EFiled: Jan 22 2014 02:33PM EST
Transaction ID 54880875

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:

Allyson Townsend v. Commercial Coal Testing, et al. **Civil Action No. 11-C-5200015**

ORDER DISMISSING ALL CLAIMS RELATED TO CHEMICALS OTHER THAN PERCHLOROETHYLENE AND DISMISSING THIRD-PARTY DEFENDANTS

On December 23, 2013, this matter came before the Court on *Interstate Chemical Company, Inc.'s Motion for Summary Judgment,* Transaction ID 54643652 ("Interstate's Motion"), which was joined by Morre-Tec Chemical Company and ICL-IP America, Inc. (collectively "Third-Party Defendants") and the *Preiser Scientific Inc.'s Joinder in Interstate Chemical Company, Inc.'s Motion for Summary Judgment and Motion for Partial Summary Judgment on All Claims Related to Chemicals Other than Perchloroethylene* ("Preiser's Motion"), Transaction ID 54646142, which was joined by Defendant Commercial Coal Testing, Inc. (collectively "Defendants"). Counsel for Plaintiff, all Defendants and Third-Party Defendants made appearances at the December 23, 2013 hearing.

Having reviewed the motions and all related pleadings, and having conferred with one another to insure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Court FINDS that any and all claims of Plaintiff Allyson Townsend related to alleged exposure to chemicals other than Perchloroethylene ("PCE") should be dismissed, with prejudice for the reasons set forth herein.

FINDINGS OF FACT

1. In accordance with Court's Order dated November 20, 2013, Transaction ID 54586742, Defendants and Third-Party Defendants in this case filed Motions for Summary

Judgment and Motions for Partial Summary Judgment for all claims based on Plaintiff's claimed exposure to any chemical other than PCE on or about December 3, 2013. Third-Party Defendants moved for a dismissal of the chemicals naphtha and dibromomethane from this case and Defendants moved for a dismissal of all chemicals other than PCE from this case.

2. Plaintiff Allyson Townsend filed *Plaintiff's Response to the Third-Party Defendants' Motion & Opposition to Preiser's Motion for Summary Judgment* ("Plaintiff's Response"), Transaction ID 54721843 on December 17, 2013. In her Response, Plaintiff first admits that she has no claims with regard to naphtha or dibromomethane and ultimately made an informal motion for additional discovery under West Virginia Rule of Civil Procedure Rule 56(f), claiming that summary judgment for chemicals other than PCE is premature at this time.

3. Preiser filed its *Reply in Support of Motion for Summary Judgment*, Transaction ID 54737111, on December 19, 2013 ("Preiser's Reply").

4. The Complaint filed in this case contains the following allegation at paragraph two:

> Non-party David Townsend, a coal testing industry worker, was often exposed to dangerous and carcinogenic chemicals, including perchloroethylene ("PCE"), during the course of his employment. The chemicals would routinely splash on Mr. Townsend's clothes and person, which would unwittingly expose his family to these chemicals when he returned home from work or when a family member laundered his soiled work clothes.

The Complaint references "chemicals" generally in each of its counts against the Defendants.

5. Non-party David Townsend, Plaintiff's father, was a Plaintiff in *In re: Float-Sink Litigation, Civil Action No. 11-C-5230025.* His employers, as identified in that case and in the instant case, were Standard Laboratories, Inc. and Commercial Coal Testing, Inc. Standard Laboratories, Inc. was in the last case and they filed Fact Sheets on October 11, 2011, detailing

the chemicals that they used in the float-sink labs, including the laboratory in which David Townsend worked. *See* Transaction ID 40293422. Likewise, Standard Laboratories, Inc. filed written discovery responses in the prior case and this case. Mr. Townsend, Plaintiff's father, has been deposed and provided discovery responses, a Float-Sink Plaintiff Fact Sheet, dated October 10, 2011, E-Service ID 40271422, and an Amended Float-Sink Plaintiff Fact Sheet, dated March 9, 2012, E-Service ID 42996156, specific to his exposure and the chemicals he worked with while employed by Standard Laboratories, Inc. and Commercial Coal Testing, Inc. All Plaintiff's claimed exposure is alleged to have been secondary to David Townsend's exposure. Counsel for Plaintiff was also counsel for David Townsend in his lawsuit.

