WD86617

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SHIRLEY A. RALLS,
Personal Representative of the ESTATE OF JAMES R. RALLS,
Plaintiff / Appellant,

vs.

SOO LINE RAILROAD COMPANY,
Defendant / Respondent.

On Appeal from the Circuit Court of Livingston County
Honorable Ryan W. Horsman, Circuit Judge
Case No. 18LV-CC00020

BRIEF OF THE APPELLANT

Jonathan Sternberg, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
(816) 292-7020
jonathan@sternberg-law.com

Thomas J. Joyce, III, *pro hac vice*
Bern Cappelli, LLP
101 West Elm Street, Suite 520
Conshohocken, Pennsylvania 19428
(610) 941-4444
tjoyce@bernllp.com

J. Clayton Schaeffer, Mo. #67444
MLS Law LLC
7710 Carondelet Ave., Suite 217
Clayton, Missouri 63105
(636) 532-1400
clay@mcmichael-logan.com

COUNSEL FOR APPELLANT

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<u>Jurisdictional Statement</u>

This is an appeal from a judgment of the Circuit Court of Livingston County after a jury trial on the plaintiff's claims against the defendant under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq*. ("FELA").

This case does not involve the validity of a Missouri statute or constitutional provision or a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Livingston County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Overview

From 1970 to 1996, the Soo Line Railroad Company ("Soo Line") employed James Ralls as a trackman, machine operator, and foreman (D2 pp. 2-3; D3 p. 3; Tr. 575-79, 589-90). In 2013, he was diagnosed with lung cancer, from which he died in 2015 (Tr. 579, 583).

In 2019, Mr. Ralls' wife, Shirley Ralls, personal representative of his estate, brought a wrongful-death negligence action for damages against Soo Line under the FELA, alleging his exposure to known carcinogens during his railroad work caused or contributed to his cancer (D2).

Before trial, each party designated expert witnesses, including medical causation experts (D4; D94). They then engaged in discovery of those experts, and ultimately filed motions to exclude each other's experts (D9; D14; D41; D46), which the trial court denied (D72; D73; D74). Mr. Ralls' treating physician, Dr. Mark Thompson, was not listed among those experts (D4; D94). Before trial, Mrs. Ralls moved to preclude Dr. Thompson from giving medical causation testimony for several reasons (D50 pp. 7-12, 14-15). The court took this under advisement (Tr. 18-20), and Mrs. Ralls renewed her objections at trial (Tr. 293-94, 569, 574), which the court ultimately denied (Tr. 571-72). Dr. Thompson then opined that Mr. Ralls' cancer was caused by smoking and not railroad exposures (Tr. 855-69; D84; App. A12-25).

The jury found for Soo Line (D78) and the court entered judgment accordingly (D79; App. A1). The trial court then denied Mrs. Ralls' timely motion for a new trial (D1 p. 30; D80; D81). Mrs. Ralls appeals (D97).

B. Pretrial proceedings

James Ralls began working for Soo Line in 1970 and retired in 1996, during which he worked as a foreman, trackman, laborer, and machine operator based out of Chillicothe, Missouri, on the main line in Missouri, Kansas, and Illinois (Tr. 575-79, 589-90). In May 2013, when he was 66 years old, he was diagnosed with small cell carcinoma lung cancer (Tr. 637, 470-71). He died in June 2015 from that cancer (Tr. 471).

In June 2018, Mr. Ralls' widow, Shirley Ralls, as personal representative of his estate, filed a petition for damages against Soo Line under the FELA in the Circuit Court of Livingston County, alleging her husband's cancer and death were caused or contributed to by his exposure to toxic substances and carcinogens during his railroad employment that Soo Line knew or should have known were harmful to its employees' health (D2). She alleged these included, among other things, diesel exhaust and silica (D2 p. 3). (Mrs. Ralls originally also named the Canadian Pacific Railroad as a defendant, but later dismissed that defendant with prejudice (D71).)

During discovery, each party designated retained experts (D4; D94).

Mrs. Ralls designated Dr. Paul Rosenfeld, Ph.D., as her liability expert to testify to Mr. Ralls' exposures and Soo Line's knowledge of the hazards from it (D4 p. 1; D5). She also designated Dr. Jerald Cook, M.D., to testify to general and specific causation and Mr. Ralls' injuries (D4 p. 2; D7).

Soo Line designated Dana Hollins as its liability expert (D94 p. 2). It also designated three medical causation experts: Dr. John E. Parker, M.D., Dr. Victor Roggli, M.D., and Dr. Peter G. Shields, M.D. (D94 pp. 3-8).

The parties then engaged in proceedings challenging several of the other's experts (D9; D14; D41; D46).

Soo Line moved to exclude both Dr. Rosenfeld's and Dr. Cook's testimony under § 490.065, R.S.Mo., and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (D9; D10; D14; D15). It argued their opinions did not rely on sufficient data and were not based on reliable methodology, as they were unable to determine the dose of the toxins at issue required to cause cancer or Mr. Ralls' specific dosage, failed to consider alternative causes, and ignored unfavorable data (D9; D10; D14; D15).

Mrs. Ralls then moved to exclude both Dr. Parker's and Dr. Roggli's testimony, arguing they failed to satisfy *Daubert* (D41; D42; D46; D47). Mrs. Ralls argued Dr. Parker did not review the other expert reports as to Mr. Ralls and so lacked any information as to his exposures, and the same was true for Dr. Roggli, who also had not reviewed relevant literature in coming to his conclusions (D42 pp. 5-6; D47 pp. 5-6).

After conducting a *Daubert* hearing before trial at which both Drs. Rosenfeld and Cook testified, the court denied the motions to exclude Drs. Rosenfeld, Cook, and Parker (Tr. 148-295; D72; D73; D74). Dr. Roggli ultimately did not testify at trial (D16).

C. Trial testimony

In November 2022, the court set trial for July 17-21, 2023, which was later changed to July 18-21 (D1 pp. 19, 28). The case proceeded to trial as scheduled (Tr. 52). Counsel for Mrs. Ralls argued the railroad overexposed Mr. Ralls to silica dust and diesel exhaust, either of which was a cause of his

cancer (Tr. 318-20). Soo Line argued there was no evidence of this, instead it followed the guidelines for exposures (Tr. 337-40), and Mr. Ralls' cancer was caused by his smoking (Tr. 346-47).

Michael Peterie, a coworker of Mr. Ralls' on the railroad, testified by edited video deposition after the parties had resolved the objections in the deposition (Tr. 349-55; Ex. 25). Mr. Ralls was Mr. Peterie's foreman in the track resurfacing gang from 1980 to 1985 and also his friend (Ex. 25 at p. 10, 32). Mr. Peterie described his and Mr. Ralls' job operating and supervising others operating ballast regulators and tampers in the resurfacing and maintenance of tracks, which was diesel powered equipment, including in ballast dumping, and their exposure to diesel exhaust and silica dust from doing so (Ex. 25 at pp. 9-21, 25-26, 37, 44, 48, 50). He testified the railroad did not provide them any safety training with regard to diesel exhaust or silica dust and they never wore respirators (Ex. 25 at pp. 27, 29).

Dr. Rosenfeld testified silica and diesel exhaust were known carcinogens with maximum exposure thresholds (Tr. 376-89). He testified he had investigated Mr. Ralls' work for the railroad, including his lack of respirator, and performed a demonstrative health risk assessment that showed levels of exposure to silica and diesel exhaust in excess of those thresholds, creating an excess cancer risk, so the railroad should have provided protective measures but did not (Tr. 402-05, 460).

Dr. Cook testified he reviewed Mr. Ralls' medical records, as well as Dr. Rosenfeld's report, and agreed Mr. Ralls was overexposed to silica and diesel exhaust (Tr. 471-72). He reviewed data about silica and diesel exhaust being

carcinogens, stated they both independently can cause lung cancer, and concluded that Mr. Ralls' smoking, exposure to silica dust, and exposure to diesel exhaust all were significant contributors to his lung cancer (Tr. 510).

Mrs. Ralls testified about her relationship with Mr. Ralls and admitted he smoked two packs of cigarettes per day from the time she met him in the 1960s until just after his cancer diagnosis (Tr. 575-79). She described his cancer treatment, the strain it inflicted, and his eventual death with medical bills somewhere around $125,000 (Tr. 580-85). She admitted he also had blood circulation issues, was diabetic, was overweight for the last 30 years of life, and had been diagnosed with COPD probably caused by smoking (Tr. 586-87). She did not remember hearing his doctors mention diesel fuel or silica and he never discussed diesel exhaust with her, but she recalled doctors telling him he needed to quit smoking (Tr. 593).

Dr. Peter Shields, M.D., testified as a defense expert (Tr. 596). He said he reviewed Mr. Ralls' medical records, depositions of his treaters and coworkers, and literature about railroad workers, and considered the plaintiff's expert opinion reports and depositions (Tr. 612). He said Mr. Ralls was correctly diagnosed with lung cancer (Tr. 614). But he said Dr. Rosenfeld's methodology was faulty, Dr. Rosenfeld did not show exposure above permissible exposure limits or proposed limits, and so Dr. Cook did not have enough information to show specific causation (Tr. 617-19). Dr. Shields also said Dr. Cook lacked sufficient research, Dr. Cook's methodology lacked transparency, and Dr. Cook's reliance on "above background" exposure instead of actual dose was insufficient (Tr. 619-21). Dr. Shields said Mr.

Ralls' age of diagnosis was typical for his smoking history, he had significant COPD, a known risk factor to smoking, doubling his risk of lung cancer, and studies showed railroad workers do not experience high enough exposure to diesel exhaust and silica dust to cause cancer (Tr. 636-50). Dr. Shields opined Mr. Ralls' smoking was the cause of his lung cancer, and his exposure levels to diesel exhaust or silica were not sufficient to cause it (Tr. 673).

