

No. 11-0385

In The Supreme Court of Appeals of West Virginia

VICKIE L. AKERS,
Plaintiff-Petitioner,

– v. –

CSX TRANSPORTATION, INC.,
Defendant-Respondent.

On Appeal from a Final Judgment of
the Circuit Court of Cabell County

Honorable David M. Pancake, Circuit Judge
Case No. 08-C-0656

**ANSWERING BRIEF
OF CSX TRANSPORTATION, INC.**

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STATEMENT CONCERNING ORAL ARGUMENT

Defendant-Respondent CSX Transportation, Inc. (“CSXT”) respectfully submits that oral argument would not assist the Court in deciding the issue presented in this appeal. Although this is an appeal from a three-day jury trial, only a limited portion of the trial transcript is implicated by the issue raised on appeal, which is itself simple and straightforward. Oral argument is not likely to provide any clarity that is not already apparent on the face of the briefs.

COUNTERSTATEMENT OF THE CASE

The relevant facts are few and undisputed. Akers filed suit against CSXT, alleging that she sustained cumulative-trauma injuries in the course of performing her job as a utility worker in CSXT’s Huntington locomotive shop between 2000 and 2006.

As a utility worker, Akers initially worked inside the locomotive shop, where “heavy repair[s]” were performed on engines. Trial Tr. 121:10. Her job for the first few weeks in the shop was to “clean[] the locker rooms and mop[] up.” *Id.* at 122:18-19. She then took an assignment in the “load box,” a semi-open area next to the shop where the locomotives are tested before being put back into service. *Id.* at 124:15-20. Akers had “a lot of tasks” in the load box, primarily “to keep the whole area clean.” *Id.* at 125:10-11, 19. She also cleaned inside and outside the locomotives themselves and emptied garbage

cans. *Id.* at 126:14-24. On the whole, Aker’s cleaning responsibilities required her to tidy, sweep, mop, scrub, shovel, spray, hose-down, wipe, and drain. *Id.* at 129-140. In 2003, after returning from a medical leave of absence, Akers returned to the “high bay” inside the locomotive shop, where she performed many of the same tasks. *Id.* at 171:21-172:8.

The case was tried to a jury. Two documents are relevant to this appeal, both of which were presented during the parties’ examination of CSXT’s ergonomics expert, Todd Brown. The first was a “job analysis” study documenting “a day in the life of a utility worker” in a CSXT “locomotive service center.” Trial Tr. 563:10, :23. CSXT offered the report into evidence to establish the nature of Akers’s day-to-day job description, which Brown testified was “highly variable” and did not involve the sort of “continuous or repetitive” (*id.* at 562:8-9) work that would cause the kind of cumulative-stress injuries that Akers claimed to suffer from (*id.* at 560:9). Akers objected to admission of the study because it was based upon observations of workers in locomotive shops at other CSXT locations, including Waycross, Georgia. *Id.* at 564:13-565:7. The trial court overruled the objection, noting that whether the study was “representative” of Akers’s job in the Huntington shop was an issue for cross-examination. *Id.* at 565:5-6, :8-9.

The second document—which Akers attempted to introduce during Brown’s cross-examination (Trial Tr. 603:16-604:3)—was a “safety assess-

ment” of the “Huntington Division Transportation Department,” detailing the results of a survey administered in March 1994 to CSXT transportation department employees. A040-A109. Brown had testified on direct examination that, when Huntington locomotive-shop employees have “complaints” or “problems” regarding safety or medical concerns, “there’s a safety committee that they can report to” each morning. Trial Tr. 536:9-16. Akers offered the survey—which included both empirical and narrative results concerning the transportation-department employees’ perceptions of safety in that department—as impeachment evidence and to contradict Brown’s claims. *See, e.g.*, A087-A089.

CSXT objected to introduction of the report, raising two separate grounds for its exclusion: *first*, the report was irrelevant because it detailed the results of a survey administered six years before Akers commenced work in the Huntington locomotive shop and reported the views of employees working different jobs in a different department; and *second*, it was unfairly prejudicial because it contained inflammatory narrative comments that would have outweighed any probative value and confused the jury. The trial court sustained the objection, reasoning that the narrative portions of the survey—which were “contrary” to and “not consistent” with other evidence in the record—contained “inflammatory language.” Trial Tr. 608:1-5.

After a three-day trial, the jury returned a verdict for CSXT. Akers moved for a new trial, arguing only that the trial court should have allowed the 1994 safety assessment into evidence. The trial court denied her motion; Akers now appeals.