6. Mr. Townsend provided an Amended Float-Sink Plaintiff Fact Sheet dated March 9, 2012, E-Service ID 42996156 ("Fact Sheet"), which was attached as Exhibit D to Plaintiff's Response. The Fact Sheet was notarized. The Fact Sheet specifically asked Mr. Townsend to indicate which chemicals were used at each float-sink lab location where he alleged exposure. For both Commercial Coal Testing, Inc. and Standard Laboratories, Inc. Mr. Townsend indicated only "Perchloroethylene" and "Bromide."

7. Mr. Townsend was also deposed in the underlying matter and Preiser attached excerpts of that deposition as Exhibit A in support of its Reply. During his January 29, 2013 deposition, Mr. Townsend was asked specifically about what chemicals he worked with at any employment in a float-sink laboratory:

> Q: What chemicals were used to perform the float sink testing at Commercial?
> A: Perchloroethylene.
> Q: Anything else?
> A: Bromide.
> Q: What about at Standard, what chemicals were used?
> A: Both, the same thing.
> Q: Perc and bromide?

A: Right.
Q: Any other chemicals you know of that were used?
A: They had something they called mineral spirits is all I know what they called it to cut it.
Q: Was that at Standard?
A: Both places had it.

Preiser's Reply at Exhibit A, excerpts of David Townsend Deposition, at page 26. Mr. Townsend was clear in his deposition those were the only chemicals used:

> Q And we talked about mineral spirits,
> bromide and perc. Were there any other chemicals you
> would put into the vats or buckets?
> A No.

See Exhibit A to Preiser's Reply at 55. Likewise, he specifically testified that he had never heard of Hevi Grav or Coal Grav:

> Q Did you ever use any chemicals called heavy grav or coal grav?
> A I really don't know what that would be, no.
> Q Not that you know of, though?
> A No, never heard of it.
> Q When you were at Commercial, did they
> ever bring any new chemicals in that you know of?
> A No.
> Q What about when you were at Standard?
> A No.

See Exhibit A to Preiser's Reply at 80.

8. David Townsend's Fact Sheet, Exhibit D to Plaintiff's Response, clearly lists "Perchloroethylene" and "Bromide" as the chemicals he used during his employment in float-sink laboratories.

9. It is admitted by the Plaintiff in this case that Bromide a/k/a Dibromomethane and mineral spirits a/k/a Naphtha did not cause her claimed injuries. *See* Plaintiff's Response at 5. *See Preiser's Reply at* Exhibit B, Excerpts from *Responses of Allyson Townsend to Defendant*

Plaintiff's Responses to Defendant Preiser Scientific, Inc.'s Second Set of Interrogatories and Requests for Production of Documents, E-Service ID 54677397, at Interrogatory Response 2.

10. This case and David Townsend's case are companions to the case of *Addair v. Litwar Processing Company, LLC, et al.*, No. 11-0397 ("*Addair*"), filed by counsel for Plaintiff in 2004. There is no dispute that counsel for Plaintiff has access to all of Preiser's records produced in the *Addair* matter and in David Townsend's lawsuit, *In re: Float-Sink Litigation, Civil Action No. 11-C-5230025.*

11. Plaintiff relied on sales documents produced by Preiser in Plaintiff's Response filed herein to argue there may be a "confounder" chemical at issue and additional discovery is warranted for this reason. However, Preiser produced the documents attached as Exhibit E to Plaintiff's Response on or about November 16, 2009 in the *Addair* matter. Those records were incorporated by reference in the *In Re: Float-Sink Litigation, Civil Action No.: 11-C-5000000* on or about November 16, 2009. Those records were incorporated by reference again in this action on or about June 7, 2013. There is no dispute that Plaintiff's counsel has had these documents in their possession for over four (4) years. Plaintiff has had sufficient time to conduct discovery on these matters and to provide this information to their experts to review.

12. In the underlying matters *In re: Float Sink Litigation, Civil Action No. 11-C-5000000*, including Mr. Townsend's case, all chemicals except PCE were excluded by Order dated June 27, 2013, Transaction ID 45057421.

