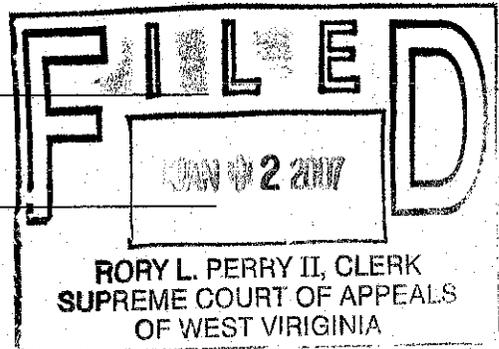


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33179



GARY JENKINS

Plaintiff Below, Appellant

vs.

CSX TRANSPORTATION, INC.

Defendant Below, Appellee

Appeal from the Circuit Court of Ohio County
The Honorable Arthur M. Recht, Judge
Civil Action No.: 01-C-0145

BRIEF OF APPELLANT

Robert F. Daley, Esquire
Sharon A. Gould, Esquire
Robert Peirce & Associates, P.C.
2500 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219-1918

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES:

 CASES: ii

 STATUTES..... iv

BRIEF:

I. LOWER COURT PROCEEDING AND NATURE OF RULING 1

II. STATEMENT OF THE FACTS OF THE CASE..... 2

III. ASSIGNMENTS OF ERROR 6

IV. POINTS AND AUTHORITIES 6

 A. The Sanction Imposed by the Court in Striking the Testimony of Dr. Ducatman Was Excessive and an Abuse of Discretion 7

 B. Dr. Ducatman’s Testimony Regarding Causation Was Sufficient 13

 C. Dr. Phifer’s Testimony with Regard to Causation Should Have Been Permitted to Stand in Support of the Claim..... 18

 D. Dr. Phifer’s Testimony in Conjunction with Dr. Ducatman’s Testimony Was Sufficient..... 23

V. PRAYER FOR RELIEF 25

TABLE OF AUTHORITIES

CASES:

<u>Adamson v. Chiovaro,</u> 705 A.2d 402, 405-406 (N.J.Super.App.Div. 1998).....	19
<u>Akers v. Cabell Huntington Hosp., Inc.,</u> 215 W.Va. 346, 599 S.E.2d 769 (2004).....	21, 22
<u>Anderson v. Kunduru,</u> 215 W.Va. 484, 600 S.E.2d 196 (2004).....	6, 9, 10, 11, 12
<u>Bailey v. Central Vermont Ry., Inc.,</u> 319 U.S. 350 (1943).....	14
<u>Bartles v. Hinkle,</u> 196 W.Va. 381, 472 S.E.2d 827 (1996).....	10
<u>Boldt v. Jostens, Inc.,</u> 261 N.W. 2d 92, 94 (Minn. 1977).....	16
<u>Cunningham v. Montgomery,</u> 921 P.2d 1355 (Or. 1996)	19
<u>Dolen v. St. Mary's Hosp. of Huntington, Inc.,</u> 203 W.Va. 181, 185, 506 S.E.2d 624, 628 (1998).....	7, 19, 20, 21
<u>Fabianke v. Weaver ex rel. Weaver,</u> 527 So. 2d 1253, 1257 (Ala.1988).....	19
<u>Gentry v. Mangum,</u> 195 W.Va. 512, 466 S.E.2d 171 (1995).....	20
<u>Gowins v. Pennsylvania Railroad Company,</u> 299 F.2d 431, 433 (6th Cir.), cert. denied, 371 U.S. 824 (1962)	14
<u>Graham v. Wallace,</u> 214 W.Va. 178, 185, 588 S.E.2d 167, 174 (2003).....	8
<u>Green v. River Terminal Ry. Co.,</u> 763 F2d. 805, 806 (6th Cir. 1984)	14

<u>Huntoon v. TCI Cablevision of Colorado, Inc.</u> , 969 P.2d 681, 690 (Colo. 1998).....	19
<u>Hutchison v. American Family Mut. Ins. Co.</u> , 514 N.W.2d 882, 886 (Iowa 1994)	19
<u>Insurance Co. of North America v. Myers</u> , 411 S.W.2d 710, 713 (Tex. 1966).....	16
<u>Jordan v. Bero</u> , 158 W.Va. 28, 210 S.E.2d 618 (1974).....	17
<u>Landers v. Chrysler Corp.</u> , 963 S.W.2d 275, 280 (Mo. Ct. App. 1997).....	19
<u>Lavender v. Kurn</u> , 327 U.S. 645, 653 (1946).....	14
<u>Lipscomb v. Tucker County Comm'n</u> , 206 W. Va. 627, 630, 527 S.E.2d 171, 174 (1999).....	9
<u>Madrid v. University of California</u> , 105 N.M. 715, 718, 737 P.2d 74, 77 (1987).....	19
<u>McDougal v. McCammon</u> , 193 W.Va. 229, 238, 455 S.E.2d 788, 797 (W.Va. 1995)	13
<u>Overton v. Fields</u> , 145 W.Va. 797, 117 S.E.2d 598 (1960).....	7
<u>Pygman v. Helton</u> , 148 W.Va. 281, 134 S.E. 2d 707 (1964).....	16
<u>Rogers v. Missouri Pacific R. Co.</u> , 352 U.S. 500 (1957).....	14, 24
<u>Sanchez v. Derby</u> , 433 N.W.2d 523, 525-26 (Neb. 1989)	19
<u>Seneca Falls Greenhouse & Nursery v. Layton</u> , 389 S.E.2d 184 (Va. Ct. App. 1990).....	19
<u>Sexton v. Grieco</u> , 216 W. Va. 714, 613 S.E. 2d 81 (2005).....	16, 17

<u>Sharon B.W. v. George B.W.,</u> 203 W.Va. 300, 507 S.E.2d 401 (1998).....	23
<u>Shilling v. Mobile Analytical Servs., Inc.,</u> 602 N.E.2d 1154 (Ohio 1992).....	19
<u>Sowards v. Chesapeake & Ohio Ry. Co.,</u> 580 F.2d 713, 714 (4th Cir. 1978)	14
<u>Tracy v. Cottrell ex rel. Cottrell,</u> 206 W.Va. 363, 383, 524 S.E.2d 879, 899 (1999).....	21
<u>United States v. Riggleman</u> 411 F.2d 1190 (4th Cir.1969)	21
<u>Valiulis v. Scheffels,</u> 547 N.E.2d 1289, 1296-1297 (Ill.App. 1989).....	19
<u>Weider v. Senebouthyrath,</u> 182 A.D.2d 1124, 589 N.Y.S.2d 94, 94 (N.Y. App. Div. 1992)	19
<u>Wilkerson v. McCarthy,</u> 336 U.S. 53 (1949).....	14

