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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

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IN RE: FLOAT-SINK LITIGATION Hon John A. Hutchison

----------x Civil Action No. 11-C-5000000

This Document Allies to All Cases

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ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AGAINST DEFENDANT PREISER SCIENTIFIC, INC. ON THE FAILURE TO WARN CAUSE OF ACTION

On June 4, 2012 this matter came before the Court pursuant to the hearing on *Plaintiffs' Motion for Partial Summary Judgment on Liability Against Defendant Preiser Scientific, Inc. on the Failure to Warn Cause of Action*, Transaction ID 39694810 ("Plaintiffs' Motion"). During oral argument, Defendant Preiser was represented by counsel, Webster J. Arceneaux, III, of Lewis, Glasser, Casey & Rollins, PLLC. Defendant Allied Chemical Corporation was represented by counsel, Clifford F. Kenny, Jr. of Spilman, Thomas & Battle, PLLC. Plaintiffs were represented by counsel, William A. Walsh of Weitz & Luxenberg and Thomas F. Basile of the Law Office of Thomas F. Basile.

In reaching its decision, the Court relies on the following facts and determinations:

1. This Order addresses plaintiffs' motion for partial summary judgment on their product liability, failure to warn claim against distributing defendant Preiser Scientific, Inc.

2. On September 7, 2011, Plaintiffs filed *Plaintiffs' Motion for Partial Summary Judgment on Liability Against Defendant Preiser Scientific, Inc. on the Failure to Warn Cause of Action*, Transaction ID 39694810.

3. Defendant Preiser Scientific Inc. ("Preiser") filed *Defendant Preiser Scientific, Inc.'s Partial Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability and Motion for Discovery Under West Virginia Rule of Civil Procedure 56(f) or Motion for Extension of Time to File Response*, Transaction ID 39951754.

4. On September 28, 2011, Plaintiff filed *Plaintiffs' Reply Memorandum of Law Supporting Their Motion for Partial Summary Judgment on Their Failure to Warn Claim Against Preiser Scientific, Inc.*, Transaction ID 40078605.

5. On September 21, 2011, Allied Chemical Corporation filed *Brief of Defendant Allied Chemical Corporation and Others with Respect to Plaintiffs' Motion for Partial Summary Judgment Against Preiser on the Failure to Warn*, Transaction ID 39951133. On September 29, 2011, Standard Laboratories, Inc. joined in *Brief of Defendant Allied Chemical Corporation and Others with Respect to Plaintiffs' Motion for Partial Summary Judgment Against Preiser on the Failure to Warn*, Transaction ID 40086787.

6. On October 5, 2011, Preiser filed *Preiser Scientific, Inc.'s Reply to Plaintiffs' Response to Motion for Discovery Under West Virginia Rule 56(f) or Motion for Extension of Time to File Response*, Transaction ID 40203385.

7. The Court heard oral argument on the instant motion on June 4, 2012, and had fully reviewed the parties' submissions in advance of the argument.

8. After careful consideration of each party's arguments, the Court finds that there are some significant, material issues of fact which must be determined by a jury, as it sits now, with regard to the failure to warn issue. Those issues could include everything from what was required to be on the material as it was shipped, what actually appeared at the jobsite and whether or not the employee who was exposed ever had an opportunity to view those warning

labels. And those are all questions of fact and, therefore, the Court denies the plaintiffs' motion for partial summary judgment.

WHEREFORE, based upon the foregoing findings and conclusions, *Plaintiffs' Motion for Partial Summary Judgment on Liability Against Defendant Preiser Scientific, Inc., on the Failure to Warn Cause of Action* is hereby **DENIED.**

The Court notes and preserves the objections of any party aggrieved by this Order.

The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

Entered this _____day of _____, 2012.

HONORABLE JOHN A. HUTCHISON
Judge, Circuit Court of Raleigh County, W. Va.

PRESENTED BY:

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This document constitutes a ruling of the court and should be treated as such.