Ms. Hollins testified Mr. Ralls' potential for diesel exhaust exposure during his railroad career was likely well below current established occupational exposure limits (Tr. 744). She said she assessed his exposure, looking at frequency, intensity, and duration, and compared it to health-based benchmarks (Tr. 756). She said there was limited information on how often he was near diesel-powered equipment and how physically close he was to this work, concluding his frequency and intensity of exposures likely were intermittent and seasonal (tr. 764-65). She said this was consistent with studies of similar work to Mr. Ralls' under which exposure to diesel exhaust while working on the railroad was below relevant occupational exposure limits (Tr. 774). She said there was insufficient evidence to evaluate Mr. Ralls' potential for silica exposure (Tr. 778). Regarding diesel exhaust, she opined Soo Line provided a reasonably safe work environment (Tr. 778).

One of Mr. Ralls' treating physicians, Dr. Stephen Quijano, testified by video about Mr. Ralls' COPD diagnosis (Tr. 832; Ex. 29). He said the COPD was related to smoking but was separate from the lung cancer diagnosis (Ex. 29 at pp. 13, 31-34). He testified to the extent of Mr. Ralls' cancer treatment and said it was reasonable and necessary (Ex. 29 at p. 28).

D. Dr. Mark Thompson's testimony and proceedings over it

The final witness at trial was Dr. Mark Thompson, M.D., a radiation oncologist and another of Mr. Ralls' treating physicians, who testified for Soo Line by video (Tr. 855-57).

1. Expert discovery

Early on in the case, Mrs. Ralls served interrogatories requesting Soo Line to "state the name or [*sic*] present address of each person you may or will expect to call as an expert witness in the litigation of this action" along with any of their materials or exhibits (D90 p. 3). In November 2019, Soo Line objected that this was premature and it "would provide such information in accordance with a case management order issued by this Court" (D90 p. 3).

Mrs. Ralls' interrogatories also requested Soo Line "state the identity of any and all witnesses who will testify in connection with the trial of this matter" (D90 p. 3). Soo Line again made the same objection (D90 p. 4).

Soo Line later supplemented these responses and provided a designation of expert witnesses (D94). This only disclosed Ms. Hollins, Dr. Parker, Dr. Roggli, and Dr. Shields (D94 pp. 1-8). Dr. Thompson was not named in any expert witness designation (D4; D94).

2. Dr. Thompson's April 21, 2023 deposition

Soo Line initially conducted Dr. Thompson's discovery deposition on April 21, 2023. Copies are in the legal file at D52 and the appendix to this brief at A4-11. During it, Dr. Thompson stated he only had one consultation note from his medical records in his possession, which was dated May 23, 2013 (D52 p. 4). That note did not indicate Mr. Ralls had any history of smoking, nor did it indicate Mr. Ralls' occupation at the railroad (D93).

Soo Line's counsel asked Dr. Thompson, "Do you have any idea what the cause of [Mr. Ralls'] cancer was?" (D52 p. 4). Dr. Thompson responded:

> No, I don't have my intake forms that would have shown how much he smoked, and I don't know what his job was with the railroad. I assume he's suing the railroad saying asbestos causes cancer, but he did have COPD, so I assume he was a heavy smoker. So, if I were to guess, I would say smoking caused his lung cancer.

(D52 p. 4).

Soo Line's counsel then asked Dr. Thompson to "assume … that Mr. Ralls had a 50 year pack history of smoking anywhere from one up to three packs a day" and asked whether that was a sufficient history for him to make a causal link with the cancer to a reasonable degree of medical certainty (D52 p. 5). Mrs. Ralls' counsel objected for lack of foundation (D52 p. 5). Dr. Thompson responded he "would also like to know what [Mr. Ralls'] job was for the railroad" (D52 p.5). Soo Line's counsel responded he was a "trackman" who was "out on the tracks and they repair tracks" (D52 p. 5). Dr. Thompson responded, "Oh, his cancer was caused by smoking," "[m]ore likely than not," "within a reasonable degree of medical certainty" (D52 p. 5).

On questioning by Mrs. Ralls' counsel, Dr. Thompson then testified that he would provide a patient with a causation opinion, but only if the patient asked him to do so (D52 p. 5). He said that if he were asked to do so, his methodology in forming that opinion would be to "review their records and then I'd do a review of the literature to come up with a decision" (D52 p. 6). He said he did not apply a methodology in Mr. Ralls' case to determine the cause of his lung cancer (D52 p. 6). The only piece of literature Dr.

Thompson discussed during the April deposition was a study, *Villanueva*, that he used to opine that only one percent of non-smokers develop lung cancer and 17% of smokers develop lung cancer (D52 p. 7).

When asked what opinion he had regarding whether silica dust or diesel exhaust caused or contributed to Mr. Ralls' lung cancer, Dr. Thompson stated he would need to see the dose to make such an opinion and even then, the risk would be far greater from smoking than from diesel exhaust or silica dust (D52 p. 6). He did not state a basis for this opinion (D52 p. 6).

Counsel for Mrs. Ralls asked Dr. Thompson what he knew about Mr. Ralls' smoking history based on the note he had with him, and he responded, "Nothing. It would be on my intake form. All I know is what the other attorney told me was that -- 50 pack year history, is what I assume -- so I do know he had COPD" (D52 p. 6).

When counsel asked Dr. Thompson about his knowledge of findings by the International Association for Research on Cancer ("IARC"), he responded he had heard of IARC but did not know its role (D52 p. 5). He was asked:

> Q. Do -- are you aware that IARC has also classified diesel exhaust as a human carcinogen?
>
> A. I would not be surprised if they have.
>
> Q. And what about classifying diesel exhaust as a lung carcinogen?
>
> A. No, that -- that's possible.
>
> Q. And would you be aware anyway at all that IARC has classified silica as a lung carcinogen?
>
> A. No, I would not be surprised.

(D52 p. 5). Then, when asked if that knowledge would change his opinion in any way that smoking was the sole cause of Mr. Ralls' cancer, he stated he would need to know the dose of this exposure, but he "would assume the dose would be sufficiently small" (D52 p. 5).

At the end of the discovery deposition, Dr. Thompson stated:

> I am saying, I don't have all the data, so I can't -- I really can't render a correct opinion. I'm just saying, just I'm telling you this is what I would say if I had all the data. That could change when I saw the data, it could easily change. You're exactly right. What I said could completely be wrong, 'cause I don't have all the data, you're right. I really can't answer your question 'cause I don't have the data. That's very fair to say, you're -- I agree with you completely. I can't say -- 'cause I haven't read all the data. If I did review it, I bet I would still say it's smoking, but I can't guarantee it, 'cause I don't know the minutiae of the case.

(D52 pp. 7-8). When asked then, whether it was just his speculation that Mr. Ralls' cancer was solely caused by his smoking, Dr. Thompson responded,

> I'm not -- I can't say because I haven't reviewed all the records. I'm just saying that if I reviewed them all, I bet it would be, but you're right, I can't say because I have not reviewed everything. I'm agreeing with you. I cannot – 'cause I haven't reviewed his whole record. Only a little two-page consult note that I have.

(D52 p. 8). While earlier in the deposition, Dr. Thompson stated Mr. Ralls' "cancer was caused by smoking" (D52 p. 5), at the end he opined smoking "probably caused it" (D52 p. 9).

3. Mrs. Ralls' July 3, 2023 motion *in limine*

In her motion *in limine* filed on July 3, 2023, Mrs. Ralls moved the Court to exclude any causation opinions from Dr. Thompson (D50 pp. 7-12, 14-15). (She also moved to exclude similar opinions from Dr. Quijano (D50

pp. 12-14), but Soo Line later agreed not to ask Dr. Quijano any opinions concerning causation (Tr. 303).)

Among other things, Mrs. Ralls argued in Motion *in Limine* #4 that based on the April 21, 2023 deposition, Dr. Thompson's testimony did not satisfy § 490.065, R.S.Mo., and *Daubert* (D50 pp. 8-12, 14-15). She argued he had not performed any differential diagnosis of the cause of Mr. Ralls' cancer, ruling in and ruling out causes, nor could he because he had no knowledge of Mr. Ralls' exposures during his railroad work (D50 pp. 11, 14-15).

Soo Line opposed this (D62 pp. 9-12).

4. Dr. Thompson's July 14, 2023 deposition

At the pretrial conference July 10, the parties agreed Dr. Thompson would testify by video (Tr. 47). The parties also presented argument on the motions *in limine* concerning Dr. Thompson, again based on Dr. Thompson's April deposition (Tr. 18-23). Mrs. Ralls' counsel stated they were asking only that Dr. Thompson be allowed to testify to everything except specific causation (Tr 21). The court took both arguments under advisement (Tr. 23).

On July 14, 2023, four days before trial was set to begin, Soo Line conducted Dr. Thompson's deposition to be used at trial. A copy was admitted at trial as Exhibit 26, and copies are in the legal file at D84 and the appendix to this brief at A12-25.

For the first time, Dr. Thompson now opined that smoking was "the overwhelming cause" and "the sole cause" of Mr. Ralls' lung cancer (D84 p. 6). Dr. Thompson then presented new testimony for the first time including:

- A discussion of the Centers for Disease Control and Prevention's website and articles on the risk of silica and developing lung cancer (D84 p. 6);
- A reference and discussion of an article by Faye Rice regarding silica exposure in miners (D84 p. 6);
- A discussion of a paper from 2008 discussing the incidence of developing lung cancer among smokers and how that compares to the increased risk of developing lung cancer from exposure to silica (D84 pp. 6-7);
- A discussion of the silica content of the earth and how there is silica in the soil which in turn causes there to be some silica content in produce (D84 p. 7);
- An opinion that humans are ingesting and breathing silica every single day (D84 p. 7);
- An opinion that "there's a lot of poor data and studies on silica" (D84 p. 7);
- An opinion that Mr. Ralls would have had to be exposed to silica for 45 years at a high level for Dr. Thompson to opine that there is a 1.9% chance that his exposure to silica caused his lung cancer (D84 p. 8);
- A reference and discussion to an article by Deborah Silverman in the Journal of the National Cancer Institute (D84 p. 8);
- An opinion that because Mr. Ralls was not working underground in mines, diesel exhaust could not have played any part in his cancer (D84 p. 8).