STATUTES:

Federal Employer’s Liability Act (FELA), 45 U.S.C. § 51 <i>et seq</i>	1
W.Va. Code §16-30-7	22

OTHER AUTHORITIES:

I. LOWER COURT PROCEEDINGS AND NATURE OF RULING

The Appellant, Mr. Jenkins initiated this action on August 19, 2002 at Civil Action No. 02-C-317, pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et seq.* See generally, Plaintiff's Complaint, ("Record Item No. 1"). On March 1, 2004, Mr. Jenkins disclosed to CSX, the Appellee, that he intended to use Dr. Alan Ducatman and Dr. James Phifer as experts in his case. See Plaintiff's Disclosure dated March 1, 2004 ("Record Item No. 3"). This case was then consolidated at Civil Action No. 01-C-145, pursuant to an Agreed Order. See Order dated June 9, 2004 ("Record Item No. 4").

CSX took the deposition of Dr. Phifer on September 7, 2004. Then, on November 19, 2004, CSX took Dr. Ducatman's deposition. See Transcript of Alan M. Ducatman, M.D. ("Record Item No. 8"). During this deposition, Dr. Ducatman did not have Dr. Phifer's neuropsychological report with him, so CSX counsel concluded the deposition by reserving the right to reopen the deposition following Dr. Ducatman's review of Dr. Phifer's report. See Record Item No. 8 at 39:7-9. However, at no time following Dr. Ducatman's deposition did CSX ask to reconvene in order to continue the line of questioning regarding Dr. Phifer's report.

At trial, on June 16, 2005, the Circuit Court ruled that Dr. Ducatman was not permitted to rely on the neuropsychological testing results of Dr. Phifer. See Transcript Volume 1 of Jury Trial ("Record Item No. 9") at 682:12-18. Consequently, the Court struck the testimony of Dr. Ducatman as related to Mr. Jenkins, determining that the opinion testimony as given by Dr. Ducatman, without the benefit of the neuropsychological testing results, was not sufficient to support the cause of action. See Record Item No. 9 at 720:15-20. Thereafter, the court took testimony with regard to causation from Dr. Phifer, a board-certified neuropsychologist, and determined that Dr. Phifer's testimony was not sufficient to satisfy the plaintiff's burden to show

causation because Dr. Phifer, not being a medical doctor, was deemed by the judge to be unable to issue an opinion on causation. *See* Record Item No. 9 at 826:13-16. The Court then dismissed Mr. Jenkins' case by oral order from the bench on June 16, 2005. Mr. Jenkins filed a timely Motion for a New Trial on June 24, 2005. Oral argument on the Motion was heard January 6, 2006 and a Final Order was entered on February 17, 2006, denying the Motion. *See* Order dated February 17, 2006 ("Record Item No. 12").

II. STATEMENT OF THE FACTS OF THE CASE

Mr. Jenkins' case was filed under the FELA, claiming damages as a result of brain injury caused by exposure to solvents. This case is one of approximately one hundred (100) cases that were combined under one caption. Mr. Jenkins' case, which was consolidated with two others for trial purposes, was actually the fourth case under the consolidated caption to go to trial. Counsel for both parties had been harmoniously working together for at least eight years in an effort to litigate cases, such as these solvent-related brain injuries, as efficiently as possible. In keeping with this cooperative spirit, plaintiffs' counsel has never withheld an expert from deposition or follow-up deposition.

Mr. Jenkins' claim is based on a medical condition commonly referred to as "toxic encephalopathy." According to the National Institute of Neurological Disorders and Stroke Encephalopathy, part of the National Institutes of Health:

Encephalopathy is a term for any diffuse disease of the brain that alters brain function or structure. Encephalopathy may be caused by ... prolonged exposure to toxic elements (including solvents, drugs, radiation, paints, industrial chemicals, and certain metals) The hallmark of encephalopathy is an altered mental state. Depending on the type and severity of encephalopathy, common neurological symptoms are progressive loss of memory and cognitive ability, subtle personality changes, inability to concentrate, lethargy, and progressive loss of consciousness.

See National Institute of Neurological Disorders and Stroke Encephalopathy Information Page, at <http://www.ninds.nih.gov/disorders/encephalopathy/encephalopathy.htm>. Due to the unique interaction of medical and psychological factors involved in the condition, a medical doctor may wish to consider the opinion of a neuropsychologist¹ when evaluating a patient who may have the disease.

Mr. Jenkins' claim was supported by the expert testimony of both Dr. Alan Ducatman, a medical doctor, and Dr. James Phifer, a neuropsychologist, as disclosed in the Plaintiff's original Disclosure of Expert Witnesses filed pursuant to Rule 26. This Rule 26 Disclosure also made it clear that Dr. Ducatman would be relying on any and all medical records made available to him, which certainly would have included Dr. Phifer's report. See Record Item No. 3. The deposition of Dr. Ducatman took place on November 19, 2004, and was to involve, in part, questioning on Dr. Ducatman's reliance on Dr. Phifer's expert report. See generally, Record Item No. 8. In previous solvent cases, counsel for CSX had taken the discovery deposition of Dr. Ducatman, and in each instance the portion regarding the doctor's review and reliance upon the neuropsychological testing had lasted no more than five minutes. But at the time of the November 19, 2004 deposition in Mr. Jenkins' case, Dr. Ducatman had misplaced the neuropsychological report of Dr. Phifer and was therefore unable to comment on it. See Record Item No. 8 at 32:21 – 33:1. Counsel for CSX therefore reserved the right to conduct a follow-up deposition of Dr. Ducatman following his review of Dr. Phifer's report. See Record Item No. 8 at 39:3-9. In response, counsel for Mr. Jenkins did not object to a follow-up deposition, and instead

1. A neuropsychologist is a psychologist with specialized training in the evaluation of cognitive functions. Neuropsychologists use a battery of standardized tests to assess specific cognitive functions and identify areas of cognitive impairment.

made a statement to the effect that she had previously sent the report to Dr. Ducatman, but would look for another copy for him to review. *See* Record Item No. 8 at 39:10-12.