13. On August 2, 2013, this Panel entered a Case Management Order in the instant case, Transaction ID 53365142, ("CMO") that provided for the Plaintiff to identify expert witnesses by August 26, 2013 and required that Plaintiff file Expert Witness Reports by October 10, 2013.

Under the CMO, Defendants were to identify expert witnesses by September 24, 2013 and provide Defendant Expert Witness Reports by November 8, 2013.

14. Plaintiff's Complaint and initial expert reports of August 26, 2013 indicated that Plaintiff may be alleging that she or her father David Townsend were exposed to chemicals, "coal testing chemicals" or "float-sink lab chemicals" to include more than PCE, specifically including but not limited to dibromomethane and naphtha. Based on these initial expert disclosures of Plaintiff, Preiser filed a Motion requesting leave to file an Amended Answer, including a Third-Party Complaint against Morre-Tec and Interstate Chemical Company, Inc. By Agreed Order, Transaction ID 54204166, Preiser's Motion to Amend its Answer to assert a Third-Party Complaint against these new Defendants was granted. An additional Third-Party Complaint was filed by Morre-Tec Industries, Inc., Transaction ID 54423417.

15. Plaintiff filed her full expert reports on October 10, 2013 in accordance with the CMO. Defendants then filed their full expert reports on November 8, 2013. Significantly, Plaintiff's expert reports generally only discuss indirect or secondary exposure to and claimed medical injuries related to exposure to PCE and not any other alleged chemicals. Specifically, Plaintiff's expert reports do not allege that any of her injuries are a result of her or her father David Townsend's alleged exposure to dibromomethane and naphtha, or any other chemicals.

16. Plaintiffs' expert witness reports primarily only discuss exposure to, and medical injuries related to, PCE and no other chemical.

17. Plaintiff admits that her experts considered the possible impact of naphtha and dibromomethane exposure and concluded that it did not have any impact on the Plaintiff and did not cause her to develop medullary thyroid cancer. Plaintiff's Response ¶¶24-26.

18. Expert witnesses retained by Preiser and Standard Laboratories also are of the opinion that there is no link between medullary thyroid cancer and naphtha or dibromomethane. *See* Transaction ID 54529029 and Transaction ID 54290542.

19. The Court FINDS that the identity of the chemicals in use in the float-sink laboratories at issue in this case, and used by Mr. Townsend during his relevant employment, is and has been well known to Plaintiff. The Court further FINDS that Plaintiff has had sufficient opportunity to conduct discovery with regard to the identity of the chemicals in use in the float-sink laboratories at issue in this case.

20. None of Plaintiff's experts offer any opinions on the adequacy of warnings that may have been provided for any chemical other than PCE.

21. None of Plaintiff's experts offer any opinions on general or specific causation of Plaintiff's injuries that reference any conclusion or link to any chemical other than PCE.

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

23. None of Plaintiffs' experts offer any opinions that Plaintiff was injured by her father's exposure to any float-sink lab chemicals other than PCE.

24. The time period for Plaintiff 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., supra*).

5. 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 for trial, or (3) submit an affidavit explaining why further discovery is necessary[.]" *Jividen, supra,* at 713, 459 (citing Syl. Pt. 3, *Williams, supra*). 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."' *Id*. (internal citations omitted).

6. West Virginia Rules of Civil Procedure 56(f) requires that a party opposing a motion for summary judgment on the basis of the necessity for additional discovery provide an affidavit stating the reasons a continuance may be necessary. Strict compliance with this requirement is not always necessary, however, the Court has held:

> …when a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. ***At a minimum***, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Syl. Pt. 1, *Powderidge Unit Owners Ass'n v. Highland Properties*, 196 W. Va. 692, 474 S.E.2d 872 (1996) (emphasis added).

B. EXPERT REPORTS ARE REQUIRED TO ESTABLISH PLAINTIFF'S CLAIMS

7. 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*. 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.

8. 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.

9. 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 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.

10. 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.*

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

12. 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.

13. As in the original *In re: Float Sink Litigation* cases, this Court follows the West Virginia Supreme Court of Appeals decision in *Addair* and FINDS that expert testimony is necessary in this case involving complex chemical exposure claims 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 Plaintiff has failed to provide expert disclosures or reports for any float-sink lab chemicals other than PCE and that the time to do so has passed.

