digestion. In an effort to reach an agreement, Counsel for Plaintiff wrote the court that they were opposed to a digestion "until such time as, at a minimum, a protocol for the digestion and dividing the tissue could be worked out between experts for the parties (Email from McVey to Court and Parties dated 12-07-18).

Following that email, Counsel for the Plaintiffs and Defendants had a conversation regarding protocol for the digestion and how the tissue should be split. Counsel for Plaintiff sent a follow up email, stating "...not sure I mentioned this but we need to send the protocol to our guy and get him to sign off. Then you can do the division of tissue and send. The idea is that we get the mirror image of what you get. Make sense?" (Email from McVey to McLeod December 7, 2018). Counsel for Defense responded, "Sure. I think that's it. I will have Dr. Oury send a protocol Monday..." (Email from McLeod, December 7, 2018).

On December 10, 2018, Counsel for Defense sent the Oury protocol for the digestion via email. Without hearing from Plaintiff, the tissue was sent from Dr. Oury to Drew R. Van Orden at RJ Lee labs with instruction that the tissue digestion could proceed. The Plaintiff was not notified that the tissue digestion was to begin on December 11, 2018.

The following day on December 11, 2018, Plaintiffs responded to Defense counsel's email regarding the protocol: "All-I think we had a misunderstanding about the protocol. We are never going to agree on the protocols for the digestion. The reasons for this are multiple. What I was really getting at was how we split the tissue. Can we agree that the tissue will be split evenly. That is if you have one block we get half of that block. If there are two blocks, we get half of each block...." (Email from Branham to McLeod 12-11-18 at 3:25pm). At 3:41pm following that email, Counsel for Defense responded: "Trey, yes, that is the plan. Thanks." (Email from McLeod

to Branham 12-11-18). Two minutes later, at 3:43 pm, Counsel for Plaintiff responded: "We need a 3rd party (uninterested) to split evenly the material already in Defense's possession. That is the only way to be sure we are comparing apples to apples, then we can each have our experts do a digestion. But we need this split ASAP to have any hope at this getting completed prior to trial. (Email from Holder to McLeod 12-11-18). No response was received to that email. Unbeknownst to Plaintiffs, the tissue has already been divided by Drew Van Orden and a tissue digestion done.

It was not until December 17, 2018, that Plaintiff was notified that the tissue had been divided without agreement. Once Plaintiff became aware, counsel sent the following email to defense counsel:

> Plaintiff counsel received today correspondence and pathology material in the Glenn matter. Enclosed were 3 lung tissue blocks, and your letter referenced some "agreement" between the parties regarding the pathology. The first condition I stated below on December 11, 2018 was that a 3rd Party (uninterested) must divide the tissue. Enclosed with your letter was a letter from Defense Expert Drew Van Orden at defense laboratory R.J. Lee stating that he divided the tissue at issue. I'm sure you understand that an asbestos defense expert such as Dr. Van Orden at the lab where Dr. Oury does his lab work, is not an "uninterested" 3rd party. This was not a meaningless request, but a condition precedent to our agreement in order for both sides to conduct a digestion in the short time left prior to trial. Is there any further pathology tissue in you, or your client, or your client's expert's possession which can be divided by an uninterested 3rd party in order for the parties to accomplish the requested digestion prior to trial?"

(Email from Holder to Bouch and McLeod December 17, 2018). No response to this email was received. This motion followed.

It is well established that the trial court has broad discretion in granting motions *in limine*. This authority is based on the Court's inherent power to admit or exclude evidence from trial, and its decision will not be overturned unless there is a clear abuse of that discretion. *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 317 S.C. 200, 205,452 S.E.2d 619,

621 (Ct. App. 1994). The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and [her] decision will be reversed only if there is a clear abuse of discretion. *State v. Jeffcoat,* 279 S.C. 167, 303 S.E.2d 855 (1983).

Under Rule 403, SCRE, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Jamison v. Ford Motor Co.,* 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007); Evid. Rule 403. The decision of whether to admit expert testimony is within the sound discretion of the trial court, and a ruling will not be reversed absent an abuse of that discretion. *State v. White,* 372, S.C. 364, 373 (2007).

After reviewing the communication between the parties, it is clear that there was no agreement or meeting of the minds regarding the division of the tissue or by whom the tissue would be divided. Based on the photographs taken of the tissue after it was divided, it is visibly apparent that the tissue was not cut equally as mirror images as was requested. Plaintiff argued that the R.J. Lee lab and Dr. Drew Van Orden were not disinterested third parties. The Defendant did not dispute this fact. Therefore, I find that the Plaintiff is unduly prejudiced by the tissue digestion performed by the Defense. During Dr. Oury's testimony, he will be precluded from testifying regarding the results of the tissue digestion or that a tissue digestion was ever performed.

The Defendant represented that there was more than enough tissue remaining to perform another digestion. No determination has been made about the viability of that tissue to complete a digestion. However, to the extent that the Defendants can show that there is more viable tissue, they are not precluded from seeking to reach an agreement from Plaintiff to complete a second digestion.

IT IS SO ORDERED.

Chief Justice Jean Toal (Ret), Supreme Court
Acting Circuit Court Judge

January ___, 2019
Columbia, South Carolina

Anderson Common Pleas

Case Caption: Rita Joyce Glenn , plaintiff, et al VS Air & Liquid Systems Corporation , defendant, et al

Case Number: 2015CP0401607

Type: Order/Exclude

IT IS SO ORDERED.

s/ Jean H. Toal #2758