

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY JENKINS,

Plaintiff/Appellant,

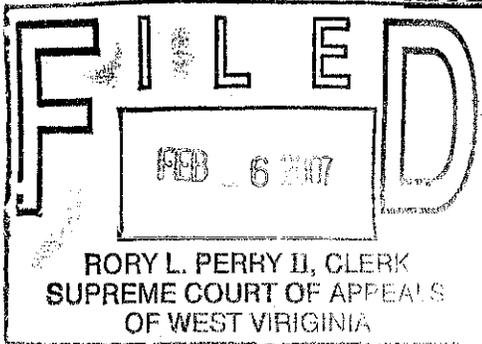
v.

Supreme Court No.: 33179

CSX TRANSPORTATION, INC.,

Defendant/Appellee.

RESPONSE BRIEF OF APPELLEE, CSX TRANSPORTATION, INC., TO BRIEF OF APPELLANT, GARY JENKINS



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LOWER COURT PROCEEDING AND NATURE OF RULING

Following the proper exclusion of certain evidence, the Honorable Arthur M. Recht of the Circuit Court of Ohio County, West Virginia correctly dismissed the cause of action of Appellant, Gary Jenkins, on the grounds that he produced no admissible evidence of medical causation. The Court properly disallowed Dr. Alan Ducatman, Appellant's only medical causation expert, from relying on the neuropsychological testing results of James Phifer, Ph.D., properly excluded Dr. Ducatman's Appellant-specific causation testimony, and correctly held that Dr. Phifer was not qualified to offer medical causation opinion testimony himself.

STATEMENT OF FACTS

Appellant originally filed this action in the Circuit Court of Ohio County, West Virginia on April 11, 2001 claiming neurological injuries under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, *et seq.* Specifically, Appellant alleged that he suffered from a specific medical condition known as toxic encephalopathy as a consequence of alleged excessive occupational solvent exposure during his employment with Appellee. Alan Ducatman, M.D., an occupational medicine practitioner, was noticed as a testifying medical causation expert in the case, the only physician to be so designated on Appellant's behalf. Dr. Ducatman clinically evaluated the Appellant one time and authored a report in the year 2000 in which he noted Appellant subjectively made complaints of memory loss. In his report Dr. Ducatman did not attribute a cause of those complaints nor did he prescribe neuropsychological testing for Appellant.

Counsel for Appellee deposed Dr. Ducatman on November 19, 2004 at which time a record was made with Dr. Ducatman of his opinions and their bases. Dr. Ducatman was specifically asked if he had reviewed any neuropsychological testing results, and he testified that

he could not state with certainty whether he had or not claiming to have no memory of doing so. He testified that "The possibility exists that I have seen it...that it was put in our records...and that it has since along with our records because it is an outside record disappeared from WVU knowledge and that I have forgotten. So I can't tell you under oath that I haven't seen it. I can tell you under oath that I don't recall it." *Ducatman Deposition*, page 32, line 16 through page 33, line 1. Dr. Ducatman later remarked that "I do not recall seeing a report from Dr. Pfeiffer(*sic*) relating to this patient. It does not mean that I haven't seen one." *Id.*, page 33, lines 19-21.

At the deposition's conclusion, counsel for Appellant made the following record, "you probably note that I forwarded those to you at one point and they have been lost and I will have to look at them again." *Id.*, page 39, lines 10-12. Appellee reserved the right to re-depose Dr. Ducatman in the event he was subsequently provided with the missing neuropsychological testing results to review and rely on. *Id.*, page 39, lines 3-9. At no time prior to Dr. Ducatman's eventual trial testimony in June 2005 did Appellant ever notify Appellee that the neuropsychological test results had been provided to Dr. Ducatman, that he had reviewed them, relied on them or that he was prepared to offer a medical causation opinion regarding the Appellant.

