UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	)	Case No. 1:03-CV-17000 (MDL Docket No. 1535)
THIS DOCUMENT RELATES TO:	)	JUDGE O'MALLEY
Peabody v. AIRCO, Inc., 1:05-CV-17678	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO REOPEN DISCOVERY

For the third time in six months, plaintiffs' counsel seek to run from a case ***they*** selected for trial because the plaintiff in the matter misrepresented fundamental facts about his claims. In arguing that they no longer wish to try the *Peabody* case because it is not representative, plaintiffs conveniently ignore the real reason for their sudden change of position: the revelation that Mr. Peabody lied about his medical history and was in fact complaining about depression and memory loss – the symptoms counsel allege were caused by welding fume exposure – ***over a year before*** he ever started welding.

Recent developments in *Peabody* present this Court ***yet again*** with a serious case management issue: what consequences plaintiffs' counsel should face for repeatedly requiring defendants to expend enormous resources working up cases that dissolve when defendants

investigate the basic facts. While defendants decided as a measure of goodwill not to seek sanctions in this instance, plaintiffs' contention that they are walking away from *Peabody* because it is not representative of their overall claims population betrays a shocking arrogance: a belief by plaintiffs' counsel that they can force defendants to spend millions of dollars defending cases that are frivolous or fraudulent without ever being held accountable for their failure to properly investigate their clients' claims in the first place.

If plaintiffs no longer seek to take Mr. Peabody's claims to trial – which is hardly surprising given the dramatic revelations of recent weeks – they should, at the very least, be required to dismiss the case with prejudice. In addition, the Court should issue a prospective order that plaintiffs will be required to pay defendants' fees and costs for any future trial candidates that plaintiffs decide not to pursue after defendants have begun affirmative discovery.

ARGUMENT

In November 2004, plaintiffs selected Darwin Peabody as their choice for the fourth trial in this MDL proceeding. In selecting Mr. Peabody's claims, plaintiffs explained that "the 'subclinical'/ neuropsychological case should be tested in Judge O'Malley's court." (Letter from D. Barrett to J. Beisner at 1 (Nov. 17, 2004) (attached as Ex. A).) Plaintiffs further stated that Mr. Peabody was a good fit for that trial because "his doctors say that he does have 'subclinical'/ neuropsychological deficits caused from manganese in welding fumes." (*Id.*) In the words of plaintiffs' counsel Don Barrett: "these three plaintiffs – Ruth, Morgan, and Peabody – give the MDL court the opportunity to test the entire range of cases which may be brought to trial around the country." (*Id.* at 2.)

Shortly after discovery commenced, the *Peabody* case began to unravel. First, Dr. Katz, Mr. Peabody's treating physician, testified that he no longer believed Mr. Peabody had

manganism. (*See* Deposition of Dr. Kenneth Katz 25:12-14 (Mar. 7, 2006) (attached as Ex. B) (Q: "Is it fair to state that at the current time, you do not believe [Peabody] has manganese toxicity?" A: "Correct.").) Then, through fact witness interviews and follow-up investigatory work, defendants discovered that Mr. Peabody had lied about the timing of the onset of his symptoms and that he and his families members lied about a history of substance abuse that could have caused those symptoms in the first place.

Now, after the defendants have spent hundreds of thousands of dollars preparing for trial, counsel are effectively telling the Court: "Oops. Mr. Peabody's claims are not representative of the other claims in the pool after all. Let's put his case on the backburner." Clearly, plaintiffs' about-face has nothing to do with representativeness. To the contrary, the emerging pattern in this litigation suggests that *Peabody* is highly representative of the welding fume plaintiff pool:

- In the *Landry* case, defendants learned that the plaintiff had lied about his history of substance abuse and his dishonorable discharge from the army. Plaintiffs notified defendants shortly thereafter that Mr. Landry no longer wished to pursue his claims, offering the excuse that his employer could not spare him for the duration of a trial. Although defendants moved for sanctions, plaintiffs' counsel incurred no consequences for forcing defendants to expend hundreds of thousands of dollars in preparing a frivolous case for trial.
- In the *Morgan* case, defendants undertook surveillance based on several obvious inconsistencies in the plaintiff's fact sheet and medical records. That surveillance revealed Mr. Morgan doing numerous tasks that his condition allegedly precluded: walking without assistance, bending down to rake leaves, riding on his tractor and balancing several bags of groceries. Shortly after the surveillance was revealed,

plaintiffs sought to dismiss Mr. Morgan's claims. Once again, plaintiffs' counsel incurred no consequences for forcing defendants to expend hundreds of thousands of dollars in preparing a fraudulent case for trial.