Neither Dr. Thompson nor Soo Line's counsel disclosed any of these opinions before this deposition (Tr. 569-70). During the deposition, Dr. Thompson also stated Mr. Ralls "worked at a railroad for 17 years" (D84 p. 6). Dr. Thompson used the Silverman article to opine, "[Mr. Ralls] wasn't working underground in the mines as far as I'm aware of, unless I'm wrong, so I don't think diesel had any role to play in this" (D84 p. 8).

During the deposition, Mrs. Ralls' counsel made these objections:

> MR. JOYCE: For the record, I object and move to strike the entire answer from Dr. Thompson. None of this contains his medical records. This is expert testimony. He's not been designated as an expert, and these studies he's referring are not studies that have been provided to me, or I object to all of this line of questions with regard to Dr. Thompson's understanding of silica -
>
> …
>
> MR. JOYCE: -- for the judge. Doctor, just a minute. Let me finish my objection. We're making a record for the judge as to whether or not you're able to give those opinions, Doctor. That's the purpose of my objection, the purpose of my moving to strike that answer as outside the scope of your medical records, and it's calling for expert testimony. You have not authored an expert report, nor have you been disclosed as an expert witness in this litigation.

(D84 pp. 7-8).

Meanwhile, on July 17, 2023, the trial court ruled on the motions *in limine* by a docket entry, overruling #4 (D1 p. 24).

5. Further proceedings at trial

At the end of the *Daubert* hearing before the presentation of evidence began at trial, Mrs. Ralls' counsel again argued the Court should exclude Dr. Thompson's testimony on causation under *Daubert*, pointing to his new

deposition (Tr. 293). Counsel argued Dr. Thompson is a radiation oncologist but had no idea about any of Mr. Ralls' exposures and no methodology for assessing causation, so he "should in no way come in and tell this jury that cigarette smoking was a sole cause of Mr. Ralls' cancer because he has no idea how to analyze it" (Tr. 295). Soo Line argued Dr. "Thompson mentioned various sources for his information," and so satisfies *Daubert* (Tr. 295). The court took the matter under advisement and adjourned for the evening (Tr. 295).

Before opening statements the next morning, counsel for Mrs. Ralls reminded the court that the parties needed a ruling on her objections to Dr. Thompson (Tr. 303). The court stated it would take up these issues after lunch that day (Tr. 304). The parties reminded the court of this later that morning twice (Tr. 351-52, 354). But no ruling was received later that day, so counsel for Mrs. Ralls again reminded the court of this before they adjourned for the day (Tr. 565-66). Counsel for Soo Line said, "We'll need a ruling on Thompson … tomorrow," and the court said, "I will do that tonight" (Tr. 566).

Before testimony began the next day, counsel for Mrs. Ralls again reminded the Court about needing a "ruling on Thompson" because it would affect the editing of his video testimony (Tr. 568). The court responded, "So Thompson I had already ruled on it. I reviewed the deposition, however, and so I don't know what further ruling you need because I'd already ruled on it" (Tr. 568). Counsel for Mrs. Ralls said he was talking about the trial deposition testimony, asking, "So you saw in his discovery dep he had like five pages of questioning, and then we've got all kinds of opinions in there.

My point is, do I need to feel [*sic*] a formal motion for reconsideration with the Court to consider the new evidence that you didn't have when you made the ruling the motion to begin with" (Tr. 568). The court responded, "So you maybe need to make an oral motion because and I read the motion what my order was [*sic*], and I read the deposition last night. So if you need to making an oral motion [*sic*]" (Tr. 568).

Counsel for Mrs. Ralls then renewed her motion to exclude any causation opinions by Dr. Thompson, both for the reasons in the motion *in limine* and under *Daubert* (Tr. 569-71). Counsel argued Dr. Thompson was Mr. Ralls' radiation oncologist, not an expert witness, and medical records of his radiation treatment were the only records provided in discovery (Tr. 569). Counsel argued Dr. Thompson had one consulting note at the time of his discovery deposition in April 2023 and "did not make these opinions as to the cause of Mr. Ralls' cancer" then (Tr. 569). Counsel argued that then, during his July 14 trial deposition, he suddenly had opinions that he has knowledge of diesel exhaust and silica, and opined that smoking is the sole cause of Mr. Ralls' cancer and has ruled out diesel exhaust and silica (Tr. 569). Counsel argued that as none of this was disclosed in discovery, these were brand new opinions that should have been made in the discovery deposition, and Dr. Thompson was asserting numerous opinions in the middle of trial that he is suddenly "an expert in terms of causation and has no methodology for general causation" (Tr. 569-70). Counsel argued Dr. Thompson had no knowledge of what Bradford Hill was, did not cite any literature, and "clearly a treater can't just come in and say it's 100 percent cigarette smoking, and I've ruled

out these exposures because he has no idea what Mr. Ralls' exposures were to silica and diesel exhaust" (Tr. 570).

The court overruled the *Daubert* objection, stating:

> I mean, I think it's clear [Dr. Thompson] does reference CDC articles and the basis for his opinions. He's obviously highly qualified and has an unbelievable amount of experience with cancer, specifically lung cancer, and that's throughout his deposition. It's not a long deposition, but I don't think anyone is going to ever question his expert credentials with regard to cancer, and specifically lung cancer and his review of that. He also refers repeatedly to CDC studies that he -- with miners, both above ground and below ground. So with regard to *Daubert*, I'm -- I would rule against you. Now, if you're telling me that there's a disclosure issue, that may be different.

(Tr. 571-72).

Mrs. Ralls' counsel said there was indeed a disclosure issue, as no expert report from Dr. Thompson was provided in discovery, there was no opportunity to discover what his opinions were before his discovery deposition, and his new opinions in his trial deposition were not disclosed beforehand (Tr. 572). Counsel argued Dr. Thompson's opinions needed to be disclosed before his trial deposition if Soo Line intended to call him as an expert as to causation (Tr. 572).

Soo Line's counsel responded Dr. Thompson's opinions were disclosed because "he said at his deposition specifically, that's what it's in the motion originally filed that smoking was the sole cause" (Tr. 572). Counsel argued Dr. Thompson said that the dose of diesel exhaust and silica were not enough in his discovery deposition, and the only thing that changed in his trial

deposition is that he had confirmed his opinions by looking at the CDC website (Tr. 572-73).

When the court said the plaintiff's real issue was that Dr. Thompson was not designated an expert witness in the first place, Soo Line's counsel responded, "When we took [Dr. Thompson's] deposition as an expert, he was asked causation opinions, and he's not a retained expert. But he was disclosed for the purposes of expert opinion" (Tr. 573). Mrs. Ralls' counsel disagreed, stating there was discovery asking for disclosure of all retained and non-retained experts, and Dr. Thompson was designated as a treating physician, but "I understand [Soo Line's counsel] he's now a non-retained expert," but the point was that still, Dr. Thompson was "to give us not just one opinion, but all the opinions you're going to testify to, nothing in discovery about diesel or silica [*sic*]" (Tr. 574).

The court then overruled what it called "the motion for reconsideration" (Tr. 574).

Later, before Dr. Thompson's video testimony was presented, counsel for Mrs. Ralls requested to present his cross-examination of Dr. Thompson from the April 2023 discovery deposition as rebuttal evidence, because he had not asked any causation questions in the trial deposition (Tr. 835-36). Soo Line did not object, and the court allowed it (Tr. 836).

Just before the video was presented, counsel for Mrs. Ralls stated, "For purposes of the record, I don't want to waive my objection to Dr. Thompson's causation opinions, but I also don't want do disrupt [*sic*] the videotape. So I think I made a record as to objections to Dr. Thompson's causation opinions,

you know, for the basis of he doesn't have a general causation analysis" (Tr. 853). The court agreed counsel had made a record of that (Tr. 853).

Dr. Thompson's video testimony of his trial deposition (D84) was then played for the jury as the final witness in the case, and counsel for Mrs. Ralls then read the cross-examination from the discovery deposition into the record (Tr. 855-69).

E. Verdict, judgment, and post-judgment

In closing argument, counsel for Mrs. Ralls argued she had met her burden of proof through evidence of Mr. Ralls' overexposure to silica and diesel exhaust and Soo Line's lack of prevention protocols (Tr. 896-931). Soo Line's counsel argued Mrs. Ralls failed her burden because it had a respirator policy, there was not enough evidence of Mr. Ralls' type of work to conclude overexposure, Mrs. Ralls' experts were insufficient, and the contribution of smoking to his lung cancer outweighed any claimed exposure, citing Dr. Thompson's opinion and pointing out he was not paid to be an expert but instead knew Mr. Ralls personally (Tr. 931-58). In rebuttal, counsel for Mrs. Ralls argued Dr. Thompson was insufficient as a causation expert (Tr. 960-61).

After deliberations, the jury entered a verdict for Soo Line by a vote of 10-2 (Tr. 968-71; D78 p. 1). The trial court then entered judgment accepting the verdict (D79; App. A1).

Mrs. Ralls timely moved the court for a new trial (D80; D81). Among her claims of error were these:

- The trial court erred in allowing Dr. Thompson to testify as to new causation opinions not disclosed during discovery (D81 pp. 4-9);
- The trial court erred in allowing a Dr. Thompson to testify as to causation as a non-disclosed, non-retained expert (D81 pp. 9-11);
- The trial court erred under § 490.065 and *Daubert* in allowing Dr. Thompson to provide any causation opinions, because his opinions were not based on sufficient facts or data, and they were not reliable because he had no methodology (D81 pp. 11-22); and

Soo Line opposed this (D95). It argued Mrs. Ralls was not prejudiced by their failure to formally disclose Dr. Thompson as an expert, nor was she unfairly surprised or prejudiced by admission of his testimony (D95 pp. 2-7). It argued his opinions fully satisfied *Daubert* (D95 pp. 7-10).

After hearing argument, the trial court overruled the motion for a new trial (2023-10-02 Hrg. Tr. 20). Mrs. Ralls then timely appealed to this Court (D97).

Points Relied On

I. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* specific causation testimony is expert testimony, under Rule 56.01(b) a witness not disclosed as an expert when requested during discovery generally cannot be allowed to give expert testimony, and if the trial court allows this anyway and it unfairly prejudices the opponent, it is a reversible abuse of discretion *in that* during discovery, Mrs. Ralls requested Soo Line identify any retained and non-retained experts and Soo Line never disclosed Dr. Thompson as either, but at trial for the first time he gave expert testimony on specific causation, which Mrs. Ralls had no idea he would give, unfairly prejudicing her.

