

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LILLIAN THOMPSON HOLMES,)
)
 Plaintiff,)
)
vs.)
)
J.M. PRODUCTS, INC., and)
U.S. CAN COMPANY,)
)
 Defendants.)

No. 03-2190BV

ORDER GRANTING MOTION OF UNITED STATES CAN COMPANY TO ALLOW
TESTING OF THE PRODUCT IN QUESTION

Before the court is the motion of the defendant, U.S. Can Company ("U.S. Can"), filed November 4, 2004, for an order allowing U.S. Can to conduct pressurized leak testing of the can in question in this lawsuit, an Isoplus Oil Sheen Hair Spray can. The motion was referred to the United States Magistrate Judge for determination. An evidentiary hearing was held on the motion on January 4, 2005. Present at the hearing were Bryan Smith and David McLaughlin, attorneys for the plaintiff; Kent Krause, attorney for the defendant J.M Products, Inc.; and Larry White and DeWitt Shy, attorneys for the defendant U.S. Can. For the reasons stated on the record at the hearing and for the following reasons, the motion is granted.

PROCEDURAL BACKGROUND

This is a products liability action in which the plaintiff, Holmes, seeks damages for second and third degree burns to her legs sustained in a fire which erupted on April 21, 2002, in the bathroom in the vanity under the sink. Holmes alleges that the flammable contents of can of Isoplus Oil Sheen Hair Spray leaked and ignited causing the fire. The hair spray was manufactured by the defendant J.M. Products. The defendant U.S. Can manufactured and supplied the can for the hair product, and Summit Packaging Systems supplied the aerosol valve assembly.

Holmes filed her original complaint on March 28, 2003, naming J.M. Products as the only defendant. She amended her complaint on June 17, 2003, adding both U.S. Can and Summit Packaging Systems as additional defendants. The amended complaint alleged that "the valve on the Isoplus product remained open through no fault of Holmes and allowed the contents to escape into the bathroom vanity." (Am. Comp. at ¶38.) It further alleged in general terms that U.S. Can was negligent in the design of the can, the use of propellants, the manufacturing of the can, and the assembly of the can. (Am. Compl. at ¶¶ 39, 40, 41, and 42.)

The original scheduling order entered in this case established the plaintiff's expert disclosure deadline as January 19, 2004, the defendants' expert disclosure deadline as March 13, 2004, a

supplementation deadline of April 26, 2004, and a discovery cutoff of June 30, 2004, with a jury trial on November 15, 2004. Reportedly, the plaintiff initially had difficulty procuring the can in issue from fire investigators retained by Holmes' insurance carrier. It appears, however, that by January of 2004, the can in question was in the possession of the plaintiff and examined by plaintiff's expert Donald J. Hoffman. After conducting an x-ray examination of the can, the plaintiff's expert Hoffman found no visible leaks. Defendant Summit filed its expert disclosures by the March 13, 2004 deadline, then moved for summary judgment on March 17, 2004. On March 24, 2004, the parties engaged in mediation in Memphis, Tennessee but were unable to reach an agreement.

Thereafter, the plaintiff sought an amendment of the Rule 16(b) scheduling order to allow additional time for the parties to supplement their expert witness disclosures. As grounds for her request, the plaintiff stated to the court that her expert Hoffman and her newly retained expert, G. L. Rhoades, needed "additional time to complete their investigation of the valve and valve/can assembly, including all aspects as to the location of the product leak and failure of the Isoplus can . . . [and] to establish protocol for and conduct destructive testing of the defective product." (Pl.'s Mem. in Supp. of Pl.'s Mot. to Amend the Rule

16(b) Scheduling Order at 3-4.) Holmes pointed out that she had been unable to identify the specific cause and mechanisms of the product leak because the defendant J.M. Products had refused to agree to destructive testing. The supplementation of experts was extended to May 31, 2004, then again to June 30, 2004. It was contemplated that all the parties' experts would attend the testing.

On May 28, 2004, the plaintiff filed supplemental Rule 26 expert disclosures in which she designated as experts two previously undisclosed expert witnesses, Edward P. Cox of EPC Engineering and Gilbert L. Rhoades of Rhoades Company. The two newly designated experts advanced new theories as to the cause of the fire. Specifically, Cox concluded that there was an internal weld defect on the vertical seam of the can and that the leak from the vertical seam caused flammable hydrocarbons to escape from the can which were then ignited by a light switch on the wall in the bathroom.

In light of the newly designated experts and new opinions advanced, the defendants sought and were granted additional time through August 6, 2004, to supplement their expert witness disclosures. The dispositive motion deadline was extended to September 17, 2004.

The aerosal can in question was provided to U.S. Can for

review and examination on June 29, 2004. U.S. Can then sought, on July 29, 2004, by way of motion, permission to clean the weld seam of rust and organic material in order to conduct for testing to determine if a hole or leak did exist as opined by the plaintiff's expert. The plaintiff and her attorneys had refused to agree to the request. U.S. Can's expert conducted a visual examination of the can with and without the aid of a microscope. The can was then provided to J.M. Products for review and inspection on August 4, 2004, pursuant to court order. Upon receipt, J.M. Products noted that the debris had already been removed from the weld seam of the can despite the pending motion for further testing. The parties agreed that the motion of U.S. Can for further testing should be held in abeyance pending further discovery to investigate the alteration of the can by the removal of the organic debris.

While the can was in the possession of J.M. Products, its expert, Montfort Johnson, immersed the can for five minutes in warm water. No gas bubbles were detected which essentially indicated no leaking. A pressure gauge was connected to the can and showed no pressure.

