

DEC 12 2006

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LORI LYNN MOSS, et. al.,

Plaintiffs,

vs.

VENOCO, INC., et. al.,

Case No BC297083  
(consolidated with Cases  
No BC300164, SC078058,  
SC080117, BC308673,  
BC315885, BC317676 &  
BC331173.

Decisions on Motions for  
Summary Judgments

Judge Wendell Mortimer, Jr.  
Department 307  
Central Civil West  
Complex Civil Litigation

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AND CONSOLIDATED ACTIONS

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Defendants' twelve Motions for Summary Judgment on Medical Causation came on for hearing November 20 and 21, 2006. A decision of this court was issued November 22 granting all motions on all grounds, with the promise of a detailed ruling to follow. This is that ruling.

The motions involve only the first twelve bifurcated plaintiffs out of over a thousand individually-named plaintiffs. Each allege that their disease was caused by one or more chemicals emitted from the Oil and Gas Well sites on or near the Beverly Hills High School campus and/or the Central Plant which supplies heating and air conditioning to Century City, located adjacent to the campus in the City of Los Angeles.

The following plaintiffs and their respective diseases are involved in these motions: Karen Lee (breast cancer), Gary Davidson (Hodgkin's disease), John Laurie (thyroid cancer), Stace Tackaberry (non-Hodgkin's lymphoma), Janet Day (Hodgkin's disease), Christine Busch (basal cell carcinoma), Jamie Shapiro (thyroid cancer and basal cell carcinoma), Linnea Shore (non-Hodgkin's lymphoma), Melissa Gross (breast cancer), Richard Gordon (testicular cancer), Jeffrey Frankel (testicular cancer) and Monica Revel (melanoma).

The chemicals which plaintiffs allege caused some or all of the diseases are benzene from the Well Sites and hexavalent chromium and PCBs and related furans from the Central Plant.

Plaintiffs' experts do not have reliable evidence to establish that the plaintiff's exposures to any or all of the chemicals was a substantial factor in causing any of the diseases, thus the defendants' motions were granted.

Defendants cite "A Century of California Law" which consists of a list of a dozen cases since 1906 generally standing for the proposition that the trial judge may exclude expert opinions which lack foundation or are based upon conjecture and speculation. They further cite California Evidence Code Sections 801(b) and 803 for authority. This court adopts that body of law and exercises its prerogative to examine the foundation and basis for the expert's opinions. Particularly instructive are the cases of *Stephen v. Ford Motor Co.* (2005) 134 CA 4<sup>th</sup> 1363, a nonsuit case where it was stated that the expert's testimony was properly excluded because there was no foundation for his opinions or conclusions (p 1365) and the *Lockheed Litigation Cases* (2004) 115 CA4th 558 which say: "Evidence Code Section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on 'in forming an opinion *upon the subject to which his testimony relates.*' (Italics added.) We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." (p 564). Plaintiffs urge the Court to rely on the case of *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 CA 4<sup>th</sup> 893 for the proposition that the court lacks discretion to exclude plaintiffs' experts' causation testimony. However that case, unlike our case, involved novel scientific methodologies and a discussion of Kelly and Daubert standards of exclusion. More importantly, that case also said that the court had deprived plaintiff of the right to present evidence without complying with procedural rules "by way of a motion for summary judgment before trial...." which is not the case here. Plaintiffs have had every opportunity to present evidence in opposition to the summary judgment motions and in the two days of oral argument.

The following rulings on defendants' objections to plaintiffs' experts are made:

DR. RICHARD CLAPP'S DECLARATION DATED AUGUST 16, 2006:

1. Page 3, lines 1-5 (including Exhibit A). Objection to lines 1-3 overruled. Objections to lines 4 and 5 and Exhibit A are sustained and the draft report stricken as lacking foundation, speculative and scientifically unreliable and for the reasons stated in defendants' objections.
2. Page 3, lines 11-23. Objections sustained. Lack of foundation, speculative, scientifically unreliable, vague, ambiguous and conclusory and the reasons stated in defendants' objections.
3. Page 3, lines 26 to page 4, line 22 (including footnote 1). Objections sustained. Lack of foundation, speculative, scientifically unreliable, vague, ambiguous and conclusory and for the reasons stated in defendant's objections.
4. Page 4, line 23 to page 5, line 5 (including footnote 2). Objections sustained. Lack of foundation, speculative, scientifically unreliable, vague, ambiguous and conclusory and for the reasons stated in defendants' objections.
5. Page 5, lines 6-21 (including footnote 3). Objections sustained. Lack of foundation, speculative, scientifically unreliable, overbroad, vague, ambiguous and conclusory and for the reasons stated in defendants' objections.