Appellant's Brief states that Appellee did not at any time request to reconvene the deposition of Dr. Ducatman in order to continue the line of questioning regarding Dr. Phifer's neuropsychological test results, thereby wrongly attempting to shift Appellant's duty of disclosure to Appellee. Quite simply, Appellant failed to disclose or supplement and is now attempting to hold Appellee responsible for his mistake. Appellant references a number of prior cases litigated between counsel for the parties in an attempt to establish some sort of history or

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course of dealing should have implied that Dr. Ducatman would offer a medical causation opinion in this specific case. Of course the full implication of such an argument is that the Appellant's experts have pre-packaged opinions that Appellee should presume regardless of individual case facts – not an argument Appellee believes Appellant truly desires to make.

In every case, regardless of what has been previously litigated between the parties, the plaintiff must meet its burden of proof. Any other cases litigated, the amount of time counsel has litigated against each other, or any assertion regarding a “harmonious” work relationship has no bearing on the facts of this particular case. Indeed, counsel for the parties have litigated many prior cases and have developed a cooperative working relationship but that has no bearing on the specific issues decided at trial or encompassed by this appeal.¹ Put simply, Appellant failed to establish causation in his case-in-chief, and the rightful consequence for this failure was dismissal.

Dr. Ducatman was called to testify at the trial of this matter on June 16, 2005. It was during his direct examination by Appellant's counsel that Appellee first became aware that the missing Phifer neuropsychological test results had in fact been provided to Dr. Ducatman, that Dr. Ducatman had reviewed and relied on them, and that he was going to testify about them if permitted. In response to an inquiry of the Circuit Court, Appellant's counsel acknowledged that it was his intent to have Dr. Ducatman review the neuropsychological testing conducted by Dr. Phifer and rely on the results to draw specific medical causation conclusions relating to the Appellant. *Trial Transcript*, page 682, lines 12-18.

¹ As proof of the cooperative relationship between counsel, Appellee was willing to allow Appellant to introduce evidence of causation informally during the discovery process. However, the introduction of new evidence in the middle of expert witness testimony at trial is inappropriate and violates the established civil practice in this State.

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Appellee timely objected to Dr. Ducatman's reliance on Dr. Phifer's testing results on the grounds it was unfairly prejudiced by the Appellant's neglect or refusal to timely advise of this circumstance. Appellee argued it had been deprived of the opportunity to discover any of the facts relating to Dr. Ducatman's reliance on these heretofore "missing" results and had no ability to credibly cross-examine Dr. Ducatman about them. The Circuit Court correctly sustained the objection finding that Appellant failed to advise of Dr. Ducatman's reliance on the neuropsychological testing results and precluded him from relying on them in his testimony. *Trial Transcript*, pages 682-683.

The Circuit Court's initial ruling was limited in scope, and Dr. Ducatman was permitted to continue testifying about his examination and findings related to Appellant. Throughout his testimony on direct examination, Dr. Ducatman was never asked to express a medical causation opinion. On cross-examination, Dr. Ducatman testified as follows:

Q. You've seen Mr. Jenkins on one occasion, as you've testified, correct?

A. Yes.

Q. You did not diagnose a causal relationship between the exposure you set forth and his memory problem, correct?

A. That's right.

Trial Transcript, page 709, lines 13-19. Counsel for Appellee then moved to strike any medical causation testimony of Dr. Ducatman specifically relating to Appellant. *Trial Transcript*, page 710, lines 9-20.

Appellant's counsel responded by arguing that he had not even solicited any causation opinions from Dr. Ducatman that needed to be stricken. *Id.*, page 710, line 21 to page 711, line 1. The Circuit Court observed that Appellant had asked around the causation issue in an attempt

to leave the misimpression that Dr. Ducatman indeed had such an opinion. *Id.*, page 711, page 714, lines 17-20.

Ultimately, the Circuit Court determined that it would “instruct the jury to totally disregard the testimony of Dr. Ducatman as it relates to Mr. Jenkins because there is no diagnosis of any relationship between his exposure and his memory problem, which is the only thing he testified to.” *Id.* page 720, lines 15-20. The Circuit Court then did so. *Id.*, page 721, lines 13-23. Dr. Ducatman was then permitted to continue his testimony on other general causation matters.