14. This need for expert testimony applies equally to the substance of warnings provided by Preiser with regard to chemicals other than PCE and this Court FINDS that such expert testimony is required in the instant case. *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. Plaintiff is not in a position to question the adequacy of the warnings that may have been provided for any chemical other than PCE as she has not provided the requisite supporting expert witness disclosure or report. The time for providing expert reports has passed.

15. Plaintiff is also pursuing a medical monitoring claim. The Court FINDS that this medical monitoring claim requires Plaintiff 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 this complex claim of chemical exposure is applicable to Plaintiff's claims against both Defendants and Third-Party Defendants.

16. This Court FINDS that, with regard to all chemicals other than PCE, Plaintiff has failed to even attempt to provide any expert opinions or reports and the time for providing such expert opinions has passed. This Court FINDS that the identity of the chemicals in use has been well-known and that Plaintiff's counsel has had information with regard to chemicals sold to Defendants Commercial Coal Testing, Inc. and Standard Laboratories, Inc. since 2009. No expert identified by Plaintiff has provided an expert opinion with regard to any chemical other than PCE.

17. Based on the foregoing, Plaintiff has failed to make a sufficient showing, or provide even a scintilla of relevant evidence, on essential elements of all claims related to any chemical other than PCE. Accordingly, the Court FINDS that Preiser's Motion for Partial Summary Judgment, and all Defendants joinders thereto regarding Plaintiff's claims based on alleged exposure to any chemicals other than PCE are GRANTED.

C. IT IS UNDISPUTED THAT NAPHTHA AND DIBROMOMETHANE ARE NOT CHEMICALS AT ISSUE IN THIS CASE.

18. Plaintiff has specifically conceded that naphtha, a/k/a mineral spirits and white spirits, and dibromomethane, a/k/a bromide, did not cause her injury. *See* Findings of Fact, at ¶ 9, *supra*; Plaintiff's Response ¶¶24-26.

19. Based on Plaintiff's admissions, the lack of any expert opinion related to a connection between Plaintiff's claimed injuries and naphtha or dibromomethane, and Defendants' expert opinions specifically excluding a connection between Plaintiff's claimed injuries and naphtha or dibromomethane, there is no genuine or material dispute of fact with regard to these two chemicals.

20. As a matter of law, this Court FINDS and concludes that Plaintiff's alleged exposure to naphtha and dibromomethane did not cause Plaintiff's claimed injuries.

21. No party has offered any evidence showing or suggesting that any chemicals allegedly supplied by Interstate, Morre-Tec or ICL-IP caused harm to the Plaintiff.

22. As a matter of law, this Court FINDS and concludes that Interstate's Motion and the Third-Party Defendants' Joinder in the same shall be GRANTED.

23. In addition, as a matter of law, this Court FINDS and concludes that all Defendants' Motions for partial summary judgment related to or arising out of Plaintiff's alleged exposure to naphtha and dibromomethane are GRANTED.

D. NO ADDITIONAL DISCOVERY IS NECESSARY AND PLAINTIFF'S REQUEST FOR ADDITIONAL DISCOVERY IS DENIED

24. Plaintiff has argued that additional discovery with regard to chemicals used by Mr. Townsend during his employment with Standard Laboratories, Inc. and Commercial Coal Testing, Inc. is necessary before summary judgment can be appropriately considered. However, Plaintiff did not make a formal motion for additional discovery under West Virginia Rule of Civil Procedure 56(f) and did not provide an affidavit as required under that rule. Accordingly, this Court considered Plaintiff's Response as an informal motion under Rule 56(f) and it analyzes that informal motion under the four minimum requirements set forth in *Powderidge, supra*. This Court FINDS and concludes that Plaintiff cannot prevail on any one of those minimum requirements.

