

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota, by its Attorney General Lori Swanson, its Commissioner of Pollution Control, John Linc Stine, and its Commissioner of Natural Resources, Tom Landwehr,
Plaintiff,

v.

3M Company,
Defendant.

Case Type: Other Civil
Civil File No. 27-CV-10-28862
Judge Kevin S. Burke

**DEFENDANT 3M COMPANY'S
RESPONSE TO PLAINTIFF'S
SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS MOTION TO
EXCLUDE EVIDENCE,
ARGUMENT, OR REFERENCE TO
INDIVIDUALS' HEALTH
(MOTION NO. 2)**

INTRODUCTION

The Supplemental Brief filed yesterday is the third brief (after its initial Memorandum and Reply) that the State has filed in support of its Motion *In Limine* To Exclude Evidence, Argument or Reference to Individuals' Health (Motion No. 2), which seeks the exclusion of any evidence, argument, or reference at trial to the fact that the State cannot identify anyone who has suffered any disease, illness, or other physical harm caused by exposure to PFCs in the State's waters. As shown in 3M's January 31, 2018 Opposition ("Opp."), the State acknowledged in its initial Memorandum (at 3) that "the present and potential hazard PFCs may pose to human health generally will be an issue at trial," and 3M is entitled to argue to the jury that the State's contention that PFCs pose a "present and potential hazard" to humans is belied by its inability to identify anyone who can be shown to have suffered physical harm as a result of exposure to 3M's PFCs. *See* Opp. at 2-4.

After full briefing, on February 7, 2018, the Court denied the State's Motion. Unhappy with the Court's decision, the State subsequently served its Third Amended Witness List on February 8, sought to argue the Motion during the hearing on February 9, and has now filed its Supplemental Brief. In its Supplemental Brief, the State essentially argues that 3M is trying "to have its cake and eat it, too" because after the Court denied the Motion, "the State proffered evidence to rebut 3M's contention" but 3M then "objected that affirmative evidence of individuals harmed by PFCs came too late and would lead to a series of mini-trials about medical causation," and "[e]ven as to individual witnesses who were disclosed in discovery, 3M suggested that evidence of individual health effects would be inappropriate because it would require evidence from doctors, medical records, and medical experts." Pl. Supp. Br. at 1-2. The State's argument does not withstand scrutiny.

First, 3M is not trying take unfair advantage here. In fact, 3M offered to meet the State more than half way with respect to the individual health effects issue. Specifically, 3M offered to agree (i) not to make any argument to the jury about the fact that the State has not produced any witnesses to demonstrate that any individual has become sick as a result of exposure to PFCs; (ii) not to introduce into evidence prior deposition testimony in which State witnesses have conceded that they cannot demonstrate that any individual has become sick as a result of exposure to PFCs; and (iii) not to seek to elicit such testimony from witnesses appearing live at trial. To be clear, 3M certainly will argue at trial that the levels of PFCs in the Minnesota environment have not made anyone sick in the past, are not making anyone sick now, and will not make anyone sick in the future. 3M expert witnesses and a significant amount of evidence, including the Minnesota Department of Health reports and statements, will make that clear. However, 3M will not attempt to bolster that argument by referring to the fact that the State has not put on evidence to establish

that any particular individuals have become sick as a result of exposure to PFCs. The State has not agreed to 3M's proposal.

Second, although the State's late disclosure of the new lay witnesses is reason enough to exclude their testimony at this juncture, the State in fact has failed—even now—to present *competent* evidence to establish that any individual has actually become sick as a result of exposure to PFCs. As discussed with the Court during the February 9, 2018 hearing, the State's earlier witness list identified two lay witnesses, Melissa Furch ("Ms. Furch") and Gary Berscheid ("Mr. Berscheid"), that the State "may call" to testify concerning "Health effects from PFC exposure." Ms. Furch's and Mr. Berscheid's declarations in this case indicated that if called, Ms. Furch (a longtime resident of Oakdale, Minnesota) and Mr. Berscheid (a former employee of 3M's at its Cottage Grove facility) would testify, or at least insinuate, that they—and others they know or have heard about—have been diagnosed with cancer and other diseases that were caused by exposure to 3M's PFCs. Based on the State's arguments during the February 9 hearing, it is clear that the six additional lay witnesses identified in the State's most recent witness list as witnesses who "may" testify concerning "Health effects from PFC exposure" are likewise present or former local residents or 3M employees who will ascribe particular health conditions to their alleged exposure to PFCs. But even on its most recent witness list, the State *still* did not disclose *any* scientific or medical expert qualified under Rule 702 to opine that any cancers or other diseases with which these lay witnesses—or their relatives, co-workers, or others they purportedly have heard about—have been diagnosed were *caused by their exposure to 3M's PFCs*. And none of the lay witnesses has *any* apparent medical training or other qualifications that would permit them to testify concerning the cause of their—or anyone else's—alleged medical conditions.