The Circuit Court next heard the testimony of James Phifer, Ph.D., who was qualified as an expert witness capable of giving opinions and conclusions in the field of neuropsychology. *Trial Transcript*, page 803, lines 11-20. As a non-physician, Dr. Phifer acknowledged that he was unable and unqualified to offer a medical diagnosis specifically regarding Mr. Jenkins. *Id.* at page 822, lines 5-24. Dr. Phifer explained that the diagnosis of toxic encephalopathy was one that required two elements: the medical component and abnormal neuropsychological testing results - only the latter he could testify about. *Id.*, page 823, lines 8-12.

Appellant did not offer any further testimony with regard to the issue of specific medical causation. In light of Dr. Ducatman’s failure to determine causation and Dr. Phifer’s inability to do so, the Circuit Court sustained Appellant’s motion to dismiss. *Id.*, page 826, lines 13-16. The Circuit Court later expanded its basis for excluding Dr. Phifer by holding,

[P]lus in Syllabus Point 5 in Gentry, where you determine an expert under 702, I do not believe that Dr. Phifer, in all due respect, his area of expertise covers the particular opinion which requires a medical component to it...Plus, in addition to the reason I’ve already stated, this entire question of causation is, as I said before, fraught with confusion, fraught with controversy. People of good will argue with equal vigor on either side of this issue. I believe, and I’ve found that it’s generally a question for the jury. But when you have somebody such as Dr.

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Ducatman, who is basically an advocate for one side, not able to draw the correlation, then unfortunately we cannot proceed on.

Id., page 829, line 12 through page 830, line 13.

ASSIGNMENTS OF ERROR

The Circuit Court did not abuse its discretion in ruling as set forth above. First, it did not err in prohibiting Dr. Ducatman from reliance on the neuropsychological testing results of James Phifer, Ph.D., on the grounds that Appellant had failed to disclose that Dr. Ducatman had done so and would offer opinions relating to them. Second, the Circuit Court did not abuse its discretion in striking Dr. Ducatman's Appellant-specific testimony on the grounds he expressed no medical causation opinion. Third, it did not err in dismissing the Appellant's action against Appellee as, without a causation opinion from Dr. Ducatman, Appellant had no witnesses qualified to offer the requisite opinion. The Honorable Arthur Recht correctly ruled on these issues, despite Appellant's assertion to the contrary.

POINTS AND AUTHORITIES

- 1. The Circuit Court did not err in prohibiting Dr. Alan Ducatman from relying upon Dr. Phifer's neuropsychological testing results.**

Under Rule 26(e) of the West Virginia Rules of Civil Procedure, a party is under a duty to amend a prior response given in discovery when the party "knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response in substance is a knowing concealment." *See* W.Va. R. Civ. P. 26(e)(2)(B). Second, a party is under a duty to supplement the identity of witnesses and the substance of the expert's testimony when the identity and/or substance of testimony change. *See* W.Va. R. Civ. P. 26(e)(1)(B). When a party fails to supplement its discovery, Rule 37 provides that the trial court may enter an Order "refusing to allow the disobedient party to support or oppose designated

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claims or defenses, or prohibiting that party from introducing designated matters in evidence.” W.V. R.Civ.P. 37(e); *see also* West Va. Dep’t of Highways v. Brumfield, 295 S.E.2d 917, 923 (W.Va. 1982)(recognizing “the salutary purposes of discovery procedures is to enable parties to obtain relevant information about the other party’s case. This is designed to prevent the trial from becoming one of ambush.”)

Applied to the present case, Dr. Alan Ducatman’s discovery deposition was properly noticed and conducted on November 19, 2004. At no time prior to that deposition had Dr. Ducatman himself ever prescribed neuropsychological testing of Appellant and, in fact, had only evaluated Appellant on one occasion four years earlier. When asked whether he had reviewed any such testing results, he testified that he had no recollection and could not swear to having done so. Though vague and speculative, his deposition testimony established that as of the date of the deposition he had no such testing results with him and had no confirmable memory that he had ever received them much less relied on them. This was a crucial issue because as of the issuance of his report in 2000 and his deposition in 2004, Dr. Ducatman had never opined that Appellant had any medical condition caused by his alleged occupational exposure to chemicals.