DR. MAX COSTA'S DECLARATION AND EXHIBITS:

Objection to paragraph 9 sustained. Lack of foundation and the reasons stated in defendants' objections.

Objections to paragraphs 12-15 sustained. Lack of foundation and speculation and for the reasons stated in defendants' objections.

Objections to paragraphs 16 and 17 sustained. Lack of foundation, speculation and irrelevant and for the reasons stated in defendants' objections.

Objections to exhibits 4,6,7,8,9,10,11 and 12 sustained and the exhibits are stricken. Lack of foundation, speculation and irrelevant and for the reasons stated in defendants' objections.

DR. WILLIAM SAWYER'S DECLARATION (References are to numbers in Defendants' Joint Evidentiary Objections beginning on page 8 thereof):

1-10. Objections sustained based upon this Court's above striking of Dr. Clapp's study and the reasons stated in defendants' objections.

11-22. Objections sustained. Lack of foundation, scientifically unreliable, speculative, vague, ambiguous, conclusory and irrelevant and for the reasons stated in defendants' objections.

23. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, irrelevant, contrary to previous deposition testimony and for the reasons stated in defendants' objections.

24. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, speculative, irrelevant and relies on Dr. Costa's opinions to which objections have been sustained.

25-28 (and exhibits 21 and 22). Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, speculative, irrelevant, contrary to previous deposition testimony and for the reasons stated in defendants' objections.

29-31 (and related footnote). Objections sustained. Lack of foundation, scientifically unreliable, assumes facts not in evidence, vague, ambiguous, conclusory, speculative, irrelevant and for the reasons stated in defendants' objections.

32 & 33. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, speculative, contrary to previous deposition testimony and for reasons stated in defendants' objections.

34-38. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, speculative, irrelevant, contrary to previous deposition testimony and based upon Dr. Costa's report which has been stricken above.

39-40. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, irrelevant, speculative and for the reasons stated in defendants' objections.

41-42. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, speculative, contrary to previous deposition testimony and for the reasons stated in defendants' objections.

43. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, irrelevant, speculative and for the reasons stated in defendants' objections.

44-52. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, irrelevant, speculative, contrary to previous deposition testimony and for the reasons stated in defendants' objections.

53-81. Objections sustained. Lack of foundation, scientifically unreliable, vague, ambiguous, conclusory, irrelevant, speculative, contrary to previous deposition testimony and for the reasons stated in defendants' objections.

DR. NACHMAN BRAUTBAR'S DECLARATION:

The declaration of Dr. Brautbar (except for his qualifications) beginning on page 9, paragraph 35 appears to be almost identical, word-for-word with the declaration of Dr. Sawyer beginning on page 4, paragraph 8. For that reason, this Court will not repeat the above specific rulings on objections and will sustain the objections as previously stated.

MOTION FOR SUMMARY JUDGMENT – GENERAL CAUSATION:

1. BENZENE: No authoritative textbooks, peer-reviewed articles, regulatory organizations or scientific bodies have found a causation link between benzene and any of the diseases at issue here. Plaintiffs concede that benzene does not directly cause testicular cancer, breast cancer, thyroid cancer, basal cell carcinoma or melanoma. They do, however, contend that benzene suppresses the human immune system and is capable of "promoting" these cancers. They do claim a direct causation link between benzene and Hodgkin's and non-Hodgkin's lymphomas. Defendants' have not, for the purposes of these motions, contested the general causation issue as to non-Hodgkin's lymphoma only.

As to plaintiffs' theory that benzene suppresses the immune system and is therefore capable of promoting the diseases, plaintiffs do not have any evidence that any of the plaintiffs had a suppressed immune system, and cite no evidence or scientific studies for this unique theory. Moreover, Dr. Sawyer and Dr. Brautbar both testified that there is no peer-reviewed literature to support the proposition that a mixture of chemicals at issue here caused or promoted any of plaintiffs' diseases (Sawyer depo. 3/28/06, p841 & Brautbar depo. 4/25/06, p1695).