STANDARD OF REVIEW

“The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary . . . rulings.” Syl. Pt. 3, *Reynolds v. City Hosp., Inc.*, 207 W.Va. 101, 529 S.E.2d 341 (2000). This Court therefore reviews such rulings “under an abuse of discretion standard.” *Id.* Abuse-of-discretion review is highly deferential: a discretionary ruling should be overturned only if it is “manifestly unreasonable or based on untenable grounds.” *Caperton v. A.T. Massey Coal Co.*, 225 W.Va. 128, 169, 690 S.E.2d 322, 363 (2009).

ARGUMENT

Akers assigns just one error on appeal: in her view, the trial court abused its discretion by refusing to allow into evidence a report detailing the results of a survey of employees in the Huntington transportation department more than six years before she commenced work in the Huntington mechanical department’s locomotive shop. Her argument fails, for two straightforward reasons: *first*, the trial court was well within its discretion to exclude the safety report as both irrelevant and unfairly prejudicial; and *second*, any

abuse of discretion in excluding the report was manifestly harmless. Nothing Akers says in her opening brief provides any reason for concluding otherwise. The judgment accordingly should be affirmed.

I. THE 1994 SAFETY REPORT WAS PROPERLY EXCLUDED FROM THE RECORD.

The report was properly excluded from the record because it was irrelevant and unfairly prejudicial. On these bases alone, the judgment should be affirmed.

A. The safety report was irrelevant.

To begin with, the safety assessment report that Akers sought to introduce lacked probative value. There is no disputing that it detailed employees' impressions of safety, not in the Huntington *locomotive shop* between 2000 and 2006 (where and when Akers worked for CSXT), but instead in the Huntington *transportation department* in 1994.

These distinctions are crucial. As an initial matter, transportation department and locomotive shop employees have fundamentally different jobs; whereas transportation department employees work with moving trains on the open tracks (*see generally* A040-A109), Akers's job entailed a range of cleaning tasks within the confines of the locomotive shop and load box (*see supra* pp. 1-2). These settings involve self-evidently different safety considerations—the transportation department report described concerns about “train schedule pressure from yardmasters,” ballast maintenance, availability

of adequate radios, and the use of safety boots. *E.g.*, A063, A066-A067, A086, A089. These issues have nothing whatever to do with Akers's cleaning duties.

And it is equally clear that a backward-looking survey administered in early 1994 sheds no light on matters nearly a decade later. That is especially so because it was precisely the point of the report to induce change in the transportation department's approach to safety. *E.g.*, A054 (recommending "drastic measures" to "ensure safety becomes the number one priority"). There is not a scintilla of evidence that any of the problems supposedly present in the transportation department in 1994 persisted *even there* between 2000 and 2006.

In short, the report is in no way probative of CSXT's safety policies or practices during the applicable time, in the applicable department, or with respect to the applicable jobs. It was therefore irrelevant and properly excluded under W. Va. R. of Evid. 402.¹

1. In arguing otherwise, Akers asserts that CSXT's "overarching theme" at trial was that it had effective safety policies and practices in place in the Huntington locomotive shop while Akers was an employee there. Akers Br. 9-13. She therefore insists that the 1994 transportation-department re-

¹ Akers suggests that the report's findings are not limited to the transportation department. That is incorrect. The first page of the report affirms that it was a "safety assessment . . . of the Huntington Division Transportation Department." A040. Nowhere does the report suggest that its scope was any broader than that.

port was germane because it “directly contradicted” CSXT’s theory of the case and served to “impeach” each of CSXT’s witnesses who testified on the issue of safety. *Id.* at 13-14, 20-22.

She is mistaken. With respect to existing safety measures, CSXT focused at trial exclusively on the *locomotive shop*. As Akers herself acknowledges, Brown testified concerning the safety practices only in the locomotive shop during the time that Akers was employed there. Akers Br. 10-11. He never testified about safety in the transportation department in 1994 or at any other time. The same is true of CSXT’s fact witnesses, Roger Simmons and Jim Fischer; as Akers again admits, each testified with respect to the locomotive shop only. *See id.* at 11-12. Yet Akers offers no credible theory as to how a long-stale survey of employees working entirely different jobs, concerning the safety culture and conditions of an altogether different department, would have impeached Brown’s, Simmons’s, or Fischer’s testimony concerning the safety measures in the locomotive shop between 2000 and 2006. That omission is unsurprising, because it would not have.