Following this deposition, Dr. Ducatman finally had another opportunity to review Dr. Phifer's report. However, counsel for Mr. Jenkins did not notify CSX of this, reasoning that CSX had clearly been put on notice (through both the Rule 26 Disclosure and the deposition) that Dr. Ducatman would be relying on Dr. Phifer's report. *See* Record Item No. 3; *and* Record Item No. 8 at 39:3-9. Despite this knowledge and notice, CSX did not file a motion *in limine* to preclude Dr. Ducatman's testimony at trial regarding Mr. Jenkins' condition due to the fact that no supplemental disclosure had ever been made by the plaintiff's counsel.

After the trial had commenced, Dr. Ducatman was allowed to testify with regard to the general science involving the connection between exposure to solvents and injuries of the brain. *See* Record Item No. 9 at 630-71. He then proceeded to address Mr. Jenkins' specific injuries, when CSX interrupted the questioning by objecting that it had not been given the opportunity to depose him following his review of Dr. Phifer's report. *See* Record Item No. 9 at 671:15 – 689:6. The Circuit Court responded by sustaining the objection, stating that it was the Plaintiff's duty under Rule 26 to file a supplemental disclosure or otherwise notify the Defendant that the doctor had reviewed the report and was now available for deposition. This ruling resulted in a situation where Dr. Ducatman was allowed to continue his testimony on Mr. Jenkins' injuries, but only to the extent that he could form an opinion on his own, without any reference to Dr. Phifer's neuropsychological report. *See* Record Item No. 9 at 682:12 – 687:5. In making this decision, Judge Recht stated:

If this was going to be month, month and a half trial, and we were able to do, I would – quite frankly, what I would do is have you redepose Dr. Ducatman at a time convenient to everybody so we can – and I've done that many times during a

trial. But they're lengthy trials. We cannot – I just – we don't have the time to do that now, and that's unfortunate.

See Record Item No. 9 at 688:14-21.

Following this ruling, and in keeping with the restrictions imposed on his testimony, Dr. Ducatman testified: "At the time I saw Mr. Jenkins, I was convinced he had a memory problem. I was convinced he had very substantial solvent exposure, and I was convinced he did not have other important risk factors other than the solvent exposure." *See* Record Item No. 9 at 700:22 – 701:2. On cross-examination, the doctor admitted that without the benefit of the neuropsychological information he was unable to "diagnose" the plaintiff with memory loss caused by exposure to solvents at the railroad. *See* Record Item No. 9 at 709:16-18. The Circuit Court then instructed the jury to disregard Dr. Ducatman's testimony as it related to Mr. Jenkins because Dr. Ducatman "did not diagnose a causal relationship between Mr. Jenkins' exposure and any memory problem." *See* Record Item No. 9 at 721:14-18.

The Circuit Court then heard the testimony of Dr. Phifer. Dr. Phifer was qualified before the jury as an expert in the area of clinical and forensic neuropsychology with the understanding that his training in neuroanatomy is a component of that particular expertise. *See* Record Item No. 9 at 803:11-18. In addition to his numerous other qualifications as evidenced on his curriculum vitae attached to the initial Disclosure of Experts and admitted as an exhibit at the trial, Dr. Phifer has been certified as an expert in the area of brain injury. *See* Record Item No. 9 at 798:2 – 806:1. Dr. Phifer proceeded to give testimony with regard to general causation and solvent injuries to the brain. *See* Record Item No. 9 at 804:4 – 807:22. Thereafter, the Court excused the jury and heard additional testimony from Dr. Phifer with regard to Mr. Jenkins specifically. *See* Record Item No. 9 at 811:10 – 823:13. Dr. Phifer clearly opined within a reasonable degree of neuropsychological certainty or probability that Mr. Jenkins' deficits were

consistent with toxic encephalopathy as a result of his exposures at the railroad. *See* Record Item No. 9 at 812:20 – 813:10; 819:3:11. He explained the basis for his opinions in detail and how there were no other explanations for Mr. Jenkins' injuries other than his exposure to solvents. *See* Record Item No. 9 at 817:6-18. After hearing this testimony from Dr. Phifer, the Circuit Court determined that the opinions of Dr. Phifer were not sufficient to support causation, especially in light of Dr. Ducatman's testimony regarding the inability to diagnose. *See* Record Item No. 9 at 823:15 – 827:17.

The Plaintiff had no additional testimony with regard to the issue of causation. The Defendant therefore made a motion to dismiss the case as being unsupported by sufficient evidence of causation. This Circuit Court granted that motion. *See* Record Item No. 9 at 826:15-16.

III. ASSIGNMENTS OF ERROR

1. The Circuit Court abused its discretion by not allowing Dr. Ducatman to testify regarding his review of Dr. Phifer's records in light of all the circumstances.

2. The Court abused its discretion by determining that Dr. Ducatman's testimony was not sufficient to permit the case to go to the jury on the issue of causation.

3. The Court abused its discretion by determining that Dr. Phifer's opinions within a reasonable degree of neuropsychological certainty on the issue of causation was not sufficient to permit the case to go to the jury.

IV. POINTS AND AUTHORITIES

With regard to the Supreme Court of West Virginia's review of the proceedings below, as a general rule, the imposition of a sanction by a circuit court is reviewed for an abuse of discretion. *Anderson v. Kunduru*, 215 W.Va. 484, 600 S.E.2d 196 (2004). Additionally, whether

a witness is qualified to state an opinion is a “matter which rests within the discretion of the trial court”. Syllabus Pt. 5, *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960). Finally, this Court has stated that “where the granting of summary judgment is dependent on the exclusion of expert testimony ... our review must be more stringent.” *Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 203 W.Va. 181, 185, 506 S.E.2d 624, 628 (1998). And although Mr. Jenkins’ case was not dismissed based upon a motion for summary judgment, the rationale for a more stringent review remains the same because expert testimony was excluded; therefore, a more stringent review than applied in other post-trial motions should be applied in this case.

A. The Sanction Imposed by the Court in Striking the Testimony of Dr. Ducatman Was Excessive and an Abuse of Discretion.

At the outset, counsel for Mr. Jenkins freely recognizes that, according to the letter of Rule 26, a supplementary disclosure should have been issued to CSX as an official notification of Dr. Ducatman’s review of the neuropsychological report. And because no such disclosure ever occurred, Mr. Jenkins was not compliant with Rule 26. Counsel does not argue that the requirement of such a disclosure was nullified by CSX’s prior knowledge that Dr. Ducatman would be relying on Dr. Phifer’s report. However, CSX’s knowledge of Dr. Ducatman’s reliance exemplifies the fact that this failure to disclose was not an intentional, calculated, and egregious violation, as CSX would have this Court believe. Rather, even though Mr. Jenkins’ counsel mistakenly failed to comply with the letter of the law, the circumstances surrounding this situation show that the spirit of the law was clearly fulfilled. And therefore, the Circuit Court should have acted with moderation in penalizing Mr. Jenkins, rather than using the most stringent sanction possible—exclusion of his main witness, which effectively destroyed his entire case.

