

## Rhode Island Court Considers Asbestos-Defendants' Daubert Motions

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Judge Richard A. Licht of the Rhode Island Superior Court recently considered Defendants' *Daubert* challenges to two Plaintiff experts, Dr. Richard L. Kradin (Dr. Kradin) and Dr. Michael J. Ellenbecker, CIH (Dr. Ellenbecker), in *Day v. 3M Co. Inc.*, No. PC-2018-5044, 2024 R.I. Super. LEXIS 95 (R.I. Super., October 11, 2024) – a case alleging that Plaintiffs' decedent, Bonnie Bonito (Mrs. Bonito), developed mesothelioma through para-occupational asbestos exposure from laundering the work clothes of her ex-husband, who owned and operated a construction company, from 1966 to 1990.

Under *Daubert*, Rhode Island Courts consider the following factors in assessing the reliability of an expert's methodology: (1) whether the expert's theory or technique can be/has been tested; (2) whether the technique or theory was subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory is generally accepted in the scientific community. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). In *DiPetrillo v. Dow Chemical Co.* 729 A.2d 677, 686 (R.I. 1999) the Court clarified that the admissibility of an expert's testimony in Rhode Island requires a two-pronged analysis: (1) whether the expert's testimony is scientifically sound; and (2) whether the expert's opinion is "relevant, appropriate, and of assistance to the jury."

Defendants, Graybar Electric Company, Inc. ("Graybar") and Union Carbide Corporation ("UCC") filed the following motions in limine relating to Dr. Kradin, a pulmonologist and pathologist, and Dr. Ellenbecker, a board-certified industrial hygienist:

- Joint Motion to Exclude Dr. Kradin's Causation Testimony;
- Joint Motion to Exclude Dr. Ellenbecker's Testimony on Asbestos-Related Risks and Adequacy of Asbestos Warnings;
- Graybar's Motions to exclude Dr. Kradin's and Dr. Ellenbecker's Testimony that Graybar's Products Caused Decedent's Mesothelioma; and
- UCC's Motions to exclude Dr. Kradin's and Dr. Ellenbecker's Testimony Regarding the Supply of UCC Calidria and its Pre+sence in Products to which Decedent was exposed.

Though the Court excluded Dr. Ellenbecker's testimony regarding the adequacy of asbestos warnings, it denied the remainder of Defendants' motions and permitted Dr. Kradin and Dr. Ellenbecker to testify at trial. In doing so, the Court: (i) held that an expert's opinion based upon the "each and every exposure" theory is independently admissible in Rhode Island as scientifically valid without the need to address the "frequency, regularity, or proximity" of a plaintiff's exposure to asbestos; and (ii) clarified that *Sweredoski's* "frequency, regularity, and proximity" requirement applies to a plaintiff's burden of proof as to liability, but "does not impose an additional

requirement . . . that an expert's opinion is only scientifically valid when he or she performs tests related to 'frequency, regularity, and proximity.'"

i. *Each and Every Exposure Scientifically Valid in Rhode Island*

The "each and every exposure" theory generally states that any exposure to asbestos above background levels is cumulatively causative of mesothelioma. Relying on *Sweredoski*, Defendants argued that Dr. Kradin's and Dr. Ellenbecker's opinions were inadmissible as mere applications of the "each and every exposure" theory which is scientifically unsupported and cannot be tested "to determine the 'frequency, regularity, and proximity' of Mrs. Bonito's asbestos exposures." The Court found Defendants' reliance on *Sweredoski* misplaced. In fact, it expressly held that – per *Sweredoski* – the "each and every exposure" theory is scientifically valid because significant medical evidence exists indicating "asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful," and further, that "mesothelioma can result from [cumulative] minor exposures to asbestos products." Therefore, consistent with the Helsinki Criteria<sup>1</sup>, under Rhode Island law, an asbestos plaintiff need not present evidence of specific exposure dosages to prove a defendant liable.

ii. *Sweredoski v. Daubert/DiPitrello – Defendant's Liability v. Expert Admissibility*

The Court also made clear the distinction between the "frequency, regularity, and proximity" showing required under *Sweredoski* to prove an asbestos defendant liable at trial versus the application of the *Daubert/DiPitrello* standard for purposes of determining the admissibility of an expert's testimony/opinions. Specifically, under Rhode Island's *Daubert/DiPetrillo* standard for expert admissibility, so long as the expert's testimony has a sound scientific basis and their opinions are relevant to the underlying action, it is admissible. Citing Presiding Judge Alice Gibney from *Sweredoski*, "[o]nce expert evidence is found to be scientifically valid, 'the expert's testimony should be put to the trier of fact to determine how much weight to accord to the evidence.'" Defendants may then attempt to undermine before the jury an expert's testimony at trial through cross-examination and the introduction of competing evidence to undermine any opinions of the expert based on the "each and every exposure" theory.

iii. *Warning Testimony*

As to Dr. Ellenbecker's warnings testimony the Court found his own admission that he was not a "warnings expert," coupled with his insufficient experience in warning design, precluded him from providing testimony on the adequacy of warnings. Notwithstanding, the Court noted that Dr. Ellenbecker's warnings opinions amounted to his assertions that Defendants *should have warned*, and that warnings *could* help limit asbestos hazards. In applying the *Daubert/DiPitrello* standard (above), based on Dr. Ellenbecker's qualifications as an industrial hygienist he was deemed qualified to opine on "administrative controls", such as warnings, and since his testimony considered the specific facts of the case it was relevant and could assist the jury in determining liability. Accordingly, though he was precluded from testifying as to the *adequacy* of asbestos warnings, Dr. Ellenbecker was permitted to testify regarding the amount of asbestos ordinarily released from products similar to Defendants based on his review of available literature and how warnings could alert workers to asbestos dangers in occupational settings.

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<sup>1</sup> The Helsinki Criteria state that the risk of developing lung cancer is materially increased, even without asbestosis, under the following conditions: (1) one year of heavy exposure, or 5 to 10 years of moderate exposure; (2) estimated cumulative exposures to mixed asbestos fibers of 25 fibers per milliliter per year; (3) a lung fiber burden within the range recorded for asbestosis in the same laboratory; (4) retained fiber levels of 2 million amphibole fibers per gram of dry lung tissue or 5 million amphibole fibers per gram of dry lung tissue, as determined by electron microscopic analysis; and (5) asbestos body concentrations determined by light microscopic analysis greater than 10,000 per gram of dry lung tissue.

## iv. Asbestos Content of UCC Products

Finally, the Court briefly discussed UCC's argument that both Dr. Kradin and Dr. Ellenbecker should be precluded from testifying that the products utilized by Mr. Bonito contained UCC Calidria brand asbestos and/or UCC phenolic molding compound because neither expert reviewed UCC-specific documents, the products themselves, or its corporate deposition testimony and both experts admitted that they do not have a factual basis to conclude the UCC joint compound at issue contained asbestos. While the Court initially agreed that both experts relied on speculative evidence to determine the joint compound at issue contained asbestos, the Court ultimately referenced prior person-most-knowlegeable testimony from Georgia Pacific indicating that all Georgia Pacific joint compound sold during the relevant time period contained UCC asbestos. As such, the Court found that this evidence, alongside Mr. Bonito's testimony, provide a sufficient factual basis satisfying the *Daubert/DiPitrello* test for both experts to proffer such testimony.

[Click here to view a copy of the Bonito Daubert opinion.](#)