2. Akers appears to admit all of this when she acknowledges that evidence bearing on “the wrong time” and “wrong job” generally should “not [be] admissible.” Akers Br. 25. She nevertheless contends that, because the trial court allowed CSXT to enter into the record a “job analysis study for workers” at locations other than Huntington—a study she asserts was inadmissible for

“identical” reasons—she should have been allowed to put the safety-assessment report before the jury. *Id.* at 24-25.

This argument fails for at least two reasons. First, and more fundamentally, the trial court’s decision to allow the job-analysis study into evidence was entirely reasonable and in no way inconsistent with its decision to exclude the safety-assessment report. The job-analysis study documented “a day in the life of a utility worker” in a CSXT “locomotive service center” (Trial Tr. 563:10-11, :23-24) and demonstrated that utility work in the locomotive shops does not generally involve the sort of “repetitive” physical stresses that might lead to a cumulative-trauma injury (*id.* at 570:21-24). Brown relied on the study (which was consistent also with the testimony of Akers’s own expert), in addition to his direct observation of workers in the Huntington locomotive shop, to support his opinion that Akers’s job was not “the type of work” that would cause her claimed injuries. *Id.* at 560:9. The job-analysis study thus was directly relevant to CSXT’s defense.

True enough, the study included the observations of workers in locomotive shops in various locations (not just Huntington) between 1995 and 2002 (*id.* at 578:22-23); but Akers fails to explain why or in what way the job description of a utility worker in any other locomotive shop or during any other time would have been so fundamentally different as to be irrelevant. Nor could she: Brown affirmed that, although the study did not necessarily pro-

vide an “exact replication of Vickie Akers’s work day,” it did “demonstrate the more general concept” that “there’s variability in the work that’s done” in a CSXT locomotive shop. *Id.* at 566:18-567:3.

The same most certainly cannot be said of the safety-assessment report, which described not the general nature of the work done by employees in the same job as Akers, but the idiosyncratic safety culture of a different department with employees doing fundamentally different jobs at a time when “drastic” changes were being recommended.

Second, even if there were some merit to Akers’s complaint about the job-analysis study (there is not), 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. No matter the propriety of allowing the job-analysis study into the record, the admission of *that* evidence provides no reason to think that the trial court abused its discretion by excluding any *other* evidence; the two documents simply had nothing to do with one another.

B. Any probative value was substantially outweighed by the certainty of unfair prejudice and confusion.

There was second, independent reason for excluding the safety assessment report: it contained inflammatory commentary that would have unfairly prejudiced CSXT and confused and misled the jury, far outweighing whatever

minimal probative value it might have had. *See* W. Va. R. of Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”).

Evidence is unfairly prejudicial when “there is a genuine risk that the emotions of a jury will be excited to irrational behavior, and this risk is disproportionate to the probative value of the offered evidence.” *United States v. Williams*, 445 F.3d 724, 730 (4th Cir. 2006) (internal quotation marks, citation, and alteration omitted). Such a risk was present here in spades. Commentary like the following was prevalent throughout the report:

- “the monkey’s on me if anything happens” (A044)
- the locomotive cabins have “[d]irty toilets” (A056), are “very trashy” (*id.*), and look like “hog pen[s]” (A066)
- employees “are not treated fairly” and must “lie to the crew callers in order to get the day off” (A067)
- management “ignor[es] ideas” and does “not listen[] to suggestions” (*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)
- management is “autocratic” and uses “fear and intimidation” to manage employees (A074)

Comments such as these—which had no bearing on any of the issues relevant to Akers’s negligence claim—cast CSXT in unfairly prejudicial light and sure-

ly would have confused and misled the jury. They had no place in the trial, and the trial court was well within its ample discretion in excluding the document as unfairly “inflammatory.” Trial Tr. 608:1-5. Tellingly, Akers spends not one word arguing otherwise in her opening brief. On this basis, too, the judgment should be affirmed.

II. ALLOWING THE SAFETY REPORT INTO EVIDENCE WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL.

Even if all that we have said were wrong, and the trial court indeed had been “manifestly unreasonable” (*Caperton*, 225 W.Va. at 169, 690 S.E.2d at 363) to exclude the safety-assessment report, a new trial still would not be warranted in this case. That is so because an “error in either the admission or exclusion of evidence” cannot provide the basis for reversing a jury verdict “unless refusal to take such action appears to the court inconsistent with substantial justice.” W. Va. R. Civ. P. 61. According to this “harmless error” rule, “[a] party is entitled to a new trial only if there is a reasonable probability that the jury’s verdict was affected or influenced by trial error.” *Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 643-644, 520 S.E.2d 418, 431-432 (1999) (quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 111, 459 S.E.2d 374, 388 (1995)). Absent “grave doubt” that it was, the verdict must be upheld. *Id.* at 644, 520 S.E.2d at 432.