The purpose of a Rule 26 disclosure is to put the opposing party on notice of the substance of the testimony to be elicited from a specific expert witness. "The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial." *Graham v. Wallace*, 214 W.Va. 178, 185, 588 S.E.2d 167, 174 (2003). And in this case, CSX would have received a fair trial if Dr. Ducatman had been allowed to testify fully, because it had this essential knowledge beforehand that Dr. Ducatman would be relying on Dr. Phifer's neuropsychological report.

Mr. Jenkins' initial disclosures as well as the discussions with defense counsel on the record indicated the nature and substance of the testimony expected. In filling out the original Plaintiff's Expert Disclosures, Mr. Jenkins identified that Dr. Ducatman would testify regarding his review of any and all medical records made available to him. Then, at the deposition of Dr. Ducatman, defense counsel acknowledged that he possessed sufficient information and notice that Dr. Ducatman would be questioned at trial regarding his review of the neuropsychological report. After learning that Dr. Ducatman had misplaced Dr. Phifer's report, Attorney Harkins stated that "I think you will at some point be asked to look at Dr Pfeiffer's [sic] neurospsych testing and results" See Record Item No. 8 at 38:5-6. Obviously, CSX was on notice and aware, both at the time of the initial disclosure as well as at the time of the deposition, that Dr. Ducatman would rely on the neuropsychological report. Furthermore, this is not the first time that Dr. Ducatman has testified in a solvent deposition or trial. CSX was well aware that Dr. Ducatman has relied on neuropsychological data in every individual solvent case that he has testified in, including other cases joined in the present consolidated action.

Because CSX possessed this knowledge beforehand, it had been Mr. Jenkins' counsel's good faith belief that CSX had chosen not to do the follow-up deposition of Dr. Ducatman. This

is contrary to CSX's accusations, contained in its Response to Plaintiff's Motion for a New Trial, that Mr. Jenkins had "concealed" this evidence in order "spring" it on them at trial—the fact is that there is absolutely no evidence to support such an attack on the character of Mr. Jenkins' counsel. Therefore, CSX is amiss in making this kind of argument, especially in light of the history of litigation between the firms in this case as well as in numerous others.

The reality is that this is not the type of case where the defense was reasonably ignorant of the opinion to be given by the plaintiff's expert, such that it was "sprung" on them at trial; the fact of the matter is that CSX is the only party that could be accused of acting unscrupulously in this situation. Despite the atmosphere of cooperation, it basically blindsided Mr. Jenkins by waiting until trial was underway to ask that Dr. Ducatman's testimony be excluded. CSX had every opportunity prior to trial to file a motion *in limine* regarding Dr. Ducatman's testimony, but instead chose to wait until the trial to make its motion, when Mr. Jenkins would have a limited ability to correct the matter. CSX's use of the technicalities of Rule 26 did not operate to promote justice, and therefore CSX should not be rewarded for its manipulation of the discovery rules by a dismissal of Mr. Jenkins' case.

And although some action was necessary by the Circuit Court in order to bring Mr. Jenkins' counsel into compliance with Rule 26's duty to supplement discovery, clearly the order prohibiting the Dr. Ducatman from relying on the neuropsychological data was too a harsh sanction. A judge's discretion with regard to sanctions is not without limit. "We grant circuit court judges wide latitude in conducting the business of their courts. However, this authority does not go unchecked, and a judge may not abuse the discretion granted him or her under our law." *Anderson*, 215 W.Va. at 487 (citing *Lipscomb v. Tucker County Comm'n*, 206 W. Va. 627, 630, 527 S.E.2d 171, 174 (1999)).

In *Anderson*, the plaintiff's attorney had failed to file a doctor's report within the time frame set forth by the circuit court. The circuit court therefore struck the doctor's testimony and granted summary judgment because the plaintiff was unable to meet the burden of proof as to whether the defendant doctor's care fell below the relevant standard. Upon review, this Court agreed with the appellant in *Anderson* that the sanction was too harsh. This Court evaluated Rule 37(b)(2), which provides for a wide spectrum of sanctions other than the striking of a witness, including admonishments to counsel and monetary sanctions against the offending attorney. *Id.* at 488. Ultimately, this Court determined that the actions of the circuit court in striking the expert "excluded what little evidence the party's attorney had compiled on a critical issue in the case, and thereby eviscerated the party's entire cause of action." *Id.* According to the *Anderson* opinion, a circuit court should determine the appropriate sanctions for a party's misconduct as follows:

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Id. at 489 (citing Syllabus Pt. 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996)).

Upon a review of the evidence, this Court agreed with the appellants that the exclusion of the doctor's testimony "operate[d] primarily to punish [the] innocent client," and that this sanction "was neither just nor fair ... particularly when [the] decision operated to deny the appellant her day in court." *Id.* at 488. Therefore, this Court reversed both the order striking the witness and the order granting summary judgment.

In reviewing the case at hand in connection with the outlined principles for the imposition of sanctions from *Anderson*, it is clear that the sanction of prohibiting Dr. Ducatman's reliance on the neuropsychological report was too severe. Just as in *Anderson*, Mr. Jenkins' own personal actions or inactions have nothing to do with Dr. Ducatman's testimony—Mr. Jenkins personally stands innocent in the whole transaction. Rather, it is the fault of Mr. Jenkins' counsel and CSX's counsel that Dr. Ducatman was never deposed a second time. Therefore, "fairness dictates that any sanction should have been directed against the actor—or, in this case, the "in-actor"—and the sanction imposed in a manner that would best dispel any cost or prejudice to the opposing parties Justice compels that the offending attorney should suffer for his actions, not the litigants." *Id.* at 484.

Considering *Anderson*, any sanction dispensed by the Circuit Court in this situation should have only penalized Mr. Jenkins' attorneys, and should not have prejudiced Mr. Jenkins' case. And also just as in *Anderson*, the exclusion of this one witness effectively eviscerated the Plaintiff's case. According to the Circuit Court, Dr. Ducatman was the only witness qualified to testify as to causation; therefore, the exclusion of his testimony on Mr. Jenkins' condition was fatal to Mr. Jenkins' cause of action. This was exactly the kind of result that this Court disapproved of in the *Anderson* decision. And contrary to what CSX may wish to argue, it makes no difference that the trial had not yet begun in *Anderson* when the circuit court was considering sanctions—the *Anderson* decision clearly stands for the proposition that a court should not sanction an innocent client for his or her attorney's mistake in any way that would prejudice the innocent client's case. Rather, the sanction should be directed only at the attorney, regardless of the stage of the proceedings.

Because it was improper to exclude Dr. Ducatman altogether, there were several alternative routes that the Circuit Court could have taken in this situation which would have held Mr. Jenkins' counsel accountable to the West Virginia Rules of Civil Procedure, while still allowing for Mr. Jenkins to have his day in court without prejudicing CSX. And although W. Va. R. Civ. P. 37 provides a list of several types of relief for violations of discovery rules, such as striking a witness, it first and foremost states that a court "may make such orders in regard to the failure as are just" As one example of just relief, the Circuit Court could have given a recess and allowed CSX the opportunity to take an additional deposition of Dr. Ducatman regarding the neuropsychological report. As previously mentioned, it usually took no longer than five minutes to depose Dr. Ducatman with this line of questioning in prior cases. And the layout of the trial was such that CSX's expert witnesses would not have been testifying for another several days, so they would have had plenty of time to review Dr. Ducatman's new testimony. This approach was favored in *Anderson*, in which this Court stated: "For instance, the circuit court could have postponed the trial date, giving the appellees greater time to depose [appellant's expert] and prepare their evidence in rebuttal, and impose the costs of the delay ... upon counsel for the appellant." *Id.* at 489. The wisdom in this approach can even be seen by the fact that Judge Recht himself was inclined to take this approach in the present case, and stated that he had done so many times before. *See* Record Item No. 9 at 688:18-19. Unfortunately, Judge Recht refused to have CSX re-depose Dr. Ducatman for the sole reason that Mr. Jenkins' trial was too short in duration. *See* Record Item No. 9 at 688:14-21. He clearly admitted that he would have Dr. Ducatman re-deposed if it had been a month-long trial. But this raises the question—why is Mr. Jenkins less deserving of this remedy simply because he is in the unfortunate position of having a claim that only requires a five day trial, as opposed to a thirty day trial? The answer is that he is

not less deserving, and justice requires that his case be treated the same as any other by requiring the other party to re-depose the witness during a recess.

And even assuming, *arguendo*, that such a re-deposition would cause too great a burden on the court's schedule, or be too great an inconvenience to the jurors, or even somehow prejudice CSX, there were still other types of relief available. For example, at the absolute harshest, the Circuit Court could have declared a mistrial and placed all of the costs of the first trial upon Mr. Jenkins' attorneys. This Court has expressly approved of this type of sanction:

The fairness and integrity of the fact-finding process is of great concern to this Court; and, when a party fails to acknowledge the existence of evidence that is favorable or adverse to a requesting party, it impedes that process. Normally, when this type of violation impacts the outcome of the trial, this Court will require redress in the form of a new trial.

McDougal v. McCammon, 193 W.Va. 229, 238, 455 S.E.2d 788, 797 (W.Va. 1995). A sanction in the form of a new trial, with costs of the first trial charged to Plaintiff's counsel, would not have cost the court extra, would have resolved any possible prejudice to CSX, and also would have preserved Mr. Jenkins' claim for resolution at a later time. Clearly, it was an abuse of the Circuit Court's discretion to dismiss Mr. Jenkins' case rather than applying one of these more judicious sanctions to his counsel.

B. Dr. Ducatman's Testimony Regarding Causation Was Sufficient.

There is no dispute that Dr. Ducatman is an expert within the meaning of West Virginia Rule of Evidence 702. *See* Record Item No. 9 at 641:15-19. In light of his expertise, the Circuit Court allowed Dr. Ducatman to testify before the jury regarding the general science of solvent exposure and its effect on human beings. But when the questioning turned to the specific issue of Mr. Jenkins' personal exposure to solvents and their effect on him, the Circuit Court conducted the questioning away from the jury in order to determine whether Mr. Jenkins would be able to

establish causation through the testimony of Dr. Ducatman without the benefit of his having reviewed Dr. Phifer's neuropsychological report. After this questioning was completed, the Circuit Court refused to allow Dr. Ducatman to testify regarding Mr. Jenkins' medical condition, due to the fact that Dr. Ducatman could not categorically "diagnose" toxic encephalopathy in Mr. Jenkins' situation. This decision was an abuse of the court's discretion in light of the relaxed standard of causation under the FELA.

Under the FELA, evidence with regard to causation is very relaxed. The landmark decision in this area is the case of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), wherein the Supreme Court held that the test of a jury case is "whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the employee's injury." *Rogers*, 352 U.S. at 506 (emphasis added). Since *Rogers*, courts have liberally construed the FELA in light of its remedial purposes, and a court's power to take a case from the jury "is restricted in light of those remedial purposes and that legislative desire to preserve the plaintiff's right to a jury trial." *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1984); see *Sowards v. Chesapeake & Ohio Ry. Co.*, 580 F.2d 713, 714 (4th Cir. 1978); *Gowins v. Pennsylvania Railroad Company*, 299 F.2d 431, 433 (6th Cir.), *cert. denied*, 371 U.S. 824 (1962). A jury trial is part and parcel of the relief afforded by Congress under the Act. *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350 (1943). In *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), the U.S. Supreme Court stated that they had granted *certiorari* in that case "because of the importance of preserving for litigants in FELA cases their right to a jury trial." *Id.* at 55. It is clear that "only when there is a complete absence of probative facts to support the conclusion" that the plaintiff's injury was caused by the railroad's negligence can the case be taken from the jury. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

While it is true that Dr. Ducatman stated that he could not “diagnose a causal relationship” without the neuropsychological report (*See* Record Item No. 9 at 709:16-19), Dr. Ducatman nevertheless gave some very strong statements regarding Mr. Jenkins’ condition. He testified: “At the time I saw Mr. Jenkins, I was *convinced* he had a memory problem. I was *convinced* he had very substantial solvent exposure, and I was *convinced* he did not have other important risk factors other than the solvent exposure.” *See* Record Item No. 9 at 700:22 – 701:2 (emphasis added). As previously stated. According to the National Institutes for Health, an injury in the form of progressive memory loss is one of the hallmarks of toxic encephalopathy. The fact that Dr. Ducatman was unable to officially “diagnose” toxic encephalopathy without the benefit of a neuropsychological report is irrelevant. In order to formally diagnose toxic encephalopathy, the doctor would have had to review and rely on the diagnostic testing, which the court below had ruled that he could not do. Nevertheless, Dr. Ducatman’s expert opinion—that Mr. Jenkins was injured in the form of memory loss caused by solvent exposure—was clearly sufficient to get to the jury under the FELA and Rule 702.