Understanding the test results were critical to Dr. Ducatman’s opinions in the case, Appellee reserved the right to re-depose him if the results were located and reviewed. The Appellant, however, never advised that the results had been located, provided to Dr. Ducatman and reviewed at any point after the deposition and before his direct trial examination was initiated seven months later. The Appellant’s contention that the simple notice of Dr. Ducatman as a witness is sufficient for disclosure is simply not supported by the Rules of Civil Procedure.

The fact that Dr. Ducatman was able to perform a subsequent review of Dr. Phifer’s test results at some unknown point in time following his discovery deposition made Appellant’s

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previous discovery response “no longer true.” What was true at his deposition was that Dr. Ducatman knew nothing about the neuropsychological testing results. Moreover, before reviewing them, Dr. Ducatman could not opine whether Appellant’s alleged memory problems were caused by occupational solvent exposure or not. At trial, however, Dr. Ducatman was prepared to testify either directly or indirectly that Appellant was suffering from a condition caused by exposure. *Trial Transcript* page 705, line 7 through page 706, line 7 and page 711, lines 2-15.

Incredibly, Appellant takes the position herein – and took at trial – that it is actually the Appellee’s duty to ensure the Appellant has complied with his responsibilities under the West Virginia Rules of Civil Procedure. No authority is offered in support of this contention, which is at it should be, since none exists. In fact, the West Virginia Rules of Civil Procedure unambiguously set forth the parties’ discovery responsibilities, and it cannot be contested that it is the obligation of the party responding to a discovery request to supplement as needed.

Dissatisfied with simply mischaracterizing the parties’ discovery responsibilities, the Appellant goes further and asserts that Appellee “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.” *Appellant’s Brief*, page 9. There is absolutely no requirement in West Virginia civil practice or under the Rules of Civil Procedure that a motion *in limine* must be filed on this issue. As previously outlined herein, the Rules of Civil Procedure provide that it was entirely proper for Appellee to seek the exclusion of the experts given the failure to disclose and diagnose through their testimony at trial. Further, Appellant’s contention overlooks the record Appellant’s counsel

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made during Dr. Ducatman's deposition that she was going to supply the missing testing results to the expert, and the Appellee's record that he would re-depose the expert if and when that happened.

While claiming the Appellee was manipulative, Appellant wrongly states that the Circuit Court upheld the objection to Dr. Ducatman's proposed testimony on the grounds Appellant was duty-bound to file a formal supplemental disclosure pursuant to Rule 26 notifying the Appellee that the Phifer neuropsychological testing results had been provided and reviewed. In fact, the Circuit Court specifically stated that "the trigger event would have been a notification that – and **I don't even say it should have been the supplementation of the 26(b)4...**but certainly, the way it was left at the conclusion of the deposition in November of 2004 is that there was something that would have or could have triggered the reconvening and the resumption of the deposition." *Trial Transcript*, page 682, lines 3-11 (emphasis added). The Court further observed, "...I do not really believe that it was the railroad's responsibility to say: **Have you done it yet? Have you done it yet? Have you done it yet.**" *Id.*, page 681, line 23 to page 682, line 2 (emphasis added).

But no notice of Dr. Ducatman's reeducation was ever provided, and thus Appellee had no idea that he had considered new evidence and was prepared to testify about it.² In reality, the Appellant's counsel failed to do that which is most basic: timely supplement when the duty arises. In this case it could have been as simple as a phone call advising that new information had been provided and relied on by Dr. Ducatman.

² In fact, Appellee had re-deposed another of Appellant's experts when advised that the expert had arrived at a new or revised opinion. *Trial Transcript*, page 673.