Minnesota Rule of Evidence 701 provides that if a witness “is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (c) *not based on scientific, technical, or other specialized knowledge* within the scope of Rule 702” (emphasis added).¹ And Minnesota courts have frequently rejected lay opinion testimony on medical issues requiring specialized expertise. *See, e.g., State v. Holmes*, 2013 Minn. App. Unpub. LEXIS 296, at *8 (Minn. Ct. App. Apr. 8, 2013) (trial court erred in admitting comments characterizing defendant’s mental health during 9-1-1 call because “[a]lthough [the witness’s] colloquial statement that [defendant] was ‘crazy’ may have been permissible lay opinion testimony, her comments that [defendant] was ‘bipolar’ and ‘schizophrenic’ relate to medical conditions, for which the state laid no foundational basis, nor did the state demonstrate [the witness’s] qualifications as an expert”); *Marose v. Hennameyer*, 347 N.W.2d 509, 511 (Minn. Ct. App. 1984) (“As a lay person, Marose is not qualified to give her opinion on need for medical care”); *Benson v. Johnson*, 392 N.W.2d 890, 897 (Minn. Ct. App. 1986) (same) (citing *Marose*); *State v. Sorgine*, 2008 Minn. App. Unpub. LEXIS 200, at *7-8 (Minn. Ct. App. Feb. 26, 2008) (district court permitted lay witness to describe his symptoms, but did not err in precluding defendant from testifying that his symptoms “were the symptoms of a particular disease”) (citing *Marose*).

Moreover, courts around the country have repeatedly excluded lay opinion testimony about the putative cause of a party’s disease. *See, e.g., Schutter v. Wyeth, Inc.*, 2011 U.S. Dist. LEXIS 110764, at *9-10 (N.D. Ill. Sept. 28, 2011) (“The questions posed in this case about

¹ As the official commentary to Rule 701 explains, “Rule 701(c) comes from the 2000 amendment to the Federal Rules of Evidence,” and “[p]arties should not avoid the foundational requirements of Rule 702 and the pre-trial disclosure requirements of Minn. R. Civ. P. 26.01(b) ... by introducing testimony based on scientific, technical, or specialized knowledge under this rule.” Rule 701, Committee Comment – 2016.

whether HRT [hormone replacement therapy] causes breast cancer call for answers based upon ‘scientific, technical, or specialized knowledge’ not possessed by a lay witness.”); *In re Welding Fume Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 146067, at *436-37 (N.D. Ohio June 4, 2010) (“lay witnesses [were] not qualified to opine regarding whether another welder has a disease, or what may have caused that disease”).²

Under Rule 401, evidence is relevant only if it has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Because there is no *competent* evidence to establish that their (or anyone else’s) alleged medical conditions were *caused* by exposure to 3M PFCs, even putting aside the issue of whether they were timely disclosed, the testimony of the State’s identified lay witnesses would have no relevance to the issue as to which the State’s witness list says it would call them: to establish “Health effects *from* PFC exposure.”³

² See also, e.g., *Harrison v. Binnion*, 214 P.3d 631, 637 (Idaho 2009) (“We have previously held that a lay person was not qualified to give an opinion about the cause of a medical condition or disease.”) (citation omitted); *In re Asbestos Pers. Injury Litig.*, 2013 W.V. Cir. LEXIS 6203, at *2-3 (Cir. Ct. Kanawha Cty. Jan. 21, 2013) (“[Defendant] anticipates that Plaintiff may attempt to present opinion testimony of certain lay witnesses or from non-medical experts on the cause of Decedent’s medical conditions and/or death ... Such evidence is inadmissible because non-medical and lay witnesses are not qualified to give medical causation opinions”); *Morphrew v. Morphrew*, 419 N.E.2d 770, 777 (Ind. App. 1981) (“[w]ith regard to diagnosis, causes and effects of disease, and other matters of medical science, skill, and practice, knowledge of which is confined to those trained for the profession, opinions of lay or nonexpert witnesses are not competent evidence ...”) (quoting 31 Am. Jur.2d Expert and Opinion Evidence § 95 (1967) and collecting cases); *Dotson v. Royal Indem. Co.*, 427 S.W.2d 150, 154 (Tex. Civ. App. 1968) (“[T]here are some subjects about which it is only the opinions of experts that have any value as evidence ... It cannot be doubted that diagnosis of the disease of poliomyelitis and the question of its cause are such subjects.”) (citation omitted).

³ Moreover, as the Minnesota Supreme Court has explained, unfair prejudice is “the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means,” *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985), and “includes an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one,” *State v. Bott*, 246 N.W.2d 48, 53 n.3 (Minn. 1976). Here, the whole thrust of the lay witnesses’ testimony about “health effects” would be to appeal to the jury’s emotions and thus to persuade the jury “by illegitimate means” that 3M’s PFCs are hazardous. As discussed in the text, there is no competent evidence to establish a causal connection between 3M’s PFCs and any diseases or health conditions with which any of the lay witnesses may have been diagnosed. The only reason for the State to call any of them to testify would be to impermissibly *suggest*

Moreover, although it is clearly improper to allow lay witnesses to offer such testimony, if the issue of individual health effects that the State wants to introduce through the lay witnesses were appropriate, extensive additional discovery would become necessary. For example, 3M would be entitled to production of medical records, the depositions of the lay witnesses and their treating physicians, and discovery concerning possible confounding factors. 3M would also be entitled to an opportunity to retain its own medical experts.

In short, the State's argument that exclusion of the lay witnesses gives 3M an unfair advantage and somehow provides a basis for the Court to reconsider its prior denial of the State's Motion in Limine No. 2 is a red herring because the State *still* has not come forward with *competent* evidence to establish that any of the lay witnesses (or any other individual) suffered health effects as a result of exposure to 3M's PFCs.

CONCLUSION

For the foregoing reasons and the reasons set forth in 3M's Opposition, the Court should adhere to its prior ruling denying the State's Motion in Limine No. 2.

such a connection and to cause the jury to decide issues "on an improper basis." *Bott*, 246 N.W.2d at 53 n.3.

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Respectfully submitted,

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