Rule 702 of the West Virginia Rules of Evidence only requires that an expert give an “opinion” regarding “scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue.” It does not require that a formal diagnosis be made. But after Dr. Ducatman had given his testimony, the Circuit Court took what he had said about his inability to “diagnose,” and paraphrased these statements as a complete inability to give a Rule 702 opinion on the issue of causation. However, the straightforward question of whether Mr. Jenkins’ memory loss was caused by his exposures at the workplace was not asked of Dr. Ducatman. In short, the doctor never professed an inability to give an opinion on causation. To the contrary, his statement that he was “convinced” that Mr.

Jenkins had memory loss, had significant solvent exposure, and had no other risk factors could clearly have assisted the jury to determine whether his exposure to solvents while working for CSX played any part, even the slightest, in producing Mr. Jenkins' injuries.

The bottom line is that the admissibility of Dr. Ducatman's testimony should not turn on the fact that he was cautious on the witness stand and did not want to use diagnosis terminology, opting instead to say that he was "convinced." As the Minnesota Supreme Court has recognized: "It is common experience of compensation and personal injury lawyers to find that the more distinguished a medical witness is, the more tentative and qualified are his statements on the witness stand." *Boldt v. Jostens, Inc.*, 261 N.W. 2d 92, 94 (Minn. 1977); *see also Insurance Co. of North America v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966) ("Reasonable probability is determinable by consideration of the substance of the testimony of the expert witness and does not turn on semantics or on the use by the witness of any particular term or phrase.").

A similar situation existed in the West Virginia case of *Sexton v. Grieco*, 216 W. Va. 714, 613 S.E. 2d 81 (2005). In that case, the plaintiff's testifying expert answered numerous questions relating to level of care required and the level of care given by the defendant. However, plaintiff's counsel never asked the all-encompassing question of whether causation existed within a reasonable degree of certainty or probability. This Court stated in that case: "All that is required to render such testimony ... sufficient to carry it to the jury is that it should be of such character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the defendant." *Id.* (citing Syllabus pt. 1, in part, *Pygman v. Helton*, 148 W.Va. 281, 134 S.E. 2d 707 (1964)). In so ruling, this Court once again "specifically rejected the requirement that the [expert] tie the injury to the negligence by way of ... any rigid incantation or formula[.]" *Id.* at 720 (alteration in original).

Therefore, Dr. Ducatman should not have been required to use any “magic” diagnosis terminology in order for his testimony to get to the jury—such a requirement is tantamount to the “rigid incantation” that was condemned in *Sexton*. Accordingly, the jury should have been allowed to hear Dr. Ducatman’s statements that he was “convinced” on the issues of memory loss, exposure, and lack of alternative causation, and then draw whatever reasonable inferences they may from that testimony. Additionally, the weight that the *Sexton* decision bears on the present case is increased all the more by the fact that *Sexton* was a medical malpractice case, where the standards of causation are to be higher than in Mr. Jenkins’ case, which was brought under the FEOLA.

In the face of these strong arguments for the admissibility of Dr. Ducatman’s testimony, no real response has been offered that the decision to exclude him was not an abuse of discretion. First of all, the only authority relied upon by the Circuit Court for this decision was the case of *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). However, *Jordan* involved the level of certainty necessary for an award of future damages, and did not deal with the issue of initial causation as does *Sexton*. Secondly, the only real attack that CSX has leveled on Dr. Ducatman’s testimony is that his opinions are conclusory without the benefit of Dr. Phifer’s report. But the fact remains that Dr. Ducatman is the medical expert here—not CSX—and if Dr. Ducatman is able to be convinced that causation existed for Mr. Jenkins’ memory loss through his personal examination of Mr. Jenkins, without the benefit of this report, then a jury should be allowed to hear his testimony, at which point CSX would then be free to attack his opinion either on cross-examination or with its own medical experts.

In summation, Dr. Ducatman’s testimony to the effect that he had been “convinced” of causation clearly gave enough information to the jury for it to draw a reasonable inference

therefrom, especially under the relaxed standard of causation under the FELA. Chronic toxic encephalopathy, or even memory loss, did not need to be formally diagnosed in this case in order for it to go to a jury; therefore, it was an abuse of the Circuit Court's discretion to exclude Dr. Ducatman's testimony with regard to Mr. Jenkins' injuries.

C. Dr. Phifer's Testimony with Regard to Causation Should Have Been Permitted to Stand in Support of the Claim.

After Dr. Ducatman was excused from testifying further, Dr. Phifer then also testified regarding Mr. Jenkins' injury. Dr. Phifer spoke at great length regarding his expertise with regard to neuropsychology, including his training and experience as a brain injury specialist. He was qualified before the Circuit Court as an expert in the field of clinical and forensic neuropsychology, which included his special training in neuroanatomy. *See* Record Item No. 9 at 803:11-20. According to Dr. Phifer, neuropsychological testing is an important component in terms of diagnosing chronic toxic encephalopathy. *See* Record Item No. 9 at 822:8-12. By doing in-depth evaluations, an expert neuropsychologist is able to diagnose the specific areas of deficiency in an individual. Thereafter, based on the expert's review of the test results, the individual's history and medical background, as well as the literature with regard to toxic encephalopathy, the expert is capable of making the diagnosis and asserting a neuropsychological opinion as to the cause.