Court: WV Raleigh County Circuit Court

Court Authorizer: John A Hutchison

/s/ Judge John A Hutchison

EFiled: Jun 27 2012 7:36PM EDT
Transaction ID 45057421

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION

CIVIL ACTION NO.: 11-C-5000000
(Honorable John A. Hutchison)

THIS DOCUMENT APPLIES TO ALL CASES

ORDER GRANTING THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL CLAIMS RELATED TO "FLOAT-SINK LAB CHEMICALS" OTHER THAN PERCHLOROETHYLENE

Granted Judge John A Hutchison Jun 27, 2012

On June 4, 2012, this matter came before the Court pursuant to the hearing on *Defendants' Joint Motion for Partial Summary Judgment for all Claims Related to "Float-Sink Lab Chemials" Other than Perchloroethylene,* Transaction ID 44154736 ("Defendant's Motion"). Defendant's Motion was presented on behalf of all remaining defendants and third-party defendants. Defendants were represented during oral argument by liaison counsel for Distributer Defendants, Webster J. Arceneaux and Lewis, Glasser, Casey & Rollins, PLLC and were otherwise represented by counsel as noted in the June 4, 2012 transcript. The plaintiffs were represented by counsel William A. Walsh, Thomas F. Basile and Donald A. Soutar.

The Court has considered the instant motion, all responses, arguments of counsel, and all relevant legal authority and hereby **GRANTS** the Motion for Partial Summary Judgment for all Plaintiffs' claims against all Defendants related to "float-sink lab chemicals" other than Perchloroethylene ("PCE") based upon the following findings and conclusions:

FINDINGS OF FACT

1. Each Amended Complaint filed in these cases contains an identical allegation:

> "In their jobs in float-sink labs, plaintiffs used or were otherwise exposed to various toxic chemicals, including but not limited to PCE, otherwise known as tetrachloroethylene, perc, per, percut, perchlor, perchloethylene, 1,1,2,2- tetrachloro-ethylene, carbon bichloride, carbon dichloride and ethylene-tetrachloride ("PCE"). Within their workplaces, plaintiffs may also have been exposed to carbon tetrachloride, ethylene dibromide, otherwise known as 1,2-

> Dibromoethane, ethylene bromide, Bromofume, Dowfume EDB, Soilbrom 40, DBE, EDB, glycol bromide and blycol dibromide; dibromomethane, otherwise known as methylene bromide, or methylene dibromide; and xylene, benzene, gasoline, white spirits and other chemicals used in float-sink labs (collectively, these chemicals will hereafter be referred to as "float-sink lab chemicals")."

Defendants have consistently disputed this definition of "float-sink chemicals." Nevertheless, Plaintiffs' expert witness disclosures primarily only discuss exposure to, and medical injuries related to, exposure to perchlorethylene ("PCE") and no other "float-sink lab chemical" alleged in their Amended Complaints.

2. On June 28, 2011, the Court ordered all parties to submit proposed "Fact Sheets" to provide the parties with "basic information about each case in the Float-Sink Litigation in order to make an initial evaluation of the cases prior to engaging in mediation." *See* June 28, 2011 Order, Transaction ID 38386487. On August 12, 2011, this Court entered the Order Approving Fact Sheets, Transaction ID 39248578. This Order adopted, without revision, Fact Sheets to be answered by (1) Plaintiffs, (2) Employer Defendants, (3) Manufacturing Defendants and (4) Distributor Defendants.

3. As a part of the Fact Sheet drafted by Plaintiffs for Employer Defendants to respond to, Plaintiffs specifically asked:

> "2. With respect to Defendant's use of Float-Sink Chemicals in its float-sink lab or testing area, please describe in detail the following:
> a. ***The manner, method or process that Defendant used for conducting float-sink testing on coal samples, ranging from the collection of samples, through the float-sink testing, to the drying and weighing of samples***.[,] by which the Defendants used PCE in its float sink lab or testing area;
> b. All equipment, i.e., 3 30 gallon tanks, 1 crusher, 1 pulverizer and 3 Acme ovens, etc., ***and chemicals which Defendant used in the testing process***;..."

Fact Sheet for Employer Defendants, Question 2 (emphasis added).

4. Employer Defendants filed responses to the Fact Sheet for Employer Defendants on or about October 10, 2011.

5. Plaintiffs have filed no objection, motion to compel or other pleading challenging Employer Defendants response to this Question, or to the Fact Sheet Responses from Employer Defendants generally.

6. The Court finds that the identity of the chemicals in use in the float-sink laboratories at issue in these cases is and has been well known to Plaintiffs. The Court further finds that Plaintiffs have had sufficient opportunity to conduct discovery with regard to the identity of the chemicals in use in the float-sink laboratories at issue in these cases.

7. The Case Management and Scheduling Order provided for Plaintiffs to file Expert Witness Disclosures on December 15, 2011. The Case Management and Scheduling Order further provided express guidelines as to what must be disclosed with regard to the Expert Disclosures.

8. Plaintiffs filed general, non-specific expert witness disclosures on December 15, 2011, and Manufacturing Defendants filed *Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures and Exclude Plaintiffs' Expert Witnesses*, Transaction ID 41543947. The other defendants, including the Distributor Defendants, joined in this Motion. *See* Transaction ID 41608747.

9. After hearing *Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures and Exclude Plaintiffs' Expert Witnesses* on January 9, 2012, the Court announced that the Plaintiffs' conduct in providing general and non-substantive expert witness disclosures in light of the requirements of the Case Management and Scheduling Order,

Transaction ID 40423060, was sanctionable. Those orders were entered on February 13, 2012, Transaction ID 42471949 and 42472270. The Court then provided additional time for the Plaintiffs to produce substantive Expert Witness Disclosures, until April 13, 2012, Transaction ID 42471949.

10. The Order Regarding Expert Witness Disclosures, Transaction ID 42471949, was further very specific as to the requirements for the Plaintiffs' expert witness disclosures:

> "2) **Product and Exposure Information**: For each expert who will address exposure of Plaintiffs ***to one or more "float-sink chemicals" (as defined by Plaintiffs in their Amended Complaints***), provide separately for each Plaintiff the expert's opinion as to:
>
> a. ***The identity (by brand name, manufacturer and chemical name, to the full extent known) of the chemical(s), substance(s) or product(s)*** allegedly causing the Plaintiff's alleged injuries;
>
> b. ***The dates, nature and circumstances of each alleged exposure of that Plaintiff to the chemical(s), substance(s) or product(s)*** listed in response to 2(a), including a description of the type (i.e., airborne, dermal, ingestion, etc.) of exposure;
>
> c. A quantification or calculation of the amount or level of alleged exposure of that Plaintiff ***to the chemical(s), substance(s) or product(s)*** listed in response to 2(a), and a description of the method used to quantify or calculate the alleged exposure; and
>
> d. A summary of the grounds for the expert's opinions with regards to items a-c.
>
> 3) **General and Specific Causation**: For each expert who will opine that a particular disease or condition of a Plaintiff was caused by exposure to one or more "float-sink chemicals" (as defined by Plaintiffs in their Amended Complaints), provide separately for ***each Plaintiff and for each chemical the expert's opinion*** as to:
>
> a. The identity of the Plaintiff's specific diseases, illnesses or injuries allegedly caused by ***exposure to each such chemical, substance or product;***

b. The type of exposure resulting in each such disease, illness or injury (e.g., airborne, dermal, ingestion, etc.);

c. A summary of the grounds for the expert's opinions with regards to items a-b, including a list of the Plaintiff's medical records reviewed by the expert; and

d. Any and all reliable scientific and/or medical evidence, i.e., peer-reviewed and/or scientific medical literature, showing a causal link between the Plaintiff's alleged exposure scenario to ***each chemical, substance, or product and the specific type of injury claimed,*** and a summary of any other grounds upon which the expert's opinion is based. (emphasis added)."

11. On April 13, 2012, the Plaintiffs filed some, but not all, of their Expert Disclosures. In particular, in the Master Case file, Plaintiffs filed a Preliminary Summary of Expert Opinion of Nicholas P. Cheremisinoff, PH.D, Transaction ID 43654892; Preliminary Summary of Expert Opinion of Charles Werntz, D.O., M.P.H., Transaction ID 43662215; Preliminary Summary of Expert Opinion of Joseph H. Guth, PH.D., C.I.H., Transaction ID 43667700; Preliminary Summary of Expert Opinion of Stephen King, PH.D, M.DIV., M.P.H., Transaction ID 43672985.

12. Most significantly, the expert opinion and witness disclosure of Nicholas P. Cheremisinoff, Ph.D., Transaction ID 43654892, one of the key expert reports filed by the Plaintiffs, states at page one: "There are a number of other solvents that were identified by various Plaintiffs as having been used in the performance of the coal density testing conducted; however, my analysis focuses specifically on the work practices and pathways of exposure to perchlorethylene."

