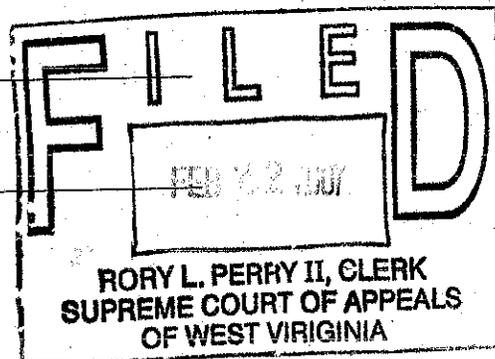


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

REPLY 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

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I. CONTRARY TO APPELLEE'S CONTENTIONS, DR. PHIFER NEVER INDICATED THAT HE WAS NOT QUALIFIED TO GIVE AN OPINION AS TO MR. JENKINS, AND HIS TESTIMONY SHOULD HAVE BEEN PERMITTED.

The Circuit Court mistakenly prohibited Dr. Phifer's expert testimony from being considered by the jury. The Court accepted Dr. Phifer "as an expert witness in the field of clinical and forensic neuropsychology...capable of giving opinions and conclusions within the field of clinical neuropsychology." *Trial Transcript* page 803, lines 12-18. If permitted to testify, Dr. Phifer would have expressed his "professional opinion to within a reasonable degree of neuropsychological certainty that chronic exposure to solvents and lead contributed to Mr. Jenkins' current neuropsychological deficits." *Trial Transcript* page 821, lines 9-14. Dr. Phifer clearly made a neuropsychological diagnosis that a causal connection existed between Mr. Jenkins' work-related exposure to chemicals and his brain injury. This diagnosis would have proven sufficient to establish the causation of Mr. Jenkins' injury, and his case should have proceeded to the jury.

Although the precise issue of whether a neuropsychologist's testimony is sufficient to establish causation of a brain injury has not been decided by the West Virginia Supreme Court of Appeals, other decisions by this Court, in addition to well-reasoned precedent from other jurisdictions, lead to the conclusion that such testimony is sufficient. As indicated, a number of other jurisdictions have considered this matter, and have determined that a psychologist or neuropsychologist that satisfies Rule 702 is permitted to testify as to the cause of brain injury. In a comprehensive footnote on page 19 of Mr. Jenkins' Initial Brief, the rulings of Courts in twelve different jurisdictions were cited for this proposition. Furthermore, West Virginia cases have supported this position by holding that an expert need not be a medical doctor in order for him or

her to testify as to the causation of an injury. *See, e.g., Dolen v. St. Mary's Hospital of Huntington*, 203 W.Va. 181, 506 S.E.2d 624 (1998) (Oral surgeon permitted to provide expert testimony even though he was not a medical doctor); *and Akers v. Cabell Huntington Hosp., Inc.*, 215 W.Va. 346, 599 S.E.2d 769 (2004) (Psychiatric testimony from a medical doctor not required to establish a medical condition). In following the trend in current West Virginia law, Dr. Phifer's expert neuropsychological testimony should have been permitted to be heard by the jury on the issue of causation.

However, the Court improperly excluded Dr. Phifer's testimony, and would not permit it to go to the jury. The Court was under the mistaken assumption that both a medical and neuropsychological component were necessary for a diagnosis to proceed to the jury. *See Trial Transcript* page 824, lines 7-15. While Dr. Phifer made a neuropsychological diagnosis, he admittedly could not provide an opinion as to the medical causation of Mr. Jenkins' brain injury. During questioning by the Court, Dr. Phifer stated that he could not provide the medical component of a medical diagnosis of Mr. Jenkins' encephalopathy, stating "I don't have the medical component". *Trial Transcript* page 823, lines 9-10. However, Dr. Phifer, who is not a medical doctor, was not required to provide the medical component of the diagnosis. He was only required to make a neuropsychological diagnosis, which he did. "I made a neuropsychological diagnosis." *Trial Transcript* page 822, line 7.

Dr. Phifer agreed that neuropsychology is an important component of the diagnosis of solvent-induced toxic encephalopathy. *See Trial Transcript* page 822, lines 8-12. However, he stopped short of saying that the absence of a medical diagnosis negated his neuropsychological diagnosis:

Q You must also have a companion medical diagnosis for the two to go together; is that right?