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo. banc 1997)
St. Louis Cnty. v. Pennington, 827 S.W.2d 265 (Mo. App. 1992)
Manahan v. Watson, 655 S.W.2d 807 (Mo. App. 1983)
Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705 (Mo. App. 2014)
Rule 56.01

II. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* litigants are required to advise their opposing parties when an expert has changed opinions or the bases for those opinions after a discovery deposition, an expert's testimony to a new or different opinion or basis for an opinion for the first time at trial without that disclosure generally should be excluded, and if the trial court allows this anyway and it unfairly prejudices the opponent, it is a reversible abuse of discretion *in that* for the first time at trial, Dr. Thompson gave what he asserted was a definitive expert opinion on specific causation citing specific factual bases including new studies and a review of materials, none of which he stated at his discovery deposition, of which Soo Line did not advise Mrs. Ralls after his discovery deposition, and which genuinely surprised Mrs. Ralls and unfairly prejudiced her.

Whitted v. Healthline Mgmt., Inc., 90 S.W.3d 470 (Mo. App. 2002)
Z.R. v. Kan. City Pediatrics, LLC, 682 S.W.3d 55 (Mo. App. 2023)
Bray v. Bi-State Dev. Corp., 949 S.W.2d 93 (Mo. App. 1997)
Green v. Fleishman, 882 S.W.2d 219 (Mo. App. 1994)

III. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* this misapplied § 490.065, R.S.Mo., as Dr. Thompson's testimony was not based on sufficient facts or data and was not the product of reliable principles and methods reliably applied to the facts of the case, and its admission unfairly prejudiced Mrs. Ralls *in that* Dr. Thompson had no facts or data about Mr. Ralls' railroad work or his exposures to silica or diesel exhaust, he did not review any other experts' reports or any depositions, and his only methodology was to cherry-pick a few studies and not consider any contrary information, which is a subjective belief, not a generally accepted scientific methodology to determine specific causation of an injury.

Weisgram v. Marley Co., 169 F.3d 514 (8th Cir. 1999)

Wright v. Willamette Indus., Inc., 91 F.3d 1105 (8th Cir. 1996)

Nichols v. Am. Nat'l Ins. Co., 154 F.3d 875 (8th Cir. 1998)

Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006)

§ 490.065, R.S.Mo.

Argument

I. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* specific causation testimony is expert testimony, under Rule 56.01(b) a witness not disclosed as an expert when requested during discovery generally cannot be allowed to give expert testimony, and if the trial court allows this anyway and it unfairly prejudices the opponent, it is a reversible abuse of discretion *in that* during discovery, Mrs. Ralls requested Soo Line identify any retained and non-retained experts and Soo Line never disclosed Dr. Thompson as either, but at trial for the first time he gave expert testimony on specific causation, which Mrs. Ralls had no idea he would give, unfairly prejudicing her.

Preservation Statement

This point is preserved for appeal. Both during Dr. Thompson's trial deposition (D84 pp. 7-8) and at trial (Tr. 572), Mrs. Ralls objected to Dr. Thompson giving specific causation testimony because he had not been disclosed as an expert in discovery, which the court overruled (Tr. 573-74). She then preserved her objection in her motion for a new trial (D81 pp. 9-11).

Standard of Review

"The trial court has broad discretion to control discovery," which "extends to [its] choice of remedies in response to the non-disclosure of evidence or witnesses during discovery." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the

court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (citation omitted). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* Still, "[w]hile a trial court has broad discretion in its choice of action in response to non-disclosure of evidence or witnesses, that discretion is not unfettered." *St. Louis Cnty. v. Pennington*, 827 S.W.2d 265, 266 (Mo. App. 1992).

Even where review is for abuse of discretion, a trial court "can abuse its discretion … through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). When a trial court's exercise of discretion is challenged on legal grounds, no deference is warranted, and this Court's review is *de novo*. *See id.*; *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. 2009). A court necessarily abuses its discretion when it bases an otherwise discretionary ruling on an erroneous legal conclusion. *Id.*

* * *

A. Summary

The law of Missouri is that testimony as to the specific cause of a medical condition is expert testimony. Under Rule 56.01(b), if requested, a party must disclose the identity of all retained and non-retained experts. If it fails to do so for a witness, to the other party's prejudice, which may be inferred, the witness should be precluded from giving expert testimony.

Here, Soo Line elicited testimony from Dr. Mark Thompson as to the specific cause of Mr. Ralls' lung cancer. But Soo Line failed to disclose Dr. Thompson as either a retained or non-retained expert when requested.

Nonetheless, the trial court allowed him to give specific causation testimony at trial that he had not given at any time during discovery. This was error, requiring a new trial.

B. Under Rule 56.01(b), the failure to disclose a witness as a retained or non-retained expert generally precludes that witness from being allowed to provide expert testimony for the first time at trial.

Rule 56.01(b)(1) (App. A26) allows parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action," including "the identity and location of persons having knowledge of any discoverable matter." Rule 56.01(b)(6) and (7) then specifically address the disclosure of expert witnesses. Rule 56.01(b)(6)(A) provides in relevant part for *retained* experts:

> A party may require through interrogatories, any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such expert's name, address, occupation, place of employment, and qualifications to give an opinion …, and to state the general nature of the subject matter on which the expert is expected to testify and the expert's hourly deposition fee.

Similarly, Rule 56.01(b)(7) provides for *non-retained* experts:

> A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial who may provide expert witness opinion testimony by providing the expert's name, address, and field of expertise. For the purpose of this Rule 56.01(b)(7), an expert witness is a witness qualified as an expert by knowledge, experience, training, or education giving testimony relative to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence.

> Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses.

If the disclosure of expert witnesses under these rules changes during the course of the case, Rule 56.01(e) puts the party under a duty to update its disclosures. That rule provides in relevant part:

> A party is under a duty seasonably to amend a prior response to an interrogatory … if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Id. This imposes a "continuing obligation on parties to supplement their responses to written interrogatories with regard to the identity of each person expected to be called as an expert witness at trial and the general nature of the subject matter on which the expert is expected to testify." *Manahan v. Watson*, 655 S.W.2d 807, 809 (Mo. App. 1983).

Ordinarily, then, if a party does not disclose a retained or non-retained expert in response to an interrogatory to do so and does not update its responses to disclose that expert later, that person should be precluded from giving expert testimony at trial. This is because "[t]he purpose of discovery is not merely to prevent surprise at trial. An equally important purpose is to narrow the issues and thereby facilitate a speedy and less expensive disposition of the case." *Wilkerson*, 943 S.W.2d at 649. Therefore, "[u]ntimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that prejudice *may be inferred*." *Id.* (citation omitted) (emphasis added).

While a "treating physician is first and foremost a fact witness, as opposed to an expert witness," *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667, 673 (Mo. banc 1993), if he is to be called to give expert testimony on causation, the rules applicable to non-retained expert disclosure still apply. *Wilkerson*, 943 S.W.2d at 647-50.

In *Wilkerson*, the Supreme Court affirmed the trial court's exclusion of one of the plaintiff's treating physicians from giving expert testimony on the issue of causation when the plaintiff failed to disclose the physician in interrogatory answers as an expert witness. *Id.* That the physician was one of the treating physicians did not matter. *Id.* at 649. The plaintiff was seeking to elicit expert testimony from a witness not designated as an expert. *Id.* Therefore, it was a proper conclusion that while the witness could testify to his treatment of the plaintiff, he could not testify to causation or any other purviews of an expert witness. *Id.* at 649-50. *See also Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 720 (Mo. App. 2014) (affirming order precluding witness from giving expert testimony where party did not disclose witness as an expert in discovery, holding that had the party been allowed to present the expert testimony, its adversary "would undoubtedly have suffered an unfair disadvantage, as well as undue delay and unnecessary expense").

While the Courts in *Wilkerson* and *Scheck* affirmed those trial courts' exclusion of the proffered expert witness testimony for lack of disclosure, Missouri appellate courts also have *reversed* trial courts' *admission* of expert testimony from witnesses who had not been disclosed as experts as an abuse of discretion.

In *Manahan*, 655 S.W.2d at 809, the Court held the trial court had abused its discretion when it allowed the defendant to present expert testimony from a witness it had not disclosed in its interrogatory response or supplemented that response to disclose and reversed and remanded for a new trial. It held:

> We find that appellant was unduly misled by respondent's failure to inform her of his expert witness and consequently, unfairly surprised at trial. Because respondent had a duty to answer appellant's interrogatories with regard to the name and subject matter on which his expert is expected to testify and nevertheless failed to do so, we find that the trial court abused its discretion in allowing the introduction of this testimony into evidence.

Id.

The Court reached the same result in *Pennington*, 827 S.W.2d at 266-67, also reversing and remanding for a new trial for this reason. There, in a condemnation case, a county requested the landowner disclose any experts, and the landowner disclosed two appraisers. *Id.* at 266. The appraisers' testimony was based on exhibits that another person, Fey, had prepared, including a development plan and documents about how the land could be developed. *Id.* Fey was not disclosed as an expert, only as a fact witness. *Id.* But when Fey then testified, he gave specific architecture and engineering opinions based on his expertise, meaning, "It is clear that Fey was utilized by the landowner as an expert." *Id.* at 266-67. The trial court allowed this over the county's objection that Fey was not disclosed as an expert. *Id.* at 266.

When the jury assessed the landowner's damages at $100,000 the county appealed, and this Court ordered a new trial solely because the landowner had not disclosed Fey as an expert. *Id.* It held:

> There is little question that the court's ruling [allowing Fey to testify on expert matters] seriously prejudiced the County. It is apparent that the County was effectively precluded from cross-examining Fey because of the absence of forewarning of his testimony. It is a purpose of discovery to allow effective cross-examination of witnesses by identifying beforehand the nature of the testimony. Further the failure to disclose the expert prevented the County from knowing that it needed an expert of its own to contest the opinions of Fey. It went to trial believing that no architectural testimony would be presented of the feasibility of developing the property as multi-family.

