

DISTRICT COURT
FILED
 IN THE DISTRICT COURT OF TULSA COUNTY
 STATE OF OKLAHOMA

APR 8 1997

EDWARD S. WILSON,
 Plaintiff,

vs.

PUBLIC SERVICE COMPANY OF
 OKLAHOMA, an Oklahoma
 CORPORATION,

Defendant.

SALLY HOWE SMITH, COURT CLERK
 STATE OF OKLA. TULSA, COUNTY

Case No. CJ-96-564

ORDER ON PSO'S MOTION FOR SCHEDULING ORDER REQUIRING PLAINTIFFS
 TO ESTABLISH A PRIMA FACIE CASE OF INJURY AND CAUSATION

History

On April 16, 1982, a component of an electrical transformer located in the Page Belcher Federal Building in Tulsa malfunctioned.

Polychlorinated biphenyls ("PCB") and smoke escaped into a heating and ventilation system air intake grill. Defendant admits some material was distributed by an air handling unit and insulating fluid containing PCBs spread along a floor drain in the boiler room.

In February, 1996, 216 lawsuits were filed against PSO. All plaintiffs allege injury from exposure to PCBs which escaped from this transformer.

On April 15, 1985, approximately 1000 named plaintiffs filed claims against PSO for injuries related to this same incident: Abdo, et al. v. PSO, Number 85-C-390-R, United States District Court for the Northern District. The case was dismissed on jurisdictional grounds on December 20, 1985.

required "further investigation".

In April, 1996, or September, 1996, PSO filed and served discovery requests on each plaintiff.

Interrogatory number eight propounded by PSO states:

"Identify every doctor or other medical or psychological care giver who has stated to you that you have an illness or injury that was caused by exposure to PCBs." PSO asserts "...approximately three fourths of the plaintiffs have not seen a doctor who has told them they have illnesses or injuries caused by exposure to PCBs". (Opening brief, PSO, page eight) This assertion has not been challenged by plaintiffs.

The issue before the Court is whether or not this Court should enter a scheduling order which requires plaintiffs to produce medical evidence sufficient to establish a prima facie case of injury and causation prior to full discovery in the case.

There are three elements essential to a prima facie case of negligence:

1. A duty owed by the defendant to protect the plaintiff from injury,
2. A failure to properly exercise or perform that duty and,
3. The plaintiffs' injuries are proximately caused by the defendant's failure to exercise his duty of care. McKellips v. Saint Francis Hospital, Inc., 741 P.2d 467 at 470 (Oklahoma 1987)

The Court finds the analysis of proximate cause by the court in McKellips to be helpful:

"Proximate cause consists of two elements: Cause in fact

and legal causation. Legal causation concerns a determination whether legal liability should be imposed as a matter of law where cause in fact is established and depends upon considerations of common sense and policy. Cause in fact, on the other hand, deals with the "but for" consequences of the act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct." McKellips, page 270

The question of cause in fact is a question for the jury. "The sufficiency of the evidence to show cause in fact presents a question of law for the court." (McKellips, at 471) The standard of proof is the greater weight of the evidence or a preponderance of the evidence.

In order to prove causation in a negligence case, a plaintiff must present evidence "When such lay and expert testimony is considered together, it must warrant the conclusion that a preponderance of the evidence discloses facts and circumstances establishing a reasonable probability that a defendant's negligence was the proximate cause of the injury." (McKellips, at 471, citing Robertson v. Lacroix, 534 P.2d 17, at 21 (1975). This burden is distinct from a plaintiff's burden of persuasion. The Supreme Court in McKellips also describes plaintiff's burden as requiring evidence that it is "more likely than not" that the harm suffered was caused by defendant's negligence.

The admissibility of testimony by experts in Oklahoma is

governed by 12 Section 2702 et seq.

The Court of Criminal Appeals, in Taylor v. The State of Oklahoma, 889 P.2d 319 (Okla. Crim. 1995), adopted the Daubert test for determining whether novel scientific evidence may be admitted through expert testimony. Daubert requires the trial judge to act as a gate keeper, ensuring that all novel scientific evidence is both reliable and relevant. The Court finds Taylor to be persuasive and the Court finds the Daubert test to be the appropriate test which will govern scientific evidence proffered in this matter.