A Well, again, from a neuropsychological perspective, I can say it's consistent. But again that -- we're stepping out of clinical things into forensic things. I'm saying that in terms of the standard of proof necessary in a court of law, so I'm saying that's really not for me to decide whether something meets the standard of proof. I'm saying, from a clinical perspective, it was consistent, but that in and of itself may or may not meet the standard of proof.

Trial Transcript page 822, lines 13-24. Dr. Phifer gave his expert opinion from a clinical perspective, and it was from this perspective that the Court had qualified him as an expert. *See Trial Transcript* page 803, lines 12-18. From a clinical perspective, his opinion was that Mr. Jenkins' chronic exposure to solvents contributed to his brain injury. This should have been sufficient for the case to proceed to the jury. Dr. Phifer admitted that he did not know if his diagnosis alone was sufficient to fulfill the standard of proof under the law for the case to proceed to the jury, and that in fact was not for him to decide. Certainly the law does not require a neuropsychologist to be fluent on legal standards of proof. What the law does require is for a neuropsychologist to provide an expert opinion within a reasonable degree of neuropsychological certainty, which Dr. Phifer did.

The Appellee has mistakenly contorted Dr. Phifer's trial testimony to appear as if he had admitted he was not qualified to testify as an expert "The analysis ends here as Dr. Phifer admitted that he was not qualified to testify as to Mr. Jenkins." *Appellee's Brief*, p. 15. The Appellee bases its conclusion on the fact that Dr. Phifer could not provide the medical component of the diagnosis. "Dr. Phifer admitted he was not properly qualified to make such a determination." *Appellee's Brief*, p. 15. Though it is true that Dr. Phifer admitted he could not provide the medical component, he never admitted that he was not qualified to provide an expert

opinion in this case. Dr. Phifer, as a neuropsychologist, could only provide an expert opinion in the field of neuropsychology. However, just because he admitted he could not provide the medical component does not mean that he admitted to not being qualified as an expert, as the Appellee would lead us to believe.

In addition, the Appellee contends, "Dr. Phifer acknowledged the diagnosis 'certainly' required a medical component that he was not able to provide." *Appellee's Brief*, p. 15. This is an inaccurate description of what actually was said:

Q You still must have the medical component, correct?

A Well, I would, certainly would -- I mean, what I said was I know of -- I don't have the medical component -- I know of no other competing hypothesis, but I don't have that medical component in the meantime.

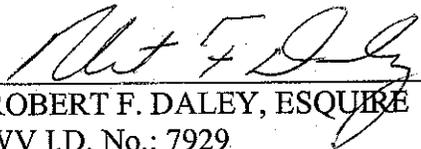
Trial Transcript page 823, lines 6-12. What Dr. Phifer said was that he certainly would like to have the medical component, but not having it does not interfere with his neuropsychological diagnosis, because he knows of no other competing hypothesis that could conflict with his neuropsychological diagnosis.

More importantly, and this is the point which the Appellee seems to miss, is that it does not matter if Dr. Phifer thinks that the medical component could supplement the diagnosis. The law of West Virginia as set forth in Dolen and Akers, in addition to the previously cited precedent from other jurisdictions makes it clear that in cases such as this one, a neuropsychological diagnosis is sufficient to carry the case to a jury.

Wherefore, for the reasons state 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, PC

By: 
ROBERT F. DALEY, ESQUIRE
WV I.D. No.: 7929

2500 Gulf Tower, 707 Grant Street
Pittsburgh, PA 15219
(412) 281-7229

Counsel for Appellant

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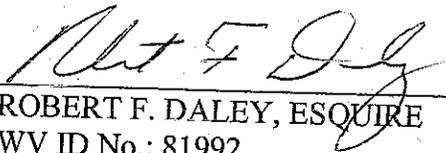
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the REPLY BRIEF OF APPELLANT was served by first class United States mail, postage pre-paid, this 9 day of Feb, 2007, upon the following:

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

Respectfully submitted,

ROBERT PEIRCE & ASSOCIATES, P.C.

By: 
ROBERT F. DALEY, ESQUIRE
WV ID No.: 81992

2500 Gulf Tower, 707 Grant Street
Pittsburgh, PA 15219
(412) 281-7229

Counsel for Plaintiff/Petitioner
Gary Jenkins