At a status conference before District Judge J. Daniel Breen on September 8, 2004, the original trial date was continued and reset to May 23, 2005. The discovery deadline was extended to November 19, 2004, and December 30, 2004 was established as the

deadline for filing *Daubert* motions.

On November 4, 2004, prior to the expiration of the discovery deadline, the defendant U.S. Can filed the instant motion to allow pressurized leak testing of the Isoplus can in accordance with a seven step protocol proposed by its expert, John Blum, Ph.D. U.S. Can's proposed testing in essence consists of adding 25ml of liquid A-46 propellant to the can through the valve to create pressure and then immersing the can in room temperature water for one hour in order to determine if any gas bubbles leak out. The propellant is the same type that was originally added to the can by J.M. Products during the manufacturing process of the hair product. The defendant J.M. Products opposed the testing because it might result in delay of trial. The plaintiff opposed the testing on the grounds that (1) the test lacks scientific validity; (2) the testing will cause destruction of the evidence; (3) the request is untimely; and (4) the proposed testing is duplicative. In the event the court grants further testing, the plaintiff, in the alternative, has proposed extensive testing of the can including progressively pressurizing the can to high extremes, immersing the can in a hot solvent, and ultimately slicing up the can and conducting metallurgical microanalysis of the pieces of the weld seam of the can. In addition, if the court grants U.S. Can's motion for testing, the plaintiff asks the court to impose the

costs of additional testing on U.S. Can.

Rule 34 of the Federal Rules of Civil Procedure provides for the pretrial testing of tangible items as part of discovery. The decision whether to allow testing, including destructive testing, falls within the sound discretion of the court. *Ostrander v. Cone Mills, Inc.*, 119 F.R. D. 417, 418 (D. Minn. 1988) (allowing partially destructive testing of garment samples from nightwear worn by toddler which caught fire). See also *Dabney v. Montgomery Ward & Co.*, 761 F.2d 494, 498 (8th Cir. 1984)(denying request for destructive testing of product in question in products liability action because request not timely made). In determining whether to permit destructive testing, "[t]he court is required to balance the interests to be served by destructive testing against the value of preservation of the evidence on behalf of the opposing party." *Ostrander*, 119 F.R.D. at 419.

After listening to the testimony of U.S. Can's expert, John Blum, Ph.D., and the testimony of Edward Cox, Ph.D., the plaintiff's expert, and statements of counsel, and from the record as a whole, the court finds the request for testing is not untimely nor duplicative, the testing will not unduly delay the trial, the testing will not result in complete destruction of the can, and the test protocol proposed by U.S. Can appears to be scientifically valid and should be followed. Here, the request for additional

destructive testing was made by U.S. Can as early as July 29, 2004. The request was held in abeyance upon consent of the parties, then U.S. Can requested additional testing in early November 2004, before the expiration of the extended discovery completion date. U.S. Can's proposed testing will not unduly delay the trial. U.S. Can's proposed immersion testing is not duplicative of the earlier immersion test conducted by J.M. Products. U.S. Can's proposed immersion test includes pressurizing the can while J.M. Products' immersion test was conducted with no pressure in the can.

Both U.S. Can's proposed leak testing and the first stage of plaintiff's proposed testing (Steps 1-8) are nearly identical, would not materially alter the can or compromise its integrity, and would result in minimal destruction of evidence, if any. The only possible destruction is that the existing dent in the can could be forced out by the addition of pressure and any remaining microscopic portion of organic debris on the outside of the can may be washed off. These two possible alterations would not necessarily impair the plaintiff's presentation of evidence to the jury at trial. The dent has already been extensively photographed and any remaining organic material is not visible to the naked eye. In addition, the plaintiff has not demonstrated that it could test any remaining organic material without more extensive destructive testing. The question of whether the can leaked or has a leak is

a critical issue in this case. The test proposed by U.S. Can may indicate whether further, destructive testing is needed and may also moot any issues regarding spoliation of evidence.

Accordingly, it is ordered:

1. Defendant U.S. Can's motion to conduct a water immersion pressurized leak test of the Isoplus can is granted.

2. Testing shall occur at the earliest possible opportunity at an independent lab to be selected by U.S. Can on a date and at a time mutually convenient to counsel and experts of all the parties. All parties, counsel, and retained experts may be present for the testing, and U.S. Can shall videotape the entire testing.

3. The testing which is the subject of this motion shall be completed on or before January 31, 2004. All experts and counsel will use their best efforts to agree on a date and time and make themselves available.

4. The following test protocol proposed by U.S. Can shall be followed:

Step 1. Remove actuator button and reserve.

Step 2. Weigh can to the nearest .001 gram, record.

Step 3. Pressurize container with A-46 liquified gas propellant, 25 ml liquid, inserted through the valve. Weigh can, record.

Step 4. Verify that can is pressurized with pressure gauge through the valve, record pressure, and weigh can.

Step 5. Immerse container in room temperature water bath with side seam facing up, for 5 minutes or until leakage site is identified, if less than 5 minutes.

Step 6. Observe container for leakage and note location, if present. Approximate leakage in bubbles/min. Capture volume if possible, displacement.

Step 7. If leakage is noted, dry can and record weigh every ten minutes for one hour.

5. U.S. Can shall bear the cost of the testing and the videotaping.

6. The plaintiff's proposed protocol for destructive testing is denied at this time, without prejudice to refileing if no leakage occurs during U.S. Can's leak testing.

IT IS SO ORDERED this 7th day of January, 2005.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE