

12-1135

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DEBORAH KAY HARRIS, Administratrix
of the Estate of RONALD K. HARRIS,

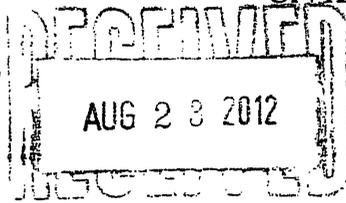
Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

CIVIL ACTION NO. 08-C-171M-(H)



FILED
2012 AUG 21 PM 4:14
DAVID R. HANZ

ORDER GRANTING SUMMARY JUDGMENT

This day came the parties, by counsel, and, pursuant to Rule 56 of the West Virginia Rules of Civil procedure, jointly¹ moved the Court for entry of summary judgment in favor of the Defendant, CSX Transportation, Inc. (hereinafter "CSXT") It appearing just to do so, the Court hereby **GRANTS** summary judgment to Defendant for those reasons expressed below:

1. The above-styled civil action has been prosecuted against CSXT pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* The Plaintiff alleges that while employed by CSXT, her decedent, Ronald Harris, was excessively exposed to diesel exhaust and, as a consequence, acquired and died of multiple myeloma, a form of cancer.
2. Under the FELA as in a common law negligence action, it is the Plaintiffs' burden to prove negligence, causation and damages. *Davis v. Burlington Northern*, 541 F. 2d 182 (8th Cir. 1976), *cert denied*, 429 U.S. 1002 (1976).
3. The general causation hypothesis at issue in this case is whether or not excessive exposure to diesel exhaust causes multiple myeloma.

¹ Plaintiff joins the motion for procedural purposes only; to wit: she desires the entry of a final order from which she

4. The Plaintiff retained three expert witnesses to meet her burden of proof on general causation: Brian Durie, MD, Peter Infante, Ph.D. and Lawrence Goldstein, Ph.D.
5. On January 14, 2011, CSXT filed its Motion of Defendant to Exclude Evidence, Or In The Alternative, For a Daubert/Gentry Hearing. Therein, the Defendant argued that the Plaintiff's experts had not employed the reliable scientific methodology required by law to support their expert opinions relating to general causation.
6. The Court granted the motion, in part, and ordered the requested *Daubert/Gentry* hearing.
7. The hearing was conducted on October 20th and 21st, 2011. The Plaintiff presented the testimony of Drs. Durie, Infante and Goldstein. CSXT countered with the testimony of Laura Green, Ph.D. and Peter Shields, MD. The proceedings were fully transcribed.
8. Following the hearing the Court ordered the parties to file proposed Findings of Fact and Conclusions of Law. The parties complied.
9. On August 15, 2012 the Court entered individual Memorandum Orders with regard to each of the Plaintiff's three general causation experts, Brian Durie, Peter Infante and Lawrence Goldstein, precluding them from testifying at trial. See, Memorandum Order As Relates to Brian Durie, M.D., attached hereto as **Exhibit A**; Memorandum Order As Relates to Peter Infante, Ph.D., attached hereto as **Exhibit B**; and Memorandum Order As Relates to Lawrence Goldstein, Ph.D., attached hereto as **Exhibit C**.
10. The effect of this Court's Memorandum Orders is to preclude the admission of any evidence supporting the Plaintiff's general causation burden at trial.
11. Rule 56 of the West Virginia Rules of Civil Procedure provides that when "there is no genuine issue as to any material fact" a party is entitled to summary judgment if the applicable substantive law so provides. *Painter v. Peavy*, 451 S.E.2d 755, Syl. Pt. 2 (W.

Va. 1994).

12. A “genuine issue” does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451, Syl. Pt. 5 (1995). A trial worthy issue is present where the non-moving party can point to one or more disputed “material” facts. *Id.* A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. *Id.*

13. Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce “concrete” evidence which would allow a reasonable finder of fact to return a verdict in its favor. *Painter v. Peavy*, 451 S.E.2d at 759.

14. In light of this Court’s Memorandum Orders there is no genuine issue of material fact regarding general causation. In short, CSXT argues, and the Plaintiff concedes, that there exists no trial worthy issue to pursue in this regard. As such, the Defendant is entitled to summary judgment.

WHEREFORE, for those reasons expressed herein and in its Memorandum Orders the Court hereby **GRANTS** the Defendant’s motion for summary judgment and **ORDERS** this case stricken from the docket.

Entered this 21st day of August, 2012.



DAVID W. HUMMEL, JR.
Chief Circuit Court Judge

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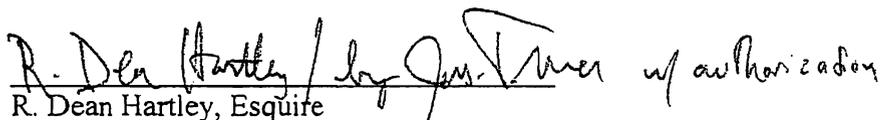
By David P. Ealy, Clerk
Donna Crow

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