Id. at 267.

C. The trial court erred in allowing Soo Line to elicit specific causation testimony, which is expert testimony, from Dr. Thompson for the first time at trial, who Soo Line did not disclose as either a retained or non-retained expert in response to Mrs. Ralls' interrogatories and expert disclosures, and which unfairly prejudiced Mrs. Ralls, requiring a new trial.

Just as in *Manahan* and *Pennington*, the trial court abused its discretion here in allowing Soo Line to elicit expert testimony on causation from Dr. Thompson for the first time at trial without having disclosed him as a retained or non-retained expert or updated its disclosures.

In response to Mrs. Ralls' Rule 51.06(b)(6) and (7) interrogatories seeking Soo Line to disclose any retained or non-retained expert or any other witness who would testify for it (D90 pp. 3-4), Soo Line only disclosed Ms. Hollins, Dr. Parker, Dr. Roggli, and Dr. Shields (D94 pp. 1-8). Dr. Thompson was not named in any expert witness designation (D4; D94).

So, when Soo Line's counsel told the trial court it "took [Dr. Thompson's] deposition as an expert" and "he's not a retained expert. But he was disclosed for the purposes of expert opinion" (Tr. 573), this was false. At

no time before trial did Soo Line designate Dr. Thompson an expert. Despite this, Soo Line's counsel openly stated to the trial court that Soo Line *had* disclosed Dr. Thompson as an expert, when in fact Soo Line *had not* done so.

Only when Soo Line first deposed Dr. Thompson in April 2023 did Mrs. Ralls have any inkling that it was going to attempt to elicit expert testimony from him. Beforehand, she was led to believe Dr. Thompson would testify only to his treatment of Mr. Ralls, as disclosed in his medical records.

But even then, at the discovery deposition, ultimately Dr. Thompson conceded he did not have sufficient information about either Mr. Ralls' exposures, work, or smoking history to render a causation opinion (D52 p. 4). He conceded he did not apply a methodology in Mr. Ralls' case to determine the cause of his lung cancer (D52 p. 6). He agreed he could not opine whether silica dust or diesel exhaust caused or contributed to the cancer (D52 p. 6). He said he knew "nothing" about Mr. Ralls' smoking history (D52 p. 6). He did not know about IARC or its classification of diesel or silica as carcinogens (D52 p. 5). He agreed he did not have any relevant data or records, so he "can't say" what the cause of Mr. Ralls' cancer was (D52 pp. 7-8).

Essentially, then, what Dr. Thompson gave at the April 2023 deposition was not really expert causation opinion at all. Rather, amid discussion of Mr. Ralls' cancer treatment, Soo Line's counsel asked him to opine as to the cause of Mr. Ralls' cancer, and ultimately, he just admitted he could speculate but could not actually say. That was all.

Only on July 14, 2023, *after* the filing of motions *in limine*, *after* the pretrial conference July 10, and only three days before trial, when Dr.

Thompson's *trial deposition* – that is, the video deposition that would be used at trial – was taken, did Mrs. Ralls first become aware that Dr. Thompson was going to attempt to offer an actual expert causation opinion. While in Point III, below, Mrs. Ralls explains that Dr. Thompson's causation opinion was insufficient to be admissible expert testimony under the *Daubert* standard, it was still *attempted* expert testimony with an attempted foundation and methodology, disclosed only for the first time at that deposition. And because the parties had agreed Dr. Thompson would testify by video, effectively this July 2023 deposition was his testimony at trial.

Only then did Mrs. Ralls first learn that Dr. Thompson was going to be rendering what he stated was a definitive opinion on the cause of Mr. Ralls' lung cancer, without the equivocation or concessions in his April 2023 deposition (D84 p. 6). For the first time, he discussed an expert basis for this new opinion, including CDC websites and articles, other researchers' articles, as well as opinions about silica, diesel, and Mr. Ralls' work (D84 pp. 6-8).

As in *Wilkerson*, *Scheck*, *Manahan*, and *Pennington*, this expert testimony by a witness who Soo Line never disclosed as a retained or non-retained expert gave Soo Line an unfair advantage and prejudiced Mrs. Ralls. In either disclosure, Soo Line would have equally had to disclose "the subject matter on which the expert is expected to testify," Rule 56.01(b)(6), or "the facts known and opinions held by such an expert …." Rule 56.01(b)(7).

As in *Manahan*, Mrs. Ralls "was unduly misled by [Soo Line]'s failure to inform her of [its] expert witness and consequently, unfairly surprised at trial." 655 S.W.2d at 809. Soo Line "had a duty to answer [Mrs. Ralls']

interrogatories with regard to the name and subject matter on which [its] expert is expected to testify" and then update those answers, but "failed to do so …." *Id.* Therefore, "the trial court abused its discretion in allowing the introduction of this testimony" on specific causation "into evidence." *Id.*

As in *Pennington*, there can be "little question that the court's ruling [allowing Dr. Thompson to give expert testimony on specific causation] seriously prejudiced" Mrs. Ralls. 827 S.W.2d at 267. Mrs. Ralls "was effectively precluded from cross-examining [Dr. Thompson] because of the absence of forewarning of his testimony." *Id.* Indeed, the only cross-examination she could give was from the April 2023 deposition, before any of the new opinions were elicited (Tr. 856-69). This also prevented Mrs. Ralls from "knowing that [she] needed an expert of [her] own to contest the opinions of" Dr. Thompson. *Id.* She "went to trial believing" Dr. Thompson would not present anything other than he had at his deposition, where he effectively conceded he could not actually opine as to specific causation. *Id.*

Dr. Thompson's testimony further prejudiced Mrs. Ralls because it enabled Soo Line's counsel to argue he was specially credible because, unlike all the other experts, Dr. Thompson was not paid, but instead was one of Mr. Ralls' treating physicians:

> And the thing that I would throw in to support that, is when you look at this situation, and someone argues, Well, he paid his experts and he paid their experts [*sic*]. But you just saw the video this morning, a real doctor, not just somebody we pull off the street. Someone that Mr. Ralls trusted to treat him for his care, a doctor he selected. And what did that doctor say? Smoking is the overwhelming cause. Smoking is the sole cause. And he told you why.

(Tr. 957). For all these reasons, allowing Dr. Thompson to testify as an expert without disclosure unfairly prejudiced Mrs. Ralls.

Mrs. Ralls expects that in response, Soo Line will point to *Beverly v. Hudak*, 545 S.W.3d 864, 873 (Mo. App. 2018), and similar decisions holding a trial court was within its discretion to allow undisclosed expert testimony when there was no unfair surprise. Those decisions concern expert testimony by a *party* physician, typically in a medical malpractice case, and are inapposite. In *Beverly*, for example, the defendant expressly reserved the right to call the treating physicians (i.e., himself) as non-retained experts to testify to the standard of care and causation. *Id.* Moreover, the treating physician there only testified to the standard of care in his own defense, which could not have surprised the plaintiff, and did not offer any causation testimony. *Id.* Unlike non-party expert testimony on causation as in *Wilkerson*, in Missouri standard of care testimony by a *party* physician in a medical malpractice case does not require expert disclosure. *Id.* at 874.

This case is like *Wilkerson*, *Scheck*, *Manahan*, and *Pennington*, not *Beverly* and similar decisions. Here, as the trial courts in *Wilkerson* and *Scheck* correctly did, and this Court held in *Manahan* and *Pennington* that the trial courts there should have done, Dr. Thompson's testimony should have been excluded for Soo Line's failure to disclose him as a retained or non-retained expert before trial or update that disclosure before trial, all as Rule 56.01 required. As in *Manahan* and *Pennington*, the trial court's allowing his testimony anyway was an abuse of its discretion. This Court should reverse the trial court's judgment and remand this case for a new trial.

II. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* litigants are required to advise their opposing parties when an expert has changed opinions or the bases for those opinions after a discovery deposition, an expert's testimony to a new or different opinion or basis for an opinion for the first time at trial without that disclosure generally should be excluded, and if the trial court allows this anyway and it unfairly prejudices the opponent, it is a reversible abuse of discretion *in that* for the first time at trial, Dr. Thompson gave what he asserted was a definitive expert opinion on specific causation citing specific factual bases including new studies and a review of materials, none of which he stated at his discovery deposition, of which Soo Line did not advise Mrs. Ralls after his discovery deposition, and which genuinely surprised Mrs. Ralls and unfairly prejudiced her.

Preservation Statement

This point is preserved for appeal. During Dr. Thompson's discovery deposition, Mrs. Ralls objected in part that Dr. Thompson was relying on materials Soo Line had not provided her (D84 pp. 7-8). At trial, Mrs. Ralls objected to Dr. Thompson giving specific causation testimony that differed from that in his discovery deposition, which the court overruled (Tr. 569-70). She then preserved these objections in her motion for a new trial (D81 pp. 4-9).

Standard of Review

The standard of review is the same as in Point I, above, at pp. 31-32.

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A. Summary

The law of Missouri is that when an expert has changed or added opinions or the bases for those opinions after a discovery deposition, the party proffering the expert must advise the opposing parties of those changes or additions. But when an expert witness seeks to testify to a new opinion or a new basis for an opinion for the first time at trial *without* that disclosure, and to the other party's prejudice, the witness should be precluded from giving that new testimony.

Here, at his discovery deposition, Dr. Mark Thompson testified he could not actually say what the cause of Mr. Ralls' lung cancer was because he had not engaged in any methodology to make that determination. At trial, however, Dr. Thompson testified for the first time that he definitively determined Mr. Ralls' cancer was caused solely by smoking, and gave a new, undisclosed factual and methodological bases for this. Nonetheless, the trial court allowed him to give this new testimony at trial, of which Soo Line had not advised Mrs. Ralls at any time beforehand. This was error, requiring a new trial.

B. The failure to advise one's opponent of an expert witness's new or changed opinion or basis for his opinion before trial generally precludes that witness from being allowed to provide that new or changed opinion or basis for the first time at trial.