Here, there is little basis for doubting at all—much less doubting “grave[ly]” (*id.*)—that any error was harmless. To begin with, for all the rea-

sons that the safety-assessment report was irrelevant, it is highly unlikely that a jury would have concluded, on the basis of the report alone, that CSXT's safety procedures in the locomotive shop between 2000 and 2006 were deficient, or that such deficiency proximately contributed to Akers's injuries. The report simply had no bearing on these issues.²

What is more, Akers is mistaken in suggesting that CSXT's "overarching" theory of the case was that there were robust safety protocols in place in the Huntington locomotive shop (although, there were). *See Akers Br. 9-13*. Instead, CSXT's central theory was simply that Akers's job did not entail the kind of repetitious physical work that might cause cumulative-stress injuries. That is precisely what Brown opined, noting that Akers's "highly variable" work responsibilities did not involve the sort of "continuous or repetitive" (Trial Tr. at 562:8-9) tasks that would cause the kind of injuries she claimed to have (*id.* at 560:8-9). It is most likely on *that* basis—one having nothing to do with the safety-assessment report—that the jury rendered its verdict for CSXT.

² In determining whether an erroneous exclusion of evidence was "inconsistent with substantial justice" (W. Va. R. Civ. P. 61), this Court may not consider what affect the evidence might have had as a result of *unfair* prejudice. *See, e.g., United States v. Gibbs*, 182 F.3d 408, 430 (6th Cir. 1999) (suggesting that, "[u]nlike the Rule 403 analysis that considers the *unfairly* prejudicial effect of the particular piece of evidence at issue, harmless error analysis" does not) (emphasis added). Thus, the fact that the safety-assessment report would have confused the jury and unfairly swayed its opinion of CSXT is no basis for finding that the exclusion of the report was not harmless.

In short, even supposing that the trial court had abused its discretion in excluding the report, the error would have been entirely harmless.

III. AKERS'S ASSERTION THAT THE TRIAL COURT IMPROPERLY INVADED THE PROVINCE OF THE JURY IS BOTH INACCURATE AND IRRELEVANT.

Ackers finally argues that, in the course of sustaining CSXT's objection, the trial court improperly "made [an] incorrect factual determination" and "invaded the province of the jury" by finding the report not credible. Akers Br. 15-16. Like the rest of her contentions, this one is incorrect.

The basis for the trial court's exclusion of the evidence is apparent on the face of its ruling: the report contained "inflammatory language," the prejudicial effect of which would have outweighed any probative value it may have had, Trial Tr. 608:1-5. True enough, the trial court also observed that the commentary was "contrary" to and "not consistent" with the empirical elements of the survey and other evidence in the case. *Id.* But it did so only to illustrate the inherently passionate and irrational nature of the survey comments—that is, their potential to prejudice CSXT unfairly.

And even if that were wrong, and the trial court had based its ruling on improper grounds, it would not make any difference in this case. It is fundamental that "[a]n appellate court reviews judgments, not the reason which may be given in their support." *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)). Thus, if an appellate court “determine[s] that the judgment is correct” in light of “record before it,” then it “is only common sense that . . . it should be affirmed, regardless of the correctness of the reasons which may [have been] given [by the trial court].” *Id.* (quoting same).

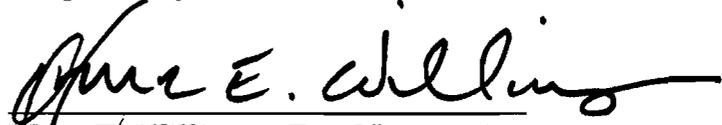
Put another way, appellate courts “may affirm on any basis supported by the record, whether or not relied upon by the district court.” *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010) (quoting *Bank of N.Y. v. Fremont Gen. Corp.*, 514 F.3d 1008, 1020 n.8 (9th Cir. 2008) (quoting *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007))); *see also, e.g., Kirwan v. Spencer*, 631 F.3d 582, 587 (1st Cir. 2011) (same); *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (same); *Schoelch v. Mitchell*, 625 F.3d 1041, 1046 (8th Cir. 2010) (same); *In re Airadigm Commc'ns, Inc.*, 616 F.3d 642, 652 (7th Cir. 2010) (same).

Against this backdrop, the exclusion of the report provides no basis for reversal: regardless of the reasons given by the district court, the report was irrelevant and prejudicial. Not only was it not an abuse of discretion to exclude it, but it *would* have been an abuse of discretion to admit it.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,



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