25. Plaintiff has failed to articulate some plausible basis for her belief that specified 'discoverable' material facts likely exist which have not yet become accessible to her. As set forth in the Findings of Fact above, this is a case that has been going on in some iteration since 2004. Plaintiff's counsel has been involved since that time. Preiser's sales information was disclosed to Plaintiff's counsel in 2009 in the *Addair* case. Plaintiff's father has been deposed and provided responses to discovery under oath indicating what chemicals he used during his

employment. Plaintiff has not articulated a plausible basis for believing that there is some "confounder" chemical that has not yet been disclosed during these years of proceedings.

26. Plaintiff cannot demonstrate some realistic prospect that additional material facts can be obtained within a reasonable additional time period. Again, the chemicals used by Mr. Townsend and in float-sink laboratories generally are well known based on the discovery taken in the companion cases. Expert reports have been issued. Plaintiff has not shown, by affidavit or otherwise, how any other chemical could have a nexus with Plaintiff's claimed injuries. Thus there is no realistic prospect that there are additional material facts to be discovered with regard to the identification of additional or unknown chemicals in this matter.

27. Plaintiff cannot demonstrate that the additional facts will, if obtained, suffice to engender an issue both genuine and material. Plaintiff argued that there is a possibility that there is some unidentified chemical substance used by Mr. Townsend, or in the float-sink laboratories in which he worked, that may have caused her claimed injuries and that Plaintiff needs time to investigate that possibility. Plaintiff has not shown, by affidavit or otherwise, how any other chemical could potentially have a nexus with Plaintiff's claimed injuries. Again, this case has been going on in some iteration since 2004. Both Plaintiff and Employer Fact Sheets have been provided, extensive written discovery taken and many depositions have been taken specifically dealing with the chemicals used generally in float-sink laboratories. In addition, Mr. Townsend has testified in his deposition specifically as to the chemicals he used during his employment in float-sink laboratories. Thus, Plaintiff's speculative argument is not sufficient to establish that there are additional facts that, if obtained, would suffice to engender a material or genuine issue of fact.

28. Plaintiff had the relevant sales records from Preiser since 2009. Plaintiff's father, Mr. Townsend was deposed in January 2013. Plaintiff cannot demonstrate good cause for failure to have conducted the now requested discovery earlier.

29. The Court FINDS that the material issue for the purposes of these motions is what chemicals Mr. Townsend used during his employment with Commercial Coal Testing, Inc. and Standard Laboratories, Inc. The Court further FINDS that there has been sufficient discovery as to what chemicals Mr. Townsend used during his employment with Commercial Coal Testing, Inc. and Standard Laboratories, Inc.

30. Plaintiff's "confounder" argument is not sufficient to defeat summary judgment with regard to all chemicals other than PCE in this case. Plaintiff had access to all discovery in *In re: Float-Sink Litigation* and the *Addair* litigation. These companion cases involved roughly 160 different plaintiffs and related employers. Further, in Preiser's Reply, sworn testimony of Mr. Townsend was provided regarding what chemicals he used while employed by Commercial Coal Testing, Inc. and Standard Laboratories, Inc. Given these facts, Plaintiff cannot articulate a potential plausible, genuine and material fact with regard to the chemicals claimed to cause Plaintiff's injuries that requires further discovery in the instant case. Accordingly, pursuant to West Virginia Rule of Civil Procedure 56(f) and *Powderidge, supra*, Plaintiff's request for additional discovery is DENIED.

CONCLUSION

WHEREFORE, based upon the foregoing findings and conclusions, *Interstate Chemical Company Inc.'s Motion for Summary Judgment*, *Preiser Scientific Inc.'s Joinder in Interstate Chemical Company, Inc.'s Motion for Summary Judgment and Motion for Partial Summary Judgment on All Claims Related to Chemicals Other than Perchloroethylene,* and all joinders to

these motions are hereby **GRANTED.** It is hereby **ORDERED** that all Plaintiff's claims against all Defendants related to any chemicals other than Perchloroethylene be and hereby are **DISMISSED** with prejudice. It is further **ORDERED** that all claims asserted against Third-Party Defendants Interstate Chemical Company, Inc., Morre-Tec Industries, Inc. and ICL-IP America, Inc. including cross claims are hereby **DISMISSED** with prejudice from this matter.

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.

Enter: January 22, 2014

/s/ John A. Hutchison
Lead Presiding Judge,
Float-Sink Litigation