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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11 - 0385

VICKIE L. AKERS, Plaintiff Below,

Petitioner,

vs.

CSX TRANSPORTATION, INC., Defendant Below,

Respondent.

Appeal from the Circuit Court of Cabell County
The Honorable David M. Pancake Judge
Civil Action No.: 08-C-0656

REPLY BRIEF OF PETITIONER

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AND NOW, comes the Petitioner, Vickie Akers, by and through her undersigned counsel, Robert F. Daley, Esquire; D. Aaron Rihn, Esquire; Max Petrunya, Esquire; and the law firm of Robert Peirce and Associates, P.C., and submits the following Reply to Respondent's Answering Brief, pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure, and in support thereof states as follows:

INTRODUCTION

The Brief submitted by CSXT in this case should be called a "change of subject" Brief, rather than one that attempts to answer the issue Ms. Akers raised on appeal. CSXT virtually ignores Ms. Akers' main issue on appeal; that the Trial Court improperly invaded the province of the jury by making an incorrect factual determination when the 1994 Huntington Division Safety Assessment was excluded from evidence because of the report's "inflammatory language that is not consistent with the evidence and testimony in this case." See Trial Transcript, Appendix Vol. 2, p. 608; 2-4. Instead, CSXT argues that the Safety Assessment is irrelevant and unfairly prejudicial, therefore making its exclusion from evidence proper.

1. CSXT Fails to Respond to Ms. Akers' Main Issue on Appeal

CSXT does not respond to Ms. Akers' main argument until the last section of its Brief. CSXT argues that the Trial Court was not usurping the role of the jury as the trier of fact and sole judge of the weight of the evidence in making the aforementioned statement when it excluded the Safety Assessment from evidence, but rather "did so only to illustrate the inherently passionate and irrational nature of the survey comments – that is, their potential to prejudice CSXT unfairly." See CSXT Br., p. 13.

While CSXT attempts to read more into the Trial Court's statements then is actually

there, it fails to counter Ms. Akers' argument that the Trial Court's reasoning for excluding this evidence was improper and invaded the province of the jury. CSXT's avoidance of this argument gives credence to Ms. Akers' appeal, and suggests that the Trial Court invaded the province of the jury in this respect.

In spite of its suggested explanation of the Trial Court's reasoning for the exclusion of the Safety Assessment, CSXT continues its argument by citing a 49 year old case from the Eighth Circuit Court of Appeals which cites a 50 year old case from the Ninth Circuit Court of Appeals (Employers Mut. Cas. Co. v. Hinshaw, 309 F.2d 806, 809 n.1 (8th Cir. 1962) *quoting* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 89 (9th Cir. 1961), *rev'd on unrelated grounds*, 370 U.S. 690 (1962)), which conveniently fits CSXT's argument but has no bearing or control on this case. Nevertheless, CSXT cites a footnote in the Employers case in an attempt to support its argument. It states that "[a]n appellate court reviews judgments, not the reason which may be given in their support" Employers Mut. Cas. Co., 309 F.2d at n. 1. While that basic proposition of law may be true; when this case is analyzed, it is clear that not only was the Court's reasoning wrong, its decision on the evidentiary matter was in error as well.

Initially, Ms. Akers' directs this Honorable Court's attention to the fact that the issues raised in the Employees and Cont'l Ore cases, which do not deal with evidentiary rulings, but rather involve a bankruptcy proceeding (Employers), and a judgment entered for the defendant in an antitrust case (Cont'l Ore), are not controlling in West Virginia. Regardless, CSXT argues that even if the ruling was based on improper grounds, it was the right ruling supported by the record because the report is irrelevant and unfairly prejudicial. As such, much in the same vein that Ms. Akers' argues on appeal, that the job analysis study offered by CSXT and admitted over her objection by the Trial Court was "different job – different time" evidence, CSXT's argument

is that the Trial Court's exclusion of the 1994 Safety Assessment was "wrong logic – right ruling".

2. The Report is Neither Irrelevant Nor is it Unfairly Prejudicial

In support of its argument that the Trial Court's exclusion of the Safety Assessment was the "right ruling", CSXT argues that the report was irrelevant and unfairly prejudicial.

A. The Report is Not Irrelevant

CSXT makes several incorrect and inaccurate statements in its Brief regarding Ms. Akers' argument as to why the 1994 Safety Assessment is relevant and should have been admitted at trial.

CSXT depicts Ms. Akers as a child crying foul because the Trial Court did not afford her the same opportunity to enter "different time – different job" evidence when CSXT was afforded this same opportunity when it entered a Job Study Analysis over Ms. Akers' objection. See Trial Transcript, Appendix Vol. 2, p. 564-565 and CSXT's Br., p. 7-9. CSXT then goes on to explain what Ms. Akers should have argued on appeal, stating "the proper means of testing her claim would be to argue on appeal that the trial court abused its discretion by admitting it into the record, not by arguing that admitting the study somehow made it an abuse of discretion to exclude the unrelated safety-assessment survey." CSXT Br., p. 9.