In an attempt to excuse his noncompliance with the West Virginia Rules of Civil Procedure, Appellant cites the case of Anderson v. Kunduru, 600 S.E.2d 196 (W.Va. 2004). In Anderson, the trial court excluded an expert witness because the plaintiff's attorney produced the report a few weeks after the court had ordered expert reports to be submitted. *Id.* On appeal to this Court, plaintiff's counsel argued that the failure to disclose an expert report long before the trial started was excusable because counsel, not the plaintiff, caused its nondisclosure. *Id.* Seizing upon the discretion the trial court is afforded under the Rules, this Court found that the sanction was too harsh under the circumstances. First, the Court noted that the report was produced only a few weeks after it was due. *Id.* More importantly, the report was given to the defendant long before the trial started. Thus, if the defendant was severely prejudiced by the report, it could have easily moved for a continuance to conduct further discovery. *Id.* While Appellant here asserts that it is counsel that should be punished for its mistake, it simultaneously attempts to shift the burden of proof to the Appellee. In response to Appellant's reliance on the Anderson case, it should be noted that Mr. Jenkins is not without legal recourse.

In the present matter, however, Appellant concealed the production and reliance on the neuropsychological testing until springing it on Appellee during the trial testimony of Dr. Ducatman.³ Realizing that such tactics violated the West Virginia Rules of Civil Procedure and severely prejudiced Appellee, the Circuit Court distinguished this matter from the result in Anderson and correctly refused to allow Dr. Ducatman to rely upon Dr. Phifer's neuropsychological testing results or testify about them in any fashion. Such a decision was in

³ Additionally, in Anderson, the plaintiff's attorneys admitted that the failure to produce the report was entirely the fault of the attorneys and that the attorneys should be sanctioned. Here, Appellant's counsel refused to state that the failure to supplement Appellant's discovery was the fault of Appellant's attorneys. Instead, Appellant's counsel claim that they had no duty to supplement discovery.

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complete agreement with West Virginia Rules of Civil Procedure, which are designed to “prevent the trial from becoming one of ambush.” See Brumfield, 295 S.E.2d at 923 (W.Va. 1982).⁴ Indeed, there was no other alternative. The objectionable testimony itself was ongoing at the time the dispute first arose – a circumstance entirely the responsibility of Appellant.

2. The Circuit Court did not err in striking the medical causation testimony of Dr. Alan Ducatman as it related to Appellant.

Under West Virginia law, trial courts are instructed to act as gatekeepers. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 1993); Wilt v. Buracker, 443 S.E.2d 196 (W.Va. 1993). In fact, Rule 702 of the West Virginia Rules of Evidence permits experts to offer their opinions only when their testimony will assist the trier of fact or to determine a fact in issue. See Morris v. Boppana, 584 S.E.2d 302 (W.Va. 1989); see also Watson v. Inco Alloys Int’l, Inc., 545 S.E.2d 294 (W.Va. 2001)(holding that for “the testimony of an expert to be ‘helpful,’ the testimony [must] not concern something that is within the common knowledge and experience of a lay juror.”). Therefore, under West Virginia law, an expert must “testify to scientific, technical, or specialized knowledge” if his or her opinions are to be heard by the jury. State ex. Rel. Wiseman v. Henning, 569 S.E.2d 204 (W.Va. 2002); see also State v. Leep, 212 W. Va. 57, 68, 569 S.E.2d 133, 144 (2002)(“Knowledge, connotes more than subjective belief or unsupported speculation”).

In the present action, Dr. Ducatman’s Appellant-specific testimony was properly stricken because he simply could not testify that Appellant’s alleged memory problems were caused by

⁴ Worth noting, courts elsewhere have “rejected the notion that a failure to comply with the rules of discovery is purged by belated compliance.” Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 353-354 (9th Cir. 1995); see also North Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1451 (9th Cir. 1986)(recognizing the “last-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts.”)

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occupational solvent exposure. To support such an opinion Dr. Ducatman admittedly would have had to rely on neuropsychological testing results properly prohibited by the Circuit Court. Without them any such opinion would have been the very definition of "speculation." Therefore, the Circuit Court was correct to prohibit Dr. Ducatman from testifying to medical causation regarding the Appellant.