The parties agree that a lay witness who is not testifying as an expert may not provide an opinion on whether the illness or injury to a plaintiff was caused by exposure to PCBs. Plaintiffs assert this is the "maximum" evidentiary standard which may be required. Plaintiffs assert that there is a "minimum" evidentiary standard, specifically, that a plaintiff may demonstrate that a plaintiff who has an illness was at increased risk for that illness due to exposure to PCBs. Plaintiffs assert there are documents in defendant's possession which demonstrate that a person who is exposed to PCBs is at higher risk for certain injury or illness. Assuming, for the limited purpose of this order, that there are documents which identify a correlation between a certain illness and PCB exposure comparable to the exposure of a plaintiff in this matter, the Court is not convinced this obviates the requirement of expert testimony to prove causation. A mere possibility that a defendant's

negligence caused a plaintiff's injury is not sufficient to prove that it is more likely than not that the injury to plaintiff was caused by defendant's negligence. Downs v. Longfellow Corp., 357 P.2d 999, at 1005 (Okla. 1960)

Authority

Pursuant to 12 OS Section 2018 (C), this Court may make such orders "...as may tend to avoid unnecessary costs or delay."

Rule 5(C) of the Rules for the District Courts of Oklahoma, 12 OS Chapter Two, Appendix One, gives this Court broad discretion to establish scheduling orders for case management.

It is undisputed that this Court has jurisdiction to hear and decide the controversy between plaintiff and PSO. The Supreme Court, in Puckett v. Cook, 586 P.2d 721 (1978), at 722, held: "The power to 'hear' a case includes power to make, and enforce, reasonable rules for orderly procedure before courts."

The Court concludes this Court has the inherent authority to enter a case management order which will ensure fairness, minimize costs, and prevent delay.

The Court finds the totality of the circumstances of the pending matter require this Court to determine this is a complex matter. The circumstances the Court has considered include but are not limited to the number of claims, the nature of the claims, specifically, injury caused by exposure to a chemical, the incident occurred in 1982, the nature of the chemical and its effect requires scientific evidence, the injury to each plaintiff

requires discovery of physical and psychological records of each plaintiff, the petitions were filed by pro se plaintiffs and a large number of plaintiffs remain pro se.

Counsel for plaintiffs' argument regarding proceeding with two test cases is without merit. The result of those two cases would not conclusively resolve liability regarding all plaintiffs, and the delay to the remaining plaintiffs would be unfair to those plaintiffs. In addition, it would be necessary to repeat discovery pertinent to the two cases when discovery proceeded regarding all other plaintiffs.

Counsel for plaintiffs' argument regarding use at trial of the material presented by a plaintiff to demonstrate a prima facie case at trial is without merit. The Court will make appropriate orders to prevent prejudice to any plaintiff.

The Court finds the following cases to be particularly persuasive: Cottle v. Superior Court of Ventura County, 3 Cal. App.4th 1367, 5 Cal. Rptr.2d 882 (1992), and Joseph V. Lore, et al v. Lone Pine Corporation, et al, Superior Court of New Jersey, November 18, 1986, not yet published.

Conclusion

The Court concludes it is necessary to achieve efficient administration and fair administration of this matter and it is hereby Ordered, Adjudged and Decreed that each plaintiff will be required to produce to the Court and to the defendant evidence sufficient to establish a prima facie case of injury and causation.

The Court reserves determination of the exact items to be produced and the schedule of production until: April 18, 1997, at 9:00 o'clock.

Counsel for each plaintiff is direct to provide the Court with a proposed case management order which identifies the documents and the contents of each document to be produced to establish a prima facie case of injury and causation, and a schedule for production. Counsel for each plaintiff is directed to provide this proposed order to the Court and opposing counsel on or before April 15, 1997. The Court will hear argument regarding the proposed order on April 18, 1997, at 9:00 o'clock.

Mr. King's Application to Withdraw

Mr. King's application to withdraw as counsel for certain named plaintiffs is granted, subject to the following: Mr. King must comply with this order, and appear for argument set April 18, 1997. Subsequent to that argument, and entry of a case management order by the Court, Mr. King will prepare and submit orders allowing withdrawal to the Court, which will include all scheduling dates established and notice to each client that failure to comply will result in dismissal.

Deborah C. Shallor

Judge of the District Court