Again, CSXT ignores Ms. Akers' main argument on appeal, that the incorrect factual determination made by the Trial Court regarding the Safety Assessment and its decision to exclude the Safety Assessment based on testimony at trial that was inconsistent with the language contained in the report, invaded the province of the jury as the trier of fact, and therefore abused its discretion. The Job Study Analysis and the Safety Assessment in question are both relevant and admissible. The objections raised by both parties regarding the evidence go

to its weight and not to its admissibility. Ms. Akers therefore references the Trial Court's admission of the job study as evidence that the Trial Court understood this distinction when it admitted the Job Study Analysis over her objection. The Trial Court, however, used the "wrong logic" and made the "wrong ruling" when it excluded the Safety Assessment.[1]

The Safety Assessment in question was done in 1994 by CSXT employees at CSXT's direction for the Transportation Department in Huntington, West Virginia. Ms. Akers worked for CSXT from 2000 until 2006 in Huntington, West Virginia. Despite its best efforts to make this Honorable Court believe that the Safety Assessment was conducted "nearly a decade" before Ms. Akers began working for CSXT, the fact remains that six years is not nearly a decade. See CSXT's Br. p. 6. Further, if CSXT would like to nit-pick about the date and location of the Safety Assessment in arguing for its exclusion, perhaps it should look at the Statistical Job Study it offered as proof that Ms. Akers' job was not as rigorous as she claimed, and therefore could not have contributed to her injuries. This Statistical Job Study was conducted at four different locations (none of which were locations where Ms. Akers worked) between 1995 and 2002. Ms. Akers worked for CSXT at Huntington from 2000 until 2006. Thus, the studies overlap only two years of Ms. Akers' time at Huntington, and do not even address the work she did at Huntington. Regardless, the Trial Court admitted Dr. Brown's studies over Ms. Akers' objection because the issues she raised about the "different time" – "different job" and "different location" of the work studies went to the weight of the evidence, not its admissibility. The Trial Court ruled that those inquiries were "proper cross-examination. It goes to the weight and credibility." See Trial Transcript, Appendix Vol. 2, p. 565; 8-9.

[1]CSXT is correct that Ms. Akers could have argued on appeal that the admission of Dr. Brown's Job Study Analyses was inappropriate, as she did at trial. However, that is simply converse of the argument Ms. Akers actually makes. In essence, the argument could be made as to CSXT's and Ms. Akers' evidence that "both should be in" or "both should be out." When deciding what issues to raise on appeal, counsel determined that, on balance and in this case,

Ms. Akers never has, nor will she ever, argue that she worked in the Transportation Department during her time at CSXT. Ms. Akers did, however, work in Huntington, West Virginia, where the Safety Assessment was conducted. While the assessment may not have been conducted in the department where Ms. Akers worked, it is not unimaginable to think that the comments and statistical results of this survey are consistent with the safety culture in the Locomotive Shop.[2] Further, the issues CSXT raises regarding the relevance of the Safety Report on appeal, that this survey is "different time" – "different job" evidence, speaks to its weight and not its admissibility. CSXT could have addressed these issues during cross examination, much the same way Ms. Akers dealt with these issues related to the entry of Statistical Job Studies.

B. Regardless of CSXT's Theme at Trial, the Safety Report was Relevant to this Action, and its Exclusion was Harmful to Ms. Akers' Case

Despite the myriad of evidence Ms. Akers referenced in her Brief indicating that one of CSXT's defenses at trial was that it had an effective Safety Program in place designed to prevent the injuries Ms. Akers sustained, CSXT now argues that its theme was "simply that Akers's job did not entail the kind of repetitious physical work that might cause cumulative-stress injuries." See CSXT Br., p. 12. CSXT then goes on to argue that this theme is consistent with the opinion provided by CSXT's liability expert witness, Todd Brown, Ph.D., which is the most likely reason "the jury rendered its verdict for CSXT." Id.

Further, even if the jury's verdict was based on the theory offered by Dr. Brown, Ms. Akers' argument that the Safety Assessment should have been admitted is even stronger. Ms. Akers attempted to admit the 1994 Huntington Division Safety Assessment during Dr. Brown's cross-examination to, among other reasons, impeach his credibility. If Dr. Brown's

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both pieces of evidence should have been admitted. This is particularly true when the admission of the Safety Assessment would also be relevant as to Dr. Brown's credibility.

opinion was so crucial to the outcome of this case, then impeaching his credibility was an important aspect of this case, and any issues related to Dr. Brown's credibility are essential to Ms. Akers' claim.