2. HEXAVALENT CHROMIUM: Hex chromium is only known to cause two types of cancer, namely lung and sino-nasal cancer, and then only in an occupational setting with decades of exposure. Dr. Sawyer, in deposition, could not make the general causation link. In his later declaration, he changed his opinion, but that has been stricken. Dr. Costa's testimony linking hex chromium to the plaintiffs' cancers is mere speculation, not supported by any scientific literature and has been stricken. There is no competent evidence of a general

causation link between hexavalent chromium and the plaintiffs' diseases.

3. PCBs AND FURANS: There is no evidence that PCBs or that furans cause any of the cancers in humans that are in issue here. Plaintiffs' experts want to add dioxins such as TCDDs to the mix, but the record is that no plaintiffs were exposed to TCDDs. Again plaintiffs cannot establish general causation.

The only claims that pass over the general causation hurdle are the Benzene/non-Hodgkin's lymphoma cases of plaintiffs Stace Tackaberry and Linnea Shore.

#### SPECIFIC CAUSATION:

Here we examine the evidence of the levels of exposure of the plaintiffs to the chemicals and whether or not the exposure was a substantial factor in causing their diseases.

Plaintiffs' expert Dr. Brautbar testified in deposition that exposure to 10 parts per billion of benzene is "very, very, very miniscule". He goes on to say that 1,000 to 1,600 parts per billion is where the risk is beginning to be significantly above background, and that that is where he would be concerned (depo. 3/13/06, p 190-193). The American Conference of Governmental Industrial Hygienists allow 500 parts per billion, the National Institute for Occupational Safety & Health says 100 parts per billion and OSHA has a permissible exposure limit of 1,000 parts per billion for benzene exposure. Plaintiffs inappropriately try to rely on PRGs (Preliminary Remediation Goals) which are used for evaluating and cleaning up sites and NSRLs (Prop 65) warning levels. Dr. Brautbar, however, has admitted that these standards recommended by regulatory agencies and policy makers to serve public health objectives should never be confused with the establishment of causation based upon scientific considerations (depo. 3/17/06, p 1176-7).

Now, let us look at the specific exposure levels of plaintiffs based upon plaintiffs' own experts.

Linnea Shore was diagnosed with non-Hodgkin's lymphoma 5 years after graduating from Beverly Hills High. Plaintiffs' expert, Dr. Clark, has testified that defendants exposed her to 1.43 to 3.83 parts per billion of benzene. Stace Tackaberry, who attended BHHS for 3 years, developed non-Hodgkin's 40 years later. He was exposed to 1.41 to 3.63 parts per billion by defendants. Both these plaintiffs' exposure levels were well below the level that Dr. Brautbar states is "very, very, very miniscule". Their exposures were trivial and do not support a triable issue of fact on specific causation.

Plaintiff Christina Busch, who has never been on the BHHS campus but worked close by indoors in the Century City Hospital for 20 hours per week for seven months developed basal cell carcinoma. Plaintiffs' expert, Dr. Clark places her maximum exposure due to defendants at 3.38 parts per billion, also at a trivial level.

Monica Revel was diagnosed with melanoma. Her level of exposure per Dr. Clark was .29 to 14.56 parts per billion, again at a trivial level.

Jamie Shapiro attended BHHS in the 1970s and was diagnosed with both basal cell carcinoma and thyroid cancer in 1999. Her exposure to benzene was only 1.43 to 3.83 parts per billion.

Richard Gordon and Jeffrey Frankel have both been diagnosed with testicular cancer. Frankel's levels are calculated at 2.4 to 14.56 parts per billion and Gordon 1.43 to 3.83 parts per billion, again at very low levels.

Karen Lee developed breast cancer 33 years after leaving BHHS. Her exposure was 1.41 to 3.64 parts per billion from defendants, again at a trivial level. Melissa Gross was diagnosed with breast cancer 13 years after leaving BHHS. She was exposed to 1.54 to 14.56 parts per billion.

Plaintiff John Laurie never attended BHHS, although he did periodically participate in YMCA activities there. He was diagnosed with thyroid cancer. His exposure levels were 2.46 to 2.71 parts per billion.

