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Pa. Judge Expands Earlier Order Allowing Benzene Defendants Access to Tissue Samples

PHILADELPHIA — A Pennsylvania state court has granted a defense motion to substitute colon and bowel tissue samples for appendix tissue the defendants had previously requested — and received — access to in order to conduct genetic testing.

Sources told HarrisMartin that Judge Jacqueline F. Allen of the Pennsylvania Court of Common Pleas for Philadelphia County granted the motion on Dec. 17.

In a Dec. 4 motion, several defendants had asked Judge Allen to expand her original order to include testing on bowel and colon tissue samples. Judge Allen's original order allowed defendants to access tissue samples after the defendants had argued that testing on the samples would aid the parties in determining causation in the case.

In the order, the judge stated that the plaintiffs could attend the testing, sources added.

In bringing the lawsuit, the plaintiffs said that Andre Harvey developed acute myelogenous leukemia as a result of exposure to benzene-containing products while working as a laborer and boilermaker in refineries.

However, according to the defendants, a known causal factor in AML development is familial or genetic predisposition.

In August, the defendants moved for testing of inanimate tissue, saying that the decedent's physical and medical condition was in controversy and such testing on Harvey's DNA "may contain discoverable information that would shed light on the issue of causation in this case."

The defendants also sought permission to obtain preserved, inanimate appendix tissue that had previously been removed from the decedent and is currently in the possession of the Hospital of the University of Pennsylvania.

In addition to the motion, the defendants filed affidavits from Len van Zyl, Ph.D., John B. Sullivan Jr., M.D., and Emanuel Rubin, M.D. In the affidavits, the doctors testify that "testing based upon generally accepted and widely used genetic testing methodologies such as are commonly used in hospitals and cancer centers across the United States can be used to conduct genetic testing to determine whether Decedent's DNA contains genetic markers associated with the development of familial or genetically inherited AML."

"This testing," the motion explained, "would address the issue of causation, which is a central issue in this case."

The defendants further proposed that the genetic testing be completed by ArrayXpress Inc., a research company in North Carolina that “conducts genetic research using state of the art technology including DNA and RNA sequencing.”

However, according to the defendants, when the appendix tissue was secured, it was infiltrated with myeloid sarcoma cancer cells.

“...[A]s a result of which DNA could not be obtained from the appendix tissue and genetic testing thereon as previously approved by this Court could not be conducted,” the defendants explained.

Other preserved, inanimate, tissue -- from a colon biopsy, a small bowel and colon biopsy and cerebrospinal fluid -- has been found to be the possession of Thomas Jefferson University Hospital, the defendants said.

“As was the case with the Plaintiff’s Decedent’s appendix tissue ... the proposed genetic testing on the above-referenced colon, small bowel and colon biopsy tissue would only involve preserved, inanimate tissue and the destructive testing of minute, micron-sized pieces of tissue,” the recent motion stated. “The overwhelming bulk of the preserved inanimate tissue would be preserved, and would be returned to Thomas Jefferson University Hospital for continued preservation or further study.”

The defendants are represented by Richard C. Biedrzycki, Jeffrey L. Pettit and Chad D. Mountain of McElroy, Deutsch, Mulvaney & Carpenter LLP; and Howard E. Jarvis of Woolf, McClane, Bright, Allen & Carpenter.

Harvey v. Valero Energy Corp., et al., December Term, 2012, No. 002471 (Pa. Ct. Comm. Pls., Philadelphia Cty.).

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