Dr. Brown was hired by CSXT in 1995, one year after the Safety Assessment was conducted, to improve CSXT's Safety Program. See generally Trial Transcript, Appendix Vol. 2, p. 526-527. Dr. Brown testified on cross-examination that he had never seen any evidence indicating that the safety committees were ineffective at the Huntington Locomotive Shops. It was at that point that Ms. Akers attempted to enter the 1994 Safety Assessment into evidence. Ms. Akers' attempt to enter this evidence was thwarted by the Trial Court in its ruling to exclude the report. Thus, Ms. Akers was precluded from being able to inquire as to the reasons why the individual hired by CSXT to improve its safety had never seen or reviewed a Safety Assessment conducted at the direction of CSXT containing statements and statistical information germane to many issues involving safety, or lack thereof, in a division of CSXT. Ms. Akers did not attempt to enter this evidence during her case in chief, nor did Ms. Akers' counsel reference this Safety Assessment in his opening statement. Rather, Ms. Akers attempted to enter this evidence during Dr. Brown's cross-examination because at that point, Dr. Brown's credibility was at issue. The Trial Court's improper invasion of the province of the jury as to the weight of such evidence, which also sought to impeach the credibility of CSXT's crucial expert witness, was unequivocally an abuse of its discretion, and warrants a new trial.

CSXT further argues that "any error [in excluding the Safety Assessment] was harmless." If the testimony of Dr. Brown was, in fact, the testimony the jury based its decision on, then it is illogical and counterintuitive to argue that any errors associated with the exclusion of the Safety

[2] Indeed some of the comments in the Safety Assessment reference the deplorable conditions of the locomotive cabins. One of Ms. Akers' jobs at Huntington was to clean locomotives.

Assessment during his testimony is harmless. Clearly, Dr. Brown was a witness CSXT relied upon heavily in setting forth its defenses, regardless of whether those defenses related to an allegedly effective Safety Program, insufficient job stresses to cause injury, or both. As such, Dr. Brown's credibility was a key factor in the trial, and evidence such as the Safety Assessment, which impeached his credibility, is extremely important and potentially dispositive.

C. The Safety Assessment and the Language Contained Therein Have Substantial Probative Value Which is not Outweighed by the Certainty of Unfair Prejudice.

CSXT also argues that the Safety Assessment "contained inflammatory commentary that would have unfairly prejudiced CSXT." See CSXT Br., p. 9. CSXT then speculates about the risk of irrational behavior by the jury if presented with the Safety Assessment. See CSXT Br., p. 10. CSXT goes on to cite several examples of this allegedly inflammatory material from the Safety Assessment that are germane to Ms. Akers' case.

For example, CSXT references the following excerpts from the Safety Assessment: "The locomotive cabins have '[d]irty toilets' (A056), are 'very trashy' Id., and look like 'hog pen[s]' (A066)." Id. "Workers used 'a deplorable old building...as a lunch room and rest facility,' which 'was in dire need of general housekeeping and repairs' (A073)." Id. As opposed to being inflammatory, these excerpts from the Safety Assessment could not be more relevant to Ms. Akers' case. Ms. Akers' claim was based, in part, on the fact that she was required to clean the locomotive cabins and other areas at the Huntington, West Virginia Locomotive Shops. She claims that these areas were extremely dirty and required her to engage in rigorous and repetitive cleaning during her time at CSXT. It is this type of work which Ms. Akers claims caused her cumulative trauma injuries, and the Safety Assessment supports her description of the areas in question.

CSXT continues with: "Employees 'are not treated fairly' and must 'lie to the crew callers in order to get the day off' (A067)". Id. "Management 'ignor[es] ideas' and does 'not listen [] to suggestions' (*id.*)." Id. "Management is 'autocratic' and uses 'fear and intimidation' to manage employees (A074)." Id. One of the issues associated with Ms. Akers' claim is the fact that she was overworked and that her complaints to management about unsafe working conditions and individuals sleeping on the job fell on deaf ears. See generally Trial Transcript, Appendix Vol. 2, p. 164-169. CSXT touted the effectiveness of management, the safety committee and safety meetings at Huntington throughout the entire trial. See generally Trial Transcript, Appendix Vol. 2, p. 204; 21-22, p. 205; 12-14, p. 530; 3-6, p. 640; 1-2, and p. 639; 20-21. Specifically, Dr. Brown went as far to state in support of his opinion that CSXT had an effective Safety Program in place that "there is an open forum at the end [of the safety meetings]" where employees were encouraged to voice "any questions or concerns or complaints." See Trial Transcript, Appendix Vol. 2, p. 536; 17-19. Given Dr. Brown's testimony (and the fact that CSXT now claims it was his testimony that impacted the jury's verdict), all of the statements related to CSXT's management's role in intimidating employees and ignoring ideas and suggestions of its employees is undoubtedly relevant to Ms. Akers' claim.

CSXT argues that such statements, and the entire Safety Assessment, are unfairly prejudicial. Evidence presented by a party in litigation is, by its very nature, prejudicial to its opponent's case. Simply because the evidence is harmful is not grounds to exclude it under the theory that it is unfairly prejudicial. Given the language contained in the Safety Assessment, and its relevance to Ms. Akers' claim, it was an abuse of discretion of the Trial Court to exclude it at trial.

CONCLUSION

In light of the foregoing, Ms. Akers respectfully requests this Honorable Court reverse the evidentiary ruling of the Trial Court with regard to the 1994 Huntington Division Safety Assessment, and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert F. Daley, hereby certify that a true and correct copy of the foregoing Reply Brief was served this 11th day of August, 2011, by first class United States mail, postage prepaid, upon counsel for the Respondent, addressed as follows:

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