Lastly, Janet Day and Gary Davidson were both diagnosed with Hodgkin's disease. Their exposures to benzene were both calculated at 1.55 to 2.91 parts per billion which is well below the miniscule level.

As to exposures to hexavalent chromium, plaintiffs' exposure was in the range of 45 to 125 nanograms per cubic meter. That low level is well below and established risk levels, and thousands of times less than levels where health effects are seen in occupational settings. The exposure to PCBs and furans was at a low level where no health effects have been determined.

Thus, none of the 12 plaintiffs here at issue, by plaintiffs' own expert's admission, were exposed to significant levels of the chemicals in question. These trivial levels of exposure do not support a finding of specific causation, or raise a triable issue of fact. It should be noted that the above-calculated exposure levels are all from plaintiffs' expert, Dr. Clark. They are based upon an assumed 24-hour per day exposure which does not reflect reality. The figures are, at best, inflated.

The two public entity defendants, namely the City of Beverly Hills and Beverly Hills Unified School District, also joined in these motions. Claims

against them are derivative and based upon theories of vicarious responsibility for the alleged acts of the Drill Site defendants and the Central Plant defendants. Because of the above rulings, and without getting to their separate motions concerning governmental tort liability and immunities, they cannot be held liable because of plaintiffs' lack of causation evidence.

The correct test for causation is the substantial factor test found in CACI 431. Plaintiffs cite *Rutherford v. Owens-Illinois, Inc.* (1997) 16 C4th 953 for a more relaxed causation standard, but that case appears to be limited to asbestos-related cancer claims (see CACI 435) and not applicable here.

#### DISCUSSION OF PLAINTIFFS' EXPERTS' TESTIMONY:

Dr. Richard Clapp is plaintiffs' epidemiologist who studied only three diseases (Hodgkin's lymphoma, thyroid cancer and testicular cancer) among the graduates at Beverly Hills High School. He specifically concedes that he is not offering opinions on causation.

Dr. Max Costa is a toxicologist hired by plaintiffs to address general causation regarding hexavalent chromium from the Central Plant. He testified that hex chromium is classified as a known human carcinogen for lung and sino-nasal cancer, diseases not at issue here. His testimony that hex chromium exposure can cause all other forms of cancer is not supported by scientific literature, is pure speculation and was stricken.

Dr. William R. Sawyer is a plaintiffs expert toxicologist offering opinions on general and specific causation. Dr. Sawyer has testified that benzene is probably not a causative agent for testicular cancer (4/19/06 depo. p 1152-3), that he never testified that benzene is a causal entity of breast cancer (4/20/06 depo. p 1195), could not identify a single regulatory agency that has concluded that exposure to benzene is a risk factor for thyroid cancer (4/20/06 depo. p 1153), and offers no scientific body or agency, no medical text and no health organization that concludes that benzene causes Hodgkin's disease.

Dr. Nachman Brautbar is another plaintiffs toxicologist on the issues of general and specific causation. He admits that we are all exposed to benzene at some levels (3/17/06 depo. p 1121). He could not name any medical textbook or regulatory agency that has concluded that benzene causes testicular cancer (3/14/06 depo p 437-8 and 4/24/06 depo p 1506), could not identify any medical textbook that has concluded that benzene can cause breast cancer (4/24/06 depo p 1506), could not name any other scientist who has concluded that exposure to benzenes causes thyroid cancer (3/13/06 depo p 217), could not name any textbook or regulatory agency that has concluded that benzene causes basal cell carcinoma (3/14/06 depo p 388) and could not identify any regulatory agency or medical textbook that concludes that benzene can cause melanoma (4/24/06 depo p 1504-7).



None of plaintiffs' experts can name any authoritative textbooks, peer-reviewed articles, regulatory organizations or scientific bodies that say that benzene causes any of the diseases involved in this case. Their opinions on causation are without support and speculative. Further, as discussed above under the heading of specific causation, plaintiffs' exposure levels were hundreds to thousands of times lower than levels associated with any risk and are thus trivial. Defendants' motions for summary judgment shifted the burden to plaintiffs and plaintiffs have not met their burden of proof to show a triable issue of fact.

Motions for Summary Judgment are granted, counsel for defendants to prepare judgments.

December 12, 2006

Wendell Mortimer, Jr.  
Judge, Los Angeles Superior Court