Although, as argued above, Dr. Ducatman's testimony was incorrectly excluded from the trial, this case still should have been allowed to proceed to the jury based upon Dr. Phifer's testimony as an expert in the field of brain injuries. The issue boils down to whether a neuropsychological expert's testimony alone is sufficient to establish causation for a brain injury. Although this question has not been dealt with directly by the courts in West Virginia, a number of other jurisdictions have considered the matter and have determined that a psychologist or

neuropsychologist who satisfies Rule 702 is thereby qualified to render opinion testimony regarding the cause of brain injury.²

In addition to the myriad of cases across the country holding that neuropsychologists or psychologists may testify on the causation of brain injuries, several West Virginia cases also support Mr. Jenkins' position with regard to the admissibility of Dr. Phifer's testimony, holding that an expert need not be a medical doctor in order for he or she to testify as to the causation of a medical injury. First, in the case of *Dolen v. St. Mary's Hospital of Huntington*, 203 W.Va. 181, 506 S.E.2d 624 (1998), the plaintiff brought a claim against the defendant hospital alleging that the hospital's employees negligently failed to diagnose her broken jaw. She submitted the

2. See, e.g., *Huntoon v. TCI Cablevision of Colorado, Inc.*, 969 P.2d 681, 690 (Colo. 1998) (holding that neuropsychologists may be qualified to testify as experts on the causation of organic brain injury based upon usual analysis applicable to determining admissibility of testimony of all other experts); *Adamson v. Chiovaro*, 705 A.2d 402, 405-406 (N.J.Super.App.Div. 1998) (upholding determination that neuropsychologist was qualified to testify as to his conclusions regarding causal link between cognitive defects and incident giving rise to action); *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 280 (Mo. Ct. App. 1997), *overruled on other grounds* (neuropsychologist was qualified to testify as to causation of organic brain injury in workers' compensation proceeding); *Cunningham v. Montgomery*, 921 P.2d 1355 (Or. 1996) (neuropsychologist allowed to testify regarding testimony on causal relationship between dentist's use of nitrous oxide and the plaintiff's subsequent cognitive defects); *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994) (neuropsychologist allowed to testify regarding the existence of a causal relationship between plaintiff's car accident and her head injury); *Shilling v. Mobile Analytical Servs., Inc.*, 602 N.E.2d 1154 (Ohio 1992) (neurotoxicologist/psychologist was qualified to render opinion that ingestion of gasoline caused brain injury even though the witness was not a physician); *Weider v. Senebouthyrath*, 182 A.D.2d 1124, 589 N.Y.S.2d 94, 94 (N.Y. App. Div. 1992) ("[A] neuropsychologist may be permitted to testify as an expert witness at trial regarding a brain injury ... "); *Seneca Falls Greenhouse & Nursery v. Layton*, 389 S.E.2d 184 (Va. Ct. App. 1990) (the fact that a neuropsychologist was not a medical doctor did not bar her from giving her expert opinion regarding the causal relationship between the insecticide exposure and the plaintiff's injury); *Valiulis v. Scheffels*, 547 N.E.2d 1289, 1296-1297 (Ill.App. 1989) (clinical psychologist and neuropsychologist was qualified to testify about causal connection between trauma plaintiff suffered in automobile accident and onset of symptoms of multiple sclerosis); *Sanchez v. Derby*, 433 N.W.2d 523, 525-26 (Neb. 1989) (neuropsychologist allowed to testify regarding causation of injured motorist's behavioral changes); *Fabianke v. Weaver ex rel. Weaver*, 527 So. 2d 1253, 1257 (Ala. 1988) (psychologist was qualified to testify concerning her opinion as to connection between respiratory distress occurring at birth and ensuing developmental problems of minor); and *Madrid v. University of California*, 105 N.M. 715, 718, 737 P.2d 74, 77 (1987) (psychologist whose work experience was and is directly related to the prevention, alleviation and cure of mental disease was qualified to present competent medical opinion evidence on issue of whether worker's mental disability was work related).

testimony of an oral surgeon, who was not a medical doctor, to discuss the relevant standards of care and the defendant's deviations from this standard. However, the hospital objected to this non-physician's opinions regarding violations of the standard of care of medical doctors. *Id.* at 183-184. The trial court agreed with the hospital and granted summary judgment, concluding that the dentist/oral surgeon was not qualified to render expert testimony regarding whether a medical doctor deviated from the standard of care, and was not qualified to render expert testimony regarding whether such conduct was the proximate cause of the injury. *Id.* at 184.

On appeal, this Court evaluated the application of Rule 702 by looking for guidance to the decision in *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). In *Gentry*, this Court stated that "Rule 702 has three major requirements: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact". *Gentry*, 195 W.Va. at 524. Furthermore, in determining who qualifies as an expert under these requirements, a trial court should conduct a two-step inquiry. "First, a circuit judge must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, the circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." *Id.* at 525.

In applying the principles set forth in *Gentry*, the Court in *Dolen* determined that the circuit court abused its discretion in refusing to qualify the oral surgeon as an expert. This Court examined the surgeon's qualifications including both his training as well as his experience as it related to the issue in the case, which was the diagnosis of a broken jaw. This Court found that the oral surgeon was indeed an expert capable of rendering opinions in that case, despite the fact

that he was not a medical doctor, and reversed the grant of summary judgment in the case.³ *Id.* at 186-187. This Court recognized that it is not the title or the degree that a person holds that is important in deciding whether her or she is qualified as an expert witness; rather, each proposed expert witness must be considered under the two-step inquiry given in *Gentry*. See also *Tracy v. Cottrell ex rel. Cottrell*, 206 W.Va. 363, 383, 524 S.E.2d 879, 899 (1999) (quoting *Gentry*: “[n]either a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert”).

Following the *Dolen* decision, this Court reached the same conclusion in the case of *Akers v. Cabell Huntington Hosp., Inc.*, 215 W.Va. 346, 599 S.E.2d 769 (2004). This case involved the psychological injuries that the plaintiff developed after being subjected to sexual harassment on the job. Although the plaintiff’s injuries were psychological in nature, such as depression and anxiety, rather than organic brain damage, this Court clearly considered them to “medical” injuries, and thus considered the issue of whether a medical doctor in psychiatry was needed in order to assess these medical injuries and opine as to their causation. In deciding the issue, this Court quoted the Fourth Circuit, stating that “the determination of a psychologist’s competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge; it does not depend upon his claim to the title of psychologist or psychiatrist.” *Id.* at 355 (quoting *United States v. Riggleman*, 411 F.2d 1190 (4th Cir.1969)). In other words, as applied to the instant case, the determination of whether Dr. Phifer was qualified to testify as to the causation of Mr. Jenkins’ injuries should have been “determined based upon [his] background, training, and

3. It is interesting to note that the *Dolen* decision not only allowed a non-physician to testify as to the proximate cause of a medical injury, but it also allowed this non-physician to testify as to a medical doctor’s standard of care—a hurdle which is not present in Mr. Jenkins’ case.

expertise, and *not* on the issue of whether [he] holds a medical degree.” *Id.* at 355-56 (emphasis in original). Under this rationale, the *Akers* Court agreed with the plaintiff, holding that the trial court “was mistaken in ruling that psychiatric [*i.e.* medical doctor] testimony was required to establish a medical condition.” *Id.* at 356.