Additionally, Appellant takes the position that it was enough for Dr. Ducatman to say that he was "convinced" that Mr. Jenkins had a memory problem. *See Appellant's Brief*, p. 15. The Appellant goes on to state that Dr. Ducatman should not have been required to use "any 'magic' diagnosis terminology in order for his testimony to get to the jury." *See Appellant's Brief*, p. 17. Under West Virginia law, though it is unsettled as to whether a physician must opine to either a reasonable degree of medical certainty or a reasonable degree of medical probability, it is clear that being "convinced" of something is not enough. In the underlying case, Appellant plead and alleged that he suffered from toxic encephalopathy, a specific medical disease. In this case, no expert testimony was presented as to the general claim of "memory loss" much less this specific medical diagnosis. In fact, neither expert alone could establish a diagnosis. Appellant is apparently contending that he should be granted leave to simply throw various scraps of a claim to the jury and it should be permitted by law to try to link it to the underlying medical claim without expert opinion in support. This is absurd. In every case, the plaintiff bears the burden of proof to establish the elements of his claim, which includes the burden of proving medical causation. Appellant grossly and obviously failed to meet these requirements, and the Honorable Judge Recht appropriately dismissed his claim.

3. The Circuit Court did not err in preventing Dr. Phifer from testifying to medical causation.

It is the responsibility of the trial court to determine questions of general admissibility and “whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court.” Watson, 209 W.Va. at 237. This Court has held that “[b]ecause the analysis of *Daubert/Wilt* offers an evidentiary window of opportunity, not a guarantee of admissibility, the courts, not the expert witness or litigants, ultimately must determine when the admission of scientific evidence is appropriate and when it is not.” Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

As relates to witness qualifications, Rule 104 of the West Virginia Rules of Evidence provides that “Preliminary questions concerning the qualification of a person to be a witness [...] shall be determined by the court.” *See* W. Va. R. Evid. 104(a).⁵ Moreover, Rule 104(a) “requires the proponent of the testimony to show by a preponderance that the evidence is admissible.” State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The standard by which an individual may offer expert evidence in West Virginia is enunciated in Rule 702:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

W.Va. R. Evid. 702.

This Court has established a two-step inquiry by which a proffered witness may be permitted to testify as an expert under Rule 702. The first step addresses the qualifications of the

⁵ “In making its determination, the court is not bound by the rules of evidence except those with respect to privileges.” *See Id.*

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purported expert:

First, a circuit court 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.

Gentry, 195 W.Va. 512, at Headnote 5. The second step focuses on the particular opinion to be offered:

Second, a circuit court **must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.**

Id. (emphasis added). The Court elaborated on the second step of this inquiry:

The second part of the expert qualification criteria is assuring that the expert has expertise in the particular field in which he testifies. Here too, a circuit court has reasonable discretion. In discussing how much of a specialist should the expert be, a circuit court must always remember that the governing principle is whether the proffered testimony can assist the trier of fact. Necessarily, the "helpfulness" standard calls for decisions that are very much ad hoc, for the question is always whether a particular expert can help resolve the particular issue at hand.

Gentry, 195 W.Va. at 526.

In this case, Appellee is not asserting that Dr. Phifer would never be qualified to be an expert witness, contrary to Appellant's assertion in his brief at page 19. *See Appellant's Brief*, p. 19. Appellant attempts to distract the Court and confuse the issue through use of a massive half-page footnote, which merely goes to whether or not a neuropsychologist **may** be admitted as an expert. The issue before the Court is not whether or not a neuropsychologist may be admitted as an expert; the issue is whether or not Dr. Phifer was qualified to render an opinion when he clearly admitted that he was not capable of doing so.

With Dr. Ducatman having declined to express a medical causation opinion (or being otherwise barred from doing so), Appellant asserts that Dr. Phifer had the requisite qualifications to offer medical opinion testimony linking Appellant's alleged memory loss to his purported

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excessive occupational exposure to solvents. Such a conclusion is erroneous, however, as under West Virginia law, to qualify as an expert witness, the expert's area of expertise must cover the particular opinion as to which the expert seeks to testify. See Jones v. Patterson Contracting, Inc., 524 S.E.2d 918 (W.Va. 1999). Dr. Phifer admitted he was not properly qualified to make such a determination. *Trial Transcript* page 808, lines 7-21. Dr. Phifer acknowledged the diagnosis "certainly" required a medical component that he was not able to provide. *Id.*, page 823, lines 8-12. And he "certainly" could not testify in contradiction to Appellant's own treating physician, Dr. Ducatman. The analysis ends here as Dr. Phifer admitted that he was not qualified to testify as to Mr. Jenkins. Thus, he was properly precluded from trying to do so in accordance with the Rules of Civil Procedure.