In Missouri, it is well established that "when an expert witness has been deposed and he later changes his opinion before trial or bases that opinion on new or different facts from those disclosed in the deposition, it is the duty of the party intending to use the expert witness to disclose that new

information to his adversary." *Shallow v. Follwell*, 554 S.W.3d 878, 881-82 (Mo. banc 2018) (citations omitted). By doing so, the party "updat[es] the responses made in the deposition." *Gassen v. Woy*, 785 S.W.2d 601, 604 (Mo. App. 1990).

The reason for this is that "[a]llowing experts to change their opinions after deposition and before trial without notice to their adversaries would frustrate the purpose of our discovery rules because it would prevent them from eliminating, as far as possible, concealment and surprise in litigation." *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 475 (Mo. App. 2002) (Russell, J.).

So, the purpose of this rule "is to relieve a party 'who is genuinely surprised at trial.'" *Shallow*, 554 S.W.3d at 881 (citation omitted). "This could happen 'when an expert witness suddenly has an opinion where he had none before, renders a substantially different opinion than the opinion disclosed in discovery, uses new facts to support an opinion, or newly bases that opinion on data or information not disclosed during the discovery deposition." *Id.* (citation omitted) (emphasis removed).

While a trial court has "'broad discretion as to its choice of a course of action during trial when evidence has not been disclosed in response to appropriate discovery,' and it is within the trial court's discretion whether to reject such evidence or impose other appropriate sanctions," *Whitted*, 90 S.W.3d at 475 (citation omitted), generally the proper action is to exclude the testimony that was not disclosed in or after the expert's discovery deposition.

For example, in *Bray v. Bi-State Dev. Corp.*, 949 S.W.2d 93, 100-01 (Mo. App. 1997), this Court affirmed a trial court's exclusion of an expert's testimony that differed from his discovery testimony and which the party did not update before trial. In a slip-and-fall case, the expert sought to testify for the plaintiff that he had taken light readings where the plaintiff fell that were dimmer than the defendant's expert had shown. *Id.* at 100. But in discovery, the expert testified he did not take any readings of the amount of light in that area he considered significant. *Id.* He only took the readings to which he sought to testify *after* his deposition. *Id.* On direct exam, the trial court sustained an objection to asking him about those readings, because he had said in his deposition that he had no such information. *Id.* Then, the trial court precluded him from testifying to that in rebuttal, either. *Id.* This Court affirmed, holding that new opinion had not been "properly disclosed." *Id.* at 101.

Similarly, in *Green v. Fleishman*, 882 S.W.2d 219, 221-23 (Mo. App. 1994), this Court affirmed the exclusion of a plaintiff's only expert's causation opinion and resultant directed verdict for the defendant where, in his deposition, the expert had stated he was unable to form an opinion at that time. There, in a medical malpractice case, the plaintiff's medical causation expert testified in his deposition that he did not have sufficient data to form an opinion whether the patient's injury resulted from an amount of a certain drug in her system that exceeded maximum therapeutic levels, as the plaintiff had alleged, and the opinion he held at that time was speculation. *Id.* at 220-21.

At trial, however, the expert testified that he *did* have data from which he could infer the levels of the drug in the patient's system went into a toxic range. *Id.* at 221. On the defendants' motion, the trial court struck the expert's testimony, because "it differed from his deposition testimony and constituted an unfair surprise." *Id.* Because the plaintiff then had no causation expert, the trial court granted the defendant a direct verdict. *Id.* This Court affirmed, because the expert had been deposed but later changed his opinion and based it on new or different facts, and the plaintiff violated the duty to disclose that new information to the defendants. *Id.* at 221-23.

At the same time, if the trial court allows the expert to give substantially different testimony from that in its discovery deposition that was not disclosed after that deposition, a new trial is proper.

In *Whitted*, a medical malpractice wrongful death case, this Court affirmed the grant of a new trial for the plaintiff when the defendant's expert gave new testimony on causation at trial that differed from that in his discovery deposition, and which the defendant did not disclose to the plaintiff before trial. 90 S.W.3d at 475-78. The decedent had suffered a fatal heart attack while receiving emergency room treatment after a fall, which the plaintiff alleged happened because of negligence by the treating physicians in failing to detect a heart problem and provide a pacemaker. *Id.* In a discovery deposition, the defendant's expert testified he could not be sure whether the decedent died from an electrical or pump problem in his heart. *Id.* at 476-77. At trial, however, the expert testified he could be sure the decedent's heart

attack was caused by cell necrosis already present in his system. *Id.* at 476-77.

After initially allowing the expert's testimony, on the plaintiff's motion the trial court ordered a new trial because the defendant's "expert changed his testimony regarding medical issues in this case after his deposition and prior to trial without notice to" the plaintiffs. *Id.* at 474. This Court's Eastern District, with now-Supreme Court Judge Mary Russell writing, affirmed, holding a new trial was proper because the "Expert's deposition testimony as to what caused Patient's death differed from his trial testimony," and the new trial testimony was not disclosed before trial. *Id.* at 477.

Similarly, just last year in *Z.R. v. Kan. City Pediatrics, LLC*, 682 S.W.3d 55, 62-65 (Mo. App. 2023), this Court also affirmed the grant of a new trial for the plaintiff for this same reason. The plaintiff there alleged the defendant physician negligently failed to evaluate and treat her bilateral hip dysplasia when she was an infant with a device called a "Pavlik harness," which would have remedied the condition without surgery. *Id.* at 57-59. The defendant's expert testified in his discovery deposition that the plaintiff indeed may have been born with dislocated hips, which early diagnosis and treatment with a Pavlik harness would have remedied. *Id.* at 62. But at trial, for the first time the expert testified that if the plaintiff were born with dislocated hips that remained dislocated, that would be a "teratologic dislocation," which a Pavlik harness would not have remedied. *Id.* at 62-63.

Although the trial court initially allowed the testimony, on the plaintiff's motion it ordered a new trial and this Court affirmed. *Id.* The expert "plainly testified to a new opinion at trial which was substantially different than his deposition testimony," the defendant "did not disclose this change in opinion to [the plaintiff] prior to trial, and thus this was 'surprise' testimony entitling [the plaintiff] to relief." *Id.* at 63. *See also Pasalich v. Swanson*, 89 S.W.3d 555, 561-62 (Mo. App. 2002) (grant of new trial was proper where defense expert offered a new opinion at trial as to what caused the plaintiff's injuries and did not disclose the change in opinion before trial).

C. The trial court erred in allowing Soo Line to elicit expert opinion testimony from Dr. Thompson for the first time at trial that substantially differed from his testimony in his discovery deposition, prejudicing Mrs. Ralls and requiring a new trial.

Here, in his trial testimony, just like the experts in *Bray*, *Green*, *Whitted*, and *Z.R.*, Dr. Thompson had opinions where he previously had none before, rendered substantially different opinions than those disclosed during his discovery deposition, and used new facts to support his new opinions. This "genuinely surprised" Mrs. Ralls, because he "suddenly ha[d] an opinion where he had none before, render[ed] a substantially different opinion than the opinion disclosed in discovery, use[d] new facts to support an opinion, [and] newly base[d] that opinion on data or information not disclosed during the discovery deposition." *Shallow*, 554 S.W.3d at 881 (citation omitted).

The trial court erred in allowing Dr. Thompson to give that new testimony. The law of Missouri is that this requires a new trial.

In his discovery deposition, Dr. Thompson only discussed one factual basis for his testimony, which was a consultation note from his medical

records dated May 23, 2013 (D52 p. 4). That note did not indicate Mr. Ralls had any history of smoking, nor did it indicate Mr. Ralls' occupation at the railroad (D93). He also only cited one piece of literature, a study, *Villanueva*, from which he opined only one percent of non-smokers develop lung cancer and 17% of smokers develop lung cancer (D52 p. 7).

When asked whether he had "any idea" what caused Mr. Ralls' lung cancer, Dr. Thompson stated he "assumed" given Mr. Ralls' COPD that he was a smoker but did not know how much, he "assumed" given Mrs. Ralls was suing the railroad that she alleged "asbestos" was the cause, and he could "guess" that "smoking caused his lung cancer" (D52 p. 4). Soo Line's counsel then asked him to "assume … a 50 year pack history of smoking … one to three packs a day" and that Mr. Ralls "was a 'trackman' who was 'out on the tracks and they repair tracks,'" to which Dr. Thompson responded, "Oh, his cancer was caused by smoking," "[m]ore likely than not," "within a reasonable degree of medical certainty" (D52 p. 5).

But like the causation experts in *Green* and *Whitted*, Dr. Thompson then made clear that this was actually just a guess, and he really "couldn't say," because he had no data from which he actually could render such an opinion, nor had he engaged in any methodology to reach that opinion. He testified he would provide a patient with a causation opinion, but only if asked, on which he would "review their records and then I'd do a review of the literature to come up with a decision," which he had not done in Mr. Ralls' case (D52 pp. 5-6). He said he did not apply a methodology in Mr. Ralls' case to determine the cause of his lung cancer (D52 p. 6).

For Mr. Ralls' smoking history, rather than the "assumption" by Soo Line's counsel, Dr. Thompson conceded he knew "[n]othing" of Mr. Ralls' smoking history, but was only going off of "what [Soo Line's] attorney told him" (D52 p. 6).

As to the substance of Mrs. Ralls' actual allegations, when asked what opinion he had regarding whether silica dust or diesel exhaust caused or contributed to Mr. Ralls' lung cancer, as with the experts in *Green* and *Whitted* Dr. Thompson stated he could not say, because he had no data from which to make such an opinion (D52 pp. 5-6). He opined that the risk would be far greater from smoking than from diesel exhaust or silica dust but stated no a basis for this opinion (D52 p. 6). He conceded he did not know what IARC was or what its findings had been (D52 p. 5).

Ultimately, Dr. Thompson conceded he "can't render a correct opinion" because he had no data on which to base it (D52 pp. 7-8). Like the experts in *Green* and *Whitted*, he conceded he "can't say" because all he had reviewed was "a little two-page consult note that I have" (D52 pp. 7-8).

In Dr. Thompson's trial deposition, however, like the experts in *Green* and *Whitted* all of this changed, and for the first time he stated he could definitively state Mr. Ralls' lung cancer was caused solely by smoking and offered entirely new factual bases for this he had not previously disclosed and of which Soo Line had not advised Mrs. Ralls.