13. Dr. Cheremisinoff then goes on to offer in his expert report specific calculations for exposure at each work site to PCE. He ultimately offers three opinions: two opinions related to exposure to PCE at each of the Employer Defendants work sites and a third opinion as

to the warning labels for PCE of Defendant Preiser Scientific, Inc. Dr. Cheremisinoff very cautiously and very pointedly limited his expert opinions to perchlorethylene and gave no expert opinion regarding exposure to any other chemical.

14. None of Plaintiffs' experts, including Dr. Cheremisinoff, offer any opinions on the adequacy of warnings that may have been provided for any other chemical to which the Plaintiffs claim exposure.

15. In addition, beginning April 13, 2012, in the majority of the remaining active individual Plaintiff's cases, approximately 40, individual expert opinions were filed, including those designated as specific causation expert witnesses. A list of each of those individual specific causation reports and their Transaction ID numbers was attached to Defendants' Motion as Exhibit A.

16. A complete review of each of those reports indicates that no mention is made of the majority of the "float-sink lab chemicals" listed in the Amended Complaints. Forty specific causation reports have been filed.[1] Of those, only nine mention exposures to specific "float-sink lab chemicals" or chemicals used in coal preparation plants, other than PCE. In none of the nine specific causation reports that mention "float-sink lab chemicals" other than PCE do any of the Plaintiffs' experts comply with paragraph 3) d. of the Order Regarding Expert Witness Disclosures, Transaction ID 42471949 that required:

> "d. Any and all reliable scientific and/or medical evidence, i.e., peer-reviewed and/or scientific medical literature, showing a causal link between the Plaintiff's alleged exposure scenario to ***each chemical, substance, or product and the specific type of injury claimed,*** and a summary of any other grounds upon which the expert's opinion is based." (emphasis added).

[1] Specific causation expert reports have not been filed for Joseph W. Copley or the estate of Lloyd B. McClung. In addition, no specific causation expert report was filed for Earl Holt, for whom Plaintiffs' counsel have announced their intent to withdraw as counsel and therefore requested an extension of the expert disclosure deadline.

17. While vague reference is made in nine of the specific causation expert reports to "float-sink lab chemicals" in general, or chemicals such as naptha, dibromomethane, sodium hydroxide, gasoline, diesel fuel, naphthalene, ethylene dibromide, hydrochloric acid, nitric acid, nitrous oxides, sulfuric oxides, bromine, not a single one of the Plaintiffs' experts provides any medical evidence or literature "showing a causal link between the Plaintiff's alleged exposure scenario to ***each chemical, substance, or product and the specific type of injury claimed,*** and a summary of any other grounds upon which the expert's opinion is based" (emphasis added).

18. Paragraph 2) c. and d. of the Order Regarding Expert Witness Disclosures, Transaction ID 42471949 required:

> "c. A quantification or calculation of the amount or level of alleged exposure of that Plaintiff ***to the chemical(s), substance(s) or product(s)*** listed in response to 2(a), and a description of the method used to quantify or calculate the alleged exposure; and
>
> d. A summary of the grounds for the expert's opinions with regards to items a-c." (emphasis added).

19. None of Plaintiffs' experts offer any quantification or calculations of exposure to any float-sink lab chemicals other than PCE.

20. The time period for Plaintiffs to disclose expert witnesses and opinions has passed.

CONCLUSIONS OF LAW

A. LEGAL STANDARD

1. Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." W. Va. R. Civ. P. 56(c) (2012).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. Summary judgment is '"designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial[,]' if in essence there is no real dispute as to salient facts or if only a question of law in involved." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E. 2d 755, 758 n. 5 (1994) (quoting *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 207 S.E. 2d 191 (1974)). A party moving for summary judgment may discharge its burden under Rule 56 by "pointing out to the . . . court that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

4. "Rule 56 was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the rule are satisfied." *Jividen, Executor v. Law*, 194 W.Va. 705, 713 461 S.E. 2d 451, 459 (1995). Rule 56 is to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." W. Va. R. Civ. P. 1. "A principle purpose of summary judgment is to isolate and dispose of meritless litigation." *West Virginia Pride, Inc. v. Wood County, West Virginia,* 811 F. Supp. 1142, 1144-45 (1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

4. To avoid summary judgment, the non-moving party must "either (1) rehabilitate the evidence attacked by" the moving party, "(2) produce additional evidence showing the

existence of a genuine issue[2] for trial, or (3) submit an affidavit explaining why further discovery is necessary[.]" *Jividen, Executor v. Law*, 194 W.Va. 705, 713, 461 S.E. 2d 451, 459 (1995) (citing Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 549 S.E. 2d 329 (1995)).