Although the driving force behind the plaintiff’s injury in *Akers* was psychological instead of the physiological exposure to solvents in Mr. Jenkins’ case, this Court’s decision in *Akers* still has clear application here. Dr. Phifer’s status as a neuropsychologist should have had no bearing on whether he could diagnose and give causation for Mr. Jenkins’ medical injuries; rather, the circuit court should have disregarded his title and analyzed his education and profound experience in the area of brain injuries under the two part test in *Gentry*. In so doing, it would have become clear that, like the dentist in *Dolen*, Dr. Phifer first of all met the minimal educational and experiential qualifications in the relevant fields of neuropsychology, brain anatomy, and brain injuries, such that he would be capable of assisting the jury in understanding the evidence. Secondly, his expertise covered the area to which Dr. Phifer sought to testify, *i.e.*, Mr. Jenkins’ brain injuries. This is all that is required for an expert to testify in West Virginia under *Gentry* and its progeny; therefore, Dr. Phifer’s testimony should have been sufficient to allow the jury to make a determination on causation.

Finally, further proof of the importance that this state places on psychologists can be seen in other areas of the law in West Virginia. For example, by statute, West Virginia has allowed psychologists to determine a person’s incapacity—W.Va. Code 16-30-7 states that: “A determination that a person is incapacitated shall be made by the attending physician, a qualified physician, a qualified psychologist or an advanced nurse practitioner who has personally examined the person.” In addition, psychologists have been qualified by the courts in criminal

matters to testify as to sexual abuse of a minor. *Sharon B.W. v. George B.W.*, 203 W.Va. 300, 507 S.E.2d 401 (1998). Again in qualifying the psychologist to testify, the court did an analysis under Rule 702 and determined that this particular expert held the requisite qualifications. *Id.* at 304.

In summation, the Circuit Court determined that Dr. Phifer possessed the requisite educational background and experience to qualify as an expert in clinical and forensic neuropsychology pursuant to the requirements of Rule 702. His opinions with regard to causation should have thereafter been given the same consideration in terms of admissibility as any other qualified expert, including a medical doctor, in the area of brain injuries. Once the expert has been qualified and the opinion has been offered, it is incumbent upon the Defendant to attack it on cross-examination; it is not for the judge to determine that the opinion is insufficient, especially considering West Virginia's liberal rules of evidence, and the FELA's liberal standards of causation.

D. Dr. Phifer's Testimony in Conjunction with Dr. Ducatman's Testimony Was Sufficient.

In the immediately preceding section, the Plaintiff has clearly set forth the reasons why Dr. Phifer, as a neuropsychologist, was qualified to offer testimony regarding the causation of Mr. Jenkins' conditions. The force of this argument is strengthened all the more when one considers Dr. Phifer's testimony in conjunction with the testimony given by Dr. Ducatman. Indeed, even the Circuit Court saw the potential strength of this dual-testimony, but apparently did not sufficiently review the testimony given by both men; otherwise, by his own admission, he would have allowed the case to go to a jury.

After the parties were finished examining both Dr. Ducatman and Dr. Phifer, Judge Recht stated:

If we didn't have the medical component, excluding it, if [Dr. Ducatman] had said: listen, I don't know. I know we have this history. I know we have the memory problems anecdotally, and I know we have no other risk factors, I can come to no other conclusion – something like that, if we had that, coupled with Dr. Phifer's testimony, I believe that it would be appropriate to move forward, because then it becomes, I believe, a question for the jury to determine.

See Record Item No. 9 at 824:7-15. A reading of this quotation reveals that Judge Recht explicitly acknowledged that the combined testimony of Mr. Jenkins' experts would have been enough to proceed if only Dr. Ducatman had said three things: (1) Mr. Jenkins has a history of solvent exposure; (2) Mr. Jenkins has memory problems; and (3) Mr. Jenkins has no other risk factors.⁴

However, the fact is that Dr. Ducatman did, in fact, say exactly these three things when he stated: "At the time I saw Mr. Jenkins, I was convinced he had a memory problem. I was convinced he had very substantial solvent exposure, and I was convinced he did not have other important risk factors other than the solvent exposure." See Record Item No. 9 at 700:22 – 701:2. Additionally, immediately thereafter, Dr. Ducatman reiterated what he had previously written in his records after his examination of Mr. Jenkins: "Unprotected solvent exposure in a patient with some problems with memory and no other real risk factors." See Record Item No. 9 at 701:7-8.

The above-quoted statement also shows that Judge Recht, in addition to these three factors, required Dr. Ducatman to have said something similar to the statement: "I can come to no other conclusion," regarding the cause of his memory loss. But it is clear that Dr. Ducatman was implying this when he stated that there were no "other important risk factors" besides his

4. Additionally, this statement by the judge— that he would have required Dr. Ducatman to basically say: "I can come to no other conclusion"—implies that he was analyzing the case under the wrong standard. According to *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957), under the FELA "[i]t does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes" In short, *Rogers* requires a plaintiff to show that the defendant's negligence either caused or contributed to an injury along with other causes; whereas the judge's statement required the Plaintiff to show one-hundred percent causation.

solvent exposure while working for CSX. It is true that at one point Dr. Ducatman affirmed defense counsel's statement: "You did not diagnose a causal relationship between the exposure ... and the memory problem" See Record Item No. 9 at 709:16-19. However, Dr. Ducatman responded with a "yes" because he was trying to tiptoe around the use of the word "diagnose." The fact is that he was never given the opportunity to be presented with Judge Recht's exact question of whether he was unable to come to any other conclusion—but he clearly implied as much.

In short, the statements made by the Circuit Court demonstrate that, upon a more detailed review of the trial transcript, the testimony of both experts was sufficient, even in the judge's eyes, to allow a jury to hear the evidence.

V. Prayer for Relief

Wherefore, for the reasons stated herein, the Plaintiff respectfully requests that this Honorable Court reverse the decision of the Circuit Court, granting the Plaintiff a new trial in this matter.

Respectfully submitted,
ROBERT PEIRCE & ASSOCIATES

By: Sharon A. Gould
ROBERT F. DALEY, ESQUIRE
West Virginia ID No.: 7929
SHARON A. GOULD, ESQUIRE
West Virginia ID No.: 7145
2500 Gulf Tower, 707 Grant Street
Pittsburgh, PA 15219
(412) 281-7229

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** has been served via first class mail, postage pre-paid, this 11th of January 2007, upon the following:

James W. Turner, Esquire
Huddleston Bolen
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722-2185

ROBERT PEIRCE & ASSOCIATES

By: Sharon G. Gould