4. The Circuit Court did not err in dismissing Appellant's case.

Under an action brought pursuant to the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.* ("FELA"), a plaintiff is required to prove the traditional common law elements of negligence, including foreseeability, duty, breach, and causation. See Fulk v. Illinois Central Ry. Co., 22 F.3d 120, 124 (7th Cir. 1994); *see also* Claar v. Burlington Northern R.R. Co., 29 F.3d 499, 503 (9th Cir. 1994)(noting that it is well settled that FELA plaintiffs must demonstrate some causal connection between a defendant's negligence and their injuries); Moody v. Maine Central R.R. Co., 823 F.2d.693, 695 (holding that although a plaintiff need not make a showing that the employer's negligence was the sole cause, there must be a sufficient showing (*i.e.* more than a possibility) that a causal relation existed). "Where the conclusion [*of causation*] is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn." See Claar v. Burlington Northern R.R. Co., 29

F.3d 499 (9th Cir. 1994)(holding the existence of a causal connection between chemical exposure and alleged injuries requires specialized knowledge).

In the case at bar the analysis is simple: Appellant noticed a single expert, Dr. Ducatman, who was credentialed to speak to medical causation. In his testimony Dr. Ducatman first declined to express an Appellant-specific medical causation opinion and then was properly prohibited from relying on evidence that could arguably permit him to do so as set forth above. Appellant then resolved to try to fill that self-inflicted evidentiary vacuum through the testimony of a non-physician, Dr. Phifer. No record whatsoever was made of Dr. Phifer's credentials to generally express medical causation opinions, much less opine in such fashion in Appellant's case. As the Circuit Court noted in granting Appellee's motion to dismiss, "when you have somebody such as Dr. Ducatman, who is basically an advocate for one side⁶, not able to draw the correlation, then unfortunately we cannot proceed on."⁷ *Id.*, page 829, line 12 through page 830, line 13.

By his own admission, James Phifer, Ph.D., was not a qualified expert on this point and, accordingly, the Circuit Court was correct to preclude him from offering any medical causation opinions. Without any competent opinion on the issue of medical causation, Appellant's case failed and the Circuit Court was left with no alternative short of dismissing it.

⁶ The "one side" the Court refers to is Appellant's side. The Court has heard testimony from Dr. Ducatman in Daubert hearings and multiple prior trials, all of it offered in favor of plaintiffs suing Appellee.

⁷ Following the Circuit Court's ruling, Appellant did not vouch the trial record with any evidence to establish Dr. Phifer's qualifications under Rule 702.

{H0264917.2 }

CONCLUSION

The Honorable Arthur M. Recht did not abuse his discretion in any of the rulings contested herein. With respect to Dr. Ducatman, the Court properly restricted his testimony by prohibiting his reliance on the belated and undisclosed review of neuropsychological testing results, properly struck his Appellant-specific testimony when he admitted he had no medical causation opinion, and correctly ruled that Dr. Phifer was not qualified to express a medical causation opinion. The Circuit Court's dismissal of Appellant's case was the only fair result in the aftermath of these appropriate evidentiary rulings.

PRAYER FOR RELIEF

WHEREFORE, for the reasons stated above, Appellee, CSX Transportation, Inc., requests that this Court deny the Appellant's Appeal.

CSX TRANSPORTATION, INC.

By _____



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY JENKINS,

Plaintiff/Appellant,

v.

Supreme Court No.: 33179

CSX TRANSPORTATION, INC.,

Defendant/Appellee

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing **“Response Brief of Appellee, CSX Transportation, Inc., to Brief of Appellant, Gary Jenkins”** upon the following persons by depositing true copies thereof to their last known address in the regular manner, United States Mail, postage prepaid from Huntington, West Virginia on the 5th day of February, 2007:

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