Dr. Thompson now opined that smoking was "the overwhelming cause" and "the sole cause" of Mr. Ralls' lung cancer (D84 p. 6). For the first time, he cited what he said were facts and studies supporting this, including

websites and articles from the CDC, Faye Rice, a 2008 paper, and Deborah Silverman, facts about the silica content of the earth and human ingestion of it, and new opinions that humans are ingesting and breathing silica every single day, "there's a lot of poor data and studies on silica," Mr. Ralls' level of exposure to silica for there to be a chance that it caused his lung cancer, would have had to be exposed to silica for 45 years at a high level for Dr. Thompson to opine that there is a 1.9% chance that his exposure to silica caused his lung cancer, and that diesel exhaust could not be a cause because Mr. Ralls was not working underground in mines (D84 pp. 6-8).

What changed from the time of Dr. Thompson's discovery deposition in April 2023 and his trial testimony in July 2023 is that Soo Line's counsel plainly provided him with literature including the Silverman article before his trial testimony. At trial, Soo Line's counsel claimed he did not do this (Tr. 962, 966-67). But Soo Line's counsel relied on the Silverman article throughout trial in Soo Line's defense, which was a peer reviewed study suggesting low level exposure to diesel exhaust was not sufficient to cause lung cancer, (Tr. 270, 275-76, 282, 523, 525-26, 652). It seems oddly coincidental that Dr. Thompson suddenly had this same study on which Soo Line's counsel relied so often. That same counsel then argued the jury should believe Dr. Thompson more than the other experts because he was not paid but was Mr. Ralls' treating physician (Tr. 957).

This was an exemplification of "genuine surprise" testimony, *Shallow*, 554 S.W.3d at 881, "entitling [Mrs. Ralls] to relief." *Z.R.*, 682 S.W.3d at 63.

First, Dr. Thompson "suddenly ha[d] an opinion where he had none before …." *Shallow*, 554 S.W.3d at 881 (citation omitted). At his discovery deposition, like the experts in *Green* and *Whitted*, Dr. Thompson conceded he could not actually render an opinion on the cause of Mr. Ralls' cancer because he did not have the data or resources to do so, and only could state a guess. Like those same experts in *Green* and *Whitted*, however, at trial for the first time he was able to state a definitive opinion that the sole cause of Mr. Ralls' cancer was smoking and not silica or diesel exhaust exposure and opine why. Like the plaintiffs in *Green* and *Whitted*, Mrs. Ralls was genuinely surprised by this change, which her counsel was not advised of and to which her counsel objected at the deposition.

Dr. Thompson also "render[ed] a substantially different opinion than the opinion disclosed in discovery …." *Shallow*, 554 S.W.3d at 881 (citation omitted). In discovery, he stated data and a methodology were required to render a causation opinion, which he did not have and had not done, so he could not render it. At trial, he brought forth data and facts that he said were a methodology for him to render a causation opinion, and that opinion was definitively that Mr. Ralls' cancer was caused by smoking.

Like the expert in *Bray*, Dr. Thompson certainly "use[d] new facts to support an opinion [and] newly base[d] that opinion on data or information not disclosed during the discovery deposition …." *Shallow*, 554 S.W.3d at 881 (citation omitted). In *Bray*, the expert performed measurements after his discovery deposition, which were never disclosed to the opponent, and which therefore had to be excluded. 949 S.W.2d at 100-01. Here, in his trial

testimony Dr. Thompson engaged in a new review for the first time of websites and articles, new facts about silica and diesel exhaust, leading to extremely specific opinions about the amount of exposure to silica necessary to cause cancer or the requirement that mining work was necessary to cause cancer from diesel exhaust.

This is exactly the surprise for which the requirement to disclose new expert opinions and bases after a discovery deposition was designed. And as explained in Point I above at pp. 39-41, this unfairly prejudiced Mrs. Ralls. The lack of disclosure of these new opinions and bases effectively precluded her from cross-examining Dr. Thompson on them, leaving her limited to using the cross-examination from the April 2023 deposition before the new opinions or bases were given. It also prevented her from knowing she needed her own expert to be able to rebut the highly specific opinions about silica and diesel exhaust exposure that Dr. Thompson gave for the first time at trial. Finally, it allowed Soo Line to argue that Dr. Thompson was specially credible because, unlike all the other experts, he was not paid, but instead was one of Mr. Ralls' treating physicians.

As in *Bray* and *Green*, the trial court should have excluded Dr. Thompson's new opinions and basis from trial. The trial court abused its discretion in holding otherwise. As in *Whitted* and *Z.R.*, a new trial is required. This Court should reverse the trial court's judgment and remand this case for a new trial.

III. The trial court erred in allowing Soo Line to present specific causation testimony from Dr. Mark Thompson *because* this misapplied § 490.065, R.S.Mo., as Dr. Thompson's testimony was not based on sufficient facts or data and was not the product of reliable principles and methods reliably applied to the facts of the case, and its admission unfairly prejudiced Mrs. Ralls *in that* Dr. Thompson had no facts or data about Mr. Ralls' railroad work or his exposures to silica or diesel exhaust, he did not review any other experts' reports or any depositions, and his only methodology was to cherry-pick a few studies and not consider any contrary information, which is a subjective belief, not a generally accepted scientific methodology to determine specific causation of an injury.

Preservation Statement

This point is preserved for appeal. Mrs. Ralls raised her *Daubert* objection to Dr. Thompson's testimony in her motion *in limine* (D50 pp. 8-12, 14-15), and again at trial, which the court overruled (Tr. 293-95, 569-72). She then preserved this objection in her motion for a new trial (D81 pp. 11-22).

Standard of Review

"This Court reviews a circuit court's decision to admit or exclude expert testimony for an abuse of discretion." *Spalding v. Stewart Title Guar. Co.*, 463 S.W.3d 770, 778 (Mo. banc 2015) (citation omitted).

But even where review is for abuse of discretion, a trial court "can abuse its discretion … through the application of incorrect legal principles." *Taylor*, 298 S.W.3d at 492. When a trial court's exercise of discretion is

challenged on legal grounds, no deference is warranted, and this Court's review is *de novo*. *See id.*; *Bohrn*, 276 S.W.3d at 865. A court necessarily abuses its discretion when it bases an otherwise discretionary ruling on an erroneous legal conclusion. *Id.*

* * *

A. Summary

Under the standards of § 490.065, R.S.Mo. and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to be admissible an expert's opinion must be both supported by sufficient facts and data and be the product of reliable principles and accepted methodologies reliably applied to the facts of the case. When it is not, it is inadmissible.

Here, Dr. Thompson's specific causation opinion that Mr. Ralls' cancer was caused solely by smoking and not by any exposures to silica or diesel exhaust was not based on any facts or data about Mr. Ralls' railroad work or his exposures. And his only methodology was to cherry-pick a few studies and not consider any contrary information. Nonetheless, reasoning solely that he referenced some articles and was a cancer physician, the trial court held this satisfied the *Daubert* standard. This misapplied § 490.065 and so was an abuse of the trial court's discretion, requiring a new trial.

B. To be admissible under § 490.065, R.S.Mo., and the *Daubert* standard, an expert opinion must be based on sufficient facts and data as foundation and must be the product of reliable principles and methodologies applied to the facts of the case.

In 2017, § 490.065, R.S.Mo., was amended so that § 490.065.2(1) now provides (App. A31-32):

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.

"The language of Sections 490.065.2(1)-(2) are now identical in their language to [Federal Rules of Evidence] 702-703," which are "interpreted under *Daubert* and its progeny …." *State v. Suttles*, 581 S.W.3d 137, 146 (Mo. App. 2019). Therefore, "the cases interpreting those federal rules remain relevant and useful in guiding our interpretation of Section 490.065." *Id.* (citing *Daubert*, 509 U.S. at 593-94).

Under the *Daubert* standard, the trial court acts as a gatekeeper to ensure an expert's opinion is reliable and relevant to a material issue. 509 U.S. at 591; *Margolies v. McCleary, Inc.*, 447 F.3d 1115, 1120 (8th Cir. 2015). This gatekeeping requirement ensures that experts use the same intellectual rigor in the courtroom as they would in their relevant field. *Bland v. Verizon Wireless, LLC*, 538 F.3d 893, 896 (8th Cir. 2008). "In sum, the [trial] court's gatekeeping role separates expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) (citation omitted). To do that, the trial court "must make 'a preliminary

assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Id.* at 988 (quoting *Daubert*, 509 U.S. at 592-93).

So, to be admissible under the *Daubert* standard, an expert opinion must rest on sufficient foundation. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). "Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006). "An expert opinion that fails to consider the relevant facts of the case is fundamentally unsupported" and must be excluded because it would be unhelpful to the jury. *Neb. Plastics, Inc. v. Holland Colors Am., Inc.*, 408 F.3d 410, 416 (8th Cir. 2005); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 685 (8th Cir. 2001) ("We would agree that where opinion testimony has no support in the record that it should be excluded"). In an exposure case, it is impossible for experts to reliably opine on specific causation without understanding the amount, duration, and substances to which the injured party was exposed, otherwise, the opinion "'is connected to existing data only by the *ipse dixit* of the expert.'" *Marmo*, 457 F.3d at 758 (citation omitted).

Even when an expert's theory meets the *Daubert* factors and applies an accepted methodology, it "should not be admitted if it does not apply to the specific facts of the case." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000). That is because deficiencies in the factual

foundation of an opinion render the expert's resulting conclusions "mere speculation." *Id.* (citation omitted).

To be sure, while generally treating physicians are considered lay fact witnesses rather than expert witnesses, once a treating physician offers an opinion on medical causation, federal courts have uniformly held that testimony must satisfy *Daubert* to be admissible. *See, e.g.*, *Brooks v. Union Pac. R.R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010).

While Missouri has only had the *Daubert* standard for a few years, so very few decisions apply it, the Eighth Circuit has clarified many times the sort of expert testimony that fails to meet its threshold because it was not based on sufficient facts or data as foundation or was not the product of reliable principles and methodologies reliably applied to the facts.