B. PLAINTIFFS HAVE FAILED TO PRESENT REQUIRED EXPERT DISCLOSURES ESTABLISHING ANY CLAIM RELATED TO "FLOAT-SINK CHEMICALS" OTHER THAN PCE

1. On or about February 9, 2012, the Supreme Court of Appeals of West Virginia issued a Memorandum Decision in the companion float sink case of *Addair v. Litwar Processing Company, LLC, et al.*, No. 11-0397. This appeal involved numerous employer defendants that were granted summary judgment orders by Judge Jack Alsop on the grounds of collateral estoppel with regard to the deliberate intent claims filed against them under W.Va. Code § 23-4-2.

2. The Supreme Court ultimately upheld Judge Alsop's decision, concluding that it did not need to consider the issue of collateral estoppel as it had alternative grounds on which to uphold Judge Alsop's ruling. Specifically, it concluded that the Plaintiffs could not prevail on their deliberate intent claims in light of Judge Alsop's February 17, 2010, Sanctions Order excluding expert witnesses and fact witnesses.

3. In rendering this decision, the Supreme Court noted that the Plaintiffs were making deliberate intent claims for occupational exposure to chemicals in the course of their employment. *Memo Dec. at pp. 6-7.* It went on to say:

> "These are not simple ailments that have resulted from common causes familiar to the average layperson. Instead, these are complex illnesses that allegedly have arisen from exposure to

[2] A "genuine issue" consists of "one half of a 'trialworthy' issue" which does not arise '"unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."' *Jividen, Executor v. Law*, 194 W.Va. 705, 713, 461 S.E. 2d 451, 459 (1995) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 549 S.E. 2d 329 (1995).

> chemicals of which the average person has no knowledge or experience. Under these circumstances, we find expert testimony to be necessary to establish the existence of an occupational disease. *Cf* Syl. pt. 15, in part, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004) ("'[W]here the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.' Syl. Pt. 11, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974)."); Syl. pt. 1, *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991) ("'It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.' Syl. Pt. 2, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964)."); Syl. pt. 5, in part, *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982) ("[E]xpert medical testimony would ordinarily be required to establish certain matters including: (1) the risks involved concerning a particular method of treatment, (2) alternative methods of treatment, (3) the risks relating to such alternative methods of treatment and (4) the results likely to occur if the patient remains untreated.")."

Id.

4. After further discussion in the Memorandum Decision, the Supreme Court upheld Judge Alsop's Order granting the employer defendants' summary judgment concluding:

> "[W]e find that, under the particular facts of the cases underlying this appeal, expert testimony is necessary to establish that the plaintiff petitioners have "suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition." W. Va. Code § 23-4-2(2)(ii)(E). Because the plaintiff petitioners have been prohibited from presenting such evidence by virtue of sanctions imposed on them by the circuit court, they are unable, as a matter of law, to meet their burden of proof as to this element of their claim. This inability to make a sufficient showing on an essential element of their case, for which they bear the burden of proof, renders summary judgment proper." *Id. at p. 8.*

5. The Plaintiffs timely filed a Petition for Rehearing with the Supreme Court and that Petition was denied on March 29, 2012.

6. Thereafter, on April 12, 2012, Judge Alsop relied upon the Supreme Court's Memorandum Decision and issued an Order Granting all Defendants' Motions for Summary Judgment, thereby dismissing the remaining cases. Judge Alsop concluded that expert opinions were necessary to prevail on complex chemical exposure cases and therefore, without any expert opinions, the Plaintiffs' remaining cases in *Addair* should be dismissed. The Plaintiffs in *Addair* have filed a Notice of Appeal with regard to this Order.

