No. 33179 *Gary Jenkins v. CSX Transportation, Inc.*

FILED
June 29, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent, because the majority opinion wrongly casts the plaintiff as being a recalcitrant who failed to diligently supplement his expert disclosures, as required by *West Virginia Rules of Civil Procedure*, Rule 26. The majority suggests that the defense was somehow surprised at trial by a novel new theory proffered by the plaintiff's expert and, in the interests of fairness and justice, the circuit court properly excluded the expert's testimony. This is simply not correct.

The record indicates that Dr. James Phifer, a neuropsychologist, examined the plaintiff and prepared an expert report of the plaintiff's brain injury. This report was made available to the defendant.

The plaintiff, pursuant to Rule 26, identified as his experts Dr. Phifer and Dr. Alan M. Ducatman. The Rule 26 disclosure of experts made it clear that Dr. Ducatman would be relying on any and all medical records made available to him, which would include Dr. Phifer's expert report.

This was not the first case tried by plaintiff's counsel or defendant's counsel regarding brain injuries to railroad employees caused by exposure to solvents on the job. In past solvent cases, defense counsel had taken discovery depositions of Dr. Ducatman, and in each instance about five minutes worth of questions were asked regarding the doctor's review and reliance upon another expert's neuropsychological testing report.

At Dr. Ducatman's deposition in the plaintiff's case, counsel for the defendant – like in past cases – asked Dr. Ducatman about Dr. Phifer's neuropsychological report. Dr. Ducatman, however, indicated he had misplaced Dr. Phifer's report and was unable to comment upon it. Counsel for the defendant therefore reserved the right to conduct a follow-up deposition of Dr. Ducatman, and counsel for the plaintiff agreed.

Following the deposition, Dr. Ducatman reviewed Dr. Phifer's report. Counsel for the plaintiff did not advise counsel for the defendant that the doctor had read the neuropsychological report, reasoning that (a) the Rule 26 disclosures already indicated Dr. Ducatman would be relying on all the plaintiff's medical records, like Dr. Phifer's report that was given to the defendants; (b) the defendant had taken Dr. Ducatman's discovery deposition, in part, to ask about his reliance on Dr. Phifer's report; and (c) in past cases, counsel for the defendant routinely asked questions about Dr. Ducatman's reliance upon neuropsychological testing of the plaintiff to form his opinion.

Furthermore, the defendant knew that Dr. Ducatman would be testifying about the causal connection between solvent exposure and the plaintiff's neuropsychological injury. Yet, prior to trial, the defendant never filed a motion *in limine* to preclude any portion of Dr. Ducatman's testimony as lacking a basis, or because the plaintiff had failed to make any supplemental disclosures.

At trial, Dr. Ducatman testified about the general science involving the connection between exposure to solvents and injuries of the brain. It was only when the doctor proceeded to address the plaintiff's specific neuropsychological injuries, and connect

those injuries with his solvent exposure, that the defendant objected that it had not been given an opportunity to depose the doctor regarding his review of Dr. Phifer's report. The circuit court sustained the objection, and prevented Dr. Ducatman from testifying about the connection between the plaintiff's injury and his on-the-job exposure to solvents. And because Dr. Phifer was only qualified to say that the plaintiff had an injury, the end result was that the circuit court dismissed the plaintiff's case for lacking evidence of causation.

On these facts, it is clear that the defendant knew of the existence of Dr. Phifer's report, and knew that Dr. Ducatman would be relying upon that report. There was no surprise, and there was no intentional, calculated, egregious failure by the plaintiff to comply with Rule 26, as the majority opinion would have us believe.

The *Rules of Civil Procedure* are designed to achieve a speedy and just resolution. *See* Rule 1. The circuit court said that "[i]f this was going to be a month, month and a half trial . . . I would have you redepose Dr. Ducatman . . . 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." But there is nothing in the record showing the circuit court asked the parties, "how long will it take to ask Dr. Ducatman about his review of Dr. Phifer's report?" In past cases, by the plaintiff's calculation, such questioning lasted about five minutes. Had the trial court allowed questioning of Dr. Ducatman by defense counsel out of the presence of the jury, in a matter of minutes the defendant's questions about the doctor's opinion regarding Dr. Phifer's report would have been answered. Justice would

have been served, because the plaintiff and the defendant would have been permitted to lay out the entirety of their evidence before the jury for a fair and final resolution.

Instead, it is my firm belief that the trial court abused its discretion, and prematurely short-circuited this case by excluding evidence crucial to the plaintiff's cause. I therefore dissent.

I am authorized to state that Justice Albright joins in this dissent.