

Failure to Fully Disclose Expert Opinions Results in Summary Judgment

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J. Benjamin Broadhead

Federal Rule of Civil Procedure 26(a)(2) requires retained expert witnesses to provide an expert report which gives “a complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B)(i). If a party fails to disclose information required under Rule 26(a)(2), “the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). As a plaintiff in the Western District of Washington recently learned, failure to adhere to Rule 26 can be fatal to a case.

In *Jacobson v. BNSF Railway Co., et al.*, No. C18-1722JLR, Plaintiff Teresa Jacobson brought suit on behalf of the estate of her deceased husband, a long-time railroad worker who died of renal cancer in 2015. Plaintiff alleged that BNSF was liable under the Federal Employers’ Liability Act (“FELA”) for negligently exposing her husband to known carcinogens in the course of his employment.

FELA claims arising out of exposure to toxic chemicals require expert testimony to establish that a carrier was negligent. Plaintiff in *Jacobson* disclosed only one expert, but one who was arguably qualified to supply all of the necessary testimony – a certified industrial hygienist who was board-certified in internal medicine, occupational medicine, and public health and general preventative medicine. Interestingly, the expert was also a licensed attorney. Plaintiff proposed to offer the expert’s testimony as to “the nature and extent of [Mr. Jacobson’s] injuries as well as their causation (general/specific); “the presence of known toxins on the railroad and the railroad’s knowledge concerning these carcinogens”; and “the railroad’s general failure to provide [Mr. Jacobson] with a safe place in which to work.” However, the expert’s written report said nothing about BNSF’s knowledge of toxic chemicals in decedent’s workplace or whether BNSF’s actions were reasonable in light of that knowledge.

BNSF moved for summary judgment, asserting that Plaintiff could not meet her burden on summary judgment because her expert’s report failed to offer any opinion on the element of breach. Plaintiff responded by arguing that her expert was qualified to offer an opinion on breach, and BNSF conceded that point. Plaintiff also cited the extensive discussion of causation in her expert’s report.

However, she was unable to point to any part of the report that suggested BNSF had acted negligently. Therefore, the court barred Plaintiff from offering the expert's testimony "about whether BNSF negligently breached its duty of care to Mr. Jacobson by failing to provide him a reasonably safe workplace." Because Plaintiff had no other evidence that would raise a genuine issue of material fact as to the element of breach, the court granted BNSF's motion for summary judgment.

Ultimately, this case is a cautionary tale about careless disclosure of expert opinions. It is not enough for litigants to understand what elements of their claims and defenses require expert testimony and disclose qualified experts on those points. Rather, the critical opinions must actually appear in the experts' written reports.

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