7. This Court follows the West Virginia Supreme Court of Appeals decision in *Addair* and finds that expert testimony is necessary in these cases involving complex chemical exposure case in order to establish the essential elements of injury and proximate cause, both general and specific. *See e.g. Tanner* v. *Rite Aid of West Virginia,* 194 W. Va. 643, 654, 461 S.E.2d 149, 160 (1995)(holding "[w]hen prima facie proof of the fact of injury or causes involves matters beyond the competency of ordinary lay persons, expert witnesses must be employed"); *Gentry v. Mangum,* 195 W. Va. 512, 528, 466 S.E.2d 171, 187 (1995)(requiring a common sense inquiry into "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in dispute.")(internal citations omitted). *See also Goundry v. Wetzel-Saffle,* 211 W.Va. 698, 568 S.E.2d 5(2002)(upholding trial court's discretion to require a medical expert for standard of care in medical malpractice cases, to survive summary judgment). The Court finds that the Plaintiffs have failed to provide expert disclosures for any float-sink lab chemicals other than PCE and that the time to do so has passed.

8. This need for expert testimony applies equally to the substance of warnings provided by Distributor Defendants with regard to these "float-sink lab chemicals" other than PCE and this Court finds that such expert testimony is required in the instant claims. *See e.g.*

Roney v. *Gencorp,* 2009 U. S. Dist. LEXIS 84859 (S.D. W. Va. September 16, 2009)(holding "[p]arsing evidence of state-of-the-art scientific knowledge would require interpretation of scientific publications and data then available to the supplier. Just as a jury is ill equipped to determine, on its own, whether the conduct of a physician met professional standards in the industry, it is ill equipped to analyze and compare scientific literature and data concerning the hazards of [a particular chemical]"). Alleged inadequacies in warnings in this case need to be established through expert testimony as such an analysis requires highly specialized scientific knowledge. Plaintiffs are not in a position to question the adequacy of the warnings that may have been provided for any chemical other than PCE as they have not provided the requisite supporting expert witness disclosure. The time for providing expert disclosures has passed.

9. Plaintiffs are also pursuing medical monitoring claims. The Court finds that these medical monitoring claims require Plaintiffs to provide information as to risk, such as exposure analysis and other general causative scientific information that require expert testimony. The Supreme Court's decision in *Addair* regarding the need for expert testimony to pursue these complex claims of chemical exposure is applicable to Plaintiffs' claims against both Employer Defendants and Distributor Defendants.

10. This Court finds that, with regard to all float-sink lab chemicals other than PCE, Plaintiffs have failed to even attempt to provide any expert evidence and the time for providing such expert evidence has passed. This Court finds that the identity of the chemicals in use has been well-known and that Plaintiffs' expert, Dr. Cheremisinoff, in his report indicated that he was aware that there were other float-sink lab chemicals to which these employees may have been exposed; however, he very cautiously and very pointedly limited his expert opinions to perchlorethylene and gave no additional expert opinion regarding exposure to any other float-

sink lab chemical. Based on the foregoing, Plaintiffs have failed to make a sufficient showing, or provide even a scintilla of relevant evidence, on essential elements of all claims related to any float-sink lab chemical other than PCE.

11. This Court provided the Plaintiffs with an express order that set forth what the Plaintiffs had to designate in their expert reports with regard to "each" float-sink lab chemical alleged in Paragraph 2 of the Amended Complaints. This Court has reviewed the expert reports and finds that the Plaintiffs are not in compliance with this Court's order for any float-sink lab chemical other than PCE. On that basis, the Court finds that the Defendants' Motion for partial summary judgment motion to exclude any claims for any float-sink lab chemicals other than Perchloroethylene is granted.

CONCLUSION

WHEREFORE, based upon the foregoing findings and conclusions, Defendants' Joint Motion for Partial Summary Judgment is hereby **GRANTED.** It is hereby **ORDERED** that all Plaintiffs' claims against all Defendants related to any float-sink lab chemicals other than Perchloroethylene be and hereby are **DISMISSED** with prejudice.

The Court notes and preserves the objections of any party aggrieved by this Order.

The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

Entered this _____day of _____, 2012.

Granted Judge John A Hutchison Jun 27, 2012

HONORABLE JOHN A. HUTCHISON
Judge, Circuit Court of Raleigh County, W. Va.

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