Defendants fully agree with plaintiffs about the futility of trying Mr. Peabody's claims. After only minimal scrutiny of this "hand-picked" trial candidate, it has become apparent that no lawyer would want to endure the embarrassment of presenting the *Peabody* case to a jury. But plaintiffs' counsel miss the key point: as defendants have noted repeatedly, counsel should have adequately researched the validity of Mr. Peabody's claims ***before*** filing his suit, ***before*** selecting him for an early MDL trial – or, at the very least, ***before*** forcing defendants to incur tremendous expense on preparing the case for trial. Plaintiffs' suggestion that Mr. Peabody's case now be thrown back in the pool reveals that plaintiffs still believe that they can avoid having the merits of the cases in that pool subjected to scrutiny.

Just as troubling as plaintiffs' sudden assertion that Mr. Peabody's claim is not representative and should simply be tossed back into the pool is their suggestion that trying *Peabody* is no longer appropriate because they "hoped that by the time the Peabody case were tried, central issues such as general causation . . . would have been conceded by the defendants" and "contemplated . . . two plaintiff verdicts" in those cases. (Pl.'s Opp. at 3.) Taken at face value, this statement effectively says that as long as defendants are succeeding in this litigation, plaintiffs believe the Court should change the rules of the game.

It is not defendants' fault that plaintiffs' own hand-picked cases have turned out to be fraudulent, and defendants' success to date in the litigation is obviously no reason to change the trial plan. The point of a bellwether trial plan is to test cases – not to tilt the playing field. In any event, plaintiffs' complaint that *Solis* was "relatively weak" and "selected by defendants" is

nothing more than spin. (*Id.* at 2.) As the Court knows, *Solis* was chosen by ***plaintiffs*** from a seven-case pool. And the only remarkable thing about the *Solis* case is how similar it is to the vast majority of the other claims in this MDL proceeding in which the plaintiff attended a screening, was told he was sick, and then filed a complaint – but never bothered to seek follow-up medical care for his supposed condition.

In short, the steady stream of frivolous, fraudulent, or untenably weak claims in this litigation can no longer be written off as mere coincidence. The time has come to hold plaintiffs' counsel accountable for the havoc and enormous expense that they have unjustifiably imposed on the defendants and the Court.[1]

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's request to stay this case and instead enter a discovery order: (1) granting defendants the right to re-depose all of plaintiff's witnesses; (2) requiring Darwin and Melinda Peabody to turn over any and all records in their possession related to Darwin Peabody's treatment for drug and/or alcohol abuse; and (3) ordering such other and further relief as the Court may deem appropriate.

In the alternative, the Court should: (1) dismiss the *Peabody* case with prejudice; and (2) issue a prospective order that plaintiffs will be required to pay defendants' cost of discovery for

[1] As noted above, defendants have refrained from seeking sanctions in this matter so as not to divert the Court from the serious case management issues raised by the troubling pattern of fraudulent claims in this litigation. It bears noting, however, that such fees or sanctions would be appropriate in this matter given that plaintiffs' counsel clearly did not conduct an adequate pre-filing investigation of Mr. Peabody's claims, and continue to assert that those claims have merit. As the Court recognized in its Order denying defendants' sanctions motion in the *Morgan* case, an attorney has a continuing obligation under Fed. R. Civ. P. 11 to investigate the factual basis of his client's claims. *See* Order at 4 (Apr. 5, 2006) (citing *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997), *cert denied*, 522 U.S. 1046 (1998) ("[l]itigants may be sanctioned under the amended rule for continuing to insist on a position that is no longer tenable")); *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 336 (6th Cir. 1988) ("an attorney and a litigant have a continuing obligation to review and reevaluate their pleadings, motions and other papers and upon discovery that such papers are without merit, to immediately dismiss the action at the risk of inviting the imposition of Rule 11 sanctions"). In addition, sanctions under § 1927 are appropriate "when an attorney knows or reasonably should know that a claim pursued is frivolous." Order at 6 (citing *Tareco Props., Inc. v. Morris*, 321 F.3d 545, 550 (6th Cir. 2003)).

any future designated trial candidates that plaintiffs decide not to pursue.

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Respectfully submitted,

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