In *Weisgram v. Marley Co.*, 169 F.3d 514, 518-20 (8th Cir. 1999), for example, the Eighth Circuit reversed a trial court's judgment and ordered a new trial where expert testimony was erroneously admitted that lacked sufficient foundation. The plaintiff brought a wrongful death claim against a manufacturer for an allegedly defective baseboard heater. *Id.* at 516. At trial, the court allowed a fire captain who investigated the home to present expert testimony that the heater had malfunctioned and had ignited other objects, and allowed a metallurgist to testify that the thermostat contacts on the heater were defective. *Id.* at 519-20. The Eighth Circuit held allowing either witness's testimony was error under *Daubert*, because there was no foundation for their opinions. *Id.* The captain had not conducted any tests based on his theory, and rather his conclusion was based on pure speculation

about the heater. *Id.* at 519. Similarly, the metallurgist had little knowledge of the heater itself or similar heaters generally. *Id.* at 519-20.

Similarly, in *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 881-82 (8th Cir. 1998), the Eighth Circuit reversed a judgment in a sexual harassment and constructive discharge case and ordered a new trial, holding expert testimony was erroneously admitted that was not based on reliable methodology. The expert had impugned the plaintiff employee's psychiatric credibility by suggesting that recall bias, secondary gain, and malingering had influenced the employee's story. *Id.* at 883. The Eighth Circuit held those theories were speculative and not based on any reliable accepted methodology that met the *Daubert* criteria. *Id.* at 883-84.

In *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1106-08 (8th Cir. 1996), the Eighth Circuit reversed a judgment in a toxic exposure case for a group of plaintiffs who claimed to have been injured by exposure to wood fibers containing formaldehyde that a nearby factory emitted sued the factory owner for negligence. The plaintiffs had evidence that formaldehyde generally could cause symptoms like theirs, and also proved they were exposed to some amount of formaldehyde from the factory because it was in their sputum and urine. *Id.* at 1107.

The problem, though, was that while the plaintiffs' expert admitted it took some amount of formaldehyde to produce harm to human beings, he only testified "about the levels of *gaseous* formaldehyde that might be expected to cause symptoms like the ones that plaintiffs claim to have experienced," not "the levels of exposure to wood fibers impregnated with formaldehyde that

are likely to produce adverse consequences." *Id.* at 1107-08 (emphasis added). There was no mention of any scientific methodology as to wood fibers impregnated with formaldehyde at all. *Id.*

So, when another expert, "after a great deal of prodding, testified that the [plaintiffs]' complaints were more probably than not related to exposure to formaldehyde," "that opinion was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve an appreciable risk of harm to human beings," so his "testimony regarding the probable cause of the [plaintiffs]' claimed injuries was simply speculation." *Id.* at 1108.

C. The trial court erred in allowing Dr. Thompson to present specific causation testimony that lacked sufficient facts or data for foundation and was not the product of any reliable principles or methodologies, but instead just cherry-picked a few studies without considering any to the contrary, prejudicing Mrs. Ralls and requiring a new trial.

Here, Dr. Thompson's opinion that smoking was the sole cause of Mr. Ralls' lung cancer failed the *Daubert* standard because it lacked sufficient foundation and was not the product of any reliable methodology. To the contrary, it was just his *ipse dixit*. As in *Weisgram*, *Nichols*, and *Wright*, the trial court misapplied § 490.065 and *Daubert* in holding otherwise, requiring a new trial.

First, Dr. Thompson's specific causation opinion that Mr. Ralls' cancer was caused solely by smoking and not by exposure to silica or diesel exhaust over his decades-long railroad career lacks sufficient facts or data to meet *Daubert*. In either his discovery or trial depositions, Dr. Thompson had no

information regarding Mr. Ralls' work history that would allow him to reliably opine on medical causation. The only information he had in his trial deposition about Mr. Ralls' work history was a note from one of his staff that indicated Mr. Ralls worked at the railroad and was exposed to creosote (D84 p. 5). Indeed, Dr. Thompson clearly did not know Mr. Ralls' work history because he mistakenly believed Mr. Ralls "worked at a railroad for 17 years" (D84 p. 6). In reality, Mr. Ralls worked for the railroad from 1970 to 1996, some 25 years (Tr. 575-79, 589-90).

At the same time, while Dr. Thompson reviewed the Silverman article to support his newly disclosed opinions prior to his trial deposition, he never reviewed the other experts' reports or depositions or Mr. Ralls' coworker's depositions that would have allowed him to understand how Mr. Ralls was exposed to silica and diesel exhaust at the railroad. He put on blinders to any additional facts regarding Mr. Ralls' work and chose to focus on smoking alone.

While this is improper in applying a reliable methodology as discussed below at pp. 61-64, as with the reversibly admitted opinions in *Weisgram* and *Wright*, it also runs afoul of *Daubert*'s requirement that an expert have a sufficient factual foundation. Without a review of the other expert reports or the coworker's statements, Dr. Thompson could not even begin to understand the exposures to which Mr. Ralls was subject to while working for the railroad. Accordingly, as in *Weisgram* and *Wright*, Dr. Thompson's conclusion lacked sufficient foundation.

Second, Dr. Thompson's ultimate opinion that smoking was "the sole cause" and "the overwhelming cause" of Mr. Ralls' cancer was not based on any reliable methodology, let alone one reliably applied to the facts.

Under § 490.065 and *Daubert*, the Court must assess whether an expert's methodology is itself reliable and whether it was reliably applied. While there is no definitive checklist for determining the reliability of an expert's principles and methods, factors to assist in this include: "(1) whether the theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted." *Lauzon*, 270 F.3d at 687 (citation omitted). At the same time, *Daubert* requires the testimony to be based on scientific or technical knowledge to be reliable. 509 U.S. at 589-90. "Knowledge" must be more than a subjective belief or unsupported speculation and testimony must be supported by "appropriate validation." *Id*. at 590, 599.

Here, in evaluating the admissibility of Dr. Thompson's opinion, there is no methodology for the Court to evaluate because Dr. Thompson himself admitted he did not apply any such methodology. He merely referred to the CDC's website where he found one article by Faye Rice (D84 p. 6). He relied exclusively on this study for the proposition that there is an increased risk of lung cancer in only those who have high levels of daily exposure to silica dust for a period of 45 years (D84 p. 6).

Therefore, because of this one cherry-picked study, Dr. Thompson ruled out silica as a potential cause of Mr. Ralls' lung cancer (D84 p. 6). At the

same time, he completely disregarded the entire set of literature connecting silica and lung cancer to which the other experts had testified. He had no idea IARC had already determined silica dust causes lung cancer and diesel exhaust causes lung cancer.

Regarding diesel exhaust, Dr. Thompson's new opinions were equally as methodologically flawed. The study on which he relied for this was an article published by Deborah Silverman (D84 p. 8). He utilized this one article during his trial testimony in support of his opinion that Mr. Ralls' exposure to diesel exhaust was not sufficient to increase his risk of lung cancer (D84 p. 8). Using solely that study, he stated broadly, "[Mr. Ralls] wasn't working underground in the mines as far as I'm aware of, unless I'm wrong, so I don't think diesel had any role to play in this" (D84 p. 8). Using one single article while ignoring the robust set of literature that exists to the contrary is not reliable.

When considering scientific evidence in its gatekeeping role, a trial court must separate legitimate scientific inquiry from subjective conjecture and speculation. *Presley v. Lakewood Eng'g & Mfg. Co.*, 553 F.3d 638, 643 (8th Cir. 2009) (citation omitted). Here, Dr. Thompson disregarded relevant admissible literature and facts regarding Mr. Ralls' occupational exposure to diesel exhaust and silica to make his *ipse dixit* opinions seem plausible.

Beyond only referencing two articles in regard to his diesel exhaust and silica dust opinions, Dr. Thompson also did not reliably apply any methodology, let alone a generally accepted one, such as the Bradford Hill Criteria for general causation or performing a differential etiology for specific

causation. *See, e.g.*, *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 560 n.2 (8th Cir. 2014) (explaining that differential etiology analysis is the presumptively admissible standard form of specific causation analysis).

What Dr. Thompson gave was plainly a prohibited *ipse dixit* opinion that does not constitute sound scientific methodology upon which expert testimony may be admitted. It was merely his subjective belief and unsupported speculation. The *Daubert* standard required more.

This is especially obvious when contrasted with the parties' other experts, to which each subjected the other to a detailed *Daubert* analysis and hearing, and for which the trial court required a pretrial *Daubert* hearing at which each testified. All the other experts were subjected to a painstaking round of briefing and an evidentiary hearing. Conversely, Dr. Thompson was improperly allowed to come to court without going through that process, without having any knowledge of Mr. Ralls' railroad work and exposures or any other factual background, pick out two studies, and say, "I know better."

The trial court misapplied § 490.065 and *Daubert* in holding Dr. Thompson's specific causation opinion satisfied those standards. This unfairly prejudiced Mrs. Ralls, as explained above at pp. 39-41. As the Eighth Circuit did in *Weisgram*, *Nichols*, and *Wright*, this Court should reverse the trial court's judgment and remand this case for a new trial.

Conclusion

This Court should reverse the trial court's judgment and remand this case for a new trial.

Respectfully submitted,

Jonathan Sternberg, Attorney, P. C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
(816) 292-7020
jonathan@sternberg-law.com

/s/ Thomas J. Joyce, III
Thomas J. Joyce, III, *pro hac vice*
Bern Cappelli, LLP
101 West Elm Street, Suite 520
Conshohocken, Pennsylvania 19428
(610) 941-4444
tjoyce@bernllp.com

/s/ J. Clayton Schaeffer
J. Clayton Schaeffer, Mo. #67444
MLS Law LLC
7710 Carondelet Ave., Suite 217
Clayton, Missouri 63105
(636) 532-1400
clay@mcmichael-logan.com

COUNSEL FOR APPELLANT
SHIRLEY RALLS

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 15,374 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on March 18, 2024, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

Mr. Mark R. Kurz — Counsel for Respondent
Reifers Holmes & Peters, LLC
5000 West Main Street
Post Office Box 23560
Belleville, Illinois 62223
(618) 277-9000
mkurz@rhpfirm.com

/s/Jonathan Sternberg
Attorney